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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellant,

4 v.

NO. A-1-CA-36499

5 **MICHAEL LUCERO,**

6 Defendant-Appellee,

7 **APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY**

8 **George P. Eichwald, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellant

12 Bennett J. Baur, Chief Public Defender

13 William A. O'Connell

14 Santa Fe, NM

15 for Appellee

16 **MEMORANDUM OPINION**

17 **ZAMORA, Judge.**

18 {1} The State appeals from the district court's order dismissing the charges against

19 Defendant Michael Lucero with prejudice. We issued a notice of proposed summary

1 disposition proposing to reverse and remand. Defendant has filed a timely
2 memorandum in opposition, which we have duly considered. We remain unpersuaded
3 that our initial proposed disposition was incorrect, and we therefore reverse and
4 remand this case to the district court for the reasons set forth below.

5 **Background**

6 {2} At Defendant’s trial on charges of burglary and criminal damage to property,
7 it became apparent during cross-examination of the State’s witness, Cuba, New
8 Mexico Police Department Chief Joe Chavez, that an audio recording of Defendant’s
9 third interview with police had not been turned over to the defense in discovery. [MIO
10 5] *See* Rule 5-501(A)(1) NMRA (stating that within ten days after arraignment the
11 State shall disclose “any statement made by the defendant, . . . within the possession,
12 custody or control of the state, the existence of which is known, or by the exercise of
13 due diligence may become known, to the district attorney”). There was a disagreement
14 between Officer Chavez and the prosecutor about whether the recording had been
15 turned over to the district attorney’s office. [RP 73] Defendant then moved for a
16 mistrial, which the district court granted. [MIO 5-6-7; RP 73-74] In its order granting
17 the mistrial, the district court found that Defendant had not been provided with
18 discovery in accordance with the rules of criminal procedure, and it dismissed all
19 charges against Defendant with prejudice. [RP 73-74]

1 {3} We review the district court’s imposition of sanctions for an abuse of discretion.
2 *See State v. Le Mier*, 2017-NMSC-017, ¶ 22, 394 P.3d 959. District courts have broad
3 discretionary authority to determine what sanction to impose for a violation of a
4 discovery order. *Id.* ¶ 22. However, our Supreme Court has provided guidelines for
5 district courts to follow in assessing what sanctions to impose. In *Le Mier*, our
6 Supreme Court considered the district court’s exclusion of a witness as a sanction for
7 the State’s failure to provide discovery in accordance with the district court’s orders.
8 While recognizing the district court’s discretionary authority to fashion an appropriate
9 remedy, the Court stated that district courts are required to assess: “(1) the culpability
10 of the offending party, (2) the prejudice to the adversely affected party, and (3) the
11 availability of lesser sanctions.” *Id.* ¶ 15; *State v. Harper*, 2011-NMSC-044, ¶ 15, 150
12 N.M. 745, 266 P.3d 25. The Supreme Court further stated that district courts “must
13 explain their decision to exclude or not to exclude a witness within the framework
14 articulated in Harper[.]” *Le Mier*, 2017-NMSC-017, ¶ 20.

15 {4} *Le Mier* addresses situations in which the district courts excluded witnesses as
16 a sanction, not the dismissal of the charges with prejudice as occurred in this case.
17 However, “both dismissal and witness exclusion constitute ‘extreme’ sanctions.” *State*
18 *v. Lewis*, 2018-NMCA-019, ¶ 8, 413 P.3d 484; *see also Harper*, 2011-NMSC-044, ¶¶
19 16, 21 (cautioning that the exclusion of witnesses and outright dismissal are severe

1 sanctions and should only be imposed in the most exceptional cases). Therefore, we
2 apply the *Harper* and *Le Mier* analysis to review the district court's action in this case.
3 *See Lewis*, 2018-NMCA-019, ¶ 8 (applying the *Harper* and *Le Mier* considerations
4 to review the district court's imposition of the extreme sanction of dismissal of
5 criminal charges as a sanction for a discovery violation).

6 {5} As an initial matter, we perceive no error in the district court's decision to
7 declare a mistrial under the circumstances. We only review the district court's
8 decision to dismiss the charges with prejudice as a sanction for the discovery
9 violation. We remain of the opinion that the record and the district court's order are
10 not sufficient to demonstrate that the district court considered or weighed the relevant
11 factors before dismissing the charges with prejudice.

12 {6} With respect to the first *Harper* factor, the culpability of the offending party,
13 the district court's order merely notes that Defendant was not provided with discovery
14 in accordance with the rules of criminal procedure. [RP 73] However, the order does
15 not demonstrate that the district court made any fact specific inquiry into the degree
16 of the State's culpability. [RP 73-74] Defendant responds in his memorandum in
17 opposition that the fact that the recording was always in the hands of either the
18 prosecutor or the police demonstrates the State's culpability, and we agree. [MIO 10]
19 *See Le Mier*, 2017-NMSC-017, ¶ 24 (acknowledging a rebuttable presumption of

1 culpability when a discovery order is violated). However, a discovery violation by the
2 State does not necessarily involve bad faith or intransigence, which is what the district
3 court is required to assess in determining an appropriate sanction. “It is through this
4 consideration of degree that bad faith or intransigence now factors into a district
5 court’s calculation of appropriate sanctions.” *Lewis*, 2018-NMCA-019, ¶ 13
6 (recognizing that the degree of culpability is a fact specific inquiry that considers bad
7 faith or intransigence in assessing sanctions against a party).

8 {7} With respect to prejudice, the second factor, *Le Mier* explains that any
9 discovery violation involves some amount of prejudice to the defendant. *See Le Mier*,
10 2017-NMSC-017, ¶ 25 (“When a court orders a party to provide discovery within a
11 given time frame, failure to comply with that order causes prejudice both to the
12 opposing party and to the court.”); *see also Lewis*, 2018-NMCA-019, ¶ 14 (noting
13 that, under *Le Mier*, every discovery violation results in some level of prejudice).
14 Additionally, the discovery violation in this case was not discovered until the middle
15 of trial. Some amount of delay would therefore necessarily result while the State
16 complied or attempted to comply with its discovery obligation. However, there is no
17 indication in the record or the district court’s order that it considered prejudice before
18 imposing the extreme sanction of dismissal with prejudice. In his memorandum in
19 opposition, Defendant states that he argued to the district court that he was prejudiced

1 by the absence of the recording because he had no way to cross-examine Officer
2 Chavez to show that his recollection of the statement was false or inaccurate. [MIO
3 5-6] We agree that Defendant’s argument as to the prejudice resulting from the
4 discovery violation would be appropriate for the district court to consider in applying
5 the *Harper* factors. However, the record does not reflect that the district court engaged
6 in this consideration. *See Lewis*, 2018-NMCA-019, ¶ 16 (reversing and remanding the
7 district court’s dismissal of criminal charges where there was no indication in the
8 record that the district court considered prejudice).

9 {8} Finally, there is no indication that the district court considered lesser sanctions
10 before dismissing with prejudice. *See Le Mier*, 2017-NMSC-017, ¶ 27 (noting that the
11 district court is not required to consider every conceivable lesser sanction, but is
12 required to fashion the least severe sanction that it feels fits the situation and achieves
13 the desired result). In our notice of proposed summary disposition, we referred to the
14 docketing statement’s assertion that the district court did not hear from either party
15 before imposing the sanction. In his memorandum in opposition, Defendant states that
16 the district court did hear from both the State and defense before dismissing the
17 charges with prejudice. Defendant argues that this constitutes a factual dispute
18 requiring assigning this case to the general calendar. [MIO 2] We disagree, however,
19 as we will accept Defendant’s statement that the district court heard from the parties

1 before dismissing the case with prejudice as true. The problem remains that the record
2 does not reflect that the district court considered lesser sanctions. “*Le Mier* requires
3 the district court to not only weigh the degree of culpability and extent of prejudice,
4 but also explain its decision regarding applicability of lesser sanctions on the record.”
5 *Lewis*, 2018-NMCA-019, ¶ 12.

6 {9} Defendant argues that the district court considered a less extreme remedy when
7 it offered to recess the trial so that the State could turn over the recording for review.
8 Defendant asserts that the district court was then met with intransigence because the
9 prosecutor and police chief did not agree about whether the recording had been
10 handed over. [MIO 11] We question whether a disagreement between the police and
11 the prosecutor about whether an item of discovery has been turned over, on its face,
12 amounts to intransigence. Regardless, the record itself does not support Defendant’s
13 characterization of the district court as having initially offered a less extreme remedy
14 only to be rebuffed by the actions of the State. Speculation as to why the district court
15 chose to impose dismissal with prejudice does not substitute for an adequately
16 developed record. Accordingly, we cannot agree that the record shows a consideration
17 of lesser sanctions. *See Lewis*, 2018-NMCA-019, ¶ 15 (determining that the record
18 was insufficient to allow for appellate review where there was no discussion by the
19 district court on the record regarding the availability of alternative sanctions and there

1 was no explanation of its decision to impose the extreme sanction of dismissal with
2 prejudice over lesser sanctions).

3 {10} As a final matter, we note that, although Officer Chavez testified that a
4 recording had been made and handed over to the prosecutor, the district court did not
5 make any finding or resolve any conflict regarding the location and the availability of
6 the recording before dismissing the charges with prejudice. *See generally State v.*
7 *Bourland*, 1993-NMCA-117, ¶ 8, 116 N.M. 349, 862 P.2d 457 (observing that it was
8 for the district court to determine whether a recording existed where there was a
9 conflict in the evidence).

10 {11} For these reasons, we continue to believe that the record is insufficient to
11 support the dismissal of charges with prejudice at this time, and we therefore reverse
12 and remand to the district court. *See Lewis*, 2018-NMCA-019, ¶ 18 (reversing the
13 district court's dismissal of criminal charges with prejudice and remanding for
14 development of a record where the record was not adequate to determine whether the
15 district court abused its discretion in dismissing because the record did not show that
16 the district court considered the factors set out in *Harper and Le Mier*). In remanding
17 this case to the district court, we express no opinion as to the propriety of dismissal
18 with prejudice as a sanction under the circumstances. We merely hold that the record

1 has not been adequately developed as required by *Le Mier*, and we therefore remand
2 for further proceedings.

3 {12} **IT IS SO ORDERED.**

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5

M. MONICA ZAMORA, Judge

6 **WE CONCUR:**

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JULIE J. VARGAS, Judge

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HENRY M. BOHNHOFF, Judge