BAR BULLETIN

Official Publication of the State Bar of New Mexico

January 8, 2004 • Volume 43, No. 01

State Bar of New Mexico, Albuquerque

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Professionalism Tips

With respect to the public and to other persons involved in the legal system:

I will be mindful of my commitment to the public good.

BAR BULLETIN

Board of Editors
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Meetings

January

12
Taxation Section Board of Directors
noon, via teleconference

14
Children's Law Section Board of Directors
11:30 a.m., Albuquerque Marriott Pyramid North

Children's Law Section Annual Meeting
3 p.m., Albuquerque Mariott Pyramid North

15
Health Law Section Board of Directors
7:30 a.m. State Bar Center

Bankruptcy Law Section Board of Directors
noon, US Bankruptcy Court, Courthouse Training Room

Commercial Litigation
Section Board of Directors
3 p.m. State Bar Center

16
Family Law Section Board of Directors
9 a.m., via teleconference

Public Legal Education Committee
noon, State Bar Center

Committee for Delivery of Legal Services to People with Disabilities
noon, NM Commission for the Blind

Workshops

January

14
Federal Employers Liability Act (FELA)
"What Every Railroad Worker Needs to Know About the Law"
Wednesday, Jan. 14
6 - 8 p.m.
Best Western Hotel, Belen, NM

15
Family Law Workshop
Thursday, Jan. 15
6 – 8 p.m.
Eastern NM University, Ruidoso Campus - Vowell Classroom
Ruidoso, NM

NOTICES

COURT NEWS

New Mexico Supreme Court
Attorney Notice

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848. Information may be e-mailed to the State Bar, at address@nmbar.org; faxed to (505) 828-3755; or mailed to the State Bar, PO Box 92860, Albuquerque NM 87199-2860. The State Bar keeps both mailing and Directory addresses. Contact the State Bar for more information.

N.M. Supreme Court
Dissolution of Legal Advertising Committee

The New Mexico Supreme Court has withdrawn two rules that created the Legal Advertising Committee of the Disciplinary Board. Effective immediately, New Mexico lawyers no longer are required to seek approval of proposed lawyer advertisements. Attorney advertisements, however, still must comply with the canons set forth in the Code of Professional Conduct that detail what is proper legal advertising.

The 1992 rules governing legal advertising were adopted by the Supreme Court and the Legal Advertising Committee was created. The committee's intended role was to provide guidance to New Mexico attorneys with respect to the newly-created attorney advertisement review process; it was not contemplated that the committee would continue indefinitely.

The Supreme Court Disciplinary Board will continue to handle complaints concerning the substance of a lawyer advertisement that may not comply with the Code of Professional Conduct.

See Dec. 18, 2003 (Vol. 42, No. 51) Bar Bulletin *for official order.*

Proposed Revisions to Chapter 3, UJI Civil

The Supreme Court is considering revisions to Chapter 3, UJI Civil. Attorneys and/or judges who would like to comment on the proposed new jury instruction, should send written comments by Jan. 16 to:

Kathleen J. Gibson,
Chief Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848

For your reference: *The proposed amendments were published in the Dec. 18, 2003 (Vol. 42, No. 51)* Bar Bulletin.

Judicial Performance Evaluation Commission
Meeting Cancelled

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers.

The commission's January meeting has been cancelled. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

First Judicial District Court
Family Law Brown Bag Meeting

The First Judicial District Court will hold its family law brownbag meeting at noon, Jan. 13 in the Grand Jury Room on the second floor of the First Judicial District courthouse. Carolyn Lumbard, Alternative Dispute Resolution Analyst, and Judge Carol Vigil will be discussing Alternative Dispute Resolutions' future plans. For more information, contact Sharon L. Pino, (505) 982-0199, or sharonpino@pinolawoffice.com.

Second Judicial District Court
Destruction of Exhibits, Civil Cases, 1990-91

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District will destroy exhibits filed with the court in civil cases for years 1990-91 (excluding cases on appeal). Counsel for parties are advised that exhibits may be retrieved through Jan. 20. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 841-7596/8767 from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Eleventh Judicial District Court
New Address

The Eleventh Judicial District Court has moved. Judge William C. Birdsall and Judge Douglas Echols can now be reached by regular mail at 851 Andrea Dr., Farmington, NM 87401. The Farmington clerk's office is also located at the new address. The court's phone number is (505) 326-2256; and fax, (505) 326-1179.

Bernalillo County Metropolitan Court
Monthly Judges Meeting

The Bernalillo County Metropolitan Court judges will conduct their monthly judges' meeting at noon, Jan. 13 in courtroom 203 of the Metropolitan Court Building, 401 Roma NW, Albuquerque. The meeting is open to the public.

Pursuant to the Americans with Disabilities Act, the court will make rea-

sonable accommodations for individuals with a disability. Should accommodations be needed, contact the Court Administrator's Office, (505) 841-8106.

State Bar News

Paralegal Division

Annual Meeting

The 2004 Annual Meeting of the State Bar Paralegal Division will be held at noon, Jan. 24 at the State Bar Center in Albuquerque. Lunch will be served courtesy of Thomson West. For information on the Annual Meeting and CLE opportunities check the Paralegal Division section on the State Bar's Web site at www.nmbar.org. The registration form for the Annual Meeting can be downloaded from the Web site to be mailed to the Division at PO Box 1923, Albuquerque, NM 87103; or e-mailed to PD@nmbar.org. Watch for the brochure outlining the CLE events – Civil Case Management by Daniel P. Ulibarri, Esq., of Daniel J. O'Brien & Associates, and HIPPA's Impacts on Discovery in Civil Cases by Judith A. Humphrey, Esq., of Bannerman & Williams, PA. Members of the Paralegal Division will receive an additional discount off the CLE registration fee. Registration for the Annual Meeting luncheon will be separate from the CLE seminars.

Paralegal Compensation Survey

The State Bar Paralegal Division is conducting a Paralegal Compensation, Utilization and Benefits Survey during the month of January. The division is urging every paralegal practicing in New Mexico to complete the survey. The complete survey will be printed in the Jan. 15 *Bar Bulletin*. A link to the online survey can be found on the State Bar Web site, www.nmbar.org, but the survey can also be downloaded, completed and e-mailed to PD@nmbar.org (type "survey" in subject line) or printed and mailed to Paralegal Division Survey, PO Box 1923, Albuquerque, NM 87103. Deadline for submission of the survey is Feb 10. Confidentiality of all personally identifiable information will be strictly maintained at all times.

2004 License and Dues

- The 2004 License and Dues forms were mailed on Dec. 5, 2003.
- Without exception, dues and license fees are due on Feb. 2. Members who have not received the form should notify the State Bar, (505) 797-6083 / (505) 797-6035.
- For members' convenience, dues may also be paid on-line through secured e-commerce at www.nmbar.org.
- License and disciplinary fees are mandatory for active attorneys and must be paid to maintain license status (inactive and judges exempt from disciplinary fees).
- The Supreme Court approved a fee increase of $30 for the Disciplinary Board, bringing the total Disciplinary Fee for 2004 to $130. **This is not a State Bar fee.**
- Late fees will be assessed if payment is not postmarked by Feb. 2.

Children's Law Section

Notice of Annual Meeting

The Children's Law Section will hold its annual meeting at 3 p.m., Jan. 14, in conjunction with the 2004 New Mexico Children's Law Institute. Additionally, the section Board of Directors will meet at 11:30 a.m. All events, the annual meeting, board of directors meeting and the conference will take place at the Marriott Pyramid in Albuquerque, 5151 San Francisco Rd. NE.

The annual meeting provides members the opportunity to meet each other and to discuss future section activities. Section members are encouraged to attend the annual meeting whether or not they attend the conference (members need not be registered for the conference in order to attend the meeting). Questions can be directed to incoming chair Linda Yen, (505) 841-5164.

Membership Services Committee

Call for New Members

The Membership Services Committee, the group most instrumental in reviewing and selecting products and services the State Bar can offer to its members, is in need of new members for 2004.

The State Bar will be conducting a member survey in 2004, the results of which can be used to gear new programs, products and services deemed most valuable by the membership at large.

State Bar members interested in being appointed to the Membership Services Committee should contact Christine Morganti, (505) 797-6028, or cmorganti@nmbar.org.

Solo and Small Firm Practitioners' Section

2004 Luncheon Speaker Schedule

The State Bar Solo and Small Firm Practitioners' Section will host monthly luncheon meetings on the third Tuesday through May at the Petroleum Club, 500 Marquette Ave., in Albuquerque.

For all new, first-time members, the first lunch is free. Contact Helen Stirling at the number below to make a free reservation.

Luncheon meetings will begin at noon with a speaker program. Members, guests and any member of the bar are welcome. The charge is $14 in advance and $16 at the door.

Reservations are required. Contact Helen Stirling, Esq., (505) 345-2800. Make the check payable to "State Bar of New Mexico," c/o Helen Stirling, 6125 Fourth St. NW, Ste. A, Albuquerque, NM 87107.

Jan. 20, noon: Demonstration of Solo Section Web site, access and application, Christine Morganti, director of State Bar Member and Public Resources, and Veronica Cordova, State Bar webmaster.

Upcoming luncheon dates in 2004 are: Feb. 17, March 16, April 20 and May 18.

Other Bars

New Mexico Indian Bar Association

Board Meeting

The New Mexico Indian Bar Association board meeting will be held at 4 p.m., Jan. 24, at the State Bar Center in Albuquerque. All Indian Bar Association members are welcomed and encouraged to attend.

Southwest Bench/Bar Conference

Conference Date and Location Set

The Southwest Bench/Bar Conference will be held Feb. 6-7, at the Las Cruces Hilton. The conference will be geared toward attorneys and judges in the Third, Sixth, Seventh and Twelfth judicial districts.

The conference will feature the debut of the 2004 Professionalism course put on by the Commission on Professionalism, which will be an historical perspective on professionalism in New Mexico's legal history. Guest speakers will be 13th Judicial District Judge John Pope, Stan Sager, Tom Chavez, director of the New Mexico Hispanic Cultural Center, and New Mexico Supreme Court Justice Pamela Minzner.

For more information, contact Mark Filosa, committee chair, (505) 894-7161 or filosa@zianet.com; Bill Lutz, (505) 526-2449 or martin@nm.net; James Roggow, (505) 526-2449 or martin@nm.net; or Mary Torres, (505) 848-1800 or mtorres@modrall.com.

Other News

Center for Civic Values

Mock Trial Attorney Coaches Needed

The Pojoaque High School mock trial team needs an attorney coach. Attorneys and or judges who are interested in volunteering should contact the mock trial program at the Center for Civic Values, (505) 764-9417 or (800) 451-1941, ext. 13, or mocktrial@civicvalues.org.

Mock Trial Judges Needed

Judges are needed for the Albuquerque and Las Cruces regional mock trial competitions (to be held Feb. 21) and for the state finals competition to be held March 19 and 20 in Albuquerque. Interested individuals may register online at the Center for Civic Values' Web site http://www.civicvalues.org/MT_registration.htm, or may print a registration form to mail or fax from the same page.

To receive a judging registration packet by mail, leave a voice mail including name and address at (505) 764-9417, ext. 13, or e-mail name and address to mocktrial@civicvalues.org, specifying "request judging packet" in the subject line. For questions or additional information, visit the mock trial pages on the CCV Web site and then contact the mock trial program via telephone or e-mail.

N.M. Commission on the Status of Women

Free Support Group

Women in Transition: Divorce, Money and Power, a free support group offered by the Displaced Homemakers Office of the New Mexico Commission on the Status of Women, will be held from 6 to 8 p.m., beginning Feb. 3. and will meet every Tuesday evening for four weeks. The class meets at the commission office, 4001 Indian School Rd. NE, Suite 300.

These classes address short- and long-term issues for women in transition due to divorce or other life change. Topics and handouts include; Divorce in New Mexico FAQs, budgeting and credit, money and control. Record keeping, risk assessment and insurance, tax topics, small business issues, education funding, and retirement and investment planning.

Seating is limited so registration is required. Contact Lorraine Bantista for information and registration, at (505) 841-8923. Anyone in need of any form of auxiliary aid or service to attend or participate, should contact the commission office at least two weeks before the seminar. TTY users call NM Relay, 1(800) 659-8331.

Uniform Partnership Act

Online Access to Information Now Available

New Mexico Secretary of State Rebecca Vigil-Giron has announced online access to partnership registrations under the Uniform Partnership Act. Interested parties can now view the official images of certificates of registration, amendments, cancellations and mergers by partnerships that have been filed with the state, as well as order certified copies and certificates of existence online. Research on a limited partnership or name availability for a limited partnership may also be done online at no charge. Original certificates of registration must be filed in person, or through the mail. To access this new online feature, visit the Secretary of State Web site, www.sos.state.nm.us., scroll down to "operations," click on "partnership searches and orders."

Westlaw Training Calendar

All classes are held at the State Bar Center, 5121 Masthead NE and are free to Westlaw® subscribers. Reservations are required; call 1-800-310-9650, ext. 7101 to reserve a space. MCLE credit is available for all Westlaw and CD-ROM classes. Visit www.westlaw.com/wl_training/main.asp for more information. Westlaw classes will be cancelled 48 business hours before class time if there are no registrants. Attendees should go to the Westgroup Web site to register early, www.westgroup.com/training. Every effort will be made to accommodate non-registered attendees or "walk-ins," but no guarantees can be made.

Jan. 6
Westlaw Paralegal Certificate Program: 1:30 - 5 p.m. (0 of 12)

Jan. 16
Bankruptcy Law Seminar
10:00 - 11:30 a.m. (0 of 12)

Beginning Westlaw
11:30 a.m. - 1 p.m. (0 of 12)

Jan. 27
Intermediate Westlaw
1:30 - 3 p.m. (0 of 12)

Advance Westlaw Class:
3:30 - 5 p.m. (0 of 12)

JANUARY

12 USA PATRIOT Act
VR - State Bar Center - Albuquerque
SBNM Center for Legal Education
8.4 G
(505) 797-6020
www.nmbar.org

13 2003 Professionalism - Still in the Dark: Disappointing Images of Professionalism
VR - State Bar Center - Albuquerque
Commission on Professionalism and SBNM Center for Legal Education
2.0 P
(505) 797-6020
www.nmbar.org

13 Ethics: Put a CAAP on Complaints
VR - State Bar Center - Albuquerque
SBNM Center for Legal Education
1.0 E
(505) 797-6020
www.nmbar.org

14 Road and Access Law in New Mexico: How to Research and Resolve Access Disputes
Albuquerque
National Business Institute
6.7 G / 0.5 E
(800) 930-6182
www.nbi-sems.com

14 Tax-advantaged Retirement Solutions
Satellite Broadcast
Edward Jones
3.6 G
(314) 515-5791

14-16 2004 Children's Law Institute: Building a Blended System
Albuquerque
UNM Institute of Public Law and New Mexico Court Improvement Project
14.4 G / 1.8 E (optional)
(505) 827-4808
http://ipl.unm.edu/childlaw

14-18 Winter Meeting
Tucson, AZ
Lawyer-Pilots Bar Associations
7.5 G / 1.2 E
(301) 972-7700

15 Advanced Workers' Compensation
Albuquerque
Sterling Education Services
7.8 G
(715) 855-0495
www.sterlingeducation.com

15-16 FMLA Update
Albuquerque
Council on Education in Management
13.2 G
(800) 942-4494
www.counciloned.com

16 Regional Seminar on Transportation Law and Litigation
Chicago, IL
University of Denver College of Law
6.6 G / 1.5 E
(303) 871-6326

21 2003 Professionalism - Still in the Dark: Disappointing Images of Professionalism
VR - State Bar Center - Albuquerque
Commission on Professionalism and SBNM Center for Legal Education
2.0 P
(505) 797-6020
www.nmbar.org

21 Ethics: Unbundling
VR - State Bar Center - Albuquerque
SBNM Center for Legal Education
1.0 E
(505) 797-6020
www.nmbar.org

G = General E = Ethics
P = Professionalism
VR = Video Replay
Programs have various sponsors; contact appropriate sponsor for more information.

22 Workers' Compensation in New Mexico
Albuquerque
Lorman Education Services
6.0 G / 1.2 E
(715) 833-3940
www.lorman.com

20 Complex Divorce Issues for the New Mexico Practitioner
Albuquerque
National Business Institute
6.7 G / 0.5 E
(800) 930-6182
www.nbi-sems.com

20 How to Select a Trustee: Tax and Non-tax Considerations
Teleconference
Cannon Financial Institute
1.8 G
(706) 353-3346

20 Prevent, Detect and Investigate
Albuquerque
Great West Investigations
3.0 G / 1.5 E
(800) 656-7250

22 Workers' Compensation in New Mexico
Albuquerque
Lorman Education Services
6.0 G / 1.2 E
(715) 833-3940
www.lorman.com

24 Civil Case Management
State Bar Center - Albuquerque
SBNM Center for Legal Education
1.8 G / 1.2 E
(505) 797-6020
www.nmbar.org

24 HIPAA's Impacts on Discovery in Civil Cases
State Bar Center - Albuquerque
SBNM Center for Legal Education
3.0 G
(505) 797-6020
www.nmbar.org

JANUARY

26 **Federal Rules of Evidence**
VR - State Bar Center - Albuquerque
SBNM Center for Legal Education
3.9 G / 1.2 E / 2.0 P
(505) 797-6020
www.nmbar.org

27 **Arbitrator Ethics and Disclosure**
Albuquerque
American Arbitration Assoc.
3.0 E
(602) 734-9319

27 **Uninsured and Underinsured Motorist Law in New Mexico**
Albuquerque
National Business Institute
6.2 G / 1.2 E
(800) 930-6182
www.nbi-sems.com

28 **2003 Professionalism - Still in the Dark: Disappointing Images of Professionalism**
VR - State Bar Center - Albuquerque
Commission on Professionalism and SBNM Center for Legal Education
2.0 P
(505) 797-6020
www.nmbar.org

28 **Ethics: Put a CAAP on Complaints**
VR - State Bar Center - Albuquerque
SBNM Center for Legal Education
1.0 E
(505) 797-6020
www.nmbar.org

28 **Practical Applications of Employment Law**
Amarillo, TX
Sterling Education Services
7.8 G.
(715) 855-0495
www.sterlingeducation.com

29 **Tax for Beginners: Forms and Definitions**
Albuquerque
Lorman Education Services
8.0 G
(715) 833-3940
www.lorman.com

29 **Tax Traps and Other Financial Issues of Divorce in New Mexico**
Albuquerque
Meyners + Co.
8.0 G
(505) 222-3510

30 **Employee Benefit Planning**
Albuquerque
Lorman Education Services
8.0 G
(715) 833-3940
www.lorman.com

30 **White Collar Crime**
VR - State Bar Center - Albuquerque
SBNM Center for Legal Education
7.2 E
(505) 797-6020
www.nmbar.org

FEBRUARY

2 **Advanced Real Estate Law in New Mexico**
Albuquerque
National Business Institute
6.2 G / 1.0 E
(800) 930-6182
www.nbi-sems.com

4 **Fundamental Issues in Human Resources Law**
Albuquerque
National Business Institute
7.2 G
(800) 930-6182
www.nbi-sems.com

4 **New Developments in Procurement of Construction**
Albuquerque
Lorman Education Services
7.2 G
(715) 833-3940
www.lorman.com

5 **Current Issues Impacting Insurance Defense Practice in New Mexico**
Albuquerque
National Business Institute
6.2 G / 1.0 E
(800) 930-6182
www.nbi-sems.com

6-7 **Southwest Bench and Bar Conference**
Las Cruces
Southwest Bench and Bar Committee
3.8 G / 2.0 E / 2.0 P
(505) 526-2499

11 **Land Use: Current Issues in Subdivision Annexation and Zoning Law**
Albuquerque
National Business Institute
7.2 G
(800) 930-6182
www.nbi-sems.com

11-13 **Federal and Indian Oil & Gas Royalty Valuation and Management**
Houston, TX
Rocky Mountain Mineral Law Foundation
16.0 G / 1.2 E
(303) 321-8100
www.rmmlf.org

WRITS OF CERTIORARI

As Updated by the Clerk of the New Mexico Supreme Court, Effective January 6, 2004

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

NO. 28,440 State v. Uranga (COA 24,266) 12/30/03
NO. 28,439 Gonzales v. LeMaster (12-501) 12/30/03
NO. 28,438 Marquez v. Allstate (COA 23,385) 12/30/03
NO. 28,437 Truong v. Allstate (COA 24,291) 12/30/03
NO. 28,436 Corliss v. Snedeker (12-501) 12/29/03
NO. 28,435 Gallup LLC v. City of Gallup (COA 22,308) 12/24/03
NO. 28,434 State v. Grubbs (COA 24,356) 12/23/03
NO. 28,432 State v. McGee (COA 23,203) 12/23/03
NO. 28,431 Albuquerque v. Park & Shuttle (COA 24,221) 12/23/03
NO. 28,429 State v. Morgan (COA 24,293) 12/22/03
NO. 28,410 State v. Romero (COA 22,836) 12/22/03
NO. 28,425 State v. Herrera (COA 22,416) 12/19/03
NO. 28,423 Marquez v. Allstate (COA 23,385) 12/19/03
NO. 28,422 State v. O'Neal (COA 24,292) 12/18/03
NO. 28,421 State v. Reveles (COA 24,260) 12/18/03
NO. 28,420 State v. Martinez (COA 23,751) 12/18/03
NO. 28,419 Henry v. Daniel (COA 23,356) 12/18/03
NO. 28,417 Harris v. Snedeker (12-501) 12/18/03
NO. 28,416 Blancett v. Blancett (COA 24,282) 12/17/03
NO. 28,415 Turner v. Tipton (12-501) 12/16/03
NO. 28,414 State v. O'Kelley (COA 23,272/23,364) 12/15/03
NO. 28,413 Hill v. Williams (12-501) 12/15/03
NO. 28,411 Doak v. Tipps (COA 23,562) 12/10/03
NO. 28,387 State v. Sandoval (COA 23,282) 12/10/03
NO. 28,408 Federal Express v. Abeyta (COA 23,519) 12/8/03
NO. 28,405 Garcia v. Department of Labor (COA 24,241) 12/8/03
NO. 28,402 State v. Stewart (COA 23,137) 12/4/03
NO. 28,399 State v. Matta (COA 24,259) 12/1/03
NO. 28,398 State v. Sosa (COA 23,357) 12/1/03
NO. 28,341 Lucero v. State (12-501) 11/18/03
NO. 28,384 Casados-Lujan v. Lujan (COA 22,984) 11/17/03
EFFECTIVE 11/1/03, RULE 12-502 AMENDED AND SUBPARA. E (30 DAYS DEEMED DENIED) WAS REMOVED
NO. 28,300 Archuleta v. Blair (12-501) 10/16/03 *time to consider petition extended to 1/5/04*
NO. 28,091 Ramos v. State (12-501) 5/29/03 *time to consider petition extended to 1/5/04*

CERTIORARI GRANTED AND UNDER ADVISEMENT:

NO. 26,910 Jaramillo v. UNM Bd of Regents (COA 20,805) 5/9/01
NO. 27,269 Kmart v. Tax & Rev (COA 21,140) 1/9/02
NO. 22,283 State ex rel. Martinez vs. City of Las Vegas (COA 14,647) 1/16/02
NO. 27,409 State v. Rodriguez (COA 22,558) 4/3/02
NO. 27,814 State v. Hertel (COA 23,153) 1/8/03
NO. 27,817 Tomlinson v. George (COA 22,017) 1/8/03
NO. 27,816 Warford v. Herrera (COA 22,848) 2/4/03
NO. 27,823 Gill v. Public Employees Retirement Board (COA 21,818) 2/4/03
NO. 27,868 State v. Alvarez-Lopez (COA 22,189) 2/4/03
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NO. 27,969 Hovet v. Allstate (COA 22,276) 4/7/03
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NO. 28,017 State v. Renfro (COA 23,206) 5/30/03
NO. 28,047 State v. Urban (COA 22,359) 5/30/03
NO. 28,068 State v. Gallegos (COA 22,888) 6/6/03
NO. 28,077 Slack v. Robinson (COA 23,189) 6/11/03
NO. 28,061 State v. Lara (COA 22,936) 6/25/03
NO. 28,076 Celaya v. Hall (COA 22,211) 6/25/03
NO. 28,128 Jicarilla Apache Nation v. Rodarte (COA 22,336) 7/15/03
NO. 28,156 State v. Anita T. (COA 23,652/23,653/23,651) 8/5/03
NO. 28,107 State v. Joanna V. (COA 22,876) 8/8/03
NO. 28,007 State v. Ruiz (on reconsideration) (COA 22,282) 8/11/03
NO. 28,198 Lentz v. Benson (COA 23,762) 9/3/03
NO. 28,178 State v. Daniel G. (COA 22,769/22,772) 9/3/03
NO. 28,119 State v. Dominguez (COA 23,286) 9/3/03
NO. 28,183 State v. Ochoa (COA 23,840) 9/3/03
NO. 28,176 State v. Golden (COA 22,769) 9/3/03
NO. 28,159 State v. Eubanks (COA 23,923) 9/3/03
NO. 28,241 State v. Duran (COA 22,611) 9/3/03
NO. 28,242 Didyoung v. Dow (COA 23,417) 9/15/03
NO. 28,233 Palmer v. St. Joseph Healthcare (COA 22,718) 9/15/03
NO. 28,225 Huntley v. Cibola General Hospital (COA 23,916) 9/15/03
NO. 28,234 State v. Blea (COA 24,032) 9/16/03
NO. 28,228 State v. Sharpe (COA 23,742) 10/10/03
NO. 28,253 Miller v. Brock (COA 24,124) 10/10/03
NO. 28,249 Miller v. Brock (COA 24,125) 10/10/03
NO. 28,237 State v. McDonald (COA 22,689) 10/10/03
NO. 28,261 State v. Dedman (COA 23,476) 10/10/03
NO. 28,272 Lester v. City of Hobbs (COA 22,250) 10/10/03

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NO. 02-8300

IN THE MATTER OF THE AMENDMENTS OF RULE 15-105 NMRA OF THE RULES GOVERNING ADMISSION TO THE BAR

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Board of Bar Examiners to approve amendments to Rule 15-105 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 15-105 of the Rules Governing Admission to the Bar hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 15-105 of the Rules Governing Admission to the Bar shall be **effective for the July 2004 bar examination**;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the Rule 15-105 of the Rules Governing Admission to the Bar by publishing the same in the *Bar Bulletin* and the NMRA.

DONE at Santa Fe, New Mexico, this 12th day of December, 2003.

Chief Justice Petra Jimenez Maes
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Richard C. Bosson
Justice Edward L. Chávez

Amended to reduce fees in Subparagraphs (1) and (2) of Paragraph.

15-105. Application fees.

A. **Fees.** Every applicant shall pay the fees as prescribed by the board from time to time. The following fees are fixed, until changed by the board:

(1) four hundred and fifty dollars ($450.00) for applicants whose graduation from law school is less than one (1) year prior to filing the application and who have not engaged in the practice of law in any state;

(2) a reduced fee of one hundred dollars ($100.00) for applicants who apply to repeat the examination; provided, however, that if the investigation report is dated more than fifteen (15) months prior to the date of application, an additional fee will be required to update the investigation report as provided in Rule 15-106 NMRA of these rules;

(3) reasonable additional expenses to be determined by the Board of Bar Examiners, in connection with any investigations or hearings;

(4) eight hundred dollars ($800.00) for all other applicants;

(5) later filing fees shall be assessed as follows:

(a) fifty dollars ($50.00) if an application is filed within thirty (30) days of the filing deadline;

(b) one hundred dollars ($100.00) if an application is filed within sixty (60) days of the filing deadline;

(c) one hundred and fifty dollars ($150.00) if an application is filed within ninety (90) days of the filing deadline;

(d) two hundred dollars ($200.00) for applications filed ninety (90) days or more after the filing deadline; provided, however, that no new applications will be accepted after January 5th for the February exam or June 5th for the July exam.

(Paragraphs B through E have not been amended.)

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NO. 28,270 State v. Paredez (COA 24,082) 10/27/03
NO. 28,286 State v. Graham (COA 22,913) 11/3/03
NO. 28,210 Cassidy-Baca v. County Comm'r (COA 24,046) 11/3/03
NO. 28,317 Turner v. Bassett (COA 22,877) 11/6/03
NO. 28,321 State v. Heinrich (COA 23,215) 12/2/03
NO. 28,337 Colonias Dev. Council v. Rhino Envtl. Svcs. (COA 22,932) 12/2/03
NO. 28,353 State v. Villa (COA 23,229) 12/2/03
NO. 28,359 State v. Moses M. (COA 23,250) 12/2/03
NO. 28,380 Angel Fire v. Wheeler (COA 24,295) 12/3/03
NO. 28,369 State v. Beltron (COA 24,234) 12/5/03
NO. 28,379 State v. Cooley (COA 23,253) 12/9/03
NO. 28,386 State v. Flores (COA 24,067) 12/16/03
NO. 28,383 Blake v. Public Service Company (COA 23,671) 12/19/03
NO. 28,376 Ryan v. Highway Dept. (COA 22,615) 12/19/03
NO. 28,374 Smith v. Bernalillo County Commissioners (COA 22,766) 12/19/03

PETITIONS FOR WRIT OF CERTIORARI DENIED:

NO.28,375 Wasko v. Moore (COA 24,175) 12/23/03
NO. 28,407 Brenneman v. Board of Regents (COA 23,778) 12/23/03
NO. 28,412 Valencia v. San Miguel County (COA 24,400) 12/29/03

WRIT OF CERTIORARI QUASHED:

NO. 27,992 State v. John C. (COA 22,866) 12/23/03

Certiorari Granted, No. 28,337, December 2, 2003

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-141

IN THE MATTER OF THE APPLICATION OF RHINO ENVIRONMENTAL SERVICES, PETITIONER FOR A SOLID WASTE LANDFILL PERMIT FOR THE RHINO SOLID WASTE FACILITY
COLONIAS DEVELOPMENT COUNCIL,
Appellant,
versus
RHINO ENVIRONMENTAL SERVICES, INC. and the NEW MEXICO ENVIRONMENT DEPARTMENT,
Appellees.
No. 22,932
(filed: October 3, 2003)

ADMINISTRATIVE APPEAL FROM THE NEW MEXICO ENVIRONMENT DEPARTMENT
PETER MAGGIORE,
Secretary of Environment

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Albuquerque, New Mexico
for Appellee Rhino Environmental Services, Inc.

OPINION

MICHAEL VIGIL, JUDGE

{1} The Colonias Development Council (CDC) seeks to reverse a decision of the New Mexico Environment Department (NMED or the Department) issuing a permit to Rhino Environmental Services, Inc. (Rhino) to operate a landfill near Chaparral, New Mexico. We address CDC's claims that the Department did not comply with the Solid Waste Act, NMSA 1978, §§ 74-9-1 to -43 (1990, as amended through 2001) (the Act), and the regulations adopted pursuant to the Act, because the Department failed to consider the "social impact" of the landfill on the community of Chaparral, and failed to consider regional planning. We also address CDC's claims that it was denied due process because the hearing officer refused to grant a continuance of the public hearing, and demonstrated bias. We hold that the Department properly considered the applicable regulatory requirements, reject the other claims, and affirm.

{2} Rhino filed an application with NMED for a permit to operate a landfill near Chaparral. Section 74-9-23(B) requires the Department to hold a public hearing on the application within 60 days from the date the application is deemed complete and Section 74-9-24(A) requires the Secretary to rule on the application within 180 days after the application is deemed complete.

{3} Consistent with statutory requirements, the Department scheduled a public hearing in Chaparral that began on September 10, 2001, CDC is an interested party who opposed the application. There was strong opposition to the proposed landfill, and emotions ran high during much of the public hearing. Additionally, the terrorist attacks on September 11, 2001, (September 11th) made an already emotionally charged hearing even more difficult. The impact of the events of September 11th affected the hearing in several ways, which we discuss later in this opinion.

{4} After the hearing, the hearing officer filed a report recommending that the Secretary grant the permit. The Secretary, acting through his designee, the Director of the Water and Waste Management Division (referred to in this opinion as the Secretary), granted the permit, with conditions, for a period of 10 years. CDC appeals that decision. The Chaparral Community Health Council (CCHC) also appeared as a party but has not appealed.

DISCUSSION

A. Standard of review

{5} CDC appeals the order granting the permit directly to this Court under the authority of Section 74-9-30, which provides that we shall set aside the order only if it is: "(1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." ***Id.*** "[A]n agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand." ***Atlixco Coalition v. Maggiore,*** 1998-NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370. CDC's claims that the hearing officer and the Secretary failed to consider "social impact" and regional planning involve statutory interpretation. We review these claims de novo. ***See Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n,*** 2003-NMSC-005, ¶ 13, 133 N.M. 97, 61 P.3d 806 (stating courts not bound by administrative agency's legal interpretation).

B. Interpretation of the Solid Waste Act

{6} CDC recognizes that NMED's permitting procedure is "heavily, if not entirely, weighted on the technical side." The record in this case is voluminous and contains a great deal of evidence on technical issues such as impacts on groundwater, reclamation after closure, and similar topics, which CDC does not challenge on appeal. Instead, it argues that NMED did not consider regional planning or the "social impact" of the landfill on the neighboring community of Chaparral, and that the Act required NMED to do so.

1. "Social Impact"

{7} CDC and certain citizens of Chaparral spoke against having a landfill near the community. Many people did not want to live near a landfill, and expressed general fears about the potential impact of a landfill

on their air and water. Some felt it was unfair to put another landfill near Chaparral when there were two or three others already nearby. One person assumed the landfill would "poison" the residents. Another theme expressed was that the landfill should be located in the desert, far from people.

{8} Sister Diana Wauters, who has a master's degree in social work, testified that having a landfill near Chaparral would have a negative collective psychic impact on the community. She said the landfill would create a perception in the community that it was a dumping ground, and it would stigmatize the community. She concluded the collective morale of the community would suffer, even if no physical harm was caused by the landfill. She urged the hearing officer to weigh "considerations of a more sociological nature."

{9} CDC argues that the foregoing "social impact" of the landfill, coupled with general community opposition to the landfill, are factors that must be considered by NMED in determining whether to grant a solid waste permit. CDC argues that NMED's failure to weigh these claimed mandatory factors invalidates the permit grant.

{10} To support its argument that a consideration of "social impact" is statutorily required, CDC relies on language in Section 74-9-2, which states that one purpose of the Act is to "enhance the beauty and quality of the environment; conserve, recover and recycle resources; and ***protect the public health, safety and welfare.***" Section 74-9-2(C) (emphasis added). CDC further relies on Section 74-9-8(A)'s command that the Environmental Improvement Board shall adopt regulations to:

> A. implement, administer and enforce a program for the cost-effective and environmentally safe siting, construction, operation, maintenance, closure and post-closure care of solid waste facilities, including financial responsibility requirements for solid waste facility owners and operators also including requirements that assure that ***the relative interests of the applicant, other owners of property likely to be affected and the general public will be considered*** prior to the issuance of a permit for a solid waste facility[.]

Id. (Emphasis added.)

{11} CDC contends that since one of the purposes of the Act is to "protect the public health, safety and welfare," Section 74-9-2(C) and Section 74-9-8(A) require consideration of the "relative interests . . . of other owners of property likely to be affected and the general public" in regulations, the "social impact" of a landfill must be considered as a prerequisite to granting a landfill permit. CDC also argues that the "social well-being" of the public also provides a basis to conclude that the Act required NMED to consider the social impact of the landfill on Chaparral's citizens.

{12} Our primary task in interpreting a statute is to determine legislative intent. ***See Key v. Chrysler Motors Corp.,*** 1996-NMSC-038, 121 N.M. 764, 768-69, 918 P.2d 350, 354-55. The plain language of the statute is the first indicator of legislative intent. ***See High Ridge Hinkle Joint Venture v. Albuquerque,*** 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. We will not "read into a statute language that is not there, particularly if it makes sense as written." ***Id.*** (internal quotation marks and citation omitted).

{13} The Act never uses the phrase "social impact." The purpose section does mention the goal of protecting the "public health, safety and welfare," § 74-9-2, but this language is extremely general, and commonly used to invoke the police power of the State. ***See generally State ex rel. City of Albuquerque v. Lavender,*** 69 N.M. 220, 231, 365 P.2d 652, 659 (1961) (noting that police power is an inherent power of government to make laws providing for the preservation of public peace, health, and safety). We reject CDC's argument based on the purpose section of the Act. The Act never mentions "social impact." "Social well-being" is not mentioned either, and even if "social well-being" is included within the broad concept of "public health, safety and welfare," we are not convinced that the Legislature intended that NMED be required to consider the "social impact" on the neighboring community when the Department grants or denies a landfill permit.

{14} CDC argues that regulations must provide for consideration of the "relative interests of the applicant, other owners of property likely to be affected and the general public." Section 74-9-8(A). However, this language makes no reference to "social impact" and only contains a general requirement that the regulations must balance the interests of an applicant, property owners likely to be affected, and the general public. The statute simply recites the common sense requirement that, in adopting regulations, the broad spectrum of interests of all affected parties should be considered without favoring the interests of a particular group.

{15} We are not persuaded that CDC's interpretation of the Act is correct. The broad interpretation of the Solid Waste Act urged by CDC would alter the essential task of NMED and transform it into a legislative body. If an administrative agency must weigh and determine different social and political issues like the ones here, and is asked to determine the social impact of a particular permit request, the agency is put into a role that has no standards. If, for example, NMED were required to consider, as Sister Wauters put it, "considerations of a more sociological nature," where would that approach end? What kind of sociological impacts would it consider? In determining whether to grant a landfill permit, would NMED consider whether the landfill would provide jobs for local citizens, or how many jobs it would provide? Would it consider whether the building of a landfill served a greater good, by providing for environmentally sound repositories for waste material generated by all citizens, including people who live outside of the adjacent community? Would it consider, as one member of the community stated, that a modern, environmentally sound landfill would potentially ameliorate the problem with illegal dumping of trash in the desert areas around Chaparral? Or would it consider that, without infrastructure, the community would never grow?

{16} CDC defines "social impact" in a narrow fashion that suits its own argument, but once the Pandora's box is opened, the "social impacts" become unlimited, multifaceted, and without standards. NMED cannot reasonably be expected to weigh sociological concerns, which it has no expertise in doing. Its role is to pass judgment on the technical aspects of a solid waste site, a subject within its expertise and which it was designed to do. Broader political and sociological concerns regarding public welfare and social impact are more appropriate for consideration by local

political bodies and the Legislature, not an administrative agency charged with a technical and scientific oversight function. ***See State ex rel. Taylor v. Johnson,*** 1998-NMSC-015, ¶¶ 21-22, 125 N.M. 343, 961 P.2d 768 (recognizing that it is the domain of the Legislature to make public policy, and that generally the Legislature, not an administrative agency, declares policy and establishes the primary standards to which the agency must conform). We conclude that the interpretation of the Act urged by CDC is unworkable and unreasonable. ***See Rio Grande Chapter of the Sierra Club,*** 2003-NMSC-005, ¶ 29 (rejecting a construction of the New Mexico Mining Act that would be unworkable); Cox v. City of Albuquerque, 53 N.M. 334, 340, 207 P.2d 1017, 1021 (1949) (stating that statutes are to be given a sensible effect).

{17} If the Legislature had intended NMED to have the expansive authority urged by CDC, we would expect the Legislature to provide a much clearer indication than the broad reference to social welfare contained in the purpose section of the Act, or the general requirement that regulations should balance the interests of applicants, owners of affected property, and the general public. If the Legislature intended NMED to be akin to a political body, and to consider broad "social impacts" in the Department's permitting scheme, it would have clearly expressed that requirement. ***See Romero v. Valencia County,*** 2003-NMCA-019, ¶ 5, 133 N.M. 214, 62 P.3d 305 (noting that the Legislature knew how to fashion an exception to sovereign immunity if it had wanted to do so). Without any clearer indication than the broad references relied on by CDC, we decline to read into the Act language that would create such expansive authority for NMED.

{18} CDC also relies on our language in ***Martinez v. Maggiore,*** 2003-NMCA-043, ¶ 19, 133 N.M. 472, 64 P.3d 499, in which we stated that "absent opponents of the Landfill share an important interest in insuring that modifications to [a] [l]andfill] permit do not adversely affect the quality of life in [an adjacent community]," to argue that NMED must consider social impact. We disagree that our reference to "quality of life" means that NMED must consider social impact as an independent criteria for granting or denying a landfill permit. ***Martinez*** addressed whether public notice was adequate, not the issue presented here. Our broad statement in ***Martinez*** is consistent with a general recognition that compliance with sound technical requirements serves the public's interest in a safe environment, and was not intended to inject broad sociological concerns into the determination whether to grant a landfill permit.

{19} CDC also complains that the hearing officer excluded and discouraged testimony concerning the landfill's impact on the social well-being of Chaparral. As we have stated, general fear and evidence about a perceived negative psychological impact, which fall within CDC's definition of "social impact," are not reasons to deny a permit that otherwise meets technical and legal requirements. ***See Cooper v. Curry,*** 92 N.M. 417, 420-21, 589 P.2d 201, 204-05 (Ct. App. 1978) (holding that it is not error to preclude questioning or evidence that is irrelevant). The hearing officer had discretion to exclude irrelevant evidence. ***See Peterson Props. v. Valencia County Valuation Protests Bd.,*** 89 N.M. 239, 242, 549 P.2d 1074, 1077 (Ct. App. 1976) (holding that taxpayer was not denied due process where irrelevant evidence was properly excluded). On the other hand, the hearing officer allowed many hours of public comment, late into the night, in which many members of the community were allowed to express their opposition to a landfill being located near them. Moreover, it also appears that the hearing officer let every person who wanted to comment do so, and summarized every person's testimony in her report to the Secretary. Even if the hearing officer curtailed some evidence on these issues, our review of the record persuades us that CDC had a sufficient opportunity to present its evidence and arguments, and we see no prejudice from the rulings of the hearing officer. ***See State v. Marquez,*** 1998-NMCA-010, ¶ 24, 124 N.M. 409, 951 P.2d 1070 (stating that the trial court may exclude cumulative evidence).

{20} CDC argues that if we do not adopt its construction of the Act, public comment is meaningless. We disagree. Here, for example, the permit contained 20 conditions, some of which may have been a direct result of the community's concerns. Moreover, since the hearing officer summarized the testimony of every member of the public who testified, the Secretary was able to review the testimony, and to consider the complete context of the hearing, in reaching his ultimate decision. Additionally, opponents may always present technical evidence on whether the application meets the regulatory requirements, as CDC did here through its expert, Paul Robinson.

{21} We hold that the hearing officer was correct in her conclusion that CDC's expression of the social impact on Chaparral, and Chaparral's opposition to the landfill because of general concerns, did not require denying Rhino its permit.

2. Regional Planning

{22} CDC argues that NMED was required to consider "regionalization," which is whether there was a "regional need for a landfill." NMED's position is that it does not site landfills, but leaves it to applicants to choose a location. NMED considers the requested site only in terms of whether it meets the thirteen siting criteria contained in 20 NMAC 9.1.III.302.A (1995) (recompiled at 20 NMAC 9.1.300 (2001)). These criteria include requirements, for example, that a landfill may not be located in a flood plain, within 500 feet of a wetland, within 200 feet of a watercourse, within 1000 feet of a well, within 500 feet of a residence, or within 10 miles of an airport. They also involve factors such as the depth to water, geological stability, archeological issues, and whether threatened or endangered species habitat will be affected. The location of the landfill satisfied all regulatory siting criteria.

{23} CDC's assertion that NMED must consider regional planning in granting a landfill permit is based on several steps of reasoning. The Act requires NMED to prepare a solid waste management plan by December 31, 1992, and to implement a solid waste management program by July 1, 1994. Sections 74-9-4, -5, and -12. The Department is also required to publish annual reports. Section 74-9-13. Since any action taken by the director of the Environmental Improvement Division must be consistent with the plan, since the plan includes as one of its purposes to "[e]ncourage the coordination of regional approaches for solid waste management within a solid waste district," and since annual reports of the Department express NMED's "policy" of regional planning, CDC concludes that NMED must consider regional planning in granting a landfill permit.

{24} We will not impose an unexpressed permit requirement of regional planning based

on a purpose section contained in the plan. Nor will we do so based on an annual report. The fact that the Department's plan states a purpose or a policy of encouraging regional planning is a slim reed on which to impose a permitting requirement, not required by the statute, and we will not do so. ***See Romero,*** 2003-NMCA-019, ¶ 5 (noting that if the Legislature intends a specific outcome, it knows how to clearly indicate it).

{25} CDC also relies on a regulation about a grant program administered by the Environmental Improvement Division. Under the Act, the division is required to set up a grant program, which makes grants to counties and municipalities, to establish or modify solid waste facilities. ***See*** §§ 74-9-40 and -41. These sections say nothing about regional planning. However, one regulation adopted pursuant to these sections encourages regional planning, stating that a county or municipality can receive a higher score toward obtaining a grant if "an application is jointly made by more than one municipality or county. The greater the regionalization effort the higher the score." 20 NMAC 9.3.300(B)(2)(i) (recompiled 20 NMAC 9.3.III.300 - III.301 (2001)). We reject CDC's argument that a regulation adopted pursuant to a grant program equates to a statutory permit requirement.

{26} For these reasons, and based on the arguments presented, we hold that NMED need not consider regional planning in determining whether to grant a permit.

C. Continuance

{27} The public hearing in Chaparral commenced on September 10, 2001. CDC argues the hearing should have been continued for two reasons. First, it argues that the tragic events of September 11th required a continuance. Second, it argues that the hearing should have been continued to allow an expert, Paul Robinson, to attend the hearing.

{28} On the morning of September 11th, our country experienced the worst terrorist attack in our history, resulting in the destruction of the World Trade Towers and extraordinary loss of life. We well recall the difficulties of that day, and the disruption to the fabric of our national life over the ensuing days and weeks. At the request of CDC and CCHC, the hearing officer recessed the hearing on the afternoon of September 11th. The hearing officer made no decision at that time about whether to resume the following day. Counsel for CDC told the hearing officer that she would be returning to Albuquerque to be with her elderly mother and daughter, no matter what the hearing officer decided to do, and that she would not be returning. CDC urged the hearing officer to call off the remainder of the hearing. Counsel for CCHC stated that CCHC refused to participate in the hearing.

{29} On September 12, 2001, at approximately 2:00 p.m., the hearing officer decided to resume the hearings because the Governor had urged business to continue as usual, and other state agencies and offices were open. Later in the week, the hearing officer reiterated her position that "so long as the State of New Mexico is doing business, we're going to be doing business, as well." Counsel for CCHC continued to press for a continuance, arguing that attendance was poor, compared to the first day of the hearing, and that its expert, Mr. Robinson, was traveling and unavailable at that time due to the events. Counsel for NMED responded that usually members of the public would attend the hearings in the evening, and that it was not unusual for attendance to be lower during the work day.

{30} Given the difficulties presented by the events of September 11th, we believe either course open to the hearing officer would have been a reasonable choice. She could have ordered a continuance, but the circumstances did not require her to do so. CCHC argued that the public's right to be heard was compromised by proceeding because people were afraid to attend a public hearing. The record belies that assertion, showing extensive public comment and questioning until very late on September 12, 13, and 14, 2001, and further public comment on Saturday, September 15. Nor do we believe resolution of this issue depends on the insoluble question whether the victims of the attack would have been better honored by a recess, as argued by CDC, or by continuing with life as normally as possible.

{31} The applicable regulation provides for a continuance for good cause after consideration of prejudice to the other parties and undue delay to the proceeding. 20 NMAC 1.4.200(C)(3) (1997) (recompiled 20 NMAC 1.4I.201 through 205 (2001)). We review the hearing officer's decision for an abuse of discretion. ***Cf. Jaycox v. Ekeson,*** 115 N.M. 635, 638, 857 P.2d 35, 38 (1993) (stating that we review the denial of a continuance for an abuse of discretion). An abuse of discretion occurs when the decision is contrary to logic and reason. ***See id.*** Whether to resume the hearing on September 12, 2001, presented a difficult question, and when other state agencies were attempting to proceed with business as usual, we hold that no abuse of discretion was committed. Proceeding with the hearing was not contrary to logic and reason.

{32} CDC also argues that the hearing officer should have granted a continuance to allow CCHC's expert witness, Paul Robinson, to attend the hearing. On August 3, 2001, CCHC moved for a continuance stating that Mr. Robinson would be traveling in Russia from August 24, 2001, until September 12, 2001. It does not appear that CCHC ever explained why Mr. Robinson was going to be in Russia, or why he would not cancel or alter his travel plans. The hearing officer denied the motion, reasoning that CCHC had agreed to the September 10, 2001, date, and expressed her concern that the statute required the hearing to be held within 180 days of the date the amended application was deemed complete. When the attacks on September 11th resulted in disruption of commercial airline service, keeping Mr. Robinson in Russia until after September 15, 2001, CCHC argued, in its renewed motion, that Mr. Robinson's absence justified a continuance. However, CDC overlooks the fact that the hearing officer held the hearing open and Mr. Robinson was allowed to testify on September 19, 2001. ***See Nat'l Council on Comp. Ins. v. N.M. State Corp. Comm'n,*** 10 N.M. 278, 286, 756 P.2d 558, 566 (1988) (holding that due process rights were not violated where no prejudice was demonstrated). This argument therefore fails.

{33} To the extent CDC argues that it was prejudiced because Mr. Robinson was not present to hear the live testimony of Rhino's witnesses, we remain unpersuaded. Rhino's witnesses filed detailed summaries of their testimony in advance of the hearing and Mr. Robinson had the opportunity to review them before he testified. CDC does not argue that Rhino's technical testimony at the hearing changed significantly from the prefiled testimony, and even if it had changed, Mr. Robinson had the opportunity to review the transcript of the hearing to ascertain the nature of Rhino's expert testimony and

confer with counsel before he testified. Mr. Robinson's testimony demonstrates he had an understanding of Rhino's expert testimony before he testified.

{34} Because Mr. Robinson had advance notice of the substance of Rhino's testimony in detail, could have helped counsel prepare for cross-examination in advance of the hearing, testified at the hearing, and had the opportunity to respond to Rhino's expert testimony, we hold that CDC has not demonstrated a denial of due process. ***See In re Laurie R.,*** 107 N.M. 529, 534, 760 P.2d 1295 (Ct. App. 1988) (finding no error in court's denial of a motion for continuance where Mother was given advance notice of the issues to be tried and had a reasonable opportunity to prepare her case).

D. Bias of the Hearing Officer

{35} CDC argues that the hearing officer's bias violated its constitutional right to due process and a fair hearing. The leading New Mexico authority, which we reiterate, is ***Reid v. N.M. Bd. of Exam'rs,*** 92 N.M. 414, 589 P.2d 198 (1979), which states:

> At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. In addition, our system of justice requires that the appearance of complete fairness be present. The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.
>
> These principles apply to administrative proceedings as well as to trials. When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.

Id. at 416, 589 P.2d at 200 (citations omitted). We examine each claim CDC makes that the foregoing requirements were violated.

1. Insistence on Decorum

{36} CDC argues that the hearing officer demonstrated bias against the community when she "initiated the hearing by warning the participants not to turn the proceedings into a rally." CDC complains that the hearing officer said, "I understand you had a rally outside, and I would ask you not to bring your outside voices into this building, or your rallying cries or your applause. Frankly, it disrupts the hearing." CDC argues that it was not a "rally," but a press conference, sponsored by the Bishop of the Diocese of Las Cruces.

{37} The hearing officer's report states that at the time she asked the public not to bring their rally inside, that is what they were trying to do. She noted that older children were climbing over her boxes and the administrative record trying to hang an anti-landfill banner behind her head so that it could be seen by television cameras that had been brought inside, that interviews with various people were being held along the sides of the gymnasium hearing room, that people were speaking loudly and excitedly, and that children were racing up and down the aisles. CDC does not challenge these findings.

{38} Moreover, the transcript reflects that immediately before the hearing officer requested that the public not bring its rally inside, she said, "it's important that we do this [hearing] in a respectful manner–that's my job, to make sure that this is a respectful proceeding and conducted calmly." Her desire to conduct the hearing in a respectful manner was expressed several times. We find nothing in these requests of the hearing officer that exhibit unconstitutional bias. ***See*** Rule 21-300(B)(3) NMRA 2003 (requiring judge to maintain order and decorum in judicial proceedings).

{39} CDC argues that the hearing officer made it clear "that parents with children . . . were not welcome." A review of the record establishes, however, that the hearing officer was only seeking to establish decorum, because many children were screaming, crying, or disruptive. The hearing officer's insistence on decorum during the hearing did not demonstrate unconstitutional bias against the community. Rule 21-300(B)(3).

2. Comments About Counsel

{40} CDC asserts that the hearing officer's bias was shown by making statements to "malign" its counsel, saying, "I have to say that I haven't really had lawyers behave the way I've witnessed on your part, either, applauding when I asked people not to applaud, laughing loudly when I did not understand a Spanish gentleman coming toward me at the public comment period, repeated threats to leave, walk out, not participate." This remark was made to counsel for CCHC, not counsel for CDC. Even if we assume that the statement to counsel for CCHC was also directed to counsel for CDC, we find no unconstitutional bias. Our review of the transcript persuades us that the hearing officer's critical comments were legitimate responses to the behavior of counsel for CCHC, do not establish unconstitutional bias against CDC, and do not require reversal. ***See United Nuclear Corp. v. Gen. Atomic Co.,*** 96 N.M. 155, 246-51, 629 P.2d 231, 292-97 (1980) (discussing and rejecting claims trial judge had personal bias or prejudice against party or that party had a reasonable basis to question trial judge's impartiality).

3. Denial of a Continuance

{41} CDC argues that the hearing officer refused to continue the hearing after the events of September 11th because she "failed to grasp the scale of tragedy." As already discussed, the hearing officer did not abuse her discretion in proceeding with the hearing, and we reject CDC's argument that the hearing officer's refusal to grant a continuance shows bias. ***See State v. Turner,*** 97 N.M. 575, 577-78, 642 P.2d 178, 180-81 (Ct. App. 1981) (stating that denial of motions for continuance is not proof of bias).

4. Ex Parte Communication

{42} CDC argues that "there was an appreciable difference between the procedural courtesy granted [Rhino] and the NMED," and "clear indications" of ex parte com-

munication between the hearing officer and NMED on procedural issues. The hearing officer acknowledged that she is an employee of the Department, and explained she is the Department Secretary's designee and that her job is to report her findings to him. In her report, she explained that in presiding over a large public hearing out of town, numerous issues arise concerning the administrative details of conducting the hearing, such as obtaining interpreting services, and providing for the physical comfort of those attending, and similar matters, which require discussion with staff. The merits of the action were not discussed in any ex parte communication.

{43} She also reminded counsel for CCHC that "I spent quite a bit more time with you and [co-counsel] privately to discuss the procedural questions you had. It was apparent to me that you had not studied our permitting procedures, and I answered a number of your questions on that point without [opposing counsel] being here." This record only shows that communications concerning scheduling and administrative matters occurred and not any communications concerning the merits of the adjudication. Therefore, there is no basis to set aside the permit grant. ***See*** Rule 21-300(B)(7)(a) (allowing ex parte communications for scheduling, administrative purposes or emergencies that do not deal with issues on the merits); ***Singha v. N.D. Bd. of Med. Exam'rs,*** 613 N.W.2d 34, 42 (N.D. 2000) (same); ***San Carlos Apache Tribe v. Bolton,*** 977 P.2d 790, 795-96 (Ariz. 1999) (same).

5. Sign-in Sheets

{44} CDC argues that the hearing officer caused confusion about sign-in sheets. However, it appears that any confusion was created by CCHC, which asked people to sign some sort of petition before they entered the hearing. Then, when the people were asked to sign the sign-in sheet, they refused, stating that they had already signed something and would not sign again. CDC has not rebutted this assertion. The hearing officer clearly explained the purpose of the sign-in sheets and, even if the hearing officer had been responsible for any confusion about a sign-in sheet, we are not persuaded that this would warrant a conclusion that she was biased, that due process was violated, or that a new hearing should be held. ***Cf. Nat'l Council on Comp. Ins.,*** 107 N.M. at 286, 756 P.2d at 566 (changing format of proceedings no violation of due process where no prejudice was demonstrated).

6. Scheduling

{45} CDC claims the hearing officer "demonstrated a clear lack of concern for the community," and "conducted the hearing with a view that public hearings run more smoothly without the public." CDC asserts that the hearing officer scheduled the hearing during working hours, which may have made it difficult or impossible for members of the community to attend. The record belies those assertions. The hearing officer conducted the hearings late into the night, and on Saturday, so that members of the public could present their comments. The public hearing did not end until 11:00 p.m. on September 12, and until 11:23 p.m. on September 13. On Friday, September 14, she allowed public questioning of witnesses until after midnight, and the hearing did not end until 1:50 a.m. on Saturday, September 15. Public comment was allowed during the day on Saturday as well. The hearing officer listened to every citizen who wanted to express a view.

7. Evidentiary Rulings

{46} CDC also asserts that the hearing officer was biased because she refused to permit members of the community to ask questions addressing the social impact of the landfill on the community. The hearing officer properly imposed limitations on the presentation of irrelevant evidence, and we find no bias from the hearing officer's correct ruling. ***See Peterson Props.,*** 89 N.M. at 242, 549 P.2d at 1077 (holding that irrelevant evidence was properly excluded).

{47} The hearing officer acted contrary to CDC and CCHC's wishes when she limited her consideration of certain testimony and attempted to conduct the hearing in a professional manner but these limitations and attempts to impose civility and decorum do not constitute bias, or support CDC's contention that the hearing officer "demonstrated a clear lack of concern for the community." On the contrary, the record reflects courtesy and frequent attempts to explain the public hearing process to the public. Our review of the transcript shows that the hearing officer exercised remarkable patience during an emotionally-charged hearing, held during an already difficult week. We reject CDC's claim that the hearing officer was biased.

CONCLUSION

{48} The decision of the Secretary granting the permit to Rhino is affirmed.

{49} **IT IS SO ORDERED.**

MICHAEL VIGIL, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

IRA ROBINSON, Judge

Certiorari Denied, No. 28,360, December 1, 2003

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-144

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JAMES LANEY,
Defendant-Appellant.
No. 22,748
(filed: October 14, 2003)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
NEIL CANDELARIA,
District Judge

PATRICIA A. MADRID
Attorney General
JAMES O. BELL
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JOHN B. BIGELOW
Chief Public Defender
TRACE L. RABERN
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

OPINION

MICHAEL D. BUSTAMANTE
JUDGE

{1} Defendant James Laney appeals his conviction for homicide by vehicle (reckless), great bodily injury by vehicle, leaving the scene of an accident (great bodily harm or death), and reckless driving. Defendant raises six issues for our review: (1) speedy trial violation, (2) improper testimony elicited by the State from its expert witness, (3) denial of his proposed jury instruction on "operating" a motor vehicle, (4) fundamental error in failing to declare a mistrial, (5) merger of his convictions for vehicular homicide and the lesser-included offense of reckless driving, and (6) cumulative error. As to the fifth issue, the State agrees that it was error to convict and sentence Defendant on the lesser-included offense of reckless driving, and therefore, we do not consider this issue on appeal. As to the remaining issues, we find no error and, hence, no cumulative error. We affirm and remand, directing the district court to enter an amended judgment and sentence vacating the reckless driving conviction. ***See State v. Pierce***, 110 N.M. 76, 87, 792 P.2d 408, 419 (1990) (holding that State may charge separately for the same offense, but the convictions for more than one of the offenses cannot stand). All other issues raised in Defendant's docketing statement are deemed abandoned. ***State v. Fish***, 102 N.M. 775, 777, 701 P.2d 374, 376 (Ct. App. 1985) (noting issues listed in the docketing statement but not argued in the brief in chief are deemed abandoned).

FACTUAL BACKGROUND AND PROCEEDINGS

{2} On April 14, 2000, Defendant was involved in a fatal car accident. Defendant fled the scene on foot, but was apprehended and arrested eleven days later. An indictment was issued on May 9, 2000, charging Defendant with homicide by vehicle (reckless), great bodily injury by vehicle (reckless), leaving the scene of an accident (great bodily harm or death), receiving or transferring a stolen vehicle (possession), and reckless driving. After three continuances, two rule extensions, and several motions, the case was eventually tried before a jury on March 28, 2001, some eleven months after Defendant's arrest.

{3} Most of the facts elicited at trial are undisputed. Defendant was in a small Mazda sports car traveling eastbound on Academy Road in Albuquerque, New Mexico. The Mazda turned northbound onto Marcheta in front of an oncoming half-ton, Chevy pickup. The pickup, which was traveling westbound on Academy, "T-boned" the Mazda, instantly killing the right front passenger, Sean Roseberry. The passenger in the pickup was seriously injured. The driver of the pickup and Defendant sustained only minor injuries. Defendant stipulated that the Mazda's sudden turn in front of the pickup was one of the primary causes of the accident. The only disputed issue was the identity of the Mazda's driver.

{4} The defense maintained there were three men in the Mazda, while the State argued there were two, Defendant and Roseberry. Eyewitnesses, including the driver of the pickup, and two persons who stopped to render aid, observed one person fleeing the scene, although their descriptions varied somewhat. Only one witness, however, could identify Defendant as the man he saw leaving the scene. The defense argued that the pickup driver saw the driver of the Mazda crawl out of the car, whereas the man who was seen leaving the scene by the other witnesses was Defendant, who had been in the right rear seat.

{5} Both sides provided expert testimony to support their theory. A forensic pathologist and OMI supervisor, Dr. Gerri McLemore, testified for the State about Roseberry's extensive injuries. The State's expert in accident reconstruction and occupant kinetics, Parker Bell, opined that given the dynamics of the accident, a person seated in the right rear seat would most likely have sustained injuries similar to those sustained by Roseberry. Defendant's expert, Dr. Karen Greist, in contrast, testified that Defendant's injuries, consisting of a long rectangular bruise and abrasion running diagonally from his upper right shoulder to his lower left rib cage, were consistent with a seat belt injury. Two defense witnesses testified Defendant was coughing up blood and had bruising to his right arm and chest area after the accident.

{6} Jury deliberation began on a Friday, the third day of trial. After four hours of deliberation, the jury advised the district court it was "deadlocked" on two counts. Although ten jurors polled stated they were hopelessly deadlocked and did not believe further deliberations would be helpful, both counsel rejected the district court's offer to receive the verdicts on three counts and declare a mistrial on the other two. Instead, the parties agreed to send the jury home for the weekend. The jury eventually acquitted Defendant on the stolen vehicle charge, but convicted him on the remaining four counts.

I. Speedy Trial

{7} The initial prosecution of Defendant was quick—he was indicted on May 10, 2000, only fifteen days after his arrest on April 25. Discovery problems, on the other hand, abounded over the next seven months. Counsel for the defense filed his Entry of Appearance and Demand for Speedy Trial on May 17, 2000. A Motion to Dismiss for failure to provide discovery was filed on July 10, 2000. This apparently prompted the State to enter its appearance the next day, two months after the indictment issued.

Defense counsel then filed two additional motions, including a Motion to Quash for failure to present exculpatory evidence of Defendant's "seat belt" injuries to the grand jury and a motion to disclose confidential informant on August 18, 2000. Motions were heard on September 5, 2000. In support of the Motion to Quash, defense counsel displayed photographs of Defendant's injuries, which he maintained were consistent with a right-hand seat belt injury. At that time, defense counsel advised the district court that he hired a private investigator to take the photographs on May 21, and that in July, it had procured Dr. Greist, an expert in forensic pathology, to testify that the injuries supported Defendant's defense. The district court denied the motions to quash and dismiss, but ordered the State to disclose the informant and immediately disclose any existing discovery, including initial police reports, photographs, and the search warrant. Supplemental reports and crime lab reports were ordered to be disclosed within one week.

{8} A second Motion to Dismiss was filed on September 22, 2000, in which Defendant complained that he had not yet received the "Final Supp Out,"[1] although the "case [had] been pending for several months." A second hearing was held on September 27 during which the State represented that the "Supp Out" was provided on September 20, however, because defense counsel did not have a copy, the completed report was provided after the hearing.

{9} As a result of these discovery delays, a Stipulated Motion to Continue vacating an October 4, 2000, trial setting was granted at Defendant's request. A second stipulated continuance vacating a November 6, 2000, trial setting was granted at the State's request. As grounds for that continuance, the State explained that pretrial interviews were set for November 1, but one witness was out of town. Over Defendant's objection, the State then requested a three-month extension, pursuant to Rule 5-604 NMRA 2003, to interview this witness. An extension was granted through February 19, 2001, and the trial was reset for February 5, 2001. In the meantime, the State filed a stipulated Motion for DNA Standard on December 1, 2000, to obtain a sample from Defendant for testing. A second Rule 5-604 Petition was granted by the Supreme Court, over Defendant's objection, because the DNA results were not ready, and because the defense expert, Dr. Greist, had not been made available to the State for an interview. Eleven months and two days after Defendant's arrest, the trial began. On the day of the trial, Defendant made several pretrial motions, including a motion to dismiss on speedy trial grounds, which was denied.

{10} The right to a speedy trial is protected by the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, and Article II, Section 14 of our state constitution. ***State v. Manzanares***, 1996-NMSC-028, ¶ 8, 121 N.M. 798, 918 P.2d 714. The right attaches when the defendant becomes an accused, either at the time of arrest or upon the issuance of an indictment or information. ***See id.*** When a speedy trial claim is made, the defendant must make a threshold showing that the length of delay is presumptively prejudicial. ***See State v. Coffin***, 1999-NMSC-038, ¶ 55, 128 N.M. 192, 991 P.2d 477. Once that showing has been made, the burden of persuasion shifts to the State to show, on balance, that the four factors do not weigh in favor of dismissal. ***Id.*** ¶ 58; ***Manzanares***, 1996-NMSC-028, ¶ 8; ***Zurla v. State***, 109 N.M. 640, 646, 789 P.2d 588, 594 (1990). Courts balance four factors to determine whether a speedy trial violation has occurred. ***Id.*** The factors to be considered are: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant." ***Plouse***, 2003-NMCA-048, ¶ 34; ***accord Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Zurla***, 109 N.M. at 642, 789 P.2d 590. On appeal from a speedy trial claim, "we [defer] to the district court's fact finding, [but] independently examine the [four factors] to ensure that no violation has occurred." ***State v. Plouse***, 2003-NMCA-048, ¶ 34, 133 N.M. 495, 64 P.3d 522; ***see Coffin***, 1999-NMSC-038, ¶¶ 56, 58; ***Manzanares***, 1996-NMSC-028, ¶ 1.

Length of the Delay

{11} The length of the delay is a two-fold inquiry. Initially, we determine whether the delay is presumptively prejudicial. If it is presumptively prejudicial, we balance the length of the delay against the remaining three factors to assess whether the constitution has been violated. ***See Coffin***, 1999-NMSC-038, ¶ 55. "[A] determination of whether delay is presumptively prejudicial requires consideration of (at least) the length of time between arrest or indictment and prosecution, the complexity of the charges, and the nature of the evidence against the accused." ***Salandre v. State***, 111 N.M 422, 426, 806 P.2d 562, 566 (1991). We have held that "a minimum of nine months delay is necessary to trigger further inquiry into the claim of a violation of the right to speedy trial in simple cases, twelve months in cases of intermediate complexity, and fifteen months in complex cases." ***Coffin***, 1999-NMSC-038, ¶ 56. We defer to the district court's finding on the question of complexity when it is supported by substantial evidence since the "trial court [is] familiar with the factual circumstances, the contested issues and available evidence, the local judicial machinery, and reasonable expectations for the discharge of law enforcement and prosecutorial responsibilities." ***Manzanares***, 1996-NMSC-028, ¶ 9.

{12} Defense counsel characterizes this case as a "simple traffic accident" in which all of the evidence was available on the day of the accident, most relevant facts were stipulated to, and the only disputed issue was whether Defendant was driving. On the other hand, given that the trial lasted over two days, included ten witnesses, three of whom were experts, and because the use of DNA evidence was contemplated, the State urges that it is a case of intermediate complexity.

{13} The district court did not make any finding on the issue of complexity but considered the four factors and denied the motion. The district court explained:

> I'm going to deny the motion. I think that delay can be attributed to both parties. Again, my — when looking at the length of the delay, reason for the delay, the prejudice, assertion of rights, my main reason for denying it is I don't feel the Defendant has been prejudiced.

{14} Because the district court engaged in an analysis of the four factors, we assume it found the delay was presumptively prejudicial, and thus a simple case. Even

[1] The parties use the term "Final Supp Out" which refers to the final supplemental report prepared by the investigating officer that includes police reports, crime lab analysis, and other documents relating to the investigation.

so, we do not agree that this was the "simple traffic accident" that Defendant urges. ***See Coffin***, 1999-NMSC-038, ¶ 57 (reviewing court is free to make a determination on the issue of complexity, absent specific findings by the district court). Typically, "simple cases require less investigation and tend to involve primarily police officer testimony during the trial." ***State v. Lefebre***, 2001-NMCA-009, ¶ 11, 130 N.M. 130, 19 P.3d 825. Cases of intermediate complexity, on the other hand, seem to involve numerous or relatively difficult criminal charges and evidentiary issues, numerous witnesses, expert testimony, and scientific evidence. ***See, e.g.***, ***State v. Tortolito***, 1997-NMCA-128, ¶ 3, 124 N.M. 368, 950 P.2d 811 (upholding trial judge's finding that case involving aggravated burglary, armed robbery, and criminal sexual penetration fall into the "high end of the intermediate[] complex range," in part, because investigation required collection and analysis of DNA samples) (internal quotation marks omitted); ***see also State v. Ortiz-Burciaga***, 1999-NMCA-146, ¶ 31, 128 N.M. 382, 993 P.2d 96 (finding by trial court case involving multiple counts of criminal sexual contact of a minor and criminal sexual penetration of a minor requiring deposition testimony of the twelve-year-old victim and testimony of several experts was of intermediate complexity not contested on appeal). Depending on the circumstances, vehicular homicide cases may fall in the intermediate category. ***See State v. White***, 118 N.M. 225, 226, 880 P.2d 322, 323 (Ct. App. 1994) (noting that nature of charges in a case of homicide and great bodily injury by vehicle could be sufficient to establish intermediate complexity, but parties agreed it was a simple case).

{15} While the complexity issue is a close call here, we agree with the district court that the delay was presumptively prejudicial. Nonetheless, we find that it falls in the high end of the simple complexity range. Even though the defense stipulated to many facts, the ultimate question of who was driving was hotly contested. Ten witnesses were needed to testify on that single question, including an accident reconstruction expert and two experts in forensic pathology.

{16} We next consider the extent of the delay beyond the presumptively prejudicial period to determine whether the delay will weigh against the State, bearing in mind that the presumption of prejudice to the defendant intensifies over time. ***See Coffin***, 1999-NMSC-038, ¶ 59 (holding that the delay is presumptively prejudicial does not necessarily mean the first factor weighs against the State but requires further consideration of the extent of the delay beyond this period). The length of delay is sixty-two days over the minimum presumptively prejudicial period. Given that this case falls in the high end of a simple case, bordering on intermediate, we find that this factor has little practical effect on the balancing. ***See White***, 118 N.M. at 226, 880 P.2d at 323 (finding that a month and a half delay beyond presumptive period in a simple vehicular homicide case had no practical effect on the balancing).

Reasons for the Delay

{17} "We examine the reasons for delay, allocating the reasons for the delay to each side and determining the weight attributable to each reason." ***Plouse***, 2003-NMCA-048, ¶ 45 (internal quotation marks and citation omitted). Our inquiry is premised on the notion that the State has a "constitutional duty to make a diligent, good-faith effort to bring a defendant to trial." ***Zurla***, 109 N.M. at 643, 789 P.2d at 591 (internal quotation marks and citation omitted). In assessing the conduct of the parties, we look at the State's culpability in causing the delay. ***See id.*** Negligent delay, such as delay attributable to excessive caseload, is deemed a more neutral reason that weighs lightly against the State, whereas intentional delay, such as tactical delays, weighs heavily against the State. ***See id.*** Intermediate categories of delay, such as bureaucratic indifference or failure to take reasonable means to bring a case to trial, are considered more culpable and weigh more heavily against the State, especially if the defendant has sought to safeguard his rights. ***See id.***

{18} Defendant maintains that any delay in bringing the case to trial was entirely attributable to the State because of its delay in providing discovery. The State responds that Defendant is largely responsible for the sixty-two day delay. It argues that Defendant not only agreed to the first two continuances, but in fact filed the first one, and the third continuance was required partly because his expert was unprepared. The district court found both parties were responsible for the delay. We first observe that the State's assumption that we consider only the delay beyond the presumptive period in our analysis of this factor is incorrect; we consider reasons for the entire eleven months and two day delay.

{19} The record reflects that the "Final Supp Out" was provided to defense counsel by September 27, 2000, as soon as it was available to the State, albeit some five months after the accident. Although the State provided the reports in the possession of the investigating officer at the September 5 hearing, it did so only in response to the district court's order to produce it. The record does not reflect that the State made any effort to obtain those reports prior to September 5 despite the fact that the motion to dismiss was filed two months earlier. The only discovery provided before September 5 was the complaint. We also find that the reason given for the delay in producing the "Final Supp Out" at the September 5 hearing was insufficient. While the State explained that the crime lab reports were pending based on the analysis of the clothing found at Defendant's apartment, there was no explanation for the lab's four-month delay. Officer Campbell also briefly explained the substation was somewhat disorganized because of the "Big I" construction, but he did not elaborate on why this would delay the report. Without providing a record to better explain the delay, the State has failed to meet its burden of persuasion. On balance, we find the State was negligent in failing to provide discovery before mid-September. Therefore, this delay, and the resulting continuance on October 4, 2000, weigh heavily against the State. ***See Tortolito***, 1997-NMCA-128, ¶¶ 12-13 (holding unreasonable delays attributable to the State's negligence or willfully oppressive conduct in DNA testing weigh heavily against the State, whereas delays attributable to the lab's normal priorities and procedure weigh less heavily against the State).

{20} On the other hand, the failure to provide timely discovery did not cause delay resulting from the second continuance. We find the inability to complete all but one interview by November 1, 2000, because the witness was out of state, is a more neutral reason, that weighs only slightly against the State.

{21} Despite Defendant's objection to the third continuance, we agree that Defendant was jointly responsible for that delay because his own expert was unpre-

pared and unavailable to the State for an interview. Defendant's assertion that his expert was unprepared because discovery was delayed is suspect. The record reflects that Defendant knew what his defense was going to be as early as July 2000, when he hired his expert, if not earlier, when he hired a private investigator to photograph Defendant's injuries on May 21, 2000. Dr. Greist testified that she based her opinion on the police reports, medical records, the May photographs of Defendant's injuries, and an examination of Defendant, which she did not perform until sometime in October. All reports, except the DNA analysis, were made available by September 25, and the pretrial interviews of the State's witnesses were done by November. We see no reason why the discovery delay would prevent a pretrial interview of Defendant's expert, Dr. Greist.

{22} Once again, the State offered no explanation why it waited until December to obtain a DNA standard, but it appears from the record that the blood was being tested at the time of the September 5 hearing. We agree with the district court that the parties were jointly responsible for this delay, and under the circumstances, we give no weight to the delay caused by this continuance. On balance, we conclude that this factor weighs moderately against the State.

Assertion of the Right

{23} To assign weight to Defendant's assertion of his speedy trial right, we explore the timing and manner in which Defendant asserted his right. ***Coffin***, 1999-NMSC-038, ¶ 67; ***Plouse***, 2003-NMCA-048, ¶ 48. Defendant argues that he repeatedly asserted his right to a speedy trial, first by filing a demand for speedy trial on May 17, 2000, and implicitly through his motions to dismiss, objections to the third continuance, and the two Rule 5-604 petitions. Nonetheless, Defendant did not specifically invoke a ruling on his speedy trial right until the day of trial. ***See Tortolito***, 1997-NMCA-128, ¶¶ 15-17 (implying mere mention of speedy trial during motion to reconsider conditions of release, without invoking a ruling on the issue was insufficient to assert speedy trial right).

{24} The July and September motions to dismiss never raised a speedy trial issue, and we find no evidence in the record that Defendant asserted his right at the hearings on these motions. Further, despite his objection to the last continuance, Defendant was not ready for trial in February. ***See Coffin***, 1999-NMSC-038, ¶ 67 (finding assertion of speedy trial right was not meaningful where the defendant objected to rule extension but represented he was not prepared for trial). While objections to the rule extensions may be persuasive evidence of an assertion, it is not conclusive. ***Id.*** The first rule extension was granted in November because the last State witness was out of town. Defendant was partially responsible for the second rule extension because his witness was unprepared, making his objection to that rule extension meaningless. ***Id.*** Because Defendant waited until the eleventh hour to specifically and meaningfully invoke a ruling on the speedy trial issue, we find this factor weighs only slightly in his favor.

Prejudice

{25} "The right to a speedy trial protects the following three interests of a criminal defendant: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." ***Coffin***, 1999-NMSC-038, ¶ 68 (internal quotation marks and citation omitted). To support a finding of prejudice, "the evidence [must show] a nexus between the undue delay in the case and the prejudice claimed." ***Salandre***, 111 N.M. at 431, 806 P.2d at 571; ***see State v. Grissom***, 106 N.M. 555, 563, 746 P.2d 661, 669 (Ct. App. 1987) (holding loss of documents and death of witness did not impair defense where both events occurred when there was no presumption of prejudice).

{26} Defendant claims to have been prejudiced as a result of the delay in four ways. First, he was incarcerated for the entire eleven-month period. Next, the Mazda that was involved in the accident was inadvertently destroyed, thus preventing his expert, as well as the State's accident reconstruction expert and the investigating officer, from obtaining all of the information they desired. Third, Defendant's shoulder strap injuries healed and his scars shrank by the time of trial. Finally, Defendant had to be transported to the county courthouse from jail for his wedding on July 25, 2000.

{27} The State persuasively argues that Defendant does not claim and the record does not support the proposition that the car was destroyed after January 25, 2001, the time when the delay became presumptively prejudicial. Defendant claims the car was destroyed several months before trial. Nor is there any evidence that Defendant's injuries and scars were substantially different before January 25. Even if the injuries had changed substantially after January 25, Defendant was only minimally prejudiced because the defense had access to at least one photograph of Defendant taken eleven days after the accident, had photos taken of the injuries only one month after the accident, waited until October to have his own forensic pathologist conduct an examination of the injuries, and there was some visible bruising apparently left for jurors to observe at trial.

{28} We also find that Defendant was primarily responsible for any impairment to his defense. Defendants must make an effort to discover or obtain evidence, which they are or should be aware of, in support of their defense. ***Id.*** at 564, 746 P.2d at 670 (holding that with regard to the defendant's claim that destruction of documents impaired his defense, defendant has a duty to initiate efforts to discover or obtain evidence of which defendant is aware); ***see Sodergren v. State***, 715 P.2d 170, 178 (Wyo. 1986) (concluding any impairment to defense because physical marks left at the accident scene vanished over two-year delay, hindering the defendant's accident reconstruction expert's ability to testify, was due to the defendant's failure to preserve evidence); ***Tortolito***, 1997-NMCA-128, ¶ 20 (stating that the defendant must accept responsibility for impairment of his defense where he failed to identify potential alibi more than a year after the State filed a demand for notice of alibi). The need to inspect the Mazda existed from the beginning, yet the record does not reflect any evidence Defendant attempted to inspect the car prior to its destruction, even though he hired a private investigator within a month of the accident and he hired an expert in July. Neither does it appear he attempted to ensure the car was preserved. On the whole, we do not find any significant impairment to Defendant's defense as a result of the delay.

{29} With regard to Defendant's other claims, we emphasize that the focus of our inquiry in a speedy trial analysis is on undue prejudice. ***Coffin***, 1999-NMSC-038, ¶ 69. Some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial. ***Plouse***, 2003-NMCA-

048, ¶ 53; ***Zurla***,109 N.M. at 644, 789 P.2d at 592; ***see also Coffin***, 1999-NMSC-038, ¶ 69. With respect to pretrial incarceration, the question is whether the length of time was unacceptably long in that it became unduly prejudicial so as to factor into the analysis. ***See Salandre***, 111 N.M. at 431, 806 P.2d at 571. Without evidence that the defense was impaired, we do not find Defendant's pretrial incarceration to be unduly prejudicial. Nor do we find the fact Defendant was married in jail three months after his arrest to be unduly prejudicial. Accordingly, we determine that Defendant has failed to show any undue prejudice that resulted from the eleven-month delay in this case.

{30} Based on the foregoing, we hold Defendant's speedy trial right was not violated. This case sits on the line between simple and intermediate complexity, perhaps giving the State some basis for the lengthy discovery delay, especially in light of Defendant's less than vigorous assertion of his right. Most critically, however, we find Defendant failed to show he was unduly prejudiced.

II. Testimony of the State's Expert Witness

{31} Defendant next argues that it was error for the prosecutor to elicit testimony from the State's accident reconstruction expert, Parker Bell, regarding the specific injuries he would expect Defendant to sustain in the accident. Before Bell testified, Defendant made an oral motion in limine to limit Bell's testimony because he was not qualified as a medical expert. The district court opted to wait until trial to determine whether Bell was qualified to give such an opinion. During trial, defense counsel renewed his objection, and the district court ordered the State to lay a foundation on occupant kinetics to determine if Bell was qualified to testify regarding the injuries that might be expected given the force of the accident. The district court subsequently ruled, and defense counsel agreed, that Bell could testify about the seriousness of the injuries or the general types of injuries but not specific injuries, such as a broken arm or leg. Sometime later, defense counsel requested that the State lay an ***Alberico*** foundation. ***See State v. Alberico***, 116 N.M. 156, 166, 861 P.2d 192, 202 (1993) (identifying prerequisites for admission of expert testimony). After the State attempted to lay that foundation, the following exchange took place:

> Q. Would this individual in this kind of accident sitting in the back seat be able to get away from the scene?
>
> A. No. I believe they would be basically trapped.
>
> [DEF]. I'm going to object. Lack of foundation.
>
> THE COURT. I'm going to sustain the objection to that question.
>
> Q. The injuries that an individual would have in this back seat, what capacity would that individual have?
>
> A. He would be incapacitated.
>
> [DEF]. Again, I'm going to object and ask that it be stricken.
>
> THE COURT. Sustained.

At the bench, the district court advised the State, "I think we're starting to get into the medical end of it which . . . he's already testified there would be a great amount of energy on that body." The prosecutor agreed and resumed his examination. No further objections or motions were made by defense counsel at trial concerning this particular testimony. In his reply brief, Defendant also complains of two other instances where, despite the district court's order, the prosecutor continued to ask questions that, in Defendant's view, required medical expertise. We decline to address these later statements which Defendant did not argue in his brief in chief. ***See*** Rule 12-213(C) NMRA 2003.

{32} Defendant's argument is perplexing. He first alludes to error on the grounds of prosecutorial misconduct by citing to the responsibility of a prosecutor as a "minister of justice" rather than as an advocate. Rule 16-308 NMRA 2003 and ABA Comment. Yet, his argument shifts to an unrelated and equally elusive theory—that sustaining defense counsel's objection and striking the testimony did not cure the damage done. Defendant's idea seems to be that even though the testimony was excluded, once the jury heard the testimony, it was ***implicitly*** admitted and its prejudicial effect requires reversal. Defendant further claims that the prejudice caused by the State's accident reconstruction expert's medical opinion was somehow compounded when the district court refused to let his medical expert testify about an area requiring expertise in accident reconstruction.

{33} We underscore our discussion by first noting Defendant's challenge is improper under Rule 12-213(A)(4)(5) NMRA 2003. His brief in chief cites no standard of review, points to no specific error, and requests no particular relief. We further note that despite Defendant's argument that the issue was preserved below through his motion in limine and repeated objections to the line of questioning complained of, Defendant does not cite to anywhere in the record where he preserved any of the arguments he raises on appeal. ***State v. Varela***, 1999-NMSC-045, ¶¶ 25-26, 128 N.M. 454, 993 P.2d 1280 (holding timely and sufficiently specific objection is required to preserve error); ***see State v. Lucero***, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993) (finding issue not preserved where defense failed to state specific objection raised on appeal). In fact, the record reflects that Defendant did not object on the basis of prosecutorial misconduct nor did he request the district court to take any further action because of any prejudice that was alleged to occur. ***Cf. State v. Ruiz***, 2003-NMCA-069, ¶ 4, 133 N.M. 717, 68 P.3d 957 (considering prosecutorial misconduct in eliciting forbidden testimony in violation of trial court order where defense counsel immediately objected, moved for mistrial, and renewed motion for mistrial at close of trial); ***State v. Trujillo***, 2002-NMSC-005, ¶ 50, 131 N.M. 709, 42 P.3d 814 (finding the defendant properly preserved issue of prosecutorial misconduct by a timely objection at trial and in a motion to dismiss); ***Davila v. Bodelson***, 103 N.M. 243, 249, 704 P.2d 1119, 1125 (Ct. App. 1985) (finding the effect of a violation of the district court's order limiting witness testimony was not properly preserved where the defendant failed to request mistrial or cautionary instruction, despite pretrial motion in limine and objection to question designed to elicit testimony). The record further shows defense counsel agreed to the limitation imposed on his own expert. Hence, we find Defendant failed to preserve these issues. ***State v. Lucero***, 1999-NMCA-102, ¶ 43, 127 N.M. 672, 986 P.2d 468 (declining to address issue where the defendant failed to cite to the record or describe how the issue was timely and specifically preserved).

{34} To the extent Defendant's argument implies fundamental or plain error, we find

no basis under either theory. First, there was no error. Defense counsel objected and moved to strike the testimony which the district court sustained. Defendant requested nothing further from the district court and thus obtained the relief requested. ***See In re Crystal L.***, 2002-NMCA-063, ¶ 19, 132 N.M. 349, 48 P.3d 87 (stating that closing statements by the State, while improper, did not constitute reversible error without evidence of substantial prejudice where defense counsel objected and the district court sustained the objection, but the defense did not request curative instruction or other remedy); ***State v. Woodward***, 121 N.M. 1, 5, 908 P.2d, 231, 235 (1995) (holding that the defendant waived objection to hearsay statement by asking the district court to caution witness, and having failed to request other relief, relief sought was obtained).

{35} Further, there was more than substantial evidence to convict on the basis of admissible evidence, including eyewitness and expert testimony, photographs showing the extent of damage to the car and to Defendant, as well as testimony regarding the extent of injuries to the front seat passenger. ***See Lucero***, 116 N.M. at 453, 863 P.2d at 1074 ("In either [fundamental or plain error], we must be convinced that admission of the testimony constituted an injustice that creates grave doubts concerning the validity of the verdict.").

III. Jury Instruction

{36} The jury instructions for vehicular homicide by reckless driving, great bodily injury by vehicle, and reckless driving require the jury to find the defendant "operated a motor vehicle." Defendant tendered the following jury instruction to the district court: "A person is `operating' a motor vehicle if the person is driving the motor vehicle." UJI 14-4511 NMRA 2003 ("`Operating' or driving a motor vehicle defined."). The State, in turn, requested an amendment, "A person is `operating' a motor vehicle if the person is: 1. Driving the motor vehicle; or 2. In actual physical control whether or not the vehicle is moving if the vehicle is on a highway." Both parties argued to the district court that their proposed instruction fit the facts of the case. Defendant maintained that since the question of whether he was driving was the only disputed issue, the State had the burden to prove he was ***actually*** driving. The State countered that Defendant's proposed instruction misstated the law by implicitly requiring someone to actually see him driving. Since no one had seen Defendant driving, but the evidence supported a reasonable inference that he was in "actual physical control" of the vehicle, the amended instruction was more accurate in the State's view. The district court noted that the statutes in question required the jury to find Defendant "operated" rather than "drove" a motor vehicle. The district court concluded that the jury could find "physical control" under the facts and accepted the amended instruction.

{37} On appeal, Defendant argues that the jury instruction which was given misstated the law. Defendant urges this Court to find that the instruction, sometimes referred to as the "***Boone*** instruction," incorporates a much broader definition of "operating a motor vehicle" and a range of activities that was intended to apply to the DWI statute exclusively, and not to vehicular homicide. ***See Boone v. State***, 105 N.M. 223, 226, 731 P.2d 366, 369 (1986) (holding that to be convicted under DWI statute, a person must be driving or in actual physical control of the vehicle but motion of the vehicle is not necessary). Instructing the jury that the State only had to prove he was "capable of physical control" rather than actually driving was prejudicial according to Defendant, in light of the fact that the jury initially hung on the vehicular homicide charge. Since, in Defendant's view, it was likely the jury was not convinced he was the driver, it could have convicted him under this instruction, without necessarily finding he was "driving in the ordinary sense."

{38} The issue of whether a given jury instruction is proper presents a mixed question of law and fact, which we review de novo. ***State v. Gaitan***, 2002-NMSC-007, ¶ 10, 131 N.M. 758, 42 P.3d 1207; ***State v. Salazar***, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996. A jury instruction is proper, and nothing more is required, if it fairly and accurately presents the law. ***State v. Duncan***, 113 N.M. 637, 644, 830 P.2d 554, 561 (Ct. App. 1990). To determine whether the instruction is accurate on the law, we review all of the jury instructions that were given as a whole. ***Id.***; ***State v. Mantelli***, 2002-NMCA-033, ¶ 16, 131 N.M. 692, 42 P.3d 272. "We [also] review [the instructions as a whole] to determine whether a reasonable juror would have been confused or misdirected by the jury instructions." ***State v. Montoya***, 2003-NMSC-004, ¶ 23, 133 N.M. 84, 61 P.3d 793; ***State v. Benally***, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. "[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." ***Id.***

{39} Our initial inquiry, therefore, focuses on whether the jury instruction accurately presented the law. A review of the relevant law in New Mexico convinces us that it did. Our legislature has made no distinction between whether a person is charged with driving while intoxicated (DWI), homicide or great bodily injury by vehicle, or reckless driving in the context of whether "operating a motor vehicle" means to drive or be in actual physical control of the vehicle. Each of these offenses is regulated under the Motor Vehicle Code. ***Cf.*** NMSA 1978, § 66-8-101 (1991); § 66-8-102 (2003); 66-8-113 (1987). The homicide or great bodily injury by vehicle and reckless driving statutes specifically require the State to prove as an element of the offense that the defendant operated or drove a motor vehicle. Sections 66-8-101 and -113. The uniform jury instructions define "`operating' a motor vehicle" as "[driving the motor vehicle;] [or] [in actual physical control whether or not the vehicle is moving;]." UJI 14-4511. The Use Note expressly instructs parties to "[u]se this instruction if `operating' or `driving' is in issue." ***Id.*** Parties are further instructed to "[u]se only [the] applicable alternative or alternatives." ***Id.***

{40} Unlike other statutes in the Motor Vehicle Code, however, the DWI statute prohibits a person from ***driving*** a motor vehicle. Because the DWI statute is somewhat different than the others, we have construed the term "operating" a motor vehicle as used in UJI 14-4511 as synonymous with the term "`driving' a motor vehicle" under the DWI statute. ***See State v. Tafoya***, 1997-NMCA-083, ¶ 4, 123 N.M. 665, 944 P.2d 894; ***see also State v. Grace***, 1999-NMCA-148, ¶ 12, 128 N.M. 379, 993 P.2d 93 ("being in control of a vehicle [is] synonymous with driving for the purposes of the DWI statute") (internal quotation marks and citations omitted). In so concluding, we recognized that the "operating" instruction was patterned after the definition

of "driver" as used in NMSA 1978, § 66-1-4.4(K) (1999), which means "every person ***who drives or*** is in ***actual physical control*** of a motor vehicle[.]" ***State v. Johnson***, 2001-NMSC-001, ¶ 11, 130 N.M. 6, 15 P.3d 1233; ***Boone***, 105 N.M. at 225, 731 P.2d at 368 (relying on motor vehicle code's definition of "driver" as person driving or in actual physical control of a motor vehicle to interpret the meaning of "drive" as used in the DWI statute). Hence, it appears that the term "operating" was applied to the DWI statute by statutory construction primarily because the language appeared to limit its application, rather than as an exception to the rule as Defendant maintains. The plain language of the vehicular homicide and reckless driving statutes, as well as the entire statutory scheme, indicate that the legislature intended the definition of "operating" a motor vehicle to be applicable to all statutes within the Motor Vehicle Code, unless otherwise stated.

{41} We also find that the jury instruction that was given would not confuse a reasonable jury on the law when considered in context with the other instructions that were given. Vehicular homicide by reckless driving, great bodily injury by reckless driving, and reckless driving specifically require the jury to find the defendant drove recklessly. Both instructions on these crimes not only require the jury to find that the "defendant operated a motor vehicle" but also that "the defendant ***drove*** with willful disregard of the safety of others and at a speed or in a manner that endangered or was likely to endanger any person." UJI 14-241 NMRA 2003 (defining "Homicide by vehicle; `driving in a reckless manner'") (emphasis added), or that "[t]he defendant ***drove*** carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property." UJI 14-4504(2) NMRA 2003 (outlining elements for "Reckless driving") (emphasis added).

{42} Thus Defendant's argument that the jury might have convicted him even if he was not driving in the ordinary sense is without merit. There is no doubt that the jury found Defendant was "driving" at the time of the accident "in the ordinary sense" of the word.

IV. Mistrial

{43} The jury retired to deliberate shortly after noon on Friday. At a little past 4:00 p.m., the jury sent a note to the district court judge. The judge told counsel that the note indicated the jury was "deadlocked on Count 1 and Count 4," but had reached verdicts on Counts 2, 3, and 5, and that he would not disclose the actual verdicts. Counsel agreed to poll each juror in open court to ascertain whether they believed they were "hopelessly deadlocked" and whether further deliberation would be helpful. The record reflects that ten jurors responded they were hopelessly deadlocked and that further deliberations would not be helpful. Two jurors, however, answered they were not hopelessly deadlocked, and further deliberations would be helpful.

{44} Consequently, the district court proposed to accept the verdicts and declare a mistrial on the remaining counts. The prosecutor disagreed, since one of the ten jurors had hesitated and the jury had been deliberating for only a short time. Defense counsel preferred to send the jury back to deliberate. When asked for how long, defense counsel responded "another hour." Both parties agreed, however, that rather than trying to rush a verdict, the jury should be sent home for the weekend.

{45} After excusing the jury, the judge received a second note from one of the undecided jurors. The district court revealed its contents to counsel, which read "Count 1 No. 4, the word `foresee' [is] the only thing that we [are] deadlocked on." After advising counsel that there were numerical values written on the verdict forms which were crossed out, the judge agreed to let the jury recess for the weekend. Without any further instruction or admonishment, except to leave their trial notes and refrain from deliberating on Monday until everyone on the panel was present, the judge promised a cooler jury room and released the jury for the weekend. Two hours after deliberations resumed on Monday, the jury reported a unanimous verdict on all counts. Defendant was acquitted on Count 4 (stolen vehicle) but convicted on the remaining counts. Each juror then unequivocally affirmed the verdicts.

{46} On appeal, Defendant claims that it was fundamental error to send the jury back to deliberate after it was polled on how hopeless further deliberations would be, especially after it revealed the numerical breakdown. Defendant further claims that withholding the numerical breakdown from counsel violated his right to be "present" at all critical stages of the prosecution and deprived him of the critical knowledge needed to make the decision whether to request a mistrial.

{47} Fundamental error is an exception to the rule that parties must preserve issues for appeal. Rule 12-216(A), (B)(2) NMRA 2003; ***State v. Cunningham***, 2000-NMSC-009, ¶ 10, 128 N.M. 711, 998 P.2d 176. Because it is the exception rather than the rule, this Court exercises its discretion to review a claim for fundamental error in only rare instances and solely to prevent a miscarriage of justice where some fundamental right has been invaded. ***See State v. Reyes***, 2002-NMSC-024, ¶¶ 41-42, 132 N.M. 576, 52 P.3d 948; ***Cunningham***, 2000-NMSC-009, ¶ 12; ***State v. Jett***, 111 N.M. 309, 314, 805 P.2d 78, 83 (1991). To rise to the level of fundamental error, the error must go "to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." ***Cunningham***, 2000-NMSC-009, ¶ 13 (internal quotation marks and citation omitted). Consequently, parties who have not preserved an issue for appeal bear a much higher burden to show fundamental error than under a reversible error standard. ***See id.*** ¶ 21. Under a fundamental error standard, the party asserting error must demonstrate the existence of circumstances that "shock the conscience" or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked. ***Id.*** (distinguishing the level of scrutiny afforded to fundamental error and reversible error).

{48} Defendant does not argue that his innocence is indisputable or his guilt so doubtful that the jury's verdict "shocks the conscience." ***See Reyes***, 2002-NMSC-024, ¶ 42 (finding of fundamental error only in the absence of substantial evidence to support the verdict); ***Cunningham***, 2000-NMSC-009, ¶ 13. Indeed, he does not even claim there was a lack of substantial evidence to support his conviction. ***State v. Clark***, 1999-NMSC-035, ¶ 3, 128 N.M. 119, 990 P.2d 793 (holding issues raised in docketing statement but not argued in the brief in chief are deemed abandoned). Defendant instead argues that the coercive effect of the district court's instruction to

the jury to deliberate in the face of hopeless deadlock and with knowledge of the numerical division of the jury, rather than to declare a mistrial, deprived him of his constitutional right to a fair and impartial trial. ***See State v. Rickerson***, 95 N.M. 666, 667-68, 625 P.2d 1183, 1184-85 (1981) (considering whether inquiry into jury's numerical division violated due process).

{49} For the trial to be considered fundamentally unfair in this instance, Defendant must demonstrate that the cumulative effect of the district court's actions and the circumstances under which they arose were so egregious and so unduly coercive on the jury to abandon its honest convictions to arrive at the verdict that those actions and circumstances violated his right to a fair and impartial trial. ***See State v. McCarter***, 93 N.M. 708, 711, 604 P.2d 1242, 1245 (1980) (holding that the coercive nature of the district court's handling of jury deadlock violated due process); ***see also Rickerson***, 95 N.M. at 667-68, 625 P.2d at 1184-85 (reaffirming rule that convictions will be reversed only if cumulative effect of trial court's actions had coercive effect on the jury). Specifically, Defendant argues that sending the jury back to deliberate, despite ten jurors' belief that they were hopelessly deadlocked, amounted to a "shotgun" instruction, which was especially egregious, in Defendant's view, because the district court knew the numerical division of the jury on those counts. Defendant urges that the direction to deliberate pressured the holdout jurors to change their votes.

{50} An inquiry into the numerical division does not constitute error unless the cumulative effect of the district court judge's conduct was coercive. ***Rickerson***, 95 N.M. at 668, 625 P.2d at 1185. To determine whether such inquiry has a coercive effect on jurors, we consider:

> (a) whether any additional instruction or instructions, especially a shotgun instruction, were given: [sic] (b) whether the court failed to caution a jury not to surrender honest convictions, thus pressuring holdout jurors to conform, and (c) whether the court established time limits on further deliberations with the threat of a mistrial.

Id. at 667, 625 P.2d at 1184.

{51} As a starting point, we believe the unsolicited revelation of the numerical breakdown substantially decreased any risk of coercion under these facts. ***See id.*** at 668, 625 P.2d at 1185 ("The inquiry itself is not coercive since the jury is already well aware of its numerical split."). In any event, there was no time limit imposed on deliberations, and prior to deliberation, jurors were instructed not to surrender their honest convictions. UJI 14-6008 NMRA 2003 and Use Note. Resolution of this issue thus turns on the question of whether the district court's actions were the equivalent of a "shotgun" instruction.

{52} The use of a shotgun instruction is prohibited by our Supreme Court. UJI 14-6030 NMRA 2003 and Use Note; ***McCarter***, 93 N.M. at 711, 604 P.2d at 1245. The primary concern with a shotgun instruction is the potentially coercive effect it has on holdout jurors to abandon their convictions to arrive at a verdict with the majority. ***See id.*** (noting the Supreme Court has recognized the instruction as coercive); ***State v. Travis***, 79 N.M. 307, 309, 442 P.2d 797, 799 (Ct. App. 1968) (recognizing that use of the then approved shotgun instruction would be improper if it coerced jury into agreement or unduly hastened their consideration). Nevertheless, when a jury communicates with the district court during deliberations and expresses its inability to arrive at a verdict, "the judge ***must*** communicate with that jury in some fashion." ***State v. Neely***, 112 N.M. 702, 712, 819 P.2d 249, 259 (1991) (emphasis added) (internal quotation marks and citation omitted); ***McCarter***, 93 N.M. at 710, 604 P.2d at 1244. Communication is proper so long as it "leaves with the jury the discretion whether or not it should deliberate further." ***Id.*** Hence, "[t]he court can inform the jury that it ***may*** consider further deliberations, but not that it ***must*** consider further deliberations." ***Id.***

{53} In ***McCarter***, for example, the jury sent a note to the judge, indicating it was deadlocked, eleven to one. 93 N.M. at 710, 604 P.2d at 1244. Over defense counsel's motion for a mistrial and objection, the district court responded by note advising the jury, "You must consider further deliberations." ***Id.*** The jury voted to convict only ten minutes after receiving the note and when polled "[i]s this your verdict?" one juror responded "Reluctantly." ***Id.*** The Supreme Court found the note was tantamount to a shotgun instruction, which coupled with the revelation of the numerical division, was implicitly coercive on the lone juror who did not favor conviction. ***See id.*** at 710-11, 604 P.2d at 1244-45.

{54} A similar argument, however, was rejected by the Court in ***Neely***, 112 N.M. at 712, 819 P.2d at 259. There, the jury advised the district court it was deadlocked after several days of deliberation. ***Id.*** The district court asked the foreperson, without objection from defense counsel, whether further deliberations would be helpful. The foreperson responded affirmatively and the district court instructed the jury to resume deliberations. ***Id.*** Shortly thereafter, a verdict was reached. ***Id.*** On appeal, the defendant asserted that the district court's direction to resume deliberations effectively forced the holdout juror to find the defendant guilty. ***Id.*** The Supreme Court held that the district court's communications with the jury were not coercive because the jury was advised it could, not that it must, deliberate further. ***Id.***

{55} Based on these cases, and others like them, we find there was no shotgun instruction or its equivalent given in this case. First, unlike ***McCarter***, the district court asked the jury whether it ***could*** deliberate. Two jurors clearly affirmed their willingness. The perception of the ten jurors who believed the jury was "hopelessly deadlocked" must be viewed in this context.

{56} ***McCarter*** and its progeny also teach us that in determining whether the jury was coerced to arrive at a verdict, the actions as well as the circumstances under which the court's actions arose should be considered. ***See Rickerson***, 95 N.M. at 667-68, 625 P.2d at 1184-85 (affirming ***McCarter*** rule that in determining whether jurors were coerced to arrive at a verdict, the cumulative effect of the district court's actions and circumstances under which they arose should be considered). The record reflects that the jurors had been deliberating for only four hours on a Friday afternoon in a hot jury room. This information was relevant to the district court's determination of whether there was a probability of reaching a verdict. Further, the district court admonished jurors to answer these two questions with a simple "yes or no." It did not attempt to target the holdout jurors or to determine which way the votes fell. If anything, the district court was attempting to avoid this effect. Also, there were no further instruc-

tions or lectures from the judge, and despite defense counsel's own suggestion, the judge did not place a time limit on deliberations. ***See State v. Nelson***, 63 N.M. 428, 433, 321 P.2d 202, 205 (1958) (pointing out that the district court's repeated reminders of what jurors said on voir dire regarding death penalty was coercive on the one holdout juror); ***see also Pirch v. Firestone Tire & Rubber Co.***, 80 N.M. 323, 326-27, 455 P.2d 189, 192-93 (Ct. App. 1969) (holding that judge's remarks relating to length of trial, expense involved, importance of case, and setting time limit on deliberations was coercive).

{57} Nor is there any evidence of juror coercion surrounding the second, unsolicited note from one apparently undecided juror. This note was not disclosed to the other jurors, and there were no further instructions to the jury regarding it. The district court instead related this information to counsel and released the jury for the weekend. The lack of coercion is self-evident in light of the fact that the jurors deliberated for two hours more on Monday and returned a "not guilty" verdict on one count. Accordingly, we cannot say the district court's actions were so coercive as to warrant the extreme remedy of fundamental error.

{58} Neither are we persuaded that the district court erred by not revealing the numerical breakdown of the jury to counsel. We acknowledge that the defendants and their counsel have a right to be present at all critical stages of a trial. U.S. Const. amends. VI and XIV; N.M. Const. art II, § 14; Rule 5-612(A) NMRA 2003; ***State v. Padilla***, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247. We also recognize that the district court must disclose any ex parte communications it has with the jury. ***McCarter***, 93 N.M. at 711, 604 P.2d at 1245. However, assuming, without deciding, that these requirements provide authority for the proposition that counsel has a right to know the numerical breakdown of the jury, we do not find that the district court's decision to withhold this information amounted to fundamental error.

{59} "To constitute a critical stage of a criminal proceeding, the particular proceeding or act in question must be one at which, or in connection with which, the accused's constitutionally protected rights may be lost or adversely affected." ***State v. Acuna***, 78 N.M. 119, 120, 428 P.2d 658, 659 (1967). Although Defendant maintains the information was "critical knowledge" he needed to decide whether to agree to a mistrial, he does not show how he was prejudiced. ***Cf. Smith v. United States***, 542 A.2d 823, 826 (D.C. Ct. App. 1988) (holding that whether the majority favored conviction or acquittal was a critical factor in the defendant's decision whether to request a shotgun instruction since precedent prohibited the instruction in such circumstances). The jury's note did not indicate whether it favored conviction or acquittal. The verdict forms that were sent with the note were ambiguous. We do not know, and Defendant does not show, how this information would have been helpful in the decision-making process. Accordingly, we find no fundamental error.

V. Cumulative Error

{60} Because we find no error in any of the issues raised, there is no cumulative error. ***State v. Aragon***, 1999-NMCA-060, ¶ 19, 127 N.M. 393, 981 P.2d 1211.

CONCLUSION

{61} Based on the foregoing, we affirm Defendant's conviction on all counts. We therefore remand the case to the district court to amend its judgment vacating Defendant's convictions for reckless driving.

{62} **IT IS SO ORDERED.**

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
CELIA FOY CASTILLO, Judge
RODERICK T. KENNEDY, Judge

Certiorari Denied, No. 28,378, December 3, 2003

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-145

DAVID MEIBOOM andGARY DOBERMAN,
Plaintiffs-Appellants,
versus
JOHN J. CARMODY, JR.,
Defendant-Appellee.
No. 22,924 (filed: October 22, 2003)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
THERESA BACA, District Judge

DAYMON B. ELY
LAW OFFICES OF
DAYMON B. ELY
Albuquerque, New Mexico

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for Appellee

OPINION

A. JOSEPH ALARID, JUDGE

{1} In this legal malpractice case, Plaintiffs claim that Defendant mishandled a fraud case against Plaintiffs' former business associate, Mr. Stephan Watson (the underlying case). In the underlying case, Plaintiffs claimed that Watson had defrauded them into taking a lower price for their shares in a close corporation by making false statements that misled them into thinking that the corporation's prospects for a potentially lucrative contract with Levi Strauss & Co. (Levi Strauss) were a year-and-a-half or two years in the future.

{2} The district court granted Defendant partial summary judgment, ruling that Plaintiffs would not have prevailed in the underlying case, so there was no malpractice claim. The district court reasoned that any statements made by Watson were opinions about future events and therefore not actionable. ***See Telman v. Galles***, 41 N.M. 56, 61, 63 P.2d 1049, 1052 (1936) (stating the general rule that "fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events") (internal quotation marks and citation omitted). Consequently, the dispositive issue in this appeal is whether Watson's statements about the prospects of the business are statements of fact or statements of opinion about future events. We hold that there are genuine issues of material fact concerning whether the statements are actionable, and we remand for further proceedings on Plaintiffs' claim that Defendant committed malpractice by mishandling the fraud case.

{3} The district court also granted Defendant partial summary judgment on Plaintiffs' claim that Defendant committed malpractice by failing to sue Watson for breach of contract. This ruling made the summary judgment complete. We reverse this ruling as well.

BACKGROUND

{4} Plaintiffs, along with Watson, formed a close corporation whose purpose, among other things, was to make paper from recycled denim scraps. Watson was already in the paper business and brought his expertise, Meiboom contributed money, and Doberman was the corporation's accountant. A cornerstone of the business was a planned arrangement to obtain scrap denim from several Levi Strauss manufacturing plants, turn it into paper products such as business cards, letterhead, and envelopes, and sell the paper products back to Levi Strauss. By the Spring of 1991, however, the business was losing money, the shareholders' relationship had disintegrated, and the three agreed to end the relationship.

{5} During negotiations to terminate their business relationship, Watson allegedly told Plaintiffs that any definite arrangement with Levi Strauss would be at least eighteen months to two years in the future. Following negotiations, the three men executed an agreement, dated April 30, 1991, in which Watson agreed to buy out Plaintiffs, and Watson would then continue the business himself. The agreement contained a provision stating that "[t]he parties shall exchange letters containing each party's understanding of the assets and liabilities of the Corporation and the prospects for the Corporation at the time that this agreement was reached on April 4, 1991."

{6} Watson's disclosure statement downplayed the possibility of any deal with Levi Strauss:

> With respect to paper products, while Watson has had some conversations with various employees of Levi [Strauss] regarding paper products, there are no contracts between the Corporation or Watson Paper Co. and Levi [Strauss] or any other company. Levi [Strauss] has indicated a desire to purchase $3,500 worth of business cards made of denim paper, but only if the paper meets its specifications. There is no contract for cards. . . . There is no commitment by Levi [Strauss] to purchase any paper products. . . . Watson hopes that in the future he will be

> able to secure contracts with Levi [Strauss] or others for denim paper products, including paper envelopes, cards, paper bags, etc. However, he has no commitment for the purchase of any of these products. Watson intends to work diligently to increase the amount of denim waste which the Corporation recycles from Levi [Strauss], including waste from other Levi [Strauss] plants, with the hope that in the future the Corporation will become the leading supplier of denim rag[s] for paper processing. If the Corporation is able to accomplish this goal, which is speculative and uncertain, Watson believes that the Corporation may be able to obtain a higher price for the waste.

Watson's oral statement that any definite arrangement with Levi Strauss was at least a year-and-a-half away, and the statements in his disclosure statement about the corporation's prospects, have fueled litigation for more than a decade.

{7} After Watson bought them out, Plaintiffs began to feel that they had been defrauded, and Defendant filed suit on their behalf. The suit alleged that Plaintiffs had been defrauded by Watson because he had not truthfully disclosed the corporation's prospects with Levi Strauss, and Plaintiffs had been prejudiced because had they known of the true state of affairs, they would have demanded more money from Watson during the buy out.

{8} The suit achieved nothing. It was voluntarily dismissed in 1995. Plaintiffs allege that, sometime after 1995, they learned their case had been dismissed and claimed they had never authorized dismissal of the suit. They obtained new counsel who tried to set aside the dismissal. That issue made its way to our Supreme Court, and the Court rejected Plaintiffs' attempt to reinstate the case. ***See Meiboom v. Watson***, 2000-NMSC-004, ¶¶ 5-41, 128 N.M. 536, 994 P.2d 1154.

{9} In addition to trying to reinstate their case, Plaintiffs also tried to resurrect their suit by filing a new complaint against Watson in 1997 alleging a new theory, breach of contract, against Watson. The district court dismissed that suit, ruling that, no matter how the 1997 suit was framed, in reality it was exactly the same case as the fraud case that had been already dismissed.

{10} Having failed in their attempt to pursue remedies against Watson, Plaintiffs now turn their attention to Defendant, alleging that he mishandled the underlying case by, among other things, dismissing it without their consent, and failing to sue Watson for breach of contract. On the claim that Defendant mishandled the underlying case, Defendant persuaded the district court that partial summary judgment was warranted because Plaintiffs had no fraud case against Watson, and therefore had no malpractice claim against him, either. ***See Richardson v. Glass***, 114 N.M. 119, 122, 835 P.2d 835, 838 (1992) (stating that to support an action for legal malpractice, a plaintiff has the burden of showing not only counsel's negligence, but also that the plaintiff would have recovered at trial in the underlying action). Defendant's argument, accepted by the district court, was that any statements made by Watson were not actionable because they were statements of opinion about future events, as opposed to statements of fact. The court granted partial summary judgment in Defendant's favor.

{11} Plaintiffs' suit against Defendant also contained a claim that he committed malpractice by failing to sue Watson for breach of contract. Defendant then obtained summary judgment on that claim, as well, arguing that the breach of contract claim was really the same as the fraud claim, and therefore summary judgment was warranted for the same reason it was in order on the fraud claim.

DISCUSSION

A. Standard of Review

{12} Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Self v. United Parcel Serv., Inc.***, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We review this issue de novo. ***Id.***

B. The Underlying Fraud Case

{13} Fraud consists of a misrepresentation of fact, known by the maker to be untrue, made with the intent to deceive and to induce the other party to act on it, and on which the other party relies to his detriment. ***Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.***, 113 N.M. 9, 14, 820 P.2d 1323, 1328 (1991). A failure to disclose information can constitute fraud. ***See id.*** at 12-13, 820 P.2d at 1326-27 (holding that the defendant's failure to disclose important information about low customer traffic constituted fraud sufficient to justify recission of a contract); ***Mason v. Salomon***, 62 N.M. 425, 428, 311 P.2d 652, 654 (1957) (stating that concealment is the same as an affirmative misrepresentation).

{14} Defendant characterizes Watson's statement that negotiations with Levi Strauss would not bear fruit for eighteen months to two years, and the statements made in Watson's disclosure statement, as opinions about future events, which are not ordinarily actionable. ***See Register v. Roberson Constr. Co.***, 106 N.M. 243, 246, 741 P.2d 1364, 1367 (1987) (stating that "an action for fraud will ordinarily not lie as to a pattern of conduct based on promises that future events will take place"); ***Telman***, 41 N.M. at 61, 63 P.2d at 1052 (stating the general rule that "fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events") (internal quotation marks and citation omitted).

{15} On the other hand, Plaintiffs argue that the statements are actionable because at the time they were made Watson was in possession of facts that made his representations inaccurate and misleading. ***See Register***, 106 N.M. at 246, 741 P.2d at 1367 (stating that an exception to the general rule exists where the promise is based on a concealment of known facts); ***Telman***, 41 N.M. at 61, 63 P.2d at 1052 ("`According to the weight of authority, if the person making the promise or statement as to a future event is guilty of an actual fraudulent intent, and makes the promise or misrepresentation with the intention of deceiving and defrauding the other party, and accomplishes this result, to the latter's injury, fraud may, under many circumstances, be predicated thereon, notwithstanding the future nature of the representations.'") (citation omitted).

{16} Plaintiffs rely on several items which they contend provide circumstantial evidence that in the Spring of 1991 Watson knew a significant deal with Levi Strauss was close to fruition, but deliberately concealed the true state of affairs. They rely on a purchase order from Levi Strauss dated May 24, 1991(the May 24th purchase order)—less than two months after Watson issued his disclosure state-

ment—in which Levi Strauss agreed to purchase business cards, letterhead, and envelopes for $149,750. A purchase order is a single agreement, whereas a contract is a long-term arrangement. Plaintiffs rely on evidence from Levi Strauss's senior purchasing agent that during the process of generating the purchase order, there would have been discussions back and forth about the corporation's ability to fill any order. The purchasing agent also stated that, given normal channels, issuing a purchase order like the May 24th purchase order would have taken six to eight months. Plaintiffs argue that the purchase order, combined with evidence that such an order could not have happened overnight, supports an inference that at the time of the agreement and disclosure statement Watson knew more about the imminency of a deal with Levi Strauss than he was saying.

{17} Plaintiffs also rely on an article from Albuquerque Monthly, dated April 1991, which they contend shows that Watson "was representing to [the magazine] that he had a contract in place with Levi Strauss" in the Spring of 1991. Plaintiffs assert that Watson was telling them one thing at the same time he was telling the magazine another. We do not agree with Plaintiffs' characterization of the article. The article describes the process of recycling denim scraps into paper, mentions that Levi Strauss is "intrigued" by Watson's proposal, and observes that Watson has been attempting to design a variety of recycled denim paper products such as envelopes, stationery, file folders, bags, and small boxes to suit Levi Strauss. The article does not contain any representation by Watson that he "had a contract in place" with Levi Strauss to provide paper products. It only mentions the plan and that Levi Strauss will have the paper products at some point in the future.

{18} After the May 24th purchase order, negotiations and work continued on an arrangement. The record reflects that between May 1991 and August 1991, Levi Strauss was not satisfied with the paper samples provided by Watson. The May 24th purchase order was not finalized, though Watson was aware of its existence and continued to work on samples that would satisfy Levi Strauss. The May 24th purchase order was superceded by a smaller purchase order, dated August 21, 1991, for $52,375. By December 1991, Watson was able to provide satisfactory samples, and in February 1992—a little less than a year after Watson allegedly told Plaintiffs any deal with Levi Strauss was at least a year-and-a-half away—Levi Strauss entered into a long-term contract with Watson. Under that contract, Levi Strauss agreed to purchase all its business cards, letterhead, and envelopes from Watson for a period of five years.

{19} Defendant argues that Watson's opinions about how long it might take for Levi Strauss, a third party, to contract with the corporation, are precisely the kinds of statements that are not actionable because they forecast future events that are out of Watson's control. He argues that Watson did not commit fraud because only Levi Strauss could know when a deal would materialize. Defendant also argues that Watson's disclosure statement is not fraudulent. He argues it is accurate because, at the time Watson made the statements, Watson had obtained no "contract" with and no "commitment" from Levi Strauss to purchase products, and Watson was accurate when he stated that any future arrangement was "speculative" and "uncertain."

{20} Because this is a summary judgment claim, we view the facts in the light most favorable to the nonmoving party. ***See Barber's Super Mkts., Inc. v. Stryker***, 81 N.M. 227, 229, 465 P.2d 284, 286 (1970). Viewing the facts in this manner, we conclude that there is evidence from which a jury could legitimately find that Watson's statements were fraudulent. Watson's statement that nothing would happen for a year and a half or more is a straightforward statement that the corporation's prospect for its deal with Levi Strauss was well in the future. However, the May 24th purchase order, combined with Levi Strauss' senior purchasing agent's testimony that such a purchase order would have taken six to eight months, and would have included discussions between Levi Strauss and the corporation, supports an inference that Watson may have known far more about the advanced and potentially lucrative status of the corporation's prospects with Levi Strauss than Watson was saying. There is no direct evidence of Watson's intent, or his knowledge at the time he made his representations, but fraud is often proven by circumstantial evidence. ***See Hummer v. Betenbough***, 75 N.M. 274, 283, 404 P.2d 110, 117 (1965) (recognizing that in fraud cases often only circumstantial evidence is available, because fraud is usually committed in secrecy and "attended with studious efforts to conceal") (internal quotation marks and citation omitted).

{21} Defendant minimizes the importance of the May 24th purchase order, arguing that it was never "binding" and was superceded by a much smaller purchase order, dated August 21, 1991, for $52,375. He argues that no fraud occurred because there was no deal with Levi Strauss until a long-term contract was made in February 1992. We disagree. Even though the May 24th purchase order is not a long-term contract, the evidence reflected that Levi Strauss typically began with purchase orders and, once the company was satisfied, a long-term contract would follow. The May 24th purchase order demonstrates tangible and significant interest on the part of Levi Strauss, whether or not it was eventually superceded by a smaller purchase order in August 1991.

{22} Defendant argues that, for the seven-month period between May and December 1991, Watson was still working to provide Levi Strauss with an acceptable product. He contends that this evidence suggests that any deal was still very much a work in progress and supports his view that Watson did not fraudulently misrepresent the prospects with Levi Strauss. We disagree. The significance of those facts is for the jury to consider. The fact that a large purchase order was issued, approximately two months after Watson's various statements, combined with evidence that these kinds of purchase orders do not happen overnight, can support the opposite inference that Watson knew far more than he was letting on. Of course, the jury is not required to draw that inference, but it would be a permissible one.

{23} Defendant relies on ***Canfield v. Rapp & Son, Inc.***, 654 F.2d 459, 466-67 (7th Cir. 1981), to argue that, as a matter of law, Watson's statements were not fraudulent because they were opinions about future events. We disagree that ***Canfield*** is dispositive here. In ***Canfield***, whether the defendant's statements were fraudulent was tried and decided by the district court against the plaintiff. ***Id.*** at 460. ***Canfield*** decided only that the district court's determination that the defendant's statements about the future purchase price of gov-

ernment equipment were opinions about future events was supported by substantial evidence. ***Id.*** at 466-67. ***Canfield*** does not dictate the outcome of this appeal or require us to hold that there is no factual issue.

{24} Additionally, we are not persuaded that Watson's statement that he had no "contract" and no "commitment" from Levi Strauss, even if technically true, is sufficient to comply with his obligation to disclose material information. The agreement reached with Plaintiffs required Watson to fully and truthfully disclose what he knew. Watson owed that duty to Plaintiffs, not just based on the agreement, but as their fellow shareholder in a close corporation. ***See Walta v. Gallegos Law Firm, P.C.***, 2002-NMCA-015, ¶¶ 30-43, 131 N.M. 544, 40 P.3d 449 (recognizing that a close corporation bears a "striking resemblance" to a partnership, and holding that shareholders in close corporation owe each other a fiduciary duty to fully disclose material facts and information relating to the affairs of the business and the value of the stock). A jury could conclude that even though Watson's statements are carefully and cleverly worded so they are technically accurate, his disclosure statement nevertheless failed to give a full and truthful accounting of the true status of the negotiations, and failed to inform Plaintiffs that the prospects with Levi Strauss were better than he was leading Plaintiffs to believe. As a business partner, Watson should not be allowed to hide behind statements that, while technically accurate, may fail to tell the whole story. ***See id.***

{25} Nor are we persuaded that Watson's statements that any future deal was "speculative" and "uncertain" are necessarily accurate. In the abstract, the future is always "speculative" and "uncertain," so in that sense Watson's disclaimer is accurate. But we believe that such an analysis is superficial and inconclusive. Some future events are more predictable than others. Sometimes the possession of information makes the future, especially in the short term, more predictable. Where Watson may have had information suggesting that the corporation was on the threshold of a major deal with Levi Strauss, his disclaimer that any future deal was "speculative" does not automatically insulate him from a claim of fraud. It is for a jury to determine, based on all the evidence, whether his statement was accurate, or whether it was deliberately designed to mislead Plaintiffs into taking a reduced price for their shares.

{26} On the other side of the coin, neither is it clear that Watson committed fraud. A jury could legitimately decide that he was not in position to know what was going on inside Levi Strauss, that in April 1991 he did not know what Levi Strauss was about to do, and that any significant progress that occurred soon after that was a pleasant and unexpected surprise. A jury might also conclude that there was no fraud case because even if Watson's assessment of a long-term contract with Levi Strauss missed the actual date by eight months (ten months versus a year and a half), Watson's inability to predict when the deal would begin providing income did not constitute fraud. However, on these facts, the question is close enough that a jury must determine the disputed issues. The answer is not so clear that summary judgment is appropriate. ***See Barber's Super Mkts.***, 81 N.M. at 229, 465 P.2d at 286 (stating that summary judgment is inappropriate if logical but conflicting inferences can be drawn from the facts).

{27} We do not decide that Defendant committed malpractice. We decide only that, on the narrow issue presented to us, there are genuine issues of material fact concerning whether Plaintiffs might have prevailed in the underlying case, and that it is appropriate for a jury to determine the issues of malpractice, proximate cause, and damages.

C. The Breach of Contract Claim

{28} In addition to granting Defendant summary judgment on Plaintiffs' claim that Defendant mishandled the underlying fraud case, the district court granted Defendant summary judgment on Plaintiffs' alternative theory that Defendant committed malpractice in failing to file a breach of contract claim against Watson. The district court granted summary judgment on this claim ruling that the claim was exactly the same as the fraud and misrepresentation claim. Because the fraud claim was invalid, the breach of contract claim, being the same claim, could not be pursued. Because we reverse the summary judgment with regard to the fraud claim, we reverse the summary judgment with regard to the contract claim.

CONCLUSION

{29} For these reasons, we reverse the grants of summary judgment.

{30} **IT IS SO ORDERED.**

A. JOSEPH ALARID,
Judge

WE CONCUR:
LYNN PICKARD, Judge
RODERICK T. KENNEDY, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2003-NMCA-146

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
ISMAEL ANDAZOLA,
Defendant-Appellant.
No. 23,158
(filed: October 22, 2003)

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
ALVIN F. JONES, District Judge

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OPINION

WECHSLER, CHIEF JUDGE

{1} Defendant Ismael Andazola pleaded no contest to two counts of kidnapping in the second degree contrary to NMSA 1978, § 30-4-1(B) (1995); two counts of criminal sexual penetration in the second degree contrary to NMSA 1978, § 30-9-11(D) (2001); and one count of aggravated battery in the third degree with a firearm contrary to NMSA 1978, § 30-3-5(C) (1969) and NMSA 1978, § 31-18-16 (1993). On appeal, Defendant argues that the district court erred in imposing consecutive sentences for the kidnapping and criminal sexual penetration, asserting that the sentences violated his right to be free of double jeopardy. Defendant also claims that he was denied due process because he was not informed about the provisions of the Earned Meritorious Deductions Act before entering his plea. NMSA 1978, § 33-2-34 (1999) (the EMDA). We affirm.

Background

{2} Because the charges were resolved by a plea agreement, we have the factual background in the record proper, including the affidavit to the criminal complaint and the sworn depositions of the victims, as well as the transcript of the hearings in this case. Both parties have indicated in their briefs that they relied on the same sources for the relevant facts.

{3} On the evening of December 23, 2000, the two seventeen-year-old female victims were riding around Roswell, New Mexico, when they encountered Defendant, who one of the victims knew from high school. They followed Defendant in their car to a liquor store where he and his companions bought beer. The victims then went to Defendant's house for a party, but after approximately an hour, they became uncomfortable and decided to leave. Defendant and his relative asked if they could go with the victims, and the four of them drove around Roswell with the two victims in the front seat and Defendant in the back with his relative. After about twenty minutes, Defendant showed the victims a chrome handgun and slid back the top part of the gun to show the victim who was driving that the gun was loaded. After ordering them to stop the car and telling one victim to move to the back seat and the other to the front passenger seat, Defendant began to drive the car. At that point, his relative stated that he "did not want to be a part of this," and Defendant drove him back to Defendant's house. Defendant then drove the two victims out of town to a remote location, where he ordered them out of the car and told them to undress. They got out of the car but refused to undress. Defendant then fired a shot into the air and again told them to undress. When they refused a second time, he ordered them back into the car. Defendant told them they were going to die and he fired another shot in the car. After this threat, the two victims undressed. With Defendant sitting in the middle of the back seat and a victim sitting on either side, he ordered each of them at gunpoint to take turns straddling him. He raped each of them three to five times and also forced each victim to perform fellatio.

{4} After Defendant ejaculated into one of the victims, he ordered both victims to get out of the car. When they were standing outside the car, Defendant shot one of them in the head from a close distance. She fell to the ground unconscious. Defendant then ordered the other victim to get dressed and get back into the car. He told her that he was taking her to Albuquerque and drove back into town for gas. While the car was stopped at a red light, the victim saw two police cars parked at a convenience store. The victim ran from the car to the officers and told them that Defendant had shot her friend. She identified Defendant by name. The victim was then taken to the hospital where a sexual assault exam was conducted and sperm was collected from her vaginal area.

{5} The second victim did not die from the gun shot to the head. When she regained consciousness, she walked to the nearest house. She knocked on the door, but the resident was afraid to answer the door because the young woman who stood before her was naked and had a great deal of blood on her face. Instead, the resident called her son who came to the house and then called 911. At the hospital, the victim told police officers that a man named "Ismael" had shot her. Because the victim's head injury was life threatening, she was flown to Albuquerque for emergency surgery.

Plea Hearing

{6} Defendant pleaded no contest to the charges at a hearing on February 15, 2002. In the plea agreement, there had been no agreement as to sentencing. During the plea hearing, the district court explained to Defendant the constitutional rights he was waiving by pleading. The court also detailed the charges and the potential sentences. In response to the court's questions, Defendant responded that he understood the plea and stated that there was a factual basis for the charges in the plea agreement. The court additionally reviewed the range of punishment Defendant was facing for each of the charges, and Defendant stated that he understood that he was facing a possible sentence of one to forty years. At the conclusion of

the colloquy, the district court concluded that Defendant's plea was a knowing, voluntary, and intelligent one. The court then set a date for sentencing and also ordered a presentence report to be prepared for use at sentencing.

Sentencing Hearing

{7} At the sentencing hearing, the prosecutor described the facts underlying the charges in the plea agreement and asked the district court to impose the forty-year maximum sentence permitted under the plea agreement. He also stated that the victims were too frightened of Defendant to attend the hearing but that each of them had written letters for the sentencing which the prosecutor read to the court. Defendant addressed the court and apologized for what he had done to the victims, acknowledged that he had committed serious crimes, and took responsibility for his actions.

{8} Defendant argued, on double jeopardy grounds, that the sentences for kidnapping and criminal sexual penetration should merge and run concurrently. The prosecutor countered that double jeopardy was not implicated because the crimes committed against each of the victims had been separate. The district court found that the sentences did not merge based on the criminal complaint and affidavit. The court then observed that the presentence report from the probation and parole office recommended that the full sentence be imposed upon Defendant without any suspension of sentence.

{9} At the conclusion of the hearing, the district court imposed the following sentence: nine years for each charge of kidnapping and criminal sexual penetration and three years for the aggravated battery with a one-year firearm enhancement, for a total of forty years imprisonment to be followed by a two-year period of parole. All sentences were to run consecutively. The court also advised Defendant that he must register as a sex offender. ***See*** NMSA 1978, § 29-11A-4(B) (2000).

{10} Defendant subsequently filed two motions with the district court. One protested the inclusion of language in the judgment and sentence identifying the crimes he had committed as serious violent offenses under the EMDA. Defendant contended that he had not agreed to a penalty or enhancement of his sentence under the EMDA in the plea and disposition agreement. Although the motion asserted that Defendant would not have pleaded to the charges if he had known that the serious violent offense provision of the EMDA would apply, he did not move to withdraw his plea, but instead asked the district court to delete the reference to serious violent offenses in the judgment and sentence. Defendant's other motion claimed that the consecutive sentences constituted multiple punishments in violation of the double jeopardy clause. In this motion, Defendant relied upon ***State v. Crain,*** 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095, and filed with the district court the sworn depositions given by each of the victims in support of his motion.

Presentment Hearing

{11} The district court heard Defendant's two motions at the presentment hearing on the judgment and sentence. On the double jeopardy claim, Defendant argued that the facts of his case were identical to those in ***Crain***, and because there was unitary conduct, the imposition of consecutive sentences for both kidnapping and criminal sexual penetration violated the double jeopardy clause. The prosecutor distinguished ***Crain*** by pointing out that, in this case, the victims were driven at gunpoint several miles to another location for the purpose of committing the criminal sexual penetration. The district court agreed, based on having read the criminal complaint affidavit and the transcript of the depositions, and concluded that the consecutive sentences did not constitute double jeopardy.

{12} Regarding the judgment and sentence, Defendant argued that he should have been put on notice of the provision in the EMDA that affected his ability to earn good time, just as he had been notified of the one-year firearm enhancement. Defendant argued that because he had not received notice that the EMDA would apply to the charges, his rights to due process had been violated. The district court entered its judgment and sentence, stating that the offenses committed by Defendant were serious violent offenses, mandatory under the EMDA.

Double Jeopardy

{13} Defendant asserts that he was sentenced to multiple punishments for the same offense when the district court imposed consecutive sentences for the kidnapping and criminal sexual penetration offenses. He claims that the sentences violate the double jeopardy clauses of the New Mexico and United States Constitutions and that this Court should instruct the district court to merge the two offenses. Although Defendant makes a merger argument, we interpret this claim as a double jeopardy claim involving multiple punishments. ***See State v. Sanchez,*** 1996-NMCA-089, ¶ 5, 122 N.M. 280, 923 P.2d 1165.

{14} The Double Jeopardy Clause "protects against both successive prosecutions and multiple punishments for the same offense." ***State v. Mora,*** 1997-NMSC-060, ¶ 64, 124 N.M. 346, 950 P.2d 789. Although Defendant refers to the New Mexico Constitution, he neither argues that his rights are not adequately protected under the federal constitution, nor does he justify a departure from federal precedent. ***See State v. Gomez,*** 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. Our Supreme Court has not previously construed our double jeopardy clause, Article II, Section 15, more broadly than its federal counterpart in the context of multiple punishments. ***See Swafford v. State,*** 112 N.M. 3, 7 n.3, 810 P.2d 1223, 1227 n.3 (1991); ***accord State v. McClendon,*** 2001-NMSC-023, ¶ 2 n.3, 130 N.M. 551, 28 P.3d 1092. We therefore resolve Defendant's double jeopardy claim under federal double jeopardy principles. Additionally, our review of his double jeopardy claim is de novo. ***See United States v. Pearson,*** 203 F.3d 1243, 1267 (10th Cir. 2000).

{15} We address a claim of double jeopardy involving multiple punishments under the analysis set forth by our Supreme Court in ***Swafford***, 112 N.M. at 13-14, 810 P.2d at 1233-34. In ***Swafford***, the Supreme Court adopted a two-part inquiry to be applied in multiple punishment cases. ***Id.*** at 13, 810 P.2d at 1233. The first inquiry is whether the conduct underlying the offenses is unitary, and, if so, the second inquiry is whether the

legislature intended multiple punishments for the unitary conduct. ***Id.*** The conduct is not unitary if the defendant's acts have sufficient indicia of distinctness. ***Id.***

{16} Similarly, in ***State v. Barrera,*** 2001-NMSC-014, ¶ 36, 130 N.M. 227, 22 P.3d 1177 (internal quotation marks and citation omitted), our Supreme Court stated:

> The "indicia of distinctness" include the separation between the illegal acts by either time or physical distance, "the quality and nature" of the individual acts, and the objectives and results of each act. Distinctness may also be established by the existence of an intervening event, the defendant's intent as evinced by his or her conduct and utterances, the number of victims, and the behavior of the defendant between acts.

{17} Also, in ***State v. Pisio,*** 119 N.M. 252, 260, 889 P.2d 860, 868 (Ct. App. 1994), this Court stated that the key to finding the restraint element in kidnapping, as opposed to restraint involved in criminal sexual penetration, is to determine the temporal point at which the physical association between the defendant and the victim was no longer voluntary. A kidnapping can occur when an association begins voluntarily but the defendant's actual purpose is other than the reason the victim voluntarily associated with the defendant. ***Id.*** Our Supreme Court identified distinct and separate conduct in ***State v. McGuire,*** 110 N.M. 304, 309, 795 P.2d 996, 1001 (1990), when the defendant abducted the victim while stealing her car, raped her, and then later took her into the woods and murdered her. The Supreme Court concluded that once the defendant had confined the victim with the requisite intent, "he had committed the crime of kidnapping, although the kidnapping continued throughout the course of defendant's other crimes and until the time of the victim's death." ***Id.*** at 309, 795 P.2d at 1001.

{18} In this case, Defendant contends that the kidnapping and criminal sexual penetration charges for each victim involved unitary conduct. Relying on ***Crain,*** 1997-NMCA-101, ¶ 17, he argues that the force necessary to accomplish the kidnapping of each victim was the same force necessary to rape each of the victims. The State responds that the act of kidnapping the victims was a distinct event from the later acts of criminal sexual penetration. We agree with the State. Defendant's claim of unitary conduct is not a reasonable view of the facts in light of the indicia of distinctness that exist in this case. Kidnapping by deception could be found to have occurred when Defendant asked the victims for a ride with another intent in mind. ***See State v. Laguna,*** 1999-NMCA-152, ¶ 13, 128 N.M. 345, 992 P.2d 896 (determining that deception occurred when defendant offered ride to victim, concealing intent of making sexual advances toward child). When Defendant took control of the car at gunpoint and then drove the victims to a remote location, the crime of kidnapping was complete before the act of criminal sexual penetration began. ***See State v. Jacobs,*** 2000-NMSC-026, ¶ 25, 129 N.M. 448, 10 P.3d 127. Our conclusion that the kidnappings and criminal sexual penetrations were separate acts constituting separate crimes ends the double jeopardy inquiry. ***Swafford,*** 112 N.M. at 14, 810 P.2d at 1234 ("[I]f the conduct is separate and distinct, inquiry is at an end.").

Notice of the EMDA

{19} Defendant argues on appeal that his right to due process was violated because he was not informed before he pleaded to the charges that the crimes he committed were serious violent offenses under the EMDA. ***See*** § 33-2-34(L)(4)(c), (e). Under the EMDA, a prisoner convicted of a serious violent offense may earn four days of credit per month for participation in various programs, while prisoners convicted of other offenses may earn up to thirty days per month. Section 33-2-34(A)(1), (2).

{20} We first address Defendant's contention that because the district court did not inform him of the possible application of the EMDA during the plea hearing, he was, in effect, not advised of the maximum possible sentence he was facing. ***See State v. Gilbert,*** 78 N.M. 437, 438, 432 P.2d 402, 403 (1967) (stating that ordinarily an accused should be advised of the maximum possible sentence and the minimum mandatory sentence which can be imposed). Defendant's argument is based on the premise that because the offenses he committed were serious violent offenses under the EMDA, he is required to serve more time.

{21} This Court has previously rejected similar claims in ***State v. Wildgrube,*** 2003-NMCA-108, ¶ 40, 134 N.M. 262, 75 P.3d 862, and in ***State v. Morales,*** 2002-NMCA-016, ¶ 6, 131 N.M. 530, 39 P.3d 747. As we have previously held, the EMDA does not change the maximum penalty for a defendant's crime or impose an additional penalty. Rather, the statute affects "the amount of time by which defendant through his own 'good conduct' could ***decrease*** his sentence." ***Morales,*** 2002-NMCA-016, ¶ 8 (internal quotation marks and citation omitted).

{22} In this case, the district court told Defendant the potential sentence for each of the charges that he faced and also advised Defendant that he was facing a total sentence of one to forty years. Defendant was sentenced to forty years and the EMDA requirements did not affect the maximum length of Defendant's sentence. ***See id.*** ¶ 6 (pointing out that "[d]efendant's sentence before application of the EMDA was 12 years, and it was still 12 years after application of the EMDA").

{23} As to Defendant's claim of lack of notice, the EMDA has been in effect since July 1, 1999. "Enactment of the statute would have put Defendant on notice." ***Wildgrube***, 2003-NMCA-108, ¶ 42; ***see People v. Brady,*** 40 Cal. Rptr. 2d 207, 212-13 (Ct. App. 1995) (holding that sentencing statute, having been "in full force and effect," would have given defendant notice that his ability to earn good conduct credits in prison would be limited under the statute). Furthermore, the sentencing statute, under which Defendant was sentenced for the offenses he committed, gives additional notice by specifically referring to the EMDA. ***See*** § 31-18-15(F) ("When the court imposes a sentence of imprisonment for a felony offense, the court shall indicate whether or not the offense is a serious violent offense, as defined in Section 33-2-34 NMSA 1978.").

Voluntariness of the Plea

{24} Defendant also argues that the failure to fully inform him of the consequences of his plea under the EMDA renders the plea unknowing and involuntary. The proper remedy, he asserts, would be for the judgment and sentence to be changed to allow him to earn the amount of good time available for nonviolent offenses, or in the alternative, that he be allowed to withdraw his plea.

{25} Even if this Court were to find this argument persuasive, which we do not, neither of the proposed remedies would be available to Defendant as a matter of law. As to the first, the legislature mandated that the EMDA statute applies to "persons convicted of a criminal offense committed on or after July 1, 1999." 1999 N.M. Laws, ch. 238, § 8. In addition, the legislature expressly defined the crimes committed by Defendant as serious violent offenses. Section 33-2-34(L)(4)(c), (e). Prisoners convicted of committing those crimes are required to serve 85% of their sentences. Section 33-2-34(A)(1); ***Morales***, 2002-NMCA-016, ¶ 12. As to the second, if a defendant fails to file a motion to withdraw a plea in the district court, he or she cannot attack the plea for the first time on direct appeal. ***State v. Madrigal,*** 85 N.M. 496, 500, 513 P.2d 1278, 1282 (Ct. App. 1973) (declining to review a claim raised for the first time on appeal that the defendant did not understand the consequences of his guilty plea before acceptance). Accordingly, Defendant cannot now claim for the first time on appeal that his plea was not knowing or voluntary; he is limited to seeking relief in collateral proceedings.

Additional Claim

{26} Defendant raises for the first time in his reply brief and in oral argument a new claim that there was an insufficient factual record for this Court to resolve his double jeopardy claims. The New Mexico Rules of Appellate Procedure do not permit a new argument to be advanced in the reply brief, Rule 12-213(C) NMRA 2003, and accordingly, we do not consider Defendant's claim.

{27} Furthermore, we note that even if Defendant's strategy had been successful, it would not have served to benefit him. In ***Sanchez***, 1996-NMCA-089, ¶ 6, the defendant raised a claim of double jeopardy after pleading guilty to charges of criminal sexual penetration, kidnapping, and aggravated burglary. A double jeopardy claim is fact specific, requiring a careful review of the evidence before the district court to determine whether the conduct involved comprises unitary conduct. ***Swafford***, 112 N.M. at 13-15, 810 P.2d at 1233-35. In ***Sanchez***, we placed "the burden on the defendant, the party raising the double jeopardy challenge, to provide a sufficient record for the court to determine unitary conduct and complete the remainder of the double jeopardy analysis." ***Sanchez***, 1996-NMCA-089, ¶ 11. We also noted that this requirement was also "fundamentally fair to the [s]tate which must have the opportunity to contest [d]efendant's version of the facts." ***Id.*** Similar to ***Sanchez***, we find lacking an adequate record with which to review Defendant's claim.

Conclusion

{28} The district court did not err in imposing consecutive sentences for the kidnapping and criminal sexual penetration charges. Nor did the district court err in designating the offenses committed by Defendant as serious violent offenses under the EMDA. Accordingly, we affirm Defendant's sentence.

{29} **IT IS SO ORDERED.**

JAMES J. WECHSLER,
Chief Judge

WE CONCUR:
IRA ROBINSON, Judge
MICHAEL VIGIL, Judge

Certiorari Granted, No. 28,352, December 2, 2003

From the New Mexico Court of Appeals

Topic Index:

Appeal and Error: Harmless Error; and Substantial or Sufficient Evidence
Constitutional Law: Double Jeopardy; and Vague or Overbroad
Criminal Procedure: Jury Instructions; and Lesser Included Offense
Government: Environmental Law

Opinion Number: 2003-NMCA-142

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
HECTOR VILLA III,
Defendant-Appellant.
No. 23,229
(filed: October 10, 2003)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY

GRACE B. DURAN,
District Judge

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OPINION

LYNN PICKARD, JUDGE

{1} Defendant appeals his convictions for violations of the Water Quality Act (WQA) for discharging in violation of a permit and for causing or allowing another to violate a permit. In this opinion we address whether, in the absence of proof that the permit was in effect at the time of the violations, attempt to commit the violations is a lesser included offense, and whether this Court can remand for sentencing on the lesser included offense. We hold that attempt to commit a violation of the WQA is a lesser included offense in this instance, and we remand to the trial court for adjudication of guilt on attempt and resentencing. We next address whether portions of the WQA are unconstitutionally vague and hold that they are not under the particular facts of this case. We also address whether the trial court erred in refusing Defendant's tendered jury instructions and whether the trial court erred in admitting certain documentary evidence. We hold that the trial court did not err in refusing the tendered jury instructions and that any error in admitting the documentary evidence was harmless. We reverse Defendant's convictions and remand to the trial court for resentencing and affirm the trial court in all other respects.

FACTS

{2} Defendant was convicted by jury verdict of eight counts of violating NMSA 1978, § 74-6-10.2(A) and (B) (1993) of the WQA. Defendant was employed by Valley By-Products (VBP), a Texas rendering plant, to provide environmental expertise and consulting. VBP regularly discharged waste on a site in southern New Mexico (the Medina site) pursuant to a discharge permit (DP-854) issued in 1992. Pursuant to the WQA and Water Quality Control Commission regulations, DP-854 was to be in effect for five years and was due to expire on October 13, 1997. The actual holder of DP-854 was Henry Medina (Mr. Medina), who originally owned the land and maintained the discharge site. DP-854 was amended in 1995 to include larger quantities of discharge and to include other substances. The letter sent by the New Mexico Environment Department (NMED) approving the 1995 modification mistakenly stated that DP-854 would expire on October 16, 2000. In April 1998 NMED sent Mr. Medina two letters. The first notified him that he was not in compliance with DP-854 and listed the areas of noncompliance. The second letter, sent several days later, informed Mr. Medina of the mistake in calculating the expiration date, informed him that the correct expiration date was November 1997, and notified him that the permit had already expired. In the same letter, NMED informed Mr. Medina that he could apply to renew the permit.

{3} Defendant was indicted for 52 violations of the WQA and was convicted of eight counts of knowingly causing or allowing another to discharge sludge from VBP in violation of DP-854 and for causing or allowing another to violate DP-854 in the failure to conduct monitoring, testing, sampling, and record keeping as required by DP-854. Defendant appeals his convictions, arguing (1) that the trial court erred in denying his motion for directed verdict because the State failed to prove an essential element of the crime, (2) that Section 74-6-10.2(B) is impermissibly vague, (3) that the trial court erred in refusing to instruct the jury on the limitations in the WQA as they pertain to DP-854, and (4) that the trial court erred in admitting certain evidence. We address each argument in order.

DENIAL OF DIRECTED VERDICT

{4} Defendant argues that DP-854 had expired and was not in effect during the relevant period. He argues that because all of the counts had, as a predicate, the existence of DP-854, the district court erred in denying his motion for a directed verdict. But for the existence of the permit, Defendant does not contend that any other element of the offenses of which he was convicted was not adequately proved.

{5} We review the trial court's denial of a directed verdict to determine whether substantial evidence supports the charge. ***State v. Dominguez***, 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct. App. 1993). The trial court denied Defendant's motion for directed verdict because it made the legal determination that the question of DP-854's validity was a question of fact for the jury to decide. We review the trial court's interpretation and application of the law de novo. ***State v. Roman***, 1998-NMCA-132, ¶ 8, 125 N.M. 688, 964 P.2d 852.

Validity of Permit

{6} Defendant was convicted of counts two through six, all of which state, in part: "[D]efendant did, in Dona Ana County, New Mexico knowingly discharge, cause or

allow another to discharge an unpermitted water contaminant onto the disposal site southwest of Las Cruces, operated by Henry Medina ***under NMED Discharge Plan #854*** contrary to Section 74-6-10.2(A)(1)." (Emphasis added.) These violations were alleged to have occurred in August 1998. Counts fifteen through seventeen, for which Defendant was also convicted, all state in part: "[D]efendant did, in Dona Ana County, New Mexico knowingly fail to monitor, sample or report, or knowingly caused or allowed another to fail to monitor, sample or report ***as required by permit, NMED Discharge Plan #854***, issued pursuant to a state law or regulation, contrary to Section 74-6-10.2(A)(4)." (Emphasis added.) These violations were alleged to have occurred in February 1999, August 1999, and February 2000. Though Section 74-6-10.2(A)(1) differentiates between discharging without a permit if a permit is required and discharging in violation of any condition of a permit, Defendant was charged, in all counts of which he stands convicted, with violating a permit. Similarly, the jury instructions for counts two through six include as an element of the crime that Defendant "discharge[d] a water contaminant in violation of any condition of a permit[.]" The jury instructions for counts fifteen through seventeen include as elements of the crime that Defendant "knowingly failed to monitor, sample, or report, or knowingly caused or allowed another to fail to monitor, sample, or report as required by a permit[.]"

{7} There was evidence introduced at trial concerning the validity of DP-854. The letter from NMED approving DP-854 was issued on November 13, 1992, and stated that the approval would expire on "October [sic] 13, 1997." The 1995 modification approval letter mistakenly stated that DP-854's approval would expire on October 16, 2000. However, in a letter to Mr. Medina dated April 20, 1998, NMED admitted its inadvertent mistake in earlier stating the 2000 expiration date and informed Mr. Medina that the permit had, in fact, expired on November 13, 1997. Two NMED officials testified that it had been the consistent position of NMED that DP-854 had expired in 1997.

{8} Though there may have been confusion as to the proper expiration date of the permit due to NMED's 1995 modification letter, there is no provision in the statute or the agency regulations indicating that a modification in a discharge permit extends the actual expiration date beyond five years. NMSA 1978, § 74-6-5(H) (1999) states, "Permits shall be issued for fixed terms not to exceed five years[.]" The only exception, which may extend a new permit by two more years if initial discharging is delayed, does not apply in this case. ***See id.*** The applicable agency regulation states that "[t]he secretary shall not approve a proposed discharge plan, modification, or renewal for . . . a period longer than five years[.]" 20.6.2.3109(H)(4) NMAC. The only exception in the regulation is for the same two-year extension for new discharges, which does not apply in this case. ***See id.*** During oral argument amicus NMED confirmed that permit modification never extends a permit term.

{9} The State concedes that DP-854 had "technically" expired, but urges us to consider DP-854 as a de facto permit because NMED implicitly instituted a grace period. The State argues that all of the parties considered that DP-854 was an active permit and acted accordingly. The State also points out that NMED took no administrative action on the permit to contravene the continued efficacy of the permit during the time of the alleged offenses.

{10} Due process requires that the State must prove every element of an offense beyond a reasonable doubt. ***State v. Brown***, 1996-NMSC-073, ¶ 31, 122 N.M. 724, 931 P.2d 69. We can determine no legal basis for holding that DP-854 was a valid permit at the time Defendant committed the acts for which he was convicted. Defendant, the State, and NMED all now agree that DP-854 expired on November 13, 1997, as a matter of law. Since Defendant was charged with violating a permit, and the jury was charged to consider violation of a permit as an element of the offenses, Defendant's convictions for violating the permit cannot stand. Consequently, we hold that, under the limited circumstances of this case in which the permit was technically not in effect, there was insufficient evidence to support the charges. We must therefore reverse Defendant's convictions. We reiterate that, in all other respects, apart from the existence of a permit, there was sufficient evidence of each and every element of the crimes on which the jury convicted, and Defendant does not contend otherwise.

Attempt is Lesser Included Offense

{11} The State argues that if this Court reverses Defendant's convictions, we should remand this matter to the trial court for resentencing on the offenses of attempt to commit the violations of the statute. Defendant argues that the elements of attempt to commit the violations of the statute are different from the elements considered by the jury at trial. Defendant argues that, because the jury was not instructed on attempt as a lesser included offense, remand for resentencing would violate his rights to due process and to a trial by jury.

{12} We first determine that the facts of this case are analogous to cases involving factual impossibilities, in which a defendant may be charged with and convicted of attempt to commit the underlying crime. ***See, e.g.***, ***State v. Lopez***, 100 N.M. 291, 292, 669 P.2d 1086, 1087 (1983) (determining that where the defendant believed the substance he was attempting to sell was cocaine, he was guilty of attempting to traffic in a controlled substance, even though it was factually impossible to commit the crime because the substance was, in fact, not cocaine). "[W]hen a defendant does everything that is required to commit a crime but is frustrated due to the fact that completion is impossible, he can nevertheless be found guilty of attempt." ***Id.***

{13} There was undisputed evidence at trial showing that Defendant believed DP-854 was validly in effect during the relevant period. A VBP employee testified that she transmitted the 1995 letter from NMED, with the mistaken expiration date, to Defendant in response to his request for documentation of the permit. One witness testified that Defendant told her that the permit expired in 2000. Defendant also informed the Texas Natural Resource Conservation Commission that waste from VBP was being transported to a New Mexico site pursuant to a permit. There was no evidence that Defendant thought or believed that the permit was not in effect.

{14} Defendant's entire defense below centered around the knowledge aspect of the charges—that Defendant did not know what VBP or Mr. Medina was doing. Defendant did not even argue to the jury the issue that

the permit had expired. Defendant's attorney argued that Defendant believed the waste at issue in this case complied with DP-854. Thus, though it was impossible for Defendant to violate the terms of the permit because the permit had expired, he acted as though the permit was still in effect. Because the jury found him guilty of "everything that [was] required to commit the crime" including Defendant's belief that DP-854 was valid, Defendant was necessarily guilty of attempt to commit these offenses.

{15} We next determine that attempt to violate Section 74-6-10.2(A) is a lesser included offense of violating the statute. "Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." NMSA 1978, § 30-28-1 (1963). The crime of attempt to commit a felony requires the specific intent to commit the underlying felony. ***State v. Hernandez***, 1998-NMCA-167, ¶ 16, 126 N.M. 377, 970 P.2d 149. Defendant was found guilty of committing the violations, meaning that he, in fact, was found guilty of completing all of the acts necessary to commit the violations, but failed only because he mistakenly believed the permit to be valid.

{16} In determining that attempt to violate the statute is a lesser included offense of violating the statute, we also look to ***State v. Meadors***, 121 N.M. 38, 908 P.2d 731 (1995), to guide our analysis. Our Supreme Court adopted a "cognate approach" for determining whether an offense is a lesser included offense. ***Id.*** at 44, 908 P.2d at 737. The ***Meadors*** approach, used when the State requests instruction on a lesser included offense, has also been applied by this Court to review a trial court's sua sponte convicting a defendant of a lesser offense. ***See State v. Hernandez***, 1999-NMCA-105, ¶ 26, 127 N.M. 769, 987 P.2d 1156. In both instances our courts have determined that a defendant, over his or her objection, can be convicted of a lesser included offense that was not included in the charging instrument, but that complies with the ***Meadors*** doctrine. We see no reason to use a different approach here, in determining whether to remand for resentencing on the lesser charge after Defendant has been found guilty of the greater charge following a jury trial.

{17} The ***Meadors*** doctrine looks to the charging instrument to determine if the elements of the lesser included offense are encompassed in it (the strict elements approach) and also looks to the evidence adduced at trial to help interpret the applicability of those elements. 121 N.M. at 45, 908 P.2d at 738. "[A]n offense is a lesser-included offense only if the defendant cannot commit the greater offense in the manner described in the charging document without also committing the lesser offense." ***Id.*** Under this analysis, a defendant is provided notice of the offense he or she must defend against and given ample time to prepare a defense. ***Id.*** In ***Meadors***, our Supreme Court found that the defendant could not have committed attempted murder by pouring gasoline on his victim and lighting him on fire without also having committed aggravated battery. ***Id.*** at 46, 908 P.2d at 739. Likewise, Defendant in this case could not have knowingly caused or knowingly allowed another to discharge a water contaminant without also attempting to do so in the event it turned out, as it did, that the permit he thought was in effect had expired. Thus, Defendant's notice of the statutory violations in the grand jury indictment necessarily included notice of attempt to violate the statute, and we determine that Defendant was not prejudiced by the failure to include attempt in the indictment or the State's failure to argue it at trial.

{18} Defendant argues that specific intent is an element of an attempt crime, ***see*** UJI 14-2801 NMRA 2003, and the jury was never instructed to find that Defendant had to "intend to commit the crime of" knowingly causing or allowing another to discharge in violation of a permit or "intend to commit the crime of" knowingly causing or allowing another to fail to monitor, sample, or report as required by a permit. Under the ***Meadors*** cognate approach, the strict elements test advocated by Defendant is only the first step in the analysis. Using the complete approach, as discussed above, we determine that Defendant was necessarily found guilty of the lesser included offense of attempt. A charge of a completed crime logically includes a charge of an attempt to commit each of the crimes charged. ***Commonwealth v. Gosselin***, 309 N.E.2d 884, 887 (Mass. 1974); ***State v. James***, 655 N.W.2d 891, 897-99 (Neb. 2003); ***State v. Lutheran***, 82 N.W.2d 507, 508 (S.D. 1957); ***see also In re Marlon C.***, 2003-NMCA-005, ¶ 12, 133 N.M. 142, 61 P.3d 851. In this case the jury found Defendant guilty of five offenses of "knowingly caus[ing], or knowingly allow[ing] another to discharge a water contaminant," and three offenses of "knowingly fail[ing] to monitor, sample, or report, or knowingly caus[ing] or allow[ing] another to fail to monitor, sample, or report." It follows, a fortiori, that the jury found that Defendant had the requisite intent to attempt to commit the offenses it found him guilty of knowingly causing. In addition, the jury was instructed that Defendant had to have acted intentionally when he committed the crime of knowingly violating the WQA. UJI 14-141 NMRA 2003.

{19} Moreover, our Supreme Court has determined that a retrial for failure to instruct on intent is not required if the facts assure that the result surely would be the same. ***State v. Griffin***, 116 N.M. 689, 695, 866 P.2d 1156, 1162 (1993). Because we have determined that (1) attempt to violate the statute at issue is a lesser included offense, (2) there is sufficient evidence to convict Defendant of attempt to violate the statute, and (3) the jury necessarily found Defendant guilty of the attempt under the facts of this case, we determine that a retrial is not required because the result would surely be the same. ***Cf. State v. Orosco***, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992) (determining that where there can be no dispute that the element was established, failure to instruct jury on that element does not offend principles of fundamental fairness and does not require reversal of conviction).

{20} We hold that, under the facts of this case, there is sufficient evidence to find Defendant guilty of attempt to commit the offenses for which the jury found him guilty, and we remand to the trial court for resentencing based on attempt to commit the violations of the statute.

Remand for Sentencing

{21} Defendant relies on ***State v. Haynie***, 116 N.M. 746, 867 P.2d 416 (1994), for his argument that this Court cannot remand for resentencing on attempt because the jury was not instructed on attempt. In ***Haynie*** our Supreme Court found that there was insufficient evidence to sustain the defendant's conviction for first degree murder because the element of endangering the lives of others was not proved, but

remanded to the trial court for resentencing for second degree murder. ***Id.*** at 748, 867 P.2d at 418. The ***Haynie*** Court determined that the defendant conceded on appeal that the evidence supported second degree murder, he argued for it below, and the jury was instructed on second degree murder, making it appropriate to remand for resentencing instead of ordering a new trial. ***Id.*** at 747-48, 867 P.2d at 417-18. Defendant argues that because the jury was not instructed on attempt, we can have no assurance that the jury necessarily found each essential element of attempt. ***See also United States v. Vasquez-Chan***, 978 F.2d 546, 554 (9th Cir. 1992) (determining that for an appellate court to enter a judgment on a lesser offense, "the jury must have been explicitly instructed that it could find the defendant guilty of the lesser-included offense and must have been properly instructed on the elements of that offense"); ***Ex parte Walls***, 711 So. 2d 490, 498 (Ala. 1997) (following acquittal for insufficient evidence on substantive charge, judgment cannot be entered on attempt when jury was not charged on that offense); ***Collier v. State***, 999 S.W.2d 779, 782 (Tex. Crim. App. 1999) (en banc) (determining that judgment cannot be entered on lesser offense unless jury was instructed on that offense). We do not agree with the rationales of these cases under the circumstances of the case at bar, where the lesser offense was necessarily found by the jury in finding the defendant guilty of the greater offense. In addition, we are at a loss to understand why instruction on a lesser offense would even be relevant when a jury finds a defendant guilty of the greater offense and thus may not reach the lesser. ***See*** UJI 14-6012 NMRA 2003 (explaining procedure to jury in deliberating greater and lesser offenses); ***cf. State v. Southerland***, 100 N.M. 591, 595, 673 P.2d 1324, 1328 (Ct. App. 1983) (stating that when a jury does not reach issue of lesser included offense, the general rule is that any error in lesser included offense instructions is harmless).

{22} ***Haynie*** stands for the proposition that "appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense." 116 N.M. at 748, 867 P.2d at 418. Our Supreme Court stated that "[t]he rationale for this holding is that there is no need to retry a defendant for a lesser included offense when the elements of the lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense." ***Id.*** We have determined above that attempt to violate the statute is a lesser included offense of violating the statute under the facts of this case, and that the jury necessarily found Defendant guilty of attempt. Our determination here is not in conflict with ***Haynie***.

{23} Moreover, the main rationale of the cases on which Defendant relies appears to us to espouse a sporting or gaming theory of justice that is inconsistent with New Mexico law. ***Collier*** explains the reason for its rule: Were it otherwise, "the state would have all the benefits and none of the risks of its trial strategy, while the accused would have all the risks and none of the protections." ***Collier***, 999 S.W.2d at 782 (internal quotation marks and citations omitted). However, we do not believe that risks, benefits, and strategies are the proper analysis in criminal cases. ***Cf. County of Los Alamos v. Tapia***, 109 N.M. 736, 742, 790 P.2d 1017, 1023 (1990) (stating various definitions of the public's interest in the orderly administration of justice, including insuring that the guilty are punished after a fair trial); ***State v. Maes***, 100 N.M. 78, 80-81, 665 P.2d 1169, 1171-72 (Ct. App. 1983) (indicating the public interest in the proper resolution of criminal cases despite the parties' concessions). In addition, we have long been committed to the rule that remedies should be tailored to the wrong suffered and should be based on a showing of particular prejudice. ***See In re Jade G.***, 2001-NMCA-058, ¶ 29, 130 N.M. 687, 30 P.3d 376; ***State v. Pedroncelli***, 97 N.M. 190, 192-93, 637 P.2d 1245, 1247-48 (Ct. App. 1981).

{24} ***Vasquez-Chan*** and ***Walls*** explain that the rule seeks to put the parties in the same position on appeal as they would have been at trial insofar as retrial on the lesser offense would be barred if only the greater offense was submitted to the jury and if the defendant was acquitted of that offense. ***Vasquez-Chan***, 978 F.2d at 554; ***Walls***, 711 So. 2d at 498. The basis of this rule is that a person may not be tried on a lesser offense once acquitted of the greater because of double jeopardy. ***See Meadors***, 121 N.M. at 41, 908 P.2d at 734. However, in the case of an appeal, as opposed to the conclusion of a trial without appeal, there is no termination of the proceedings and no termination of jeopardy. ***See Sattazahn v. Pennsylvania***, 537 U.S. 101, ___, 123 S. Ct. 732, 740 (2003).

{25} Thus, when a trial concludes with a defendant's being convicted of a greater offense, we believe that the applicable rule is as set forth in ***Shields v. State***, 722 So. 2d 584, 586-87 (Miss. 1998) (relying on ***Rutledge v. United States***, 517 U.S. 292, 306 (1996), in finding no federal impediment to an appellate court's directing the entry of judgment for a lesser included offense when finding insufficient evidence of the greater offense as long as (1) there is a failure of proof of one element of the greater offense, (2) the evidence sustains all the elements of the lesser offense, (3) the lesser offense is included in the greater offense, and (4) there is no undue prejudice to the defendant). Applying this rule to the present case, we hold that all the elements of it are met.

{26} First, we have held that there was a failure of proof of the permit element of the greater offense. Second and third, the evidence sustains the elements of attempt, and attempt is a lesser included offense under the facts of this case. Finally, and most important, Defendant does not argue that his defense would have been any different had he also been specifically and expressly charged with attempt, thereby showing that the fourth ***Rutledge*** element is met. In fact, during the directed verdict motion, Defendant suggested that attempt was the more appropriate offense. Defendant was charged with violating Section 74-6-10.2(A)(1) and (4), he was on notice of the charges, he defended against the charges, and he was found guilty of the charges. We again note that, except as to the technical validity of the permit, Defendant does not challenge the sufficiency of the evidence on which the jury found him guilty. By defending against the greater charge on the basis of lack of knowledge of the workings of VBP and the Medina site and on the basis that he did not know that the type of sludge disposed was not allowed under the permit,

Defendant necessarily defended against the lesser included charge of attempt under the facts of this case. We discern no reason to mandate a retrial on these facts.

CONSTITUTIONALITY OF STATUTE

{27} Defendant argues that the statute underlying his convictions, which makes it a crime to knowingly "allow" another person to violate the statute, is impermissibly vague and violates his right to due process under the United States Constitution and the New Mexico Constitution. We review a challenge to the constitutionality of a statute de novo. ***State v. Laguna***, 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896. Due process requires that a criminal statute be drafted in such a manner that it provides fair warning of the conduct sought to be proscribed, and so that the statute does not encourage arbitrary or discriminatory enforcement. ***State v. Luckie***, 120 N.M. 274, 276, 901 P.2d 205, 207 (Ct. App. 1995). "A penal statute offends due process and is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is being prohibited so that he or she may act accordingly." ***Id.*** A strong presumption of constitutionality underlies each statute, and Defendant has the burden to prove unconstitutionality beyond all reasonable doubt. ***Laguna***, 1999-NMCA-152, ¶ 24. A claim of vagueness is analyzed according to the particular facts of each case. ***Luckie***, 120 N.M. at 276, 901 P.2d at 207. "Defendant will not succeed if the statute clearly applied to his conduct." ***Laguna***, 1999-NMCA-152, ¶ 24.

{28} Defendant contends that Section 74-6-10.2(B), which prohibits a person from allowing another person to violate the statute, is unconstitutionally vague because it does not specify what a potential defendant must do to prevent the conduct at issue. Defendant was convicted of five counts of knowingly causing or knowingly allowing another to discharge a water contaminant, contrary to Section 74-6-10.2(A)(1) and (B) and three counts of knowingly causing or allowing another to fail to monitor, sample, or report the requirements of a permit contrary to Section 74-6-10.2(A)(4) and (B). Defendant suggests that the "allows" clause does not provide reasonable notice of what he must do ***not*** to allow someone to discharge water contaminates, asking us if advising a client would be sufficient, or if he must threaten to report the client to the authorities, or even physically prevent the discharge. He makes the same argument regarding both sections of the statute pursuant to which he was convicted.

{29} However apt Defendant's hypothetical questions may be, he fails to tell us how this statute is vague according to the specific facts under which he was convicted. He points to no evidence that he produced at trial showing that he advised his client that improper contaminants were being dumped, that insufficient paper work was being filed, that he threatened to report his client to NMED, that he physically tried to prevent the discharges, or that he filed the reports himself.

{30} The evidence shows that Defendant was hired as an environmental expert to help VBP correct some problems that resulted in notice of environmental violations received from the Texas Natural Resource Conservation Commission (TNRCC), and that VBP expected to have a continuing relationship with him in order to maintain compliance with environmental issues in the future. VBP notified Defendant of and shared with him all correspondence from the environmental regulatory agencies. Defendant was aware of DP-854 and possessed a copy of it. Defendant even informed TNRCC that VBP's sludge was being transported to an approved site in New Mexico, and that records were being kept pursuant to the permit requirements. There was ample evidence showing that the amount and type of waste being transported to the Medina site greatly exceeded the permit requirements, and that monitoring and record keeping for that site was incomplete. Defendant even eventually admitted to an Environmental Enforcement Officer from the New Mexico Attorney General's office that the rendering waste dumped at the Medina site was not included in DP-854. We think that a person of ordinary intelligence can determine that an environmental expert hired to solve environmental violations, with knowledge of the contents and requirements of DP-854, who knew VBP was not in compliance with DP-854, who took no action to comply with the permit, and who took no action to remedy the violations he knew to be occurring, would be on adequate notice that he "knowingly cause[d] or allow[ed] another person to violate" the WQA. Section 74-6-10.2(B).

{31} Defendant's vagueness challenge to the words "any person" and to the definition of "water contaminant" contained in the statute fails for the same reason. In this case there is no question about who "any person" might be. Defendant was convicted of knowingly allowing his client VBP and the landfill owner, Mr. Medina, to violate the statute. There is no question either about the contaminants at issue. As we discuss below, there was ample evidence that the contaminants in question were toxic or carcinogenic, or both, and ample evidence showing that these particular contaminants altered the qualities of the water.

{32} The statute also contains a scienter requirement, meaning that the jury necessarily found that Defendant "knowingly" caused or allowed another to violate the statute. "A statute requiring the fact-finder to determine whether a defendant committed a knowing or willful violation is less likely to be found vague because the jury must determine scienter." ***State v. Rowell***, 119 N.M. 710, 718, 895 P.2d 232, 240 (Ct. App. 1995), ***rev'd on other grounds***, 121 N.M. 111, 908 P.2d 1379 (1995). We hold that Section 74-6-10.2(B) is not unconstitutionally vague as applied.

{33} In light of the foregoing analysis, Defendant's reliance on ***People v. Maness***, 732 N.E.2d 545 (Ill. 2000), is unavailing. The statute at issue in ***Maness*** had a similar "allows" provision. ***See id.*** at 549. However, the defendant in ***Maness*** did take some steps to prevent the prohibited action, but the statute did not specify what exactly a person should do ***not*** to allow the prohibited acts. ***Id.*** at 549-50. Thus, under the specific facts presented, the Illinois Supreme Court determined that the defendant could not reasonably know what the statute required of her in order to avoid prosecution. ***Id.*** at 550. Such is not the case here, where Defendant did nothing to prevent or ***not*** allow the prohibited acts.

JURY INSTRUCTIONS

{34} Defendant argues that the trial court erred in refusing to instruct the jury on the limitations to the WQA as enumerated in NMSA 1978, § 74-6-12 (1999). "[A] criminal defendant is entitled to an instruction as to any defense, provided the instruction has

an evidentiary foundation and accurately states the law." ***State v. Gaines***, 2001-NMSC-036, ¶ 6, 131 N.M. 347, 36 P.3d 438. We review de novo the trial court's refusal of Defendant's tendered jury instruction, viewing the evidence in the light most favorable to the giving of the requested instruction. ***State v. Hill***, 2001-NMCA-094, ¶ 5, 131 N.M. 195, 34 P.3d 139.

{35} Defendant argues that the WQA excludes regulation "if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters." Section 74-6-12(C). He further agues that the jury should have decided whether he was exempt because of this statutory limitation. Defendant misinterprets the statute.

{36} Section 74-6-12(C) states:

> The Water Quality Act does not authorize the commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters.

This section plainly places limitations on the Water Quality Commission from regulating under certain conditions. However, Defendant asked the trial court to instruct the jury that "[t]he Water Quality Act ***does not apply*** to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters." (Emphasis added.) He was, in effect, asking the jury to determine that no violation occurred if no pollution actually occurred, which is not what the statute mandates. In fact, the statute mandates civil and criminal penalties for violating a requirement of the statute, of a regulation, or of a permit. ***See*** NMSA 1978, § 74-6-10 (1993); § 74-6-10.2. Nowhere does the statute require that actual pollution occur before a sanction or penalty is levied against a discharger.

{37} Furthermore, Defendant and his client had already submitted to the regulation of the Water Quality Commission which determined that a permit was required. The applicable regulation requires anyone who intends to make a water contaminant discharge that may affect ground water to notify NMED, which will then inform the applicant whether a discharge permit is required. 20.6.2.1201 NMAC. The applicant does not determine whether any limitations or exemptions apply. ***See Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n***, 98 N.M. 240, 244, 647 P.2d 873, 877 (Ct. App. 1982) (determining that the director of the agency makes a determination of whether or not a permit is required, not the potential discharger of contaminants). Upon notification that a discharge permit is required, a discharger must then apply for the permit pursuant to the conditions set forth in the regulation. 20.6.2.3106 NMAC. The determination that a permit was needed for the Medina site necessarily meant that no limitations or exemptions applied to it. Defendant and his client were then bound by the requirements of DP-854. ***See*** Section 74-6-5.

{38} The statute and the regulations provide for appeals of decisions regarding the conditions of a permit, pursuant to which the permitee could have availed himself. However, the issue at trial was not whether the Water Quality Commission or NMED had exceeded its authority in regulating the Medina site's discharges or whether or not actual pollution occurred. At issue was whether Defendant violated Section 74-6-10.2(A) and (B) and the conditions imposed by DP-854. Accordingly, we hold that the trial court did not err in refusing Defendant's proffered jury instructions because they did not accurately state the law.

ADMISSION OF LAB REPORT

{39} Defendant argues that the trial court erred in admitting evidence of a lab report purporting to find salmonella in meat and bone meal that VBP produced. He argues that the report constitutes hearsay, for which the prosecution failed to establish an exception, and that its admission was highly prejudicial. The State argues that there was a sufficient foundation laid that met the requirements of Rule 11-803(F) NMRA 2003 as a business records exception to the hearsay rule. The State further argues that even if the admission of the lab report was error, it was harmless error because there was no reasonable possibility that the evidence contributed to Defendant's conviction. We review the trial court's evidentiary rulings for abuse of discretion. ***State v. Woodward***, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995). "'An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case.'" ***Id.*** (quoting ***State v. Apodaca***, 118 N.M. 762, 770, 887 P.2d 756, 764 (1994)).

{40} At trial, the State sought to admit the lab report as evidence that the water that left the plant to be dumped at the landfill contained contaminants. The State contended that the lab report, prepared by Ralston Analytical Laboratories, was directly related to VBP's operations and the waste it generated. No one from the Ralston Laboratories testified about the report. The trial court held a hearing outside the presence of the jury in order to ascertain whether Natalie Jerome (Ms. Jerome), vice president of VBP and custodian of its business records, could establish an adequate foundation for the admission of this report, and whether the report was relevant and not too prejudicial. The trial court admitted the report under the business records exception, Rule 11-803(F).

{41} We need not decide whether the admission of the report was error, because even if it was error, the error was harmless. In order to determine that an error is harmless, we consider three factors: (1) whether there was substantial evidence to support the conviction without reference to the improperly admitted evidence, (2) whether there was such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so minuscule that it could not have contributed to the conviction, and (3) whether there was substantial conflicting evidence to discredit the State's testimony. ***State v. Duffy***, 1998-NMSC-014, ¶ 38, 126 N.M. 132, 967 P.2d 807.

{42} We note first that Defendant did not cross examine Ms. Jerome in the presence of the jury about the incidence of salmonella in the plant's wastewater, and that there was no evidence admitted to discredit the report. Indeed, Ms. Jerome admitted that salmonella was known to occur in meat and bone meal, it was not a significant issue for the plant, and the testing for salmonella was VBP's voluntary effort to improve their products. Our review of the trial transcript reveals no other mention of salmonella or

this lab report.

{43} There was testimony from several witnesses about the contents of the water and the soil tested from the places VBP and Defendant were accused of dumping, but none mentioned the presence of salmonella. However, all of these witnesses testified as to the presence of other toxic chemicals. For instance, a chemist with the New Mexico Department of Health testified that in water samples that he tested, he found the presence of 4-methylphenol, 9-octadecenoic acid, cis-9-octadecenoic acid, and 2, 3-dihydroxypropyl, some of which are regulated by the EPA and considered toxic and suspected to be carcinogens. Another state chemist testified that he identified 1, 3-dichlorobenzene, 4-methylphenol, and long-chain organic acids, all in very high quantities in the soil he tested. A New Mexico Department of Public Safety crime lab technician testified that he found numerous animal hairs in the soil samples he tested. An NMED Surface Water Quality Inspector testified that he found the presence of ammonia in low and high concentrations in water tested at his laboratory, and very high concentrations of long-chain fatty acid organics, which would alter the chemical, physical, or biological qualities of water. He also found toxic phenols in his samples. Although some of the above-mentioned samples were taken from areas other than the landfill pursuant to which Defendant was convicted, we note that the State introduced all of this evidence to show that contaminants were being discharged, which was the core of the charges.

{44} In all, the State presented twenty-one witnesses and admitted over 100 exhibits. The only mention of salmonella or the Ralston Laboratories report was when the report was admitted into evidence through Ms. Jerome. This particular report was introduced approximately halfway through the lengthy introduction of nearly 60 documents that were admitted one by one through Ms. Jerome's testimony. We determine that the State introduced substantial evidence of contaminants to support the conviction in such a quantity that the report of the presence of salmonella was minuscule in comparison. We hold that any error in admitting this evidence was harmless.

CONCLUSION

{45} We reverse Defendant's convictions and remand to the trial court for resentencing on the lesser included offense of attempting to commit the violations of the statute. We affirm as to all other issues.

{46} **IT IS SO ORDERED.**

LYNN PICKARD, Judge

I CONCUR:

CELIA FOY CASTILLO, Judge

RODERICK T. KENNEDY, Judge (concurring in part and dissenting in part).

KENNEDY, Judge (concurring in part and dissenting in part).

{47} There is a profound difference between reviewing a verdict and producing a verdict. I join the majority in reversing Defendant's conviction for insufficient evidence; it was impossible for him to commit crimes in violation of a discharge permit when no such permit legally existed. We correctly decided that the evidence was insufficient as a matter of law to sustain those convictions. A directed verdict on the charges would therefore have been proper.

{48} I respectfully dissent from the majority's accepting the invitation in the State's supplemental brief to now, in the face of our reversal of the substantive charge, convict on a "lesser" offense by adopting what the Mississippi Supreme Court, in its 5-4 majority opinion, called the "direct remand rule," ***Shields***, 722 So. 2d at 585, or what the federal system knows as the "***Allison*** Rule." ***Allison v. United States***, 409 F.2d 445, 451 (D.C. Cir. 1969); ***see also Rutledge***, 517 U.S. at 306. Under certain circumstances, this rule allows appellate courts to remand a case for imposition of conviction and sentencing upon a lesser included offense when a defendant's conviction of a greater offense is invalidated on appeal for insufficient evidence. In this case, it allows the State to inject an issue they consciously waived at trial into their appeal, and we deliver a conviction on a charge they did not seek. When we have found the evidence insufficient as a matter of law to support the jury's own verdict in the case, we should not be quick to render verdicts of our own on new and different charges.

{49} Defendant has rights to notice of the charges against him and trial of those charges to a jury under both the U. S. and New Mexico Constitutions. ***See*** U.S. Const. amend. VI; N.M. Const. art II, §§ 12, 14 and 18. He also has the right to have the facts developed and considered before a properly instructed fact-finding body, rather than having a fact-reviewing body interpose itself in the process of determining guilt of uncharged crimes.

{50} I am not convinced that attempt is a proper lesser included offense in this case. I am, however, unequivocally convinced that it is not a proper function of an appellate court to depart from reviewing the sufficiency of evidence supporting a conviction and impose the effect of that evidence on an entirely new crime that the State did not charge below and for which Defendant had no notice. The jurisdictions are split on this issue, and I believe that New Mexico should not follow cases like ***Allison*** and ***Shields***, but rather we should follow cases such as ***Collier***, 999 S.W.2d at 782 and ***State v. Myers***, 461 N.W.2d 777, 782 (Wis. 1990) (stating that when a defendant is convicted of an uncharged crime on appeal "the state is in effect asking the appellate court to give it the benefit of jury instructions it failed to request at trial").

Where the State Requests no Jury Instruction on Attempt at Trial, They have Waived Prosecution of the Charge and Failed to Preserve it for Consideration on Appeal

{51} Amending the indictment to charge attempt was only one option open to the State at trial that they chose not to exercise. The other was to seek an instruction to the jury on a lesser included offense. The State, having chosen not to pursue attempt by amendment to the indictment, further chose at trial not to pursue a charge of attempt by requesting that the jury be instructed on attempt to violate the permit.

(52) Defendant urges that we hold that he cannot be found guilty of attempt unless that charge has been properly submitted to the jury as a lesser included instruction. The majority have declined to do so, stating that it would serve no purpose, because the evidence is unequivocal, and attempt is necessarily included as a part of the greater offense, and its elements are necessarily proven. The history of lesser included offenses, and their purpose in enabling the jury to distinguish between different charges where the evidence is weak shows the importance of this consideration.

Jury Instructions Protect Fundamental Due Process Interests—They Are Not

Incidental to "Gamesmanship"

{53} The majority states that they are unable to understand "why instruction on a lesser offense" is "relevant when a jury finds a defendant guilty of the greater offense and thus may not reach the lesser." Majority opinion, ¶ 21. Simply put, guilt of the lesser offense might be the correct verdict for the case, as the majority hold, yet without an instruction on the lesser included offense, the jury convicts of a greater offense for which the evidence is insufficient to sustain the verdict. The issue involves the fact illustrated in ***Haynie*** that the jury had the opportunity to consider the merits of a greater charge against the lesser as they were instructed and reach a decision as to the relative merits of each. ***Haynie***, 116 N.M. at 748, 867 P.2d at 418. Accordingly, they made their considered determination between the charges based on proof beyond a reasonable doubt.

{54} As stated in ***Beck v. Alabama***, 447 U.S. 625, 634 (1980), "providing the jury with the `third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." This protects the rights of the accused by allowing the jury to conform the verdict more accurately to the evidence than when presented with a single option for conviction. ***Id.***; ***see also State v. Andrade***, 1998-NMCA-031, ¶ 11, 124 N.M. 690, 954 P.2d 755 (stating that a lesser included offense instruction is a procedural safeguard for the defendant where a jury, confronted with an all-or-nothing choice, may wrongly convict of the greater crime because they believe the defendant committed a crime (the lesser included offense) and an acquittal would be unacceptable). ***Beck*** states this rationale quite clearly:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory.

Beck, 447 U.S. at 634 (internal quotation marks and citation omitted). Therefore there is no reason for this Court to go where no prosecutor went in this case.

When the State Decided Not to Request a Lesser Included Instruction, it Precluded Our Review of a Lesser Included Offense

{55} In this case, the State chose to take a "go for broke" position. For the State to appeal to us for help because they did not ask to have the jury consider attempt as a lesser offense would require the State to have tendered a correct instruction on attempt at trial. Rule 5-608(D) NMRA 2003. Having failed in that regard, they now ask us to create a lesser offense they did not seek from a guilty verdict reversed for insufficient evidence. ***See Collier***, 999 S.W.2d at 782. "The state is asking us to rescue it from a trial strategy that went awry." ***Id.*** (quoting ***Myers***, 461 N.W.2d at 782); ***State v. Holley***, 604 A.2d 772, 776 (R.I. 1992) (stating that remand for imposition of lesser included offense requires sufficient evidence to support conviction and instruction of jury on lesser included offense); ***Shields***, 722 So. 2d at 588 (Sullivan, J., dissenting).

{56} Lesser included offense instructions developed at common law as a tool of the State. They enabled the State to exercise its discretion to charge the greater offense yet preserve its ability to seek a conviction of the lesser included offense when, at trial, its proof of the greater offense proved nonexistent or weak. Instructing the jury on lesser included offenses developed at common law to aid the prosecution "in cases in which the proof failed to establish some element of the crime charged." ***Beck***, 447 U.S. at 633.

{57} At trial, failing to request an instruction constitutes a waiver of the issue, and precludes review by the higher court. To preserve error concerning a failure to instruct on an issue, a correct written instruction must be tendered before the jury is instructed. ***State v. Foster***, 1999-NMSC-007, ¶ 54, 126 N.M. 646, 974 P.2d 140. A charge of attempt could properly have been before the trial court but for the prosecution's failure to request that an instruction on attempt be given. "Under Rule 5-608, counsel must submit a proper instruction to preserve error only if no instruction is given on the issue in question on appeal." ***Santillanes v. State***, 115 N.M. 215, 218, 849 P.2d 358, 361(1993). This was held in ***Myers*** to preclude considering a lesser included offense on appeal when no instruction was tendered. ***See Myers***, 461 N.W.2d at 781-82.

{58} The purpose of Rule 5-608 "is to allow the court an opportunity to decide a question whose dimensions are not open to conjecture or after-the-fact interpretation." ***Gallegos v. State***, 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992). New Mexico does not require the giving of a lesser included instruction without it being requested by a party. ***State v. Garcia***, 46 N.M. 302, 306, 128 P.2d 459, 461 (1942) (stating that the court rule requiring tender of instruction or objection to a tendered instruction required supersedes case law that formerly required giving lesser included instructions). When a party does not tender a written jury instruction, the issue of whether such an instruction should have been allowed is not preserved for our review. ***State v. Badoni***, 2003-NMCA-009, ¶ 7, 133 N.M. 257, 62 P.3d 348. The State was clearly alerted that an instruction on attempt might be proper. There is no reason for us to pursue an option consciously abandoned by the State. The majority opinion seems to regard Defendant's mention of "attempt" in his motion for a directed verdict as some sort of waiver by him that would allow us to consider the charge here. That is an incorrect view. At trial, Defendant could have accepted or objected to a lesser included offense instruction. If he did not object, the issue would be waived. The defense requested no consideration of a lesser included offense and now objects to our considering one on appeal.

{59} At one time, New Mexico required trial courts, in murder cases, to sua sponte give lesser included instructions if warranted by the evidence. ***State v. Diaz***, 36 N.M. 284, 289, 13 P.2d 883, 887 (1932), ***overruled in part by Garcia***, 46 N.M. at 306, 128 P.2d at 463. This is not indicative of anything consistent with "sporting" or "gaming." ***Diaz*** was overruled in part because of the adoption of a rule requiring all parties to request instructions on all theories of their case or face a finding of waiver if they did not. ***Garcia***, 46 N.M. at 306, 128 P.2d at 463. Our Supreme Court

chose the will of the parties over the imposition of policy forcing instruction on lesser included offenses.

{60} New Mexico courts have recognized that even when instructions on lesser offenses may otherwise be constitutionally mandated if requested, "the defendant is free to make strategic choices regarding the manner in which he will or will not avail himself of procedural safeguards afforded by the law, and he generally will be bound by those choices." ***State v. Boeglin***, 105 N.M. 247, 251, 731 P.2d 943, 947 (1987). The State's entitlement to a lesser included instruction, where warranted, has been held by our Supreme Court to be no less than that of the defense. ***Meadors***, 121 N.M. at 47, 908 P.2d at 740 (deciding that a defendant's right to a lesser included offense instruction is "at least as great" as the State's right to a lesser included offense instruction). There is no reason to hold the State to a lesser standard of behavior when they decided not to seek to have the jury be instructed on such an offense, particularly when they are entitled to by law, and were clearly alerted that attempt would "perhaps" be all that was left in the absence of a valid permit. The State now "cannot be heard to complain on appeal if [they have] gambled and lost." ***Boeglin***, 105 N.M. at 251, 71 P.2d at 947. The majority opinion is no more than the "after-the-fact interpretation" the rules seek to avoid. ***Gallegos***, 113 N.M. at 341, 825 P.2d at 1251.

{61} If the State wants to have a lesser charge considered, it is the State's burden to seek consideration of such charges by the trial court if they want them or to bear the cost of not doing so. "If substantial justice has been done, parties must have duly taken and preserved exceptions in the lower court to the invasion of their legal right before we will notice them here." ***Garcia***, 46 N.M. at 308, 128 P.2d at 462 (internal quotation marks and citation omitted). "[A] party to a criminal prosecution will not be heard to complain about the failure to charge a lesser included offense that is not alleged in the bill of indictment ***unless*** a timely written request to make such a charge is submitted to the trial court." ***Prater v. State***, 545 S.E.2d 864, 868 (Ga. 2001) (holding that where the prosecution requested, then abjured a lesser included instruction at trial, the State's failure to pursue an adequate instruction on attempt "waived all claims on appeal relative to the instructions's omission from the trial court's overall charge"). To so hold

> places no onerous burden on the State. It means only that, at the close of the evidence at trial, the State, no less than the accused, must take care to evaluate the sufficiency of the evidence to support the charge. If the evidence will support a lesser included offense instruction, then either the State or the accused may, and probably should, request one.

Collier, 999 S.W.2d at 782; ***see People v. Najera***, 503 P.2d 1353, 1358-59 (Cal. 1972) (en banc); ***People v. Spencer***, 99 Cal. Rptr. 681, 690-91 (Ct. App. 1972).

{62} Choosing to seek an instruction on a lesser included offense has serious implications, including due process considerations. A defendant risks being convicted of a greater crime than he committed if the jury convicts on the greater offense, and the State risks the jury's (proper) acquittal if they follow their instruction and find that a requisite element is not proven. In this case, the defense argued that the permit was not legally extant, and the trial court gave the matter to the jury to decide as an issue of fact. The defense properly sought to rely on the jury after it was instructed that the State's burden is to prove each element beyond a reasonable doubt.

{63} Here, the defense chose its path, asserting that the permit was not valid as a matter of law, and argued that theory to the trial court. Ultimately, this proved to be a proposition with which we agree. In so doing, however, the defense alerted the State to the possibility of a lesser included offense that the State—equally consciously—chose not to pursue. This is not a case like ***Tapia***, cited by the majority, where the defendant waited until jeopardy attached before moving to suppress evidence. In fact, this case is more like what ***Tapia*** said would invoke double jeopardy protection for the defendant; the case where the State's desire in this case smacks of "honing its trial strategies and perfecting its evidence through successive attempts at conviction," as here on appeal the State seeks the result they now ask us to provide. ***Tapia***,109 N.M. at 744, 790 P.2d at 1025 (concluding that evidence is not insufficient when trial stopped because the defendant wrongly acted so as to secure exclusion of evidence; retrial permitted). Likewise, ***Maes*** is inapposite, standing for the proposition that the orderly administration of justice compels courts to evaluate stipulated dismissals of appeal for just result. ***Maes***, 100 N.M. at 80-81, 665 P.2d at 1171-72 (concluding that the State's stipulation is not warranted; declining to dismiss appeal).

{64} The majority ignores the distinction between an appellate court finding evidence in the record sufficient to support a jury verdict, and the jury finding the evidence sufficient to prove guilt beyond a reasonable doubt. ***Shields***, 722 So. 2d at 588 (Sullivan, J., dissenting). Here, the jury had nothing to compare between the substantive crime and an attempt to commit it. The evidence on which the jury decided the case is judged by us to be insufficient to sustain the verdict. We are not in a position to say that there is no remaining defense to attempt.

{65} Both the prosecution and defense in this case are capable attorneys who know the burdens and benefits of their actions. ***Myers*** points out that for us to remand for entry of conviction on the lesser included offense would encourage the State to go for broke as it did here, and then, if a verdict was overturned for insufficient evidence, seek a conviction in our Court. ***See Myers***, 461 N.W.2d at 782-83.

{66} ***State v. Garcia***, 114 N.M. 269, 276, 837 P.2d 862, 869 (1992) (opinion on rehearing), found that where the evidence supported inferences favoring both the greater and lesser offenses, it did not necessarily support either one beyond a reasonable doubt. The upshot was remanding for trial on two lesser included offenses because justice demanded full consideration of the charges. ***Id.*** The implication seems to be that a retrial may be "in the interests of justice" when the jury has not had an opportunity to consider all proper matters in a case. ***Id.*** Even ***Allison***, on which the majority relies (via ***Rutledge***), allows for retrials if they are in the interest of justice. ***Allison***, 409 F.2d at 452; ***see also State v. Darkis***, 2000-NMCA-085, ¶¶ 12, 21, 129 N.M. 547, 10 P.3d 871 (remanding case for trial on lesser included offense when the defendant's instruction was refused by the trial court).

Defendant Has a Due Process Right to

Notice of the Offense with Which He Is Charged; the State Purposefully Chose Not to Charge Defendant with Attempt

{67} By imposing a conviction on an uncharged crime of attempt and remanding for sentencing, we find Defendant guilty of a crime with which he was not charged. The defense mentioned the crime of attempt in their motion for a directed verdict on the permit-related counts, stating that: "[The State] [has] to prove there was a permit in effect, and there wasn't. There wasn't. If they had charged [Defendant] with attempt, ***perhaps*** they could stay in the case at this point, but they didn't." (Emphasis added.) The State thereafter requested no amendment of the indictment to include the charge as conforming to the evidence received at trial. ***See*** Rule 5-204(C) NMRA 2003 ("The court may at any time allow the indictment or information to be amended in respect to any variance to conform to the evidence."). During oral argument before this Court, and later in the supplemental briefing we requested, the State pleaded that if we reverse the convictions, we should remand for resentencing on attempt. The State should have pursued the attempt option below when they had the opportunity.

{68} We consider it to be a "basic proposition that the function of a charge in a criminal case is to provide the defendant with notice of the charges against which the defendant must defend." ***In re Marlon C.***, 2003-NMCA-005, ¶ 9. "[A] defendant in a criminal case is entitled to know with what he is charged and to be tried solely upon the charges against him." ***State v. Crump***, 82 N.M. 487, 491, 484 P.2d 329, 333 (1971). That determination requires consideration of the specific elements of each offense in light of the evidence in the particular case. ***State v. Johnson***, 103 N.M. 364, 371, 707 P.2d 1174, 1181 (Ct. App. 1985); ***State v. Brecheisen***, 101 N.M. 38, 41, 677 P.2d 1074, 1077 (Ct. App. 1984).

{69} "The ***trial court*** can properly consider a lesser-included offense if the evidence at trial would support a conviction for that offense." ***Hernandez***, 1999-NMCA-105, ¶ 25 (emphasis added). In ***Haynie***, the case was remanded on appeal for sentencing on a lesser included offense, but the defendant had conceded at trial that he was guilty of that offense. ***Haynie***, 116 N.M. at 747-48, 867 P.2d at 417-18. Here, the lesser included offense suggested by the majority is a different crime itself, and Defendant admits no guilt.

{70} For a defendant to be found guilty of attempt, the defendant must commit an overt act in furtherance of the commission of the greater offense. ***See*** § 30-28-1. That overt act is not part of the charging document here. The majority relies on ***Gosselin***, 309 N.E.2d at 888, for the general proposition that a completed crime necessarily includes all the elements of an attempt, but this is not all of that case. ***Gosselin*** held that where the element of an overt act in furtherance of the greater crime was not included in the charging document, the defendant was not on notice for the element of attempt to commit the crime and could not be convicted of the lesser offense. ***Id.***

{71} Defendant was not on notice in this case that if a permit did not exist he would be considered to have attempted to violate it. Nor was he on notice that discharging contaminants on the dates the State accused him of violating a permit were alternatively violations committed by acting illegally if there was no permit. Where a different unrelated crime is supported by evidence produced at trial, the trial court still cannot enter a conviction if the defendant is not on notice that he is charged with it. ***State v. McGee***, 2002-NMCA-090, ¶¶ 7-19, 132 N.M. 537, 51 P.3d 1191. Neither should we. To find Defendant acting where no permit exists is to establish a different crime. We found the evidence to be insufficient, and reversed the conviction. The evidence should therefore be viewed as inherently suspect, suggesting that we should hesitate to act, perhaps particularly where we are most certain that the proof supports the elements of another crime. Without notice that there is a new crime to defend, Defendant's due process rights should preclude our finding a new crime of which to convict him.

Legal–as Opposed to Factual–Impossibility Precludes Conviction for Attempt as a Lesser Included Offense in this Case; the Attempt Here is a Completed, Though Different, Crime

{72} Without a permit in place, Defendant was not legally capable of committing the crimes of which he was convicted; his acts would constitute a different crime entirely. In ***State v. Rael***, we held that whether a person was part of a criminal enterprise was a matter of statutory interpretation, which is a question of law, and "not subject to the substantial evidence standard of review." 1999-NMCA-068, ¶ 5, 127 N.M. 347, 981 P.2d 280. We review questions of law de novo. ***Id.*** Here, we determined, after analyzing the permitting requirements of the WQA to see if any inference could support the validity of an expired permit, that there was no legal permit in effect for Defendant to violate. "Interpretation of a statute is an issue of law, not a question of fact." ***State v. Rowell***, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

{73} The State maintained throughout trial and now before this Court that permit DP-854 was, even if expired, a "de facto" permit and that, "[n]o evidence indicated that DP-854 was considered to be invalid or defunct such that continued operations at the disposal site . . . were . . . discharges without a permit." The State obviously recognized the legal necessity of some form of permit to support a conviction under Section 74-6-10.2(A)(1) and (4) if the violation were to involve a permit violation. Although they argued that less than a currently valid permit was required to exist when the crime was committed, we rejected this position, holding that, "[w]e can determine no legal basis for considering that DP-854 was a valid permit at the time Defendant committed the acts for which he was convicted." Majority opinion, ¶ 10. Without the permit, the legal impossibility of committing the crime renders attempt an unchargeable crime.

{74} After reversing the convictions here, the majority went on, and, citing ***Lopez***, 100 N.M. at 292, 669 P.2d at 1087, found that this case is "analogous to cases involving factual impossibilities" and then proceeded to construct a crime of attempted violation of a permit. Majority opinion, ¶ 12. In doing so, I believe the majority missed that what we properly determined was the ***legal*** impossibility of Defendant's ***committing*** the crime. ***Lopez*** made a distinction (that it later abandoned) between legal and factual impossibility in a case involving the defendant's sale of a substance he believed and represented to the buyer as cocaine, but was not. ***Id.*** I believe this case shows the problem with ***Lopez***'s holding that legal and factual impossibility are the same, as Justices Sosa and Federici pointed out in their

dissents. ***Id.*** at 293, 669 P.2d at 1088 (Sosa and Federici, J.J., dissenting). This is particularly so since the legal preclusion of the existence of one element results in a legally separate violation of the statute with regard to a violation of Section 74-6-10.2(A)(1), with which Defendant was charged in other counts in the indictment in this case. With regard to Section 74-6-10.2(A)(4), failing to monitor, sample or report as required by a permit is simply legally impossible to commit absent "a permit issued pursuant to a state or federal law or regulation."

{75} In ***Lopez***, the determination was a factual one; Lopez, who did not know what he sold was other than cocaine, intended to traffic in cocaine, and offered for sale a substance as the illegal drug itself to a police informant. ***Lopez***, 100 N.M. at 292, 669 P.2d at 1087. Our Supreme Court, in its majority opinion, held that this constituted an attempt, because factual impossibility precluded his actually selling cocaine. ***Id.*** The distinction of whether it was actually an illegal drug was eclipsed by the defendant's intent to sell what he believed and represented to buyers to be an illegal substance. ***Id.***

{76} Where the crime is impossible because the completed act itself could not legally be criminal, an impossibility exists that stands outside the context of fact and the defendant's intent or belief. Here, it even constitutes a different crime. Violation of Section 74.6.10.2(A)(1) consists of committing the same acts—the only difference is whether done in violation of a permit or without one when a permit is required. Discharging a contaminant in the absence of a permit is a different violation, as the statute and Defendant's indictment in this case clearly show. This is then the case that the Court in ***Lopez*** did not address, namely where the crime's ***commission*** is impossible, not just its ***completion***.

{77} Unlike in ***Lopez***, the crimes charged here depend on the legal existence of a permit, not a factual question of chemical composition. The trial court wrongly allowed the jury to decide the legal issue of the existence of a permit as an issue of fact. We concluded that it did not exist as a matter of law. "[I]f the intended act is not criminal, there can be no criminal liability for an attempt to commit the crime." ***State v. Lopez***, 81 N.M. 107, 108, 464 P.2d 23, 24 (Ct. App. 1969), ***overruled in part by State v. Ruffins***, 109 N.M. 668, 671, 789 P.2d 616, 619 (1990). With no permit in play, Defendant falls under the other crimes of which he was accused in other counts: illegal dumping and failing to monitor ***without*** a permit. Attempting to violate a permit makes no sense in this context.

Remanding for Sentencing from the Appellate Court Violates Defendant's Rights to Due Process

{78} The majority's reliance on ***Rutledge*** to imply that the U.S. Supreme Court approves this policy is not compelling because the issue of appellate remand for imposition of conviction for the lesser included offense was handled only in dicta, with the Court finding that "[t]here is no need for us now to consider the precise limits on the appellate courts' power to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense." ***Rutledge***, 517 U.S. at 306. As the majority notes, this practice of entering convictions for lesser included offenses is not universally accepted among the Federal Circuits. ***See, e.g., United States v. Duran***, 141 F.3d 1186 (10th Cir. 1998) (unpublished opinion) (recognizing that the practice is allowed in Tenth Circuit survey of other circuits' law); ***Vasquez-Chan***, 978 F.2d at 554. As noted above, ***Shields***, primarily relied upon by the majority, was a split decision. ***Shields***, 722 So. 2d at 588. The four dissenting justices in ***Shields*** joined Texas, Wisconsin, and Alabama in eschewing the practice of employing the ***Allison*** rule to enter judgments of conviction for lesser included offenses on appeal. ***See Ex parte Roberts***, 662 So. 2d 229, 232 (Ala. 1995). The Wisconsin Supreme Court's unanimous opinion in ***Myers***, 461 N.W.2d at 777 thus advances what I believe is a more persuasive analysis of this problem. Myers had been convicted of aggravated battery. The Wisconsin Court of Appeals reversed the conviction because the evidence was insufficient on the element of great bodily harm, but declined to remand the case for entry of judgment of conviction on a lesser included offense, and the State appealed. ***Id.*** at 778. The Supreme Court affirmed the refusal to enter a conviction in a case where the verdict had been reversed for insufficient evidence. ***Id.*** First, the court concluded that a verdict reversed for insufficient evidence was "too suspect a determination of guilt for an appellate court to use as the basis for ordering conviction of a lesser included offense for which no instruction had been submitted to the jury." ***Id.*** at 780. Second, the Court concluded that "directing the entry of a judgment of conviction . . . after reversal of the conviction for insufficient evidence does not comport with the underlying principles governing [jury instructions concerning] lesser included offenses and the role of the [trial] court vis-à-vis the parties and counsel in instructing juries." ***Id.*** Finally, it concluded (as did the Court of Appeals) that by requesting the modification of judgment, the State was changing its trial strategy and objecting on appeal to jury instructions to which it entered no objection at trial. ***Id.***

CONCLUSION

{79} The majority's chosen path is not so easily resolved by concentrating on evidence that is "necessarily found," nor charges that are "necessarily included." In many ways, the charges do not match up so congruently. The State caused its problem at trial by consciously, purposefully failing to preserve ***their*** right to have a lesser included offense considered. The State in fact had no inclination toward an attempt charge until they realized they faced reversal of the only convictions they had in the case when the "de facto" permit showed itself to be less than secure. We know an attempt was not considered as a charge below. From our perch, we cannot presume that the defense would not have a different strategy defending an attempt or other charge than the original charge. We cannot presume the way a jury would view all the evidence once it is submitted. We therefore should decline to allow the State to reverse its trial strategy by asking us to do on appeal what they did not seek to accomplish below. We consistently deny such relief to criminal defendants who did not seek lesser included instructions; there is no reason to accord the State more leeway. In light of the foregoing reasons, I conclude that a different path would have been more appropriate for this case.

RODERICK T.
KENNEDY, Judge