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

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico
Filed 2/20/2024 11:10 AM

3 Plaintiff-Appellant,



Cynthia A. Hernandez-Madrid
Acting Chief Clerk

4 v.

No. A-1-CA-40565

5 **YURIDIA RODRIGUEZ a/k/a JUDY**
6 **RODRIGUEZ a/k/a YURIDIA RODRIGUEZ-**
7 **RUIZ a/k/a YORIDIA RODRIGUEZ a/k/a**
8 **YURIDIA RUIZ RODRIGUEZ a/k/a YURIDIA**
9 **RAMIREZ a/k/a YURIDIA R. RODRIGUEZ,**

10 Defendant-Appellee.

11 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**
12 **Douglas R. Driggers, District Court Judge**

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18 for Appellant

19 Bennett J. Baur, Chief Public Defender
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21 Santa Fe, NM

22 for Appellee

1 **MEMORANDUM OPINION**

2 **YOHALEM, Judge.**

3 {1} The State appeals from an order of the district court revoking and reinstating
4 Defendant Yurida Rodriguez’s probation. The State argues that the district court
5 violated NMSA 1978, Section 31-20-5(B)(2) (2003), when it awarded credit toward
6 completion of Defendant’s probation for time Defendant spent in custody as a
7 sanction for a parole violation. Because the State failed to preserve this issue, or
8 indeed any issue concerning the length of Defendant’s remaining probation, and
9 failed to provide this Court with the record necessary for review of this issue, we
10 affirm.

11 **BACKGROUND**

12 {2} At a May 26, 2022, probation revocation hearing in the district court,
13 Defendant admitted to a probation violation. The district court accepted the
14 admission and entered an order stating that the case would proceed to sentencing. A
15 few days later, the prosecutor of record in the case filed a request for a presentment
16 hearing. The request for a presentment hearing informs the district court and the
17 parties that an “[i]ssue regarding probation credit while serving parole violation
18 sanction” needs to be heard. The district court noticed the presentment hearing for
19 June 23, 2022.

1 {3} At the outset of the hearing, the district court stated that it had reviewed the
2 State’s proposed order revoking probation. The district court told the parties that it
3 also had reviewed a “lengthy response, point-by-point response, to the order” that
4 was emailed by defense counsel. The court then asked the State if they had received
5 a copy of this email. The prosecutor representing the State at the hearing replied:
6 “This prosecutor, is unaware, your Honor, because I’m just filling in. But I’m sure
7 [defense counsel] probably sent it to [the prosecutor of record].”

8 {4} The court then proceeded to rule that “this defendant gets credit that was
9 denied her in the [proposed] order revoking probation so make sure you excise from
10 this [proposed] order, what where it’s stated she did not get credit for that time.” The
11 district court then asked the State to draft the order and submit it to the court for
12 signature. The final order revoking probation, imposing judgment, and partially
13 suspending sentence was submitted to the district court later that day by the
14 prosecutor who had appeared at the hearing, with her signature noting the State’s
15 approval. The defense noted its approval as well and the district court entered the
16 order on June 23, 2022.

17 {5} The district court’s June 23, 2022, order revoking probation, imposing
18 judgment, and partially suspending sentence, explains the court’s decision to grant
19 the probation credit at issue on appeal as follows:

20 The issue before the [c]ourt was the State not having included as
21 probation credit the time . . . Defendant was in custody serving a parole

1 violation sanction, and . . . Defendant’s objection to said exclusion. The
2 [c]ourt agreed with . . . Defendant’s position that the [c]ourt could not
3 order the exclusion after the fact and that it constituted an increase in
4 sentence. The [c]ourt, therefore, FINDS that . . . Defendant shall be
5 given probation credit for the time . . . Defendant was serving her parole
6 violation sanction in the custody of the New Mexico Corrections
7 Department.

8 {6} The State appealed. We note that the record on appeal does not include (1) the
9 State’s proposed order to revoke probation that was the subject of the June 23, 2022,
10 presentment hearing; or (2) the defense’s point-by-point response objecting to the
11 exclusion of the time Defendant was in custody for a parole violation from the period
12 of probation remaining to be served.

13 **DISCUSSION**

14 **I. Lack of Preservation**

15 {7} The State acknowledges that it failed to make any argument at the presentation
16 hearing on the question noticed for hearing: whether Defendant was entitled to
17 probation credit for the time she was in custody serving a parole violation sanction.
18 This is, of course, the question the State now raises on appeal. The State argues that
19 its failure to preserve should be excused under the exception, which allows this Court
20 to review an unpreserved issue when a party had no opportunity to object to the
21 district court’s ruling at the time the ruling was made. *See* Rule 12-321(A) NMRA
22 (“If a party has no opportunity to object to a ruling or order at the time it is made,
23 the absence of an objection does not thereafter prejudice the party.”). The State

1 claims that the procedure followed by the district court in proceeding to rule after
2 the prosecutor told the court she had not seen the defense's argument deprived the
3 State of any opportunity to object or to address the court's ruling that Defendant was
4 entitled to credit towards her probation for time served in custody on a parole
5 violation. We disagree that an exception to preservation applies and explain.

6 {8} The record shows that the State filed a request for a presentment hearing to
7 address the very issue the prosecution now claims it was precluded from addressing.
8 The State cannot, therefore, claim that it was not on notice weeks before the
9 presentment hearing of the issue to be heard. Further, at the hearing, the prosecutor
10 did not claim that the defense had failed to serve the State with its argument on the
11 probation credit issue. In fact, the prosecutor acknowledged that the State had almost
12 certainly been properly served. The State also does not claim on appeal that it was
13 not properly served. The State has cited no authority for the proposition that
14 substitute counsel is excused from preparation for a hearing, or excused from
15 consulting with counsel of record to obtain any pleadings relevant to the hearing.
16 We are aware of no authority that supports this proposition and assume that none
17 exists. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482.

18 {9} The State also fails to present any argument as to why its counsel could not
19 have objected to the district court's ruling and asked for reconsideration after having

1 prepared the proposed order. State’s counsel instead noted the State’s approval of
2 the order.

3 {10} Thus, the circumstances here, do not support the State’s argument that it had
4 no opportunity to object to the sentencing decision made by the district court. *Cf.*
5 *State v. Jimenez*, 2004-NMSC-012, ¶¶ 10-11, 135 N.M. 442, 90 P.3d 461 (holding
6 that the defense had no opportunity to object and could raise the issue for the first
7 time on appeal, where there was no notice of the issue that would be considered prior
8 to the hearing, the issue was not raised at the hearing and appeared only in the final
9 order entered by the district court).

10 {11} Moreover, this is a case where the failure to preserve the question raised on
11 appeal has made our review difficult, if not impossible. Our preservation rule serves
12 many purposes: “it provides the lower court an opportunity to correct any mistake,
13 it provides the opposing party a fair opportunity to show why the court should rule
14 in its favor, and it creates a record from which this Court may make informed
15 decisions.” *State v. Joanna V.*, 2003-NMCA-100, ¶ 7, 134 N.M. 232, 75 P.3d 832,
16 *aff’d*, 2004-NMSC-024, ¶ 7, 136 N.M. 40, 94 P.3d 783. The record in this case is
17 inadequate.

18 {12} In addition to not preserving the issue it raises on appeal in the district court,
19 the State also has not provided this Court with an adequate record for review. The
20 State, as the appellant, has the obligation to present an adequate record on appeal.

1 *See Dillard v. Dillard*, 1986-NMCA-088, ¶ 6, 104 N.M. 763, 727 P.2d 71 (“It is
2 quite clear that it is [an appellant]’s duty to see that the record necessary to review
3 alleged errors is before th[is C]ourt.”); *see also Jeantete v. Jeantete*, 1990-NMCA-
4 138, ¶ 9, 111 N.M. 417, 806 P.2d 66 (“An appellant has the duty of providing an
5 adequate record sufficient to review the issues raised on appeal.”). In failing to
6 include in the record on appeal the proposed order that was the subject of the
7 presentment hearing, or to provide the written, point-by-point argument made by
8 defense counsel and relied on by the district court at the presentment hearing, we are
9 left only with the district court’s written judgment to review and the argument of
10 counsel for the State in its briefing on appeal.

11 **CONCLUSION**

12 {13} Because the State has failed to preserve its challenge to the ruling of the
13 district court and has not provided this Court a record on appeal that allows review
14 of the district court’s decision on its merits, we apply our presumption of correctness
15 and affirm. *See Michaluk v. Burke*, 1987-NMCA-044, ¶ 25, 105 N.M. 670, 735 P.2d
16 1176 (“Where the record on appeal is incomplete, the ruling of the trial court is
17 presumed to be supported by the evidence.”); *see also Corona v. Corona*, 2014-
18 NMCA-071, ¶ 26, 329 P.3d 701 (“The appellate court presumes that the district court
19 is correct, and the burden is on the appellant to clearly demonstrate that the district
20 court erred.”).

1 {14} IT IS SO ORDERED.

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3


JANE B. YOHALEM, Judge

4 WE CONCUR:

5 
6 KRISTINA BOGARDUS, Judge

7 
8 ZACHARY A. IVES, Judge