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

Court of Appeals of New Mexico
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2 **STATE OF NEW MEXICO,**



Ramon J. Maestas
Chief Clerk

3 Plaintiff-Appellant,

4 v.

No. A-1-CA-41046

5 **ERIC BERNARD LAATE,**

6 Defendant-Appellee.

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

8 **Louis E. DePauli, Jr., District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Emily Bowen, Assistant Attorney General

12 Albuquerque, NM

13 for Appellant

14 Bennett J. Baur, Chief Public Defender

15 Nina Lalevic, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellee

1 **DISPOSITIONAL ORDER**

2 **HENDERSON, Judge.**

3 **THIS MATTER** is on appeal from the district court’s order granting
4 Defendant’s motion to reconsider, and excluding witnesses not timely disclosed by
5 the State.¹ We note the following:

6 1. The State argues that the district court failed to “adequately explain its
7 reasoning [for excluding witnesses], did not consider lesser sanctions, and abused
8 its discretion when it imposed the most extreme sanction for a violation that had
9 been cured.”

10 2. “The decision to exclude evidence calls on judicial discretion to weigh
11 all the circumstances, including willfulness in violating the discovery rule, the
12 resulting prejudice to the opposing party, and the materiality of the precluded
13 testimony.” *State v. Guerra*, 2012-NMSC-014, ¶ 33, 278 P.3d 1031.

14 3. In *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, our
15 Supreme Court “embraced a pragmatic approach to guide courts in assessing
16 whether the sanction of witness exclusion is appropriate.” *State v. Le Mier*, 2017-

¹On the day of trial, the State failed to appear and the district court granted dismissal in favor of Defendant orally. However, no written order was filed and therefore the dismissal is not a final order. *See State v. Lohberger*, 2008-NMSC-033, ¶ 20, 144 N.M. 297, 187 P.3d 162 (“While not all written orders are final, all final orders must be written, must be formal, and must contain decretal language.” (internal quotation marks and citation omitted)).

1 NMSC-017, ¶ 15, 394 P.3d 959. This approach requires “assess[ing] (1) the
2 culpability of the offending party, (2) the prejudice to the adversely affected party,
3 and (3) the availability of lesser sanctions.” *Id.*

4 4. It is not necessary for “all of the *Harper* considerations [to] weigh in
5 favor of exclusion.” *Le Mier*, 2017-NMSC-017, ¶ 20. However, “[c]ourts must
6 evaluate the considerations identified in *Harper*—culpability, prejudice, and lesser
7 sanctions—when deciding whether to exclude a witness and *must explain their*
8 *decision to exclude or not to exclude a witness within the framework articulated in*
9 *Harper.*” *Id.* (emphasis added).

10 5. Under our Supreme Court’s holding in *Le Mier*, a district court is
11 required “to not only weigh the degree of culpability and extent of prejudice, but
12 also explain its decision regarding applicability of lesser sanctions on the record.”
13 *State v. Lewis*, 2018-NMCA-019, ¶ 12, 413 P.3d 484.

14 6. We have carefully reviewed the briefs, applicable law, and arguments
15 made by the parties. We have also reviewed the entire record.

16 7. We conclude that the district court failed to provide on-the-record
17 consideration of the availability of lesser sanctions. Although the district court’s
18 order contemplates the State’s culpability and prejudice against both Defendant and
19 the court, the order fails to consider a sanction lesser than exclusion. Similarly, the

1 district court failed to provide a discussion in consideration of any lesser sanctions
2 during the hearing in which it granted Defendant's motion.

3 8. Because the record in this case does not contain a discussion of the
4 consideration of lesser available sanctions, the record is inadequate for this Court to
5 determine whether the district court abused its discretion in imposing the extreme
6 sanction of witness exclusion. *See Lewis*, 2018-NMCA-019, ¶ 12. Therefore, the
7 exclusion of witnesses in this case "cannot presently be evaluated or justified by this
8 Court, and we must reverse and remand the matter to the district court for further
9 proceedings." *Id.*

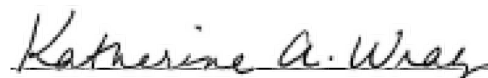
10 9. We make no determination regarding whether total witness exclusion
11 was an appropriate sanction in this case and reverse the district court's order and
12 remand with instructions for the district court to reinstate the case for further
13 consideration in light of this order.

14 **IT IS SO ORDERED.**

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16 _____
16 **SHAMMARA H. HENDERSON, Judge**

17 **WE CONCUR:**

18 
19 _____
19 **GERALD E. BACA, Judge**

20 
21 _____
21 **KATHERINE A. WRAY, Judge**