

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,**

3 Plaintiff-Appellant,



Mark Reynolds

4 v.

**No. A-1-CA-42971**

5 **DAVID ROBERT CIPRIANO BERNAL,**

6 Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

8 **Conrad F. Perea, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Henry Chynoweth, Assistant Solicitor General

12 Albuquerque, NM

13 for Appellant

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15 Santa Fe, NM

16 Luz C. Valverde, Assistant Appellate Defender

17 Albuquerque, NM

18 for Appellee

19 **MEMORANDUM OPINION**

20 **WRAY, Judge.**

21 {1} The State appeals from the district court's order excluding a witness. We

22 issued a notice of proposed summary disposition, proposing to affirm, and the State

23 has responded with a timely memorandum in opposition, which we have duly

24 considered. We remain unpersuaded that our initial proposed disposition was

1 incorrect, and we therefore affirm. However, for the reasons set out below, we  
2 remand with instruction to vacate the district court’s October 10, 2025 order,  
3 dismissing the appeal.

4 {2} We briefly set out the relevant factual and procedural background relative to  
5 the district court’s order excluding the witness. Defendant was arraigned on one  
6 count of battery against a household member on February 24, 2025. [RP 1, 13] On  
7 April 1, 2025, the district court entered an order assigning the case to Track 1,  
8 pursuant to the local case management rule, LR3-303(I) NMRA, which required the  
9 district court to enter a scheduling order setting specific deadlines for discovery and  
10 trial. *See* LR3-303(J) (“At the conclusion of the status hearing, the court shall issue  
11 a scheduling order, which assigns the case to one (1) of three (3) tracks . . . and which  
12 identifies the dates when events required by that track shall be scheduled.”). [RP 62]

13 {3} The district court entered a scheduling order the same day that it set the trial  
14 date for September 22, 2025. *See* LR3-303(K)(1) (requiring that trials for Track 1  
15 cases commence within 210 days of arraignment). [RP 63] The date for completion  
16 of witness interviews was July 24, 2025, which was sixty days before the trial date.  
17 *See* LR3-303(K)(1)(h) (setting the date for completion of witness interviews as “not  
18 less than sixty (60) days before the trial date” in Track 1 cases).

19 {4} On July 9, 2025, Defendant served a notice of statement of the complaining  
20 witness, Ms. Olivas, for a pretrial interview to occur on July 24, 2025. [RP 69, 71]

1 See Rule 5-503(A) NMRA (“A party may obtain the statement of the person by  
2 serving a written ‘notice of statement’ upon the person to be examined and upon  
3 each party not less than five (5) days before the date scheduled for the statement.”).  
4 Ms. Olivas did not appear for the interview, and on July 30, 2025, Defendant filed a  
5 motion to dismiss seeking exclusion of Ms. Olivas as a witness, and, alternatively,  
6 dismissal of the case. [RP 70-72]

7 {5} The State filed an untimely response to the motion on August 21, 2025, which  
8 the district court refused to consider. [RP 75; FTR 8/21/20251:34:50] See generally  
9 Rule 5-120(E) NMRA (“Unless otherwise specifically provided in these rules, a  
10 written response shall be filed within fifteen (15) days after service of the motion.”).  
11 The district court held a hearing on Defendant’s motion on August 21, 2025, after  
12 which it orally granted Defendant’s motion to dismiss. [FTR 8/21/2025: 1:47:43] In  
13 its subsequently issued written order, the district court found that the State’s witness  
14 had not made herself available and no pretrial witness interview had been conducted  
15 by the July 24, 2025 deadline, as required under LR3-303(K)(1)(h). [RP 82-83] The  
16 district court further found:

17 The State, due to its witness, is culpable. There is prejudice to . . .  
18 Defendant based on the State’s failure to make the witness available for  
19 a pretrial interview and there is detriment to Defendant’s case with trial  
20 being so close in proximity. For example, Ms. Olivas may be on  
21 probation and the reasons may be critical to Defendant’s defense.

1 [RP 83] The district court also stated that its decision to exclude the witness was a  
2 lesser sanction than outright dismissal. [RP 83]

3 {6} On August 26, 2025, after the district court made its oral ruling to exclude Ms.  
4 Olivas, but before it entered its written order, the State filed a motion to reconsider  
5 in which it asserted that its victim advocate contacted Ms. Olivas after the August  
6 21, 2025 hearing, to inform her that she had been excluded as a witness. [RP 79] The  
7 State further represented that “Ms. Olivas advised that [D]efendant had influenced  
8 her and promised to marry her if she did not attend her interview. Ms. Olivas asserted  
9 she failed to appear due to [D]efendant’s actions, and she would now like to assist  
10 in the case.” [RP 80] On September 9, 2025, the district court denied the motion to  
11 reconsider without a hearing, and the State appeals. [RP 85]

12 {7} “The propriety of a trial court’s decision to exclude or not to exclude witnesses  
13 is reviewed for abuse of discretion.” *State v. Le Mier*, 2017-NMSC-017, ¶ 22, 394  
14 P.3d 959; *see State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25.  
15 In its memorandum in opposition, the State contends that the district court erred in  
16 denying its motion to reconsider. [MIO 2, 9-10] To the extent the State argues the  
17 district court was required to overturn its order excluding Ms. Olivas in light of the  
18 revelation contained in its motion to reconsider, we disagree. The district court could  
19 reasonably decline to consider the State’s late offered explanations for her absence.  
20 The State’s motion to reconsider recounts only that the victim advocate contacted

1 Ms. Olivas *after* the August 21, 2025 hearing, when she was excluded as a witness.  
2 [RP 80] However, it provides no account for why the State did not contact Ms. Olivas  
3 prior to the hearing, at which time Defendant could have responded to the State’s  
4 allegations regarding the reason for her absence. The State also cites to no authority  
5 to suggest the district court was required to accept the recitation contained in its  
6 motion to reconsider as fact and to reconsider its ruling or convene a hearing on that  
7 basis. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (stating that  
8 where a party cites no authority in support of a proposition, we assume no such  
9 authority exists). Under these circumstances, we perceive no abuse of discretion in  
10 the district court’s denial of the State’s motion to reconsider. *See generally Beggs v.*  
11 *City of Portales*, 2013-NMCA-068, ¶ 28, 305 P.3d 75 (recognizing that “[t]o the  
12 extent [the p]laintiffs’ motion for reconsideration raised new matters that could have  
13 been raised during the [briefing stage] but were not, such failure would provide a  
14 basis [for] . . . denial of the motion”).

15 {8} The State next argues that this Court should consider its arguments on appeal  
16 that the *Harper/LeMier* factors did not weigh in favor of witness exclusion, despite  
17 the fact that the district excluded its late filed response to the motion to dismiss, and  
18 the State conceded at the August 21, 2025 hearing, that witness exclusion was the  
19 more appropriate remedy than dismissal. [MIO 1-7] We disagree. We first reject the  
20 State’s argument that its untimely response to Defendant’s motion to dismiss

1 sufficiently preserved its arguments against witness exclusion. As noted, the  
2 response was late, and the district court ruled it would not be considered. While, as  
3 the State notes, the district court discussed the State’s response at some length during  
4 the August 21, 2025 hearing, this was mostly done to highlight the inappropriate and  
5 offensive tone of the response and to offer guidance regarding citation to the relevant  
6 cases for future filings, not to consider any substantive arguments made by the State  
7 on the legal issues before the district court. [MIO 5-6; FTR 8/21/2025: 1:46:03-  
8 1:47:43] Moreover, the State acknowledged at the hearing that it understood the  
9 district court would not be considering its untimely response and made no argument  
10 that it should. [FTR 8/21/2025: 1:41:07-17]

11 ¶ Additionally, the State did not argue against witness exclusion in its oral  
12 presentation during the August 21, 2025 hearing. *See State v. Montoya*, 2015-  
13 NMSC-010, ¶ 45, 345 P.3d 1056 (recognizing that to preserve an issue for appeal, a  
14 party “must make a timely objection that specifically apprises the trial court of the  
15 nature of the claimed error and invokes an intelligent ruling thereon” (internal  
16 quotation marks and citation omitted)). When considering “whether the sanction of  
17 witness exclusion is appropriate, *Harper* instructs our courts to assess (1) the  
18 culpability of the offending party, (2) the prejudice to the adversely affected party,  
19 and (3) the availability of lesser sanctions.” *Le Mier*, 2017-NMSC-017, ¶ 15. With  
20 respect to both the culpability and prejudice factors, the State made no argument.

1 The State’s only argument directed at any of the *Harper/LeMier* factors went to the  
2 availability of lesser sanctions. On this factor, the State argued dismissal was not an  
3 appropriate remedy and that the lesser sanction of witness exclusion was appropriate.

4 [FTR 8/21/2025: 1:42:25]

5 {10} We understand the State to argue that the prosecutor was only making a  
6 general statement regarding witness exclusion as a remedy broadly, and that he did  
7 not intend to suggest that any sanction was actually warranted here. [MIO 5-6] In  
8 any case, this was the only argument made by the State regarding lesser sanctions.  
9 Critically, the State did not argue that witness exclusion should not be granted in this  
10 case, nor did it argue that any lesser sanction should be imposed. *See Montoya*, 2015-  
11 NMSC-010, ¶ 45.

12 {11} For these reasons, we do not address the State’s arguments made for the first  
13 time on appeal. [MIO 7-12] *See id.*; *see also State v. Druktenis*, 2004-NMCA-032,  
14 ¶ 122, 135 N.M. 223, 86 P.3d 1050 (“[G]enerally, [we] will [not] address issues not  
15 preserved below and raised for the first time on appeal.”). Referring the State to our  
16 analysis of the district court’s application of the *Harper/LeMier* factors set out in the  
17 notice of proposed summary disposition, we find no abuse of discretion in the district  
18 court’s decision to exclude the witness, and we therefore reject this assertion of error.

19 {12} As a final matter, we address the procedural posture of this case. As set out in  
20 detail in the notice of proposed summary disposition, the State timely appealed the

1 district court’s order excluding Ms. Olivas as a witness, and we therefore have  
2 jurisdiction over this appeal. However, for the sake of clarity, we restate the facts  
3 and legal principles relevant to this issue. On August 21, 2025, the district court held  
4 a hearing on Defendant’s motion to dismiss, during which it indicated its intention  
5 to grant the State’s motion to exclude the witness. [FTR 8/21/2025: 1:47:00] On  
6 August 26, 2025, the State filed a motion to reconsider, asking the district court to  
7 rescind its order excluding the witness. [RP 79]

8 {13} On September 3, 2025, the district court entered a written order granting  
9 Defendant’s motion to exclude the State’s witness. [RP 82] On September 9, 2025,  
10 the district court entered a written order denying the State’s motion to reconsider.  
11 [RP 85] On September 11, 2025, the State filed a notice of appeal in the district  
12 court, in which it stated that it was appealing the district court’s “[o]rder entered on  
13 September 9, 2025, denying the State’s [m]otion to [r]econsider the [c]ourt’s earlier  
14 [o]rder dated August 26, 2025.” [RP 86] The State’s notice of appeal was therefore  
15 filed within ten days of both the district court’s written order excluding the witness  
16 and its written order denying the motion for reconsideration. *See* NMSA 1978, § 39-  
17 3-3(B)(2) (1972) (providing that the state has a statutory right to appeal in any  
18 criminal proceeding “within ten days from a decision or order of a district court  
19 suppressing or excluding evidence or requiring the return of seized property”); Rule

1 12-201(A)(1)(a) NMRA (allowing ten days to file a notice of appeal from an order  
2 excluding evidence).

3 {14} On September 17, 2025, the State filed a motion to vacate the trial set for  
4 September 22, 2025, noting that it had filed a notice of appeal of the witness  
5 exclusion order. [RP 91] On September 23, 2025, Defendant filed a motion to  
6 dismiss for violation of LR3-303(K)(1). [RP 102-104] On October 6, 2025, the State  
7 filed an emergency motion to cancel the trial setting and stay the proceedings  
8 pending appeal. [RP 106] On October 10, 2025, the district court entered an order  
9 granting Defendant’s motion to dismiss. [RP 120] In its order, the district court  
10 stated that the State did not have an appeal of right of its order denying the motion  
11 to reconsider, and the case was therefore not subject to an automatic stay. [RP 121]  
12 The district court also stated that “[t]he denial of the reconsideration was also not a  
13 final order of this [c]ourt.” [RP 121]

14 {15} As we have explained, the State had a right to appeal the order denying the  
15 motion to reconsider the order excluding a witness. *See State v. Chavez*, 2023-  
16 NMCA-071, ¶ 12, 535 P.3d 736 (“Here, the [s]tate timely filed its notice of appeal  
17 within ten days of the district court’s order on its motion for reconsideration: the  
18 order denying the motion for reconsideration was filed on July 27, 2020, and the  
19 [s]tate timely filed its notice of appeal three days later, on July 30, 2020. Therefore,  
20 the [s]tate’s interlocutory appeal is properly before this Court.”), *rev’d on other*

1 *grounds*, 2025-NMSC-036, 578 P.3d 1151; *State v. Suskiewich*, 2014-NMSC-040,  
2 ¶ 8, 339 P.3d 614 (recognizing that “the [s]tate’s notice of appeal is not necessarily  
3 invalid merely because it refers to the district court order denying the motion to  
4 reconsider, rather than referencing the underlying, appealable suppression order”);  
5 *see generally* Rule 12-312(C) NMRA (“An appeal filed within the time limits  
6 provided in these rules shall not be dismissed for technical violations of Rule 12-202  
7 [NMRA] which do not affect the substantive rights of the parties.”).

8 {16} We also clarify that, at the time the State filed its notice of appeal, the district  
9 court lost jurisdiction to dismiss the underlying criminal case. *See State v. Gutierrez*,  
10 2011-NMCA-088, ¶ 6, 150 N.M. 505, 263 P.3d 282 (recognizing that “[i]n general,  
11 [the] trial court loses jurisdiction [over] a case upon the filing of the notice of appeal,  
12 except for the purposes of perfecting [the] appeal, or of passing upon a motion  
13 directed to the judgment pending at the time” (internal quotation marks and citation  
14 omitted)); *State v. McClaugherty*, 2008-NMSC-044, ¶ 23, 144 N.M. 483, 188 P.3d  
15 1234 (recognizing that a pending appeal divests the district court of jurisdiction to  
16 address a motion requesting further action that will affect the judgment that is the  
17 subject of the appeal); *see also State v. Clemons*, 1972-NMCA-052, ¶ 8, 83 N.M.  
18 674, 496 P.2d 167 (stating that the taking of an appeal completely divests the district  
19 court of jurisdiction as the taking of an appeal removes the litigation from the district  
20 court).

1 {17} In summary, the State timely filed an appeal of right in this matter, and the  
2 district court thereafter had no jurisdiction to dismiss the case during the pendency  
3 of the appeal. We express, however, no opinion regarding the merits of the district  
4 court’s decision to dismiss the case. We merely hold that that district court was  
5 without jurisdiction when it entered the order. Accordingly, the State’s “Motion for  
6 Determination of Jurisdiction and to Vacate the [d]istrict [c]ourt’s October [10],  
7 2025 [o]rder” is **GRANTED**. The district court’s October 10, 2025 order, dismissing  
8 the criminal case is hereby **VACATED**, and this case is remanded to the district  
9 court for further proceedings consistent with this opinion.

10 {18} **IT IS SO ORDERED.**

11   
12 **KATHERINE A. WRAY, Judge**

13 **WE CONCUR:**

14   
15 **JACQUELINE R. MEDINA, Chief Judge**

16   
17 **JENNIFER L. ATTREP, Judge**