NOT DESIGNATED FOR PUBLICATION

No. 125,193

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

AUSTIN REY HINOJOSA,
Appellee.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Opinion filed April 7, 2023. Reversed and remanded.

Shawn M. Boyd, deputy county attorney, *Todd Thompson*, county attorney, and *Derek Schmidt*, attorney general, for appellant.

Thomas J. Bath Jr. and *Tricia A. Bath*, of Bath & Edmonds, P.A., of Leawood, for appellee.

Before ISHERWOOD, P.J., MALONE and WARNER, JJ.

PER CURIAM: The State appeals the district court's dismissal with prejudice of its rape charge against Austin Rey Hinojosa as a sanction for an alleged discovery violation committed by the State. We find that the drastic sanction of dismissal with prejudice was not required to serve the interests of justice in this case and that other remedies were available to the district court to protect Hinojosa's rights to a fair trial. Thus, we reverse the district court's dismissal with prejudice order and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

R.S. and Hinojosa met when they matched on Tinder in October 2017. After chatting over the phone for about a week, they decided to find a time to meet up for an in-person date. On October 20, 2017, Hinojosa picked up R.S. from her house around 6:15 p.m. R.S. recalled that the date was a "meet-and-greet hangout type of thing" and that they planned to "watch a movie, eat some food, have a few drinks, and that was it." R.S. remembered having two beers before Hinojosa picked her up because she was a little nervous. She also brought supplies to make cocktails on the date. After picking her up, Hinojosa drove to a campground in a park near the river and settled down to have a picnic and watch a movie on R.S.'s iPad.

Once at the campground, R.S. made several drinks for herself and Hinojosa in mason jars that she brought with her. R.S. had two drinks—totaling about 4 ounces of Captain Morgan—while at the park. R.S. and Hinojosa laid down on a blanket to watch a movie; Hinojosa put his arm around R.S.'s shoulder, and they briefly kissed. At some point near the beginning of the movie, R.S. left to find a restroom—she left her drink behind and returned less than five minutes later. After returning, the pair continued to watch the movie but, at some point about an hour later, R.S. lost consciousness. She woke up to the credits of the movie rolling and then felt Hinojosa's hand going up her inner thigh and noticed that the top button of her shorts was undone. R.S. told Hinojosa "[w]e can't do this," and she said he became upset and started yelling at her. R.S. began to feel scared and unsafe as Hinojosa got angry, so she called her brother to pick her up because she did not want to get back in Hinojosa's car. She told Hinojosa that she found another ride, and he left her at the campground. R.S. kept the mason jars that the mixed drinks had been in—she would turn them over to law enforcement the next day.

When R.S. got home, she "had a few suspicions on something had happened, but I wasn't sure what had happened." She then spoke to her mother about "getting an entire

rape kit done" and decided to go to the hospital "to make sure everything was okay" and "probably get some answers." R.S. later testified that she did not consent to any form of sexual intercourse during the date with Hinojosa.

In the early morning hours of October 21, 2017, Jennifer Green, a sexual assault nurse examiner and manager of the clinical forensic care program at Saint Luke's Health System, performed a sexual assault examination on R.S. The examination revealed "abrasions on the outside and inside of [R.S.'s] vaginal area." Green found that R.S. had been penetrated vaginally based on the injuries and some active bleeding she sustained. She also noted that R.S. had several hickeys on her chest and neck that she could not account for. Green later testified that R.S. was alert and oriented during the examination but showed signs of intoxication and smelled of alcohol.

The Leavenworth Police Department began investigating the matter soon afterward but by the time a detective could contact Hinojosa, he had left the country and was on assignment for the military in Germany. Hinojosa did not give a statement. He did provide DNA samples through the Criminal Investigation Division of the military, which were later provided to the Leavenworth police.

Based on R.S.'s report of losing consciousness, the State asked the Kansas Bureau of Investigation (KBI) to have a forensic toxicologist test for drugs present in samples taken during R.S.'s sexual assault examination as well as in the mason jars that she and Hinojosa had been drinking from. Notably, the State did not request any analysis into R.S.'s blood alcohol content (BAC) at that time. The KBI found no traces of controlled substances (other than those R.S. had been prescribed) in R.S.'s urine and found no GHB or GBL—known as date rape drugs—in the mason jars and liquid.

On December 20, 2018—14 months after the incident—the State charged Hinojosa with one count of rape committed while R.S. was unconscious or physically

powerless, a level 1 person felony, in violation of K.S.A. 2017 Supp. 21-5503(a)(1)(B). Assistant district attorney, Michael Jones, was in charge of the State's case. The next month, the parties signed and filed a reciprocal discovery order, requiring both to comply fully with all discovery obligations in K.S.A. 2017 Supp. 22-3212 and for the State to maintain an "'open-file'" policy. The order also required Hinojosa to provide materials such as the names of his experts and witnesses in return for the State providing any forensic reports.

The district court held a preliminary hearing on June 12, 2019. R.S., Green, and members of the Leavenworth Police Department testified for the State. R.S. testified extensively in both direct and cross-examination about the amount of alcohol she had consumed on the evening of the incident. Green testified about the results of her sexual assault examination of R.S., and she stated that R.S.'s blood was not examined for alcohol at the hospital. After hearing the evidence, the district court found probable cause to support the rape charge and bound Hinojosa over for trial. Hinojosa was arraigned on June 26, 2019, and his jury trial was later scheduled for December 16, 2019.

During August and October 2019, the State moved to admit expert testimony from several KBI scientists as well as lab reports from those scientists. The substance of these reports and the experts' testimony concerned the findings of R.S.'s sexual assault examination and DNA testing of Hinojosa.

On November 13, 2019, Jones contacted the KBI and asked for R.S.'s blood to be tested for BAC. Jones later testified that he could not recall why he determined there was a need to test R.S.'s blood for alcohol at that time, explaining it was simply in preparation for trial upon realizing that her BAC had not been tested. Jones did not notify the district court or Hinojosa at that time that he had requested the KBI to perform the test.

The district court held a pretrial conference on November 15, 2019. Hinojosa expressed his intention to waive a jury trial and other trial matters were discussed. Jones said nothing at this hearing about his request for the BAC testing.

The BAC analysis—called KBI report No. 8—was completed by the KBI on November 27, 2019. The KBI forensic toxicologist later testified that the test result was "released"—meaning it was available for law enforcement to download—on December 3, 2019. The test results were received by the police department on December 9, 2019, and by the prosecutor's office the next day. The test concluded that R.S. had a BAC of 0.12 grams per 100 milliliters of blood. Jones emailed Hinojosa's attorney with the BAC results on December 10, 2019, at 1:37 p.m., the same day he received the results, but he did not follow up to ensure that counsel had read the email.

The next day, Hinojosa waived his right to a jury trial. The State did not mention the newly produced KBI tests during the hearing and agreed to Hinojosa's waiver. On December 12, 2019, the day after the waiver hearing, the State formally produced the BAC lab report to Hinojosa's attorney. Four days later, Hinojosa moved to suppress the KBI report, arguing it was surprise evidence and should have been produced within 21 days of his arraignment under K.S.A. 2017 Supp. 22-3212. Hinojosa argued that although R.S.'s blood had been collected hours after the incident in October 2017, the BAC test was not performed for over two years, and the results only shared with him six days before trial. The State responded that the BAC report did not constitute a surprise because Hinojosa knew that R.S.'s level of intoxication was at issue and that the KBI report "simply provide[d] some evidence of that element and should be admissible."

The district court took up the suppression motion on December 18, 2019, the day of Hinojosa's scheduled bench trial. This hearing was just a few days before Hinojosa's statutory speedy trial deadline. The district court asked Jones about the delay in the BAC testing, and he responded: "I can't speak for the KBI. The—the KBI technician will be

here tomorrow to testify about why they didn't test it sooner." Jones later explained: "[M]y experience with the KBI and what they do and don't test is not really anything that county or district attorneys have much control over, or law enforcement officers. They submit items, request testing, and they don't always test everything that's sent."

The district court said that it "really prefer[red] that cases be decided on the merits, not on procedure," and it could not see how Hinojosa would be prejudiced if the court granted a continuance to allow him to prepare for the new evidence. The district court commented that the State was not giving a good reason why it took two years to perform the BAC test, but the court also observed that the evidence at the preliminary hearing was pretty clear that there had been alcohol consumption. The district court ultimately denied the motion to suppress but offered Hinojosa a trial continuance if he wanted one to prepare for trial. After a brief recess, Hinojosa's attorney stated that the defense was "very reluctantly" requesting a continuance but expressed dissatisfaction with the fact that Hinojosa was faced with choosing between his right to a fair trial and his right to a speedy trial. Defense counsel stated that Hinojosa would be moving to withdraw the jury trial waiver, and Jones responded that "the State is not in a position to object to that request." Hinojosa formally withdrew his jury trial waiver at a hearing in February 2020, and the district court scheduled the case for a jury trial to be held in April 2020.

On March 6, 2020, Hinojosa moved to dismiss, alleging violations of his constitutional and statutory speedy trial and discovery rights. The motion alleged that Hinojosa "was forced to take a continuance" in a manner that violated his rights. The State responded and opposed the motion, but before any argument could be heard—or the trial held—the global public health crisis related to the novel coronavirus (COVID-19) struck, leading to the temporary suspension of all proceedings.

In September 2021, Hinojosa, now represented by new counsel, filed a supplemental motion to dismiss with prejudice. In the supplemental motion, he argued

dismissal was appropriate because of "violations of Due Process, discovery statutes, *Brady* [*v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] and statutory speedy trial." The State opposed the motion to dismiss and contended it was merely a request for the district court to reconsider Hinojosa's motion to suppress.

The district court held a two-day evidentiary hearing on the motion to dismiss. Jones, who was no longer with the prosecutor's office, testified on the first day of the hearing along with the KBI forensic toxicologist. Jones testified that he knew the KBI report constituted new forensic evidence and that he knew that Hinojosa's speedy trial time was running out when he received the report. He also admitted that he told the court at the hearing in December 2019 that he did not know why the KBI report was so late, and he admitted that he did not advise the court or defense counsel about the testing when he requested it in November 2019. The KBI's forensic toxicologist testified that until Jones' request, the State had only requested testing for drugs, not R.S.'s BAC.

Hinojosa's former attorney, Deborah Snider, testified on the second day of the hearing. She testified that she did not receive the BAC test results until December 12, 2019. Snider explained that she did not see Jones' December 10, 2019, email with the test results until after Hinojosa had waived his jury trial the next day, and she stated that she would not have advised her client to waive the jury trial had she known about the BAC evidence. Snider also explained that the BAC evidence was significant because her "defense strategy was premised on the fact that there was no blood alcohol content to quantify the—the alleged victim's claim. And lacking quantification, it helped to create—or, excuse me, reasonable doubt as to her claims."

After considering the evidence and the parties' arguments, the district court ruled from the bench and granted Hinojosa's motion to dismiss. Because the district court did not file a written memorandum decision, we set forth the court's ruling in its entirety:

"Well, the parties present a very difficult case for the Court here today. The case is very troubling. First of all, I have known Mr. Jones for a long time, perhaps 20 years. I have never known anything about Mr. Jones to indicate that he would do anything dishonest, unethical, or inappropriate. Mr. Jones has a very good reputation in this community. And so nothing I say is meant to disparage him, but there are a lot of problems in this case.

"Prosecutors, as we all know, have tremendous power. And with that power comes a lot of responsibility. I constantly hear talk of open-file policies but we often have discovery problems. It's difficult for me to understand how we have so many discovery problems when we have this open-file policy.

"In this case, this isn't newly discovered evidence. The State had the evidence back in October of 2017. For whatever reason, the State didn't choose to have it tested until November of 2019. That was a choice the State made. For the State to come in and say that the KBI doesn't decide what tests to run or that—they don't decide what tests to run, that's up to the KBI, that is incorrect. I don't know why Mr. Jones would say that, he's been a prosecutor a long time. We all know that the KBI cooperates with prosecutors. I know from years of prosecuting that anytime I called the KBI and asked for a test to be performed, they got performed. I just don't know why Mr. Jones would indicate that that was the KBI's fault that it didn't get tested until late.

"I also don't understand, he requested that testing on November 13th and they did the testing immediately. There didn't seem to be any hesitation by the KBI performing those tests. With a trial deadline looming so soon, it's troubling to me that Mr. Jones wasn't monitoring that. Why he wasn't calling the lab to see if those tests that he requested got performed. I know from experience that calling the KBI, they will tell you we don't have a formal report ready yet but here's what our findings are going to be after it goes through peer review.

"I—I just think there's so many things Mr. Jones could have done different in this case. The least of which wouldn't be to—to have disclosed to the defense that those tests had been requested. He had two—at least two court hearings before Judge Gibbens where he could well have disclosed it to the Court and to counsel but yet chose not to until after such time as the defense had waived their right to a jury trial. Was that for tactical reasons? Was that unethical? I don't know. I don't know what was going on in Mr. Jones' mind. I don't know why he did it the way he did it. But in any event, it had repercussions

on the defendant and the defendant's rights. It affected what actions were taken by the defense.

"You know, perhaps it was just general unpreparedness. Perhaps the State didn't begin preparing for their trial till November. But that still doesn't—that still doesn't explain why they didn't disclose that they're awaiting those test results.

"The parties talk about 3212, the parties talk about *Brady*. Both of those things, the spirit of both of those are full disclosure so the parties know what's going on so they can adequately prepare for trial. I think in addition to that, the prosecutors have a responsibility to seek justice. Prosecutors aren't there to try to win the case and carve a notch in their belt, so to speak. They're there to seek justice. And I cannot conceive of what prosecutorial function was being served by keeping a secret of the fact that additional testing had been requested. I don't understand why when Mr. Jones met Ms. Snider in the hallways he wouldn't have told her we're doing these tests. Surely as a prosecutor seeking a just result, he would want to make sure the defense is fully informed of what's going on. I just cannot conceive of the reasoning for the way this case has been handled by the prosecution, whether you're talking statutorily, constitutionally, ethically, or any other reason. It was only after the defendant waived his right to his jury trial that the State was forthright with their test results.

"And Mr. Bath is correct. When those test results were ready on November 27th, that is imputed to the State. The State should have at least had it at that point and turned it over. Waiting till it physically was mailed to them is really inexcusable.

"Given all of that, the Court does not know—well, when there is a discovery problem, the Court needs to take the least severe reaction to that. The statute provides that the Court can not [*sic*] allow the evidence to be offered at trial. That could have been done here, but for whatever reason Judge Gibbens didn't select that option.

"The defense is asking for dismissal which is a pretty drastic measure. It's the course—the most severe one that can be imposed by the Court for the violation. But in this case, the actions of the State caused the defendant's rights to speedy trial to be violated. After the defendant waived his right to a jury trial, the speedy trial time was about to run, and for him to reinvoke his right to a jury trial and be ready for trial was next to impossible.

"I reviewed this case and, frankly, I—I disagree with the decision that Judge Gibbens made, but that's neither here nor there. The issue becomes whether this Court

has authority to overrule that, so to speak. The defense presented their arguments and they did not prevail and now we're back again sort of on the same topic.

"As I reviewed the law, there's certain conditions that allows a Court to reconsider. Clearly, the defense is not entitled to a do-over or a second bite at the apple, but in some cases the Court is allowed to—to reconsider. One of those is clear error. I don't know that that really applies. The fact that I might have disagreed with Judge Gibbens' sanctions really doesn't amount to clear error.

"But the other one is manifest injustice. And the Court believes that there is manifest injustice here. Because of the inappropriate actions of the State, the defendant was forced to either give up his right to a jury trial or give up his right to speedy trial. Both constitutional rights that are very, very important, very precious to any defendant. And forcing the defendant to choose between those rights should never have happened.

"Mr. Jones should have been candid with the Court, candid with counsel, should have been forthright and told the parties about the other tests as he knew—he should have known that it would totally change the approach the defense is going to take. It would totally change how it would go forward.

"So given all of those factors, the Court believes that the defense is correct. And the Court at this time is going to grant the defense's motion to dismiss as the Court believes that that is the appropriate remedy for the inappropriate actions that occurred in this case. So that will be the order of the Court."

The district court later signed a journal entry granting the motion to dismiss "for violation of Mr. Hinojosa's Constitutional rights." The State timely appealed the district court's dismissal order.

ANALYSIS

On appeal, the State argues that the district court erred in dismissing the rape charge against Hinojosa. Within its argument, the State alleges that it did not commit a discovery violation under either K.S.A. 2017 Supp. 22-3212 or *Brady*; that Hinojosa's constitutional and statutory speedy trial rights were not violated; and that even if a discovery violation occurred, the appropriate sanction would have been suppression of

the evidence. The State contends the interests of justice did not require dismissal. As a separate issue, the State argues that the district the court improperly treated Hinojosa's motion to dismiss as a motion to reconsider the denial of his suppression motion.

Hinojosa does not thoroughly address the second part of the State's argument. Instead, Hinojosa maintains that the district court did not abuse its discretion in dismissing the case because of the inappropriate actions of the State and multiple violations by the State related to the late production of evidence. Hinojosa argues that the State's actions violated his constitutional rights by forcing him to choose between proceeding to trial in the face of surprise, *Brady* evidence or seeking a continuance beyond the expiration of his statutory speedy trial right.

Did the district court treat Hinojosa's motion as a motion to reconsider?

We will first address the State's argument that the district court improperly treated Hinojosa's motion to dismiss as a motion to reconsider the denial of his suppression motion. We see this as a nonissue. Although it is true that both motions contained similar legal arguments and focused on the State's late disclosure of the BAC lab report, the motions requested drastically different relief. The motion to suppress simply asked the district court to exclude the BAC evidence because it constituted an unfair surprise. Hinojosa's supplemental motion to dismiss asked the district court for dismissal with prejudice. The motion focused on the prosecutor's allegedly intentional bad faith conduct and the deprivation of Hinojosa's due process right to a fair trial. The mere fact that both motions contained similar arguments did not transform Hinojosa's motion to dismiss into a motion to reconsider the denial of his suppression motion.

The district court complicated its ruling by agreeing with the State that it needed to find manifest injustice to reconsider a prior ruling by another judge. Under the law-of-the-case doctrine, Hinojosa may have been prevented from relitigating his suppression

motion within successive stages of the same proceeding, after a first appeal has been brought in the same case, without a finding of manifest injustice. See *State v. Parry*, 305 Kan. 1189, 1194-98, 390 P.3d 879 (2017). But nothing prevented the district court from reconsidering the court's pretrial ruling on the suppression motion before the case reached trial, especially if suppression of the evidence would be considered a less drastic remedy than granting a motion to dismiss. See *State v. Clovis*, 248 Kan. 313, 331, 807 P.2d 127 (1991) (explaining that dismissal for a discovery violation should be employed only when a lesser sanction would not accomplish the desired objective).

The district court's decision on the motion to dismiss focused on its findings that Jones' inappropriate actions in requesting the BAC evidence and disclosing the results to Hinojosa forced him to request a continuance beyond the statutory speedy trial deadline. Hinojosa's motion to dismiss was the only pleading filed in the case requesting dismissal with prejudice as a sanction for the alleged discovery violation by the State. The district court was authorized to hear evidence and decide the motion. We reject the State's argument that the district court improperly treated Hinojosa's motion to dismiss as a motion to reconsider the denial of his suppression motion.

Did the district court abuse its discretion by dismissing the case?

We now turn to the heart of this appeal. The State claims the district court erred by dismissing the rape charge against Hinojosa as a sanction for the alleged discovery violation and the prosecutor's actions in handling the BAC testing. The State asserts that it did not commit a discovery violation under K.S.A. 2017 Supp. 22-3212 or *Brady*, and, even if a discovery violation occurred, dismissal was not the appropriate remedy. Hinojosa contends the dismissal order was within the district court's discretion.

Appellate courts review a district court's dismissal of a criminal case with prejudice for an abuse of discretion. *State v. Bolen*, 270 Kan. 337, 343, 13 P.3d 1270

(2000); *State v. Auman*, 57 Kan. App. 2d 439, 445, 455 P.3d 805 (2019). Judicial discretion is abused if (1) no reasonable person would take the view adopted by the district court, (2) the action stems from error of law, or (3) the action stems from error of fact. *State v. Levy* 313 Kan. 232, 237, 485 P.3d 605 (2021). Our Supreme Court has clarified that "an abuse of discretion may be found if the trial court's decision goes outside the framework of or fails to properly consider statutory limitations or legal standards." *State v. Atkisson*, 308 Kan. 919, 926, 425 P.3d 334 (2018) (quoting *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 [2007]).

A district court may order the dismissal of a criminal complaint "if the interests of justice require such action." *Bolen*, 270 Kan. at 343; see also *State v. Crouch & Reeder*, 230 Kan. 783, 788, 641 P.2d 394 (1983). But that discretion is tempered with the warning that "such power should be exercised with great caution and only in cases where no other remedy would protect against abuse." *Bolen*, 270 Kan. at 343; *Clovis*, 248 Kan. at 331. Our Supreme Court has stated that district courts should seek to "impose the least drastic sanctions which are designed to accomplish the object[ive]s of discovery but not to punish." *State v. Winter*, 238 Kan. 530, 534, 712 P.2d 1228 (1986). The reluctance to use this remedy stems, at least in part, from the fact that the "[d]ismissal of charges oftentimes punishes the public rather than the prosecutor and creates a windfall for the defendant." *Bolen*, 270 Kan. at 343. Thus, this court is faced with the question of whether the district court appropriately found the circumstances were severe enough to warrant dismissal and that no other remedy would serve the ends of justice.

The district court did not dismiss the case on speedy-trial grounds, but as a sanction for the State's handling of the BAC report.

The State spends a good portion of its brief arguing that Hinojosa's statutory and constitutional speedy trial rights were not violated. The State appears to recognize that if Hinojosa's December 2019 continuance—which pushed his new trial date beyond the

statutory speedy trial deadline—were attributable to the State because of prosecutorial misconduct, dismissal would have been the appropriate remedy. See K.S.A. 2022 Supp. 22-3402(g). But the district court's explanation of its ruling, although thoroughly critical of the State's actions, did not explicitly charge the continuance to the State based on prosecutorial misconduct. Rather, the district court found that it was dismissing the case because it believed it to be "the appropriate remedy for the inappropriate actions that occurred in this case." The district court did not dismiss the case because of a statutory or constitutional speedy trial violation, so we need not analyze those issues.

We thus turn to the district court's reasons for dismissing the case—Jones' actions during his request for and disclosure of the BAC report. The State argues that this reasoning was flawed for several reasons. First, the State argues that no *Brady* violation occurred. The district court did not expressly find that the State committed a *Brady* violation in granting the motion to dismiss. But the district court discussed *Brady* in its ruling and observed that the spirit of the rule is "full disclosure [by the State] so the parties know what's going on so they can adequately prepare for trial." The State argues that no *Brady* violation occurred here "because the [BAC] lab report was disclosed before trial, [Hinojosa] was given ample opportunity to review the lab report, and the District Court even granted [Hinojosa's] request for continuance specifically to provide ample time to review the evidence and obtain expert testimony if necessary."

The guarantee of a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes an affirmative duty on the State to disclose evidence favorable to a defendant when "'the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *State v. Warrior*, 294 Kan. 484, 506, 277 P.3d 1111 (2012) (quoting *Brady*, 373 U.S. at 87).

> "There are three components or essential elements of a *Brady* violation claim: (1) The evidence at issue must be favorable to the accused, either because it is

> exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice." *Warrior*, 294 Kan. 484, Syl. ¶ 10.

Exculpatory evidence "need not be evidence so strong that it would absolutely exonerate the defendant, but only strong enough to be of assistance in the defense." *State v. Gammill*, 2 Kan. App. 2d 627, 633, 585 P.2d 1074 (1978). See also *State v. Breitenbach*, 313 Kan. 73, 98, 483 P.3d 448, *cert. denied* 142 S. Ct. 255 (2021) ("[W]e further acknowledge that evidence may be exculpatory without being exonerating.").

We tend to agree with the State that whether a *Brady* violation occurred is not the focus here—not because the State disclosed the BAC report before trial—but because it is somewhat of a stretch to categorize the report as exculpatory evidence subject to the *Brady* rule. Hinojosa's original motion to dismiss did not allege any *Brady* violation. He did not categorize the discovery issue as a *Brady* violation until he filed his supplemental motion to dismiss. The lab report found that R.S. had a BAC of .12 grams per 100 milliliters of blood—and the blood was drawn several hours after her date with Hinojosa. The report quantified R.S.'s testimony that she had several alcoholic drinks before and during her encounter with Hinojosa. The evidence was more damaging to Hinojosa than helpful—in our view, far more so—which is why he tried to suppress it in the first place. Snider, Hinojosa's attorney when the BAC report was generated, testified the evidence was damaging because her "defense strategy was premised on the fact that there was no blood alcohol content to quantify the—the alleged victim's claim. And lacking quantification, it helped to create—or, excuse me, reasonable doubt as to her claims."

Hinojosa's brief relies heavily on *Auman*, 57 Kan. App. 2d 439, so we will address that case. The State charged Auman with aggravated battery while driving under the influence. Days before trial, the State disclosed a dashcam video that included the names of several previously unidentified witnesses and a discussion between officers about how

the glare from the setting sun—not Auman's alleged impairment—may have caused the collision. Before the video's disclosure, the State had repeatedly represented that it had provided all evidence to the defense. Because the statutory speedy trial deadline was approaching, the district court found it was impossible to grant a continuance to permit Auman to investigate and prepare a defense with the dashcam evidence, so it dismissed the case with prejudice. This court found that under the facts, the district court did not abuse its discretion in dismissing the case. 57 Kan. App. 2d at 448.

Although *Auman* is similar to Hinojosa's case, there are important distinctions. Most important, the evidence disclosed on the eve of trial in *Auman* was clearly exculpatory. It was entirely new evidence that Auman knew nothing about that may have exonerated him of the pending charge. Here, the BAC evidence merely corroborated and quantified R.S.'s preliminary hearing testimony that she had been drinking alcohol on the evening of the alleged rape. The evidence at the preliminary hearing indicated that R.S.'s blood had not been examined for alcohol, so either party could have requested the testing any time before the trial. Hinojosa never asked for dismissal at the December 18, 2019, hearing before the scheduled bench trial, he only asked for suppression of the evidence. And while suppression of the evidence may well have been an appropriate remedy because of the late disclosure of the BAC lab test, the district court chose to grant a continuance to allow Hinojosa to prepare for trial.

Even though Hinojosa tried hard to suppress the BAC evidence at the December 18, 2019, hearing, he argued in his supplemental motion to dismiss that the evidence "potentially impeaches the complaining witness" because he could argue that her BAC level was not high enough to cause her to pass out. He makes the point that had the BAC evidence been admitted at trial, the defense may have been able cast a favorable light on the evidence to the jury. We understand that evidence that is favorable to the accused encompasses both exculpatory and impeachment evidence. But it is difficult to classify the BAC evidence as favorable to Hinojosa, which is why he tried to suppress it, and the

more important inquiry is whether the State violated the discovery statute and the reciprocal discovery order by not requesting the BAC lab report and providing it to the defense until the eve of the scheduled trial. We will address that issue next.

Early in the case, the parties signed and filed a reciprocal discovery order, requiring both to comply fully with all discovery obligations in K.S.A. 22-3212. That statute provides, in pertinent part:

> "(a) Upon request, the prosecuting attorney shall permit the defense to inspect and copy or photograph the following, if relevant: . . . (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; . . . .
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> . . . .
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> "(h) Discovery under this section must be completed no later than 21 days after arraignment or at such reasonable later time as the court may permit.
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> "(i) If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, the party shall promptly notify the other party or party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." K.S.A. 2022 Supp 22-3212(a), (h), and (i).

Although the district court was very critical of Jones' actions in handling the BAC testing and disclosing the results to Hinojosa in its ruling dismissing the case, the court did not identify any explicit section of K.S.A. 2017 Supp. 22-3212 that the State violated. The BAC lab report did not exist until Jones requested the additional testing in November 2019. Before then, both parties knew that R.S.'s blood had not been tested for alcohol and

either party could have requested the additional testing. The district court's biggest criticism of how Jones handled the evidence was that he did not notify the court and Hinojosa when he contacted the KBI and asked for R.S.'s blood to be tested for BAC on November 13, 2019. But we find nothing in K.S.A. 2017 Supp. 22-3212 that required Jones to notify the court and Hinojosa when he contacted the KBI and requested the additional testing, although it may have been the better practice for him to do so. K.S.A. 2022 Supp. 22-3212(a) only requires the State to turn over "results or reports . . . of scientific tests or experiments made in connection with the particular case." So, the State had no obligation to disclose information to Hinojosa until it received the KBI lab report with the BAC test results.

K.S.A. 2022 Supp. 22-3212(h) provides that discovery must be completed no later than 21 days after arraignment or at such reasonable later time as the court may permit. There is nothing in the statute prohibiting Jones from asking the KBI for the additional testing in November 2019 when he was preparing for trial and realized that R.S.'s blood had never been tested for BAC. The main risk he was taking by waiting so long was a potential ruling from the district court that the results were inadmissible because the evidence was not produced until the eve of trial. The district court was aware at the December 18, 2019, hearing that the case was more than 21 days after arraignment, but it permitted the late disclosure of the BAC lab report, as allowed by K.S.A. 2022 Supp. 22-3212(h), conditioned on granting Hinojosa a trial continuance.

Hinojosa asserts that the State "did not even attempt to follow the procedure set out in" K.S.A. 2022 Supp. 22-3212(i) in providing the BAC evidence to the defense. But the BAC lab report was not "additional material previously requested or ordered which [was] subject to discovery or inspection" by Hinojosa, so subsection (i) does not apply.

Once Jones received the BAC test results, he notified defense counsel almost immediately. The BAC analysis was completed by the KBI on November 27, 2019. We

observe this was the day before Thanksgiving. The KBI forensic toxicologist later testified that the test result was "released"—meaning it was available for law enforcement to download—on December 3, 2019, two business days after the test was completed. The record reflects that the test results were received by the police department on December 9, 2019, and by the prosecutor's office the next day. Jones emailed Hinojosa's attorney the BAC results on December 10, 2019, at 1:37 p.m., the same day he received the results. The State formally produced the report to Hinojosa's attorney on December 12, 2019.

Hinojosa correctly argues that law enforcement's knowledge of the BAC test results is imputed to the State, so under the facts here the State had imputed knowledge of the test results as early as November 27, 2019. See *Auman*, 57 Kan. App. 2d at 444. But Hinojosa does not adequately explain how the outcome would have been different had he received the BAC evidence on the day the testing was completed as opposed to the date he received the test results. Either way, he was receiving new forensic evidence with little time to prepare a defense before trial. The district court stated at the December 18, 2019, hearing that it would need to hold a *Daubert* hearing to decide whether an expert on either side could testify about the effect of a 0.12 BAC on a person's consciousness and behavior, which was going to delay the proceedings even further. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Hinojosa emphasizes that he would not have waived his jury trial on December 11, 2019, had he known about the BAC evidence. But the record shows that Jones emailed the test results to Hinojosa's attorney on December 10, 2019, the day before the jury trial waiver, so Hinojosa would have received the results before the jury trial waiver had his counsel read the email. More importantly, Hinojosa's attorney stated at the December 18, 2019, hearing that he would be moving to withdraw the jury trial waiver, and Jones responded that the State would not object. Hinojosa formally withdrew his jury trial waiver in February 2020, and the district court rescheduled the case for a jury trial.

In sum, there was no *Brady* violation here that warranted dismissal of the rape charge against Hinojosa. Likewise, we do not find that the State committed a statutory discovery violation in the manner it requested the additional BAC testing and disclosed the results to Hinojosa, or at least not a flagrant one. And even if Hinojosa waived his right to have a jury trial without knowing about the BAC evidence, there was no prejudice because the district court allowed him to reschedule the case for a jury trial.

This brings us to the matter of whether Jones made false statements to the court at the suppression hearing on December 18, 2019. Hinojosa alleges that Jones' conduct evidenced a lack of good faith in dealing with the court and that he made "misleading statements and/or omissions to the court at the December 18, 2019, hearing regarding the State's knowledge of how or when the BAC testing was initiated or what control the State had over the testing and blaming the KBI for the late discovery." In granting the motion to dismiss, the district court faulted Jones for not explaining at the December 18, 2019, hearing that he did not request the BAC testing until November 2019 and for representing to the court that it was the KBI's fault for not conducting the test earlier.

A lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Rule 3.3(a)(1) of the Kansas Rules of Professional Conduct. (2023 Kan. S. Ct. R. at 390). At the hearing on December 18, 2019, the district court asked about the delay in the BAC testing. At first, Jones deferred to whatever explanation the KBI technician would offer when the technician testified the next day. But even though Jones was aware that he had not ordered the testing until November 2019, he later informed the court that he did not know what caused the delay. Hinojosa's point is well-taken that Jones did not volunteer to the court the information that he did not request the BAC test until November 2019, and he appeared to be casting blame on the KBI for the late testing.

Even if Jones were less than candid to the district court in explaining why the testing was late, the record reflects that this fact did not materially affect the court's decision to deny the suppression motion and grant a trial continuance instead. The district court commented at the hearing that the State was not giving a good reason why it took two years to perform the BAC test, so the court was not "misled" into believing there was a good reason for the delay. But the district court denied the suppression motion anyway because it "prefer[red] that cases be decided on the merits, not on procedure," and it could not see how Hinojosa would be prejudiced if the court granted a continuance. The district court also observed that the evidence at the preliminary hearing was clear that R.S. had consumed alcohol, so Hinojosa knew that R.S.'s level of intoxication was at issue.

Thus, while Jones could have handled this case better and could have been more transparent in his BAC request, we question many of the bases for the district court's consternation that led to its dismissal of the case against Hinojosa. But the district court's dismissal ultimately resulted from a more fundamental and legal error: The court failed to properly consider whether a less serious sanction than dismissal was warranted.

The district court failed to properly consider whether a less serious remedy than dismissal would be appropriate.

After the district court denied the suppression motion and rescheduled the case for a jury trial, Hinojosa moved to dismiss alleging violations of his constitutional and statutory speedy trial rights and discovery rights. Hinojosa filed a supplemental motion to dismiss with prejudice alleging violations of due process and a *Brady* violation. After conducting an evidentiary hearing, the district court ruled from the bench and granted the motion to dismiss. Although the district court's comments about the case were somewhat meandering, the crux of the ruling was that Jones' actions in handling the BAC testing and disclosing the results to Hinojosa violated his constitutional rights because it forced him to either give up his right to a jury trial or give up his right to a speedy trial:

"Because of the inappropriate actions of the State, [Hinojosa] was forced to either give up his right to a jury trial or give up his right to speedy trial. Both constitutional rights that are very, very important, very precious to any defendant. And forcing [Hinojosa] to choose between those rights should never have happened.

"Mr. Jones should have been candid with the Court, candid with counsel, should have been forthright and told the parties about the other tests as he knew—he should have known that it would totally change the approach the defense is going to take. It would totally change how it would go forward.

"So given all of those factors, the Court believes that the defense is correct. And the Court at this time is going to grant the defense's motion to dismiss as the Court believes that that is the appropriate remedy for the inappropriate actions that occurred in this case. So that will be the order of the Court."

We first observe that the district court incorrectly stated that Hinojosa was forced to give up his constitutional right to a speedy trial when, in fact, the issue involved his statutory right to a speedy trial. We next observe that Hinojosa was not forced to give up his right to a jury trial as that right was reinstated soon after the suppression hearing. But more importantly, we observe that if the district court's analysis is correct, then the State's prosecution of the rape charge against Hinojosa was doomed from the moment the district court denied the suppression motion and granted a trial continuance instead. In its ruling, the district court acknowledged that dismissal "is a pretty drastic measure" and that the court "needs to take the least severe reaction" to a discovery violation, but it still seemed resigned to the notion that dismissal was the only "appropriate remedy for the inappropriate actions that occurred in this case." Given our analysis that the district court erred as a matter of law in finding the State committed any serious discovery violations, we disagree that the district court had no choice but to dismiss the rape charge.

There is no doubt this case would be a lot simpler had the district court granted Hinojosa's suppression motion. Suppressing the BAC evidence would have been a fair and reasonable remedy given the State's late decision to request testing. We recognize that the district court's ruling left Hinojosa with little choice but to request a continuance.

But that choice was imposed on Hinojosa as a result of the district court's decision to deny the suppression motion, not as the direct result of any misconduct by the prosecutor. And, in fact, the district court's decision denying the suppression motion is a ruling that Hinojosa can still appeal if the State's prosecution of the rape charge ever results in a conviction—but that is not the issue before this court now. We are reviewing only the district court's decision to dismiss the case as a sanction for an alleged discovery violation and misconduct committed by the State.

Hinojosa argues that the district court's denial of his suppression motion and the offer of a trial continuance led to Hinojosa "waiving [his] statutory speedy trial right." That is not the case. While the district court's ruling caused Hinojosa to request a continuance that pushed the trial beyond the original speedy trial deadline, he never waived his statutory speedy trial rights. Hinojosa's statutory speedy trial rights remained intact until they were later suspended by the Kansas Legislature in response to the COVID-19 pandemic. See K.S.A. 2022 Supp. 22-3402(j).

Even though the district court's ruling on the suppression motion caused Hinojosa to request a trial continuance, that does not mean that two years later, when the district court addressed the motion to dismiss, dismissal was required to serve the interests of justice and no other remedy could protect Hinojosa's rights. In granting the motion to dismiss, the district court focused on punishing the prosecution for what it perceived as shoddy or derelict management of the case. *But that is not the appropriate inquiry*. The appropriate inquiry should have been whether the court could still give Hinojosa a fair trial on the rape charge that was filed against him.

Dismissal is a drastic sanction and "such power should be exercised with great caution and only in cases where no other remedy would protect against abuse." *Bolen*, 270 Kan. at 343. Dismissal for a discovery violation should be employed only when a lesser sanction would not accomplish the desired objective. *Clovis*, 248 Kan. at 331. A

court should seek to "impose the least drastic sanctions which are designed to accomplish the object[ive]s of discovery but not to punish." *Winter*, 238 Kan. at 534. Here, the district court could have reconsidered the denial of the suppression motion if it believed such a remedy was appropriate to grant Hinojosa a fair trial because suppression of the evidence would have been a less drastic remedy than dismissal of the case. Or perhaps the district court could have fashioned a different remedy. But dismissal of the case should have been a last resort and granted only if required to serve the interests of justice. The district court here did not consider these potential avenues, but instead dismissed the case as a sanction for what it perceived as the State's misconduct.

Appellate courts review a district court's dismissal of a criminal case for an abuse of discretion. But our Supreme Court has clarified that "an abuse of discretion may be found if the trial court's decision goes outside the framework of or fails to properly consider statutory limitations or legal standards." *Atkisson*, 308 Kan. at 926. That is what happened here. In granting the dismissal with prejudice, the district court failed to properly consider the well-established legal standards that dismissal is appropriate only if it is required to serve the interests of justice and that dismissal for a discovery violation should be employed only if no lesser sanction would accomplish the desired objective.

In sum, we reverse the district court's dismissal with prejudice order and remand for further proceedings. On remand, if faced with a request from Hinojosa, the district court can reconsider the prior ruling on the suppression motion, and the court can fashion any other remedy it deems appropriate to ensure that Hinojosa receives a fair trial on the rape charge that the State has filed against him.

Reversed and remanded.