In the Southwest Intertribal Court of Appeals for the Zuni Tribal Court

CHRISTOPHER LONJOSE,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Plaintiff-Appellee.

SWITCA Case Nos. 15-014-ZTC
and 15-015-ZTC
Zuni Cause Nos. CR-2014-0135, CR-2014-1218

Appeal filed December 8, 2014

Appeal filed in the Southwest Intertribal Court of Appeals on June, 26, 2015

Appeal from the Zuni Tribal Court
John Chapela, Judge

Appellate Judges: Jonathan Tsosie,
Anthony Lee and Jeanette Wolfley

OPINION

SUMMARY

Tribal court abused its discretion and did not act in accordance with Rules of Criminal Procedure when, in light of evidence raising reasonable doubt as to Appellant's competence to stand trial, court refused to order Appellant to undergo a mental health evaluation.

Court has independent duty to appoint interpreter, or court itself can act as interpreter, if court is made aware that defendant or witness does not understand English language well, unless defendant expressly waives right to interpreter.

Judge's actions leading up to trials indicated that he was not an impartial decision maker while presiding over both cases because he wholly disregarded another judge's order and forced Appellant to face two trials with two weeks' notice, which was arbitrary and an abuse of discretion, in violation of Appellant's due process rights.

Even though rule contemplates written request from the defendant in order to compel disclosure from police department or tribal prosecutor, due process and fundamental fairness impose a continuing duty on police and prosecutors to disclose potentially exculpatory evidence to defendant, so the rule may be read to recognize this duty.

If there are new proceedings in this matter on remand, Appellant has right to counsel at tribe's expense because judge conferred this right on Appellant in exchange for Appellant's waiver of his right to a speedy trial. Appellant keeps this right to counsel at tribe's expense whether he is deemed to be competent or not, as a finding of incompetence would arguably create a greater need for counsel to act on behalf of Appellant's best interests. This holding is not based on tribe's constitution, but rather on the rights created in Appellant by judge's order.

Because trials were held within six-month time limit of tribe's Rules of Criminal Procedure, tribal court did not violate Appellant's right to speedy trial. Rule 26 also applies when new trial is ordered, thus a new six-month 'clock' begins to run upon the date of issuance of this opinion (should tribe wish to prosecute this case on remand).

Ambiguous evidence was presented at trial to demonstrate Appellant's mens rea that he either knew alleged victim's age, or that he was indeed aware of substantial and unjustifiable risk that alleged victim was under sixteen years old, and that he consciously disregarded that risk when he engaged in each of three acts of sexual intercourse with her. If tribe wishes to make unlawful sexual intercourse a strict liability offense, it must amend tribal code accordingly. Under current code, the three convictions for unlawful sexual intercourse were reversed because they were not in accordance with law, and they were remanded for new trial.

It was an abuse of discretion for judge to cut off Appellant's cross-examination of alleged victim as to possible other sexual partners. By doing so, judge effectively deprived Appellant of opportunity to develop a defense with respect to charge of spreading venereal disease. Appellant's conviction on this charge was therefore reversed and remanded. Should tribe elect to re-try Appellant on remand, Appellant must be allowed to ask alleged victim whether someone else could have been source of venereal disease.

* * *

The above-captioned Zuni Tribal Court Cause Numbers are consolidated in this Opinion. In "Case One," Defendant-Appellant (hereinafter "Appellant") appeals a conviction of sexual assault. In "Case Two," Appellant appeals convictions of three counts of unlawful sexual intercourse and one count of spreading venereal disease. When we accepted the appeals in these matters, we denied Appellant's motion to consolidate the appeals because there were two trials in the Zuni Tribal Court, and each trial involved different alleged victims and different alleged offenses. During our consideration of these appeals, however, it became apparent that even though

each matter began as a separate case, they share some of the same overarching issues on appeal. One tribal court order, in particular, forms a basis of both appeals. Accordingly, we have elected to consolidate the matters. Plaintiff-Appellee did not file any briefs, thus Appellant's opening briefs are unopposed.

The Southwest Intertribal Court of Appeals ("SWITCA") has jurisdiction over this matter pursuant to Zuni Tribal Council Resolution No. M70-2015-P042, "Resolution to Reinstate SWITCA and to adopt the SWITCA Rules of Appellate Procedure," enacted on April 29, 2015. For the reasons below, we REVERSE the conviction of sexual assault and REMAND for a new trial in Case One. In Case Two, we REVERSE the three convictions of unlawful sexual intercourse due to insufficiency of the evidence, therefore Appellant cannot be retried for these charges. With respect to the conviction of spreading venereal disease, we REVERSE and REMAND for a new trial.

I. BACKGROUND

Appellant is an enrolled member of the Zuni Tribe, and lives within the exterior boundaries of the Zuni Reservation. On January 8, 2014, the Pueblo of Zuni charged Appellant with rape, which is "Case One" in this opinion. The Pueblo accused Appellant of having committed this crime in the early morning hours of January 4, 2014. Three months later, on April 2, 2014, the Pueblo of Zuni filed four more criminal complaints against Appellant. These four complaints comprise "Case Two" in this Opinion. Three of the complaints accused Appellant of having engaged in unlawful sexual intercourse twice in late 2012, and once in early 2014, all three times with the same individual of minority age.[1] 'Unlawful sexual intercourse' is the Pueblo's analog to what is more commonly known as statutory rape. The fourth criminal complaint accused Appellant of spreading venereal disease to the same minor. "Case One" and "Case Two" involve different alleged victims.

Appellant may have one or more intellectual disabilities, though the extent of any such disabilities were not established or considered by the Zuni Tribal Court. Appellant completed high school at the age of twenty. The Zuni language is Appellant's primary language, and he is more fluent in Zuni than in English. Appellant lives with his grandmother, Diana Shebala, and both receive a modest Supplemental Security Income ("SSI") as their only source of income. In order to receive SSI, one must be determined by the Social Security Administration to be so disabled that one is unable to work.

In Case One, Ms. Shebala filed two motions in the Zuni Tribal Court on behalf of her grandson on January 28, 2014, well before the complaints were filed to initiate Case Two. One motion asked the Zuni Tribal Court to assign Judge Val Panteah to Case One because Judge Panteah could speak the Zuni language and explain words or concepts to Appellant that Appellant might not understand in English. This motion was granted by Judge John Chapela, the judge initially assigned to Case One, who immediately recused himself. In his Order of Recusal, Judge Chapela wrote that "good cause has been stated for the granting of the motion," and he ordered, "The Clerk of the Court is directed to assign this matter to the Hon. Val Panteah, Sr. to preside in this Cause until conclusion."

Ms. Shebala's second motion requested that the Zuni Tribal Court appoint a guardian *ad litem* to Appellant because, according to the motion, Appellant was not competent to defend himself due to a "specific learning disability." A hearing on this motion was scheduled for March 21, 2014.

At that hearing, Judge Panteah asked Appellant to present his motion but Appellant remained silent. Judge Panteah then spoke to Appellant in the Zuni language, but Appellant did not respond.[2] During Appellant's silence, Ms. Shebala audibly tried to get Appellant to speak, but Appellant did not say anything. Over the objection of Lay Prosecutor Ghachu, who is a Lieutenant of the Zuni Tribal Police, Judge Panteah asked Ms. Shebala to argue the motion because she had filed it. A conversation in both Zuni and English ensued. Judge Panteah explained that a guardian *ad litem* would not be appropriate in a criminal case involving an adult defendant, and that a criminal defense attorney would be more appropriate. Judge Panteah denied the motion for a guardian *ad litem*.

When addressing Ms. Shebala's contention that Appellant is not competent to stand trial, Judge Panteah stated from the bench: "As far as the motion, that it says, for an incompetent person, and I believe the documentation included has information about a learning disability that the defendant has.[3] Mr. Lonjose, are you able to understand what's going to go on in this trial today?" Again, Appellant did not respond. After approximately thirty-five seconds of silence, Judge Panteah asked Ms. Shebala if she could afford counsel, to which she replied that she could not.

[1] The Zuni Pueblo's age of consent is sixteen.

[2] None of the judges on this appellate panel speaks Zuni, and there is no English translation in the certified record of any of the several colloquies conducted in the Zuni language.

[3] For unknown reasons, the "documentation" that Judge Panteah is referring to here was not included in the certified record, and we do not know its contents.

Judge Panteah then stated:

> In light of the information provided to the court on whether the defendant Christopher Lonjose would be considered incompetent by this court, again, really, the court has not received any testimony by any medical professional or psychologist to present that information to the court to determine that Mr. Lonjose is incompetent to stand trial. That has not been presented to this court. However, just based on the initial proceedings of this court, the defendant appears that he is not able to understand the proceedings of this trial. And based on that, the court is under the belief that he won't be able to properly defend himself against the charge of rape. So what I'm going to do is I'm going to continue this matter and give the defendant some time to seek legal counsel.

Judge Panteah memorialized his oral order in a written Order dated March 21, 2014, which continued Case One until April 18, 2014.

In the interim, the Pueblo of Zuni filed the four additional criminal complaints in Case Two on April 2, 2014. Case Two was assigned to Judge Panteah. The Zuni Tribal Court did not consolidate the cases. As will be explained below, the trials for Case One and Case Two occurred on the same day, one immediately after the other.

On April 15, 2014, Ms. Shebala filed a handwritten letter addressed to Judge Panteah in which she complained of the behavior of the Criminal Investigator in Case Two, after the investigator twice visited her home that she shared with Appellant. According to Ms. Shebala's letter, the investigator insisted on speaking to Appellant despite Ms. Shebala's attempts to explain that Appellant had a "learning disability" and that he had difficulty understanding the "sophisticated words" that the investigator was using.

Based on Ms. Shebala's letter regarding Case Two, Lay Prosecutor Ghachu filed a motion in Case One on April 17, 2014, in which he acknowledged that Ms. Shebala's letter was the second time that she had brought up Appellant's learning disability to the Zuni Tribal Court. Ghachu wrote in his motion, "in all fairness Prosecution requests that under Rule 28 of the Rules of Criminal Procedure, Mental Incompetency; Lack of Capacity (2)(a) the defendant should be ordered to undergo a mental evaluation to prove or disprove his claim prior to another scheduled trial date." Ghachu further requested that Appellant's "mental capacity" be evaluated "by a professional," and that a Zuni language interpreter be made available to Appellant in the event of a finding of competency.

On May 20, 2014, Appellant filed for both Case One and Case Two a single Motion for Appointment of Counsel at the Expense of the Tribe and Concurrence in Request for Court-Ordered Evaluation. This motion was ostensibly pro se, but it was prepared with the assistance of New Mexico Legal Aid ("NMLA"), and it was accompanied by an affidavit from the NMLA attorney who is currently representing Appellant in these appeals, Ms. Jean Philips. The thrust of the motion was that because the Zuni Tribe had recently accepted a monetary grant specifically intended to create a public defender's office, the Tribe had the obligation to provide counsel at the Tribe's expense to indigent defendants such as Appellant. In support of this argument, the motion cited a constitutional guarantee, unique to that of the Zuni Constitution, that "all members of the Zuni Tribe shall have equal political rights and equal opportunities to share in tribal assets." Zuni Const. art. III, § 1. Appellant further stated in the motion, "I do not understand what is happening in this case or how to defend myself." The motion requested that in the event the Tribe did not pay for counsel for Appellant, that the matter be continued until the Tribe hired a public defender.

On May 28, 2014, Judge Panteah held a hearing for Appellant's motion to appoint counsel at the Tribe's expense. Judge Panteah asked Appellant at the beginning of the hearing if he was ready to present his motion, and Appellant responded, "Yes." Judge Panteah proceeded to address some preliminary housekeeping matters. Judge Panteah then asked a question in the Zuni language, to which Appellant responded, "I don't know." Judge Panteah asked another question in the Zuni language, to which there was no response. Presumably because Appellant would not respond, Judge Panteah asked Ms. Shebala to speak. Ms. Shebala spoke at length, primarily in the Zuni language. Judge Panteah spoke both Zuni and English when speaking to Ms. Shebala. The gist of their colloquy was that Ms. Shebala and Appellant had tried to find an affordable attorney but were unsuccessful.

When Judge Panteah asked Lay Prosecutor Ghachu to respond, Ghachu stated that Appellant had had plenty of time to seek an attorney and still had not found one. Ghachu argued that the Zuni Constitution explicitly placed the burden of the expense of an attorney on Appellant. Ghachu further said that he believed that Appellant indeed understood the proceedings and that trial could proceed. Ghachu, however, then stated that if Judge Panteah did not think Appellant capable, "I think at this time we should request for a mental evaluation."

With respect to a mental evaluation, Judge Panteah stated:

> The court, in its resources, is somewhat limited as far as ordering an evaluation for a defendant to be determined whether he's capable of standing

> trial, you know, if his mental capabilities will allow him to stand trial, you know, even as a *pro se* defendant. [Judge Panteah speaks briefly in the Zuni language.] We are not here as the Indian Health Service to provide that service.

Judge Panteah explained that the Tribe had indeed accepted a grant for the creation of a public defender's office, but that he did not know when the office would actually begin to operate. Judge Panteah also explained that the Tribe had an obligation to try this matter within six months, pursuant to every defendant's constitutional right to a speedy trial. Judge Panteah then proposed that if Appellant were willing to waive his right to a speedy trial, then Judge Panteah would continue the matter until the public defender's office was ready to take cases. However, if Appellant were not willing to waive his right to a speedy trial, then the trials would proceed as scheduled. Judge Panteah explained these legal concepts to Appellant and to Ms. Shebala a few times to ensure they understood what he was proposing. Appellant then waived his right to a speedy trial. In closing, Judge Panteah stated for the record that Appellant had waived his right to a speedy trial in exchange for this continuance.

In a written Order dated May 28, 2014, Judge Panteah wrote, "In presenting the motion, the Defendant appeared that he did not understand the motion and could not present the motion." Judge Panteah also wrote of Appellant's fruitless efforts to obtain an affordable attorney. In conclusion, Judge Panteah wrote:

> IT IS THEREFORE ORDERED:
>
> The Court shall continue with these two cases until such time that the Public Defender is hired by the Tribe enters [sic] his Entry of Appearance whereupon, the Court shall set a date for the Bench Trials. If for any reason the Public Defender declines to represent the Defendant, the court will proceed with the Bench Trial without the Defendant being represented by legal counsel.

At no point in the hearing nor in the written Order did Judge Panteah impose a duty or obligation upon Appellant to continue searching for an attorney.

Nothing further occurred in these matters until November 3, 2014, over five months later, when Judge Chapela – *not* Judge Panteah – sent two notices to Appellant ordering Appellant to appear for trial in both cases on the afternoon of November 19, 2014. Neither Notice of Trial mentioned Judge Panteah's Order of May 28, 2014. Nor did either notice explain why Judge Panteah was no longer the presiding judge in the cases. Thus Judge Chapela, who had recused himself at the outset of Case One because he did not speak the Zuni language, became the presiding judge once again. Judge Chapela had also suddenly become the presiding judge in Case Two.

On the morning of the trials, Appellant submitted a handwritten motion requesting a continuance based on the fact that Judge Panteah had previously ordered that both Case One and Case Two be continued until the Zuni Tribe hired a public defender. Appellant also wrote that he had waived his right to a speedy trial as a condition of Judge Panteah's continuance. Appellant's motion stated that he did not waive his right to a speedy trial if he were forced to proceed without counsel. At its end, the motion stated, "Motion prepared by Diane Shebala."

In opposition, Lay Prosecutor Ghachu quickly drafted a Response to Motion for Continuance that same morning. Ghachu argued that Appellant's motion was untimely under Rule 27(E) of the Zuni Rules of Criminal Procedure, which provides that a motion to continue filed less than five days before trial will not be considered unless there existed unforeseeable or exigent circumstances, and if the movant did not engage in unreasonable delay. Ghachu further wrote that Appellant had had more than nine months to find an attorney and had not done so.

At the time set for the first trial that same afternoon, Judge Chapela began by addressing Appellant's motion to continue and Ghachu's opposing response. Judge Chapela acknowledged that Judge Panteah had ruled that there would be no trial until the Tribe hired a public defender, and that Appellant had waived his right to a speedy trial as a condition of continuing this case until a public defender was hired. Judge Chapela then characterized Appellant's motion to continue as a request for more time to find an attorney, stating from the bench, "[Appellant] wants to continue the trial one additional time so that he can obtain counsel to represent him."

Ghachu objected to Appellant's motion and argued the points of his own opposing motion. Ghachu stated that Appellant's motion to continue should be denied because Appellant had had more than nine months to find an attorney "and hasn't shown that he has expended any effort to seek counsel."

Judge Chapela immediately noted that one of the alleged incidents occurred "almost two years ago," which was a reference to Case Two. Judge Chapela then began describing the procedural history of Case One, which turned into a description of the histories of both cases. When Judge Chapela came to Appellant's motion arguing that he had the right to an attorney at the Tribe's expense, Judge Chapela stated, "That is not the law." Judge Chapela again acknowledged Judge Panteah's continuance, as well as Appellant's waiver of his right to a

speedy trial until a public defender was hired by the Tribe. Judge Chapela then stated:

> As of today, the Pueblo of Zuni has not, does not have a public defender that's been retained to represent any defendant; not just Mr. Lonjose, but any defendant. It's not as, through no fault of the Pueblo of Zuni. [sic] The Pueblo of Zuni has advertised for the position of public defender both in newspapers as well as online. The Pueblo of Zuni received responses from approximately nine attorneys. … No one of those attorneys was hired, mainly because they had obtained other positions at the time of the interview and so the Pueblo was forced to, well, we couldn't hire anybody. This court cannot continue to delay this matter, because in addition to the rights of the defendant, the victim, the alleged victim and the family of the alleged victim, has a right to have justice served as well. Again, this incident, the first incident, alleged to have taken place almost two years ago.[4] The court has to take into consideration the mental situation that the alleged victim is in. The alleged victim at the time of the incident is a young child, at the time of the incident fourteen years old. And Lt. Ghachu is correct, there's rules that govern procedure in every court, and the rules of criminal procedure that have been adopted by this court indicate that the court will not consider a motion to continue a hearing or a trial of any kind if it's filed within five days of the date of the scheduled trial. That's what the rules state.

Judge Chapela found that the trial was not unforeseen, that there was "nothing exigent" in Appellant's motion, and denied Appellant's motion to continue.

Proceeding to the issue of appointment of counsel to represent Appellant, Judge Chapela asked, "Mr. Lonjose, since the last time this matter was scheduled for trial, since May of this year, what have you done to look for a lawyer?" Appellant did not respond. Judge Chapela persisted, "This matter, this trial was scheduled in May, and was continued by Judge Panteah because you said that you were looking for a lawyer … Since May until today, what have you done to try and get a lawyer for yourself?" Appellant responded that he had spoken to a lawyer who was too expensive, and that another lawyer's license had been suspended. Judge Chapela admonished Appellant by stating that those efforts occurred in May, and, "There's nothing in the record of the court to indicate that you have done anything since May to obtain a lawyer." Judge Chapela then asked Ghachu, "Is the alleged victim available this afternoon? … The defendant has rights, but the victim has rights to bring this matter to a closure as well. We'll have trial this afternoon."

A. Trial for Case One

Trial for Case One then began immediately. Judge Chapela did not provide an interpreter and the trial was conducted entirely in English. The court heard testimony from the alleged victim, the alleged victim's mother, responding officers, and Appellant's grandmother.

The alleged victim testified that she had initiated contact with Appellant by sending him a friend request through Facebook. She invited him to her home one night to watch television. She testified that Appellant drove to her house and entered her bedroom through the bedroom window so as not to draw attention from her family, who were elsewhere in the home. She testified that halfway through a movie they were watching, Appellant began to forcefully remove her clothes, placed himself upon her, and then physically forced her to have sexual intercourse. Appellant then left through the bedroom window. Both the alleged victim and her mother testified that they promptly went to the Indian Health Services hospital when the alleged victim told her mother what had happened.

Appellant was able to raise some relevant issues when cross-examining the prosecution's witnesses, but not without some difficulty. When Appellant asked the alleged victim if she had "paper proof of what happened" from the hospital, Ghachu objected on the grounds that the prosecution was "not using that as evidence." Judge Chapela did not rule on that objection, but instead asked the witness if she had gone to the hospital.

At various times during Appellant's questioning of the witnesses, Judge Chapela or the witness had to ask Appellant to clarify his questions. Judge Chapela sometimes attempted to clarify Appellant's questions for the witness on the stand. Judge Chapela and Ghachu also interrupted or objected to certain lines of questioning as irrelevant, or as testimonial statements rather than questions, or as inadmissible hearsay. Judge Chapela, however, made little attempt to explain these legal concepts to Appellant in terms that Appellant might understand. Many of Appellant's questions did not make sense. Appellant was clearly confused at many points throughout the trial.

For Appellant's part, he called his grandmother to the stand. Ms. Shebala provided an alibi and testified that Appellant did not leave her home at all on the night in question.

[4] Another reference to the alleged incidents of Case Two.

When the prosecution rested its case, Appellant declined to make any statement or argument in his defense.

Though initially charged with the offense of rape, Judge Chapela, from the bench, found Appellant guilty of the lesser included offense of sexual assault, Class B, pursuant to section 4-4-19 of the Zuni Tribal Code. At the conclusion of the trial, Judge Chapela can be heard on the audio record calling for a brief recess before beginning the trial for Case Two.

B. Trial for Case Two

On direct examination, the alleged victim testified that she met Appellant through Facebook and began exchanging messages with him. Appellant arranged to have her come to his house and to his bedroom twice in December, 2012, and they engaged in consensual sexual intercourse. The third encounter occurred in February, 2014. At some point between the second and third encounters (the record is not very clear), the alleged victim discovered she had chlamydia, and she blamed Appellant for transmitting it to her. Ghachu asked if she had had any other sexual partners besides Appellant, to which she replied that she did not.

There were only two brief exchanges where Lay Prosecutor Ghachu asked the alleged victim if Appellant knew her age. The first exchange occurred approximately nine minutes into her testimony:

> Ghachu: And earlier you testified that you and Mr. Lonjose had met on Facebook. Is there a way Mr. Lonjose would have known how old you were?
> Witness: Yes, because my birthday is on there.
> Ghachu: Your birthday is on there.
> Witness: Yes.
> Ghachu: And how old were you when this took place in Mr. Lonjose's bedroom?
> Witness: I was thirteen at the time.
> Ghachu: Thirteen years old. So you had sexual intercourse with Mr. Lonjose, how long did you remain in the house thereafter?

The only other instance where Ghachu asked the alleged victim about whether Appellant knew her age was after she had testified about the third encounter between her and Appellant:

> Ghachu: Did Mr. Lonjose know how old you were?
> Witness: He had known how old I was because once when we were at his house we had an argument and he said fourteen and twenty-two wasn't statutory rape, wasn't considered statutory rape.
> Ghachu: Did you go any place for medical reasons?
> [Witness explains she went to a clinic that later told her that she had chlamydia.]

On cross-examination, Appellant asked the alleged victim why her Facebook account represented she was seventeen years of age. She stated that that was not true, and that her Facebook account showed she was thirteen. From that point Appellant tried to demonstrate that the alleged victim pursued him, but Appellant had a difficult time formulating questions that were relevant or that made sense. Judge Chapela cut Appellant off a few times when the questioning became too confusing or seemed to lack a relevant point.

When Appellant asked the alleged victim, "How many times have you done this?," Judge Chapela interjected immediately and stated he would not allow that question. Appellant was trying to ask the alleged victim if she had engaged in sexual activity with anyone besides Appellant during the time surrounding the alleged incidents, but Judge Chapela chastised Appellant by stating that the alleged victim's other sexual experiences were irrelevant, and that the only issues in court that day had to do with what had occurred between Appellant and the alleged victim.

On re-direct, Ghachu asked the alleged victim if she had proof of her visit to the clinic, to which she stated that she did. Apparently documentation of some kind was present in the courtroom and in the alleged victim's possession, but that documentation is not in the record.

In his defense, Appellant called his grandmother to the stand, who testified that Appellant essentially never left their house except for regular religious duties that he did for the Pueblo.

Judge Chapela asked Appellant if he had anything to say in his defense. Appellant tried to speak of individuals who were not present in court, which Judge Chapela would not allow due to hearsay concerns. Appellant tried to allege that the alleged victim had posted sexually suggestive photos on Facebook that led him to believe that she was older than she really was, but Judge Chapela cut him off again, saying the photos were not in Appellant's possession, that Appellant cannot testify about things he could not prove, and that "anyone can make up stories."

At the conclusion of Appellant's attempt at a closing statement, Judge Chapela stated from the bench that Appellant "knew or should have known as a result of the information he had, from his Facebook account, regarding the victim[’s]" age, "who was just a child." He found Appellant guilty of all four offenses from the bench. The

resultant written order does not make any reference to a particular *mens rea*.

II. ISSUES

On appeal, Appellant argues that his due process rights were violated in both Case One and Case Two: (1) when the Zuni Tribal Court failed to order a mental health evaluation for Appellant; and (2) when Judge Chapela chose to wholly disregard Judge Panteah's May 28, 2014, Order, and the rights and obligations guaranteed therein, without notice or a hearing.

With respect to Case One, Appellant asserts: (1) that the Zuni Tribal Court erred in finding him guilty of the lesser included offense of sexual assault, claiming that the evidence presented could not have satisfied the statutory requirements for the imposition of the lesser included offense; and (2) that the lay prosecutor violated his due process rights by failing to disclose potentially exculpatory evidence.

With respect to Case Two, Appellant claims: (1) that the Zuni Tribal Court erred when it did not apply the correct *mens rea* standard, as required by the Zuni Tribal Code, when it found Appellant guilty of three counts of unlawful sexual intercourse; and (2) that the Zuni Tribal Court violated Appellant's due process rights when the court denied him the ability to ask the alleged victim about prior instances of sexual conduct with anyone other than Appellant.

III. STANDARD OF REVIEW

At the time Appellant filed his notice of appeal, the Zuni Rules of Appellate Procedure ("Z.R.A.P.") were in place. Rule 14(C) is the only place in the Z.R.A.P. that provides a standard of review. Because the standard of review of Rule 14(C) is identical to that of *Hualapai Nation v. D.N., A Minor*, 9 SWITCA Rep. 2 (1998), a criminal case decided by this Court, we apply that standard of review here.

"The decision of the trial court shall be set aside only if it is shown that the decision: (1) is arbitrary, capricious or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with law." Rule 14(C), Z.R.A.P. (The Zuni Tribal Council rescinded the Z.R.A.P. on April 29, 2015, by Tribal Council Resolution No. M70-2015-P042.)

IV. DISCUSSION

A. The Zuni Tribal Court Abused Its Discretion in Refusing to Order a Mental Health Evaluation for Appellant.

With respect to a defendant's mental competency, the Zuni Rules of Criminal Procedure provide as follows:

> A. Competency to Stand Trial
>
> (1) The issue of the defendant's competency to stand trial may be raised by motion, or upon the court's own motion, at any stage of the proceedings.
>
> (2) The issue of the defendant's competency to stand trial *shall* be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as to the defendant's competency to stand trial.
>
> (a) If a reasonable doubt as to the defendant's competency to stand trial is raised prior to trial, the court *shall* order the defendant to undergo a mental health evaluation. Within thirty days after receiving an evaluation of the defendant's competency, the court, without a jury may determine the issue of competency to stand trial.
>
> (b) If the issue of the defendant's competency to stand trial is raised during trial, the court shall stay further proceeding and order the defendant to undergo a mental health evaluation.

Rule 28(A), Z.R.Crim.Pr. (emphasis added).

"While this Court is very aware of the financial constraints on tribal governments, particularly on tribal courts, this cannot be a valid defense to failing to comply with the clear written law." *Fort Mojave Indian Tribe v. Jenkins*, 7 SWITCA Rep. 1, 3 (1996).

Here, Appellant's grandmother raised the issue of Appellant's competence to stand trial when she filed the Motion for Appointment of Guardian ad Litem on January 28, 2014. On that form motion, Ms. Shebala checked a box stating that "Defendant is not competent to defend himself/herself in this case because of a developmental disability or cognitive disability." In response to the form's instructions to write a diagnosis, Ms. Shebala wrote "Specific Learning Disability," with no further explanation. From the audio recording of the motion hearing of March 21, 2014, Judge Panteah can be heard to acknowledge "documentation" that Ms. Shebala had apparently filed in support of her contention that

Appellant had a mental disability, but that "documentation" is missing from the certified record.

Thus Ms. Shebala raised the issue of Appellant's competence to stand trial, in compliance with Rule 28(A)(1) of the Zuni Rules of Criminal Procedure. According to Rule 28(A)(2), Judge Panteah then had the duty to either (i) determine the competency of Appellant or, (ii) if there was evidence raising reasonable doubt as to Appellant's competency, order Appellant to undergo a mental health evaluation.

Judge Panteah declined to determine whether Appellant was competent, apparently because Appellant had not provided "any testimony by any medical professional or psychologist to present that information to the court to determine that Mr. Lonjose is incompetent to stand trial." While such testimony would likely have been helpful at that stage, the language of Rule 28 merely requires a defendant to raise the issue of competency before trial; the Rule does not impose a duty upon defendant to produce professional/medical testimony when raising the issue of competence. In fact, the Rule contemplates that such testimony would necessarily be obtained after a court-ordered mental health evaluation.

It is clear from the record that Judge Panteah was not completely convinced on March 21, 2014, that Appellant was competent to stand trial. Given Appellant's apparent inability to understand what was asked of him and what was happening in that hearing, Judge Panteah continued the trial due to his belief that Appellant "won't be able to properly defend himself against the charge of rape." The ability of a defendant to assist in his defense, to understand the proceedings and participate in them with counsel, and to fully understand the consequences of the proceedings are critical factors in assessing whether a mental evaluation should be undertaken.

Ms. Shebala again raised the issue of Appellant's "learning disability" in her April 15, 2014, letter to Judge Panteah, in which she complained about the Criminal Investigator's use of "sophisticated words" that Appellant did not understand when being interviewed. Two days after that letter, Lay Prosecutor Ghachu submitted his motion explicitly requesting "in all fairness" that Judge Panteah order a mental health evaluation for Appellant "by a professional" in order to determine Appellant's competency to stand trial.

Thus the combination of Ms. Shebala's motion raising the issue of Appellant's incompetence; her letter of April 15, 2014, to Judge Panteah; Ghachu's April 17, 2014, motion requesting a mental health evaluation; and Judge Panteah's impressions of Appellant during the March 21 hearing were cumulative evidence that can be said to have raised reasonable doubt in Judge Panteah as to Appellant's competency to stand trial. Judge Panteah should have therefore ordered Appellant to undergo a mental health evaluation pursuant to Rule 28(A)(2) upon receipt of Ghachu's motion.

Judge Panteah had another opportunity to comply with Rule 28 on May 28, 2014, when considering Appellant's Motion for Appointment of Counsel at the Expense of the Tribe and Concurrence in Request for Court-Ordered Evaluation. There, however, Judge Panteah again declined to determine whether Appellant was competent, and he refused to order a mental health evaluation despite Ghachu's explicit recommendation during that hearing that if the court did not think Appellant capable, "at this time we should request for a mental evaluation." Even though Judge Panteah still harbored doubts as to Appellant's mental capabilities, Judge Panteah denied the mental health evaluation because "the court, in its resources, is somewhat limited as far as ordering an evaluation," and because "[The court is] not here as the Indian Health Service to provide that service."

Judge Panteah thus impermissibly disregarded the mandatory language of Rule 28. Moreover, Judge Panteah erroneously construed the mental health evaluation itself to be a "service" to possibly incompetent defendants, rather than a statutory requirement. Such an interpretation must be corrected, as it carries the inherent risk of denying a potentially incompetent defendant the right to a mental health evaluation that may well prove that a defendant is not competent to stand trial.

Based on the above, we hold that the Zuni Tribal Court abused its discretion and did not act in accordance with the clear written law of its Rules of Criminal Procedure when, in light of evidence raising reasonable doubt as to Appellant's competence to stand trial, the court refused to order Appellant to undergo a mental health evaluation. The evidence raising reasonable doubt included the facts that Appellant had some kind of disability to such an extent that he was unable to work and received regular Supplemental Security Income; that it was possible that Appellant's disability may well have been an intellectual disability (as there was no evidence that Appellant had a physical disability); that Appellant did not graduate high school until the age of twenty; that Ms. Shebala raised the issue of Appellant's competence at the outset of Case One; that both Ms. Shebala and Appellant consistently insisted that Appellant had difficulty understanding what was said to him or required of him by the tribal court and the tribal Criminal Investigator; that Ghachu twice requested Judge Panteah to order a mental health evaluation for Appellant; and that Judge Panteah himself observed and acknowledged that Appellant did not appear to understand the court's proceedings.

Because there was evidence raising reasonable doubt as to Appellant's competence, it was absolutely crucial for both the tribal court and Appellant to be certain of competence before proceeding any further, as subjecting an incompetent person to trial would have been a grave injustice. Judge Panteah's refusal to order a mental health evaluation in light of such reasonable doubt was an abuse of discretion that was fundamentally unfair and contrary to the clearly written law of Rule 28.

In order for the Zuni Tribal Court to try Appellant on remand, Appellant must first undergo a mental health evaluation pursuant to Rule 28(A)(2) of the Zuni Rules of Criminal Procedure, and the results of the evaluation must be duly and fairly considered by the tribal court to determine whether Appellant is competent to stand trial.

B. The Zuni Tribal Court Violated Appellant's Due Process Rights.

The Due Process Clause of the Zuni Constitution provides: "The Zuni Tribe, in exercising its powers of self-government, shall not: Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]" Zuni Const., art. III, § 2(h).

The essential concern of due process is fair process/procedure, which requires at the very least prior notice of a proposed governmental action and an opportunity, often at a hearing, to present objections to the proposed governmental action in front of a neutral decision maker. A primary purpose of the Due Process Clause is to provide procedural safeguards against arbitrary deprivation by the government, of which the Zuni Tribal Court is a branch.

1. Recusal of Judge Chapela and Failure to Provide Appellant an Interpreter

When Judge Chapela suddenly made himself the presiding judge once again in Case One in November, 2014, he did not offer any explanation as to why he had ignored his own order of recusal. The purpose of recusal is "to promote public confidence in the integrity of the judicial process [, which] does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Durhan v. Neopolitan*, 875 F.2d 91, 97 (7th Cir. 1989). The test for appearance of partiality is whether an objective, disinterested observer fully informed of the reasons that recusal was sought would entertain a significant doubt that justice would be done in the case. *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985).

Because Judge Chapela had initially acknowledged "good cause" to recuse himself in Case One in favor of a judge who spoke Zuni, Judge Chapela had at one point recognized the importance, if not necessity, of someone able to speak Zuni to Appellant during the proceedings. When Judge Chapela suddenly made himself the presiding judge in both cases, however, he did not provide an interpreter for Appellant, and he conducted all proceedings in English. By November, 2014, Judge Chapela was aware or should have been aware of Lay Prosecutor Ghachu's request for an interpreter, and of the fact that Appellant, Ms. Shebala and Judge Panteah often spoke Zuni in previous hearings.

In light of the fact that Judge Chapela had initially recused himself in Case One due to concerns about Appellant's ability to understand English, we find that an objective and disinterested observer could, and would, entertain a significant doubt that justice would be done in either trial when Judge Chapela chose to preside over both trials without providing an interpreter. It was therefore a fundamentally unfair abuse of discretion of Judge Chapela to force Appellant to defend himself at trial without a qualified interpreter. This is particularly true given the various rights at stake when a defendant or witness who does not understand the English language appears in court.

There is no Zuni statute requiring the appointment of an interpreter for a defendant, but we hold that a trial court has an independent duty to appoint an interpreter, or the court itself can act as an interpreter, if the court is made aware that a defendant or witness does not understand the English language well, unless the defendant expressly waives the right to an interpreter.

2. Expedited Trial with Two Weeks' Notice

A judge has a duty to provide a fair trial and to ensure that justice is rendered in an impartial manner. The fact that Judge Chapela, without warning, sent notice to Appellant that Appellant would only have slightly more than two weeks to prepare for two significant criminal trials makes us question Judge Chapela's impartiality. We also take issue with Judge Chapela's dismissive consideration of Appellant's morning-of-trial motion to continue. Such actions raise serious questions about whether Appellant was afforded a fair trial.

On the day scheduled for trial, Lay Prosecutor Ghachu opposed Appellant's motion to continue with two arguments that did not address Judge Panteah's May 28 Order, which formed the very basis of Appellant's motion to continue. Appellant's motion stated, "On May 28th 2014 Judge Panteah ruled that there would be no trial until the Pueblo of Zuni hired a public defender. The Courts required me to waive my rights to a speedy trial as a

condition of continuing my case until I had a counsel." [sic] Instead of attacking the validity of the May 28 Order and the benefit of appointed counsel that the Order conferred on Appellant, Ghachu argued that Appellant's motion was untimely and did not satisfy Rule 27(E) of the Zuni Rules of Criminal Procedure, and that Appellant had had more than nine months to seek counsel and had failed to do so.

Rule 27(E), in relevant part, provides: "A motion to continue filed less than five days before trial will not be considered unless unforeseeable or exigent circumstances are shown and the moving party did not unreasonably delay in seeking the continuance." Z.R.Crim.P. 27(E). Up until Appellant received the notices of trial for both cases, Appellant had been living for over five months with the reasonable expectation that he did not have to search for an affordable attorney because one would eventually be appointed to him, per Judge Panteah's Order. Without warning or explanation, however, Judge Chapela ordered Appellant to appear for trials in both matters in a mere two weeks, and scheduled both trials to occur on the same day. The notices of trial did not mention Judge Panteah's Order, and they gave no indication as to whether Appellant would still be appointed counsel or not.

We find it extremely unlikely, if not impossible, that Appellant could have acquired an affordable attorney who could have adequately prepared a defense in two serious criminal matters in just two weeks. Ordering an unrepresented, indigent defendant to prepare for two serious criminal trials in only two weeks is manifestly unreasonable and unfair. To be suddenly placed in such a position without prior warning, with so little time to act and in clear disregard of one's right to the appointment of counsel, should have clearly satisfied the "unforeseeable or exigent circumstances" required by Rule 27(E) for a continuance. Furthermore, considering the mere two-week window in which Appellant was ordered to prepare for both trials, we cannot imagine how Appellant could have possibly engaged in unreasonably delaying his motion to continue, as the time period for preparation was itself unreasonably brief.

We also take issue with Ghachu's argument that Appellant's motion to continue should be denied because Appellant had had nine months to secure counsel and had failed to do so. That argument led Judge Chapela to question Appellant about what efforts Appellant had made between May 28 and November 19 to find an attorney. Appellant, of course, could not provide an answer, as the May 28 Order imposed no obligation upon Appellant to continue seeking counsel, and Appellant expected that an attorney would eventually be appointed to him at the Tribe's expense. It was fundamentally unfair of Judge Chapela and Ghachu to impose a nonexistent duty on Appellant, and to then use Appellant's 'failure' to comply with that duty as a basis to immediately require Appellant to proceed through two trials *pro se.*

In light of the foregoing, Appellant's morning-of-trial motion to continue never stood a chance, and Judge Chapela's pretrial hearing that day was merely a formality. Judge Chapela's actions leading up to the trials force us to conclude that he was not an impartial decision maker while presiding over both cases. Wholly disregarding Judge Panteah's May 28 Order and forcing Appellant to two trials in two weeks was both arbitrary and an abuse of discretion, in violation of Appellant's due process rights.

C. Prosecutor's Duty to Disclose Potentially Exculpatory Evidence.

Appellant ostensibly relies on "Rule 3.8 of the [American Bar Association's] Code of Professional Responsibility" as the source of Lay Prosecutor Ghachu's duties of disclosure to Appellant. In a footnote, Appellant explains that the Code of Professional Responsibility was "[a]dopted by the Zuni Tribe via § 1-5-5" of the Zuni Tribal Code. Appellant, however, cites language from Rule 3.8 of the ABA Model Rules of Professional Conduct. While section 1-5-5 of the Zuni Tribal Code indeed adopted the Code of Professional Responsibility, the Code of Professional Responsibility does not contain the language of Rule 3.8 of the Model Rules of Professional Conduct. The Zuni Tribal Code does not state anywhere that it has adopted the Model Rules of Professional Conduct, and we are not aware of any amendment to the Zuni Tribal Code adopting the Model Rules of Professional Conduct. We therefore cannot find that Rule 3.8 of the Model Rules of Professional Conduct imposed upon Lay Prosecutor Ghachu the prosecutorial duties as argued by Appellant.

The only other provisions in the Zuni Tribal Code that describe a prosecutor's duties of disclosure are contained in Rules 21 and 23 of the Zuni Rules of Criminal Procedure. Appellant contends that Ghachu violated his prosecutorial duties to disclose potentially exculpatory evidence by failing to abide the following provisions of Rule 21(A) of the Zuni Rules of Criminal Procedure:

> Rule 21. Disclosure by the Zuni Tribe
>
> A. Information Subject to Disclosure.
>
> Within ten days of a written request made by the defendant, the Zuni Police Department or the Tribal Prosecutor shall disclose or make available to the defendant:
>
> (3) any results or reports of physical or mental examinations, and of scientific tests or experiments, … made in connection with the matter before the court; …

> (6) any material evidence which would tend to mitigate or negate the defendant's guilt as to the offense charge [sic], or would intend to reduce his punishment thereof.

Rules 21(A)(3) and (6), Z.R.Crim.P.

As for Rule 23, "Continuing Duty to Disclose," it provides:

> A. Additional Material or Witnesses.
>
> If at any time prior to or during trial, a party discovers additional material or witnesses which he would have under a duty to produce or disclose, he shall promptly give notice to the other party or the party's legal counsel of the existence of the additional material or witnesses.

Rule 23(A), Z.R.Crim.P.

Notably, the Zuni Rules of Criminal Procedure do not explicitly state that a prosecutor has a continuing duty to disclose potentially exculpatory evidence. Principles of due process and fundamental fairness would clearly require a prosecutor and the police department to disclose potentially exculpatory evidence to a defendant charged with a crime. If such a duty did not exist, prosecutors and the police would be able to withhold any and all evidence mitigating or negating a defendant's guilt without penalty. This would not serve the ends of justice. Thus even though Rule 21(A) contemplates a written request from the defendant in order to compel disclosure from the Zuni Police Department or the Tribal Prosecutor, we hold that due process and fundamental fairness imposes upon the police and prosecutors a continuing duty to disclose potentially exculpatory evidence to a defendant. Rule 23(A) may be read to recognize this duty.

Here, Appellant argues that Ghachu withheld potentially exculpatory evidence by not disclosing to Appellant Facebook messages and text messages between Appellant and the alleged victim that Appellant believed were in the alleged victim's possession. Appellant, however, never described what he expected these messages to show, nor how they would be helpful or favorable to him. Ghachu never produced or disclosed any of these messages, and there is no indication that he had ever acquired them from the alleged victim. The substance of these alleged messages remains unknown. Under such circumstances, we cannot speculate that messages of unknown content were potentially exculpatory. It follows that we cannot find that Ghachu violated a duty to disclose potentially exculpatory evidence with respect to these messages.

Appellant also contends that Ghachu improperly objected to Appellant's cross-examination of the alleged victim when Appellant asked if the alleged victim had any "paper proof" from the hospital that she visited after she reported the allegation of rape. According to Appellant, the Indian Health Service is required to follow a lengthy protocol when treating victims of sexual assault. The protocol involves the preservation of evidence, recorded examinations, written reports, and scientific tests and experiments. When Appellant attempted at trial to ask the alleged victim if the hospital provided her with such documents, Ghachu objected on the basis that the prosecution "was not using that as evidence." Judge Chapela, in turn, did not rule on Ghachu's objection, but instead asked the alleged victim if she had indeed gone to the hospital, to which she replied that she had. Judge Chapela then told Appellant to pursue a new line of questioning.

We note that such a hospital report would, by its very nature, tend to be either inculpatory or exculpatory. As such, it was proper for Appellant to inquire about these documents – whether they existed and what results and conclusions they contained. Ghachu's objection was therefore improper, and Judge Chapela should have overruled Ghachu's objection. Instead, Judge Chapela refused to allow Appellant to continue in that line of questioning, preventing Appellant from presenting a defense.

Because such documents, if shown to exist, may have contained potentially exculpatory evidence, it was an abuse of discretion of Judge Chapela to deny Appellant the opportunity to ask about such documents, as Appellant was effectively denied his right to fully develop a defense, in violation of his due process rights.

D. Right to Counsel

Appellant claims that because of his indigence, both the Due Process Clause and the Right to Counsel Clause of the Zuni Constitution guarantee him the right to be appointed counsel at the Tribe's expense. In support of this contention, Appellant cites authority from the United States Supreme Court, which of course has long acknowledged an indigent defendant's constitutional right to counsel at the State's expense in criminal matters. Tribal constitutions, however, simply guarantee criminal defendants the right to obtain counsel, and only at the defendants' expense. Thus Appellant's constitutional argument can be summarily dismissed by the plain language of the Zuni Constitution, which guarantees Appellant "at his own expense, to have the assistance of counsel for his defense." Zuni Const., art. III, § 2(f).

Appellant next argues that the Zuni Constitutional provision guaranteeing that "all members of the Zuni Tribe shall have equal political rights and equal opportunities to share in tribal assets" entitles him to the appointment of counsel at the Tribe's expense. Zuni

Const., art. III, § 1. Appellant claims that the "assets" he is guaranteed to share are the federal funds that the Zuni Tribe accepted for the creation of a public defender's office. However, at the conclusion of Appellant's trial, the public defender's office had not yet been created, and we are unaware if such an office was ever created or if it currently exists. We cannot find that Appellant is entitled to legal assistance from an entity that may or may not exist, nor that he is entitled to a pool of funds that may or may not exist, especially in light of the plain language of the Zuni Constitution, which guarantees Appellant "at his own expense, to have the assistance of counsel for his defense." Zuni Const., art. III, § 2(f).

Appellant's claim that the guarantee to "equal political rights" obligates the Pueblo to appoint him counsel in order to protect him from "losing political rights" is frivolous. Simply because certain criminal convictions might impact one's political rights is not a sufficient reason to ignore the plain language of Article III, section 2(f) of the Zuni Constitution.

While Appellant acknowledges that there is no right to tribally funded counsel in the Zuni Constitution or the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, Appellant contends that his rights to due process and to equal protection entitle him to the appointment of counsel by the Pueblo due to his intellectual disability.[5] This argument, however, puts the cart before the horse, as it would have us presume that Appellant is intellectually disabled when there is no conclusive evidence in the record demonstrating the existence or extent of an intellectual disability.

While there are indeed questions about Appellant's mental capacities, the issue was not resolved in the tribal court, where it was a source of contention throughout the proceedings with Judge Panteah. Such questions about Appellant's mental capacities are the reason we are ordering Appellant to undergo a mental health evaluation on remand. In the meantime, we cannot hold that Appellant is entitled to the appointment of counsel by the Pueblo due to an intellectual disability that has yet to be proved to exist.

We hold, however, that in the event of new proceedings in this matter on remand, Appellant indeed has the right to counsel at the Tribe's expense because Judge Panteah conferred this right on Appellant in exchange for Appellant's waiver of his right to a speedy trial. We further hold that Appellant maintains this right to counsel at the Tribe's expense whether he is deemed to be competent or not, as a finding of incompetence would arguably create a greater need for counsel to act on behalf of Appellant's best interests. We do not base this holding on the Zuni Constitution, but rather on the rights created in Appellant by Judge Panteah's May 28 Order.

[5] Counsel for Appellant states in the brief-in-chief that "intellectual disability" is a modern term for what has historically been referred to as "mental retardation."

E. Right to a Speedy Trial

Rule 26(A)(1) of the Zuni Rules of Criminal Procedure requires a criminal trial to commence within six months of a defendant's arraignment. This time limit may be extended, for good cause shown, "provided that the aggregate of all continuances requested by the Pueblo of Zuni may not exceed six months." Rule 26(B), Z.R.Crim.P. If trial does not commence within these limits, the criminal complaint must be dismissed. Rule 26(C), Z.R.Crim.P.

Appellant argues that the Zuni Tribal Court violated his right to a speedy trial "when Judge Chapela insisted that Appellant proceed with trial *pro se*, in direct contradiction to the Court's previous Order," over nine months after arraignment. As a result, Appellant contends, Appellant's waiver of his right to speedy trial was never valid. We do not agree with Appellant's assertion that requiring Appellant to proceed with trial *pro se* automatically and retroactively rendered his May 28 waiver invalid.

The running of the six month 'clock' in Case One began on January 22, 2014, the date of arraignment. We find that it was tolled on May 28, 2014, when Appellant agreed to waive his right to speedy trial in exchange for the appointment of counsel at the Tribe's expense. In other words, the 'clock' was paused on May 28, 2014 – slightly over four months after arraignment. We find that the 'clock' began to run again on November 3, 2014, the date of Judge Chapela's Notice of Trial in this matter. Only sixteen days elapsed between November 3 and November 19, the day of trial. Thus less than five months elapsed that would count toward the six month time limit in Case One. Because arraignment in Case Two occurred in April, 2014, even less time elapsed that would count toward the six month limit in that case.

Because trials were held within the six month time limit of Rule 26 of the Zuni Rules of Criminal Procedure, we hold that the Zuni Tribal Court did not violate Appellant's right to a speedy trial. We note that Rule 26 also applies when "a new trial is ordered," thus a new six month 'clock' begins to run upon the date of issuance of this Opinion (should the Zuni Tribe wish to prosecute this case on remand).

F. Double Jeopardy in Case One

As a preliminary matter, we are not convinced by Appellant's contention that Judge Chapela could not have

possibly found Appellant guilty of the lesser included offense of Class B sexual assault. Appellant apparently interprets the offense of rape and the offense of Class B sexual assault to be mutually exclusive of each other in light of the alleged victim's testimony at trial. At this juncture it would not be prudent to comment on the sufficiency or weight of testimony that may have to be elicited yet again on remand. Suffice it to say that Appellant's characterization of the alleged victim's testimony may be too narrow.

Section 4-1-9(B) of the Zuni Tribal Code provides, "A finding of guilty of a lesser-included offense is an acquittal of the greater offense even though the conviction of the lesser-included offense is subsequently reversed, set aside, or vacated."

The Zuni Constitution's Bill of Rights contains a Double Jeopardy Clause which provides, "The Zuni Tribe, in exercising its powers of self-government, shall not compel any person for the same offense to be twice put in jeopardy." Zuni Const., art. III, § 2(d). Because the Tribe's Double Jeopardy Clause is essentially identical to the Double Jeopardy Clause of the Federal Constitution, and because the jurisprudence of double jeopardy has been developed extensively by the United States Supreme Court, we turn to that Court for guidance.

In *Price v. Georgia*, 398 U.S. 323 (1970), the U.S. Supreme Court held that the Double Jeopardy Clause of the Federal Constitution prohibits a trial court from retrying a defendant whose conviction has been reversed on appeal for any offense that is more serious than the offense for which Appellant was originally convicted at the first trial. This is consistent with section 4-1-9(B) of the Zuni Tribal Code.

Based on the above, Appellant may not be retried on remand in Case One for any offense that is more serious than Class B sexual assault.

G. The Proper *Mens Rea* in Case Two

Appellant argues that there was insufficient evidence of the necessary *mens rea* to convict Appellant of the three counts of unlawful sexual intercourse. *Mens rea* is the state of mind that the prosecution must prove that a defendant had when committing a crime. Black's Law Dictionary, 2d. Ed. At the conclusion of the trial in Case Two, Judge Chapela told Appellant from the bench that Appellant "knew or should have known" the alleged victim's age. Judge Chapela then found Appellant guilty of all three counts of unlawful sexual intercourse. Generally, in order to convict a defendant of a crime, the *mens rea* required by the Zuni Tribal Code is as follows:

> A person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each element of the offense, or unless his acts constitute an offense involving strict liability. ZTC § 4-2-2(A).

In order to convict a defendant of a strict liability offense, the statute at issue must state that it is a strict liability offense:

> Strict Liability: an element of an offense shall involve strict liability only when the definition of the offense or element clearly indicates a legislative purpose to impose strict liability for an element of the offense *by use of the phrase "strict liability" or other terms of similar import*, and when so used no proof of a culpable mental state is required to establish the commission of the element or offense. ZTC, § 4-2-2(E) (emphasis added).

If the criminal statute does not explicitly state the particular *mens rea* required for conviction, then the defendant must have acted at least recklessly, knowingly or purposely in order to convict: "When the culpability to establish an element of an offense is not specifically prescribed, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto." ZTC, § 4-2-2(F). Thus for statutes that do not specify a *mens rea*, acting negligently is not sufficient to sustain a conviction.

The offense of unlawful sexual intercourse is defined as follows: "A male person is guilty of unlawful sexual intercourse if he has sexual intercourse with a female, not his wife, who is under 16 years of age, regardless of her consent." ZTC, § 4-4-17(1).

In the vast majority of other jurisdictions, statutory rape is a strict liability offense. However, the Zuni statute for unlawful sexual intercourse (Zuni's analog to statutory rape) does not specify a *mens rea*, and it does not contain the phrase "strict liability" or any other language of similar import. Therefore in order to sustain a conviction for unlawful sexual intercourse pursuant to the Zuni Tribal Code, the prosecution must prove beyond a reasonable doubt all of the elements of the offense, and that defendant acted at least "recklessly" with respect to such elements.

The Zuni Tribal Code defines "recklessly" as:

> [A] person acts recklessly with respect to an element of an offense when he *consciously* disregards a substantial and unjustifiable risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the defendant's conduct and *the circumstances known to him*, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. ZTC, § 4-2-2(C) (emphasis added).

In comparison, the Zuni Tribal Code defines "negligently" as:

> [A] person acts negligently with respect to an element of an offense *when he should be aware* of a substantial and unjustifiable risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. ZTC, § 4-2-2(D) (emphasis added).

Appellant contends that Judge Chapela's statement from the bench that Appellant "knew or should have known" Appellant's age merely imputed a *mens rea* of negligence, and was therefore insufficient to sustain the convictions. Appellant further argues that the prosecution did not sufficiently demonstrate that Appellant knew the alleged victim's true age, and that the court should not have presumed that Appellant knew or calculated the alleged victim's age given Appellant's "intellectual disability."

The only two instances where Ghachu asked the alleged victim if Appellant knew her age elicited answers that were not entirely conclusive, and which would require further inference from a factfinder. When the alleged victim first answered that Appellant knew her age because her birthday was listed on her online Facebook profile, she did not testify as to what her birth date was, nor as to how her birth date appeared on her Facebook profile. In order to establish knowledge of the alleged victim's age, then, the factfinder would have to infer that the listed birth date was accurate; that Appellant had seen the birth date; and that Appellant had correctly calculated her age from it.

When the alleged victim later answered the same question by stating that Appellant knew her age "because once when we were at his house we had an argument and he said fourteen and twenty-two wasn't statutory rape, wasn't considered statutory rape," she did not specify when that argument occurred nor elaborate as to what they were arguing about. Ghachu did not follow up with clarifying questions, either.

The alleged victim never described any instance where she explicitly told Appellant her age. Ghachu did not ask her of circumstances in her life that would have indicated her age to Appellant or given Appellant reason to think she was under the age of sixteen. Nor did Ghachu ask her about anything she may have told Appellant that would have indicated to Appellant how old she was. Ghachu instead limited his questions primarily to what allegedly occurred, step by step, during the underlying incidents.

Complicating matters are varying ages and characterizations that repeatedly occur in the record. The alleged victim testified that she was thirteen years old during the first two alleged incidents in December, 2012, and that she was fourteen for the third incident "on February 28." At the end of the trial, Judge Chapela recited his findings from the bench and stated that the alleged victim was thirteen for the first sexual encounter and fourteen for the second and third encounters, yet Judge Chapela wrote in his order that she was "14" for the first two incidents and "15 years old" at the time of the third.

Judge Chapela also wrote in his order that the alleged victim "knew that the Defendant was 22 years old at the time she was having sexual intercourse with him from his Facebook Profile," but there is nothing in the record showing she ever stated this or that this was even true. In fact, she testified that Appellant had misrepresented his age on Facebook as eighteen years old when they first began communicating in 2012. Moreover, whether the alleged victim knew Appellant's age is irrelevant to the real issue of whether Appellant knew *her* age when he engaged in sexual intercourse with her.

Judge Chapela further wrote, "On one occasion, Defendant told [the alleged victim] *the fact* that he was 22 years old and that [she] was 14 years old did not constitute statutory rape" (emphasis added). As noted above, the alleged victim merely testified that Appellant knew her age because they once had an argument where Appellant "said fourteen and twenty-two wasn't statutory rape." The alleged victim did not testify that Appellant told her it was a fact that he was twenty-two years old.

We must point out that in order to convict Appellant of all three counts of unlawful sexual intercourse, it must be shown at trial that *before the first alleged incident* Appellant either knew Appellant's age or that he was indeed aware of a substantial and unjustifiable risk, given the *circumstances known* to him, that she was younger than sixteen years old, and that he *consciously* disregarded that risk. If, for example, Appellant lacked such knowledge or awareness until after the first two sexual

encounters, then he could not have been convicted for the first two encounters. Even if Appellant's statement that "fourteen and twenty-two wasn't statutory rape" demonstrated Appellant's knowledge of the alleged victim's age or Appellant's awareness of a substantial or unjustifiable risk that she was less than sixteen years old, the alleged victim did not testify as to *when* Appellant made that statement in relation to the sexual encounters.

When Appellant's probation officer interviewed the alleged victim for a post-conviction victim impact statement, Appellant's probation officer recorded that the alleged victim learned Appellant's age "two months after the second sexual event when she was talking about her older brother age (sic); Christopher stated that 13 and 28 is not Statutory Rape." Pre-Sentence Report, December 11, 2014. The alleged victim thus attributed the same statement to Appellant regarding what constitutes statutory rape, but with two different numbers (thirteen and twenty-eight) than at trial (fourteen and twenty-two). Based on the alleged victim's testimony, however, she would have been thirteen and Appellant would have been twenty-one "two months after the second sexual event."[6]

Based on the above, we must conclude that there was ambiguous evidence presented at trial to demonstrate that Appellant either knew the alleged victim's age, or that he was indeed aware of a substantial and unjustifiable risk that the alleged victim was less than sixteen years old, and that he consciously disregarded that risk when he engaged in each of the three acts of sexual intercourse with her.

If the Zuni Tribe wishes to make the offense of unlawful sexual intercourse a strict liability offense, the Zuni Tribe must amend the Zuni Tribal Code accordingly. Pursuant to the current provisions of the Zuni Tribal Code, however, we must reverse the three convictions for unlawful sexual intercourse, as they were not in accordance with law, and remand for a new trial.

H. The Zuni Tribal Court Did Not Allow Appellant Adequate Cross-Examination.

With respect to Appellant's conviction for spreading venereal disease, the tribal court erred when it did not allow Appellant to cross-examine the alleged victim about possible sexual partners besides Appellant.

First, Lay Prosecutor Ghachu "opened the door" to questions of prior sexual behavior when he asked the alleged victim on direct examination how she had contracted chlamydia and if she had had other sexual partners besides Appellant. Moreover, Federal Rule of Evidence 412(1)(A) allows a court to admit "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." The Zuni Tribal Code provides that Federal rules may be considered and applied in tribal court. ZTC, § 1-3-8(f).

Based on the above, it was an abuse of discretion for Judge Chapela to cut off Appellant's questioning of the alleged victim as to possible other sexual partners. By doing so, Judge Chapela effectively deprived Appellant of developing a defense with respect to the charge of spreading venereal disease. Appellant's conviction for spreading venereal disease must therefore be reversed and remanded. Should the Pueblo of Zuni elect to re-try Appellant on remand, Appellant must be allowed to inquire of the alleged victim as to whether someone other than Appellant could have been the source of the venereal disease.

CONCLUSION

For the reasons above, the convictions in Case One and Case Two are hereby REVERSED and REMANDED. Should the Pueblo of Zuni elect to re-try Appellant in these matters, the Pueblo of Zuni must first order Appellant to undergo a mental health evaluation, at the Pueblo's expense, in order to determine whether Appellant is competent to stand trial. Because we find that Judge Panteah's May 28, 2014 Order was valid and not properly overruled, the Pueblo must provide counsel to Appellant at the Pueblo's expense. We extend this right to counsel to Appellant whether Appellant is found to be competent or not. In the event of retrial, the Zuni Tribal Court must provide a Zuni-speaking interpreter or, in the alternative, a presiding judge who speaks the Zuni language. Appellant will have the right to speedy trials in both matters.

It is so ORDERED.

January 17, 2017

[6] Appellant's birth date is known. We deduce from the alleged victim's testimony that she would have still been thirteen years old two months after the second alleged incident because if she were fourteen at that time (approximately mid-February 2013), then she would have necessarily been fifteen during the third alleged incident over a year later, February 28, 2014. However, she testified that she was fourteen years old as of February 28, 2014.

In the Southwest Intertribal Court of Appeals for the Nambe Tribal Court

JAMIE GOMEZ,

Respondent-Appellant,

v.

NAMBE PUEBLO HOUSING AUTHORITY,

Plaintiff-Appellee,

SWITCA Case No. 16-003-NTC
Trial Court Case No. CV-2016-040

Appeal filed June 10, 2016

Appeal from the Nambe Tribal Court
Roman J. Duran, Chief Judge

Appellate Judge: Anthony Lee

ORDER DISMISSING APPEAL

SUMMARY

Appeal denied because notice of appeal was insufficient under SWITCA rules of appellate procedure.

* * *

Pursuant to Nambe Pueblo Tribal Council Resolution NP-2008-20, adopted on June 18, 2008, the Southwest Intertribal Court of Appeals ("SWITCA") was given jurisdiction to hear appeals from the final decisions of the Pueblo of Nambe Tribal Court ("Tribal Court"). The Tribal Court issued a final Default Writ of Restitution and Order for Eviction against Jamie Gomez on May 26, 2016. The Appellant filed a timely letter on June 10, 2016 appealing the decision of the Tribal Court. In the interest of justice, this Court will treat Appellant's letter as a formal Notice of Appeal.

This Court finds that the Notice of Appeal is defective and not sufficient to allow an appeal.

According to SWITCA Rules of Appellate Procedure ("SWITCARA"), 11(e):

The notice of appeal shall, at a minimum, include:

(1) the names, titles, addresses, and telephone numbers of the parties taking the appeal and their counsel unless the lower court determines that including the address or telephone number of any person would place that person in physical jeopardy;
(2) the name of the court rendering the adverse ruling and the date the ruling was rendered;
(3) a concise statement of the adverse ruling or alleged errors made by the lower court;
(4) the nature of the relief being sought; and,
(5) a concise statement of the reasons for reversal and modification.

SWITCARA #11(e) (2001).

Appellant's Notice of Appeal does not include the addresses and telephone numbers of the Appellants, nor does it present any reasoned argument or legal grounds for reversing the lower court's decision. The Notice of Appeal only asserts personal reasons for the appeal, but does not mention any basis for reversal. It is the duty of the Appellants to show specific errors and explain why, as a matter of law, the lower court made a mistake. *See Southern Ute Indian Tribe v. In the Interest of Baby Boy Weaver*, 16 SWITCA Rep. 10, 11 (2005).

The Notice of Appeal is clearly insufficient to perfect an appeal under SWITCARA #11(e) because it fails to provide the Court with adequate information of the errors challenged to form the basis for the appeal. Further, the Notice of Appeal does not contain any mention of any legal authority, or custom or tradition of the Pueblo of Nambe that was violated, misinterpreted or not considered by the lower court for the Court to review. This Court has consistently held that such a deficiency is jurisdictional. *See, Rice v. Yavapai-Prescott Indian Tribe*, 21 SWITCA Rep. 12, 13 (2010). Therefore, the Notice of Appeal in this matter must be denied.

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE APPEAL IS HEREBY DISMISSED.

February 28, 2017

In the Southwest Intertribal Court of Appeals for the Zuni Tribal Court

ELAINE KALLESTEWA,

Appellant,

v.

GABRIEL SICE,

Respondent.

SWITCA Case No. 16-004-ZTC
Zuni Case No. CS-2014-0024

Appeal filed November 17, 2016

Appeal from the Zuni Tribal Court
Samuel Crowfoot, Judge

Appellate Judges: Jeanette Wolfley,
Anthony Lee and Gloria Valencia-Weber

ORDER DENYING APPEAL

SUMMARY

Appeal denied because notice of appeal was insufficient under Zuni and SWITCA rules of appellate procedure.

* * *

This case is an ongoing custody dispute between the Appellant Kallestewa and Respondent Sice over their minor child. On September 9, 2016, Respondent filed an Emergency Motion for Custody and sought primary custody following alleged actions of the Appellant. The lower court on November 15, 2016, following Home studies for the parties, briefing and hearing on the matter ordered that Respondent Sice be granted sole legal and physical custody of the child.

The Appellant filed a Notice of Appeal on November 17, 2016. For the reasons below, Appellant's notice of appeal is denied.

SWITCARA #11 (e)(2001) requires at a minimum the notice of appeal contain a "concise statement of the adverse ruling or alleged errors made by the lower court." Appellant's Notice of Appeal contains no such statement. Appellant's Notice of Appeal sets forth many facts and denial of court findings, alleged abuse of discretion and unfairness by the Honorable Samuel Crowfoot. The Notice of Appeal fails to raise any specific errors that would support her challenge to the decision. When the Court reviews a notice of appeal, it is not in the position to assume or create an error made by the lower court. See *Baker v. Southern Ute Indian Tribe*, 5 SWITCA Rep. 2 (Southern Ute Tribe, 1993); *Archuleta v. Archuleta*, 9 SWITCA Rep. 27 (San Juan Pueblo, 1998) (denying appeal alleging "disagreement and belief" with decision below); *Twist Jr. v. Connors*, 12 SWITCA Rep. 6 (Cocopah Tribe, 2000) (denying appeal that alleged "judgment of the lower court was unjustifiable and unfair"). It is the responsibility of appellant to meet the statutory requirements set out in the rule. As stated in *Peters v. Ak-Chin Indian Community*, 16 SWITCA Rep. 11, 12 (Ak-Chin, 2005), "this Court is not in the position to guess the Appellants' reasons for reversing and modifying the lower Court's decision or granting any specific relief when it not clearly requested."

The statement is clearly insufficient to perfect an appeal under either ZRCP Rule 38(c) or SWITCARA #11 (e) because the statement fails to provide the Court with adequate information of the errors challenged to form the basis for the appeal. The notice does not contain any mention of the Zuni Constitution, Zuni Law and Order Code provision, or Zuni custom or tradition that was misinterpreted or not considered by the lower court for the Court to review. This Court has consistently held that such deficiency is jurisdictional. *See*, *Rice v. Yavapai-Prescott Indian Tribe*, 21 SWITCA Rep. 12, 13 (2010). Therefore, the notice of appeal in this matter must be denied.

IT IS SO ORDERED.

April 28, 2017