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

Court of Appeals of New Mexico
Filed 1/25/2023 11:20 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.



Mark Reynolds

No. A-1-CA-40214

5 **WILLIAM R. DANIELS,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY**

8 **Flora Gallegos, District Court Judge**

9 Raúl Torres, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Santa Fe, NM

14 Mark A. Peralta-Silva, Assistant Appellate Defender

15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **BOGARDUS, Judge.**

19 {1} Defendant appeals his conviction for second degree murder. We previously

20 issued a notice of proposed summary disposition in which we proposed to affirm.

21 Defendant has filed a combined memorandum in opposition and motion to amend

22 the docketing statement. After due consideration, we deny the motion and affirm.

1 {2} We will begin with the motion to amend. Defendant principally seeks to
2 advance a challenge to the district court’s failure to instruct the jury, sua sponte, on
3 the lesser included offense of voluntary manslaughter. [MIO 1-3, 11-16] However,
4 any election to request such an instruction would have constituted a strategic
5 decision, which the district court was not in a position to make on Defendant’s
6 behalf. *See State v. Boeglin*, 1987-NMSC-002, ¶¶ 8-10, 105 N.M. 247, 731 P.2d 943
7 (rejecting an argument that the district court should have instructed the jury sua
8 sponte on a lesser included offense, and explaining that “we consistently have
9 imposed upon the defendant the duty to make the tactical decision whether or not to
10 seek jury instructions on lesser degrees of homicide supported by the evidence”).
11 We similarly reject any suggestion [MIO 13] that it was incumbent upon the district
12 court to conduct an inquiry to clarify Defendant’s election not to pursue instruction
13 on the lesser included offense. *See id.* ¶ 18 (holding that it is not necessary to conduct
14 a “formulaic inquiry” into a defendant’s decision to waive lesser included offense
15 instructions, and ultimately explaining that where the defendant was represented by
16 counsel “we may assume that he knew of his right to [a lesser included offense]
17 instruction and of the possible consequences of his waiver”).

18 {3} Alternatively, Defendant suggests that his attorney’s failure to request an
19 instruction on involuntary manslaughter should be regarded as ineffective assistance
20 of counsel. [MIO 16-21] However, where there is a plausible, rational strategy or

1 tactic to explain counsel’s conduct, a prima facie case for ineffective assistance is
2 not made, *State v. Roybal*, 2002-NMSC-027, ¶ 21, 132 N.M. 657, 54 P.3d 61; and
3 as previously stated, counsel’s failure to request a lesser-included offense instruction
4 generally represents a strategic decision. *See Boeglin*, 1987-NMSC-002, ¶ 18
5 (reiterating that the decision not to submit a lesser included offense to the jury is
6 often tactical). *Cf. State v. Villa*, 2004-NMSC-031, ¶ 14, 136 N.M. 367, 98 P.3d
7 1017 (explaining that on appeal the reviewing court will not second-guess ‘all-or-
8 nothing’ trial strategies, by which instructions on lesser included offenses are not
9 requested). Although Defendant contends that the record does not affirmatively
10 establish his desire to pursue an all-or-nothing approach, [MIO 13] this does not
11 supply the requisite support for his claim of ineffective assistance. *See, e.g., State v.*
12 *Jensen*, 2005-NMCA-113, ¶¶ 12-16, 138 N.M. 254, 118 P.3d 762 (rejecting a claim
13 of ineffective assistance of counsel based on a failure to submit a lesser-included
14 offense instruction, where the record contained “no indication that Defendant’s
15 counsel acted in derogation of his client’s wishes,” and where the defendant offered
16 “no persuasive argument that eliminates any conceivable and viable strategy or
17 tactic”). *See generally Roybal*, 2002-NMSC-027, ¶ 19 (“When an ineffective
18 assistance claim is first raised on direct appeal, we evaluate the facts that are part of
19 the record. If facts necessary to a full determination are not part of the record, an

1 ineffective assistance claim is more properly brought through a habeas corpus
2 petition.”).

3 {4} In light of the foregoing considerations, we conclude that the additional issues
4 Defendant seeks to raise are not viable. We therefore deny the motion to amend. *See,*
5 *e.g., State v. Powers*, ¶ 8, 1990-NMCA-108, 111 N.M. 10, 800 P.2d 1067
6 (illustrating).

7 {5} Finally, we turn to the issues originally advanced in the docketing statement
8 and renewed in the memorandum in opposition, by which Defendant continues to
9 contend that the district court erred in denying his motions for continuance and
10 change of venue. [MIO 21-28] Because we previously set forth the relevant
11 background information and principles of law, [CN 1-6] we will not reiterate here.
12 Defendant has not asserted any facts, law, or argument that persuade us that our
13 notice of proposed disposition was erroneous. *See generally Hennessy v. Duryea*,
14 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly
15 held that, in summary calendar cases, the burden is on the party opposing the
16 proposed disposition to clearly point out errors in fact or law.”); *State v. Mondragon*,
17 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that a party
18 responding to a summary calendar notice must come forward and specifically point
19 out errors of law and fact, and the repetition of earlier arguments does not fulfill this
20 requirement), *superseded by statute on other grounds as stated in State v. Harris*,

1 2013-NMCA-031, ¶ 3, 297 P.3d 374. As a consequence, we adhere to our initial
2 assessment of these matters, and reject the assertions of error.

3 {6} Accordingly, for the reasons stated in our notice of proposed disposition and
4 herein, we affirm.

5 {7} **IT IS SO ORDERED.**

6 
7 **KRISTINA BOGARDUS, Judge**

8 **WE CONCUR:**

9 
10 **J. MILES HANISEE, Judge**

11 
12 **JANE B. YOHALEM, Judge**