IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41921**

P.J. FITZWATER,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Fred Van Soelen, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
Serena R. Wheaton, Assistant Solicitor General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Maria Pomorski, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

DUFFY, Judge.

{1} A jury found Defendant P.J. Fitzwater guilty of one count of burglary, contrary to NMSA 1978, Section 30-16-3(B) (1971), and one count of criminal damage to property (over $1,000), contrary to NMSA 1978, Section 30-15-1 (1963). Defendant appeals, arguing that (1) his convictions violate his right to be free from

double jeopardy; (2) the State presented insufficient evidence to support his convictions; (3) the district court committed fundamental instructional error; (4) the district court abused its discretion by denying Defendant's request for a continuance; and (5) Defendant received ineffective assistance of counsel. We affirm.

BACKGROUND

{2} Defendant's convictions stem from damage he caused to La Casa Family Health Center (La Casa) on a February night in 2022. On the exterior of the building, Defendant shattered sliding glass doors that allowed him to enter a vestibule and separately broke, but did not shatter, a window on the vestibule's exterior wall. Inside, Defendant broke through an additional glass door to access the reception area. At the main reception desk, Defendant broke a glass window-partition and shattered glass COVID shields. He broke keyboards and overturned a monitor, and also took a picture off the wall and attempted to burn the paper inside. Defendant gouged one of the interior walls, and removed a fire extinguisher and discharged it in three separate rooms.

{3} At trial, the State introduced evidence of the cost to replace all of the glass, along with the cost of cleaning the facility to reopen for business. Defendant testified on his own behalf, stating that he had been attempting to get help for several days because he believed he had snakes or a bomb inside his stomach. He stated that he broke into La Casa to try to find a phone to summon emergency services. Once

inside, he lit a cigarette to try to set off the smoke detectors and made what was his fourth call to 911 in three days.

{4} After hearing testimony and reviewing the State's exhibits, which included twenty-nine pictures of the damage, the jury convicted Defendant on both counts. Defendant appeals.

DISCUSSION

I. Double Jeopardy

{5} Defendant argues that his convictions for burglary and criminal damage to property violate his right to be free from double jeopardy because they were based on the same conduct—the initial damage to La Casa's exterior windows in the course of entry. We review Defendant's double jeopardy challenge de novo. *State v. Sena*, 2020-NMSC-011, ¶ 43, 470 P.3d 227.

{6} Where, as here, a defendant alleges that he was convicted under different statutes for a single act or single course of conduct, we review the double jeopardy challenge under the double-description line of cases. *See id.* ¶ 44. Double description claims are subject to the two-part test established in *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. *See Sena*, 2020-NMSC-011, ¶ 45. First, we determine "whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates multiple statutes." *Id.* (alteration, internal quotation marks, and citation omitted). "If the question is answered in the affirmative, we proceed to

the second part, which focuses on the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses." *Id.* (internal quotation marks and citation omitted). "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." *Swafford*, 1991-NMSC-043, ¶ 25.

{7} At the first step, to determine whether a defendant's conduct is unitary, we must determine whether the challenged offenses were separated by "sufficient indicia of distinctness." *Id.* ¶ 26. To examine distinctness, we rely on the six factors identified in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624: "(1) temporal proximity of the acts, (2) location of the victim during each act, (3) the existence of intervening events, (4) the sequencing of the acts, (5) the defendant's intent as evidenced by his conduct and utterances, and (6) the number of victims." *State v. Phillips*, 2024-NMSC-009, ¶ 12, 548 P.3d 51. "The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial." *Swafford*, 1991-NMSC-043, ¶ 27. "Unitary conduct is not present when one crime is completed before another is committed." *Sena*, 2020-NMSC-011, ¶ 46.

{8} Defendant argues that both his burglary and criminal damage to property convictions are based "on his breaking the exterior glass to La Casa." Defendant contends that (1) the State did not delineate when the burglary ended and the criminal

damage to property began; (2) the State's evidence only provided the total cost of replacing all six panes of broken glass "but made no effort to differentiate the cost of replacing what was broken in the course of the burglary and what was purportedly broken thereafter"; and (3) the State referred to damage to an exterior window when discussing the criminal damage to property charge during closing argument. The State responds that the evidence demonstrates the burglary was complete before the criminal damage to property began, and thus Defendant's conduct was not unitary. We agree with the State.

{9} "The crime of burglary is complete when there is an unauthorized entry with the requisite intent." *State v. Martinez*, 1982-NMCA-053, ¶ 14, 98 N.M. 27, 644 P.2d 541. In this case, the burglary was complete when Defendant entered La Casa. Even if we were to assume that all of the damage to the exterior glass occurred at the time of Defendant's entry, the jury was presented with evidence showing that Defendant committed additional damage in excess of $1,000 after he entered the building. The State introduced testimony and photographic evidence of the extensive damage Defendant caused once inside, including evidence that La Casa paid over $4,400 in cleaning costs to remove the shattered glass and clean the three rooms where the fire extinguisher was discharged so that the building would be safe for employees and patients again. This evidence demonstrates that the convictions were based on separate and distinct conduct—the burglary was completed upon

Defendant's unauthorized entry, and the criminal damage occurred after the burglary was complete.

{10} We briefly address the prosecutor's closing argument. Defendant asserts that "[i]n its closing argument, the State expressly urged the jury to convict [Defendant] of [c]riminal [d]amage to [p]roperty because he broke La Casa's exterior windows in the course of entry." In context, after discussing the burglary charge with the jury, the prosecutor turned to the elements of criminal damage to property. Beginning with the element of intentional damage, the prosecutor remarked, "You have all the property that was damaged. That's intentional. . . . [W]hen you pick up a rock and you break a business window, that's intentional damage." The prosecutor continued by informing the jury that criminal damage is a general intent crime and spent an additional three minutes detailing for the jury all the damage Defendant caused inside La Casa.

{11} Considering the prosecutor's closing as a whole, the prosecutor's initial comment on the pre-entry damage, though "poorly crafted" as the State acknowledges, appears limited to giving an example of what constitutes intentional conduct. Though we acknowledge that a prosecutor's framing of the conduct and legal theory during closing argument can impact the unitary conduct analysis, *see State v. Lorenzo*, 2024-NMSC-003, ¶¶ 11, 24, 545 P.3d 1156 (noting that the state's legal theory, as presented during closing argument, relied on the same conduct to

prove multiple offenses), we are not persuaded that the prosecutor's comment in this case encouraged the jury to rely on the exact same conduct to find criminal damage to property and burglary. *Cf. State v. Reed*, 2022-NMCA-025, ¶ 14, 510 P.3d 1261 (observing that the state, during closing argument, relied on the exact same use of force as a basis for the jury to find both armed robbery and aggravated battery with a deadly weapon); *State v. Franco*, 2005-NMSC-013, ¶¶ 6-7, 137 N.M. 447, 112 P.3d 1104 (noting that courts may consider the state's legal theory, but concluding that the state's legal theory is not necessarily determinative of whether conduct is unitary). Nevertheless, we encourage the State to take greater care during closing argument to avoid leading the jury to a verdict that violates the Double Jeopardy Clause. In this case, however, as discussed above, "the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *Franco*, 2005-NMSC-013, ¶ 7 (internal quotation marks and citation omitted). We thus conclude there was no double jeopardy violation in Defendant's convictions for both burglary and criminal damage to property.

II. Sufficiency of the Evidence

{12} Defendant challenges the sufficiency of the evidence supporting both convictions. We review the sufficiency of the evidence pursuant to a substantial evidence standard. *State v. Treadway*, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746. This requires that we determine "whether substantial evidence of either a

direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. We view the evidence "in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary." *Treadway*, 2006-NMSC-008, ¶ 7. To the extent our review requires us to interpret a statute or rule, that "presents a question of law which is reviewed de novo." *State v. Chavez*, 2009-NMSC-035, ¶ 10, 146 N.M. 434, 211 P.3d 891.

A. Criminal Damage to Property

{13} Regarding his criminal damage to property conviction, Defendant asserts that the State failed to present sufficient evidence to establish "[t]he amount of the damage to the property was more than one thousand dollars ($1,000.00)." Specifically, Defendant argues that (1) cleaning costs cannot be used to establish the amount of damage; (2) in order to rely on cleaning costs as a measure of the cost of repair, the State was also required to present evidence of replacement cost but failed to do so; and (3) the remaining evidence presented by the State did not establish that Defendant caused over $1,000 in damage inside La Casa. We conclude the jury could have considered the cleaning costs as a measure of damage in this case, and the State presented sufficient evidence to establish that Defendant caused more than $1,000 in property damage inside La Casa.

{14} Defendant's first argument essentially challenges whether cleaning costs can be considered as a measure of damage to support a criminal damage to property conviction. As Defendant and our Supreme Court acknowledge, the criminal damage to property statute, § 30-15-1, "does not specify how to determine the dollar value of the property damage." *State v. Cobrera*, 2013-NMSC-012, ¶ 8, 300 P.3d 729. However, our Supreme Court has adopted a uniform jury instruction defining the "amount of damage" in criminal damage to property cases, which was given to the jury in this case:

> "Amount of damage" means the difference between the price at which the property could ordinarily be bought or sold prior to the damage and the price at which the property could be bought or sold after the damage. If the cost of repair of the damaged property exceeds the replacement cost of the property, the value of the damaged property is the replacement cost.

UJI 14-1510 NMRA. The instruction provides "two separate methods for evaluating property damage": (1) "the diminution in the value of the property due to the damage, or the 'before and after value,'" and (2) "the cost of repair or replacement, whichever is less." *Cobrera*, 2013-NMSC-012, ¶ 8 (quoting *State v. Barreras*, 2007-NMCA-067, ¶ 5, 141 N.M. 653, 159 P.3d 1138). We are concerned here only with the second method.

{15} Defendant argues that cleaning costs "are not akin to repair or replacement costs" because "cleaning costs do not constitute 'property damage' under the [c]riminal [d]amage to [p]roperty statute." Instead, Defendant contends that cleaning

costs "constitute the kind of 'additional charges or costs' that are not appropriately credited toward the total 'amount of damage.'" *See State v. Fierro*, 2024-NMCA-016, ¶ 8, 542 P.3d 802. In support of this argument, Defendant relies on *Fierro*, where this Court held that "the language 'repair or replacement cost' is clear and does not necessarily encompass additional charges such as transportation costs to a repair facility or for the technician to perform the repair or replacement." *See id.* (holding that mileage and per diem for the technician are not part of the replacement cost).

{16} Unlike *Fierro*, the cleaning costs in this case were not merely additional charges tacked on to the cost of the repair work—the cleaning *was* the repair work. While we decline to broadly hold that cleaning costs can always be used as a measure of damage in criminal damage to property cases, we agree with the State that cleaning costs are an appropriate measure of damage in this case. Witnesses testified that La Casa first called in a remediation company, CarpetTech, at 3:00 a.m. to clean up glass and fire extinguisher residue. Afterward, La Casa's regular cleaning company, La Luz, made a special trip off-hours to perform a "top to bottom clean" to address the damage. La Casa's chief operating officer testified that it was necessary to bring in both companies because there were glass shards everywhere, "like an explosion," on the floor, furniture, and employee work stations, and it was necessary to have those areas thoroughly cleaned to ensure there was nothing that

could injure patients or staff. La Casa's maintenance director testified that La Casa contracts with La Luz to perform all of the cleaning at La Casa, and that custodial work is not part of his regular job duties. From this, the jury could reasonably infer that La Casa does not employ someone on-site for cleaning or custodial purposes, and that it was necessary to bring in outside help to address the damage. Under the circumstances, the State established both that the cleaning was necessary to restore La Casa to its pre-damage condition and that it was necessary to hire an outside company to perform that work. Based on these facts, the cleaning costs were repair costs, and were properly considered by the jury as a measure of damage in this case.

{17} Defendant next argues that even if it was appropriate to use the cleaning costs to establish the cost of repair, the State was also required, but failed, to provide the cost of replacement. Generally, because the measure of damage is "the cost of repair or replacement, *whichever is less*," *Cobrera*, 2013-NMSC-012, ¶ 8 (emphasis added), we have required the State to produce evidence of both the repair and the replacement cost so that the jury can compare them, unless it would be apparent to an average juror that the repair cost is less than the replacement cost. *See Barreras*, 2007-NMCA-067, ¶ 9 (explaining that an average juror would understand that the $5,100 repair cost was less than the cost to replace a one-year-old Cadillac Escalade). In this case, an average juror would understand that the cost of replacing the affected

areas at the facility, including its furniture, workspaces, flooring, and wall(s), would exceed the approximately $4,400 in repair costs.[1]

{18} Defendant's final argument is that if the cleaning costs are not considered, the State presented insufficient evidence to establish that Defendant caused more than $1,000 in damage inside La Casa. In light of our conclusion that cleaning costs are an appropriate measure of damage in this case, we reject this argument. The State presented evidence that the cleaning costs exceeded $4,400, which is sufficient to establish that the damage caused by Defendant inside La Casa exceeded $1,000, even without taking the cost to replace the broken glass into consideration.

{19} For all of these reasons, we conclude that the State presented sufficient evidence to support Defendant's conviction for felony-level criminal damage to property.

B. Burglary

{20} Defendant also argues that the State presented insufficient evidence to support his burglary conviction. In particular, Defendant argues that burglary is a specific intent crime, and to prove the burglary charge in this case, the State needed to show

[1]Defendant's briefing refers to "replacement costs for the affected *carpet* at La Casa." In reviewing the record, we find no evidence that the impacted flooring inside of La Casa was carpet, and the State made no such argument at trial. Accordingly, we consider Defendant's argument as we construe it to be intended, i.e., that the State did not present evidence of the cost to replace the items and areas at La Casa that were cleaned during the repair.

that Defendant entered La Casa with the intent to commit felony-level criminal damage to property, i.e., property damage that exceeds $1,000. *See* § 30-15-1 (stating that criminal damage to property is a misdemeanor, but "when the damage to the property amounts to more than one thousand dollars ($1,000) [the defendant] is guilty of a fourth degree felony"). Defendant asserts that the only evidence of his intent was his own testimony "that he entered La Casa in order to find a phone to call 911."

{21} As an initial matter, "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. Applying the well-established standard of review for sufficiency of the evidence, we must "disregard all evidence and inferences" that are contrary to the verdict. *Id.* Instead, we consider only whether the State provided direct or circumstantial evidence of Defendant's intent. *See State v. Ortiz*, 2017-NMCA-006, ¶ 9, 387 P.3d 323 (stating that courts examine whether direct or circumstantial evidence exists to support a conviction). As the jury was instructed in this case, "[w]hether . . . Defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, his conduct and any statements made by him." UJI 14-141 NMRA; *see State v. Frank*, 1979-NMSC-

012, ¶ 11, 92 N.M. 456, 589 P.2d 1047 ("Intent is subjective and is almost always inferred from other facts in the case.").

{22} As discussed, the State put on extensive evidence of the damage Defendant caused inside La Casa, and both the nature and extent of the damage are probative of Defendant's intent. From this evidence, the jury could reasonably infer that Defendant intended to commit over $1,000 worth of property damage at the time that he entered La Casa. *See* UJI 14-141. Accordingly, we conclude the State presented sufficient evidence to support the burglary conviction.

III. Jury Instructions

{23} Defendant next argues that the district court committed fundamental instructional error by (1) failing to sua sponte give an instruction on the defense of intoxication, and (2) failing to instruct the jury that to convict Defendant of burglary, it must find that Defendant intended to commit felony-level criminal damage to property inside La Casa—that is, criminal damage in excess of $1,000. *See* § 30-15-1.

{24} "As it pertains to jury instructions, fundamental error analysis follows two steps." *State v. Sivils*, 2023-NMCA-080, ¶ 10, 538 P.3d 126. "First, we determine whether error occurred." *Id.* "If we conclude that the jury instruction was erroneous, we move to step two, asking whether that error was fundamental." *Id.* ¶ 11.

A. Intoxication

{25} Defendant contends that he was entitled to an intoxication instruction because the State's witnesses and the prosecutor suggested that Defendant was intoxicated at the time of the burglary. As Defendant correctly notes, evidence of a defendant's intoxication may be taken into consideration by the jury as a defense to a specific intent crime. *See State v. Lovato*, 1990-NMCA-047, ¶ 4, 110 N.M. 146, 793 P.2d 276 ("A showing of intoxication is a defense to a specific intent crime where the intoxication is to such a degree as would negate the possibility of the necessary intent."). However, such an instruction is required only where it is supported by the defendant's theory of the case. *State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d 69 (holding that it was reversible error to refuse to give an instruction regarding intoxication where it had been requested and where it was consistent with the defendant's theory of the case).

{26} In this case, an intoxication instruction would have been contrary to Defendant's theory of the case. Defendant took the stand in his defense and testified that he was not intoxicated on the night he broke into La Casa. Accordingly, Defendant has not established that he was entitled to an intoxication instruction under the circumstances, and the district court did not err by failing to sua sponte instruct the jury on a defense that conflicts with Defendant's own theory of the case.

B. Burglary

{27} Defendant asserts that the burglary instruction failed to include required information regarding the intent element. As instructed, the jury was asked to determine whether "Defendant entered the structure with the intent to commit [c]riminal [d]amage to [p]roperty when inside." As Defendant correctly points out, "[b]urglary requires the State to prove that . . . [D]efendant entered a structure . . . with the intent to commit a *felony* once inside." *See* UJI 14-1630 NMRA. Defendant argues that because criminal damage to property is not a felony unless the damage exceeds $1,000, s*ee* § 30-15-1, the burglary instruction needed to inform the jury that it must find Defendant intended to commit criminal damage in excess of $1,000 in order to establish that Defendant intended to commit a *felony* once inside La Casa.

{28} The State responds that we must consider the erroneous jury instruction in the context of the other instructions given to the jury and determine whether the instructions as a whole fairly and accurately state the applicable law. *See State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176 ("[I]n a fundamental error analysis jury instructions should be considered as a whole and a failure to include an essential element in the elements section may be corrected by subsequent proper instructions that adequately addresses the omitted element."); *see also State v. Parish*, 1994-NMSC-073, ¶ 4, 118 N.M. 39, 878 P.2d 988 ("A jury

instruction standing by itself may appear defective. However, when considered in the context of the other instructions given to the jury it may fairly and accurately state the applicable law." (internal quotation marks and citation omitted)). The State argues that the other jury instructions properly instructed the jury on the amount of damage at issue. We agree with the State.

{29} After the jury was instructed on burglary as charged in Count 1, the very next instruction addressed criminal damage to property as charged in Count 2. The criminal damage to property instruction informed the jury that it must find that "[t]he amount of the damage to the property was more than one thousand dollars ($1,000.00)." Together, these instructions informed the jury that it had to find that Defendant intended to commit felony-level criminal damage to property—that is, damage over $1,000—when he entered La Casa. Accordantly, to the extent the burglary instruction omitted an essential element, we conclude any error was corrected by the criminal damage to property instruction, and therefore, the failure to include the dollar value at issue in the burglary instruction does not constitute fundamental error. *See Cunningham*, 2000-NMSC-009, ¶ 24.

IV. Denial of Request for Continuance

{30} Defendant also challenges the district court's denial of his request for a continuance. On the morning of trial, during a bench conference before the jury was brought in, the prosecutor made an oral motion in limine regarding two exhibits the

defense indicated it intended to introduce—a photograph of a medical document and dispatch logs of Defendant's 911 calls. After hearing from the parties, the district court expressed that the photograph of the medical document raised hearsay concerns. In response, Defendant moved for a continuance for a couple of months "to get the doctors on board." The district court denied Defendant's request. As for the documents, the district court indicated that counsel should not mention them during opening, but the court did not prohibit their admission during trial, provided a proper foundation was established.

{31} We review the district court's denial of a continuance for an abuse of discretion. *See State v. Salazar*, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Id.* (internal quotation marks and citation omitted).

{32} Our Supreme Court has articulated seven factors that courts should consider when evaluating a request for a continuance:

> [(1)] the length of the requested delay, [(2)] the likelihood that a delay would accomplish the movant's objectives, [(3)] the existence of previous continuances in the same matter, [(4)] the degree of inconvenience to the parties and the court, [(5)] the legitimacy of the motives in requesting the delay, [(6)] the fault of the movant in causing a need for the delay, and [(7)] the prejudice to the movant in denying the motion.

State v. Torres, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20. "In addition to meeting the *Torres* factors, the defendant must show that the denial of the continuance prejudiced him." *State v. Hildreth*, 2022-NMSC-012, ¶ 30, 506 P.3d 354 (alteration, internal quotation marks, and citation omitted).

{33} As applied in this case, the *Torres* factors weigh against Defendant's request for a continuance. Defendant requested a two-month continuance on the morning of trial, after the case had been pending for eighteen months and the jury had been selected. The length of the requested delay was significant, particularly in light of the fact that the jury had been selected already (first factor). From the facts presented to the district court, it is unclear whether a two-month delay would have allowed Defendant to accomplish his stated objective, which was to secure as-yet unidentified doctors to either provide a foundation for the substantive information contained in the photograph of the medical document or, more generally, to testify about Defendant's mental health in the days leading up to the break-in at La Casa (second factor). Furthermore, the district court did not exclude the documentary evidence that Defendant sought to present; rather, the court merely required Defendant to consult with the court prior to entering the exhibits. As for the remaining factors, Defendant had requested and received three prior continuances (third factor). A continuance would have been deeply inconvenient to the court and the witnesses, who were present and prepared to testify that day (fourth factor). *See*

State v. Gonzales, 2017-NMCA-080, ¶ 36, 406 P.3d 534 (stating that "we presume resetting the trial date on the day trial is supposed to begin is inconvenient for the parties and for the court"). Though we do not doubt that the continuance was requested for legitimate motives (fifth factor), Defendant and defense counsel still bear the responsibility for causing the need for the continuance (sixth factor). And while Defendant argues that the denial of a continuance prejudiced his ability to present a defense, we note that Defendant took the stand and was able to testify about both his medical condition and his 911 calls (seventh factor). Defendant has not indicated what additional evidence the unidentified additional witnesses would provide in support of his defense, and has not otherwise demonstrated prejudice resulting from the denial of the continuance.

{34} On balance, nearly all of the *Torres* factors weigh against granting a continuance under the circumstances, and Defendant has not established prejudice. For these reasons, we conclude the district court did not abuse its discretion in denying Defendant's request for a continuance.

V. Ineffective Assistance of Counsel

{35} Finally, Defendant asserts that he received ineffective assistance of counsel. Defendant contends his trial counsel "fail[ed] to adequately prepare, fail[ed] to request certain instructions, and fail[ed] to object to errors made by the court."

{36} We review a claim of ineffective assistance of counsel de novo. *State v. McCalep*, 2024-NMCA-083, ¶ 15, 560 P.3d 18. "When evaluating such claims on direct appeal, we evaluate facts that are part of the record, and require a defendant to show, first, that his counsel's performance was deficient and, second, that this deficiency prejudiced his defense." *Id.* (alteration, internal quotation marks, and citation omitted). "If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition, although an appellate court may remand a case for an evidentiary hearing if the defendant makes a prima facie case of ineffective assistance." *Id.* (internal quotation marks and citation omitted).

{37} Although Defendant points to a number of matters he claims amount to ineffective assistance, we cannot conclude, on the record before use, that the alleged errors establish a prima facie case that counsel's performance was deficient or that Defendant was prejudiced by the same. *See State v. Romero*, 2023-NMSC-014, ¶ 29, 533 P.3d 735 ("[W]e do not second-guess defense counsel's trial strategy and tactics." (internal quotation marks and citation omitted)); *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406, 143 P.3d 168 ("We indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

(internal quotation marks and citation omitted)). Should he so choose, Defendant may pursue his claims in habeas corpus proceedings. *See Romero*, 2023-NMSC-014, ¶ 30 (noting our Supreme Court's "preference that ineffective assistance of counsel claims be brought under habeas corpus proceedings so that the defendant may actually develop the record with respect to defense counsel's actions" (internal quotation marks and citation omitted)).

CONCLUSION

{38} We affirm.

{39} **IT IS SO ORDERED.**

Megan P Duffy

MEGAN P. DUFFY, Judge

WE CONCUR:

J. MILES HANISEE, Judge

SHAMMARA H. HENDERSON, Judge