

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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

5 **JON LAURENCE GREEN,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

8 **David E. Finger, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Santa Fe, NM

14 Steven J. Forsberg, Assistant Public Defender

15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **WRAY, Judge.**

19 {1} Defendant appeals his conviction, following a jury trial, of criminal
20 solicitation to commit first degree murder. We issued a notice of proposed
21 disposition, proposing to affirm. Defendant filed a memorandum in opposition,
22 which we have duly considered. Unpersuaded, we affirm.

Court of Appeals of New Mexico

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Mark Reynolds

No. A-1-CA-42865

1 {2} Initially, we note that Defendant’s memorandum in opposition abandons the
2 issue that the district court erred by allowing inadmissible hearsay statements into
3 evidence. *See Taylor v. Van Winkle’s IGA Farmer’s Mkt.*, 1996-NMCA-111, ¶ 5,
4 122 N.M. 486, 927 P.2d 41 (recognizing that issues raised in a docketing statement,
5 but not contested in a memorandum in opposition are abandoned). Defendant
6 pursues his contention that there was insufficient evidence to support his conviction
7 [MIO 2-3], which we proposed to affirm in our calendar notice [CN 5-7].

8 {3} Defendant’s challenge to the sufficiency of the evidence centers on the
9 credibility of the State’s witness, who was Defendant’s cellmate. Defendant argues
10 that “[t]he key witness in [his] case was unreliable[]” because “[h]e was a career
11 criminal who only fingered [Defendant] after he was facing charges in another case.”
12 [MIO 3] It appears from Defendant’s memorandum in opposition that the jury was
13 provided this information. [MIO 1] Specifically, Defendant explained that “even
14 after being told about the accusing inmate’s criminal record and deal for leniency,
15 the jury convicted [him].” [MIO 1] As explained in our calendar notice, this Court
16 does not “invade the jury’s province as fact-finder by second-guessing the jury’s
17 decision concerning the credibility of witnesses.” *State v. Garcia*, 2016-NMSC-034,
18 ¶ 15, 384 P.3d 1076 (alteration, internal quotation marks, and citation omitted); *see*
19 *also State v. Griffin*, 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156 (noting
20 that this Court does not reweigh the evidence, and we may not substitute our

1 judgment for that of the fact-finder, as long as sufficient evidence supports the
2 verdict); *State v. Roybal*, 1992-NMCA-114, ¶ 9, 115 N.M. 27, 846 P.2d 333
3 (explaining that the testimony of a single witness constitutes sufficient evidence to
4 uphold a conviction).

5 {4} Defendant also raises a new issue that he received ineffective assistance of
6 counsel [MIO 3-4], which we construe as a motion to amend the docketing
7 statement. This Court will grant such a motion to include additional issues if the
8 motion (1) is timely, (2) states all facts material to a consideration of the new issues
9 sought to be raised, (3) explains how the issues were properly preserved or why they
10 may be raised for the first time on appeal, (4) demonstrates just cause by explaining
11 why the issues were not originally raised in the docketing statement, and (5)
12 complies in other respects with the appellate rules. *See State v. Rael*, 1983-NMCA-
13 081, ¶ 15, 100 N.M. 193, 668 P.2d 309.

14 {5} Defendant argues that the record supports a prima facie case of ineffective
15 assistance of counsel because “his trial counsel failed to call a key eyewitness who
16 was present during [his] conversation with the inmate who accused him.” [MIO 4]
17 Defendant further argues that the “eyewitness could have testified that [he] did not
18 solicit the killing of his wife but instead was fooled into sympathetically bailing out
19 the other inmate.” [MIO 4] “We review claims of ineffective assistance of counsel
20 de novo.” *State v. Garcia*, 2011-NMSC-003, ¶ 33, 149 N.M. 185, 246 P.3d 1057.

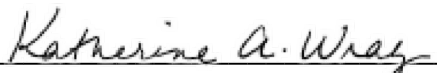
1 “A defendant seeking to establish ineffective assistance must show both deficient
2 performance of counsel and prejudice caused by the deficient performance.” *State v.*
3 *Rivas*, 2017-NMSC-022, ¶ 23, 398 P.3d 299.

4 {6} As to the first prong of the analysis, the decision of whether to call a witness
5 is a matter of trial tactics that we do not second guess on direct appeal. *See State v.*
6 *Trujillo*, 2012-NMCA-112, ¶ 47, 289 P.3d 238 (stating that “[t]he decision whether
7 to call a witness is a matter of trial tactics and strategy within the control of trial
8 counsel” (internal quotation marks and citation omitted)). Although Defendant
9 argues that this other witness had exculpatory evidence to offer, there is nothing in
10 the record proper before this Court to support that assertion. *See State v. Hobbs*,
11 2016-NMCA-006, ¶ 21, 363 P.3d 1259 (rejecting the defendant’s argument that he
12 received ineffective assistance of counsel based on the failure to call a witness where
13 there was no evidence in the record that the outcome would have been different if
14 counsel had called such a witness); *State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M.
15 593, 973 P.2d 845 (holding that without a record, we cannot consider “claim[s] of
16 ineffective assistance of counsel on direct appeal”). We conclude that Defendant has
17 not made a prima facie showing of ineffective assistance of counsel, and these issues
18 must be pursued, if at all, in collateral proceedings. *See State v. Herrera*, 2001-
19 NMCA-073, ¶ 37, 131 N.M. 22, 33 P.3d 22 (“When the record on appeal does not
20 establish a prima facie case of ineffective assistance of counsel, this Court has

1 expressed its preference for resolution of the issue in habeas corpus proceedings over
2 remand for an evidentiary hearing.”). Accordingly, we deem this issue nonviable
3 and deny Plaintiff’s motion to amend. *See State v. Moore*, 1989-NMCA-073, ¶¶ 36-
4 51, 109 N.M. 119, 782 P.2d 91 (stating that this Court will deny motions to amend
5 that raise issues that are not viable), *superseded by rule on other grounds as*
6 *recognized in State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730.

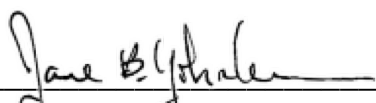
7 {7} For the reasons stated in our notice of proposed disposition and herein, we
8 affirm.

9 {8} **IT IS SO ORDERED.**

10 
11 **KATHERINE A. WRAY, Judge**

12 **WE CONCUR:**

13 
14 **JENNIFER L. ATTREP, Judge**

15 
16 **JANE B. YOCHALEM, Judge**