IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42865**

JON LAURENCE GREEN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
David E. Finger, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Santa Fe, NM
Steven J. Forsberg, Assistant Public Defender
Albuquerque, NM

for Appellant

MEMORANDUM OPINION

WRAY, Judge.

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

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

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

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

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

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

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

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

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

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

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

KATHERINE A. WRAY, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

JANE B. YOHALEM, Judge