STATE V. CHAVEZ

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MICHAEL CHAVEZ,
Defendant-Appellant.

NO. 33,095

COURT OF APPEALS OF NEW MEXICO

December 23, 2015

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Judith Nakamura, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Margaret McLean, Assistant Attorney General, Olga Serafimova, Assistant Attorney General, Santa Fe, NM, for Appellee

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JUDGES

RODERICK T. KENNEDY, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, LINDA M. VANZI, Judge

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Judge.

{1} Defendant makes multiple assertions of ineffective assistance of counsel. For lack of a sufficient factual basis, he does not make a prima facie showing of ineffective

assistance. We therefore decline to reverse and deem those assertions to be better suited for resolution through a habeas proceeding. Defendant also asserts that the district court abused its discretion by refusing to exclude one of the State's witnesses. We hold that the district court did not abuse its discretion by refusing to strike Officer Lopez's testimony because the requirements for exclusion under *State v. Harper*, 2011-NMSC-044, ¶ 21, 150 N.M. 745, 266 P.3d 25, were not met. We further hold that the district court properly denied Defendant's requested instruction on eyewitness identification, because the instruction that Defendant tendered was cumulative to the witness credibility and reasonable doubt instructions that the court administered. We affirm Defendant's conviction.

I. BACKGROUND

{2} Matthew Garcia was walking home from work on the evening of May 11, 2010, when he was attacked from behind. The assailant punched and kicked Garcia, threatened him verbally, and took Garcia's backpack. The assailant's face was covered during the entire altercation. The police were called to the scene. After paramedics treated Garcia's injuries, he returned home. Approximately fifteen minutes later, two officers brought Garcia from his home to a street near the altercation where Michael Chavez (Defendant) was being detained as part of a traffic stop. Garcia identified Defendant as the man who had attacked him and stolen his backpack. Officer Lopez retrieved Garcia's backpack from the passenger's side of Defendant's vehicle, and after Garcia filled out a report, Officer Lopez returned the backpack to Garcia.

{3} A grand jury indicted Defendant on charges of robbery and conspiracy to commit robbery. Defense counsel filed a motion to suppress Garcia's show-up identification—three calendar days before the trial was scheduled to begin. After hearing the arguments from both parties regarding the motion, the district court struck the motion to suppress as untimely. Defense counsel also filed a motion in limine, seeking, among other things, to exclude Officer Lopez's testimony. The district court ruled on the motion in limine, as the parties stipulated to many of the issues presented in the motion in limine, and ultimately allowed Officer Lopez to testify. After a jury trial, Defendant was convicted of both charges. Defendant was sentenced, and he appealed to this Court. We limit our recitation of the facts here, and provide additional detail as each issue is discussed below.

II. DISCUSSION

A. Ineffective Assistance of Counsel

{4} We review claims of ineffective assistance of counsel de novo. *State v. Dylan J.*, 2009-NMCA-027, ¶ 33, 145 N.M. 719, 204 P.3d 44. "When an ineffective assistance claim is first raised on direct appeal, we evaluate the facts that are part of the record." *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. In doing so, "we review the entire proceeding and consider the totality of the evidence presented." *State v. Martinez*, 2007-NMCA-160, ¶ 21, 143 N.M. 96, 173 P.3d 18.

{5} “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.” *Roybal*, 2002-NMSC-027, ¶ 19. Habeas corpus proceedings, under Rule 5-802 NMRA, are the preferred avenue for adjudicating ineffective assistance of counsel claims where the record on appeal does not establish a prima facie case of ineffective assistance of counsel. *See, e.g.*, *State v. Hosteen*, 1996-NMCA-084, ¶ 6, 122 N.M. 228, 923 P.2d 595, *aff’d on other grounds* 1997-NMSC-063, ¶ 8, 124 N.M. 402, 951 P.2d 619; *Dylan J.*, 2009-NMCA-027, ¶ 41. This preference is based on the need for a fully developed record; the record before the district court may not contain the evidence necessary for a determination on counsel’s effectiveness, as “ ‘conviction proceedings focus on the defendant’s misconduct rather than that of his attorney.’ ” *Id.* (quoting *Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466). Because of the preference for habeas proceedings in ineffective assistance claims, “ ‘a record on appeal that provides a basis for remanding to the district court for an evidentiary hearing on ineffective assistance of counsel is rare.’ ” *State v. Allen*, 2014-NMCA-047, ¶ 16, 323 P.3d 925 (quoting *State v. Baca*, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776) (alterations omitted)).

{6} In order to make a prima facie showing of ineffective assistance of counsel that warrants remand, Defendant must show that “(1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible, rational strategy or tactic to explain counsel’s conduct; and (3) the actions of counsel are prejudicial.” *State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22 (internal quotation marks and citation omitted). This follows the two-prong test for proving ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Roybal*, 2002-NMSC-027, ¶ 19. We presume counsel is competent. *State v. Jacobs*, 2000-NMSC-026, ¶ 48, 129 N.M. 448, 10 P.3d 127. In order to overcome that presumption, a defendant bears the burden of proving both prongs of the *Strickland* test. *State v. Hester*, 1999-NMSC-020, ¶ 9, 127 N.M. 218, 979 P.2d 729. Counsel’s actions are not unreasonable “ ‘if there is a plausible, rational strategy or tactic to explain the counsel’s conduct.’ ” *State v. Ortega*, 2014-NMSC-017, ¶ 55, 327 P.3d 1076 (quoting *Lytle v. Jordan*, 2001-NMSC-016, ¶ 26, 130 N.M. 198, 22 P.3d 666). “[W]e will not second guess the trial strategy and tactics of the defense counsel.” *Ortega*, 2013-NMSC-017, ¶ 56 (internal quotation marks and citation omitted). In order to prove prejudice, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Lytle*, 2001-NMSC-016, ¶ 27 (internal quotation marks and citation omitted).

{7} We note that with regard to the prejudice prong of the ineffective assistance test, Defendant urges us to consider the approach adopted in Alaska, Oregon, and Hawaii. Defendant spends a considerable amount of his brief explaining the prejudice standards used by these other states, but does not offer any authority allowing us to abandon the long-standing precedent set forth by our Supreme Court in *Hester*, 1999-NMSC-020, ¶ 9, requiring that we follow the *Strickland* test for claims of ineffective assistance of

counsel. *See State v. Travarez*, 1983-NMCA-003, ¶ 5, 99 N.M. 309, 657 P.2d 636 (acknowledging that the Court of Appeals must follow applicable precedents of our Supreme Court). We decline to address Defendant's proffer of out-of-state precedent to support his position. *See Santa Fe Expl. Co. v. Oil Conservation Comm'n*, 1992-NMSC-044, ¶ 11, 114 N.M. 103, 835 P.2d 819 (stating that appellate courts do not review issues unsupported by citation to authority).

1. Waiver of Challenge to Identification of Defendant

{8} Defendant acknowledges that defense counsel's motion to suppress Garcia's show-up identification of Defendant was untimely. *See* Rule 5-212(C) NMRA (2012) (providing that a motion to suppress "shall be made within twenty (20) days after the entry of a plea" absent good cause for delay); *City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 25-26, 285 P.3d 637 (requiring district courts to adjudicate suppression issues prior to trial absent good cause). Defendant asserts that his right to counsel was violated because the failure to timely file the motion constitutes an unauthorized waiver of his right to challenge an unconstitutional show-up identification. We equate counsel's untimely filing of a motion to suppress to a failure to file the motion at all, as the functional effect in both situations is that the matter is not properly brought before the district court. Thus, Defendant must show that the facts supported a motion to suppress and that a reasonably competent attorney could not have decided that the motion was unnecessary to satisfy the reasonableness prong of ineffective assistance. *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 19, 130 N.M. 179, 21 P.3d 1032; *but see State v. Roberts*, 2015 WL 3750174, No. 33,285, mem. op. ¶ 14 (N.M. Ct. App. May 5, 2015) (stating that counsel's failure to investigate case led to filing of an inadequate motion the eve before trial). In order to satisfy the prejudice prong, Defendant must show that, had the district court suppressed the show-up identification, there is a reasonable probability he would not have been convicted. *Lytle*, 2001-NMSC-016, ¶ 27; *State v. Padilla*, 1996-NMCA-072, ¶ 22, 122 N.M. 92, 920 P.2d 1046 ("As part of a prima facie showing of ineffective assistance of counsel, Defendant must show that competent actions by his counsel would likely have altered the outcome of the trial.").

{9} We first determine whether the facts of this case support the motion to suppress the show-up identification. A show-up identification must be reliable under the totality of the circumstances. *Patterson*, 2001-NMSC-013, ¶ 20. New Mexico courts have acknowledged that show-up identifications are "inherently suggestive," and situations where police shine a spotlight on a suspect in order to facilitate identification, as occurred in this case, are "especially suggestive." *Id.* ¶ 21. Our courts allow show-up identifications, however, where there are sufficient indicia of reliability to outweigh the suggestiveness of the identification procedure. *Id.* ¶ 20 (stating that courts assess the reliability of the identification by weighing "the corrupting effect of the suggestive identification against the witness's opportunity to view the criminal at the time of the crime, the attention the witness paid, the accuracy of any pre-identification description, the witness's level of certainty at the identification, and the time between the crime and the identification." (internal quotation marks and citation omitted)). By his own admission, Garcia's view of his assailant was poor at best. Not only was he attacked

unexpectedly from behind, he was wearing headphones, not really paying attention, had been prescribed glasses but was not wearing any, had a cataract in one eye, and was walking on a dark street. This factor weighs slightly against the reliability of the show-up identification. *See id.* ¶ 23 (naming witness's opportunity to view perpetrator as first factor).

{10} Next, the record contains two descriptions of Garcia's assailant: Garcia's testimony, given more than two years after the incident, and a transcript of Garcia's pre-trial interview with defense counsel, given over a year after the incident. Nothing in the record reflects Garcia's description of his attacker *before* he saw Defendant during the show-up identification. Additionally, although Garcia acknowledged that his identification of Defendant as the assailant was based largely upon Defendant's tattoo, there is nothing in the record that shows what Defendant's tattoo looks like. Garcia acknowledged that nothing in the pre-identification report that he filled out mentions a tattoo. During his testimony, Garcia's description of his assailant's tattoo varies. First he described the tattoo as a "snake or a dragon wrapped around a heart and a dagger, with a triangle and some lettering." Garcia later testified, "I know there was some lettering, and I think it was like a dragon or a snake wrapped around a heart and a triangle that went around it." Defendant's booking sheet indicates that Defendant has a shield tattoo on his left arm. Without knowing what Defendant's tattoo, or Defendant himself looks like, and without knowing the exact way that Garcia described his attacker prior to the show-up identification, we have no way to determine whether this prong of the test weighs in favor of or against the reliability of the identification. We cannot assess the accuracy of a pre-identification description that we do not have, and therefore do not have enough information to assess this prong of the test articulated in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). *Patterson*, 2001-NMSC-013, ¶ 24. We therefore cannot determine whether the facts support the motion to suppress, and cannot rule on the reasonableness of defense counsel's actions in filing an untimely motion to suppress. As such, Defendant has made no prima facie showing that defense counsel acted unreasonably.

{11} Even if we had enough information in the record to determine the show-up identification was unreliable by making defense counsel's untimely filing unreasonable, Defendant has still failed to make a showing of prejudice. Defendant's assertions that without the identification, he could only have been convicted of the conspiracy count and not of the robbery count are unpersuasive in light of the circumstantial evidence of guilt that the State presented and from which a jury could have convicted Defendant of robbery. It is undisputed that the backpack that had been stolen was found a short time after the robbery in the front seat of the vehicle that Defendant was driving.[1] Defendant was apprehended with the stolen property only minutes after and in the vicinity of the robbery. Defendant was wearing clothing that matched Garcia's description of his assailant. Defendant was also in a vehicle whose body type matched Garcia's description of his assailant's vehicle. We recognize that possession alone cannot stand as a basis for robbery. *State v. Beachum*, 1970-NMCA-119, ¶¶ 18-19, 82 N.M. 204, 477 P.2d 1019 (acknowledging that possession of stolen property alone will not support conclusion of guilt); *cf. State v. Aragon*, 1990-NMCA-001, ¶ 17, 109 N.M. 632, 788 P.2d

932 (acknowledging that possession of stolen property alone does not justify a conviction for burglary or larceny). However, Defendant's possession of Garcia's backpack, combined with the other evidence of Defendant's guilt, is sufficient to justify a robbery conviction and render the show-up identification cumulative.

{12} Defendant cannot show in light of the evidence which was equally as damning, that effective action by defense counsel to suppress the identification would have changed the outcome of the trial. *See Padilla*, 1996-NMCA-072, ¶¶ 20-22 (acknowledging that a defendant may have had a meritorious motion to suppress show-up identification, but concluding there was no prima facie showing of prejudice because possession of stolen property and circumstances liking the defendant with theft justified conviction). Here, the combination of time, location, and possession constitute "persuasive corroborating evidence upon which a jury could reasonably rely to convict" Defendant. *Id.* ¶ 22.

{13} Not only do we have an insufficient amount of evidence to determine reasonableness, Defendant has failed to make a showing of prejudice sufficient to undermine our confidence in the outcome of the case. He has therefore failed to make a prima facie showing of ineffective assistance of counsel on this issue.

2. Failure to Interview Officer Lopez Prior to Trial

{14} Defendant asserts defense counsel failed to take appropriate steps toward securing an interview with Officer Lopez prior to trial. It is clear from the record that defense counsel requested pretrial interviews with Officer Lopez, but that Officer Lopez did not present himself at the scheduled interview. Defense counsel neither subpoenaed Officer Lopez for an interview, nor provided a reason for having failed to do so. Defendant asserts defense counsel was ineffective for failing to interview a "key witness" and that there is no "plausible or rational [trial] strategy or tactic" to explain counsel's failure to learn of the basis for that nonexistent motion to suppress while the case was pending. Defendant argues that the failure to interview Lopez resulted in a failure to investigate how Garcia's backpack was obtained, which then resulted in a failure to file a meritorious motion to suppress based on Fourth Amendment concerns.

{15} A failure to interview a critical witness prior to trial, though seemingly negligent behavior by counsel, is not necessarily prejudicial where there is no indication that the witness's testimony would have benefitted the defendant. *State v. Dartez*, 1998-NMCA-009, ¶ 27, 124 N.M. 455, 952 P.2d 450. The only benefit Defendant points to that could have resulted from an earlier interview of Officer Lopez is that defense counsel would have been able to file a motion to suppress the backpack. In fact, Defendant's entire ineffective assistance of counsel claim regarding the interview of Officer Lopez is rooted in prejudice resulting from defense counsel's failure to file a motion to suppress the backpack. In order to establish that it was unreasonable for counsel to not have filed a motion to suppress, Defendant must establish that the facts support the motion to suppress and that a reasonably competent attorney could not have decided that such a motion was unwarranted. *Patterson*, 2001-NMSC-013, ¶ 19.

{16} The plain view doctrine is an exception to the warrant requirement. *State v. Ruffino*, 1980-NMSC-072, ¶ 3, 94 N.M. 500, 612 P.2d 1311. Under the plain view doctrine, "items may be seized without a warrant if the police officer was lawfully positioned when the evidence was observed, and the incriminating nature of the evidence was immediately apparent, such that the officer had probable cause to believe that the article seized was evidence of a crime." *State v. Rivera*, 2010-NMSC-046, ¶ 28, 148 N.M. 659, 241 P.3d 1099 (internal quotation marks and citation omitted). "[I]f, following a lawful stop on a roadway, an item in an automobile is in plain view and the officer has probable cause to believe the item is evidence of a crime, the officer may seize the item." *State v. Bomboy*, 2008-NMSC-029, ¶ 17, 144 N.M. 151, 184 P.3d 1045 (concluding that such seizure is reasonable under exigent circumstances exception to warrant requirement).

{17} Officer Lopez testified that he discovered the backpack while looking through an open driver's side door during an inventory search of Defendant's car. Once he saw the green camouflage pattern on the backpack, he immediately recalled that Garcia's robbery was recently reported over the police radio and the backpack that was taken in that case fit the description of the one sitting in Defendant's vehicle. Defendant asserts on appeal that Officer Lopez discovered the backpack while another officer was administering field sobriety tests to Defendant, therefore disallowing an inventory search pursuant to arrest.[2] This assertion is contrary to the evidence in the record. Officer Lopez testified that when he arrived on the scene and prior to his conducting the inventory search, Defendant was already in handcuffs and was under arrest. Based on these facts, the seizure of Garcia's backpack was reasonable. *See, e.g.*, *State v. Rivera*, 2010-NMSC-046, ¶ 28 (acknowledging the rule that under the plain view doctrine, items can be seized if the officer was lawfully positioned when he observed the evidence, and the incriminating nature of the evidence was immediately apparent).

{18} Defendant asserts, however, that a motion to suppress would have been successful had defense counsel been aware, prior to trial, of the manner in which it was obtained. Defendant bases this argument on a statement Officer Lopez made during counsel's interview with him, rather than his trial testimony. Defense counsel represented to the district court that Officer Lopez stated during his interview with defense counsel that he had opened the driver's side door of Defendant's vehicle prior to seeing Garcia's backpack. Defense counsel did not attempt to impeach Officer Lopez's trial testimony regarding whether the vehicle's door was open.

{19} Regardless of what position the vehicle's door was in when Officer Lopez observed Garcia's backpack, we conclude that the facts in the record do not support a successful motion to suppress. Either Officer Lopez was standing outside the vehicle looking in, or he was looking through a door that he opened pursuant to an inventory search. In either scenario, Officer Lopez was lawfully positioned when he observed Garcia's backpack. Further, Officer Lopez testified that he immediately recognized the backpack as one matching the description of a backpack stolen in a robbery that had recently happened in the same area, giving him reason to believe that the backpack was evidence of a crime. *See Rivera*, 2010-NMSC-046, ¶ 28 (incriminating nature of the

evidence is immediately apparent where it gives the officer probable cause to believe the article was evidence of a crime). Because the facts in the record do not support the motion, it would not have been unreasonable for defense counsel to make the decision not to file it. Defendant has therefore failed to satisfy the first prong of the *Strickland* test.

{20} Defense counsel's failure to file a motion to suppress the backpack exists as Defendant's sole assertion of prejudice arising from counsel's failure to interview Officer Lopez prior to trial. We decline to categorize counsel's failure to file a motion that was not supported by the facts as prejudicial. We therefore conclude that Defendant has failed to make a prima facie showing of prejudice.

3. Failure to Present Expert on Eyewitness Identification

{21} Defendant asserts that defense counsel's failure to obtain expert testimony on the issue of eyewitness identification was neither a reasonable nor tactical decision. In support of his assertion, Defendant cites to *State v. Guilbert*, 49 A.3d 705, 726 (Conn. 2012), for the proposition that counsel's arguments are an inadequate substitute for expert testimony. That case, however, focused on whether eyewitness identification may be the proper subject for expert testimony. *Id.* at 726. As such, Defendant's citation to *Guilbert* is immaterial to the case at hand. Defendant's argument again ignores the binding precedent in our own jurisdiction regarding ineffective assistance of counsel.

{22} In New Mexico, "[t]he decision whether to call a witness is a matter of trial tactics and strategy within the control of trial counsel." *Lytle*, 2001-NMSC-016, ¶ 47 (internal quotation marks and citation omitted); *id.* ¶ 44 (acknowledging that the New Mexico Supreme Court has "expressly rejected the contention that the failure to introduce the testimony of an expert witness constitutes ineffective assistance of counsel per se"). The decision to rely on cross examination rather than calling an expert witness is also a tactical one. *See State v. Chamberlain*, 1991-NMSC-094, ¶ 45, 112 N.M. 723, 819 P.2d 673 (acknowledging that counsel's failure to hire expert witnesses was a matter of trial strategy and did not constitute ineffective assistance where the State's evidence was subject to vigorous cross examination). During cross examination of Garcia, defense counsel elicited testimony that Garcia was not paying much attention to the people around him at the time of the attack, was listening to music through headphones that he had on, was not wearing glasses prescribed to him, and was afflicted by a cataract in one eye. Counsel also emphasized that Garcia did not record his assailant's tattoo in his witness statement, despite Garcia's contention that his identification of Defendant as the assailant was based almost entirely on his tattoo.

{23} There is nothing in the record reflecting counsel's reasons for not hiring an expert, and nothing in the record indicates whether defense counsel considered hiring an expert or consulted with one at any point. Further, without any indication that failure to call an expert was not a tactical decision, Defendant has not demonstrated that he was prejudiced by counsel's failure to call an expert. We therefore conclude that Defendant has failed here to make a prima facie showing of ineffective assistance. We

note that our conclusion that Defendant has failed to meet his burden of demonstrating a prima facie case of ineffective assistance of counsel does not impair Defendant's ability to bring such a claim in a habeas proceeding. *See State v. Bahney*, 2012-NMCA-039, ¶ 53, 274 P.3d 134 (acknowledging that the defendant's failure to make prima facie showing regarding ineffectiveness of counsel does not impair ability to later bring such a claim in habeas proceedings).

B. District Court's Refusal to Exclude Testimony of Officer Lopez

{24} Defendant asserts that the district court abused its discretion when it denied Defendant's motion in limine that sought to exclude the testimony of Officer Lopez. Despite the untimeliness of Defendant's motion in limine,[3] the district court ruled on the motion, declining to exclude Officer Lopez's testimony and instead allowing defense counsel to interview Officer Lopez immediately prior to jury selection. In doing so, the district court cited the failure of either party to issue subpoenas in the case as well as the absence of suppression motions in the record as its reason for moving the trial forward.

{25} Exclusion of a witness is a severe sanction that "should not be imposed except in extreme cases, and only after an adequate hearing to determine the reasons for the violation and the prejudicial effect on the opposing party." *State v. Harper*, 2011-NMSC-044, ¶ 21, 150 N.M. 745, 266 P.3d 25. A witness is properly excused where there is "an intentional violation of a court order, prejudice to the opposing party, and consideration of less severe sanctions[.]" *Id.* ¶ 2. Refusal to comply with a court's order rises to the level of exclusion only where the State's conduct is "especially culpable, such as where evidence is unilaterally withheld by the State in bad faith, or all access to the evidence is precluded by State intransigence." *Id.* ¶ 17. Even where the violation of a court order is committed with "a high degree of culpability," dismissal is only proper where the opposing party suffered prejudice. *Id.* ¶ 19. A determination of prejudice in this context turns on whether the missing evidence is "important and critical to the case." *Id.* (internal quotation marks and citation omitted). When discovery is merely delayed in reaching the defendant, or the defendant has knowledge of the contents of the unproduced evidence, a determination of prejudice is more elusive. *Id.* ¶ 20.

{26} The criteria for excluding a witness under *Harper* were not met in this case. Defense counsel never apprised the district court of her inability to conduct a pretrial interview with Officer Lopez, nor did she request a discovery order from the district court who did not know of the problem until the day trial was scheduled to begin. Defendant also never subpoenaed Officer Lopez for an interview. As such, there was no court order that the State could violate with regard to making Officer Lopez available for an interview.

{27} Defendant asserts, without reference to the record, that the State in this case is especially culpable, that it withheld its witnesses from defense counsel, and precluded all access to Officer Lopez through intransigence. In fact, it appears from the record that the State took steps to schedule interviews between its witnesses and defense counsel,

and State-scheduled interviews took place with all witnesses except Officer Lopez. According to the State, Officer Lopez was absent from that scheduled interview because he was on military leave.

{28} In addition to the fact that there was no court order and no evidence that the State acted in bad faith, Defendant shows no prejudice resulting from the failure to interview Officer Lopez. Defense counsel knew that Officer Lopez found Garcia's backpack in Defendant's car before conducting any interview with Officer Lopez; that information was contained in Officer Lopez's report. Defense counsel does not contend that it never received a copy of Officer Lopez's report. Because defense counsel had knowledge of the content of Officer Lopez's testimony, namely, that he discovered the backpack, counsel's ability to prepare for trial was not impaired and Defendant was not prejudiced.

{29} After reviewing the record, it appears that the criteria for excluding a witness were not met. Thus, exclusion was not warranted. We conclude that the district court did not abuse its discretion in refusing to exclude Officer Lopez's testimony.

C. District Court's Refusal to Issue Requested Eyewitness Identification Jury Instruction

{30} Defendant asserts that the district court erred in refusing his requested eyewitness identification instruction. We review a district court's denial of jury instructions de novo. *State v. Perry*, 2009-NMCA-052, ¶ 32, 146 N.M. 208, 207 P.3d 1185; *State v. Gaines*, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438. New Mexico is replete with case law stating that "it is not error [for a district court] to refuse a requested instruction [that] is merely cumulative to, and states in another form, that which the court has declared in its general instructions given to the jury." *State v. Vaisa*, 1923-NMSC-029, 28 N.M. 414, 213 P. 1038; *see State v. Bailey*, 1921-NMSC-009, ¶ 13, 27 N.M. 145, 198 P. 529 (acknowledging that if the instructions given by the court properly present the law to the jury, it is not error to refuse a requested instruction, covering the same ground); *State v. Venegas*, 1981-NMSC-047, ¶ 9, 96 N.M. 61, 628 P.2d 306 (same); *State v. Starr*, 1917-NMSC-092, ¶ 25, 24 N.M. 180, 173 P. 674 (same); *see also State v. Rushing*, 1973-NMSC-092, ¶¶ 19-20, 85 N.M. 540, 514 P.2d 297 (stating that there is no error in refusing a jury instruction that was merely cumulative of what was stated in another instruction given). The uniform jury instructions on witness credibility and reasonable doubt cover a defendant's theory of misidentification by an eyewitness. *See State v. Ortega*, 1991-NMSC-084, ¶ 72, 112 N.M. 554, 817 P.2d 1196; *see also State v. Gallegos*, 1993-NMCA-046, ¶¶ 10-11, 115 N.M. 458, 853 P.2d 160 (stating that a district court's refusal to instruct on infirmities in eyewitness testimony was not reversible error where reasonable doubt and witness credibility instructions were given); *State v. Haynes*, 2000-NMCA-060, ¶ 23, 129 N.M. 304, 6 P.3d 1026 (same); *State v. Mazurek*, 1975-NMCA-066, ¶ 10, 88 N.M. 56, 537 P.2d 51 (same).

{31} Defendant's proffered instruction states that, in addition to the various factors mentioned in the instructions concerning credibility of witnesses, the jury may also take into account: (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's pre-identification descriptions; (4) the certainty of the witness; and (5) the time elapsed between the crime and the identification.[4] The district court denied this requested instruction on the grounds that it was duplicative. The district court did, however, give the uniform jury instructions on witness credibility and reasonable doubt. UJI 14-5020 NMRA; UJI 14-5060 NMRA.

{32} Defendant's assertions on appeal regarding the necessity of judicial guidance in eyewitness identification cases due to the advancement of research on the issue are compelling. Our case law, however, has explicitly held that a district court's refusal of an eyewitness identification instruction is not error. Based upon our existing law regarding eyewitness identification, we conclude that the district court did not err in denying Defendant's proffered eyewitness identification instruction.

III. CONCLUSION

{33} We conclude that because Defendant has failed to make a prima facie showing of ineffective assistance of counsel in any of his three claims, his assertions of ineffective assistance are more suited for habeas review. The district court did not err in refusing to exclude Officer Lopez's testimony or in its denial of Defendant's proffered eyewitness identification instruction. We therefore affirm Defendant's conviction.

{34} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge

1Although the backpack's presence in Defendant's car is undisputed, the admissibility of the backpack is contested by the parties.

2We note that defense counsel did not assert the inventory search was invalid because Defendant was not yet in custody. Instead, defense counsel only asserted that seizing the backpack during the presumably valid inventory search without first obtaining a warrant, pursuant to *Ruffino*, 1980-NMSC-072, ¶ 5 ("If during an inventory search evidence of a crime is discovered, a search warrant should normally be obtained prior to

seizing the evidence.”). This potential lack of preservation does not alter the outcome of this issue.

3A motion in limine “shall be made at the arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.” Rule 5-601(D) NMRA. Defendant was arraigned on October 25, 2010. He filed the motion on March 29, 2013.

4Defendant’s proffered instruction, when compared to the generally accepted *Telfaire* instruction for eyewitness identification cases, is woefully inadequate. *Compare United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) *with* the tendered instruction that reads:

“In any criminal case, the government must prove beyond a reasonable doubt that the defendant was the perpetrator of the crime[s] alleged. You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may take into account the various factors mentioned in these instructions concerning credibility of witnesses. In addition to those factors, in evaluating eyewitness identification testimony, you may also take into account:

1. the witness’s opportunity to view the perpetrator at the time of the crime;

2. the witness’s degree of attention at the time of the crime;

3. the accuracy of the witness’s pre-identification description;

4. the certainty of the witness; and

5. the time elapsed between the crime and the identification.”