

STATE V. MONTOYA

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
THOMAS MONTOYA,
Defendant-Appellant.**

No. 35,938

COURT OF APPEALS OF NEW MEXICO

June 8, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker,
District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldrige, Assistant Appellate
Defender, Santa Fe, NM, for Appellant

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, HENRY
M. BOHNHOFF, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Defendant argues that the district court erred in revoking his probation. We issued a notice of proposed summary disposition proposing to affirm. Defendant has responded with a timely memorandum in opposition, which we have duly considered.

Because we remain unpersuaded that our initial proposed disposition was incorrect, we affirm.

DISCUSSION

{2} Following an evidentiary hearing, the district court found that Defendant violated a condition of his probation requiring him to not violate state law by engaging in domestic abuse against his ex-girlfriend. [RP 182]¹ The district court also found that Defendant violated a condition of probation requiring that he not possess deadly weapons. [RP 182] “We review a trial court’s probation revocation decision under an abuse of discretion standard.” *State v. Orquiz*, 2003-NMCA-089, ¶ 4, 134 N.M. 157, 74 P.3d 91.

{3} Defendant first argues that the evidence was not sufficient to show a violation. [MIO 4-5] “In a probation revocation proceeding, the [s]tate bears the burden of establishing a probation violation with a reasonable certainty.” *State v. Leon*, 2013-NMCA-011, ¶ 36, 292 P.3d 493. “To meet this burden, the [s]tate must introduce evidence that a reasonable and impartial mind would be inclined to conclude that the defendant has violated the terms of probation.” *Id.* When reviewing a challenge to the sufficiency of the evidence to support a probation revocation “we view the evidence in a light most favorable to the [State], indulging all reasonable inferences and resolving all conflicts to uphold the [district] court’s decision.” *In re Bruno R.*, 2003-NMCA-057, ¶ 9, 133 N.M. 566, 66 P.3d 339.

{4} The docketing statement and the memorandum in opposition recite that the victim testified that Defendant came into her home without her permission, held her against her will, put a knife to her throat, and cut her dog’s collar. [DS 3; MIO 2, 4-5] Viewing this evidence in the light most favorable to the State, this testimony adequately supports a finding that Defendant violated state law by committing assault with intent to commit a violent felony. See NMSA 1978, § 30-3-3 (1977) (“Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary.”). Additionally, this testimony is sufficient to support a finding that Defendant was in possession of a deadly weapon, contrary to the terms of his probation. See *State v. Sanchez*, 2001-NMCA-060, ¶ 13, 130 N.M. 602, 28 P.3d 1143 (stating that a probation violation must be proved to a reasonable certainty, such that a reasonable and impartial mind would believe that the defendant violated the terms of probation).

{5} Defendant also continues to argue that his due process right to effective assistance of counsel was denied when his attorney failed to call his girlfriend as an alibi witness. [MIO 2-8]. “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. “To establish a claim of ineffective assistance of counsel, a defendant must show that his or her attorney failed to exercise the skill of a reasonably competent attorney and that the defendant was prejudiced by the failure.” *State v. Reyes*, 2002-NMSC-024, ¶ 46, 132

N.M. 576, 52 P.3d 948, *abrogated on other grounds by Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

{6} With respect to the first prong of the analysis, the decision whether to call a witness is a matter of trial tactics, which we do not second guess on 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)). Additionally, although Defendant asserts his girlfriend would have provided him with an alibi, nothing in the record before this Court supports that assertion, or otherwise suggest that she had relevant or exculpatory evidence to offer. See *State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 (holding that without a record, we cannot consider claims of ineffective assistance of counsel on direct appeal). Defendant has therefore failed to show that he was prejudiced by the failure to call this witness. *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 an expert witness); *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318. Consequently, Defendant has not made a prima facie showing of ineffective assistance of counsel, and these issues must be pursued, if at all, in a collateral proceeding. 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.”).

{7} For these reasons, we affirm the district court’s revocation of Defendant’s probation.

{8} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

HENRY M. BOHNHOFF, Judge

1 Citations are to the Record Proper in CR-2013-01248.