IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-42835

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ANTHONY RAY GOMEZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
Jim Foy, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Connor D. Bridges, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

ATTREP, Judge.

{1} Defendant appeals from a judgment and sentence convicting him of possession of a controlled substance. [2 RP 268-70] This Court issued a calendar notice proposing to summarily affirm. Defendant filed a memorandum in opposition, which we have duly considered. Unpersuaded, we affirm.

{2} Defendant's memorandum first asserts that his trial counsel was ineffective because he failed to file a suppression motion in a timely manner based on an admission Defendant made while subject to custodial interrogation and when he had not

been provided *Miranda* warnings. [MIO 6-7] *See State v. Wilson*, 2007-NMCA-111, ¶ 12, 142 N.M. 737, 169 P.3d 1184 ("*Miranda* warnings are required when a person is (1) interrogated while (2) in custody." (internal quotation marks and citation omitted)). We note that Defendant provides us with minimal facts to evaluate this claim, and relies mainly on audio log notes from the trial that appear in the written record. [MIO 4]

{3} "Remand for an evidentiary hearing on a claim of ineffective assistance of counsel is appropriate only when the record on appeal establishes a prima facie case of ineffective assistance of counsel." *State v. Mosley*, 2014-NMCA-094, ¶ 19, 335 P.3d 244 (internal quotation marks and citation omitted). "A prima facie case is made by showing (1) that defense counsel's performance fell below the standard of a reasonably competent attorney, and (2) that due to the deficient performance, the defense was prejudiced." *Id.* (alteration, internal quotation marks, and citation omitted). We review a claim for ineffective assistance of counsel de novo. *Id.* ¶ 18.

{4} In support of his assertion, Defendant directs us to *State v. Howl*, 2016-NMCA-084, 381 P.3d 684. [MIO 6] In *Howl*, the defendant argued that his trial counsel's failure to move to suppress a pipe and methamphetamine on the grounds that the arresting officer conducted an illegal search constituted ineffective assistance of counsel. *Id.* ¶ 9. At the close of the state's case in *Howl*, the defendant's "trial counsel moved for directed verdicts on [the d]efendant's possession of a controlled substance and possession of drug paraphernalia charges." *Id.* ¶ 21. This Court noted that "[a] motion to suppress and a motion for a directed verdict are not functionally equivalent." *Id.* ¶ 22. "A directed verdict is appropriate if there is no legally sufficient evidentiary basis for a reasonable jury to rule in favor of the non[]moving party." *Id.* Because the defendant's "trial counsel failed to move to suppress, *or even to object to the admission of*[] the evidence against [the d]efendant, the admitted evidenced weigh[ed] against [the d]efendant's motion for a directed verdict." *Id.* (emphasis added). This Court concluded that the trial attorney fell below the standard of a reasonably competent attorney because "[a] motion for a directed verdict was not a strategically viable mechanism under the circumstances, and we can discern no rationally-based reason that [the d]efendant's trial counsel would forgo an effort to suppress the evidence at issue." *Id.* ¶ 23. This Court then further concluded that the prejudice prong was satisfied because the defendant's convictions were "inextricably linked to the admission of the paraphernalia and methamphetamine into evidence" and, had the evidence been suppressed, "a legitimate question would exist as to whether the [s]tate could have proven the charges against [the d]efendant beyond a reasonable doubt." *Id.* ¶ 25.

{5} This is in contrast to what occurred in this case. According to Defendant's memorandum, the issue of the voluntariness of his statement was raised during trial, and not through a motion for directed verdict. [MIO 4] The district court "held a mid-trial hearing on voluntariness" [MIO 4-5] and it is apparent from the audio log notes Defendant relies on in the record that the State provided evidence in the form of testimony from the arresting officer. [1 RP 202] *Cf.* Rule 5-212(D) NMRA (stating that, after the filing of a motion to suppress, "[t]he court shall receive evidence on any issue of fact necessary to the decision of the motion"); *see also State v. LaCouture*, 2009-

NMCA-071, ¶ 10, 146 N.M. 649, 213 P.3d 799 ("In arguing against a motion to suppress, the prosecution must prove that the defendant's statement was voluntary by a preponderance of the evidence."). It is also apparent through the log notes that the officer testified that he did not give the *Miranda* warnings to Defendant, but that Defendant was the one asking the questions and not the officer. [1 RP 202] Both parties proceeded to proffer argument. [1 RP 203] The log notes indicate that the district court judge did "not believe it was pure custodial interrogation," but that he decided to view the video where the statements at issue were apparently made in his chambers. [1 RP 203] After viewing the video, the district court judge found Defendant's statements were not made during custodial interrogation and that "everything mostly came from [Defendant] basically asking for a break." [1 RP 204] *See State v. Javier M.*, 2001-NMSC-030, ¶ 42, 131 N.M. 1, 33 P.3d 1 ("Absent custodial interrogation the constitutional procedural safeguards pronounced in *Miranda* do not apply."); *State v. McDowell*, 2018-NMSC-008, ¶ 13, 411 P.3d 337 ("Unsolicited statements, whether they are made before or after an accused is informed of [their] *Miranda* rights, are not protected by *Miranda*."). The jury was also provided with the jury instruction from UJI 14-5040 NMRA, which, according to the use notes, is given after the district court has made a determination that a statement by a defendant was given voluntarily. [1 RP 179]

{6} We decline Defendant's invitation to engage in the analysis of whether a suppression motion was warranted because Defendant's trial counsel litigated the issue before the district court. *See Mosley*, 2014-NMCA-094, ¶ 20 (holding that when a claim for ineffective assistance of counsel is premised on trial counsel's failure to move to suppress evidence the defendant must establish that the facts supported a motion to suppress and that a reasonably competent attorney could not have decided that such a motion was unwarranted). Defendant's admission was brought to the attention of the district court judge, an evidentiary hearing was held mid-trial, and the district court made findings as to whether the statements were voluntary and whether Defendant was subject to custodial interrogation. Defendant does not contend how the result would have been different had Defendant's trial counsel moved to suppress the statements before trial. We therefore conclude that Defendant has not established that his trial counsel's performance fell below the standard of a reasonably competent attorney. *Cf. State v. Crocco*, 2014-NMSC-016, ¶ 14, 327 P.3d 1068 ("The burden of establishing a prima facie case requires [the d]efendant to establish both elements of ineffective assistance.").

{7} Additionally, we note that we presume correctness in the district court's rulings; the burden is on the appellant to clearly demonstrate the claimed error on appeal. *State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211. Further, "[w]here there is a doubtful or deficient record, every presumption must be indulged by the reviewing court in favor of the correctness and regularity of the [district] court's judgment." *State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). Defendant asserts that he was "prejudiced by the admission of a statement in which he admits to knowing that a substance he possessed was a controlled substance." [MIO 10] Further, Defendant asserts that knowledge is an element of his conviction and that his statement "goes directly to whether [he] knew that

the substance found on him was fentanyl." [Id.] However, Defendant acknowledges that it "is not clear from the log notes what an alternative method of proving knowledge could be." [Id.] Thus, Defendant has not established that, even had his admission been suppressed, the State would not have otherwise been able to prove the possession charge with other evidence. *See id.* We therefore conclude that Defendant has also not established that he was prejudiced as a result of his trial counsel's failure to move to suppress his statement prior to trial, and that Defendant has not established that he received ineffective assistance of counsel. However, we note that "a claim of ineffective assistance of counsel is best addressed in a habeas corpus proceeding." *State v. Astorga*, 2016-NMCA-015, ¶ 25, 365 P.3d 53.

{8} Defendant next asserts that fundamental error occurred because the jury was improperly instructed on a dismissed charge. [MIO 11] We note that this issue was not raised in the docketing statement and is brought as part of a motion to amend the docketing statement pursuant to Rule 12-208(F) NMRA. [MIO 2] In cases assigned to the summary calendar, this Court will grant a motion to amend the docketing statement 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, ¶¶ 7-8, 10-11, 14-17, 100 N.M. 193, 668 P.2d 309. This Court will deny motions to amend that raise issues that are not viable, even if they allege fundamental or jurisdictional error. *See State v. Moore*, 1989-NMCA-073, ¶¶ 36-51, 109 N.M. 119, 782 P.2d 91, *superseded by rule on other grounds as recognized in State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730.

{9} Defendant contends that the jury "was apparently orally instructed on" a breaking and entering charge that had been dismissed the morning of the trial. [MIO 11] Defendant again provides us with almost no facts to evaluate this issue. *See Rael*, 1983-NMCA-081, ¶¶ 7-8. Regardless, this Court has previously concluded that fundamental error does not occur when the written jury instructions accurately reflect the law, even when there is an erroneous statement by the prosecutor. *State v. Percival*, 2017-NMCA-042, ¶ 27, 394 P.3d 979. We therefore deny the motion to amend because the issue Defendant seeks to raise is not viable. *See Moore*, 1989-NMCA-073, ¶¶ 36-51.

{10} Accordingly, for the reasons stated in our notice of proposed disposition and herein, we affirm.

{11} IT IS SO ORDERED.

JENNIFER L. ATTREP, Judge

WE CONCUR:

J. MILES HANISEE, Judge

GERALD E. BACA, Judge