FOR IMMEDIATE RELEASE: **Contact:** James Hallinan

March 24, 2016 (505) 660-2216

AG Announces Clovis & Tularosa Convicted Murderers to Stay in Prison

Santa Fe, NM – This afternoon, Attorney General Hector Balderas announced that two convicted murderers will stay in prison after the New Mexico Supreme Court agreed with the Office of the Attorney General's Criminal Appeals Division. The Supreme Court affirmed the convictions of Daniel Marson Murrell for felony murder, armed robbery, theft of a credit card, eleven counts of fraudulent use of an illegally obtained credit card and tampering with evidence in Clovis, New Mexico. In a separate ruling today, the Supreme Court affirmed the convictions of Paul N. Reynolds for first degree murder, unlawful taking of a motor vehicle, and tampering with evidence pursuant to a plea agreement in Tularosa, New Mexico.

"Two men convicted of heinous and brutal murders in eastern New Mexico will stay in prison after the Supreme Court agreed with our office's Criminal Appeals Division," said Attorney General Balderas. "Keeping the most violent offenders in prison remains our priority, and my thoughts are with the families of the victims."

Please see attached for photos of the defendants and the Supreme Court decisions for both cases that were issued this afternoon.

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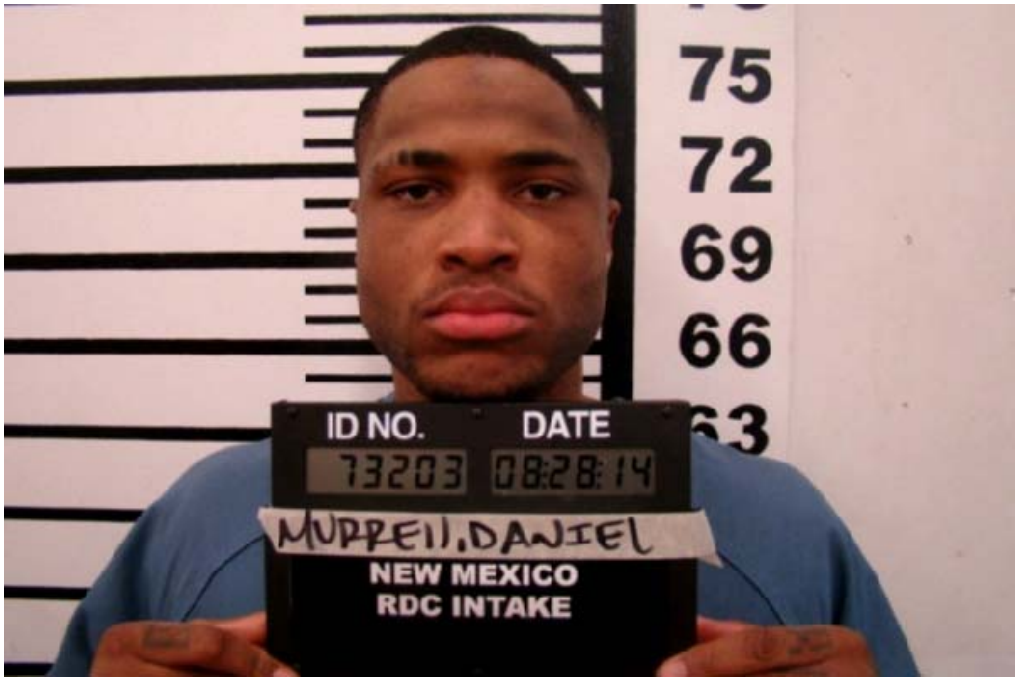
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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Filing Date: March 24, 2016

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **NO. S-1-SC-34954**

DANIEL MARSON MURRELL,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Fred Travis Van Soelen, District Judge

Jorge A. Alvarado, Chief Public Defender
William A. O'Connell, Assistant Appellate Defender
Santa Fe, NM

for Appellant

Hector H. Balderas, Attorney General
Maris Veidemanis, Assistant Attorney General
Santa Fe, NM

for Appellee

DECISION

DANIELS, Justice.

{1} Defendant Daniel Murrell appeals his convictions for felony murder, armed robbery, theft of a credit card, eleven counts of fraudulent use of an illegally obtained credit card, and tampering with evidence. He argues that there was insufficient evidence to support the verdict and that the ineffective assistance of defense counsel requires reversal. We affirm Defendant's convictions by nonprecedential decision. *See* Rule 12-405(B) ("The appellate court may dispose of a case by non-precedential order, decision or memorandum opinion . . . [where t]he issues presented have been previously decided . . . [or t]he presence or absence of substantial evidence disposes of the issue . . . [or t]he issues presented are manifestly without merit.").

I. BACKGROUND

{2} The charges against Defendant arose from two robberies committed in Clovis, New Mexico, within a two-day period. On January 2, 2013, victim David Shober, who was eighty-four years old at the time of trial, was in his garage when a man with a gun approached him from behind and demanded money. The man hit Shober in the head twice with the gun, knocking him down, and took his wallet. Shober did not get a clear look at his assailant but said that the man wore a bandana over his face and a

hat on his head, and "by the dialect of his voice [Shober] assumed he was a black person." Shober also thought his attacker was about the same height as Shober himself, five feet ten-and-a-half inches, but saw the man only after being knocked to the ground, and because "[the assailant] was in a lunging position, . . . [Shober] never really saw him erect."

{3} Two days later, on January 4, 2013, a second victim, sixty-one-year-old Joseph Garcia, was attacked when walking down an alley near Allsup's. Garcia's assailant also came up behind him and knocked him down, then took his wallet and cell phone. Garcia described his attacker as a tall black male in his early to middle thirties, wearing a hooded jacket or sweatshirt and a white head covering with black writing on it. Garcia was beaten severely and his jaw was broken. He was prescribed hydrocodone for the pain, and relatives cared for him and ensured that he took his medication as prescribed. On January 7, 2013, Garcia became dizzy, had difficulty breathing, and was given oxygen. After returning to his daughter's house later in the day, he had trouble breathing again and then died suddenly.

{4} Garcia was in poor health even before the attack and had previously been diagnosed with congestive heart failure. His heart was significantly enlarged, his coronary arteries were narrowed, and he had cirrhosis of the liver. Forensic

pathologist Dr. Katherine Callahan, who performed Garcia's autopsy, testified that pain from his injuries would have increased his heart rate and blood pressure. She concluded that he had suffered "sudden cardiac death" as a result of complications from blunt trauma to the head and chest. She acknowledged that toxicology results showed an elevated level of hydrocodone in his blood, but she did not believe that he had died of an overdose because there was no frothy fluid in his airways and he had remained alert prior to his sudden death, both atypical of an opiate overdose. Further, the blood samples were not a reliable indicator of his hydrocodone levels before death due to post-mortem redistribution of that drug from body tissues to the blood. Dr. Callahan classified Garcia's death as a homicide and opined that despite his poor health he would not have died on January 7, 2013, if he had not received the beating. In contrast, Defendant's expert testified that he believed Garcia's death was attributable to a hydrocodone overdose and not to his injuries. But he agreed with the State that Garcia would still be alive had he not been beaten because he would not have ingested the hydrocodone if he had not suffered injuries from the beating.

{5} Witness Terrill Smolar testified that Defendant was the assailant in both of these robberies. At about 6:00 a.m. on January 2, 2013, Smolar was at a friend's house when Defendant knocked on the door and asked Smolar to accompany him.

With Smolar as his passenger, Defendant drove a red Ford Mustang that belonged to his fiancée. After a few minutes, Defendant pulled into an alley and got out of the car. He returned shortly with a gun and a wallet, resumed driving, and took money and credit cards out of the wallet before throwing it out of the car. He then bought gas and Newport cigarettes with one of the stolen credit cards. In the morning of January 4, 2013, Defendant again picked Smolar up and this time drove to an Allsup's convenience store. Defendant got out of the car, and Smolar drove around the block on Defendant's instructions to move the car. When Smolar returned, he saw Defendant knock Garcia to the ground, hit him twice, and kick him in the face before Garcia "went limp." Defendant got back in the car with a wallet and a knife. Smolar drove away, but when Defendant realized he had dropped his beanie hat at the scene he told Smolar to drive back. When Smolar refused to go back, Defendant threatened him, then switched seats to drive back for the hat himself before dropping Smolar off.

{6} Smolar's testimony was corroborated by independent evidence tying Defendant to the crimes. Police recovered Shober's wallet in the area where Smolar described it as having been discarded. There were seven unauthorized charges on Shober's stolen credit cards. Surveillance video from near the Allsup's store where one of the stolen cards was used showed "an older model" red Ford Mustang there at the time

of the transaction. Video also showed the car traveling around the block, as Smolar described, just before Garcia was attacked on January 4, 2014.

{7} The Mustang was registered to the mother of Defendant's fiancée. Defendant's fiancée lived with him, let him drive her car, and believed that he was using it at the time of the robberies. After Defendant's arrest he called her from jail and told her to clean the car out and keep it inside the garage. She did not do so, and police located the Mustang parked outside Defendant's residence.

{8} The police recovered stolen property belonging to Garcia from the Mustang and from Defendant's room inside the house. Defendant's fingerprints were on a card that had been in Shober's wallet. Other items found by the police included a money order and cell phone that belonged to Garcia, a black and white bandana, a beanie, several garage door openers, and a Newport cigarette butt.

{9} Smolar turned himself in and gave a statement to police before being offered any plea agreement. He later pleaded guilty to his part in the robberies, and in return for his cooperation in Defendant's prosecution the State agreed that he would be released from prison after serving twenty months and would then be on probation for five years.

{10} Defendant's jury found him guilty of felony murder, armed robbery, robbery,

theft of a credit card, eleven counts of fraudulent use of an illegally obtained credit card, and tampering with evidence. The robbery conviction merged with the felony murder conviction, and the district court sentenced Defendant as a habitual offender on the remaining charges, for a total sentence of life in prison plus thirty-one years.

{11} Defendant appeals his convictions directly to this Court. *See* N.M. Const. art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court.").

II. DISCUSSION

{12} Defendant argues first that insufficient evidence supports his convictions and next that, even if supported by sufficient evidence, his convictions must be reversed because he was denied effective assistance of counsel.

A. Sufficient Evidence Supports Defendant's Convictions

{13} Defendant does not argue that the acts constituting armed robbery, robbery, theft of a credit card, fraudulent use of an illegally obtained credit card, and tampering with evidence did not occur but asserts that the State failed to present sufficient evidence that it was he, rather than Smolar, who committed those crimes.

{14} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a

reasonable doubt with respect to every element essential to a conviction." *State v. Cabezuela*, 2015-NMSC-016, ¶ 14, 350 P.3d 1145 (internal quotation marks and citation omitted). Substantial evidence is evidence acceptable to a reasonable mind as adequate to support a conclusion. *State v. Arredondo*, 2012-NMSC-013, ¶ 10, 278 P.3d 517. This Court reviews the sufficiency of the evidence to support a conviction by viewing it "in the light most favorable to the State, resolving all conflicts and making all permissible inferences in favor of the jury's verdict." *State v. Consaul*, 2014-NMSC-030, ¶ 42, 332 P.3d 850 (internal quotation marks and citation omitted).

1. Identity

{15} Defendant admits that he drove the car and handled some of the evidence, but he maintains that not he but Smolar attacked Garcia and Shober. Defendant argues that Smolar should not be deemed a credible witness against him because Smolar also admitted to being present when the robberies occurred, could have fit the descriptions given of the assailant, and had a motive to shift the blame. Defendant contends that Smolar's testimony should be disregarded and that without this testimony, on which the State heavily relied, there is insufficient evidence to support the jury's verdict.

{16} The law is clear in New Mexico that the factfinder is the judge of credibility, and this Court will not reweigh the evidence. *See State v. Garcia*, 2011-NMSC-003,

¶ 5, 149 N.M. 185, 246 P.3d 1057 ("New Mexico appellate courts will not invade the jury's province as fact-finder by second-guess[ing] the jury's decision concerning the credibility of witnesses, reweigh[ing] the evidence, or substitut[ing] its judgment for that of the jury." (alterations in original) (internal quotation marks and citation omitted)).

{17} Additionally, Smolar's testimony was corroborated by independent evidence and is controverted only by arguments made by defense counsel. Surveillance video confirmed Smolar's description of the car traveling around the Allsup's store at the time Garcia was attacked. Defendant's fingerprints were on a card taken from Shober's wallet, and several pieces of evidence, including some clearly connected to both robberies, were found at Defendant's residence. The totality of the evidence was sufficient to support the jury's conclusion that it was Defendant who attacked and robbed Shober and Garcia.

2. Causation

{18} Defendant argues further that even if he was properly convicted for robbing Garcia, the State did not present sufficient evidence that Garcia's death was a homicide caused in the commission of the robbery so as to justify a felony murder conviction. *See* NMSA 1978, § 30-2-1(A)(2) (1994) ("Murder in the first degree is

the killing of one human being by another . . . in the commission of or attempt to commit any felony."). Robbery is a predicate felony that will support a conviction for felony murder if it is committed in a dangerous manner with the requisite mens rea and it is a cause of the homicide. *See* NMSA 1978, § 30-16-2 (1973) (defining robbery as a third-degree felony involving theft "by use or threatened use of force or violence"); UJI 14-202 NMRA (containing the essential elements of felony murder, including that a felony of less than first degree must be committed "under circumstances or in a manner dangerous to human life" and with the intent to kill or knowledge that one's "acts created a strong probability of death or great bodily harm"); *State v. Duffy*, 1998-NMSC-014, ¶¶ 18-28, 126 N.M. 132, 967 P.2d 807 (affirming a conviction for felony murder that occurred when a defendant snatching the purse of an elderly woman knocked her to the ground where the resulting head injury caused her death; and determining that the robbery was an independent felony, that the jury reasonably concluded that the defendant possessed the requisite mens rea, that the crime was committed in a dangerous manner, and that the act of forcefully taking the purse caused the victim to fall and hit her head which resulted in her death), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110.

{19} Despite the severe injuries that were inflicted on Garcia during the attack, Defendant denies that his actions in committing the robbery can be said to have caused Garcia's death three days later. For the purposes of felony murder, the predicate felony must be both the factual and the proximate cause of death. *State v. Montoya*, 2003-NMSC-004, ¶ 11, 133 N.M. 84, 61 P.3d 793; *see also* UJI 14-251 NMRA (Defining proximate cause of homicide as an act that "was a significant cause of death . . . which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the [foreseeable] death and without which the death would not have occurred."). Even if another cause may have contributed, Defendant is not relieved "of responsibility for an act that significantly contributed to the cause of the death so long as the death was a foreseeable result of the defendant's actions." UJI 14-252 NMRA. *See also Montoya*, 2003-NMSC-004, ¶ 19 ("In cases where death results from multiple causes, an individual may be a legal cause of death even though other significant causes significantly contributed to the cause of death. Thus, even if the victim is at 'death's door,' a defendant is liable for the victim's death if his act hastens the victim's death." (citation omitted)). Although Garcia already had severe health problems prior to the robbery, "defendants take their victims as they find them." *State v. Romero*, 2005-NMCA-060, ¶ 19, 137 N.M. 456, 112 P.3d 1113.

{20} In *Montoya*, we explained that while a defendant's act must be a factual "but for" cause of death, it need not be the only cause. *See* 2003-NMSC-004, ¶ 19 ("'General principles of criminal law do not require that a defendant's conduct be the *sole* cause of the crime.'" (*quoting State v. Simpson*, 1993-NMSC-073, ¶ 14, 116 N.M. 768, 867 P.2d 1150)). We held that there was sufficient evidence to support a felony murder conviction where the defendant had kidnapped an already severely injured victim, driven him in a direction away from the hospital, and left him alone where he bled to death from gunshot wounds. *See id.* ¶¶ 27-30. Despite medical testimony that the victim would probably still have died even if he had been taken directly to a hospital, a jury could reasonably have concluded that the defendant's actions were a significant factual cause of death because they precluded any chance of the victim's survival. *See id.*

{21} Here, there is sufficient evidence that Defendant's actions were a significant cause of Garcia's death. Callahan testified that Garcia had suffered a "sudden cardiac death" classified as a homicide because it was the result of physical stress to his heart caused by the pain he experienced from the injuries inflicted during the robbery. This expert testimony alone is substantial evidence on which a reasonable jury was entitled to rely in finding that Defendant's violent acts during the commission of the robbery

were a significant cause of Garcia's death and therefore that Defendant was guilty of felony murder.

{22} While Defendant's expert offered a contrary opinion that a hydrocodone overdose rather than cardiac arrest was the ultimate cause of Garcia's death, the conflicting testimony of experts must be resolved by the jury. *See State v. Hughey*, 2007-NMSC-036, ¶ 15, 142 N.M. 83, 163 P.3d 470. Additionally, Defendant concedes that Garcia would not have ingested the hydrocodone and died when he did had he not been attacked and severely injured, so that even under Defendant's theory of the case a reasonable jury could still have concluded that his actions were a significant cause of Garcia's death. *See Montoya*, 2003-NMSC-004, ¶ 19 ("[A] defendant is a but for cause of death if the death would not have occurred at the time it did and in the manner it did but for defendant's actions."); *Romero*, 2005-NMCA-060, ¶¶ 17, 19-20 (stating that a jury would not entertain any reasonable doubt that the defendant's acts were a significant cause of the victim's death when she died after being beaten by the defendant, even though the victim's drunken state and preexisting liver condition had rendered her more susceptible to the beating that was not so severe to ordinarily have caused death); *State v. Ewing*, 1968-NMCA-071, ¶¶ 4-6, 79 N.M. 489, 444 P.2d 1000 (affirming a conviction for second-degree murder and

holding that there was substantial evidence that gunshot wounds caused a victim's death when the shots themselves were not fatal but where treatment of the resulting injuries by insertion of a tracheotomy tube caused an infection in the area of the insertion that spread to the victim's brain).

{23} We conclude that sufficient evidence supports Defendant's convictions.

B. Defendant Has Not Shown That His Counsel Was Ineffective

{24} Even though his convictions are supported by sufficient evidence, Defendant asks this Court to overturn the jury's verdict and order a new trial based on ineffective assistance of counsel. "To establish ineffective assistance of counsel, a defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" *State v. Paredez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

{25} "Claims of ineffective assistance of counsel are reviewed de novo." *State v. Tafoya*, 2012-NMSC-030, ¶ 59, 285 P.3d 604. But because the record on direct appeal is often inadequate to evaluate counsel's performance or to determine prejudice, we prefer these claims to be brought in a habeas corpus proceeding where evidence can be presented regarding defense counsel's actions. *State v. Astorga*,

2015-NMSC-007, ¶ 17, 343 P.3d 1245. "Absent a prima facie case, we presume that counsel's performance was reasonable," and we will not remand to the district court on direct appeal without the benefit of a habeas record. *Id.*

{26} Defendant's central claim is that his counsel should have moved to sever the charges related to Shober from those pertaining to Garcia because the evidence was not cross-admissible and joinder of the offenses allowed the jury to consider propensity evidence that was unfairly prejudicial. However, Shober's testimony reflected that the height of his attacker was closer to Smolar's height of five feet nine inches than to Defendant's height of six feet three-or-four inches. Defense counsel could rationally have concluded that this weakness might undermine the credibility of Smolar's testimony regarding the deadly attack on Garcia that resulted in the most serious charge. Additionally, the similarity of these crimes extended beyond the nature of the charges and could have rendered much of the evidence cross-admissible to prove the identity of the perpetrator. *See State v. Lovett*, 2012-NMSC-036, ¶ 40, 286 P.3d 265 ("[E]vidence is cross-admissible to prove identity when it demonstrates a unique or distinct pattern easily attributable to one person." (internal quotation marks and citation omitted)). Both victims were elderly men who were attacked in broad daylight two days apart in the same area of Clovis, New Mexico, and each

described his attacker as a black man wearing a bandana who approached from behind, hit him in the head, knocked him down, and took his wallet. Much of the evidence was obtained from one location, and both cases would have involved the presentation of largely the same witnesses. Considering the available evidence on each charge and the probability that much of that evidence would have been cross-admissible if the crimes had been tried separately, defense counsel's choice not to move for severance was a reasonable trial tactic. "A prima facie case for ineffective assistance of counsel is not made if there is a plausible, rational strategy or tactic to explain the counsel's conduct." *Astorga*, 2015-NMSC-007, ¶ 18 (internal quotation marks and citation omitted).

{27} Defendant argues further that his counsel failed to adequately cross-examine Smolar or to present evidence probative of Smolar's guilt and failed to intervene when the prosecutor attempted to influence prospective jury members or when a juror fell asleep at trial. He contends that the cumulative impact of these failures deprived him of a fair trial but fails to specify how he was prejudiced by these alleged deficiencies. Because the record does not allow us to adequately evaluate these claims on direct appeal, we hold that Defendant has not made a prima facie case of ineffective assistance of counsel.

III. CONCLUSION

{28} Sufficient evidence supports the jury's verdict. We affirm Defendant's convictions.

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

CHARLES W. DANIELS, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

JUDITH K. NAKAMURA, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Filing Date: March 24, 2016

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **NO. S-1-SC-34944**

PAUL N. REYNOLDS,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
Jerry H. Ritter, Jr., District Judge

Jorge A. Alvarado, Chief Public Defender
David C. Henderson, Assistant Appellate Defender
Santa Fe, NM

for Appellant

Hector H. Balderas, Attorney General
Jacqueline R. Medina, Assistant Attorney General
Santa Fe, NM

for Appellee

DECISION

VIGIL, Chief Justice.

{1} Defendant Paul Reynolds pled no contest to first-degree murder, unlawful taking of a motor vehicle, and tampering with evidence, pursuant to a plea agreement. Defendant now argues that he should be allowed to withdraw that plea because it was not knowing, intelligent, and voluntary due to the ineffective assistance of his plea counsel. Specifically, Defendant contends that his attorneys were ineffective because they failed to investigate and advise him of potential defenses based on a lack of specific intent or insanity, and that had he been so advised, he would not have entered the plea. The Twelfth Judicial District Court denied Defendant's motion to withdraw his plea, and we hold that the district court did not abuse its discretion in so doing. Because established New Mexico law resolves the issues raised by Defendant, we issue our ruling in this case by this non-precedential decision. *See* Rule 12-405(B)(1) NMRA.

I. BACKGROUND

A. Facts Supporting Defendant's Charges

{2} Defendant's charges arose from a series of events in which Rita Gallegos was killed in her home in Tularosa, New Mexico, on January 1, 2013. Based on its investigation of the case, the State presented the following factual theory in support

of the charges.

{3} Rita and her husband Albert Gallegos met and befriended Defendant, who was a teenager with a difficult home life. As part of his employment with a transport company, Mr. Gallegos transported Defendant from Tularosa to Albuquerque for medical appointments. At times, the Gallegoses would feed Defendant and allow him to stay in their home when he got kicked out of his own house.

{4} As of January 1, 2013, Defendant had been staying with a friend in Tularosa. Also staying there were two women who told Defendant that they wanted to go to Las Cruces but had no way to get there. Remembering that Mr. Gallegos had an older muscle car, Defendant told the women that he knew where they could get a car and that he would take them to Las Cruces.

{5} Defendant and the two women went to a Dollar General Store where they stole duct tape and a knife. They then walked to the Gallegoses' home. The women waited outside near the street while Defendant went to talk to Mr. Gallegos under the ruse that Defendant was interested in purchasing some stereo equipment, when really he was just trying to verify that Mr. Gallegos still had the old muscle car Defendant planned to steal. Mr. Gallegos invited Defendant inside the house, where the two talked briefly, and then Defendant left to meet his companions who were still waiting

outside.

{6} After walking down the street with the two women, Defendant instructed them to wait for him and he returned to the Gallegos home by himself. Mr. Gallegos was out delivering some food to a family friend, so Mrs. Gallegos was there alone. Defendant entered the home, armed with a box cutter, where he found Mrs. Gallegos in the kitchen. Defendant attacked Mrs. Gallegos, cutting her with the box cutter and stabbing her multiple times with a pair of scissors and a large barbeque fork. The attack ended in Mrs. Gallegos's bedroom, where she ultimately died of the injuries. Defendant then searched the house for the keys to the muscle car, but when he could not find them, he chose instead to steal Mrs. Gallegos's SUV. Defendant drove the SUV to pick up the two women who were waiting a short distance away. One of the women later told officers that she observed blood on Defendant's face and clothing. She also said Defendant told her he had done something bad and was sorry.

{7} Mr. Gallegos returned home and saw that Mrs. Gallegos's vehicle was missing from the driveway. When he went inside the home he saw a large pool of blood on the floor of the kitchen but could not find his wife. Mr. Gallegos called the authorities to report his wife and her vehicle missing. Investigators arrived on scene and located his wife's body in the bedroom. They concluded that Mrs. Gallegos had died from the

multiple stab wounds and lacerations on various parts of her body.

{8} Meanwhile, Defendant drove the SUV with his two passengers away from the scene. As Defendant drove away from the Gallegos home, he lost control of the vehicle and rolled it over on a highway in Alamogordo. The three attempted to flee the scene of the accident on foot, but the two women were apprehended by law enforcement. Defendant fled and went to Wal-Mart where he shoplifted supplies so he could hide out in the mountains to evade police. That evening, Defendant called his father and told him that he had done something really bad and would be going to prison for a long time. Defendant was apprehended the next day when he returned to Wal-Mart where he was arrested for shoplifting a cart full of food and camping supplies.

B. District Court Proceedings

{9} On January 16, 2013, Defendant was charged by grand jury indictment with an open count of first-degree murder, unlawful taking of a motor vehicle, aggravated burglary, two counts of tampering with evidence, and shoplifting. At arraignment, Defendant pled not guilty to each of the six charges.

{10} While attorneys on both sides were conducting their investigations in preparation for trial, Defendant was evaluated for competency. The evaluation was

conducted by Dr. Eric Westfried, who met with Defendant on September 12 and 13, 2013. On September 24, 2013, Dr. Westfried sent an email to one of Defendant's attorneys, which read:

> I've made a half dozen attempts to call you, and had no success. I left a message with [a member of your staff] last week, but have not heard back from you.
> Briefly my conclusions:
> 1.) he is competent to stand trial;
> 2.) he may have lacked specific intent;
> 3.) he is not a good candidate for a risk assessment report.
> To pursue intent we need to gather records to support the argument. [Your staff member] will need to do that leg work. If you want to do that, let me know and I will guide [that staff member through] the process.

Another printout of that same email contains a handwritten note, apparently by the staff member referred to in the email, dated October 9, 2013, which read, "Per [Defendant's attorney:] he will speak to [the prosecutor and] get [back] to me on intent issue [sic]." There is nothing in the record reflecting any additional communications between defense counsel and Dr. Westfried, or defense counsel and the prosecutor, from the date the email was sent until November 23, 2013, when Dr. Westfried faxed his evaluation report to defense counsel. Dr. Westfried's report reflected his ultimate conclusion that Defendant was competent to stand trial, but it also noted that Defendant had a history of abuse and neglect and diagnoses of major

mental illnesses, including bipolar affective disorder, major depressive disorder, and post-traumatic stress disorder. Notably, the fax cover sheet with the competency report made reference to a "forthcoming specific intent report"; however, there is nothing in the record to conclusively show whether Defendant's attorney and Dr. Westfried actually discussed or further investigated the specific intent issue.

{11} On December 13, 2013, the district court issued an order, stipulated to by both parties, declaring Defendant competent to stand trial or enter a plea. The case was then set for a change of plea hearing, during which Defendant pled no contest to first-degree murder (felony murder), unlawful taking of a motor vehicle, and one count of tampering with evidence. In exchange for Defendant's plea, the State agreed to request that Defendant's sentences on each count run concurrently and to dismiss three charges—aggravated burglary, tampering with evidence, and shoplifting. The district court approved the change of plea under the agreement and scheduled the case for a sentencing hearing.

{12} On the morning of Defendant's scheduled sentencing hearing, Defendant, through new counsel, filed a motion to withdraw his no contest plea based on his prior attorneys' failure to investigate and advise Defendant of the potential availability of a defense based on a lack of specific intent. The district court agreed

to hear the motion, and scheduled a hearing to occur approximately one month later so as to allow the State to respond to the motion and to give both parties time to prepare and present evidence.

{13} The hearing on Defendant's motion to withdraw his plea was held on May 13, 2014. Defendant did not present witness testimony from either Dr. Westfried or his prior attorneys, but instead relied upon his own testimony, Dr. Westfried's report, and the September 24, 2013, email from Dr. Westfried concerning the specific intent investigation. Defendant testified that his two prior attorneys had each only met with him one or two times, for approximately ten to fifteen minutes. He stated that neither attorney had discussed potential defenses based on lack of specific intent or insanity, nor had they explained that Defendant would not receive good time credit against a life sentence for pleading to first-degree murder. Defendant also testified that if he had known about the possible defenses, he would not have pled guilty to the charges.

{14} The district court denied Defendant's motion to withdraw the plea. The district court stated that it was "arguable" that the attorneys had fallen below the standard of reasonableness, but the evidence on the issue was "weak and insufficient to overcome the strong presumption that the attorneys' conduct was sound trial strategy." The district court was also unpersuaded that Defendant had been prejudiced by the

conduct of his prior attorneys, noting that the only evidence presented on the issue was Defendant's testimony during the hearing that he would have gone to trial if he had received advice about the potential defenses. In its written order denying the motion, the district court stated, "The Defendant's self serving statements are insufficient given the record of the case and the strength of the State's case."

{15} Defendant's sentencing hearing took place on August 22, 2014. The district court ordered that Defendant's sentences on each charge "be served consecutively for a total of life plus [four and a half] years." Defendant appealed the denial of his motion to withdraw his plea to this Court. *See* 12-102(A)(1) NMRA ("[A]ppeals from the district courts in which a sentence of . . . life imprisonment has been imposed" "shall be taken to the Supreme Court.").

II. DISCUSSION

A. Standard of Review

{16} We review the district court's denial of a motion to withdraw a plea for an abuse of discretion. *State v. Hunter*, 2006-NMSC-043, ¶ 11, 140 N.M. 406, 143 P.3d 168. "A trial court abuses its discretion when it denies a motion to withdraw a plea that was not knowing or voluntary." *Hunter*, 2006-NMSC-043, ¶ 12. "This standard [applies] on appeal to all motions to withdraw a plea, whether prior to or following

sentencing." *Id.* ¶ 11. "Where, as here, a defendant is represented by an attorney during the plea process and enters a plea upon the advice of that attorney, the voluntariness and intelligence of the defendant's plea generally depends on whether the attorney rendered ineffective assistance in counseling the plea." *State v. Favela*, 2015-NMSC-005, ¶ 9, 343 P.3d 178 (internal quotation marks and citation omitted). In order for a defendant to present a successful claim of ineffective assistance of counsel, that defendant bears the burden of demonstrating: "(1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *Id.* ¶ 10 (internal quotation marks and citation omitted). These two parts of the test for ineffective assistance of counsel are referred to as the reasonableness prong and the prejudice prong, respectively.

B. Reasonableness of Counsel's Performance

{17} "Counsel's performance is deficient if it fell below an objective standard of reasonableness." *Hunter*, 2006-NMSC-043, ¶ 13 (internal quotation marks and citation omitted).

> Because of the difficulties inherent in making the [reasonableness] evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689 (1984) (citation omitted). Thus, in this case, in order to satisfy the reasonableness prong, Defendant must show that no reasonably competent attorney would have performed as his attorneys did in their alleged failure to investigate and advise Defendant of the potential defenses or the unavailability of good time credit. *See Patterson v. LeMaster*, 2001-NMSC-013, ¶ 19, 130 N.M. 179, 21 P.3d 1032.

{18} Defendant relies on *United States v. Kauffman*, 109 F.3d 186 (3rd Cir. 1997), to support his position that his plea counsel fell below the requisite level of reasonable competence. In *Kauffman*, the Third Circuit Court of Appeals ordered a new trial as a result of the ineffective assistance of the defendant's attorney, who failed to investigate an insanity defense even though he had received a letter from the defendant's psychiatrist indicating that the defendant was manic and psychotic at the time of the crime. *Id.* at 190-91. During Kauffman's hearing on his ineffective assistance of counsel claim, his former attorney testified that "even though he had a letter from Kauffman's psychiatrist concerning Kauffman's mental condition, he did not pursue *any* investigation into an insanity defense." *Id.* at 190. The attorney specifically "admitted to having no conversation about Kauffman's mental status with any physician or making any review of the medical records, or doing any research on

the federal insanity defense." *Id.* at 188. In addition to his plea counsel, Kauffman called two physicians and another mental health counselor who had treated him around the time of his alleged crimes. *Id.* at 188-89. All three mental health professionals testified concerning Kauffman's unstable mental health and history of mental illness. *Id.*

{19} The *Kauffman* Court ultimately determined that there was "no reasonable professional calculation which would support [Kauffman's attorney's] failure to conduct *any* pre-trial investigation into the facts and law of an insanity defense under the circumstances of [that] case." *Id.* at 190. The *Kauffman* Court also noted that if the attorney "had investigated Kauffman's long history of serious mental illness, and conducted *some* legal research regarding the insanity defense . . . his counseling [could] be characterized as 'strategy.' " *Id.* However, the complete failure to investigate the issue "fell below an objective standard of reasonableness," and therefore the evidence was sufficient to satisfy the first prong of the test for ineffective assistance of counsel. *Id.*

{20} While at first glance *Kauffman* appears factually similar to Defendant's case, there are important differences between the two. First, in *Kauffman*, the attorney whose performance was the subject of the ineffective assistance of counsel inquiry

was called to testify at the hearing and admitted that he conducted no research into the insanity defense in the course of his representation of the defendant. *Id.* at 188, 190. In contrast, here Defendant did not call either of his prior attorneys to testify concerning their representation of Defendant. Instead, Defendant relied upon an email from Dr. Westfried referring to a handful of unsuccessful attempts to contact one of Defendant's attorneys. This evidence did not provide any information concerning whether Dr. Westfried was ultimately able to reach Defendant's attorneys, whether there was ever any discussion between Dr. Westfried and Defendant's attorneys concerning specific intent, or whether Defendant's attorneys conducted further research or investigation on specific intent.

{21} Also, the nature of the information provided by the defendant's doctor in *Kauffman* is quite different from what Dr. Westfried provided here. In *Kauffman*, the opinion expressed in the doctor's letter to counsel was conclusive and its exculpatory value apparent—"Kauffman was manic and psychotic 'at the time of the committing of the crime he was charged with.' " *Id.* at 188. That type of medical opinion supports the availability of an insanity defense. *See id.* (recognizing the "exculpatory nature" of the letter); UJI 14-5101 NMRA ("The defendant was insane at the time of the commission of the crime if, because of a mental disease . . . the defendant:" either (1)

"did not know what [he or she] was doing or understand the consequences of [his or her] act," (2) "did not know that [his or her] act was wrong," or (3) "could not prevent [himself or herself] from committing the act."). At Kauffman's hearing, three additional mental health professionals testified on his behalf, providing "substantial evidence which would support Kauffman's claim that an insanity defense was . . . viable." *Id.* at 188-89. On the other hand, here the email from Dr. Westfried only indicated that Defendant "may have lacked specific intent." Such a statement is not conclusive or even strong support for the viability of such a defense. *See State v. Boyett*, 2008-NMSC-030, ¶ 27, 144 N.M. 184, 185 P.3d 355 ("The defense of inability to form specific intent allows a defendant to avoid culpability for willful and deliberate murder whenever he or she was unable to form the specific intent required to commit the crime."). Further, unlike the medical professionals in *Kauffman*, who rendered opinions within their own medical expertise, the inconclusive statement from Dr. Westfried was relayed in legal terms without explanation of the observations, expert opinions, or diagnoses that might support a specific intent defense for Defendant. *See Boyett*, 2008-NMSC-030, ¶ 27 (explaining that a defense based on lack of specific intent requires "evidence of the condition of the mind of the accused at the time of the crime, together with the surrounding circumstances" to

demonstrate that, because of intoxication or mental disease or disorder, the defendant was unable to form specific intent (internal quotation marks and citation omitted)). And like Defendant's attorneys, Dr. Westfried was not called to testify at the hearing to provide additional information that might support Defendant's claims.

{22} Keeping in mind, as the district court did, that an attorney's conduct is presumed to have been effective and Defendant bears the burden of demonstrating otherwise, it is unclear why Defendant failed to call Dr. Westfried or his prior attorneys to testify at the motion hearing to provide support for his claims. The district court was not persuaded that Defendant had "overcome the strong presumption that the attorneys' performance was sound trial strategy, [and that they decided] not to look into this because the evidence wasn't there." Defendant failed to create a record that would rule out the possibility that his attorneys' conduct could be explained by "a plausible, rational strategy or tactic" because the evidence Defendant presented did not show what his attorneys' conduct actually was. *State v. Jacobs*, 2000-NMSC-026, ¶ 49, 129 N.M. 448, 10 P.3d 127. To conclude that Defendant's attorneys acted unreasonably based on the email from Dr. Westfried without more evidence showing what the attorneys did would require this Court to speculate about matters for which Defendant has not provided an evidentiary basis.

See Romanesco v. Barber, 1968-NMSC-066, ¶ 11, 79 N.M. 83, 439 P.2d 919 ("We, of course, will not speculate on questions requiring the assumption of facts."). The district court properly concluded that the limited evidence presented at the hearing on Defendant's motion to withdraw the plea was insufficient to establish an evidentiary basis that would support a finding that the performance of Defendant's plea counsel was objectively unreasonable. Given the scant evidence presented at the hearing, the district court did not abuse its discretion in determining that Defendant failed to meet his evidentiary burden to demonstrate that his attorneys were ineffective.

C. Prejudice

{23} A claim of ineffective assistance of counsel can only prevail where a defendant demonstrates that the attorney's conduct was unreasonable *and* that the defendant suffered prejudice as a result. *Favela*, 2015-NMSC-005, ¶ 10; *see also Jacobs*, 2000-NMSC-026, ¶ 51 ("Failure to prove either prong of the test defeats a claim of ineffective assistance of counsel."). Where, as here, a defendant has failed to demonstrate that the attorney's performance was deficient, there can be no claim that any such deficiency prejudiced the defendant. Thus, because Defendant failed to meet his burden of showing that his attorneys' performance was deficient we find it

unnecessary to address Defendant's prejudice arguments.

III. CONCLUSION

{24} Defendant has not met his evidentiary burden of showing that he received ineffective assistance of counsel such that the district court abused its discretion in denying his motion to withdraw his no contest plea. The order of the district court is affirmed.

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

BARBARA J. VIGIL, Chief Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

JUDITH K. NAKAMURA, Justice