

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: December 29, 2016

4 **NO. 35,006**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **JOSEPH MONTOYA, aka JOSEPH E.**

9 **MONTOYA, aka JOSEPH EMETERIO**

10 **MONTOYA, aka JOSE MONTOYA,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY**

13 **Gerald E. Baca, District Judge**

14 Hector H. Balderas, Attorney General

15 Santa Fe, NM

16 Elizabeth Ashton, Assistant Attorney General

17 Albuquerque, NM

18 for Appellee

19 L. Helen Bennett

20 Albuquerque, NM

21 for Appellant

1 **OPINION**

2 **SUTIN, Judge.**

3 {1} This case turns on whether Defendant’s conviction for his robbery of the victim
4 he earlier robbed and killed can stand given that the victim was already dead at the
5 time of the second robbery. The question presented to us is one of “personhood,”
6 Defendant contends. He asserts that just as one cannot kill a person already dead, one
7 cannot rob a person already dead. We hold that under the facts of this case, the
8 robbery statute was properly applied, and Defendant was properly convicted of
9 robbery despite the posthumous—by several hours—nature of the second robbery.

10 **BACKGROUND**

11 {2} Defendant Joseph Montoya, with the assistance of others, robbed and then
12 killed Angel Arroyo. Defendant then left the scene of these crimes. Returning a few
13 hours later, Defendant, again with the aid of others, emptied Arroyo’s pocket of any
14 remaining cash, poured gasoline throughout the residence and on Arroyo’s body, then
15 set the residence on fire. Convicted of multiple crimes and sentenced to 104.5 years
16 of incarceration, Defendant challenges the application of the robbery statute when the
17 robbery commenced and concluded on a person dead for several hours. He also raises
18 ineffective assistance of counsel because his attorney did not request an instruction
19 on theft as a lesser included offense of robbery.

1 **DISCUSSION**

2 **Personhood**

3 {3} We start with whether Defendant’s conviction for the second robbery was
4 lawful. We review this issue de novo, since it involves statutory interpretation. *State*
5 *v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50; *see State v. Almanzar*,
6 2014-NMSC-001, ¶ 9, 316 P.3d 183.

7 {4} NMSA 1978, Section 30-16-2 (1973), reads: “Robbery consists of the theft of
8 anything of value from the person of another or from the immediate control of
9 another, by use or threatened use of force or violence.” The jury was instructed that
10 in order to find Defendant guilty of robbery, the State was required to prove
11 Defendant took cash from Arroyo’s pocket by force or violence, intending to deprive
12 Arroyo of the cash. *See* UJI 14-1620 NMRA. “[R]obbery is distinct from larceny
13 because it requires, and is designed to punish, the element of force.” *State v. Bernal*,
14 2006-NMSC-050, ¶ 28, 140 N.M. 644, 146 P.3d 289.

15 {5} Defendant contends that there was insufficient evidence to convict him of
16 robbery after he returned to the scene of the killing because “a robbery conviction is
17 improper when the robbery both commences and concludes on a dead person.” He
18 relies on language in *Stephenson v. State*, 29 N.E.3d 111, 116 (Ind. 2015), that states,
19 “[w]hile a robbery conviction may not be proper when a robbery both commences and

1 concludes on a dead person, the crime is committed when part of the robbery occurs
2 before the victim's death and the other part occurs after the death." Defendant argues
3 that just as attempting to kill someone who is already dead is a legal impossibility,
4 "one cannot rob a corpse." He further argues that Arroyo did not have immediate
5 control over the cash in his pocket when Arroyo was already dead, as required under
6 Section 30-16-2. And he argues that the Legislature did not intend the robbery statute
7 to apply to circumstances, such as those here, in which the victim was no longer a
8 "person." Defendant asserts that "[t]he temporal and relational gap between the first
9 robbery and shooting and killing of Arroyo, and the subsequent, second theft of
10 money from Arroyo's body before the arson is simply too large, and was broken by
11 [Defendant's] flight from the scene intending to go elsewhere." The bottom line,
12 according to Defendant, "[p]ersonhood ceases upon the death of the individual." He
13 cites articles that medically and philosophically wax on life as fundamental to the
14 term "person," as a term that ceases to apply upon death. *See, e.g.,* John D. Arras, *The*
15 *Severely Demented, Minimally Functional Patient: An Ethical Analysis*, 36 JAGS
16 938, 940 (1988) (arguing that patients who lack all fundamental human capacities
17 have ceased to be persons in any meaningful sense); Amir Halevy & Baruch Brody,
18 *Brain Death: Reconciling Definitions, Criteria, and Tests*, 119 *Annals of Internal*
19 *Med.* 519, 523 (1993) (noting that while there are many different views of

1 personhood, all, except those that identify personhood with simple biologic
2 functioning, require cortical activity).

3 {6} The application of a robbery statute to theft from a dead person has been
4 addressed in several cases. Our Supreme Court in *State v. Barela*, No. 32,506, 2013
5 WL 1279111, at *19-20, dec. (N.M. Sup. Ct. Mar. 28, 2013) (non-precedential),
6 upheld a robbery conviction “where the killing and the taking of the property are part
7 of the same transaction of events[.]” and adopted the following view, quoted from
8 *James v. State*, 618 S.E.2d 133, 138 (Ga. Ct. App. 2005).

9 Although, as an abstract principle of law, one ordinarily cannot be guilty
10 of robbery if the victim is a deceased person, this principle does not
11 apply where a robbery and homicide are a part of the same transaction
12 and are so interwoven with each other as to be inseparable. If the taking
13 was made possible by an antecedent assault, the offense is robbery
14 regardless of whether the victim died before or after the taking of the
15 property.

16 *Barela*, 2013 WL 1279111, at *20 (alteration, internal quotation marks, and citation
17 omitted). *Barela* also relied on *People v. Navarette*, 66 P.3d 1182, 1207 (Cal. 2003),
18 for the similarly stated view that “while it may be true that one cannot rob a person
19 who is already dead when one first arrives on the scene, one can certainly rob a living
20 person by killing that person and then taking his or her property[.]” *Barela*, 2013 WL
21 1279111, at *20 (alteration, internal quotation marks, and citation omitted).

1 {7} At least two less-recent cases came to the same or similar conclusion. *See, e.g.,*
2 *Smothers v. United States*, 403 A.2d 306, 313 n.6 (D.C. 1979) (“It is settled law in
3 this jurisdiction that a dead person can be a robbery victim, at least where the taking
4 and the death occur in close proximity.”); *State v. Coe*, 208 P.2d 863, 866 (Wash.
5 1949) (holding that a robbery conviction was appropriate when the defendant killed
6 the victim in a vehicle, then took the body from the vehicle, and “conveyed it a
7 distance from the road and took the property from the clothing” of the victim, and
8 stating that it was “not a case where the only act was the taking of property from the
9 person of one deceased” but rather “[t]he robbery commenced with the first overt act
10 on the part of [the co-defendant]”).

11 {8} We interpret Section 30-16-2 to apply to the circumstances here and hold that
12 Defendant was properly convicted under Section 30-16-2 for the second robbery that
13 occurred after the killing. It is reasonable to conclude that the second robbery and the
14 subsequent arson were “clean-up” activities directly connected with the original
15 robbery and killing, and therefore the second robbery can rationally be linked to the
16 murder that enabled the robbery.

17 **Ineffective Assistance**

18 {9} “Normally, a claim of ineffective assistance of counsel is established by a
19 showing of error by counsel and prejudice resulting from the error.” *State v. Grogan*,

1 2007-NMSC-039, ¶ 11, 142 N.M. 107, 163 P.3d 494. An error is found if the
2 “attorney’s conduct fell below that of a reasonably competent attorney.” *State v.*
3 *Baca*, 1997-NMSC-059, ¶ 24, 124 N.M. 333, 950 P.2d 776. The defendant has the
4 burden to show both incompetence and prejudice. *See id.*

5 {10} Defendant contends that his counsel was ineffective for failing to request the
6 district court to give a lesser included offense instruction on “theft.” Defendant does
7 not refer to the particular statute, but presumably intends application of NMSA 1978,
8 Section 30-16-1 (2006) (defining “larceny”). We cannot agree. Counsel may have
9 consciously determined that the better strategy was to defeat the second robbery
10 conviction leaving no step-down charge. *See Bernal*, 2006-NMSC-050, ¶ 35 (stating
11 that the defendant’s claimed errors “may implicate tactical decisions made by counsel
12 . . . and are best evaluated during habeas corpus”). Further, Defendant has not shown
13 prejudice. *See Grogan*, 2007-NMSC-039, ¶ 11; *State v. Herrera*, 2001-NMCA-073,
14 ¶ 36, 131 N.M. 22, 33 P.3d 22 (requiring, for a prima facie case, proof of both lack
15 of reasonable competence and prejudice).

16 {11} Even assuming that the lesser included offense had been requested, we do not
17 hold that there existed a reasonable probability that, but for counsel’s error, the result
18 would have been different. *See Bernal*, 2006-NMSC-050, ¶ 32 (“With regard to the
19 prejudice prong, generalized prejudice is insufficient. Instead, a defendant must

1 demonstrate that counsel’s errors were so serious, such a failure of the adversarial
2 process, that such errors undermine judicial confidence in the accuracy and reliability
3 of the outcome.” (alteration, internal quotation marks, and citations omitted). “A
4 defendant must show a reasonable probability that, but for counsel’s unprofessional
5 errors, the result of the proceeding would have been different.” *Id.* (internal quotation
6 marks and citation omitted).

7 {12} Defendant is free to pursue his ineffective assistance claim in a habeas corpus
8 proceeding. *See Grogan*, 2007-NMSC-039, ¶ 9; *Herrera*, 2001-NMCA-073, ¶ 37.

9 **CONCLUSION**

10 {13} We affirm Defendant’s second robbery conviction.

11 {14} **IT IS SO ORDERED.**

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13

JONATHAN B. SUTIN, Judge

14 **WE CONCUR:**

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M. MONICA ZAMORA, Judge

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J. MILES HANISEE, Judge