

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

2 Opinion Number: \_\_\_\_\_

3 Filing Date:    September 14, 2017

4 **NO. A-1-CA-34058**

5 **STATE OF NEW MEXICO,**

6           Plaintiff-Appellee,

7 v.

8 **JUAN URIBE-VIDAL,**

9           Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

11 **Gary L. Clingman, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

14 Elizabeth Ashton, Assistant Attorney General

15 Albuquerque, NM

16 for Appellee

17 L. Helen Bennett, P.C.

18 L. Helen Bennett

19 Albuquerque, NM

20 for Appellant

1 **OPINION**

2 **FRENCH, Judge.**

3 {1} This appeal stems from a jury verdict convicting Defendant Juan Uribe-Vidal  
4 of eleven counts of aggravated assault upon a peace officer (deadly weapon), contrary  
5 to NMSA 1978, Section 30-22-22(A)(1) (1971), and one count of aggravated battery  
6 upon a peace officer (deadly weapon), contrary to NMSA 1978, Section 30-22-25(C)  
7 (1971). Defendant raises four issues on appeal: (1) the State presented insufficient  
8 evidence to sustain the convictions, (2) the convictions violate Defendant's right to  
9 be free from double jeopardy, (3) defense counsel's failure to present evidence  
10 proving Defendant's innocence violated Defendant's right to effective assistance of  
11 counsel, and (4) Defendant's sentence constitutes cruel and unusual punishment. We  
12 affirm.

13 **BACKGROUND**

14 {2} On November 23, 2012, officers from the Lea County Sheriff's Office and the  
15 Hobbs Police Department attempted to execute a search of Defendant's residence  
16 pursuant to a warrant. The officers were organized into two SWAT teams, one for a  
17 camper on the property and one for a mobile home on the property. The officers  
18 arrived at Defendant's property in an armored patrol carrier and, upon exiting the  
19 vehicle, one SWAT team began walking toward the camper and the other began

1 walking toward the mobile home. Officer Tovar was part of the SWAT team tasked  
2 with entering the camper. When that team was close to the front door of the camper,  
3 another officer gave the command for Officer Tovar to deploy a distractionary device,  
4 which would emit smoke and conceal their movement. Immediately after Officer  
5 Tovar deployed the distractionary device, the officers—including Officer  
6 Tovar—heard and saw gunfire coming from the camper. As soon as the officers heard  
7 the shots, they tried to take cover behind a nearby tree and another vehicle parked on  
8 Defendant’s property. When Officer Tovar took cover behind the vehicle, he  
9 discovered that he had been shot in his right arm. He remained behind the vehicle  
10 until the firefight was over, which lasted about twenty-one seconds and included the  
11 exchange of rounds fired from the camper and several rounds fired by one of the  
12 officers in front of the camper. Once the gunfire ceased, two officers helped get  
13 Officer Tovar back to the armed patrol carrier, and the individuals inside the camper  
14 were ordered to come out. Defendant and six others were arrested outside the camper.  
15 {3} Law enforcement seized from the camper various firearms, a grenade, a gas  
16 mask, a bulletproof vest, and an explosive device. They also discovered a video  
17 surveillance system inside the camper, which displayed the area in front of the camper  
18 where the SWAT teams had assembled. All of the officers said they could not see

1 who was firing at them from inside the camper, but the gunfire appeared to come from  
2 the window and the doorway of the camper.

3 {4} Defendant was charged with thirteen counts of aggravated assault on a peace  
4 officer (deadly weapon), one charge for each of the officers present that day, and one  
5 count of aggravated battery on a peace officer (deadly weapon), for Officer Tovar, the  
6 officer who was shot in the arm. Two counts of aggravated assault were dismissed by  
7 directed verdict by the district court before being submitted to the jury. In addition  
8 to its substantive instructions, the jury was also instructed on accessory liability. The  
9 jury found Defendant guilty of eleven counts of aggravated assault on a peace officer  
10 and one count of aggravated battery on a peace officer. Defendant was sentenced to  
11 a total of twenty years imprisonment, minus 492 days credit for time served.  
12 Defendant appeals his convictions based on the sufficiency of the evidence, double  
13 jeopardy, ineffective assistance of counsel, and cruel and unusual punishment.

## 14 **DISCUSSION**

### 15 **Sufficiency of the Evidence**

16 {5} Defendant asserts that there was insufficient evidence to support all of his  
17 convictions because the testimony at trial only established that while Defendant  
18 owned the property and was present in the camper during the firefight, he was on the  
19 floor, not near the window or door from which the shots were fired. Defendant

1 emphasizes the absence of evidence proving that he possessed a gun during the  
2 firefight and notes that the DNA evidence from one of the guns only established that  
3 Defendant handled the gun at some point in time. Defendant argues it is therefore not  
4 reasonable to infer that he shot at the officers outside. Defendant also notes the  
5 absence of ballistics tests that could have proven which rounds were fired by the gun  
6 that Defendant allegedly handled during the firefight, and argues the State made no  
7 effort to determine which of the guns caused Officer Tovar’s injury. Therefore,  
8 Defendant argues the jury could only have speculated that Defendant participated in  
9 the firefight based upon his presence in the camper.

10 {6} “The sufficiency of the evidence is reviewed pursuant to a substantial evidence  
11 standard.” *State v. Treadway*, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746.  
12 When reviewing a challenge to the sufficiency of the evidence, we determine  
13 “whether substantial evidence of either a direct or circumstantial nature exists to  
14 support a verdict of guilt beyond a reasonable doubt with respect to every element  
15 essential to a conviction.” *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126,  
16 753 P.2d 1314. “[W]e must view the evidence in the light most favorable to the guilty  
17 verdict, indulging all reasonable inferences and resolving all conflicts in the evidence  
18 in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711,  
19 998 P.2d 176. “In our determination of the sufficiency of the evidence, we are

1 required to ensure that a rational jury *could* have found beyond a reasonable doubt  
2 the essential facts required for a conviction.” *State v. Duran*, 2006-NMSC-035, ¶ 5,  
3 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). “Contrary  
4 evidence supporting acquittal does not provide a basis for reversal because the jury  
5 is free to reject [the d]efendant’s version of the facts.” *State v. Rojo*, 1999-NMSC-  
6 001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

7 {7} The State argues it presented evidence sufficient to support Defendant’s  
8 convictions because it proceeded on a theory of accessory liability and the evidence  
9 determined that Defendant “watched, waited, encouraged, and caused” the criminal  
10 conduct. We agree. *See State v. King*, 2015-NMSC-030, ¶ 21, 357 P.3d 949 (noting  
11 that “New Mexico long ago abolished the distinction between accessory and principal  
12 liability” and “[t]he charge against [the d]efendant as a principal include[s] a  
13 corresponding accessory charge, assuming the evidence at trial supported the charge”  
14 (internal quotation marks omitted)). Where the State’s theory of the case includes  
15 accomplice liability, the jury is accordingly instructed and “[t]he sufficiency of the  
16 evidence is assessed against the jury instructions because they become the law of the  
17 case.” *State v. Quiñones*, 2011-NMCA-018, ¶ 38, 149 N.M. 294, 248 P.3d 336.

18 {8} Specifically, the State presented evidence showing that Defendant owned and  
19 was inside the camper at the time of the fire. The State also called as a witness

1 the forensics expert who ran various tests—cartridge casing comparison tests, bullet  
2 comparison tests, and function tests—on the cartridge casings and firearms found  
3 inside the camper. Of the thirteen firearms found within the camper and provided to  
4 the forensics expert for testing, he was able to identify cartridge casings with the .45  
5 caliber colt, the AR-15 caliber rifle, the .40 caliber glock, and the .40 caliber beretta  
6 pistol. The bullets that hit Officer Tovar matched the .40 caliber beretta pistol found  
7 inside the camper. The State also presented the results of DNA tests performed on  
8 several of the firearms. Defendant was not eliminated as a contributor to the DNA  
9 found on the beretta pistol. The other six individuals inside the camper were  
10 eliminated as contributors to the DNA mixture found on the magazine of the beretta  
11 pistol, but there was no conclusion about Defendant being “a possible contributor.”  
12 Defendant was also found to be a “major contributor” on another firearm, while  
13 everyone else in the camper was eliminated, and Defendant was found to be “the  
14 source of the major DNA profile” on another one of the many firearms found inside  
15 the camper.

16 {9} From this, it was reasonable for the jury to infer that Defendant either shot at  
17 the officers himself, or, given the presence of the surveillance system and the  
18 availability of firearms and ammunition inside his camper, Defendant encouraged,  
19 helped, or caused others to shoot at the officers. Despite the difficulty in proving

1 which of the seven individuals inside the camper actually shot the three guns, there  
2 was evidence sufficient to convict Defendant as an agent of the crimes. *See State v.*  
3 *Bahney*, 2012-NMCA-039, ¶ 26, 274 P.3d 134 (noting that “we need only find  
4 sufficient evidence under one of the theories presented to uphold [the d]efendant’s  
5 convictions,” and choosing “to address each of the . . . crimes under the [s]tate’s  
6 theory of accessory liability”). Given all the evidence presented and the alternative  
7 manner used to charge Defendant, as well as prove the State’s case at trial, we  
8 conclude that sufficient evidence supports each of Defendant’s convictions.

### 9 **Double Jeopardy**

10 {10} Defendant argues that the jury’s separate guilty verdicts for one count of  
11 aggravated assault and one count of aggravated battery, both involving Officer Tovar  
12 as the victim, violated the Double Jeopardy Clause. Whether separate convictions  
13 violate double jeopardy is “a question of law, which we review de novo.” *State v.*  
14 *Saiz*, 2008-NMSC-048, ¶ 22, 144 N.M. 663, 191 P.3d 521, *abrogated on other*  
15 *grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d  
16 783. The Double Jeopardy Clause prohibits the imposition of multiple punishments  
17 for the same offense. *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d  
18 1223. “There are two types of multiple punishment cases: (1) unit of prosecution  
19 cases, in which an individual is convicted of multiple violations of the same criminal

1 statute; and (2) double[]description cases, in which a single act results in multiple  
2 convictions under different statutes.” *State v. Branch*, 2016-NMCA-071, ¶ 20, 387  
3 P.3d 250, *cert. granted*, 2016-NMCERT-\_\_\_\_\_, \_\_\_\_\_ P.3d \_\_\_\_\_ (No. A-1-CA-  
4 35,951, July 28, 2016). Defendant’s argument involves separate statutes, raising a  
5 double description issue.

6 {11} Our courts have established a two-part test for determining whether convictions  
7 under different criminal statutes violate the Double Jeopardy Clause. *Swafford*, 1991-  
8 NMSC-043, ¶¶ 25-26. First, we determine “whether the conduct underlying the  
9 offense[] is unitary, *i.e.*, whether the same conduct violates both statutes.” *Id.* ¶ 25.  
10 “Whether conduct is unitary depends upon whether the two events are sufficiently  
11 separated by either time or space as well as the quality and nature of the acts or the  
12 objects and results involved.” *State v. Meadors*, 1995-NMSC-073, ¶ 36, 121 N.M. 38,  
13 908 P.2d 731 (omission, internal quotation marks, and citation omitted). “[I]f the  
14 conduct is separate and distinct, [the] inquiry is at an end.” *Swafford*, 1991-NMSC-  
15 043, ¶ 28. If the conduct is unitary, we must then consider “whether the [L]egislature  
16 intended to create only alternative means of prosecution or separately punishable  
17 offenses.” *State v. Cowden*, 1996-NMCA-051, ¶ 6, 121 N.M. 703, 917 P.2d 972.

18 {12} Defendant maintains that the conduct resulting in harm to Officer Tovar was  
19 unitary because there was “no temporal distinction between the gun shots resulting

1 in the alleged assaults experienced by the officers, and the shot that hit Officer  
2 Tovar’s arm[,]” and “[t]he only physical distinction was that Officer Tovar was  
3 touched while none of the other officers were.” Defendant relies on *State v. Montoya*,  
4 2013-NMSC-020, ¶ 54, 306 P.3d 426, concluding that the same shots, fired at the  
5 same time, establish both charges, and “where both convictions were premised on the  
6 unitary act of shooting [the victim,]” one must be vacated. *Id.* ¶ 54.

7 {13} The State argues that Defendant’s conduct was not unitary because the State’s  
8 case was based on a theory of accessory liability, which involved multiple  
9 perpetrators. Defendant’s convictions for aggravated assault and aggravated battery  
10 against Officer Tovar could be based on Defendant’s commission of the crimes, or  
11 it could have been based on accessory liability for having assisted the individual  
12 inside the camper who did in fact fire the shot that struck Officer Tovar.

13 {14} We conclude that the conduct is unitary. We examine four cases where our  
14 courts have concluded one perpetrator shooting one firearm constitutes unitary  
15 conduct. In *Branch*, the defendant pointed a firearm at two people who were standing  
16 directly next to one another and fired a single shot, striking only one of the two  
17 victims. 2016-NMCA-071, ¶ 7. The jury convicted him of aggravated battery with a  
18 deadly weapon (for the victim who was shot) and aggravated assault with a deadly  
19 weapon (for the victim who was not shot but reasonably believed the defendant

1 would batter her as well). *Id.* ¶¶ 1-2. We concluded that the firing of a single shot was  
2 unitary conduct. *Id.* ¶ 22.

3 {15} In *Cowden*, the defendant was one of several defendants involved in “an  
4 incident in which [the d]efendant and others shot at Santa Fe police officers,” and  
5 only one officer was shot. 1996-NMCA-051, ¶ 2. The defendant was crouched behind  
6 the victim’s van, pointed his gun at the victim, and upon seeing one another,  
7 discharged one shot. *Id.* ¶ 3. The state conceded the conduct was unitary and we  
8 agreed. *Id.* ¶ 5. This Court cited to *State v. Gonzales*, 1992-NMSC-003, 113 N.M.  
9 221, 824 P.2d 1023, *overruled on other grounds by State v. Montoya*, 2013-NMSC-  
10 020, 306 P.3d 426, in support of our conclusion. *Cowden*, 1996-NMCA-051, ¶ 5.

11 {16} In *Gonzales*, the defendant was convicted of shooting into an occupied motor  
12 vehicle and first degree murder. 1992-NMSC-003, ¶ 1. The victim was a passenger  
13 in a truck and was killed by shots fired into the truck while the driver drove past the  
14 residence of the defendant. *Id.* ¶ 2. Our Supreme Court concluded the conduct was  
15 unitary: “the facts presented at trial established that [the] defendant fired multiple gun  
16 shots into [the] truck in rapid succession. Because the shots were not separated by  
17 either time or space, [our Supreme Court agreed] with the trial court that [the]  
18 defendant committed one criminal act.” *Id.* ¶ 8 (internal quotation marks omitted).

1 {17} In *Montoya*, our Supreme Court was asked to determine whether the defendant  
2 could be punished for both voluntary manslaughter and shooting at a motor vehicle  
3 resulting in great bodily harm. 2013-NMSC-020, ¶ 28. The defendant shot at a  
4 vehicle driving by his residence, and the driver of the vehicle died of multiple  
5 gunshot wounds. *Id.* ¶ 7. As in *Gonzales*, the state conceded that “[the d]efendant’s  
6 act of shooting the driver of the [vehicle] was the common factual basis for both the  
7 shooting into the motor vehicle and the voluntary manslaughter convictions, and his  
8 culpable conduct was therefore ‘unitary.’ ” *Montoya*, 2013-NMSC-020, ¶ 30. Our  
9 Supreme Court agreed that the conduct was unitary, citing *Gonzales* for the  
10 proposition that “the firing of multiple gun shots into the victim’s vehicle in rapid  
11 succession constituted unitary criminal conduct[.]” *Montoya*, 2013-NMSC-020, ¶ 30  
12 (alteration, internal quotation marks, and citation omitted).

13 {18} In summary, in *Branch and Cowden*, one perpetrator shot at more than one  
14 person only one time. This conduct was unitary. In *Gonzales* and *Montoya*, one  
15 perpetrator shot at more than one person, but did so many times. This conduct was  
16 also deemed unitary. Here, as in *Gonzales* and *Montoya*, Defendant shot at or, under  
17 a theory of accessory liability, encouraged others to shoot at more than one person  
18 many times. Based on this Court and our Supreme Court precedent, we conclude that  
19 Defendant’s conduct was unitary, “[b]ut because this is a double[.]description case,

1 where the same conduct results in multiple convictions under different statutes, we  
2 must go further before our analysis is complete.” *Montoya*, 2013-NMSC-020, ¶ 30  
3 (internal quotation marks and citation omitted).

4 {19} We turn to the legal question, “whether the [L]egislature intended to create  
5 separately punishable offenses.” *Swafford*, 1991-NMSC-043, ¶ 25. “Determinations  
6 of legislative intent, like double jeopardy, present issues of law that are reviewed de  
7 novo, with the ultimate goal of such review to be facilitating and promoting the  
8 [L]egislature’s accomplishment of its purpose.” *Montoya*, 2013-NMSC-020, ¶ 29  
9 (alterations, internal quotation marks, and citation omitted). “When . . . the statutes  
10 themselves do not expressly provide for multiple punishments, we begin by applying  
11 the rule of statutory construction from *Blockburger v. United States*, 284 U.S.  
12 299 . . . (1932), to determine whether each provision requires proof of a fact that the  
13 other does not.” *Branch*, 2016-NMCA-071, ¶ 22.

14 {20} For double jeopardy claims involving statutes that are vague and unspecific or  
15 written with many alternatives, we do not “apply a strict elements test in the abstract;  
16 rather, we look to the state’s trial theory to identify the specific criminal cause of  
17 action for which the defendant was convicted,” and we examine the charging  
18 documents and the jury instructions presented. *Id.* ¶ 23. “If the statutes survive  
19 *Blockburger*, we examine other indicia of legislative intent[,],” and “we must identify

1 the particular evil sought to be addressed by each offense.” *Branch*, 2016-NMCA-  
2 071, ¶ 24 (internal quotation marks and citations omitted). “Statutes directed toward  
3 protecting different social norms and achieving different policies can be viewed as  
4 separate and amenable to multiple punishments.” *Swafford*, 1991-NMSC-043, ¶ 32.

5 {21} Defendant provides no argument about the legislative-intent prong. The State  
6 argues that the statutory elements of the two crimes are different and address two  
7 different social evils: the assault charge required proof of the threat of harm to Officer  
8 Tovar; the battery charge required proof that Officer Tovar was injured. Furthermore,  
9 the State points out that the assault statute addresses the victim’s fear and mental  
10 anguish, while the battery statute addresses the ensuing physical harm to the victim,  
11 two distinct social evils.

12 {22} We are guided on this issue by our recent opinion in *Branch*. There, we  
13 concluded that the crimes of aggravated assault and aggravated battery address  
14 societal harms separate and distinct from one another—placing another in fear versus  
15 physically injuring another—and therefore survive *Blockburger*. We consider the  
16 conclusion reached in *Branch*—that multiple harms can arise from a single  
17 gunshot—may also be applied in a case where multiple shots were fired that  
18 ultimately produced two distinct harms to a single officer, an assault and a battery.  
19 Here, the charging document specifically identified Subsection (1) of Section 30-22-

1 22(A), the subsection prohibiting any unlawful assaulting or striking of a peace  
2 officer with a deadly weapon. The jury instruction required the jury to find, among  
3 other things, that “[D]efendant’s conduct threatened the safety of [Officer] Tovar[.]”  
4 and “[D]efendant acted in a rude, insolent or angry manner[.]” It appears that the  
5 State proceeded under the “threat” prong of the aggravated assault statute. The State  
6 also charged Defendant under Section 30-22-25(C), the section of our aggravated  
7 battery statute that makes its commission against a peace officer a third degree felony  
8 if it is committed with a deadly weapon such that great bodily harm or death may be  
9 inflicted. While some of the elements of the two crimes overlap, each crime requires  
10 proof of at least one element that the other does not—assault requires threatening or  
11 menacing conduct; battery requires physical injury to the victim. One offense is not  
12 subsumed within the other, and *Blockburger* alone does not preclude the possibility  
13 of punishment under both the aggravated assault statute and the aggravated battery  
14 statute. *See Branch*, 2016-NMCA-071, ¶ 27.

15 {23} Next, we look to the history, language, and subject of the statutes, and identify  
16 the particular evil addressed by each statute. *See Montoya*, 2013-NMSC-020, ¶ 32.  
17 “[T]he social evils proscribed by different statutes must be construed narrowly[.]”  
18 *Swafford*, 1991-NMSC-043, ¶ 32. We have previously determined that aggravated  
19 assault under NMSA, 1978, Section 30-3-1(B) (1963) and aggravated battery under

1 NMSA, 1978, Section 30-3-5(A) (1969), address different social evils, albeit in a  
2 situation where the victim was not a peace officer. *See Branch*, 2016-NMCA-071,  
3 ¶ 28 (explaining that the aggravated battery statute, Section 30-3-5(A), “protects  
4 against the social evil that occurs when one person intentionally physically attacks  
5 and injures another[,]” but “[t]he culpable act under Section 30-3-1(B), on the other  
6 hand, is one that causes apprehension or fear” (internal quotation marks and citation  
7 omitted)). Though we now analyze Sections 30-22-22 and 30-22-25, the analysis is  
8 the same because the State pursued Defendant’s aggravated assault charges based  
9 upon Officer Tovar’s separate fear of harm during this firefight where multiple shots  
10 were fired. Again, here, “the harm related to assault is mental harm; assaults put  
11 persons in fear. The harm related to battery is physical harm; batteries actually injure  
12 persons.” *Branch*, 2016-NMCA-071, ¶ 28 (alteration, internal quotation marks, and  
13 citation omitted). In *Branch*, we upheld convictions for aggravated assault and  
14 aggravated battery under a double jeopardy analysis, where the defendant pointed a  
15 gun at two victims and fired one shot, striking only one of the victims. *Id.* ¶¶ 1, 64.  
16 We affirm Defendant’s convictions for aggravated assault and aggravated battery  
17 upon one police officer because both distinct social harms arose when multiple shots  
18 were fired at the officers and caused them all to hide behind a tree and a vehicle in  
19 fear of being hit by a bullet, including Officer Tovar who was both fearful of being

1 struck and then actually struck by one of the bullets. As a result, we conclude that  
2 Defendant’s convictions for aggravated assault and aggravated battery against Officer  
3 Tovar do not violate Defendant’s right to be free from double jeopardy. *See id.* ¶ 29.

4 **Ineffective Assistance of Counsel**

5 {24} Defendant argues defense counsel failed to introduce evidence establishing his  
6 innocence, thereby violating his constitutional right to effective assistance of counsel.  
7 Specifically, Defendant argues trial counsel “erred by failing to present any defense,  
8 and by failing to adequately investigate and challenge evidence presented,  
9 particularly the evidence that no gun shot residue test was performed on  
10 [Defendant].”

11 {25} “We review claims of ineffective assistance of counsel de novo.” *Bahney*,  
12 2012-NMCA-039, ¶ 48. In order to establish a prima facie case of ineffective  
13 assistance of counsel on appeal, Defendant “must demonstrate that his counsel’s  
14 performance fell below that of a reasonably competent attorney and that he was  
15 prejudiced by his counsel’s deficient performance.” *State v. Perez*, 2002-NMCA-040,  
16 ¶ 36, 132 N.M. 84, 44 P.3d 530.

17 {26} Defendant makes no citation to the record or the trial proceedings showing  
18 counsel’s failure to investigate and challenge evidence presented. Contrary to  
19 Defendant’s assertion, the record reflects that defense counsel questioned technicians

1 about the State’s failure to perform the gun shot residue tests during trial, specifically  
2 inquiring about why the case agent chose not to perform gun shot residue tests on  
3 Defendant’s palms after the incident and asking questions that made it clear gun shot  
4 residue tests, unlike DNA tests, are conclusive evidence of a person firing a firearm.  
5 Defense counsel also highlighted the absence of gun shot residue tests during closing  
6 argument. We cannot conclude that defense counsel’s performance fell below that of  
7 a reasonably competent attorney. *See Lytle v. Jordan*, 2001-NMSC-016, ¶ 50, 130  
8 N.M. 198, 22 P.3d 666 (“[J]udicial review of the effectiveness of counsel’s  
9 performance must be highly deferential, and courts should recognize that counsel is  
10 strongly presumed to have rendered adequate assistance and made all significant  
11 decisions in the exercise of reasonable professional judgment.” (internal quotation  
12 marks and citation omitted)); *see also State v. Roybal*, 2002-NMSC-027, ¶ 21, 132  
13 N.M. 657, 54 P.3d 61 (stating that an appellate court presumes that counsel’s  
14 performance “fell within a wide range of reasonable professional assistance” (internal  
15 quotation marks and citation omitted)).

16 {27} Defendant has failed to establish a prima facie case of ineffective assistance of  
17 counsel. However, Defendant may bring an ineffective assistance of counsel claim  
18 in a habeas proceeding. *See Saiz*, 2008-NMSC-048, ¶ 65 (noting that a defendant  
19 “may pursue habeas corpus proceedings on [the ineffective assistance of counsel]

1 issue in the future if he is ever able to provide evidence to support his claims”); *see*  
2 *also State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating  
3 that if the record does not establish a prima facie case of ineffective assistance of  
4 counsel, the defendant must pursue the claim in a habeas corpus proceeding).

### 5 **Cruel and Unusual Punishment**

6 {28} Defendant maintains that it was cruel and unusual punishment to sentence him  
7 to twenty years imprisonment where there exists no direct evidence of his  
8 participation in the firefight. To the extent that Defendant’s argument can be  
9 construed as a challenge to the sufficiency of the evidence supporting his convictions  
10 based on the lack of direct evidence that Defendant himself shot a firearm, we have  
11 previously addressed this issue and held that the State presented evidence sufficient  
12 to support Defendant’s convictions. We also note that Defendant did not preserve his  
13 cruel and unusual punishment claim at sentencing. *See State v. Chavarria*, 2009-  
14 NMSC-020, ¶ 14, 146 N.M. 251, 208 P.3d 896 (“[A] sentence authorized by statute,  
15 but claimed to be cruel and unusual punishment under the state and federal  
16 constitutions, does not implicate the jurisdiction of the sentencing court and,  
17 therefore, may not be raised for the first time on appeal.”). Furthermore, Defendant  
18 does not dispute that his sentence is within the range allowed by statute. *See State v.*  
19 *Gardner*, 2003-NMCA-107, ¶ 42, 134 N.M. 294, 76 P.3d 47 (“Regardless of what

1 mitigating evidence [the d]efendant presented, the statutory scheme does not require  
2 the trial court to depart from the basic sentence.”). Since Defendant’s sentence in this  
3 case “was authorized by statute, [his] cruel and unusual punishment claim may not  
4 be raised for the first time on appeal.” *Chavarria*, 2009-NMSC-020, ¶ 14. We  
5 conclude there is no fundamental error necessitating reversal of Defendant’s  
6 convictions and sentence, and therefore, we do not reach the merits of Defendant’s  
7 cruel and unusual punishment claim.

8 **CONCLUSION**

9 {29} We affirm all of Defendant’s convictions.

10 {30} **IT IS SO ORDERED.**

11 \_\_\_\_\_  
12 **STEPHEN G. FRENCH, Judge**

13 **WE CONCUR:**

14 \_\_\_\_\_  
15 **LINDA M. VANZI, Chief Judge**

16 \_\_\_\_\_  
17 **TIMOTHY L. GARCIA, Judge**