



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

### 3 **DISCUSSION**

4 {2} Following an evidentiary hearing, the district court found that Defendant  
5 violated a condition of his probation requiring him to not violate state law by engaging  
6 in domestic abuse against his ex-girlfriend. [RP 182]<sup>1</sup> The district court also found  
7 that Defendant violated a condition of probation requiring that he not possess deadly  
8 weapons. [RP 182] “We review a trial court’s probation revocation decision under an  
9 abuse of discretion standard.” *State v. Orquiz*, 2003-NMCA-089, ¶ 4, 134 N.M. 157,  
10 74 P.3d 91.

11 {3} Defendant first argues that the evidence was not sufficient to show a violation.  
12 [MIO 4-5] “In a probation revocation proceeding, the [s]tate bears the burden of  
13 establishing a probation violation with a reasonable certainty.” *State v. Leon*,  
14 2013-NMCA-011, ¶ 36, 292 P.3d 493. “To meet this burden, the [s]tate must  
15 introduce evidence that a reasonable and impartial mind would be inclined to conclude  
16 that the defendant has violated the terms of probation.” *Id.* When reviewing a  
17 challenge to the sufficiency of the evidence to support a probation revocation “we  
18 view the evidence in a light most favorable to the [State], indulging all reasonable

---

19 <sup>1</sup>Citations are to the Record Proper in CR-2013-01248.

1 inferences and resolving all conflicts to uphold the [district] court’s decision.” *In re*  
2 *Bruno R.*, 2003-NMCA-057, ¶ 9, 133 N .M. 566, 66 P.3d 339.

3 {4} The docketing statement and the memorandum in opposition recite that the  
4 victim testified that Defendant came into her home without her permission, held her  
5 against her will, put a knife to her throat, and cut her dog’s collar. [DS 3; MIO 2, 4-5]  
6 Viewing this evidence in the light most favorable to the State, this testimony  
7 adequately supports a finding that Defendant violated state law by committing assault  
8 with intent to commit a violent felony. *See* NMSA 1978, § 30-3-3 (1977) (“Assault  
9 with intent to commit a violent felony consists of any person assaulting another with  
10 intent to kill or commit any murder, mayhem, criminal sexual penetration in the first,  
11 second or third degree, robbery or burglary.”). Additionally, this testimony is  
12 sufficient to support a finding that Defendant was in possession of a deadly weapon,  
13 contrary to the terms of his probation. *See State v. Sanchez*, 2001-NMCA-060, ¶ 13,  
14 130 N.M. 602, 28 P.3d 1143 (stating that a probation violation must be proved to a  
15 reasonable certainty, such that a reasonable and impartial mind would believe that the  
16 defendant violated the terms of probation).

17 {5} Defendant also continues to argue that his due process right to effective  
18 assistance of counsel was denied when his attorney failed to call his girlfriend as an  
19 alibi witness. [MIO 2-8]. “We review claims of ineffective assistance of counsel de

1 novo.” *State v. Garcia*, 2011-NMSC-003, ¶ 33, 149 N.M. 185, 246 P.3d 1057. “To  
2 establish a claim of ineffective assistance of counsel, a defendant must show that his  
3 or her attorney failed to exercise the skill of a reasonably competent attorney and that  
4 the defendant was prejudiced by the failure.” *State v. Reyes*, 2002-NMSC-024, ¶ 46,  
5 132 N.M. 576, 52 P.3d 948, *abrogated on other grounds by Allen v. LeMaster*, 2012-  
6 NMSC-001, 267 P.3d 806.

7 {6} With respect to the first prong of the analysis, the decision whether to call a  
8 witness is a matter of trial tactics, which we do not second guess on appeal. *See State*  
9 *v. Trujillo*, 2012-NMCA-112, ¶ 47, 289 P.3d 238 (stating that “[t]he decision whether  
10 to call a witness is a matter of trial tactics and strategy within the control of trial  
11 counsel” (internal quotation marks and citation omitted)). Additionally, although  
12 Defendant asserts his girlfriend would have provided him with an alibi, nothing in the  
13 record before this Court supports that assertion, or otherwise suggest that she had  
14 relevant or exculpatory evidence to offer. *See State v. Telles*, 1999-NMCA-013, ¶ 25,  
15 126 N.M. 593, 973 P.2d 845 (holding that without a record, we cannot consider claims  
16 of ineffective assistance of counsel on direct appeal). Defendant has therefore failed  
17 to show that he was prejudiced by the failure to call this witness. *State v. Hobbs*,  
18 2016-NMCA-006, ¶ 21, 363 P.3d 1259 (rejecting the defendant’s argument that he  
19 received ineffective assistance of counsel based on the failure to call a witness where

1 there was no evidence in the record that the outcome would have been different if  
2 counsel had called an expert witness); *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10,  
3 121 N.M. 562, 915 P.2d 318. Consequently, Defendant has not made a prima facie  
4 showing of ineffective assistance of counsel, and these issues must be pursued, if at  
5 all, in a collateral proceeding. *See State v. Herrera*, 2001-NMCA-073, ¶ 37, 131 N.M.  
6 22, 33 P.3d 22 (“When the record on appeal does not establish a prima facie case of  
7 ineffective assistance of counsel, this Court has expressed its preference for resolution  
8 of the issue in habeas corpus proceedings over remand for an evidentiary hearing.”).

9 {7} For these reasons, we affirm the district court’s revocation of Defendant’s  
10 probation.

11 {8} **IT IS SO ORDERED.**

12  
13 

---

M. MONICA ZAMORA, Judge

14 **WE CONCUR:**

15  
16 

---

JONATHAN B. SUTIN, Judge

17  
18 

---

HENRY M. BOHNHOFF, Judge