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

2       **STATE OF NEW MEXICO,**

3             Plaintiff-Appellee,

4       v.

**No. A-1-CA-36549**

5       **LOGAN REAVIS,**

6             Defendant-Appellant.

7       **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

8       **Fred Van Soelen, District Judge**

9       Hector H. Balderas, Attorney General

10       Santa Fe, NM

11       for Appellee

12       Bennett J. Baur, Chief Public Defender

13       Santa Fe, NM

14       Steven J. Forsberg, Assistant Appellate Defender

15       Albuquerque, NM

16       for Appellant

17                                       **MEMORANDUM OPINION**

18       **ZAMORA, Judge.**

1 {1} Defendant Logan Reavis appeals from his conviction for second degree  
2 criminal sexual penetration (CSP II). We previously issued a notice of proposed  
3 summary disposition in which we proposed to uphold the conviction. Defendant has  
4 filed a joint memorandum in opposition and motion to amend the docketing statement.  
5 After due consideration, we deny the motion and affirm.

6 {2} We will begin our discussion with the issue originally raised in the docketing  
7 statement, challenging the sufficiency of the evidence. [DS 3; MIO 1-2] As we  
8 previously described in the notice of proposed summary disposition, [CN 3-4] the  
9 State presented testimony in support of all of the essential elements of the offense.  
10 Defendant does not dispute our recitation. [MIO 1] Nevertheless, he suggests that the  
11 State failed to adequately establish the element of mental anguish. [MIO 1] We  
12 disagree. The victim's testimony that she suffered severe mental anguish as a result  
13 of the assault, such that she was suicidal, [CN 4; RP 189] is sufficient. *See State v.*  
14 *Barraza*, 1990-NMCA-026, ¶¶ 8-9, 11, 110 N.M. 45, 791 P.2d 799 (observing that the  
15 mental anguish necessary to establish CSP II is simply distress of the mind, and  
16 holding that testimony describing the victim's mood swings, emotional turmoil, and  
17 efforts to avoid bad memories and embarrassment supplied sufficient evidence to  
18 support a verdict). We therefore reject Defendant's first assertion of error.

1 {3} We turn next to the motion to amend, by which Defendant seeks to expand  
2 upon the non-specific claim of ineffective assistance of counsel that was originally  
3 raised in the docketing statement. [MIO 2-4] Such a motion will only be granted if the  
4 issue is viable. *See State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d  
5 91, *overruled on other grounds by State v. Salgado*, 1991-NMCA-044, 112 N.M. 537,  
6 817 P.2d 730. For the reasons that follow, we conclude that this requirement is not  
7 met.

8 {4} “To establish a claim of ineffective assistance, a defendant must show error on  
9 the part of counsel and prejudice resulting from that error.” *State v. Schoonmaker*,  
10 2008-NMSC-010, ¶ 32, 143 N.M. 373, 176 P.3d 1105, *overruled on other grounds by*  
11 *State v. Consaul*, 2014-NMSC-030, 332 P.3d 850. “[E]rror is found if the attorney’s  
12 conduct fell below that of a reasonably competent attorney.” *Moore*, 1989 -NMCA-  
13 073, ¶ 32 (internal quotation marks and citation omitted). “Prejudice is shown when  
14 there is a reasonable probability that, but for counsel’s unprofessional errors, the result  
15 of the proceeding would have been different.” *Id.* (internal quotation marks and  
16 citation omitted).

17 {5} Defendant contends that he received ineffective assistance of counsel as a result  
18 of his attorney’s failure to discuss with him the question of “agreeing to the

1 submission of the lesser included offense of CSP II.” [MIO 2] He relies upon the case  
2 of *State v. Boeglin*, 1987-NMSC-002, ¶ 8, 105 N.M. 247, 731 P.2d 943 (indicating  
3 that “the defendant, not defense counsel, ultimately must decide whether to seek  
4 submission of lesser included offenses to the jury”), to support his position.

5 {6} We reject the argument, principally because the record before us is insufficient  
6 to establish what transpired below. This is a fatal deficiency. *See State v. Jensen*,  
7 2005-NMCA-113, ¶¶ 12-16, 138 N.M. 254, 118 P.3d 762 (rejecting a claim of  
8 ineffective assistance of counsel based on a failure to submit a lesser-included offense  
9 instruction, where the record contained “no indication that [the d]efendant’s counsel  
10 acted in derogation of his client’s wishes,” and where the defendant offered “no  
11 persuasive argument that eliminates any conceivable and viable strategy or tactic”);  
12 *see also State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 (“When  
13 an ineffective assistance claim is first raised on direct appeal, we evaluate the facts  
14 that are part of the record. If facts necessary to a full determination are not part of the  
15 record, an ineffective assistance claim is more properly brought through a habeas  
16 corpus petition[.]”).

17 {7} Moreover, even if we were to assume that counsel failed to consult with  
18 Defendant on this matter, this is insufficient to establish prejudice. *See State v. Favela*,

1 2015-NMSC-005, ¶ 12, 343 P.3d 178 (indicating that even where categorically  
2 unreasonable conduct is established, it remains incumbent upon the defendant to prove  
3 that he was prejudiced by counsel’s deficient performance); *State v. Duran*,  
4 1988-NMSC-082, ¶ 12, 107 N.M. 603, 762 P.2d 890 (“[T]o establish a due process  
5 violation, and thus reversible error, the defendant must demonstrate prejudice.”),  
6 *superseded by rule as stated in State v. Gutierrez*, 1998-NMCA-172, 126 N.M. 366,  
7 969 P.2d 970. Although Defendant takes issue with trial counsel’s agreement to the  
8 submission of that instruction, [MIO 2] it is not at all clear that counsel had any  
9 principled basis for objecting to the State’s request. *See State v. Darkis*,  
10 2000-NMCA-085, ¶¶ 14-20, 129 N.M. 547, 10 P.3d 871 (recognizing that *State v.*  
11 *Meadors*, 1995-NMSC-073, ¶ 11, 121 N.M. 38, 908 P.2d 731, provides the test for  
12 determining when a court should grant the state’s request for an instruction on a  
13 lesser-included offense). The memorandum in opposition suggests none. We  
14 therefore conclude that the record on appeal does not provide a basis for remanding  
15 the issue of ineffective assistance to the trial court. *Cf. State v. Lopez*,  
16 1996-NMSC-036, ¶¶ 25-26, 122 N.M. 63, 920 P.2d 1017 (concluding that a defendant  
17 did not establish that he suffered prejudice when his attorney’s failure to object to a  
18 jury instruction did not affect the outcome of the trial).

1 {8} Accordingly, for the reasons stated above and in the notice of proposed  
2 summary disposition, Defendant's conviction is **AFFIRMED**.

3 {9} **IT IS SO ORDERED.**

4 \_\_\_\_\_  
5 **M. MONICA ZAMORA, Judge**

6 **WE CONCUR:**

7 \_\_\_\_\_  
8 **JULIE J. VARGAS, Judge**

9 \_\_\_\_\_  
10 **DANIEL J. GALLEGOS, Judge**