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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-37089

5 **JAMES PACE,**

6 Defendant-Appellant.

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

8 **Mark Sanchez, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 C. David Henderson, Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **VANZI, Chief Judge.**

1 {1} Defendant James Pace appeals his conviction for DWI (3rd Offense). We issued
2 a calendar notice proposing to affirm. Defendant has responded with a memorandum
3 in opposition. Not persuaded, we affirm.

4 {2} Defendant's sole issue on appeal is whether trial counsel was ineffective. We
5 will not decide an ineffective assistance of counsel claim on direct appeal unless a
6 defendant makes a prima facie showing that counsel was incompetent and the
7 incompetence resulted in prejudice to the defense. *See State v. Richardson*, 1992-
8 NMCA-112, ¶ 4, 114 N.M. 725, 845 P.2d 819, *abrogated on other grounds by Allen*
9 *v. LeMaster*, 2012-NMSC-001, 267 P.3d 806. A defendant must show that counsel's
10 actions were not simply matters of strategy, were made part of the record, and have
11 prejudiced Defendant. *See State v. Baca*, 1997-NMSC-59, ¶ 25, 124 N.M. 333, 950
12 P.2d 776 (stating that "a prima facie case is not made when a plausible, rational
13 strategy or tactic can explain the conduct of defense counsel" (internal quotation
14 marks and citation omitted)).

15 {3} Here, Defendant claims that defense counsel was ineffective because he failed
16 to move to exclude a dash cam video, which captured his behavior after he was placed
17 in the backseat of the patrol car. [MIO 3] When a defendant's ineffective assistance
18 of counsel claim is based upon trial counsel's failure to file a motion, the record must
19 show "that a reasonably competent attorney could not have decided that such a motion

1 was unwarranted.” *State v. Mosley*, 2014-NMCA-094, ¶ 20, 335 P.3d 244. Our
2 calendar notice observed that Defendant did not specify the legal basis for objecting
3 to the introduction of the video. In his memorandum in opposition, Defendant claims
4 that the video—which showed him highly agitated and cursing—constituted prior bad
5 act evidence, and that it was inadmissible under Rule 11-404(B) NMRA. [MIO 8-9]
6 However, this Court has held that “[t]he inclusion of the word ‘other’ [in Rule
7 11-404(B)] connotes crimes, wrongs, or acts that are not the subject of the [current]
8 proceedings[.]” *State v. Ruiz*, 2007-NMCA-014, ¶¶ 27-28, 141 N.M. 53, 150 P.3d
9 1003. In this case, Defendant’s conduct at the scene was part of the charged conduct,
10 since it was probative on this issue of whether Defendant was under the influence of
11 alcohol. [See Jury Instruction No. 3, RP 28] Although the jury could determine that
12 the anger was unrelated to being under the influence, as Defendant advocates [MIO
13 3], this does not affect the admissibility of the evidence, since a jury could well
14 conclude that it showed the opposite. In other words, it was probative of mental state
15 and we conclude that the motion would have been denied.

16 {4} For the reasons set forth above, we affirm.

17 {5} **IT IS SO ORDERED.**

18

19

LINDA M. VANZI, Chief Judge

20 **WE CONCUR:**

1

2 **DANIEL J. GALLEGOS, Judge**

3

4 **JENNIFER L. ATTREP, Judge**