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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 31,093

10 **WALKER T. SCHOONOVER,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

13 **Denise Barela Shepherd, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

17 Jacqueline L. Cooper, Acting Chief Public Defender

18 Tania Shahani, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **VANZI, Judge.**

1 Defendant appeals his convictions for homicide by vehicle and great bodily
2 injury by vehicle. We proposed to affirm in a calendar notice, and we have received
3 a memorandum in opposition to our notice as well as a motion to amend the docketing
4 statement. We have duly considered Defendant's arguments, but we are unpersuaded
5 by them. We deny the motion to amend the docketing statement, and we affirm
6 Defendant's convictions.

7 In our calendar notice, we pointed out that trial counsel failed to provide us all
8 of the facts as required by Rule 12-208 NMRA. In the memo in opposition, appellate
9 counsel repeatedly states that trial counsel cannot recall certain facts relevant to the
10 issues on appeal. [MIO 3-4] For example, on the issue of the qualification of the
11 police officer, trial counsel cannot recall what testimony the officer gave as to his
12 qualifications, cannot recall what the State argued about prejudice, and cannot recall
13 the discussion in the district court. [MIO 6] With regard to the rebuttal witness, trial
14 counsel cannot recall the testimony of the witness. Based on trial counsel's faulty
15 memory, appellate counsel argues that the case must be assigned to a different
16 calendar, and appellate counsel should be given access to the trial record. [MIO 7]

17 Rule 12-208(A) NMRA states that trial counsel shall be responsible for
18 preparing and filing the docketing statement unless relieved of that responsibility by
19 the appellate court. Rule 12-208 explains in detail all of the information that must be

1 included in the docketing statement, including “a concise, accurate statement of the
2 case summarizing all facts material to a consideration of the issues presented.” Rule
3 12-208(D)(3). As explained in *Loverin v. Debusk*, 114 N.M. 1, 1, 833 P.2d 1182,
4 1182 (Ct. App. 1992), Rule 12-208 was adopted by our Supreme Court, and this Court
5 is required to follow the rule. The Court in *Loverin* went on to explain that we use the
6 docketing statement in our calendaring system, and therefore, it is important that the
7 docketing statement is in compliance with the rule. *Id.* The responsibility for
8 preparing a docketing statement in compliance with the rule falls on trial counsel
9 because trial counsel was present during the proceedings and knows first-hand what
10 evidence or testimony was presented, what objections were made, how issues were
11 preserved, what arguments were made to the district court, and the details of the
12 rulings made by the district court. All of this information is important to this Court
13 when considering the issues raised by an appellant.

14 Appellate counsel suggests that, because trial counsel did not comply with the
15 appellate rules with regard to the docketing statement and because trial counsel claims
16 a loss of memory with regard to important details, we should assign this case to
17 another calendar to allow appellate counsel to address the deficiencies in the
18 docketing statement. To do so would be contrary to our commitment to the principle
19 that issues raised by the appellate attorney after picking through the transcript are

1 disfavored. *See Id.* at 1-2, 833 P.2d at 1182-83. Moreover, if we believe the facts that
2 are contained in the docketing statement or contained in the record are sufficient to
3 enable us to resolve the issues raised on appeal, we will assign the case to the
4 summary calendar as we did in this case. *See Udall v. Townsend*, 1998-NMCA-162,
5 ¶ 3, 126 N.M. 251, 968 P.2d 341. We have determined that we can decide this case
6 on the summary calendar. We now proceed to address the arguments in opposition
7 to our proposal and Defendant's motion to amend the docketing statement.

8 **Motion to Amend Docketing Statement**

9 Defendant moves to amend the docketing statement to include two issues.
10 Defendant claims that it was error for the district court to grant the State's motion in
11 limine to exclude information regarding a civil settlement, and Defendant claims that
12 he was denied effective counsel based on trial counsel's failure to attend the pretrial
13 interview of Deputy Armijo and failure to obtain an expert to support Defendant's
14 theory of the case. We will deny a motion to amend the docketing statement when the
15 argument offered in support of the motion is not viable. *State v. Sommer*, 118 N.M.
16 58, 60, 878 P.2d 1007, 1009 (Ct. App. 1994).

17 Defendant claims that he was prevented from introducing evidence that Tommy
18 Gurule's insurer had paid money pursuant to a civil lawsuit to the estate of the
19 deceased motorist as compensation for Gurule's involvement in the crash. Defendant

1 wished to use the evidence to show that he was not solely responsible for the crash.
2 “We review the admission of evidence under an abuse of discretion standard and will
3 not reverse in the absence of a clear abuse.” *See State v. Sarracino*, 1998-NMSC-022,
4 ¶ 20, 125 N.M. 511, 964 P.2d 72. As argued by the State, the civil lawsuit involved
5 a different burden of proof and different considerations and financial concerns than
6 the criminal case against Defendant. [RP 84] The State argued that admission of
7 evidence concerning the civil lawsuit would be confusing to jurors in the criminal
8 case, the jurors could be influenced to draw incorrect conclusions without
9 understanding the differences between the two types of cases, and admission of the
10 evidence would be unduly prejudicial. [Id.] Defendant has not demonstrated an abuse
11 of discretion by the district court in excluding the evidence.

12 Defendant claims that his counsel failed to call an expert witness to respond to
13 the State’s expert witness and failed to attend the interview of the witness called by
14 the State as an expert. There is a two fold test for proving ineffective assistance of
15 counsel; the defendant must show (1) that counsel’s performance fell below that of a
16 reasonably competent attorney, and (2) that defendant was prejudiced by the deficient
17 performance. *State v. Hester*, 1999-NMSC-020, ¶ 9, 127 N.M. 218, 979 P.2d 729.
18 The burden of proof is on defendant to prove both prongs. *Id.*

1 Defendant suggests that trial counsel did not call an expert “due to the late
2 disclosure” of the State’s witness as an expert and due to the “district court’s refusal
3 to exclude” the testimony of the State’s expert. [MIO 18] Defendant also suggests
4 that trial counsel’s actions were not for strategic reasons. The suggestions made by
5 Defendant are not part of the record in this case. In addition, although Defendant
6 refers to a portion of the record and claims that it provides support for his theory of
7 the case, we disagree with Defendant’s claim. The document cited to by Defendant
8 is a response to the State’s motion in limine, and it refers to “assertions” made by
9 Defendant that were not contested by the State in its motion in limine. [RP 142] We
10 do not view the statements in Defendant’s response to be support for Defendant’s
11 theory of the case. However, as noted by Defendant, “[w]hen an ineffective assistance
12 claim is first raised on direct appeal, we evaluate the facts that are part of the record.
13 If facts necessary to a full determination are not part of the record, an ineffective
14 assistance claim is more properly brought through a habeas corpus petition.” *State v.*
15 *Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61 (citing *State v. Swavola*,
16 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992)). Although Defendant has
17 not presented a prima facie claim for ineffective assistance of counsel, he may choose
18 to pursue his claim through habeas corpus proceedings.

1 Because Defendant's arguments are not viable, we deny the motion to amend
2 the docketing statement.

3 **Issues on Appeal**

4 Defendant continues to claim that Deputy Armijo was not qualified as an expert
5 witness. As explained in our calendar notice, Defendant does not provide us with
6 information to support his claim that the deputy was not qualified in accident
7 reconstruction. As pointed out by Defendant in the memorandum in opposition,
8 Deputy Armijo stated in an interview conducted in November 2009 that he attended
9 training in crash investigation and accident reconstruction and obtained certificates.
10 [RP 224] Deputy Armijo also discussed his years of experience and the number of
11 accidents that he had investigated. [RP 225] In addition, the interview with Deputy
12 Armijo took place approximately one year before trial, and the deputy relied on
13 information from another officer when offering his opinion. Therefore, Defendant
14 was aware that the State could decide to rely on Deputy Armijo as an expert at trial.
15 We hold that there was no abuse of discretion by the district court when it allowed
16 expert testimony to be given by Deputy Armijo.

17 Defendant claims that the State should not have been allowed to call Elizabeth
18 Mendez as a rebuttal witness. Defendant claims that the testimony should have been
19 presented in the State's case in chief, and the State did not reveal Mendez as a witness

1 before calling her to testify. Defendant claims that the State called Mendez in order
2 to gain a tactical advantage. As previously discussed, we review the admission of
3 rebuttal testimony for abuse of discretion. *State v. Wilson*, 2001-NMCA-032, ¶ 39,
4 130 N.M. 319, 24 P.3d 351, *abrogated on other grounds by State v. Montoya*,
5 2005-NMCA-078, 137 N.M. 713, 114 P.3d 393. As explained in our calendar notice,
6 testimony from Mendez was used to rebut Defendant's claim that another person
7 caused the accident, and her testimony would not have been admissible in the State's
8 case as directly bearing on Defendant's guilt. *See Wilson*, 2001-NMCA-032, ¶¶ 40-
9 41. The district court did not abuse its discretion.

10 Defendant again claims that statements made during the State's rebuttal closing
11 argument shifted the burden to Defendant to prove his innocence. We reviewed this
12 argument under the standard for fundamental error. Defendant claims that the
13 standard should be abuse of discretion because trial counsel informed appellate
14 counsel that the issue was preserved for appeal. [MIO 10] Even when an issue of
15 prosecutorial misconduct is properly preserved, we must determine whether the
16 prosecutor's actions had such a persuasive and prejudicial effect on the jury's verdict
17 that Defendant was deprived of a fair trial. *State v. Duffy*, 1998-NMSC-014, ¶ 46, 126
18 N.M. 132, 967 P.2d 807, *modified on other grounds by State v. Gallegos*, 2007-
19 NMSC-007, 141 N.M. 185, 152 P.3d 828. We applied a similar standard when

1 addressing this issue in our calendar notice. We hold that Defendant has again failed
2 to show that the statement made by the prosecutor had such a persuasive and
3 prejudicial effect on the jury's verdict as to deny him a fair trial. We hold that the
4 district court did not abuse its discretion.

5 For the reasons discussed in this opinion and in our calendar notice, we affirm.

6 **IT IS SO ORDERED.**

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8

LINDA M. VANZI, Judge

9 **WE CONCUR:**

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JAMES J. WECHSLER, Judge

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J. MILES HANISEE, Judge