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

2 **Dispositional Order of Affirmance Number:** _____

3 **Filing Date: August 4, 2014**

4 **NO. 33,975**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **HORACE CARLOS SOLOMON, JR.,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY**

11 Fernando R. Macias, District Judge

12 L. Helen Bennett, P.C.

13 Linda Helen Bennett

14 Albuquerque, NM

15 for Appellant

16 Gary K. King, Attorney General

17 Nicole Beder, Assistant Attorney General

18 Santa Fe, NM

1 for Appellee

2 **DISPOSITIONAL ORDER OF AFFIRMANCE**

3 **BOSSON, Justice.**

4 {1} This direct appeal having come before the Supreme Court from a Third Judicial
5 District Court's order and sentencing, and every member of the Court having
6 considered the briefs, and being otherwise fully informed on the issues and applicable
7 law; and

8 {2} The members of the Court having concurred that there is no reasonable
9 likelihood that a decision or opinion would affect the disposition of this appeal or
10 advance the law of the State; and

11 {3} The members of the Court having agreed to invoke the Court's discretion under
12 Rule 12-405(B)(1) NMRA to dispose of a case by order, decision, or memorandum
13 opinion rather than formal opinion;

14 **IT IS THEREFORE ADJUDGED THAT:**

15 {4} Defendant Horace Carlos Solomon appeals to this Court following his
16 conviction by a jury for first degree murder, kidnapping, child abuse (two counts),
17 false imprisonment (two counts), aggravated burglary, and interference with
18 communications. The district court sentenced Defendant to a total term of life
19 imprisonment for the first degree murder conviction plus forty years and one hundred

1 eighty one days for the remaining convictions.

2 {5} On appeal, Defendant argues that the district court erred (1) in not ordering
3 Defendant to submit to a mental health evaluation to determine whether he was
4 competent to stand trial; (2) in denying Defendant's request for jury instructions on
5 diminished capacity and self defense; (3) in denying Defendant's motion for a directed
6 verdict; (4) in dismissing the felony murder conviction; and (5) in denying the State's
7 request for a continuance. Defendant also advances an ineffective assistance of
8 counsel argument on appeal based on defense counsel's failure to file a motion
9 requesting a mental evaluation. We first address Defendant's argument that the district
10 court erred when it did not order an evaluation to determine Defendant's competency
11 to stand trial, and then proceed to the other issues.

12 **District Court Did Not Abuse Its Discretion by Not Ordering a Mental Health**
13 **Evaluation**

14 {6} NMSA 1978, Section 31-9-1 (1993) provides that "[w]henver it appears that
15 there is a question as to the defendant's competency to proceed in a criminal case, any
16 further proceeding in the cause shall be suspended until the issue is determined."
17 NMSA 1978, Section 31-9-2 (1967) provides that "[u]pon motion of any defendant,
18 the court shall order a mental examination of the defendant before making any
19 determination of competency"

1 {7} Our rules of criminal procedure provide that “[t]he issue of the defendant’s
2 competency to stand trial shall be determined by the judge, unless the judge finds
3 there is *evidence which raises a reasonable doubt* as to the defendant’s competency
4 to stand trial.” Rule 5-602(B)(2) NMRA (emphasis added). However, Rule 5-602(C)
5 provides that “[u]pon motion and upon good cause shown, the court shall order a
6 mental examination of the defendant before making any determination of competency
7 under this rule.” Even so, the district court “may decide that there is no reasonable
8 doubt as to the defendant’s competency to stand trial Such a determination is
9 only subject to review for abuse of discretion.” *State v. Noble*, 1977-NMSC-031, ¶ 7,
10 90 N.M. 360, 563 P.2d 1153.

11 {8} As our Court of Appeals has observed, the district court does not have an
12 “affirmative duty . . . to order a mental examination [when] determining the issue of
13 competency.” *State v. Hovey*, 1969-NMCA-049, ¶ 14, 80 N.M. 373, 456 P.2d 206.
14 Section 31-9-1 requires the district court to determine the issue of competency when
15 the defendant’s competency is *questioned*. But, defense counsel’s mere assertion that
16 a defendant may be incompetent does not raise a question, “even though the assertion
17 is [made] in good faith.” *See Hovey*, 1969-NMCA-049, ¶ 18 (analyzing statutes that

1 provided for a determination of a defendant’s competency).¹

2 {9} In *Hovey*, defense counsel “‘wondered’ about [the defendant’s] competency to
3 stand trial and wanted further investigation . . . based on [the defendant’s] appearance
4 on the stand and his testimony.” *Hovey*, 1969-NMCA-049, ¶ 19. Reviewing the
5 record, the Court of Appeals determined that “the ‘wondering’ about [the defendant’s]
6 mental capacity [was] based solely on counsel’s impression.” *Id.* ¶ 21. Further,
7 defense counsel “never asserted he believed his client *was* incompetent to stand trial.
8 He only *wondered* about it.” *Id.* ¶ 22 (emphasis added). Also, defense counsel made
9 “no claim . . . that [the defendant] did not understand the nature of the charge against
10 him or could not assist counsel in the preparation and defense of the case.” *Id.*

11 {10} More recently, in *State v. Flores*, 2005-NMCA-135, ¶ 29, 138 N.M. 636, 124
12 P.3d 1175, our Court of Appeals correctly observed that a district court may consider
13 defense counsel’s observations and opinions, “but that those observations and
14 opinions alone cannot trigger reasonable doubt about the defendant’s competency.”
15 The Court of Appeals noted that expert testimony was not required, but “an affidavit
16 from someone who has observed the defendant and formulated an opinion about his

17 ¹While *Hovey* analyzed NMSA 1953, Sections 41-13-3.1 and -3.2 (Repl. Vol.
18 6, Supp. 1967), the predecessors to Sections 31-9-1 and -2, the analysis is applicable
19 to this case as the language and substance of the statutes are sufficiently similar.

1 or her competency, such as a corrections officer or defense counsel’s paralegal” might
2 suffice. *Id.* ¶ 31.

3 {11} In this case, defense counsel filed a motion to “extend[] the deadline to file
4 motions, conduct witness interviews, and to continue the jury trial” on September 7,
5 2012. As support, the motion asserted that Defendant “has been a difficult client to
6 deal with and possibly suffers from mental illness.” On September 18, 2012 at the
7 hearing on the motion, defense counsel asserted that Defendant “seems to exhibit
8 some characteristics that give rise to the question of his competency,” in particular,
9 defense counsel indicated that this concern was based on Defendant’s refusal to be
10 interviewed by a psychiatrist or communicate with defense counsel’s legal team.
11 Defense counsel did not produce any evidence other than his observations or opinions
12 that there might be a question regarding Defendant’s competency. In short, no
13 evidence was offered that Defendant was not competent to stand trial.

14 {12} Further, defense counsel did not submit a motion for a competency evaluation
15 even though the district court mentioned, and defense counsel acknowledged, this
16 option at the September 18, 2012 hearing. *See* Rule 5-602(C) (providing for a mental
17 examination upon a motion and showing of good cause) Instead, on October 3, 2012
18 defense counsel submitted a motion to withdraw citing, among other grounds: (1) the

1 attorney/client relationship had dissolved; (2) Defendant failed to stay in touch with
2 defense counsel and had refused communication from defense counsel; and (3) against
3 defense counsel's advice, Defendant refused to participate in a forensic psychological
4 evaluation.

5 {13} At the hearing on the motion to withdraw, Defendant stated that his "mind is
6 as sound as anyone in this courtroom today" and that his "mental acuity is as sharp as
7 anyone here today." The district court denied the motion to withdraw and noted that
8 Defendant had the right to refuse the mental evaluation. The district court added
9 further that it never "had . . . any question in terms of [Defendant's] competency or
10 [his] understanding of these processes." Again, defense counsel did not offer anything
11 more than his observations or opinions regarding Defendant's competency.

12 {14} Because defense counsel only suggested that Defendant may have a mental
13 health issue and provided no supporting evidence, we hold that the district court did
14 not abuse its discretion when it found no reasonable doubt that Defendant was
15 competent to stand trial.

16 {15} Defendant's ineffective assistance of counsel claim rests on the fact that defense
17 counsel did not file a motion requesting a mental evaluation to determine whether
18 Defendant was competent to stand trial. As discussed above, defense counsel knew

1 that filing such a motion was an option, albeit one that he did not exercise. There are
2 numerous reasons that defense counsel may not have filed a motion questioning
3 Defendant's competence to stand trial, including counsel's determination that the
4 motion would be groundless or unsuccessful. *See State v. Stenz*, 1990–NMCA–005,
5 ¶ 7, 109 N.M. 536, 787 P.2d 455 (“A trial counsel is not incompetent for failing to
6 make a motion when the record does not support the motion.”). In this case, the “facts
7 necessary to a full determination are not part of the record, an ineffective assistance
8 claim is more properly brought through a habeas corpus petition.” *State v. Roybal*,
9 2002–NMSC–027, ¶ 19, 132 N.M. 657, 54 P.3d 61. Defendant is free to raise the issue
10 of ineffective assistance of counsel in a subsequent habeas corpus petition.

11 **District Court's Denial of the Request for Jury Instructions on Diminished**
12 **Capacity and Self Defense Was Not Error**

13 {16} Defendant argues that the district court erred by denying his request for jury
14 instructions on diminished capacity and self defense. Defendant introduced no
15 evidence and did not testify. In short, Defendant presented no defense. Defendant did
16 not introduce any evidence to support a finding that he had a diminished capacity
17 based on intoxication at the time the murder occurred, nor did he introduce any
18 evidence to support a finding that he acted in self-defense. Based on this record, it was
19 not error for the district court to deny Defendant's request for jury instructions on

1 diminished capacity and self-defense. Defendant's argument is without merit.

2 **District Court Properly Vacated Defendant's Felony Murder Conviction**

3 {17} The grand jury indicted Defendant for first degree murder, willful and
4 deliberate, or *in the alternative*, felony murder. Defendant argues that the district court
5 erred when it allowed the State to dismiss the first degree felony murder conviction,
6 instead of vacating the underlying predicate felony convictions of kidnapping and
7 aggravated battery. Because the jury convicted Defendant of both willful and
8 deliberate first degree murder and felony murder the district court appropriately
9 *vacated* Defendant's felony murder conviction. Once felony murder is vacated,
10 Defendant has no basis to challenge the underlying predicate felonies.

11 **District Court's Denial of the State's Motion for Continuance Was Not an Abuse**
12 **of Discretion**

13 {18} Defendant argues that the district court abused its discretion in denying the
14 State's request for a continuance, "especially where [Defendant's] mental health and
15 competency were in significant controversy." It appears that Defendant is referring to
16 the State's motion for continuance on October 18, 2012, which mentions Defendant's
17 earlier motion for a continuance in which defense counsel asserted that he "believed
18 [Defendant] *may* have a mental illness" (emphasis added). However, contrary to the
19 suggestion in Defendant's brief in chief, it does not appear that the State shared

1 defense counsel's concern. Based on the record, the district court did not abuse its
2 discretion when it denied the State's motion for continuance.

3 {19} **WE AFFIRM.**

4 {20} **IT IS SO ORDERED.**

5

6

RICHARD C. BOSSON, Justice

7 **WE CONCUR:**

8

9 **BARBARA J. VIGIL, Chief Justice**

10

11 **PETRA JIMENEZ MAES, Justice**

12

13 **EDWARD L. CHÁVEZ, Justice**

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15 **CHARLES W. DANIELS, Justice**