

STATE V. MONTOYA

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FELIX MONTOYA,
Defendant-Appellant.**

NO. A-1-CA-37225

COURT OF APPEALS OF NEW MEXICO

December 12, 2018

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Douglas R.
Driggers, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Gregory B. Dawkins, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: EMIL J. KIEHNE, Judge, DANIEL J. GALLEGOS, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant Felix Montoya appeals his conviction of aggravated stalking following a jury trial. This Court issued a notice of proposed summary disposition, proposing to

affirm. Defendant has filed a memorandum in opposition to that disposition, which we have duly considered. As we are unpersuaded by Defendant's arguments, we affirm.

{2} Defendant's memorandum in opposition continues to assert that he was denied effective assistance of counsel at trial by his attorney's failure to introduce evidence of communications between Defendant and the victim in this case. [MIO 1] Specifically, Defendant asserts that such evidence would have shown that the victim "was equally culpable by initiating contact." [Id.]

{3} As pointed out in our notice of proposed summary disposition, this issue was not developed below, meaning that it is not preserved for appeal and also that facts surrounding counsel's trial strategy do not appear in the record. [CN 2-3] There are, for instance, no facts currently before this Court establishing that trial counsel was aware of the communications at issue prior to or during the trial. Similarly, because the alleged communications were not offered at trial, we have no indication whether trial counsel expect them to be admissible, or what evidence the State could have offered in rebuttal. As our proposed disposition pointed out, "facts bearing directly upon trial counsel's strategic decisions or communications between counsel and client will not generally appear in the record." [CN 3]

{4} Fortunately, evidence related to such questions can generally be considered by way of proceedings pursuant to Rule 5-802 NMRA and that is "the preferred avenue for adjudicating ineffective assistance of counsel claims." *Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466. Indeed, "habeas corpus is specifically designed to address such postconviction constitutional claims and is the procedure of choice in this situation." *Id.* If Defendant believes he can demonstrate ineffectiveness if given the opportunity to present evidence at a hearing, he remains free to do so pursuant to that rule.

{5} Thus, for the foregoing reasons as well as those stated in our notice of proposed summary disposition, we affirm Defendant's conviction without prejudice to Defendant's opportunity to pursue a claim of ineffective assistance of counsel in post-conviction proceedings.

{6} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:

EMIL J. KIEHNE, Judge

DANIEL J. GALLEGOS, Judge