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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. 29,692

10 **SOLOMON PEÑA,**

11 Defendant-Appellant.

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

13 **Robert Schwartz, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

17 Hugh W. Dangler, Chief Public Defender

18 Kathleen T. Baldrige, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **WECHSLER, Judge.**

1 Defendant appeals from his convictions for receiving stolen property and
2 conspiracy to receive stolen property. In our notice of proposed summary disposition,
3 this Court proposed to affirm. Defendant has filed a memorandum in opposition in
4 which he seeks to amend his docketing statement to add an additional issue on appeal.
5 We have considered Defendant's arguments, and as we are not persuaded by them, we
6 deny his motion to amend the docketing statement and we affirm.

7 In our notice of proposed summary disposition, we proposed to conclude that,
8 viewing the evidence in the light most favorable to the verdict, there was sufficient
9 direct and circumstantial evidence to support Defendant's convictions. In Defendant's
10 memorandum in opposition, he continues to assert, pursuant to *State v. Franklin*, 78
11 N.M. 127, 428 P.2d 982 (1967), and *State v. Boyer*, 103 N.M. 655, 712 P.2d 1 (Ct.
12 App. 1985), that the evidence was insufficient. [MIO 1, 3-6] However, as Defendant
13 does not provide this Court with any new facts or legal argument that would persuade
14 this Court that its proposed disposition was erroneous, we hold that the evidence was
15 sufficient.

16 Defendant also seeks to amend his docketing statement to add a claim that he
17 was provided with ineffective assistance of counsel at trial. [MIO 1-2, 6-9] This
18 Court will only grant a motion to amend if the issue to be added is viable. *See State*
19 *v. Ibarra*, 116 N.M. 486, 490, 864 P.2d 302, 306 (Ct. App. 1993).

1 A defendant makes a prima facie case of ineffective assistance “by showing that
2 defense counsel’s performance fell below the standard of a reasonably competent
3 attorney and, due to the deficient performance, the defense was prejudiced.”
4 *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032 (internal
5 quotation marks and citation omitted). Defendant argues that his defense counsel’s
6 performance fell below the standard of competence because his attorney told
7 Defendant that he should not testify or call other witnesses to the effect that, although
8 Defendant was innocent, he had confessed to the police in an effort to save his brother.
9 [MIO 7-8] On the record we have before us, we are unable to conclude that defense
10 counsel acted unreasonably in encouraging Defendant not to testify. A reasonable
11 defense attorney might have made a tactical determination that a jury might find that
12 this story lacked credibility and that Defendant’s decision to testify might harm
13 Defendant more than it would help him. *See State v. Roybal*, 2002-NMSC-027, ¶ 21,
14 132 N.M. 657, 54 P.3d 61 (“[I]f on appeal we can conceive of a reasonable trial tactic
15 which would explain the counsel’s performance, we will not find ineffective
16 assistance.”). Therefore, as we conclude that this issue is not viable on direct appeal,
17 we deny Defendant’s motion to amend the docketing statement. Defendant is always
18 free to raise a claim of ineffective assistance of counsel in a post-conviction
19 proceeding.

