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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. 35,059

5 **JOSEPH WATERS,**

6 Defendant-Appellant.

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

8 **James Lawrence Sanchez, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Acting Chief Public Defender

13 J.K. Theodosia Johnson, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **SUTIN, Judge.**

1 {1} Defendant Joseph Waters appeals from his convictions after a jury trial of
2 kidnapping, contrary to NMSA 1978, Section 30-4-1(A) (2003); criminal sexual
3 penetration (CSP) in the first degree, contrary to NMSA 1978, Section 30-9-11(D)
4 (2009); aggravated battery, contrary to NMSA 1978, Section 30-3-5 (1969); and
5 interference with communications, contrary to NMSA 1978, Section 30-12-1 (1979).
6 [DS 2; *see also* RP 121-23] In this Court's notice of proposed disposition, we
7 proposed to summarily affirm. [CN 1, 9] Defendant filed a timely memorandum in
8 opposition to our proposed summary affirmance, including a motion to amend his
9 docketing statement to add additional issues for our consideration. We have duly
10 considered Defendant's memorandum in opposition and motion to amend, and we
11 remain unpersuaded. We therefore affirm Defendant's convictions.

12 {2} Defendant continues to argue that there was insufficient evidence to sustain his
13 convictions [MIO 12-15] and also moves to add four additional issues for this Court's
14 consideration: (Issue I) Defendant's convictions for aggravated battery and first
15 degree CSP based upon great bodily harm violate double jeopardy [MIO 1, 7]; (Issue
16 III) the State violated Defendant's due process rights by failing to take pictures of
17 Defendant the day after the incidents [MIO 1, 15]; (Issue IV) the seventeen-and-a-
18 half-month delay in this case violates Defendant's right to a speedy trial [MIO 1, 17];

1 and (Issue V) Defendant should have been mirandized and his statement should have
2 been suppressed [MIO 1, 21]. We address each issue in turn.

3 **Prior Issue**

4 **Issue II: Sufficiency of the Evidence**

5 {3} In his memorandum in opposition, Defendant continues to argue that there was
6 insufficient evidence to sustain his convictions. [MIO 12-15] With regard to his
7 sufficiency argument, Defendant raises no new arguments or facts that are not
8 otherwise addressed by this Court's notice of proposed disposition, so we refer
9 Defendant to our responses therein. [CN 2-8] *See Hennessy v. Duryea*,
10 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly
11 held that, in summary calendar cases, the burden is on the party opposing the proposed
12 disposition to clearly point out errors in fact or law."). We therefore conclude that
13 there was sufficient evidence to uphold Defendant's convictions.

14 **Motion to Amend the Docketing Statement**

15 {4} As indicated earlier, Defendant filed as part of his memorandum in opposition
16 a timely motion to amend his docketing statement. *See State v. Rael*, 1983-NMCA-
17 081, ¶ 8, 100 N.M. 193, 668 P.2d 309 (stating that a motion to amend is timely when
18 filed prior to the expiration of the time for filing a memorandum in opposition); *see*
19 *also State v. Moore*, 1989-NMCA-073, ¶ 39, 109 N.M. 119, 782 P.2d 91 (same),

1 *superseded by rule on other grounds as stated in State v. Salgado*, 1991-NMCA-044,
2 ¶ 2, 112 N.M. 537, 817 P.2d 730. We grant motions to amend the docketing statement
3 when such motions show good cause for the amendment. *See Rael*, 1983-NMCA-081,
4 ¶ 8. To show good cause, the motion must be timely and show that the issues sought
5 to be added were either properly preserved or allowed to be raised for the first time
6 on appeal. *Moore*, 1989-NMCA-073, ¶ 42. By his timely motion, Defendant seeks to
7 add four issues that are either allowed to be raised for the first time on appeal or are
8 unpreserved but raised as fundamental error. [*See* MIO 1 (¶ 2)] The issues sought to
9 be added must also be viable—i.e., colorable or arguable—and not devoid of any
10 merit. *See id.* As explained more fully later in this Opinion, the issues Defendant seeks
11 to add are not viable, and some of them were not preserved or allowed to be raised for
12 the first time on appeal. Accordingly, we deny Defendant’s motion to amend. *See id.*
13 ¶ 45 (stating that “we should deny motions to amend that raise issues that are not
14 viable”); *cf. State v. Sommer*, 1994-NMCA-070, ¶ 11, 118 N.M. 58, 878 P.2d 1007
15 (denying a motion to amend the docketing statement based upon a determination that
16 the argument sought to be raised was not viable).

17 **Issue I: Double Jeopardy**

18 {5} Defendant first seeks to add a double jeopardy issue, arguing that his
19 convictions for aggravated battery and first degree CSP based upon great bodily harm

1 violate double jeopardy. [MIO 7-12] However, Defendant’s argument rests upon the
2 faulty premise that, although convictions for aggravated battery and CSP do not
3 typically violate double jeopardy, because Victim did not testify that she suffered
4 mental anguish, great bodily harm was necessarily the basis for the CSP conviction.
5 [MIO 6, 7, 11] *See, e.g., State v. Traeger*, 2000-NMCA-015, ¶¶ 14-19, 128 N.M. 668,
6 997 P.2d 142 (concluding that “[the d]efendant’s right to freedom from double
7 jeopardy was not violated by punishment for attempted murder, aggravated battery
8 and CSP”), *rev’d on other grounds by* 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.
9 Defendant cites to no authority for the proposition that, in order to prove the element
10 of mental anguish, the victim must testify that she suffered mental anguish, so we
11 assume no such authority exists. *See State v. Casares*, 2014-NMCA-024, ¶ 18, 318
12 P.3d 200 (“We will not consider an issue if no authority is cited in support of the
13 issue, because absent cited authority to support an argument, we assume no such
14 authority exists”).

15 {6} Moreover, this Court has previously relied on evidence of a victim’s mental
16 condition and testimony from a sexual assault coordinator to determine that sufficient
17 evidence of mental anguish existed. *See State v. Barraza*, 1990-NMCA-026, ¶¶ 9-10,
18 110 N.M. 45, 791 P.2d 799; *cf. State v. Garcia*, 1980-NMCA-061, ¶ 11, 94 N.M. 583,
19 613 P.2d 725 (stating that mental anguish “requires no more than distress of mind”

1 and that, as such, expert testimony is not required to show mental anguish). As set
2 forth in Defendant’s docketing statement and our notice of proposed disposition,
3 testimony was given at trial regarding Victim’s upset, anxious, and distraught
4 demeanor. [DS 7, 9, 11-12; CN 3; *see also* MIO 4 (ambulance driver testified that
5 Victim was upset and crying), 6-7 (SANE nurse testified that Victim was anxious and
6 distraught)] Additionally, Victim testified that she begged Defendant not to kill her
7 and that she felt disgusted. [See DS 5, 7] As there was evidence of mental anguish
8 presented at trial, including Victim’s own testimony regarding her distress of mind,
9 *see Garcia*, 1980-NMCA-061, ¶ 11 (stating that mental anguish “requires no more
10 than distress of mind”), the premise of Defendant’s double jeopardy argument—that
11 the CSP must have been based on great bodily harm because there was no evidence
12 of mental anguish—is untrue, and the issue is, thus, non-viable. *See Moore*, 1989-
13 NMCA-073, ¶ 42 (stating that a viable issue must be colorable or arguable).
14 Accordingly, we deny Defendant’s motion to amend the docketing statement to add
15 the double jeopardy issue. *See id.* ¶ 45.

16 **Issue III: Due Process**

17 {7} Defendant next seeks to add a due process issue, arguing that the State violated
18 his due process rights by failing to take pictures of him the day after the incidents.
19 [MIO 15-17] Specifically, Defendant appears to be arguing that, because Victim

1 claimed that she slapped Defendant's hand away from her breast [MIO 5]; that she
2 fought back and grabbed Defendant by the testicles when he got on top of her, ripped
3 off her clothing, and told her nobody could hear her where they were [MIO 5]; and
4 that Defendant continued to hit her [MIO 5], Defendant's hands and testicles would
5 have shown injury [MIO 6, 15], and the police's failure to document such injuries
6 amounted to a due process violation. [MIO 15-17] By his argument, Defendant
7 attempts to characterize the fact that the *police* did not take pictures of Defendant's
8 hands and testicles as akin to the State's obligation to preserve evidence obtained
9 during the investigation of a crime. [MIO 15-17] However, Defendant fails to cite any
10 authority in support of such a characterization, and we are not inclined to agree with
11 Defendant's characterization or draw such an analogy based on the facts of this case.
12 *See Casares*, 2014-NMCA-024, ¶ 18 ("We will not consider an issue if no authority
13 is cited in support of the issue, because absent cited authority to support an argument,
14 we assume no such authority exists.").

15 {8} Moreover, Defendant did not preserve this argument, and "[g]enerally, due
16 process claims will not be addressed when raised for the first time on appeal."
17 *Atherton v. Gopin*, 2015-NMCA-087, ¶ 31, 355 P.3d 804 (alteration, internal
18 quotation marks, and citation omitted). Although there are circumstances in which we
19 may consider an unpreserved issue, *see, e.g., id.*, Defendant has made no argument

1 that he is entitled to review of his due process issue, notwithstanding the lack of
2 preservation, so we decline to consider it. *See Corona v. Corona*, 2014-NMCA-071,
3 ¶ 28, 329 P.3d 701 (“This Court has no duty to review an argument that is not
4 adequately developed.”); *see also Elane Photography, LLC v. Willock*, 2013-NMSC-
5 040, ¶ 70, 309 P.3d 53 (“[The appellate courts] will not review unclear arguments[]
6 or guess at what a party’s arguments might be.” (alteration, internal quotation marks,
7 and citation omitted)). Accordingly, we conclude that Defendant’s due process issue
8 is non-viable, and we deny Defendant’s motion to amend the docketing statement to
9 add it. *See Moore*, 1989-NMCA-073, ¶¶ 42, 45.

10 **Issue IV: Speedy Trial**

11 {9} Defendant seeks to add a speedy trial issue, arguing that the seventeen-and-a-
12 half-month delay in this case violated his right to a speedy trial. [MIO 17-21]
13 Defendant did not raise a speedy trial argument below [MIO 18], so we review the
14 issue for fundamental error. *See State v. Smith*, 2016-NMSC-007, ¶ 57, 367 P.3d 420.

15 In determining whether a defendant’s speedy trial right was violated, . . .
16 [we weigh] the conduct of both the prosecution and the defendant under
17 the guidance of four factors: (1) the length of the delay; (2) the reasons
18 for the delay; (3) the timeliness and manner in which the defendant
19 asserted his speedy trial right; and (4) the particular prejudice that the
20 defendant actually suffered. Each of these factors is weighed either in
21 favor of or against the [s]tate or the defendant, and then balanced to
22 determine if a defendant’s right to a speedy trial was violated.

23 *Id.* ¶ 58 (internal quotation marks and citations omitted).

1 {10} Defendant implies that the delay in this “very simple case” or “at most, . . .
2 intermediate” complexity case is presumptively prejudicial. [MIO 18-19] Assuming,
3 without deciding, that this first factor weighs in Defendant’s favor, however slightly,
4 we consider the other three factors that must, on balance, weigh in Defendant’s favor
5 in order to find a speedy trial violation. *See id.* ¶ 59.

6 {11} With regard to the second factor, Defendant contends that “[t]here is no record
7 of why there was a delay in this case” and provides no other argument that the reasons
8 should be attributed to the State or that this factor should weigh in Defendant’s favor.
9 [MIO 19] As Defendant has not asserted any argument that we should weigh this
10 factor against the State, we decline to make such an argument on Defendant’s behalf.
11 *See Elane Photography, LLC*, 2013-NMSC-040, ¶ 70.

12 {12} With regard to the third factor, Defendant states that his trial counsel did not file
13 any demand for speedy trial, not even a pro forma demand, and as indicated earlier,
14 no speedy trial argument was raised at all below. [MIO 19-20; *see also* MIO 18]
15 Although Defendant alleges that he “repeatedly told his attorney he wanted a speedy
16 [trial,]” this fact does not affect our consideration of the timeliness and manner in
17 which Defendant *actually asserted* his speedy trial right.¹ *See Smith*, 2016-

17 ¹ *But see State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M. 107, 163 P.3d 494
18 (stating that “[h]abeas corpus proceedings are the preferred avenue for adjudicating
19 ineffective assistance of counsel claims, because the record before the trial court may

1 NMSC-007, ¶ 58. Thus, as Defendant made no demand for speedy trial at any point
2 below, this factor weighs heavily against Defendant. *See id.*

3 {13} Finally, with regard to the fourth factor, Defendant indicates that he did not
4 suffer any articulable prejudice and instead states that “[w]hen the State delays a trial
5 long past a presumptively reasonable point, prejudice may be presumed even if the
6 defendant is unable to articulate it.” [MIO 20] However, our Supreme Court has
7 “abolished the presumption that a defendant’s right to a speedy trial has been violated
8 based solely on the threshold determination that the length of delay is presumptively
9 prejudicial.” *Id.* ¶ 59 (alteration, internal quotation marks, and citation omitted).
10 Rather, Defendant “must still show particularized prejudice cognizable under his
11 constitutional right to a speedy trial and demonstrate that, on the whole, the *Barker*
12 factors weigh in his favor.” *Id.* As there is no actual prejudice asserted, the prejudice
13 factor weighs heavily against Defendant. *See id.* ¶¶ 59-60.

14 {14} Overall, taking all four factors into consideration, we conclude that there was
15 no speedy trial violation. *See id.* ¶ 58. Accordingly, Defendant’s speedy trial issue is
16 non-viable, and we deny Defendant’s motion to amend the docketing statement to add
17 it. *See Moore*, 1989-NMCA-073, ¶¶ 42, 45.

17 not adequately document the sort of evidence essential to a determination of trial
18 counsel’s effectiveness” (internal quotation marks and citation omitted)).

1 **Issue V: Suppression**

2 {15} Finally, Defendant seeks to add a suppression issue, arguing that he should have
3 been mirandized and his statement should have been suppressed. [MIO 21-23]
4 According to the memorandum in opposition, Defendant initially denied having sexual
5 intercourse or contact with Victim, but the detective testified that Defendant later
6 “confessed that he was worried about a leak under the truck and went under the truck
7 with [Victim] and had sexual intercourse with her.” [MIO 6] Defendant indicates that
8 this statement was made at the police station and that he in fact stated that he had
9 sexual intercourse with Victim’s *mother*, and not Victim, and that the statements were
10 misconstrued. [MIO 6, 22-23] Defendant contends that the detective’s testimony at
11 trial that Defendant confessed to having sex with Victim should have been suppressed.
12 [MIO 23]

13 {16} Defendant did not preserve this argument below or even file a motion to
14 suppress. [MIO 21] When a defendant fails to preserve an argument regarding
15 suppression, we need not consider it. *See State v. Ramos-Arenas*, 2012-NMCA-117,
16 ¶ 22, 290 P.3d 733; *see also State v. Anaya*, 2012-NMCA-094, ¶¶ 35-36, 287 P.3d 956
17 (stating that “[b]ecause the . . . issue was not preserved below, we decline to address
18 this matter any further”). Accordingly, we conclude that Defendant’s suppression

1 issue is non-viable, and we deny Defendant's motion to amend the docketing
2 statement to add it. *See Moore*, 1989-NMCA-073, ¶¶ 42, 45.

3 **Conclusion**

4 {17} For the reasons stated in our notice of proposed disposition and in this Opinion,
5 we affirm Defendant's convictions.

6 {18} **IT IS SO ORDERED.**

7
8

JONATHAN B. SUTIN, Judge

9 **WE CONCUR:**

10
11

MICHAEL E. VIGIL, Chief Judge

12
13

LINDA M. VANZI, Judge