

1 **WECHSLER, Judge.**

2 {1} Defendant appeals from the district court’s judgment and partially suspended
3 sentence, entered following a jury trial, convicting him of one count of trafficking
4 controlled substances (by distribution) (cocaine), and one count of conspiracy to
5 commit trafficking controlled substances (by distribution) (cocaine). [CN 1-2] This
6 Court issued a notice proposing summary affirmance. Defendant filed a memorandum
7 in opposition to this Court’s notice of proposed disposition and a motion to amend his
8 docketing statement, each of which we have duly considered. Remaining unpersuaded,
9 we deny the motion to amend, and we affirm.

10 {2} Defendant raised two issues in his docketing statement: (1) whether the district
11 court erred in admitting certain recorded out-of-court statements and (2) whether the
12 evidence was sufficient to support the guilty verdicts. [DS 5] In his memorandum in
13 opposition, Defendant has moved to amend the docketing statement to add a double
14 jeopardy claim. [MIO 12-16]

15 {3} With respect to Defendant’s first issue—that the district court erred in admitting
16 the recorded out-of-court statements of a woman named Destiny—we proposed to
17 conclude in our notice of proposed disposition that the district court did not abuse its
18 discretion in admitting the challenged statements as statements of a co-conspirator.
19 [CN 4-5, *citing* Rule 11-801(D)(2)(e) NMRA (providing that a statement is not

1 hearsay if the statement is offered against a party and is a statement “by the party’s co-
2 conspirator during and in furtherance of the conspiracy”)] Furthermore, we suggested
3 that admission of the challenged statements did not violate Defendant’s right to
4 confrontation. [CN 5-6] Consequently, we proposed to hold that the district court did
5 not err in admitting the statements over Defendant’s objections. [CN 6] Defendant has
6 not opposed summary affirmance of this issue, and, in fact, Defendant explicitly
7 concedes the issue and chose not to further argue it in his memorandum in opposition.
8 [MIO 2] Accordingly, this issue is deemed abandoned. *See State v. Johnson*, 1988-
9 NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306 (stating that when a case is decided on
10 the summary calendar, an issue is deemed abandoned where a party fails to respond
11 to the proposed disposition of the issue); *cf. Hennessy v. Duryea*, 1998-NMCA-036,
12 ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly held that, in summary
13 calendar cases, the burden is on the party opposing the proposed disposition to clearly
14 point out errors in fact or law.”).

15 {4} With respect to the second issue, Defendant continues to argue that the evidence
16 was insufficient to sustain his conviction for trafficking cocaine. [MIO 3, 9-11]
17 Defendant focuses his challenge on the fact that his brother “was the principal actor
18 who attempted to sell cocaine” to undercover detectives, and Defendant contends that
19 his presence during the drug transaction was insufficient proof that he helped,

1 encouraged, or caused his brother to sell cocaine to the undercover officers. [MIO 10-
2 11] In support, Defendant cites to *State v. Phillips*, 1971-NMCA-114, ¶ 6, 83 N.M.
3 5, 487 P.2d 915, which states that “[n]either presence, nor presence with mental
4 approbation is sufficient to sustain a conviction as an aider or abettor. Presence must
5 be accompanied by some outward manifestation of expression or approval.”

6 {5} In our notice of proposed disposition, we observed that it appeared from the
7 docketing statement that evidence was presented that: Defendant communicated to a
8 woman named Destiny that he would sell a pound of cocaine to undercover police
9 detectives; Destiny served as an intermediary between the undercover detectives and
10 Defendant and his brother in arranging the details of the planned sale of narcotics;
11 Defendant communicated to Destiny that his brother wanted the transaction to happen
12 at his house; Defendant accompanied Destiny to the agreed-upon location to meet the
13 undercover detectives; Defendant and other passengers in a brown Cadillac led the
14 undercover detectives to his brother’s house, while Destiny rode with the detectives;
15 Defendant went inside his brother’s house; a woman named Vanessa—one of the
16 other passengers in the Cadillac—came outside and asked the detectives and Destiny
17 if they were coming inside, to which the detectives responded that they were not;
18 Vanessa went back into the house, and then exited the house with both Defendant and
19 his brother; Defendant began looking up and down the street, which in the detectives’

1 training and experience constituted “counter surveillance” for police activity or
2 possible robbery activity; Defendant and his brother approached the driver’s side of
3 the detectives’ vehicle and asked them to come inside the house to do the deal; a
4 detective replied that he was uncomfortable going into the house with all of his cash;
5 Defendant’s brother replied that he did not like to do big deals in vehicles; the
6 detectives persuaded Defendant’s brother to get in the car; Defendant’s brother then
7 pulled out a large baggy, and—wearing latex gloves—began cutting a brick of cocaine
8 while telling the detectives about the quality of the cocaine; and Defendant remained
9 present, but outside the car, while the transaction occurred. [CN 4, 7-8] Based on these
10 facts, which are not specifically contradicted or challenged by the more robust factual
11 recitation in Defendant’s memorandum in opposition, we conclude that a jury could
12 have found beyond a reasonable doubt that Defendant was not merely present during
13 the drug transaction, but that his actions—in particular, his “counter surveillance”
14 during the course of the transaction—indicated “outward manifestation or expression
15 of approval.” *Id.* Therefore, we remain unpersuaded that the evidence was insufficient
16 to support Defendant’s trafficking conviction. Further, because it does not appear
17 from the memorandum in opposition that Defendant is challenging our proposed
18 affirmance with respect to the sufficiency of the evidence to support his conspiracy

1 conviction, we deem that issue abandoned. *See Johnson*, 1988-NMCA-029, ¶ 8; *cf.*
2 *Hennessy*, 1998-NMCA-036, ¶ 24.

3 {6} In his memorandum in opposition, Defendant has moved to amend the
4 docketing statement to add a claim that his convictions for trafficking and for
5 conspiracy to commit trafficking violate double jeopardy. [MIO 3, 12-16] *See* Rule
6 12-208(F) NMRA (permitting the amendment of the docketing statement based upon
7 good cause shown); *State v. Rael*, 1983-NMCA-081, ¶¶ 15-16, 100 N.M. 193, 668
8 P.2d 309 (setting out requirements for a successful motion to amend the docketing
9 statement). The essential requirements to show good cause for our allowance of an
10 amendment to an appellant’s docketing statement are that (1) the motion be timely,
11 (2) the new issue sought to be raised was either (a) properly preserved below or (b)
12 allowed to be raised for the first time on appeal, and (3) the issues raised are viable.
13 *See State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on*
14 *other grounds by State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d
15 730.

16 {7} In support of his motion to amend, Defendant essentially argues that the
17 prohibition against double jeopardy requires reversal of one of his convictions on the
18 basis of “double-description”; that is, he is asserting that he was punished for the same
19 conduct under multiple statutes. [MIO 13]

1 {8} We analyze double-description issues using a two-part analysis in which we
2 consider (1) whether the convictions were premised on unitary conduct, and if so, (2)
3 whether the Legislature intended to punish the crimes separately. *State v. Swick*, 2012-
4 NMSC-018, ¶ 11, 279 P.3d 747. “Conduct is unitary when not sufficiently separated
5 by time or place, and the object and result or quality and nature of the acts cannot be
6 distinguished.” *State v. Silvas*, 2015-NMSC-006, ¶ 10, 343 P.3d 616.

7 {9} In *Silvas*, our Supreme Court reversed the defendant’s conspiracy to commit
8 trafficking conviction on the basis of double jeopardy where it was based on the same
9 illegal act that supported the trafficking conviction. *Id.* ¶¶ 1, 8-29. The Court stated
10 that “[t]he [s]tate’s legal theory for both crimes rested upon [the d]efendant’s unitary
11 conduct of transferring the drugs from his hand to Ortega’s hand and Ortega
12 transferring the money to [the d]efendant.” *Id.* ¶ 19. The Court held that “New Mexico
13 law . . . requires evidence of more than just the substantive crime.” *Id.* ¶ 26. However,
14 the Court also recognized that “[u]nder New Mexico law, courts have upheld separate
15 convictions for conspiracy to commit trafficking and the act of trafficking when the
16 evidence showed more than just the exchange of drugs for money.” *Id.* ¶ 27.

17 {10} Here, Defendant contends that his convictions were based on one illegal act, as
18 in *Silvas*. [MIO 13-14] Specifically, Defendant argues that his actions as an accessory
19 indicate that he was a conspirator and that such factual overlap resulted in his

1 punishment under separate statutes for the same actions. [MIO 13] We are not
2 convinced.

3 {11} We note that the *Silvas* court emphasized the state’s focus on a single moment
4 in time—the point at which the narcotics were passed from the defendant’s hands to
5 Ortega’s hands—as well as the state’s reliance on that moment to establish both the
6 agreement and the substantive act of trafficking. *Id.* ¶¶ 19-21. Whereas, in the present
7 case, the State presented evidence that Defendant communicated with Destiny that he
8 would sell a pound of cocaine to the undercover police detectives and communicated
9 the details of the sale, including the location of the sale, to the detectives through
10 Destiny; Defendant accompanied Destiny to the agreed-upon location to meet the
11 undercover detectives; and Defendant and other passengers in a brown Cadillac led
12 the undercover detectives to his brother’s house, while Destiny rode with the
13 detectives. These actions are sufficiently separated by time and place from the
14 Defendant’s later actions at his brother’s home, and the quality and nature of the
15 acts—planning and setting up the sale, in concert with at least Destiny—are
16 sufficiently distinguishable from the “counter surveillance” he undertook during the
17 actual sale conducted by his brother. Therefore, we are not persuaded that the
18 convictions were premised on unitary conduct. *See id.* ¶ 10. As a result, there is no
19 double jeopardy violation. *See Swick*, 2012-NMSC-018, ¶ 11. Consequently, this issue

1 is not viable and does not satisfy the requirements for the granting of a motion to
2 amend the docketing statement. The motion to amend is denied.

3 {12} Accordingly, for the reasons stated in this opinion, as well as those provided in
4 our notice of proposed disposition, we affirm.

5 {13} **IT IS SO ORDERED.**

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JAMES J. WECHSLER, Judge

8 **WE CONCUR:**

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TIMOTHY L. GARCIA, Judge

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J. MILES HANISEE, Judge