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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. 31,536**

5       **HARRY WILLIAM HESS,**

6             Defendant-Appellant.

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

8       **Daniel Viramontes, District Judge**

9       Gary K. King, Attorney General

10       Sergio J. Viscolo, Assistant Attorney General

11       Santa Fe, NM

12       for Appellee

13       Nancy L. Simmons

14       Albuquerque, NM

15       for Appellant

16                                       **MEMORANDUM OPINION**

17       **VIGIL, Judge.**

18             Defendant appeals from his convictions for two counts of fraud (over \$2500)

19       and one count of conspiracy to commit fraud (over \$2500). In his docketing

1 statement, Defendant raised four issues: (1) ineffective assistance of counsel, (2) the  
2 State's failure to disclose reports, (3) prosecutorial misconduct, and (4) insufficient  
3 evidence. This Court issued a calendar notice proposing to affirm. Defendant has  
4 filed a memorandum in opposition abandoning Issues 2 and 3. We have duly  
5 considered Defendant's arguments in opposition to our proposed disposition of the  
6 remaining issues. Unpersuaded by Defendant's arguments, we affirm. To the extent  
7 Defendant has moved to amend his docketing statement to assert that the district court  
8 erred in permitting other acts evidence to be admitted, for the reasons set forth below  
9 we conclude that this issue is not viable and deny Defendant's motion to amend.

#### 10 **Sufficiency of the Evidence**

11 Defendant contends that there was insufficient evidence to support his  
12 convictions for fraud. In this Court's calendar notice, we noted that Defendant  
13 appeared to be asking this Court to reweigh evidence on appeal, based on Defendant's  
14 argument that other witnesses's testimony contradicted the victim, Deborah Cash's  
15 testimony that a fraudulent transaction had occurred. [CN 10-11 (citing *State v. Mora*,  
16 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789, *abrogated on other grounds by*  
17 *Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683, for the proposition  
18 that "[t]he reviewing court does not weigh the evidence or substitute its judgment for  
19 that of the fact finder as long as there is sufficient evidence to support the verdict")]

1 In his memorandum in opposition, Defendant contends that he is not asking this Court  
2 to reweigh evidence or determine credibility. [MIO 10] Instead, Defendant contends  
3 that Cash’s testimony, even if uncontradicted, is “per se insufficient.” [Id.] We  
4 disagree.

5 “Jury instructions become the law of the case against which the sufficiency of  
6 the evidence is to be measured.” *State v. Smith*, 104 N.M. 729, 730, 726 P.2d 883,  
7 884 (Ct. App. 1986). The jury was instructed that to find Defendant guilty of fraud  
8 it must find: (1) “[D]efendant, by any words or conduct, misrepresented a fact to  
9 Deborah Cash, intending to deceive or cheat Deborah Cash”; (2) “Because of the  
10 misrepresentation and Deborah Cash’s reliance on it, [D]efendant obtained \$20,000”;  
11 (3) “This \$20,000 belonged to someone other than [D]efendant”; and (4) “This  
12 happened in New Mexico on or about the 6th day of September, 2007.” [RP 173] The  
13 jury was similarly instructed with respect to the \$4,000 Cash paid to Defendant for the  
14 five acres of land. [RP 174] In his memorandum in opposition, Defendant submits that  
15 Cash testified that Defendant told her he would sell her a double-wide trailer for  
16 \$20,000 and five acres of land for \$5,000. [MIO 5] Cash testified that Defendant told  
17 her he had purchased the property for \$185,000. [Id.] Cash testified that she gave  
18 Defendant a check for \$20,000 for the double-wide trailer, and a check for \$4,000 for  
19 the land. [Id.] Defendant’s wife and co-defendant testified that they did not own the

1 property at the time they agreed to sell it to Cash. [Id.] We conclude this evidence  
2 satisfies each of the aforementioned elements. *See State v. Salgado*, 1999-NMSC-  
3 008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (providing that substantial evidence is “such  
4 relevant evidence as a reasonable mind might accept as adequate to support a  
5 conclusion”).

6 Defendant specifically contends that there is “no discernable evidence . . . that  
7 Defendant intended to defraud Cash.” [MIO 11] “Intent is subjective and is almost  
8 always inferred from other facts in the case, as it is rarely established by direct  
9 evidence.” *State v. Sosa*, 2000-NMSC-036, ¶ 9, 129 N.M. 767, 14 P.3d 32 (internal  
10 quotation marks and citation omitted). We conclude that a reasonable jury could infer,  
11 based on Cash’s testimony that Defendant told her he owned the property and offered  
12 to sell it to Cash and his co-defendant’s testimony that they did not own the property  
13 at the time of this transaction, that Defendant intended to deceive Cash. *See State v.*  
14 *Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176 (“In reviewing the  
15 sufficiency of the evidence, we must view the evidence in the light most favorable to  
16 the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the  
17 evidence in favor of the verdict.”).

18 To the extent Defendant contends Cash’s testimony that she and Defendant  
19 entered into an oral agreement is insufficient to support Defendant’s conviction for

1 fraud since an oral agreement would not satisfy the statute of frauds, we conclude that  
2 Defendant's argument is misplaced. The statute of frauds governs the existence of an  
3 enforceable contract to sell real estate and has no bearing on a criminal prosecution  
4 for fraud, and Defendant has not directed this Court to any authority indicating  
5 otherwise. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330  
6 (1984) (stating that an appellate court will not consider an issue if no authority is cited  
7 in support of the issue, as absent cited authority to support an argument, we assume  
8 no such authority exists). Further, to the extent Defendant is arguing that Cash's  
9 reliance on his misrepresentation was unreasonable, because she claims he offered to  
10 sell her property worth close to \$200,000 for \$25,000, there is no requirement in the  
11 jury instruction that Cash's reliance be reasonable, Defendant does not challenge the  
12 instructions given to the jury, and Defendant cites no authority to support his  
13 argument that this renders the evidence against him "per se insufficient." We  
14 therefore conclude that Defendant has not demonstrated that there is insufficient  
15 evidence to support his conviction. *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127  
16 N.M. 393, 981 P.2d 1211 (providing that there is a presumption of correctness in the  
17 rulings or decisions of the district court, and the party claiming error bears the burden  
18 of showing such error).

19 **Ineffective Assistance of Counsel**

1           This Court understood Defendant to have argued in his docketing statement that  
2 the district court’s denial of his counsel’s motion for continuance rendered his counsel  
3 ineffective. As a result, we applied the standard set forth in *State v. Brazeal*, 109  
4 N.M. 752, 790 P.2d 1033 (Ct. App. 1990), and proposed to conclude that Defendant  
5 had not satisfied his burden. In proposing to affirm on this basis, we noted that  
6 Defendant had not demonstrated prejudice. [CN 3-5] *State v. Aker*, 2005-NMCA-  
7 063, ¶ 34, 137 N.M. 561, 113 P.3d 384 (“To establish a prima facie case of ineffective  
8 assistance of counsel, Defendant must show that (1) counsel’s performance was  
9 deficient in that it fell below an objective standard of reasonableness; and (2) that  
10 Defendant suffered prejudice in that there is a reasonable probability that, but for  
11 counsel’s unprofessional errors, the result of the proceeding would have been  
12 different.” (internal quotation marks and citation omitted)). Defendant’s counsel has  
13 responded to this deficiency by asking this Court to place the matter on the general  
14 calendar to engage in a “plenary” review of the proceedings. [MIO 17-18] We decline  
15 to do so. Defendant has not directed this Court to any evidence of prejudice in the  
16 record. This is Defendant’s burden on direct appeal. Where “facts necessary to a full  
17 determination are not part of the record, an ineffective assistance claim is more  
18 properly brought through a habeas corpus petition.” *State v. Roybal*, 2002-NMSC-  
19 027, ¶ 19, 132 N.M. 657, 54 P.3d 61.

1 **Motion to Amend the Docketing Statement**

2 Defendant has moved this Court to amend his docketing statement to add an  
3 additional issue: Whether the district court committed reversible error by allowing the  
4 introduction of other bad acts evidence. The essential requirements to show good  
5 cause for our allowance of an amendment to an appellant’s docketing statement are:  
6 (1) that the motion be timely; (2) that the new issue sought to be raised was either (a)  
7 properly preserved below or (b) allowed to be raised for the first time on appeal; and  
8 (3) the issues raised are viable. *See State v. Moore*, 109 N.M. 119, 129, 782 P.2d 91,  
9 101 (Ct. App. 1989), *superceded by rule as stated in State v. Salgado*, 112 N.M. 537,  
10 817 P.2d 730 (Ct. App. 1991).

11 Defendant contends that “it was reversible error for the [d]istrict [c]ourt to  
12 admit evidence concerning the allegedly fraudulent Morrison transaction.” [MIO 11]  
13 In determining the viability of this issue, this Court must ask whether the district court  
14 abused its discretion in admitting this evidence. An abuse of discretion occurs when  
15 the ruling is clearly against the logic and effect of the facts and circumstances of the  
16 case. “We cannot say the trial court abused its discretion by its ruling unless we can  
17 characterize it as clearly untenable or not justified by reason.” *State v. Rojo*, 1999-  
18 NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citations  
19 omitted).

1 Rule 11-404(B)(1) NMRA provides that “[e]vidence of a crime, wrong, or other  
2 act is not admissible to prove a person’s character in order to show that on a particular  
3 occasion the person acted in accordance with the character.” However, “[t]his  
4 evidence may be admissible for another purpose, such as proving motive, opportunity,  
5 intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”  
6 Rule 11-404(B)(2). Defendant contends that evidence he tricked Morrison into  
7 signing over the deed to her house, the house that Cash testified he then offered to sell  
8 to her, was offered to establish that Defendant had a propensity for defrauding middle-  
9 aged single women, and as such should have been excluded. [MIO 14] Given the  
10 connection between Defendant’s conduct in getting Morrison to sign over the deed to  
11 her house and Defendant’s representations to Cash that he was going to sell her the  
12 same home, we cannot say that the district court abused its discretion in allowing this  
13 evidence to come in as evidence of a common scheme or plan. *See State v. McCallum*,  
14 87 N.M. 459, 461, 535 P.2d 1085, 1087 (Ct. App. 1975) (“In the case of fraud, related  
15 incidents of accused’s acts are admissible to establish motive, absence of mistake or  
16 accident, common scheme or plan, or the identity of the person charged with various  
17 crimes.”).

18 To the extent Defendant contends that this evidence should have been excluded  
19 because it was more prejudicial than probative, we note that “[d]etermining whether

1 the prejudicial impact of evidence outweighs its probative value is left to the  
2 discretion of the trial court . . . [i]n determining whether the trial court has abused its  
3 discretion in applying Rule 11-403, the appellate court considers the probative value  
4 of the evidence, but the fact that some jurors might find this evidence offensive or  
5 inflammatory does not necessarily require its exclusion.” *Rojo*, 1999-NMSC-001, ¶  
6 48 (citations omitted). Thus, “[t]he fact that competent evidence may tend to  
7 prejudice the defendant is not grounds for exclusion of that evidence. . . . The question  
8 is whether the probative value of the evidence was outweighed by its prejudicial  
9 effect.” *State v. Hogervorst*, 90 N.M. 580, 588, 566 P.2d 828, 836 (Ct. App. 1977)  
10 (citation omitted). Based on the facts of this case, we cannot say the district court  
11 clearly abused its discretion in determining that the probative value of Morrison’s  
12 testimony outweighed any prejudice caused to Defendant. Because we conclude that  
13 Defendant has not demonstrated that his evidentiary claim is viable, we deny  
14 Defendant’s motion to amend the docketing statement to include his challenge that the  
15 district court erred in admitting other bad acts evidence.

16 For the reasons stated above and in this Court’s notice of proposed disposition,  
17 we affirm.

18 **IT IS SO ORDERED.**

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**MICHAEL E. VIGIL, Judge**

1 **WE CONCUR:**

2

3 **JAMES J. WECHSLER, Judge**

4

5 **LINDA M. VANZI, Judge**