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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. 32,817

5 **RONNIE R. BAKER,**

6 Defendant-Appellant.

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

8 **Edmund H. Kase III, District Judge**

9 Gary K. King, Attorney General

10 Margaret McClean, Assistant Attorney General

11 Santa Fe, NM

12 for Appellee

13 Jason M. Alarid

14 Scott S. Hilty

15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **GARCIA, Judge.**

1 {1} Defendant appeals from the district court’s judgment finding him guilty of
2 driving while under the influence of intoxicating liquor or drugs and failure to use a
3 turn signal, and remanding to the magistrate court for enforcement of the original
4 judgment and sentence. [RP 87] Our notice proposed to affirm and Defendant filed a
5 memorandum in opposition. We remain unpersuaded by Defendant’s arguments, and
6 therefore affirm.

7 {2} In issues (1) and (2), Defendant continues to argue that the officer lacked
8 reasonable suspicion to stop his vehicle and that his arrest was not supported by
9 probable cause. [DS 13; MIO 2-7] Defendant concedes that these issue were not
10 preserved. [MIO 2] *See* Rule 12-216(A) NMRA (“To preserve a question for review
11 it must appear that a ruling or decision by the district court was fairly invoked[.]”).
12 Absent preservation, we affirm.

13 {3} Defendant, however, urges this Court to consider the merits of issues (1) and
14 (2), asserting that counsel’s failure to preserve these issues amounts to ineffective
15 assistance of counsel, as “representative” of the ineffective assistance argument raised
16 in issue (6). [MIO 2] This is a different argument from that raised in the docketing
17 statement, and for this reason we view Defendant’s ineffective assistance argument
18 as a motion to amend the docketing statement. The standard for determining trial
19 counsel erred is whether “counsel’s representation fell below an objective standard of

1 reasonableness.” *See Lytle v. Jordan*, 2001-NMSC-016, ¶ 26, 130 N.M. 198, 22 P.3d
2 666 (internal quotation marks and citation omitted). For reasons articulated in our first
3 notice, even if these issues were preserved, they lack merit. Given this, trial counsel
4 appropriately did not argue these issues below. *See, e.g., State v. Duarte*,
5 1996-NMCA-038, ¶ 25, 121 N.M. 553, 915 P.2d 309 (stating that a failure to file a
6 non-meritorious motion is not ineffective assistance); *see also Lytle*, 2001-NMSC-
7 016, ¶ 43 (recognizing that trial counsel’s strategy and tactics will not be
8 second-guessed on appeal). We accordingly deny Defendant’s motion to amend his
9 docketing statement. *See State v. Sommer*, 1994-NMCA-070, ¶ 11, 118 N.M. 58, 878
10 P.2d 1007 (recognizing that issues sought to be presented must be viable).

11 {4} In issue (3), Defendant continues to argue that the district court erred “in
12 allowing opinion testimony from Dr. Hwang regarding Defendant’s performance on
13 standardized field sobriety tests.” [DS 18; MIO 7-8] In his docketing statement,
14 Defendant challenged the admission of Dr. Hwang’s testimony based on an assertion
15 that Dr. Hwang did not qualify as an expert in forensic toxicology. [DS 9-10] In his
16 memorandum in opposition, Defendant does not challenge our proposed conclusion
17 that Dr. Hwang’s opinion testimony satisfied the prerequisites for admission as
18 required by *State v. Alberico*, 1993-NMSC-047, ¶ 42, 116 N.M. 156, 861 P.2d 192.
19 So for the same reasons extensively detailed in our notice, we affirm.

1 {5} Defendant does, however, “re-frame” issue (3) in his memorandum in
2 opposition to argue that admission of Dr. Hwang’s opinion testimony was improper
3 based on asserted improper questioning by the State. [MIO 7] Again, as with issues
4 (1) and (2), Defendant has raised a different argument than that raised in his
5 docketing statement, and for this reason we view his argument as a motion to amend
6 the docketing statement. While unclear, we understand Defendant to argue that the
7 State’s questioning improperly elicited testimony from Dr. Hwang that was “based on
8 lack of proper foundation in hypotheticals but with no specific information with
9 regard to Defendant.” [MIO 8] We further understand Defendant to argue that the
10 State’s questioning improperly required Dr. Hwang to consider a video that he had
11 viewed in magistrate court and not district court [MIO 9-10] and elicited Dr. Hwang’s
12 opinion on a matter which Defendant asserts he was unqualified to give—
13 Defendant’s performance on field sobriety tests. [MIO 9-10]

14 {6} It is not clear whether all the arguments raised in Defendant’s re-framed issue
15 were preserved. While Defendant objected to the “lack of proper foundation in
16 hypotheticals” [MIO 8], there is no indication that he objected to Dr. Hwang’s reliance
17 on the video in district court or that Dr. Hwang lacked qualification to opine about
18 performance on field sobriety tests. [MIO 8-10] *See* Rule 12-216(A) (requiring
19 arguments to be preserved for appeal). Nonetheless, we are not persuaded there was

1 any error in the State’s questioning of Dr. Hwang. As discussed in our notice, when
2 relating Dr. Hwang’s qualifications, Dr. Hwang’s opinion testimony was specific to
3 Defendant—rather than based on hypotheticals—because it was based, among other
4 matters, upon Defendant’s toxicology reports, the video of Defendant, and
5 Defendant’s performance on the field sobriety tests. As further extensively detailed
6 in our notice, Dr. Hwang was qualified to give his expert opinion on the effect of the
7 combination of alcohol and marijuana as related to Defendant. And when giving his
8 expert opinion, Dr. Hwang could properly rely on a video tape he had observed of
9 Defendant, regardless of when he watched the videotape. Any suggestion that Dr.
10 Hwang’s testimony was not reliable because he had not seen the video in five months
11 goes to the weight of his testimony. *See State v. Casteneda*, 1982-NMCA-046, ¶ 42,
12 97 N.M. 670, 642 P.2d 1129 (stating that it is the role of the factfinder to resolve any
13 conflicts in the evidence and to determine the credibility and weight to afford the
14 evidence). Moreover, in forming their opinions, experts may nonetheless rely on facts
15 or data that has not been admitted into evidence. *See, e.g.*, Rule 11-703 NMRA
16 (providing that “[a]n expert may base an opinion on facts or data in the case that the
17 expert has been made aware of or personally observed [and] [i]f experts in the
18 particular field would reasonably rely on those kinds of facts or data in forming an
19 opinion on the subject, they need not be admissible for the opinion to be admitted”).

1 Because Defendant's arguments lack merit, we deny his motion to amend. *See State*
2 *v. Sommer*, 1994-NMCA-070, ¶ 11 (recognizing that issues sought to be presented
3 must be viable).

4 {7} With regard to issue (4), Defendant maintains that the evidence was
5 insufficient to support his conviction for driving while under the influence of
6 intoxicating liquor or drugs. [DS 20; MIO 13] *See* NMSA 1978, § 66-8-102(A)
7 (2010); *see also State v. Dutchover*, 1973-NMCA-052, ¶ 7, 85 N.M. 72, 509 P.2d 264
8 (observing that DUI may be established through evidence that the defendant's ability
9 to drive was impaired to the slightest degree). While Defendant asserts that his poor
10 performance on the field sobriety test should not have been considered [MIO 14], case
11 law provides that his poor performance is a relevant factor to consider. *See State v.*
12 *Neal*, 2008-NMCA-008, ¶ 29, 143 N.M. 341, 176 P.3d 330 (affirming a DWI
13 conviction based on evidence that the defendant veered over the shoulder line three
14 times, smelled of alcohol, had bloodshot watery eyes, admitted drinking, and failed
15 to adequately perform field sobriety tests). And apart from Defendant's poor
16 performance on the field sobriety test, other competent evidence supported his
17 conviction. Specifically, we point out that Defendant was driving in the middle of the
18 road [DS 4], admitted to consuming alcohol [DS 5] in the amount of four to five beers

1 [RP 82], and had slurred speech, slightly red eyes, and “an odor of intoxicating
2 beverage.” [DS 5; RP 66] For the same reasons provided in our notice, we affirm.

3 {8} In issue (5), Defendant argues that trial counsel was ineffective based on his
4 failure to make arguments to challenge his prosecution for failure to use a turn signal.
5 [DS 25] Our notice proposed to affirm and Defendant did not further address the issue
6 in his memorandum in opposition. *See Frick v. Veazey*, 1993-NMCA-119, ¶ 2, 116
7 N.M. 246, 861 P.2d 287 (failing to respond to a calendar notice constitutes acceptance
8 of the proposed disposition). For the reasons provided in our notice, we affirm.

9 {9} Lastly, in issue (6), Defendant continues to argue that trial counsel was
10 ineffective based on his failure to challenge the foundational requirements for the
11 admitted breath and blood test results. [DS 7; MIO 10] Defendant emphasizes that
12 defense counsel knew that the State was going to rely on the synergistic effects of the
13 alcohol and marijuana to show impairment, and thus should have contested the
14 admission of the tests. [MIO 13] As provided in our notice, however, this is a matter
15 of trial strategy and tactics, which we will not second guess. *See generally Lytle*,
16 2001-NMSC-016, ¶ 43 (“On appeal, we will not second guess the trial strategy and
17 tactics of the defense counsel.” (internal quotation marks and citation omitted)); *see*
18 *also State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31

1 (expressing a “preference for habeas corpus proceedings over remand when the record
2 on appeal does not establish a prima facie case of ineffective assistance of counsel”).

3 {10} To conclude, for the reasons set forth herein and in our notice, we affirm.

4 {11} **IT IS SO ORDERED.**

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6

TIMOTHY L. GARCIA, Judge

7 **WE CONCUR:**

8

JONATHAN B. SUTIN, Judge

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M. MONICA ZAMORA, Judge

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