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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. 33,828**

5       **CALVIN BECKWITH,**

6             Defendant-Appellant.

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

8       **Ross C. Sanchez, District Judge**

9       Hector H. Balderas, Attorney General

10       Santa Fe, NM

11       for Appellee

12       Jorge A. Alvarado, Chief Public Defender

13       Santa Fe, NM

14       Josephine H. Ford, Assistant Appellate Defender

15       Albuquerque, NM

16       for Appellant

17                               **MEMORANDUM OPINION**

18       **SUTIN, Judge.**

1 {1} Defendant appeals from a district court on-the-record judgment affirming his  
2 metropolitan court conviction for battery against a household member. We issued a  
3 calendar notice proposing to affirm. Defendant has responded with a memorandum  
4 in opposition. As explained in this Opinion, we believe that Defendant’s  
5 memorandum makes arguments beyond the scope of the sole issue in the docketing  
6 statement. We construe this as an implicit motion to amend the docketing statement,  
7 and we hereby deny the motion. We affirm the judgment.

#### 8 **Sufficiency**

9 {2} Defendant continues to challenge the sufficiency of the evidence to support his  
10 conviction for battery against a household member. [MIO 13] “In reviewing the  
11 sufficiency of the evidence, we must view the evidence in the light most favorable to  
12 the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the  
13 evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128  
14 N.M. 711, 998 P.2d 176. “The reviewing court does not weigh the evidence or  
15 substitute its judgment for that of the fact[-]finder as long as there is sufficient  
16 evidence to support the verdict.” *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M.  
17 346, 950 P.2d 789, *abrogated on other grounds as recognized by Kersey v. Hatch*,  
18 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.

1 {3} In order to convict Defendant, the evidence had to show that Defendant picked  
2 up Victim by the arms and threw her against a wall in a rude, insolent, or angry  
3 manner and that Defendant and Victim were household members. [RP 41]  
4 “Household member” includes those involved in a continuous personal relationship.  
5 [RP 42] Here, our calendar notice proposed to affirm based on the facts as set forth  
6 in the docketing statement. Specifically, Defendant and Victim had been in a dating  
7 or intimate relationship. [DS 3] On the day of the incident, Defendant came over to  
8 her apartment and entered the apartment after Victim opened the door. [DS 3]  
9 Although Defendant was not invited in, he went into the apartment as Victim backed  
10 up without saying anything. [DS 3] Defendant appeared to be unhappy and angry.  
11 [DS 4] To the extent that Defendant is arguing that there were inconsistencies in  
12 Victim’s testimony, this was a matter for the fact-finder to sort out. *See State v. Salas*,  
13 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the  
14 fact-finder to resolve any conflict in the testimony of the witnesses and to determine  
15 where the weight and credibility lie). Although Defendant maintains that the  
16 prosecutor tainted the process by asking leading questions [MIO 15-16], Victim made  
17 clear throughout her testimony that Defendant grabbed her by the arm and threw her  
18 against the wall as he was yelling at her. [DS 5, 7, 10-11] In light of her testimony on

1 these basic facts, we conclude that the evidence was sufficient to support the  
2 conviction.

### 3 **Motion to Amend**

4 {4} As indicated earlier, we construe Defendant’s memorandum in opposition to  
5 raise arguments that go beyond sufficiency of the evidence. Although Defendant did  
6 not formally move to amend the docketing statement, we will address these arguments  
7 in the context of our rule governing such amendments. *See* Rule 12-208(F) NMRA.  
8 In cases assigned to the summary calendar, this Court will grant a motion to amend  
9 the docketing statement to include additional issues if the motion (1) is timely,  
10 (2) states all facts material to a consideration of the new issues sought to be raised, (3)  
11 explains how the issues were properly preserved or why they may be raised for the  
12 first time on appeal, (4) demonstrates just cause by explaining why the issues were not  
13 originally raised in the docketing statement, and (5) complies in other respects with  
14 the appellate rules. *State v. Rael*, 1983-NMCA-081, ¶ 15, 100 N.M. 193, 668 P.2d  
15 309. This Court will deny motions to amend that raise issues that are not viable, even  
16 if they allege fundamental or jurisdictional error. *See State v. Moore*, 1989-NMCA-  
17 073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *superseded on other grounds by rule as*  
18 *recognized in State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730.

1 {5} Here, Defendant argues that the prosecutor improperly elicited testimony  
2 through leading and coaching by the prosecutor and that the district court erred in  
3 failing to reign in the prosecutor. [MIO 14-16] Defendant has not indicated that he  
4 objected to the leading questions or alleged improper refreshing of Victim's  
5 recollection. *See* Rule 12-216(B) NMRA; *In re Aaron L.*, 2000-NMCA-024, ¶ 10,  
6 128 N.M. 641, 996 P.2d 431 (stating that, on appeal, the reviewing court will not  
7 consider issues not raised in the district court unless the issues involve matters of  
8 fundamental or jurisdictional error). This case does not involve fundamental error.  
9 Defendant is not indisputably innocent. Nor is there any indication that the conviction  
10 was fundamentally unfair. *See State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621,  
11 92 P.3d 633 (providing that fundamental error only occurs in "cases with defendants  
12 who are indisputably innocent, and cases in which a mistake in the process makes a  
13 conviction fundamentally unfair notwithstanding the apparent guilt of the accused").  
14 As such, we do not construe Defendant's arguments to raise any viable new issues.

15

16 {6} For the foregoing reasons, we affirm.

17 {7} **IT IS SO ORDERED.**

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**JONATHAN B. SUTIN, Judge**

1 **WE CONCUR:**

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**MICHAEL E. VIGIL, Chief Judge**

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**J. MILES HANISEE, Judge**