

1 **WECHSLER, Judge.**

2 {1} Defendant Kevin Lopez filed a docketing statement appealing from the district
3 court's affirmance of his conviction by bench trial for driving while under the
4 influence of intoxicating liquor (first offense). [DS 2; RP 3, 52] In this Court's notice
5 of proposed disposition, we proposed to adopt the memorandum opinion of the district
6 court and affirm. [CN 1–2] We additionally proposed to conclude that Defendant's
7 due process argument was undeveloped and unpreserved. [CN 3–4] Defendant timely
8 filed a memorandum in opposition. [Ct. App. File, top doc.] We have given due
9 consideration to the memorandum in opposition, and, remaining unpersuaded, we
10 affirm Defendant's conviction.

11 {2} As a prefatory matter, we note that a party responding to a proposed disposition
12 of this Court must point out specific errors in fact or law. *See Hennessy v. Duryea*,
13 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly
14 held that, in summary calendar cases, the burden is on the party opposing the proposed
15 disposition to clearly point out errors in fact or law.”). In response to this Court's
16 calendar notice, counsel has provided sixteen pages describing the facts and
17 proceedings. [MIO 1–16] The fact section in the memorandum in opposition is
18 essentially a verbatim reiteration of the fact section from Defendant's docketing
19 statement. [*See* DS 2–18] Counsel has not pointed out whether any of the facts

1 asserted are contrary to those relied on by this Court in our notice of proposed
2 disposition. This repetition of material that has already been presented to the Court,
3 with no indication as to which parts, if any, contradict the facts relied upon by the
4 district court or this Court or which parts, if any, are responsive to the notice of
5 proposed disposition, is not useful and creates unnecessary work for both this Court
6 and the parties. We request that counsel refrain from this practice in any future
7 pleadings she may file with this Court.

8 {3} In his memorandum in opposition, Defendant continues to argue that the verdict
9 was not supported by substantial evidence that Defendant drove under the influence
10 of alcohol and that the conviction violated his constitutional right to due process and
11 a fair trial. [MIO 17; *see also* DS 18] In this Court's notice of proposed disposition,
12 we proposed to adopt the memorandum opinion of the district court regarding
13 Defendant's substantial evidence argument [CN 1–2], and we proposed to conclude
14 that Defendant's due process argument—to the extent it was separate from
15 Defendant's substantial evidence argument—was undeveloped and unpreserved [CN
16 3–4]. Defendant has not responded to this Court's proposed disposition regarding his
17 due process argument, to the extent it is separate from Defendant's substantial
18 evidence argument; therefore, we conclude that the argument is undeveloped and
19 unpreserved as set forth more fully in our notice of proposed disposition.

1 {4} With regard to Defendant’s substantial evidence argument, Defendant has not
2 raised any issues or arguments that were not addressed in our notice of proposed
3 disposition and the district court’s memorandum opinion that we proposed to adopt,
4 so we refer Defendant to our responses therein. *See Hennessy*, 1998-NMCA-036, ¶ 24
5 (“Our courts have repeatedly held that, in summary calendar cases, the burden is on
6 the party opposing the proposed disposition to clearly point out errors in fact or
7 law.”); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003
8 (stating that a party responding to a summary calendar notice must come forward and
9 specifically point out errors of law and fact, and the repetition of earlier arguments
10 does not fulfill this requirement), *superseded by statute on other grounds as stated in*
11 *State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374.

12 {5} To the extent Defendant argues that the district court erred because Defendant
13 presented evidence that there were other reasons for Defendant’s poor performance
14 on the field sobriety tests, including other vehicles’ lights and other factors causing
15 distraction, Defendant’s injured leg, the cold weather, the distracting noise of traffic,
16 and Defendant’s boots [MIO 18–19], we reiterate that conflicting testimony is not a
17 basis for reversal. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d
18 829 (“Contrary evidence supporting acquittal does not provide a basis for reversal
19 because the jury is free to reject [the d]efendant’s version of the facts.”). Rather, it was

1 for the district court to weigh the evidence and assess credibility, and we will not
2 engage in a reweighing of the evidence on appeal. *See State v. Apodaca*, 1994-NMSC-
3 121, ¶ 3, 118 N.M. 762, 887 P.2d 756 (stating that the appellate court views the
4 evidence in the light most favorable to the verdict, resolving all conflicts and
5 indulging all reasonable inferences in favor of the verdict); *State v. Griffin*, 1993-
6 NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156 (“This court does not weigh the
7 evidence and may not substitute its judgment for that of the fact finder so long as there
8 is sufficient evidence to support the verdict.” (internal quotation marks and citation
9 omitted)).

10 {6} Likewise, to the extent Defendant argues that he exhibited no signs of mental
11 impairment while driving, notwithstanding his decision to drive five people in a three-
12 person vehicle, and that the risks he took were reasonable in light of the circumstances
13 [MIO 18], we repeat that it was for the district court to weigh the evidence, and we
14 will not re-weigh the evidence on appeal. *See id.* ¶ 17 (“This court does not weigh the
15 evidence and may not substitute its judgment for that of the fact finder so long as there
16 is sufficient evidence to support the verdict.” (internal quotation marks and citation
17 omitted)); *see also Rojo*, 1999-NMSC-001, ¶ 19 (stating that the factfinder “is free to
18 reject [the d]efendant’s version of the facts”).

1 {7} Finally, to the extent Defendant argues that the officer’s testimony was not
2 credible because he was not a medical professional able to determine if additional tests
3 were necessary and because he incorrectly remembered a few things during his
4 testimony [MIO 19–20], we repeat that it was within the province of the trial court to
5 determine the officer’s credibility and weigh the evidence, and we will not re-weigh
6 the evidence on appeal. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986
7 P.2d 482 (recognizing that it is for the factfinder to resolve any conflict in the
8 testimony of the witnesses and to determine where the weight and credibility lay);
9 *Griffin*, 1993-NMSC-071, ¶ 17 (stating that we do not re-weigh the evidence on
10 appeal or substitute our judgment for that of the factfinder).

11 {8} Accordingly, for the reasons set forth in our notice of proposed disposition and
12 herein, and for the reasons articulated in the memorandum opinion of the district
13 court, we affirm Defendant’s convictions.

14 {9} **IT IS SO ORDERED.**

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JAMES J. WECHSLER, Judge

17 **WE CONCUR:**

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RODERICK T. KENNEDY, Judge

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2 **J. MILES HANISEE, Judge**