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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. 36,006

5 **JOSEPH STEWARD,**

6 Defendant-Appellant.

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

8 **Matthew E. Chandler, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Will O'Connell, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **ZAMORA, Judge.**

18 {1} Joseph Steward (Defendant) appeals his convictions for driving while under the
19 influence (DWI) and assault on the basis that there was insufficient evidence. This
20 Court's calendar notice proposed summary affirmance, and Defendant filed a

1 memorandum in opposition to the proposed disposition. Not persuaded by
2 Defendant's arguments, we affirm.

3 {2} Defendant continues to argue that there was no evidence he drove his pickup
4 truck while intoxicated because the officer was unable to testify that he saw Defendant
5 drive or that Defendant drank to the point of impairment, and no field sobriety tests
6 or blood alcohol tests were performed. [MIO 5-6] Defendant's neighbor testified that
7 she witnessed him rev up his engine, drive over a log, hit a fence, and damage the
8 fence, before driving off and then returning after several minutes. [RP 95, 96] The
9 officer on the scene also testified that Defendant smelled of alcohol and had bloodshot
10 watery eyes. [RP 89-90] He further testified that Defendant became loud and
11 belligerent when asked about the threats made to his neighbors, and that Defendant
12 told the officer if he took out his gun they "would get it on." [RP 91] The neighbor
13 witnessed Defendant driving the truck, after which there was circumstantial evidence
14 to infer that Defendant drove while intoxicated. *See State v. Mailman*,
15 2010-NMSC-036, ¶ 28, 148 N.M. 702, 242 P.3d 269 ("Actual physical control is not
16 necessary to prove DWI unless there are no witnesses to the vehicle's motion and
17 insufficient circumstantial evidence to infer that the accused actually drove while
18 intoxicated." (emphasis omitted)). Defendant does not dispute the evidence relied
19 upon in the notice of proposed disposition. *See State v. Mondragon*, 1988-NMCA-

1 027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that “[a] party responding to a
2 summary calendar notice must come forward and specifically point out errors of law
3 and fact”), *superseded in statute on other grounds as stated in State v. Harris*, 2013-
4 NMCA-031, 297 P.3d 374. We therefore conclude that there was sufficient evidence
5 from which the fact finder could determine that Defendant was DWI.

6 {3} Defendant further argues the testimony that he made an idle threat while
7 standing fifty yards away from the neighbor’s family fails to establish the family
8 reasonably feared an immediate battery. [MIO 6] He argues that since this was the
9 only evidence offered to show that an assault occurred, the evidence fails to establish
10 an essential element of the crime. [Id.] We disagree. Not only was there evidence that
11 Defendant yelled and threatened to shoot them all, but the neighbor testified she was
12 concerned for herself and her family who were all standing outside. [RP 96]
13 Defendant does not dispute this evidence relied upon in the proposed disposition. *See*
14 *Mondragon*, 1988-NMCA-027, ¶ 10. Based on this evidence, we conclude that there
15 was sufficient evidence to support Defendant’s conviction for assault. *See State v.*
16 *Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (stating that
17 “substantial evidence” is defined as “such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion” (internal quotation marks and
19 citation omitted)).

1 {4} Last, Defendant contends that the State failed to prove the validity of the
2 alleged prior convictions used to enhance his DWI conviction. [MIO 6] He contends
3 that the documentation provided by the State only established that he was previously
4 charged with the offense. [Id.] Because Defendant did not raise this issue in his
5 docketing statement, we construe it as a motion to amend the docketing statement. In
6 cases assigned to the summary calendar, this Court will grant a motion to amend the
7 docketing statement to include additional issues if the motion (1) is timely, (2) states
8 all facts material to a consideration of the new issues sought to be raised, (3) explains
9 how the issues were properly preserved or why they may be raised for the first time
10 on appeal, (4) demonstrates just cause by explaining why the issues were not
11 originally raised in the docketing statement, and (5) complies in other respects with
12 the appellate rules. *See State v. Rael*, 1983-NMCA-081, ¶¶ 7-8, 10-11, 14-17, 100
13 N.M. 193, 668 P.2d 309.

14 {5} This Court will deny motions to amend that raise issues that are not viable, even
15 if they allege fundamental or jurisdictional error. *See State v. Moore*,
16 1989-NMCA-073, ¶¶ 36-51, 109 N.M. 119, 782 P.2d 91, *superseded by rule on other*
17 *grounds as recognized in State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d
18 730. Defendant has not explained whether the issue was properly preserved or why
19 it can be raised for the first time on appeal. *See Rael*, 1983-NMCA-081, ¶¶ 7-8. Nor

1 has Defendant cited a case standing for the proposition that documentation such as a
2 dated, file-stamped judgment and sentence properly verifying prior convictions is not
3 evidence of a conviction. [RP 110-127] *See In re Doe*, 1984-NMSC-024, ¶ 2, 100
4 N.M. 764, 676 P.2d 1329 (stating that we are entitled to assume, when arguments are
5 unsupported by cited authority, that supporting authorities do not exist). Because the
6 issue Defendant seeks to add to his docketing statement is not viable, the motion to
7 amend is denied. *See Moore*, 1989-NMCA-073, ¶¶ 36-51.

8 {6} For all of these reasons, and those stated in the notice of proposed disposition,
9 we affirm Defendant's convictions.

10 {7} **IT IS SO ORDERED.**

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M. MONICA ZAMORA, Judge

13 **WE CONCUR:**

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MICHAEL E. VIGIL, Judge

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TIMOTHY L. GARCIA, Judge