

1 {1} Defendant Neil Ochoa appeals from his convictions from a conditional plea
2 and resulting judgment and sentence convicting him of trafficking a controlled
3 substance (possession with an intent to distribute), two counts of possession of a
4 controlled substance (cocaine and morphine sulfate), and two counts of distribution
5 of a controlled substance (ecstasy and psilocybin). [RP 312-17] In his docketing
6 statement, Defendant challenged the district court's denial of his motions to suppress
7 evidence and his motion to disclose the identity of a confidential informant. [DS
8 unnumbered 4] We issued a notice proposing to affirm. [CN 1, 8] Defendant filed a
9 memorandum in opposition and a motion to amend the docketing statement, which we
10 have duly considered. Remaining unpersuaded, we deny Defendant's motion to amend
11 and now affirm.

12 {2} Because the pertinent background information and applicable principles have
13 previously been set out, we will avoid unnecessary repetition here and instead focus
14 on the content of the motion to amend and the memorandum in opposition.

15 {3} Defendant seeks to amend his docketing statement to add an issue arguing the
16 search of his house was illegal because the warrant had not yet been signed at the time
17 of the search, and the search was not otherwise justified by exigent circumstances.
18 [MIO 14-18] The essential requirements to show good cause for amendment of a
19 docketing statement are: (1) the motion be timely, (2) the new issue sought to be

1 raised was either (a) properly preserved below or (b) allowed to be raised for the first
2 time on appeal, and (3) the issues raised are viable. *See State v. Moore*,
3 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by*
4 *State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730. Defendant neither
5 points out how this issue was properly preserved below nor explains why his
6 argument may be raised for the first time on appeal. The motion to amend the
7 docketing statement is therefore **DENIED**.

8 {4} Defendant continues to argue the search warrant affidavit was not supported by
9 probable cause. [MIO 3-11] Defendant does not challenge the confidential informant's
10 credibility. His argument is based on the assertion that the affidavit was based on
11 rumors about Defendant's activities, and the informant did not provide sufficiently
12 detailed information, including names and dates related to Defendant's previous
13 trafficking activities. [MIO 5-6, 9] Defendant does not explain how the lack of certain
14 facts undermines the informant's basis for knowledge or shows the affidavit lacked
15 a substantial basis to support a finding of probable cause. *State v. Williamson*,
16 2009-NMSC-039, ¶ 29, 146 N.M. 488, 212 P.3d 376 (stating we will uphold an
17 issuing court's determination of probable cause "if the affidavit provides a substantial
18 basis to support a finding of probable cause").

1 {5} The basis of the confidential informant’s knowledge is adequately established
2 by the affiant’s statement that the confidential informant observed Defendant with
3 methamphetamine in his home. *See, e.g., State v. Baca*, 1982-NMSC-016, ¶ 16
4 (clarifying that an informant’s observations or dealings with a defendant can provide
5 the requisite factual basis); *State v. Lujan*, 1998-NMCA-032, ¶¶ 8,12 (noting that a
6 confidential informant’s first-hand knowledge satisfies the basis of knowledge prong).
7 Because the affidavit establishes a factual basis without considering the officer’s
8 reliance on unnamed informants and officers, we need not consider whether those
9 statement corroborated the factual basis for the confidential informant’s knowledge.

10 {6} Defendant also asserts evidence suppressed in an unrelated case in which
11 Defendant was arrested for possession of a controlled substance could not be used to
12 corroborate information from the informant. [MIO 10-11] We first point out issues
13 regarding evidence suppressed in a separate case are not part of the record in this case.
14 “[R]eference to facts not before the district court and not in the record is inappropriate
15 and a violation of our Rules of Appellate Procedure.” *Durham v. Guest*,
16 2009-NMSC-007, ¶ 10, 145 N.M. 694, 204 P.3d 19. To the extent Defendant’s
17 assertions regarding the separate case, by virtue of his arguments made in support of
18 his motion to suppress, are part of the record in the present case, “[i]t is not our
19 practice to rely on assertions of counsel unaccompanied by support in the record. The

1 mere assertions and arguments of counsel are not evidence.” *Chan v. Montoya*, 2011-
2 NMCA-072, 150 N.M. 44, 256 P.3d 987 (internal quotation marks and citation
3 omitted). Moreover, Defendant does not provide any explanation or authority in
4 support of his assertion that evidence suppressed in a separate case cannot be used to
5 corroborate the Informant’s observations in the present case. “[A]ppellate courts will
6 not consider an issue if no authority is cited in support of the issue and that, given no
7 cited authority, we assume no such authority exists.” *State v. Vigil-Giron*,
8 2014-NMCA-069, ¶ 60, 327 P.3d 1129.

9 {7} Defendant further argues the affiant was not credible in the present case because
10 his testimony had been determined not credible in an unrelated case. [MIO 13-14]
11 Although this argument appears under the argument heading related to the identity of
12 the informant, because it relates to probable cause for the warrant, we address it out
13 of order. “A reviewing court should not substitute its judgment for that of the issuing
14 court [but instead should] determine whether the affidavit as a whole, and the
15 reasonable inferences that may be drawn therefrom, provide a substantial basis for
16 determining that there is probable cause to believe that a search will uncover evidence
17 of wrongdoing.” *Williamson*, 2009-NMSC-039, ¶ 29. Because we do not substitute
18 our judgment regarding credibility for the district court’s, and having considered the
19 affidavit as a whole, we conclude the affidavit was supported by probable cause.

1 {8} Defendant also continues to argue the district court erred in denying his motion
2 to disclose the identity of the informant. [MIO 11-14] Defendant argues the
3 informant’s testimony was vital to his defense, and Defendant wished to question the
4 informant about the times he was alleged to have been in Defendant’s house. [MIO
5 12] However, as Defendant notes and we point out in our proposed disposition,
6 Defendant learned the informant’s identity prior to trial. [DS unnumbered 3; CN 7]
7 Thus, it appears Defendant had the opportunity to interview the informant and to seek
8 to have him testify at trial, and it is unclear why Defendant did not pursue such a
9 course. *State v. Fernandez*, 1994-NMCA-056, ¶ 13, 117 N.M. 673, 875 P.2d 1104.
10 (“In the absence of prejudice, there is no reversible error.”). Moreover, the denial of
11 Defendant’s motion to disclose the identity of the informant became moot once he
12 learned of the identity. Generally, an appellate court will not decide a case when it has
13 become moot. *See State v. Lope*, 2015-NMCA-011, ¶ 11, 343 P.3d 186. Therefore, the
14 district court’s denial of the disclosure of the informant’s identity does not present a
15 basis for reversal on appeal.

16 {9} Accordingly, for the reasons explained in our notice of proposed disposition
17 and herein, we affirm.

18 {10} **IT IS SO ORDERED.**

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M. MONICA ZAMORA, Judge

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2 **WE CONCUR:**

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EMIL J. KIEHNE, Judge

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JENNIFER L. ATTREP, Judge