

This memorandum opinion was not selected for publication in the New Mexico Appellate Reports. Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please also note that this electronic memorandum opinion may contain computer-generated errors or other deviations from the official paper version filed by the Court of Appeals and does not include the filing date.

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**STATE OF NEW MEXICO,**

Plaintiff-Appellee,

v.

**NO. A-1-CA-37054**

**AMADEO SALGUERO,**

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY**

**James Lawrence Sanchez, District Judge**

Hector H. Balderas, Attorney General

Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender

Santa Fe, NM

Steven J. Forsberg

Albuquerque, NM

for Appellant

**MEMORANDUM OPINION**

**VANZI, Chief Judge.**

1 {1} Defendant Amadeo Salguero appeals his convictions for kidnapping,  
2 aggravated burglary, aggravated battery, aggravated assault with a deadly weapon,  
3 attempted armed robbery, and conspiracy to commit kidnapping. We issued a notice  
4 of proposed summary disposition proposing to affirm, and Defendant has responded  
5 with a timely memorandum in opposition and a motion to amend the docketing  
6 statement raising a double jeopardy challenge, which we have duly considered. We  
7 remain unpersuaded that our initial proposed disposition was incorrect, and we reject  
8 Defendant’s argument that his right to be free from double jeopardy was violated. We  
9 therefore affirm.

## 10 **DISCUSSION**

11 {2} Defendant continues to argue that his right to due process and a fair trial was  
12 denied by the district court’s admission of photo lineup identifications of him at trial.  
13 Defendant argues that the photo lineup by which he was identified by two witnesses  
14 was impermissibly suggestive, and the district court should have granted his motion  
15 to suppress the identifications. [DS 3-4; MIO 1-2] “We apply a two-part test to  
16 determine whether an out-of-court photographic identification is admissible.” *State*  
17 *v. Salgado*, 1999-NMSC-008, ¶ 16, 126 N.M. 691, 974 P.2d 661. We first consider  
18 whether the procedure employed was “so impermissibly suggestive as to give rise to  
19 a very substantial likelihood of irreparable misidentification.” *State v. Johnson*,

1 2004-NMCA-058, ¶ 13, 135 N.M. 567, 92 P.3d 13. If so, then we then ask whether  
2 the identification was nonetheless reliable under the totality of the circumstances.  
3 *State v. Cooper*, 1998-NMCA-180, ¶ 24, 126 N.M. 500, 972 P.2d 1. In reviewing a  
4 photo array, “ [t]he size of the array, the manner of its presentation by the officers,  
5 and the details of the photographs themselves’ should be considered when a court  
6 determines whether a photographic identification was impermissibly suggestive.”  
7 *Salgado*, 1999-NMSC-008, ¶ 17 (quoting *United States v. Sanchez*, 24 F.3d 1259,  
8 1262 (10th Cir. 1994)).

9 {3} Defendant makes no argument, in either his docketing statement or his  
10 memorandum in opposition, that the size of the array or the manner of presentation  
11 by the officers rendered the array impermissibly suggestive. Defendant argued in his  
12 docketing statement only that his picture in the photo array was different from the  
13 others because his head is slanted to the right and “spaced differently” than the other  
14 individuals. [DS 3] We stated in our notice of proposed summary disposition that it  
15 was not clear from either the record or the docketing statement what Defendant meant  
16 when he said his photo was “spaced differently” from the others. [CN 3] *See State v.*  
17 *Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that this Court  
18 will “not review unclear or undeveloped arguments [that] require us to guess at what

1 [the party's] arguments might be"). Defendant has not clarified or expanded on this  
2 argument in his memorandum in opposition.

3 {4} Additionally, a bare assertion that Defendant's head was uniquely slanted in the  
4 photo array is insufficient to require suppression of the identifications because  
5 Defendant has not established that this rendered the array impermissibly suggestive.  
6 *See State v. Stampley*, 1999-NMSC-027, ¶ 17, 127 N.M. 426, 982 P.2d 477 (rejecting  
7 the argument that the array was impermissibly suggestive because the defendant's  
8 head was tilted back and he was the only one wearing a t-shirt where nothing in the  
9 record existed to establish that the purported differences in posture, clothing, and body  
10 build were unduly suggestive and noting that "[a]ny array composed of different  
11 individuals must necessarily contain certain differences" (internal quotation marks and  
12 citation omitted)). We therefore reject this assertion of error.

13 {5} Defendant has not responded to our proposed summary disposition of the other  
14 issues he raised in his docketing statement: that the evidence was insufficient to  
15 support his convictions and that he was denied a fair trial due when the district court  
16 allowed witnesses to identify him in court. [MIO 2] We therefore affirm on those  
17 issues for the reasons stated in our notice of proposed summary disposition.

18 {6} Finally, we address Defendant's motion to amend the docketing statement.  
19 Defendant argues that he was subject to a double jeopardy violation by his convictions

1 for four counts of aggravated assault based on his threatening four individuals with  
2 a gun. [MIO 2-4] Defendant acknowledges that this issue was decided by our Court  
3 in *State v. Roper*, 2001-NMCA-093, ¶ 12, 131 N.M. 189, 34 P.3d 133 (holding that  
4 double jeopardy principles are not offended when a defendant is convicted and  
5 sentenced for “two counts of assault for pointing a gun at two persons at the same  
6 time”). [MIO 3] However, Defendant argues that *Roper* was incorrectly decided and  
7 that our decision in *Roper* stands in opposition to this Court’s decision in *State v.*  
8 *Castañeda*, 2001-NMCA-052, ¶ 18, 130 N.M. 679, 30 P.3d 368, in which we held that  
9 the defendant could only be convicted of one count of child abuse based on driving  
10 while intoxicated with three children in the car. [MIO 3-4] We addressed this same  
11 argument in *Roper*, however, and we decline to revisit that decision. We therefore  
12 reject Defendant’s argument that his convictions for four counts of aggravated assault  
13 based on his pointing a gun at and threatening to kill four people violate double  
14 jeopardy.

15 {7} For these reasons and those set out in our notice of proposed summary  
16 disposition, we affirm Defendant’s convictions.

17 {8} **IT IS SO ORDERED.**

18  
19

---

**LINDA M. VANZI, Chief Judge**

1 **WE CONCUR:**

2

3 \_\_\_\_\_  
3 **JULIE J. VARGAS, Judge**

4

5 \_\_\_\_\_  
5 **STEPHEN G. FRENCH, Judge**