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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 31,368

10 **CARLOS H.,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

13 **Sandra A. Price, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

17 Jacqueline L. Cooper, Acting Chief Public Defender

18 Allison H. Jaramillo, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **WECHSLER, Judge.**

23 Child appeals from a district court order entered after he was adjudicated a

1 delinquent child, based on graffiti. We issued a calendar notice proposing to affirm.
2 Child has responded with a memorandum in opposition and a motion to amend the
3 docketing statement. We deny Child's motion to amend the docketing statement, and
4 we affirm the district court judgment.

5 **Motion to Amend**

6 Child has filed a motion to amend the docketing statement to add a new issue.
7 *See* Rule 12-208(F) NMRA. In cases assigned to the summary calendar, this Court
8 will grant a motion to amend the docketing statement to include additional issues if
9 the motion (1) is timely, (2) states all facts material to a consideration of the new
10 issues sought to be raised, (3) explains how the issues were properly preserved or why
11 they may be raised for the first time on appeal, (4) demonstrates just cause by
12 explaining why the issues were not originally raised in the docketing statement, and
13 (5) complies in other respects with the appellate rules. *See State v. Rael*, 100 N.M.
14 193, 197, 668 P.2d 309, 313 (Ct. App. 1983). This Court will deny motions to amend
15 that raise issues that are not viable, even if they allege fundamental or jurisdictional
16 error. *See State v. Moore*, 109 N.M. 119, 129, 782 P.2d 91, 101 (Ct. App. 1989),
17 *superceded by rule on other grounds, as stated in State v. Salgado*, 112 N.M. 537, 817
18 P.2d 730 (Ct. App. 1991).

19 Child seeks to add the issue of whether the district court erred in denying his

1 motion to suppress based on an alleged delay in providing him his *Miranda* rights and
2 otherwise informing him of his rights as a juvenile to remain silent. [MIO 7] The New
3 Mexico Children's Code provides, as is relevant to this case:

4 C. No person subject to the provisions of the Delinquency Act who is
5 alleged or suspected of being a delinquent child shall be interrogated or
6 questioned without first advising the child of the child's constitutional
7 rights and securing a knowing, intelligent and voluntary waiver.
8

9 D. Before any statement or confession may be introduced at a trial or
10 hearing when a child is alleged to be a delinquent child, the state shall
11 prove that the statement or confession offered in evidence was elicited
12 only after a knowing, intelligent and voluntary waiver of the child's
13 constitutional rights was obtained.
14

15 E. In determining whether the child knowingly, intelligently and
16 voluntarily waived the child's rights, the court shall consider the
17 following factors:

- 18 (1) the age and education of the respondent;
- 19 (2) whether the respondent is in custody;
- 20 (3) the manner in which the respondent was advised of the
21 respondent's rights;
- 22 (4) the length of questioning and circumstances under which the
23 respondent was questioned;
- 24 (5) the condition of the quarters where the respondent was being
25 kept at the time of being questioned;
- 26 (6) the time of day and the treatment of the respondent at the time
27 of being questioned;
- 28 (7) the mental and physical condition of the respondent at the time
29 of being questioned; and
- 30 (8) whether the respondent had the counsel of an attorney, friends
31 or relatives at the time of being questioned.

32 NMSA 1978, § 32A-2-14 (2009).

33 In *State v. Javier M.*, 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1, the Court

1 addressed several aspects of Section 32A-2-14. The Court held that the section is
2 triggered when a child is subjected to investigatory detention such that he or she is not
3 free to leave. *Id.* ¶¶ 37-38. “The statute’s protections . . . do not apply when a child,
4 not subject to investigatory detention, answers general on-the-scene questions or when
5 the child makes a voluntary statement.” *Id.* ¶ 40. We conclude that the current
6 situation, as minimally described in the memorandum [MIO 2] and the docketing
7 statement [DS 3], did not constitute an investigatory detention, but merely on-the-
8 scene questions. Under Child’s analysis [MIO 7-11], the officers would have had to
9 immediately provide Child his rights when the officers came to Child’s front door.
10 [DS 3] As the district court determined, the encounter was not coercive up to the
11 point where the officer noticed the smudges on Child’s arm and saw that his shoes
12 matched the prints leaving the scene. Accordingly, we conclude that this issue is not
13 viable.

14 **Motion for Mistrial**

15 Child continues to argue that the trial court erred in refusing to grant a mistrial
16 when a witness testified to her belief that Child was a gang member. Child was
17 charged with four counts of unauthorized graffiti after the Bloomfield Police
18 Department (BPD) found a number of markings stating “BPL 27,” or the like. [MIO
19 2] During her testimony, BPD Officer Tina Adair stated that Child was a gang

1 member, based on information on a BPD database. [MIO 3] This database was
2 maintained by another officer, and Child objected on hearsay grounds. [MIO 3, 5;DS
3 3] The district court ruled that Officer Adair could only testify about gang affiliation
4 if she had personal knowledge. [MIO 3; DS 3] She then resumed her testimony,
5 stating that she had personal knowledge of Child’s gang affiliation based on the
6 database. [DS 3] The district court denied the motion for mistrial, but promptly gave
7 a curative instruction to the jury. [MIO 3;DS 3-4]

8 We review the district court’s ruling for an abuse of discretion. *See State v.*
9 *Gonzales*, 2000-NMSC-028, ¶ 35, 129 N.M. 556, 11 P.3d 131. “An abuse of
10 discretion occurs when the ruling is clearly against the logic and effect of the facts and
11 circumstances of the case. We cannot say the trial court abused its discretion by its
12 ruling unless we can characterize it as clearly untenable or not justified by reason.”
13 *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation
14 marks and citation omitted).

15 Although Child continues to maintain that the limiting instruction could not
16 overcome the prejudice of this testimony, we do not believe that the district court
17 acted outside of its discretion in denying the mistrial. We first note that there is no
18 indication that the improper statement resulted from any misconduct by the
19 prosecutor. *See State v. Simonson*, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983)

1 (distinguishing a case in which a prosecutor deliberately asked a question in order to
2 elicit improper evidence). Moreover, “[t]he overwhelming New Mexico case law
3 states that the prompt sustaining of the objection and an admonition to disregard the
4 answer cures any prejudicial effect of inadmissible testimony.” *Gonzales*, 2000-
5 NMSC-028, ¶ 37 (internal quotation marks and citation omitted). We also disagree
6 with Child’s claim that the gang affiliation was the only evidence linking him to the
7 graffiti. To the contrary, the evidence to support the graffiti charges was significant,
8 with the trail of Child’s shoe imprint leading to his front door, and with Child bearing
9 smudges of spraypaint on his arms. [DS 3] *See State v. Trujillo*, 2002-NMSC-005, ¶
10 45, 131 N.M. 709, 42 P.3d 814 (“Although the statement may have had some
11 prejudicial effect, Defendant has not demonstrated that had this statement not come
12 in, the result of the proceeding would have been different.”).

13 For the reasons stated above, we affirm.

14 **IT IS SO ORDERED.**

15 _____
16 **JAMES J. WECHSLER, Judge**

17 **WE CONCUR:**

18 _____
19 **MICHAEL D. BUSTAMANTE, Judge**

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J. MILES HANISEE, Judge