

STATE V. GALLEGOS

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ALBERT GALLEGOS,
Defendant-Appellant.

No. 32,878

COURT OF APPEALS OF NEW MEXICO

December 19, 2013

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Charles Brown,
District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Santa Fe, NM, Josephine H. Ford, Assistant Public Defender, Albuquerque, NM, for Appellant

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, J. MILES HANISEE, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Defendant Albert Gallegos appeals his conviction of assault against a household member. In our notice of proposed summary disposition, we proposed to affirm. The State then filed a motion to dismiss, arguing that this Court lacked jurisdiction to hear an

appeal from the district court's on-record judgment affirming Defendant's conviction in metropolitan court. [Ct. App. File] As this Court recently affirmed its jurisdiction to hear such appeals in *State v. Carroll*, 2013-NMCA-____, ____ P.3d __ (No. 32,909, Oct. 21, 2013), we deny the State's motion. In response to this Court's notice, Defendant has filed a memorandum in opposition, which we have duly considered. As we do not find it persuasive, we affirm.

{2} In this Court's notice of proposed summary disposition, we proposed to hold that the district court did not abuse its discretion in admitting the testimony of Defendant's brother that Defendant had historically taken medication to treat the symptoms of a head injury and that the brother had observed Defendant's behavior to be erratic when he was either not taking his medication or when he was taking his medication and also using alcohol. Defendant conceded that this evidence was relevant to the charge at issue, but argued that it was nevertheless unfairly prejudicial pursuant to Rule 11-403 NMRA. This Court proposed to hold that the district court did not abuse its discretion in concluding that the probative value of the evidence was not "substantially outweighed by a danger of . . . unfair prejudice[.]" See Rule 11-403. We also stated that the district court correctly limited the testimony to proper lay witness testimony under Rule 11-701 NMRA.

{3} In Defendant's memorandum in opposition, he continues to argue that the evidence was unfairly prejudicial and should have been excluded pursuant to Rule 11-403. [MIO 11-12] However, he acknowledges that the district court has great discretion in this area, and points to no authority to demonstrate an abuse of discretion under the circumstances of this case.

{4} Defendant addresses the bulk of his memorandum to an argument that the evidence was inadmissible because his brother lacked first-hand knowledge about his medications, how those medications interact with alcohol, and whether he was or was not taking his medications. [MIO 12-20] This argument was not squarely presented in his docketing statement, and Defendant has failed to file a motion to amend the docketing statement and has therefore failed to establish a basis for our review of the issue. See Rule 12-208(F) NMRA (permitting the amendment of the docketing statement based on good cause shown); *State v. Rael*, 1983-NMCA-081, ¶¶ 15-16, 100 N.M. 193, 668 P.2d 309 (setting out requirements for a successful motion to amend the docketing statement). Accordingly, we need not address this argument. Furthermore, we note that the issue is not viable, and this Court will not grant a motion to amend the docketing statement to add an issue that is not viable. See *State v. Sommer*, 1994-NMCA-070, ¶ 11, 118 N.M. 58, 878 P.2d 1007. Defendant's brother testified that he had observed Defendant over the course of twenty years since his accident, both when he was and was not taking his medication. This was sufficient to lay a foundation for the brother's opinion testimony about Defendant's aggressive behavior and about whether his response to that behavior was reasonable. See Rule 11-701(A) (requiring the testimony to be based on first-hand knowledge).

{5} Accordingly, for the reasons stated here and in our notice of proposed summary disposition, we affirm.

{6}___IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

J. MILES HANISEE, Judge