

STATE V. GARDNER

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JACKSON OREN GARDNER,
Defendant-Appellant.**

No. A-1-CA-36275

COURT OF APPEALS OF NEW MEXICO

December 26, 2017

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, Karen L.
Townsend, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, J.K. Theodosia Johnson, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, JULIE J. VARGAS, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant Jackson Oren Gardner appeals from his conviction, after a jury trial, of embezzlement of a motor vehicle, contrary to NMSA 1978, Section 30-16D-2(A) (2009). In this Court's notice of proposed disposition, we proposed to summarily affirm the

convictions. Defendant filed a memorandum in opposition and motion to amend the docketing statement that we have duly considered. Remaining unpersuaded, we deny the motion to amend and affirm.

{2} Sufficiency: By his memorandum in opposition, Defendant continues to argue that there was insufficient evidence that he converted the vehicle by keeping another's property, rather than returning it, or used another's property for one's own purpose, rather than for the purpose authorized by the owner. [MIO 8-9] He argues that because he returned the vehicle, the fact that he "merely borrowed [it] for a longer period of time than they agreed" does not constitute the felony of embezzlement. [MIO 8] However, as Defendant acknowledges, the jury was not required to find that he intended to *permanently* deprive the owner of the vehicle. [MIO 9-10; see also RP 118-20 (pertinent jury instructions)] See *State v. Moss*, 1971-NMCA-117, ¶ 5, 83 N.M. 42, 487 P.2d 1347. Moreover, as we stated in our notice of proposed disposition, it was for the jury to resolve any conflicts in the testimony and determine weight and credibility, and the jury was free to reject Defendant's version of the events. See *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829; *State v. Griffin*, 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156; *State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482. Thus, for the reasons stated in our notice of proposed disposition and herein, we conclude that there was sufficient evidence to uphold Defendant's embezzlement conviction.

{3} Motion to Amend: By his motion to amend, Defendant seeks to argue that he "was denied due process when an amended Judgment and Sentence determined he had to pay \$4,000 without notice and opportunity to be heard." [MIO 4] However, Defendant fails to inform this Court how the issue was raised below or why it would be allowed to be raised for the first time on appeal. See *State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91 (recognizing that the essential requirements to show good cause for our allowance of an amendment to an appellant's docketing statement are that (1) the motion be timely, (2) "*the new issue sought to be raised was either (a) properly preserved below or (b) allowed to be raised for the first time on appeal[,]*" and (3) the issues raised must be viable (emphasis added)), *overruled on other grounds by State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730. Indeed, the motion to amend does not indicate that Defendant has made any request with the district court for a hearing regarding his restitution. [See MIO 4-6] See NMSA 1978, § 31-17-1(G) (2005) (stating that "[a]t any time during the probation or parole period, the defendant or the victim may request and the court shall grant a hearing on any matter related to the plan of restitution"). We therefore deny Defendant's motion to amend as non-viable for its failure to meet certain criteria that establishes good cause for our allowance of such amendment. See *Moore*, 1989-NMCA-073, ¶¶ 41-43; see also *State v. Rael*, 1983-NMCA-081, ¶¶ 15-16, 100 N.M. 193, 668 P.2d 309 (identifying the criteria required to show good cause for amending a docketing statement and indicating that we will not grant motions to amend that raise non-viable issues).

{4} Accordingly, for the reasons stated in our notice of proposed disposition and herein, we affirm Defendant's conviction.

{5} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

JULIE J. VARGAS, Judge