

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

Court of Appeals of New Mexico
Filed 1/23/2023 11:36 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-40330

5 **JOHNATHON J. MARTINEZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF QUAY COUNTY**

8 **Albert J. Mitchell, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Kimberly Chavez Cook, Assistant Appellant Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **MEDINA, Judge.**

18 {1} Defendant appeals from a district court order revoking his probation. We
19 issued a calendar notice proposing to affirm. Defendant has responded with a motion
20 to amend the docketing statement and a memorandum in opposition. For the reasons
21 set forth below, we deny the motion to amend the docketing statement, and we affirm
22 the order of revocation.

1 **MOTION TO AMEND**

2 {2} Defendant has filed a motion to amend the docketing statement to add a new
3 issue. [MIO i] In cases assigned to the summary calendar, this Court will grant a
4 motion to amend the docketing statement to include additional issues if the motion
5 (1) is timely, (2) states all facts material to a consideration of the new issues sought
6 to be raised, (3) explains how the issues were properly preserved or why they may
7 be raised for the first time on appeal, (4) demonstrates just cause by explaining why
8 the issues were not originally raised in the docketing statement, and (5) complies in
9 other respects with the appellate rules. *See State v. Rael*, 1983-NMCA-081, ¶ 15,
10 100 N.M. 193, 668 P.2d 309. This Court will deny motions to amend that raise issues
11 that are not viable, even if they allege fundamental or jurisdictional error. *See State*
12 *v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other*
13 *grounds by State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730.

14 {3} Here, Defendant seeks to add the issue of whether the district court erred in
15 imposing a one-year habitual offender enhancement onto each of the four underlying
16 felonies, when one of those four felonies ran concurrently to the others in the original
17 sentence. [MIO 16] Defendant’s argument presumes that the original concurrent
18 sentence was binding on any subsequent habitual enhancement that had been left
19 open in the plea and the original sentence. This is not the case, and the district court
20 had discretion to impose the habitual enhancements either concurrently or

1 consecutively, regardless of whether the underlying crimes ran concurrently. *See*
2 *State v. Triggs*, 2012-NMCA-068, ¶¶ 17, 19-20, 281 P.3d 1256. Accordingly, we
3 deny the motion to amend because it is not a viable issue.

4 **SUFFICIENCY OF THE EVIDENCE**

5 {4} Defendant continues to challenge the sufficiency of the evidence to support
6 the revocation of his probation. [MIO 8] “In a probation revocation proceeding, the
7 [s]tate bears the burden of establishing a probation violation with a reasonable
8 certainty.” *State v. Leon*, 2013-NMCA-011, ¶ 36, 292 P.3d 493. “To establish a
9 violation of a probation agreement, the obligation is on the [s]tate to prove willful
10 conduct on the part of the probationer so as to satisfy the applicable burden of proof.”
11 *In re Bruno R.*, 2003-NMCA-057, ¶ 11, 133 N.M. 566, 66 P.3d 339; *see also State*
12 *v. Martinez*, 1989-NMCA-036, ¶ 8, 108 N.M. 604, 775 P.2d 1321 (explaining that
13 probation should not be revoked where the violation is not willful, in that it resulted
14 from factors beyond a probationer’s control).

15 {5} Here, the State filed two separate petitions, both of which alleged violations
16 of standard condition #1, which required him to obey the law and not endanger any
17 person or property. [RP 223, 253] The April 27, 2021 petition, alleged that
18 Defendant caused criminal damage to property and resisting an officer. [RP 226]
19 The May 18, 2021 petition, relied on an incident where Defendant attempted to bite
20 corrections officers while prepping for transport, and spit on the officers during

1 transport. [RP 255] The district court found in favor of the State on both petitions.
2 [RP 322] We note that we may affirm if the evidence was sufficient to support any
3 of these violations. *See Leon*, 2013-NMCA-011, ¶ 37 (stating that sufficient
4 evidence to support a single probation violation supports affirmance of a district
5 court's revocation of probation). We also observe that the State did not have to prove
6 the failure to obey the law beyond a reasonable doubt. *See Martinez*, 1989-NMCA-
7 036, ¶ 4 (observing that “proof of a violation of a condition of probation need not be
8 established beyond a reasonable doubt,” but rather, must merely incline a
9 “reasonable and impartial mind to the belief that the defendant has violated the terms
10 of probation”).

11 {6} The majority of Defendant’s argument in his memorandum in opposition is
12 that the criminal damage to property allegation was not sufficiently supported by the
13 evidence, and that the resisting claim linked to this allegation is unsupported as a
14 result because there was no lawful basis to arrest him on the charge. [MIO 8-13] We
15 do not need to address this argument because we conclude that there was sufficient
16 evidence to support the assault and/or battery charge in the May 18, 2021 petition.
17 [RP 255] Specifically, corrections officer Anaya testified that Defendant attempted
18 to bite him prior to transport, and that Defendant had spit in his face during transport,
19 while at the same time Defendant was making threats against the officer’s family.
20 [RP 290; MIO 5] Defendant claims that there may not have been sufficient evidence

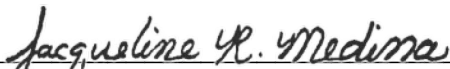
1 of a meeting all of the elements of battery on a peace officer. [MIO 15] However, as
2 Defendant appears to concede, there is sufficient evidence of at least simple battery
3 and therefore the failure to obey the law. [MIO 15] *See State v. Kraul*, 1977-NMCA-
4 032, ¶¶ 13, 15, 90 N.M. 314, 563 P.2d 108 (observing that simple battery is a lesser
5 included offense to battery on a peace officer). In addition, this incident amounted
6 to a reasonable certainty that an assault was committed. *See* NMSA 1978, § 30-3-
7 1(1963) (defining assault).

8 **PROCEDURAL DEADLINE**

9 {7} Defendant’s docketing statement raised the issue of whether the revocation
10 proceeding should have been dismissed because the adjudicatory hearing was not
11 held within sixty days of the initial hearing. [DS 7] *See* Rule 5-805(H) NMRA.
12 Defendant has abandoned this issue. *See State v. Salenas*, 1991-NMCA-056, ¶ 2,
13 112 N.M. 268, 814 P.2d 136 (stating that where a party has not responded to the
14 Court’s proposed disposition of an issue, that issue is deemed abandoned).

15 {8} For the reasons set forth above, we affirm.

16 {9} **IT IS SO ORDERED.**

17 
18 JACQUELINE R. MEDINA, Judge

1 **WE CONCUR:**

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3 **ZACHARY A. IVES, Judge**

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5 **SHAMARA H. HENDERSON, Judge**