

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

Court of Appeals of New Mexico
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2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-40408

5 **ROBERT SERRANO,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **Mary Marlowe Sommer, District Court Judge**

9 Raúl Torrez, Attorney General
10 Santa Fe, NM

11 for Appellee

12 Law Office of Barry Klopfer, P.C.
13 Barry Klopfer
14 Albuquerque, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **HANISEE, Judge.**

18 {1} Defendant appeals his conviction for two counts of criminal sexual
19 penetration of a minor (CSPM). In this Court's notice of proposed disposition, we
20 proposed to summarily affirm. Defendant filed a memorandum in opposition that
21 raises issues not contained in the docketing statement, which we construe as a motion
22 to amend the docketing statement, and deny. Having duly considered Defendant's

1 memorandum, we remain unpersuaded that Defendant has shown error and we
2 therefore affirm.

3 {2} Our calendar notice recognized that Defendant had raised two issues in his
4 docketing statement: (1) the district court abused its discretion in admitting
5 Facebook messages as evidence at trial; and (2) there was insufficient evidence to
6 support his convictions. [CN 3, 5] Defendant’s memorandum in opposition contains
7 nothing responsive to our notice of proposed disposition regarding the sufficiency
8 of the evidence supporting his conviction. We therefore deem that issue abandoned.
9 *See generally State v. Johnson*, 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306
10 (observing that where a memorandum in opposition does not respond to our
11 proposed summary disposition with respect to an issue, that issue is deemed
12 abandoned).

13 {3} In his memorandum in opposition, Defendant maintains that the Facebook
14 messages entered into evidence were not sufficiently authenticated. [MIO 4] We
15 review evidentiary matters for an abuse of discretion. *State v. Jesenya O.*, 2022-
16 NMSC-014, ¶ 10, 514 P.3d 445. “[T]he authentication of social media evidence is
17 governed by the traditional standard set out in Rule 11-901 [NMRA], which requires
18 the proponent to offer evidence sufficient to support a finding that the evidence is
19 what the proponent claims it is.” *Jesenya O.*, 2022-NMSC-014, ¶ 18. Authentication
20 may be accomplished using evidence of “appearance, contents, substance, internal

1 patterns, or other distinctive characteristics of the item, taken together with all the
2 circumstances.” *State v. Jackson*, 2018-NMCA-066, ¶ 13, 429 P.3d 674 (quoting
3 Rule 11-901(B)(4)). Once this threshold showing of admissibility is met, it is for the
4 jury to determine the weight of the evidence, including the identity of a message’s
5 author. *See Jesenya O.*, 2022-NMSC-014, ¶ 18 (stating that “arguments contesting
6 authorship go to the weight of the evidence, not its admissibility”); *cf. State v.*
7 *Hernandez*, 2009-NMCA-096, ¶ 9, 147 N.M. 1, 216 P.3d 251 (“In the event the
8 [s]tate makes a threshold showing of authentication, then ultimately the issue of the
9 caller’s identity will be a matter for the jury to decide.”).

10 {4} In his memorandum in opposition, Defendant continues to argue, as he did in
11 the docketing statement, that the Facebook messages in this case were not properly
12 authenticated because of testimony indicating that it was possible someone other
13 than Victim could have used the accounts attributed to Victim and that there was no
14 way to confirm the identity of each individual who wrote the messages attributed to
15 Victim and Defendant. [MIO 6-7] According to the docketing statement and the
16 memorandum in opposition, law enforcement executed a search warrant for the
17 messages attributable to Victim’s accounts and received a certificate of authenticity
18 directly from Facebook. [MIO 6] These facts indicate that, under *Jesenya O.*, the
19 State met the foundational requirements with regard to the Facebook messages. *See*
20 2022-NMSC-014, ¶ 15 (adopting the traditional authentication standard of Rule 11-

1 901, but noting that even if applying heightened scrutiny to social media content, it
2 would be sufficient to “obtain information directly from the social networking
3 website” linking “the establishment of the profile to the person who allegedly created
4 it”); Rule 11-901(B)(4). Furthermore, a party responding to a summary calendar
5 notice must come forward and specifically point out errors of law and fact, and the
6 repetition of earlier arguments does not fulfill this requirement. *See State v.*
7 *Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003, *superseded by*
8 *statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d
9 374; *see also Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d
10 683 (“Our courts have repeatedly held that, in summary calendar cases, the burden
11 is on the party opposing the proposed disposition to clearly point out errors in fact
12 or law.”). We therefore conclude Defendant has not demonstrated that the district
13 court abused its discretion by admitting the Facebook messages.

14 {5} Next, to the extent the memorandum raises a new issue regarding his sentence,
15 we construe the memorandum as a motion to amend the docketing statement. This
16 Court will deny motions to amend that raise issues that are not viable, even if they
17 allege fundamental or jurisdictional error. *State v. Moore*, 1989-NMCA-073, ¶¶ 36-
18 51, 109 N.M. 119, 782 P.3d 91, *overruled on other grounds by State v. Salgado*,
19 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730. The new issue Defendant raises—
20 apparently for the first time on appeal—is that his sentence of 36 years constitutes


1 cruel and unusual punishment. [MIO 7] In light of the serious nature of the crimes
2 in this case, we are not convinced that this is a viable claim. *See State v. Ira*, 2002-
3 NMCA-037, ¶ 18, 132 N.M. 8, 43 P.3d 359 (noting that cruel and unusual sentence
4 must be so disproportionate to crime that it shocks the conscience); *State v. Trujillo*,
5 2002-NMSC-005, ¶¶ 64-65, 131 N.M. 709, 42 P.3d 814 (reviewing unpreserved
6 claim that sentence constituted cruel and unusual punishment for fundamental error,
7 and affirming the defendant’s thirty year sentence because it did not “shock the
8 general conscience”); *State v. Burdex*, 1983-NMCA-087, ¶ 15, 100 N.M. 197, 668
9 P.2d 313 (“Here, nothing indicates that [the] defendant’s sentence was statutorily
10 improper; a statutorily lawful sentence does not constitute cruel and unusual
11 punishment.”); *cf. State v. Perez*, 2002-NMCA-040, ¶ 40, 132 N.M. 84, 44 P.3d 530
12 (concluding that forty-seven-and-a-half year sentence for five counts of accessory to
13 CSP was a legal sentence that did not shock the conscience or constitute cruel and
14 unusual punishment). Accordingly, we deny the motion to amend. *See State v.*
15 *Ibarra*, 1993-NMCA-040, ¶ 13, 116 N.M. 486, 864 P.2d 302 (indicating that if the
16 issue which the defendant seeks to add to the docketing statement is not viable, the
17 motion to amend will be denied).

18 {6} Furthermore, to the extent Defendant’s memorandum in opposition lists the
19 contested exhibits and simply states they were irrelevant under Rule 11-401 NMRA
20 and unfairly prejudicial under Rule 11-403 NMRA, Defendant has not developed


1 his argument adequately for this Court to identify any error. *See State v. Fuentes*,
2 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (noting that we will “not
3 review unclear or undeveloped arguments [that] require us to guess at what a
4 part[y’s] arguments might be”); *see also State v. Vigil-Giron*, 2014-NMCA-069, ¶
5 60, 327 P.3d 1129 (“[A]ppellate courts will not consider an issue if no authority is
6 cited in support of the issue and that, given no cited authority, we assume no such
7 authority exists.”). As such, Defendant has failed to present a viable issue that would
8 warrant granting a motion to amend the docketing statement. *See Ibarra*, 1993-
9 NMCA-040, ¶ 13.

10 {7} For the reasons stated in our notice of proposed disposition and herein, we
11 affirm.

12 {8} **IT IS SO ORDERED.**

13 
14 **J. MILES HANISEE, Judge**

15 **WE CONCUR:**

16 
17 **JACQUELINE R. MEDINA, Judge**

18 
19 **MEGAN P. DUFFY, Judge**