


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

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico  
Filed 3/18/2024 11:09 AM

3 Plaintiff-Appellee,



Cynthia A. Hernandez-Madrid  
Acting Chief Clerk

4 v.

**No. A-1-CA-41218**

5 **YADIRA LOYA MARRUFO,**

6 Defendant-Appellant.

7 **APPEAL FROM THE METROPOLITAN COURT OF BERNALILLO**  
8 **COUNTY**

9 **Nina Safier, Metropolitan Court Judge**

10 Raúl Torrez, Attorney General

11 Santa Fe, NM

12 for Appellee

13 Law Offices of Christopher C. Marlowe, LLC

14 Christopher C. Marlowe

15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **YOHALEM, Judge.**

19 {1} Defendant Yadira Loya Marrufo appeals from her metropolitan court on-the-  
20 record conviction for first offense driving while intoxicated (DWI). We issued a  
21 calendar notice proposing to affirm. Defendant has responded with a memorandum  
22 in opposition. We affirm.

1 {2} Defendant continues to raise two issues that we consolidate as a claim that the  
2 district court erred in admitting breath alcohol test results because the State failed to  
3 establish compliance with regulation 7.33.2.15(B)(2) NMAC (stating that a breath  
4 test shall not be administered unless the operator “has ascertained that the subject  
5 has not had anything to eat, drink or smoke for at least 20 minutes prior to collection  
6 of the first breath sample”).

7 {3} Prior to the admission of breath-alcohol test (BAT) results, a court must find  
8 by a preponderance of the evidence that all accuracy-ensuring regulations have been  
9 satisfied. *See State v. Willie*, 2009-NMSC-037, ¶ 12, 146 N.M. 481, 212 P.3d 369.  
10 In making this determination, the court can rely on hearsay evidence. *See State v.*  
11 *Martinez*, 2007-NMSC-025, ¶ 23, 141 N.M. 713, 160 P.3d 894. We review a district  
12 court’s decision on whether to admit this evidence for abuse of discretion. *See id.*  
13 ¶ 7.

14 {4} Here, Sergeant Brian Johnson was the sole witness at trial. [DS 1] Sergeant  
15 Johnson conducted a traffic stop of a vehicle driven by Defendant. [DS 1-2] He  
16 arrested Defendant for suspected DWI at 2:01 a.m., and inspected her mouth at that  
17 time, which is consistent with 7.33.2.15(B)(2) NMAC. [DS 2] Officer Christian  
18 Cordova arrived at the scene and transported Defendant to the station for breath  
19 alcohol testing because Sergeant Johnson’s vehicle was not equipped for the  
20 transport. [DS 2] Sergeant Johnson did not arrive at the station until five minutes

1 before he conducted the BAT (3:52 a.m.), because his vehicle had gotten a flat tire.  
2 [DS 2] Sergeant Johnson testified that his recollection was that Defendant was still  
3 handcuffed and seated next to the testing machine, and that he conducted the test  
4 five minutes after he arrived. [DS 2] Sergeant Johnson further stated that Officer  
5 Cordova had observed Defendant during the interim deprivation period. [DS 2-3]  
6 Sergeant Johnson also reiterated that he had personally commenced the deprivation  
7 period when he arrested Defendant at 2:01 a.m. [DS 3-4]

8 {5} Defendant has argued that Officer Cordova was a necessary witness to explain  
9 his observations during the deprivation period, and it would be speculative to  
10 determine that the deprivation period had been satisfied. Defendant maintains that  
11 this is an issue that requires a de novo review of the regulation. [MIO 2] We agree  
12 that the interpretation of an administrative regulation involves a de novo review.  
13 *Willie*, 2009-NMSC-037, ¶ 9. However, the SLD regulation in question and its use  
14 of the term “ascertain” has been broadly interpreted by our Supreme Court to allow  
15 a determination “that a subject has not had anything to eat, drink, or smoke by using  
16 a variety of means at his or her disposal, including observation, on an individualized,  
17 case-by-case basis.” *Id.* ¶ 14.

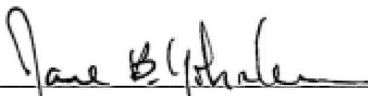
18 {6} As noted, hearsay evidence can be used to support admission of BAT  
19 evidence. *Cf. Martinez*, 2007-NMSC-025, ¶ 23 (holding that this foundational  
20 requirement was satisfied by the hearsay testimony that a sticker on the breathalyzer

1 instrument indicated that it was certified at the time of the defendant’s BAT). The  
2 individual who signed the certification in *Martinez* was not considered an  
3 indispensable witness, and Sergeant Johnson here could rely on his interactions with  
4 Officer Cordova, including the fact that Sergeant Johnson, as a supervisor, stated  
5 that his subordinate (Officer Cordova) had observed Defendant for the deprivation  
6 period. [DS 2-3]

7 {7} Defendant argues that a testifying officer needs to have personally observed  
8 Defendant during the deprivation period. [MIO 9] This constricted interpretation of  
9 “ascertained” is at odds with the holdings of *Willie* and *Martinez*. Finally, the fact  
10 that Defendant had been seated, handcuffed next to the testing machine, further  
11 supports a determination that Defendant had not placed anything in her mouth during  
12 the deprivation period. Based on all of this, we conclude that the metropolitan court  
13 did not abuse its discretion in admitting the evidence. *See State v. Duarte*, 2007-  
14 NMCA-012, ¶ 3, 140 N.M. 930, 149 P.3d 1027 (observing that “[a]n abuse of  
15 discretion occurs when the ruling is clearly against the logic and effect of the facts  
16 and circumstances of the case”).

17 {8} For the reasons set forth above, we affirm.

18 {9} **IT IS SO ORDERED.**

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**JANE B. YOHALEM, Judge**

1 **WE CONCUR:**

2 *Jacqueline R. Medina*  
3 JACQUELINE R. MEDINA, Judge

4 *Megan P. Duffy*  
5 MEGAN P. DUFFY, Judge