

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

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

2| STATE OF NEW MEXICO,

## Court of Appeals of New Mexico

Filed 1/21/2026 8:10 AM

Plaintiff-Appellee,

Mark Reynolds

4 | V.

**No. A-1-CA-42125**

5 | BENITO MARTINEZ,

6 Defendant-Appellant.

7 APPEAL FROM THE METROPOLITAN COURT OF BERNALILLO  
8 COUNTY

## 9 | Jill M. Martinez, Metropolitan Court Judge

10 | Raúl Torrez, Attorney General

11 | Santa Fe, NM

12 for Appellee

13 | Bennett J, Baur, Chief Public Defender

14 | Melanie C. McNett, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

## MEMORANDUM OPINION

18 | ATTREP, Judge.

19 {1} This matter was submitted to the Court on the brief in chief pursuant to this  
20 Court's general calendar notice with a modified briefing schedule. Having  
21 considered the brief in chief, concluding the briefing submitted to the Court provides  
22 no possibility for reversal, and determining that this case is appropriate for resolution  
23 on Track 1 as defined in the Administrative Order for Appeals in Criminal Cases

1 from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project*  
2 *for Criminal Appeals*, No. 2022-002, effective November 1, 2022, we affirm.

3 {2} Defendant appeals his metropolitan court conviction for driving while under  
4 the influence. Defendant argues that the metropolitan court erred in admitting  
5 portions of a 911 call that contained testimonial statements of a nontestifying  
6 witness.

7 {3} According to Defendant's brief in chief the charges in this case arose when  
8 Defendant was alleged to have hit a parked car and, later, a fire hydrant around 9:00  
9 p.m. [BIC 1] At least two people heard the crash, one of whom testified at trial.  
10 [BIC 1]

11 {4} The witness who testified at trial was Norberto Rodriguez, who lived nearby  
12 where the accident occurred. [BIC 1-2] Rodriguez looked outside and saw that there  
13 had been a collision. [BIC 1] He observed the profile of the driver of one vehicle,  
14 including that the driver was wearing a hat. [BIC 1] Rodriguez did not see the  
15 driver's face, but described him as an older man with white and black hair on the  
16 sides of his head. [BIC 1] Rodriguez saw the driver get out of the vehicle, looking  
17 dizzy, after the collision and observed that the man had a black dog with him. [BIC  
18 1-2] The driver of the vehicle apparently got back into his car, and Rodriguez also  
19 got into his car and followed the vehicle, later observing it hit a fire hydrant. [BIC

1 1-2] Rodriguez never interacted with the driver of the car and could not identify who  
2 the driver was at trial. [BIC 1-2]

3 {5} The other person who heard the crash did not testify at trial. Instead, portions  
4 of statements he made during a 911 call were played, after a records data coordinator  
5 for 911/dispatch laid the foundation for the call's admission. [BIC 2] The facts  
6 admitted from the 911 call were as follows. The 911 caller heard banging noises and  
7 saw a vehicle pass by, hitting the curb, while the caller was outside of his home  
8 smoking a cigarette. [BIC 3] The caller described the driver of the vehicle as "a  
9 Mexican man in his 50s, about 5 feet 6 inches tall, weighing at least 180 pounds,  
10 heavy build, and wearing an orange beanie and brown pants." [BIC 3] The caller  
11 apparently got into his vehicle and followed the driver, who was now on foot. [BIC  
12 3] The driver apparently yelled at the caller, before he stopped in front of a home  
13 and laid down in the street. [BIC 3]

14 {6} The State also presented law enforcement witnesses, including a lapel video  
15 of Defendant's field sobriety testing. This testimony linked Defendant to the black  
16 vehicle, as its registered owner [BIC 3]; established that there was a dog nearby to  
17 the scene when Defendant was interacting with officers [BIC 4]; and indicated that  
18 Defendant was lying on the ground, seemingly intoxicated and belligerent, when  
19 officers first encountered and interacted with Defendant. [BIC 4] The law

1 enforcement testimony also corroborated the two civilian descriptions of the driver  
2 of the vehicle and matched them to Defendant. [BIC 4-5]

3 {7} Defendant objected to the 911 call as hearsay and on grounds that it violated  
4 the Confrontation Clause. Defendant also argued the call was more prejudicial than  
5 probative, noting that the caller was listed on the State's witness list, but the State  
6 "inexplicably chose not to interview or call him to testify." [BIC 3] The State  
7 responded that the 911 audio was admissible as a present sense impression and as an  
8 excited utterance, and that it did not violate the Confrontation Clause because it  
9 pertained to an ongoing emergency. [BIC 2] After listening to the 911 call in its  
10 entirety, the metropolitan court admitted the portions of the call where the caller  
11 described events happening as they occurred, but excluded the dispatcher's  
12 questions and the caller's identifying information. [BIC 3] The metropolitan court  
13 held that the caller's ongoing description of events, including of the driver, were  
14 admissible as present sense impressions. [BIC 3]

15 {8} On appeal, Defendant does not appear to challenge that the admitted portions  
16 of the 911 call qualified for admission under the present sense impression to the  
17 hearsay rule. Instead, Defendant argues, "[t]he fact that evidence may have qualified  
18 for admission under an exception to the hearsay rule does not necessarily mean that  
19 a defendant's constitutional right to confrontation was not violated." [BIC 6] *State*  
20 *v. Martinez*, 1982-NMCA-137, ¶ 16, 99 N.M. 48, 653 P.2d 879.

1 {9} The admissibility of out-of-court statements under the Confrontation Clause  
2 is a question of law that we review de novo. *State v. Largo*, 2012-NMSC-015, ¶ 9,  
3 278 P.3d 532.

4 Statements are nontestimonial when made in the course of police  
5 interrogation under circumstances objectively indicating that the  
6 primary purpose of interrogation is to enable police assistance to meet  
7 an ongoing emergency. They are testimonial when the circumstances  
8 objectively indicate that there is no such ongoing emergency, and that  
9 the primary purpose of the interrogation is to establish or prove past  
10 events potentially relevant to a later criminal prosecution.

11 *Id.* (alterations, internal quotation marks, and citation omitted). We have identified  
12 four factors that guide the analysis of whether a statement is nontestimonial:

13 [A] statement is likely nontestimonial if (1) the individual is describing  
14 events as they are actually happening rather than describing past events;  
15 (2) the individual is facing an ongoing emergency; (3) when viewed  
16 objectively, the elicited statements are necessary to resolve a present  
17 emergency rather than simply to learn what had happened in the past;  
18 and (4) the individual's statements were not made in the safety of a  
19 station house or in response to a series of questions with an officer-  
20 interrogator taping and making notes but were provided over the phone  
21 in an environment that was neither tranquil nor safe.

22 *State v. Soliz*, 2009-NMCA-079, ¶ 13, 146 N.M. 616, 213 P.3d 520.

23 {10} Defendant argues that the admitted statements of the 911 call were testimonial  
24 because there was no ongoing emergency at the time of the call. [BIC 9] Instead,  
25 "the driver was walking down the street, and the caller was following in a car." [BIC  
26 9] See *State v. Romero*, 2007-NMSC-013, ¶ 21, 141 N.M. 403, 156 P.3d 694  
27 ("[W]hen an interrogation, as part of an investigation, about potentially criminal *past*

1 conduct is conducted, a declarant's statements are testimonial." (internal quotation  
2 marks and citation omitted)). We conclude that Defendant's argument defines the  
3 term "ongoing emergency" too narrowly. *See Soliz*, 2009-NMCA-079, ¶¶ 20, 23  
4 (rejecting a defendant's "narrow definition of the term ongoing emergency" and  
5 noting that "the fact that [a caller] initiated the 911 call after [an] attack—and was  
6 thus describing an event that had already occurred—does not, in and of itself, render  
7 those statements a description of past events").

8 {11} Under the relevant circumstances of this case, the 911 caller was describing  
9 events as they were happening in a circumstance that lacked formality. *See Largo*,  
10 2012-NMSC-015, ¶ 14 (noting that the "formality involved in an interrogation  
11 conducted at a police station" indicates the absence of an emergency, whereas  
12 "quick, unstructured" questioning occurring at the scene tends to indicate the  
13 existence of an emergency). Indeed, while Defendant was no longer driving a vehicle  
14 at the exact moment the 911 call was occurring, the relevant circumstances indicate  
15 that the environment was neither tranquil nor safe: Defendant had already exited and  
16 reentered his vehicle once, causing a second accident [BIC 1-2]; Defendant was  
17 yelling at the 911 caller while the call was occurring [BIC 3-4]; Defendant was  
18 apparently belligerent in general [BIC 3-4]; and Defendant was lying on the ground  
19 in the street while the call was ongoing and when law enforcement subsequently  
20 arrived [BIC 3-4]. These circumstances suggest the existence of an ongoing

1 emergency. *See Soliz*, 2009-NMCA-079, ¶¶ 19-20 (noting that statements made to a  
2 911 operator about events that had just occurred tend to indicate an ongoing  
3 emergency because they serve to establish whether a defendant poses a present  
4 danger and to provide officers dispatched to apprehend the defendant with “the  
5 information they needed to ensure their safety while carrying out that task”).

6 {12} Accordingly, we hold that the statements to the 911 operator were  
7 nontestimonial. *See Largo*, 2012-NMSC-015, ¶¶ 14-21 (concluding under the facts  
8 of the case that a victim’s statements to a 911 call operator were not testimonial);  
9 *Soliz*, 2009-NMCA-079, ¶¶ 19-30 (analyzing the four factors and determining that  
10 statements made during a 911 call were not testimonial). We therefore conclude that  
11 the admitted portions of the 911 call did not violate Defendant’s right to  
12 confrontation.

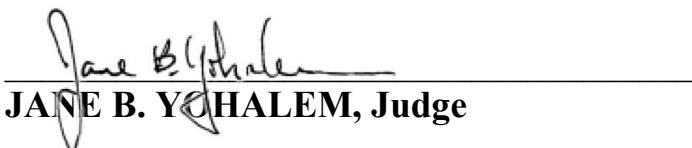
13 {13} For the reasons stated above, we affirm Defendant’s conviction.

14 {14} **IT IS SO ORDERED.**

15   
16 JENNIFER L. ATTREP, Judge

17 **WE CONCUR:**

18   
19 JACQUELINE R. MEDINA, Chief Judge

20   
21 JANE B. YOHALEM, Judge