

1 {2} Relying on the same theories presented in her docketing statement,
2 Defendant’s memorandum in opposition maintains that there was insufficient
3 evidence to support her conviction [MIO 6-13] and the metropolitan court erred in
4 admitting testimony from a drug recognition expert (DRE) without additional
5 corroborating expert testimony. [MIO 14-18]

6 {3} For her sufficiency argument, Defendant continues to rely on *State v. Sims*,
7 2010-NMSC-027, 148 N.M. 330, 236 P.3d 642; *State v. Mailman*, 2010-NMSC-036,
8 148 N.M. 702, 242 P.3d 269; and *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583
9 263 P.3d 925, to argue that the State failed to present evidence that Defendant was
10 in physical control of the vehicle and intended to drive at the time of the accident.
11 [MIO 8-13] Our calendar notice proposed to affirm in light of the testimony from
12 two officers who responded to the accident. [CN 3] One officer testified that
13 Defendant was found sitting in the driver seat of the car that caused the accident,
14 Defendant admitted to driving immediately before and causing the accident,
15 Defendant failed field sobriety tests and struggled to maintain her balance when
16 asked to leave the car. [CN 3] The second officer, the DRE, testified that Defendant
17 admitted to taking controlled substances and observed that Defendant was acting
18 “restless[], eyes rolling in the back of her head, rocking back and forth, and [with]
19 random body movements.” [CN 3-4] Defendant acknowledges the same in her
20 memorandum. [MIO 2-6] While Defendant argues that the State failed to prove

1 actual physical control, this is not “necessary to prove DWI unless there are no
2 witnesses to the vehicles motion *and insufficient circumstantial evidence to infer*
3 *that the accused actually drove while intoxicated.*” *Mailman*, 2010-NMSC-036, ¶
4 28. “Such evidence may include the accused’s own admission” or “any other similar
5 evidence that tends to prove that the accused drove while intoxicated,” all of which
6 is present in the instant case. *See id.*

7 {4} Defendant also continues to argue that the metropolitan court relied on
8 excluded hearsay statements. [MIO 12-13] But as we explained in our notice of
9 proposed disposition, the officers’ testimony allowed for the same inference as the
10 excluded statements, and because the metropolitan court did not rely on the hearsay
11 statements, any reference to the statements in the State’s closing argument was
12 harmless. *See State v. Hernandez*, 1999-NMCA-105, ¶ 22, 127 N.M. 769, 987 P.2d
13 1156 (“We presume that a judge is able to properly weigh the evidence, and thus the
14 erroneous admission of evidence in a bench trial is harmless unless it appears that
15 the judge must have relied upon the improper evidence in rendering a decision.”).

16 {5} For her argument that the metropolitan court erred in admitting the DRE
17 testimony, Defendant continues to argue that *State v. Aleman*, 2008-NMCA-137,
18 145 N.M. 79, 194 P.3d 110, requires a secondary expert opinion to admit DRE
19 testimony. [MIO 14-16] But as we explained in our notice of proposed disposition,
20 *Aleman* sets no such requirement. [CN 6] While the *Aleman* Court found additional

1 expert testimony corroborating the DRE testimony at issue helpful, it was not
2 required to establish the DRE’s expert qualification to testify to his specialized
3 knowledge. *See id.* ¶¶ 9, 19. Although Defendant argues that the testimony should
4 also have been excluded because the full exam was not completed because
5 Defendant refused a blood test, Defendant acknowledges this is a question of
6 weight—not admissibility—of the testimony. [MIO 17] *See id.* ¶ 24 (noting that
7 “[a]ny dispute about the accuracy of the [DRE exam]’s methods is a question of
8 weight of the evidence and not its admissibility” (internal quotation marks and
9 citation omitted)). Because the metropolitan court properly admitted the DRE
10 testimony, we decline to address Defendant’s harmless error argument. [MIO 17-
11 18]

12 {6} Because Defendant maintains the same arguments that this Court has already
13 addressed, Defendant does not now direct this Court to any new fact, law, or
14 argument that persuades this Court that our notice of proposed disposition was
15 incorrect. *See State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d
16 1003 (stating that a party responding to a summary calendar notice must come
17 forward and specifically point out errors of law and fact, and the repetition of earlier
18 arguments does not fulfill this requirement), *superseded by statute on other grounds*
19 *as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374; *see also Hennessy*
20 *v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have

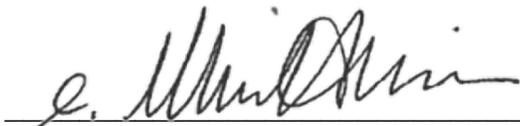
1 repeatedly held that, in summary calendar cases, the burden is on the party opposing
2 the proposed disposition to clearly point out errors in fact or law.”). We therefore
3 remain unpersuaded that Defendant’s conviction was supported by insufficient
4 evidence or that the metropolitan court erred by admitting the DRE testimony.

5 {7} For the reasons stated in our notice of proposed disposition and herein, we
6 affirm.

7 {8} **IT IS SO ORDERED.**

8 
9 **JENNIFER L. ATTREP, Judge**

10 **WE CONCUR:**

11 
12 **J. MILES HANISEE, Judge**

13 
14 **ZACHARY A. IVES, Judge**