IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42964**

PORTIA HITE,

Defendant-Appellant.

APPEAL FROM THE METROPOLITAN COURT OF BERNALILLO COUNTY
Maria Dominguez, Metropolitan Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Geran D. Lanen, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

MEDINA, Chief Judge.

{1} This matter was submitted to this Court on the brief in chief in the above-entitled cause, pursuant to this Court's notice of assignment to the general calendar with modified briefing. Having considered the brief in chief, concluding the briefing submitted to this Court provides no possibility for reversal, and determining that this case is appropriate for resolution on Track 1 as defined in the Administrative Order

in *In re Pilot Project for Criminal Appeals*, No. 2022-002, we affirm for the following reasons.

{2} Defendant appeals her conviction for aggravated driving while intoxicated (DWI), challenging the sufficiency of the evidence. *See* NMSA 1978, § 66-8-102(A) (2016) ("It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state."), *id.* (D)(1) (defining aggravated DWI as "driving a vehicle in this state with an alcohol concentration of sixteen one hundredths or more in the driver's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle").

{3} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). We view the evidence "in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "We will not substitute our judgment for that of the fact[-]finder, nor will we reweigh the evidence." *State v. Trujillo*, 2012-NMCA-092, ¶ 5, 287 P.3d 344.

{4} At trial, Sergeant Danny Padilla testified that he was on duty in northwest Albuquerque, when he came upon the scene of a crash at an intersection. Sergeant Padilla testified that he contacted dispatch to see if an accident had been reported, and this occurred around 9:25 a.m. [BIC 2] Defendant informed Sergeant Padilla that she and the other driver had exchanged information and that a tow truck had been called. Defendant also told Sergeant Padilla that she had "just dropped [her] daughter off at school." [CD 8/26, 2025: 1:48:17] Sergeant Padilla called for a DWI unit after observing that Defendant appeared dazed. [BIC 2]

{5} Officer Alexander Cordero testified that he arrived at the scene at around 9:00 a.m. in response to Sergeant Padilla's call. [BIC 2] Defendant told Officer Cordero that she had caused the accident by running a light. [CD 8/26, 2025: 2:19:23-2:19:35] Officer Cordero noticed that Defendant had slurred speech, bloodshot, watery eyes, and was emanating a faint odor of alcohol. [BIC 3] Officer Cordero administered Standard Field Sobriety Tests (SFSTs), and testified that Defendant stepped off the line, made an improper turn, stepped backwards, and used her arms for balance during the "walk and turn" test. During the "one-leg stand" test, Officer Cordero noted that Defendant put her foot down, used her arms for balance, failed to count properly and was swaying. [BIC 3]

{6} Officer Cordero placed Defendant under arrest on suspicion of DWI. [BIC 4] After a deprivation period that began at 9:50 a.m., Officer Cordero administered

three breath alcohol tests beginning at 10:31 a.m. Defendant's blood alcohol concentrations (BAC) registered at 0.27, 0.24, and 0.25. [BIC 4] Following a bench trial, the metropolitan court convicted Defendant of aggravated DWI and failure to yield. [BIC 6; MRP] This appeal follows.

{7} Defendant raises two arguments premised on her contention that the there was no evidence establishing when she drove the vehicle. Defendant first argues that the State failed to prove that it measured her BAC within three hours of her driving, as required to prove per se DWI. [BIC 9-13] *See* UJI 14-4506 NMRA (requiring the fact-finder to find that the defendant operated a motor vehicle and that, within three hours of driving, the defendant had an alcohol concentration of 0.16 grams or more and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle in order to convict the defendant of aggravated DWI). Defendant also contends that the State failed to prove a nexus between her impairment and driving. [BIC 21-29] *See State v. Cotton*, 2011-NMCA-096, ¶ 14, 150 N.M. 583, 263 P.3d 925 (holding that in order to prove that a defendant drove while impaired in violation of Section 66-8-102, there must be evidence "presented to prove that the driving and impairment overlapped").

{8} The State presented evidence that Defendant's BAC measured above 0.16 at 10:31 a.m. Accordingly, in order to convict Defendant of aggravated DWI, the State had to prove that Defendant drove her vehicle after 7:31 a.m. and that she consumed

alcohol before driving. *See* § 66-8-102(D)(1); UJI 14-4506. As noted, Sergeant Padilla testified he came upon the scene of the crash and called dispatch at around 9:25 a.m.[1] At that time, the two vehicles involved were still in the intersection, and when Sergeant Padilla approached Defendant, she told him that she had "just dropped her daughter off at school." *See State v. Alvarez*, 2018-NMCA-006, ¶ 16, 409 P.3d 950 (concluding that the defendant had recently drove his truck into a median while impaired when the dispatch call reported that someone had observed the truck stuck in the median trying to pull back into traffic, the truck was found stuck in the median when officers responded to the scene, and the truck's hazard lights were on). The metropolitan court could reasonably infer from this statement and the circumstances that Defendant had driven her vehicle recently, and not several hours prior. *See State v. Mailman*, 2010-NMSC-036, ¶ 28, 148 N.M. 702, 242 P.3d 269 (holding that circumstantial evidence to infer that the defendant drove while intoxicated can include the defendant's own admissions, the location of the vehicle, or any other similar evidence). We therefore conclude that there was

[1]Defendant argues that the timeline of events is unclear because Officer Cordero testified that he arrived at around 9:00 a.m., and Sergeant Padilla testified that he arrived at around 9:25 a.m., and thereafter called Officer Cordero to the scene. [BIC 11-12] We note, however, that "it is for the fact-finder to evaluate the weight of the evidence, to assess the credibility of the various witnesses, and to resolve any conflicts in the evidence." *State v. Armijo*, 2005-NMCA-010, ¶ 4, 136 N.M. 723, 104 P.3d 1114.

sufficient evidence from which the metropolitan court could find that Defendant's BAC was measured within three hours of driving.

{9} We also reject Defendant's argument that the State failed to prove that she was impaired by alcohol when she drove the vehicle. [BIC 21-29] Defendant relies on our analysis in *Cotton*, for this argument, in which we reversed the defendant's conviction for aggravated DWI because the state failed to provide evidence that the defendant actually drove while impaired. *See* 2011-NMCA-096, ¶ 13. The defendant was found by the responding officer sitting in the driver's seat of a van parked on the side of the road. *Id.* ¶¶ 4, 5. "The van was not running, and the keys were not in the ignition." *Id.* ¶ 5. The defendant failed field sobriety tests and admitted to drinking an hour before the officer arrived. *Id.* ¶ 6. At trial, "there was no evidence presented to prove that the driving and impairment overlapped. No one testified about seeing [the d]efendant driving while impaired." *Id.* ¶ 14. Additionally, because there was no evidence regarding when the defendant had parked the van, we noted that the defendant could have parked the van and then consumed the beer. *Id.* We therefore concluded the state "failed to establish that [the d]efendant drove after he had consumed alcohol and after alcohol had impaired his ability to drive to the slightest degree." *Id.* (emphasis omitted).

{10} *Cotton* does not assist Defendant. Unlike in *Cotton*, in this case, when officers encountered Defendant she admitted that she had caused a collision with another

vehicle by running a light and failing to yield, and Defendant made comments indicating the accident had recently occurred. Defendant also had slurred speech, bloodshot watery eyes, smelled of alcohol, and she performed poorly on SFSTs. Under these circumstances, "a reasonable [fact-finder] could infer that the collision itself was evidence of [the d]efendant's impairment at the time [they] operated the vehicle." *See State v. Willyard*, 2019-NMCA-058, ¶ 26, 450 P.3d 445.

{11} For these reasons, we hold that there was sufficient evidence to prove that Defendant drove while intoxicated. *See Mailman*, 2010-NMSC-036, ¶¶ 23, 27-28 (observing that direct evidence is not required to support a conviction for past DWI; rather, circumstantial evidence may be relied upon to establish that the accused actually drove while intoxicated). Accordingly, we do not consider Defendant's argument that the State's failed to prove actual physical control of the vehicle. [BIC 13-15] *See id.* ¶ 28 ("Actual physical control is not necessary to prove DWI unless there are no witnesses to the vehicle's motion and insufficient circumstantial evidence to infer that the accused actually drove while intoxicated." (emphasis omitted)); *State v. Flores*, 2010-NMSC-002, ¶ 19, 147 N.M. 542, 226 P.3d 641 ("[C]ircumstantial evidence alone can amount to substantial evidence."), *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, ¶ 87, 478 P.3d 880.

{12} For these reasons, we affirm Defendant's conviction for aggravated DWI. We note, however, that the metropolitan court judgment and sentence indicates that

Defendant entered a guilty plea to the charges. [MRP 30] As the recording of the metropolitan court proceedings reflects that Defendant was found guilty following a bench trial, the notation on the judgment and sentence appears to be a clerical error. We therefore remand this case to the metropolitan court for entry of a corrected judgment and sentence.

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

JACQUELINE R. MEDINA, Chief Judge

WE CONCUR:

ZACHARY A. IVES, Judge

JANE B. YOHALEM, Judge