

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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

5 **PORTIA HITE,**

6 Defendant-Appellant.

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

9 **Maria Dominguez, Metropolitan Court Judge**

10 Raúl Torrez, Attorney General

11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Chief Public Defender

14 Geran D. Lanen, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **MEDINA, Chief Judge.**

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

Court of Appeals of New Mexico

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Mark Reynolds

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

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

3 {2} Defendant appeals her conviction for aggravated driving while intoxicated  
4 (DWI), challenging the sufficiency of the evidence. *See* NMSA 1978, § 66-8-102(A)  
5 (2016) (“It is unlawful for a person who is under the influence of intoxicating liquor  
6 to drive a vehicle within this state.”), *id.* (D)(1) (defining aggravated DWI as  
7 “driving a vehicle in this state with an alcohol concentration of sixteen one  
8 hundredths or more in the driver’s blood or breath within three hours of driving the  
9 vehicle and the alcohol concentration results from alcohol consumed before or while  
10 driving the vehicle”).

11 {3} “The test for sufficiency of the evidence is whether substantial evidence of  
12 either a direct or circumstantial nature exists to support a verdict of guilt beyond a  
13 reasonable doubt with respect to every element essential to a conviction.” *State v.*  
14 *Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks  
15 and citation omitted). We view the evidence “in the light most favorable to the guilty  
16 verdict, indulging all reasonable inferences and resolving all conflicts in the  
17 evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128  
18 N.M. 711, 998 P.2d 176. “We will not substitute our judgment for that of the  
19 fact[-]finder, nor will we reweigh the evidence.” *State v. Trujillo*, 2012-NMCA-092,  
20 ¶ 5, 287 P.3d 344.

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

9 {5} Officer Alexander Cordero testified that he arrived at the scene at around 9:00  
10 a.m. in response to Sergeant Padilla’s call. [BIC 2] Defendant told Officer Cordero  
11 that she had caused the accident by running a light. [CD 8/26, 2025: 2:19:23-  
12 2:19:35] Officer Cordero noticed that Defendant had slurred speech, bloodshot,  
13 watery eyes, and was emanating a faint odor of alcohol. [BIC 3] Officer Cordero  
14 administered Standard Field Sobriety Tests (SFSTs), and testified that Defendant  
15 stepped off the line, made an improper turn, stepped backwards, and used her arms  
16 for balance during the “walk and turn” test. During the “one-leg stand” test, Officer  
17 Cordero noted that Defendant put her foot down, used her arms for balance, failed  
18 to count properly and was swaying. [BIC 3]

19 {6} Officer Cordero placed Defendant under arrest on suspicion of DWI. [BIC 4]  
20 After a deprivation period that began at 9:50 a.m., Officer Cordero administered

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

5 {7} Defendant raises two arguments premised on her contention that there was  
6 no evidence establishing when she drove the vehicle. Defendant first argues that the  
7 State failed to prove that it measured her BAC within three hours of her driving, as  
8 required to prove per se DWI. [BIC 9-13] *See* UJI 14-4506 NMRA (requiring the  
9 fact-finder to find that the defendant operated a motor vehicle and that, within three  
10 hours of driving, the defendant had an alcohol concentration of 0.16 grams or more  
11 and the alcohol concentration resulted from alcohol consumed before or while  
12 driving the vehicle in order to convict the defendant of aggravated DWI). Defendant  
13 also contends that the State failed to prove a nexus between her impairment and  
14 driving. [BIC 21-29] *See State v. Cotton*, 2011-NMCA-096, ¶ 14, 150 N.M. 583,  
15 263 P.3d 925 (holding that in order to prove that a defendant drove while impaired  
16 in violation of Section 66-8-102, there must be evidence “presented to prove that the  
17 driving and impairment overlapped”).

18 {8} The State presented evidence that Defendant’s BAC measured above 0.16 at  
19 10:31 a.m. Accordingly, in order to convict Defendant of aggravated DWI, the State  
20 had to prove that Defendant drove her vehicle after 7:31 a.m. and that she consumed

1 alcohol before driving. *See* § 66-8-102(D)(1); UJI 14-4506. As noted, Sergeant  
2 Padilla testified he came upon the scene of the crash and called dispatch at around  
3 9:25 a.m.<sup>1</sup> At that time, the two vehicles involved were still in the intersection, and  
4 when Sergeant Padilla approached Defendant, she told him that she had “just  
5 dropped her daughter off at school.” *See State v. Alvarez*, 2018-NMCA-006, ¶ 16,  
6 409 P.3d 950 (concluding that the defendant had recently drove his truck into a  
7 median while impaired when the dispatch call reported that someone had observed  
8 the truck stuck in the median trying to pull back into traffic, the truck was found  
9 stuck in the median when officers responded to the scene, and the truck’s hazard  
10 lights were on). The metropolitan court could reasonably infer from this statement  
11 and the circumstances that Defendant had driven her vehicle recently, and not  
12 several hours prior. *See State v. Mailman*, 2010-NMSC-036, ¶ 28, 148 N.M. 702,  
13 242 P.3d 269 (holding that circumstantial evidence to infer that the defendant drove  
14 while intoxicated can include the defendant’s own admissions, the location of the  
15 vehicle, or any other similar evidence). We therefore conclude that there was

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<sup>1</sup>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.

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

3 {9} We also reject Defendant's argument that the State failed to prove that she  
4 was impaired by alcohol when she drove the vehicle. [BIC 21-29] Defendant relies  
5 on our analysis in *Cotton*, for this argument, in which we reversed the defendant's  
6 conviction for aggravated DWI because the state failed to provide evidence that the  
7 defendant actually drove while impaired. *See* 2011-NMCA-096, ¶ 13. The defendant  
8 was found by the responding officer sitting in the driver's seat of a van parked on  
9 the side of the road. *Id.* ¶¶ 4, 5. "The van was not running, and the keys were not in  
10 the ignition." *Id.* ¶ 5. The defendant failed field sobriety tests and admitted to  
11 drinking an hour before the officer arrived. *Id.* ¶ 6. At trial, "there was no evidence  
12 presented to prove that the driving and impairment overlapped. No one testified  
13 about seeing [the d]efendant driving while impaired." *Id.* ¶ 14. Additionally, because  
14 there was no evidence regarding when the defendant had parked the van, we noted  
15 that the defendant could have parked the van and then consumed the beer. *Id.* We  
16 therefore concluded the state "failed to establish that [the d]efendant drove after he  
17 had consumed alcohol and after alcohol had impaired his ability to drive to the  
18 slightest degree." *Id.* (emphasis omitted).

19 {10} *Cotton* does not assist Defendant. Unlike in *Cotton*, in this case, when officers  
20 encountered Defendant she admitted that she had caused a collision with another

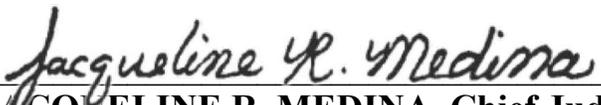
1 vehicle by running a light and failing to yield, and Defendant made comments  
2 indicating the accident had recently occurred. Defendant also had slurred speech,  
3 bloodshot watery eyes, smelled of alcohol, and she performed poorly on SFSTs.  
4 Under these circumstances, “a reasonable [fact-finder]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

7 {11} For these reasons, we hold that there was sufficient evidence to prove that  
8 Defendant drove while intoxicated. *See Mailman*, 2010-NMSC-036, ¶¶ 23, 27-28  
9 (observing that direct evidence is not required to support a conviction for past DWI;  
10 rather, circumstantial evidence may be relied upon to establish that the accused  
11 actually drove while intoxicated). Accordingly, we do not consider Defendant’s  
12 argument that the State’s failed to prove actual physical control of the vehicle. [BIC  
13 13-15] *See id.* ¶ 28 (“Actual physical control is not necessary to prove DWI unless  
14 there are no witnesses to the vehicle’s motion and insufficient circumstantial  
15 evidence to infer that the accused actually drove while intoxicated.” (emphasis  
16 omitted)); *State v. Flores*, 2010-NMSC-002, ¶ 19, 147 N.M. 542, 226 P.3d 641  
17 (“[C]ircumstantial evidence alone can amount to substantial evidence.”), *overruled*  
18 *on other grounds by State v. Martinez*, 2021-NMSC-002, ¶ 87, 478 P.3d 880.

19 {12} For these reasons, we affirm Defendant’s conviction for aggravated DWI. We  
20 note, however, that the metropolitan court judgment and sentence indicates that

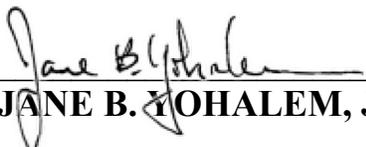
1 Defendant entered a guilty plea to the charges. [MRP 30] As the recording of the  
2 metropolitan court proceedings reflects that Defendant was found guilty following a  
3 bench trial, the notation on the judgment and sentence appears to be a clerical error.  
4 We therefore remand this case to the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

6 {13} **IT IS SO ORDERED.**

7   
8 **JACQUELINE R. MEDINA, Chief Judge**

9 **WE CONCUR:**

10   
11 **ZACHARY A. IVES, Judge**

12   
13 **JANE B. YOHALEM, Judge**