

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

No. A-1-CA-42538

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

LAWRENCE MCCORMICK,

Defendant-Appellant.

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

Nina Safier, Metropolitan Court Judge

Raúl Torrez, Attorney General

Santa Fe, NM

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for Appellee

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for Appellant

OPINION

DUFFY, Judge.

{1} Defendant Lawrence McCormick challenges his convictions for aggravated driving while intoxicated (DWI), contrary to NMSA 1978, Section 66-8-102(D)(3) (2016), and possession of an open container in a motor vehicle, contrary to NMSA 1978, Section 66-8-138(B) (2013). Defendant raises four issues on appeal: (1) the metropolitan court erred in sentencing Defendant as a third-time DWI offender; (2) the metropolitan court erred in declining to strike a juror for actual bias; (3) the metropolitan court erred in admitting 911 call audio and the admission of the recording violated Defendant's right of confrontation; and (4) the State presented insufficient evidence to support Defendant's convictions. We affirm.

BACKGROUND

{2} In the afternoon on October 11, 2023, a driver on Louisiana Boulevard in Albuquerque called 911 to report that a vehicle was stopped in the roadway with an unconscious man in the driver's seat who had a bottle of alcohol in his lap. When officers with the Albuquerque Police Department arrived, they located a running vehicle stopped in a lane of travel and blocking a side street, with a man later identified as Defendant unresponsive in the front seat. One officer shut off the vehicle and removed a bottle of alcohol from between Defendant's legs as he attempted to rouse Defendant. When Defendant came to, he reached for the steering

column and began fumbling for his keys before another officer removed the keys from the ignition. Defendant then complied with instructions to exit the vehicle and proceed to the curb. He had bloodshot, watery eyes and smelled of alcohol. Defendant struggled to answer officers' questions, slurred his speech, and attempted to get up from the curb several times but could not keep his balance. Ultimately, officers determined that it was unsafe to attempt standardized field sobriety tests due to Defendant's condition and placed him under arrest. Defendant subsequently refused to submit to a breath test. He was tried before a jury and convicted of aggravated DWI and possession of an open container. He was then sentenced as a third-time DWI offender. This appeal followed.

DISCUSSION

I. The Metropolitan Court Did Not Err in Sentencing Defendant as a Third-Time DWI Offender

{3} Defendant challenges his sentence for a DWI (third) conviction, arguing that the sentence is illegal because the State did not present evidence of Defendant's prior DWI convictions, and Defendant did not otherwise stipulate to or waive the State's burden to submit such proof. Defendant contends that the absence of evidence of prior convictions renders his sentence illegal. Our review is de novo to the extent that we evaluate what is required under Section 66-8-102 to prove prior DWI convictions to enhance a DWI sentence. *See State v. Garrett*, 2026-NMCA-016, ¶ 28, 584 P.3d 1049 (applying a de novo standard of review to determine a trial

1 court's sentencing authority derived from statute as a feature of the court's subject
2 matter jurisdiction). However, we review Defendant's challenge to the evidence
3 supporting the sentencing enhancement for its sufficiency. *See State v. Lopez*, 2009-
4 NMCA-127, ¶¶ 31, 36-44, 147 N.M. 364, 222 P.3d 361 (analyzing challenge to
5 application of DWI enhancement under sufficiency of the evidence standard).

6 {4} Whether a defendant is charged with a first or subsequent offense under
7 Section 66-8-102(A)-(D), "the elements of DWI do not change." *State v. Diaz*, 2007-
8 NMCA-026, ¶ 16, 141 N.M. 223, 153 P.3d 57. Instead, the statute provides
9 sentencing enhancements for repeat offenders, which are graduated based on the
10 defendant's prior DWI convictions. *State v. Anaya*, 1997-NMSC-010, ¶ 18, 123
11 N.M. 14, 933 P.2d 223; *Lopez*, 2009-NMCA-127, ¶ 36; § 66-8-102(E)-(K). "In
12 proving prior DWI convictions for purposes of enhancing a DWI conviction, the
13 state has the initial burden of presenting evidence of the validity of each of a
14 defendant's prior DWI convictions." *Lopez*, 2009-NMCA-127, ¶ 36 (internal
15 quotation marks and citation omitted). "If the state presents a prima facie case, the
16 defendant may present contrary evidence," but the state continues to bear "the
17 ultimate burden of persuading the [trial] court, as factfinder, of the validity of each
18 of the convictions." *Id.* (alteration, internal quotation marks, and citation omitted).
19 "Proof beyond a reasonable doubt of the prior DWI convictions is not needed." *State*

1 v. *Sedillo*, 2001-NMCA-001, ¶ 5, 130 N.M. 98, 18 P.3d 1051 (determining that a
2 prior DWI conviction must be proved by a preponderance of evidence).

3 {5} This Court has considered whether the state has met its burden only twice in
4 published opinions. In the first, *Sedillo*, this Court concluded that three documents
5 presented by the state—court-certified copies of a complaint filed with the
6 metropolitan court that had a handwritten notation of a guilty plea and a judge’s
7 signature but no file stamp, a signed waiver of counsel form, and a computer printout
8 indicating that the defendant had pleaded guilty to DWI, first offense—satisfied the
9 state’s burden because they all indicated that the defendant had pleaded guilty and
10 was convicted of a DWI first offense. *Id.* ¶¶ 4, 7-10.

11 {6} In the second, *Lopez*, this Court concluded the state’s presentation did not
12 suffice, “[d]espite the degree of informality that the *Sedillo* Court was willing to
13 accept.” *Lopez*, 2009-NMCA-127, ¶ 43. In the trial court, the prosecutor produced
14 “a single, uncertified judgment and sentence, which relied on plea agreement
15 admissions of other convictions.” *Id.* ¶ 43. That document was not made part of the
16 record, and “the only indication of its contents [was] presented through argument of
17 counsel.” *Id.* Because “assertions of counsel unaccompanied by support in the
18 record” are not evidence, this Court emphasized that “[t]he records of prior
19 convictions must be properly admitted into the record and available for review on

1 appeal, *unless such proof is stipulated to or otherwise waived by [the d]efendant.*”

2 *Id.* (emphasis added).

3 {7} Since *Lopez*, this Court has issued a series of memorandum opinions dealing
4 with circumstances similar to this case, where the state did not offer any documents
5 into the record to establish the defendant’s prior convictions, and we were required
6 to determine whether the defendant “stipulated to or otherwise waived” proof of their
7 prior convictions. *Id.*; *see State v. Garcia*, A-1-CA-34650, mem. op. ¶ 20 (N.M. Ct.
8 App. Aug. 28, 2018) (nonprecedential) (concluding that because the defendant’s
9 counsel volunteered to the court that he should be sentenced for a fifth DWI
10 conviction, he “effectively stipulated to [the d]efendant’s four prior DWI
11 convictions”); *State v. Begay*, A-1-CA-41326, mem. op. ¶¶ 3-4 (N.M. Ct. App. Mar.
12 10, 2025) (nonprecedential) (concluding the defendant had stipulated to or otherwise
13 waived any challenge to the validity of three prior DWI convictions he contested on
14 appeal), *cert. denied* (S-1-SC-40849, May 5, 2025); *State v. Shirley*, A-1-CA-41433,
15 mem. op. ¶ 21 (N.M. Ct. App. July 10, 2025) (nonprecedential) (rejecting the
16 defendant’s challenge to the evidence supporting his enhanced DWI sentence
17 because the defendant failed to challenge the validity of the prior convictions in the
18 district court, and concluding that the defendant “stipulated to or otherwise waived
19 the [s]tate’s requirement to prove the validity of those convictions” (internal
20 quotation marks and citation omitted)), *cert. denied* (S-1-SC-41040, Aug. 26, 2025).

1 As with these cases, the record in this case leads us to conclude that Defendant
2 stipulated to the State's proof of his prior convictions.

3 {8} At a pretrial conference about six weeks after the criminal complaint was
4 filed, the State orally moved the metropolitan court to amend Defendant's charge of
5 aggravated DWI to a third offense based on two prior DWI convictions, "one from
6 1988, and one from 1990." The prosecutor stated that proof of the priors had been
7 shared with defense counsel. The metropolitan court asked defense counsel whether
8 he had received proof of those priors, and counsel confirmed that he had. The
9 metropolitan court granted the State's motion to amend the charge.

10 {9} The following month, Defendant was arraigned on the amended aggravated
11 DWI third charge. At a later pretrial conference, defense counsel again confirmed
12 that he had received proof of the defendant's priors from the State during discovery.
13 And at the conclusion of trial, after the jury returned its guilty verdict, the
14 metropolitan court addressed Defendant and advised him that the court would await
15 the presentencing report to learn more about his prior convictions, stating that she
16 would take into consideration that the prior convictions were relatively old. At the
17 ensuing sentencing hearing, the metropolitan court judge acknowledged that she had
18 received and reviewed the presentencing report.¹ She then stated that she would
19 sentence defendant on an aggravated DWI third offense and referenced the

¹The presentencing report is not part of the record on appeal.

1 mandatory jail time for a third offense set forth in Section 66-8-102(F)(2). After
2 articulating the proposed sentence, the court asked the State for its position, and the
3 prosecutor responded, “The State would like to defer to the court on your sentencing
4 recommendations, your honor.” The metropolitan court then asked for comment
5 from the defense, and defense counsel stated, “Yes your honor, just, that’s what I
6 was going to ask for, so I’m fine with that decision.”

7 {10} The foregoing exchanges between the metropolitan court and the parties, who
8 both agreed to the court’s proposed sentence and the reasons for it, amount to a
9 stipulation that Defendant was subject to sentencing for a third DWI offense because
10 he had two valid prior convictions. *See Stipulation, Black’s Law Dictionary* (12th
11 ed. 2024) (stating that a stipulation is a “voluntary agreement between opposing
12 parties concerning some relevant point; esp., an agreement relating to a proceeding,
13 made by attorneys representing adverse parties to the proceeding”). Defendant was
14 apprised of the prior convictions the State intended to rely upon before trial and twice
15 acknowledged having received proof of those convictions on the record. When
16 Defendant was given an opportunity to address the Court’s reliance on his prior
17 convictions at sentencing, he agreed that an enhanced sentence for a third DWI
18 conviction was appropriate. Based on these facts, we conclude Defendant stipulated
19 to the State’s proof of his prior convictions.

{11} Notwithstanding our affirmance, we note that cases involving stipulations on these and similar facts present unnecessarily close calls about whether a defendant's acquiescence to an enhanced sentence or the application of prior DWI convictions to enhance a sentence is a form of stipulation. Rather than asking for the parties' position as to a proposed sentence, the better practice is for the trial court to address the state's burden of proof directly. If the state makes a proffer as to a defendant's prior convictions, as it did in this case when moving to amend the charge, the court should determine on the record whether the defendant affirmatively stipulates to or waives proof of their prior convictions. If the defendant agrees to stipulate to the state's proof, the court should require the defendant to confirm that they are the same person identified in each prior conviction and confirm that the information provided by the state accurately reflects the defendant's prior convictions for DWI. *See* § 66-8-102(S); *see also State v. Gaede*, 2000-NMCA-004, ¶ 6, 128 N.M. 559, 994 P.2d 1177 (“[The d]efendant does not contest the fact that he has entered no contest or guilty pleas to four separate DWI charges, or that he is the same person involved in each of those cases.”). In the event the defendant declines to stipulate to or waive the opportunity to contest the state's proof, the state will need to ensure that records of prior DWI convictions are properly admitted into the record to make a prima facie case. *See Lopez*, 2009-NMCA-127, ¶¶ 36, 43. Absent a stipulation or waiver, if the state fails to admit records to establish the defendant's prior convictions, the trial

1 court's reliance on information contained in a presentencing report or other court
2 records—information that is not otherwise part of the appellate record—will not be
3 sufficient to overcome the state's failure to meet its burden. *See id.* ¶ 44 (“The
4 [s]tate's failure in the present case to meet that burden cannot be overcome by the
5 trial court's willingness to check its own records.”).

6 **II. The Metropolitan Court Did Not Err in Denying Defendant's Motion to**
7 **Strike Juror 1 for Cause**

8 {12} Defendant argues that the metropolitan court erred by denying his challenge
9 to Juror 1 for cause because the juror expressed actual bias against men. “We review
10 the trial court's rulings regarding the selection of jurors for an abuse of discretion
11 because the trial court is in the best position to assess a juror's state of mind, based
12 upon the juror's demeanor and credibility.” *State v. Mendez*, ___-NMSC-___, ¶ 18,
13 ___ P.3d ___ (S-1-SC-40404, Jul. 13, 2026) (internal quotation marks and citation
14 omitted). Trial courts are afforded a great deal of discretion in dismissing potential
15 jurors for cause, but “it is an abuse of such discretion to fail to excuse a juror who
16 could not be impartial.” *Id.* (internal quotation marks and citation omitted).
17 “Excusable partiality on the part of a member of the venire is established by showing
18 actual or implicit bias.” *State v. Holtsoi*, 2024-NMCA-042, ¶ 6, 547 P.3d 770. The
19 party claiming juror bias has the burden of proving bias. *Mendez*, ___-NMSC-___,
20 ¶ 19. “In evaluating a party's challenge, we start with the presumption that all
21 potential jurors are capable of impartiality so long as the jurors can conscientiously

1 and properly carry out their sworn duty to apply the law to the facts of a particular
2 case.” *Id.* (internal quotation marks and citation omitted).

3 {13} “Actual bias is bias in fact, or the existence of a state of mind that leads to an
4 inference that the person will not act with entire impartiality.” *State v. Romero*, 2023-
5 NMSC-014, ¶ 9, 533 P.3d 735 (internal quotation marks and citation omitted). “A
6 prospective juror demonstrates actual bias in one of two ways. First, a prospective
7 juror demonstrates actual bias by an unequivocal statement that [they] cannot be fair
8 and impartial.” *Mendez*, ___-NMSC-___, ¶ 19 (omission, internal quotation marks,
9 and citation omitted). Second, “actual bias is inferred when a juror’s responses call
10 into question the juror’s ability to decide the matter objectively.” *Id.* (internal
11 quotation marks and citation omitted). However, even when a prospective juror
12 makes a statement that calls into question their ability to decide the matter
13 objectively, “a prior or subsequent statement indicating the prospective juror’s
14 ability to remain fair and impartial is generally sufficient to uphold the trial court’s
15 denial of a motion to strike for cause.” *Id.*

16 {14} In this case, Defendant asked for leave to conduct additional voir dire of
17 Juror 1 because she indicated on her juror questionnaire that she was “biased against
18 all men.” Defendant asked Juror 1 whether she would be able to remain fair and
19 impartial given that the Defendant was male. Juror 1’s responses are not audible on
20 the recording of the exchange, but defense counsel’s remarks appear to confirm that

Juror 1 affirmed that she could be fair and impartial. Defendant then challenged Juror 1 for cause because she “indicated that it depends on the evidence on whether or not she could be fair and impartial.” The metropolitan court denied Defendant’s motion, reasoning that Juror 1 “was asked twice the specific question about being fair and impartial, she said yes twice, in the whole-group panel and alone. . . . She talked about . . . , she does believe in innocent until proven guilty, she raised her hand for a belief in beyond a reasonable doubt. . . . We didn’t ask enough questions about this ‘biased towards men’ concept, but in her full articulation in person alone she said again she could be fair and impartial.”

{15} Defendant concedes that Juror 1 answered affirmatively when asked direct questions about whether she could be fair and impartial, both before and after she was questioned about her bias against men. The metropolitan court expressly relied on these statements when denying Defendant’s for-cause challenge. While Defendant directs us to New Mexico authority where a prospective juror should have been dismissed for cause due to actual bias because the juror never provided assurances that they could view the evidence impartially, *see Holtsoi*, 2024-NMCA-042, ¶¶ 7-10, in this case, Juror 1’s statements that she *could* be fair and impartial are “generally sufficient to uphold the trial court’s exercise of discretion to deny motions to strike for cause.” *See id.* ¶ 11. As a result, we conclude that the

metropolitan court did not abuse its discretion by denying Defendant's motion to strike Juror 1.

III. Defendant's Hearsay Objection Was Not Preserved and the Admission of the 911 Call Did Not Violate Defendant's Confrontation Clause Rights

{16} Defendant raises two challenges to the metropolitan court's decision to admit audio of a 911 call. First, Defendant contends that the metropolitan court abused its discretion when it determined that the contents of the call were excepted from the rule against hearsay. Second, Defendant argues that the admission of the call violated his constitutional right to confront witnesses against him. We address each argument in turn.

A. Defendant Failed to Preserve His Hearsay Objection

{17} Defendant argues that the metropolitan court abused its discretion when it ruled that the 911 caller's statements were excepted from the rule against hearsay as present sense impressions. At a pretrial hearing on the State's motion in limine to admit the 911 call, Defendant argued that the caller's statement that "it looks like [Defendant] was trying to turn" could not be a present sense impression because it was in the past tense. The metropolitan court responded that it understood the statement to be a "present sense description of how the car is facing or the direction of travel" and asked defense counsel to articulate why this statement was not a present sense impression. At this point, defense counsel expressly conceded that the challenged statement "is in a sense a description of the vehicle that might fall under

1 the present sense exception.” The metropolitan court then ruled that the challenged
2 statement would not be excluded as hearsay. Defense counsel made no further
3 hearsay objection. “Acquiescence in the admission of evidence constitutes waiver of
4 the issue on appeal.” *State v. Frazier*, 2007-NMSC-032, ¶ 38, 142 N.M. 120, 164
5 P.3d 1 (omission, internal quotation marks, and citation omitted). Because
6 Defendant conceded that the 911 caller’s statements amount to a present sense
7 impression, his hearsay argument provides no basis for reversal.

8 **B. Admission of the 911 Call Audio Did Not Violate Defendant’s**
9 **Confrontation Rights**

10 {18} Defendant further claims the admission of the 911 call audio violated his
11 constitutional right to confront witnesses against him. Defendant argues that the
12 caller’s statements were generally testimonial in nature and should have been
13 excluded by the metropolitan court. This Court “reviews claimed violations of the
14 Confrontation Clause de novo.” *State v. Sisneros*, 2013-NMSC-049, ¶ 9, 314 P.3d
15 665.

16 {19} The Confrontation Clause provides a procedural guarantee that “an out-of-
17 court statement that is both testimonial and offered to prove the truth of the matter
18 asserted may not be admitted unless the declarant is unavailable and the defendant
19 had a prior opportunity to cross-examine the declarant.” *State v. Navarette*, 2013-
20 NMSC-003, ¶ 7, 294 P.3d 435; *see State v. Aragon*, 2026-NMSC-008, ¶¶ 42-43, 593
21 P.3d 596 (discussing *Crawford v. Washington*, 541 U.S. 36, 61 (2004)). Statements

are considered testimonial when they are made during the course of an interrogation with the primary purpose of establishing or proving “past events potentially relevant to later criminal prosecution.” *Navarette*, 2013-NMSC-003, ¶ 8 (internal quotation marks and citation omitted); *see id.* (“[A] statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution.”).

{20} This Court has relied on four criteria that are likely to render a statement nontestimonial:

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

State v. Soliz, 2009-NMCA-079, ¶ 13, 146 N.M. 616, 213 P.3d 520. Based on these criteria, our Courts have concluded that statements made on a call to 911 are nontestimonial in nature when they are offered to provide information necessary to summon first responders and enable them to meet an ongoing emergency. *See Sisneros*, 2013-NMSC-049, ¶¶ 14-17 (holding that a witness’s statements to a 911 call operator were not testimonial under the circumstances); *State v. Largo*, 2012-NMSC-015, ¶¶ 14-21, 278 P.3d 532 (holding that a victim’s statements to a 911 call

operator were not testimonial under the circumstances); *Soliz*, 2009-NMCA-079, ¶¶ 19-30 (same). We reach the same conclusion here.

{21} The 911 caller was a witness to the scene who initiated the call to report a nonresponsive driver blocking a roadway. On the recording, the caller tells the 911 dispatcher that a driver is “slumped over in his seat” with his head hanging by the steering wheel, appearing to be “unconscious but breathing,” and that his car is stopped in the middle of a lane of travel. The caller’s tone is urgent, and she tells the dispatcher that she decided to call 911 because of the driver’s apparent condition. The majority of the remainder of the call concerns descriptive identifying details of the vehicle and the driver, which the caller relays as, or shortly after, observing them. Viewing these statements in the context of the events and circumstances, which were to summon emergency responders to assist Defendant, who appeared to be having a medical emergency, we conclude the caller’s statements to the 911 operator were nontestimonial, and the admission of the recording of the call did not violate Defendant’s confrontation rights.

IV. Defendant’s Convictions Are Supported by Sufficient Evidence

{22} Finally, Defendant challenges his convictions for lack of sufficient evidence. “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” *State v.*

1 *Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and
2 citation omitted). We “view the evidence in the light most favorable to the guilty
3 verdict, indulging all reasonable inferences and resolving all conflicts in the
4 evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128
5 N.M. 711, 998 P.2d 176. “We do not search for inferences supporting a contrary
6 verdict or re-weigh the evidence because this type of analysis would substitute an
7 appellate court’s judgment for that of the jury.” *State v. Graham*, 2005-NMSC-004,
8 ¶ 13, 137 N.M. 197, 109 P.3d 285. The sufficiency of the evidence is measured
9 against the jury instructions, which “become the law of the case.” *State v.*
10 *Arrendondo*, 2012-NMSC-013, ¶ 18, 278 P.3d 517 (internal quotation marks and
11 citation omitted).

12 **A. Operation of a Motor Vehicle**

13 {23} Defendant argues that the State failed to present sufficient evidence to
14 establish that Defendant “operated a motor vehicle”—an element common to both
15 aggravated DWI and possession of an open container. The jury was instructed that
16 “[a] person is ‘operating’ a motor vehicle if the person is in actual physical control
17 with the intent to drive the vehicle, whether or not the vehicle is moving.” The jury
18 was further instructed, in accordance with UJI 14-4512 NMRA, to weigh fourteen
19 nonexhaustive factors to determine whether Defendant was in actual physical control
20 of his vehicle:

1. whether the vehicle was running;
2. whether the ignition was in the “on” position;
3. where the ignition key was located;
4. where and in what position the driver was found in the vehicle;
5. whether the person was awake or asleep;
6. whether the vehicle’s headlights were on;
7. where the vehicle was stopped;
8. whether the driver had voluntarily pulled off the road;
9. the time of day;
10. the weather conditions;
11. whether the heater or air conditioner was on;
12. whether the windows were up or down;
13. whether the vehicle was operable;
14. any explanation of the circumstances shown by the evidence.

{24} The jury was shown body camera footage from responding officers depicting Defendant in the driver’s seat of a vehicle, which was stopped but running and positioned in a lane of travel of a primary roadway such that it was blocking a side street. A responding officer testified that he felt it necessary to place a tire deflation device in front of the vehicle to prevent the vehicle from driving off. Defendant was asleep behind the wheel even though it was the middle of the day and broad daylight.

1 After officers turned the vehicle off and woke Defendant up, he reached for the
2 steering column in a manner that officers interpreted as an attempt to restart the
3 vehicle, prompting them to remove the keys from the ignition. The fact-finder could
4 have reasonably relied on this evidence to determine that Defendant was in actual
5 physical control of his vehicle and had an intent to drive based on the factors set
6 forth in UJI 14-4512. *See State v. Sims*, 2010-NMSC-027, ¶ 35, 148 N.M. 330, 236
7 P.3d 642 (observing that physical control was demonstrated when the vehicle’s “key
8 was in the ignition, the ignition was on, and the driver was sitting behind the wheel
9 of the vehicle in a traffic lane while he applied the brakes”); *id.* (“That the vehicle
10 was on a roadway arguably increases the danger posed to both the defendant and the
11 public and supports an inference of the general intent to drive.”). The jury was free
12 to reject Defendant’s version of the events leading up to his arrest. *See State v. Salas*,
13 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (“We defer to the [finder of
14 fact] when it weighs the credibility of witnesses and resolves conflicts in witness
15 testimony.”). We conclude sufficient evidence supported the jury’s determination of
16 actual physical control, and therefore, its conclusion that Defendant operated a motor
17 vehicle.

18 **B. Intoxication**

19 {25} Defendant also appears to argue that the State presented insufficient evidence
20 to establish that he was impaired at the time he operated the vehicle for purposes of

1 his aggravated DWI conviction. Defendant contends his behavior can be explained
2 due to the fact that he was upset, grieving the death of his friend, and “his behavior
3 was indicative of mental illness, not impairment.” The jury was instructed that the
4 State was required to prove beyond a reasonable doubt, in relevant part, that
5 Defendant operated a motor vehicle while “under the influence of intoxicating
6 liquor; that is, as a result of drinking liquor [D]efendant was less able to the slightest
7 degree, either mentally or physically, or both, to exercise the clear judgment and
8 steady hand necessary to handle a vehicle with safety to the person and the public.”
9 See UJI 14-4508 NMRA. This is commonly referred to as the “impaired to the
10 slightest degree” standard. *State v. Gurule*, 2011-NMCA-042, ¶ 7, 149 N.M. 599,
11 252 P.3d 823 (internal quotation marks and citation omitted).

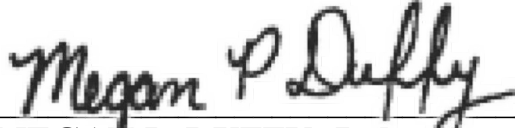
12 {26} In the responding officers’ body camera footage, Defendant is clearly depicted
13 in his vehicle with an open and largely empty bottle of alcohol between his legs.
14 Defendant could not accurately recall his name, did not know where he was, could
15 not answer where he was coming from or where he was going, and did not know
16 how much he had to drink. Officers testified that Defendant had bloodshot, watery
17 eyes, slurred speech, and smelled of alcohol. Defendant was unsteady on his feet and
18 required assistance from officers to stand and walk, leading officers to decline to
19 attempt standardized field sobriety tests. The jury was entitled to make reasonable
20 inferences from this evidence, which is sufficient to support a finding that Defendant

1 was impaired to the slightest degree. *See State v. Soto*, 2007-NMCA-077, ¶ 34, 142
2 N.M. 32, 162 P.3d 187 (holding that the evidence was sufficient to support an
3 aggravated DWI conviction where the defendant refused to consent to blood alcohol
4 testing, had bloodshot, watery eyes, slurred speech, a smell of alcohol on his breath,
5 admitted he had been drinking, and the officers found several open containers of
6 alcohol where he had been drinking), *overruled on other grounds by State v.*
7 *Tollardo*, 2012-NMSC-008, 275 P.3d 110; *State v. Neal*, 2008-NMCA-008, ¶ 27,
8 143 N.M. 341, 176 P.3d 330 (“Given the testimony as to [the d]efendant’s driving
9 behavior, physical condition, admission of drinking, and performance on the field
10 sobriety tests, the factfinder could rely on common knowledge and experience to
11 determine whether [the d]efendant was under the influence of alcohol.”).

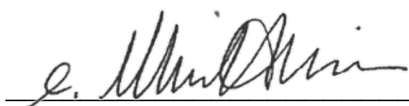
12 **CONCLUSION**

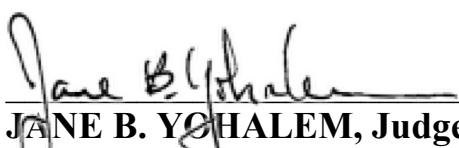
13 {27} We affirm.

14 {28} **IT IS SO ORDERED.**

15 
16 **MEGAN P. DUFFY, Judge**

17 **WE CONCUR:**

18 
19 **J. MILES HANISEE, Judge**

20 
21 **JANE B. YOHALEM, Judge**