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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-43470**

MELANIE AUSTIN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
Bradley L. Keeler, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Kathleen T. Baldridge, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

HANISEE, Judge.

{1} This matter was submitted to the Court on the brief in chief pursuant to the Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective November 1, 2022. Having considered the brief in chief, concluding the briefing submitted to the Court provides no possibility for reversal,

and determining that this case is appropriate for resolution on Track 1 as defined in that order, we affirm for the following reasons.

{2} Defendant appeals from her conviction, after a jury trial, of aggravated driving while intoxicated (DWI), second offense, contrary to NMSA 1978, Section 66-8-102 (2016), as set forth in the district court's judgment and sentence. [RP 94-95] On appeal, Defendant argues that the State presented insufficient evidence to prove beyond a reasonable doubt that Defendant was driving while impaired to the slightest degree. [BIC 7]

{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 guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] 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 disregard all evidence and inferences that support a different result. *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Torres*, 2018-NMSC-013, ¶ 42, 413 P.3d 467 (internal quotation marks and citation omitted).

{4} Section 66-8-102(D)(3) defines aggravated driving while intoxicated as consisting of "refusing to submit to chemical testing, as provided for in the Implied Consent Act . . . , and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs." "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883. To convict Defendant of aggravated driving while intoxicated under Section 66-8-102(D)(3), the State had to prove beyond a reasonable doubt that (1) Defendant operated a motor vehicle; (2) at that time Defendant was under the influence of intoxicating liquor; that is, as a result of drinking liquor Defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public; (3) Defendant refused to submit to chemical testing; and (4) the offense happened in New Mexico, on or about the 16th day of July, 2023. [RP 88] *See* UJI 14-4508 NMRA.

{5} At Defendant's jury trial, Officer Alana Bradley with the Gallup Police Department testified that following a 911 call, she was dispatched to a neighborhood in Gallup, New Mexico on July 16, 2023, at around 3:00 p.m. in the afternoon. [BIC 1-2] Officer Bradley was wearing her body camera and recorded the events of that afternoon, some of which the jury viewed. [BIC 2, 9] She first spoke with the person

who placed the 911 call and was advised that Defendant was in a car traveling east on Blue Hill Avenue. [BIC 2] Soon thereafter, Officer Bradley located Defendant standing with a man and a second police officer, Officer Bowman, in front of a blue car on Blue Hill Avenue. [BIC 2]

{6} Officer Bradley testified that she smelled alcohol coming from Defendant as they spoke. [BIC 2] She observed that Defendant had bloodshot watery eyes. [BIC 2] Officer Bradley asked Defendant who was driving. [BIC 2] Defendant pointed to herself and nodded in the affirmative. [BIC 2] Officer Bradley asked Defendant how much she had to drink. [BIC 2] Defendant said "a couple." [BIC 2] When asked by Officer Bradley when the alcohol was consumed, Defendant indicated one and one-half hours ago. [BIC 2] Defendant explained to Officer Bradley why she was in the neighborhood and stated, "We drove off" to get away from a domestic dispute that had recently taken place at a nearby house. [BIC 2]

{7} Officer Bradley asked Defendant if she would agree to perform standardized field sobriety tests (FSTs). [BIC 2] Defendant said yes, but advised Officer Bradley that she had five pins in her foot and could not walk a straight line or stand on her foot. [BIC 2-3] Officer Bradley asked Defendant if she graduated from high school. Defendant said yes. [BIC 3] Officer Bradley asked Defendant if she had any education beyond high school. Again, Defendant said yes. [BIC 3] Officer Bradley then administered alternative FSTs.

{8} Officer Bradley first administered the HGN test. Defendant followed the officer's finger horizontally with her eyes, but moved her head a couple of times. [BIC 3] Officer Bradley then asked Defendant to count 4 to 1 and 1 to 4 on her fingers; she did so without any problem. [BIC 3] Officer Bradley asked Defendant to count backward from 62 to 42. Defendant counted "62, 61, 60, 52 or 59" then asked the officer to hold on because nobody could do that and argued with the officer about it, telling the officer that she received training about this test at work and it was a trick. [BIC 3] Defendant continued, "62, 61, 60, 59, 58, 57, 56, 44, 54, 53, 52, 51, 50, 49, 48, 47, 48, or 48, 47, 46, 45, 43 or 45, 43, 42." [BIC 3]

{9} At this point, Officer Bowman interrupted the alternative FSTs to let Officer Bradley know that he was going to "let him go," referring to the man that was with Defendant in the car. Officer Bradley said, "Okay." [BIC 3-4]

{10} Officer Bradley then instructed Defendant to recite the alphabet from E to X without singing it. [BIC 4] Defendant responded that she was trained on this test as well and it, too, was a trick. [BIC 4] Officer Bradley asked Defendant if she would recite the alphabet as instructed and Defendant responded by asserting that Officer Bradley could not even perform that test. [BIC 4] Defendant continued, "e, f, g, h," and stopped. [BIC 4] Officer Bradley asked if Defendant was done and she said no, she could keep going and the two argued again. [BIC 4] Defendant continued, "f, g, h, i, j, k, 1, m, n, o, p, q, r, s, t, y, x." [BIC 4]

{11} Officer Bradley then arrested Defendant for DWI on the basis of the odor of alcohol, her admission to drinking, and her inability to successfully perform alternative field sobriety tests. [BIC 4] Officer Bradley then read the Implied Consent Act to Defendant and when asked if she consented to a breath test, Defendant shook her head as if to say no. [BIC 4] Officer Bradley then advised Defendant of the consequences of refusing the breath test and asked her again if she consented to a breath test, and Defendant did not respond. [BIC 4] Officer Bradley interpreted this as a refusal, and Defendant did not subsequently request a breath test.

{12} On cross-examination, Officer Bradley acknowledged that she never saw Defendant driving the blue car. [BIC 5] Officer Bradley was not sure if Officer Bowman, who was not present at trial, saw Defendant drive. [BIC 5] Officer Bradley agreed that Defendant told her only that "we drove off" and that "we" could mean that Defendant was a passenger in the car driven by the other man, who Officer Bradley could not identify, that had been released by Officer Bowman. [BIC 5]

{13} On redirect examination, Officer Bradley reiterated that Defendant told her that she drove from the home where a domestic altercation had occurred to the place where the officer encountered her. [BIC 5-6] Defendant also admitted to consuming alcohol earlier in the day. [BIC 6]

{14} Again, Defendant challenges the sufficiency of the evidence presented to prove beyond a reasonable doubt that Defendant was driving while impaired to the slightest degree. Specifically, Defendant argues "the State failed to prove beyond a reasonable doubt that she was actually driving the car that she was standing outside of during her entire encounter with Officer Bradley." [BIC 8] Defendant notes the "State's theory in this case was that [Defendant] drove, not that she was in actual physical control of the car." [BIC 9] Defendant also "challenges the jury's finding that she was driving while impaired," noting that "New Mexico law requires that the State prove that [Defendant] was impaired at the time that she drove." [BIC 10]

{15} As previously stated, when reviewing for sufficiency, we view the evidence in the light most favorable to the verdict, and then determine "whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Trossman*, 2009-NMSC-034, ¶ 16, 146 N.M. 462, 212 P.3d 350 (internal quotation marks and citation omitted). We "indulg[e] all reasonable inferences and resolv[e] all conflicts in the evidence in favor of the verdict." *State v. Chavez*, 2009-NMSC-035, ¶ 11, 146 N.M. 434, 211 P.3d 891 (internal quotation marks and citation omitted). In reviewing for sufficiency, "[t]he reviewing court does not weigh the evidence or substitute its judgment for that of the fact[-]finder as long as there is sufficient evidence to support the verdict." *Id.* (internal quotation marks and citation

omitted). Circumstantial evidence alone may be sufficient to allow a fact-finder to infer that the accused drove while intoxicated. *See State v. Mailman*, 2010-NMSC-036, ¶¶ 24-28, 148 N.M. 702, 242 P.3d 269. Such circumstantial evidence "may include the accused's own admissions, the location of the vehicle next to the highway, or any other similar evidence that tends to prove that the accused drove while intoxicated." *Id.* ¶ 28. Actual physical control of the vehicle "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." *Id.* (emphasis omitted).

{16} As described above, the State presented circumstantial evidence to prove Defendant's guilt. That evidence included that the testifying officer encountered Defendant standing in front of a blue car following the officer's dispatch pursuant to a 911 call. The officer testified that she smelled alcohol coming from Defendant as they spoke and that she observed Defendant with bloodshot watery eyes. When the officer asked Defendant who was driving, Defendant pointed to herself and nodded in the affirmative. Defendant admitted to having "a couple" one and one-half hours earlier. Defendant did not perform alternative field sobriety tests entirely successfully, and was argumentative with the officer while performing them. We conclude there to have been sufficient evidence by which the jury could infer that Defendant drove a vehicle, as she admitted, while impaired by the alcoholic

beverages she further admitted to consuming one and one-half hours previously, thus supporting Defendant's conviction for aggravated driving while intoxicated based on past impaired driving. *See Mailman*, 2010-NMSC-036, ¶¶ 23, 27-28 (observing that direct evidence is not required to support a conviction for past DWI and that circumstantial evidence may be relied upon to establish that the accused actually drove while intoxicated).

{17} We acknowledge Defendant's argument that no one testified to seeing Defendant drive the car. [BIC 9] We also acknowledge that Defendant told the officer, "We drove off," and suggested to the jury that this referred to the man that was with her in the car. [BIC 9] We also recognize Defendant's argument with regard to signs of impairment while driving, namely that Defendant did not have slurred speech and successfully performed some aspects of the alternative field sobriety tests. [BIC 11] However, it is established that "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *Rojo*, 1999-NMSC-001, ¶ 19. We decline Defendant's invitation to reweigh this evidence on appeal and conclude that there was sufficient evidence to support Defendant's conviction for driving while intoxicated based on past driving.

{18} Accordingly, we affirm Defendant's conviction by jury for aggravated driving while intoxicated, second offense.

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

J. MILES HANISEE, Judge

WE CONCUR:

JACQUELINE R. MEDINA, Chief Judge

JENNIFER L. ATTREP, Judge