

1 241], and raised three issues for our consideration on appeal. [DS 7] In this Court's
2 notice of proposed disposition, we proposed to affirm. [CN 1] Defendant timely filed,
3 after extension granted, a memorandum in opposition. We have given due
4 consideration to the memorandum in opposition, and, remaining unpersuaded, we
5 affirm Defendant's conviction.

6 **Admissibility of Expert Testimony**

7 {2} Defendant continues to argue that the expert testimony on reverse extrapolation
8 should not have been admitted. [MIO 2–5] In Defendant's docketing statement,
9 Defendant's argument focused on whether the expert was properly qualified to testify
10 regarding reverse extrapolation. [DS 7] In our calendar notice, we proposed to
11 conclude that Defendant did not preserve that argument. [See CN 2–3] We further
12 suggested that, if Defendant instead intended to argue that the expert lacked relevant
13 knowledge, as he argued below [see RP 122–24], Defendant failed to show error on
14 the part of the district court because the expert's factual assumptions were supported
15 by evidence found in the record, circumstantial or otherwise. [See CN 4–6]

16 {3} In his memorandum in opposition, Defendant clarifies that his argument on
17 appeal is that the expert's testimony should not have been admitted because the
18 testimony is not reliable, which argument was preserved in the motion to strike,
19 below. [MIO 2] In support of this argument, Defendant continues to argue that the

1 expert was “forced to make several assumptions that severely undercut the reliability
2 of the retrograde extrapolation.” [MIO 4] As we explained in our calendar notice,
3 however, experts are permitted to base their opinions regarding reverse extrapolation
4 on factual assumptions, so long as those assumptions are supported by evidence in the
5 record. [CN 3–5] *See State v. Downey*, 2008-NMSC-061, ¶¶ 25, 32, 34–35, 145 N.M.
6 232, 195 P.3d 1244. As explained more fully in our calendar notice, the expert’s
7 assumptions were supported by evidence in the record, his reliance on such evidence
8 was permissible, and the expert’s analysis was, therefore, admissible. [CN 4–6] *See*
9 *id.* ¶¶ 32, 35. Consequently, for the reasons stated herein and in our calendar notice,
10 we hold that the district court did not err in admitting the expert testimony.

11 **Insufficiency of the Evidence**

12 {4} Defendant continues to argue that there was insufficient evidence to support his
13 convictions. [MIO 5] Defendant has not raised any points in his memorandum in
14 opposition that were not otherwise addressed in our calendar notice [*see* CN 7–9],
15 except for stating that, “[w]ithout the improper extrapolation testimony, there was no
16 evidence [Defendant] was impaired and caused the accident.” [MIO 6] As we have
17 determined that the extrapolation testimony was not improper, *see* above, the
18 argument is unavailing. Accordingly, for the reasons stated herein and in our calendar

1 notice, we hold that there was sufficient evidence with which to support Defendant's
2 conviction.

3 **Ineffective Assistance of Counsel**

4 {5} Defendant continues to argue that he was provided ineffective assistance of
5 counsel. [MIO 6] Defendant has not raised any points in his memorandum in
6 opposition that were not otherwise addressed in our calendar notice [*see* CN 9–10],
7 except for setting forth New Mexico case law regarding the appropriateness of habeas
8 corpus proceedings when an ineffective assistance of counsel claim relies on facts not
9 contained in the record. [*See* MIO 7–8] For the reasons stated in our calendar notice,
10 we decline to reverse Defendant's conviction based on his ineffective assistance of
11 counsel claim. We express no opinion as to the effect, if any, our decision may have
12 on Defendant's ability to raise this issue in habeas proceedings.

13 {6} To conclude, for all the reasons stated above and detailed in this Court's notice
14 of proposed disposition, we affirm Defendant's conviction of homicide by vehicle
15 (driving while under the influence of intoxicating liquor or any drug).

16 {7} **IT IS SO ORDERED.**

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CYNTHIA A. FRY, Judge

1 **WE CONCUR:**

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TIMOTHY L. GARCIA, Judge

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M. MONICA ZAMORA, Judge