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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

No. 33,653

5 **WILLIAM A. BARRERAS,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Stan Whitaker, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

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12 Albuquerque, NM

13 for Appellee

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15 Santa Fe, NM

16 Vicki W. Zelle, Assistant Appellate Defender

17 Albuquerque, NM

18 for Appellant

19 **MEMORANDUM OPINION**

20 **KENNEDY, Judge.**

1 {1} Defendant, with a deputy sheriff purposefully hiding in Defendant’s blind spot
2 some two to three car lengths behind, was eventually pulled over after the deputy
3 concluded that Defendant had failed to signal a turn while changing lanes to enter the
4 freeway and that the deputy was, by virtue of his following Defendant, “affected” by
5 Defendant’s failure to signal under NMSA 1978, Section 66-7-325(A) (1978).

6 {2} Defendant appealed his convictions for failure to signal and aggravated driving
7 while under the influence of liquor or drugs (DWI). He also appealed the denial of his
8 motion to suppress all evidence obtained following the traffic stop citing *State v.*
9 *Anaya*, 2008-NMCA-020, 143 N.M. 431, 176 P.3d 1163, *abrogated on other grounds*
10 *by State v. Dopslaf*, 2015-NMCA-098, 356 P.3d 559. Accordingly, we evaluate
11 whether the deputy’s stop of Defendant was invalid for having made a mistake of law,
12 in the context of whether the deputy had reasonable suspicion to stop Defendant.
13 Defendant does not claim a pretextual stop or a violation of Article II, Section 10 of
14 the New Mexico Constitution. Review of an order granting or denying a suppression
15 motion is a mixed question of law and fact. *Anaya*, 2008-NMCA-020, ¶ 5. We view
16 the facts “in the light most favorable to the prevailing party and defer to the [trial]
17 court’s findings of fact if those findings are supported by substantial evidence.” *Id.*
18 We review de novo the application of the law to the facts. *Id.*

19 {3} The effect of Defendant’s actions on the deputy’s driving was largely a product

1 of the deputy's pursuit of Defendant until a final violation was committed. However,
2 in this case, this determination is factual and not based on any mistake of law on the
3 part of the deputy. *See id.* ¶¶ 7, 15; *see also State v. Hubble*, 2009-NMSC-014, ¶ 27,
4 146 N.M. 70, 206 P.3d 579 ("In essence, the second part of the *Anaya* proposition
5 [that reasonable suspicion on a basis other than the mistake of law can justify the stop]
6 is our objective test for reasonable suspicion."). Our de novo review of whether the
7 detention was justified requires that the metropolitan court's ruling must be supported
8 by substantial evidence and in light of the totality of the circumstances. *Hubble*, 2009-
9 NMSC-014, ¶ 5. Last, we review Defendant's DWI conviction and determine whether
10 it was based on substantial evidence capable of supporting the metropolitan court's
11 verdict beyond a reasonable doubt.

12 {4} Because we determine that substantial evidence supports Defendant's
13 convictions for failing to signal and DWI beyond a reasonable doubt, we affirm his
14 convictions for the violations. We also hold that the deputy's stopping Defendant was
15 adequately supported by reasonable suspicion.

16 **DISCUSSION**

17 {5} The parties are familiar with the facts and, for the sake of brevity in this
18 Opinion, we present only such facts as are needed for our discussion of the issues.
19 There is no dispute between the parties as to the facts of this case.

1 **I. Failure to Signal**

2 {6} “A reasonable suspicion is a particularized suspicion, based on all the
3 circumstances that a particular individual, the one detained, is breaking, or has broken,
4 the law.” *State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856. Section
5 66-7-325(A) provides in relevant part that “[n]o person shall . . . turn any vehicle
6 without giving an appropriate signal . . . in the event any other traffic may be affected
7 by such movement.” The two elements in the statute that must be satisfied in order for
8 its mandate to be triggered are “(1) there must be other traffic (2) that may be affected
9 by the motorist’s turn.” *Hubble*, 2009-NMSC-014, ¶ 11 (internal quotation marks and
10 citation omitted). The failure to signal is not a *per se* infraction. *Anaya*, 2008-NMCA-
11 020, ¶ 3. However, absent a determination that the failure could have affected traffic,
12 the offense is not established. *Id.*

13 {7} The metropolitan court found that the deputy was affected by Defendant’s
14 failure to use his turn signal at the time he pulled onto the freeway. The metropolitan
15 court found Defendant guilty of the failure to signal at the point he crossed the line
16 from the on-ramp lane into the right hand lane of traffic on I-25. The on-ramp to I-25
17 at that point also became a marked exit and off-ramp from I-25; moving onto the
18 interstate was most certainly a lane change for which Section 66-7-325(A) required
19 a signal if traffic was to be affected.

1 {8} The deputy testified that he was affected because he had to change his driving
2 behavior as a result of what Defendant did because he did not know if Defendant
3 would enter the freeway or continue down the exit ramp lane that they were both on.
4 Defendant could have gone in either direction by moving to the left (as he did) or
5 proceeding straight to the off-ramp and traffic light below. Since the deputy was
6 following behind him, the deputy's actions depended on Defendant's direction of
7 travel, signaled or not. Immediately preceding this maneuver, the deputy was hiding
8 in Defendant's blind spot in the right lane to avoid being seen.¹ However, that the
9 deputy's own pursuit of Defendant was the cause of the effect is of no consequence.
10 There is no doubt that the deputy himself was "traffic" under the statute. *See Hubble*,
11 2009-NMSC-014, ¶ 12. More innocuous traffic, had there been any, might well have
12 been similarly affected by Defendant's failure to signal by having to wait to see which
13 lane Defendant would proceed before themselves choosing to enter or exit the freeway
14 behind him.

15 {9} Defendant's reliance on *Hubble* and *Anaya* is unavailing in this case with regard
16 to whether the deputy had reasonable suspicion to stop him. The interpretation of
17 Section 66-7-325 in *Hubble* defines a violation as not signaling when there is no more
18 than a "reasonable possibility that other traffic may be affected." 2009-NMSC-014,

19 ¹"I'm in his blind spot because I don't want him to see my car."

1 ¶ 13. It does not depend, as Defendant wishes, on whether the un signaled maneuver
2 was safely accomplished or whether any evasive action was needed on the deputy's
3 part. Defendant's conduct falls within that prohibited by Section 66-7-325(A).
4 Whether the deputy was affected by Defendant's driving is a question of fact, not law.
5 *See Hubble*, 2009-NMSC-014, ¶ 32. The deputy's "determinations—that he, while
6 driving his vehicle on the highway, was 'traffic,' [and the deputy's description] that
7 he 'may have been affected' by [the d]efendant's turn—[were based on] facts that
8 were material to the transaction." *Id.* (alterations, internal quotation marks, and
9 citation omitted). The metropolitan court determined that in entering the freeway
10 without signaling, the deputy's travel on the road was affected, and we agree.
11 Applying an objective standard to these facts, the deputy operated under no mistake
12 of law, and Defendant violated the signal statute. Reasonable suspicion for the stop
13 existed based on the facts, and Defendant's conviction for failing to signal was
14 supported by substantial evidence.

15 **II. DWI**

16 {10} Turning from the validity of Defendant's traffic stop and the denial of his
17 motion to suppress, Defendant argues that substantial evidence does not support his
18 conviction for aggravated DWI beyond a reasonable doubt. As discussed below, there
19 is no chemical test in this case. The evidence of Defendant's driving and demeanor

1 when stopped comprise the bounds of the evidence the metropolitan court considered.
2 We recognize that Defendant's driving was not in question for the considerable time
3 he was observed by the deputy. However, his taking a wide left turn into the deputy's
4 lane is germane, as is the deputy's impression that driving two exits down before
5 pulling over after the deputy engaged his lights was an indicator that Defendant's
6 faculties were impaired. Additionally, the deputy testified that the odor of alcohol on
7 Defendant's person was peculiarly strong after he got out of his car and was standing
8 roadside.

9 {11} Defendant's eyes were bloodshot and watery, and he had come from a bar,
10 though he denied drinking. When asked to perform standardized field sobriety tests
11 (SFSTs), Defendant delayed before consenting. The deputy thought this was
12 significant, and we note that refusal to perform the tests can be evidence of his
13 consciousness of guilt. *State v. Sanchez*, 2001-NMCA-109, ¶ 9, 131 N.M. 355, 36
14 P.3d 446 (holding that refusal to participate in SFSTs can be used by the state to
15 establish consciousness of guilt on the defendant's part). He forgot to unbuckle his
16 seat belt when he got out of his car to do the tests. However, his performance on the
17 field sobriety tests was equivocal, with small but notable defects in his performance,
18 including not following instructions, and swaying significantly as he stood roadside.
19 Despite Defendant stating that he was affected by a condition that caused him to shake

1 at times, the deputy testified that he observed no shaking.

2 {12} The deputy testified that with his experience in DWI enforcement, he was
3 confident in his assessment that Defendant was under the influence, and directed
4 Defendant to take a breath test. Defendant initially agreed, but then declined, stating
5 that he did not understand the Implied Consent Act warnings—specifically how it was
6 that he did not have to take it, but refusing to take it would be a criminal act.
7 Testimony about the discussions between the deputy and Defendant indicated a
8 disconnect between what was expected of Defendant and what Defendant said he
9 understood about his situation. The deputy testified that he left the option to take the
10 test open for Defendant through their entire encounter; Defendant maintained his
11 confusion about the Implied Consent Act and stated that as a result he would not take
12 the test. Evidence of refusing a breath test is properly argued to constitute evidence
13 of his consciousness of guilt of DWI. *See State v. Soto*, 2007-NMCA-077, ¶ 34, 142
14 N.M. 32, 162 P.3d 187 (“A jury may infer [a d]efendant’s consciousness of guilt and
15 fear of the test results from [the d]efendant’s refusal to take a breath test.”).

16 {13} The metropolitan court found defendant guilty of the charges, specifically
17 mentioning that the standard is whether Defendant’s driving ability was impaired to
18 the slightest degree. The court’s assessment of the deputy’s observations, demeanor,
19 and testimony from the stand increased his credibility with the court. It found that

1 although many of the defects in Defendant’s roadside demeanor and performance
2 might not have had individual significance to any great degree, the sum total of them,
3 from the strong odor of alcohol through errors in the SFSTs and Defendant’s confused
4 conversation around the deputy’s repeated advising of the Implied Consent Act
5 warning and Defendant’s getting the instructions wrong was attributable to
6 impairment by alcohol. The court believed that in light of the “physical and mental
7 manifestations” of Defendant’s intoxication and that his refusing the breath test was
8 a choice propelled by his consciousness of guilt, and an intentional act, thus
9 convicting Defendant of the aggravating factor.

10 {14} Our task is to “indulge all reasonable inferences in support of the verdict, and
11 disregard all evidence and inferences to the contrary.” *State v. Largo*, 2012-NMSC-
12 015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). The
13 metropolitan court judge was free to draw her own conclusions from the evidence.
14 *State v. Baldwin*, 2001-NMCA-063, ¶ 16, 130 N.M. 705, 30 P.3d 394 (pointing out
15 that a fact finder can rely on “human experience” in deciding whether a defendant was
16 under the influence and could “drive an automobile in a prudent manner”). Either
17 direct or circumstantial evidence may support a conviction, *State v. Mailman*, 2010-
18 NMSC-036, ¶¶ 23, 28, 148 N.M. 702, 242 P.3d 269, and Defendant’s behavior
19 “before, at, and after the time of driving” is relevant to the court’s determination. *State*

1 *v. Cavanaugh*, 1993-NMCA-152, ¶ 10, 116 N.M. 826, 867 P.2d 1208. To the extent
2 Defendant argues the effect of the equivocal nature of much of the evidence, we are
3 not required to consider the “merit of evidence that may have supported a verdict to
4 the contrary.” *State v. Vigil*, 1990-NMSC-066, ¶ 6, 110 N.M. 254, 794 P.2d 728. We
5 note that even with regard to the shaking disorder Defendant says affects him, he did
6 not testify that it influenced his behavior or performance during the investigation of
7 the case.

8 {15} Evaluating the evidence under the foregoing standard of review, we conclude
9 that Defendant’s physical symptoms, occasional confusion and delay in responding
10 to the deputy, minor traffic transgressions, and refusal to take a breath test—even if
11 because of confusion from being asked to take a test the refusal of which would carry
12 a criminal penalty—could properly be considered as evidence of some impairment of
13 his mental functioning that was within the trial court’s purview to regard as signs that
14 Defendant was under the influence of alcohol to the slightest degree, warranting
15 conviction for DWI. Evidence of Defendant’s refusal was sufficient to aggravate his
16 DWI conviction. We therefore affirm Defendant’s convictions.

17 {16} **IT IS SO ORDERED.**

18
19

RODERICK T. KENNEDY, Judge

1 **WE CONCUR:**

2

3 _____
3 **JONATHAN B. SUTIN, Judge**

4

5 _____
5 **TIMOTHY L. GARCIA, Judge**