



1 a memorandum in opposition, which this Court has duly considered. Because we  
2 remain unpersuaded by Defendant’s arguments, we affirm.

3 {2} In this Court’s calendar notice, we proposed to conclude that Defendant’s traffic  
4 violation and Defendant’s failure to pull over for three miles after the deputy initiated  
5 the traffic stop, in combination with observations by the deputy that Defendant was  
6 lethargic, had bloodshot, watery eyes, smelled of alcohol, and his refusal to submit to  
7 field sobriety tests was sufficient evidence for the jury to have concluded that  
8 Defendant operated a vehicle while impaired to the slightest degree. *See State v.*  
9 *Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (stating that substantial  
10 evidence is “such relevant evidence as a reasonable mind might accept as adequate to  
11 support a conclusion” (internal quotation marks and citation omitted)); *State v.*  
12 *Sanchez*, 2001-NMCA-109, ¶ 9, 131 N.M. 355, 36 P.3d 446 (“The [s]tate can use  
13 evidence of a driver’s refusal to consent to the field sobriety testing to create an  
14 inference of the driver’s consciousness of guilt.”). We further proposed to conclude  
15 that the deputy’s testimony that he read the implied consent warning to Defendant and  
16 that Defendant declined to submit to chemical testing, was sufficient evidence to  
17 support the jury’s conclusion that Defendant refused chemical testing.

18 {3} We also noted that, to the extent Defendant argued that he was not the driver  
19 of the vehicle, but that his brother was driving and they switched seats, the deputy

1 testified that he saw Defendant in the driver's seat as the car sped past him on the  
2 opposite side of the road. [DS 3] Thus, we suggested that to the extent Defendant  
3 was directing this Court to contrary evidence, “[c]ontrary evidence supporting  
4 acquittal does not provide a basis for reversal, because the [fact-finder] is free to reject  
5 [the d]efendant's version of the facts.” *See State v. Rojo*, 1999-NMSC-001 ¶ 19, 126  
6 N.M. 438, 971 P.2d 829. We also noted that Defendant's argument on appeal asked  
7 this Court to reweigh evidence and that such a request is outside the purview of this  
8 Court's appellate review. *See State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346,  
9 950 P.2d 789 (“The reviewing court does not weigh the evidence or substitute its  
10 judgment for that of the fact[-]finder as long as there is sufficient evidence to support  
11 the verdict.”), *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶  
12 17, 148 N.M. 381, 237 P.3d 683.

13 {4} In his memorandum in opposition, Defendant does not challenge the sufficiency  
14 of the evidence to establish that he was impaired by alcohol or that he refused to  
15 submit to chemical testing. [MIO 4] Rather, Defendant asserts that “no rational trier  
16 of fact could have found beyond a reasonable doubt that he was driving/operating the  
17 car.” [Id.] Specifically, Defendant asserts that both he and his brother testified that  
18 they switched seats because Defendant's brother had active warrants; that Defendant's  
19 brother was driving at the time that the deputy engaged his lights and siren to initiate

1 the stop for speeding; and, that it was several miles later when the deputy stopped the  
2 vehicle to find Defendant behind the wheel. [MIO 4] While Defendant notes that the  
3 deputy testified that he saw Defendant driving, Defendant argues that this testimony  
4 cannot support guilt beyond a reasonable doubt. [MIO 5]

5 {5} As we noted in this Court’s calendar notice, the flaw in Defendant’s argument  
6 is that he is asking this Court to reweigh the credibility of the witnesses and conclude  
7 that Defendant’s testimony and the testimony of another occupant of the car are more  
8 credible than the testimony of the deputy. Not only does this Court not reweigh the  
9 evidence, but we must “resolve all disputed facts in favor of the [s]tate, indulge all  
10 reasonable inferences in support of the verdict, and disregard all evidence and  
11 inferences to the contrary.” *Rojo*, 1999-NMSC-001, ¶ 19. Moreover, as we pointed out  
12 in our notice of proposed disposition, “[c]ontrary evidence supporting acquittal does  
13 not provide a basis for reversal because the jury is free to reject [the d]efendant’s  
14 version of the facts.” *Id.*

15 {6} Defendant argues that “evidence equally consistent with two inferences does  
16 not, without more, provide a basis for adopting either one—especially beyond a  
17 reasonable doubt[,]” *State v. Garcia*, 1992-NMSC-048, ¶ 32, 114 N.M. 269, 837 P.2d  
18 862, and that the testimony in this case required the jury to speculate in order to fill  
19 the gaps in the State’s proof. [MIO 5] However, as this Court has stated in response

1 to a similar argument, “[w]hen a defendant argues that the evidence and inferences  
2 present two equally reasonable hypotheses, one consistent with guilt and another  
3 consistent with innocence, . . . the jury has necessarily found the hypothesis of guilt  
4 more reasonable than the hypothesis of innocence.” *State v. Montoya*, 2005-NMCA-  
5 078, ¶ 3, 137 N.M. 713, 114 P.3d 393. We therefore decline Defendant’s invitation  
6 to intrude upon the role of the jury and to overturn its verdict.

7 {7} Finally, to the extent Defendant asserts that there is insufficient evidence of  
8 actual physical control, we note that no evidence of the *State v. Sims*, 2010-NMSC-  
9 027, 148 N.M. 330, 236 P.3d 642, factors is necessary where direct testimony of  
10 driving has been provided. “It is only when there are no witnesses to the vehicle’s  
11 motion that actual physical control is essential to prove DWI at the time an accused  
12 is apprehended.” *Id.* ¶ 3. Given the deputy’s testimony that he saw Defendant driving,  
13 there was sufficient evidence to support Defendant’s conviction.

14 {8} For the reasons stated above and in this Court’s notice of proposed disposition,  
15 we affirm Defendant’s conviction.

16 {9} **IT IS SO ORDERED.**

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M. MONICA ZAMORA, Judge

1 **WE CONCUR:**

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**JONATHAN B. SUTIN, Judge**

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**J. MILES HANISEE, Judge**