

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

2 Opinion Number: \_\_\_\_\_

3 Filing Date: August 8, 2017

4 **NO. 34,855**

5 **STATE OF NEW MEXICO,**

6           Plaintiff-Appellee,

7 v.

8 **ANTONIO ALVAREZ,**

9           Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

11 **Fernando R. Macias, District Judge**

12 Hector H. Balderas, Attorney General

13 Santa Fe, NM

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15 Albuquerque, NM

16 for Appellee

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19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} Defendant Antonio Alvarez appeals his convictions for aggravated DWI,  
4 reckless driving, and possession of an open container of alcohol in a motor vehicle.  
5 On appeal, he raises three issues, challenging only his DWI and reckless driving  
6 convictions. First, he argues that his DWI conviction is unsupported by the evidence  
7 under either the theory of past driving or actual physical control. Second, Defendant  
8 argues that his conviction for reckless driving is also unsupported by sufficient  
9 evidence. Third, he argues that if this Court finds that there is sufficient evidence to  
10 support his conviction for reckless driving, it nevertheless should be vacated because  
11 his convictions for both DWI and reckless driving violate double jeopardy. The State  
12 concedes that Defendant's conviction for reckless driving is unsupported by sufficient  
13 evidence and must be vacated. Accepting the State's concession, we affirm  
14 Defendant's conviction for aggravated DWI, reverse Defendant's conviction for  
15 reckless driving, and determine that it is unnecessary to address Defendant's double  
16 jeopardy arguments.

17 **BACKGROUND**

18 {2} On March 29, 2014, at around 11:30 p.m., Sergeant Thomas Vitale and  
19 Patrolman Cesar Duran of the New Mexico State Police both responded to a dispatch

1 call about a pickup truck stuck in the median on Interstate 10 where the driver was  
2 trying to back into traffic. Sergeant Vitale arrived at the scene first, around 11:35 p.m.  
3 (time stamp on dash cam as Sergeant Vitale pulls in). The vehicle was not in the  
4 originally reported location, but was a couple of miles ahead. Sergeant Vitale  
5 observed that the vehicle was stuck in the median, the vehicle appeared to be “on,”  
6 and the hazard lights were on. In Sergeant Vitale’s dash cam video, which was played  
7 for the jury, it appears that the truck’s tires are stuck in the dirt. When Sergeant Vitale  
8 exited his patrol unit and began walking towards the vehicle, Defendant opened the  
9 driver’s side door and exited from the driver’s seat. Defendant was the only person  
10 in the vehicle. Sergeant Vitale testified that the keys to the vehicle were in the  
11 ignition. A check of the vehicle’s license plate indicated that it belonged to  
12 Defendant.

13 {3} Sergeant Vitale described Defendant’s appearance as “disheveled and messy”;  
14 his shirt was untucked, his pants were unzipped, and he looked confused, as though  
15 he did not know where he was at that time. As he walked up to Defendant, Sergeant  
16 Vitale observed a strong odor of alcohol, which became stronger as Sergeant Vitale  
17 walked closer. The odor was “overwhelming” when he stood next to Defendant.

18 {4} Sergeant Vitale initiated a conversation with Defendant, and testified at trial  
19 that it was “kind of hard to understand” Defendant. The following dialogue can be

1 heard in Sergeant Vitale's dash cam video. Initially, Sergeant Vitale asked Defendant  
2 how he was doing, and Defendant replied, "Alright." Sergeant Vitale asked  
3 Defendant if he had anything to drink, noting that he could smell alcohol on  
4 Defendant's breath. Although it is difficult to hear the audio, it appears that  
5 Defendant responded, "Yeah." Sergeant Vitale requested that Defendant walk over  
6 to the shoulder of the road, again inquiring if Defendant was okay. Defendant  
7 somewhat unsteadily walked to the shoulder with Sergeant Vitale.

8 {5} At that point, Sergeant Vitale asked Defendant, "Where were you coming from;  
9 where were you driving from? Do you understand English?" Defendant replied, "A  
10 little. Coming from Albuquerque." Sergeant Vitale again asked, "Coming from  
11 Albuquerque?"; Defendant replied in the affirmative. Sergeant Vitale then inquired,  
12 "Where were you headed to?" Defendant answered, "Going to El Paso." Sergeant  
13 Vitale asked Defendant if he had anything to drink, and Defendant answered in the  
14 negative. Sergeant Vitale asked Defendant if he would be willing to take field  
15 sobriety tests, and although Sergeant Vitale testified that it was difficult for him to  
16 understand Defendant, and also difficult for Defendant to understand him, Defendant  
17 agreed to take the tests. Based on Defendant's performance on the field sobriety tests,  
18 Sergeant Vitale arrested him for DWI. A blood draw was performed, and Defendant's  
19 blood alcohol concentration was determined to be 0.25 grams of ethanol per one

1 hundred milliliters of blood.

2 {6} Patrolman Duran testified that he responded to the same dispatch call as  
3 Sergeant Vitale, and that Sergeant Vitale was already speaking with Defendant when  
4 he arrived at the scene a few minutes after Sergeant Vitale. Patrolman Duran asked  
5 Defendant in Spanish if he could understand or speak English; Defendant stated that  
6 he could understand English, and Patrolman Duran determined that translation to  
7 Spanish was not necessary. Patrolman Duran observed Defendant to have slurred  
8 speech, odor of alcohol, bloodshot eyes, and to be very unsteady on his feet.  
9 Patrolman Duran stood by for safety as Defendant was arrested, and he saw a 25-  
10 ounce open can of Budweiser on the passenger floor of the vehicle. Patrolman Duran  
11 could not recall if it was full or had spilled, and no fingerprints were taken from the  
12 can. He also did not remember if the vehicle's engine was running or if he took the  
13 keys from the ignition.

14 {7} During the State's closing argument, the prosecutor asked the jury to find  
15 Defendant guilty of aggravated DWI on the theory of past driving, arguing  
16 specifically that the evidence showed that Defendant actually drove because he told  
17 Sergeant Vitale that he was coming from Albuquerque and going to El Paso, and his  
18 vehicle was stuck in the median on the interstate between those two locations. The  
19 prosecutor specifically argued that the State was not asking the jury to find that

1 Defendant was guilty under the actual physical control theory, but only under the  
2 theory of past driving. Defendant’s closing argument asked the jury to consider the  
3 actual physical control alternative.

4 {8} Ultimately, the jury convicted Defendant by a general verdict of DWI, based  
5 on a jury instruction that defined the operation of a motor vehicle as one of two  
6 alternatives: either actually driving the motor vehicle (past driving) or being in actual  
7 physical control of the vehicle with intent to drive the vehicle. *See* UJI 14-4511  
8 NMRA. Based on the jury instruction setting forth both alternatives, the jury could  
9 have relied on either past driving or actual physical control as the basis for its  
10 conviction, and the jury was not required to specify which theory it relied upon in  
11 reaching its verdict. On appeal, Defendant raises no argument to suggest that one of  
12 these bases should not be considered due to the arguments made at trial. *See State v.*  
13 *Fox*, 2017-NMCA-029, ¶ 8, 390 P.3d 230 (“The jury instructions become the law of  
14 the case against which the sufficiency of the evidence is to be measured.” (internal  
15 quotation marks and citation omitted)), *cert. granted*, 2017-NMCERT-\_\_\_ (No.  
16 36269, Feb. 14, 2017).

1 **DISCUSSION**

2 **Aggravated DWI**

3 **Past Driving**

4 {9} We turn first to Defendant’s argument that insufficient evidence exists to  
5 uphold Defendant’s conviction for aggravated DWI on the theory that Defendant  
6 actually drove the vehicle. Because Defendant does not challenge the element of  
7 intoxication, we limit our discussion to the contested question of whether Defendant  
8 operated the vehicle.

9 {10} “The test for sufficiency of the evidence is whether substantial evidence of  
10 either a direct or circumstantial nature exists to support a verdict of guilty beyond a  
11 reasonable doubt with respect to every element essential to a conviction.” *State v.*  
12 *Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and  
13 citation omitted). The reviewing court “view[s] the evidence in the light most  
14 favorable to the guilty verdict, indulging all reasonable inferences and resolving all  
15 conflicts in the evidence in favor of the verdict.” *State v. Cunningham*,  
16 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and  
17 inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19,  
18 126 N.M. 438, 971 P.2d 829.

19 {11} In support of his contention that there was insufficient evidence presented of

1 past driving, Defendant argues that his statement to Sergeant Vitale that he was  
2 “coming from Albuquerque” and “going to El Paso” was not an admission that he was  
3 driving, but merely a statement of where he was coming from and where he was  
4 headed. Defendant further argues that there were no witnesses who personally  
5 observed Defendant driving, it was unclear how long the vehicle had been parked on  
6 the road, and it was also not known whether another person had been driving the  
7 vehicle before police approached.

8 {12} The State contends that sufficient circumstantial evidence was presented to  
9 support an inference that Defendant had actually driven the vehicle. We agree. *See,*  
10 *e.g., State v. Mailman*, 2010-NMSC-036, ¶¶ 23, 27-28, 148 N.M. 702, 242 P.3d 269  
11 (observing that direct evidence is not required to support a conviction for past DWI;  
12 rather, circumstantial evidence may be relied upon to establish that the  
13 accused actually drove while intoxicated).

14 {13} In the present case, Sergeant Vitale reached Defendant’s vehicle about five  
15 minutes after receiving a dispatch call alerting him that there was a pickup truck stuck  
16 in the median that was trying to back into traffic. Sergeant Vitale confirmed that the  
17 truck was actually stuck in the median. Sergeant Vitale observed that the vehicle was  
18 stuck in the median, the vehicle appeared to be on, and the hazard lights were on.  
19 Defendant was alone, and Sergeant Vitale witnessed Defendant exit from the driver’s



1 seat. No evidence was presented that there was any other occupant in the vehicle.  
2 Although Defendant argues that his statements to Sergeant Vitale that he was coming  
3 from Albuquerque should not be interpreted as an admission to driving, we disagree.  
4 Sergeant Vitale asked Defendant where he was coming from in two Defendant  
5 phrased ways: “Where were you coming from; where were you driving from?”  
6 Defendant replied that he was coming from Albuquerque, and he never suggested that  
7 Sergeant Vitale’s assumption that he was driving was incorrect.

8 {14} We conclude, based on our case law, that this constitutes sufficient  
9 circumstantial evidence to uphold a conviction based on past driving. *See Mailman*,  
10 2010-NMSC-036, ¶¶ 2-4, 23-24 (observing that there was sufficient circumstantial  
11 evidence to support a DWI conviction under a theory of past driving, based on the  
12 defendant’s presence behind the wheel of a vehicle parked by itself in a dark area of  
13 a convenience store parking lot, along with admissions to having driven to the  
14 convenience store and having consumed alcohol while driving); *cf. State v. Owelicio*,  
15 2011-NMCA-091, ¶ 33, 150 N.M. 528, 263 P.3d 305 (concluding that sufficient  
16 evidence was presented to support a finding that the defendant operated a vehicle as  
17 part of her DWI conviction based on the defendant’s admission that she was driving,  
18 the fact that the defendant and a third party who denied driving were the only persons  
19 at the scene, and a videotape showing the defendant approaching the passenger side

1 of the vehicle).

2 {15} We acknowledge Defendant's efforts to analogize the facts of this case to those  
3 in *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925. In *Cotton*, this  
4 Court held that there was insufficient evidence to support a conviction where there  
5 was nothing from which the jury could infer that the defendant had driven after he  
6 had consumed alcohol and after his ability to drive had become impaired. *Id.*  
7 ¶¶ 14-15. In that case, police responded to a call about a possible domestic incident  
8 in a van parked on the side of the road; the van was not running; the keys were not  
9 in the ignition; and the defendant admitted to drinking one hour prior to contact with  
10 police. *Id.* ¶¶ 4-6. The determinative factor in *Cotton*, however, was the lack of  
11 evidence presented as to timing of the driving. This Court held that although it would  
12 have been reasonable for the jury to conclude that the defendant drove to the place  
13 where he was arrested, there was insufficient evidence for the jury to conclude that  
14 the defendant had been impaired by alcohol prior to doing so. *Id.* ¶ 14-15.

1 {16} The facts of the present case are distinguishable from *Cotton*. Notably, the  
2 dispatch call reported that someone observed the truck stuck in the median trying to  
3 pull back into traffic, and only five minutes later, Sergeant Vitale arrived at the scene.  
4 The jury could reasonably have inferred that a five-minute lapse was not enough time  
5 for Defendant to have consumed enough alcohol to result in impairment.

1 Additionally, unlike the vehicle in *Cotton*, Defendant’s truck was stuck in the median,  
2 with the hazard lights on, suggesting that he did not intentionally park the vehicle  
3 there; taken together with the fact that a dispatch call was made about the truck, the  
4 jury could have reasonably inferred that Defendant recently drove the truck into the  
5 median. *See State v. Garcia*, 2005-NMSC-017, ¶ 20, 138 N.M. 1, 116 P.3d 72  
6 (permitting a jury to draw reasonable inferences from the evidence to reach a verdict).  
7 We therefore conclude that the State presented sufficient evidence to support a  
8 conviction for DWI based on past driving.

9 **Actual Physical Control**

10 {17} Because we have concluded that there was sufficient evidence presented to  
11 uphold Defendant’s DWI conviction based on past driving, we need not consider  
12 whether the State presented sufficient evidence to uphold his conviction under the  
13 theory of actual physical control. *See State v. Olguin*, 1995-NMSC-077, ¶ 2, 120  
14 N.M. 740, 906 P.2d 731 (holding that due process does not require a general verdict  
15 of guilt to be set aside if one of the two alternative bases for conviction is supported  
16 by sufficient evidence and the other basis is not legally inadequate); *see also*  
17 *Mailman*, 2010-NMSC-036, ¶ 28 (“Actual physical control is not necessary to prove  
18 DWI unless there are no witnesses to the vehicle’s motion and insufficient  
19 circumstantial evidence to infer that the accused actually drove while intoxicated.

1 Such evidence may include the accused’s own admissions, the location of the vehicle  
2 next to the highway, or any other similar evidence that tends to prove that the accused  
3 drove while intoxicated.”). Nevertheless, we proceed to address Defendant’s  
4 arguments regarding the sufficiency of the evidence under the theory of actual  
5 physical control.

6 {18} Under a theory of actual physical control, the State must prove “(1) the  
7 defendant was actually, not just potentially, exercising control over the vehicle, and  
8 (2) the defendant had the general intent to drive so as to pose a real danger to himself,  
9 herself, or the public.” *State v. Sims*, 2010-NMSC-027, ¶ 4, 148 N.M. 330, 236 P.3d  
10 642. *Sims* addressed a situation wherein a defendant was found passed out or asleep  
11 behind the wheel of his car parked in a commercial parking lot. *Id.* ¶ 1. Our Supreme  
12 Court explained in *Sims* that “we do not believe that the Legislature intended to  
13 forbid intoxicated individuals from merely entering their vehicles as passive  
14 occupants or using their vehicles for temporary shelter.” *Id.* ¶ 3. Ultimately, our  
15 Supreme Court concluded that “the [s]tate failed to prove that [the d]efendant used  
16 the vehicle other than as a passive occupant[, and i]t was pure speculation whether  
17 [the d]efendant would rouse himself and drive the vehicle.” *Id.* ¶ 4.

18 {19} There are fourteen factors for the jury to consider when determining whether  
19 a defendant is in actual physical control of a vehicle: whether the vehicle was

1 running; whether the ignition was on; where the ignition key was located; where and  
2 in what position the driver was found in the vehicle; whether the person was awake  
3 or asleep; whether the vehicle's headlights were on; where the vehicle was stopped;  
4 whether the driver had voluntarily pulled off the road; time of day; weather  
5 conditions; whether the heater or air conditioner was on; whether the windows were  
6 up or down; whether the vehicle was operable; and any explanation of the  
7 circumstances shown by the evidence. UJI 14-4512 NMRA; *see Sims*, 2010-NMSC-  
8 027, ¶ 33; *Mailman*, 2010-NMSC-036, ¶ 20.

9 {20} Applying these factors, we conclude that sufficient evidence was presented to  
10 establish actual physical control under *Sims* and *Mailman*. Defendant was in the  
11 driver's seat of the truck, which was stuck in the median on the interstate with the  
12 hazard lights on, suggesting that Defendant knew that the car should not have been  
13 there, and that he drove into the median inadvertently. It was around 11:30 p.m., and  
14 the weather was clear and warm. Neither officer who testified could recall specifically  
15 whether the truck's engine was running, but Sergeant Vitale testified that the vehicle  
16 appeared to be "on," indicating the ignition was turned on. Sergeant Vitale also  
17 testified that the key was in the ignition. While Defendant argues that his disheveled  
18 appearance suggests that he was asleep in the vehicle, the State argues that the fact  
19 that he opened the driver's door and exited as soon as Sergeant Vitale approached

1 suggests that Defendant was awake. We agree with the State that the jury could have  
2 inferred that Defendant’s rapid exit from the vehicle suggested that he was awake.  
3 *See Cunningham*, 2000-NMSC-009, ¶ 26 (explaining that our standard of review  
4 requires us to indulge all inferences in favor of the guilty verdict).

5 {21} Defendant argues that he could not have been in actual physical control of the  
6 vehicle because his truck was stuck in the dirt. Although the evidence was that the  
7 vehicle’s tires were stuck in the median, it was not apparent that the vehicle was  
8 entirely inoperable, and it could reasonably be inferred that Defendant could have  
9 moved the vehicle out of the median, either by himself or with assistance; he  
10 expressed an intent to go somewhere, as he told Sergeant Vitale that he was “going  
11 to El Paso.” This distinguishes the present case from *Mailman*, wherein the defendant  
12 told the police officer who stopped him that his car had broken down and asked the  
13 officer to arrange for a tow truck. 2010-NMSC-036, ¶ 5. The officer in *Mailman*  
14 looked for but could not find the keys to the car, and was unable to start the car  
15 without a key, leading him to conclude that the vehicle was inoperable. *Id.* Our  
16 Supreme Court held that on its own, evidence that a defendant “was in a non-moving,  
17 inoperable vehicle attempting to make a phone call[,]” that he told the officer that his  
18 car broke down, and that he asked the officer to help him arrange a tow, was  
19 insufficient as a matter of law to prove actual physical control. *Id.* ¶ 21. In so holding,

1 our Supreme Court explained that “[w]hile the operability of the vehicle may be  
2 highly relevant to [the] determination [of actual physical control], it is not  
3 necessarilydispositive.” *Id.* ¶ 19. Unlike the situation in *Mailman*, there was no  
4 evidence in this case to suggest that Defendant’s truck could not have been moved  
5 from the median.

6 {22} In sum, considering the totality of the evidence, we conclude that Defendant  
7 was more than a passive occupant of the truck, and that sufficient evidence was  
8 presented to support the conviction under the theory of actual physical control.  
9 Having concluded that there was sufficient evidence to establish that Defendant  
10 operated the vehicle either under the theory of past driving or actual physical control,  
11 we affirm Defendant’s conviction for aggravated DWI.

12 **Reckless Driving**

13 {23} Finally, we turn to Defendant’s contention that his reckless driving conviction  
14 must be vacated. The State concedes this issue, acknowledging that “there was  
15 admittedly no evidence of reckless driving beyond [Defendant’s] intoxication.” The  
16 State further notes that “[w]hile the jury could reasonably infer that [Defendant] had  
17 driven off the highway into the median, this in itself does not establish reckless  
18 driving, because without witness testimony or an admission from [Defendant], the  
19 jury could only speculate as to why he did so.”

1 {24} While we are not bound to accept the State’s concession, *see State v. Tapia*,  
2 2015-NMCA-048, ¶ 18, 347 P.3D 738 (stating appellate courts are not bound by the  
3 state’s concessions), we agree that the reckless driving conviction should be vacated.  
4 *See State v. Sandoval*, 1975-NMCA-096, ¶ 2, 88 N.M. 267, 539 P.2d 1029 (“The rule  
5 in criminal cases in New Mexico is that evidence of intoxication is but a circumstance  
6 to be considered by the jury in deciding the issue of reckless driving.”).

7 {25} Because we reverse Defendant’s conviction for reckless driving, we do not  
8 address Defendant’s argument that his convictions for both aggravated DWI and  
9 reckless driving violate double jeopardy. *See State v. Trujillo*, 2012-NMCA-112,  
10 ¶ 44, 289 P.3d 238 (“Because we reverse the kidnapping conviction, there is no need  
11 to address [the d]efendant’s double jeopardy arguments regarding kidnapping.”).

## 12 **CONCLUSION**

13 {26} For the foregoing reasons, we affirm Defendant’s conviction for aggravated  
14 DWI and reverse his conviction for reckless driving. We therefore remand to the  
15 district court to vacate Defendant’s conviction for reckless driving and resentence  
16 Defendant accordingly.

17 {27} **IT IS SO ORDERED.**

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**MICHAEL E. VIGIL, Judge**



1 **WE CONCUR:**

2

3 **J. MILES HANISEE, Judge**

4

5 **STEPHEN G. FRENCH, Judge**