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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. 32,799**

5 **JULIO VALDEZ,**

6           Defendant-Appellant.

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

8 **Stan Whitaker, District Judge**

9 Gary K. King, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Mary McCleary

13 Los Lunas, NM

14 for Appellant

15   **MEMORANDUM OPINION**

16 **BUSTAMANTE, Judge.**

1 {1} Defendant-Appellant Julio Valdez (Defendant) has appealed his conviction for  
2 DWI (first offense). We issued a notice of proposed summary disposition, proposing  
3 to affirm. Defendant has filed a memorandum in opposition, which we have duly  
4 considered. Because we remain unpersuaded, we uphold the conviction.

5 {2} On appeal Defendant contends that he received ineffective assistance of  
6 counsel. Because we outlined the applicable standards and discussed the particulars  
7 of this case at length in the notice of proposed summary disposition, we will not  
8 reiterate it here. Instead, we will focus on the content of the memorandum in  
9 opposition.

10 {3} Defendant continues to assert that trial counsel's proffer of a prescription bottle,  
11 without reading its label, was unreasonable and prejudiced his defense. [MIO 1-4]  
12 However, as we previously observed, the introduction of the bottle appears to fall  
13 within the ambit of trial strategy, insofar as it tended to support Defendant's assertion  
14 that he had taken a prescription medication, the effects of which he did not believe he  
15 was feeling at the time of driving. [DS 2-4] Defendant asserts that such strategic value  
16 constituted "dumb luck," [MIO 2] and further suggests that any support that the bottle  
17 may have supplied to Defendant's assertions must have been outweighed by its  
18 prejudicial effect. [MIO 3-4] However, as we observed in the notice of proposed  
19 summary disposition, we cannot second-guess strategic matters. *See generally Lytle*

1 v. *Jordan*, 2001-NMSC-016, ¶ 43, 130 N.M. 198, 22 P.3d 666 (stating that on appeal,  
2 we will not second guess the trial strategy and tactics of the defense counsel).

3 {4} We also briefly acknowledge Defendant’s suggestion that trial counsel’s  
4 approach to cross-examination constituted ineffective assistance, insofar as it led the  
5 arresting officer to comment that he was a drug-recognition expert (DRE), and to offer  
6 his opinions about the probable effect of Defendant’s consumption of Ambien and  
7 alcohol. [DS 2-3] However, insofar as the officer’s comment about his DRE status  
8 appears to have been spontaneous, [DS 3] we do not believe this suggests  
9 unreasonable conduct on the part of trial counsel. We further note that trial counsel  
10 may have elicited the testimony about Ambien’s status as a non-narcotic sleep aid [DS  
11 2-3] for the strategic purpose of diminishing concerns that the finder of fact may have  
12 had about the nature of the drug, particularly in light of the fact that testimony had  
13 already been presented indicating that Defendant had admitted to taking an Ambien  
14 prior to driving. [DS 2] While the presentation of this evidence may ultimately have  
15 redounded to the detriment of the defense, this does not take it outside the realm of  
16 reasonable trial strategy. *See generally State v. Garcia*, 2011-NMSC-003, ¶ 33, 149  
17 N.M. 185, 246 P.3d 1057 (observing in this context that “any ‘sound’ trial tactic or  
18 strategy withstands review”).

1 {5} Moreover, even if defense counsel’s conduct was objectively unreasonable, we  
2 remain unpersuaded by Defendant’s assertions of prejudice. In this context,  
3 “generalized prejudice is insufficient. . . . A defendant must show a reasonable  
4 probability that, but for counsel’s unprofessional errors, the result of the proceeding  
5 would have been different.” *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644,  
6 146 P.3d 289 (internal quotation marks and citations omitted). In this case, given the  
7 testimony about erratic driving and the various indicia of intoxication observed by the  
8 arresting officer, together with Defendant’s apparent inability to perform field  
9 sobriety tests, his BAC content of .07, and his admission to drinking and taking a  
10 sedative prior to driving, [RP 64-65] we do not believe more prudent or effective  
11 performance by counsel would have had any impact on the result. *See, e.g., State v.*  
12 *Nevarez*, 2010-NMCA-049, ¶¶ 33-36, 148 N.M. 820, 242 P.3d 387 (upholding the  
13 sufficiency of the evidence to support a conviction for driving while impaired to the  
14 slightest degree, based on testimony that the defendant drove his vehicle at a high rate  
15 of speed, had bloodshot watery eyes, smelled of alcohol, admitted to having consumed  
16 alcohol, and failed to satisfactorily perform field sobriety tests); *State v. Soto*, 2007-  
17 NMCA-077, ¶ 34, 142 N.M. 32, 162 P.3d 187 (holding that there was sufficient  
18 evidence to support a conviction where officers observed the defendant driving, where  
19 the defendant admitted to drinking, and where the defendant had bloodshot watery

1 eyes, smelled of alcohol, and slurred speech); *State v. Notah-Hunter*, 2005-NMCA-  
2 074, ¶ 24, 137 N.M. 597, 113 P.3d 867 (holding that evidence that a defendant  
3 smelled of alcohol, had slurred speech, admitted to drinking alcohol, failed field  
4 sobriety tests, and was driving erratically was sufficient to uphold a conviction for  
5 driving while intoxicated).

6 {6} Finally, Defendant suggests that the case of *State v Aragon*, 2009-NMCA-102,  
7 ¶¶ 9-15, 147 N.M. 26, 29-30, supports his claim of ineffective assistance. [MIO 2-3]  
8 However, *Aragon* dealt with a situation in which consultation with an expert was  
9 necessary to understand the nature of the State’s evidence and to prepare an adequate  
10 defense. *Id.* ¶¶ 15, 17. This case is not analogous.

11 {7} Accordingly, for the reasons stated above and in the notice of proposed  
12 summary disposition, we affirm.

13 {8} **IT IS SO ORDERED.**

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**MICHAEL D. BUSTAMANTE, Judge**

16 **WE CONCUR:**

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**RODERICK T. KENNEDY, Chief Judge**

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**LINDA M. VANZI, Judge**