

1 Defendant's sixth and subject to the enhanced sentence for a sixth conviction.
2 Unpersuaded that the district court erred by using the prior DWI conviction to
3 enhance Defendant's sentence, we issued a notice of proposed summary disposition,
4 proposing to affirm. Defendant has filed a response to our notice. We have considered
5 Defendant's response and remain unpersuaded that Defendant demonstrated error. We
6 affirm.

7 On appeal, Defendant contends that his 2004 DWI conviction was not valid for
8 enhancement purposes because Defendant's waiver of counsel and guilty plea in
9 municipal court related to that conviction were not knowing and voluntary. [DS 3;
10 MIO 5-8] Defendant pursues his appeal under the demands of *State v. Franklin*, 1967-
11 NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029,
12 ¶ 24, 103 N.M. 655, 712 P.2d 1. [MIO 4]

13 Our notice explained that for a defendant to succeed in a collateral attack
14 against a prior DWI conviction, the defendant must show fundamental error by
15 producing evidence of the invalidity of the prior conviction. *See State v. Pacheco*,
16 2008-NMCA-059, ¶¶ 8-9, 144 N.M. 61, 183 P.3d 946. "In applying the fundamental
17 error test to claims involving guilty or no contest pleas, this Court has stated that the
18 following factors must be met: (1) the error must be clear, and (2) the error must

1 clearly have affected the outcome.” *Id.* ¶ 12 (internal quotation marks and citation
2 omitted).

3 Our notice detailed the evidence the State presented to support the validity of
4 Defendant’s conviction and the contrary evidence and arguments Defendant asserted
5 to rebut the State’s prima facie showing of the conviction’s validity. In his response
6 to our notice, Defendant does not dispute the accuracy of our account of this evidence
7 or the arguments he asserted in rebuttal. Our notice proposed to hold that the State’s
8 evidence was sufficient to establish a prima facie case of validity and that the State
9 carried its ultimate burden of persuasion on the validity of prior conviction. In
10 response, Defendant continues to argue that the trial judge presiding over the 2004
11 DWI conviction denied him the opportunity to present evidence that he had a learning
12 disability, and the district court in the current case failed to take his learning disability
13 under consideration in assessing whether Defendant established fundamental error.

14 [MIO 7]

15 The record indicates that the district court in the current case indeed considered
16 Defendant’s learning disability. [RP 80] The district court noted that the 2004
17 conviction was not Defendant’s first DWI conviction; Defendant’s previous DWI
18 conviction was only a year earlier and he chose to have representation during those
19 previous proceedings. [RP 78] The district court further noted that Defendant did not

1 express a lack of understanding at any time in the 2004 DWI proceedings, however.
2 [RP 80] We continue to agree with the district court that Defendant did not present
3 evidence showing clear error that affected the outcome of the 2004 DWI case. [RP 81]
4 *See id.* ¶ 12.

5 For the reasons stated in the notice and in this opinion, we affirm Defendant's
6 conviction for sixth offense, aggravated DWI.

7 **IT IS SO ORDERED.**

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CYNTHIA A. FRY, Judge

10 **WE CONCUR:**

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12 **MICHAEL D. BUSTAMANTE, Judge**

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14 **JONATHAN B. SUTIN, Judge**