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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. 33,119**

5           **MARK MARTINEZ-THORMAN,**

6                 Defendant-Appellant.

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

8           **Stan Whitaker, District Judge**

9           Hector H. Balderas, Attorney General

10          Margaret McLean, Assistant Attorney General

11          Santa Fe, NM

12          for Appellee

13          Jorge A. Alvarado, Chief Public Defender

14          Steven J. Forsberg, Assistant Appellate Defender

15          Albuquerque, NM

16          for Appellant

17   **MEMORANDUM OPINION**

18          **ZAMORA, Judge.**

19          {1}        Defendant appeals from the district court’s judgment and sentence convicting

20          him of possession of a controlled substance and sentencing him to nine and a half

1 years under the habitual offender statute. On appeal, Defendant argues: (1) he was  
2 illegally seized and evidence obtained as a result of the seizure should have been  
3 suppressed; (2) insufficient evidence was presented to support his conviction; and (3)  
4 he was denied effective assistance of counsel. The State concedes the merits of  
5 Defendant's seizure claim and does not answer Defendant's arguments related to  
6 sufficiency of the evidence and ineffective assistance of counsel.

7 {2} We are not bound by the State's concession that Defendant's seizure was  
8 unlawful. *State v. Guerra*, 2012-NMSC-027, ¶ 9, 284 P.3d 1076; *see State v.*  
9 *Caldwell*, 2008-NMCA-049, ¶ 8, 143 N.M. 792, 182 P.3d 775 ("This Court, however,  
10 is not bound by the [s]tate's concession[,] and we conduct our own analysis[.]"). Our  
11 review of the trial testimony, along with a lapel recording of Defendant's encounter  
12 with police introduced at trial, supports the State's position that Defendant was  
13 improperly seized and that the physical evidence recovered as a result of that seizure  
14 should have been suppressed. *See State v. Martinez*, 2015-NMCA-\_\_\_\_, ¶ 15, \_\_\_\_P.3d  
15 \_\_\_\_ (No. 32,516, Jan. 6, 2015) ("[R]eviewing a video by itself is like reviewing any  
16 other documentary evidence, and we are in as good a position as the district court to  
17 view the video and interpret what it shows."). We accept the State's concession and  
18 reverse Defendant's conviction on that basis.

1 {3} Defendant contends that without the physical evidence there is insufficient  
2 evidence to support his conviction. Because the State does not argue that sufficient  
3 evidence exists, we conclude that Defendant is entitled to a dismissal rather than a  
4 new trial. *See State v. Templeton*, 2007-NMCA-108, ¶ 27, 142 N.M. 369, 165 P.3d  
5 1145 (explaining that the defendant “would be entitled to a dismissal of the charges  
6 on remand if the evidence adduced at trial was insufficient to support the conviction”  
7 (alteration, internal quotation marks, and citation omitted)). Therefore, Defendant’s  
8 ineffective assistance claim is moot. *See Crutchfield v. N.M. Dep’t of Taxation &*  
9 *Revenue*, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 (“A reviewing court  
10 generally does not decide academic or moot questions.”).

11 **CONCLUSION**

12 {4} For the foregoing reasons we reverse.

13 {5} **IT IS SO ORDERED.**

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**M. MONICA ZAMORA, Judge**

16 **WE CONCUR:**

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**MICHAEL D. BUSTAMANTE, Judge**

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**JONATHAN B. SUTIN, Judge**

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