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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. 34,175

5 **EDUARDO RAFAEL,**

6 Defendant-Appellant.

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

8 **Ross C. Sanchez, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Jorge A. Alvarado, Chief Public Defender

13 Josephine H. Ford, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

1 **MEMORANDUM OPINION**

2 **BUSTAMANTE, Judge.**

3 {1} Defendant appeals his convictions for DWI and parking to obstruct traffic. [RP
4 120] Our notice proposed to affirm and Defendant filed a memorandum in opposition.
5 We remain unpersuaded by Defendant’s arguments and therefore affirm.

6 {2} Defendant continues to argue that the metropolitan court erred in allowing
7 Officer Welch to testify, in violation of Defendant’s *Miranda* rights, to Defendant’s
8 admission to drinking made while he was being transported to the police station. [DS
9 9; MIO 7] *See State v. Barrera*, 2001-NMSC-014, ¶ 23, 130 N.M. 227, 22 P.3d 1177
10 (“On appeal, we review the [district] court’s findings of fact for substantial evidence
11 and review de novo the ultimate determination of whether a defendant validly waived
12 his or her *Miranda* rights prior to police questioning.”).

13 {3} Even assuming that this argument was preserved in the sidebar conversation
14 [MIO 7], for the reasons extensively detailed in our notice, we conclude that
15 Defendant’s volunteered statements made in the context of his non-custodial and self-
16 initiated exchange with the officer [RP 115] did not entitle him to *Miranda* warnings.
17 *See generally State v. Fekete*, 1995-NMSC-049, ¶¶ 43-44, 120 N.M. 290, 901 P.2d
18 708 (stating that “*Miranda* protections do not apply in those situations where [a
19 person in police custody] volunteers statements” that were not elicited by police); *cf.*

1 *State v. LaCouture*, 2009-NMCA-071, ¶ 11, 146 N.M. 649, 213 P.3d 799 (recognizing
2 that an involuntary statement is made in response to some element of official
3 overreaching by the police, such as “intimidation, coercion, deception, assurances, or
4 other police misconduct that constitutes overreaching” (internal quotation marks and
5 citation omitted)).

6 {4} Defendant also continues to argue that the evidence was insufficient to show
7 that he was driving while under the influence. [DS 10; MIO 9-10] *See* NMSA 1978,
8 § 66-8-102(A) (2010); *see also State v. Sims*, 2010-NMSC-027, ¶¶ 7, 10-12, 148 N.M.
9 330, 236 P.3d 642 (recognizing that there are two ways a person may “drive” a vehicle
10 as contemplated by the DWI statute: DWI based on being in “actual physical control”
11 of the vehicle while impaired, whether or not the vehicle is moving; and DWI based
12 on actually driving a moving vehicle while impaired). [RP 38] We review the
13 evidence to determine “whether substantial evidence of either a direct or
14 circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt
15 with respect to every element essential to a conviction.” *See State v. Sutphin*, 1988-
16 NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314 (setting forth our standard of review).

17 {5} Defendant does not dispute that he was intoxicated, but instead argues that the
18 evidence was insufficient to show that he was driving, given that Officer Welch
19 encountered Defendant’s non-moving vehicle in the middle of a driving lane. [RP 104,

1 115-16] As for DWI based on being in actual physical control of the vehicle while
2 impaired, Defendant maintains that there was no evidence to show that he was in
3 actual physical control of the vehicle while impaired *and* that he intended to drive
4 while impaired in the future. [MIO 9] *See generally Sims*, 2010-NMSC-027, ¶¶ 4, 20-
5 21 (recognizing that for DWI based on “actual physical control,” the evidence must
6 show that the defendant was actually exercising control over the vehicle *and* had the
7 general intent to drive so as to pose a real danger to himself, herself, or the public). As
8 emphasized in our notice, however, evidence was presented that Defendant was in the
9 driver’s seat, with the keys in the ignition, the engine running, the vehicle in the
10 middle of a traffic lane, and that Officer Welch had to put the vehicle in park upon
11 encountering Defendant. [RP 115-16] From this evidence, the factfinder could infer
12 Defendant’s actual physical control over the vehicle and his intent to drive in the
13 future. *See State v. Sparks*, 1985-NMCA-004, ¶ 6, 102 N.M. 317, 694 P.2d 1382 (Ct.
14 App. 1985) (defining substantial evidence as evidence that a reasonable person would
15 consider adequate to support a defendant’s conviction).

16 {6} And as for DWI based on past driving, Defendant maintains that there was no
17 evidence to show that he was intoxicated when he drove to the middle of the lane [RP
18 104; MIO 10], thereby suggesting that he only became intoxicated after he stopped in
19 the middle of the lane. [RP 112] As we provided in our notice, although the Officer

1 did not see Defendant's vehicle in motion, the same evidence that supported
2 Defendant's intent to drive in the future also provides ample circumstantial evidence
3 from which to infer that Defendant actually drove while intoxicated. *See, e.g., State*
4 *v. Mailman*, 2010-NMSC-036, ¶¶ 23, 26, 28, 148 N.M. 702, 242 P.3d 1269 (observing
5 that direct evidence is not required to support a conviction for past DWI; rather,
6 circumstantial evidence may be relied upon to establish that the accused actually drove
7 while intoxicated). In addition, Defendant admitted to driving after drinking [RP 115]
8 and Officer Welch encountered an intoxicated Defendant in his vehicle stopped in the
9 middle of a traffic lane, an inappropriate stopping place that in and of itself indicates
10 impaired driving up to such stopping place. From this evidence, the factfinder could
11 infer that Defendant drove to the middle of the lane while intoxicated and remained
12 in such state up until his encounter with Officer Welch. *See State v. Owelicio*, 2011-
13 NMCA-091, ¶ 33, 150 N.M. 528, 263 P.3d 305 (concluding that sufficient evidence
14 was presented to support a conviction for DWI based on the defendant's admission
15 that she was driving, the fact that the defendant and a third party who denied driving
16 were the only persons at the scene, and a videotape showing the defendant
17 approaching the passenger side of the vehicle); *Sparks*, 1985-NMCA-004, ¶ 6
18 (defining substantial evidence as evidence that a reasonable person would consider
19 adequate to support a defendant's conviction).

1 {7} For the reasons detailed in our notice and above, we affirm.

2 {8} **IT IS SO ORDERED.**

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5

MICHAEL D. BUSTAMANTE, Judge

6 **WE CONCUR:**

7

8 **JAMES J. WECHSLER, Judge**

9

10 **TIMOTHY L. GARCIA, Judge**