

This memorandum opinion was not selected for publication in the New Mexico Appellate Reports. Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please also note that this electronic memorandum opinion may contain computer-generated errors or other deviations from the official paper version filed by the Court of Appeals and does not include the filing date.

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

2         **STATE OF NEW MEXICO,**

3             Plaintiff-Appellee,

4         v.

**NO. 34,326**

5         **JOHNNY MILLER,**

6             Defendant-Appellant.

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

8         **Judith Nakamura, District Judge**

9         Hector H. Balderas, Attorney General

10         Santa Fe, NM

11         for Appellee

12         Jorge A. Alvarado, Chief Public Defender

13         Sergio J. Viscoli, Assistant Public Defender

14         Albuquerque, NM

15         for Appellant

16                                 **MEMORANDUM OPINION**

17         **WECHSLER, Judge.**

1 {1} Defendant appeals his conviction for DWI (first offense) entered by the  
2 metropolitan court following a bench trial and subsequently affirmed by the district  
3 court following an on-record appeal. [RP 75, 85] Our notice proposed to affirm, and  
4 Defendant filed a memorandum in opposition. We remain unpersuaded by  
5 Defendant’s arguments, and therefore affirm.

6 {2} In Issue (I), Defendant continues to argue that the metropolitan court violated  
7 Rule 11-615 NMRA in allowing witness William Thomas (the civilian witness) to  
8 stay in the courtroom while Deputy Morpher (the Deputy) testified. [DS 14; MIO 13]  
9 *See generally State v. Shirley*, 2007-NMCA-137, ¶ 33, 142 N.M. 765, 170 P.3d 1003  
10 (recognizing that trial courts are afforded broad discretion under Rule 11-615 and that  
11 “[w]e will not disturb the decision of the trial court absent a clear abuse of this  
12 discretion and prejudice to the complaining party” (internal quotation marks and  
13 citation omitted)).

14 {3} For the reasons extensively detailed in our notice, we hold that the metropolitan  
15 court did not abuse its discretion in allowing the civilian witness to remain in the  
16 courtroom during the Deputy’s testimony. While Defendant maintains that allowing  
17 the civilian witness to stay in the courtroom allowed the witness to tailor his testimony  
18 to conform to the Deputy’s testimony [MIO 15], we continue to disagree. As  
19 emphasized in our notice, whereas the Deputy did not go into any detail in his

1 testimony [RP 76, 80], the civilian witness on the other hand testified in detail about  
2 his own independent observations and interactions with Defendant while driving on  
3 I-40 [RP 77] and while at Defendant’s house [RP 78] that were separate from the  
4 Deputy’s interactions. [RP 80]

5 {4} We similarly disagree with Defendant’s assertion that he was prejudiced  
6 because “the civilian witness was able to tailor his testimony regarding the signs of  
7 intoxication to match that of the officers.” [MIO 14] As noted above, the civilian  
8 witness testified in detail as to his independent observations of Defendant and his  
9 exhibited signs of intoxication. *See, e.g., Shirley*, 2007-NMCA-137, ¶ 34 (concluding  
10 no abuse of discretion or prejudice in allowing the officer to remain in the courtroom  
11 while the other officer testified because “Officer Johnson testified about what  
12 occurred inside Defendant’s house; [whereas] Officer Carr could not testify about  
13 such matters because he remained outside the house during the transaction”). And as  
14 we pointed out in our notice, the civilian witness specifically testified as to his own  
15 basis of knowledge for recognizing signs of intoxication [RP 80]—providing that he  
16 came from a family of alcoholics and was familiar with people who were under the  
17 influence of alcohol; that he had been a tow truck and taxi driver and had experience  
18 with intoxicated people from that line of work; and that he had driven an eighteen-  
19 wheeler and had seen multiple alcohol-related accidents. [RP 78] *See, e.g., Sanchez*

1 v. *Wiley*, 1997-NMCA-105, ¶¶ 2, 19, 124 N.M. 47, 946 P.2d 650 (holding that a  
2 witness who was a teenager could rely on his knowledge in testifying that the  
3 defendant was “drunk”). We affirm Issue (I).

4 {5} In Issue (II), Defendant continues to challenge the sufficiency of the evidence  
5 to support his DWI conviction. [DS 14; MIO 15] *See* NMSA 1978, § 66-8-102(A)  
6 (2010); *see also State v. Dutchover*, 1973-NMCA-052, ¶ 5, 85 N.M. 72, 509 P.2d 264  
7 (observing that DWI may be established through evidence that the defendant’s ability  
8 to drive was impaired to the slightest degree); *State v. Sutphin*, 1988-NMSC-031,  
9 ¶ 21, 107 N.M. 126, 753 P.2d 1314 (setting forth the standard of review).

10 {6} As detailed in our notice, the civilian witness observed Defendant driving  
11 erratically on I-40—swerving [RP 77], veering off the road [RP 76, 77], almost hitting  
12 a concrete barrier in the center lane [DS 2]—and causing another vehicle to swerve  
13 to avoid a collision and causing the driver of a diesel truck to dive under his truck to  
14 avoid being hit. [RP 75-77] Believing that Defendant’s driving presented an  
15 emergency [DS 7], the civilian witness called the police [DS 7] and followed  
16 Defendant to his home. [DS 8] Once there, the civilian witness testified that Defendant  
17 exited his vehicle, at which time he observed that Defendant had slurred speech, could  
18 not stand up on his own, and smelled strongly of alcohol. [DS 9] In addition to the  
19 testimony of the civilian witness, the Deputy who arrived at Defendant’s home in

1 response to the emergency call also testified. [RP 76] The Deputy related that  
2 Defendant's mannerisms and speech indicated he was intoxicated [RP 76] and that  
3 Defendant refused to perform the standardized field sobriety tests (SFSTs). [RP 76]  
4 {7} Based on the foregoing, we hold that substantial evidence supports findings that  
5 Defendant was under the influence of drugs to such a degree that he was incapable of  
6 safely driving a vehicle. *See State v. Sparks*, 1985-NMCA-004, ¶ 6, 102 N.M. 317,  
7 694 P.2d 1382 (defining substantial evidence as that evidence that a reasonable person  
8 would consider adequate to support a defendant's conviction). Although the Deputy  
9 himself did not observe Defendant driving [DS 14; MIO 16], the factfinder could  
10 properly consider the civilian witness's testimony relating his observations of  
11 Defendant driving, as well as his observations of Defendant's signs of intoxication.  
12 *See generally State v. Sims*, 2010-NMSC-027, ¶ 3, 148 N.M. 330, 236 P.3d 642  
13 (stating that "[h]ad [a] police officer *or other witnesses* observed [the d]efendant  
14 behind the steering wheel of a moving vehicle at or near the time of his apprehension"  
15 then the actual physical control instruction would not have been required) (emphasis  
16 added); *State v. Baldwin*, 2001-NMCA-063, ¶ 16, 130 N.M. 705, 30 P.3d 394  
17 (pointing out that a factfinder can rely on "human experience" in deciding whether a  
18 defendant was under the influence and could "drive an automobile in a prudent  
19 manner"). Moreover, the Deputy did observe Defendant at his home after Defendant

1 had been driving, and related that Defendant's mannerisms and speech indicated he  
2 was clearly intoxicated. [RP 76] *See, e.g., State v. Mailman*, 2010-NMSC-036, ¶¶ 2-5,  
3 24, 148 N.M. 702, 242 P.3d 269 (observing that there was sufficient circumstantial  
4 evidence to support the DWI conviction based on the defendant's presence behind the  
5 wheel of a parked vehicle, admissions to having driven and having consumed alcohol,  
6 refusal either to perform field sobriety tests or to provide a breath sample, the presence  
7 of an open can of beer in the vehicle, and a variety of indicia of intoxication including  
8 odor of alcohol, disorientation and confusion, difficulty maintaining balance, and  
9 bloodshot watery eyes). We accordingly hold that the evidence was sufficient to  
10 support Defendant's DWI conviction.

11 {8} To conclude, for the reasons set forth in our notice and discussed above, we  
12 affirm.

13 {9} **IT IS SO ORDERED.**

14  
15 

---

**JAMES J. WECHSLER, Judge**

16 **WE CONCUR:**

1

2 **CYNTHIA A. FRY, Judge**

3

4 **LINDA M. VANZI, Judge**