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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. 34,328**

5       **LANCE HOUSEWRIGHT,**

6             Defendant-Appellant.

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

8       **James M. Hudson, District Judge**

9       Hector H. Balderas, Attorney General

10       Santa Fe, NM

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12       Albuquerque, NM

13       for Appellee

14       Bennett J. Baur, Chief Public Defender

15       Allison H. Jaramillo, Assistant Appellate Defender

16       Santa Fe, NM

17       for Appellant

18                                       **MEMORANDUM OPINION**

19       **SUTIN, Judge.**

1 {1} Defendant Lance Housewright appeals his conviction for aggravated driving  
2 while under the influence (DWI) first offense. On appeal, Defendant argues (1) the  
3 district court erred in denying him a jury trial, and (2) there was insufficient evidence  
4 to convict him of aggravated DWI because (a) the “injury to a human being” element  
5 used to elevate the DWI charge to an aggravated DWI charge was erroneously applied  
6 when he was the one injured, and (b) there was insufficient evidence of the bodily  
7 injury element of the aggravated DWI statute. We hold that Defendant was not  
8 entitled to a jury trial. And we hold that the evidence of bodily injury was insufficient.  
9 We therefore hold that the DWI conviction should be for the lesser included offense  
10 of DWI first offense, not aggravated DWI first offense.

## 11 **BACKGROUND**

12 {2} Defendant was charged with reckless driving, under NMSA 1978, Section 66-8-  
13 113 (1987), and aggravated DWI first offense, under NMSA 1978, Section 66-8-102  
14 (2010, amended 2016), after he crashed his vehicle, exhibited signs of intoxication,  
15 and performed poorly on field sobriety tests. The case was initially filed in Chaves  
16 County Magistrate Court (the magistrate court), however, a nolle prosequi was filed  
17 seven days later.<sup>1</sup> The case was re-filed in the Fifth Judicial District Court. Defendant

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18 <sup>1</sup> The State filed a nolle prosequi so that “this case [could] be re-filed in  
19 [d]istrict [c]ourt due to the necessity to bring in a Scientific Laboratory Division  
20 analyst to testify at trial.”

1 demanded a jury trial. Over the course of the pendency of the case, the district court  
2 issued several notices of jury trial due to scheduling conflicts for both parties, but the  
3 trial was eventually converted to a bench trial. On the day of trial, Defendant filed a  
4 motion to dismiss on speedy trial grounds and, while arguing that motion, claimed that  
5 he had a right to a jury trial, despite the fact that he did not argue for a jury trial when  
6 the case was set for a bench trial approximately nine months earlier. Defendant  
7 admitted that his purpose for raising the jury trial issue on the day of trial was so that  
8 jeopardy would attach. The court denied Defendant's motion and Defendant was  
9 ultimately found guilty of aggravated DWI first offense. The court sentenced  
10 Defendant to ninety days in jail (all suspended, except forty-eight mandatory hours  
11 to be served at Chaves County Detention Center), and to one year of supervised  
12 probation (conditions to include community service, use of an ignition interlock, drug  
13 and alcohol screening, and DWI school), and the court also ordered Defendant to pay  
14 a fine and fees. Additional facts will be offered throughout as needed.

## 15 **DISCUSSION**

### 16 **I. Right to a Jury Trial**

17 {3} Defendant argues that he was denied his right to a jury trial under the Sixth  
18 Amendment to the United States Constitution. "The question of whether a defendant's

1 constitutional rights were violated is a question of law [that the appellate courts]  
2 review de novo.” *State v. Turrietta*, 2013-NMSC-036, ¶ 14, 308 P.3d 964.

3 {4} Defendant argues that he was wrongfully denied a jury trial because he would  
4 have been entitled to a jury trial had the State moved forward with its case in  
5 magistrate court instead of re-filing it in district court, and also because he had a  
6 constitutional right to a jury trial insofar as DWI first offense is “a serious offense in  
7 light of the severe penalties and sentence imposed.” Defendant urges this Court to  
8 reconsider its holding in *State v. Cannon*, 2014-NMCA-058, 326 P.3d 485, which  
9 specifically held that “DWI[] first offense[] is not a serious offense for [the] purpose  
10 of a defendant’s Sixth Amendment right to a jury trial.” *Id.* ¶ 20. In reaching its  
11 conclusion, the *Cannon* Court noted that the defendant was not entitled to a jury trial  
12 under the six-month threshold standard provided by *State v. Sanchez*, 1990-NMSC-  
13 012, ¶ 7, 109 N.M. 428, 786 P.2d 42, because the potential sentence did not exceed  
14 six months’ imprisonment. *Cannon*, 2014-NMCA-058, ¶¶ 11-12. *Cannon* also held  
15 that the defendant was not entitled to a jury trial under *Blanton v. City of North Las*  
16 *Vegas*, 489 U.S. 538, 542 (1989), which held that additional statutory penalties may  
17 be considered in conjunction with the maximum period of incarceration to determine  
18 whether an offense is “serious” and thus entitles a charged defendant to demand a jury  
19 trial. *Cannon*, 2014-NMCA-058, ¶¶ 13, 18. As did the defendant in *Cannon*, who was

1 convicted of aggravated DWI first offense,<sup>2</sup> Defendant argues that the Legislature  
2 views DWI as a serious offense, as evidenced by the onerous statutory penalties,  
3 which in addition to jail time, include probation, community service, use of an ignition  
4 interlock device, drug and alcohol screening and treatment, DWI school, fees, and  
5 fines. *See id.* ¶¶ 1, 14. Defendant argues that because DWI first offense is serious, he  
6 has a constitutional right to a jury trial, “under both the Sixth Amendment of the  
7 United States Constitution, and Article II, Section 12 of the New Mexico  
8 Constitution[,]” and he should therefore be “permitted a jury trial upon request.”

9 {5} We begin by noting that Defendant cited no authority for his proposition that  
10 because he was entitled to a jury trial in magistrate court that right extended to district  
11 court. Because Defendant failed to provide any support for his argument, we assume  
12 none exists, and thus reject the contention. *See In re Adoption of Doe*, 1984-NMSC-  
13 024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“[The appellate courts] assume where  
14 arguments in briefs are unsupported by cited authority, counsel after diligent search,

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15 <sup>2</sup> Although the analysis in *Cannon* is worded such that it applies to DWI first-  
16 offense cases generally, the defendant in *Cannon* was specifically charged with  
17 aggravated DWI first offense. 2014-NMCA-058, ¶ 1. We agree with the *Cannon*  
18 Court that the analysis of a defendant’s alleged right to a jury trial when charged with  
19 aggravated DWI first offense is the same as the analysis for DWI first offense because  
20 the potential penalties under DWI first offense are the same as the potential penalties  
21 under aggravated DWI first offense, except that an individual who is convicted of  
22 aggravated DWI first offense *must* serve forty-eight hours in jail. *See* § 66-8-102(E).

1 was unable to find any supporting authority[, and the appellate courts] therefore will  
2 not do this research for counsel. Issues raised in appellate briefs which are  
3 unsupported by cited authority will not be reviewed . . . on appeal.” (citation  
4 omitted)). We also note that Defendant failed to preserve or adequately argue for  
5 protections under the New Mexico Constitution, and we therefore limit our analysis  
6 to Defendant’s claimed right under the United States Constitution. *See Cannon*, 2014-  
7 NMCA-058, ¶ 10 (“This Court does not read [the d]efendant’s brief in chief or reply  
8 brief as asserting an argument for greater protection under the New Mexico  
9 Constitution, and [the d]efendant has made no attempt to rebut the [prosecution’s]  
10 contention that this issue was not preserved. We therefore limit our analysis  
11 accordingly.”).

12 {6} In light of the binding and on-point precedent regarding aggravated DWI first  
13 offense provided by *Cannon*, we decline to conclude in this case now before us that  
14 aggravated DWI first offense is serious enough to warrant entitlement to a jury trial  
15 under the Sixth Amendment. As held by this Court in *Cannon*, neither the statutory  
16 penalties nor the courts’ and/or the Legislature’s recognition of DWI as problematic  
17 is sufficient to “overcome the presumption that we view the offense of DWI[] first  
18 offense[] as ‘petty’ for purposes of the Sixth Amendment.” *Id.* ¶¶ 14-16. We find no

1 compelling reason to stray from the analysis set forth in *Cannon*, and we hold that  
2 Defendant was not entitled to a jury trial.<sup>3</sup>

### 3 **II. Sufficiency of the Evidence**

4 {7} Defendant makes two arguments regarding his conviction for aggravated DWI.  
5 First, he argues that there was not sufficient evidence to prove aggravated DWI  
6 because the only injury alleged was an injury to himself. Second, he argues that the  
7 injury used to support the conviction was a minor hand injury that did not sufficiently  
8 prove a “bodily injury” as required by the statute. We reverse because the evidence  
9 of the cut to Defendant’s hand was not sufficient to satisfy the bodily injury element.<sup>4</sup>

10 *See* § 66-8-102(D)(2).

11 {8} “The test to determine the sufficiency of the evidence in New Mexico . . . is  
12 whether substantial evidence of either a direct or circumstantial nature exists to  
13 support a verdict of guilt beyond a reasonable doubt with respect to every element

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13 <sup>3</sup> Although not argued by Defendant, we agree with the State that even  
14 considering the potential penalties associated with the reckless driving charge (i.e., a  
15 maximum sentence of ninety days and maximum fine of \$100), a jury trial is not  
16 warranted either under the *Sanchez* six-month threshold or the “seriousness” factors  
17 considered in *Cannon*. *See* § 66- 8-113(B).

18 <sup>4</sup> Although this Opinion reverses on the ground that Defendant’s particular  
19 injury was not a great bodily injury, we note that in *State v. Gray*, \_\_\_\_-NMCA-\_\_\_\_,  
20 \_\_\_\_ P.3d \_\_\_\_ (No. 33,940, Aug. 3, 2016), filed simultaneously with this Opinion, this  
21 Court held that Section 66-8-101(B) and (C) are not applicable to a DWI defendant  
22 where the great bodily injury resulting from his unlawful conduct was to himself and  
23 not others.

1 essential to a conviction.” *State v. Graham*, 2005-NMSC-004, ¶ 6, 137 N.M. 197, 109  
2 P.3d 285 (omission in original) (alteration, internal quotation marks, and citation  
3 omitted). When reviewing whether there is sufficient evidence to support a conviction,  
4 this Court engages in a two-part analysis:

5 First, a reviewing court must view the evidence in the light most  
6 favorable to the [prosecution], resolving all conflicts therein and  
7 indulging all permissible inferences therefrom in favor of the verdict.  
8 Second, an appellate court determines whether the evidence, viewed in  
9 this manner, could justify a finding by any rational trier of fact that each  
10 element of the crime charged has been established beyond a reasonable  
11 doubt.

12 *Id.* (alteration, internal quotation marks, and citations omitted).

13 {9} Aggravated DWI “consists of . . . causing bodily injury to a human being as a  
14 result of the unlawful operation of a motor vehicle while driving under the influence  
15 of intoxicating liquor or drugs[.]” Section 66-8-102(D)(2). Although Section 66-8-102  
16 does not define “human being,” it defines “bodily injury” as “an injury to a person that  
17 is not likely to cause death or great bodily harm to the person, but does cause painful  
18 temporary disfigurement or temporary loss or impairment of the functions of any  
19 member or organ of the person’s body[.]” Section 66-8-102(U)(1).

20 {10} Viewing the evidence in the light most favorable to the State, we do not believe  
21 that a rational trier of fact could find that “bodily injury” was established beyond a  
22 reasonable doubt. At trial, the State offered one witness, Officer Jonathan Daniel, a



1 patrol officer with the City of Roswell Police Department who responded to the scene  
2 of Defendant’s accident after dispatch advised of a crash with injuries.

3 {11} Officer Daniel testified that he observed that Defendant “had a cut on his hand  
4 when he was dealing with the paramedics.” Officer Daniel provided no other  
5 information about the injury and apparently was at the scene for the primary purpose  
6 of conducting field sobriety tests. Defendant was taken to the hospital for a blood  
7 draw. No evidence showed that any injury was observed or addressed by hospital  
8 staff. The State did not enter any photographs or other exhibits documenting the cut  
9 and did not elicit any testimony as to the severity or impact of the cut. Because the  
10 record contains no evidence of temporary disfigurement or temporary loss or  
11 impairment of the functions of Defendant’s hand as a result of the cut, we hold that  
12 bodily injury, and thus aggravated DWI, was not established beyond a reasonable  
13 doubt. *See* § 66-8-102(U)(1).

14 **III. Lesser Included Offense**

15 {12} The State argues that “[i]f this Court concludes that sufficient evidence did not  
16 support conviction under Section 66-8-102(D), it should order a limited remand  
17 vacating only the aggravated portion of the conviction.” We agree that in this case,  
18 and pursuant to *State v. Notah-Hunter*, 2005-NMCA-074, ¶¶ 20-22, 137 N.M. 597,  
19 113 P.3d 867, it is appropriate to reverse Defendant’s conviction for aggravated DWI

1 first offense and remand for entry of a conviction for DWI under Section 66-8-102(A)  
2 first offense.

3 {13} In *Notah-Hunter*, this Court reversed the defendant’s conviction for aggravated  
4 DWI because the defendant’s marginal breath-alcohol content test (BAC) results came  
5 from a test administered one hour and twenty-two minutes after driving and because  
6 there was a lack of corroborating evidence to substantiate that she “was actually  
7 driving with a BAC of 0.16 or greater[.]” *Id.* ¶ 19. Due to the lack of evidence in  
8 support of aggravated DWI, this Court opted to reverse the magistrate court, but then  
9 chose to remand the case for entry of judgment convicting the defendant of DWI  
10 under Section 66-8-102(A). *Notah-Hunter*, 2005-NMCA-074, ¶¶ 1, 31. In support of  
11 our decision, we recognized that “[o]ur courts have determined that under certain  
12 conditions a defendant can be convicted of a lesser included offense that was not part  
13 of the charging document.” *Id.* ¶ 21. One such condition is when “it would be  
14 impossible ever to commit the greater offense without also committing the lesser  
15 offense.” *Id.* (internal quotation marks and citation omitted). In holding that DWI is  
16 a lesser included offense of aggravated DWI, we noted that “the offense of aggravated  
17 DWI itself is not a different crime from DWI, but rather only an enhanced degree of  
18 the DWI offense.” *Id.* ¶ 22 (alteration, internal quotation marks, and citation omitted).  
19 We also determined that, although there was insufficient evidence to prove aggravated

1 DWI, there was sufficient evidence to prove DWI when the defendant had slurred  
2 speech, smelled of alcohol, admitted to drinking alcohol, failed field sobriety tests,  
3 and was speeding. *Id.* ¶¶ 23-24. Additionally, we determined that the defendant had  
4 sufficient notice that aggravated DWI necessarily encompasses DWI, and the  
5 “interests of justice would not be served by remanding [the] case for retrial.” *Id.*  
6 ¶¶ 27-29.

7 {14} In the present case, DWI is a lesser included offense because it would be  
8 impossible to “[cause] bodily injury to a human being as a result of the unlawful  
9 operation of a motor vehicle while driving under the influence of intoxicating  
10 liquor[,]” Section 66-8-102(D)(2), without also driving a vehicle while “under the  
11 influence of intoxicating liquor[,]” Section 66-8-102(A). As noted earlier, aggravated  
12 DWI is simply an enhanced degree of DWI. *See Notah-Hunter*, 2005-NMCA-074,  
13 ¶ 22. Additionally, we determine that there was sufficient evidence to convict  
14 Defendant of DWI because the testimony indicated that Defendant crashed his vehicle,  
15 had bloodshot and watery eyes, had the odor of alcoholic beverages on his breath,  
16 admitted to drinking alcohol, and performed poorly on field sobriety tests.

17 {15} We reject Defendant’s argument that *Notah-Hunter* is distinguishable from the  
18 present case because, unlike Defendant, the defendant in *Notah-Hunter* requested that  
19 the district court find her not guilty or, in the alternative, guilty of non-aggravated

1 DWI. *Id.* ¶ 20. Although the *Notah-Hunter* Court noted that the defendant’s request  
2 indicated an explicit awareness that the lesser charge of DWI was included in  
3 aggravated DWI, *id.* ¶ 27, neither the Court’s ultimate decision that DWI was a lesser  
4 included offense of aggravated DWI, nor the Court’s decision that there was sufficient  
5 evidence of DWI, turned on the defendant’s request.

6 {16} In the case before us, because there was sufficient evidence of DWI first offense  
7 and because DWI first offense is a lesser included offense of aggravated DWI first  
8 offense, we do not think that the interests of justice would be served by remanding the  
9 case for retrial.

## 10 **CONCLUSION**

11 {17} Because there was insufficient evidence of “bodily injury,” but sufficient  
12 evidence of DWI, we reverse the conviction for aggravated DWI first offense and  
13 remand this case with instructions to the district court to (1) vacate the conviction for  
14 aggravated DWI first offense, (2) enter judgment on a charge of DWI first offense,  
15 and (3) sentence Defendant accordingly.

1 {18} **IT IS SO ORDERED.**

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**JONATHAN B. SUTIN, Judge**

4 **WE CONCUR:**

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6 **JAMES J. WECHSLER, Judge**

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8 **STEPHEN G. FRENCH, Judge**