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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. 35,835**

5       **MATTHEW PERKINS,**

6             Defendant-Appellant.

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

8       **Jane Shuler Gray, District Judge**

9       Hector H. Balderas, Attorney General

10       Santa Fe, NM

11       for Appellee

12       Bennett J. Baur, Chief Public Defender

13       Kathleen T. Baldrige, Assistant Appellate Defender

14       Santa Fe, NM

15       for Appellant

16                                       **MEMORANDUM OPINION**

17       **GARCIA, Judge.**

18       {1}     Defendant appeals his conviction for driving while intoxicated. We issued a

1 Notice of Proposed Summary Disposition proposing to affirm. Defendant has  
2 responded with a timely memorandum in opposition, which we have duly considered.  
3 Because we remain unpersuaded that our initial proposed disposition was incorrect,  
4 we affirm.

## 5 **DISCUSSION**

6 {2} Defendant continues to argue that his right to confrontation was violated when  
7 the district court allowed the State's expert witness to testify that in his opinion  
8 Defendant was driving while impaired. [MIO 1, 4-5] "We review claimed violations  
9 of the confrontation right de novo." *See State v. Huettl*, 2013-NMCA-038, ¶ 16, 305  
10 P.3d 956.

11 {3} According to facts as stated in the docketing statement and the memorandum  
12 in opposition, during voir dire, Dr. Hwang, the State's analyst, testified that he did not  
13 conduct the test of Defendant's blood, did not personally observe the test being  
14 conducted, and did not train the analyst who conducted the test. [DS 4; MIO 3] Dr.  
15 Hwang did testify that he independently reviewed the data provided by the gas  
16 chromatograph machine, the notes and paperwork provided by the analyst. [DS 4;  
17 MIO 3] Dr. Hwang also testified that he formed his opinion by taking other evidence  
18 into account such as the fact that Defendant was speeding. Dr. Hwang was then  
19 allowed to testify that in his expert opinion, Defendant had both marijuana and

1 methamphetamine in his system and was impaired while driving. [MIO 3]

2 {4} Defendant argues that admission of this evidence and testimony violated his  
3 right to confrontation. We disagree. In *Huettl*, we noted that the Confrontation Clause  
4 prohibits expert testimony that is based solely on a non-testifying analyst's  
5 conclusions and analysis. We therefore determined that the defendant's right to  
6 confrontation was not violated when the expert witness reviewed raw data interpreted  
7 by a non-testifying analyst and formed his own expert opinion that the substance in  
8 question was methamphetamine. *See id.* ¶¶ 3, 34-39. In this case, Dr. Hwang testified  
9 that he reviewed data generated by another analyst, and then formed his own expert  
10 opinion based on this data and other information. We therefore, conclude that  
11 Defendant's right to confrontation was not violated. *Compare State v. Moncayo*,  
12 2012-NMCA-066, ¶¶ 3, 8-9, 12, 284 P.3d 423 (holding that the defendant's  
13 confrontation right was violated where an analyst testified as to the content of a report  
14 prepared by a non-testifying analyst and not to his independently derived expert  
15 opinion).

16 {5} Defendant also continues to argue that the district court erred in denying his  
17 Rule 5-203(C) NMRA motion to sever. [MIO 6] *See* Rule 5-203(C) (providing for  
18 separate trials of offenses where it appears that a defendant is prejudiced by the  
19 joinder of offenses). We review the district court's denial of a motion for severance

1 for abuse of discretion. *See State v. Flores*, 2015-NMCA-002, ¶ 21, 340 P.3d 622.

2 {6} Defendant sought severance of the “driving on a revoked license charge from  
3 [the] trial because the revocation was based on a prior DWI.” [MIO 6] According to  
4 the memorandum in opposition, after Defendant filed his motion to sever, the parties  
5 agreed to stipulate that Defendant’s license was revoked without stating the basis for  
6 the revocation. [DS 4, MIO 6] The record in this case does not indicate that any  
7 evidence of the basis of Defendant’s prior license revocation was actually introduced  
8 against him at trial. *See State v. Dominguez*, 2007-NMSC-060, ¶ 10, 142 N.M. 811,  
9 171 P.3d 750 (stating that the granting of a severance is discretionary, “and one test  
10 for abuse of discretion is whether prejudicial testimony, inadmissible in a separate  
11 trial, is admitted in a joint trial” (internal quotation marks and citation omitted)). We  
12 therefore reject this assertion of error.

13 {7} Finally, Defendant withdraws his argument that the district court erred when  
14 it did not play the entire recording of the officer’s encounter with Defendant because  
15 it violated the rule of completeness. [MIO 6-7] *See* Rule 11-106 NMRA (“If a party  
16 introduces all or part of a writing or recorded statement, an adverse party may require  
17 the introduction, at that time, of any other part—or any other writing or recorded  
18 statement—that in fairness ought to be considered at the same time.”). Defendant  
19 states that, while a factual basis exists to support this claim, the factual basis is not on

1 the record. *See State v. Haddenham*, 1990-NMCA-048, ¶25, 110 N.M. 149, 793 P.2d  
2 279 (stating that issues for which there is no factual basis in the record will not be  
3 reviewed).

4 {8} For these reasons, and those stated in our notice of proposed summary  
5 disposition, we affirm the district court.

6 {9} **IT IS SO ORDERED.**

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**TIMOTHY L. GARCIA, Judge**

9 **WE CONCUR:**

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**JAMES J. WECHSLER, Judge**

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**M. MONICA ZAMORA, Judge**