

STATE V. GUTIERREZ

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RANDALL GUTIERREZ,
Defendant-Appellant.**

No. A-1-CA-35,092

COURT OF APPEALS OF NEW MEXICO

August 3, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker,
District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Law Offices of Jennifer J. Wernersbach, P.C., Jennifer J. Wernersbach, Albuquerque,
NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: TIMOTHY L. GARCIA, Judge,
STEPHEN G. FRENCH, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant appeals from the district court's judgment and sentence entered pursuant to a jury verdict that convicted him for aggravated DWI failure to maintain traffic lane. Unpersuaded that Defendant's docketing statement demonstrated error, we

issued a notice of proposed summary disposition, proposing to affirm. Defendant has filed a memorandum in opposition, which we have duly considered. We remain unpersuaded that the district court erred. We affirm.

{2} On appeal, Defendant challenges the sufficiency of the evidence to support his convictions for failure to maintain a single traffic lane and aggravated DWI, the latter of which was based on Defendant having been impaired to the slightest degree while driving and having refused chemical testing. [DS unnumbered 3; RP 48, 50; MIO 1] This appeal has been pursued under *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, ¶ 24, 103 N.M. 655, 712 P.2d 1. [DS unnumbered 4; MIO 3-4] Our notice proposed to summarily affirm on the basis of the facts supplied by the docketing statement, which indicated that evidence was presented that Defendant had failed to maintain his traffic lane, smelled of alcohol, showed clues of intoxication in his performance of the field sobriety tests, and refused a breath test. [DS unnumbered 3; CN 3] Our notice observed that the docketing statement did not state which elements of the offenses were not met by the evidence recounted therein. [CN 3-4] Viewing that evidence in the light most favorable to the verdict, we proposed to hold that it was sufficient to establish the facts required to convict Defendant. See, e.g., *State v. Neal*, 2008-NMCA-008, ¶¶ 4-5, 29, 143 N.M. 341, 176 P.3d 330 (holding that the evidence was sufficient to support the defendant's DWI conviction where he was driving under the speed limit and over the shoulder line of the road, smelled of alcohol, had bloodshot, watery eyes, admitted to drinking, performed poorly on the field sobriety tests, and did not agree to chemical testing, stating that he did not want a DWI on his record, supporting an inference of consciousness of guilt). [CN 4]

{3} In response to our notice, the memorandum in opposition asserts that trial counsel is unable to recall any additional details about the evidence presented and requests that we assign the case to the general calendar for a more thorough factual development. [MIO 3] To be clear, we did not propose to *presume* that there was sufficient evidence, nor was our notice attempting to elicit more facts. We proposed to affirm on the ground that the evidence recounted in the docketing statement was adequate to support the convictions. We simply were questioning how the evidence recounted might not be sufficient, given that it so clearly seemed to meet the elements. We see no basis to place this case on the general calendar.

{4} For the reasons stated in our notice and in this opinion, we affirm the district court's judgment and sentence.

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

LINDA M. VANZI, Chief Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

STEPHEN G. FRENCH, Judge