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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 29,650

10 **GILBERT BENALLIE,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

13 **Thomas J. Hynes, District Judge**

14 Gary K. King, Attorney General

15 Margaret E. McLean, Assistant Attorney General

16 Santa Fe, NM

17 for Appellee

18 Frechette & Associates, P.C.

19 Todd Hotchkiss

20 Albuquerque, NM

21 for Appellant

22 **MEMORANDUM OPINION**

23 **WECHSLER, Judge.**

1 The opinion filed in this case on December 9, 2009 is hereby withdrawn and the
2 following substituted therefor. The motion for rehearing of Defendant Gilbert
3 Benallie is denied.

4 Defendant appeals his convictions for DWI and for failure to display
5 registration plate. The notice proposed to affirm. Defendant filed a timely
6 memorandum in opposition (MIO), and the State filed a timely response pursuant to
7 a granted motion for extension of time. We remain unpersuaded by Defendant's
8 arguments, and therefore we affirm. As discussed in our notice and agreed to by the
9 State in its response, we further remand to the district court for the limited purpose of
10 correcting Defendant's judgment and sentence to reflect that he was convicted for a
11 violation of NMSA 1978, Section 66-8-102(A) (2008) rather than for a violation of
12 Section 66-8-102©.

13 **Issues (1) and (2)**

14 These issues relate to Defendant's central contention that there was a lack of
15 substantial evidence to support his conviction for driving while under the influence
16 of intoxicating liquor or drugs (DWI). **[DS 2, 5; MIO 11]**

17 We review the evidence to determine "whether substantial evidence of either
18 a direct or circumstantial nature exists to support a verdict of guilt beyond a

1 reasonable doubt with respect to every element essential to a conviction.” *State v.*
2 *Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). Under this standard, “[w]e
3 view the evidence in the light most favorable to supporting the verdict and resolve all
4 conflicts and indulge all inferences in favor of upholding the verdict.” *State v.*
5 *Hernandez*, 115 N.M. 6, 26, 846 P.2d 312, 332 (1993). We do not weigh the
6 evidence, nor substitute our judgment for that of the factfinder, so long as there is
7 sufficient evidence to support the verdict. *Sutphin*, 107 N.M. at 131, 753 P.2d at
8 1319.

9 Defendant’s conviction for DWI requires that Defendant operated a motor
10 vehicle and that, at the time, Defendant was under the influence of intoxicating liquor
11 -- that is, as a result of drinking liquor, Defendant was less able to the slightest degree,
12 either mentally or physically, or both, to exercise the clear judgment and steady hand
13 necessary to handle a vehicle with safety to the person and the public. **[RP 1-2, 128-**
14 **31]** *See* § 66-8-102(A). **[RP 100]**

15 The facts provide that Officer Sexton **[RP 54]** stopped Defendant’s vehicle after
16 observing Defendant make a wide right turn, cross the painted divider into oncoming
17 traffic, and almost strike a parked vehicle. **[RP 13, 56; MIO 3]** Officer Sexton could
18 smell the odor of alcohol emanating from the interior of Defendant’s vehicle **[RP 13]**,

1 as well as from Defendant's person once he exited the vehicle. [RP 57] In addition,
2 Officer Sexton observed that Defendant's eyes were red, bloodshot, and watery. [RP
3 13] Defendant admitted that he had been drinking the night before and at around
4 12:00 that day. [RP 13] Officer Sexton administered field sobriety tests [RP 13], and
5 testified that Defendant performed in a manner consistent with impairment. [RP 57,
6 60] Specifically, on the "walk and turn test," Officer Sexton observed all eight clues.
7 [RP 14, 60] Defendant had difficulty maintaining his balance, missed heel-to-toe on
8 every step, raised his arms more than six inches from his sides, stepped off of the line
9 on several steps, performed the turn without planting his front foot, did not watch his
10 feet or count the steps out loud as instructed to do so prior to beginning the test, and
11 took an uneven number of steps in the different directions. On the "one leg stand
12 test," Officer Sexton observed a total of three clues, and Defendant began swaying
13 from side to side. [RP 14]

14 We hold that the foregoing facts support Defendant's conviction for DWI. *See*
15 *State v. Sparks*, 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct. App. 1985) (defining
16 substantial evidence as that evidence which a reasonable person would consider
17 adequate to support a defendant's conviction); *see also State v. Gutierrez*,
18 1996-NMCA-001, ¶ 4, 121 N.M. 191, 909 P.2d 751 (filed 1995) (upholding a DWI

1 conviction based on behavior evidence when the defendant smelled of alcohol, had
2 bloodshot and watery eyes, failed field sobriety tests, admitted to drinking alcohol,
3 and the defendant's vehicle was weaving into other traffic lanes); *State v. Neal*, 2008-
4 NMCA-008, ¶ 29, 143 N.M. 341, 176 P.3d 330 (filed 2007) (holding that evidence
5 was sufficient to support a reasonable inference that the defendant was under the
6 influence of alcohol when, among other factors, he was seen veering over the shoulder
7 line of the road; he smelled of alcohol and had bloodshot, watery eyes; he admitted
8 to drinking; he appeared to the officer to be under the influence of alcohol; and he
9 failed on several field sobriety test criteria).

10 Although Defendant's blood and breath tests showed readings of .05 and .06,
11 within the legal limits [**RP 14, 61; MIO 7**], it was within the jury's prerogative to rely
12 instead upon behavioral evidence to convict Defendant for DWI. *See generally State*
13 *v. Foster*, 1999-NMSC-007, ¶ 42, 126 N.M. 646, 974 P.2d 140 (recognizing that it is
14 up to the jury to weigh any contradictory evidence). We recognize also that
15 Defendant maintains that his failure to adequately perform on the field sobriety tests
16 was a reflection of an un-level surface [**RP 59; MIO 3, 7**] and lack of an actual line
17 for use in the "walk and turn test" [**MIO 25**], as well as his restless leg syndrome,
18 body weight, back problems, and other health problems. [**RP 68-73; MIO 6, 8-10**]

1 Again, it was within the jury's prerogative to weigh the evidence and reject
2 Defendant's version of the events. *See State v. Nichols*, 2006-NMCA-017, ¶ 11, 139
3 N.M. 72, 128 P.3d 500 (filed 2005) (recognizing that the jury, as trier of fact, is
4 entitled to weigh conflicting evidence); *State v. Sutphin*, 107 N.M. at 131, 753 P.2d
5 at 1319 (holding that the factfinder may reject the defendant's version of events). And
6 although Defendant's expert witness, Dr. Saltzman, testified that he believed that
7 Defendant's medical conditions would make it very difficult to complete the field
8 sobriety tests [MIO 9-10], the jury was free to reject the expert's opinion. *See State*
9 *v. Alberico*, 116 N.M. 156, 164, 861 P.2d 192, 200 (1993) (recognizing that "an
10 expert's opinion is not conclusive of a fact in issue even though the opinion may be
11 uncontroverted). In this regard, we note that Dr. Saltzman also acknowledged on
12 cross-examination that alcohol could cause Defendant to perform as he did on the
13 field sobriety tests. [MIO 10]

14 Lastly, to the extent Defendant argues that his performance on the field sobriety
15 tests was not a valid factor to consider in assessing the sufficiency of his conviction
16 [MIO 21-23], we disagree. As noted above, Defendant's conviction requires that, as
17 a result of drinking liquor, he was less able to the slightest degree, either mentally or
18 physically, or both, to exercise the clear judgment and steady hand necessary to handle

1 a vehicle with safety to the person and the public. *See* § 66-8-102(A). Thus, when
2 our notice at page 4 stated that “Defendant performed [on the field sobriety tests] in
3 a manner consistent with impairment” [CN 4; MIO 22], we were referring not to
4 Defendant’s BAC level, but instead to evidence supporting the conclusion that
5 Defendant was under the influence of intoxicating liquor within the meaning of
6 Section 66-8-102(A). *See, e.g.,* State v. Neal, 2008-NMCA-008, ¶ 26 (stating that
7 “[t]he statute gives notice, according to the plain meaning of the word ‘influence,’ that
8 the Legislature intends to criminalize a condition less than intoxication, but
9 ‘influenced’ to any degree by alcohol, no matter how slight”).

10 **Motion to amend**

11 In disputing our sufficiency analysis, Defendant argues for the first time in his
12 MIO that the district court improperly admitted Officer Sexton’s testimony that
13 “[b]ased on all of [his] observations, there is a 90% chance [Defendant] was
14 impaired.” [MIO 6, 12-14, 19] We note initially that although the officer’s testimony
15 is a relevant consideration in evaluating the sufficiency of the evidence, whether or
16 not such evidence was properly admitted is a separate issue from one contesting the
17 sufficiency of the evidence. *See State v. Post*, 109 N.M. 177, 181, 783 P.2d 487, 491
18 (Ct. App. 1989) (recognizing that, in reviewing the sufficiency of the evidence, the

1 appellate court looks at all evidence admitted, including wrongfully admitted
2 evidence). Because this particular argument was not raised in Defendant’s docketing
3 statement, we consider Defendant’s argument as a motion to amend the docketing
4 statement to add the issue of whether the testimony was wrongfully admitted.

5 Defendant argues that admission of Officer Sexton’s testimony was comparable
6 to the wrongfully admitted testimony addressed in *State v. Marquez*, 2008-NMCA-
7 133, ¶ 25, 145 N.M. 31, 193 P.3d 578, *rev’d in part*, 2009-NMSC-055, ___ N.M. ___,
8 ___ P.3d ___. [MIO 13] In *Marquez*, the officer testified that, “based on the clues
9 of all three field sobriety tests, including the HGN test, the probability that a person’s
10 breath score was over the legal limit was in the ninetieth percentile.” 2008-NMCA-
11 133, ¶ 8. This Court held that such testimony was wrongfully admitted as scientific
12 evidence without first qualifying the officer as an expert and establishing the
13 evidentiary reliability of the scientific knowledge but that the error was harmless. *Id.*
14 ¶ 19. Our Supreme Court reversed our holding that the error was harmless because
15 the evidence was “likely to impact the jury’s verdict.” 2009-NMSC-055, ¶ 23. In the
16 present case, however, even assuming that Officer Sexton’s testimony is comparable
17 to the officer’s testimony in *Marquez*, one significant difference is that Defendant
18 failed to object to Officer Sexton’s testimony. [MIO 6] Because of this lack of

1 preservation, we consider whether admission of Officer Sexton’s testimony
2 constituted “plain error.” [MIO 17] *See generally State v. Contreras*, 120 N.M. 486,
3 492, 903 P.2d 228, 234 (1995) (reviewing un-objected to evidentiary questions for
4 plain error), *limitation of holding on other grounds recognized by State v. Rackley*,
5 2000-NMCA-027, ¶¶ 24-25, 128 N.M. 761, 998 P.2d 1212. In light of the
6 aforementioned ample substantial evidence in support of Defendant’s conviction,
7 under a plain error analysis, we are not “convinced that admission of the testimony
8 constituted an injustice that creates grave doubts concerning the validity of the
9 verdict.” *State v. Lucero*, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993) (internal
10 quotation marks and citation omitted). For this reason, we deny Defendant’s motion
11 to amend. *See State v. Sommer*, 118 N.M. 58, 60, 878 P.2d 1007, 1009 (Ct. App.
12 1994) (recognizing that issues sought to be presented in a motion to amend must be
13 viable).

14 **Issue (3)**

15 Defendant continues to argue that his trial counsel was ineffective. [MIO 14]
16 To establish a prima facie case of ineffective assistance of counsel, Defendant must
17 show that counsel’s performance fell below that of a reasonably competent attorney
18 and that the defendant was prejudiced by the deficient performance. *State v. Aker*,

1 2005-NMCA-063, ¶ 34, 137 N.M. 561, 113 P.3d 384.

2 Defendant argues specifically that counsel failed to exercise the skill of a
3 reasonably competent attorney because he failed to object to Officer Sexton’s
4 testimony. **[MIO 14]** Whether or not to object, however, can be a matter of trial
5 tactics, and the failure to object does not establish ineffective assistance of counsel.
6 *State v. Peters*, 1997-NMCA-084, ¶ 40, 123 N.M. 667, 944 P.2d 896. In this case,
7 counsel may have elected not to object for any number of reasons, including, for
8 example, a determination that any objection would unnecessarily call attention to
9 Officer Sexton’s testimony. *See Lytle v. Jordan*, 2001-NMSC-016, ¶ 43, 130 N.M.
10 198, 22 P.3d 666 (holding that “we will not second guess the trial strategy and tactics
11 of the defense counsel on appeal” (internal quotation marks and citation omitted)).
12 Because Defendant has failed to establish a prima facie case of ineffective assistance
13 of counsel, we affirm.

14 **Issue (4)**

15 Defendant does not contest the calendar notice’s proposed holding that the
16 district court did not improperly restrict the cross-examination of Officer Sexton
17 regarding his reference to the “28 different signs that we look for” of impairment.
18 **[CN 6-7; DS 4, 5]** *See generally State v. Mondragon*, 107 N.M. 421, 423, 759 P.2d

1 **WE CONCUR:**

2 _____
3 **MICHAEL E. VIGIL, Judge**

4 _____
5 **TIMOTHY L. GARCIA, Judge**