

1 **HANISEE, Judge.**

2 {1} Defendant appeals from the district court's judgment adversely resolving his
3 on-record metropolitan court appeal by affirming Defendant's conviction of
4 aggravated DWI (first offense). [RP 152] The district court's judgment is supported
5 by a memorandum opinion. [RP 135-51] Defendant raises three issues on appeal: (1)
6 whether the traffic stop was justified by reasonable suspicion in light of the officer's
7 mistake of law regarding Defendant's failure to maintain his lane and the officer's
8 pretextual motivation for stopping Defendant; (2) whether the State presented
9 sufficient evidence to prove that Defendant's driving was impaired by alcohol; and (3)
10 whether aggravation of the DWI charge was illegal because the evidence that
11 Defendant refused the breath test was equivocal rather than willful since Defendant
12 agreed to take a blood test rather than the breath test. [DS 21]

13 {2} The calendar notice proposed summary affirmance. [Ct. App. File, CN1]
14 Defendant has filed a memorandum in opposition that we have duly considered. [Ct.
15 App. File, MIO] Unpersuaded, however, we affirm.

16 **DISCUSSION**

17 **Issue 1A - Mistake of law.**

18 {3} In the memorandum, Defendant argues that the careless driving alternative for
19 justifying the stop should not be considered on appeal, because the State failed to raise

1 this alternative below and therefore the trial court had no opportunity to consider the
2 merits of, or rule intelligently on, that argument. [MIO 25-26] This issue requires us
3 to examine the basis for the metropolitan court’s order denying Defendant’s motion
4 to suppress. [RP 68-70] Our review reveals that Defendant’s argument regarding
5 preservation lacks merit.

6 {4} In its memorandum opinion, the district court observed that the officer testified
7 that she pulled Defendant over because Defendant was failing to maintain his lane and
8 concluded that this was a mistake of law. [RP 141-42] The metropolitan court order
9 denying Defendant’s motion to suppress, however, focuses on the officer’s testimony
10 about her observations of Defendant’s irregular driving, including that, when pulling
11 over, Defendant parked partially off the street near a sidewalk, obstructing traffic;
12 while Defendant was driving, both of the driver’s side tires were over the dividing line
13 a full tire length; Defendant drove back and forth between lanes; Defendant weaved
14 within his own lane; and Defendant drove at a high rate of speed. [RP 68-69; *see also*
15 RP 144, 147-49] As such, the metropolitan court judge denied Defendant’s motion to
16 suppress, because these facts indicated that the officer had reasonable articulable
17 suspicion that Defendant committed “a violation of the traffic laws and/or that
18 Defendant was driving while intoxicated.” [RP 69, ¶ 13] As such, the metropolitan
19 court judge did not convict Defendant of failure to maintain his lane [RP 3], nor did

1 the metropolitan court cite the failure to maintain lane statute, NMSA 1978, § 66-7-
2 317 (1978), as a basis for denying Defendant’s motion to suppress. [RP 69 ¶ 13]

3 {5} In its memorandum opinion, the district court observes that the applicable law
4 regarding reasonable suspicion provides that for a stop to be justified at its inception,
5 the officer, looking at the totality of the circumstances, must be able to form a
6 reasonable suspicion that the individual in question is engaged in or is about to be
7 engaged in criminal activity. *See, e.g., State v. Urioste*, 2002-NMSC-023, ¶ 10, 132
8 N.M. 592, 52 P.3d 964. In addition, “[r]easonable suspicion must be based on specific
9 articulable facts and the rational inferences that may be drawn from those facts.” *State*
10 *v. Flores*, 1996-NMCA-059, ¶ 7, 122 N.M. 84, 920 P.2d 1038; *see State v. Hernandez*,
11 1997-NMCA-006, ¶ 20, 122 N.M. 809, 932 P.2d 499 (“Reasonable suspicion is
12 judged by an objective standard which evaluates whether the facts available to the
13 officer would warrant the officer, as a person of reasonable caution, to believe the
14 action taken was appropriate.”) (alteration, internal quotation marks, and citation
15 omitted).

16 {6} In this case, we agree with the metropolitan court, and the district court’s
17 recitation of the applicable law, that the officer’s testimony, consisting of her
18 observations of Defendant’s irregular driving, supports the metropolitan court’s
19 conclusion that the officer had reasonable suspicion to stop Defendant for violation

1 of traffic laws and/or because Defendant was driving while intoxicated. [RP 68-69]
2 Under the circumstances, therefore, we find it unnecessary to consider Defendant's
3 numerous other subissues discussed in the memorandum, consisting of additional
4 arguments concerning whether Defendant's irregular driving constitutes "careless"
5 driving. [MIO 29-35]

6 {7} We therefore affirm the denial of Defendant's motion to suppress.

7 **Issue 1B - Pretextual stop.**

8 {8} As Defendant acknowledges in his docketing statement, the metropolitan court
9 did not find that the vehicle stop was pretextual because, once the officer did make
10 contact with Defendant, no questions were asked about Defendant's suspected
11 involvement in other criminal activity. [DS 21] In fact, the officer testified that she
12 pulled over Defendant because of his irregular driving, including that when pulling
13 over, Defendant parked partially off the street near a sidewalk, obstructing traffic;
14 while Defendant was driving, both of the driver's side tires were over the dividing line
15 a full tire length; Defendant drove back and forth between lanes; Defendant weaved
16 within his own lane; and Defendant drove at a high rate of speed. [RP 68-69] Based
17 on this testimony, the metropolitan court concluded that the officer stopped
18 Defendant's vehicle based on reasonable suspicion that Defendant was violating
19 traffic laws and/or driving while intoxicated, and not on any other reason unrelated

1 to the officer’s direct traffic-related observations. [RP 69 ¶ 13] We thus agree with the
2 district court that the totality of the circumstances, summarized in the district court
3 opinion, indicate that there was no unrelated motive to conducting the traffic stop in
4 this case. [RP 146] We also agree with the district court that Defendant did not meet
5 his burden of showing pretext by presenting “sufficient facts indicating the officer had
6 an unrelated motive that was not supported by reasonable suspicion or probable
7 cause[.]” *State v. Ochoa*, 2009-NMCA-002, ¶ 40, 146 N.M. 32, 206 P.3d 143.

8 **Issue 2 - Sufficiency of the evidence of impairment.**

9 {9} Also in his memorandum, Defendant continues to argue that there was
10 insufficient evidence to show that he was impaired by alcohol while driving. [MIO 36]
11 He contends that “[l]ittle weight” should be given to his bloodshot, watery eyes since
12 Defendant contends he was suffering from allergies; the odor of alcohol merely
13 established that Defendant had consumed alcohol earlier; and the “clues” of
14 intoxication that the officer referred to with regard to the field sobriety tests (FSTs)
15 were taken out of context when the baseline for performance on FSTs when
16 intoxicants are not involved has not been established. [MIO 36-38]

17 {10} To the extent that Defendant testified that his allergies would have contributed
18 to his bloodshot, watery eyes, and to the extent that he presented other evidence that
19 conflicted with the State’s evidence of physical indicia of impairment by alcohol, we

1 are mindful that the trier of fact (in this case the metropolitan court in a bench trial),
2 not the appellate court, weighs the evidence and determines the credibility of the
3 witnesses. *See State v. Barrera*, 2001-NMSC-014, ¶ 12, 130 N.M. 227, 22 P.3d 1177;
4 *see also State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (stating
5 that the fact finder is free to reject the defendant’s version of the facts); *State v. Mora*,
6 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789 (stating that an appellate court
7 does not weight the evidence or substitute its judgment for that of the fact finder),
8 *abrogated on other grounds as recognized by Kersey v. Hatch*, 2010-NMSC-020, ¶
9 17, 148 N.M. 381, 237 P.3d 683.

10 {11} Moreover, we are satisfied that the evidence, presented in metropolitan court
11 and summarized in the district court’s memorandum opinion, supports the conclusion
12 that the State presented sufficient evidence that Defendant’s driving was impaired by
13 alcohol. [RP 68-69, 147-49] As discussed above, the officer’s testimony was that she
14 observed Defendant park partially off the street near a sidewalk when pulling over,
15 in a manner that obstructed traffic; while Defendant was driving, both of the driver’s
16 side tires were over the dividing line a full tire length; Defendant drove back and forth
17 between lanes; Defendant weaved within his own lane; and Defendant drove at a high
18 rate of speed. [RP 68-69, 144, 147-49]

1 {12} We hold that the officer’s testimony about her observations of Defendant’s
2 driving, his physical signs of intoxication, and his performance on the FSTs provide
3 substantial evidence that Defendant drove a motor vehicle while impaired to the
4 slightest degree by alcohol. *See State v. Sanchez*, 2001-NMCA-109, ¶ 6, 131 N.M.
5 355, 36 P.3d 446 (stating that “under the influence” means that the defendant was less
6 able to the slightest degree, either mentally or physically or both, to exercise the clear
7 judgment and steady hand necessary to handle a vehicle with safety to the defendant
8 and the public); *see also State v. Ruiz*, 1995-NMCA-098, ¶¶ 3-4, 24, 120 N.M. 534,
9 903 P.2d 845 (holding that probable cause existed where the police officers observed
10 the defendant speeding and weaving, the defendant admitted to drinking, and the
11 officer noticed bloodshot, watery eyes, slurred speech, and a smell of alcohol, and the
12 results of FSTs were mixed), *abrogated on other grounds by State v. Martinez*, 2007-
13 NMSC-025, 141 N.M. 713, 160 P.3d 894; *State v. Hernandez*, 1980-NMCA-138, ¶ 8,
14 95 N.M. 125, 619 P.2d 570 (concluding that the officer had probable cause to arrest
15 when the defendant had driven in the officer’s presence, and the officer noted that the
16 defendant smelled of alcohol and had slurred speech).

17 {13} We affirm the metropolitan court, as affirmed by the district court, on this issue.

18 **Issue 3 - Defendant’s refusal to take the breath test.**

1 {14} Lastly in his memorandum, Defendant argues that he did not willfully refuse
2 to submit to the breath test, and he contends that the evidence was insufficient to
3 establish his willful refusal beyond a reasonable doubt. [MIO 40] We are not
4 persuaded.

5 {15} The officer testified that after being read the implied consent act, Defendant
6 refused to take the breath test. [RP 138] The officer then testified that he informed
7 Defendant of the consequences of refusing a breath test and Defendant again refused.
8 [Id.] Defendant testified that although he did not consent to a breath test, he did
9 consent to taking a blood test, believing that it was his right to choose which test he
10 took. [Id.] The officer testified that if an individual requests a blood test, he is told
11 that he has to take a breath test first and afterward his blood can be drawn. [Id.]
12 Defendant once again refused the breath test and was arrested for aggravated DWI.
13 [RP 138-39] As we discussed in the calendar notice, therefore, it is undisputed that
14 Defendant refused to take the breath test, which was the test offered by the officer,
15 preferring to take a blood test. [Ct. App. File, CN1 4]

16 {16} As the district court noted, “[Defendant] made a conscious decision not to take
17 the specific test that was offered by [the officer].” [RP 150] In addition, the district
18 court observed that “[i]f [Defendant] was concerned about the accuracy or reliability
19 of the breath test results he could have taken the breath test and then taken an

1 independent test of his own choosing.” [RP 150] *See* NMSA 1978, Section 66-8-
2 109(B) (1993) (stating that “[t]he person tested shall be advised by the law
3 enforcement officer of the person’s right to be given an opportunity to arrange for a
4 physician, licensed professional or practical nurse or laboratory technician or
5 technologist who is employed by a hospital or physician of his own choosing to
6 perform a chemical test *in addition to any test performed at the direction of a law
7 enforcement officer*”) (emphasis added); *Fugere v. State Tax & Rev. Dept., Motor
8 Vehicle Div.*, 1995-NMCA-040, ¶¶ 15, 21, 120 N.M. 29, 897 P.2d 216.

9 {17} We remain persuaded that the metropolitan court’s analysis of this issue, as
10 affirmed by the district court, is correct and appropriate. We therefore affirm on this
11 issue.

12 **CONCLUSION**

13 {18} We affirm Defendant’s conviction for aggravated DWI (first offense).

14 {19} **IT IS SO ORDERED.**

15

16

J. MILES HANISEE, Judge

17 **WE CONCUR:**

18

1 **MICHAEL D. BUSTAMANTE, Judge**

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3 **JONATHAN B. SUTIN, Judge**