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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellant,

4 v.

**No. 33,374 Consolidated
with 33,857**

5
6 **HEATHER LUCERO and LUIS CORONADO,**

7 Defendants-Appellees.

8 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

9 **Jacqueline D. Flores, District Judge**

10 Hector H. Balderas, Attorney General

11 Santa Fe, NM

12 Jacqueline R. Medina, Assistant Attorney General

13 Albuquerque, NM

14 for Appellant

15 Bennett J. Baur, Acting Chief Public Defender

16 Sergio Viscoli, Assistant Appellate Defender

17 B. Douglas Wood, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellee Heather Lucero

20 L. Helen Bennett, P.C.

1 L. Helen Bennett
2 Albuquerque, NM

3 for Appellee Luis Coronado

4 **MEMORANDUM OPINION**

5 **HANISEE, Judge.**

6 {1} The district court granted Defendants’ motions to suppress evidence after police
7 officers, who executed a search warrant, failed to knock and announce their presence
8 before entering Defendants’ residence. The State appeals, arguing that exigent
9 circumstances justified the officers’ decision to enter without knocking and
10 announcing. We affirm.

11 **BACKGROUND**

12 {2} Albuquerque Police Department Central Narcotics Unit Detective Herman
13 Martinez learned from a paid informant that a woman named Heather and her partner
14 were dealing drugs out of their residence.¹ The informant told Detective Martinez
15 what Heather looked like, that there were children in the residence, and that her
16 partner was a member of the TCK gang who went by the nickname “Lobo.” The
17 informant told Detective Martinez that Lobo was “possibly” armed. Detective
18 Martinez knew from experience that the TCK gang was “a very violent group that

18 ¹Our recitation of the facts is based on the testimony of Detective Martinez,
19 Albuquerque Police Department Detective Kelly Sinclair, and D.M., Defendant
20 Lucero’s daughter, at the district court’s hearing on Defendants’ motions to suppress.

1 ha[d] committed murders, been involved in the drug trade, and [had] threatened
2 witnesses in the past, including district judges and, I believe, also the DA.”

3 {3} Detective Martinez obtained a search warrant for the residence based on the
4 information provided by the informant, but did not include any mention of Lobo in his
5 probable cause affidavit. Detective Martinez testified that the reason he omitted any
6 mention of Lobo in his application for a search warrant was that he was unable to
7 locate photographs or other information that would allow him to identify Lobo. At a
8 briefing before executing the warrant, Detective Martinez informed fellow officers
9 that Lobo was “possibly” present at the house and that he was “known to carry a
10 firearm.”

11 {4} Detective Martinez led the search team’s approach to the house. Detective
12 Martinez carried a door ram, and the officer behind him carried a tool for prying open
13 security doors. The team planned to enter through a door on the South side of
14 Defendants’ residence beneath a carport. This entrance was protected by a wrought
15 iron mesh security door. Detective Martinez tested the security door and found that
16 it was unlocked. The interior door was ajar.

17 {5} Peering through the wrought iron mesh security door, Detective Martinez
18 observed a person moving away from the door. Although he could not identify the
19 person through the security door, Detective Martinez surmised from the character of

1 the figure’s movement that the person “had seen us, and was running away from the
2 door, possibly to arm themselves or to destroy evidence.” Detective Martinez
3 immediately yelled “compromise[!]” three or four different times. Detective Martinez
4 opened the door and stood to the side while the rest of the search team entered the
5 residence. Members of the team yelled “Police[!] Search warrant[!]” as they entered.
6 The officers found narcotics and narcotics paraphernalia in the house, and Defendants
7 were charged by indictment with drug trafficking, drug possession with intent to
8 distribute, possession of drug paraphernalia, child abuse, conspiracy to commit child
9 abuse, and possession of a controlled substance.

10 {6} Defendants each filed a motion to suppress the State’s evidence, arguing that
11 the police officers’ failure to knock and announce their presence prior to entering their
12 residence violated Defendants’ rights under the Fourth Amendment to the United
13 States Constitution and Article II, Section 10 of the New Mexico Constitution. *See*
14 *State v. Attaway*, 1994-NMSC-011, ¶¶ 11-41, 117 N.M. 141, 870 P.2d 103 (describing
15 the “knock-and-announce” requirement under the Fourth Amendment and Article II,
16 Section 10), *holding modified on other grounds by State v. Lopez*, 2005-NMSC-018,
17 ¶¶ 18-19, 138 N.M. 9, 116 P.3d 80. The State responded that the information provided
18 by the informant that an armed member of the TCK gang might be inside the house

1 created an exigency that justified entry without announcement.²

2 {7} The district court granted Defendants’ motions to suppress. It concluded that
3 the fact “that there was possibly—and I stress ‘possibly’—a TCK member[,] who
4 may—and I stress the word ‘may’—be staying at the residence and who may also,
5 once again, be armed, and [that] information came from a paid confidential informant
6 who may or may not be reliable” did not create an exigency justifying the officers’
7 failure to announce their presence before entering the residence to effectuate the
8 search warrant. The State appeals the district court’s order suppressing evidence.

9 **STANDARD OF REVIEW**

10 {8} “In reviewing the grant of a motion to suppress, this Court must determine
11 whether the law was correctly applied to the facts, viewing the facts in a light most
12 favorable to the [district] court’s ruling.” *State v. Chavarria*, 2001-NMCA-095, ¶ 2,
13 131 N.M. 172, 33 P.3d 922 (alteration, internal quotation marks, and citation omitted).
14 The district court’s findings of fact are accepted as true so long as they are supported
15 by “such relevant evidence as a reasonable mind might accept as adequate to support
16 a conclusion.” *State v. Gonzales*, 2010-NMCA-023, ¶ 4, 147 N.M. 735, 228 P.3d 519

18 ²Alternatively, the State argued that under *Hudson v. Michigan*, 547 U.S. 586
19 (2006), suppression was not an appropriate remedy for the officers’ failure to
20 announce themselves before executing the search warrant. But the State concedes on
17 appeal that so long as *Attaway* remains good law, suppression remains the default
18 remedy for knock-and-announce violations in New Mexico courts. *See Attaway*, 1994-
19 NMSC-011, ¶ 22 n.6.

1 (alteration, internal quotation marks, and citation omitted).

2 **DISCUSSION**

3 {9} “In New Mexico, law enforcement officers are constitutionally required to
4 knock and announce their identity and purpose, and wait a reasonable time to
5 determine if consent to enter will be given prior to forcefully entering a dwelling in
6 order to execute a search warrant.” *State v. Hand*, 2008-NMSC-014, ¶ 7, 143 N.M.
7 530, 178 P.3d 165 (alteration, internal quotation marks, and citation omitted). “By
8 requiring the police to announce the fact that they have a warrant and then give the
9 occupants time to voluntarily answer the door, the knock-and-announce rule protects
10 those elements of privacy and dignity that can be destroyed by a sudden entrance and
11 gives occupants the time necessary to collect themselves and to prepare for the entry
12 of the police before answering the door.” *State v. Jean-Paul*, 2013-NMCA-032, ¶ 9,
13 295 P.3d 1072 (internal quotation marks and citation omitted). “The rule serves a
14 number of additional purposes, including preventing the needless destruction of
15 property, reducing the risk of violence to both occupants and police, and permitting
16 an opportunity for the occupants to comply with the law.” *Id.*

17 {10} Because the knock-and-announce rule is “part of the constitutional protections
18 against unreasonable searches and seizures embodied in [A]rticle II, [S]ection 10 of
19 the New Mexico Constitution, and the Fourth Amendment to the United States

1 Constitution . . . the ultimate question underlying any purported knock-and-announce
2 violation is whether the search and seizure was reasonable.” *State v. Vargas*, 2008-
3 NMSC-019, ¶ 11, 143 N.M. 692, 181 P.3d 684 (alteration, internal quotation marks,
4 and citations omitted). There are at least two circumstances where an officer’s failure
5 to knock and announce is deemed reasonable: (1) when obeying the knock-and-
6 announce requirement would be futile, and (2) when exigent circumstances counsel
7 against knocking and announcing. *Jean-Paul*, 2013-NMCA-032, ¶ 10. “The futility
8 exception applies when it is clear that the authority and purpose of the police are
9 already known to those within the premises, such that knocking and announcing that
10 the police intend to execute a warrant would serve no purpose.” *Id.* “Exigent
11 circumstances include situations involving, among other things, a demonstrable risk
12 that evidence will be destroyed while the officers wait to be denied entry, or specific
13 information indicating that the danger to the officers executing the warrant will be
14 increased, rather than decreased, if the officers comply with the rule.” *Id.* (alteration,
15 internal quotation marks and citation omitted).

16 {11} “To determine whether an exception applies, a court must look to the totality
17 of the circumstances at the time of entry from the point of view of a reasonable,
18 well-trained, and prudent police officer to decide whether the officer had a reasonable
19 belief that there were exigent circumstances or that knocking and announcing would

1 be futile.” *Id.* ¶ 11 (internal quotation marks and citation omitted). “The
2 reasonableness of an officer’s belief is measured under a reasonable suspicion
3 standard, which is not high but which requires specific, articulable facts, together with
4 reasonable inferences therefrom, as a basis for concluding that the facts and
5 circumstances of the particular entry justified dispensing with the
6 knock-and-announce requirement.” *Id.* (internal quotation marks and citation omitted).
7 “In determining whether exigent circumstances existed, the appellate court must
8 weigh underlying policy considerations, and balance competing legal interests,
9 specifically between the safety of law enforcement officers and Fourth Amendment
10 privacy interests.” *Lopez*, 2005-NMSC-018, ¶ 11 (alteration, internal quotation marks,
11 and citation omitted).

12 {12} The State argues that the police officers had an objectively reasonable basis to
13 conclude that entry into Defendants’ residence without knocking and announcing was
14 required in order to protect their physical safety. The State’s brief in chief identifies
15 the following facts as furnishing a sufficient basis for this conclusion: (1) the officers
16 had probable cause to believe that the residence was being used as a base for a heroin
17 trafficking operation; (2) the informant’s report that a member of the TCK gang was
18 Defendant Lucero’s boyfriend, who might be present and armed inside the residence
19 at the time of the search; and (3) Detective Martinez’s personal experience with the

1 TCK gang and its history of violence.

2 {13} The State’s brief argues that this case is analogous to cases where courts have
3 found exigent circumstances based on the presence of weapons, *see id.* ¶ 19, or a
4 member of a gang with a reputation for violence, *see Vargas*, 1996-NMCA-016, ¶ 12,
5 inside the residence to be searched. But the State’s argument mischaracterizes the
6 district court’s rationale for suppressing the State’s evidence. The district court did not
7 reason that the presence of an armed gang member failed to establish exigent
8 circumstances as a matter of law; rather, it concluded that there was inadequate
9 evidence for a reasonable officer to conclude that such an exigency existed in the first
10 place.

11 {14} This conclusion was based on a number of findings that the State fails to
12 challenge on appeal. First, the district court questioned the reliability of the paid
13 informant who told Detective Martinez that a dangerous gang member might be inside
14 Defendants’ residence. Second, the district court found that even if the informant was
15 reliable, the informant’s information provided at most a basis for further investigation,
16 not reasonable suspicion: in the district court’s words, the informant informed
17 Detective Martinez that “there was possibly—and I stress ‘possibly’—a TCK member
18 . . . [w]ho may—and I stress the word ‘may’—be staying at the residence and [w]ho
19 may also, once again, be armed[.]” In other words, the district court concluded that it

1 would not be reasonable to infer that an armed member of the TCK gang was in fact
2 inside the home at the time of the search based only on the informant's vague and
3 equivocal statements to that effect. Moreover, by failing to challenge these findings
4 on appeal and instead characterizing the question on appeal exclusively as one of law,
5 the State has waived its opportunity to challenge the district court's findings of fact,
6 and therefore whatever viable basis which may have existed to overturn the district
7 court's suppression order. *See Stroope v. Potter*, 1944-NMSC-049, ¶ 27, 48 N.M. 404,
8 151 P.2d 748 (explaining that the appellant bears the burden of demonstrating that a
9 district court's finding of fact is unsupported by substantial evidence).

10 {15} Even if the State hadn't waived its challenge to the district court's finding that
11 the informant's tip was either unreliable or insufficiently specific to give rise to
12 reasonable suspicion, there is ample evidence to support the district court's
13 conclusion. The informant gave Detective Martinez concrete, specific information
14 about one suspect: her first name "Heather," her "physical description," hair color, the
15 length of her hair, even the color of her eyes. By contrast, the most the informant
16 could say about Lobo was that he was a member of the TCK gang, a Hispanic male
17 who "might be" at the residence, and who "possibly had a handgun." Detective
18 Martinez testified that he tried to but could not verify Lobo's identity. Tellingly,
19 Detective Martinez did not include any reference to Lobo in his application for a

1 search warrant or in the police report he filed after the warrant was executed. And on
2 cross examination, Detective Martinez conceded his fear that there might be weapons
3 in the residence was more of a “general” fear that he felt whenever he executed a
4 search warrant, not a specific fear arising from what the informant told him. While
5 this evidence is not relevant to the objective reasonableness of Detective Martinez’s
6 actions, it supports the district court’s conclusion that the informant’s reports about
7 Lobo were too vague and generalized to provide a reasonable basis for concluding that
8 Lobo was actually inside the house at the time Detective Martinez approached the
9 door. *See Jean-Paul*, 2013-NMCA-032, ¶ 11 (stating that a police officer must possess
10 “specific, articulable facts, together with reasonable inferences therefrom, as a basis
11 for concluding that the facts and circumstances of the particular entry justified
12 dispensing with the knock-and-announce requirement.” (internal quotation marks and
13 citation omitted)). Viewing this evidence in the light most favorable to the district
14 court’s order suppressing evidence, as our standard of review demands, we agree with
15 the district court’s conclusion that the informant’s vague and unverifiable statements
16 about a “possibly” armed gang member who “might” be present in Defendants’
17 residence did not furnish a reasonable basis to conclude that a dangerous gang
18 member was in fact inside Defendants’ residence at the time Detective Martinez

1 entered.³ Our precedents do not allow the substitution of a mere possibility for
2 “specific, articulable facts” in this context. *Id.* (internal quotation marks and citation
3 omitted).

4 **CONCLUSION**

5 {16} We affirm the district court.

6 {17} **IT IS SO ORDERED.**

7
8

J. MILES HANISEE, Judge

9 **WE CONCUR:**

10
11

MICHAEL E. VIGIL, Chief Judge

12
13

RODERICK T. KENNEDY, Judge

14 ³In addition to waiving any argument challenging the district court’s findings
15 of fact, the State has also failed to argue that Detective Martinez’s reliance on the
16 informant’s statements about Lobo was reasonable at the time of the entry based on
17 the magistrate’s earlier determination that the informant was reliable enough to
18 provide probable cause for the issuance of a search warrant. Because this argument
19 was not raised by the State, this decision should not be read as rejecting this or any
20 other possible argument that Detective Martinez’s actions were reasonable under the
21 totality of the circumstances despite the absence of reasonable suspicion of exigent
22 circumstances.