

1 {1} Defendant Diana Rodriguez appeals from her judgment and sentence entered
2 after her guilty plea to possession of a controlled substance. Defendant argues that the
3 district court improperly denied her motion to suppress evidence seized from her after
4 a traffic stop because: (1) the officer unlawfully expanded the scope of the
5 investigation, and (2) her consent to the search was involuntary. Defendant
6 additionally argues that the district court erred by denying her motion to dismiss on
7 compulsory joinder grounds. We hold that the scope of the investigation was lawfully
8 expanded and that Defendant voluntarily consented to the search. We further hold that
9 Defendant waived her right to appeal the district court's denial of her motion to
10 dismiss. As such, we affirm.

11 **BACKGROUND**

12 {2} On December 31, 2014, Defendant's vehicle came to Deputy Adam Lem's
13 attention because of an obscured registration sticker. After running the license plate,
14 Deputy Lem discovered that the vehicle's registered owner had a suspended driver's
15 license. Deputy Lem initiated a traffic stop, Defendant pulled the vehicle over, and
16 Deputy Lem spoke with Defendant and her passenger Eric Arzate. Deputy Lem
17 learned that the vehicle belonged to Arzate's brother. Neither Defendant nor Arzate,
18 however, possessed a valid driver's license, so Deputy Lem offered to perform a field
19 release of the vehicle after a tow truck arrived. During this exchange, Defendant stated

1 that she and Arzate lived “right around the corner.” Deputy Lem testified that
2 Defendant began to sweat profusely about halfway through the conversation, that both
3 Defendant and Arzate searched aimlessly for registration and insurance information
4 (which they were unable to find), that Defendant stumbled and stuttered in her speech,
5 and that Defendant was more nervous than the normal motoring public. {3} As
6 Deputy Lem returned to his unit, Arzate exited the passenger’s side of the vehicle.
7 Deputy Lem saw Arzate throw something back toward the vehicle, then Arzate began
8 to leave. Around this same time, Deputy Lem discovered that Arzate had outstanding
9 felony warrants. Deputy Lem shouted for Arzate to stop, but Arzate continued to run
10 and disappeared into a nearby mobile home park. Deputy Lem asked Defendant where
11 Arzate had gone. Defendant answered that Arzate was going to the bathroom. Deputy
12 Lem went back to his unit and called for backup, communicating information about
13 Arzate. Defendant then opened her door, stepped out of the vehicle with her purse, and
14 attempted to leave. Deputy Lem yelled from his unit for her to stay in her vehicle and
15 she complied.

16 {4} Deputy Lem returned to the vehicle and questioned Defendant about where she
17 and Arzate lived. Defendant was evasive in her answers and claimed not to know their
18 address. This line of questioning and evasion lasted approximately two minutes.
19 Defendant ultimately stated that they were staying “kinda far” away on Riverside.

1 Deputy Lem described Defendant as even more nervous at this point and unwilling
2 to make eye contact. Deputy Lem again asked Defendant why Arzate ran. Defendant
3 claimed not to know, but then stated that it may have been due to a bench warrant for
4 nonappearance at a court date.

5 {5} Deputy Lem then asked Defendant to step out of the vehicle. Clutching a large
6 purse, Defendant exited the vehicle, whereupon Deputy Lem asked Defendant whether
7 she had anything on her person, to which she replied, “Nope.” Deputy Lem went on
8 to ask, “Anything illegal?” Defendant replied, “Nope.” Deputy Lem then asked “Any
9 narcotics or anything?” Defendant replied, “No.” Deputy Lem testified that based on
10 all the indicators, he requested to search Defendant’s purse, to which she replied,
11 “Sure.” During the search of Defendant’s purse, Deputy Lem found marijuana and
12 approximately one gram of methamphetamine. When Defendant was told she was
13 being arrested, she produced a baggy of more than 40 grams of methamphetamine.

14 {6} Defendant was charged with one count of trafficking methamphetamine (by
15 possession with intent to distribute), in violation of NMSA 1978, Section 30-31-20
16 (2006), as well as various motor vehicle violations that were later dismissed and
17 prosecuted separately in magistrate court. Defendant moved to suppress evidence
18 obtained during the traffic stop, alleging violations of the Fourth Amendment to the
19 United States Constitution and Article II, Section 10 of the New Mexico Constitution.

1 The district court held a suppression hearing at which only Deputy Lem testified and
2 the parties stipulated to the admission of the dash cam audio-video recording of the
3 traffic stop. After taking the officer's testimony and reviewing the dash cam
4 recording, the district court denied Defendant's motion to suppress. In denying
5 Defendant's motion to suppress, the district court found that Defendant was very
6 nervous, stuttering, fumbling through paperwork, sweating profusely, avoiding eye
7 contact, evasive, not providing her address, and repeatedly trying to leave. The district
8 court also found that Arzate "tossed something away" after he exited the vehicle and
9 that Arzate ran "away and would not come back." The district court held that Deputy
10 Lem acquired reasonable suspicion of additional criminal activity, specifically drug
11 activity.

12 {7} Defendant also moved to dismiss the trafficking charge on compulsory joinder
13 grounds, arguing that the State violated the Rules of Criminal Procedure by failing to
14 prosecute all the crimes arising out of the stop together. The district court denied this
15 motion. Defendant entered into a conditional plea agreement in which she pled guilty
16 to possession of a controlled substance, in violation of NMSA 1978, Section 30-31-
17 23(E) (2011), and reserved the right to appeal the denial of her motion to suppress.
18 Defendant did not reserve her right to appeal the denial of her motion to dismiss.

19 **DISCUSSION**

1 **I. The District Court Did Not Err in Denying the Motion to Suppress**

2 {8} Because we hold that Deputy Lem’s expansion of his investigation to matters
3 outside the initial reason for the stop was supported by reasonable suspicion and
4 Defendant’s consent to search her purse was voluntary, we affirm the district court’s
5 denial of Defendant’s motion to suppress.

6 **A. Standard of Review**

7 {9} “Appellate review of a motion to suppress presents a mixed question of law and
8 fact.” *State v. Paananen*, 2015-NMSC-031, ¶ 10, 357 P.3d 958 (internal quotation
9 marks and citation omitted). “[W]e first look for substantial evidence to support the
10 [district] court’s factual finding, with deference to the . . . court’s review of the
11 testimony and other evidence presented[.]” *State v. Leyva*, 2011-NMSC-009, ¶ 30, 149
12 N.M. 435, 250 P.3d 861. “[W]e then review de novo the [district] court’s application
13 of law to the facts to determine whether the search or seizure were reasonable. The
14 burden to show reasonableness is on the [s]tate. Our review of a district court’s
15 determination of whether reasonable suspicion existed is de novo based on the totality
16 of the circumstances.” *Id.* (citations omitted).

17 **B. Reasonable Suspicion Analysis**

18 {10} Defendant argues that Deputy Lem lacked reasonable suspicion to expand the
19 scope of his investigation in violation of Article II, Section 10 of the New Mexico

1 Constitution. Defendant properly preserved her state constitutional argument below.
2 Given Defendant’s reliance on the New Mexico Constitution, as well as the
3 divergence of search and seizure jurisprudence under Article II, Section 10 and the
4 Fourth Amendment, we evaluate this case only under Article II, Section 10. *See*
5 *Leyva*, 2011-NMSC-009, ¶ 3 (finding that “Article II, Section 10 provides greater
6 protections against unreasonable searches and seizures than does the Fourth
7 Amendment”); *State v. Olson*, 2012-NMSC-035, ¶ 10, 285 P.3d 1066 (addressing only
8 broader protections of Article II, Section 10, where New Mexico Constitution
9 provides more expansive protections than the United States Constitution).

10 {11} A traffic stop and the attendant detention of its occupants is a “seizure” for
11 purposes of Article II, Section 10 of the New Mexico Constitution. *See State v. Duran*,
12 2005-NMSC-034, ¶ 22, 138 N.M. 414, 120 P.3d 836, *overruled on other grounds by*
13 *Leyva*, 2011-NMSC-009, ¶ 17. As set forth in *Duran*, the proper inquiry under Article
14 II, Section 10 is that “all questions asked by police officers during a traffic stop must
15 be analyzed to ensure they are reasonably related to the initial justification for the stop
16 or are supported by reasonable suspicion.” 2005-NMSC-034, ¶ 35. “An officer may
17 expand the scope of the search or seizure during the investigatory stop only where the
18 officer has reasonable and articulable suspicion that other criminal activity has been
19 or may be afoot.” *Id.* ¶ 23 (internal quotation marks and citation omitted).

1 “Reasonable suspicion must be based on specific articulable facts and the rational
2 inferences that may be drawn from those facts.” *Id.* (internal quotation marks and
3 citation omitted). “In determining whether reasonable suspicion exists, we examine
4 the totality of the circumstances.” *Id.* (internal quotation marks and citation omitted).¹

5 {12} Defendant does not challenge the lawfulness of the initial stop, and the State
6 does not argue that grounds other than independent reasonable suspicion existed for
7 expanding the stop. *See Olson*, 2012-NMSC-035, ¶ 11 (“Under *Duran*, an officer may
8 ask questions unrelated to the traffic stop so long as those questions are ‘supported by
9 independent reasonable suspicion, for reasons of officer safety, or if the interaction
10 has developed into a consensual encounter.’” (quoting *Leyva*, 2011-NMSC-009,
11 ¶ 55)). Thus, the issue before us is whether Deputy Lem’s questions about matters
12 unrelated to the obstruction of the registration sticker and the licensure offenses were
13 supported by reasonable suspicion.

14 {13} Defendant first argues that questions relating to Arzate’s motivations for fleeing
15 impermissibly went beyond the scope of the stop. At the time of these questions,
16 Arzate had fled, Deputy Lem knew Arzate had outstanding felony warrants, and
17 Deputy Lem had called other officers to the scene to assist in locating Arzate. Deputy

16 ¹The State spends a substantial portion of its brief discussing standards of
17 review and citing extensively to out-of-state case law. Because we determine that
18 Deputy Lem’s inquiries were lawful within the existing rubric of Article II, Section
19 10 jurisprudence, we need not address the out-of-state case law cited by the State.

1 Lem’s inquiry about Arzate’s motivations and his whereabouts were responsive to the
2 evolving circumstances of the stop, which now included the flight of Defendant’s
3 passenger. These circumstances, “while not rising to the level of reasonable suspicion
4 of other criminal activity” on the part of Defendant, permitted Deputy Lem to ask
5 limited questions about Arzate’s motivations. *See Duran*, 2005-NMSC-034, ¶ 37.
6 Deputy Lem acted properly as he employed “graduated response[s] to the evolving
7 nature of the stop.” *See State v. Funderburg*, 2008-NMSC-026, ¶¶ 28-29, 144 N.M.
8 37, 183 P.3d 922. We, therefore, conclude that Deputy Lem’s limited questions “were
9 fairly responsive to the emerging tableau” and “reasonably related in scope to the
10 circumstances of the case.” *Id.* ¶ 27 (internal quotation marks and citation omitted).

11 {14} Defendant next argues that Deputy Lem’s questions about whether Defendant
12 had anything illegal on her, such as narcotics, and seeking permission to search
13 Defendant’s purse impermissibly expanded the scope of the stop. In making this
14 argument, Defendant contends that Deputy Lem impermissibly relied on the actions
15 of Arzate and on her nervousness.

16 {15} Defendant’s suggestion that law enforcement and reviewing courts cannot
17 consider the actions of a defendant’s passenger in assessing reasonable suspicion is
18 incorrect. Indeed, our Court addressed this issue a number of years ago in *State v.*
19 *Williamson*, 2000-NMCA-068, 129 N.M. 387, 9 P.3d 70. In *Williamson*, the defendant

1 driver exhibited some signs of impairment, but they were insufficient to arrest him for
2 driving while intoxicated. 2000-NMCA-068, ¶ 4. At the same time, an illegal
3 substance was found on passenger’s person. *Id.* This Court held that the officer
4 reasonably expanded the scope of the traffic stop to question the defendant about
5 illegal substances and ask for consent to search his person. *Id.* ¶ 10. This reasonable
6 suspicion was based in part on factors individualized to the defendant and in part on
7 the passenger’s possession of drugs. *Id.* ¶ 14.

8 {16} Defendant cites to *State v. Patterson*, 2006-NMCA-037, 139 N.M. 322, 131
9 P.3d 1286, for the proposition that the behavior of vehicle occupants cannot be
10 attributed to a defendant driver. *Patterson* is distinguishable. Unlike the case before
11 us, “[t]he only fact concerning [the d]efendant . . . [in *Patterson*] was that he was
12 present in the car” where criminal activity was occurring. *Id.* ¶ 28. Our Court held that
13 “mere presence was not sufficient to create an individualized suspicion that [the
14 d]efendant . . . was violating the . . . law.” *Id.* *Patterson* merely stands for the
15 proposition that when an officer provides no articulable facts that give rise to
16 individualized suspicion as to the defendant, a general concern based on proximity to
17 illegal activity is insufficient. *See id.* Such is not the case here.

18 {17} Defendant finally contends that the only fact—other than Arzate’s
19 flight—supporting suspicion toward her was her nervousness. While nervousness

1 *alone* may be insufficient to form the basis of reasonable suspicion, we must look at
2 the totality of the circumstances. *See id.* ¶ 29; *State v. Martinez*, 2018-NMSC-007,
3 ¶ 12, 410 P.3d 186 (“On appeal, we must review the totality of the circumstances and
4 must avoid reweighing individual factors in isolation.”). In doing so, we find that mere
5 nervousness was not the basis for Deputy Lem’s expansion of his investigation.
6 Deputy Lem described Defendant as more nervous than the normal motoring public,
7 sweating profusely notwithstanding the cold weather, and avoiding eye contact. The
8 district court noted that these behaviors were indicative of drug activity.² Deputy Lem
9 articulated that his suspicion toward Defendant developed over the course of the
10 traffic stop based on all the foregoing factors, as well as: (1) Arzate’s flight from the
11 scene after throwing something back toward the vehicle where Defendant sat; (2)
12 Defendant’s own attempt to leave the scene; (3) Defendant’s inconsistent and evasive
13 answers regarding where she resided; and (4) Defendant’s clutching of her purse when
14 she got out of the vehicle. These facts support individualized suspicion as to

16 ²We note that Deputy Lem never testified to the conclusion that the way
17 Defendant was acting was consistent with drug use or drug activity. *See Duran*, 2005-
18 NMSC-034, ¶ 40 (noting that “[p]olice officers should always explain with specificity
19 how their training and experience led them to draw their conclusions when testifying
20 at a hearing on a motion to suppress”). Defendant, however, does not raise this as a
21 ground for error on appeal. Regardless, Deputy Lem’s “testimony, while not perfect,
22 sufficiently articulated the facts that gave him reasonable suspicion to expand the
23 scope of the stop.” *Id.*; *see also Leyva*, 2011-NMSC-009, ¶ 59 (“Reasonable suspicion
19 is measured by an objective standard based on the totality of the circumstances.”).

1 Defendant, well beyond her mere proximity to her fleeing passenger and her own
2 nervousness.

3 {18} “All of these facts, considered in the totality of the circumstances, gave [Deputy
4 Lem] reasonable suspicion that criminal activity may have been afoot.” *Duran*, 2005-
5 NMSC-034, ¶ 38. As such, Deputy Lem permissibly expanded the scope of the stop
6 by asking Defendant whether she had anything illegal, including narcotics, and
7 requesting consent to search Defendant’s purse. *See State v. Portillo*, 2011-NMCA-
8 079, ¶ 23, 150 N.M. 187, 258 P.3d 466 (holding that officer “could ask questions
9 about narcotics and weapons only if he had developed independent, reasonable
10 suspicion giving rise to such questions”); *see also Duran*, 2005-NMSC-034, ¶ 38
11 (finding reasonable suspicion for drug investigation, the court considered, among
12 other things, the defendant’s nervousness and conflicting accounts of travel itinerary);
13 *State v. Pacheco*, 2008-NMCA-131, ¶¶ 16-17, 145 N.M. 40, 193 P.3d 587 (same);
14 *Funderburg*, 2008-NMSC-026, ¶¶ 32-33 (considering the passenger’s possession of
15 drugs and drug paraphernalia in lawfully requesting to search the defendant’s vehicle);
16 *State v. Harbison*, 2007-NMSC-016, ¶ 18, 141 N.M. 392, 156 P.3d 30 (finding
17 reasonable suspicion, the court considered the defendant’s flight from area where
18 another individual had just completed a drug sale); *Williamson*, 2000-NMCA-068, ¶

1 14 (finding reasonable suspicion, the court considered the defendant’s signs of
2 impairment in connection with the passenger’s possession of illegal narcotics).

3 {19} Additionally, as found by the district court, Deputy Lem’s inquiries did not
4 impermissibly extend the duration of the stop. *See Duran*, 2005-NMSC-034, ¶ 35
5 (“We believe that [the reasonable suspicion] determination must also include an
6 examination of both the length of the detention and the manner in which it is carried
7 out. The length of the detention should be reasonably limited to the time it takes to
8 complete the underlying justification for the stop.” (internal quotation marks and
9 citation omitted)). Because of the need to wait for a tow truck, as well as the
10 concurrent investigation into Defendant’s fleeing passenger, the duration of the stop
11 already was permissibly lengthened beyond the scope of a usual traffic stop.

12 {20} Because we determine that Deputy Lem had reasonable suspicion to inquire
13 about illegal items, including narcotics, and to request consent to search, Defendant’s
14 argument that her consent to search was tainted by prior illegality is without merit. *See*
15 *Williamson*, 2000-NMCA-068, ¶ 17; *Funderburg*, 2008-NMSC-026, ¶ 33 (“Because
16 the detention was reasonable, [officer’s] request for consent was lawful.”).

17 **C. Voluntariness of Defendant’s Consent to Search**

18 {21} Defendant additionally argues that her consent to the search of her purse was
19 involuntary. Defendant specifically argues that she could not voluntarily consent to

1 the search because she was “seized” at the time consent was sought. The cases
2 Defendant cites for this proposition are inapposite and the well-settled law is to the
3 contrary. “The fact that a suspect has been subjected to arrest or detention does not
4 automatically invalidate a subsequent consent to search.” *State v. Mann*, 1985-
5 NMCA-107, ¶ 30, 103 N.M. 660, 712 P.2d 6. Indeed, “a person may validly consent
6 to a search even though the consent is given while he is in custody . . . the fact of
7 custody does not inherently render the consent invalid.” *Id.* (omission in original)
8 (internal quotation marks and citation omitted). “To determine the voluntariness of
9 consent, we examine whether the consent was specific and unequivocal, and whether
10 the consent was the result of duress or coercion, in light of the presumption
11 disfavoring the waiver of constitutional rights.” *State v. Shaulis-Powell*, 1999-NMCA-
12 090, ¶ 8, 127 N.M. 667, 986 P.2d 463.

13 {22} “The voluntariness of consent is a factual question in which the [district] court
14 must weigh the evidence and decide if it is sufficient to clearly and convincingly
15 establish that the consent was voluntary.” *State v. Davis*, 2013-NMSC-028, ¶ 10, 304
16 P.3d 10 (internal quotation marks and citation omitted). “In conducting such a review,
17 the question is whether the [district] court’s decision is supported by substantial
18 evidence, not whether the trial court could have reached a different conclusion.” *Id.*
19 (alterations, internal quotation marks, and citation omitted). The uncontroverted

1 evidence in this case is that Deputy Lem requested consent to search Defendant's
2 purse and Defendant said, "Sure." At that time, one other officer was on scene,
3 peering into the vehicle. No factors indicate coercion. *See id.* ¶ 23 ("Specific factors
4 indicating coercion include the use of force, brandishing of weapons, threat of
5 violence or arrest, lengthy and abusive questioning, deprivation of food or water and
6 promises of leniency in exchange for consent."). Substantial evidence supports the
7 district court's finding that Defendant "explicitly and unambiguously gave the
8 [d]eputy consent to search her purse[,]” and that “[t]here [was] no evidence of duress
9 or coercion.”

1 **II. The Denial of Defendant’s Motion to Dismiss is Not Preserved**

2 {23} Finally, Defendant argues that the district court erred in denying her motion to
3 dismiss based on compulsory joinder. Defendant entered into a conditional plea in this
4 case, reserving only the suppression issue addressed above; the conditional plea did
5 not reserve the compulsory joinder issue. As such, Defendant waived her right to
6 appeal the district court’s denial of her motion to dismiss by pleading guilty and
7 failing to reserve the issue in her conditional plea agreement. *See State v. Morgan*,
8 2016-NMCA-089, ¶ 29, 382 P.3d 981.

9 **CONCLUSION**

10 {24} For all the foregoing reasons, we affirm the district court’s denials of
11 Defendant’s motion to suppress and Defendant’s motion to dismiss.

12 {25} **IT IS SO ORDERED.**

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JENNIFER L. ATTREP, Judge

15 **WE CONCUR:**

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M. MONICA ZAMORA, Judge

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STEPHEN G. FRENCH, Judge