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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. 29,309

10 **EVARISTO AYALA,**

11 Defendant-Appellant.

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

13 **Kenneth H. Martinez, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

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17 Albuquerque, NM

18 for Appellee

19 John A. McCall

20 Albuquerque, NM

21 for Appellant

22 **MEMORANDUM OPINION**

23 **GARCIA, Judge.**

24 Defendant appeals his convictions of second-degree murder pursuant to NMSA

1 1978, Section 30-2-1(B) (1994), two counts of tampering with evidence pursuant to
2 NMSA 1978, Section 30-22-5 (2003), conspiracy to commit tampering with evidence
3 pursuant to NMSA 1978, Section 30-28-2 (1979) and NMSA 1978, Section 30-22-5
4 (2003), and unlawful taking of a motor vehicle pursuant to NMSA 1978, Section 30-
5 16-1 (1987) (amended 2006). Defendant raises three issues on appeal: (1) whether
6 the jury instruction on the homicide charge was erroneous; (2) whether substantial
7 evidence supports a finding that Defendant did not act in self-defense or defense of
8 another; and (3) whether the district court erred in denying Defendant's motion to
9 suppress evidence seized under a search warrant that was based upon an earlier
10 warrantless search of Defendant's mother's apartment. We determine the district
11 court erred when it denied Defendant's motion to suppress the evidence seized
12 pursuant to a warrantless search of Defendant's mother's apartment. We reverse and
13 remand this matter to the district court for a new trial.

14 **BACKGROUND**

15 While visiting her boyfriend, Wally Garcia, at the Santa Rosa prison facility
16 Defendant's neighbor, Christa Wyrick, provided authorities with information
17 regarding a possible shooting. This information included details about Defendant
18 shooting an unknown person in Albuquerque. Authorities turned the information over
19 to the Albuquerque Police Department and Detective Frank Flores initiated an

1 investigation. He interviewed Ms. Wyrick by telephone before she left the Santa Rosa
2 prison. Ms. Wyrick stated in her phone interview that Defendant told her “I killed that
3 dude” or “I shot that f**ker.” Detective Flores indicated that “[t]here wasn’t enough
4 information to know whether somebody had been killed or shot.”

5 Detective Flores immediately went to the apartment complex where, according
6 to Wyrick, Defendant’s mother’s apartment (Mother’s Apartment) was located, “to
7 find out and see if there was somebody there that needed help in that apartment.” The
8 officers confirmed with neighbors that Defendant, his mother, and brother lived at
9 Mother’s Apartment. “All we knew was somebody had been shot or killed in that
10 apartment possibly.” The officers “knocked several times [and] couldn’t get any
11 response.” It “[d]idn’t look like anybody was there[. The l]ights were off at that
12 point.” The officers also called out and looked in the windows. Detective Flores then
13 discussed entering the location with his supervisor, Sergeant Argueta. Detective
14 Flores testified that “it’s hard to say how long somebody can live being shot,
15 depending on where they are shot . . . [w]e just couldn’t take that risk of not checking
16 . . . my main concern was making sure nobody was in there that needed help.” “It
17 could have been a body or someone shot that needed aid[, w]e didn’t know at that time
18 to take that risk not to find out.” Detective Flores also testified that, depending upon
19 the availability of a judge, it could take three or four additional hours to obtain a

1 warrant. Instead of waiting for a warrant, the officers forcibly entered Mother's
2 Apartment without a warrant and "look[ed] for . . . somebody injured or a body . . .
3 we didn't touch anything." At the time of the warrantless entry, Officer Flores and
4 Sergeant Argueta were aware that it was approximately forty-eight hours after the
5 alleged shooting or murder. Police seized no physical evidence as a result of
6 Detective Flores' initial warrantless entry into Mother's Apartment.

7 Although police did not seize any physical evidence, they did use observations
8 of blood found inside Mother's Apartment as material information to obtain a
9 subsequent search warrant for the premises. To rule on Defendant's motion to
10 suppress, the district court looked at the actual affidavit and subsequent search
11 warrant. Defendant's motion to suppress was denied. The district court's denial of
12 the motion to suppress was based on the officers' affidavit.

13 **DISCUSSION**

14 **1. The Warrantless Search of Mother's Apartment**

15 We review the district court's denial of Defendant's motion to suppress as a
16 mixed question of law and fact. *State v. Ryon*, 2005-NMSC-005, ¶ 11, 137 N.M. 174,
17 108 P.3d 1032. We view the facts in the light most favorable to the prevailing party
18 and defer to the district court's findings of historical facts and witness credibility
19 when supported by substantial evidence. *Id.* The legality of a search, however,

1 ultimately turns on a question of reasonableness. *Id.* We must carefully balance
2 constitutional values “to shape the parameters of police conduct by placing the
3 constitutional requirement of reasonableness in a factual context.” *Id.* (internal
4 quotation marks and citation omitted).

5 “Warrantless searches and seizures inside a home are presumptively
6 unreasonable, subject only to a few specific, narrowly defined exceptions.” *Id.* ¶ 23.
7 “[T]he motivation for the entry [of a home] without a warrant or probable cause must
8 be a strong sense of an emergency.” *Id.* ¶ 27. The State argues that the emergency
9 assistance doctrine establishes a valid exception to the warrant requirements for the
10 search of Mother’s Apartment. We apply the three-part test adopted in *Ryon* to
11 determine whether the emergency assistance doctrine applies. 2005-NMSC-005, ¶¶ 9,
12 29 (applying the three- part test established in *People v. Mitchell*, 347 N.E.2d 607
13 (N.Y. 1976)). “The emergency assistance doctrine requires an emergency, a strong
14 perception that action is required to protect against imminent danger to life or limb,
15 [and] an emergency that is sufficiently compelling to make a warrantless entry into the
16 home objectively reasonable under the Fourth Amendment.” *Ryon*, 2005-NMSC-005,
17 ¶ 31. “[I]ndividual privacy expectations must at times yield to a paramount interest
18 in protecting and preserving life.” *Id.* ¶ 28. As such, “[p]olice need not ignore an
19 emergency simply because they are conducting a criminal investigation.” *Id.*

1 Under the first part of the *Mitchell* test, police must have reasonable grounds
2 to believe an emergency is at hand and there is an immediate need for police
3 assistance to protect life or property. *Ryon*, 2005-NMSC-005, ¶ 29. To justify
4 intrusion into Mother’s Apartment, “officers must have credible and specific
5 information that a victim is very likely to be located at a particular place and in need
6 of immediate aid to avoid great bodily harm or death.” *Id.* ¶ 42. In the present case,
7 Detective Flores needed credible and specific information from Wyrick to establish
8 not only that the shooting victim was in Mother’s Apartment, but also that the victim
9 was in immediate need of aid approximately forty-eight hours after the shooting
10 occurred. Warrantless entry to a residence is not justified where further investigation
11 of the facts is necessary to establish credible and specific information. *Id.* ¶¶ 32, 43.
12 The test is an objective one, and the officer’s subjective beliefs for the entry are
13 irrelevant. *Chavez v. Bd. of County Comm’rs*, 2001-NMCA-065, ¶ 26, 130 N.M. 753,
14 31 P.3d 1027.

15 Based upon Detective Flores’ testimony and the facts known at the time of entry
16 into Mother’s Apartment, the State has failed to meet the first part of the *Mitchell* test
17 for applying the emergency assistance doctrine. There is no evidence to establish that
18 Wyrick told Detective Flores who was shot, when the alleged shooting occurred,
19 where the alleged shooting occurred, or where to locate a purported victim. Wyrick

1 simply informed the detective that Defendant shot or killed someone and that
2 Defendant lived at Mother’s Apartment. In addition, Wyrick never indicated that a
3 victim needed aid. In fact, Wyrick told Detective Flores that Defendant also stated the
4 victim had been “killed.”

5 Relying upon this limited information, approximately forty-eight hours after
6 Defendant made his statements to Wyrick inside her apartment, Detective Flores went
7 to the apartment complex where Mother’s Apartment is located. The detective
8 initiated an onsite investigation at the apartment complex and did not obtain any
9 further information regarding the shooting, whether a victim existed, or whether a
10 victim was in need aid. Although Detective Flores had some limited general
11 information regarding a possible shooting, he did not possess any credible or specific
12 information that a shooting occurred inside Mother’s Apartment, that the shooting
13 victim was presently located inside Mother’s Apartment, or that the shooting victim
14 was in need of immediate aid to avoid great bodily harm or death. An officer is not
15 entitled to rely upon his intuition, speculation, or a hunch to establish the objective
16 reasonableness of his actions. *See State v. Baca*, 2007-NMCA-016, ¶ 27, 141 N.M.
17 65, 150 P.3d 1015 (“Speculation and conjecture are insufficient to establish ‘an
18 emergency at hand and an immediate need for [police] assistance.’”); *see also State*
19 *v. Olson*, 2011-NMCA-056, ¶ 17, 150 N.M. 348, 258 P.3d 1140 (recognizing that a

1 detention is improper when it is based on no more than an officer's hunch or
2 speculation of criminal conduct); *State v. Garcia*, 2009-NMSC-046, ¶ 45, 147 N.M.
3 134, 217 P.3d 1032 (recognizing that an officer is not entitled to rely on mere
4 speculation to establish reasonable suspicion). Breaking into Mother's Apartment to
5 find a possible victim and render potential aid was mere speculation and not supported
6 by credible or specific facts. As a result, exigent circumstances did not necessitate the
7 limited search of Mother's Apartment, and no exception to the Fourth Amendment
8 warrant requirement applies. Such a warrantless search is not constitutionally
9 reasonable.

10 Because we determine that the State has not met the first part of the *Mitchell*
11 test, it is unnecessary for us to examine and develop the remaining two *Mitchell* test
12 factors. We reverse the district court's ruling that the emergency assistance doctrine
13 established an exigent circumstance to allow Detective Flores to enter Mother's
14 Apartment without a warrant.

15 **2. The Search Warrant for Mother's Apartment and Related Evidence**

16 Relying on *State v. Wagoner (Wagoner II)*, 2001-NMCA-014, 130 N.M. 274,
17 24 P.3d 306 and *State v. Trudelle*, 2007-NMCA-066, 142 N.M. 18, 162 P.3d 173,
18 Defendant argues that the evidence gathered as a result of a tainted search warrant
19 should be suppressed. The officer's affidavit and search warrant are not included in

1 the appellate record. The evidence seized and offered at trial is also missing from the
2 record presented for review. Defendant never clearly identifies what evidence was
3 obtained or admitted as the potential fruits of either search of Mother's Apartment.
4 In addition, Defendant has not materially developed whether additional evidence was
5 in fact obtained as the fruits of the tainted search warrant for review by this Court.
6 *See State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111
7 (explaining that this Court has no duty to review arguments that are not adequately
8 developed). It is also unclear whether the district court used *Wagonner II* and
9 *Trudelle* when it considered the suppression of the warrant issued for Mother's
10 Apartment. Based on our Opinion, this case will be remanded for a new trial.
11 Resolution of any evidentiary issue involving potential fruits of a tainted search are
12 best left to the district court if raised on remand.

13 **3. Sufficiency of the Evidence Regarding the Second Degree Murder**
14 **Conviction**

15 With respect to the sufficiency of the evidence challenge, we interpret
16 Defendant's brief as asking us to review whether there was sufficient evidence to
17 establish the element that Defendant did not act in self-defense or defense of another,
18 when he was convicted of second-degree murder. "Our substantial evidence review
19 of the sufficiency of the evidence to support a conviction must take into account both
20 the jury's fundamental role as factfinder in our system of justice and the independent

1 responsibility of the courts to ensure that the jury’s decisions are supportable by
2 evidence in the record, rather than mere guess or conjecture.” *State v. Flores*, 2010-
3 NMSC-002, ¶ 2, 147 N.M. 542, 226 P.3d 641. “The test for sufficiency of the
4 evidence is whether substantial evidence of either a direct or circumstantial nature
5 exists to support a verdict of guilt beyond a reasonable doubt with respect to every
6 element essential to a conviction.” *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M.
7 94, 140 P.3d 515 (internal quotation marks and citation omitted). “Substantial
8 evidence is defined as that evidence which is acceptable to a reasonable mind as
9 adequate support for a conclusion.” *State v. Robinson*, 94 N.M. 693, 696, 616 P.2d
10 406, 409 (1980), *limited on other grounds by Sells v. State*, 98 N.M. 786, 653 P.2d
11 162 (1982). Furthermore, “we must view the evidence in the light most favorable to
12 the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the
13 evidence in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128
14 N.M. 711, 998 P.2d 176. After reviewing the evidence in this light, the question is
15 whether any rational trier of fact could have found the essential elements of the crime
16 beyond a reasonable doubt. *Id.* In making this determination, a reviewing court “does
17 not weigh the evidence and may not substitute its judgment for that of the fact finder
18 so long as there is sufficient evidence to support the verdict.” *State v. Sutphin*, 107
19 N.M. 126, 131, 753 P.2d 1314, 1319 (1988).

1 Where Defendant presents evidence of self-defense, the jury is charged with
2 weighing the evidence and credibility of the testimony provided. *See State v. Gurule*,
3 2004-NMCA-008, ¶ 38, 134 N.M. 804, 82 P.3d 975. It is for the jury to determine
4 whether it believes Defendant’s evidence and theory of self-defense. *State v. Hunter*,
5 2001-NMCA-078, ¶ 16, 131 N.M. 76, 33 P.3d 296; *State v. Foxen*, 2001-NMCA-061,
6 ¶ 17, 130 N.M. 670, 29 P.3d 1071 (noting that the jury was not obligated to believe
7 the defendant’s assertions regarding testimony, to disbelieve or discount conflicting
8 testimony, or to adopt the defendant’s particular view of the credibility of witnesses
9 and weight of the evidence against him). In addition, the reasonableness in the use of
10 force is generally a jury question. *State v. Johnson*, 1998-NMCA-019, ¶ 16, 124 N.M.
11 647, 954 P.2d 79. When a claim of self-defense is asserted, Defendant is only
12 obligated to raise reasonable doubt in the minds of the jurors. *State v. Harrison*, 81
13 N.M. 623, 630, 471 P.2d 193, 200 (Ct. App. 1970).

14 Defendant’s brief fails to identify the evidence in the record that supports the
15 jury’s determination that he did not act in self-defense or defense of another. The only
16 evidence presented by Defendant in his brief was evidence the jury would have
17 rejected in finding that Defendant did not act in self-defense or defense of another.
18 However, the State points to evidence that Defendant was the first aggressor when he
19 pulled a gun on the victim, the victim was severely injured by multiple wounds

1 inflicted during the incident, and the trajectory of the fatal bullet was consistent with
2 the victim being shot execution style through the face from a higher position. We are
3 satisfied that there is sufficient conflicting evidence regarding the shooting incident
4 for a jury to reject Defendant's claims that he acted in self-defense and defense of
5 another when he shot the victim.

6 **4. Remand for Retrial**

7 Because there was substantial testimony and evidence to support Defendant's
8 conviction for second-degree murder, double jeopardy does not attach and this matter
9 is remanded for a new trial. *State v. Gallegos*, 2005-NMCA-142, ¶ 34, 138 N.M. 673,
10 125 P.3d 652 (recognizing that "principles of double jeopardy [only] bar retrial if [a
11 d]efendant's convictions are not supported by substantial evidence" (internal
12 quotation marks and citation omitted)), *aff'd in part, rev'd in part on other grounds*
13 *by* 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828; *State v. Post*, 109 N.M. 177, 181,
14 783 P.2d 487, 491 (Ct. App. 1989) ("If all of the evidence, including the wrongfully
15 admitted evidence, is sufficient, then retrial following appeal is not barred [by the
16 Double Jeopardy Clause]."). Defendant has failed to adequately address the
17 evidentiary requirements necessary to bar retrial in this case. *See State v. Graham*,
18 2005-NMSC-004, ¶ 6, 137 N.M. 197, 109 P.3d 285 (setting out the two-part test for
19 whether substantial evidence exists to support a conviction); *see also Gonzales*, 2011-

1 NMCA-007, ¶ 19 (explaining that this Court has no duty to review arguments that are
2 not adequately developed); *State v. Torres*, 2005-NMCA-070, ¶ 34, 137 N.M. 607,
3 113 P.3d 877 (stating that this Court will not address issues unsupported by argument
4 and authority). As a result, double jeopardy does not bar a retrial of Defendant for his
5 convictions in this case.

6 Finally, since we reverse and remand for a new trial based upon the error in
7 denying Defendant's motion to suppress, it is not necessary to address Defendant's
8 remaining assertion of error regarding the jury instructions.

9 **CONCLUSION**

10 We reverse Defendant's convictions and remand this matter back to the district
11 court for a new trial. We instruct the district court to suppress all evidence obtained
12 as a result of the initial warrantless search of Mother's Apartment and to address any
13 issues regarding the search warrant that may be raised on remand.

14 **IT IS SO ORDERED.**

15 _____
16 **TIMOTHY L. GARCIA, Judge**

17 **WE CONCUR:**

1

2 **CELIA FOY CASTILLO, Chief Judge**

3

4 **MICHAEL E. VIGIL, Judge**