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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. 29,423

10 **MARK STEVENS,**

11 Defendant-Appellant.

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

13 **Daniel Viramontes, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

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17 Albuquerque, NM

18 for Appellee

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21 Santa Fe, NM

22 for Appellant

23 **MEMORANDUM OPINION**

24 **WECHSLER, Judge.**

1 Defendant appeals the district court's denial of his motion to suppress. On
2 appeal, Defendant argues that (1) there was no reasonable suspicion to support the
3 initial stop of a vehicle in which he was a passenger, (2) the officer expanded the stop
4 into an unconstitutional frisk by failing to articulate safety concerns, and (3)
5 subsequent to the frisk, the officer impermissibly searched his pocket without consent.
6 Because reasonable suspicion that the occupants of the vehicle committed a burglary
7 supported the initial stop, and the remaining issues were unpreserved, we affirm.

8 **BACKGROUND**

9 The facts of this case are undisputed. At 10:30 p.m., Officer Robert Chavez
10 received a dispatch report stating that a possible burglary was in progress at the old
11 farmer's market. At the time, the old farmer's market was undergoing destruction and
12 was enclosed by a fence. Dispatch advised that a tipster reported that two men jumped
13 over the fence at the old farmer's market and left the area in an older model, red
14 Camaro with a black top. Upon hearing the dispatch report, Officer Chavez
15 "suspected" that the two men were stealing copper wire from the old farmer's market
16 because there had been a string of recent copper wire thefts from homes and
17 businesses throughout the city.

18 Shortly after receiving the dispatch report, Officer Chavez observed an older
19 model, red Camaro with a black top with three individuals, including two males,

1 inside. Officer Chavez initiated a traffic stop of the Camaro and observed a female,
2 Teresa Tackitt, in the driver's seat and two males in the Camaro, including Defendant,
3 who was seated in the front passenger seat. Upon approaching the Camaro, Officer
4 Chavez observed that there were gloves, screwdrivers, and other tools on the
5 floorboard. Officer Chavez asked Tackitt if she had been in the area of the old
6 farmer's market site, and Tackitt replied "[a]pproximately an hour ago." Supporting
7 officers were on the scene, and Officer Chavez ordered everyone out of the Camaro.

8 After the occupants exited the Camaro, Officer Chavez made contact with
9 Defendant. Officer Chavez asked Defendant if he "could conduct a pat down for my
10 safety and his." While conducting the frisk, Officer Chavez felt "something in his
11 right front pocket" and asked Defendant what it was. Defendant said he did not know.
12 Officer Chavez then asked for permission to retrieve it. Defendant responded that it
13 was "kinda close to my[.]" apparently referencing that the front pocket was close to
14 Defendant's groin area. Officer Chavez responded that he did not care and again
15 asked to retrieve the item. Defendant then gave permission. Officer Chavez
16 recovered a vial from Defendant's pocket, which contained a white substance later
17 determined to be methamphetamine.

18 Officer Chavez arrested Defendant for possession of methamphetamine.
19 Defendant filed a motion to suppress, arguing that his rights to be free of unreasonable

1 searches and seizures under the New Mexico and federal Constitutions were violated.
2 In his motion to suppress, Defendant argued that no reasonable suspicion justified the
3 initial stop of the Camaro or the continued detention of the occupants and therefore
4 the admission of the methamphetamine into evidence was barred under the fruit of the
5 poisonous tree doctrine. The district court denied the motion, finding that the initial
6 traffic stop was supported by reasonable suspicion and that the frisk was therefore “an
7 appropriate response to the situation.” Defendant entered into a conditional plea,
8 reserving his right to appeal the denial of his motion to suppress.

9 On appeal, Defendant argues that the district court erred in denying his motion
10 to suppress because (1) no reasonable suspicion justified the initial stop of the
11 Camaro, (2) Officer Chavez expanded the stop into an unconstitutional frisk, and (3)
12 Defendant did not voluntarily consent to the subsequent search of his pocket.

13 **STANDARD OF REVIEW**

14 Reviewing a district court’s denial of a motion to suppress involves mixed
15 questions of law and fact. *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52
16 P.3d 964. This Court reviews the surrounding circumstances using a substantial
17 evidence standard, while viewing the facts in the light most favorable to the prevailing
18 party. *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856. Whether
19 the district court correctly applied the law to the facts is a legal inquiry, which we

1 review de novo. *Urioste*, 2002-NMSC-023, ¶ 6.

2 **REASONABLE SUSPICION FOR INITIAL STOP**

3 Defendant argues that there was no particularized, reasonable suspicion
4 justifying the initial stop of the Camaro. As part of his argument, Defendant contends
5 that the dispatch report was based on an anonymous, uncorroborated tip and therefore
6 cannot be sufficiently reliable to establish reasonable suspicion. Indeed, Officer
7 Chavez did not refer to the tipster by name at the suppression hearing, and the State
8 did not call her to testify. However, “[o]n appeal, we are not limited to the record
9 made on a motion to suppress, but may review the entire record to determine whether
10 there was sufficient evidence to support the [district] court’s denial of the motion to
11 suppress.” *State v. Johnson*, 1996-NMCA-117, ¶ 21, 122 N.M. 713, 930 P.2d 1165.
12 The record indicates that the tip was from a citizen-informant and was therefore not
13 an anonymous tip. The statement of probable cause, written by Officer Chavez,
14 indicates that “[d]ispatch informed officers that a female identified as Rachel
15 Baumgartner had observed two males jumping over the fence” of the old farmer’s
16 market. Because she was identified, Baumgartner was a citizen-informant. *Cf. State*
17 *v. Contreras*, 2003-NMCA-129, ¶ 10, 134 N.M. 503, 79 P.3d 1111 (holding that a tip
18 was an anonymous tip when the caller was described as a “concerned motorist” and
19 was not identified).

1 “[A] citizen-informant is regarded as more reliable than a police informant or
2 a crime-stoppers informant.” *Id.*; *see State v. Michael G.*, 106 N.M. 644, 647, 748
3 P.2d 17, 20 (Ct. App. 1987) (“The willingness to identify oneself to the authorities as
4 an eyewitness provides an accurate indicator of credibility.”). Officer Chavez was
5 therefore entitled to rely on the dispatch report without further establishing the
6 reliability of Baumgartner’s tip in determining reasonable suspicion because the
7 source of the information was inherently reliable. *See State v. Ochoa*, 2008-NMSC-
8 023, ¶ 20, 143 N.M. 749, 182 P.3d 130 (stating that when “facts originate from a
9 third-party, then whether the stop was justified depends on the third-party’s reliability
10 as the source of such information”). We therefore turn to whether the tip, dispatch
11 report, and Officer Chavez’s knowledge of recent copper wire thefts in Deming
12 provided sufficient reasonable suspicion to justify the stop. *See State v. Candelaria*,
13 2011-NMCA-001, ¶¶ 9-10, 149 N.M. 125, 245 P.3d 69 (holding that a traffic stop is
14 a seizure for Fourth Amendment purposes and must be supported by reasonable
15 suspicion that a law has been violated).

16 Defendant argues that Officer Chavez lacked reasonable suspicion for the initial
17 stop because the dispatch report only alleged “suspicious behavior” and not that a
18 crime had actually been committed. Reasonable suspicion is particularized suspicion
19 that the person detained is breaking or has broken the law. *State v. Rivas*, 2007-

1 NMCA-020, ¶ 7, 141 N.M. 87, 150 P.3d 1037. “Unsupported intuition and
2 inarticulate hunches are not sufficient.” *Id.* (internal quotation marks and citation
3 omitted). “In determining whether reasonable suspicion exists, we apply an objective
4 standard that takes into account the totality of the circumstances and all information
5 available to the officer at the moment of the detention.” *State v. Gutierrez*, 2008-
6 NMCA-015, ¶ 14, 143 N.M. 522, 177 P.3d 1096 (internal quotation marks and
7 citation omitted). “Reasonable suspicion must exist at the inception of the seizure.”
8 *State v. Garcia*, 2009-NMSC-046, ¶ 43, 147 N.M. 134, 217 P.3d 1032 (internal
9 quotation marks and citation omitted).

10 Officer Chavez testified that the nature of the dispatch “was to inform officers
11 that there was a possible burglary in progress.” In *State v. Cobbs*, 103 N.M. 623, 625,
12 711 P.2d 900, 902 (Ct. App. 1985), an officer received a dispatch report relating to
13 “‘suspicious persons’ and a possible residential burglary in progress” around 11:40
14 p.m. The dispatch report stated that two men were in a parked vehicle behind a
15 residence and that the two men repeatedly approached the rear door of the residence
16 and then returned to the vehicle. *Id.* The officer arrived at the scene and observed two
17 men seated in a parked vehicle with its lights on. *Id.* The officer initiated a stop of
18 the vehicle once it began to leave the residence. *Id.* This Court upheld the denial of
19 a motion to suppress, holding that the contents of the dispatch resulted in the officer

1 being “amply justified” in stopping the vehicle. *Id.* at 627, 711 P.2d at 904.

2 Similarly, in this case, the dispatch stated that two men jumped over a fence of
3 a business at night and entered a late model, red Camaro with a black top. Considering
4 the similar time of night in *Cobbs*, and the similar behaviors engaged in at private
5 property by the defendant in *Cobbs* and Defendant in this case, there was reasonable
6 suspicion that the occupants of the Camaro committed a burglary. Officer Chavez was
7 therefore justified in the initial stop of the Camaro after observing that there were two
8 males inside. Officer Chavez’s testimony that there had been a string of copper wire
9 thefts in the city from homes and businesses in the area strengthens our conclusion
10 that the stop was supported by reasonable suspicion.

11 Defendant relies on *State v. Galvan*, 90 N.M. 129, 560 P.2d 550 (Ct. App.
12 1977), and *State v. Aguilar*, 2007-NMCA-040, 141 N.M. 364, 155 P.3d 769, for the
13 proposition that reasonable suspicion cannot be formed by “neutral conduct” or
14 conduct that has “too many possible innocent explanations.” In *Galvan*, this Court
15 held that an officer did not have reasonable suspicion to initiate a stop when the
16 defendant turned onto an unmarked road after seeing the spotlight of a patrol car. 90
17 N.M. at 132, 560 P.2d at 553. Although, the state attempted to justify the stop by
18 characterizing the defendant’s actions as “evasive,” this Court held that such “neutral
19 conduct” is not sufficient for reasonable suspicion. *Id.* at 132-33, 560 P.2d at 553-54.

1 In this case, while there may be innocent explanations, jumping over the fence of an
2 enclosed, private business at night is generally not consistent with innocent behavior.
3 Indeed, the conduct in *Galvan* of turning onto a public road was more consistent with
4 innocent behavior. We therefore cannot characterize Defendant’s conduct as “neutral
5 conduct” insufficient to establish reasonable suspicion.

6 Defendant similarly relies on *Aguilar*, in which this Court addressed whether
7 an officer’s observation that the defendant was driving a vehicle with a dealer’s
8 temporary demonstration plate at 2:00 a.m. was sufficient to establish reasonable
9 suspicion. 2007-NMCA-040, ¶ 1. This Court held that the officer did not have
10 reasonable suspicion, because, although dealerships are not open at 2:00 a.m., there
11 are no restrictions on the time of day the plates could be used and the officer did not
12 have knowledge that temporary plates were reportedly being misused or stolen. *Id.*
13 ¶¶ 10, 12. Therefore, the defendant’s conduct was entirely consistent with innocent
14 behavior. *Id.* ¶ 12. In this case, as we have previously determined, jumping over the
15 fence of an enclosed, private business at night is generally not consistent with
16 innocent behavior. Additionally, unlike *Aguilar*, there were reports of copper wire
17 thefts from businesses throughout the city that strengthened Officer Chavez’s
18 reasonable suspicion determination. *Cf. id.* ¶ 17 (noting that the holding does not limit
19 investigations when the officer has specific information regarding theft or misuse of

1 temporary plates).

2 **PATDOWN AND CONSENT TO SEARCH POCKET**

3 Defendant argues that, assuming the initial stop was justified, Officer Chavez
4 impermissibly expanded the stop into an unconstitutional frisk of Defendant by failing
5 to articulate any safety concerns, and, assuming the frisk was lawful, Defendant did
6 not consent to the search of his pocket after the frisk. Particularly, Defendant argues
7 that a protective frisk is only justified “when the officer reasonably believes the
8 suspect is armed and presently dangerous” and that Officer Chavez “could not
9 articulate anything about the stop that gave him reason to fear for his safety.” *See*
10 *State v. Pierce*, 2003-NMCA-117, ¶ 9, 134 N.M. 388, 77 P.3d 292 (“Police may
11 initiate a protective patdown search for weapons if they have specific and articulable
12 facts which they contend support their assessment of danger.” (internal quotation
13 marks and citation omitted)). Further, Defendant argues that Officer Chavez
14 impermissibly seized the item in Defendant’s pocket, without consent, even though
15 he knew it was not a weapon. The State contends that Defendant failed to preserve
16 the constitutionality of the frisk and search of Defendant’s pocket, and, if preserved,
17 Defendant consented to both the frisk and the search of his pocket.

18 “To preserve a question for review[,] it must appear that a ruling or decision by
19 the district court was fairly invoked[.]” Rule 12-216(A) NMRA. In order to fairly

1 invoke a ruling, “an objection must be made with sufficient specificity to alert the
2 mind of the trial court to the claimed error[.]” *State v. Riley*, 2010-NMSC-005, ¶ 24,
3 147 N.M. 557, 226 P.3d 656 (internal quotation marks and citation omitted).

4 In his motion to suppress, Defendant did not argue that the frisk and subsequent
5 search of his pocket by Officer Chavez were unlawful or that he did not consent. The
6 arguments and supporting authorities in Defendant’s motion to suppress to the district
7 court argue that (1) Defendant was seized without reasonable suspicion, (2) the tip
8 relied on by dispatch and Officer Chavez was anonymous and uncorroborated, and (3)
9 all evidence obtained thereafter is barred from admission under the fruit of the
10 poisonous tree doctrine. Defendant made identical arguments to the district court at
11 the suppression hearing. The arguments challenging the frisk and subsequent search
12 of Defendant’s pocket in this appeal are distinct from whether reasonable suspicion
13 supported the initial stop. Defendant therefore did not fairly invoke a ruling from the
14 district court on either issue and they were therefore not properly preserved. *See*
15 *Riley*, 2010-NMSC-005, ¶ 24. We therefore do not address Defendant’s arguments
16 challenging the frisk and subsequent search of Defendant’s pocket by Officer Chavez.
17 *See State ex rel. Children, Youth & Families Dep’t. v. Michael T.*, 2007-NMCA-163,
18 ¶ 15, 143 N.M. 75, 172 P.3d 1287 (holding that because party “did not preserve [the]
19 issue for appeal and because he does not argue that denial of his motion to suppress

1 was fundamental error, we do not address it now”).

2 **CONCLUSION**

3 For the foregoing reasons, we affirm.

4 **IT IS SO ORDERED.**

5

6

JAMES J. WECHSLER, Judge

7 **WE CONCUR:**

8

9 **JONATHAN B. SUTIN, Judge**

10

11 **TIMOTHY L. GARCIA, Judge**