**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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FILED: 04-20-2010
PHILIP G. URRY, CLERK
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| STATE OF ARIZONA, | ) | 1 CA-CR 08-0912 |
| | ) | |
| Appellee, | ) | DEPARTMENT A |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication – |
| | ) | Rule 111, Rules of the |
| COSME RODRIGO BERNAL-ESPINOZA, | ) | Arizona Supreme Court) |
| | ) | |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-161517-003 DT

The Honorable Pendleton Gaines, Judge

**AFFIRMED**

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Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
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and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

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**D O W N I E**, Judge

**¶1** Cosme Rodrigo Bernal-Espinoza ("defendant") challenges the denial of his suppression motion and his ensuing convictions and sentences. For the following reasons, we affirm.

**FACTS and PROCEDURAL BACKGROUND**[1]

**¶2** In June 2007, Arizona Department of Public Safety Lt. F.S. was the lead supervisor of the Illegal Immigration Prevention Apprehension Co/Op Team ("IIMPACT Squad"), a joint venture between three law enforcement agencies tasked with "human smuggling related crimes." Lt. F.S. received information that a home in the 4500 block of West Earll was being used as a "drop house" for human smuggling. An informant said he knew someone who had "escaped" from a house where a number of undocumented aliens were held, and when the "aliens came across the border they were charged $800.00 a head by one 'Coyote'[2]. . . . then sold to another Coyote for $2000.00 a head." The informant said there were "a lot of weapons involved with this organization, AK-47's," that "guards" were posted at the house,

[1] We view the facts in the light most favorable to upholding the trial court's ruling. *State v. Box,* 205 Ariz. 492, 495, ¶ 7, 73 P.2d 623, 626 (App. 2003) (citation omitted). At the suppression hearing, the court took judicial notice of an affidavit used to obtain a search warrant--something defendant does not challenge on appeal. The court thus had before it testimony from one of the officers and the facts set forth in the affidavit.

[2] The term describes someone who "smuggles immigrants into the United States." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/coyote (last visited April 6, 2010).

and that the Coyotes "are on drugs and have threatened violence."

**¶3** Using a physical description of the house provided by the informant, Lt. F.S. drove through the neighborhood and "identified the house." Over the next three months, the IIMPACT Squad periodically watched the house. Officers observed more than twenty vehicles come into contact with the home, including some "transport vehicles . . . capable of bringing large quantities of undocumented aliens up from the border," vehicles known as "Bajadores[,]"[3] and a vehicle registered to an individual with a prior arrest for "Alien Smuggling, Robbery, Sell[ing] of Narcotics, Illegal entry into the United States, False info to police, Dangerous drugs, Shoplifting, and Obstructing police." Officers, however, felt they did not have enough evidence to procure a search warrant. Instead, Lt. F.S. decided they should "knock on the door and talk to the folks inside."

**¶4** On September 19, 2007, officers dressed in "raid gear and physically identified as police" went to the house and positioned themselves in front of the house and in the alley behind a gated backyard. About the same time as officers knocked on the front door and identified themselves as police,

[3] "Bajadores" translates in English as "Rip Off Crews"; these individuals are "extremely violent and use police like uniforms and tactics to rip off the 'Coyotes' [sic] cargo."

officers in the alley reported over a radio that "several subjects were running from" the back of the house. Officers in the alley detained two persons inside the backyard, one of whom was later identified as defendant. Defendant told officers there were "15 or 16 'Pollo's'[4] [sic] inside the residence."

**¶5** When Lt. F.S. entered the backyard, he "formulated a quick tactical plan" to ensure the safety of his officers and persons inside the house. Officers "took points on the rear door and began to call anybody in the house out in both English and Spanish." When no one answered, officers entered the residence. They saw no one in a large open area, so the officers walked down a hallway. Suddenly, "subjects start[ed] coming out from a back bedroom." Officers took the individuals outside, completed another sweep of the house to determine whether anyone remained inside, and then secured the residence.

**¶6** During the sweep, officers observed weapons in plain view and later used that observation, in part, to obtain a search warrant for the house.[5] Defendant was arrested and charged with kidnapping, a class 2 felony; theft by extortion, a

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[4] The defendant noted in his motion to suppress that "[s]muggled illegally [sic] aliens are commonly referred to as 'pollos.'"

[5] When the warrant was executed, officers removed a high-power assault rifle, 12-gauge shotgun, ammunition, pellet gun, pay stubs, a ledger documenting the names of persons and money collected, various identification cards, cell phones, calling cards, birth certificates, shoes, and wire transfer receipts.

class 2 felony; and misconduct involving weapons, a class 4 felony.

**¶7** Defendant moved to suppress the evidence obtained during the warrantless entry into the house and all evidence seized pursuant to the later-issued warrant. After briefing and oral argument, the trial court denied his motion, stating:

> I think the State has proved all of this conclusively either beyond a reasonable doubt or by fair and convincing evidence, there was a reasonable suspicion in a right to detain the defendant when he attempted to flee the residence, regardless of whether the evidence was that he was the one running or the other guy was running, or whatever, given all of the circumstances attendant to the decision by the law enforcement at the time to stop him.
>
> While there is no evidence in this case that there was an issue regarding destruction of evidence, in the totality of the circumstances, it's my view as a Judge that the State has proved that law enforcement on the scene at the time had a reasonable belief that a crime was in progress or had just been committed and that there would be a delay attendant to obtaining a warrant and would potentially endanger the safety or life of a person herein.

**¶8** After a jury trial, defendant was found guilty of misconduct involving weapons and the lesser included offense of unlawful imprisonment, but he was acquitted of the other charges. The jury found the existence of four aggravating factors. Defendant was sentenced to two years of supervised

probation and eight months in jail.[6] He timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A) (Supp. 2008).

**DISCUSSION**

**¶9** Defendant asserts the trial court erred by denying his suppression motion because officers had no basis for detaining or arresting him. As such, defendant maintains, his statement about "pollos" inside the home was illegally obtained and could not be used to justify a warrantless entry into the house.

**¶10** In reviewing a motion to suppress, we defer to the trial court's factual determinations, but we review *de novo* its

[6] The sentencing minute entry erroneously states that defendant was placed on probation for "count 2," but defendant was acquitted on "Count 2, Theft by Extortion." A judgment of conviction and sentence is "complete and valid at the time of their oral pronouncement in open court." Ariz. R. Crim. P. 26.16. The oral pronouncement controls when there is an inconsistency between the oral and written statements. *State v. Johnson,* 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972). Here, the trial court clearly indicated it was sentencing defendant to supervised probation only for unlawful imprisonment ("count I") and misconduct involving weapons ("count III"). The court made no reference to any sentence related to the theft by extortion charge and the Uniform Conditions of Supervised Probation forms correspond to counts I and III. Because the true sentence is clear from the transcript of the sentencing hearing, we correct the record to reflect probation only for counts I and III. *See State v. Bowles,* 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) (finding remand is unnecessary to correct discrepancy between oral pronouncement of sentence and the minute entry when true sentence can be ascertained by reviewing the record).

ultimate legal conclusion. *Box,* 205 Ariz. at 495, ¶ 7, 73 P.3d at 626 (citation omitted). We will not disturb a trial court's ruling on a motion to suppress absent clear and manifest error. *State v. Gulbrandson,* 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995) (citation omitted). Clear and manifest error "is really shorthand for abuse of discretion." *State v. Jones,* 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002).

**1. Detention**

**¶11** The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated."[7] Defendant contends the trial court erred by failing to "distinguish the detention from an arrest." The record, however, demonstrates otherwise. The court clearly stated, "I think the State has proved . . . there

[7] Article 2, Section 8, of the Arizona Constitution also provides protection from unreasonable searches and seizures, and has been interpreted as providing more protection in "preserving the sanctity of homes and in creating a right of privacy." *See State v. Ault,* 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986) (citing *State v. Bolt,* 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984)). Defendant does not cite the Arizona Constitution on appeal and relies only on the Fourth Amendment. Although we do not require litigants to "jump through hyper-technical hoops," we do require them to clearly articulate the basis for their legal arguments. Because defendant does not mention the Arizona Constitution on appeal, we do not address it. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97,* 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (finding that issues not clearly raised and argued in a party's appellate brief are waived).

was a reasonable suspicion in a right to *detain* the defendant." (Emphasis added.) We agree with this conclusion.

**¶12** An investigatory stop is proper if an officer has an articulable, reasonable suspicion, based on the totality of the circumstances, that an individual is involved in criminal activity. *State v. Teagle,* 217 Ariz. 17, 22-23, ¶ 20, 170 P.3d 266, 271-72 (App. 2007). Totality of the circumstances includes "such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances, such as the time of day, and taking into account the officer's relevant experience, training, and knowledge." *State v. Fornof,* 218 Ariz. 74, 76, ¶ 6, 179 P.3d 954, 956 (App. 2008) (citations omitted). The court must view the facts through the eyes of a trained law enforcement officer. *United States v. Cortez,* 449 U.S. 411, 418-19 (1981). Flight following the approach of a police officer is suggestive of criminal activity. *See Illinois v. Wardlow,* 528 U.S. 119, 124 (2000) (finding that "[h]eadlong flight-wherever it occurs-is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such" and can be considered a "pertinent factor in determining reasonable suspicion") (citations omitted); *State v. Bible,* 175 Ariz. 549, 592, 858 P.2d 1152, 1195 (1993) (holding evidence of flight "usually constitutes an admission by conduct.") (citation omitted).

**¶13** The totality of circumstances here supports the determination that officers properly detained defendant. The officers were members of a law enforcement squad investigating human smuggling. They had a relatively detailed tip and information procured from three months of surveillance that caused them to suspect the house was being used for human smuggling. When officers knocked at the front door, persons fled from the back of the house. Lt. F.S. testified at the suppression hearing that radio communications indicated "several subjects were running from the house and were headed towards the fence, which would lead me to believe they were trying to escape from the house; that they were trying to flee being contacted by the police." He testified these individuals were "detained . . . until we could find out what was going on."

**¶14** The defense attempted to discredit Lt. F.S.'s testimony by showing that defendant was walking rather than running and that officers did not distinguish "how quickly or slowly the other person was moving." No matter the speed at which defendant moved, it was undisputed he was heading "towards the parked blue pickup." Likewise, defendant did not contest the fact that the other individual *was* running from the home, even if his exact speed was not detailed in officer reports. Moreover, the fact that these events occurred at the same time officers knocked and announced their presence at the front door

supports a belief that the two individuals were fleeing from law enforcement. The trial court determined defendant's actions gave rise to "a reasonable belief that a crime was in progress or had just been committed," "whether the evidence was that he was the one running or the other guy was running, or whatever, given all of the circumstances attendant to the decision by the law enforcement at the time to stop him." *See Cortez,* 499 U.S. at 417-19 (holding that founded suspicion can be based on inferences drawn from innocent-appearing facts by experienced officers); *Teagle,* 217 Ariz. at 24, ¶ 26, 170 P.3d at 273 (according deference "to a trained law enforcement officer's ability to distinguish between innocent and suspicious actions.") (citation omitted). We agree.

**¶15** Contrary to defendant's assertion, the fact that officers drew their weapons and handcuffed him does not per se transform an investigatory detention into an arrest. *See State v. Blackmore,* 186 Ariz. 630, 633-34, 925 P.2d 1347, 1350-51 (1996) (holding that an investigatory stop did not become a "*de facto* arrest" because officers ordered defendant to lie down at gunpoint and handcuffed and searched him); *State v. Romero,* 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993) ("The use of force does not transform a stop into an arrest if the situation explains an officer's fears for his personal safety.") (citation omitted); *State v. Saez,* 173 Ariz. 624, 627, 845 P.2d 1119, 1122

(App. 1992) ("Police are permitted to draw their weapons when they have reasonable basis to fear for their safety; by doing so, they do not convert an investigative stop into an arrest.") (citation omitted). The officers here were experienced in human smuggling cases and knew from experience that "a level of violence" exists in drop houses. They suspected that a "rip off crew" was operating out of this house and knew that such groups are especially violent. The informant told officers that people had been held against their will and threatened with violence in this home, and that there were "a lot of weapons involved with this organization, AK-47's." Under these circumstances, the trial court could reasonably conclude that officers were justified in using force to detain defendant.

**2. Search**

**¶16** We first consider at what point a warrantless search occurred.[8] Knocking at the front door of a house does not constitute a search. *See United States v. Hammett,* 236 F.3d

[8] A person must also have "a legitimate expectation of privacy in the invaded place . . . that society is prepared to consider reasonable." *State v. Juarez*, 203 Ariz. 441, 444, ¶ 12, 55 P.3d 784, 787 (App. 2002) (citations omitted). Defendant testified that he had permission to stay at the house and slept there for "around 20 days." The trial court determined he had standing to raise a constitutional challenge. The State assigns error to this ruling, but it did not file a cross-appeal. Consequently, we do not address the standing issue because "a cross-assignment of error in the absence of a cross-appeal can be considered only in support of the judgment." *State v. Dawson*, 164 Ariz. 278, 282, 792 P.2d 741, 745 (1990).

1054, 1059 (9th Cir. 2001) ("[A]nyone may 'openly and peaceably knock [on an individual's door] with the honest intent of asking questions of the occupant thereof-whether the questioner be a pollster, a salesman, or an officer of the law.'")(citation omitted).

**a. Entry Into Backyard**

**¶17** "[T]he home and its traditional curtilage [are] given the highest protection against warrantless searches and seizures." *United States v. Warner,* 843 F.2d 401, 405 (9th Cir. 1988). The curtilage is "the land immediately surrounding and associated with the home." *State v. Olm,* 223 Ariz. 429, 431, ¶ 5, 224 P.3d 245, 247 (App. 2010) (citation omitted). Courts employ four factors to determine whether an area is part of the curtilage: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 432, ¶ 10, 224 P.3d at 248 (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987)). In the case at bar, the backyard was not open to the public; it was completely surrounded by a fence with a gate that could be opened only from the inside, not from the alley. As a result, Fourth Amendment protections extended to the backyard.

**¶18** Officers admittedly entered the backyard without a warrant. "'[S]ubject only to a few specifically established and well-delineated exceptions,' a search is presumed to be unreasonable under the Fourth Amendment if it is not supported by probable cause and conducted pursuant to a valid search warrant." *State v. Gant*, 216 Ariz. 1, 3, ¶ 8, 162 P.3d 640, 642 (2007) (citation omitted). The State carries the burden of proving that a warrantless entry falls within an exception. *State v. Wright,* 125 Ariz. 36, 37, 607 P.2d 19, 20 (App. 1979).

**¶19** The emergency aid exception allows officers to "enter a dwelling without the benefit of a warrant where they reasonably believe there is someone within in need of immediate aid or assistance." *State v. Fisher,* 141 Ariz. 227, 237, 686 P.2d 750, 760 (1984). The intent of the doctrine is to ensure that officers "need not speculate or meditate or attempt to secure a warrant" when "[e]ach passing second may mean the difference between life and death." *Wright,* 125 Ariz. at 38, 607 P.2d at 21. Prior to entry, two factors must be evident: (1) officers must have "reasonable grounds" to believe an emergency exists that requires "an immediate need" for assistance to protect life or property; and (2) there must be "some reasonable basis, approximating probable cause," to

associate the emergency with the area to be searched.[9] *Fisher,* 141 Ariz. at 237-38, 686 P.2d at 760-61. We consider whether "the facts available to the officers at the moment they entered the [area] would have warranted a man of reasonable caution in the belief that entry was appropriate." *Wright,* 125 Ariz. at 37, 607 P.2d at 20.

**¶20** The trial court found that officers "on the scene at the time had a reasonable belief that a crime was in progress or had just been committed *and that there would be a delay attendant to obtaining a warrant and would potentially endanger the safety or life of a person herein*." (Emphasis added.) The record supports this determination. The events of September 19, combined with what officers knew from their three-month surveillance, could lead a reasonable officer to believe that individuals on the premises needed life-saving assistance. *Cf. United States v. Brooks,* 367 F.3d 1128, 1135-37 (9th Cir. 2004) (finding officer's "legitimate concern" for safety of a woman in domestic violence situation, combined with corroborating facts at the scene, supported warrantless entry into hotel room); *State v. Lawson,* 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985) (finding that probable cause can exist "from the collective

[9] A third factor--that the search not be primarily motivated by an intent to arrest and seize evidence--was vitiated after the United States Supreme Court held, in *Brigham City, Utah v. Stuart,* that an officer's "subjective motivation is irrelevant." 547 U.S. 398, 404-05 (2006) (citations omitted).

knowledge of all the law enforcement agents involved" in an operation) (citation omitted).

**¶21** Officers specializing in "human smuggling related crime" were on the scene and knew from experience that such operations were often violent. The informant had related that people in the house were being held against their will and threatened with violence and that those holding them had weapons, including "AK-47's." Surveillance corroborated the informant's tip that the residence was being used as a drop house. The likelihood of dangerous criminal activity being afoot increased on September 19 when, instead of answering officers' knocks at the front door, occupants of the home, including defendant, fled through a back entrance. *See Bible,* 175 Ariz. at 592, 858 P.2d at 1195; *State v. Edwards,* 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983) ("In Arizona, flight or concealment of an accused is a fact which may be considered by the jury as raising an inference that the accused is guilty."); *State v. Hunter,* 136 Ariz. 45, 48, 664 P.2d 195, 198 (1983) ("Analytically, flight or concealment is viewed as an admission by conduct."). Given the totality of circumstances, an objective officer could reasonably believe that occupants of the house were in need of immediate aid or assistance. *Fisher,* 141 Ariz. at 240, 686 P.2d at 763.

**¶22** At the suppression hearing, defendant testified that, when officers detained him, they told him "not to speak" and asked only whether others were in the house. Defendant's testimony supports Lt. F.S.'s statement that officers were concerned for the safety of persons held against their will inside the house who "may have been injured or maybe need[ed] some help."[10]

**¶23** The "gravity of the offense" is also an important factor to consider in determining whether an emergency exists. *See State v. Green,* 162 Ariz. 431, 433, 794 P.2d 257, 259 (1989) (holding that a domestic violence call itself is a "sufficient indication" of exigency allowing officers to enter a dwelling without a warrant "if no circumstance indicates that entry is unnecessary"). The situation at issue here was reported to be violent and volatile, such that it could escalate rapidly and require immediate officer involvement to protect individuals on the premises.

**b. Entry Into House**

**¶24** The emergency nature of the situation was heightened once defendant told officers that sixteen "pollos" were inside the house. Entry into the home was an appropriate continuation of law enforcement's response to the emergency situation. The

[10] The officer further testified his "intention was strictly for the safety of not only my officers, but if there were any other additional folks in the house."

ensuing search lasted approximately fifteen minutes. It focused on places persons could hide and was limited in duration to the time necessary for officers to conclude "they didn't have any more folks in the house." Although officers saw evidence in plain view, they did not confiscate it. Instead, they sealed the house, obtained search warrants, and then collected evidence.

**CONCLUSION**

**¶25** We conclude that the warrantless entries into the backyard and the home were appropriate and could be relied upon as bases for the subsequently issued search warrant. We thus affirm the judgment of the superior court.

_/s/_____
MARGARET H. DOWNIE, Judge

CONCURRING:

_/s/_____
MAURICE PORTLEY, Presiding Judge

_/s/_____
LAWRENCE F. WINTHROP, Judge