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

STATE OF ARIZONA, Appellee, v. JOHN LEE HUBBARD, Appellant.	)	1 CA-CR 09-0149 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. V-1300-CR-0820080632

The Honorable Warren R. Darrow, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/
Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Emily L. Danies — Tucson
Attorney for Appellant

H A L L, Judge

¶1 Defendant, John Lee Hubbard, appeals from his convictions for two counts of weapon misconduct, class four felonies, one count of resisting arrest, a class six felony, one

count of possession of marijuana, a class six felony, and one count of possession of drug paraphernalia, a class six felony, and the sentences imposed. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On October 4, 2008, at approximately 1:30 a.m., Deputy M.S. of the Yavapai County Sheriff's Office was on routine patrol in a marked vehicle. He observed a blue SUV parked in front of a business on his patrol route. In the two years that he had patrolled that route, Deputy M.S. had never before seen a vehicle parked at that business at night. Deputy M.S. noticed that the interior dome light was on and the driver's door was open with a foot "hanging out."

¶3 The deputy pulled his patrol vehicle behind the SUV. He could see a person hunched over in the driver's seat. Deputy M.S. exited the patrol vehicle and walked to the driver's side of the SUV. As he approached, the deputy looked inside the vehicle's windows and saw weapons in the back of the vehicle and defendant "passed out in the driver's seat." The deputy tried to wake defendant by speaking to him in a loud voice, but to no avail.

¶4 Deputy M.S. then returned to his patrol car, asked for assistance over the police radio, and waited for another deputy

to arrive. Moments later, Deputy J.S. arrived and the deputies approached the vehicle together, with Deputy M.S. on the driver's side and Deputy J.S. on the passenger's side. Deputy M.S. then shook defendant and he awoke. Deputy M.S. ordered defendant to exit the vehicle and asked him what he was doing in the car. Defendant stated that he was sleeping. When Deputy M.S. asked defendant for identification, defendant stated that it was inside the vehicle and turned to re-enter the SUV. Deputy M.S. ordered defendant to remain outside the vehicle, informing defendant that he was aware there were weapons inside the SUV. Deputy M.S. offered to retrieve the identification for defendant, but defendant refused the offer and re-entered the SUV.

¶5 At that point, Deputy J.S. opened the passenger door so that he could have an unobstructed view of what defendant was doing inside the vehicle. Upon opening the door, Deputy J.S. immediately recognized the odor of burnt marijuana and the deputies placed defendant under arrest.

¶6 Deputy M.S. walked defendant to the patrol car and attempted to place him in the back seat when defendant began kicking his legs. The deputy used his Taser on defendant but it was "completely ineffective." Defendant attempted to "head butt" the deputy and managed to take the deputy to the ground.

Eventually, however, the deputies were able to gain control of defendant and place him in the patrol car.

¶7 During his search of the vehicle subsequent to defendant's arrest, Deputy J.S. found, in plain view on the passenger seat, an open film container with marijuana inside and rolling papers. He also found a metal pipe in the center console and various weapons in the back of the vehicle.

¶8 Defendant was charged with two counts of weapon misconduct, two counts of aggravated assault, one count of resisting arrest, one count of possession of marijuana, and one count of possession of drug paraphernalia. The State also alleged that defendant had two historical prior felony convictions.

¶9 After waiving his right to counsel, defendant filed a pro per motion to suppress the evidence seized from his vehicle. Defendant argued that there was no evidence of criminal activity that supported the officers' search of his car. After hearing argument and taking the matter under advisement, the trial court denied defendant's motion.

¶10 The matter proceeded to trial and defendant was found guilty of two counts of weapon misconduct, one count of resisting arrest, one count of possession of marijuana, and one count of possession of drug paraphernalia. The trial court

found defendant had two historical prior felony convictions and sentenced him to an 8 year term of imprisonment on each count of weapon misconduct, a 4.5 year term of imprisonment on the count of resisting arresting, a 3 year term of imprisonment on the count of possession of marijuana, and a 3 year term of imprisonment on the count of possession of drug paraphernalia. Each of the sentences is concurrent to the others.

¶11 Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and -4033 (2010).

DISCUSSION

I. Denial of Motion to Suppress

¶12 Defendant contends that the trial court erred by denying his motion to suppress the evidence seized from his vehicle. Specifically, defendant argues that the officers did not have a reasonable suspicion that criminal activity was afoot and therefore had no authority to ask him questions or order him to exit his vehicle. He also argues that their subsequent search of his vehicle was illegal.

¶13 We review a trial court's denial of a motion to suppress for an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). In conducting our review,

we defer to the trial court's findings of fact underlying its ruling including its determinations of the credibility of the officers and the reasonableness of the inferences they drew. *State v. Lopez*, 198 Ariz. 420, 421, ¶ 7, 10 P.3d 1207, 1208 (App. 2000); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). If the trial court has not articulated specific findings, we will infer those factual findings reasonably supported by the record that are necessary to support the trial court's ruling. *State v. Russell*, 175 Ariz. 529, 533, 858 P.2d 674, 678 (App. 1993). We review, however, the superior court's legal conclusions de novo. *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778. We view the evidence presented at the suppression hearing in the light most favorable to upholding the trial court's ruling. *State v. Rosengren*, 199 Ariz. 112, 116, ¶ 9, 14 P.3d 303, 307 (App. 2000).

¶14 The United States and Arizona Constitutions prohibit all unreasonable searches and seizures. *See* U.S. Const. amends. IV, XIV; Ariz. Const. art. II, § 8. Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *State v. Dean*, 206 Ariz. 158, 161, ¶ 8, 76 P.3d 429, 432 (2003) (citation omitted).

¶15 Under the "community caretaker" doctrine, evidence discovered without a warrant is admissible when it was obtained while law enforcement engaged in "community caretaking functions" intended to promote public safety. *State v. Organ*, 225 Ariz. 43, 46, ¶ 12, 234 P.3d 611, 614 (App. 2010) (citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). These caretaking functions are lawful with respect to automobiles in part "because of the extensive regulation of motor vehicles by states." *Id*. This function justifies a warrantless entry if "the intrusion is suitably circumscribed to serve the exigency which prompted it." *Id*. at 47, ¶ 14, 234 P.3d at 615 (citation omitted).

¶16 In determining whether evidence is admissible, we review the reasonableness of the law enforcement officials' conduct, that is, whether a "prudent and reasonable officer [would] have perceived a need to act in the proper discharge of his or her community caretaking functions[.]" *Id*. at 47, ¶ 15, 234 P.3d at 615 (quoting *People v. Ray*, 981 P.2d 928, 937 (Cal. 1999)). "The reasonableness standard arises from a police officer's status as a 'jack-of-all-emergencies,' who is 'expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community

safety.'" *State v. Mendoza-Ruiz*, 1 CA-CR 09-0560 at ¶ 9 (Ariz. App. Jul. 29, 2010) (citation omitted).

¶17 The community caretaking function permits a warrantless intrusion on privacy interests when the intrusion is:

> [S]uitably circumscribed to serve the exigency which prompted it. . . . The officer's . . . conduct must be carefully limited to achieving the objective which justified the [search]—the officer may do no more than is reasonably necessary to ascertain whether someone is in need of assistance [or property is at risk] and to provide that assistance [or to protect that property.]

Organ, 225 Ariz. at 47, ¶ 14, 234 P.3d at 615 (internal quotations omitted). When assessing the reasonableness of the officer's conduct, "due weight must be given not to his unparticularized suspicions or 'hunches,' but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary." *Id.* at 47, ¶ 15, 234 P.3d at 615 (internal quotations omitted).

¶18 Deputy M.S. testified that in the two years he had been assigned to his night-time patrol route he had never before seen a car parked at the business where defendant's SUV was located. As he approached the vehicle, he observed that the

driver's side door was ajar with a foot dangling outside and the interior dome light was on. As the trial court found, "[i]t was entirely appropriate for the deputy to stop and check on the welfare of [defendant] and briefly investigate" given the "very unusual circumstances."[1]

¶19 Defendant contends, however, that the trial court erred in finding that the deputies' continued contact with him after waking him, including ordering him out of the vehicle and requesting that he produce identification, was a violation of his constitutional rights to privacy. We disagree.

¶20 Deputy M.S. testified that he initially attempted to wake defendant by talking to him very loudly, but to no avail. Eventually, after Deputy J.S. arrived at the scene, Deputy M.S. was able to rouse defendant by shaking him. The deputy then asked defendant to exit the vehicle. As the trial court found, it was reasonable for Deputy M.S. "to speak briefly with [defendant] to see if some significant health problem or other possible emergency or need for assistance existed. Also, because the deputy had observed weapons in the SUV, it was

[1] The trial court also found that the "very unusual circumstances" provided reasonable suspicion of possible criminal activity until the point Deputy M.S. realized that defendant was "either asleep or passed out."

reasonable for the Deputy to order [defendant] out of the vehicle."

¶21 Once defendant exited the SUV, Deputy M.S. "asked him what he was doing here." The trial court concluded, and we concur, "that asking this general question . . . is consistent with the purpose of determining whether there was a health problem, a vehicle problem, or some other emergency or need for assistance of some kind."

¶22 Deputy M.S. then asked defendant for identification. The deputy did not testify to his purpose in requesting identification, but we conclude, as did the trial court, "that the request for identification was reasonable" in this case. Both deputies testified that Deputy M.S. requested identification from defendant and did not command him to produce it, and there is no evidence in the record that defendant "opposed this request in any way." More importantly, although defendant was being detained at this point, the intrusion into his privacy by the request for identification was both brief and minor. *See State v. Ellenbecker*, 464 N.W.2d 427, 428 (Wis. App. 1990) (holding a police officer who reasonably initiates a stop pursuant to the community caretaker function may request identification – "the public interest in permitting an officer to request a driver's license and run a status check during a

lawful police-driver contact outweighs the minimal intrusion on the driver"); *O'Donnell v. State*, 409 S.E.2d 579, 582 (Ga. 1991) ("[C]onsidering [the driver] had voluntarily stopped in a public rest area, parked, and laid down in the vehicle late at night, causing [the] Trooper to have a legitimate concern primarily regarding his medical status . . . it was not unreasonable within the meaning of the Fourth Amendment for [the] Trooper thereafter to initiate promptly a routine and limited inquiry to determine the [driver]'s identity."); *State v. Brunelle*, 766 A.2d 272, 274 (N.H. 2000) (holding that an officer's request for the driver's license and vehicle registration of the driver of a disabled vehicle was part of a limited community caretaking exception, and that such request was reasonable "in the event that any questions about the vehicle or [the trooper's] contact with the owner subsequently arose); *Coffia v. State*, 191 P.3d 594 (Okla. App. 2008) (concluding that an officer acting in the community caretaking capacity may request identification – "[W]e find the public interest in asking for [a] license and conducting a status check outweigh[s] the minimal intrusion involved."); *but see State v. DeArman*, 774 P.2d 1247, 1249-50 (Wash. App. 1989) (holding officer acting in community caretaking capacity had no reasonable basis to request

identification once he determined the driver did not require assistance).

¶23 Defendant also argues that the deputies' search of his vehicle following his arrest was in contravention of the Fourth Amendment's prohibition against unreasonable searches and seizures. Again, we disagree.

¶24 When defendant re-entered his vehicle, contrary to Deputy M.S.'s order, Deputy J.S. opened the passenger's side door to ensure that defendant did not reach a weapon. We conclude that Deputy J.S. acted reasonably to prevent a dangerous officer-safety situation. Once Deputy J.S. smelled the odor of burnt marijuana wafting out of the vehicle and saw the open container of marijuana and rolling papers in plain view, the officers possessed probable cause to place defendant under arrest. They also had probable cause to believe that the vehicle contained "evidence of criminal activity" and were permitted to search any "area of the vehicle in which the evidence might be found." *Arizona v. Gant*, 129 S.Ct. 1710, 1721 (2009). We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion to suppress.

II. Denial of Motion for New Trial

¶25 Defendant contends that the trial court erred by denying his motion for a new trial. Specifically, he contends

that Deputy M.S.'s trial testimony, elicited in a response to a juror's question, that he had attempted to obtain a warrant to draw defendant's blood as part of a DUI investigation was inadmissible, undisclosed evidence.

¶26 We review a trial court's ruling on a motion for new trial for an abuse of discretion. *State v. Hall*, 204 Ariz. 442, 447, ¶ 16, 65 P.3d 90, 95 (2003). An improper reference to facts not properly before the jury must have a probable impact on the jury's verdict to warrant a new trial. *See State v. Williams*, 169 Ariz. 376, 380, 819 P.2d 962, 966 (App. 1991); *see also State v. Marshall*, 197 Ariz. 496, 500, ¶ 13, 4 P.3d 1039, 1043 (App. 2000) ("A mistrial based upon a claim of evidentiary error is warranted only when the jury has been exposed to improper evidence and the error might have affected the verdict.").

¶27 In its order tentatively denying defendant's motion for new trial, the court ordered the State to "produce any documentation to defendant of any recorded or written statement regarding deputy's attempts to obtain a blood draw warrant." Thereafter, the State filed a notice that it was "unable to find any written or recorded materials" pertaining to Deputy M.S.'s search warrant request and the trial court then proceeded to sentence defendant.

¶28 As noted by the State, the trial court implicitly accepted the State's avowal and found that the State had not committed a discovery violation, and this finding was well within the trial court's discretion. *See State v. Roque*, 213 Ariz. 193, 205, ¶ 21, 141 P.3d 368, 380 (2006). Moreover, defendant has not explained, and our review of the record has not revealed, any basis to conclude that Deputy M.S.'s statements regarding a potential DUI investigation may have affected the verdict. Defendant was not operating a vehicle at the time of the "stop" and none of the crimes for which he was convicted involved the elements of driving under the influence. *See* A.R.S. § 28-1381 (Supp. 2009). Therefore, we conclude the trial court did not abuse its discretion by denying defendant's motion for a new trial.

CONCLUSION

¶29 For the foregoing reasons, we affirm defendant's convictions and sentences.

PHILIP HALL, Presiding Judge

CONCURRING:

SHELDON H. WEISBERG, Judge

PETER B. SWANN, Judge