IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RONALD JAMES SISCO II,
Appellant.

No. 2 CA-CR 2014-0181
Filed October 7, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20131500001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 This case comes to us on remand from our supreme court. *State v. Sisco*, 239 Ariz. 532, ¶ 30, 373 P.3d 549, 556 (2016), *vacating State v. Sisco*, 238 Ariz. 229, 359 P.3d 1 (App. 2015). Appellant Ronald Sisco's opening brief includes two issues that remain to be decided: first, whether he was entitled to have the evidence against him suppressed pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), or *Maryland v. Garrison*, 480 U.S. 79 (1987); second, whether sufficient evidence supports his conviction for negligent child abuse. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 On March 14, 2013, three police officers noticed a "strong" to "overpowering" odor of fresh marijuana emanating from a storage complex. The facility consisted of four separate warehouses, each of which had its own street address and was surrounded by a wall and locked gate. After identifying Unit 18 as the probable source of the odor, officers from the Tucson Police Department obtained a telephonic search warrant for this property. The warehouse, however, contained no marijuana. The officers then obtained a second telephonic search warrant for an adjacent warehouse, Unit 20, and discovered in that building an extensive marijuana-growing operation. In addition, the officers learned that several rooms within the warehouse had been converted into living quarters and that Sisco's one-year-old son lived there, although no occupants were present when the officers conducted their search.

¶3 An indictment charged Sisco with possession of marijuana for sale, production of marijuana, possession of drug paraphernalia, negligent child abuse, and money laundering. Following a bench trial, the court found him guilty of all the charges except money laundering. The court sentenced him to concurrent prison terms, the longest of which are 3.5 years. This appeal followed.

Suppression of the Evidence

Franks

¶4 Sisco notes that the police officer's affidavit for the first search warrant made no mention of wind conditions. In applying for the second search warrant, after finding no marijuana during the initial search, the same officer avowed to the magistrate that "the wind [had been] moving around" earlier but that the officers' presence on the first property allowed them to determine the source of the odor more accurately.

¶5 On appeal, Sisco contends the police obtained the first search warrant in violation of the *Franks* doctrine by "recklessly withholding information about wind conditions." He further contends that, because the officers' presence on the first property enabled them to obtain the second search warrant, the evidence resulting from the second warrant should be suppressed as the fruit of the invalid first search.

¶6 As a general matter, we require a party to present his legal theories to the trial court in order to give that court an opportunity to rule correctly. *Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970); *accord State v. Deschamps*, 105 Ariz. 530, 533, 468 P.2d 383, 386 (1970). Suppression theories not advanced below are therefore not preserved for appeal; our review is limited to fundamental error. *State v. Tarkington*, 218 Ariz. 369, ¶ 6, 187 P.3d 94, 95 (App. 2008). Under this standard, an appellant carries the burden of showing that the alleged error was fundamental and resulted in prejudice. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Appellate courts are reluctant to engage in fact-intensive suppression inquiries in the first instance. *See State v.*

West, 176 Ariz. 432, 440, 862 P.2d 192, 200 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, n.7, 961 P.2d 1006, 1012 n.7 (1998).

¶7 Sisco did not squarely raise the present argument in his suppression motion below. He based his *Franks* argument on an unrelated issue concerning the timing of the search warrants, asserting that the affidavit for the second warrant contained the "false statement . . . that the [first] search warrant had already been executed and no marijuana [had been] found." On appeal, he concedes that his suppression motion "does not explicitly state that the officers misled [the magistrate] regarding the smell evidence." Nonetheless, he maintains this implication was clear from language in the motion as well as the evidence and arguments presented at the suppression hearing. Apart from quoting a portion of the motion to suppress,[1] Sisco fails to provide any supporting citations to the record under Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., showing

[1]The motion states:

> The smell evidence provided to [the magistrate] is highly questionable. Various officers described the smell in various ways contradicting each other and weather conditions were described in terms that conflicted with each other and with the National Oceanic and Atmospheric Administration records of that evening. This evidence needs to be provided under oath at an evidentiary hearing. In addition to law enforcement witnesses the defense expects to call an expert witness [on human olfaction] on this issue.
>
> Given the highly questionable, actually lack of, probable cause to search either [Unit] 18 . . . or 20 . . . this is certainly a 'doubtful or marginal case' and therefore should be resolved in favor of [Sisco].

he raised the present contention below. We conclude his mere allegation of "conflict[s]" in the evidence concerning weather conditions was insufficient to preserve the issue.

¶8 As the Supreme Court explained in *Franks*:

> There is . . . a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. . . . Allegations of negligence or innocent mistake are insufficient.

438 U.S. at 171. "A trial court's finding on whether the affiant deliberately . . . excluded material facts is a factual determination" that an appellate court will uphold unless it is "'clearly erroneous.'" *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991), *quoting United States v. Fawole*, 785 F.2d 1141, 1145 (4th Cir. 1986).

¶9 Here, the fact that the trial court did not address any issue concerning weather conditions is consistent with our conclusion that Sisco did not adequately present such a claim. Whereas his motion alleged the police had acted "with reckless disregard for the truth" and had made "a false statement" concerning the timing of the warrants, the motion made no comparable claim concerning the weather conditions. Sisco only characterized the evidence of marijuana odors as "highly questionable." Hence, in the court's written ruling, it addressed only the specific allegation regarding the timing of the warrants,

finding that the alleged false statement was the result of a mere "clerical error."

¶10 In any event, we find no error, fundamental or otherwise, on the record before us. The evidence suggests that the officer who applied for the warrants actually believed, albeit incorrectly, that he had accurately identified the source of the odor when he applied for the first warrant. At least two other officers from two separate police departments shared this impression. Implicit in their belief was the assumption that wind conditions did not affect their ability to locate the source of the apparently overwhelming odor. The record does not establish that this assumption was unreasonable, even if it was ultimately mistaken. *Cf. United States v. Mueller*, 902 F.2d 336, 341 (5th Cir. 1990) (finding it "not . . . entirely unreasonable . . . to assume that . . . wind . . . was calm enough not to displace the smell" of methamphetamine and that experienced officer could connect odor to particular address). At most, this was the type of "negligence or innocent mistake" that is insufficient to invalidate a search warrant. *Franks*, 438 U.S. at 171. The record does not demonstrate that the officer deliberately omitted a material fact or acted with reckless disregard for the truth.

Garrison

¶11 Relying on *Garrison*, 480 U.S. at 87, Sisco next contends suppression was warranted because the police "lingered on the property and peered over [his] wall" to collect information for the second search warrant instead of immediately terminating their search and withdrawing from the first property when they discovered no contraband. He acknowledges that because he failed to raise this issue below, he carries the burden of showing fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶12 Under the Fourth Amendment, a person cannot vicariously assert the rights of another. *See State v. Steiger*, 134 Ariz. 268, 272, 655 P.2d 808, 812 (App. 1982); *State v. Johnson*, 132 Ariz. 5, 7, 643 P.2d 708, 710 (App. 1981); *see also Plumhoff v. Rickard*, ___ U.S. ___, ___, 134 S. Ct. 2012, 2022 (2014). The challenged police conduct must be "illegal as to the person making the challenge." *State v.*

Maddasion, 130 Ariz. 306, 308-09, 636 P.2d 84, 86-87 (1981). Sisco and his codefendant rented Unit 20 and had no interest in Unit 18. His contention that officers "lingered" too long on the first property does not implicate his own privacy or property rights. Hence, he cannot raise this contention under the Fourth Amendment. *Cf. State v. Platt*, 130 Ariz. 570, 573, 637 P.2d 1073, 1076 (App. 1981) ("Appellant cannot object to any claimed illegal entry of his neighbor's yard.").

¶13 To the extent he suggests his own privacy rights were infringed because officers "peered over [his] wall" to "pinpoint the source of the odor," the limited record before us does not support this contention. Testimony from the suppression hearing suggested the officers did not necessarily pinpoint the odor's source by looking over the wall. Rather, they made "different observations about the odor of marijuana" as soon as they "approach[ed Unit] 18" to execute the warrant. Officer C.C. stated he "could clearly observe that the smell seemed to be originating from the Unit next door, which would be 20," after the SWAT team had breached the gate to Unit 18 and the officers "were able to get closer to a facade of the building."

¶14 Furthermore, the record does not show that the officers acted improperly in looking over the wall. Officer C.C. explained, "[We] . . . look[ed] over the wall, because it was only maybe a five foot wall." Police violate no reasonable expectation of privacy by looking into property visible from a neighboring yard. *See Platt*, 130 Ariz. at 573, 637 P.2d at 1076. Accordingly, on the record before us, Sisco has failed to establish any fundamental, prejudicial error.

Sufficiency of the Evidence

¶15 Sisco was convicted of negligent child abuse under A.R.S. § 13-3623(B)(3): causing or permitting a child "to be placed in a situation where the person or health of the child . . . is endangered." The state argued Sisco had placed his child "in extreme risk" by having him live in a large, illegal marijuana-growing operation that was "ripe for invasion." In support of this theory, a narcotics detective testified that illegal cultivation sites are often targeted for robberies or violent "home

invasions" because these locations often contain currency and valuable growing equipment in addition to marijuana. The detective added that people frequently become aware of marijuana-cultivation sites based on the strong odor they emit, such as the odor the officers here detected from the public street.

¶16 As he did below, Sisco characterizes this evidence as speculative and maintains it was legally insufficient to establish that he endangered his child. We review the sufficiency of the evidence de novo. *See State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007), *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (alteration in *Cox*). If reasonable minds could differ on whether the evidence established a fact in issue, then the evidence is substantial and the conviction must be upheld. *See State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004).

¶17 Although we believe that reasonable people could fairly disagree whether Sisco "endangered" his child's person or health within the meaning § 13-3623(B)(3), we nonetheless conclude the state presented adequate evidence to support the conviction. *See Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. The element of endangerment requires proof that a child was exposed to a risk of harm greater than "the ordinary danger to which children are exposed on a daily basis." *State v. Mahaney*, 193 Ariz. 566, ¶ 15 & n.4, 975 P.2d 156, 159 & n.4 (App. 1999). A rational trier of fact could conclude that housing a child in an illegal marijuana-growing facility exposes that child's "person" to a risk of violent robbery and that such a risk is greater than the normal, everyday danger that children encounter. § 13-3623(B)(3).

¶18 Far from being a speculative risk, the danger of marijuana-cultivation sites being robbed is one that is implicitly recognized in Arizona law. Because of this danger, the Arizona Medical Marijuana Act, A.R.S. §§ 36-2801 to 36-2819, and its related regulations require medical marijuana dispensaries and cultivation sites to undertake a host of protective measures, such as installing

security cameras and panic buttons. *See* §§ 36-2803(A)(4)(d), 36-2804(B)(1)(c); Ariz. Admin. Code R9-17-318(G)(1)(c), (d). Even with such measures in place, persons under twenty-one years of age are among those prohibited from entering authorized marijuana-cultivation sites. *See* §§ 36-2801(10), 36-2804(B)(4); Ariz. Admin. Code R9-17-318(A). In light of this well-recognized danger, which was established at trial through the testimony of an experienced law enforcement officer, we conclude there was sufficient evidence to support the child abuse conviction.

Disposition

¶19 For the foregoing reasons, Sisco's convictions and sentences are affirmed.