IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL MUNOZ PEREZ,
Appellant.

No. 2 CA-CR 2015-0266
Filed March 6, 2017

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201401177
The Honorable Craig A. Raymond, Judge
The Honorable Steven J. Fuller, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

E S P I N O S A, Judge:

¶1 Following an eight-day jury trial, Daniel Perez was convicted of three counts of armed robbery, six counts of aggravated assault, weapons misconduct,[1] theft by control, and theft of a means of transportation. The trial court sentenced Perez to consecutive and concurrent sentences totaling forty-five years. On appeal, he claims the court erred by denying his motion to suppress and that there was insufficient evidence to support his conviction for theft of a means of transportation. We affirm.

Factual Background

¶2 Just before noon on December 10, 2010, Perez and two other men robbed a hardware store in Coolidge, during which Perez threatened individuals in the store with a handgun and the robbers took a glass gun case containing seven guns and multiple boxes of ammunition. Perez left the scene of the robbery in a "bright red car" described as "a newer model Dodge or Chrysler" with a "slanted back window" and a temporary license plate. Shortly afterwards, Police Officer Diana De La Rosa located a vehicle matching the description of the one used in the robbery at the home of B.L., who told her the car belonged to Perez. B.L. allowed officers to enter his home, and during a security check for officer safety, they discovered a locked door to a bedroom, which they opened with a pocket knife.

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[1]Perez was charged with two counts of weapons misconduct, which were severed from the other charges on the first day of trial. One charge was dismissed and Perez pled guilty to the other, for which he received a ten-year term of imprisonment.

Upon entering, they discovered in plain view a glass case, boxes of ammunition and piles of clothing, all of which were consistent with items taken from the hardware store and the clothing worn by the suspects. The officers then obtained a warrant to search B.L.'s house.

¶3 Later that afternoon, while investigating an unrelated matter in Casa Grande, officers encountered Perez, who made "a beeline straight" for the officers while pointing a gun and threatening to kill one of them. Perez then entered one of the patrol cars, which had been left running; he closed the door, "revv[ed]" the engine, caused the brake lights to flash "off and on," and made the car "jerk[] forward," while attempting to operate the gear shift and "get away."[2] Officers then shot and wounded him.

Motion to Suppress

¶4 Perez moved to suppress the evidence obtained pursuant to the search warrant, arguing the protective sweep was illegal and therefore the evidence obtained from the ensuing search warrant was also illegal. In reviewing the denial of a motion to suppress, we review only the facts adduced at the suppression hearing and view them in the light most favorable to upholding the trial court's ruling. *See State v. Manuel*, 229 Ariz. 1, ¶ 11, 270 P.3d 828, 831 (2011).

¶5 At the suppression hearing, De La Rosa testified that on the day in question, she received a "hot tone" emergency dispatch regarding an armed robbery at a Coolidge hardware store. The alert provided that three suspects had left the scene heading northbound in a "box style red car with a Chrysler 300 sort of grill in the front . . . [and] a rear window that was slanted . . . [and] a paper temporary registration where the license plate would go." She began searching the area for the vehicle "just a few minutes" after receiving the alert,

[2]The police car was equipped with a special anti-theft feature requiring the driver to perform certain actions to put the vehicle in gear.

and decided to go to B.L.'s house, where "a lot of [the] criminal element type used to hang out." She arrived there no more than one hour after the robbery had occurred and observed a vehicle matching the description of the one used in the robbery, parked in an "odd" location as if being concealed.

¶6 De La Rosa called for assistance based on her belief that "the suspects [were] possibly still in [B.L.'s] home." Officers surrounded the house because they believed they "were dealing with armed suspects." When De La Rosa explained to B.L. that she was investigating an armed robbery and asked who owned the red car, he "acted like he didn't know what [she] was talking about." But after he looked at the car, B.L. said it belonged to "Danny," who lived in a room in his house but whose last name he said he did not know. When officers asked B.L. who was currently inside the house, he responded that his girlfriend and her grandson were present, and when asked who else was there B.L. said, "Nobody. You can check if you want." At the suppression hearing, the prosecutor asked De La Rosa if she was "required to take [B.L.] at his word." She responded negatively and confirmed she had been lied to as a police officer "[m]ultiple times."

¶7 The officers entered the home "looking for . . . three armed suspects." They then entered the locked room B.L. identified as Perez's room with their "guns drawn . . . expect[ing] to open the door and find three armed suspects inside the room," but instead discovered clothing, a large glass case, ammunition, a cellular telephone, and a portable radio. Police Officer Ashley Walker testified that although only three individuals had participated in the actual robbery at the hardware store, there could have been more than three people involved in the entire incident, and added that the bedroom door could have been locked from the inside. She also testified that officers "[t]ypically . . . always conduct protective sweeps to make sure that there are no dangers to the officers who'll be performing the execution of the search warrant," and agreed that the "scene" at B.L.'s house was "very dynamic." After confirming there were no armed suspects in the room, the officers left without collecting any evidence and obtained a search warrant.

¶8 Citing *Maryland v. Buie*, 494 U.S. 325 (1990), the trial court concluded the state had established "this [was] a valid protective sweep for officer safety reasons," setting forth the following specific, articulable factors in support: the distance between the hardware store and B.L.'s home was short, and the time between the issuance of the "hot tone" alert and the discovery of the suspect vehicle was brief; B.L.'s home was known to harbor individuals involved in criminal activity; the suspect vehicle was "parked out back in an odd and curious manner"; and the suspects were known to be armed.

¶9 The trial court considered that although De La Rosa had passed a truck on the way to B.L.'s home with three men who looked "fearful" when they saw her, she "was not required at that point in time to conclude that the three individuals in the pickup truck were in fact the individuals that had accomplished this armed robbery." Noting that "[t]his was an incredibly dangerous situation," the court concluded "[t]he testimony which went unrefuted . . . was that [De La Rosa] and her fellow officers were voluntarily allowed into the home by [B.L.]." The court determined the officers "were not only entitled to, but compelled to do a protective sweep to determine if any of the suspects were still in the home," and that they "were justified in manipulating the [locked] door to get in for officer safety." The court also concluded the officers were not required to "take [B.L.'s] word for it" regarding the presence of others in the home.

¶10 On appeal, Perez argues the trial court erred in not suppressing the evidence related to "all of the charges" associated with the evidence discovered during the protective sweep, which he asserts supported the search warrant. We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, but review legal and constitutional issues de novo. *State v. Huerta*, 223 Ariz. 424, ¶ 4, 224 P.3d 240, 242 (App. 2010).

¶11 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is protected by the Fourth Amendment to the United

States Constitution.[3] U.S. Const. amend. IV. "[A]lthough 'searches and seizures inside a home without a warrant are presumptively unreasonable,' that presumption may be overcome." *Michigan v. Fisher*, 558 U.S. 45, 47 (2009), *quoting Groh v. Ramirez*, 540 U.S. 551, 559 (2004). Warrantless searches must fall into one of the specific exceptions to the warrant requirement, such as the protective sweep, which was first recognized in *Buie*. 494 U.S. at 327 (protective sweep of residence permissible if officers have reasonable belief supported by "specific and articulable facts" that home "harbored an individual posing a danger to the officers or others"), *quoting Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983); *see also State v. Fisher*, 226 Ariz. 563, ¶¶ 12, 16, 250 P.3d 1192, 1195-96 (2011) ("[S]pecific facts, and not mere conjecture, are required to justify a protective sweep of a residence based on concerns for officer safety.").

¶12 In *Buie*, the United States Supreme Court found that police may conduct two types of limited protective sweeps in connection with an in-home arrest. 494 U.S. at 334; s*ee also Fisher*, 226 Ariz. 563, ¶¶ 7-9, 250 P.3d at 1194-95 (finding *Buie* set forth constitutional standard for warrantless entry to conduct search incident to arrest). Because Perez does not argue on appeal that the protective sweep was improper as not incident to his arrest, he has waived any such argument.[4] *See State v. Bolton*, 182 Ariz. 290, 298,

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[3] Although Perez cited Article II, § 8 of the Arizona Constitution in his motion to suppress, he did not explain below how it should be applied differently from the Fourth Amendment, nor does he mention it on appeal. "Because a single reference to the Arizona Constitution is insufficient to preserve a claim, we do not address whether the [entry and] protective sweep violated the Arizona Constitution." *State v. Fisher*, 226 Ariz. 563, n.3, 250 P.3d 1192, 1194 n.3 (2011).

[4]We nonetheless assume, without deciding, that although not incident to an arrest, the protective sweep here was permissible based on the specific articulable facts warranting the officers to believe the area to be swept posed a danger to themselves or others. *See Fisher*, 226 Ariz. 563, ¶ 10, 250 P.3d at 1195 (court assumes, without deciding, that protective sweep applies to defendant not yet

896 P.2d 830, 838 (1995) (failure to provide sufficient argument for review on appeal constitutes waiver of claim).

¶13 Perez has not identified any error in the trial court's identification of specific factors supporting the protective sweep. And the authority he cites does not compel a different result. Unlike *Fisher*, the officers here did not "conduct [a] protective sweep[] based on mere speculation or the general risk inherent in all police work." 226 Ariz. 563, ¶ 15, 250 P.3d at 1196; *see United States v. Tapia*, 610 F.3d 505, 511 (7th Cir. 2010) (protective sweep proper where officers had several separate valid articulable facts). Moreover, protective sweeps are allowed because society has a "legitimate and weighty" interest in officer safety. *Arizona v. Johnson*, 555 U.S. 323, 331 (2009), *quoting Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977).

¶14 Finally, to the extent Perez argues the trial court "never addressed the issue of consent to search," and to the extent he actually presented this issue in his motion to suppress, the record belies his argument. At the suppression hearing, the court cited a case addressing consent[5] and noted that even had B.L. tried to prevent the officers from opening the door to the locked room, "the officers were justified in manipulating the door to get in for officer safety." Moreover, despite Perez's suggestion that consent was improper because B.L. had told De La Rosa that Perez was renting a room from him for $200 per month, the officer testified that "[f]or some reason [she] remember[ed]" hearing that Perez was renting a

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arrested, but detained and questioned outside residence); *see also United States v. Miller*, 430 F.3d 93, 98 (2nd Cir. 2005) (holding "specific, articulable facts giving rise to a reasonable inference of danger may justify a protective sweep in circumstances other than during the in-home execution of an arrest warrant").

[5]Although the case cited by the trial court, *State v. Maximo*, 170 Ariz. 94, 97, 821 P.2d 1379, 1382 (App. 1991), is distinguishable from the one before us, the court's reference to that case shows that it was aware of and addressed the issue of consent.

room from B.L., but she could not "be a hundred percent certain" if and when she had heard that, nor could she recall if B.L. had told her Perez was paying him $200 per month. Accordingly, because Perez incorrectly states that the court did not address the issue of consent, and because Perez relies, in part, on inaccurate facts to support his suggestion that B.L.'s consent was improper, we do not address this claim further. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

Sufficiency of the Evidence

¶15 Perez also argues there was insufficient evidence to support his conviction of theft of a means of transportation. His sole argument on this claim is that because he was unable to get the police vehicle "into gear," there was insufficient evidence to convict him of this offense.[6]

¶16 We review the sufficiency of the evidence de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), and will affirm if the conviction is supported by "substantial evidence," *see State v. Ellison*, 213 Ariz. 116, ¶ 65, 140 P.3d 899, 916-17 (2006). Evidence is substantial if reasonable people could accept it as proving, beyond a reasonable doubt, all the elements of a crime and the defendant's responsibility for it. *See State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009); *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). Because it is the jury's role to determine the credibility of witnesses, weigh the evidence, and resolve any conflicts therein, *see Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d at 269, we will reverse for insufficient evidence "only where there is a complete absence of probative facts to support a conviction," *State v. Fernane*,

[6]Because it does not appear Perez objected to the submission of the case to the jury on this count or moved for a judgment of acquittal at trial, he has forfeited this argument absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). However, it is "fundamental error to convict a person for a crime when the evidence does not support a conviction." *State v. Roberts*, 138 Ariz. 230, 232, 673 P.2d 974, 976 (App. 1983).

185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). "In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against the defendant." *State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003).

¶17 A person commits the crime of theft of a means of transportation if the person knowingly and without lawful authority "[c]ontrols another person's means of transportation with the intent to permanently deprive the person of the means of transportation." A.R.S. § 13-1814(A)(1). "'Control' . . . means to act so as to exclude others from using their property except on the defendant's own terms." A.R.S. § 13-1801(A)(2).

¶18 As previously noted, Perez entered an officer's patrol car, which had been left running, closed the door, and tried "to get away," as evidenced by his revving the engine, manipulating the gear shift and applying the brakes. Perez also aimed his gun at the officers before entering the police car and retained possession of the weapon while moving around in the car. Based on these facts, sufficient evidence supported the jury's determination that Perez knowingly controlled the officer's vehicle with the intent to "exclude others from using their property." A.R.S. § 13-1801(A)(2). Moreover, Perez acknowledges he "tried to take the patrol car," but asserts it was impossible for him to do so "because he did not know how to disengage the gear lock." *See State v. Hoag*, 165 Ariz. 215, 217-18, 797 P.2d 1233, 1235-36 (App. 1990) (to be found guilty of unlawful use of means of transportation absent movement of vehicle, evidence must show defendant intended to use vehicle as means of transportation). The relevant statutes say nothing about actually moving a vehicle in order to show control thereof; rather, this is an additional element Perez attempts to inject into the offense. *Cf. State v. Dawley*, 201 Ariz. 285, ¶¶ 7-8, 34 P.3d 394, 397 (App. 2001) (fact that vehicle was inoperable does not preclude conclusion that person was in actual physical control of it while under influence of intoxicating liquor or drug); *State v. Larriva*, 178 Ariz. 64, 65, 870 P.2d 1160, 1161 (App. 1993) ("operability of the vehicle is only tangentially relevant to the determination of actual physical control"). Thus, there was substantial evidence from which the jury

could reasonably find that Perez unlawfully controlled the officer's vehicle with the intent to permanently deprive him of its use. *See State v. Love*, 182 Ariz. 324, 326, 897 P.2d 626, 628 (1995) (whether person is in actual physical control of vehicle depends on totality of circumstances).

Disposition

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