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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS SERRANO SAMANIEGO, Appellant.	)	2 CA-CR 2007-0306 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR 98000346

Honorable Stephen M. Desens, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Jesus Serrano Samaniego was convicted in absentia of one count of possession of marijuana for sale. Eight years later, Samaniego was apprehended and the trial court sentenced him to a mitigated, six-year prison term and ordered him to pay a fine of $13,200.[1] On appeal, Samaniego challenges the validity of a warrantless search of his home and argues that the trial court erred by finding the search was consensual and denying his motion to suppress evidence obtained as a result of this search. Because the trial court did not abuse its discretion, we affirm Samaniego's conviction and sentence.

¶2 Samaniego contends he did not voluntarily consent to the search because law enforcement agents entered his home without permission, created an intimidating atmosphere, refused to leave unless he consented to a search, and placed him in de facto custody. We review the trial court's denial of a motion to suppress for an abuse of discretion, *see State v. Olguin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 252 (App. 2007), but we review purely legal issues de novo. *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006). "[W]e view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing." *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). "[W]e do not impose our own determination

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[1]In a footnote in its answering brief, the state concedes that A.R.S. § 13-4033(C) does not preclude Samaniego from appealing his conviction "nearly a decade after it was obtained." Subsection C of this statute became effective on September 25, 2008. *See* 2008 Ariz. Sess. Laws, ch. 25, § 1; *see also* Ariz. Const. art. IV, pt. 1, § 1(3) (laws effective ninety days after close of legislative session). Samaniego was convicted on July 7, 1999, and sentenced on September 5, 2007. We accept the state's concession.

as to the credibility of witnesses" and instead "defer to the trial court's assessment of witness credibility because the trial court is in the best position to make that determination." *Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d at 230.

¶3 As a general rule, police may not conduct a search until a warrant has been obtained. *See State v. Flores*, 195 Ariz. 199, ¶ 11, 986 P.2d 232, 236 (App. 1999). "An exception to the rule, however, is a search conducted pursuant to a valid consent." *Id.* "Whether a consent to search has been voluntarily given is a question determined by the totality of the circumstances." *Id.* ¶ 18. "The trial court's factual determinations on the issue of giving consent will not be overturned unless clearly erroneous." *State v. Swanson*, 172 Ariz. 579, 583, 838 P.2d 1340, 1344 (App. 1992).

¶4 The record supports the trial court's determination that Samaniego voluntarily consented to the search of his home. A customs agent testified at the suppression hearing that before any officers entered the home, Samaniego had told him it "would be fine" for them to look around. Two customs agents testified that they had read and explained the consent-to-search form to Samaniego before he signed it. Agents present when Samaniego signed the consent-to-search form testified that officers had not threatened Samaniego with any form of consequences if he refused to sign the form. Three agents testified that Samaniego had been informed multiple times that he had the right to refuse consent to search the home. Two of the agents present when Samaniego signed the consent to search form, including the group supervisor, testified that Samaniego had been informed that if he

requested that the officers leave his property, they would do so. And finally, Samaniego, who did not testify at the suppression hearing, could not therefore personally claim that he had felt threatened in any way.

¶5 Samaniego's mother-in-law attempted to testify that the officers had entered Samaniego's home without permission. But she spoke no English and the trial court sustained the state's objections to her testimony on the ground that she may not have understood whether the English-speaking agent had asked for permission to enter. Further, although Samaniego's mother-in-law did testify that Samaniego's wife had asked him if the agents had a search warrant, a customs agent testified that Samaniego's wife had merely "shrugged her shoulders like she wasn't quite sure what to do." The agents testified Samaniego had not, in fact, asked for a warrant. And, in any event, it was for the trial court to determine which witnesses to believe. *See Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d at 230 (trial court in best position to evaluate credibility of witnesses).

¶6 Samaniego argues, however, that he was coerced into agreeing to a search of his home because, according to a witness present during the search, Agent Del Toro had threatened to "arrest everyone on the premises, and to take the children" if he did not sign the consent-to-search form. But Agent Del Toro testified that he never threatened Samaniego in any way. And as we previously stated, Samaniego did not testify during the suppression hearing to contradict Agent Del Toro's claims. Because the trial court was in the best position to determine the credibility of Agent Del Toro's testimony, we defer to the court's

findings that Samaniego was not coerced and that he voluntarily consented to the search. *See id.* (trial court in best position to evaluate credibility of witnesses).

¶7 Citing federal case law, Samaniego also argues that the customs agents entered his yard without permission and placed him in de facto custody before obtaining consent to search his home.[2] *See, e.g.*, *United States v. Washington*, 490 F.3d 765, 775 (9th Cir. 2007) (noting that whether defendant was in custody when he consented to search had "major impact" on determination of voluntariness); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997) (discussing factors that can be used to determine if consent to search voluntarily given). Additionally, Samaniego complains that the trial court did not address whether he had withdrawn his consent to search. Without citing any authority, he argues that these specific contentions were subsumed in his general challenge to the voluntariness of the consent. But he was required to specifically identify the grounds for his challenge in the trial court to preserve the arguments for appeal. *See State v. Moody*, 208 Ariz. 424, ¶ 39, 94 P.3d 1119, 1136 (2004) (motion to preclude evidence must state specific grounds to preserve issue for appeal); *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (general objection does not preserve specific). He thus failed to preserve these arguments below and

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[2]Samaniego also asks this court to adopt the holding of *State v. Ferrier*, 960 P.2d 927 (Wash. 1998). In *Ferrier*, the Washington Supreme Court held that police may not conduct a warrantless search of a defendant's home unless they obtain the defendant's consent and, in doing so, advise the defendant that he or she has the right to refuse consent. *Id.* at 932-33. But Samaniego was twice advised that the police would leave if he refused consent to search his home. And Samaniego was informed he had the right to refuse consent. Accordingly, *Ferrier* would not help Samaniego if we did adopt its holding.

has forfeited review based on them absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error applies when defendant fails to object below). The defendant, and not the state, has the "burden of persuasion in fundamental error review." *Id.* "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶8 Samaniego does not argue any errors were fundamental. Therefore, he has not sustained his burden in a fundamental error analysis and we need not address these arguments further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued).

Conclusion

¶9 In light of the foregoing, we affirm Samaniego's conviction and sentence.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge