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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STATE OF ARIZONA, Appellee, v. J. JESUS BARRIGA ACEVEDO, Appellant.	2 CA-CR 2008-0114 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070094

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst — Tucson
Attorneys for Appellee

Susan M. Schauf — Tucson

and

Peter B. Keller — Tucson
Attorneys for Appellant

E S P I N O S A, Presiding Judge.

¶1 After a jury trial, appellant Jesus Acevedo was convicted of possessing for sale marijuana weighing four pounds or more, a class two felony. The trial court sentenced him to a substantially mitigated, three-year prison term. On appeal, Acevedo argues the court erred in denying his pretrial motion to suppress evidence and his right to a fair and impartial jury. Finding no error, we affirm.

Factual Background and Procedural History

¶2 We view the evidence in the light most favorable to sustaining Acevedo's conviction. *State v. Gay*, 214 Ariz. 214, ¶ 2, 150 P.3d 787, 790 (App. 2007). In November 2006, Pima County Sheriff's Deputies Lappin and Rosalik approached a mobile home in response to a 911 hang-up call. Lappin went to the front door and heard loud music inside. After knocking and announcing she was with the Sheriff's Department, she heard rustling, footsteps, and a male voice say, "[S]on la policia," which she understood to mean "It's the police." No one came to the door.

¶3 While at the front door, Lappin smelled a strong odor of what she recognized as fresh marijuana. Rosalik too smelled a "very strong" odor of fresh marijuana while outside the home. He beckoned for Lappin to leave the front porch because he "wasn't sure what was inside the trailer, and . . . suspected that it was a possible marijuana load house." The deputies then took positions behind their patrol car, pointed their guns at the home, and radioed a request for backup.

¶4 Moments later, a black Mercedes sport utility vehicle (SUV) drove out from behind the home toward the road. The deputies directed the vehicle to come toward them and, with their guns drawn, ordered the two occupants out of the vehicle. The deputies handcuffed Acevedo and his companion, patted them down for weapons, and removed their cellular telephones.

¶5 Once an additional officer arrived,[1] the deputies performed a "protective sweep" of the mobile home to determine whether anyone remained inside. They did not find any other people but did observe a handgun, a rifle, several packages of ammunition, and multiple twenty-pound bales of marijuana. In the same room with the marijuana, they observed on the floor a tarp covered with wet white paint and a paint roller. The bales had been wrapped in plastic wrap, painted with white latex paint, and then wrapped again with more plastic wrap. The deputies noted both men had white paint on their shoes and "formally" arrested them following the protective sweep. In addition, they determined that Acevedo had a key that fit the lock to the front door of the home.[2]

¶6 After an evidentiary hearing, the trial court denied Acevedo's motion to suppress all evidence found in the mobile home and on his person. A jury subsequently found

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[1]The record shows that Sergeant Crieger arrived within five minutes of Acevedo's detention but is unclear whether any other officers responded to the scene at that time.

[2]The deputies later learned the mobile home was not the source of the 911 call and they had gone to the wrong address. Acevedo does not dispute that the deputies were present as the result of a good-faith error and had believed they were at the correct residence when they arrived.

him guilty of possession of marijuana for sale but not guilty of possession of a deadly weapon during the commission of a felony drug offense. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(B), and 13-4033(A)(1).

Discussion

Denial of Acevedo's Motion to Suppress

¶7 In reviewing a denial of a motion to suppress, we view the facts in the light most favorable to sustaining the trial court's ruling, considering only the evidence presented at the suppression hearing. *State v. Box*, 205 Ariz. 492, ¶ 2, 73 P.3d 623, 624 (App. 2003). "We review the court's decision 'for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.'" *Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d at 790, *quoting State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

Acevedo's Initial Detention

¶8 Acevedo first argues the trial court erred in denying his motion to suppress because there was no reasonable suspicion justifying the stop of his vehicle and his initial detention. He contends that, although "the smell of marijuana alone, if articulable and particularized, may establish not merely reasonable suspicion but probable cause, . . . the smell has to be particularized in order for there to be reasonable suspicion for a stop" and, here, "the smell of the marijuana could not be particularized to him."

¶9 "[A] police officer may make a limited investigatory stop in the absence of probable cause if the officer has an articulable, reasonable suspicion, based on the totality of

the circumstances, that the suspect is involved in criminal activity." *State v. Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d 266, 271-72 (App. 2007). "Although 'reasonable suspicion' must be more than an inchoate 'hunch,' the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention." *Id.* ¶ 25. We review de novo whether officers had reasonable suspicion to justify an investigatory stop. *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).[3]

¶10 When the deputies went to the front door of the residence, they knew it was occupied because Lappin heard people inside. In addition, both deputies could smell emanating from the residence the "very strong" odor of fresh marijuana, which was strong enough for Rosalik to suspect it was a marijuana "load house." Then, moments after hearing a male voice say "son la policia," Acevedo and a second suspect departed from the backyard of the residence in a vehicle. This evidence amply supported the deputies' reasonable suspicion that Acevedo was connected to the residence and to the marijuana smell and was sufficient for the officers to detain him while they investigated further. *See Teagle*, 217 Ariz. 17, ¶¶ 28-29, 170 P.3d at 273-74 (concluding totality of circumstances established reasonable suspicion justifying further detention).

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[3]Although Acevedo relies on both the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution to support his arguments concerning his motion to suppress, we confine our analysis to his federal constitutional claim because the right of privacy afforded by article II, § 8 "has not been expanded beyond that provided by the Fourth Amendment" except in cases "involving 'unlawful' warrantless home entries." *Teagle*, 217 Ariz. 17, n.3, 170 P.3d at 271 n.3.

Whether Acevedo's Detention Became a De Facto Arrest

¶11 Acevedo next argues that, even if there was reasonable suspicion to detain him, initially, "the detention exceeded its constitutionally permissible scope and, therefore, amounted to an arrest for which probable cause was required." "'[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] . . . the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.'" *Id.* ¶ 21, *quoting Florida v. Royer*, 460 U.S. 491, 500 (1983). "[W]hether the length of a particular detention is reasonable under the Fourth Amendment is measured by balancing the degree of intrusion on the individual's privacy against the societal need that justifies the intrusion . . . ." *Id.* ¶ 31.[4]

¶12 The record demonstrates Acevedo was detained only briefly and the deputies acted quickly to determine whether there were others in the residence. Within approximately ten minutes of Acevedo's detention, another officer arrived to assist Lappin and Rosalik. Their actions in restraining Acevedo for this limited time were justified under the circumstances and did not transform the investigatory stop into an arrest, particularly since "[p]olice may reasonably detain an individual suspected of committing a serious crime for a

[4]Acevedo's argument relates only to the period of time before the sweep of the residence was completed; he concedes "the officers had enough evidence to arrest [him] after they completed the protective sweep of the house."

longer period of time than an individual suspected of committing a less serious offense." *Id.* ¶ 33 (upholding detention of one hour and forty minutes).

¶13 Furthermore, because Lappin and Rosalik were responding to a "'swiftly developing situation,'" *Id.* ¶ 32, *quoting United States v. Sharpe*, 470 U.S. 675, 686 (1985), the trial court could find it was reasonable for them to prolong Acevedo's detention briefly while they waited for additional officers to arrive. Rosalik explained the need for backup was "[f]or officer safety reasons, as we didn't know if there were any other subjects in there with possible firearms or anything like that" and because they still believed the home was the source of the 911 hang-up call. Thus, the approximate ten-minute delay imposed by the deputies' waiting for backup to arrive did not unreasonably prolong Acevedo's detention or transform it into an arrest.

¶14 Likewise, the deputies' handcuffing Acevedo did not necessarily convert his detention to an arrest. *See State v. Blackmore*, 186 Ariz. 630, 633-34, 925 P.2d 1347, 1350-51 (1996); *State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981). Rather, the reasonableness of "handcuffing [a suspect] and placing him in [a] police car" is "evaluated in light of the circumstances." *Aguirre*, 130 Ariz. at 56, 633 P.2d at 1049. Here, based on the strong smell of fresh marijuana, Rosalik suspected the home was a marijuana load house, which "often involves high powered weapons." There were only two deputies on the scene, and they did not know if there were additional people inside the home. Under these circumstances, it was reasonable for the deputies to handcuff Acevedo during his brief

detention, and doing so did not necessarily consitute an arrest. *See, e.g.*, *Blackmore*, 186 Ariz. at 634, 925 P.2d at 1351 (officer's handcuffing suspect during detention "was reasonable in order to preserve his own safety and to prevent defendant from fleeing" and did not create de facto arrest); *Aguirre*, 130 Ariz. at 56, 633 P.2d at 1049 (detention of suspect, during which he was handcuffed and placed in patrol car while officers investigated, did not amount to arrest). Accordingly, we conclude the trial court properly denied Acevedo's motion to dismiss on this basis as well.[5]

Warrantless Search of Mobile Home

¶15 Acevedo next contends the trial court erred in denying his motion to suppress with respect to the "warrantless search" of the mobile home, arguing none of the exceptions to the warrant requirement applies. The state responds that the warrantless entry "was a permissible protective sweep conducted expressly to ensure officer safety."

¶16 "A warrantless search is unlawful under the Fourth Amendment of the United States Constitution and article II, § 8 of the Arizona Constitution unless one of the specific

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[5]Because we reject Acevedo's argument that his detention was a de facto arrest, we need not reach his argument that probable cause was required. Likewise, because he concedes there was probable cause to arrest him after the protective sweep and does not challenge the search of his person incident to his subsequent arrest, we do not address his argument that the removal of his cell phones during his initial pat-down search violated his Fourth Amendment rights. *See State v. Lamb*, 116 Ariz. 134, 137-38, 568 P.2d 1032, 1035-36 (1977) (suppression of evidence found during initial pat-down search not required when subsequent arrest and search incident to arrest were inevitable); *State v. Paxton*, 186 Ariz. 580, 585-86, 925 P.2d 721, 726-27 (App. 1996) (holding court properly denied motion to suppress evidence seized prior to defendant's arrest because evidence would have been confiscated during ensuing arrest and booking).

and well-established exceptions to the warrant requirement has been met." *Mazen v. Seidel*, 189 Ariz. 195, 197, 940 P.2d 923, 925 (1997). "Exigent circumstances are one exception to the warrant requirement and include protective sweeps . . . ." *Id.* "A protective sweep is appropriate only when the police reasonably perceive an immediate danger to their safety." *State v. Kosman*, 181 Ariz. 487, 491, 892 P.2d 207, 211 (App. 1995).

¶17 Although Acevedo argues "the only suspected occupants of the house were in handcuffs and detained," the deputies specifically testified they did not know if there were additional people inside the suspected marijuana load house and, if so, whether they were armed. Moreover, although Deputy Rosalik testified he had, "[a]t that point . . . switched gears" because he believed the residence was a "marijuana load house," the deputies had been responding to a 911 hang-up call and could not know whether the presumed caller might still be in the house. "'Arresting officers have a right to conduct a quick and cursory check'" of a residence following an arrest near the residence "'where they have reasonable grounds to believe that there are other persons present inside who might present a security risk.'" *Kosman*, 181 Ariz. at 491-92, 892 P.2d at 211-12, *quoting United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989); *see Maryland v. Buie*, 494 U.S. 325, 333 (1990) (recognizing need for officers to "tak[e] steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack"); *cf. Michigan v. Summers*, 452 U.S. 692, 702 (1981)

("[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence.").[6]

¶18 Relying on *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986), Acevedo further argues the search was not supported by exigent circumstances because the deputies had sufficient time to obtain a search warrant, either while they were waiting for backup or after Sergeant Crieger arrived. However, even if *Echegoyen* were controlling,[7] it would not advance Acevedo's argument. In *Echegoyen*, the Ninth Circuit held that warrantless entries conducted over several hours were lawful due to exigent circumstances where the record showed that officers did not have time to obtain a telephonic warrant. 799 F.2d at 1278-80. Similarly, the record here demonstrates that, while the deputies were waiting for support to arrive, they apprehended and detained Acevedo and his companion, who were leaving the scene. Then, within a few minutes, they stopped and investigated another suspicious vehicle that drove by.[8] As a result, the trial court could find the exigency that required the officers

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[6]For this reason, *United States v. Gooch*, 6 F.3d 673 (9th Cir. 1993), on which Acevedo relies, is inapposite and does nothing to support a contrary result. In *Gooch*, the Ninth Circuit held a search was not justified by exigent circumstances because, when they searched the defendant's tent, the officers knew it was empty and the defendant was handcuffed and locked in the back of a patrol car. *Id.* at 676, 679-80. Here, the deputies did not know if other people were still inside the home.

[7]We are not bound by Ninth Circuit precedent. *See State v. Allen*, 216 Ariz. 320, n.4, 166 P.3d 111, 116 n.4 (App. 2007).

[8]Rosalik explained the second vehicle was driving by "very slowly" and "watching [them] the entire time so [he] didn't know whether or not they were involved" and thought perhaps the suspects from the first vehicle had been able to call for their own "back-up." The

to wait for additional assistance did not abate in the short time frame involved, and similar to *Echegoyen*, there was no time for them to obtain a telephonic warrant. In addition, even though Sergeant Crieger's arrival meant there was an additional officer on the scene, this did not remove the uncertainty and risk factors that necessitated the protective sweep of the mobile home. Accordingly, we conclude the trial court did not err in determining the search of the mobile home was supported by exigent circumstances. *See Mazen*, 189 Ariz. at 197, 940 P.2d at 925.

Denial of Fair and Impartial Jury

¶19 Acevedo next argues the trial court erred by denying his right to a fair and impartial jury. He contends this was structural error requiring a new trial.

¶20 During voir dire, defense counsel asked the potential jurors whether any of them were "wondering or affected by the fact that [his] client [was] participating through a translator." Ultimately, three potential jurors responded in conferences held at the bench. The first juror said her impartiality would be affected if Acevedo was an illegal immigrant, and she was excused for cause. A second juror requested that the question be clarified and, after it was, stated that the use of a translator would not affect her decision regarding Acevedo's guilt or innocence. A third juror approached the bench and asked if Acevedo was in the country legally; after being questioned, that juror was excused for cause.

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deputies allowed the second vehicle to leave after they had questioned the occupants and determined they were not associated with the suspected load house.

¶21 On its own initiative, the trial court followed up on the issue because of the possibility other jurors might "have an issue with the interpreter" but "haven't admitted to their bias." Both defense counsel and the prosecutor agreed the court could inform the jurors that Acevedo was a United States citizen, but the court declined to do so because it did not want to inject evidence it did not know to be true. However, the court again asked the venire if anything about the trial process, including the fact that an interpreter was present, might affect their ability to be fair and impartial, and no one responded. The court then asked counsel if they wanted any jurors stricken for cause, and defense counsel had none.

¶22 Outside the presence of the jury, before the trial commenced, defense counsel told the court, "I think my client's citizenship status is irrelevant" and that counsel "was disturbed at hearing a couple of these jurors mention it." He explained, "I had asked Mr. Acevedo what he could bring, and he says he could bring his naturalization with his U.S. passport," but "I still haven't decided whether I want to try and just introduce the documents to prove he is a citizen . . . in the face of an instruction that it's irrelevant." The court responded, "It's not an issue, but I don't want to inject it as an issue," and, thus, "for the time being it's going to be a nonissue." Defense counsel did not object and did not again raise the issue of Acevedo's citizenship status at trial.

¶23 Acevedo now contends the court's "refusal to inform the potential jurors of [his] true immigration status, when his status as a United States citizen could have easily been proven . . . , amounted to a denial of a fair and impartial jury." Although Acevedo claims he

adequately raised this issue before the trial court, we agree with the state that he did not. Acevedo contends his request "that the trial judge inform the prospective jurors that he was a U.S. citizen" was adequate to raise "the issue of the fairness and impartiality of the jury panel." He also claims "[t]he trial judge refused to allow the introduction of the passport or even a stipulation to the effect that [he] was a U.S. citizen."

¶24 But Acevedo misconstrues the record. At trial, defense counsel stated he still had not decided whether to introduce documents reflecting Acevedo's citizenship and, as the state correctly points out, never "actually [sought] to introduce evidence of [his client's] citizenship." In addition, defense counsel agreed that evidence of Acevedo's citizenship status was irrelevant. After the court stated that "for the time being" it was not an issue, counsel did not object and does not claim to have raised the issue again. Accordingly, we conclude Acevedo forfeited this argument by failing to raise it adequately below. *See State v. Lopez*, 217 Ariz. 433, ¶ 6, 175 P.3d 682, 684 (App. 2008) (failure to object to alleged error at trial forfeits right to obtain relief absent fundamental error); *State v. McIntosh*, 213 Ariz. 579, ¶¶ 6-12, 146 P.3d 80, 82-83 (App. 2006) (reviewing for fundamental and structural error where defendant had failed to object).[9]

[9]Because Acevedo does not ask us to review this issue for fundamental error, we decline to do so. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue alleged error was fundamental waives fundamental error review on appeal).

¶25 Finally, notwithstanding his failure to preserve the issue, Acevedo argues it amounts to structural error.[10] "Structural error 'deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 235 (2009), *quoting State v. Ring (III)*, 204 Ariz. 534, ¶ 45, 65 P.3d 915, 933 (2003). Structural error accordingly is limited to circumstances such as the denial of counsel or a biased factfinder. *See id.*

¶26 "A defendant is entitled to 'a fair trial by a panel of impartial, indifferent jurors.'" *State v. Velazquez*, 216 Ariz. 300, ¶ 18, 166 P.3d 91, 97 (2007), *cert. denied*, __ U.S. __, 128 S. Ct. 2078 (2008), *quoting Morgan v. Illinois*, 504 U.S. 719, 727 (1992). "'We will not disturb the trial court's selection of the jury in the absence of a showing that a jury of fair and impartial jurors was not chosen.'" *State v. Cañez*, 202 Ariz. 133, ¶ 37, 42 P.3d 564, 579 (2002), *quoting State v. Walden*, 183 Ariz. 595, 607, 905 P.2d 974, 986 (1995). Significantly, "[j]uror prejudice will not be presumed but must be demonstrated by objective evidence." *Id.* ¶ 32.

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[10]The state argues Acevedo is not entitled to structural error review, citing *State v. Hickman*, 205 Ariz. 192, 68 P.3d 418 (2003). *Hickman* provides that "a trial court's error in failing to remove a juror for cause, and the defendant's subsequent use of a peremptory challenge to remove that juror, should be reviewed for harmless error." *Id.* ¶ 32. But that is not the situation presented here, and we therefore address the merits of Acevedo's structural error argument.

¶27 Here, the trial court dismissed for cause the only two potential jurors who indicated they could not be impartial if Acevedo were in the United States illegally. Acevedo's statement that "[p]rejudice against undocumented aliens is common in Arizona" and his speculation that other jurors maintained a "silent bias" are insufficient to meet his burden of presenting evidence demonstrating that the jury in his case was prejudiced. *See id*. ¶ 32. Accordingly, we do not discern any error, much less structural error.[11]

¶28 Acevedo contends we should nonetheless address this issue because "there is no case law in Arizona [that] provides a uniform procedure for the quelling of any potential jury bias that may arise due to a defendant's immigration status." He urges us to "lay down explicit guidelines delineating exactly what evidence is properly admissible when a defendant's immigration status is in question, and then grant [him] a new trial in which these guidelines could be properly used to quell any potential bias." It is well settled, however, that an appellate court "does not give advisory opinions or decide issues it is not required to reach in order to dispose of an appeal." *Stonecreek Bldg. Co. v. Shure*, 216 Ariz. 36, n.3, 162 P.3d 675, 676 n.3 (App. 2007). Accordingly, we decline Acevedo's invitation.[12]

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[11]Nor do we agree with Acevedo that the requirement that jury prejudice be proven by objective evidence does not apply when there is an alleged pervasive bias against illegal immigrants or when two potential jurors claim to have such a bias in separate bench conferences.

[12]Even if we were to agree with Acevedo that this issue warrants our review, he does not present authority from any state or federal court that has addressed a similar issue, nor does he indicate the absence of any such authority. As a result, we would decline to address the issue on that basis as well. *See* Ariz. R. Crim. P. 31.13(c)(vi) (appellant's brief must contain argument with citations to authority); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d

Disposition

¶29 For the foregoing reasons, Acevedo's conviction is affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

JOHN PELANDER, Judge

1119, 1147 n.9 (2004) ("'[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).