NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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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. ROBERT LYNN LARSON, Appellant.	2 CA-CR 2009-0400 DEPARTMENT A <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091733-001

Honorable Edgar B. Acuña, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson — Tucson
Attorneys for Appellee

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B R A M M E R, Presiding Judge.

¶1 Robert Larson appeals from his conviction and sentence for transportation of marijuana for sale. He argues the trial court erred by denying his motion to suppress

evidence and by failing sua sponte to instruct the jury on the affirmative defense of duress. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdict. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In reviewing the denial of a motion to suppress evidence, we 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. *See State v. Ellison*, 213 Ariz. 116, ¶ 25, 140 P.3d 899, 909 (2006).

¶3 On April 29, 2009, Arizona Department of Public Safety (DPS) officer Steve Kroeger observed Larson driving a truck on an interstate highway. He saw the truck drift left and right within its lane, and then cross into the adjacent lane two times. Kroeger then pulled alongside the truck and noticed its left front tire "appeared to be low of air." He stopped the truck on the shoulder of a nearby off ramp.

¶4 As Kroeger approached the truck, he noticed plywood protruding from its bed, a spare tire on top of the wood, and a gas can on each side of the spare. Kroeger peered into a small opening between the truck's bed and the wood, but saw nothing unusual. He addressed Larson through the truck's open window, confirmed Larson's identity, and told him he was concerned about the left front tire's pressure. Larson responded that the truck had alignment and steering problems.

¶5 Kroeger asked Larson to get out of the vehicle. Using a gauge from Kroeger's car, Larson checked the left front tire's pressure, advising Kroeger that it was

thirty-three pounds.[1] Kroeger and Larson walked back to the side of Kroeger's patrol car while Kroeger filled out a written warning citation indicating improper lane usage. The warning did not refer to low tire pressure. Before handing him the warning, Kroeger asked Larson where he was going that day. Larson said he was going to a friend's house to fix a leaking roof. Kroeger asked Larson if there was any marijuana in the truck. Larson "stared" at Kroeger without blinking and replied "no." Once Kroeger handed him the written warning, Larson walked "very quickly" back to the truck, and appeared unusually anxious.

¶6 As Larson sat back down in the driver's seat, Kroeger walked back up along the right side of the truck, and "believed [he] smelled a possible odor of marijuana coming from the vehicle" for a "short second and then [the smell] was gone." Kroeger asked Larson if he could search the truck, and Larson replied "yes." Kroeger then had Larson get out of the truck and walk to the side of the patrol car, where he signed a consent to search form. The form explained that Larson could refuse the search and withdraw his consent to the search at any time. Kroeger found 526 pounds of marijuana in the bed of the truck, and placed Larson under arrest. After Larson was taken into custody, another officer drove his truck back to DPS headquarters.

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[1]Kroeger stated at the suppression hearing that he neither verified Larson's reading nor checked the tire pressure himself. At trial, however, he testified he had checked the tire pressure and got a reading of twenty-eight pounds. Because we only consider the evidence presented at the suppression hearing when reviewing the denial of a motion to suppress, we assume for the purpose of this review that Kroeger did not check the tire pressure.

¶7 Larson was taken to DPS headquarters, where he was interviewed by DPS officer Mack Dunham. Larson told Dunham that a family friend named Cirvando Paz had borrowed his vehicle three weeks earlier, and when he returned it to Larson there was marijuana in the back. Larson stated he was "concerned" about the marijuana and had dumped it in the desert. Larson claimed that, when Paz discovered what Larson had done, he put a gun to Larson's head and told Larson he "owed" him for the lost marijuana. Larson explained that the night before he was arrested, an associate of Paz had come to Larson's house, told him it was "time to pay his debt," and gave him instructions to pick up a load of marijuana the following morning. Dunham testified that Larson's truck was a "load vehicle," and that it is "not uncommon for drug organizations to use threats of violence to get . . . drivers [of load vehicles] to do things."

¶8 Larson was charged with transportation and possession of marijuana for sale. The trial court denied his motion to suppress the evidence found in his truck. Larson did not request a jury instruction on the defense of duress, and the court gave no duress instruction. After a two-day trial, the jury found Larson guilty of transportation of marijuana for sale. The court sentenced Larson to a presumptive prison term of 9.25 years. This appeal followed.

Discussion

Motion to Suppress

¶9 Larson contends the trial court erred in denying his motion to suppress the evidence obtained from the search of his truck. He asserts Kroeger had lacked reasonable suspicion to stop him, had detained him improperly a second time when he asked for permission to search the truck, and Larson's consent to that search was both tainted by the unlawful detentions and involuntary. He also contends Kroeger's questioning him about matters unrelated to the traffic stop violated his right to privacy under Arizona's constitution. We review the factual findings underlying the court's ruling for an abuse of discretion, but we review its legal conclusions de novo. *See State v. Newell*, 212 Ariz. 389, ¶ 27, 132 P.3d 833, 841 (2006).

The Initial Stop

¶10 An investigatory stop of a motor vehicle constitutes a seizure under the Fourth Amendment. *State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003). However, officers need possess only a "reasonable suspicion" of criminal activity to justify a vehicle stop. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 881 (1975. Reasonable suspicion is "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996), *quoting United States v. Cortez*, 449 U.S. 411, 417-18 (1981). A traffic stop may occur if a police officer reasonably suspects a vehicle's driver of having violated a traffic law. *See Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d at 1105. Here,

the state had the burden of proving, by a preponderance of the evidence, that Kroeger's stop of Larson was justified by reasonable suspicion. *See* Ariz. R. Crim. P. 16.2(b).

¶11 Relying on *Livingston*, as he did below, Larson first asserts his crossing of the lane divider on two occasions did not violate A.R.S. § 28-729(1), which provides, "[a] person shall drive a vehicle as nearly as practicable entirely within a single lane and shall not move the vehicle from that lane until the driver has first ascertained that the movement can be made with safety." Larson contends that because in *Livingston* we "held that crossing the white shoulder line once did not constitute grounds for a traffic stop when the driver did not pose a hazard to others on the road," and because there was no evidence he had "created a safety hazard to other vehicles on the road," he did not violate § 28-729(1).

¶12 Larson misreads *Livingston*. There, we determined a driver's brief, one-time deviation from the marked traffic lanes on "a dangerous, curved road" did not give the officer a reasonable basis for a traffic stop. 206 Ariz. 145, ¶¶ 4-8, 12, 75 P.3d at 1105-06. We reasoned that the phrase, "as nearly as practicable," as used in the statute demonstrated the legislature's intent to avoid penalizing drivers for "brief, momentary, and minor deviations." 206 Ariz. 145, ¶ 10, 75 P.3d at 1106. Contrary to Larson's argument, we did not conclude that a traffic stop was only proper when a driver's violation of the statute resulted in danger to others. We instead focused on the "as nearly as practicable language" in the statute and stated the trial court had not abused its discretion in finding Livingston's "alleged isolated and minor breach of the shoulder line" was not a traffic violation given the totality of the circumstances—particularly the

fact the road was curved and dangerous. *Id.* ¶ 12. We noted that "seemingly small factual distinctions can affect a court's conclusions as to the reasonableness of a stop." *Id.* n.1. Here, Larson crossed the lane divider on two occasions, and the roadway was neither curved nor dangerous. Nothing in the record suggests it was not practicable for Larson to stay within a single lane. The trial court did not abuse its discretion in determining Larson's two crossings of the lane divider constituted a violation of § 28-729(1), warranting the traffic stop. In view of our resolution of this issue, we need not address Larson's contention the trial court also erred in finding the traffic stop justified by Kroeger's testimony that the air pressure in one of the truck's tires appeared low.

The "Second Detention"

¶13 Larson next argues Kroeger "unconstitutionally reinitiated" the initial detention by walking up to Larson's vehicle and requesting permission to search the truck after giving Larson a warning citation. But an officer is "free to ask [a driver] additional questions unrelated to the traffic stop" after a stop has ended if the interaction "was within the scope of a consensual encounter." *State v. Box*, 205 Ariz. 492, ¶ 21, 73 P.3d 623, 629 (App. 2003). "The Fourth Amendment permits police officers to approach and question individuals in public places so long as a reasonable person would understand that he or she can refuse to answer." *Id.* ¶ 22, *citing Florida v. Bostick*, 501 U.S. 429, 434 (1991). As in *Box*, nothing in the record here suggests Kroeger "dominated the ensuing colloquy with an overbearing show of authority." *Id.* Although Larson asserts the encounter was not consensual because he "could not have driven away without

endangering [Kroeger]," he cites nothing in the record supporting this conclusion. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's argument shall contain citation to "parts of the record relied on"). Indeed, Kroeger testified he had stopped Larson on "the right shoulder" of the highway offramp because "[i]t's a very safe area [to] pull people over."

¶14 Even if Larson is correct that he could not have driven away instead of answering Kroeger's question, and assuming that fact rendered Kroeger's additional interaction with Larson a detention under the Fourth Amendment, we agree with the state the detention was de minimis.[2] In *Box*, we held the detention of a defendant for "less than one additional minute" after a traffic stop was complete was "de minimis and not unreasonable under the Fourth Amendment." 205 Ariz. 492, ¶ 24, 73 P.3d at 630. Larson asserts *Box* is distinguishable because the defendant there had "continued standing outside his vehicle and . . . conversing with the officer" after the citation had been issued. We do not find that distinction meaningful in these circumstances. The defendant in *Box* was detained after the encounter had become a consensual one so the officer could subject his vehicle to a dog sniff. *Id. ¶* 17. Here, even if Larson was detained when Kroeger returned to his window seeking permission to search the truck, it was only moments before Larson consented. That the encounter was consensual in *Box* was only relevant insofar as it illustrated the brief duration of the defendant's later

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[2]Because Larson's encounter with Kroeger after Larson got back in his truck was either consensual or a de minimis detention, we need not address his argument Kroeger lacked reasonable suspicion to further detain him. Nor need we address his argument that the previous detention or detentions "tainted" his consent to the search of his truck. There was no impermissible detention, and therefore no taint.

detention. A consensual encounter is not a prerequisite for a later detention to be de minimis.

¶15 Nor do we find convincing Larson's reliance on *State v. Sweeney*, 224 Ariz. 107, 227 P.3d 868 (App. 2010). There, Division One of this court found an additional detention to permit a dog sniff was not de minimis because the officer "waited until the arrival of a second officer . . . before conducting the sniff [and] . . . used physical force to detain Appellant when he grabbed his arm and ordered him to stand in front of the patrol car." *Id.* ¶ 15. Here, of course, Kroeger immediately asked Larson for permission to search the truck and used no physical force to detain him—if he detained him at all.

Voluntariness

¶16 Larson next contends his consent to the search was not voluntary. A warrantless search is valid if a person voluntarily consents to the search. *State v. Guillen*, 223 Ariz. 314, ¶ 11, 223 P.3d 658, 661 (2010). "[W]hether the consent was voluntary 'is a question of fact to be determined from the totality of the circumstances.'" *Id.*, *quoting State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004). The state bears the burden of showing voluntary consent. *Id.* Here, the trial court determined Larson's consent was voluntary and that he had not been coerced.

¶17 Larson has provided no basis for us to disturb the trial court's factual findings. His argument rests primarily on his position that Kroeger unlawfully had detained him before requesting his permission to search. We have rejected that argument. The traffic stop was justified and, if there was a "second" detention, it was lawful. Insofar as Larson suggests he was coerced because Kroeger was armed and in

uniform, "[c]ountless decisions have upheld automobile searches upon a finding that the defendant voluntarily consented to the search after a uniformed officer asked permission." *State v. Acinelli*, 191 Ariz. 66, 70, 952 P.2d 304, 308 (App. 1997). Moreover, Larson signed a consent form indicating he knew he had a right to refuse the search. *See id.* (knowledge of right to refuse factor in determining consent). Although Larson argues his decision to consent to Kroeger's search of his truck "makes no sense," as he plainly was aware he was carrying approximately five hundred pounds of marijuana in it, that did not require the court to find Larson had been coerced. *See State v. Ballesteros*, 23 Ariz. App. 211, 214, 531 P.2d 1149, 1152 (App. 1975) (whether defendant gave consent knowing contraband would be discovered factor in assessing voluntariness).

Right to Privacy

¶18 Larson next asserts the search "violated Arizona's constitutional right to privacy," arguing the Arizona constitution provides broader protection than the Fourth Amendment and prohibits officers from questioning "a vehicle's occupants about matters unrelated to a traffic stop." *See* Ariz. Const. art II, § 8; *see also Arizona v. Johnson*, ___ U.S. ___, 129 S. Ct. 781, 788 (2009) (officer's inquiry into matters unrelated to traffic stop does not violate Fourth Amendment). Because Larson did not raise this argument below, he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶19 We recently rejected a similar argument in *State v. Johnson*, 220 Ariz. 551, ¶¶ 12-13, 207 P.3d 804, 810 (App. 2009). Arizona courts have consistently held that,

outside of searches or seizures within the home, Arizona's constitution provides no broader protection than the Fourth Amendment. *See State v. Teagle*, 217 Ariz. 17, n.3, 170 P.3d 266, 271 n.3 (App. 2007); *State v. Reyna*, 205 Ariz. 374, ¶ 14 & n.5, 71 P.3d 366, 369-70 & n.5 (App. 2003); *see also Malmin v. State*, 30 Ariz. 258, 261, 246 P. 548, 548-49 (1926) (addressing automobile search, noting article II, § 8, "although different in its language, is of the same general effect and purpose as the Fourth Amendment, and, for that reason, decisions on the right of search under the latter are well in point"). Larson has provided no reason compelling us to depart from this jurisprudence.[3] There was no error, fundamental or otherwise.

Duress Jury Instruction

¶20 Larson alleges the trial court committed fundamental error by failing sua sponte to instruct the jury on the affirmative defense of duress. *See* A.R.S. § 13-412. Because Larson did not request this instruction, and raises the issue for the first time on appeal, we review only for fundamental error. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 81, 25 P.3d 717, 741 (2001). It is fundamental error for the trial court to fail to instruct on matters vital to proper consideration of the evidence "'even if not requested by the defense.'" *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003), *quoting State v. Avila,* 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985). But, "[i]t is a rare case

[3]Larson also suggests that A.R.S. § 28-1594 prohibits "interrogation of [a vehicle's] occupants about matters unrelated to the stop's purpose unless supported by reasonable suspicion of criminal activity." That statute authorizes a police officer to "stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of this title." § 28-1594. But nothing in the statute precludes an officer from asking questions unrelated to that investigation.

where the omission of an instruction without objection constitutes fundamental error." *State v. Marchesano*, 162 Ariz. 308, 316, 783 P.2d 247, 255 (App. 1989) (lack of sua sponte instruction on duress not fundamental error), *disapproved of on other grounds by State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002).

¶21 Although "'a defendant is entitled to a justification instruction if it is supported by the slightest evidence,'" *State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692 (App. 2005), *quoting State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997), one should not be given unless "'reasonably and clearly supported by the evidence.'" *Id.*, *quoting State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987).

¶22 Duress is defined in A.R.S. § 13-412 (A):

> Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct *by the threat or use of immediate physical force* against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

(emphasis added). "Duress envisions a third person compelling a person by the threat of immediate physical violence to commit a crime . . . ." *State v. Lamar*, 144 Ariz. 490, 497, 698 P.2d 735, 742 (App. 1984) (giving example of taxicab driver forced by armed passenger to drive to crime scene). To constitute duress, the threat of harm must be "present, imminent and impending." *State v. Jones*, 119 Ariz. 555, 558, 582 P.2d 645, 648 (App. 1978); *see also State v. Kinslow*, 165 Ariz. 503, 505, 799 P.2d 844, 846 (1990).

¶23 Nothing in the record suggests any threat of harm to Larson was "present, imminent, and impending" when he transported the marijuana. Larson argues Paz's threat was "directly linked" to Larson's obligation to repay his debt by transporting the marijuana. However, a "link" between a past threat and a future criminal action is insufficient to show duress where the threat is no longer immediate. *See Kinslow*, 165 Ariz. at 506, 799 P.2d at 847 (duress defense fails where defendant had "reasonable opportunity" to escape threatened harm without committing crime); *Jones*, 119 Ariz. at 558, 582 P.2d at 648 (concluding facts did not support duress defense where plaintiff alleged he stole van because threatened at gunpoint night before and told to leave town).

¶24 Larson suggests the jury "could have inferred that [he] reasonably believed he would be killed or seriously injured . . . if he did not transport the marijuana," because drug organizations, in general, commonly use violence against drivers or have them watched. A general belief, however reasonable, that harm may result from working with a dangerous drug organization is not sufficient, standing alone, to constitute duress—that belief must be the result of a "threat or use of immediate physical force." § 13-412(A). Because there was no evidence from which the jury could conclude Larson was acting under an immediate threat, the trial court did not commit fundamental error in failing sua sponte to instruct the jury on duress. *See Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d at 692; *Walters*, 155 Ariz. at 553, 748 P.2d at 782; *see also Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 ("To obtain relief under the fundamental error standard of review, [appellant] must first prove error.").

Disposition

¶25 For the reasons stated, we affirm Larson's conviction and sentence.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge