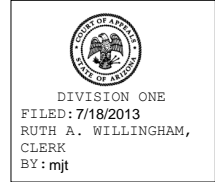


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 12-0276
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
NATHAN ALAN GUNN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-153106-001

The Honorable Lisa Flores, Judge

AFFIRMED

Thomas C. Horne, Attorney General
by Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

Phoenix

James J. Haas, Maricopa County Public Defender
by Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

H O W E, Judge

¶1 Gunn appeals his sentences and convictions, arguing that his pre-*Miranda*,¹ pre-arrest silence in response to police questioning at the scene of a car collision should not have been admitted at trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY²

¶2 Gunn and K were in a relationship and living together. After attending lunch with K and her daughter, Gunn drove K to work. While driving, Gunn and K began to argue. The argument escalated, and K suggested that they end their relationship. Gunn threatened to kill everyone at K's office. K responded, "okay" and then Gunn said, "Fuck this, I'm going to kill both of us." He then turned the car into the oncoming lane and crashed into another car. The collision injured K and the driver of the other car.

¶3 Police arrived at the scene and questioned the witnesses. K spoke to Officer J, but did not report Gunn's threats to her or state that Gunn did anything to intentionally cause the collision. Officer J asked Gunn what had happened, and Gunn responded that the brakes locked up and he could not turn the steering wheel. Gunn told Officer J that he had overshot his

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² We view the evidence in the light most favorable to sustaining the conviction and resolve all reasonable inferences against the defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

turn. When Officer J asked why Gunn did not just turn around and come back after he missed his turn, Gunn did not answer.

¶14 At the hospital, K spoke with her family and they encouraged her to tell police exactly what had happened. Officer J came to the hospital to interview K and she told him that Gunn had intentionally turned into oncoming traffic.

¶15 Gunn was tried for three counts of aggravated assault, one count of criminal damage and one count of endangerment. During Officer J's testimony, and when he was about to be questioned about his interview with Gunn, defense counsel objected, believing that the prosecutor would ask Officer J to testify about Gunn's silence after being asked "Why didn't you just turn around and go back?" During the sidebar, defense counsel argued that Gunn had exercised his right to remain silent and that commenting on Gunn's silence at the accident scene was inappropriate. The prosecutor argued that Gunn was not under arrest at the accident scene and had not been read Miranda rights, and nothing indicated that Gunn's constitutional rights had been violated. The court determined that Gunn was not in custody and that Officer J was simply investigating the accident, and allowed the prosecutor to ask the question.

¶16 The prosecutor asked the officer, "And you indicated that you asked him why didn't you just continue driving eastbound and turn around if he knew he'd already overshot his

turn?" Officer J responded "yes" and the prosecutor asked, "And did he provide an explanation for that?" Officer J responded that Gunn had not.

¶17 The jury found Gunn guilty on all counts except the count of endangerment, and he was sentenced to six years' imprisonment. Gunn timely appealed his convictions and sentences. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and 13-4033(A) (West 2013).³

DISCUSSION

¶18 Gunn argues that the trial court committed reversible error when it allowed the State to introduce evidence of his pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. We review de novo whether a defendant's constitutional rights were violated. *State v. Beasley*, 205 Ariz. 334, 336, ¶ 9, 70 P.3d 463, 465 (App. 2003).

¶19 A person who wishes to shield incriminating information must claim the Fifth Amendment privilege against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). As the United States Supreme Court recently stated, "simply standing mute" in response to questioning does not invoke the privilege, unless the person is subject to custodial

³ Absent revisions material to this decision, we cite the current version of applicable statutes.

interrogation without *Miranda* warnings. *Salinas v. Texas*, 133 S. Ct. 2174, 2178, 2180 (2013) (plurality). Consequently, a person's silence in response to noncustodial questioning without *Miranda* warnings is not protected by the Fifth Amendment. *Id.* at 2180-81 ("Our cases all but foreclose such an exception" to the invocation requirement.).

¶10 Here, although Officer J questioned Gunn about the collision, Gunn was not in custody⁴ and not given *Miranda* warnings. In that circumstance, Gunn was required to invoke his privilege against self-incrimination if he wished to prevent his silence from being used against him at trial. He did not do so, but "simply st[ood] mute" in response to Officer J's question. Thus, Gunn's silence was not protected by the Fifth Amendment. The trial court therefore did not err in admitting evidence of Gunn's silence.

⁴ Gunn argues for the first time in his reply brief that he need not expressly invoke the privilege because he was in custody when Officer J questioned him. Although Gunn was not under arrest or otherwise restrained, he claims that he was not free to leave because leaving would have incurred further criminal liability for leaving the scene of an accident. Because Gunn not only failed to raise this issue before the trial court—he did not object when the court found that he was not in custody—but also did not raise it on appeal until the reply brief, the issue is waived. *In re Marriage of Pownall*, 197 Ariz. 577, 583, n.5, ¶ 25, 5 P.3d 911, 917 n.5 (App. 2000) (Arguments raised for the first time in a reply brief are deemed waived.). Moreover, Gunn's decision to remain at the scene of the collision lest he violate a statute is not the kind of compulsion that constitutes custody.

CONCLUSION

¶11 For the aforementioned reasons, we affirm.

_____/s/_____
RANDALL M. HOWE, Presiding Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Judge

_____/s/_____
PATRICIA A. OROZCO, Judge