IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR09-0626
	)	1 CA-CR09-0666
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT C
	)	
DEQUINTON MARQUS TAYLOR,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-154025-001 SE and CR2005-119113-002 SE

The Honorable J. Kenneth Mangum, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

The Law Office of Eleanor L. Miller — Phoenix
by Eleanor L. Miller
Attorney for Appellant

W E I S B E R G, Judge

¶1 DeQuinton Marqus Taylor ("Defendant") appeals his convictions and sentences on promoting prison contraband, a class two felony, and possession or use of marijuana, a class 6 felony. He argues that because he was arrested and taken to

jail by police, he could not have committed a voluntary act of promoting prison contraband. Additionally, he asserts that his conviction violates the privilege against self-incrimination. For reasons that follow, we find no error and affirm.

BACKGROUND

¶2 In February 2008, a Scottsdale police officer stopped a vehicle at night because only the parking lights were illuminated. As he approached the car, he "immediately noticed the smell of marijuana coming from inside the car." Detective Daniel Garcia arrived to assist, and he, too, detected the odor and asked the driver and his passenger, Defendant, to step out.

¶3 While searching the car's interior, the detective found in the console a glass pipe commonly used to smoke methamphetamine. He arrested Defendant, read the *Miranda* warnings, and searched Defendant's person. The detective did not find anything and asked if he had missed "anything of evidentiary value." Defendant said, "No." The detective cuffed Defendant's hands behind his back and informed him that if he took "anything else into the jail, it [could] be an additional felony."

¶4 When they arrived at the jail, the detective removed Defendant from the vehicle and spotted a bag of cocaine on the

floor.[1] He asked Defendant why he had dropped it, and Defendant said that he could not move his hands. The detective again advised Defendant that if he brought anything illegal into the jail, he could face another charge. Once inside, Defendant was strip-searched and a ball of marijuana fell onto the floor. The State accordingly charged him with promoting prison contraband, possession or use of narcotic drugs (cocaine), possession or use of marijuana, and possession of drug paraphernalia (pipe).

¶5 The day before trial, the State moved to preclude Defendant from arguing that he had not voluntarily entered the jail with marijuana or that police questions about whether he possessed contraband violated the Fifth Amendment. The State relied on *State v. Alvarado*, 219 Ariz. 540, 200 P.3d 1037 (App. 2008), which held that an arrestee's possession of drugs when booked into jail was a voluntary act and that no Fifth Amendment violation occurs when police ask a suspect prior to being detained at the jail whether he possesses contraband. In opposing the motion, Defendant objected only to preclusion of argument on whether he had committed a voluntary act. The superior court granted the State's motion.

[1]The detective testified that he had searched the vehicle before his shift began and that there was nothing in it when he arrested Defendant.

¶6 Defendant testified at trial and denied possessing the glass pipe or the marijuana found on his person. He admitted that he had two prior felony convictions in 2005 for kidnapping.

¶7 At the end of trial and over a defense objection, the court gave the following instruction:

> Before you may convict the defendant . . ., you must find that the State proved beyond a reasonable doubt that [he] committed a voluntary act. A "voluntary act" means a bodily movement performed consciously and as a result of effort and determination. You must consider all the evidence in deciding whether the defendant committed the act voluntarily.
>
> Whether a person's presence on a jail or correctional facility premises was voluntary or against his will is irrelevant for the purpose of determining whether he committed the offense of promoting prison contraband.

¶8 The jury found Defendant guilty of promoting prison contraband and of possession of marijuana but acquitted him of the other counts. The court imposed concurrent terms of 9.25 years for the prison contraband offense and 1.75 years for marijuana possession. It also revoked probation and imposed a consecutive four-year term for the prior kidnapping convictions.[2]

[2]Defendant included this prison sentence in his notice of appeal but has waived any error by failing to address it in his opening brief. *Best v. Edwards,* 217 Ariz. 497, 504 n. 7, ¶ 28, 176 P.3d 695, 702 n. 7 (App. 2008)

¶9 Defendant timely appealed. We have jurisdiction under Article VI, section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4033 (2010).

DISCUSSION

¶10 Defendant asserts that he could not have promoted prison contraband because he was involuntarily taken to the jail and thus committed no voluntary act. He also argues that he "was constitutionally protected [by the Fifth Amendment] from having disclose his possession of marijuana," that he chose to remain silent rather than disclose the drug, and was prosecuted for his silence. We first consider the contraband statute.

¶11 Section 13-2505(A)(1)(2010) provides that one commits the offense of promoting prison contraband by "knowingly taking contraband into a correctional facility or [its] grounds". Defendant contends that he could not violate the statute because he did not voluntarily enter the jail. He cites A.R.S. § 13-201 (2010), which provides that to be criminally liable, a person must perform "conduct, which includes a voluntary act" and A.R.S § 13-105(6) (2010), which defines conduct as "an act or omission and its accompanying culpable mental state." Section 13-105(41) defines a "voluntary act" as "a bodily movement performed consciously and as a result of effort and determination."[3]

[3]We cite the current version. Although the definitions have been renumbered, they are not otherwise altered.

Defendant asserts that bringing marijuana into the jail was not a "voluntary act" because he did not "act" but "was brought into the jail, against his free will, in the custody of a police officer."[4]

¶12 We review *de novo* the superior court's statutory interpretation. *State v. Ross*, 214 Ariz. 280, 283, ¶ 21, 151 P. 3d 1261, 1264 (App. 2007). When construing statutes, our aim is to determine and advance the legislature's intent. *Id*. at ¶ 22. Generally, we apply the statutory language as written if it is clear and unambiguous. *Id*. (quoting *Hughes v. Jorgenson*, 203 Ariz. 71, 73, ¶ 11, 50 P.3d 821, 823 (2002)). If it is unclear, we consider the statute's "context, subject matter, historical background, effects and consequences, and spirit and purpose." *Id*. We also seek to avoid absurd results. *State v. Medrano-Barraza*, 190 Ariz. 472, 474, 949 P.2d 561, 563 (App. 1997).

¶13 In *Alvarado*, with very similar facts, this court considered the meaning of the voluntary act requirement in the prison contraband statute. We acknowledged differing analyses

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[4]To the extent Defendant suggests that he did not knowingly bring marijuana into the jail, the jury reasonably could find from evidence that it was in a ball in his underwear that Defendant knowingly committed the offense. This mental state only requires that Defendant was "aware . . . that the circumstance [i.e. his possession] exist[ed]." A.R.S. § 13-105(10)(b).

by other state courts of similar statutes banning introduction of contraband, 219 Ariz. at 543-44, ¶¶ 12-13, 200 P.3d at 1040-41, but concluded that to promote prison contraband under § 13-2505(A)(1) "does not require that a person voluntarily enter the jail." *Id*. at 545, ¶ 17, 200 P.3d at 1042. We noted that the defendant "confuse[d] the concept of a 'voluntary act' with the requisite culpable mental state for the offense." *Id*. at ¶ 16. Evidence that he remarked, "Oh man, I worked hard for that" when the marijuana was discovered in a search at the jail showed that he had the requisite *mens rea* of "knowingly" taking the drug into the jail. *Id*.

¶14 Our supreme court has not construed the contraband statute, but it did consider the meaning of a voluntary act in *State v. Lara*, 183 Ariz. 233, 234-35, 902 P.2d 1337, 1338-39 (1995). The defendant, charged with aggravated assault and attempted murder, offered expert testimony that he suffered a brain impairment that could reduce his use of good judgment and increase a tendency to "fly off into a tantrum or rage as if by reflex." *Id*. at 234, 902 P.2d at 1338. The court of appeals concluded that a jury might find his conduct reflexive rather than voluntary and should have been instructed that the State had to prove that he "did a voluntary act forbidden by law. 'Voluntary act' means a bodily movement performed consciously and as a result of effort and determination." *Id*.

¶15 The supreme court clarified that a "voluntary act" required "a determined conscious bodily movement, in contrast to a knee-jerk reflex driven by the autonomic nervous system." *Id*. at 234-235, 902 P.2 at 1338-1339. It affirmed rejection of the requested instruction because reflexive movements, like a beating heart or inflating lungs, occur without thought or conscious effort. *Id*. at 234, 902 P.2d at 1338. The defendant, however, had not pursued the victim while unconscious, *id*., and without evidence that he had performed some movement *unconsciously,* he was not entitled to an instruction that the State had to "prove that [he] did a voluntary act." *Id*. at 235, 902 P.2d at 1339.

¶16 In *Alvarado*, we also reasoned that under the defendant's interpretation, "the statute would only apply to non-inmates, such as employees or visitors, who 'voluntarily' enter the jail while carrying drugs." 219 Ariz. At 545, ¶ 16, 200 P.3d at 1042. Nothing in the statute suggested that the legislature intended such a narrow scope, and we "decline[d] . . . to modify [it] in a manner contrary to its plain wording." *Id*. Accordingly, because the defendant twice had been informed of the consequence of bringing contraband into the jail and had an opportunity to surrender it, he "perform[ed] a bodily movement 'consciously and as a result of effort and

determination' when he carried the contraband into the jail." *Id*. at ¶ 18. We need not depart from *Alvarado* here.

¶17 Defendant, like Alvarado, ignored notice that he would be charged if found with contraband, chose not to disclose the marijuana, and entered the jail while possessing it. *Id*. Defendant was not unconscious when brought to jail. Instead, he carried contraband into the jail with "effort and determination." Our interpretation not only accords with the statutory language but advances the legislature's obvious intent to keep prisons safe and secure by banning introduction of weapons and other illegal items whether brought by staff, visitors, or arrestees. We cannot imagine that the legislature wished to punish a jail visitor for bringing contraband but not a person arrested, booked, and about to be detained in the facility.

¶18 We acknowledge that a minority of courts have held that a defendant does not voluntarily bring contraband into a correctional facility if he is brought there against his will. *See State v. Eaton,* 229 P.3d 704, 708-09, ¶ 13 (Wash. 2010) (to enhance sentence for bringing contraband into jail, state must prove volition; enhancement improper if inmate had no choice over his location or movement); *State v. Tippetts,* 43 P.3d 455, 459-60 (Or. App. 2002) (defendant's voluntary possession of drugs before his arrest is not enough to convict him for

bringing them into jail); *State v. Cole,* 164 P.3d 1024, 1027, ¶ 11 (N.M. App. 2007) (accord); *State v. Gotchall,* 43 P.3d 1121 (Or. App. 2002)(per curiam) (defendant did not willingly bring contraband to jail and could not have voluntarily possessed it once there).

¶19 Other courts, however, have adopted reasoning similar to ours. In *People v. Gastello*, 232 P.3d 650, 655 (Cal. 2010), the California supreme court found it "immaterial that the defendant was . . . not present by choice in jail. The critical fact is that an arrestee has the opportunity to decide whether to purge himself of hidden drugs before entering jail, or whether to bring them inside and commit a new crime." *See also People v. Cargile,* 916 N.E.2d 775, 778, ¶ 20 (Ohio 2009) (one taken to jail after arrest and who possesses drugs when he enters "meets the *actus reus* requirement"); *Herron v. Commonwealth*, 688 S.E.2d 901 (Va. App. 2010) (focus on voluntariness of defendant's entry into jail leads to absurd results; criminal act was failing to reveal presence of drugs before taking them inside); *State v. Winsor*, 110 S.W.3d 882, 888 (Mo. App. 2003) (accused's decision to enter jail premises "with a controlled substance on his person was a voluntary act").

¶20 Given the statutory language and our decision in *Alvarado*, we find no error in the superior court's granting of the motion in limine. As in *Alvarado*, 219 Ariz. at 545-46, ¶

18, 100 P.3d at 1042-43, Defendant may not have gone to the jail voluntarily, but once there, he knew that he possessed marijuana, and although given notice and an opportunity to disclose it, he determined to remain silent and by his conduct, took the drug with him into the jail. Accordingly, he "perform[ed] a bodily movement 'consciously and as a result of effort and determination' when he carried the contraband into the jail." *Id*. *See also Winsor*, 110 S.W.3d at 887 (statute prohibits voluntary act of possession of controlled substances, not act of being involuntarily present on the jail premises).

¶21 In addition to his statutory challenge, for the first time on appeal Defendant contends that the Fifth Amendment[5] forbids the police from requesting that he produce evidence that, if he complied, would incriminate him. In his oral response to the motion in limine, defense counsel only asked for permission to argue that Defendant's involuntary presence at the jail barred his conviction for bringing in contraband. The prosecutor then mentioned that *Alvarado* not only had rejected that contention but also had found no Fifth Amendment violation when police asked Defendant whether he possessed any contraband. One "who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases that involve 'error

[5]"No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). In order to prevail, Defendant must show that fundamental error occurred and prejudiced him. *Id*. at ¶ 20.

¶22 We find no fundamental error. To warrant Fifth Amendment protection, a defendant's evidence must be "compelled" and "testimonial" or "communicative." *Schmerber v. California*, 384 U.S. 757, 764 (1966). But, the Amendment does not confer "a privilege to lie"; thus, it allows one "to remain silent, but not to swear falsely." *Brogan v. United States*, 522 U.S 398, 404-05 (1998) (citation omitted); *see also Gastello*, 232 P.3d at 655 (Fifth Amendment does not apply to "the nontestimonial act of 'knowingly bring[ing] prohibited drugs into a jail or prison.'"); *People v. Ross*, 76 Cal.Rptr.3d 477, 482 (Cal. App. 2008) (Fifth Amendment does not protect one from consequences of falsely denying possession of contraband).

¶23 Thus, *Alvarado* held that an arrestee's decision not to reveal contraband concealed on his person does not "somehow absolve him of responsibility for his actions on the theory that providing him an opportunity to choose between admitting to possession of the [drug] and being charged with introducing that

substance into the jail violates the . . . Fifth Amendment." 219 Ariz. at 545, ¶ 18, 200 P.3d at 1042. The Kentucky supreme court similarly reasoned that an arrestee may "waive his Fifth Amendment right and not face the promoting contraband charge, or . . . not waive his Fifth Amendment right and face a separate (and in this case, a more serious) charge if caught. His conscious choice was a gamble . . . [but] [a]sserting his right to not incriminate himself does not prevent the further investigation, nor the use of the fruits of that investigation." *Taylor v. Commonwealth*, 313 S.W.3d 563, 566 (2010).

CONCLUSION

¶24 Sufficient evidence supports the jury's findings that Defendant committed the offenses of promoting prison contraband and possession of marijuana, and we find no error in the superior court's ruling on the motion in limine. We also find no Fifth Amendment violation. We affirm the convictions and sentences imposed.

/s/
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

K E S S L E R, Judge, dissenting in part and concurring in part:

¶25 I concur with the majority on the Fifth Amendment issue, but respectively dissent from the majority on the issue of whether Taylor voluntarily brought drugs into the jail. Accordingly, I would affirm his conviction for possession of marijuana but reverse his conviction for promoting prison contraband and remand for a new trial to permit Taylor to argue that issue to the jury.

¶26 A.R.S. § 13-2505(A)(1) (2010) provides that a person is guilty of promoting prison contraband by "knowingly taking contraband into a correctional facility or the grounds of such facility . . .". Pursuant to A.R.S. § 13-201 (2010), "[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing." A "voluntary act" is defined as "a bodily movement performed consciously and as a result of effort and determination." A.R.S. § 13-105(41) (2010).

¶27 I cannot conclude that Taylor brought the marijuana into the jail of his own free will or by his own effort and determination. I disagree with the decision in *Alvarado*, 219 Ariz. at 544-45, ¶¶ 15-16, 200 P.3d at 1041-42, applying *State v. Lara*, 183 Ariz. 233, 234-35, 902 P.2d 1337, 1338-39 (1995), to facts similar to those here.

¶28 In *Lara*, Lara threatened and attacked the victim with a knife. *Lara*, 183 Ariz. at 234, 902 P.2d at 1338. The issue there was whether the defendant suffered from a brain impairment or personality disorder that increased his tendency to fly into a rage as if by reflex. The supreme court affirmed his conviction and addressed his argument that he had not acted voluntarily. The court held that involuntarily bodily functions, like a knee-jerk, are controlled by the nervous system and are not the "sorts of bodily movements that would not be 'performed consciously and as a result of effort and determination' within the meaning of our statute." *Id*. Therefore, the evidence would have to show that Lara's act was a "bodily movement performed unconsciously and without effort and determination." *Id.* at 235, 902 P.2d at 1339. Consequently, the court held that Lara was not unconscious and that "he was relentless in his effort and determination . . . [thus] not entitled to a voluntary act instruction." *Id*. at 234, 902 P.2d at 1338.

¶29 The facts in *Lara*, do not apply to *Alvarado*, and therefore, do not apply to this case. In *Lara*, the defendant claimed that his act was the result of an involuntary and unconscious "reflex". To address that issue, the Supreme Court defined reflex and distinguished it from a voluntary act. However, the court did not conclude that *all* involuntary acts *must be* the result of a reflex as the *Alvarado* court would have

us conclude. Furthermore, *Lara* does not conclude that in order to find that a person acted without "effort and determination," he must be unconscious. In sum, we look to the common usage of the term voluntary to mean that done by a person's free will.

¶30 In attempting to give meaning to statutory language, we often look to respected dictionary definitions. "Voluntariness" is a form of "free will" which has been defined as "the power of directing our own actions without constraint by necessity or fate." The Compact Edition of the Oxford English Dictionary 1076 (1971). I cannot say that Taylor acted voluntarily or of his own free will because he was not entering the jail of his own accord without "constraint by necessity or fate," or, in the statutory language construed in *Lara*, of his own effort and determination.

¶31 Rather, I concur with those other courts which have held that a defendant does not voluntarily act in bringing contraband into a correctional facility when he is brought to the facility against his will. *See State v. Tippetts*, 43 P.3d 455, 458 (Or. Ct. App. 2002) ("It [the statute] does not suggest, as the state reasons, that a defendant who has been moved against his or her will and is conscious of that fact has acted voluntarily."); *State v. Cole,* 164 P.3d 1024, 1027, ¶ 11 (N.M. Ct. App. 2007) (holding that defendant could "not be held liable for bringing contraband into a jail when he did not do so

voluntarily"); *State v. Gotchall,* 43 P.3d 1121, 1122 (Or. Ct. App. 2002) (holding that "if defendant did not voluntarily introduce contraband into the correctional facility," defendant could not "voluntarily possess that contraband once she was confined in the facility"). Furthermore, to

> be concerned in the commission of crime . . . one must either commit the crime himself, or procure it to be done, or aid or assist, abet, advise, or encourage its commission. A mere mental assent to or acquiescence in the commission of a crime by one who did not procure or advise its perpetration, who takes no part therein, gives no counsel and utters no word of encouragement . . . does not in law constitute such person a participant in the crime.

Anderson v. State, 91 P.2d 794 (Okla. Crim. App. 1939). Simply stated, it is the "fate" of an arrestee to enter a correctional facility without the power to direct his own actions.

¶32 My conclusion is also supported by the reasoning in *Martin v. State*, 17 So.2d 427 (Ala. Ct. App. 1944). In *Martin*, the defendant appealed his conviction of being drunk on a public highway. *Id*. Officers had arrested him at home while he was drunk, took him out to the highway and charged him with manifesting "a drunken condition by using loud and profane language" under 14 Ala. Code Section 120 (1940). The statute provided that "[a]ny person who, while intoxicated or drunk, appears in any public place where one or more persons are present, and manifests a drunken condition, boisterous or

indecent conduct, or loud and profane discourse, shall, on conviction, be fined." *Id*. The court reversed the conviction holding that

> [u]nder the plain terms of [the] statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.

Id.

¶33 As the plain language of the statute states, a "voluntary act" requires "a bodily movement performed consciously and as a result of effort and determination." A.R.S. § 13-105(41). When a person is placed under arrest, that person has lost the ability to "choose" or "determine" what movements he can take or he can direct his own person. Taylor's physical movements of entering the correctional facility were not the "result of effort and determination." He was "involuntarily and forcibly carried" into the facility by the arresting officer. Because he was under arrest, he *did not* have a choice, *but to enter* the facility. The "mere fact that defendant voluntarily possessed the drugs before he was arrested is insufficient to hold him criminally liable for the later act of introducing the drugs into the jail." *Tippetts*, 43 P.3d at 459.

¶34 Nor do I agree with the conclusion in *Alvarado* that requiring a suspect to voluntarily enter the jail to amount to promoting prison contraband would limit A.R.S. § 13-2505(A) to apply only to non-inmates. 219 Ariz. at 545, ¶ 16, 200 P.3d at 1042. A.R.S. § 13-2505(A) provides that

> [a] person, not otherwise authorized by law, commits promoting prison contraband: (1) by knowingly taking contraband into the correctional facility or the grounds of such facility; or (2) by knowingly conveying contraband to any person confined in a correctional facility; or (3) by knowingly making, obtaining or possessing contraband while being confined in a correctional facility or while being lawfully transported or moved incident to correctional facility confinement.

¶35 The statute states that not only does the person conveying the contraband into the correctional facility have to do so knowingly, but must also "act" to convey it. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.1 (2d. ed. 2009) ("[A] statute which is worded vaguely on the question of whether an act (or omission), in addition to a state of mind, is required for criminal liability will be construed to require some act (or omission).").

¶36 This interpretation does not narrow the interpretation in such a way that it will only apply to persons entering the facility voluntarily. Subsections two and three apply to persons conveying contraband to a prisoner or prisoners

obtaining or possessing contraband while confined or while being transported or moved incident to such confinement. The real issue is whether the person voluntarily *introduced* the drugs into the facility. The language of the statute should and does apply to all persons, whether they enter the prison voluntarily or involuntarily, but not to those who are brought into the prison after initial arrest in possession of the illegal substance and whom, by virtue of being under custody and having lost control over their person, have involuntarily introduced the drugs into the prison.

¶37 This differs from: (1) a person who is already a prisoner and obtains contraband while confined to the prison facility; or (2) a prisoner who temporary leaves the confines of the facility; or (3) a prisoner who is transported to another location with knowledge that he is to re-enter a prison facility. In all these circumstances, the person at the time he obtains and possesses the contraband has prior knowledge and control that he is to enter a prison facility with the contraband; thus voluntarily introducing the contraband into the correctional facility. Conversely, a person who has been arrested for another crime, and at the time of the arrest was in voluntary possession of an illegal substance, having no power to direct his own actions, does not voluntarily introduce the

illegal substance into the prison. *See Cole*, 164 P.3d at 1027, ¶ 11.

¶38 For the reasons stated above, I would reverse Taylor's conviction for promoting prison contraband and remand for a new trial to allow Taylor to argue that he did not voluntarily bring the marijuana into the jail.

/s/
DONN KESSLER, Presiding Judge