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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THE STATE OF ARIZONA, Appellee, v. WHITNEY BROOKE DRUM, Appellant.	2 CA-CR 2012-0187 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102251001

Honorable Paul E. Tang, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Whitney Drum was convicted of second-degree burglary. The trial court suspended the imposition of sentence and placed her on three years' probation. On appeal, Drum argues the court erred by denying her motion to suppress the statements she had made to a detective because the *Miranda*[1] warnings were inadequate and her waiver of her rights was not knowing, intelligent, and voluntary. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 In reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), and view it in the light most favorable to support the trial court's ruling, *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). At 3:20 p.m. on June 19, 2010, Pima County Sheriff's Deputy William Walker received a report of a possible burglary in a Tucson foothills residential subdivision. A witness had observed two males, later identified as Francisco Molina and Vincente Cota, attempting to load electronic equipment into a teal or green colored car. When Walker arrived in the area, he saw a car "matching the description," a green Honda Civic, occupied by two females. Suspecting they were either involved in the burglary or the victims of a carjacking, Walker initiated a traffic stop. When he requested identification, both produced a driver license; Alexandra Barber was identified as the owner and driver of the vehicle and Drum as the passenger. Barber and Drum apparently stated they recently had dropped off two

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

male friends in the area and agreed to get into Walker's patrol car and show him where they had dropped them off.

¶3 While driving there, Walker received a radio call requesting his assistance in locating the two burglary suspects. That call was followed by another radio report that Molina and Cota had been detained by other deputies. Walker then was flagged down by two individuals who said they could show him where the burglary had occurred and could identify the two males involved. Walker, with Barber and Drum still in his vehicle, followed the witnesses as they eventually drove to where the other deputies had detained Molina and Cota. The witnesses positively identified them as the suspicious persons they had seen earlier and pointed out the house where the burglary apparently had occurred.

¶4 Detective Patricia Willson arrived later in the evening, briefly interviewed Drum and Barber, and obtained a written consent to search Barber's vehicle. Willson testified she had not advised them of their *Miranda* rights because they were not under arrest or suspected of any wrongdoing. Drum and Barber were transported back to Barber's vehicle, which was searched and nothing of "evidentiary value" was found. Willson stated that she was prepared to release the vehicle to Barber and Drum but before doing so contacted detective David Andrews, who informed her Molina and Cota had implicated the two females in the burglary and he wanted to speak with them. Walker then transported Drum and Barber to the station for further questioning. Drum was interviewed by Andrews and ultimately confessed to being involved in the burglary.

¶5 A grand jury indicted Drum for second-degree burglary. She was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

¶6 Drum argues the trial court abused its discretion by denying her motion to suppress the statements she had made to Andrews.[2] She contends: (1) the *Miranda* warnings were inadequate because she was not advised that if she could not afford an attorney one would be appointed for her; (2) she did not knowingly and intelligently waive her rights; and (3) her confession was not voluntary. The adequacy of *Miranda* warnings is a question of law we review de novo. *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002). "In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court with respect to the factual determinations it made but review the court's legal conclusions de novo." *State v. Olm*, 223 Ariz. 429, ¶ 7, 224 P.3d 245, 248 (App. 2010).

¶7 In *Miranda*, the United States Supreme Court "established certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989); *see also State v. Newell*, 212 Ariz. 389,

[2]The trial court granted Drum's motion to suppress as to any pre-*Miranda* statements she may have made to Walker or Willson. The court found Drum was in custody during the period she was "interacting" with the deputy and detective, but also found "there was no interrogation" because neither Walker nor Willson had "ask[ed] any questions." The court nevertheless precluded the state from eliciting testimony about any statements Drum may have made to Walker or Willson.

397, 132 P.3d 833, 841 (2006). A suspect must be given the following essential warnings prior to questioning:

> "[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Powell v. Florida, ___ U.S. ___, ___, 130 S. Ct. 1195, 1203 (2010), *quoting Miranda*, 384 U.S. at 479 (alterations in *Powell*). With respect to the right to appointed counsel, the Court stated:

> In order fully to apprise a person interrogated of the extent of his rights under this system . . . , it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.

Miranda, 384 U.S. at 473.

¶8 There is no "talismanic incantation" of the warnings required by *Miranda*. *California v. Prysock*, 453 U.S. 355, 359 (1981) (no "talismanic incantation" of warnings required). Indeed, *Miranda* recognized the viability of "fully effective equivalent[s]" to the warnings it prescribed. 384 U.S. at 476. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth*, 492 U.S. at 203, *quoting Prysock*, 453 U.S. at 361 (alterations in *Duckworth*).

¶9 Drum maintains the *Miranda* warnings were inadequate because she "was never advised that if she could not afford a lawyer one would be appointed for her prior to questioning."[3] She contends the actual warning—"If you don't know of an attorney, . . . one will be appointed for you"—failed to convey constitutionally required information about "legal representation for an indigent client" that was "particularly critical in this case considering" she in fact was indigent.

¶10 Relying on *Powell* and *Duckworth*, the state argues the warning given to Drum about her right to appointed counsel was adequate. But neither of those cases squarely addressed the issue before us. In *Powell*, the issue was whether the warnings "'clearly informed [the suspect] that he ha[d] the right to consult with a lawyer and to have the lawyer with him during interrogation.'" ___ U.S. at ___, 130 S. Ct. at 1203, *quoting Miranda*, 384 U.S. at 471. In rejecting the defendant's challenge to the warnings, the Court noted that the right to the presence of counsel during interrogation was not "entirely omi[tted]," and when considered together the warnings "reasonably

[3]Drum's motion to suppress was based primarily on her argument that she did not voluntarily waive her right to remain silent. She asserted that her silence could not be construed as a waiver, "[g]iven the lengthy period of time [she] was detained." Thus, because she did not argue below that the *Miranda* warnings were insufficient, we would be justified in treating the argument as waived, *see State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) (issues not raised at suppression hearing waived on appeal), or forfeited for all but fundamental, prejudicial error, *see Newell*, 212 Ariz. 389, ¶ 34, 132 P.3d at 842. However, the trial court, to some extent, did consider and address the sufficiency of the warnings, and the state does not argue we should treat the issue as waived or forfeited. Therefore, in our discretion, we treat the argument as having been properly raised below. *See State v. Aleman*, 210 Ariz. 232, ¶ 24, 109 P.3d 571, 579 (App. 2005) (court has discretion to consider argument arguably waived).

conveyed" to the suspect his right to have an attorney present at all times. *Id.* at ___, 130 S. Ct. at 1204-05.

¶11 Similarly, in *Duckworth*, the Court addressed whether the *Miranda* warnings, which included the right to consult with a lawyer before and during questioning, were rendered inadequate because the police officer also informed the suspect that an attorney would be appointed for him "if and when you go to court." 492 U.S. at 203. As in *Powell*, the defendant in *Duckworth* was given two sets of warnings, and the Court concluded that the warnings in combination reasonably conveyed that the suspect had the right to an attorney before and during questioning, even if he could not afford one, despite the "if and when you go to court" language. *Id.* at 203-04. However, the state points to the second set of warnings, which in dictum the Court said "plainly compl[ied] with *Miranda*," *id.* at 205 n.8, arguing those warnings contained an advisory very similar to that complained of here. In that set of warnings, the suspect was advised, "if [you] do not hire an attorney, one will be provided for [you]," and here, Drum was advised, "[i]f you don't know of an attorney, . . . one will be appointed for you."

¶12 But as we have noted, the question in *Duckworth* involved *Miranda*'s third warning—the right to counsel before and during questioning—not the right to an attorney regardless of his ability to pay. 492 U.S. at 197-98. Moreover, neither of the two cases cited by the Court in support of its conclusion that the warning given to Duckworth "plainly complied" with *Miranda* involved the issue with which we are now confronted. The suspect in each of those cases had been advised that if he could not afford an

attorney, one would be appointed for him. *See Richardson v. Duckworth*, 834 F.2d 1366, 1367 (7th Cir. 1987) (suspect advised "[i]f you cannot afford a lawyer, one will be appointed for you"); *Robinson v. State*, 397 N.E.2d 956, 958 (Ind. 1979) (suspect advised "an attorney will be provided . . . if [you] cannot afford one"). In any event, we do not agree that there is no meaningful difference between the warnings in *Duckworth*—if you do not "hire" an attorney one will be "provided"—and those given here—if you do not "know" an attorney one will be "appointed."

¶13 Here, the warnings did not reasonably convey to Drum "'that if [s]he is indigent a lawyer will be appointed to represent h[er].'" *Duckworth*, 492 U.S. at 203, *quoting Miranda*, 384 U.S. at 473. And we are not persuaded by the state's argument that "[a] reasonable person in [Drum]'s situation would assume that an 'appointed' attorney referred to a free attorney." "When any element of *Miranda* is omitted, we do not presume it is common knowledge." *State v. Carlson*, 228 Ariz. 343, ¶ 9, 266 P.3d 369, 372 (App. 2011). Because the warnings were inadequate,[4] Drum's statements were

[4]Drum argues the *Miranda* warnings also were deficient because "Andrews' testimony does not reflect that he informed [her that] she had a right to speak to a lawyer prior to questioning, or that anything she said can *and will* be used against her in court." Drum acknowledges the state's response to her motion contained a "transcript" of Andrews' interview with Drum, which establishes that Andrews advised Drum more fully than his testimony reflected and covered both of these warnings. However, Drum argues the actual transcript of the interview was not admitted and we cannot consider the information contained in the motion because it is hearsay. We disagree. Although the better practice would have been to admit the transcript into evidence, both parties referred to and relied upon the transcript in their motions and, at the hearing, and neither party sought to have the transcript admitted separately. Moreover, neither party challenged the transcript on the ground it was not an accurate reflection of the interview.

taken in violation of *Miranda* and the trial court erred by not suppressing them.[5] *See State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983).

¶14 We must next determine whether the error requires reversal. When statements should have been suppressed because they were taken in violation of *Miranda*, we review "the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005); *see also State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). The state has sustained its burden here.

¶15 Aside from Drum's confession, the following evidence was presented at trial. N.M., the victim's son and Drum's former roommate, testified that Drum had gone with him to his father's house three or four times while his father had been out of town.

[5]Because we conclude the *Miranda* warnings were inadequate, Drum's waiver of the right to counsel was not knowing and intelligent. *Miranda*, 384 U.S. at 470 ("No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given."). And, because we conclude the statement should not have been admitted on other grounds, we need not address her alternative argument that her confession was involuntary. Even if we were to conclude her statement was involuntary and, for that additional reason, should not have been admitted, the admission of involuntary statements is subject to harmless error analysis. *State v. Gonzales*, 181 Ariz. 502, 512, 892 P.2d 838, 848 (1995), *citing Arizona v. Fulminante*, 499 U.S. 279, 295 (1991).

He stated that when they shared an apartment, Drum asked him to speak to his father about loaning her money to cover her share of the rent.

¶16 Molina testified that on June 18, 2010, Drum sent him a telephonic text message that she and Barber needed money for rent and asked for his assistance.[6] After Molina and Cota agreed to help, Drum and Barber picked them up in Benson and the four of them stayed the night at Drum and Barber's apartment in Tucson. Drum told Molina and Cota that she wanted to rob houses and that "[she] kn[e]w this guy's house and his dad lives there." They all agreed that any stolen property would be sold and the proceeds would be divided among them. The next day as the four drove around looking for houses to burglarize, Drum guided them to the victim's house.

¶17 A witness later observed Molina and Cota carrying electronic equipment as they were running from the victim's residence and attempting to get into a green vehicle occupied by two females near the crime scene. Shortly thereafter, Walker stopped Drum and Barber after observing them in Barber's green Honda Civic near the victim's residence.

¶18 Although Drum's confession was strong evidence of guilt, we conclude the error in its admission was harmless in light of the other, overwhelming, evidence of guilt. *See State v. Bass*, 198 Ariz. 571, ¶ 45, 12 P.3d 796, 807 (2000).

[6]Molina and Cota were reluctant, uncooperative witnesses. And although their trial testimony in some respects was unclear and ambiguous, both were impeached with their prior statements to investigating detectives that explicitly implicated Drum in the crime.

Disposition

¶19 For the reasons set forth above, Drum's conviction and sentence are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge