IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DANIEL ENRIQUE GARCIA SAENZ, *Appellant*.

No. 1 CA-CR 16-0252
FILED 5-22-2018

Appeal from the Superior Court in Maricopa County
No. CR2012-007865-006
The Honorable Danielle J. Viola, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Eric Knobloch
Counsel for Appellee

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Kenton D. Jones joined.

M O R S E, Judge:

¶1 Daniel Enrique Garcia-Saenz ("Defendant") appeals his conviction for various crimes stemming from a home invasion. He challenges the superior court's denial of his motion to suppress the statements he made to officers before receiving a *Miranda*[1] warning. He also claims his right to protection from double jeopardy was violated. For the following reasons, we affirm in part and vacate in part.

FACTS AND PROCEDURAL HISTORY

¶2 On June 22, 2008, Phoenix Police Captain Shore and Phoenix Police Officer Esperum heard numerous rounds of gun fire and drove, in separate vehicles, toward the sound to investigate. As the officers drove into the neighborhood where the shots came from, a red Mustang and a red SUV drove out. Both officers drove through the neighborhood before Esperum left to find the vehicles he had just seen.

¶3 Captain Shore drove through the neighborhood a second time and parked his vehicle after noticing spent bullet casings on the ground. A neighbor told Shore that a red SUV was involved and identified the house where the shots were fired. Shore radioed this information to Officer Esperum. After two additional patrol officers arrived, Shore looked through a broken window and saw a man lying face down on the ground inside the house. He and the other officers broke through the front door and determined the man was dead.

¶4 Officer Esperum located the red SUV on the interstate and continued to follow it without activating his police lights. Other police officers joined the pursuit but remained back to avoid detection. After the SUV exited the freeway, marked patrol cars activated their lights and followed the SUV into an alley. The SUV briefly stopped before speeding off down the alley. The driver stopped the SUV again, and the driver and

---

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

passengers fled on foot. Before pursuing the subjects, the officers cleared the SUV and found rifles, a handgun, and tactical vests with "Police" placards on them. Evidence of gun-shot residue was found on the driver-side and passenger-side headliner, doors, and mirrors of the SUV. Testing also linked the weapons found in the SUV to the spent shell casings at the scene of the shooting and connected fingerprints and DNA found in the SUV to Defendant.

¶5 The police set up a perimeter and started searching for the suspects with the help of air support and K-9 search teams. One suspect was taken into custody with the assistance of the air unit. A K-9 search team found another suspect in a shed. Both suspects were wearing black battle-dress uniform pants and tactical boots similar to those worn by the SWAT team.

¶6 Another K-9 search team found two tactical style holsters. This team continued searching and found Defendant hiding behind a roof-top cooling unit. After the dog was restrained, Defendant jumped down and was taken into custody. Defendant was wearing black tactical pants, black boots, and a black shirt with "police" written in yellow block letters. A black belt with a "T" written on the buckle and a tactical holster were found on the roof where Defendant had been hiding. A bullet-proof vest, also with a "T" written on it, was recovered from the SUV. During trial, one of the other suspects taken into custody that night testified that the "T" stood for Travieso, which is Defendant's nickname.

¶7 Officer Villa Rodriguez took custody of Defendant from the SWAT team. Villa Rodriguez searched and took photographs of Defendant but did not question Defendant at that time. An investigator tested samples taken from Defendant's hands and found that Defendant "may have discharged a firearm, may have come in contact with items with residue on it or may have been in close proximity to a firearms discharge."

¶8 While the officers were waiting for further instructions, Defendant started talking and asked about the seriousness of the situation. Defendant continued to talk, and the officers did not respond until Sergeant Carlson asked Defendant for his name. Defendant responded and added that he was from Mexico. Carlson complimented Defendant's ability to speak English, and Defendant responded that he had spent time here as a child.

¶9 Because of a concern for officer safety, Sergeant Carlson commented on Defendant's "military style haircut" and asked if Defendant

had been in the military. Defendant said he had not, and then, without further prompting, offered that he had been in trouble and sent to prison, had been deported, and had a girlfriend and children here. Defendant said making a living in Mexico was difficult, and he was hired and trained in Mexico to go after "negative people" but not "positive people." Carlson asked what Defendant meant by "negative people," and Defendant said negative people make money illegally while positive people earn an honest living. Carlson asked if police are positive or negative. Defendant said police are positive, and he would never hurt a police officer. Defendant also suggested that the fact he was unarmed when taken into custody was proof that he would not hurt a police officer. Carlson did not ask Defendant to elaborate about this statement. Instead, Carlson continued focusing on officer safety by asking if Defendant had tactical training. Defendant said he had "some skills."

¶10 Sergeant Carlson reminded Defendant that they were treating him nicely and asked if he would have received the same treatment in Mexico. Defendant said he would not and that he admired police officers. Carlson asked Defendant what type of work he would like to do, and Defendant said he would like to be a police officer. Defendant commented that he was bitten by a police dog during a previous arrest. The officers put Defendant into the back of a police car and waited for further instructions.

¶11 Officer Villa Rodriguez transported Defendant to another staging location. After arriving at the new location, Villa Rodriguez gathered background information from Defendant, including his name and date of birth. During this process, Officer Carver approached Villa Rodriquez and Defendant and stated his disbelief that Defendant was wearing a police uniform. The comment elicited a response from Defendant, and Carver and Defendant had a mutually confrontational conversation**.** After Carver left, Villa Rodriguez continued asking Defendant background information, including a question about the meaning of the tattoo on Defendant's neck.

¶12 Defendant was left in the back of Officer Villa Rodriguez's patrol car with the window down. Officer Mays walked past the patrol car and thought Defendant asked a question. Mays stopped and asked what Defendant said, and Defendant responded, "Nothing. There's nothing to say. You got us man. You got us." Mays did not respond and immediately documented Defendant's statement on an index card.

¶13 Later, Officer Villa Rodriguez transported Defendant to the police station. As they were about to leave, Defendant said "you guys

should be glad we are out here" because they make people scared of the police and they only go after negative people. Villa Rodriguez did not respond to this statement, and at no point during the questioning did Villa Rodriguez ask Defendant about that evening's events.

¶14 The State indicted Defendant on ten counts: conspiracy to commit burglary in the first degree, a class 2 felony; conspiracy to commit armed robbery, a class 2 felony; first degree murder, a class 1 dangerous felony; burglary in the first degree, a class 2 dangerous felony; attempted armed robbery, a class 3 dangerous felony; discharge of a firearm at a structure, a class 2 dangerous felony; impersonating a peace officer, a class 4 felony; misconduct involving body armor, a class 4 felony; assisting a criminal syndicate, a class 4 felony; and misconduct involving weapons, a class 4 felony.

¶15 Before the hearing, Defendant filed a motion to suppress the statements he made to officers after he was taken into custody. The parties agree that Defendant was in custody and had not been given a *Miranda* warning when the statements were made. Defendant, however, argues that he was being interrogated when he made the statements and that some of the conversations never occurred. After a hearing on the motion, the superior court granted the motion as to Defendant's statements to Officer Carver and denied the motion as to Defendant's statements to the other officers.

¶16 After a 51-day trial, the jury found Defendant guilty and also found aggravating factors for conspiracy to commit burglary in the first degree; conspiracy to commit armed robbery; burglary in the first degree; impersonating a peace officer; misconduct involving body armor; and assisting a criminal syndicate. The jury was unable to reach a verdict on the charges of first degree murder; attempted armed robbery, and discharge of a firearm at a structure. Defendant later plead guilty to an amended charge of second degree murder, a class 1 felony; and the remaining charges were dismissed. The superior court sentenced Defendant to concurrent prison terms of 23 years for the conspiracy convictions, 16 years for second degree murder, 21 years for burglary in the first degree, and 7.5 years for assisting a criminal syndicate. The superior court also sentenced Defendant to 7.5 years imprisonment for impersonating a peace officer and misconduct involving body armor, to be served concurrent to each other and consecutive to the other sentences.

¶17 Defendant timely appealed his convictions, other than the conviction for second degree murder. We have jurisdiction pursuant to

Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033.

DISCUSSION

¶18 Defendant argues (1) the superior court erred by denying his motion to suppress statements made by Defendant to officers before he was given a *Miranda* warning and (2) his conspiracy convictions violate his right against double jeopardy.

I. *Miranda* Warning

¶19 We review the superior court's ruling on a suppression motion for abuse of discretion, consider only the evidence presented at the suppression hearing, and view that evidence "in a light most favorable to sustaining the trial court's ruling." *State v. Adair*, 241 Ariz. 58, 60, ¶ 9 (2016). While we must defer to the superior court's factual findings, we conduct a de novo review of its legal conclusions. *Id*.

¶20 The Fifth Amendment of the United States Constitution protects all persons from compulsory self-incrimination. Before conducting a custodial interrogation, law enforcement must inform the person of this right by providing a *Miranda* warning. *Miranda*, 384 U.S. at 478-79; *State v. Maciel*, 240 Ariz. 46, 49, ¶ 10 (2016). The parties do not dispute that Defendant was in custody and had not been given *Miranda* warnings when he made the statements. We, however, must determine whether Defendant's statements were made in response to interrogation.

¶21 An interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). An officer's intent may be relevant when determining if an officer should have known the words and actions were reasonably likely to elicit a response. *Id.* at 301 n.7.

A. Spontaneous, Voluntary Statements

¶22 Defendant's statements made without prompting by an officer's words or actions are not the result of an interrogation. *See State v. Carter*, 145 Ariz. 101, 106-07 (1985) (finding spontaneous, voluntary statements are not a violation of *Miranda* if not made in response to police interrogation); *State v. Vickers*, 159 Ariz. 532, 539 (1989) (finding unprompted statements are admissible). Many of Defendant's statements

were voluntary and not prompted by officers, including the statements he made while waiting at the back of the police car, while Officer Villa Rodriguez transported him to the police station, and when Officer Mays passed by the window.[2] Because these statements were voluntary, Defendant's *Miranda* rights were not violated, and the statements were admissible.

B. Gathering Background Information

¶23 Additionally, courts have generally found that routine gathering of background information is not an interrogation. *State v. Jeney*, 163 Ariz. 293, 297 (App. 1989). Officer Villa Rodriquez asked Defendant for his name, date of birth, and about the tattoo on his neck. The trial court determined that Defendant's responses were admissible because the purpose of the questions was to gather background information and not an interrogation. We agree.

C. Interrogation Statements

¶24 Sergeant Carlson's questioning of Defendant presents a different scenario. Carlson's questions regarding Defendant's military background, tactical training, and the meaning of "positive" and "negative" people, while not directly related, had a contextual relationship to the alleged crime. Because of this relationship, the questions could reasonably be expected to lead to incriminating statements, constituting an interrogation. Thus, the trial court erred in finding that Defendant's statements to Carlson did not result from interrogation.

¶25 The State argues that, even if these statements were the result of an interrogation, the statements are admissible based upon the public safety exception to *Miranda*. A response to questions that are necessary to ensure an officer's own safety or the safety of the public is admissible, even without a *Miranda* warning. *State v. Leteve*, 237 Ariz. 516, 522, ¶ 9 (2015) (quoting *New York v. Quarles*, 467 U.S. 649, 659 (1984)). An "objectively reasonable need to protect the police or the public from any immediate danger" outweighs the privilege against self-incrimination. *Quarles*, 467 U.S. at 657, 659 n.8; *see also United States v. Carrillo*, 16 F.3d 1046, 1049-50 (9th Cir. 1994) (finding exception for a question regarding possession of drugs

[2] Officer Mays' request that Defendant repeat what he said does not alter the voluntariness of the statement. *Cf. State v. Amaya-Ruiz*, 166 Ariz. 152, 165 (1990) (noting that exhortations to tell the truth do not render a statement involuntary).

or needles on the suspect prior to search); *In re Roy L.*, 197 Ariz. 441, 446, ¶ 15 (App. 2000) (finding exception for a question regarding gun possession after arrest). As the United States Supreme Court stated:

> We decline to place officers [] in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Quarles, 467 U.S. at 657-58. This narrow exception, however, does not allow officers to ask "questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-59.

¶26 At the time of Sergeant Carlson's questioning, Defendant had just been arrested wearing tactical style clothing, the arrest was in connection with a fatal shooting, and the K-9 and air teams were actively searching for additional suspects. To the extent that Carlson asked questions designed to assess whether Defendant and the additional suspects posed a potential safety risk to his officers, such questions could fall within the public safety exception. *See People v. Laliberte*, 615 N.E.2d 813, 821 (Ill. App. 1993) (applying public safety exception to Miranda for questions about possible accomplices based upon "concern for the safety of the search party"); *see also Commonwealth v. Clark*, 730 N.E.2d 872, 884–85 (Mass. 2000) (finding public safety exception applied to questions about whether a defendant was alone after a gun battle); *Hill v. State*, 598 A.2d 784, 786 (Md. App. 1991) (applying public safety exception to questions about location of missing armed-robbery suspect who fled from police); *State v. McKessor*, 785 P.2d 1332, 1337 (Kan. 1990) (applying public safety exception to a question about location of robbery suspect's companion).

¶27 However, Defendant was already arrested, handcuffed, and searched, and Sergeant Carlson testified that he did not ask any questions about the fugitives or other suspects. In this situation, there is room for disagreement about the application of the public safety exception. Because the superior court did not address this issue below, we decline to resolve

such close questions. *See State v. Steinle, ex rel. Moran*, 239 Ariz. 415, 419, ¶ 14 (2016) (criticizing appeals court for addressing Rule 403 issues "in the first instance" because the issues "are highly contextual").

D. Harmless Error

¶28 Nevertheless, even if we assume that the public safety exception does not apply, and Defendant's statements to Sergeant Carlson were admitted in error, the error is harmless. The improper admission of a statement is subject to harmless error analysis. *State v. Eastlack*, 180 Ariz. 243, 251 (1994). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588 (1993). "The question is whether the appellate court can say beyond a reasonable doubt that the jury would have found the defendant guilty without the evidence." *State v. Montes*, 136 Ariz. 491, 497 (1983).

¶29 The evidence in the record established beyond a reasonable doubt that admitting Defendant's statements did not affect the verdict. Defendant's conviction was supported by overwhelming evidence, including his fingerprints in the SUV, his DNA on a facemask found in the SUV, his initial on the belt (found on the roof where he was hiding), and a bullet-proof vest (found in the SUV). Additionally, he was taken into custody on a roof wearing police tactical clothing, evidence of gun powder residue was found on his hands, and another participant in the invasion testified against Defendant. Further, Defendant's statements to Officers Villa Rodriguez and Mays, which are admissible, provide additional evidence supporting the conviction.[3] Based upon the substantial evidence presented at trial, we find the error was harmless.

II. Conspiracy Convictions

¶30 Defendant also argues that his convictions for conspiracy to commit burglary in the first degree and conspiracy to commit armed robbery violated A.R.S. § 13-1003(C), which prohibits a defendant from

[3] Also, many of Defendant's statements during his discussion with Sergeant Carlson exceeded the scope of Carlson's questions and comments. At least some of his statements were voluntary and either spontaneous or not-responsive to the questions, and a portion of his statements would likely have been admissible as not prompted by interrogation. However, we do not need to engage in such a statement-by-statement analysis, because any error was undoubtedly harmless.

being convicted of multiple conspiracies that are part of the same agreement. The State concedes Defendant's multiple conspiracy convictions were in error. We agree.

¶31 Defendant and the State request this court merge the two conspiracy convictions and vacate the conviction for conspiracy to commit armed robbery. Accordingly, we merge and modify the convictions to reflect a conviction for conspiracy to commit burglary in the first degree and armed robbery, and we vacate the conviction for conspiracy to commit armed robbery.

CONCLUSION

¶32 For the foregoing reasons, we affirm the trial court's denial of Defendant's motion to suppress; we modify the conspiracy convictions; and we vacate the conviction for conspiracy to commit armed robbery.

AMY M. WOOD • Clerk of the Court
FILED: AA