IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARIA LILIANA SALLARD,
Appellant.

No. 2 CA-CR 2018-0272
Filed October 11, 2019

Appeal from the Superior Court in Cochise County
No. CR201500359
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Casey D. Ball, Assistant Attorney General, Phoenix
Counsel for Appellee

Robert J. Zohlmann, Tombstone
Counsel for Appellant

OPINION

Chief Judge Vásquez authored the opinion of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Maria Sallard was convicted of conspiracy to commit transportation of marijuana for sale, transportation of marijuana for sale, possession of drug paraphernalia, and making a false statement to a law enforcement agency. The trial court sentenced her to concurrent prison terms, the longest of which are 4.25 years. On appeal, Sallard argues the court erred by denying her motion to suppress the data collected from her cell phone during a search after she had invoked her rights pursuant to *Miranda*.[1] She also argues the court erred by considering extrinsic evidence from her codefendant's suppression hearing without permitting her to confront and cross-examine the witnesses. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to affirming Sallard's convictions. *See State v. Miles*, 211 Ariz. 475, ¶ 2 (App. 2005). One evening in July 2014, Detective Jeffrey Richardson saw a white truck being driven by Sheri Hogan with Sallard as a passenger. The truck had "two [old] bales of hay in the . . . pickup bed of the vehicle." Richardson followed the truck and observed speed and lane-usage violations. He also noticed that Hogan was "watching [him] very closely in the rear view or side view mirrors" and that Sallard was "moving stuff around in the back seat." Because of the traffic violations, Richardson "activated [his traffic] equipment" and stopped the truck.

¶3 As Richardson approached the truck, he noticed Sallard had her cell phone in her hand and asked her to put it away. He then asked Hogan and Sallard for their information—Sallard provided a false name, which she later admitted. Richardson then asked Hogan to step out of her

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

truck so that he could write a warning for the traffic violations. While writing the warning, Richardson asked Hogan about her whereabouts for the day. As Hogan responded, Richardson observed her "getting nervous, pacing back and forth," and "making gestures" toward Sallard. At that point, Richardson returned to the truck, where he observed Sallard using her cell phone again and "moving around in the front seat." When Richardson questioned Sallard about her whereabouts, she gave a different response than Hogan. Richardson returned to Hogan and asked her again about where the two had been and where they were going that day, and Hogan changed her previous account.

¶4 Richardson continued to write Hogan's warning but requested a canine unit based on "reasonable suspicion that criminal activity was afoot." When the canine arrived, it conducted "an exterior sniff of the vehicle," and, after the canine had alerted, Richardson conducted a probable-cause search. At that time, Officer Paul Barco and Detective Clemente Rodriguez had arrived on scene and were assisting Richardson with the search. In the truck, they found brown packages containing "almost 50 pounds" of marijuana. Sallard was placed under arrest, read her rights pursuant to *Miranda*, and agreed to speak with Barco. But, at some point during the interview, Sallard became "unwilling to answer any more questions," and Barco notified Richardson and Rodriguez that Sallard had "invoked" and that he had stopped all questioning. Sallard was then transported to the Douglas Police Department.

¶5 During booking, Richardson directed Rodriguez "to request consent [from Sallard] to search [her] phone." Rodriguez was aware Sallard "had invoked" and understood it to mean that "she didn't want to answer questions." Sallard was brought from her holding cell and told that "she [could] g[i]ve permission . . . [to] extract the data from the cell phone" and it "would go with her" once she was able to leave, or he "would have to ask for a search warrant" and "the cell phone would . . . be placed into evidence until [he] drafted a search warrant." Sallard was presented with a consent form, read and agreed she understood the document, and subsequently signed it.

¶6 A grand jury indicted Sallard for conspiracy to commit transportation of marijuana for sale, conspiracy to commit possession of marijuana for sale, transportation of marijuana for sale, possession of marijuana for sale, possession of drug paraphernalia, and making a false statement to a law enforcement agency. At trial, some evidence gleaned from Sallard's cell phone was introduced during her cross-examination by the state, and she was convicted and subsequently sentenced as described

above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motion to Suppress

¶7 Sallard argues the trial court erred by denying her motion to suppress the contents of her cell phone because it was searched after she had invoked her rights to remain silent and to counsel. We review the denial of a motion to suppress for an abuse of discretion, *State v. Cornman*, 237 Ariz. 350, ¶ 10 (App. 2015), but we review legal and constitutional issues de novo, *State v. Aguilar*, 228 Ariz. 401, ¶ 12 (App. 2011). "In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8 (App. 2008).

¶8 Before trial, Sallard filed a motion to suppress data and information obtained from her cell phone, reasoning that her consent to search the phone was involuntary as "obtained in violation of her rights under the Fourth, Fifth and Sixth Amendments." Specifically, she argued that Rodriguez had "initiat[ed] question[ing]" by asking her for consent to search when she had previously "invoked her rights to silence and to counsel." And "[b]ecause the search was conducted in violation" of her rights to silence and counsel, Sallard maintained that her consent was involuntary and the search was "presumptively unreasonable." In response, the state argued that the cell phone data was "not testimonial [and] thus not subject to Fifth Amendment or voluntariness scrutiny." It reasoned that the protections of the Fifth Amendment only apply to "acts which are communicative and testimonial" and concluded "Fifth] Amendment *Miranda*, and voluntariness simply do not apply."

¶9 At the evidentiary hearing, Barco testified that Sallard had understood she had the right to have counsel present during questioning, but at no time requested counsel. Additionally, Rodriguez testified that he had been informed Sallard invoked her "rights," but understood it to mean simply that "she did not want to answer any questions," not that she was also requesting counsel. He thus requested her consent for the search. The trial court denied the motion as to the cell phone search because "the consent [was] valid." The court reasoned that Sallard's statement, "I don't want to answer any more questions," was solely an invocation of her Fifth Amendment right to remain silent and not an invocation of her Sixth Amendment right to counsel. The court further explained that the Fifth Amendment right to remain silent "does not prevent law enforcement from

asking for consent under the Fourth Amendment to search the cell phone, and if they obtain it from acting upon that consent." We agree.

¶10 Before any custodial interrogation, a suspect must be advised of her rights as set forth in *Miranda*. *State v. Kennedy*, 116 Ariz. 566, 568-69 (App. 1977); *see also Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). *Miranda* provides a procedural safeguard that notifies the suspect: (1) she has a right to remain silent, (2) anything she says may be used against her in court, (3) she has a right to an attorney, and (4) counsel will be provided prior to questioning if she cannot afford one. *State v. Carlson*, 228 Ariz. 343, ¶ 8 (App. 2011).

¶11 The Fifth Amendment right to remain silent protects a person from being compelled to "provide the [s]tate with evidence of a testimonial or communicative nature," *Schmerber v. California*, 384 U.S. 757, 761 (1966); *see also* U.S. Const. amend. V, because "[t]estimonial or communicative evidence 'reveals the subjective knowledge or thought processes of the subject,'" *State v. Lee*, 184 Ariz. 230, 233 (App. 1995) (quoting *State v. Theriault*, 144 Ariz. 166, 167 (App. 1984)). "A consent to a search is not the type of incriminating statement toward which the fifth amendment is directed," *United States v. Lemon*, 550 F.2d 467, 472 (9th Cir. 1977), because "[i]t is not in itself 'evidence of a testimonial or communicative nature,'" *United States v. Henley*, 984 F.2d 1040, 1042-43 (9th Cir. 1993) (quoting *Lemon*, 550 F.2d at 472); *cf. United States v. Watson*, 423 U.S. 411, 424 (1976) (person in custody may give voluntary consent). And "the right to remain silent is separate and distinct from the right to counsel." *State v. Strayhand*, 184 Ariz. 571, 585 (App. 1995). To invoke her Fifth Amendment right to counsel, the defendant must make "a statement that shows a desire for an attorney during custodial interrogation." *State v. Thornton*, 172 Ariz. 449, 453 (App. 1992). The Sixth Amendment right to counsel generally, by contrast, "does not attach until after the initiation of formal charges." *Moran v. Burbine*, 475 U.S. 412, 431 (1986); *see also* U.S. Const. amend. VI.

¶12 Sallard contends that "the rights recognized in *Miranda* are two; a Fifth Amendment right to remain silent and a Sixth Amendment right to enjoy the assistance of counsel."[2] She relies on *State v. Britain*, 156

[2] Sallard also attempts, as we understand it, to make a Fourth Amendment argument regarding the search of her cell phone. However, she failed to develop this argument on appeal, *see* Ariz. R. Crim. P. 31.10(a)(7) (opening brief must contain argument "with supporting reasons

Ariz. 384 (App. 1988), to support her assertion that the request for consent to search her cell phone "was an interrogation" and a violation of her Fifth and Sixth Amendment rights.

¶13 In *Britain*, this court determined that the defendant's statements admitting guilt to the officer should have been suppressed because "a request for a consent to search, after the right to counsel has been invoked[is an] interrogation and the serving of a search warrant [is] conduct 'reasonably likely to elicit an incriminating response.'" 156 Ariz. at 386 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). As such, we reversed the defendant's convictions, in part, because the defendant had invoked his right to counsel and the investigating officer nevertheless requested the defendant's consent to search his home. *Id.* When he refused, the officer handed him a copy of a search warrant, and the defendant attempted to elicit "a deal" by making inculpatory statements. *Id.*

¶14 *Britain*, however, is distinguishable because, unlike the defendant in that case, Sallard did not invoke her right to counsel. *Britain* solely discusses a defendant's invocation of her right to counsel and a subsequent request for consent as an interrogation, not the right to remain silent. *Id.* Sallard points to no controlling authority that would direct us to apply *Britain* to a situation in which a defendant solely invoked her right to remain silent. Thus, we find *Britain* unpersuasive.

¶15 Additionally, Sallard's reliance on the Fifth and Sixth Amendments in this context is misplaced. Specifically, as noted above, Sallard did not invoke her right to counsel under the Sixth Amendment and that right does not otherwise attach until formal charges have been initiated. *See Moran*, 475 U.S. at 431. Notably, Sallard was not indicted until nearly a year after the incident. She also did not invoke her right to counsel under the Fifth Amendment, as the trial court correctly pointed out, as no evidence was presented at the evidentiary hearing that Sallard had requested counsel at any time. As to Sallard's Fifth Amendment right to remain silent, she is only protected from "provid[ing] the [s]tate with evidence of a testimonial or communicative nature," *Schmerber*, 384 U.S. at 761, and a request for consent to search is neither testimonial nor communicative, "even though the derivative evidence uncovered may itself be highly incriminating," *Henley*, 984 F.2d at 1042. Rodriguez requested consent to search from Sallard, explaining the implications of providing or

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for each contention"), and we consider it waived, *see State v. Bolton*, 182 Ariz. 290, 298 (1995) (failure to argue claim on appeal constitutes waiver).

refusing her consent, and she agreed she had "no problem" with giving consent. Despite the potential for "highly incriminating" evidence to be discovered on Sallard's cell phone, *id.*, the request for consent itself did not amount to a Fifth Amendment violation, *see Lemon*, 550 F.2d at 472. Accordingly, the court did not abuse its discretion in denying Sallard's motion to suppress. *See Cornman*, 237 Ariz. 350, ¶ 10.

Confrontation Clause

¶16 Sallard next argues the trial court erred when it considered extrinsic testimony presented at her codefendant's suppression hearing, "thereby denying her right to confront and cross-examine witnesses." Sallard admits that this issue was not raised below. Accordingly, the issue is forfeited for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Under this standard, the defendant must show error and, if it exists, that the error is fundamental. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *Id.* Additionally, the defendant must make a showing of prejudice if alleging error under factors one and two. *Id.*

¶17 At the evidentiary hearing, the trial court stated:

> And let me note that I do have the file in the case of the codefendant, State of Arizona against . . . Hogan . . . . And not that it's binding in this matter, but I did read my decision in the matter of . . . Hogan's motion to suppress. So I reminded myself about what I said then.

And in making its ruling the court stated, "And without going into all the things, and I believe I discussed all of them or at least most of them in my written ruling in . . . Hogan's case, I'll just say that I find that the stop was justified." The court did not refer to extrinsic evidence or testimony in its ruling.

¶18 Sallard argues the trial court "deprived . . . her [of the] basic constitutional right to confront and cross-examine" witnesses when it "considered" the codefendant's file "in reaching [its] decision to not grant . . . Sallard's motion to suppress." She contends the court "referr[ed] to extrinsic documents, testimony and a ruling made by [it] in a separate suppression hearing" and did not provide her the opportunity to be present

and cross-examine the witnesses. *See Davis v. Washington*, 547 U.S. 813, 821 (2006) (Confrontation Clause provides constitutional right for accused to confront witness's testimonial statement).

¶19 Sallard, however, has not met her preliminary burden of establishing the trial court's mere reference to her codefendant's case constituted error. *See Escalante*, 245 Ariz. 135, ¶ 21. Based on the record before us, the court's comments about the codefendant's case were not made in error; it was simply a commentary on what had occurred in the companion case. Sallard was afforded the opportunity to cross-examine the witnesses at the suppression hearing, and there is no showing the court considered any extrinsic evidence from her codefendant's hearing in making its ruling to deny Sallard's motion to suppress. *See Davis*, 547 U.S. at 821. Thus, no error—fundamental or otherwise—occurred. *See Escalante*, 245 Ariz. 135, ¶ 21.

Disposition

¶20 For the reasons stated above, we affirm Sallard's convictions and sentences.