FILED BY CLERK
MAR 12 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. MELISSA CATHERINE WARD, Appellee.	)	2 CA-CR 2012-0375 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR201100540

Honorable Peter J. Cahill, Judge

REVERSED AND REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 The state appeals from the trial court's order granting appellee Melissa Ward's motion to suppress evidence. It contends the court erred in concluding a police officer's conversation with Ward constituted custodial interrogation requiring Ward to

have been advised of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). We reverse and remand.

¶2 "In reviewing the grant of a motion to suppress, we view the evidence presented at the evidentiary hearing[,] and any reasonable inferences from that evidence, in the light most favorable to upholding the trial court's order." *State v. Garcia-Navarro*, 224 Ariz. 38, ¶ 2, 226 P.3d 407, 408 (App. 2010). In June 2011, Payson Police Department Sergeant Jason Hazelo saw Ward and a male walking on the side of the road. The couple was arguing, and Hazelo saw the male "put his hands on [Ward]'s shoulders" and "sp[i]n her around" to cause her to begin walking in the opposite direction. He also saw Ward "put her hands up" as if to strike her companion. Although the couple "end[ed] up hugging," Hazelo, who was in plainclothes, had already requested backup in accordance with departmental procedures for a "domestic situation."

¶3 Hazelo approached the pair, "pulled [his] shirt up" to display his badge, identified himself as a police officer, and asked if they would speak with him. As he did so, two uniformed police officers arrived in marked patrol cars. After Ward and her companion agreed to talk to him, Hazelo separated them, asked for identification, and spoke to them to ensure "there wasn't a domestic or physical" altercation and to "inquir[e] if everything was okay." He determined the two had argued because Ward wanted to retrieve her car, and the male believed she should not do so "because she had already been drinking." Ward agreed she should not be driving. After determining he was "not going to arrest someone," Hazelo asked Ward if "she had anything on her" and, in reference to a canister attached to her necklace, asked "what that was for." In

response, Ward pulled the necklace off her neck, breaking it, handed the canister to Hazelo, and stated it contained marijuana. Hazelo confiscated the canister and its contents and "allowed [Ward] to leave."

¶4 Ward was charged with possession of marijuana. She moved to suppress "all information derived from the stop," arguing Hazelo lacked "any legal basis to stop and question her." After an evidentiary hearing,[1] the trial court granted the motion to suppress, concluding Hazelo's contact with Ward had been proper but that Ward had been "in custody" when Hazelo asked her about the necklace and that her statement in response "was not voluntary" because she had not been given the *Miranda* warnings. The court then granted the state's motion to dismiss the charge without prejudice, and this appeal followed. *See* A.R.S. § 13-4032(6) (state may appeal order "granting a motion to suppress the use of evidence").

¶5 The state argues the trial court erred in determining that Ward had been in custody and, thus, that Hazelo had been required to give her *Miranda* warnings. "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). A police officer has authority to detain and question a person without administering *Miranda* warnings if the officer has a reasonable, articulable suspicion of criminal activity. *State v. Pettit*, 194 Ariz. 192, ¶ 15, 979 P.2d 5, 8 (App. 1998). *Miranda* warnings are required only when a

[1]Ward was not present at the evidentiary hearing; the trial court found her absence was voluntary.

person is subjected to "custodial interrogation." *Miranda*, 384 U.S. at 444; *see also Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (*Miranda* warnings required only after person taken into custody or freedom otherwise "significantly restrained"). And "[n]eutral, nonaccusatory questioning in furtherance of a proper preliminary investigation is permissible under *Miranda*." *Pettit*, 194 Ariz. 192, ¶ 16, 979 P.2d at 8; *see also Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (police may ask general questions of person not in custody without giving *Miranda* warnings).

¶6 The objective test used to determine whether an interrogation is custodial "is whether under the totality of the circumstances a reasonable person would feel that he was in custody or otherwise deprived of his freedom of action in a significant way." *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985); *see also State v. Spreitz*, 190 Ariz. 129, 143, 945 P.2d 1260, 1274 (1997) (test is "whether the person's freedom of movement is restricted to the extent it would be tantamount to formal arrest"). In making this determination, courts may consider whether objective indicia of arrest are present; the site of the questioning; the length and form of the investigation; and whether the investigation had focused on the accused. *State v. Stanley*, 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991); *see also Stansbury v. California*, 511 U.S. 318, 324-25 (1994) (officer's knowledge or beliefs bear upon custody issue only if conveyed to individual questioned and affect how reasonable person would gauge breadth of freedom of action). Additionally, in the context of roadside investigative questioning, the interrogation becomes custodial for purposes of *Miranda* only when "police have both reasonable grounds to believe that a crime has been committed and reasonable grounds to believe

that the person they are questioning is the one who committed it." *Petitt*, 194 Ariz. 192, ¶ 15, 979 P.2d at 8.

¶7 We first address the state's argument that the trial court abused its discretion in granting Ward's motion to dismiss because it "relied on Ward's supposed subjective perspective of custody" instead of relying on objective factors. *See Stanley*, 167 Ariz. at 523, 809 P.2d at 948 ("Whether one is in custody is determined objectively."); *see also State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 112 (App. 2010) (court abuses discretion when it "predicates its decision on an incorrect legal standard"). The court stated that "it's clear to me that at least from the subjective perspective, [Ward] did not feel she was free to just leave." In light of the record, however, it is plain the court did not intend to suggest it had relied on Ward's subjective belief. Ward did not testify at the hearing; thus, the court had no basis from which to determine that belief. And the court listed several objective factors in support of its ruling, specifically that there were multiple police officers present and that Ward had been separated from her companion.

¶8 But we agree with the state that there were insufficient indicia to warrant a finding that Ward had been in custody for *Miranda* purposes. Hazelo initially asked if Ward and her companion would speak with him, and they agreed. *See State v. Wyman*, 197 Ariz. 10, ¶ 8, 3 P.3d 392, 395 (App. 2000) (finding encounter consensual when "officer did not draw his gun or otherwise physically compel a response . . . [and] did not demand that appellant . . . speak with him; instead, he asked, albeit in a loud, forceful manner") (citation omitted). Ward was not placed in handcuffs or told she was not free

to leave. *See State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983) (objective indicia of arrest include use of handcuffs, display of weapon, and subjecting defendant to booking process). Nor was there any indication Ward had attempted to leave and was prevented from doing so; indeed, Hazelo testified that Ward had been extremely cooperative. She was not threatened in any fashion, and none of the officers drew their weapons. *See id.* The questioning took place in public and, to the extent it was focused on the possibility Ward had contraband, the questioning was extremely brief and nonaccusatory. *See Stanley*, 167 Ariz. at 523, 809 P.2d at 948 (location relevant to custody determination); *State v. Thompson*, 146 Ariz. 552, 556, 707 P.2d 956, 960 (App. 1985) (brief and "investigatory rather than accusatory" police interview tended to show defendant was not in custody). Indeed, Ward was not detained even after she handed Hazelo a canister she admitted contained marijuana. *See United States v. Galceran*, 301 F.3d 927, 930-31 (8th Cir. 2002) (whether suspect arrested after questioning relevant to custody determination). "General on-the-scene questioning" as part of the fact-finding process does not trigger the necessity for *Miranda* warnings, *Miranda*, 384 U.S. at 477, because "[t]he warning mandated by *Miranda* was meant to preserve the privilege during 'incommunicado interrogation of individuals in a police-dominated atmosphere,'" *Illinois v. Perkins*, 496 U.S. 292, 296 (1990), *quoting Miranda*, 384 U.S. at 445.

¶9 We find no authority suggesting that the presence of multiple police officers in a public area, standing alone, transforms general investigatory questions into custodial interrogation. *See United States v. Nishnianidze*, 342 F.3d 6, 12, 14 (1st Cir. 2003) (finding interrogation noncustodial when questioning conducted by three officers);

United States v. Quinn, 815 F.2d 153, 157 (1st Cir. 1987) (presence of five officers could not lead "to a reasonable inference that a *de facto* arrest had occurred"). Although those officers initially spoke to Ward, there is no evidence she provided them with any incriminating information. And there is no evidence that they were in such close proximity to Ward during her conversation with Hazelo such that she would not have felt free to leave. Nor do we agree with the trial court that the fact Hazelo had separated Ward from her companion before speaking to her warrants a finding that she was in custody absent any other meaningful indicia of custody. *See, e.g., United States v. Cavazos*, 668 F.3d 190, 194 (5th Cir. 2012) (suspect in custody when handcuffed and separated from family while "more than a dozen officers entered and searched his home" and suspect "interrogated by two federal agents for at least an hour"); *United States v. Uzenski*, 434 F.3d 690, 705 (4th Cir. 2006) (interrogation of police officer noncustodial although officer separated from chief of police who had accompanied him to law enforcement office); *United States v. Griffin*, 7 F.3d 1512, 1519 (10th Cir. 1993) (suspect in custody when separated from friend and taken to "small private office within a police-controlled area of the airport" with "no exit except around the police").

¶10 Ward nonetheless argues that the trial court's suppression order must be affirmed because, despite the court's contrary finding, Hazelo had no basis to stop and question her because "[h]aving a verbal argument is not a crime" and the argument had ended before Hazelo made contact. *See State v. King*, 213 Ariz. 632, ¶ 8, 146 P.3d 1274, 1277 (App. 2006) ("[W]e will uphold a trial court's ruling if the court reached the correct result even though based on an incorrect reason."). Police officers may make limited

investigatory stops if they have an articulable, reasonable suspicion that a suspect is involved in criminal activity based on the totality of the circumstances. *State v. Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d 266, 271-72 (App. 2007). Police officers are not required to give *Miranda* warnings during that investigative detention. *See Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) ("The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that [investigatory] stops are subject to the dictates of *Miranda*."); *see also Spreitz*, 190 Ariz. at 143-44, 945 P.2d at 1274-75 (relying in part on *Berkemer* to hold investigative traffic stop not subject to *Miranda*).

¶11 Even assuming, without deciding, that Ward did not consent to speak to Hazelo, the officer clearly had a proper basis to speak with her.[2] As the trial court correctly noted, Hazelo had witnessed several potential crimes in the interaction between Ward and her companion, including assault and disorderly conduct. *See generally* A.R.S. §§ 13-1203(A)(2), (3); 13-2904(A)(1), (2). Thus, although the argument apparently had ended before Hazelo arrived, he was fully justified in approaching the couple to investigate those possible crimes.

¶12 Finally, we find unavailing Ward's argument that her encounter with Hazelo was unlawful because his questions about contraband, her necklace, and the

[2]Police officers "'do not violate the Fourth Amendment by merely approaching an individual on the street or [in] another public place.'" *In re Ilono H.*, 210 Ariz. 473, ¶ 8, 113 P.3d 696, 698 (App. 2005), *quoting Bostick*, 501 U.S. at 434. Further, officers may question citizens without implicating Fourth Amendment protections "'so long as the officers do not convey a message that compliance with their requests is required.'" *Id.*, *quoting Bostick*, 501 U.S. at 437.

attached canister improperly exceeded the scope of the investigation justified by the reason for the stop—a possible incident of domestic violence. Ward cites no authority in support of that argument, and we find none suggesting that Hazelo was not permitted to ask those questions as part of the investigatory stop. His questions did not appreciably extend the duration of the encounter and, as we noted above, were nonaccusatory. *See Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.").

¶13 For the reasons stated, we reverse the trial court's order granting Ward's motion to suppress and remand the case to the trial court for further proceedings consistent with this decision.

/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