IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RUBEN ANTHONY PEREZ,
Appellant.

No. 2 CA-CR 2013-0106
Filed December 9, 2013

Appeal from the Superior Court in Gila County
No. S0400CR201200031
The Honorable Robert Duber II, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Joseph L. Parkhurst, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Ruben Perez appeals from his conviction of use of methamphetamine, a dangerous drug. He argues the trial court erred by denying his motion to suppress his statements related to and the results of a urinalysis test—which was administered while he was on juvenile probation—that led to his being charged. We affirm.

¶2 Perez was on juvenile probation in July 2011 when he was required to submit a urine specimen for drug testing. The test was positive for methamphetamine. Although Perez's probation officer recommended that Perez's probation be revoked, the juvenile court instructed the probation office to refer the case to the county attorney because Perez would turn eighteen before the matter could be adjudicated. Perez subsequently was indicted for use of a dangerous drug.

¶3 Perez moved to suppress the urinalysis test results and "statements obtained" during the test and to dismiss the charge, arguing that his being required to submit to drug testing that was later used as evidence in a criminal prosecution violated his Fifth Amendment right against self-incrimination. After an evidentiary hearing, the trial court denied the motion. After a jury trial, Perez was convicted as charged and sentenced to a 2.5-year prison term. This appeal followed.

¶4 On appeal, Perez repeats his claim that being compelled to provide a urine sample violated his Fifth Amendment right against self-incrimination and that the court thus erred in denying his motion to suppress. In reviewing the denial of a motion to suppress, we view the evidence presented at the suppression

hearing in the light most favorable to upholding the court's ruling; we defer to the court's factual findings but review its legal conclusions de novo. *State v. Brown*, 233 Ariz. 153, ¶ 4, 310 P.3d 29, 32 (App. 2013).

¶5 Additional recitation of the facts is not necessary here. We agree with the state that being compelled to provide a urine sample does not implicate a defendant's Fifth Amendment right against self-incrimination because it is not testimonial. The Fifth Amendment privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 760 (1966), *overruled on other grounds by Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct 1552, 1556 (2013). For example, a blood draw is not testimonial or communicative in nature, and thus the privilege against self-incrimination does not apply. *Id.* at 764-65; *see also State v. Butler*, 231 Ariz. 42, ¶ 10, 290 P.3d 435, 438 (App. 2012) ("[B]lood evidence is not testimonial and therefore is not subject to suppression on a Fifth Amendment voluntariness basis."), *reversed on other grounds by State v. Butler*, 232 Ariz. 84, ¶¶ 6, 21, 302 P.3d 609, 611-12, 614 (2013). The authority cited by Perez is inapposite because it addresses possible Fifth Amendment violations related to evidence that is clearly testimonial. *See, e.g.*, *State v. Eccles*, 179 Ariz. 226, 228-29, 877 P.2d 799, 801-02 (1994) (defendant may not be compelled to answer incriminating questions as condition of probation); *In re Miguel R.*, 204 Ariz. 328, ¶¶ 27-33, 63 P.3d 1065, 1072-73 (App. 2003) (Fifth Amendment could encompass statements made during mandated treatment program). Like a blood draw, obtaining a urine sample does not include "even a shadow of testimonial compulsion upon or enforced communication by the accused . . . either in the extraction or in the chemical analysis." *Schmerber*, 348 U.S. at 765. Thus, the trial court did not err in rejecting Perez's claim that the taking of the urine sample violated his Fifth Amendment rights.

¶6 Moreover, as the state correctly points out, nothing in the record suggests Perez made any incriminating statements at or near the time the test was administered. Thus, it is unnecessary for

us to determine whether the Fifth Amendment's protections apply to statements made in these circumstances because any theoretical error was harmless. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (error harmless if it did not affect verdict).

¶7 Finally, although Perez notes in passing that the taking of the sample constituted a "warrantless search," he does not develop this argument in any meaningful way. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). We therefore do not address it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop argument sufficient for review results in waiver).

¶8 Perez's conviction and sentence are affirmed.