IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ADAM EDWARD FOX,
Appellant.

No. 2 CA-CR 2015-0402
Filed October 19, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20143178001
The Honorable Danelle B. Liwski, Judge

AFFIRMED AS CORRECTED

COUNSEL

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MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Adam Fox was convicted after a jury trial of two counts of disorderly conduct.[1] The trial court sentenced him to consecutive, 3.75-year prison terms for each offense. Fox argues on appeal that the court erred in denying his motion to suppress his statements to a police officer and to paramedics that he had taken methamphetamine. Because any error was harmless beyond a reasonable doubt, we affirm his convictions and his sentences as corrected.

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In July 2014, Fox entered a restaurant carrying a knife and chain and acting strangely, including mumbling and trying to get underneath a bench. He approached two restaurant employees while brandishing his knife, but ultimately left the restaurant and ran to a nearby retail store. Upon entering the store, he tried to hide under a rack of clothing, then began yelling, acting erratically, and walking in circles while waving his arms. A security officer called 9-1-1, and police officers took Fox into custody. While Fox was seated outside the store, awaiting medical treatment, an officer asked him "what type of drug he was on," and Fox responded, "G.," a slang term for methamphetamine.

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[1] The sentencing minute entry incorrectly identifies Fox's offenses as class three felonies. We correct it to reflect both offenses as class six felonies. *See* A.R.S. § 13-2904(B).

¶3 Fox was charged with two counts of aggravated assault with a deadly weapon or dangerous instrument, but the jury acquitted him of those charges and found him guilty of the lesser-included offenses of disorderly conduct by recklessly handling or displaying a deadly weapon or dangerous instrument. He was sentenced as described above. This appeal followed.

¶4 Before trial, Fox moved to suppress his statement to the officer, arguing the officer's question constituted a custodial interrogation and, therefore, should be suppressed because he was not first apprised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The state conceded Fox was in custody, but asserted the question did not constitute an interrogation and, in any event, was admissible pursuant to "the private safety exception" to *Miranda* because the officer's "primary motive for the question was to provide medical assistance." The trial court denied Fox's motion, concluding the officer had asked "a routine informational question." The court also denied Fox's subsequent motion for reconsideration, further finding the officer's question "did not rise to the level of interrogation" because it "was not designed to elicit an incriminating response" and Fox's answer was unlikely to "lead to criminal charges."

¶5 On appeal, Fox first repeats his argument that his statement to the officer should have been suppressed because the officer's question constituted custodial interrogation.[2] A person is entitled to be advised of his rights pursuant to *Miranda* before being subjected to custodial interrogation. *Berkemer v. McCarty*, 468 U.S.

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[2]Fox suggests in passing that his statement to the officer was involuntary, an issue separate from whether the officer was required to advise him of his rights before asking about his drug use. *See State v. Tapia*, 159 Ariz. 284, 286, 767 P.2d 5, 7 (1988) ("Voluntariness and *Miranda* violations are two separate inquiries."). He did not raise this argument below and does not develop it on appeal. Accordingly, we do not address it further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

420, 434 (1984); *State v. Pettit*, 194 Ariz. 192, ¶ 13, 979 P.2d 5, 8 (App. 1998). The United States Supreme Court has defined "interrogation" under *Miranda* as "express questioning," and "any words or actions on the part of the police . . . 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). Not all express questioning constitutes interrogation; "[a] definition of interrogation that included any question posed by a police officer would be broader than that required to implement the policy of *Miranda* itself." *United States v. Foster*, 227 F.3d 1096, 1102-03 (9th Cir. 2000), *quoting United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981); *see also State v. Waggoner*, 139 Ariz. 443, 445, 679 P.2d 89, 91 (App. 1983) (approving of *Booth*'s holding that "not every question posed in a custodial setting is equivalent to interrogation"). And our supreme court has found no violation of *Miranda* when an officer's direct questions were not "designed to elicit incriminating responses." *State v. Smith*, 193 Ariz. 452, ¶¶ 19-20, 974 P.2d 431, 436-37 (1999).

¶6 But we need not decide whether the officer's question about Fox's drug use constituted interrogation because we agree with the state that any error in admitting Fox's statement plainly was harmless. Indeed, Fox's failure to respond to the state's harmless-error argument would provide us an adequate basis to affirm his convictions.[3] *See State v. Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d 460, 463 (App. 2002) (failure to file reply brief on issue presented in answering brief is sufficient basis for rejecting appellant's position); *Ariz. Dep't of Pub. Safety v. Indus. Comm'n*, 170 Ariz. 275, 277, 823 P.2d 1283, 1285 (App. 1991) ("A failure to reply to

[3]Fox's argument as presented in his opening brief would also justify our summary rejection of this claim. The argument consists of two paragraphs and does not address the definition of interrogation, ignoring the wealth of legal authority addressing that issue, including authority cited by the state. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("insufficient" arguments waived on appeal). In any event, as we stated above, any error was harmless.

arguments raised in an answering brief may justify a summary disposition of an appeal."). In any event, "[e]rror is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004). As we noted above, the jury acquitted Fox of aggravated assault, finding him guilty only of two counts of disorderly conduct. The evidence in support of those convictions was overwhelming. *See* A.R.S. § 13-2904(A)(6). And the officer testified Fox was exhibiting the symptoms of drug use, and Fox presented no evidence suggesting that his apparent intoxication was involuntary. *See State v. Edmisten*, 220 Ariz. 517, ¶ 8, 207 P.3d 770, 774 (App. 2009) ("involuntary intoxication" defense requires defendant to "offer[] evidence of involuntary intoxication"); *see also* A.R.S. § 13-503 (voluntary intoxication "is not a defense for any criminal act or requisite state of mind"). Whatever theoretical negative inference the jury might have drawn from Fox's admission that the drug he had used was methamphetamine, it would not have changed the jury's verdicts.

¶7 Fox additionally argues the trial court erred in "failing to preclude evidence that [he] said he was on methamphetamine to the paramedics" because his statement was privileged. But Fox acknowledged at the suppression hearing that he had not made any such statement to paramedics.[4] We therefore do not address this argument further.

¶8 We affirm Fox's convictions and the sentences, correcting the sentencing minute entry to reflect that they are class six rather than class three felonies.

[4]Although Fox initially had sought suppression of a statement he had made to paramedics about ingesting methamphetamine, as he clarified at the suppression hearing, he instead had made a statement to the paramedics about ingesting "bath salts." The trial court precluded that statement as hearsay.