IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAISHUN D'QUAY MARTINEZ,
Appellant.

No. 2 CA-CR 2016-0039
Filed October 3, 2017

Appeal from the Superior Court in Cochise County
No. CR201500549
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Gail Gianasi Natale, Phoenix
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Following a jury trial, appellant Daishun Martinez was convicted of possession of heroin, possession of methamphetamine, and two counts each of weapons misconduct and possession of drug paraphernalia. The trial court sentenced him to enhanced, presumptive, consecutive and concurrent prison terms, totaling 6.25 years. Counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she had reviewed the record and had found no "arguable issue of law" to raise on appeal, asking us to review the record for fundamental error.

¶2 After an initial review of the record, this court ordered additional briefing, pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), asking counsel for the parties to address the testimony of Suzanne Harvey, a chemist for the Arizona Department of Public Safety crime lab. Harvey testified about the scale that had been seized from Martinez and drugs found thereon.

¶3 Harvey acknowledged that she had not examined the scale herself, but that it had been examined by a colleague, Cassandra Brophy, and that she had "reviewed her bench notes" and instrument documentation "in preparation for [her] testimony." Harvey then explained "what sort of tests [Brophy] performed on the scale," including "color tests" indicating "what family the drug might be in." She stated, "Depending on what color we get with what chemicals, it gives us an idea of what family the drug might be in . . . and it gives us a direction to go, when we want to go further with the analysis." Harvey testified Brophy had gotten "an orange color" on the

"Marquis test," which showed the substance being tested as in the "amphetamine family." Harvey testified that Brophy had then done a "sodium nitroprusside" test, which resulted in "a bright blue color, which indicated methamphetamine."

¶4 Harvey then explained that Brophy had gone on to conduct different series of tests to different kinds of residue found on the scale. The next Marquis test had turned a purple color, which indicated "some kind of opiate, a narcotic drug." She then completed two other tests. Harvey also explained how Brophy had done "an extraction," removing the material from the scale and collecting material from a rinse of the scale using a gas chromatograph mass spectrometer. Harvey testified she had reviewed the reports generated by that instrument and that it indicated the materials found were methamphetamine and heroin. She further testified that the scale in evidence was the same scale Brophy had tested based on department record numbers.

¶5 Martinez objected to Harvey's testimony, arguing that it lacked foundation and violated his rights under the Confrontation Clause. The court overruled the objections. On cross-examination, Harvey affirmed that she had not done the testing herself. Brophy's report, to which Harvey referred in her testimony, was not admitted into evidence. "[W]e review de novo challenges to admissibility based on the Confrontation Clause." *State v. Bennett*, 216 Ariz. 15, ¶ 4, 162 P.3d 654, 656 (App. 2007).

¶6 The Confrontation Clause, set forth in the Sixth Amendment to the United States Constitution, guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. As explained in *Crawford v. Washington*, the "primary object" of the Clause is "testimonial hearsay." 541 U.S. 36, 53 (2004). Such evidence is not admissible unless the declarant is unavailable and the defendant has had an opportunity for cross-examination. *Id.* at 59. A forensic report "created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial." *Bullcoming v. New Mexico,* 564 U.S. 647, 664 (2011), *quoting Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 311 (2009).

¶7 In *Bullcoming*, the Supreme Court addressed the admission of "a forensic laboratory report containing a testimonial certification . . . through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Id.* at 652. A majority of the court (a four-justice plurality plus Justice Sotomayor who concurred) concluded that the report could not be introduced because the "surrogate" testimony violated the Confrontation Clause. *Id.* at 652, 657-58. The plurality rejected the idea that the surrogate was simply reciting machine-generated results, *id.* at 660-61, and emphasized that the surrogate "could not convey what [the testing analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed," *id.* at 662. Justice Sotomayor, however, emphasized that the certification in question had inherent formality, including the signature of the analyst, and concluded that its primary purpose was to serve as "an out-of-court substitute for trial testimony." *Id.* at 670-71, *quoting Michigan v. Bryant*, 562 U.S. 344, 358 (2011). And she went on to distinguish various factual circumstances, including when "an expert witness [i]s asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at 673, *citing* Fed. Rule Evid. 703.

¶8 Likewise, Division One of this court concluded that, consistent with the Confrontation Clause, "an expert may testify to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion and is reasonably relied upon by experts in the field." *State ex rel. Montgomery v. Karp,* 236 Ariz. 120, ¶ 13, 336 P.3d 753, 757 (App. 2014). In *Karp*, the court ruled the state could elicit an expert's testimony about the defendant's blood alcohol content (BAC) when it did not introduce the "documents that form the basis of her opinion," but she instead relied on those documents in forming an independent expert opinion about the BAC. *Id.* ¶ 15. Arizona courts have also, however, made clear that an expert may not serve "only as a 'conduit'" for another's opinion. *State v. Smith*, 242 Ariz. 98, ¶ 10, 393 P.3d 159, 163 (App. 2017), *quoting State v. Gomez*, 226 Ariz. 165, ¶ 22, 244 P.3d 1163, 1168 (2010).

¶9 In this case, Martinez contends broadly that Harvey acted solely as a conduit for Brophy's report, while the state argues she acted as an expert giving an independent expert opinion. We question whether Harvey's testimony as to the preliminary color tests Brophy completed can be considered anything more than a conduit for Brophy's work. Although the state asserts that these tests were "merely mechanical steps that require no analysis," no evidence in the record supports that assertion. Harvey did not testify about the degree of human analysis required to obtain a color result or to analyze what color resulted. As detailed above, she merely recited what Brophy had done. We need not determine, however, whether Harvey's testimony in this regard complies with the Confrontation Clause because we conclude her testimony as to the spectrometer results was proper, and that evidence was sufficient to establish guilt.

¶10 Harvey testified in some detail about the process used with the spectrometer and stated she had reviewed the graphs generated by the machine in this case. She testified it was her conclusion that the materials found on the scale, based on that testing, were methamphetamine and heroin. She also testified about her own experience as a chemist and said she had reviewed Brophy's notes and completed similar work in the past. Brophy's work itself was not admitted into evidence, but only served as the basis for Harvey's opinion as to the results of that testing. This testimony, therefore, fell within the category of admissible evidence under *Karp*. 236 Ariz. 120, ¶ 13, 336 P.3d at 757; *see also Gomez*, 226 Ariz. 165, ¶¶ 21-24, 244 P.3d at 1167-68. Given that the state established Martinez possessed methamphetamine and heroin through Harvey's testimony about the spectrometer results, any error as to the balance of Harvey's testimony was harmless. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (erroneous admission of cumulative evidence constitutes harmless error).

¶11 Martinez also asserts the evidence should have been suppressed because the officer who stopped him lacked reasonable suspicion or probable cause. But he acknowledges the Supreme Court's decision in *Utah v. Strieff*, ___ U.S.___, 136 S. Ct. 2056 (2016), resolves the question in this case and asserts the claim only to

preserve it in the hope that "the Supreme Court will change their collective minds." We therefore do not address it.

¶12 We have reviewed Martinez's sentences and found they are within the statutory limits and were properly imposed. *See* A.R.S. §§ 13-703(B), (I), 13-3102(A)(8), 13-3407(A)(1), (B)(1), 13-3415(A). Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found no other arguable issues warranting appellate review. Therefore, Martinez's convictions and sentences are affirmed.