IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID VILLARREAL JR.,
Appellant.

No. 2 CA-CR 2021-0072
Filed August 19, 2022

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201901979
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Casey D. Ball, Assistant Attorney General, Phoenix
Counsel for Appellee

E.M. Hale Law PLLC, Lakeside
By Elizabeth M. Hale
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 David Villarreal Jr. appeals from his convictions and sentences for possession of a dangerous drug and possession of drug paraphernalia. He argues his admissions to law enforcement were inadmissible at trial because they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and were involuntary. For the reasons explained below, we affirm.

Factual and Procedural Background

¶2 In June 2019, Detective England of the Department of Public Safety saw Villarreal "walking in the center of the roadway" in Coolidge. England turned on his patrol car lights and saw Villarreal "reach into his right pocket and throw a small bag with a white substance inside of it" onto the road behind him. DPS Sergeant Jeffrey detained Villarreal in handcuffs while England picked up the bag which he identified as containing methamphetamine. England asked Villarreal if the bag was his, which he denied; England replied "come on, I watched you throw this," and Villarreal conceded he had done so. Jeffrey then read Villarreal his rights pursuant to *Miranda* and "interviewed him about the substance[,] basically asking the same questions that [they] had already asked." England and Jeffrey "decided to let him go" and informed Villarreal that the charges would be sent to the county attorney's office. The substance in the bag was later confirmed to be 1.08 grams of methamphetamine. Villarreal was charged with one count each of possession of a dangerous drug and possession of drug paraphernalia.

¶3 Following a jury trial for which Villarreal was voluntarily absent, he was convicted as charged. The trial court thereafter sentenced him to concurrent prison terms, the longer of which is ten years. Villarreal

appealed, and we have jurisdiction under A.R.S. § 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).[1]

Discussion

¶4 Villarreal contends his initial admission to possessing the methamphetamine was obtained in violation of the protections set forth in *Miranda* governing custodial interrogation. He then briefly asserts that his post-*Miranda* statements were tainted by the earlier admission and were also inadmissible. Villarreal lastly maintains the trial court erred by finding all his statements voluntary.

***Miranda* Violation**

¶5 Because Villarreal failed to raise any *Miranda* issue below, our review is limited to fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). To establish fundamental error, Villarreal bears the burden to show error that (1) went to the foundation of his case, (2) took from him a right essential to his defense, or (3) was so egregious that he could not possibly have received a fair trial. *See State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Under the first two prongs, he must also show prejudice, but if he shows the error was so egregious he could not have received a fair trial, he has necessarily shown prejudice and fundamental error. *Id.*

¶6 To safeguard the Fifth Amendment's privilege shielding people from compulsory self-incriminating, law enforcement officers must provide warnings pursuant to *Miranda* before conducting a custodial interrogation. *State v. Maciel*, 240 Ariz. 46, ¶ 10 (2016). A person is generally "in custody" for *Miranda* purposes if there is a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest. *Id.* ¶¶ 11-12. But restraint alone does not establish *Miranda* custody. *Id.* ¶ 12; *see also Howes v. Fields*, 565 U.S. 499, 508-09 (2012). Such requires "not only curtailment of an individual's freedom of action, but also an environment

[1]Villarreal attempted to file a pro se notice of appeal dated five days after sentencing, but the Pinal County Clerk's office rejected it for being "completed in blue ink." Villarreal later filed a "request to proceed as an indigent on appeal," which the trial court may have considered as a subsequent notice of appeal. The court granted Villarreal's request for an appellate attorney, implicitly accepting either his rejected notice of appeal or his "request to proceed as an indigent on appeal" as an untimely notice of appeal. In any event, the state does not contest Villarreal's notice of appeal.

that 'presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'" *Maciel*, 240 Ariz. 46, ¶ 12 (quoting *Howes*, 565 U.S. at 509). Factors to consider in determining whether questioning takes place in an inherently coercive setting include exposure to public view, the length of interrogation, and the circumstances to which police are responding. *Id.* ¶¶ 16-20.

¶7 Villarreal contends he was subject to custodial interrogation because he "had been stopped by officers, placed in handcuffs and then questioned as to his involvement in illegal activity." We disagree for several reasons. First, the circumstances and testimony regarding the initial encounter demonstrate it was no more than a temporary investigative detention. *See State v. Teagle*, 217 Ariz. 17, ¶ 21 (App. 2007) (investigative detention is temporary, lasts no longer than necessary to effectuate purpose of stop, and employs least intrusive means reasonably available to verify or dispel suspicion). Significantly, Villarreal was placed in handcuffs for the officers' safety because, as Detective England explained, "he kept reaching for his pockets and moving his hands around quickly." Sergeant Jeffrey too testified that "[r]eaching in and out of pockets is a safety concern" because Villarreal could have been "reaching for a weapon, or evidence . . . pulling things out of his pocket, especially his behavior reaching in and out rapidly and throwing his hands around." Although England was "almost 100 percent sure" Villarreal had committed an "arrestable" offense, the primary concern was to "detain [Villarreal] and keep him in handcuffs" for officer safety and to prevent Villarreal "from discarding anything else."

¶8 Moreover, as noted, that Villarreal's freedom of movement was restricted does not end the inquiry. Other factors indicate Villarreal was not in an environment presenting inherently coercive pressures and therefore not subject to custodial interrogation. The brief question by Detective England was asked while the sun was still up on a public street of a residential area, which "substantially offsets 'the aura of authority surrounding an armed, uniformed officer' that can otherwise exert some pressure on a detainee to respond to questions." *See Maciel*, 240 Ariz. 46, ¶ 22 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984)). Only two officers were present, *see id.* ¶ 26, and neither threatened force, made exaggerated displays of authority, or otherwise employed coercive tactics, *see State v. Cruz-Mata*, 138 Ariz. 370, 373 (1983). Finally, the length of the questioning was extremely brief, as detailed below. *See Maciel*, 240 Ariz. 46, ¶ 26. On this record, we cannot say Villarreal was subject to custodial interrogation. Thus, he has not established that his admission was obtained in violation of his *Miranda* rights.

¶9 Furthermore, even were we to assume a violation of *Miranda*'s tenets, Villarreal has failed to argue, let alone establish any prejudice from the introduction of his statement.[2] His admissions regarding the methamphetamine were merely cumulative of the other, overwhelming evidence of his guilt. *See State v. Davolt*, 207 Ariz. 191, ¶¶ 40-43 (2004) (erroneous admission of evidence harmless where properly admitted evidence of guilt overwhelming). Detective England testified he had seen Villarreal reach into his pocket and toss a small bag with a white substance in it, and the bag was found near Villarreal on a section of the street free from trash or other debris. The substance in the bag tested positive for methamphetamine. As the state points out, "It would strain credulity to argue that the jury would have believed the detectives' testimony regarding Villarreal's admissions, but not Detective England's testimony that he saw [him] toss the baggie of methamphetamine." Accordingly, there was no prejudice from the admission of Villarreal's statements. *See State v. Hensley*, 137 Ariz. 80, 88-89 (1983) (no prejudice under harmless error standard when "improperly considered confession was merely cumulative of other, overwhelming evidence on the same point"); *United States v. Street*, 472 F.3d 1298, 1314-16 (11th Cir. 2006) (applying harmless error rule to evidence admitted in violation of *Miranda*, considering whether the evidence—minus pre-*Miranda* statements—is so overwhelming "that we are convinced beyond a reasonable doubt that the improperly admitted evidence did not affect the verdict").

Voluntariness

¶10 Villarreal also challenges the admission of his statements to Detective England and Sergeant Jeffrey on the ground they were involuntary. Because the state requested a pre-trial voluntariness hearing

[2] Villarreal fleetingly argues his post-*Miranda* admissions were tainted by the claimed initial *Miranda* violation. We reject this argument for two reasons. First, he has not established the officers violated *Miranda* by subjecting him to custodial interrogation. Second, Villarreal has failed to argue, let alone establish, that the officers purposefully employed an interrogation protocol meant to evade *Miranda* and the pre-*Miranda* statements "were otherwise coerced and the taint from such coercion has not dissipated through the passing of time or a change in circumstances." *See State v. Zamora*, 220 Ariz. 63, ¶ 18 (App. 2009).

to determine the statements' admissibility pursuant to A.R.S. § 13-3988,[3] during which Villarreal argued his statements were involuntary, we review the trial court's ruling for an abuse of discretion. *See State v. Cota*, 229 Ariz. 136, ¶ 22 (2012). We limit our review to the facts presented at that hearing. *See State v. Ellison*, 213 Ariz. 116, ¶ 25 (2006).

¶11 Villarreal argued below that both his pre- and post-*Miranda* statements were inadmissible due to the "time lapse period of being detained, being in handcuffs with two officers wearing tactical uniforms." The trial court determined that all of Villarreal's statements were voluntary, finding his "will had in fact not been overcome" because he initially denied having thrown the bag and his subsequent admission "came not as a result of any other coercion but in response to Detective England's statement that he had witnessed [him] throw the baggie."

¶12 The voluntariness of a confession is a separate inquiry from alleged violations of the *Miranda* rules. *State v. Tapia*, 159 Ariz. 284, 286 (1988). To be admissible, a statement must be voluntary, not obtained by coercion or improper inducement. *Ellison*, 213 Ariz. 116, ¶ 30. Because confessions are presumed to be involuntary, "the state must show by a preponderance of the evidence that the confession was freely and voluntarily made." *State v. Newell*, 212 Ariz. 389, ¶ 39 (2006) (quoting *State v. Montes*, 136 Ariz. 491, 496 (1983)). In making that determination, we evaluate whether the defendant's will was overcome under the totality of the circumstances, *State v. Boggs*, 218 Ariz. 325, ¶ 44 (2008), considering (1) the environment of the interrogation, (2) whether *Miranda* warnings were given, (3) the duration of the interrogation, and (4) whether there was impermissible police questioning, *State v. Blakley*, 204 Ariz. 429, ¶ 27 (2003). To find a defendant's statements involuntary, there must be both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will. *Boggs*, 218 Ariz. 325, ¶ 44.

¶13 Nothing in the record before us suggests Villarreal's will was overborne or his admissions coerced. As noted above, the questioning took place on a public street in a residential area, while it was still daylight, and only two law enforcement officers were present. Villarreal was cooperative during the brief encounter, and the duration of the pre-*Miranda* questioning

[3] That statute provides that before a confession is received in evidence, the trial court must "determine any issue as to voluntariness," listing several factors it must consider. § 13-3988.

was less than two minutes. The post-*Miranda* questioning was similarly brief, lasting less than fifteen minutes.

¶14 Contrary to Villarreal's implicit suggestion, the failure to initially provide *Miranda* warnings does not of itself render his confession involuntary. *See New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984); *see also Tapia*, 159 Ariz. at 286 ("The necessity of giving *Miranda* warnings relates to the admissibility of a confession based upon defendant's being apprised of his right to counsel and waiving that right and not to its voluntariness."). Nor does the record support his argument that the trial court failed to consider the lack of *Miranda* warnings. Indeed, the court specifically considered that fact but reasonably concluded,

> Although *Miranda* had not yet been given at the time of [Villarreal]'s earliest statements, those earliest statements pre-*Miranda* occurred very quickly and very early on in the course of the short period of time while Detective England and Sergeant Jeffrey were actively in the process of securing the scene, collecting evidence and information . . . .
>
> Not withstanding [Villarreal] had been placed in handcuffs . . . [his] pre-*Miranda* statements were voluntary.
>
> In fact, it is clear [he] initially denied having thrown the baggie suggesting that his will had in fact not been overcome at that point.

Finally, and importantly, the officers did not employ any impermissible questioning techniques—they did not threaten Villarreal, draw their weapons, or make any promises to induce his admissions.[4] Thus, Villarreal has not shown the court abused its discretion in finding his statements voluntary. *See Cota*, 229 Ariz. 136, ¶ 22.

[4] After Villarreal had twice admitted to possessing the methamphetamine, Jeffrey and England approached him with an offer to become a confidential informant to "work off the charges." To the extent this could be construed a promise or inducement, it certainly did not influence Villarreal's admission as it came only after he had admitted the crimes. *See State v. Lopez*, 174 Ariz. 131, 138 (1992).

Disposition

¶15 For all the foregoing reasons, Villarreal's convictions and sentences are affirmed.