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Court of Appeals of Arizona, Division 1.

STATE OF ARIZONA, Appellee,
v.
JOSUE MANUEL JAQUEZ, Appellant.

No. 1 CA-CR 16-0912
|
FILED 7-31-2018

Appeal from the Superior Court in Mohave County

No. S8015CR201600044

S8015CR201600656

The Honorable Steven F. Conn, Judge, *Retired*

**AFFIRMED IN PART; VACATED IN PART**

**Attorneys and Law Firms**

Arizona Attorney General's Office, Phoenix, By Michael Valenzuela, Counsel for Appellee

Mohave County Legal Advocate, Kingman, By Jill L. Evans, Counsel for Appellant

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Michael J. Brown joined.

## MEMORANDUM DECISION

THOMPSON, Judge:

***1 ¶1** Josue Manuel Jaquez appeals his convictions and sentences for assisting a criminal street gang, transportation of dangerous drugs for sale, possession of dangerous drugs for sale, and possession of drug paraphernalia. For the following reasons, we vacate the conviction and sentence for possession of dangerous drugs for sale and affirm the remaining convictions and sentences.

## FACTUAL AND PROCEDURAL HISTORY [1]

**¶2** At 10:45 p.m. on January 9, 2016, an Arizona Department of Public Safety (DPS) trooper traversing the left lane of I-40 noticed a silver Toyota ahead of him in the right lane traveling behind a tractor-trailer. Determining the Toyota's following distance of one-half of a vehicle length was unsafe given its seventy-five miles per hour rate of speed, the trooper decelerated as he approached to provide the Toyota's driver "ample time" to safely change lanes, but the Toyota continued following directly behind the tractor-trailer at a speed of approximately seventy-five miles per hour.

**¶3** After conducting a registration check and discovering that the Toyota was a rental vehicle, the trooper maneuvered his patrol car behind it and activated his vehicle's lights and siren. The Toyota immediately pulled to a stop on the interstate's shoulder and the trooper approached the car. Contacting the driver, Jaquez, through the passenger-side window, the trooper explained the reason for the stop and requested a driver's license and a copy of the car-rental agreement. Jaquez provided a California identification card, stating he had forgotten his California license. While Jaquez then looked in the glovebox for the rental agreement, the trooper scanned the interior of the car and noticed two cell phones, numerous snack foods, and a bottle of air freshener on the passenger floorboard. After Jaquez failed to locate the rental agreement, he explained that a friend had rented the Toyota for him, and apparently had retained the contract. The trooper requested the friend's name, and Jaquez notably hesitated before answering "Rodriguez."

**¶4** Finding Jaquez's reluctance to disclose the renter's name as well as the presence of air freshener (possibly used to mask drug odor) and multiple phones (older phone possibly used as a disposable "burn" phone) suspicious, the trooper ran a license check and discovered that Jaquez's California license had been suspended. While writing a citation for driving without a license, the trooper asked Jaquez about the nature of his trip and Jaquez answered that he was moving from California to Texas to live with his father. Given the absence of any visible luggage or other personal property in the interior of

the vehicle, the trooper doubted the veracity of Jaquez's response.

**¶5** Once Jaquez signed the citation, the trooper: (1) told him that drugs are often transported on the interstate, (2) inquired whether he had contraband in the car, and (3) asked for his consent to search the Toyota. Denying the presence of any contraband, Jaquez provided verbal consent to a search of his vehicle. The trooper then presented him with a written consent form, which Jaquez read and signed.

***2 ¶6** At that point, the trooper asked Jaquez to sit on a guardrail and requested that a second officer respond to the location. While conducting a search of the vehicle, the trooper discovered multiple cellophane-wrapped packages concealed behind a trunk panel. Subsequent testing revealed that these packages contained methamphetamine weighing a total of 6.93 pounds.

**¶7** After the trooper arrested Jaquez and transported him to a DPS office, a detective photographed and interviewed him. Initially, the detective observed that Jaquez had numerous tattoos and wore predominantly blue, including blue shoes and shoelaces. Once he photographed the tattoos, the detective researched the symbols and numbers they depicted and discovered that they referenced the Barrio Dream Homes gang. He also learned that blue is the color associated with that gang. At that point, the detective questioned Jaquez about the tattoos, and he claimed that they were simply artwork, denying that they were gang-related. When pressed, however, Jaquez admitted that he had been a Barrio Dream Homes gang member, but claimed he no longer actively participated. Nonetheless, he acknowledged that he "still represents" the gang through his appearance.

**¶8** Shortly thereafter, another detective also interviewed Jaquez about his gang activity. During that conversation, Jaquez again admitted that he had been a gang member, and acknowledged that the gang made money from selling drugs, but claimed he no longer participated in the gang and denied knowing that the methamphetamine had been hidden in the Toyota's trunk.

**¶9** After these interviews, Jaquez was transported to a county jail. A few weeks after he arrived, a detention officer asked him about his gang affiliation, for internal placement purposes, and Jaquez disclosed that he was an active member of the Barrio Dream Homes gang.

**¶10** The state charged Jaquez with one count of assisting a criminal street gang (Count 1), one count of transportation of dangerous drugs for sale (Count 2), one count of possession of dangerous drugs for sale (Count 3), and one count of possession of drug paraphernalia (Count 4). The state also alleged aggravating circumstances and that Jaquez had two prior felony convictions.

**¶11** After a three-day trial, the jury found Jaquez guilty as charged. The superior court sentenced Jaquez to a presumptive term of sixteen and one-quarter years' imprisonment on Count 1, a concurrent presumptive term of twenty and three-quarters' years imprisonment on Count 2, a concurrent presumptive term of twenty and three-quarters' years imprisonment on Count 3, and a concurrent presumptive term of six and three-quarters' years imprisonment on Count 4. Jaquez timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2018), 13-4031 (2018), and -4033(A)(1) (2018). [2]

## DISCUSSION

### I. Denial of Motion to Suppress

**¶12** Jaquez contends the superior court improperly denied his motion to **suppress**. Asserting the trooper lacked reasonable suspicion to detain him once he had signed the citation, Jaquez argues the trooper's continued questioning unlawfully expanded the scope of the traffic stop, thereby invalidating Jaquez's subsequent consent to a search of his vehicle.

***3 ¶13** Before trial, Jaquez moved to **suppress** all evidence seized from the Toyota. At an evidentiary hearing held on the motion, the trooper testified that Jaquez never walked away or otherwise sought to leave after signing the citation, and never rescinded his consent. When defense counsel questioned how much time elapsed between Jaquez signing the citation and the consent form, the trooper answered that only two minutes had transpired, with the former signed at 10:57 p.m. and the latter signed at 10:59 p.m. Jaquez also testified and explained that he did not want "to walk away abruptly" after signing the citation, so he "back[ed] up" and had moved about ten to twelve feet toward his car by the

  

time the trooper posed additional questions. When asked whether he felt free to leave once he signed the citation, Jaquez stated that he felt obliged to stay and answer questions "out of respect" for the trooper.

**¶14** After considering the evidence presented, the superior court found that Jaquez's interaction with the trooper became consensual once he signed the citation. Given this finding, the court determined that Jaquez's consent was valid and the resulting search and seizure were therefore lawful. Accordingly, the court denied Jaquez's motion to **suppress**. [3]

**¶15** We review the denial of a motion to **suppress** evidence for an abuse of discretion, *Brown v. McClennen*, 239 Ariz. 521, 524, ¶ 10 (2016), but review de novo the superior court's ultimate legal conclusion that a search and seizure "complied with the dictates of the Fourth Amendment." *State v. Valle*, 196 Ariz. 324, 326, ¶ 6 (App. 2000). In doing so, we defer to a superior court's determination of witnesses' credibility, *State v. Mendoza-Ruiz*, 225 Ariz. 473, 475, ¶ 6 (App. 2010), and uphold the court's ruling if it is legally correct for any reason. *State v. Huez*, 240 Ariz. 406, 412, ¶ 19 (App. 2016).

**¶16** The federal and state constitutions protect individuals against unreasonable searches and seizures, U.S. Const. amend. IV; Ariz. Const. art. 2, § 8, and "any evidence collected in violation" of these provisions "is generally inadmissible in a subsequent criminal trial." *State v. Valenzuela*, 239 Ariz. 299, 302, ¶ 10 (2016). Although an investigatory stop of a motor vehicle constitutes a seizure, it is less intrusive than an arrest, and therefore "officers need only possess a reasonable suspicion that the driver has committed an offense to conduct a stop." *State v. Kjolsrud*, 239 Ariz. 319, 322, ¶ 9 (App. 2016) (internal quotation omitted). "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' – to address the traffic violation that warranted the stop," and authority for the seizure thus ends once the officer has returned the driver's documents and issued a warning or citation. *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015); *see also State v. Teagle*, 217 Ariz. 17, 23, ¶ 21 (App. 2007). At that point, "the driver must be permitted to proceed on his way without further delay or questioning" unless: (1) the encounter between the driver and the officer becomes consensual, or (2) during the encounter, the officer develops a reasonable and articulable suspicion that criminal activity is afoot. *Teagle*, 217 Ariz. at 23, ¶ 22; *see also Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (explaining "[a]n 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").

**¶17** Applying these principles here, Jaquez does not dispute that the initial traffic stop was reasonable. Instead, he argues that the trooper unlawfully prolonged the detention by asking additional questions after issuing the citation. Because an extended detention, beyond the time reasonably required to complete the traffic-related purpose of a stop, is unconstitutional absent an independent basis, the question before us is whether this stop became a consensual encounter. *See Kjolsrud*, 239 Ariz. at 322, 325-26, ¶¶ 10, 21-24; *see also Florida v. Royer*, 460 U.S. 491, 498, 500 (1983) (explaining "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," and a motorist may not be detained "even momentarily without reasonable, objective grounds").

***4 ¶18** To determine whether this encounter was consensual or amounted to an additional seizure, we consider the totality of the circumstances and whether a reasonable person under those circumstances would have felt free to leave. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A traffic stop may become consensual once an officer returns a driver's documents and issues a warning or citation, so long as the officer proceeds without an "overbearing show of authority." *State v. Box*, 205 Ariz. 492, 498, ¶¶ 21-22 (App. 2003), *abrogated in part on other grounds by Rodriguez v. United States*, 135 S.Ct. 1609, 1615-16 (2015). Factors that indicate an additional seizure include: (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) some physical touching or restraint, and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Mendenhall*, 446 U.S. at 554. Absent such evidence, "otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* at 555.

**¶19** In this case, there is no evidence that the trooper threatened Jaquez, touched or otherwise restrained his person, displayed a weapon, used language or

an authoritative tone that compelled his compliance, or otherwise exhibited overbearing authority. To the contrary, when asked whether he felt free to leave after he signed the citation, Jaquez explained that he had initially walked away, albeit backward, but then felt obliged to stay and answer the trooper's questions out of respect for the trooper's position, not because he was legally compelled, afraid, or intimidated. Under these circumstances, the superior court did not err by finding that Jaquez's brief, post-citation encounter with the trooper was consensual, and therefore his subsequent consent to a search of his vehicle was valid. *See State v. Acinelli*, 191 Ariz. 66, 69-70 (App. 1997) (concluding the defendant was free to leave after the officer returned his documents and explained the issued citations were warnings, and therefore the officer's continued "dialogue with the defendant" was lawful and the defendant's consent to a search of his vehicle was valid). Because consent is an exception to the general warrant requirement, *State v. Flores*, 195 Ariz. 199, 203, ¶ 11 (App. 1999), the trooper's search of the Toyota was lawful, and the superior court did not abuse its discretion by denying Jaquez's motion to **suppress**. *See State v. Caraveo*, 222 Ariz. 228, 232, ¶ 17 (App. 2009) ("[W]hether the initial encounter was consensual or based on a valid *Terry* stop, officers may conduct a search when the suspect consents to the search.").

**II. Alleged Prosecutorial Vindictiveness**

**¶20** Jaquez contends the state acted with vindictiveness by bringing a second indictment containing an additional charge, and the superior court therefore improperly denied his motion to dismiss on that basis.

**¶21** In its initial indictment, filed January 14, 2016 in CR 2016-00044, the state charged Jaquez with one count of transportation of dangerous drugs for sale, one count of possession of dangerous drugs for sale, and one count of possession of drug paraphernalia. Eight days later, the state filed a notice alleging aggravating factors and that Jaquez was a repetitive offender based upon his prior California convictions: (1) 2012 – possessing a controlled substance for sale and participation in a criminal street gang, and (2) 2010 – burglary.

**¶22** On January 25, 2016, the prosecutor presented defense counsel with a plea offer, noting that in the event Jaquez rejected the offer, his prior convictions could be used for enhancement and aggravation purposes. In a follow-up email, the prosecutor notified defense counsel that the offer would expire if not accepted before the upcoming April 11, 2016 omnibus hearing. At an April 7, 2016 settlement conference, the superior court asked the prosecutor to supplement her settlement conference memorandum with any additional information she may have received regarding the 2012 convictions, and the prosecutor responded, "I have absolutely nothing so far from California ... all of my research is based on public records, documents ..., which are at times inconsistent ... [s]o it's kind of difficult to know ... what the underlying information is." Recognizing that the state had yet to obtain reliable documentation regarding the California convictions, defense counsel remarked that, if the matter proceeded to trial, the prosecutor would "actually have to locate those records, find them, bring them to court, and prove" the convictions.

***5 ¶23** At the omnibus hearing, Jaquez rejected the plea offer and the court scheduled trial for June 7, 2016. Eleven days later, the prosecutor emailed defense counsel and reported that she had received California police reports relating to Jaquez's 2012 gang conviction. Noting she previously did not have documentation regarding the identity of the gang and Jaquez's membership, the prosecutor informed defense counsel that she intended to re-indict Jaquez and include an additional charge of assisting a criminal street gang, as well as a criminal street gang enhancement, which would add five years to any sentence. "Because this information [wa]s all new" and could "affect [Jaquez's] assessment of the case," the prosecutor invited Jaquez "to reconsider the state's original plea offer[.]"

**¶24** Consistent with the prosecutor's representations to defense counsel, on May 19, 2016, the state filed a second indictment in CR 2016-00656, adding one count of assisting a criminal street gang to the original charges and a street gang enhancement. At the joint final case management conference held four days later in the CR 2016-00044 proceeding, the state notified the court of a scheduling conflict with the June 7, 2016 trial date, and defense counsel likewise moved, over Jaquez's objection, for a trial continuance. Based upon both counsels' requests, the court continued the trial date in CR 2016-00044 from June 7, 2016 to June 28, 2016, and, in the event the state moved to dismiss CR 2016-00044, "reserve[ed] the right" to set the second case for trial on the same date to preserve Jaquez's "right to have a speedy trial."

  

**¶25** On May 25, 2016, the state moved to reset the trial date to June 14, 2016, expressly to accommodate Jaquez's speedy trial rights. Defense counsel objected to any acceleration of the trial date, however, and requested another continuance, so the court reset trial for July 26, 2016.

**¶26** On July 5, 2016, Jaquez moved to dismiss the case for vindictive prosecution, alleging the state charged an additional count of assisting a criminal street gang in the second indictment to retaliate against him for rejecting the plea offer and invoking his right to a speedy trial. After hearing from the parties, the court denied the motion, concluding Jaquez's assertion that the state could have charged him with assisting a criminal street gang in the original indictment, based upon the information it then had, was wholly without merit.

**¶27** We review a superior court's disposition of a claim of prosecutorial vindictiveness for an abuse of discretion. *State v. Brun*, 190 Ariz. 505, 506 (App. 1997). A prosecutor's decision to file new charges is vindictive if made in retaliation for the defendant's exercise of a constitutional or statutory right. *Id.*

**¶28** "A defendant may demonstrate prosecutorial vindictiveness by proving objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *State v. Tsosie*, 171 Ariz. 683, 685 (App. 1992) (internal quotation omitted). Because actual vindictiveness is difficult to prove, a defendant in some circumstances may rely upon a presumption of vindictiveness. *Id.* (internal quotation omitted). A presumption of vindictiveness may lie in a pretrial setting, but its application at that stage of the proceedings is disfavored because "[i]n the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that the information possessed by the state has a broader significance." *United States v. Goodwin*, 457 U.S. 368, 381 (1982). Therefore, to warrant a presumption of vindictiveness in the pretrial setting, the defendant must set forth "additional facts" that, combined with the sequence of events, justify the presumption. *Brun*, 190 Ariz. at 507. "If a defendant makes a prima facie showing that the charging decision is more likely than not attributable to vindictiveness by the prosecutor, the burden shifts to the prosecutor to overcome the presumption by objective evidence justifying the prosecutor's action." *State v. Mieg*, 225 Ariz. 445, 448, ¶ 12 (App. 2010) (internal quotations omitted).

***6 ¶29** In this case, the record reflects that Jaquez failed to set forth any additional facts that, together with the sequence of events, warranted a presumption of vindictiveness. To the extent Jaquez argues the state filed an additional charge to retaliate for his exercise of the right to a speedy trial, the record reflects that the state moved to accelerate the trial date to preserve Jaquez's speedy-trial rights, and defense counsel objected and moved for a continuance. Likewise, to the extent Jaquez contends the state brought an additional charge because he rejected the plea offer, the record reflects that the prosecutor: (1) provided timely notice that she intended to use Jaquez's prior convictions for enhancement and aggravation purposes, (2) informed the court, before Jaquez declined the plea offer, that she was still seeking reliable information regarding Jaquez's prior convictions, and (3) reoffered the original plea after she received documentation regarding the prior convictions.

**¶30** Moreover, even if Jaquez set forth a prima facie case of vindictiveness, the state rebutted the presumption. When the prosecutor filed the initial indictment, the only known information regarding Jaquez's gang affiliation was his tattoos, clothing, and repeated denials of current gang membership. The record reflects that the prosecutor diligently sought documentation of Jaquez's prior gang-related conviction, however, and timely disclosed that information to defense counsel once she received it. On this record, and consistent with the superior court's findings, the prosecutor reasonably believed she had insufficient evidence to support a charge of assisting a criminal street gang until she received the California police reports, which documented Jaquez's criminal activity on behalf of the Barrio Dream Homes gang. *See Goodwin*, 457 U.S. at 382 n.14 (recognizing that "a prosecutor should not file any charge until he has investigated fully all of the circumstances surrounding a case"); *see also State v. Canez*, 202 Ariz. 133, 147, ¶ 28 (2002) ("We give great deference to the trial court's ruling, based, as it is, largely upon an assessment of the prosecutor's credibility."), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299 (2016). Therefore, the superior court did not abuse its discretion by denying Jaquez's motion to dismiss the charges.

  

### III. Alleged *Miranda*[4] Violations

**¶31** Jaquez contends the superior court improperly denied his motions to preclude statements he made to two law enforcement officers. Specifically, he argues the officers questioned him while he was in custody without providing the requisite *Miranda* warnings, and therefore the statements were obtained in violation of his constitutional rights.

**¶32** In reviewing an alleged *Miranda* violation, we defer to the superior court's underlying factual findings, absent an abuse of discretion, but review de novo its ultimate legal conclusion. *State v. Newell*, 212 Ariz. 389, 397, ¶ 27 (2006).

**¶33** Police officers are free to ask questions of a person who is not in custody without providing *Miranda* warnings, but when a person is in custody, the police must advise the individual of certain constitutional rights; otherwise, statements made in response to questioning will be inadmissible at trial. *See Miranda*, 384 U.S. at 444; *State v. Zamora*, 220 Ariz. 63, 67, ¶ 9 (App. 2009). Specifically, before conducting a custodial interrogation, police must advise a person "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

#### A. Statements to the Detective

**¶34** At the close of the detective's testimony, defense counsel asked whether he had advised Jaquez of his *Miranda* rights before questioning him. The detective stated he did not issue *Miranda* warnings to Jaquez, and defense counsel moved to strike the detective's testimony in its entirety. Characterizing defense counsel's motion to strike as a motion to **suppress**, the superior court denied the motion as untimely.

***7 ¶35** Pursuant to Arizona Rule of Criminal Procedure 16.1(c), the court "may preclude any motion ... not timely raised" at least twenty days before trial, "unless the basis was not then known and could not have been known through reasonable diligence, and the party raises it promptly after the basis is known." Although Jaquez acknowledges the state timely disclosed the detective's report detailing the interrogation, he asserts he was unable to review the report because it was part of a voluminous digital disclosure, and therefore he had no knowledge before trial that the detective failed to issue *Miranda* warnings. Even accepting his implicit claim that Rule 16.1(c)'s "reasonable diligence" standard did not require that he review the "2500 pages of digital disclosure," Jaquez knew firsthand, by virtue of his presence, that the detective had not advised him of his *Miranda* rights. Because this information was known to him independent of any state disclosure, Jaquez was not excused from his obligation to timely challenge the admission of his statements.

**¶36** Moreover, even if Jaquez's statements to the detective were inadmissible, any err would be harmless. *State v. Davolt*, 207 Ariz. 191, 209, ¶ 64 (2004) (holding erroneously admitted evidence is harmless "if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict"). The record reflects that Jaquez consistently denied current gang membership when he spoke with the detective. Although he admitted his tattoos were not mere "artwork" and acknowledged he still "represents" the gang through his appearance, these admissions were cumulative to other evidence that his tattoos and clothing were associated with the Barrio Dream Homes gang. *See State v. Romero*, 240 Ariz. 503, 510, ¶ 17 (App. 2016) (erroneous admission of cumulative evidence constitutes harmless error); *State v. Dunlap*, 187 Ariz. 441, 458 (App. 1996) (same). Therefore, the superior court did not abuse its discretion by denying Jaquez's motion to strike the detective's testimony.

#### B. Statement to the Detention Officer

**¶37** On the eve of trial, Jaquez moved to preclude a statement he made to the detention officer admitting that he was an active gang member. Applying *State v. Kemp*, 185 Ariz. 52 (1996), the court denied the motion, concluding the question the detention officer posed to Jaquez reasonably related to jail safety and did not constitute interrogation.

**¶38** Before calling the detention officer to testify, the state moved to admit a different statement Jaquez had made to the officer, in which Jaquez implied he still committed crimes on behalf of the Barrio Dream Homes gang. Finding the question that prompted that statement did not reasonably relate to any jail security concerns, the court denied the state's request and precluded the statement.

**¶39** When the detention officer then testified, he explained that the jail has a "classifying process" to ensure inmates are housed in a safe location within the jail. Because gang membership presents a significant safety issue, inmates who have gang tattoos or a criminal record relating to gang activity are questioned regarding their gang affiliation so they are not inadvertently placed with a rival gang member. As part of this screening process, the detention officer approached Jaquez on January 28, 2016 and asked whether he was affiliated with any gang. Although Jaquez had been housed at the jail for several weeks by that date, the officer was reevaluating pod assignments due to an influx of inmates. In response to the officer's question, Jaquez acknowledged that he was an active member of the Barrio Dream Homes gang.

**¶40** In *Kemp*, our supreme court analyzed whether two detention officers' inquiries regarding an inmate's protective custody status violated the inmate's Fifth and Sixth Amendment rights. 185 Ariz. at 57-58. Reasoning the officers "were not attempting to overcome [the inmate's] will to induce him to inculpate himself," and instead simply questioning the "circumstances of his incarceration," our supreme court concluded the officers' queries did not constitute "custodial interrogation," and therefore did not trigger the Fifth Amendment. *Id.* at 58. Likewise, the court concluded no Sixth Amendment violation occurred because the officers "did not seek to elicit incriminating evidence." *Id.*

***8 ¶41** Applying this rationale here, the record supports the superior court's finding that the detention officer's question did not infringe upon Jaquez's constitutional rights. Although Jaquez was clearly in custody, the officer testified that he questioned Jaquez regarding his gang allegiance only to ensure his safety and the overall security of the jail, not to elicit incriminating information on behalf of the state. Consistent with this testimony, the prosecutor avowed to the court that the jail did not function as an investigative arm of the state and the detention officer's routine questions were intended only to protect the safety of the inmates and the security of the jail, not to further the state's criminal investigation. *Cf. State v. Jeney*, 163 Ariz. 293, 297-98 (App. 1989) (explaining "[t]he routine gathering of background information on a defendant" does not constitute interrogation and therefore the state's use of "statements ... given during a routine booking procedure" against a defendant at trial "does not transform that routine procedure into an interrogation"). Indeed, the detention officer did not contact the investigating detectives or otherwise disclose Jaquez's statement on his own accord; rather, investigators learned of Jaquez's statement at "a much later date." Given these facts, the detention officer's placement-based question did not constitute an interrogation, and the superior court did not abuse its discretion by denying Jaquez's motion to preclude accordingly.

### IV. Admission of Drug Profile Evidence

**¶42** Jaquez argues the superior court improperly denied his motion for mistrial predicated upon the admission of drug profile evidence.[5] Specifically, he contends the state impermissibly elicited profile evidence as substantive proof of his guilt, creating the risk that the jury would convict him, not for his own conduct, but for the conduct of others.

**¶43** On direct examination, the detective testified, over objection, that: (1) methamphetamine consumed in the United States is primarily manufactured in Mexico and then transported into the country by drug cartels using either "natural voids" in vehicle compartments or luggage; (2) large quantities of methamphetamine enter the United States at cities such as Tucson or Phoenix, and then these large bundles are "broken down into smaller quantities and shipped to other areas" across the country; (3) illegal drugs are frequently transported through Mohave County on the interstate; (4) drug trafficking organizations typically transport several pounds of methamphetamine at a time; (5) a single person, operating alone, does not have the requisite resources and connections to transport large quantities of illegal drugs; (6) drug trafficking organizations frequently use rental vehicles to transport illegal drugs, at least in part, to avoid detection by license plate readers; (7) drug trafficking organizations may task a person other than the driver to conceal drugs in a rental vehicle; (8) drug trafficking organizations frequently instruct transporters to consent to a search if stopped, believing the drugs will not be discovered; (9) transporters are not always armed; (10) transporters frequently use air fresheners to mask the odor emitted from illegal drugs; (11) drug trafficking organizations often provide transporters with a "burner" cell phone that is exclusively used for drug-related calls and texts and then destroyed once transport is complete; (12) drug trafficking organizations frequently have transporters

  

prepare a cover story in case of a traffic stop; (13) when large quantities of drugs are broken down into smaller quantities, the profit margin for drug trafficking organizations increases, such that a large quantity of methamphetamine may be purchased at a rate of $3000 per pound, but the "street level" of any single pound may be worth as much as $45,000; (14) drug trafficking organizations often select a member who does not use drugs to transport them, usually a "middle" member of the organization; (15) in the few circumstances in which illegal drugs have been abandoned in rental vehicles, only small amounts have been left behind, not several pounds; and (16) a transporter who left a large quantity of illegal drugs in a vehicle would probably be assaulted or even killed by the drug trafficking organization. Specific to this case, the detective also testified that: (1) text messages retrieved from Jaquez's seized cell phone referenced the Dream Homes neighborhood and drug sales, as well as Jaquez's travel plans and expected return to California in a couple of days; and (2) Jaquez could not have transported nearly seven pounds of methamphetamine without "significant connections" to a drug trafficking organization, such as a gang.

***9 ¶44** Following the detective's testimony, Jaquez renewed his objections, arguing the detective's statements regarding transporters' use of firearms, air freshener, burner phones, and cover stories constituted inadmissible drug profile evidence. Although he acknowledged the detective's general testimony regarding the transportation of large quantities of drugs qualified as modus operandi evidence, Jaquez also objected to the detective's testimony linking that evidence to this case, specifically, the detective's opinion that the large quantity of drugs found in the Toyota proved Jaquez was working with a drug trafficking organization. Accordingly, Jaquez moved for a mistrial, which the superior court denied.

**¶45** We review the denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32 (2000). In evaluating whether a mistrial is warranted, the superior court "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* The court "should consider (1) whether the remarks called to the attention of the jurors matters they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Hallman*, 137 Ariz. 31, 37 (1983). Because a "declaration of mistrial is the most dramatic remedy for trial error," it should be granted "only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262 (1983).

**¶46** "Profile evidence tends to show that a defendant possesses one or more ... characteristics ... typically displayed by persons engaged in a particular kind of activity." *State v. Ketchner*, 236 Ariz. 262, 264, ¶ 15 (2014) (citation omitted). Because profile evidence "implicitly invit[es] the jury to infer criminal conduct based on the described characteristics," it "may not be used as substantive proof of guilt[.]" *Ketchner*, 236 at 264-65, ¶¶ 15, 17. Stated differently, and as relevant here, the state may not meet its burden of proving intentional or knowing possession of illegal drugs by suggesting that "the accused's behavior" is "consistent with that of known drug couriers." *State v. Lee*, 191 Ariz. 542, 546, ¶ 18 (1998).

**¶47** Unlike drug courier profile evidence, modus operandi evidence may "properly [be] admitted to assist the jury in understanding" the procedures employed by drug trafficking organizations. *State v. Gonzalez*, 229 Ariz. 550, 554, ¶ 13 (App. 2012). Nonetheless, even this evidence must be limited to "the structure and methods used by drug trafficking organizations," and a testifying expert "may not provide an opinion comparing the modus operandi of such an organization with the conduct of a defendant in a particular case." *State v. Garcia-Quintana*, 234 Ariz. 267, 272, ¶ 14 (App. 2014). "Rather, it is the province of the jury to determine whether a defendant's conduct fits within the modus operandi of a drug trafficking organization." *Id.*

**¶48** As applied to this case, the detective's general testimony that drug trafficking organizations often: transport large quantities of illegal drugs to maximize their profit margins, use rental vehicles, task separate individuals to conceal and transport drugs, select mid-level, non-user members to transport drugs, provide transporters burner phones, instruct transporters to consent to searches and use cover stories, and harm transporters who abandon drugs in rental vehicles was admissible modus operandi evidence. On the other hand, the detective's testimony "about where drugs originate and where they are distributed" should not have been admitted, *Beijer v. Adams*, 196 Ariz. 79, 83, ¶ 21 (App. 1999); *see also Lee*, 191 Ariz. at 545, ¶ 15, and his

  

statements regarding transporters' frequent use of air freshener was improper drug profile evidence, *see Lee*, 191 Ariz. at 546, ¶ 18 ("By the time of trial, the reasons for the arresting officers' suspicions were no longer relevant."). Moreover, although the detective's testimony regarding drug trafficking organizations' transport of large quantities of drugs was permissible, his use of this modus operandi evidence to opine that Jaquez necessarily worked with a drug trafficking organization was improper.

***10 ¶49** Because some of the evidence the prosecutor elicited was impermissible, we must review for harmless error. "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Ketchner*, 236 Ariz. at 265-66, ¶ 20 (internal quotation omitted). Therefore, as to each count,[6] we consider whether the state has demonstrated that the error did not contribute to the verdict.

**¶50** For brevity and analytic clarity, we first consider Jaquez's direct drug offenses. To obtain a conviction for transporting dangerous drugs for sale, the state had to prove beyond a reasonable doubt that Jaquez knowingly transported dangerous drugs. A.R.S. § 13-3407(A)(7) (2018). As relevant here, "knowingly" means that Jaquez was aware that the circumstances of his conduct constituted the offense. A.R.S. § 13-105(10)(b) (2018). To obtain a conviction for possession of drug paraphernalia, the state had to prove beyond a reasonable doubt that Jaquez possessed any item used to pack, store or contain an illegal drug. A.R.S. § 13-3415(A) (2018).

**¶51** For these counts, the state presented evidence that 6.93 pounds of methamphetamine was concealed in a vehicle solely within Jaquez's possession and control. Although Jaquez informed the trooper that he was traveling to Texas to live with his father, the text messages retrieved from his cell phone reflect that he told associates he was making some quick money and would be returning to California within a couple of days. Moreover, Jaquez's claim that he had no knowledge the methamphetamine was in the trunk of his rental vehicle, implying that it must have been left behind by a previous renter, was substantially undermined by the detective's permissible modus operandi testimony that a drug trafficking organization would never abandon drugs with a street value in excess of $200,000. Given this overwhelming evidence that Jaquez knowingly possessed the methamphetamine (and associated cellophane packaging) hidden in the trunk of his vehicle, the detective's impermissible drug profile testimony was harmless as to Counts 2 and 4.

**¶52** To obtain a conviction for assisting a criminal street gang, the state had to prove beyond a reasonable doubt that Jaquez transported the methamphetamine "for the benefit of, at the direction of or in association with" the Barrio Dream Homes gang. A.R.S. § 13-2321(B) (2018). With respect to this count, the state presented evidence that Jaquez admitted: (1) he is an active member of the gang, and (2) the gang derives substantial revenue from drug sales. In addition, the state presented text messages retrieved from Jaquez's cell phone referencing both the Barrio Dream Homes neighborhood and drug transactions. Although the detective improperly used modus operandi evidence to opine that Jaquez worked with a drug trafficking organization, his testimony that transporting a large quantity of drugs requires extensive connections and resources was properly presented for the jury's consideration. Based upon the strength of the state's evidence that Jaquez associated with the Barrio Dream Homes gang while committing the underlying drug offenses, the detective's impermissible drug profile testimony was harmless as to Count 1.

***11 ¶53** In summary, the prosecutor elicited some impermissible drug profile evidence. However, viewing the trial evidence in its totality, and excluding the impermissible evidence and inferences, overwhelming evidence supported the jury's convictions, and the error was therefore harmless. For these reasons, the superior court did not abuse its discretion by denying Jaquez's motion for a mistrial.

### V. Convictions for Greater and Lesser-Included Offenses

**¶54** Jaquez argues his convictions for both possession and transportation of dangerous drugs for sale violated his constitutional protection against double jeopardy. Specifically, he contends that possession of dangerous drugs for sale is a lesser-included offense of transportation of dangerous drugs for sale, and therefore the same offense. The state confesses error and we agree.

**¶55** The double jeopardy clauses of the federal and state constitutions "protect criminal defendants from multiple

convictions and punishments for the same offense." *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9 (App. 2008). When the same act violates "two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact" that the other does not. *Id.* at 324, ¶ 9 (internal quotation omitted). A lesser-included offense, "composed solely of some but not all of the elements of the greater crime," and the greater offense are the "same offense for double jeopardy purposes." *State v. Cheramie*, 218 Ariz. 447, 448, ¶ 9 (2008); *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9 (App. 2208) (citations omitted). Whether an offense is a lesser-included offense of a greater offense is a question of law, which we review de novo. *Cheramie*, 218 Ariz. at 448, ¶ 8.

**¶56** The crime of transportation of dangerous drugs for sale requires the state to prove that the defendant knowingly (1) transported, (2) for sale (3) a dangerous drug. A.R.S. § 13-3407(A)(7) (2018). The crime of possession of dangerous drugs for sale requires the state to prove that the defendant knowingly (1) possessed, (2) for sale, (3) a dangerous drug. A.R.S. § 13-3407(A)(2). Because a person cannot transport a drug without possessing it, *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 12 (App. 1998), the elements of possession of a dangerous drug for sale are all included within the elements of transportation of a dangerous drug for sale, making possession for sale a lesser-included offense. *See Cheramie*, 218 Ariz. at 449, ¶ 10. Therefore, Jaquez's convictions for both the greater and lesser offenses violate the constitutional protections against double jeopardy and we vacate the conviction for possession of dangerous drugs for sale.

### VI. Application of "Gang" Sentencing Enhancement

**¶57** Jaquez contends he was punished twice for the same offense, in violation of the constitutional proscription against double jeopardy, when the superior court applied a "gang" sentencing enhancement to his sentence for assisting a criminal street gang.

**¶58** In rendering their verdicts, the jurors found that Jaquez committed each offense with the intent to either promote, further, or assist a criminal street gang. At sentencing, defense counsel moved to strike the gang enhancement with respect to Count 1, arguing it was "multiplicitous." The superior court denied Jaquez's motion to strike, finding the offense of assisting a criminal street gang is substantively different from the conduct proscribed in the statutory "gang" enhancer.

***12 ¶59** We review de novo whether double jeopardy applies. *Lemke v. Rayes*, 213 Ariz. 232, 236, ¶ 10 (App. 2006). Pursuant to A.R.S. § 13-2321(B), "[a] person commits assisting a criminal street gang by committing any felony offense, whether completed or preparatory for the benefit of, at the direction of or in association with any criminal street gang." Under A.R.S. § 13-714 (2018), "[a] person who is convicted of committing any felony offense with the intent to promote, further or assist any criminal conduct by a criminal street gang" shall receive an increased sentence.

**¶60** In *State v. Harm*, 236 Ariz. 402, 408-09, ¶¶ 23-26 (App. 2015), we considered whether application of the statutory "gang" enhancer to a sentence for assisting a criminal street gang violates double jeopardy. Noting A.R.S. § 13-714 "does not contain any language limiting its application or suggesting it may not operate independently from crimes committed 'at the direction of or in association with' a criminal street gang," we concluded the statute "applies broadly" and reflects the legislature's intent to "mete[ ] out harsher penalties in circumstances involving crimes that provide recognition to or promotion of a criminal street gang." *Id.* at 409, ¶ 25. Accordingly, application of the statutory enhancer to sentences for assisting a criminal street gang "cannot be said to constitute a greater punishment than that anticipated by the legislature" and does not offend double jeopardy. *Id.* at ¶ 26. Therefore, in this case, application of the gang enhancement to Count 1 did not violate Jaquez's constitutional rights against double punishment.

## CONCLUSION

**¶61** For the foregoing reasons, we vacate Jaquez's conviction and sentence for possession of dangerous drugs for sale and affirm the remaining convictions and sentences.

### All Citations

Not Reported in Pac. Rptr., 2018 WL 3721441

  

Footnotes

1 We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

2 We cite to the current version of any statute unless the statute was amended after the pertinent events and such amendment would affect the result of this appeal.

3 Although its finding of valid consent was dispositive, the superior court further found that the trooper lacked reasonable suspicion to detain Jaquez once he issued the citation.

4 *Miranda v. Arizona*, 384 U.S. 436 (1966).

5 Although Jaquez also makes a fleeting reference to the alleged admission of gang profile evidence, he presents no argument to support that claim, and we therefore do not consider it. *State v. Bolton*, 182 Ariz. 290, 298 (1995) (explaining the failure to develop argument sufficient for review results in waiver).

6 For reasons stated below, *infra* ¶¶ 54-56, we vacate the conviction for possession of dangerous drugs for sale, and therefore do not analyze the evidence as to Count 3.