

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 21 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2012-0226
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOSHUA DAVID NELSON,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100333

Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART AND VACATED IN PART

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MILLER, Judge.

¶1 Joshua Nelson appeals from his jury convictions for transportation of methamphetamine for sale, possession of methamphetamine, and possession of drug paraphernalia. Nelson contends the trial court erred in denying his motion to suppress post-*Miranda*¹ statements he had made to sheriff's detectives. He also asserts that, based on double-jeopardy principles, the conviction of possession of methamphetamine must be vacated because it is a lesser-included offense of transportation of methamphetamine for sale. We affirm the transportation and drug paraphernalia convictions and sentences but vacate the possession of methamphetamine conviction and sentence.

Factual and Procedural Background

¶2 We view the trial evidence and the inferences from that evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). So viewed, the evidence established that in April 2011, Cochise County Sheriff's detective Kevin Jamka stopped Nelson because Nelson had been speeding. Nelson did not have a driver's license and the car did not belong to him or the passenger in the car. Nelson consented to a search of the car, where the detective found a digital scale with white residue on it, three empty baggies, and a baggie containing methamphetamine. Nelson also allowed the detective to look at his cell phone messages, which showed text messages of drug sales, and voluntarily spoke to the detective about the messages. The detective arrested Nelson and questioned him with another detective at the sheriff's substation. Nelson admitted having transported

¹*Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

methamphetamine repeatedly and gave the detectives specific information related to deliveries of methamphetamine.

¶3 Nelson was indicted on six counts: one count of transportation of methamphetamine for sale, one count of possession of methamphetamine for sale, three counts of possession of drug paraphernalia, and use of cell phone to facilitate sale of methamphetamine. Nelson filed a motion to suppress statements he made on the basis they had been taken after he invoked his right to remain silent. The trial court denied the motion. After a three-day jury trial, at which the jury heard the audio recording of the statements, Nelson was convicted as detailed above; acquitted of two drug paraphernalia counts and the cell phone count; and sentenced to presumptive, concurrent terms, the longest of which was ten years. This appeal followed.

Discussion

Denial of motion to suppress statements

¶4 Nelson first argues the trial court erred by denying his motion to suppress statements he had made to the detectives at the substation, insisting Detective Jamka continued to question him after he had invoked his Fifth Amendment right not to answer any questions. He asserts, as he did in his motion, that he had invoked his rights by responding “no” when Detective Jamka asked if he would answer questions. The state contends the detective merely asked a clarifying question in response to an ambiguous response, which ultimately resulted in a clarification and explicit consent. Nelson disputes any ambiguity.

¶5 We review the denial of a motion to suppress a defendant’s statements to law enforcement officers “for ‘clear and manifest error,’ the equivalent of abuse of discretion.” *State v. Mendoza-Ruiz*, 225 Ariz. 473, ¶ 6, 240 P.3d 1235, 1237 (App. 2010), quoting *State v. Newell*, 212 Ariz. 389, ¶ 22 & n.6, 132 P.3d 833, 840 & n.6 (2006). The trial court’s legal conclusions, however, are reviewed de novo. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). In doing so, we review only the evidence presented at the suppression hearing, *Newell*, 212 Ariz. 389, ¶ 22, 132 P.3d at 840, and defer to the court’s determinations of the credibility of the interrogating officers and the reasonableness of their inferences, *Mendoza-Ruiz*, 225 Ariz. 473, ¶ 6, 240 P.3d at 1237.

¶6 When a suspect is in custody,² interrogation must cease if the defendant states that he wishes to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). In *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), the Supreme Court 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.” Not all express questioning constitutes interrogation, however, and “[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.*

²The state conceded that the interrogation had been custodial.

Smith, 193 Ariz. 452, ¶¶ 19-20, 974 P.2d 431, 436-37 (1999) (analyzing whether direct question was designed to elicit incriminating response); *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"); cf. *State ex rel. LaSota v. Corcoran*, 119 Ariz. 573, 578-79, 583 P.2d 229, 234-35 (1978) (finding one-word question to be interrogation due to inflection, without further analysis). To determine whether police conduct is "interrogation," the focus is "not on the form of words used, but the intent of the police officers and the perceptions of the suspect." *State v. Finehout*, 136 Ariz. 226, 230, 665 P.2d 570, 574 (1983).

¶7 Detective Jamka testified at the suppression hearing that before interrogation began, he read the *Miranda* warnings from a department-issued card. The detective asked Nelson if he understood the warnings, and Nelson answered that he did. The detective then asked if Nelson wished to speak to him. Detective Jamka described the rest of the exchange between them as follows:

[State]: How did he respond?

[Jamka]: He said no.

[State]: Okay. Did you respond to that answer?

[Jamka]: I did.

[State]: How did you respond to that answer?

[Jamka]: I reiterated his answer, but my inflection was, I guess you'd say, inquisitive.

[State]: Kind of questioning?

[Jamka]: Questioning.

[State]: Questioning whether he meant to say no?

[Jamka]: Correct.

[State]: And was no with a question mark the only thing that you said?

[Jamka]: Yes.

[State]: Yes, no with a question mark is the only thing you said?

[Jamka]: Yes, that's correct.

[State]: Okay. All right. And why was that? Why were you asking whether he meant to say no?

[Jamka]: Because, generally, it's been my experience that most people are interested in talking.

[State]: Well, Mr. Nelson had granted you consent all along, correct?

[Jamka]: Yes.

[State]: Consent to search his vehicle?

[Jamka]: Yes.

[State]: Consent to search his cellphone?

[Jamka]: Yes.

[State]: You were surprised he said no, that he didn't want to speak to you?

[Jamka]: Correct.

[State]: Okay. So you just said no, question?

[Jamka]: Yes, that's what I said.

[State]: And did he respond to that?

[Jamka]: He did.

[State]: How did he respond?

[Jamka]: He stammered. I don't remember his verbatim words, but he stammered and said, no, and basically that he was confused. He didn't understand what he was answering no to.

[State]: All right. So at that point what did you do?

[Jamka]: I re-Mirandized him from the card.

¶8 Detective Jamka again asked Nelson if he understood his rights. Nelson answered that he did. The detective asked again, "Having these rights in mind, do you wish to talk to us now[?]" This time, Nelson answered, "[Y]es." The detective asked Nelson to explain why he had changed his answer, to make sure they "were all on the same sheet of music." Nelson answered that he had not understood the question the first time it was asked and that he had not meant to invoke his right to remain silent. The trial court took the motion under advisement.

¶9 In its written ruling, the trial court found that Detective Jamka had been "surprised" by Nelson's refusal to answer questions after he gave him the *Miranda* warnings because the "Defendant had consented to everything else" The court reasoned in determining whether to grant the motion to suppress, the essential question was "whether Detective Jamka's 'No?' was a question amounting to continued interrogation following an invocation of rights, or whether it was a reiteration of the

Defendant's answer which sounded like a question because Detective Jamka was surprised." The court found the detective had not interrogated Nelson after Nelson responded. Instead, the court found, Jamka "didn't challenge or ignore Defendant's answer," he had "attempted to confirm it." The court concluded Nelson then had clarified he had misunderstood the question and, after he again was given the *Miranda* warning, he had waived "the right to remain silent," and answered the detective's questions. Based on the record before us, the court did not abuse its discretion.

¶10 The trial court's conclusion was premised on the finding that Detective Jamka's response of, "No?" was not a true question and was not, therefore, custodial interrogation. Nelson contends on appeal that the court's ruling also is premised on the implicit finding that Nelson's initial response of "no" was ambiguous. Nelson essentially concedes that when a suspect's invocation of his right to remain silent is ambiguous, officers may ask further questions to clarify the invocation. *State v. Szpyrka*, 220 Ariz. 59, ¶ 6, 202 P.3d 524, 527 (App. 2008). But, Nelson argues, his "no" was unambiguous and further questioning for clarification purposes was not justified here. He asserts the court improperly considered the detective's subjective surprise.³

¶11 The determination of whether a suspect clearly and unequivocally has invoked his constitutional rights after having been given the *Miranda* warning must be based on an objective analysis of what a reasonable law enforcement officer in similar

³At the evidentiary hearing, Nelson did not object to the state's questions regarding why Detective Jamka had said "No?" nor did he move to strike Jamka's testimony that he had been surprised.

circumstances would conclude. *State v. Strayhand*, 184 Ariz. 571, 585, 911 P.2d 577, 591 (App. 1995). Nelson’s argument that the trial court erroneously employed a subjective test seems to be based on the court’s reference to the detective’s subjective perceptions. But the court’s mere consideration of the detective’s surprise does not mean it applied a subjective test. There is nothing in the record establishing the court found determinative the detective’s belief that Nelson’s response had been confusing. Rather, these perceptions could have assisted the court in determining, objectively, whether Nelson unambiguously had invoked his rights. *See* Ariz. R. Evid. 701 (“rationally based” perception may be admissible to assist court in determining fact in issue).

¶12 We find instructive and persuasive the court’s reasoning in *State v. Pitts*, 936 So.2d 1111 (Fla. App. 2006). There, the defendant had spoken to police officers during a series of interviews before he was given the *Miranda* warning and thereby informed of his constitutional rights. *Id.* at 1120. When asked if, knowing those rights, he wished to speak, the defendant had said, “No sir.” *Id.* at 1120-21. The court concluded that, given the defendant’s earlier cooperation with law enforcement officers, “a ‘reasonable police officer in the circumstances’ would have been justified in believing either that [Defendant] had misunderstood the question, that [Defendant] had misspoken in response to the question, or that the officer had misunderstood the response.” *Id.* at 1130, quoting *State v. Owen*, 696 So.2d 715, 718 (Fla. 1997); *see also State v. Forte*, 629 S.E.2d 137, 145 (N.C. 2006) (where defendant cooperative from beginning of encounter with police, unexpected answer of “no” ambiguous, and officer properly asked what

defendant meant). Here, Nelson's earlier cooperation with the detectives, which included consenting to the search of the car and cell phone, and discussing the text messages that were in Nelson's phone, created ambiguity, allowing Detective Jamka to ask a clarifying question.

¶13 Finally, we note this was not the type of situation in which police asked questions designed to keep the suspect talking to wear down his resistance and induce him to waive his rights. *Cf. Szpyrka*, 220 Ariz. 59, ¶¶ 3-9, 202 P.3d at 526-28 (finding error where interrogators repeatedly asked if suspect meant to say "no" and if he wanted to tell his side of the story). Here, after the detective said "No?," Nelson immediately volunteered that he had not understood what he had said "no" to, at which point Detective Jamka repeated the *Miranda* warnings as required. *See State v. Villalobos*, 225 Ariz. 74, ¶ 12, 235 P.3d 227, 231 (2010) ("Repeated *Miranda* warnings are required in 'circumstances suggesting that a suspect is not fully aware of his rights.'"), *quoting State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997). The trial court did not abuse its discretion in finding Nelson clearly had waived the right to remain silent. Therefore, the court did not err in denying the motion to suppress and admitting the statements at trial.

Conviction of lesser-included offense

¶14 Nelson's second argument on appeal is that the conviction and sentence on possession of methamphetamine must be vacated because it is a lesser-included offense of transportation for sale of a dangerous drug. The state agrees with Nelson.

¶15 Convictions for greater- and lesser-included offenses based on the same actions violate a defendant’s double jeopardy rights. *State v. Welch*, 198 Ariz. 554, ¶ 6, 12 P.3d 229, 230-31 (App. 2000). We review double jeopardy violations de novo. *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.2d 668, 670 (App. 2001). To determine whether an offense is a lesser-included offense, we may consider whether the greater offense can be committed without necessarily committing the lesser offense. *State v. Ennis*, 142 Ariz. 311, 314, 689 P.2d 570, 573 (App. 1984). Two offenses are not the same if each offense requires proof of an element that the other does not. *State v. Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d 395, 397 (2000).

¶16 In count one, Nelson was convicted pursuant to A.R.S. § 13-3407(A)(7), which states a person shall not knowingly “[t]ransport for sale . . . a dangerous drug,” while count two was pursuant to A.R.S. § 13-3407(A)(1), which states a person shall not knowingly “[p]ossess . . . a dangerous drug.” The only additional factor in the lesser offense is “possess,” and our supreme court has held that a person cannot “transport” drugs without having possession of them. *State v. Cheramie*, 218 Ariz. 447, ¶ 11, 189 P.3d 374, 376 (2008). Possession of methamphetamine is a lesser-included offense of transportation of methamphetamine for sale. *Id.* ¶ 22. Further, because the possession of methamphetamine was incidental to the transportation for sale charge, it was the lesser-included offense, and Nelson’s conviction of that offense, and the attendant sentence, should be vacated. *Id.* ¶ 21.

Disposition

¶17 The convictions and sentences are affirmed as modified by vacating the conviction and sentence on the charge of possession of methamphetamine.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.