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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NOT FOR PUBLICATION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).
Court of Appeals of Arizona, Division 2.

THE STATE OF ARIZONA, Appellee,
v.
WANDA KAY JOHNSON, Appellant.

No. 2 CA-CR 2017-0184
|
Filed December 4, 2018

Appeal from the Superior Court in Cochise County

No. CR201600920

The Honorable James L. Conlogue, Judge

AFFIRMED

Attorneys and Law Firms

Mark Brnovich, Arizona Attorney General Joseph T. Maziarz, Chief Counsel By Karen Moody, Assistant Attorney General, Tucson Counsel for Appellee

Gail Gianasi Natale, Phoenix Counsel for Appellant

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Eckerstrom concurred.

MEMORANDUM DECISION

BREARCLIFFE, Judge:

***1** **¶1** Wanda Johnson appeals from her **convictions** after a jury trial on four counts of possession of drug paraphernalia. The trial court placed her on three years' probation. We affirm.

Issues

¶2 Johnson contends the trial court erred by failing to grant her pre-trial motion to suppress her statements to law enforcement and by denying her Rule 20 motion for judgment of acquittal. She also contends the court abused its discretion in admitting expert testimony and certain irrelevant and prejudicial character evidence and the prosecutor committed misconduct. The state contends the court properly denied Johnson's motion to suppress her statements, sufficient evidence supported her **conviction**, the court's other evidentiary rulings were correct, and no prosecutorial misconduct occurred. The issues are: 1) whether the statements Johnson made were custodial, in violation of *Miranda,* [1] and therefore should have been precluded; 2) whether the state presented sufficient evidence to support the verdicts; 3) whether the investigating agent's testimony identifying drug residue was permissible; 4) whether the court allowed irrelevant, impermissible character evidence in violation of Arizona Rules of Evidence 401, 402, 403, and 404(a); and 5) whether the prosecutor committed misconduct.

Factual and Procedural History

¶3 In examining a trial court's rulings at a suppression hearing, we review only the evidence presented to the court at the hearing and view the facts in the light most favorable to upholding the court's pre-trial ruling. *State v. Maciel*, 240 Ariz. 46, ¶ 9 (2016). In our evaluation of the rulings at trial, we view the evidence "in the light most favorable to sustaining the **conviction**." *State v. Robles*, 213 Ariz. 268, ¶ 2 (App. 2006).

¶4 At about 1:20 a.m. on June 3, 2016, Shirley Mecklenburg drove a sport utility vehicle (SUV) through a fixed United States Border Patrol checkpoint north of Tombstone. Johnson was in the front passenger seat. Border Patrol Agent Kathleen June's K-9 unit dog "alerted" on the vehicle, and another agent directed Mecklenburg to pull into the secondary inspection area. Johnson stated the SUV was registered in her husband's name, and, when asked, gave June consent to search the vehicle. [2] Johnson and Mecklenburg got out of the SUV and sat on a nearby bench. When June asked where they were traveling, Mecklenburg said they were on their way to the airport in Tucson to pick up a friend.

¶5 The dog jumped into the SUV and alerted on two purses in the front seat. Johnson identified the larger of

the two purses as hers. The dog then alerted on the bags in the rear cargo area of the SUV, and stared at a multi-colored plastic bag; Agent June determined "that that was where [the dog] believed the source was." June removed all four bags, and placed them on the ground, approximately six-to-eight feet away from Johnson and Mecklenburg. Johnson said all of the bags were hers.

***2 ¶6** In the multi-colored bag, Agent June found a small red bag with a cell phone box inside. Inside the box were two pipes and marijuana "[s]hake." June had been a Border Patrol agent for ten years and had been trained to identify illegal substances and paraphernalia. She testified one of the pipes contained black residue that smelled like burnt marijuana. She testified the other pipe had both black and white residue, and, in light of her training and experience, it appeared to be a methamphetamine pipe. After the paraphernalia was discovered, Johnson said the cell phone box "might have been her nephew's."

¶7 Also in the multi-colored bag, Agent June found a small black pouch holding two digital scales. She testified there was residue on the weighing platforms she believed was methamphetamine. Using a testing kit, June conducted a preliminary field test on the residue, which, to her, confirmed that belief. In Johnson's purse, June found a torch lighter that, based on her training and experience, appeared to be drug paraphernalia, used for heating methamphetamine pipes. Johnson testified she used the torch lighter to light a wood-burning stove and a wall heater.

¶8 Deputy Christopher Robison with the Tombstone Marshall's Office arrived at the checkpoint and arrested Johnson and Mecklenburg. Johnson was ultimately charged with five counts of possession of drug paraphernalia.

¶9 Before trial, Johnson filed a "Motion to Suppress Evidence Obtained Via Illegal Custodial Interrogation" and a "Motion for Voluntariness Hearing." In the motion to suppress, Johnson asserted the stop by Agent June had been illegal because it was based on the Border Patrol K-9 unit dog alerting to Johnson's SUV, but no evidence had been "disclosed to verify what the canine has been trained to detect, nor has the animal's accuracy been established." Johnson further asserted she had not "engaged in any behavior that falls within the limited scope of what the checkpoint is authorized to enforce against." Johnson claimed the state had failed to produce "any information that Agent June is endowed with law enforcement powers of peace officers in Cochise County ... while also using her federal authority to arrest." Johnson argued all evidence obtained as a result of the stop should be suppressed. In her motion for voluntariness hearing, Johnson did not assert any specific basis for a claim her statements were involuntary, but merely requested a pre-trial hearing on voluntariness.

¶10 At the hearing on the two motions, Agent June and Deputy Robison testified. June testified to her training and experience and to her K-9 unit dog's training, certifications, and periodic evaluations. She testified the dog was certified to detect, by odor, concealed humans and drugs, including heroin, cocaine, methamphetamines, ecstasy, and marijuana and its derivatives. June also testified that, when the dog encounters odors it has been trained to detect, its alerts consist of increased respiration and change in body posture and the dog "alerted" to Johnson's SUV when it drove through the checkpoint. Once the dog alerted, it pulled June toward the SUV. June then testified that, after that alert, she had directed the primary agent to send the SUV to the secondary inspection area for further inspection.

¶11 Once Mecklenburg pulled into the secondary inspection station, Agent June asked Johnson for consent to have the dog sniff the interior and exterior of the SUV, which Johnson gave. June then testified substantially to the facts detailed above, including that, after the dog alerted to the bags in the cargo area of the SUV, Johnson admitted to owning all of them, and Johnson also admitted to owning the larger of the two green purses in the passenger compartment. June then testified she had found the drug paraphernalia during her physical search of the bags and Johnson's purse. She told the trial court Johnson had been "detained" throughout the search though not handcuffed, but she had not given Johnson *Miranda* warnings at any time.

***3 ¶12** The state argued against suppression because Johnson had a "diminished expectation of privacy" at the checkpoint, the trained dog alerted to the odor of illegal drugs thus providing Agent June probable cause, and Johnson gave consent for the further search within the vehicle. The state further argued Johnson's statements were not taken during a custodial interrogation, but rather were voluntary. Johnson argued June was a federal officer

but working as an agent of the State of Arizona and "[w]e haven't heard anything that authorizes that." Johnson argued the stop itself was illegal and all seized evidence must be suppressed as a consequence. Johnson did not argue her statements to June were involuntary or even that the state had failed to show they were voluntary; her arguments were limited to the propriety of the stop itself. The trial court denied the motion to suppress, and found Johnson's statements were voluntary and there was no violation of *Miranda*.

¶13 At trial, after the state's case, Johnson moved for a judgment of acquittal on all counts on the grounds of insufficient evidence. The trial court granted the motion as to Count 3 (related to a spoon as drug paraphernalia), but denied the motion as to all other counts. Johnson was **convicted** and placed on probation as described above; this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A).

Analysis

Claimed *Miranda* Violation

¶14 On appeal, Johnson asserts Agent June and Deputy Robison interrogated her while she was in custody, but without giving her the required *Miranda* warnings, and the trial court therefore erred in denying her motion to suppress her statements made during interrogation. This is a new argument by Johnson. As stated above, in the trial court, Johnson did not assert or argue her statements to June were involuntary or even that the state had failed to carry its burden to show voluntariness. She argued only that her statements and all other evidence must be suppressed because there was no reasonable suspicion to justify the stop, thus making the stop itself illegal. Because Johnson did not argue below as she does here that her statements were the fruit of an illegal custodial interrogation under *Miranda*, we conclude she has waived this argument. *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Notwithstanding Johnson's waiver, because the state sufficiently addressed the voluntariness of Johnson's statements under *Miranda*, and the trial court made express findings that they were voluntary and were not taken in violation of *Miranda*, we will, in our discretion, address the claim of a *Miranda* violation here. *See State v. Smith*, 203 Ariz. 75, 79 (2002) (in its discretion court may address merits of waived argument).

¶15 A detention at a border checkpoint is a seizure under the Fourth Amendment. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). However, given the substantial public interest in protecting the integrity of our national borders, and the "minimal" intrusion upon privacy by a "routine" border inspection, "a border patrol agent may briefly detain and question an individual without any individualized suspicion as required under *Terry v. Ohio*."[3] *Id.* at 556-62. Border patrol agents may direct motorists from the primary inspection area to a secondary inspection area without individualized suspicion and "have wide discretion in selecting the motorists to be diverted." *Id.* at 563-64. Border patrol agents are allowed to conduct a routine checkpoint stop, but "[a]ny further detention ... must be based on consent or probable cause." *Id.* at 567 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)). A routine checkpoint stop must be brief and unintrusive, and generally involves questions concerning the motorist's citizenship or immigration status, and a request for documentation. *Martinez-Fuerte*, 428 U.S. at 558. A cursory visual inspection of the vehicle is also routine. *Id.*

***4 ¶16** Johnson here complains not about the legality or circumstances of her detention, but about the admissibility of incriminating statements she made during questioning while she was detained.[4] Both the Fifth Amendment to the U.S. Constitution and Article 2, section 10 of the Arizona Constitution shield "all persons from compulsory self-incrimination. To safeguard this privilege, law enforcement officers must provide the well-known *Miranda* warnings before interrogating a person in custody." *State v. Maciel*, 240 Ariz. 46, ¶ 10 (2016). Courts have deemed such warnings before questioning necessary "because 'without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' " *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). Because *Miranda* warnings must only come before custodial interrogations, in the absence of a custodial interrogation, such warnings are not needed. *Id.*

¶17 Before *Maciel*, our courts determined custody for *Miranda* purposes by applying a test adopted in *State v. Cruz-Mata*, 138 Ariz. 370, 373 (1983). In *Cruz-Mata*, the court stated that, for a detention to be *Miranda* custody, there must be either a formal arrest or a detention akin to

a formal arrest, evaluated by "the site of the questioning; whether objective indicia of arrest are present; [ ] the length and form of the interrogation ... [and] the method used to summon the individual." *Id.* As stated in *Maciel*, in light of decisions of the United States Supreme Court since *Cruz-Mata*, now to determine whether a suspect is in custody for *Miranda* purposes, "we must consider both whether [his] freedom of action was significantly curtailed and, if so, whether the environment in which he was questioned presented inherently coercive pressures similar to a station house interrogation." 240 Ariz. 46, ¶ 13.

¶18 As to the first prong, in determining whether a person's freedom of movement has been significantly curtailed, we look to whether "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* ¶ 14 (quoting *Howes v. Fields*, 565 U.S. 499, 509 (2012)). And "[t]o determine how a suspect would have gauged his or her freedom of movement, we must evaluate 'all of the circumstances surrounding the interrogation,' " not just the factors stated in *Cruz-Mata*. *Id.* (quoting *Howes*, 565 U.S. at 499). In applying the *Cruz-Mata* factors and in examining the totality of the circumstances of Johnson's detention, we do not find that a reasonable person, at the time of the questioning Johnson underwent, would have felt she was not free to leave, or was in anything like *Miranda* custody.

¶19 Here, after Agent June's dog alerted to the SUV, Johnson and Mecklenburg were directed to pull into the secondary inspection area, a public location. June then asked for Johnson's consent for a physical search of the SUV, which she, seemingly, freely gave. Johnson was not isolated: she was outdoors, in a public location, alongside her companion, visible to the passing public. As to the length of interrogation as a factor, no rigid time limit controls; the question is whether law enforcement unreasonably delays an investigation in order to gain an advantage over the subject, increasing the chance he will say something self-incriminating. *Id.* ¶¶ 19-20. There is no evidence that June unreasonably delayed her investigation in order to gain any advantage over Johnson. Approximately forty minutes elapsed between the agent directing the SUV to the secondary inspection station and Johnson's arrest. There was no indication the investigation was longer than necessary or longer than any other consensual search at a secondary inspection station. In fact, because Johnson consented to the physical search of the SUV, to the extent she was detained during the search, she also consented to that detention.

***5 ¶20** Finally, objective indicia of arrest were absent here: Johnson was not handcuffed or placed in a patrol vehicle during the search or the contemporaneous questioning, nor was she threatened with impending arrest as she was being questioned. Indeed, at the time of the relevant questioning, Agent June had not yet discovered anything incriminating. Each of the questions and responses Johnson seeks to suppress here were given after she had consented to the search and before June opened any bag and discovered any of the drug paraphernalia for which Johnson was charged and **convicted**. Johnson was either unaware of the illegal nature of the contents of the bag, or did not fear arrest if the contents were discovered.

¶21 Under the totality of the circumstances, we conclude that a reasonable person in Johnson's circumstances, at the time she made the statements she seeks to suppress, may have believed that she was being temporarily detained for an investigation, but not that she had been taken into custody. Therefore, Johnson was not in *Miranda* custody at the time of the questioning in issue, *Miranda* warnings were not required, and the trial court therefore did not err by refusing to suppress Johnson's statements. [5]

Sufficiency of the Evidence

¶22 Johnson argues the trial court erred when it denied her Rule 20 motion for judgment of acquittal on four counts of the indictment. She argues there was insufficient evidence 1) any of the items were drug paraphernalia; 2) of her "knowing possession" of the scales and both pipes; and 3) of her "intent to use" the torch lighter "with drugs."

¶23 Sufficiency of the evidence is a question of law, which we review *de novo*. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). When reviewing claims of insufficient evidence, appellate courts "view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the **conviction**." *State v. Fimbres*, 222 Ariz. 293, ¶ 4 (App. 2009) (quoting *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005)). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate to support a conclusion of defendant's guilt beyond a reasonable doubt.' " *State v. Mathers*, 165 Ariz. 64, 67 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419 (1980)). Evidence may be

direct or circumstantial. *State v. Bustamante*, 229 Ariz. 256, ¶ 5 (App. 2012). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *Id.* (quoting *State v. Arredondo*, 155 Ariz. 314, 316 (1987)). We do not reweigh the evidence and resolve all reasonable inferences against the defendant. *State v. Lee*, 189 Ariz. 590, 603 (1997).

¶24 "The sufficiency of the evidence [is] tested against the statutorily required elements of the offense." *Pena*, 209 Ariz. 503, ¶ 8. Here, Johnson's **convictions** were for possession of drug paraphernalia under A.R.S. § 13-3415(A): "[i]t is unlawful for any person to use, or possess with intent to use, drug paraphernalia to ... convert, ... process, ... ingest, inhale, or otherwise introduce into the human body a drug in violation of [Chapter 32 of Title 13 of the Arizona Revised Statues.]." According to § 13-3415(F), " '[d]rug paraphernalia' means all equipment, products and materials of any kind which are used, intended for use or designed for use in" among other things, "manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ... inhaling or otherwise introducing" a drug into the body.

Drug Paraphernalia: All Items

***6 ¶25** Agent June testified she has been involved in "hundreds" of investigations concerning, specifically, methamphetamine and marijuana. In the course of her investigations she has seen numerous marijuana and methamphetamine pipes. She testified that, based on her training and experience, the shape of the pipe, the burned residue inside, and the smell of burnt marijuana, one of the pipes was for smoking marijuana. She also testified that, based on the shape of the pipe, the black residue inside the bulb, and the white residue on the exterior, the other pipe was used for methamphetamine. Deputy Robison agreed. June stated torch lighters are preferred to cigarette lighters for heating methamphetamine pipes. June further identified the particles found in the cell phone box with the pipes as marijuana. She also testified she believed, based upon her training and experience, the residue on both of the digital scales was methamphetamine.

¶26 Johnson argues, that because the scales and pipes were not sent for lab analysis and because the marijuana had been lost, Agent June's testimony alone that those items were drug paraphernalia was insufficient. Law enforcement witnesses may testify as experts based on "knowledge, skill, experience, training, or education." Ariz. R. Evid. 702; *State v. Mosely*, 119 Ariz. 393, 400 (1978) ("[t]he highest possible qualifications to testify about a particular matter are not necessary; the extent of training and experience of an expert goes to the weight, rather than the admissibility, of [her] testimony."). That testimony may extend to identifying items as drug paraphernalia. § 13-3415(E)(14) ("In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors ... [e]xpert testimony concerning its use."). Additionally, when determining whether an item is drug paraphernalia, a jury can consider the proximity of the object to drugs, drug residue on the objects, and expert testimony about its use. § 13-3415(E)(4)-(5) (**"**In determining whether an object is drug paraphernalia, a court ... shall consider, in addition to all other logically relevant factors ... [t]he proximity of the object to drugs ... [t]he existence of any residue of drugs on the object."). June's expert testimony, based on her training and experience, along with the proximity of the objects to each other, to the marijuana, and the presence of residue on the pipes and scale, were sufficient for the jury to determine the scales, pipes, and torch lighter were drug paraphernalia.

"Knowing Possession" of Scales and Pipes

¶27 As to Counts 2, 4, and 5, Johnson argues Agent June's testimony that Johnson said "all" of the bags in the back of the SUV belonged to her was insufficient to demonstrate "knowing possession" of the scales and pipes found within one of them because, Johnson maintains, she did not know that specific bag was there. June testified at trial the four bags in the cargo area of the vehicle were visually very different and "readily distinguishable as four separate bags": one was denim, one was a black purse, one was flowered, and one was plastic and multi-colored. June testified she had removed the bags from the vehicles, and placed them six-to-eight feet away from where Johnson was seated on the bench. Before searching within the bags, June asked whose bags they were, and Johnson said all of the bags belonged to her.

The foregoing was sufficient circumstantial evidence of her knowing possession of its contents—the scales and pipes—to support the convictions. *State v. Harris*, 9 Ariz. App. 288, 290 (1969) (holding exclusive control over an automobile, evidence indicating knowledge of the location of drugs, and subsequent discovery of drugs are sufficient evidence of possession to submit the question to the jury).

"Intent to Use" Torch Lighter "With Drugs"

¶28 Johnson argues the state presented no evidence to support Count 1 that Johnson intended to use the torch lighter found in her purse for drugs. As stated above, Agent June testified she had been a Border Patrol agent for ten years and had been trained to identify illegal substances and paraphernalia. Based on her training and experience, June testified torch lighters are preferred to cigarette lighters for heating methamphetamine pipes and are used for that purpose. A witness may testify on a subject about which he has gained practical experience. *See State v. Delgado*, 232 Ariz. 182, ¶ 15 (App. 2013) (Rule 702 "not intended to 'preclude the testimony of experience-based experts' "). Further, as stated above, when determining whether an object is drug paraphernalia, the fact-finder shall consider expert testimony concerning its use, § 13-3415(E)(14), and the proximity of the object to other drug paraphernalia, § 13-3415(E)(2). June's testimony, based on her experience as a law enforcement officer, coupled with the torch lighter's proximity to the scales and pipes, was substantial and therefore sufficient evidence of Johnson's intent to use the torch lighter for drugs.

***7 ¶29** There was sufficient evidence presented by the state at trial from which a reasonable jury could convict on each count. The trial court did not, therefore, err in denying Johnson's Rule 20 motion.

Expert Testimony

¶30 Johnson argues the trial court abused its discretion in admitting evidence of the results of the field narcotics test, which Agent June testified indicated the presence of methamphetamine on the digital scales. It abused its discretion, Johnson alleges, because June was not an expert on the preliminary field test and because the state presented no evidence on the reliability of the test. Johnson argues June's testimony on the results of the test was inadmissible under Arizona Rules of Evidence 702 and *Daubert*. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We review the trial court's ruling on the admissibility of expert testimony for an abuse of discretion. *State v. Jacobson*, 244 Ariz. 187, ¶ 6 (App. 2017).

¶31 At trial, Agent June testified she had performed a preliminary field test on the residue on the digital scales, following the directions on the packaging. She testified when she had swabbed the residue off the scales and performed the preliminary test, the test changed color and matched the color on the packaging, which was the color she "expected to receive when [she] used [the] field test." She admitted she did not know the scientific principles behind the test. She testified the tests are recommended by the Drug Enforcement Agency. Johnson objected to her testimony, asserting June lacked qualifications to testify about "clearly scientific evidence."

¶32 We need not reach Johnson's arguments concerning the field-test results, however, because sufficient evidence apart from the results was presented to support the convictions such that we would deem any error harmless. *State v. Bogan*, 183 Ariz. 506, 515 (App. 1995) ("Because any error in the challenged ruling would be manifestly harmless, we find addressing the admissibility issue unnecessary."). "When an issue is raised but erroneously ruled on by the trial court, this court reviews for harmless error." *State v. Bible*, 175 Ariz. 549, 588 (1993). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *Id.* In making the harmless error inquiry, the question " 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.' We must be confident beyond a reasonable doubt that the error had no influence on the jury's judgment." *Id.* (emphasis omitted) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

¶33 Among other factors, "[i]n determining whether evidentiary errors are harmless, courts ... consider whether the error involved the admission or exclusion of primary evidence." *State v. Romero*, 240 Ariz. 503, ¶ 14 (App. 2016). Here, the test results were not the primary evidence of the presence of drug residue on the scales. Nor was the testimony about the test results dispositive. Agent

June testified about her experience and training in the identification of illegal drugs. She testified she believed the substance on the scales was methamphetamine based on her examination of it. She was asked if she reached a conclusion as to the nature of the substance independent of any field testing, and she answered she did, and she concluded it was methamphetamine. She further testified in her years of experience, as to the testing of methamphetamine pipes, she had never incorrectly identified a substance as methamphetamine. June's testimony about the field test was comparatively fleeting and inconclusive: she admitted any field test was preliminary and further testing was needed and customary.

***8** **¶34** The gravamen of the evidence as to the nature of the residue on the scales was Agent June's opinion, based on her physical examination of the residue, that it was methamphetamine. Even if it were error, the admission of the field-test evidence, in light of June's other testimony, was harmless beyond a reasonable doubt.

Relevancy and Impermissible Character Evidence

¶35 Johnson argues the trial court erred when it permitted Johnson to answer the prosecutor's questions that revealed the name of her brother—who is in prison—because the evidence was not relevant, was substantially more prejudicial than probative, and constituted impermissible character evidence in violation of Arizona Rules of Evidence 401, 402, 403, and 404(a). We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 7 (App. 2013).

¶36 At trial, Johnson's attorney asked her to name her brothers and sisters. Johnson testified she had two brothers and three sisters, and named each by first name. Johnson volunteered that two of her siblings were deceased and that one sister was present in the courtroom. During cross-examination, the prosecutor asked if her siblings still lived in Bisbee. Johnson replied "Toby is no longer with us here." The prosecutor asked where Toby was, and, without objection by her counsel, Johnson answered he was in prison. The following exchange then took place:

Q. What's your maiden name?

A. Byers, B-y-e-r-s.

Q. Does Toby go by that name as well?

A. No.

Q. What does Toby go by?

Mr. Swartz: Objection. Relevance.

The Court: You can answer the question.

A. Jones.

Q. Okay. You said Toby is in prison?

A. Yes.

Rule 401 and 402

¶37 Evidence is probative and thus relevant if it has some tendency to make a fact of consequence to the determination of the action more or less probable than it would be without the evidence. Ariz. R. Evid. 401. Relevant evidence is admissible. Ariz. R. Evid. 402. The court has considerable discretion in determining the relevancy and admissibility of evidence. *State v. Hensley*, 142 Ariz. 598, 602 (1984). Here, Johnson first testified about her family members, identifying them by first name, on direct examination by her counsel. Then, on cross-examination, once Johnson stated her brother was in prison, further questions revealed her brother's last name. Neither party argues Johnson's direct testimony about her siblings' first names was relevant because it made any fact of consequence in the case more or less probable. Where one party injects improper or irrelevant evidence or argument, the "door is open," and the other party may have a right to respond with comments or evidence on the same subject. *Pool v. Superior Court*, 139 Ariz. 98, 103 (1984). By introducing evidence that was not relevant, Johnson "opened the door" to the state responding on the same subject with equally irrelevant information. Neither side's injection of irrelevant information appears on its face more egregious than the other's. The trial court did not err when it allowed Johnson to testify as to her brother's full name over the objection that it was irrelevant.

Rule 403 and 404(a)

¶38 While we review a trial court's ruling on the admissibility of evidence for an abuse of discretion, *Buccheri-Bianca*, 233 Ariz. 324, ¶ 7, an objection on one ground does not preserve the issue on another ground. *See State v. Rutledge*, 205 Ariz. 7, ¶¶ 29-30 (2003) (requiring objection on specific legal ground to preserve issue); *see also State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008). During trial, Johnson objected to the testimony regarding her brother's last name only on relevancy grounds. Therefore, Johnson's Rule 403 and Rule 404(a) character evidence arguments were not preserved and are reviewed for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Because, however, Johnson did not argue on appeal the error was fundamental, such arguments are waived, and we will not review for fundamental error. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008).

Prosecutorial Misconduct

***9 ¶39** Finally, Johnson argues her **convictions** should be reversed due to individual acts of prosecutorial misconduct and due to their cumulative effect. She alleges the prosecutor's question regarding her brother's last name constituted misconduct, the prosecutor engaged in improper vouching for Agent June, and the prosecutor made improper statements about testing the residue on the scales during closing arguments.

¶40 We "will reverse [a] defendant's **conviction** because of prosecutorial misconduct if two conditions are satisfied: (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Anderson*, 210 Ariz. 327, ¶ 45 (2005) (quoting *State v. Atwood*, 171 Ariz. 576, 606 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25 (2001)). We first review each alleged instance of prosecutorial misconduct to determine whether error occurred. *State v. Roque*, 213 Ariz. 193, ¶ 154 (2006), *abrogated on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254 (2017). After reviewing each allegation of misconduct, we review the cumulative effect on the trial of any misconduct found to determine whether "persistent and pervasive misconduct" existed. *Roque*, 213 Ariz. 193, ¶ 155. The standard of review for each instance depends on whether Johnson objected at trial: if she failed to object, we review only for fundamental error, *id.* ¶ 154, otherwise, we review for harmless error. *Henderson*, 210 Ariz. 561, ¶ 19 (harmless error standard applies when defendant objects at trial, thereby preserving issue for appeal).

¶41 Johnson first argues the question that elicited her brother's last name, discussed above, constituted misconduct because it was a "foul blow" "calculated ... to bring to the jury's attention that Ms. Johnson's brother was a known meth dealer" in order to combat any sympathy the jury might feel for Johnson. There is nothing in the record to support the argument the prosecutor calculated any "foul blow." Further, there is no reason to believe any of the jurors were aware of Johnson's brother's crimes, such that eliciting his full name would have impacted the case. Additionally, the trial court instructed the jurors to "determine the facts only from the evidence produced in court." We assume jurors follow the jury instructions provided by the court. *See State v. Newell*, 212 Ariz. 389, ¶ 68 (2006). Because, as determined above, the prosecutor did not improperly elicit Johnson's brother's full name, doing so was not misconduct.

¶42 Johnson then complains of three instances of "prosecutorial vouching." Improper prosecutorial vouching occurs where: 1) the prosecutor places the prestige of the government behind the witness; or 2) the prosecutor suggests that information outside of the record supports the witness's testimony. *State v. Vincent*, 159 Ariz. 418, 423 (1989). The first form of vouching is typically found where the prosecutor states or alludes to his personal opinion that a witness has testified honestly. *See, e.g.*, *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 79 (2018) (prosecutor alluding to defense witness testimony as "manufactured" and then stating, "[y]ou have been presented with the truth."). The second occurs, for example, where a prosecutor states he witnessed an event or saw a piece of evidence outside of the record that supports a witness's testimony or which lends weight to admitted evidence relied on by a witness. *See, e.g.*, *State v. Salcido*, 140 Ariz. 342, 344 (App. 1984) (prosecutor stated personal knowledge about size of gas tank which confirmed testimony of witness whose credibility was "pivotal issue"); *Newell*, 212 Ariz. 389, ¶ 64 (prosecutor asserted DNA testing is "the most powerful investigative tool in law enforcement at this time.").

***10 ¶43** Johnson first contends the prosecutor vouched for Agent June when he referred to a statutory

definition of drug paraphernalia not included in the jury instructions. The prosecutor's statements in this respect neither amounted to a personal opinion of the credibility of a witness nor referred to matters outside of the record to bolster a witness's credibility or to give weight to evidence on which any witness relied. This argument was not, therefore, prosecutorial vouching, and the trial court did not err by allowing it over Johnson's objection.

¶44 Johnson next argues the prosecutor vouched for Agent June's credibility when he described her testimony, and then said, "[i]s she really going to stake her entire career ... [s]he's under oath. You heard she's under oath. And you know the consequences of that." In *State v. Ramos*, after defense counsel noted that two officers' testimony seemed inconsistent, he invited the jury to review the evidence and come to its own conclusion as to whether the officers' recollections were accurate. 235 Ariz. 230, ¶¶ 29-30 (App. 2014). In rebuttal, the prosecutor argued the " 'police [were] simply doing their job' " and suggested they "[had] no motive to lie." *Id.* ¶ 29. The defendant objected that this was impermissible vouching. *Id.* The trial court sustained defense counsel's objection. *Id.* On appeal, this court found the prosecutor's statements were equivalent to rhetorical questions such as, "[W]hat motive would the police have to lie in a case like this?" and "[W]hat motive would they have to lie or fabricate any evidence?" and were not misconduct. *Id.* ¶ 30.

¶45 Here, the prosecutor merely reminded the jury that Agent June was under oath, and posed a rhetorical question alluding to the consequences of a witness in violating that oath. As in *Ramos*, such a rhetorical question was not a statement of any personal opinion of the prosecutor as to June's credibility, and therefore was not vouching, and the trial court's allowing such a statement was not error. In any event, the court instructed the jury that closing arguments are not evidence, and we assume jurors follow the instructions provided. *See Newell*, 212 Ariz. 389, ¶ 68.

¶46 Johnson next argues the prosecutor's statements that "many, if not all of you, have been to the Tucson airport. You know what it looks like at 1:20 in the morning ... [y]ou know what time flights come in and flights go out" was also impermissible vouching. This, Johnson claims, somehow generally supported and therefore vouched for Agent June's testimony. Such a statement is not vouching, either as a comment supporting a witness's credibility, or one alluding to evidence outside of the record to support a witness's testimony. Because the argument was not vouching, it was not prosecutorial misconduct.

¶47 Johnson's final claim of prosecutorial misconduct is that the prosecutor misled the jury during his closing argument by suggesting Johnson could have tested the residue on the scales, even though no residue existed after the scales were taken into evidence. Johnson objected to the comment as "[b]urden shifting." Impermissible "burden shifting" occurs in the state's argument when argument may lead a jury to believe the defendant bears some burden of proof on a question as to which the state bears the burden. *See, e.g.*, *State v. Sarullo*, 219 Ariz. 431, ¶ 24 (App. 2008) (considering whether prosecutor's comments improperly shifted the burden of proof to the defendant, but finding no such misconduct). On appeal, Johnson argues this comment was improper because it "misstated the evidence and misled jurors," and wrongly suggested to the jury that Johnson "should have done the impossible—test residue not impounded by police."

***11 ¶48** Assuming Johnson is persisting in her argument that such a statement is misconduct because it is misleading and thereby constituted misconduct by "burden shifting," we do not agree. "[A]dvocates are ordinarily given wide latitude in closing argument." *State v. Leon*, 190 Ariz. 159, 162 (1997). As Johnson concedes, a "prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify." *State v. Fuller*, 143 Ariz. 571, 575 (1985); *see also State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160 (1987). Because this argument did not do so, the trial court did not err in allowing the prosecutor's statement over Johnson's objection.

¶49 Finally, Johnson argues the cumulative effect of the individual instances of prosecutorial misconduct constituted fundamental error. Having found no individual instances of prosecutorial misconduct, we need not review the cumulative effect of such instances on the fairness of the trial. *See Roque*, 213 Ariz. 193, ¶ 155.

Disposition

¶50 We affirm Johnson's **convictions** and sentences.

All Citations

Not Reported in Pac. Rptr., 2018 WL 6333583

Footnotes

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

2 Agent June confirmed that Johnson and her husband were both registered owners of the SUV.

3 392 U.S. 1 (1968).

4 Johnson has abandoned on appeal her claim that she was stopped without reasonable suspicion or probable cause, and therefore the lawful basis for the stop is unchallenged. *State v. Moody*, 208 Ariz. 424, n.9 (2004) ("[F]ailure to argue a claim usually constitutes abandonment and waiver of that claim.").

5 Because we find the absence of *Miranda* custody after examining the first prong of the *Maciel* test, we need not apply the remainder of the test.

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