NOT DESIGNATED FOR PUBLICATION

No. 124,784

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BARBARA ANN RAY,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Opinion filed May 5, 2023. Affirmed.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris Kobach*, attorney general, for appellee.

Before BRUNS, P.J., GREEN and WARNER, JJ.

PER CURIAM: After a 14-month investigation by the Leavenworth County Sheriff's Office, the State charged Barbara Ann Ray with five counts ranging from possession of drug paraphernalia to intent to distribute drugs within 1,000 feet of a school. Prior to trial, Ray filed a motion to suppress evidence seized during the execution of a search warrant. After the district court denied the motion, a jury convicted Ray on all the charges. On appeal, Ray contends that the district court erred in denying her motion to suppress. She also contends that the State committed prosecutorial error. Based on our review of the record, we find no reversible error. Thus, we affirm.

FACTS

On August 14, 2018, at approximately 7:22 a.m., a tactical team from the Leavenworth County Sheriff's Office served a search warrant at Ray's residence. Ray lived in the basement of a house on North 16th Street in Leavenworth. The house is located near the David Brewer Elementary School, which was named for former United States Supreme Court Justice David J. Brewer. There is little, if any, dispute regarding the facts presented at trial. Rather, the parties dispute whether there was sufficient information presented in the application and affidavit in support of the search warrant to allow the district court judge who issued the warrant to make a finding of probable cause.

The search warrant was obtained from District Court Judge Michael D. Gibbens based on information compiled by the Leavenworth County Sheriff's Narcotics Bureau from June 6, 2017, until August 12, 2018. The investigation was led by Corporal Megan Mance and Sergeant Jason Slaughter. During the 14-month investigation, the officers received information from various sources, performed surveillance of Ray's residence, and conducted two controlled drug buys.

Among other things, the affidavit presented to a district court judge when applying for a warrant to search Ray's residence contained the following information:

- Beginning in June 2017, Corporal Mance and Sergeant Slaughter began receiving tips from several people who had been arrested for drug-related crimes that Ray was actively selling illegal drugs, including methamphetamine, heroin, prescription pills, and marijuana.
- On June 6, 2017, James Reed informed law enforcement that Ray purchased prescription pills from his wife and sold them to other people. He also identified Ray's residence and indicated that she lived in the

basement. In addition, Reed reported that Ray had sold him methamphetamine on a regular basis at her residence.

- On August 22, 2017, Thomas Eismann—who was arrested for the distribution of methamphetamine—informed law enforcement that Ray was a known associate of Michelle Cabrera, who had been convicted of distribution of illegal drugs.
- On September 6, 2017, law enforcement received a tip from an anonymous citizen that Megan Walker sold prescription pills for Ray. The tipster also identified other individuals known to be associated with the distribution of illegal drugs who were associated with Walker and Cabrera.
- On September 12, 2017, Patricia Perkins reported that Ray and Cabrera had a falling out.
- On January 4, 2018, Officer Derek Garver with the Leavenworth Police Department reported that Ray was residing on North 16th Street with Kenneth Allen. He also indicated that Allen was a known drug user and dealer. The officer further indicated that he observed Elijah McFarlin—who he indicated was another known drug user—with Ray on multiple occasions.
- Also on January 4, 2018, Detective Ryan Hoppe with the Leavenworth Police Department reported that McFarlin was arrested and wanted to talk to Sergeant Slaughter about his knowledge of drug activity. McFarlin told Detective Hoppe that he purchased methamphetamine from Ray and provided her address as well as her phone number. The phone number provided by McFarlin was the same one used by Ray during two subsequent controlled drug buys.
- On January 15, 2018, Corporal Mance and Sergeant Slaughter interviewed McFarlin, who informed them that Ray sells methamphetamine, heroin, prescription pills, guns, and marijuana.

- On January 23, 2018, McFarlin told Corporal Aaron Burchyett of the Leavenworth County Sheriff's Office that he was present in Ray's residence on more than one occasion when she sold illegal drugs. McFarlin further stated that Ray was "currently buying her product from Baller B—Brian Quinley and Crystal Gallagher."
- On January 26, 2018, Alton Johnson also informed Corporal Mance and Sergeant Slaughter that "Baller B" was Ray's methamphetamine supplier.
- On February 12, 2018, Joshua Morse told Sergeant Slaughter that Ray was his aunt and that he had been buying methamphetamine and prescription pills from her for several years. Morse described Ray's basement residence and provided a floor plan to Sergeant Slaughter. Morse also reported that Ray had been in possession of several handguns.
- On March 12, 2018, a confidential informant (No. 4602) provided information about buying marijuana from Ray and described Ray's residence and basement.
- On March 21, 2018, another confidential informant (No. 4604) reported buying and selling methamphetamine for Ray. The informant also provided a layout of Ray's basement residence that was consistent with the one Morse previously provided.
- Also on March 21, 2018, an officer with the Leavenworth Police Department conducted a traffic stop which resulted in the arrest of Ray and Curtis Sult after they were found to be in possession of illegal narcotics.
- On March 22, 2018, confidential informant (No. 4604) provided additional information to law enforcement. The informant stated that Ray was supplying 1 ounce a day to known drug offenders to sell for her.
- On April 5, 2018, yet another confidential informant (No. 4603) reported that Quinley was supplying Ray with methamphetamine.

- On April 10, 2018, Marcus Mack told law enforcement that Ray was selling pills and methamphetamine. In addition, Mack indicated that he saw Ray in possession of 2 ounces of methamphetamine.
- On April 19, 2018, Gallagher told law enforcement that Ray was selling methamphetamine, prescription pills, and heroin.
- During the month of May 2018, law enforcement conducted a controlled purchase of methamphetamine from Ray at her North 16th Street residence.
- On August 9, 2018, Corporal Mance conducted surveillance on Ray's residence. She observed Rickey Lee Saldivar—who she was familiar with from previous encounters and who has prior drug violations—exit Ray's residence and go back inside.
- Within 72 hours prior to law enforcement applying for a search warrant of Ray's residence, a second controlled purchase of methamphetamine from Ray was conducted at her North 16th Street residence.
- During the investigation, it was observed that Sult was residing with Ray. Based on interviews, law enforcement believed that Ray was romantically involved with Sult and that he served as her bodyguard.
- The investigation revealed that Ray rented the basement portion of the house located on North 16th Street.

When the warrant was executed on August 14, 2018, three women—Ray, Celesta Day, and Rebecca Walker—were in the basement of the home. After the tactical team cleared the home, Corporal Mance and Sergeant Slaughter conducted the search. During the search, the women were detained. After Ray was detained, a member of the tactical team searched Ray and found $434 in cash and a cell phone. Law enforcement officers at the scene also observed that Walker appeared to be under the influence of an unidentified substance.

Based on the information obtained during the investigation, Corporal Mance and Sergeant Slaughter believed that Ray lived in the basement bedroom of the house. In searching the bedroom, the officers found clothing, makeup, jewelry, and other items that appeared to belong to a female. In addition, they found "Hello Kitty" memorabilia, which they had been told that Ray collected. The officers also found a storage rental document in the bedroom from August 6, 2018, that listed Ray's address on North 16th Street. Sergeant Slaughter found a purse in the bedroom containing a Kansas identification card for Ray, as well as identification cards for other known drug users. Three cell phones were also found inside the bedroom.

Additionally, the officers found a floral design bag located near the foot of the bed. Significantly, the bag contained a digital scale with methamphetamine residue, small baggies, a small measuring cup, items used for the injection of narcotics, 35 hydrocodone pills, 5.5 amphetamine pills, suboxone strips, fentanyl patches, straws, and 19.65 grams of methamphetamine. Sergeant Slaughter testified at trial that bags like the one discovered in the bedroom of Ray's residence are often referred to as a "'go-to bag" or "'go-bag'" because it contains the items necessary to make a drug deal. Also, Sergeant Mance testified that the methamphetamine found in the bag would have a street value between $500 and $1,000, depending on how much was sold at a time.

In the bedroom, the officers also found a storage bin at the foot of the bed containing ziplock baggies. In another part of the bedroom, the officers found a "Hello Kitty" pipe inside an eyeglass case as well as other drug paraphernalia. In addition, the officers found several prescription bottles—some with the labels removed—containing gabapentin and eletriptan pills. Further, the officers found two Narcan nasal sprays, a loaded handgun, documents belonging to Sult, and a set of scales in the bedroom.

On the living room couch, Corporal Mance found a steno notepad which she suspected was a financial drug ledger. The notepad contained handwritten names or

nicknames, words which the officers believed were slang names for drugs, and numbers reflecting what the officers believed represented drug transactions. The last page of the notepad had a grocery list. At trial, Sergeant Slaughter testified that a grocery list is not unusual for a drug dealer to keep because they sometimes trade drugs for groceries or other items. The officers also found a coffee creamer container with a false bottom and homemade smoking devices in the ceiling. Finally, they found several antique coins—including buffalo nickels—that Sergeant Slaughter testified are used as payment for narcotics on occasion because they are difficult to trace.

On August 16, 2018, the State charged Ray with one count of felony possession with intent to distribute methamphetamine within 1,000 feet of a school; one count of felony possession with intent to distribute hydrocodone within 1,000 feet of a school; one count of felony possession with intent to distribute fentanyl within 1,000 feet of a school; and one count of felony possession of drug paraphernalia used to distribute a controlled substance. Two days later, the State amended the complaint to add an additional count of misdemeanor possession of drug paraphernalia with intent to use.

Shortly before trial, on October 25, 2021, Ray filed a motion to suppress the evidence seized as a result of the execution of the search warrant. In particular, Ray argued that the affidavit presented to the district court judge in support of the application for the search warrant did not contain sufficient information upon which a finding of probable cause could be made. At a hearing held on October 29, 2021, Ray did not present any evidence but argued that the affidavit was not sufficient on its face. After hearing the arguments of counsel and examining the affidavit submitted in support of the application for the search warrant, the district court noted some weaknesses in the affidavit but found that there was probable cause to search Ray's residence for evidence of drug offenses.

The district court commenced a two-day jury trial on November 1, 2021. At trial, the State presented the testimony of Corporal Mance and Sergeant Slaughter. The State also presented the testimony of one of Ray's neighbors. In addition, the State introduced 45 exhibits that were admitted into evidence. After the State rested, Ray exercised her right not to testify or present evidence. At the conclusion of the trial, the jury found Ray guilty on all five charges, and the district court subsequently sentenced her to a controlling term of 162 months in prison.

Thereafter, Ray filed a timely notice of appeal.

ANALYSIS

Motion to Suppress

Ray contends that the evidence seized by law enforcement officers during the execution of the search warrant at her residence should have been suppressed because the warrant was not supported by probable cause. Ray argues that the affidavit offered in support of the search warrant was based—in part—on hearsay statements made by unreliable witnesses or made by unidentified confidential informants. In response, the State contends that the search warrant was supported by probable cause. Alternatively, the State argues that even if the search warrant had not been supported by probable cause, the evidence seized should not be suppressed because the law enforcement officers acted in good-faith reliance on the warrant issued by a district court judge.

The Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights protect all persons against unreasonable searches and seizures and require that "no warrant shall issue, but upon probable cause." The State bears the burden of proving the lawfulness of a search and seizure. *State v. Hillard*, 315 Kan. 732, 747, 511 P.3d 883 (2022). In determining whether probable cause exists to

support a warrant, we review the evidence under a deferential standard to determine if the affidavit "provided the issuing judge 'with a substantial basis for determining that probable cause existed.' [Citation omitted.]" *State v. Regelman*, 309 Kan. 52, 62, 430 P.3d 946 (2018).

In *State v. Mullen*, 304 Kan. 347, 353, 371 P.3d 905 (2016), the Kansas Supreme Court held:

> "'[T]he task of the reviewing court is to ensure that the issuing magistrate had a substantial basis for concluding probable cause existed. This standard is inherently deferential. It does not demand that the reviewing court determine whether, as a matter of law, probable cause existed; rather, the standard translates to whether the affidavit provided a substantial basis for the magistrate's determination that there is a fair probability that evidence will be found in the place to be searched. Because the reviewing court is able to evaluate the necessarily undisputed content of an affidavit as well as the issuing magistrate, the reviewing court may perform its own evaluation of the affidavit's sufficiency under this deferential standard.' [*State v. Hicks*,] 282 Kan. 599, Syl. ¶ 2, [147 P.3d 1076 (2006)]."

Furthermore, in reviewing the contents of an affidavit in support of an application for a search warrant, the issuing judge is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of any person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Hicks*, 282 Kan. 599, Syl. ¶ 1, 147 P.3d 1076 (2006). As our Supreme Court has found, in order to provide law enforcement an incentive to seek warrants, the review of an affidavit in support of an application for a search warrant "'is less rigorous than the de novo standard of review of reasonable suspicion and probable cause determinations underlying warrantless searches . . . .'" *Regelman*, 309 Kan. at 62.

The United States Supreme Court has adopted a "totality of the circumstances" analysis in determining the existence of probable cause with respect to information provided by an informant. As explained in *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), the information offered in support of a search warrant should not be viewed in isolation but instead should be evaluated based on the totality of the circumstances. As a result, "even if [there is] some doubt as to an informant's motives, his [or her] explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles [the] tip to greater weight than might otherwise be the case." 462 U.S. at 234. Furthermore, "an excessively technical dissection of informant's tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate" is discouraged. 462 U.S. at 234-35.

Here, when the affidavit in support of the application for a warrant to search Ray's residence for evidence of drug offenses is reviewed under the deferential totality of the circumstances standard, we find that it provided the issuing district court judge with a substantial basis for determining that there was a fair probability that evidence of drug offenses would be found at Ray's residence. The affidavit summarized a 14-month investigation by the Leavenworth County Sheriff's Office Narcotics Bureau into Ray's involvement in the distribution of illegal substances from her residence located within several hundred feet of an elementary school. Although the affidavit could have contained more details of the investigation, we find that it sufficiently summarized the information received from eight identified informants—including one who identified himself to be Ray's nephew—three confidential informants, and a tip from an anonymous citizen. Each of them pointed in various ways to Ray's involvement in the sale of drugs, and many offered information that the drugs were being sold from her residence.

Specifically, the investigating officers were informed by various sources that Ray was selling prescription pills, methamphetamine, heroin, and marijuana. In addition, a

review of the affidavit reveals that much of the information was based on the first-hand knowledge of the informants and not merely based on rumors. For example, one of the informants provided details that his wife had sold her prescription pills to Ray who, in turn, sold them to other people. Reed also indicated that he purchased methamphetamine from Ray on several occasions while she was living at the North 16th Street residence. In fact, several of the informants reported that they had personally purchased drugs from Ray.

Also, at least two of the informants were able to provide details about Ray's living arrangements in the basement of the house, and the officers verified Ray's residence through surveillance prior to requesting the warrant. Morse—who claims Ray is his aunt—drew a floor plan of the basement for the officers. In addition, one of the confidential informants also drew a layout of the basement that was consistent with the information provided by Morse. Ray's involvement with illegal drugs was also confirmed when she and her companion, Sult, were arrested for possession following a traffic stop in March 2018.

Significantly, one of the informant's, McFarlin, not only provided Ray's address to the investigating officers, but he also provided them with her phone number. As the affidavit indicates, this phone number "would prove to be the same phone number for RAY during control buys of methamphetamine on two separate occasions." According to the affidavit, these two controlled buys of methamphetamine from Ray—one in May 2018 and one in August 2018—were completed from Ray's residence. Accordingly, we find the collective information contained in the affidavit regarding the 14-month investigation of Ray is sufficient when viewed in its totality to provide a reasonable magistrate with a substantial basis to determine that she was selling illegal drugs from her residence in the basement of the house located on North 16th Street.

We pause to note that Ray cites two cases—*State v. Landis*, 37 Kan. App. 2d 409, 417, 156 P.3d 675 (2007), and *State v. Hendricks*, 31 Kan. App. 2d 138, 139, 61 P.3d 722 (2003)—in which panels of this court found that an affidavit offered in support of a search warrant application was unreliable because the informants had a motive to provide false information. But neither of these cases involved the type of corroboration from multiple sources that is present in this case. Again, the affidavit presented to the district court judge in this case in support of the application for a search warrant contained a substantial amount of overlapping information and was confirmed through surveillance as well as through two controlled drug buys.

Although Ray devotes a significant portion of her brief to discussing the criminal history of several of the named informants, most of this discussion is based on information outside of the record on appeal. Moreover, because we are to examine the affidavit under a totality of the circumstances standard, we reject the invitation to perform an "excessively technical dissection" or to consider the contents of the affidavit on a piecemeal basis. As indicated above, when we view the affidavit under this deferential standard, we conclude that the district court did not err in denying Ray's motion to suppress, and we need not reach the State's alternative argument regarding the good-faith exception.

Prosecutorial Error

Next, Ray contends that the assistant county attorney who represented the State at trial committed prosecutorial error during the rebuttal portion of his closing argument. Specifically, Ray argues that the prosecutor accused defense counsel of making up evidence. In response, the State contends that the assistant county attorney did not commit prosecutorial err. Likewise, the State argues that even if his argument during rebuttal had risen to the level of error, it would be harmless in light of the evidence presented against Ray at trial to support her convictions.

Even though Ray did not contemporaneously object to the arguments made by the assistant county attorney during closing argument that she now challenges, we may still review this issue on appeal. Nevertheless, we may consider the absence of an objection into our analysis of the alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021). In reviewing a claim of prosecutorial error, we apply the two-step process set forth in *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). First, we are to determine whether the prosecutor committed error. Second, if we find that the prosecutor did commit error, we are to determine whether the error prejudiced the defendant's right to a fair trial. 305 Kan. at 109.

In determining whether a prosecutor committed error, we start from the premise that prosecutors are afforded wide latitude in crafting arguments that include reasonable inferences drawn from the evidence presented at trial. *State v. Banks*, 306 Kan. 854, 862, 397 P.3d 1195 (2017). However, prosecutors are not allowed to misstate the evidence, interject their personal beliefs as a form of unsworn testimony, or accuse a defendant or defense counsel of lying. See *State v. Haygood*, 308 Kan. 1387, 1402, 430 P.3d 11 (2018). Even if we find a prosecutor's arguments to be erroneous, no error at trial is grounds for granting a new trial or setting aside a verdict "[u]nless justice requires otherwise." K.S.A. 2022 Supp. 60-261.

Likewise, prosecutorial error is deemed harmless if the State can establish "'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" *Sherman*, 305 Kan. at 109. Although the statutory harmlessness test also applies to prosecutorial error, it is only necessary that we address the higher standard of constitutional error. 305 Kan. at 109. Even if a prosecutor's actions are egregious, reversal of a criminal conviction is not appropriate if the actions are determined to satisfy the constitutional harmless error test. 305 Kan. at 114. In other words, there is no reversible error if there is no reasonable

possibility that the error contributed to the guilty verdict. *State v. Ross*, 310 Kan. 216, 220-21, 445 P.3d 726 (2019).

Ray argues that the assistant county attorney erred during the rebuttal portion of his closing argument when he responded to defense counsel's argument that the floral makeup bag containing the drugs and other items that supported the distribution charges likely belonged to Walker because she was the only person at the scene that was intoxicated. In response to this argument, the assistant county attorney asked these rhetorical questions to the jury: "Walker had the bag? Where's the evidence of that? Or did [defense counsel] just make that up?" He then went on to assert that "[t]here's no evidence to support that. Well, . . . Walker was high, so the bag must have been hers. That doesn't make any sense."

Despite Ray's argument to the contrary, we do not find that the assistant county attorney's rebuttal argument falls outside the wide latitude granted to prosecutors in crafting their arguments. Here, the prosecutor was directly responding to defense counsel's argument and pointing out that it was not supported by the evidence. Further, we find that this responsive argument was isolated and did not misstate the evidence. In addition, we do not find that the assistant county attorney improperly interjected his personal beliefs, nor did he accuse a defendant or defense counsel of lying. Instead, the prosecutor was attacking the faulty premise of defense counsel's argument and not attacking the defense counsel personally. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) ("[A] court should not . . . infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.").

In addition, Ray argues that the assistant county attorney misstated the evidence when he argued during rebuttal:

> "The evidence is that that is a dealer quantity with dealer paraphernalia. It's a dealer's go-bag. It's not something that somebody carries around with them and, oh, I think I'll get high now. I'll take a little bit of my thousand dollars worth of meth and snort it. That's not how that works."

Even though Ray suggests that this argument contradicts testimony offered at trial that most drug dealers are also drug users, we do not find this argument to be a misstatement of the facts. Rather, it appears that the assistant county attorney was attempting to argue that dealers do not use drugs from their "go-bag" because it is intended to be used for drug transactions and not for personal use. Perhaps the argument could have been more artfully articulated, but we do not find that it falls outside the wide latitude granted to prosecutors in making arguments or in drawing reasonable inferences from evidence. *State v. Longoria*, 301 Kan. 489, 524, 343 P.3d 1128 (2015).

Even if we were to find that the assistant county attorney's arguments constituted error—which we do not—we would find any such error to be harmless in light of the evidence presented by the State at trial. Based on our review of the entire record, we find no reasonable possibility that the alleged error contributed to the jury's verdict. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012). The record reveals that the district court properly instructed the jury that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence." See *State v. Peppers*, 294 Kan. 377, 392, 276 P.3d 148 (2012) (Jurors are presumed to follow the instructions they were given and focus on the evidence presented.).

Here, the State persuasively argues—and our review of the record confirms—that Ray received of a fair trial. The State presented a significant amount of evidence—both direct and circumstantial—that Ray sold drugs from her residence located in the basement of the house located on North 16th Street. The investigating officers testified

regarding their 14-month investigation. Also, one of Ray's neighbors testified regarding the unusual amount of traffic in and out of the basement of the residence, especially during the weekends. Additionally, the makeup bag or "go bag" was found at the foot of the bed in Ray's bedroom. Moreover, there was no evidence in the record to suggest that either of the other women who were at Ray's residence when the search warrant was executed either lived in the residence or were involved in selling drugs. Consequently, we find that there is no reasonable possibility that the alleged prosecutorial error contributed to the verdict in this case, and we conclude beyond a reasonable doubt that the challenged arguments did not affect the outcome of the trial in light of the entire record.

Affirmed.