NOT DESIGNATED FOR PUBLICATION

No. 125,190

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

SHERIDAN KIRALY,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE. Opinion filed April 14, 2023. Affirmed.

Sierra M. Logan, assistant district attorney, *Thomas Stanton*, district attorney, and *Derek Schmidt*, attorney general, for appellant.

Shannon S. Crane, of Hutchinson, for appellee.

Before SCHROEDER, P.J., WARNER and CLINE, JJ.

PER CURIAM: The State brings this interlocutory appeal, challenging the district court's suppression of evidence found in Sheridan Kiraly's pants pocket. The district court found that the State did not have probable cause to arrest Kiraly, and thus the search incident to that arrest was also invalid. After carefully reviewing the record and the parties' arguments, we agree with the district court that suppression was proper under these circumstances. We therefore affirm its ruling.

FACTUAL AND PROCEDURAL BACKGROUND

Late at night on July 19, 2021, a man who lived across the street from an apartment building in Hutchinson called 911. He reported that he heard yelling and cursing—from both a man and a woman—and other noises coming from inside the building. The neighbor was outside on his porch when he heard the noises and decided to report the incident because he thought he heard somebody's body being thrown against a wall. The neighbor recalled the noises lasting for about 10 minutes.

A short time later, Officers Michael Ruebke and Taylor Grace arrived to investigate the disturbance. When they arrived at the two-story apartment building, they heard yelling coming from a top-floor unit. The officers entered the building and stood outside the door to the unit for several minutes, listening to a verbal argument between a man and a woman. The officers did not hear any threats of violence or any sounds indicating that any physical harm was being inflicted. The man was yelling, the woman was sobbing, and both were speaking in loud, upset voices. When they heard the man call the woman a "stupid bitch," Officer Grace knocked on the door.

The man, later identified as Kiraly, opened the door and came out of the apartment unit. Shortly thereafter, the woman, later identified as R.K., also came outside. Officer Grace talked with R.K., and Officer Ruebke talked with Kiraly. R.K. told Officer Grace that she and Kiraly were in a relationship. She explained that they had been arguing, but the argument never became violent. Kiraly had a cut on his hand, but neither he nor R.K. indicated that he suffered the cut during the argument. He admitted, however, that he had called R.K. a "stupid bitch."

The officers arrested Kiraly for disorderly conduct involving domestic violence. Both officers believed that Kansas law and Hutchinson Police Department policy required them to arrest Kiraly for calling R.K that name.

Once Kiraly was arrested, the officers searched him before leaving the apartment building. Officer Ruebke found two small, clear baggies in Kiraly's pants pocket, one filled with a white substance and the other with a leafy vegetation—methamphetamine and marijuana. Based on this evidence, the State charged Kiraly with possession of methamphetamine, possession of marijuana, possession with intent to use drug paraphernalia, and disorderly conduct under K.S.A. 2021 Supp. 21-6203(a)(3).

Kiraly moved to suppress the drugs. He argued that the search leading to the discovery of those drugs was illegal because the officers lacked probable cause to arrest him for disorderly conduct under K.S.A. 2021 Supp. 21-6203(a)(3). More specifically, he asserted that using the phrase "stupid bitch" during an argument does not support an arrest for disorderly conduct based on "fighting words"—the sole basis for his arrest.

In response, the State pointed out that the crime of disorderly conduct includes "using fighting words" *or* by "engaging in noisy conduct tending to reasonably arouse alarm, anger or resentment in others." K.S.A. 2021 Supp. 21-6203(a)(3). The State argued that the officers had probable cause to arrest Kiraly for committing both types of misconduct, asserting that Kiraly used fighting words when he called R.K. a "stupid bitch," and Kiraly engaged in noisy conduct by angering R.K. throughout the argument.

The district court held a hearing on Kiraly's suppression motion, where both arresting officers testified:

- Officer Ruebke stated that the arrest for disorderly conduct resulted from Kiraly calling R.K. a "stupid bitch." This explanation was consistent with his previous testimony during the preliminary hearing, where he explained the basis for the arrest was Kiraly's use of fighting words.

- Officer Grace testified that he believed the arrest was for disorderly conduct arising from fighting words or noisy conduct. He stated that while the arrest report did not mention noisy conduct, it did state that the argument could be heard from outside the residence. On cross-examination, Officer Grace admitted that if he had arrested Kiraly for noisy conduct, he also would have arrested R.K. because both were engaged in the loud argument. Officer Grace stated that he did not hear any sounds of actual or threatened physical violence.

After hearing this evidence, the district court suppressed the drugs. The court found that the State had no probable cause to arrest Kiraly, and therefore no basis to search him without obtaining a warrant. In particular, the court found that, while offensive and profane, using the phrase "stupid bitch" in this case—during a verbal argument with no physical violence—did not constitute using fighting words within the meaning of the disorderly conduct offense.

The order did not directly address the State's argument that the officers also had probable cause to arrest Kiraly for disorderly conduct based on noisy conduct tending to reasonably arouse alarm, anger, or resentment in others. But the court ultimately ruled that the "totality of the circumstances" did not support probable cause for an arrest under K.S.A. 2021 Supp. 21-6203(a)(3). The State then filed this interlocutory appeal of the district court's suppression ruling.

DISCUSSION

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment's Due Process Clause, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Section 15 of the Kansas Constitution Bill of Rights provides this same protection. *State v. Ellis,* 57 Kan. App. 2d 477, 481, 453

P.3d 882 (2019) (citing *State v. Daniel*, 291 Kan. 490, 498, 242 P.3d 1186 [2010]), *aff'd* 311 Kan. 925, 469 P.3d 65 (2020).

Generally speaking, the Fourth Amendment requires law enforcement officers to obtain a warrant before searching people or property. *State v. Hillard*, 315 Kan. 732, 747, 511 P.3d 883 (2022). There are some limited exceptions to this requirement, however. Relevant here, officers may conduct a warrantless search of a person and the immediate area surrounding a person incident to an arrest. *State v. Abbott*, 277 Kan. 161, 163, 83 P.3d 794 (2004). The State bears the burden to show that the arrest and the search incident to that arrest were lawful. See *State v. Thompson*, 284 Kan. 763, 772, 166 P.3d 1015 (2007).

An officer must have probable cause to lawfully arrest a person. This means that the officer must have a reasonable belief that the person has committed or is committing a crime. K.S.A. 22-2401(c); *Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, 20, 290 P.3d 555 (2012). Courts determine whether an arrest was supported by probable cause by evaluating the totality of the circumstances from the perspective of an objectively reasonable officer. 296 Kan. at 20. This includes the information known to the officer at the time of the arrest, as well as fair inferences drawn from that information. 296 Kan. at 20. In other words, the assessment of probable cause surrounding an arrest involves "a practical, common-sense decision whether a crime has been or is being committed." *State v. Hicks*, 282 Kan. 599, 613-14, 147 P.3d 1076 (2006).

When a district court rules on a suppression motion after an evidentiary hearing, its ruling involves both factual and legal components. After hearing the witnesses' testimony and considering all the evidence presented, the court makes factual findings, often summarized in a written journal entry or order. The court then rules as a legal matter whether suppression is appropriate under those facts.

Because a district court's suppression ruling comprises both factual findings and legal analysis, appellate review of such a ruling involves mixed levels of deference. Because appellate judges were not present at the evidentiary hearing to hear the witnesses' testimony or observe their demeanor, we cannot reassess credibility or reweigh the evidence presented. Instead, we uphold the district court's factual findings if they are based on substantial competent evidence. See *State v. Cleverly*, 305 Kan. 598, 604, 385 P.3d 512 (2016). But we give no deference to a district court's ultimate legal conclusion—here, whether the officers had probable cause to arrest Kiraly under the totality of the circumstances. See 305 Kan. at 604. When the parties do not challenge the district court's factual findings, whether evidence should be suppressed is a question of law over which this court exercises unlimited review. 305 Kan. at 604; *State v. Bickerstaff*, 26 Kan. App. 2d 423, 424, 988 P.2d 285, *rev. denied* 268 Kan. 889 (1999).

With these principles in mind, we turn to the crime that formed the basis of Kiraly's arrest—disorderly conduct. Kansas law provides multiple ways this crime can be committed. Relevant here, K.S.A. 2021 Supp. 21-6203(a)(3) states that disorderly conduct includes "using fighting words" or "engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others." See *State v. Mead*, No. 115,989, 2017 WL 4082240, at *5 (Kan. App. 2017) (unpublished opinion) (K.S.A. 2016 Supp. 21-6203[a][3] "offers two paths for the State to prove an act sufficient to support a disorderly-conduct charge—fighting words *or* noisy conduct.").

The State challenges the district court's conclusion that Kiraly's arrest for uttering fighting words lacked probable cause. It also argues that even absent fighting words, there was another valid basis for Kiraly's arrest and subsequent search under K.S.A. 2021 Supp. 21-6203(a)(3)—that he engaged in noisy conduct that reasonably tended to arouse alarm, anger, or resentment in others.

We are not persuaded by these arguments for at least two reasons. First, we agree with the district court's conclusion that there was no probable cause to arrest Kiraly for using fighting words. And second, even if Kiraly had been arrested for engaging in noisy conduct, there was no probable cause to support an arrest on that basis.

1. *The officers lacked probable cause to arrest Kiraly for disorderly conduct based on fighting words.*

Fighting words are "words that by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace." K.S.A. 2021 Supp. 21-6203(c). The district court here found that Kiraly's use of the phrase "stupid bitch" during his argument with R.K. in the apartment did not meet this definition. The court explained:

> "There was no evidence of any physical altercation between defendant and [R.K.]. Although the phrase 'stupid bitch' is offensive and profane, when said in a mutual argument between two people, unaccompanied by any physical actions or threats, the phrase does not rise to the level of words which 'by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace.'"

The State challenges this reasoning on appeal, arguing that this case presents "a textbook example of a breach of the peace." The State points out that the neighbor heard Kiraly and R.K. arguing from across the street and was concerned by both the yelling and the other noises he was hearing. But the State's argument is misplaced; disorderly conduct based on fighting words does not occur whenever people loudly argue. Rather, Kansas courts have previously found a "breach of the peace" to involve "acts and words *likely to produce violence to others*." *State v. Stroble*, 169 Kan. 167, 170, 217 P.2d 1073 (1950).

Using this standard, this court has upheld a conviction for disorderly conduct based on fighting words when a person told police officers, "'Come up here and I'll fuck with you.'" *State v. Beck*, 9 Kan. App. 2d 459, 463, 682 P.2d 137, *rev. denied* 235 Kan.

1042 (1984). The *Beck* decision emphasized that the defendant's words included an "offer to fight . . . addressed to the officers before they entered the apartment," and the "provocative nature of the words themselves" illustrated "his resistance to their efforts to restore tranquility to the domestic scene." 9 Kan. App. 2d at 463.

In contrast, a previous panel of this court found that a defendant's use of language very similar to Kiraly's did not support an arrest for using fighting words. See *State v. Hamilton*, No. 120,729, 2019 WL 6223352 (Kan. App. 2019) (unpublished opinion). *Hamilton* also involved the district court's suppression of evidence in Hutchinson. That case arose out of a disturbance call at a hotel about an argument in the hallway. The officers arrested Hamilton for disorderly conduct involving domestic violence because he admitted to calling his wife a "fucking bitch." 2019 WL 6223352, at *3. A search incident to arrest found drugs in Hamilton's pocket, which he moved to suppress on the basis that officers lacked probable cause to arrest him for fighting words. 2019 WL 6223352, at *1.

The district court granted Hamilton's motion to suppress, finding he was arrested without probable cause. This court affirmed. 2019 WL 6223352, at *3. As the district court acknowledged in Kiraly's case, the *Hamilton* court noted that "the phrase 'fucking bitch' is offensive and profane." 2019 WL 6223352, at *3. But the *Hamilton* court found "no evidence that Hamilton engaged in disorderly conduct by using fighting words" when he used that phrase "in a mutual argument between a husband and wife, unaccompanied by any physical actions or threats." 2019 WL 6223352, at *3.

While we are not bound by *Hamilton*, we find its reasoning persuasive and reach the same conclusion here. Kiraly's decision to call R.K. a "stupid bitch" was undoubtedly in poor taste. But unlike the defendant's speech in *Beck*, Kiraly's words did not tend to incite violence. See 9 Kan. App. 2d at 463. And while the words Kiraly used are coarse, they are not words that "by their very utterance inflict injury." K.S.A. 2021 Supp. 21-

6203(c). In short, we agree with the district court's conclusion that there was no evidence that Kiraly used fighting words when he called R.K. a "stupid bitch" during a verbal argument in an apartment without any threat of physical violence.

2. *The State did not demonstrate that the officers had probable cause to arrest Kiraly for noisy conduct tending reasonably to arouse alarm, anger, or resentment in others.*

The State argues that even if Kiraly did not use fighting words, the officers had probable cause to arrest him under the alternative definition of disorderly conduct in K.S.A. 2021 Supp. 21-6203(a)(3)—for "engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others." Again, the State points out that a neighbor overheard a loud argument, ostensibly between Kiraly and R.K., from across the street, accompanied by loud banging noises. The State argues that this testimony, combined with the officers overhearing Kiraly calling R.K. the offensive name, provided probable cause for the arrest.

The district court did not directly address this alternative argument in its suppression ruling. But the court ultimately concluded that suppression was proper.

There are several reasons why we do not find the State's alternative argument convincing. Most notably, the district court made none of the factual findings that would support the State's argument that Kiraly was arrested for noisy conduct under K.S.A. 2021 Supp. 21-6203(a)(3).

- The court made no factual finding that the officers believed they were arresting Kiraly for engaging in noisy conduct. The police report for the incident did not mention noisy conduct as a basis for the arrest, only fighting words. And Officer Ruebke testified at the suppression hearing and at the preliminary hearing that he

believed an arrest was necessary because calling R.K. "stupid bitch" met the definition of fighting words, not noisy conduct.

- The court did not find that the argument between Kiraly and R.K. tended "to arouse alarm, anger[,] or resentment in others"—a finding necessary to support an arrest for noisy conduct under K.S.A. 2021 Supp. 21-6203(a)(3). The State had the burden to make this showing. Although the argument was loud, no evidence showed that it aroused alarm, anger, or resentment in others. Rather, the neighbor testified that it was not the yelling, but what he perceived as other noises (not later corroborated by the officers' investigation), that caused his alarm.

- The surrounding circumstances did not show that the officers believed Kiraly had engaged in noisy conduct. Even though the argument was ongoing, the officers waited to knock on the door of the apartment until they heard Kiraly call R.K. the offensive name. The officers did not arrest R.K., who was an equal participant in the argument. And while Officer Grace testified at the suppression hearing that the arrest could have been for either offense under the statute, he acknowledged that a noisy-conduct violation would have resulted in the arrest of both Kiraly and R.K. That did not happen here.

In light of these deficiencies, it is unsurprising that the *Hamilton* court considered and rejected the same arguments the State now makes. In that case, facing language that did not meet the definition of fighting words, the State argued that the argument in the hotel could also be considered noisy conduct under K.S.A. 2018 Supp. 21-6203(a)(3). This court easily rejected this assertion:

> "To the extent that the State claims Hamilton committed the crime of disorderly conduct by engaging in 'noisy conduct tending reasonably to arouse alarm, anger or resentment in

> others,' Officer Martin testified that he did not intend to make an arrest when he first approached Hamilton's room to discuss the disturbance call. See K.S.A. 2018 Supp. 21-6203(a)(3). Martin further testified that he only obtained probable cause to make the arrest upon learning that Hamilton had called his wife a fucking bitch." 2019 WL 6223352, at *3.

Similarly, Kiraly's arrest was unlawful because officers arrested him because he called R.K. a derogatory name—not because of any other noisy conduct. Indeed, the circumstances of this case are easily distinguishable from situations where this court has affirmed convictions for disorderly conduct based on noisy conduct that tended reasonably to arouse alarm, anger, or resentment in others. See, e.g., *Mead*, 2017 WL 4082240, at *5 (man came toward several people while yelling and flailing his arms in an aggressive manner at a motorcycle rally); *City of Paola v. Ammel*, No. 96,301, 2007 WL 2767953, at *1-3 (Kan. App. 2007) (unpublished opinion) (man screamed at cops in a library, assumed a fighting stance, and engaged in a struggle with law enforcement), *rev. denied* 286 Kan. 1176 (2008); *State v. Heyder*, No. 82,810, 2000 WL 36745844, at *1-2 (Kan. App. 2000) (unpublished opinion) (man shouted profanity at a tollbooth worker, motioned his arms, and blocked traffic by standing in the exit lane).

Kiraly's decision to call R.K. a "stupid bitch" during their verbal argument was insulting, ill-advised, and in poor taste. But under the facts of this case, that language did not provide probable cause to believe Kiraly had committed the crime of disorderly conduct. The officers thus did not have probable cause to arrest Kiraly for that offense, making the officers' search incident to that arrest improper.

The State offers no other explanation for why the officers' warrantless search of Kiraly was reasonable under these circumstances. The district court did not err when it granted Kiraly's motion to suppress the evidence from that search.

Affirmed.