DIVISION ONE
FILED: 12/18/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0104
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
BETTY MARIE VANHEEMSKERCK,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201100235

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

O R O Z C O, Judge

¶1 Betty Marie Vanheemskerck appeals her convictions and sentences for possession of dangerous drugs for sale and possession of drug paraphernalia, on grounds of insufficiency of the evidence and prosecutorial misconduct. For the reasons that follow, we find no error and affirm.

Sufficiency of the Evidence

¶2 A police officer observed an altered vehicle registration sticker and stopped the truck in which Vanheemskerck was a front-seat passenger. During the traffic stop, the officer's narcotics canine alerted to the truck. When the officer asked the driver if there was anything illegal in the truck, the driver paused and turned to look at Vanheemskerck before answering. The officer testified that the driver understood and spoke broken English.

¶3 After consenting to a search of the vehicle, the driver removed a black banker's-type bag from the truck and gave it to Vanheemskerck, who "stuck it in her purse." With her consent, police subsequently searched Vanheemskerck's purse, including the black bag. They found a digital scale, $1,560 in cash, and methamphetamine valued at approximately $5,440. Police also found a drug-sales ledger in the driver's side map pocket, methamphetamine valued at approximately $405 in a clear plastic baggie between the driver's seat and the truck's center

console, and more methamphetamine with an approximate value of $264 in the pocket of a jacket in the backseat.

¶4 Vanheemskerck testified that she and a friend had been waiting by the side of the highway in Fort Mohave for another friend to pick her up to drive her to Bullhead City. She further stated that the driver was a stranger who did not speak English, and that she and a friend accepted a ride from the driver after he pointed to Laughlin on a map, indicating he needed directions. Although Vanheemskerck was initially waiting for a ride to Bullhead City to run an errand, she testified that she accepted a ride to Laughlin because she also needed to run an errand there before heading back to Fort Mohave to catch a ride to California later that day. She also stated that she had no knowledge of the drugs in the black bag the driver handed her during the traffic stop, and she just took the bag without thinking.

¶5 Vanheemskerck argues that in light of her testimony that she had no knowledge of the drugs; the evidence at trial was insufficient to establish that she knew there was methamphetamine in the truck in which she was a passenger. The offense of possession of dangerous drugs for sale requires proof that the defendant "knowingly" possessed a dangerous drug for

sale. *See* A.R.S. § 13-3407.A.2 (Supp. 2012).[1] We review de novo the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). We do not distinguish between direct and circumstantial evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). We leave credibility determinations to the jury. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004). "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." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶6 The jury could have rejected Vanheemskerck's testimony as implausible and not credible. Also the jury could have inferred from the look that the driver gave Vanheemskerck when the officer asked him if there was anything illegal in the truck, and the fact that she accepted the black bag without question, that she knew about the methamphetamine in the bag and did not think police would look in the bag if she put it in her

[1] Absent any material revisions, we cite to the current version of the applicable statute.

purse. The jurors could also have reasonably inferred that the driver was unlikely to hand an innocent stranger a black bag containing approximately $5,440 worth of methamphetamine and $1,560 in cash. We accordingly find that the evidence was sufficient to establish that Vanheemskerck knew at a minimum about the methamphetamine in the black bag and thus, to convict her of the charged offense.

Prosecutorial Misconduct

¶7 Vanheemskerck also argues that the prosecutor engaged in misconduct by: 1) arguing, in the absence of any supporting evidence, that the driver was unlikely to give a ride to anyone who did not know about the thousands of dollars worth of methamphetamine inside the truck; 2) misstating the evidence by arguing that Vanheemskerck's story did not make sense because she had accepted a ride to Laughlin "not knowing how she's going to get back" in order to meet up with her ride to California; and 3) arguing that her story did not make sense because "since 9/11, the last 10 years, you don't take bags from other people," a comment unsupported by any evidence and "submitted to the jury solely for the purpose of arousing the jurors['] passions or prejudices."

¶8 Prosecutors are given wide latitude in presenting closing arguments to the jury: "'excessive and emotional language is the bread and butter weapon of counsel's forensic

arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury.'" *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation omitted). To determine whether a prosecutor's remarks are improper, we consider whether the remarks called to the attention of jurors matters they would not be justified in considering and the probability that the jurors were influenced by the remarks. *Jones*, 197 Ariz. at 305, ¶ 37, 4 P.3d at 360. To require reversal, prosecutorial misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted). We focus on whether the prosecutor's statements in closing arguments affected the proceedings in such a way as to deny Vanheemskerck a fair trial. *See State v. Hughes*, 193 Ariz. 72, 80, ¶ 32, 969 P.2d 1184, 1192 (1998).

¶9 We find no prosecutorial misconduct, much less misconduct so egregious and persistent that it permeated the entire atmosphere of the trial or deprived Vanheemskerck of a fair trial. First, the argument that a driver transporting more than $5,000 worth of methamphetamine would normally not give rides to strangers was simply an argument relying on common sense. *See United States v. Quilca-Carpio*, 118 F.3d 719, 722

(11th Cir. 1997) ("A reasonable jury could infer from the quantity of drugs seized that a 'prudent smuggler' is not likely to entrust such valuable cargo to an innocent person without that person's knowledge."). Second, the argument that Vanheemskerck's story did not make sense did not misstate the evidence, but rather was a fair interpretation of the inconsistency in her conduct in accepting a ride from a person she described as a non-English-speaking stranger, in light of her testimony about her plans that day. Finally, the argument that after 9/11 people do not just accept bags from strangers was a fair response to defense counsel's argument that "our instincts are to take something that somebody's giving us." *See State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985) ("Prosecutorial comments which are a fair rebuttal to areas opened by the defense are proper."). Moreover, we find that the reference to 9/11 was not offered to appeal to the jury's passions or prejudices, but rather to appeal to its common sense about a normal person's reaction in this era of heightened security to a stranger handing them a bag of unknown contents. On this record, we find no prosecutorial misconduct, much less misconduct so egregious that it requires reversal.

¶10 For the foregoing reasons, we affirm Vanheemskerck's convictions and sentences.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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MAURICE PORTLEY, Presiding Judge

/S/
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RANDALL M. HOWE, Judge