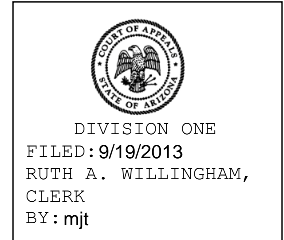
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 9/19/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,	)	1 CA-CR 12-0448
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ALICIA LEAH GILSTRAP,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201000770

The Honorable Derek C. Carlise, Judge Pro Tem

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Alice Jones, Assistant Attorney General
Attorneys for Appellee

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

T H U M M A, Judge

¶1 Alicia Leah Gilstrap appeals her convictions for possession of dangerous drugs for sale, possession of marijuana and two counts of possession of drug paraphernalia and resulting

sentences. Gilstrap argues the superior court erred by denying her motion to suppress evidence seized during a search; failing to find prosecutorial misconduct and denying her motion to preclude evidence as not timely disclosed. Finding no error, Gilstrap's convictions and sentences are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 When executing a warrant to search a house in Mohave County for methamphetamine and related paraphernalia, law enforcement officers found Gilstrap taking a shower in a bathroom connected to a bedroom. The search warrant did not identify Gilstrap and she did not own the house. An officer found and searched a purse in the house, later identified as Gilstrap's purse. The search of that purse revealed Gilstrap's identification as well as 3.5 grams of methamphetamine; 6.12 grams of marijuana; plastic baggies containing drug residue; new plastic baggies and a scale commonly used by sellers of drugs; a glass pipe containing drug residue and what appeared to be a ledger identifying drug sales.

¶3 The State charged Gilstrap with, and a jury convicted her of, possession of methamphetamine for sale, possession of marijuana and two counts of possession of drug paraphernalia. The superior court sentenced Gilstrap to presumptive, concurrent prison terms, the longest of which was for 15.75 years in prison. From Gilstrap’s timely appeal, this court has

jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2013), 13-4031 and 13-4033.[1]

DISCUSSION

I. Denial Of The Motion To Suppress.

¶4 Gilstrap first argues the superior court erred in denying her motion to suppress evidence seized from her purse. Gilstrap argues law enforcement officers could not lawfully search her purse because she was only on the premises "incidentally" and was not named in the warrant. A superior court's ruling on a motion to suppress will not be disturbed "absent clear and manifest error." *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). The legal question of whether the search violated Gilstrap's constitutional rights, however, is reviewed de novo. *State v. Adams*, 197 Ariz. 569, 572, ¶ 16, 5 P.3d 903, 906 (App. 2000).

A. Background[2]

¶5 Law enforcement officers obtained a warrant to search a house for methamphetamine and related paraphernalia. During

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[1] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

[2] This court reviews a ruling on a motion to suppress based solely on the evidence presented at the suppression hearing, viewing the facts in the light most favorable to sustaining the ruling. *State v. Newell*, 212 Ariz. 389, 396, ¶ 22, 132 P.3d 833, 840 (2006); *Hyde*, 186 Ariz. at 265, 921 P.2d at 668.

the search, officers found Gilstrap taking a shower. Although not named in the warrant and not an owner of the residence, Gilstrap had spent the previous night at the house. Gilstrap testified she "was staying there at the time, helping them out," had full access to all of the house and planned to pay rent for staying in the house when she could.

¶6 There was conflicting testimony about the location of the purse when law enforcement officers arrived at the house. Gilstrap testified her purse was in the bathroom while she was taking a shower and that police moved her purse to an adjacent bedroom. An officer who entered the bathroom and found Gilstrap in the shower testified he did not recall seeing the purse in the bathroom, but acknowledged someone could have moved the purse. He did, however, see the purse in the adjacent bedroom and felt "certain" it was not in the bathroom when he found Gilstrap in the shower.

¶7 A different officer, who searched the purse, testified he found the purse in the bedroom on the floor by the bed and did not know whether it had been moved. He searched the purse because, in his experience, items identified in the search warrant could be found in a purse. The superior court found the testimony of the officers more credible, found the purse was in the bedroom, found the search was valid and denied Gilstrap's motion to suppress.

B. Discussion

¶8 A lawful search pursuant to a search warrant generally extends to the entire area in which the object of the search may be found and includes all containers in the area that could contain the object of the search. *United States v. Ross*, 456 U.S. 798, 820-21 (1982). "[S]pecial concerns," however, "arise when the items to be searched belong to visitors, and not occupants, of the premises." *United States v. Giwa*, 831 F.2d 538, 544 (5th Cir. 1987). "Such searches may become personal searches outside the scope of the premises search warrant requiring independent probable cause." *Id.*

¶9 Courts addressing whether a search warrant permits the search of an item belonging to a visitor to the premises have generally adopted one of two analyses. Some courts have adopted the "physical possession" approach, which focuses on whether the object is in the actual physical possession of the visitor at the time of the search. *Id.* (discussing *United States v. Teller*, 397 F.2d 494 (7th Cir. 1968)). Under this analysis, unless the object is in the owner's actual physical possession, a law enforcement officer may search the object pursuant to the warrant. *Teller*, 397 F.2d at 497-98. Other courts have adopted the "relationship test," which focuses "on the relationship between the person whose personal effects are searched and the place which is the subject of the search." *Giwa*, 831 F.2d at

544. (discussing *United States v. Gray*, 814 F.2d 49 (1st Cir. 1987) and *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973)). Pursuant to this analysis, if the owner of the object is more than a casual visitor to the premises, law enforcement officers may search the object pursuant to the warrant. *See Giwa*, 831 F.2d at 544-45 (adopting relationship test); *Micheli*, 487 F.2d at 432 (discussing relationship test).

¶10 In this case, the superior court considered both the "physical possession" approach and the "relationship test" as well as the holdings of *Giwa*, *Micheli*, *Teller* and other cases applying these approaches. After discussing these cases, the superior court concluded:

> Under the facts of this case, it does not matter which approach is used. The Court previously found that the defendant's purse was in the bedroom, not in her physical possession. The defendant testified she had spent the night at the residence and she was found taking a shower. She was more than a casual visitor. Therefore, the search of her purse was proper.[3]

[3] At trial, an officer who did not testify at the suppression hearing explained he found the purse in the bathroom and placed it on the floor of the adjoining bedroom so Gilstrap could not have access to the purse when she got dressed. The superior court held that, even if this evidence had been presented at the suppression hearing, the court would have found the search valid. *See also* A.R.S. § 13-3925(C)(noting otherwise admissible evidence is not suppressed if determined to have been seized "as a result of a good faith mistake or technical violation"); *State v. Wassenaar*, 215 Ariz. 565, 577, ¶ 50, 161 P.3d 608, 620 (App. 2007)(noting affirmation proper "on any basis supported by the record").

¶11 The parties have cited, and this court has found, no Arizona case addressing the application of the "physical possession" approach, the "relationship test" or any combination of the two. Given the facts of this case, this court need not decide if one or the other (or a combination) of these two approaches is more appropriate because, as found by the superior court, the search of Gilstrap's purse was valid under either approach. The search was valid under the "physical possession" approach because Gilstrap did not have actual physical possession of her purse at the time of the search (and, in fact, she successfully argued at trial -- as discussed more fully below -- that the State could not even argue that the purse was in the bathroom). The search was valid under the "relationship test" because the record shows Gilstrap was more than a mere casual visitor, having spent the night, admitting to staying at the house with full access and planning to begin paying rent as soon as she could afford it. Thus, the superior court did not err in denying the motion to suppress.

II. Prosecutorial Misconduct Allegations.

¶12 Gilstrap argues the prosecutor engaged in misconduct during closing argument. To justify 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) (quoting authority). The misconduct must amount to "intentional conduct which the prosecutor knows to be improper and prejudicial" and not mere "legal error, negligence, mistake or insignificant impropriety." *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). Reversal is not required unless the prosecutor's conduct denied the defendant a fair trial. *State v. Bible*, 175 Ariz. 549, 600, 858 P.2d 1152, 1203 (1993). Decisions addressing prosecutorial misconduct allegations are reviewed for an abuse of discretion. *Lee*, 189 Ariz. at 616, 944 P.2d at 1230.

A. Alleged Comment On Gilstrap's Failure To Testify.

¶13 Although Gilstrap did not dispute she possessed the marijuana, her defenses to the other charges were that someone else placed the methamphetamine-related evidence in her purse and/or that there was no evidence she possessed the methamphetamine for sale. During closing arguments, the prosecutor stated:

> None of us has a sort of machine to be able to get inside of a defendant's head. None of us has some sort of telepathic ability to tell what someone was thinking. So all you as a juror are able to consider is what the circumstances were and what the facts you know show.

The prosecutor then briefly argued the evidence regarding who had access to Gilstrap's purse; how the officers encountered her purse; how one officer picked up the purse and searched it; how

the house was secured once police entered and generally how nobody but law enforcement officers had access to Gilstrap's purse. The prosecutor then added: "There has been no testimony or any evidence against what these officers have testified to."

¶14 Gilstrap timely but summarily objected to this last sentence, an objection the superior court sustained and instructed the jury to disregard "the last argument." The court later explained that it took these actions based on a concern that the statement did not make it sufficiently clear that the prosecutor was not commenting on Gilstrap's failure to testify. The court also found the statement did not constitute prosecutorial misconduct.[4] Although Gilstrap contends the prosecutor's argument was a comment on her failure to testify, for several reasons, there was no prosecutorial misconduct.

¶15 First, although "it is constitutionally impermissible for a prosecutor . . . to comment on a defendant's failure to testify," *State v. Schaaf*, 169 Ariz. 323, 333, 819 P.2d 909, 919 (1991), the statement here was not such a comment. Indeed, the superior court's actions were based on a concern about ambiguity, not that the prosecutor improperly commented on Gilstrap's failure to testify. Second, the superior court

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[4] While Gilstrap did not make a specific objection, the superior court addressed the objection on the merits. Therefore, the context of the superior court's consideration of and ruling on the objection is sufficient to preserve the issue for appellate review.

sustained Gilstrap's objection and instructed the jury to disregard the prosecutor's statement and "[j]uries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996). Third, the statement was not "manifestly intended" to be a comment on Gilstrap's failure to testify, nor would a reasonable juror "naturally and necessarily" understand it to be a comment on her failure to testify. *See Schaaf*, 169 Ariz. at 333, 819 P.2d at 919 (using these standards to analyze whether judge's comments were impermissible). There was evidence that there were several other adults in the house at the time law enforcement officers approached the house to execute the search warrant. Gilstrap, therefore, was not the only person who could explain or contradict the State's evidence. Finally, despite the prosecutor's statement, the officers' testimony about the location of the purse and whether anyone else in the residence had access to the purse was contradictory, a point Gilstrap argued in closing. For these reasons, the court did not abuse its discretion in finding the prosecutor's argument did not constitute prosecutorial misconduct.

B. Alleged Violation Of An Order By The Superior Court.

¶16 Gilstrap next argues the prosecutor engaged in misconduct by violating a court order and insinuating in closing argument that police initially found Gilstrap's purse in the

bathroom rather than the bedroom. As noted above, the prosecutor at the suppression hearing took the position (consistent with testimony at that hearing) that officers found Gilstrap's purse in the bedroom. Based on the evidence at the suppression hearing, the superior court found "that the purse was in the bedroom adjacent to the bathroom." A different prosecutor then tried the case. Consistent with the additional testimony of an officer who did not testify at the suppression hearing but who apparently was the first officer to find the purse, the prosecutor tried the case on the theory that officers initially found the purse in the bathroom, not the bedroom, and then moved the purse to the bedroom.

¶17 Gilstrap raised no objection to the change in the State's position, which apparently first surfaced in opening statements, until after the State rested. At that time, Gilstrap argued the State was estopped from taking a different position at trial than it took at the suppression hearing. The only relief Gilstrap sought, however, was to limit the prosecutor's closing argument; Gilstrap did not seek to strike any evidence admitted at trial. The superior court granted Gilstrap's motion and ordered the prosecutor not to argue in closing that the purse was in the bathroom. The court further stated it would not strike any evidence.

¶18 In her initial closing argument, the prosecutor argued that officers found the purse in the bedroom. Gilstrap argued in closing that one of the questions the jury had to consider was where the officers found the purse. Gilstrap noted that the prosecutor indicated in her opening statement that officers found the purse in the bathroom with Gilstrap and, therefore, nobody else could have placed the drugs in her purse. Gilstrap then addressed the inconsistencies of the officers' trial testimony regarding where they found the purse, noting one officer testified the purse was in the bathroom while two other officers testified the purse was in the bedroom. Gilstrap questioned how there could be such inconsistency -- as the prosecutor argued -- on such a crucial detail. Gilstrap then argued someone else could have put the drugs in her purse.

¶19 Gilstrap alleges the prosecutor violated the superior court's order during rebuttal argument, where the prosecutor stated defendant was arguing the evidence conflicted, noting

> Detective Stopke [testified that] . . . the purse was on the floor. Officer Mann told you it was on the bed. And Detective Upton told you it was in the bathroom. Who to believe? They each told you a very clear order of events that happened on that search warrant. They each told you a clear order of their actions regarding Ms. Gilstrap's purse. Detective Upton described the doors to the bathroom being closed. He described clearing that bathroom.

Gilstrap objected, but offered no grounds, and the superior court overruled the objection without elaboration. The prosecutor then continued without objection:

> And then after that was done during his time searching, during his time getting clothes for those children, Detective Stopke described how he found the purse for the first time for him in the bedroom. Then he moved it from the floor to the bed.
>
> And Officer Mann told you that after that purse had been searched, he came in and saw it on [the] bed. He also told you when he first walked through in his second clearing of the residence, I believe, that he had seen it on the floor.
>
> The officers' testimony [is] not in conflict. The officers' testimony show[s] where that purse was and how it was secured from the time of entry.

¶20 During a post-verdict hearing, the superior court found the prosecutor did not argue the purse was in the bathroom and did not argue "that there is any inference that could be drawn." The court further found that while the prosecutor addressed the testimony regarding the purse, the prosecutor "never made any arguments with respect to that," did not take a position contrary to the position the State took at the evidentiary hearing and did not argue one way or the other. For these reasons, the court found the prosecutor did not violate

the court's order.[5] At a hearing on a motion for new trial, the superior court again found the prosecutor complied with the order.[6]

¶21 On appeal, Gilstrap argues the prosecutor's rebuttal argument violated the superior court's order by insinuating officers found the purse in the bathroom. For a variety of reasons, the court did not err in finding the prosecutor did not violate that court's order.

¶22 The superior court, of course, is in the best position to determine the purpose of its own order and whether the prosecutor's argument violated that order. The court ordered the prosecutor not to argue the purse was in the bathroom and the prosecutor did not argue the purse was in the bathroom. The prosecutor addressed the evidence admitted at trial, none of which was stricken. The prosecutor did so without advocating that any officer's testimony regarding the location of the purse was or was not correct and without offering any interpretation of the evidence that suggested the purse was, in fact, in the bathroom. The prosecutor's only reference to testimony

[5] Despite Gilstrap's failure to state the grounds of her objection, the superior court ultimately addressed the issue in the context of whether the prosecutor's argument violated the court's order, which adequately preserved the issue for appellate review.

[6] Gilstrap does not present this issue in the context of the denial of her motion for new trial.

indicating the purse was in the bathroom was in addressing Gilstrap's claim of inconsistency and noting Gilstrap argued one officer claimed he found the purse on the bedroom floor, another claimed he found the purse on the bed and a third claimed he found it in the bathroom. The prosecutor then asked, "Who to believe?"

¶23 From that point forward, the prosecutor did not argue or otherwise suggest which version of events regarding the location of the purse the jury should believe. Instead, the prosecutor simply highlighted the testimony and posited that, contrary to Gilstrap's argument, the officers' testimony was not inconsistent. The prosecutor did so without arguing, inferring or insinuating the purse was actually in the bathroom with Gilstrap as she took her shower. Therefore, the superior court did not abuse its discretion when it found the prosecutor did not violate the court's order and that she did not otherwise engage in prosecutorial misconduct.

IV. Denial Of The Motion To Preclude.

¶24 Gilstrap argues the superior court erred in denying her motion to preclude the admission of a ledger found in her purse, claiming a lack of timely disclosure, a decision this court reviews for an abuse of discretion. *See State v. Tucker*, 157 Ariz. 433, 439, 759 P.2d 579, 585 (1988).

A. Background.

¶25 The State made its initial disclosure to Gilstrap's first counsel on August 19, 2010, which identified the ledger and police reports that also identified the ledger. The State's initial disclosure included a compact disc that included a digital photograph of the ledger pages. Gilstrap does not contend this disclosure was untimely and has offered no evidence that her first attorney did not receive this material.

¶26 By June 2011, when Gilstrap had new counsel, the prosecutor wrote a letter to Gilstrap's second counsel, referencing the compact disc, noting the State had already disclosed the disc and stating the disc would be "used against Ms. Gilstrap." In mid-July 2011, Gilstrap's counsel wrote to the prosecutor, noted that the State's disclosure identified the ledger and stated "I would request disclosure of this item." At some point after this, a new prosecutor took over the case.

¶27 In late February 2012, the new prosecutor, apparently unaware of Gilstrap's previous request, emailed Gilstrap's counsel and asked if he needed any further disclosure. Gilstrap's counsel responded that Gilstrap was ready to go to trial and "The only outstanding issue is that I have never seen the sales ledger. I requested a copy last year." The new prosecutor later explained to the court that because she knew of the ledger and that the photograph of the ledger had already

been disclosed, she believed Gilstrap's second counsel was making a request to see the ledger itself or perhaps obtain a copy of the ledger. She did not understand counsel's inquiry to mean that he had never even seen a photograph of the ledger.

¶28 As a result, nearly three months before trial, the prosecutor had the actual ledger brought to her office so Gilstrap's second counsel could inspect it. Gilstrap's counsel, however, did not follow up to see the actual ledger. When the parties finally sorted out that Gilstrap's counsel was claiming he could not locate the compact disc in his file and had never seen any depiction of the ledger, the State immediately provided a second copy of the photograph of the ledger. By then, however, it was approximately one week before trial.

¶29 At trial, Gilstrap sought to preclude admission of the ledger. Gilstrap's counsel argued that, even though the State may have provided a compact disc with photographs of the ledger to Gilstrap's first counsel, he could not find the disc in his file, adding "Maybe it's in the file and I just don't see it." Gilstrap's counsel argued that the State had a duty to disclose the disc "again" or at least help Gilstrap locate the disc once he informed the State he could not find it.[7] Gilstrap's counsel

[7] Gilstrap concedes on appeal that "In effect, [Gilstrap] was requesting another copy of the 'photo CD' that was missing from [the] file[.]"

further argued the State's failure to do so violated Gilstrap's right to due process.

¶30 The superior court found the State's disclosure clearly stated the existence of the ledger and the State timely disclosed the disc with the photograph of the ledger to Gilstrap's first counsel. The court further found Gilstrap's second counsel was always aware of the ledger's existence, something Gilstrap has never contested. The court noted Gilstrap's counsel never followed up on what could reasonably be interpreted as his request to see the ledger. Ultimately, the court found the State complied with the disclosure requirements of Rule 15.1 and denied Gilstrap's motion to preclude.

B. Discussion.

¶31 The State must "list" and "make available to the defendant" within thirty days after arraignment all papers, documents, photographs or tangible objects the prosecutor intends to use at trial or that were obtained from the defendant. Ariz. R. Crim. P. 15.1(b)(5), (c). The State also must "make available to the defendant" these and other items within thirty days of a defendant's written request. Ariz. R. Crim. P. 15.1(e). "The underlying principal of Rule 15 is adequate notification to the opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and

surprise may be avoided at trial by both sides." *State v. Stewart*, 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984).

¶32 As applied, from the time of the State's initial disclosure nineteen months before trial, Gilstrap was aware of the existence of the ledger and the State's plan to use the ledger at trial. The State provided Gilstrap's first counsel a copy of a disc containing a digital image of the pages of the ledger. That someone later lost or misplaced the defense copy of the disc does not negate this disclosure; the State fulfilled its disclosure obligations.

¶33 The letters from Gilstrap's second counsel to the prosecutor does not clearly indicate he did not have the disc or that he had never seen the image contained on that disc. The first letter only made a nonspecific request for "disclosure" of the ledger, something the prosecutor knew had already occurred. The second letter to the new prosecutor stated that Gilstrap's counsel had not "seen the sales ledger" and that he had requested a copy last year. It was not unreasonable for the prosecutor to interpret this as a request to inspect the ledger itself or obtain a copy and, as a result, make the ledger "available" by having the ledger brought to her office for inspection nearly three months before trial.

¶34 The record appears to reflect miscommunication between the parties and some confusion regarding the ledger. The record

does not, however, indicate that the State failed or refused to timely disclose the ledger. Moreover, the State did not resist disclosure when Gilstrap requested that the ledger be provided a second time. In short, there was no action or inaction by the State that mandated preclusion of the ledger as a sanction. Accordingly, the court did not abuse its discretion when it denied Gilstrap's motion to preclude.

Conclusion

¶35 Gilstrap's convictions and sentences are affirmed.

/S/___________________________________
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_________________________________
DONN KESSLER, Presiding Judge

/S/_________________________________
ANDREW W. GOULD, Judge