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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LINDA LEE CHAVEZ, *Appellant*.

No. 1 CA-CR 16-0109
FILED 3-9-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-116965-002
The Honorable Richard L. Nothwehr, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Nicholaus Podsiadlik
Counsel for Appellant

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MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 Linda Lee Chavez appeals her convictions and sentences for two counts of possession of dangerous drugs for sale. For the reasons stated below, we affirm the convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 The evidence at trial, viewed in the light most favorable to supporting the convictions,¹ demonstrated Chavez sold 3.2 grams of methamphetamine to an undercover officer in the parking lot of a Circle K in Mesa and arranged the subsequent sale of 3.5 grams of methamphetamine to the same officer in a nearby Fry's parking lot. After the second sale, the officer texted Chavez that he wanted to purchase two more "eight balls" of methamphetamine. Chavez texted the officer that the supplier would be coming, but it would take twenty to thirty minutes. Chavez was arrested before the third sale was completed.

¶3 Chavez testified that she was addicted to drugs, but had never sold drugs before the incidents for which she was charged. She testified that a police informant kept pressuring her into selling drugs, and offered her an extra \$100, money she could use to "pay another two nights on [her] room." She testified she agreed to assist in the second sale because "he offered to give [her] drugs and he offered to give [her] some money if [she] helped him out." Chavez acknowledged that shortly after the second sale, she made arrangements for a third sale. Defense counsel argued the informant and undercover officer entrapped Chavez into selling the drugs.

¶4 The jury convicted Chavez of the charged offenses and found the presence of an aggravating circumstance as to each count. The superior

¹ "We view the facts and all reasonable inferences therefrom in the light most favorable to supporting the convictions." *State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009) (citation omitted).

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court found the existence of two historical prior felony convictions and sentenced Chavez to concurrent terms of fourteen years' imprisonment. Chavez filed a timely notice of appeal. This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2016), 13-4031 (2016), and 13-4033(A) (2016).²

DISCUSSION

I. Prosecutorial Misconduct

A. Argument on Predisposition

¶5 Chavez first argues the prosecutor engaged in misconduct requiring reversal by arguing in closing that Chavez's poverty, drug addiction, and prostitution showed she was predisposed to sell drugs. Chavez had testified on direct examination that she was addicted to drugs, did not have steady employment, and prostituted herself to pay for drugs and a hotel room.

¶6 To determine whether a prosecutor's remarks are improper, we consider "(1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37 (2000) (citation omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (citation and internal quotations omitted).

¶7 Because Chavez failed to object to the argument at trial, we review her claim for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22 (2005). On fundamental error review, the defendant has the burden of showing the court erred, the error was fundamental in nature, and she was prejudiced thereby. *Id.* at 567, ¶ 20.

¶8 Chavez failed to meet her burden. A person who asserts an entrapment defense has the burden of showing by clear and convincing evidence in pertinent part that she "was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense." A.R.S. § 13-206(B)(3) (2010).

² We cite the current version of the relevant statutes unless changes material to this decision have occurred since the events in question.

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Predisposition, however, is relevant in an entrapment case only “to the extent it bears on the defendant’s intent to commit the crime with which he is charged,” therefore it was improper for the prosecutor to suggest that Chavez’s lifestyle of drug use, prostitution, and living in hotels predisposed her to sell drugs. *State v. Ross*, 25 Ariz. App. 23, 25 (1975); see *State v. Burciaga*, 146 Ariz. 333, 335-36 (App. 1985) (holding that a prior conviction of theft was not sufficiently similar to the crime of trafficking in stolen property to show predisposition to latter crime).

¶9 However, Chavez’s own counsel elicited this testimony on direct examination to show Chavez did not have the predisposition to sell drugs, “opening the door” to this evidence’s use. See *Pool v. Superior Court (State)*, 139 Ariz. 98, 103 (1984) (recognizing that “where one party injects improper or irrelevant evidence or argument, the ‘door is open,’ and the other party may have a right to retaliate by responding with comments or evidence on the same subject”). Furthermore, regardless of who introduced the statements, the statements did not prejudice Chavez. The comments were brief, unclear, and couched in argument suggesting that Chavez’s claim that she was not predisposed to sell drugs was belied by the evidence that she sold an amount of drugs greater than what she personally used, and the evidence that she sold drugs on two separate occasions and arranged a third sale. Moreover, the court instructed the jury that Chavez had the burden to demonstrate by clear and convincing evidence that she was not predisposed to commit “the type of offenses charged.” And the court responded without objection to the jury’s request for a clear definition of “predisposed” by informing it that “[t]he term does not have a specific legal definition, and please apply the commonly understood meaning for this word.” The court also instructed the jury that “[w]hat a lawyer says is not evidence, but it may help you understand the law and the evidence.” The jury is presumed to have followed these instructions. See *State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006). On this record, we are not persuaded that these brief remarks during closing argument “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” See *Morris*, 215 Ariz. at 335, ¶ 46. We decline to reverse on this basis.

B. Vouching on Cross-Examination

¶10 Chavez also argues that the prosecutor engaged in impermissible vouching when he cross-examined her on her motive to lie by insinuating he had information outside the record showing that she was committing perjury.

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¶11 There are “two forms of impermissible prosecutorial vouching: 1) where the prosecutor places the prestige of the government behind its witness; [and] 2) where the prosecutor suggests that information not presented to the jury supports the witness’s testimony.” *State v. King*, 180 Ariz. 268, 276-77 (1994) (citation omitted).

¶12 The court sustained objections to two of the prosecutor’s questions regarding Chavez’s motive to lie on the ground they were argumentative and overruled Chavez’s later relevance objection.³ Chavez did not raise any objection on grounds of vouching, however, limiting this court to review of her claim on appeal of improper vouching for fundamental error only. *See State v. Bolton*, 182 Ariz. 290, 304 (1995).

¶13 Chavez has failed to meet her burden for reversal on fundamental error review. The court appropriately sustained objections to two of the prosecutor’s questions on the ground they were argumentative, and later instructed the jury that if the court “sustained an objection to a

³ The testimony was as follows:

Prosecutor: All right. Now I want to ask you some different questions here, Ms. Chavez. If you answer truthfully, it will show the jury that you do have a motivation to lie to them while you were on the stand.

Defense: Objection. Judge, is there a question?

Court: Yes. It’s argumentative. Please just ask the question.

...

Prosecutor: All right. It’s fair to say that if the jury believes the officers and not you, that you would be convicted of selling meth; correct?

Chavez: Yes.

Defense: Objection. Calls for legal conclusion –

Court: Argumentative.

Defense: – and argumentative.

Court: Sustained.

Prosecutor: All right. All right, Ms. Chavez, you are aware that it is a felony to take the stand and lie; correct?

Chavez: Yes, I am.

Prosecutor: All right. And if you were convicted of that, you would be convicted of a felony; correct?

Defense: Objection. Relevance.

Court: Overruled.

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lawyer's question, you must disregard it and an answer given." The jury is presumed to have followed this instruction. See *Newell*, 212 Ariz. at 403, ¶ 68. The remaining question, unclear though it was, appears to have been designed to point out that Chavez's desire not to be convicted gave her a motive to lie, but confirmed she was aware that lying on the witness stand could result in an additional felony charge. This does not imply the prosecutor had information outside the record suggesting that Chavez was lying on the witness stand, as Chavez argues on appeal. Under the circumstances, we are not persuaded that this confusing line of questions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Morris*, 215 Ariz. at 335, ¶ 46; see *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (holding it was not improper for a prosecutor to explain to a witness the effect of perjured testimony when the prosecutor did not accuse the witness of perjury); but see *McGlothlin v. State*, 705 S.W.2d 851, 863 (Tex. App. 1986) (holding it was arguably improper for a prosecutor to ask the witness if he understood the effect of his oath and the consequences for violating it because that would imply to the jury the prosecutor has reason to believe based on facts not in evidence that the witness was lying), *rev'd on other grounds*, 749 S.W.2d 856 (Tex. Crim. App. 1988). We decline to reverse on this basis.

C. Cumulative Misconduct

¶14 Chavez's argument that the cumulative effect of the incidents requires reversal also fails because Chavez has failed to demonstrate that the "prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to prejudice the defendant." See *State v. Gallardo*, 225 Ariz. 560, 568, ¶ 35 (2010) (citation omitted) (stating standard for reversal due to cumulative prosecutorial misconduct).

D. Comment on Silence

¶15 Chavez argues that the State improperly commented on her right to silence by repeatedly asking her whether she had volunteered exculpatory statements during her police interrogation.

¶1 Chavez objected at trial to individual questions only on the ground of lack of foundation and that the questions "misstate[d] testimony." Although the court denied defense counsel's request to approach the bench at one point, defense counsel did not make any record afterward that he had sought to make an objection on a different ground. Because Chavez failed to object below on the ground she raises on appeal,

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this court is limited to review for fundamental error only. *Bolton*, 182 Ariz. at 304.

¶2 It is well settled that use of a defendant's post-arrest silence as evidence of guilt, even for impeachment purposes, violates a defendant's due process rights. See *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *State v. VanWinkle*, 229 Ariz. 233, 236, ¶ 14 (2012). It is permissible, however, to comment on matters that a defendant volunteers before asserting her rights. See *Anderson v. Charles*, 447 U.S. 404, 408-09 (1980) ("*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements."); *State v. Tuzon*, 118 Ariz. 205, 207 (1978) (holding that prosecutor did not impermissibly comment on defendant's post-arrest silence by impeaching defendant with what he had not said during his police interrogation, because defendant did not keep silent after arrest, but rather voluntarily answered the officer's questions); *State v. Stuck*, 154 Ariz. 16, 21 (App. 1987) ("If a defendant, after receiving *Miranda* rights, voluntarily gives a statement, that statement may be used to impeach his credibility if he testifies at trial to a directly exculpatory version of the facts.").

¶16 Chavez has failed to meet her burden for reversal on fundamental error review. The detective who interrogated Chavez testified that the interrogation was conducted at the police station and lasted fifteen to twenty minutes. There is no indication in the record that Chavez ever asserted her right to silence, and no recording of the interrogation was admitted as evidence at trial. At trial, the prosecutor introduced only two statements, both of which Chavez acknowledged making during the interrogation: 1) In response to the officer's remark that he knew "she was not getting rich off drug sales, and that [he] would like to go one step above her," she responded, "What do you want to know? That I sell dope?"; and 2) In response to his question about how many customers she had, she responded, "Man, why don't you go after bigger fish?" Chavez has failed to demonstrate that the prosecutor's questions about the inconsistency between her responses and her defense at trial that she had never sold drugs before and was pressured by the informant to do so were improper. See *Anderson*, 447 U.S. at 409 (concluding that *Doyle* did not apply to the facts of that case, because "[t]he questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement"). Chavez accordingly has failed to demonstrate that the court erred, much less fundamentally erred, in failing to *sua sponte* strike this line of questioning. Nor can we conclude that these two isolated statements prejudiced Chavez.

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II. Preclusion of Evidence

¶17 Chavez argues that the court abused its discretion, violating her right to confront the witnesses against her, by precluding her from eliciting testimony from the undercover detective on his alleged “unlawful employment of the informant” as probative of the detective’s untruthfulness and bias.

¶18 The court sustained relevancy objections to defense counsel’s questions of the detective as to whether the informant had a social security number, where he was born, if he was in the country legally, and if he had a visa permitting him to work in this country. Although we ordinarily review evidentiary rulings for abuse of discretion, we review evidentiary rulings that implicate a defendant’s constitutional rights *de novo*. See *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006).

¶19 Chavez argues that the detective’s admission outside the presence of the jury that he did not know whether the informant was in the country illegally, because the Mesa Police Department does not enforce immigration, and that he did not believe it was illegal to pay someone who was in the country illegally, would have been probative of the detective’s character for untruthfulness. She argues, therefore, that such statements were admissible under Arizona Evidence Rule 608(b), or as evidence of his bias under Arizona Evidence Rule 404(b).

¶20 A defendant has the right under the Confrontation Clause to cross-examine witnesses about their bias, motive, prejudice, and issues that directly bear on their credibility. See *Davis v. Alaska*, 415 U.S. 308, 316-18 (1974). Trial judges, however, retain wide latitude to impose reasonable limits on cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). A defendant’s right to present evidence is subject to restriction by application of reasonable restrictions. See *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

¶21 The court’s ruling precluding this evidence fell within its “wide latitude to impose reasonable limits on cross-examination to prevent confusion of the issues or interrogation that is only marginally relevant.” See *State v. Buccheri-Bianca*, 233 Ariz. 324, 328, ¶ 8 (App. 2013). The detective had elaborated outside the presence of the jury that although he did not know whether the informant was in this country illegally, “[t]o my knowledge, he is not here illegally. I mean, I know he had a visa at one point or another.” Moreover, Chavez failed to seek a court order before trial requiring the informant to respond to questions about whether he was

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in this country illegally, as the court suggested she do if the informant continued to refuse to respond to this question in pretrial interviews. Chavez also failed to ask the informant at trial whether he was in the country illegally, and made no offer of proof at trial that the informant was in fact not in the country legally.

¶22 On this record, the court did not abuse its discretion or violate Chavez's right to confront the detective by precluding questions designed to suggest that the detective had broken the law by employing an informant who was possibly not legally in this country. *See id.* at ¶¶ 9-11 (holding that the court did not abuse its discretion by precluding evidence of the victims' immigration status, in light of the absence of evidence that the victims had "unauthorized status" when they applied for a special visa a year after reporting the crime).

CONCLUSION

¶23 For the foregoing reasons, we affirm Chavez's convictions and sentences.



AMY M. WOOD • Clerk of the Court
FILED: AA