IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LUANNE MORGAN, *Appellant*.

No. 1 CA-CR 17-0697
FILED 10-23-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-143229-001
The Honorable Christopher A. Coury, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jesse Finn Turner
Counsel for Appellant

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

W E I N Z W E I G, Judge:

¶1 Luanne Morgan appeals her convictions and sentences for possession of dangerous drugs for sale, possession of drug paraphernalia and promoting prison contraband. She argues the superior court violated the Confrontation Clause when it improperly admitted several recorded telephone calls between her and Darrin Loschiavo into evidence. We disagree and affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 Loschiavo was an inmate at the Durango Jail in June 2016, when a detention officer received information about suspicious conduct and began to closely monitor Loschiavo's phone calls and mail. The officer recognized a pattern over several months—Loschiavo would speak with his sister, Morgan, on the telephone and then receive a postcard from Ron McDonald or Kim Maverick. In July and August 2016, the detention officer intercepted and impounded six postcards addressed to Loschiavo or another inmate he described to Morgan as a "pen-pal." At least two postcards tested positive for liquid methamphetamine.

¶3 Police officers executed a search warrant on Morgan's house in September 2016 and seized multiple bongs, multiple pipes, multiple stashes of methamphetamine, a glass dish with a "dried up postcard" and methamphetamine residue, a digital scale with methamphetamine residue, multiple small plastic baggies, including several with methamphetamine, and a tin can holding 171 grams of liquid methamphetamine.

¶4 Morgan was present during the search and received her *Miranda*[2] warnings. She acknowledged the methamphetamine and drug

[1] We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

paraphernalia was found in her bedroom and admitted using methamphetamine daily. She denied, however, mailing any postcards laced with methamphetamine.

¶5 The State charged Morgan with one count of possession of dangerous drugs for sale (Count 1), one count of possession of drug paraphernalia (Count 2), and one count of promoting prison contraband (Count 4).

¶6 Before trial, Morgan moved to preclude, among other things, the evidence of recorded phone calls between Loschiavo and two female non-defendants unless the female declarants were made available for cross-examination at trial. The prosecutor later said he had no intention to "offer jail call evidence that would violate [Morgan's] confrontation rights," and agreed that Loschiavo would be available to testify if the State used any of his jail calls. The court granted the motion.

¶7 Four days before trial, the superior court ordered Loschiavo to appear as a witness and granted him immunity from prosecution for any offense he disclosed during trial, but Loschiavo refused to testify and the court thus held him in contempt. Notwithstanding an objection, the court also admitted the recorded jail calls between Loschiavo and Morgan into evidence, finding: (1) Loschiavo had voluntarily "absent[ed] himself" and was therefore unavailable to testify; (2) the recorded statements were against Loschiavo's interest; (3) the corroborating circumstances of the recorded conversations indicated the statements were trustworthy; and (4) the statements were not testimonial in nature and their admission would not, therefore, implicate the Confrontation Clause.

¶8 At trial, a detective opined that Morgan possessed the methamphetamine for sale, rather than personal use, based upon the amount she possessed, the digital scale and the numerous methamphetamine baggies already "proportioned out and ready for sale."

¶9 The jury also heard several recorded jail phone calls from mid-2016, where Loschiavo asked Morgan to send postcards (sometimes "quick[ly]," "right away" and "still wet") and Morgan uniformly agreed. Loschiavo expressed anger and frustration when postcards did not arrive and gratitude when they did. Morgan inquired whether it "work[ed],"[3] and Loschiavo answered, "it was okay." Loschiavo complimented

[3] The question as to whether "it worked" presumably inquired into the efficacy of a methamphetamine-soaked postcard.

Morgan's use of "Ronald McDonald" as the return address. In August 2016, Loschiavo told Morgan about a fellow inmate who sought a "pen-pal" and asked her to send him "the same."

¶10 During closing argument, defense counsel acknowledged that Morgan possessed both dangerous drugs and drug paraphernalia. Defense counsel contested, however, that Morgan possessed the drugs for sale and mailed drug-laced postcards into the prison.

¶11 A jury found Morgan guilty as charged, and the superior court sentenced her to a minimum term of five-years' imprisonment on Count 1, a concurrent, minimum term of four years' imprisonment on Count 4, and a three-year term of probation on Count 2, scheduled to commence upon her release from prison. Morgan timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

¶12 Morgan raises one issue on appeal. She argues the superior court improperly admitted recordings of her conversations with Loschiavo in violation of the Confrontation Clause. She contends her conversations with Loschiavo were testimonial in nature and she was denied the chance to cross-examine him. "We review de novo challenges to admissibility based on the Confrontation Clause." *State v. Boggs*, 218 Ariz. 325, 333, ¶ 31 (2008).

¶13 The Sixth Amendment Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.[4] The Confrontation Clause bars the admission of out-of-court testimonial evidence unless the defendant has had an opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Testimonial evidence, in turn, includes the pretrial statements of declarants who can reasonably expect their statements to be used in furtherance of a criminal prosecution, but are unavailable for the defendant to cross-examine. *Id.* at 51; *State v. Medina*, 232 Ariz. 391, 405, ¶ 54 (2013). The Clause is most concerned with witness statements made to a government officer to "establish[] or prov[e] some fact" because "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person

[4] The Arizona Constitution likewise guarantees a defendant's right to confront the witnesses against him. Ariz. Const. art. 2, § 24.

who makes a casual remark to an acquaintance does not." *State v. Parks*, 211 Ariz. 19, 25, ¶ 27 (App. 2005) (quoting *Crawford*, 541 U.S. at 51).

¶14 The recorded phone conversations do not implicate the Confrontation Clause. The statements reflect non-hearsay communications between conspirators in furtherance of a conspiracy to smuggle methamphetamine into a jail, Ariz. R. Evid. 801(d)(2)(E), and "statements in furtherance of a conspiracy" are not testimonial "by their nature." *Crawford*, 541 U.S. at 56; *see State v. Tucker*, 231 Ariz. 125, 144, ¶ 49 (App. 2012) ("[T]here is no requirement that a coconspirator's statement satisfy the Confrontation Clause to be admissible."). The superior court did not violate Morgan's constitutional rights by admitting the recorded conversations.

CONCLUSION

¶15 For the foregoing reasons, we affirm the convictions and sentences.

AMY M. WOOD • Clerk of the Court
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