IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

CONNIE ESKELSON, *Appellant*.

No. 1 CA-CR 19-0665
FILED 4-29-2021

Appeal from the Superior Court in Maricopa County
No. CR2018-001338-001
The Honorable Frank Moskowitz, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

Brown & Little, PLC, Chandler
By Matthew O. Brown
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Brian Y. Furuya joined.

C A T T A N I, Judge:

¶1 Connie Eskelson appeals her conviction and resulting sentence for attempt to commit first degree murder. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In August 2017, Eskelson attempted to kill her husband R. using ethylene glycol (anti-freeze). Eskelson initially maintained that R.'s drinking caused his collapse and near death. She later asserted that, although R. had agreed to stop drinking, he had not done so, and was using ethylene glycol to conceal the smell of alcohol.

¶3 During their 34-year marriage, Eskelson and her husband raised four children: R.N. and B. (from R.'s previous marriage) and N. and J. (from Eskelson's previous marriage). In the later years of their marriage, they had arguments over Eskelson's spending and R.'s drinking. In early August 2017, Eskelson told her children that R. was drinking himself to death and was mistreating her, and that she wanted a divorce.

¶4 Later that month, Eskelson and R. were hosting a party at their house on a Sunday. During the party, R. began to stumble around and appeared to be drunk. Early the next morning, Eskelson reported she found him unconscious, nonverbal, and with labored breathing. Eskelson called for paramedics, and an ambulance transferred R. to the hospital.

¶5 After telling hospital doctors that R.'s drinking was likely the cause of his collapse, Eskelson asked the doctors to provide her information directly, and not to share it with other family members. R. underwent chemical testing that revealed he had extremely high levels of ethylene glycol in his system.

¶6 Later that week, doctors asked family members if they had searched the home for anti-freeze. This request confused R.'s family because they were not aware that R. had ethylene glycol in his system. R.'s

sons then decided to talk to Eskelson, to try to determine how R. ingested the ethylene glycol. But before they did so, R. unexpectedly woke up and made a full recovery.

¶7 After the doctors told R.'s children about his ingestion of ethylene glycol, the children called the Maricopa County Sheriff's Office ("MCSO"). MCSO deputies obtained a search warrant for Eskelson's home and seized multiple electronic devices, including an iPad, a laptop, and cell phones belonging to Eskelson.

¶8 After a forensic analysis of the electronic items, MCSO determined that Eskelson had purchased ethylene glycol through her Amazon account and had attempted to delete the account. MCSO then obtained a search warrant for Eskelson's data with Amazon. MCSO also obtained search warrants for the bank accounts linked to the Amazon account, call records and search data from Eskelson's cell phones, data from her email accounts, and shipping information from various companies. These search warrants were issued by Arizona magistrates to out-of-state companies doing business in Arizona. The information obtained from the search warrants showed that Eskelson purchased ethylene glycol on more than one occasion, paid for it using her credit card, and had the items shipped to her house. MCSO also discovered that after the doctors found ethylene glycol in R.'s system, Eskelson had obtained a passport with a fake name.

¶9 Eskelson was charged with one count of attempt to commit first degree murder, a class 2 felony. After an 18-day jury trial, the jury found her guilty as charged, and the superior court imposed an aggravated sentence of 21 years. Eskelson timely appealed, and we have jurisdiction under A.R.S. § 13-4033(A)(1).

DISCUSSION

¶10 Eskelson raises three arguments on appeal: (1) Arizona courts do not have the authority to issue search warrants out of state, and therefore, the superior court erred by denying her request to suppress the evidence obtained through the search warrants; (2) the superior court erred by declining to declare a mistrial following testimony from R. and N. relating to allegedly precluded evidence; and (3) the superior court erred by not striking R.'s testimony after he allegedly violated the rule of exclusion of witnesses.

I. Search Warrants.

¶11 Eskelson argues that the superior court should have granted her motion to suppress evidence seized outside Arizona. We review the superior court's denial of a motion to suppress for an abuse of discretion but review its conclusions of law de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62 (2004).

¶12 As a preliminary matter, three of the search warrants ("Family Member Search Warrants") sought electronic information created or used by R., R.N., B., N., J., and their spouses. The superior court found that Eskelson did not have standing to challenge the Family Member Search Warrants, and Eskelson has arguably waived this issue by failing to squarely address it on appeal. *See, e.g.*, *State v. Bolton*, 182 Ariz. 290, 298 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim."). Moreover, even assuming the argument is not waived, the court did not err by rejecting Eskelson's challenge to those warrants.

¶13 In challenging a search warrant, a defendant must establish a reasonable expectation of privacy in the items to be searched. *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). Fundamental to determining whether a privacy right exists is whether the individual has a subjective expectation of privacy and if the expectation is one "that society is prepared to recognize as 'reasonable.'" *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citation omitted). Here, Eskelson's asserted expectation of privacy in *another* person's data is unpersuasive, and we are unaware of any case suggesting the existence of such a right. *See State v. Peoples*, 240 Ariz. 244, 247, ¶ 8 (2016) (noting that constitutional protections against unlawful searches "are personal and can be invoked only by a defendant with a 'legitimate expectation of privacy in the invaded place'") (citation omitted). Accordingly, the superior court did not err by denying Eskelson's motion to suppress related to the Family Member Search Warrants.

¶14 The other warrants at issue pertained to Eskelson's online purchases, online search data, call logs, emails, bank records, and shipping information from companies located in nine different states outside of Arizona. A search warrant may only be issued based on probable cause, supported by an affidavit that particularly describes the property to be seized and the place to be searched. U.S. Const. amend. IV; A.R.S. § 13-3913; *see also* Ariz. Const. art. 2, § 8. Eskelson does not challenge the scope of the warrant, but argues that Article 6, Section 13 of the Arizona Constitution limits the superior court's authority to issue warrants to

searches within Arizona because it provides that "[t]he process of the court shall extend to all parts of the state."

¶15 Eskelson's reliance on Article 6, Section 13 is misplaced. This provision simply dictates that the superior court is a single court, with unified general jurisdiction. *See Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 102 (1995); *see also* Ariz. Const. art. 6, § 14. Although Eskelson asserts that the term "process" applies to search warrants and that the phrase "to all parts of the state" limits the court's authority, those arguments read more into the constitutional provision than the text dictates. "Process" in this context simply means the court's ability to "finally adjudicate claims . . . arising out of 'an event' occurring within the state against all persons, be they residents or nonresidents of Arizona." *Exec. Props., Inc. v. Sherman*, 223 F. Supp. 1011, 1013–14 (D. Ariz. 1963). "Process" does not apply to the location where search warrants are to be carried out but rather to the court's procedures for conducting its business. *See id.* In fact, Arizona's "long-arm" rules specifically contemplate an exercise of jurisdiction over—and service of process on—parties both within and outside of the state. *See, e.g.*, Ariz. R. Civ. P. 4.1(a), 4.2(a).

¶16 In *State v. Conner*, this court affirmed the superior court's authority to issue extraterritorial search warrants. 249 Ariz. 121, 125, ¶ 23 (App. 2020), *abrogated in part on other grounds by State v. Smith*, 250 Ariz. 69, 80–81, ¶¶ 21–22 (2020). Eskelson's argument to the contrary is unavailing, and we conclude that Article 6, Section 13 does not limit the execution of search warrants to a specific geographical location and does not preclude an exercise of authority that is to be carried out elsewhere. *Compare State v. Jacob*, 924 N.E.2d 410, 413, ¶¶ 17–19 (Ohio Ct. App. 2009) (finding limitation on Ohio courts' authority to issue extraterritorial search warrants based on express language of Ohio statute authorizing a judge to issue warrants "within his jurisdiction," Ohio Rev. Code Ann. § 2933.21, and an Ohio procedural rule authorizing warrants for "property located within the court's territorial jurisdiction," Ohio R. Crim. P. 41(A)(1)). In sum, the only limitation that the Arizona Constitution and the Legislature have placed on the issuance of search warrants is the existence of probable cause, and when that is established, the magistrate "shall issue a search warrant." *See* A.R.S. §§ 13-3911 to -3915.

¶17 Other than citing Article 6, Section 13, Eskelson provides no other basis for her claim that a search warrant may not be effectuated outside Arizona. Eskelson has not contested the magistrate's probable cause determination, and, as in *Conner*, no company responding to the search warrants objected to the issuance of the warrants. *See* 249 Ariz. at

125, ¶ 23. Accordingly, the superior court did not err by denying Eskelson's motion to suppress evidence obtained through the search warrants.

II. Motions for Mistrial.

¶18 Eskelson next argues that the superior court improperly denied her motions for a mistrial after N. and R. testified regarding what Eskelson asserts was precluded evidence.

¶19 A declaration of a mistrial is "the most dramatic remedy for trial error," and we review the superior court's decision to deny a motion for mistrial for an abuse of discretion. *State v. Dann*, 205 Ariz. 557, 570, ¶ 43 (2003) (citation omitted). "And because the trial judge is in the best position to assess the impact of a witness's statements on the jury, we defer to the trial judge's discretionary determination." *Id.* When witness testimony is the basis for a mistrial request, we will only reverse if there is a "'reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, 142–43, ¶ 57 (2000), *abrogated in part on other grounds as recognized by McKinney v. Ryan*, 813 F.3d 798, 813–18 (9th Cir. 2015).

¶20 In determining whether a mistrial is appropriate based on a witness's testimony, the superior court considers "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, 439, ¶ 40 (2003). The purpose of this inquiry is to determine whether the defendant would be denied a fair trial if trial were to continue. *State v. Bailey*, 160 Ariz. 277, 279 (1989).

¶21 Eskelson asserts that N. impermissibly testified to an alleged contract between Eskelson and a private investigator. Here, the superior court precluded admission of the contract into evidence. N. later testified that "[Eskelson] had *talked* about hiring detectives and putting trackers on cars." Eskelson's counsel objected, and the court overruled the objection, stating that the testimony was not encompassed by its ruling regarding the contract. On this record, the superior court did not abuse its discretion. N.'s testimony did not reference a contract, and the testimony did not call the jury's attention to matters that would not otherwise be properly received in evidence. And beyond this brief exchange, there was no other discussion suggesting any type of relationship, much less a contract, between Eskelson and a private investigator. Accordingly, Eskelson did not establish a viable basis for a mistrial. *See Lamar*, 205 Ariz. at 439, ¶ 40.

¶22 Next, Eskelson argues that when R. testified that Eskelson withdrew money from their joint account at Desert Federal Credit Union, he violated the court's pretrial ruling precluding evidence of Eskelson withdrawing money from R.'s retirement account (at Edward Jones) and putting it into a Chase savings account. At trial, in discussing R.'s decision to divorce Eskelson after the poisoning, the State asked him whether he had decided to take money out of his accounts after he was in the hospital. He replied that he did. When asked why, he stated that he took money out of the Desert Federal Credit Union account because "[Eskelson] took every dime out of *that* account." The parties agreed that this transfer was not subject to the court's pretrial ruling on the motion in limine, but the court nevertheless offered to provide a curative instruction. Eskelson declined the offer, and the superior court did not give any type of curative instruction.

¶23 Given the parties' agreement that the withdrawal referenced by R. was not subject to the court's pretrial ruling, Eskelson's argument fails. Moreover, reference to the withdrawal did not create a danger of improperly influencing the jury, and it was not referenced again. Over the 18-day trial, the jury heard overwhelming evidence of Eskelson's guilt, including that: (1) Eskelson purchased ethylene glycol; (2) the ethylene glycol was shipped to her home; (3) she paid for the purchases with her credit card; and (4) Eskelson purchased a fraudulent passport after doctors determined that R. had been poisoned. Further, the parties agreed not to bring up the funds transfer again, including in closing arguments. In this context, there was little risk that the comment at issue (even assuming it was improper) influenced the jury. *See id.*

¶24 Accordingly, the superior court did not err by denying Eskelson's requests for a mistrial.

III. Violation of the Rule of Exclusion of Witnesses.

¶25 Eskelson asserts (and the State agrees) that R. violated the rule of exclusion of witnesses (the "Rule"). *But see* Ariz. R. Crim. P. 9.3(a)(2)(A) ("A victim has a right to be present at all proceedings at which the defendant has that right."); Ariz. R. Evid. 615(e) ("[T]his rule does not authorize excluding: . . . a victim of crime . . . who wishes to be present during proceedings against the defendant."). Eskelson argues that the superior court erred by denying her request to strike R.'s testimony and provide a jury instruction regarding the violation. "[W]e review for abuse of discretion a trial court's choice of appropriate remedy for violation of an

order excluding witnesses." *Spring v. Bradford*, 243 Ariz. 167, 170, ¶ 11 (2017); *State v. Jones*, 185 Ariz. 471, 483 (1996).

¶26 The Rule provides that at a party's request, the court must exclude witnesses from the courtroom so they cannot hear other witnesses' testimony. Ariz. R. Crim. P. 9.3(a)(1); Ariz. R. Evid. 615; *see also* Ariz. R. Crim. P. 9.3(a)(3) (noting that the court's order "must instruct the witnesses not to communicate with each other about the case until all of them have testified"). The purpose of the Rule is to prevent witnesses from tailoring their testimony to that of the other witnesses, causing "less than candid" testimony. *Spring*, 243 Ariz. at 170, ¶ 14 (citation omitted). The court has discretion to determine the appropriate remedy when a witness violates the Rule, and we will only reverse if the non-violating party demonstrates prejudice. *Id.* at 172, 174, ¶¶ 19–20, 29 (noting the superior court's discretion and describing potential remedies for a violation of the Rule); *see also Jones*, 185 Ariz. at 483.

¶27 Here, Eskelson has not established either an abuse of discretion or resulting prejudice. Eskelson's theory at trial was that R. purchased the anti-freeze. On cross-examination, Eskelson's counsel asked R. whether he remembered telling a detective when he was in the hospital that he knew anti-freeze contained ethylene glycol. He stated that he did not remember this discussion.

¶28 Then, during a two-week recess, he talked to his daughter-in-law, who had also testified. R. asked his daughter-in-law about Eskelson's attorney's questioning, and she provided him a tape-recording of the conversation R. had with the detective. When trial resumed, R. acknowledged that he had talked to his daughter-in-law and listened to the recording. The defense then moved to strike R.'s testimony. The court denied the request, and instead permitted Eskelson's counsel to question R. about the Rule violation.

¶29 Eskelson argues that because R. was a fact witness and discussed the case with another fact witness, the violation was prejudicial. Although a violation of the Rule by a fact witness is more likely to be prejudicial than, for example, a violation by an expert witness, *see Spring*, 243 Ariz. at 172, ¶ 21, Eskelson does not articulate any specific prejudice from the discussion about whether R. remembered his conversation with the detective. And here, the superior court considered the violation, and after reviewing the other evidence the jury heard over "weeks of [] trial," reasonably concluded that striking R.'s testimony was not warranted. Further, the court allowed Eskelson's attorney to cross-examine R. about

his out-of-court conduct and to discuss it during closing argument, and Eskelson has not shown why this remedy was inadequate. *Cf. id.* at 173–74, ¶¶ 28–29 (explaining that cross-examination and allowing the non-violating party to argue the violation at closing was an appropriate remedy). Accordingly, the court did not err by denying Eskelson's request to strike R.'s testimony or to instruct the jury regarding his purported violation of the Rule.

CONCLUSION

¶30 Eskelson's conviction and sentence are affirmed.

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