DIVISION ONE
FILED: 11/22/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0416
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
TERRA LYNN FISHER,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-148708-001 DT

The Honorable Lisa Ann Vandenberg, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Angela Corinne Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Karen M. V. Noble, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Judge

¶1 Terra Lynn Fisher appeals her conviction and resulting sentence imposed after a jury found her guilty of possession of

a dangerous drug (methamphetamine). For the following reasons, we affirm.

BACKGROUND

¶2 Around 8:00 p.m. on July 15, 2008, Scottsdale Police Officer Mark Ashton arrested Fisher on an unrelated warrant after a traffic stop. While handcuffed in the back seat of the police car, Fisher asked Officer Ashton to retrieve her phone and call a friend to look after her children. While looking through Fisher's purse to find her cell phone, Officer Ashton discovered a plastic baggie of "a crystal-like substance," which was later revealed to be methamphetamine. The officer showed Fisher the baggie and asked whether she knew it was methamphetamine and whether she knew it was in her purse. According to Officer Ashton, Fisher admitted knowing the substance was methamphetamine and knowing the methamphetamine was in her purse. Fisher, on the other hand, maintains she told Officer Ashton she did not know what the substance was and did not know it was in her purse.

¶3 The State charged Fisher with one count of possession of a dangerous drug (methamphetamine) in violation of Arizona Revised Statutes ("A.R.S.") section 13-3407(A)(1) (2009),[1] a class four felony. At trial, the jury returned a unanimous

[1] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

guilty verdict. On April 29, 2010, the court sentenced Fisher to one year of supervised probation and imposed a $1000 statutory fine. This timely appeal followed.

DISCUSSION

¶4 Fisher argues the trial court committed fundamental error because (1) the court did not sua sponte hold a voluntariness hearing concerning the statements Fisher made to Officer Ashton after her arrest, and (2) the court failed to sua sponte stop the prosecutor from engaging in alleged misconduct and failed to give a curative instruction to the jury. Because Fisher did not raise these arguments to the trial court, she has waived them absent fundamental error. *State v. Schaff*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). To gain relief, Fisher must prove error occurred, the error was fundamental, and she was prejudiced by the error. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23-24, 26, 115 P.3d 601, 608 (2005). Error is considered fundamental if it reaches the foundation of the defendant's case or removes an essential right to the defense. *State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982) (citation omitted). With these principles in mind, we consider Fisher's arguments.

A. Voluntariness hearing

¶5 Although a defendant may object to admissibility of a confession and has a right to a fair hearing to resolve any issue raised as to voluntariness, the defendant must first object; "[t]he trial court is not required to [s]ua sponte enter upon an examination to determine the voluntary nature of evidence." *State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Sutton*, 115 Ariz. 417, 420, 565 P.2d 1278, 1281 (1977) (holding no voluntariness hearing required without motion to suppress, hearing request, or objection to admissibility by defendant, even when prosecutor indicated possible issue as to voluntariness); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974) (to same effect); *cf. State v. Stevenson*, 101 Ariz. 254, 256, 418 P.2d 591, 593 (1966) (concluding hearing required when defendant, "at least by implication," raised question as to voluntariness and jury was instructed on voluntariness).

¶6 Fisher never requested a voluntariness hearing before trial and never objected to the admissibility of her statements during trial. She argues, nevertheless, the court was required to conduct a hearing because the totality of the circumstances surrounding Fisher's confession suggested it was involuntarily made. *See* A.R.S. § 13-3988(A) (2010) ("Before [a] confession is received in evidence, the trial judge shall . . . determine any

issue as to voluntariness." (emphasis added)); *State v. Strayhand*, 184 Ariz. 571, 582 n.3, 911 P.2d 577, 588 n.3 (App. 1995) ("If the "'involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment of conviction without exclusion of the confession.'" (quoting *Blackburn v. Alabama*, 361 U.S. 199, 210 (1960))). Specifically, Fisher points to (1) evidence that at the time she made her statements to Officer Ashton, she was handcuffed and isolated in the patrol car, and she was concerned about leaving her children alone, and (2) a lack of evidence that an officer advised her of her *Miranda*[2] rights before Officer Ashton asked her about the baggie.

¶7 We do not agree these circumstances suggested Fisher involuntarily made her statements. Nothing in the exchange between Officer Ashton and Fisher or the circumstances of Fisher's custody suggested police coerced her statements, as is necessary to deem a statement involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (stating that "coercive police activity is a necessary predicate" to a finding of involuntariness); *State v. Boggs*, 218 Ariz. 325, 335-36, ¶ 44, 185 P.3d 111, 121-22 (2008) ("To find a confession involuntary, we must find both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne

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

will."); *State v. Poyson*, 198 Ariz. 70, 75, ¶ 10, 7 P.3d 79, 84 (2000) (holding that "[a]lthough 'personal circumstances, such as . . . emotional status, may be considered in a voluntariness inquiry, the critical element . . . is whether police conduct constituted overreaching'" (citation omitted)). Also, although no one testified about *Miranda* warnings at trial, Officer Ashton testified at the preliminary hearing that he read Fisher the *Miranda* warnings upon arrest and before any interrogation. We are not aware of any authority precluding the court from considering this prior testimony when assessing whether circumstances suggested Fisher's statements to Officer Ashton were involuntary. In these circumstances, absent objection or request by Fisher, the trial court was not required to sua sponte hold a voluntariness hearing, and there is no error – much less fundamental error – in the trial court's failure to do so.[3]

B. Prosecutorial misconduct

¶8 Fisher also contends the State engaged in prosecutorial misconduct when, during cross-examination, it "compelled her to state that Officer Ashton was lying" and later commented on this testimony during closing argument. We will

[3] Although we need not consider whether Fisher was prejudiced by the lack of a voluntariness hearing, we note that the record does not reveal any prejudice, especially in light of Officer Ashton's testimony at the preliminary hearing that he gave *Miranda* warnings before any interrogation.

reverse for prosecutorial misconduct only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004). In addition, reversal is only required if misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)). We look to "whether the misconduct affected the jury's ability to fairly assess the evidence." *Id.* (citing *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995)).

¶9 Fisher testified at trial that, when questioned by Officer Ashton about the crystalline substance found in her purse, she denied knowing what the substance was or even that it was in her purse. That testimony directly contradicted the officer's testimony. During cross-examination of Fisher, the prosecutor asked three times, without objection, whether Officer Ashton was lying. After the defense rested, the State recalled Officer Ashton in rebuttal, who testified that he had no reason to lie about Fisher's statements and that he could lose his job for lying on the stand. In closing, the defense argued that Fisher "ha[d] no reason to lie" and was telling the truth. In

its rebuttal closing argument, the State argued, without objection and with explicit acknowledgment by the State that the jury is the sole judge of witness credibility, that Fisher was calling Officer Ashton a liar and that Fisher indeed had motive to lie.

¶10 Fisher now contends the State's tactic "to set [Fisher] up to answer whether the officer was lying" amounted to prosecutorial misconduct requiring reversal. Although in Arizona opinion testimony by one witness commenting on the truthfulness of another is generally disfavored, if not outright barred, *see Boggs*, 218 Ariz. at 335, ¶ 39, 185 P.3d at 121, we have declined to categorically prohibit "were they lying" questions in this context. *State v. Morales*, 198 Ariz. 372, 375, ¶ 12-13, 10 P.3d 630, 633 (App. 2000).

¶11 Even assuming the prosecutor's cross-examination was improper, any alleged misconduct was not "so pronounced and persistent" as to require reversal. *Rosas-Hernandez*, 202 Ariz. at 218-19, ¶ 23, 42 P.3d at 1183-84 (quoting *Lee*, 189 Ariz. at 616, 944 P.2d at 1230). We have noted that "'[w]ere they lying' questions alone will rarely amount to fundamental error." *Morales*, 198 Ariz. at 376, ¶ 15, 10 P.3d at 634. In this context, the questions merely highlighted the differences between Officer Ashton's and Fisher's testimony – inconsistencies that the jury could consider and the parties

could argue to the jury. *See State v. Canion*, 199 Ariz. 227, 236-37, ¶ 43, 16 P.3d 788, 797-98 (App. 2000). We fail to discern how the use of the word "lying" alone is so provocative that it unduly affected the jury's assessment of witness credibility. *Cf. id.*; *Morales*, 198 Ariz. at 376, ¶ 15, 10 P.3d at 634. Similarly, the prosecutor's comment in closing that "[Fisher] said that the officer was a liar," especially when accompanied by an acknowledgment that the jury is to judge a witness's credibility, is unlikely to have had any significant effect on the jury's determinations. Moreover, the court properly instructed the jurors that they are the sole judges of witness credibility and that testimony from a police officer or from Fisher should be judged in the same manner as any other witness's testimony; we presume jurors followed the court's instructions. *Rosas-Hernandez*, 202 Ariz. at 219, ¶ 25, 42 P.3d at 1184. In sum, even if, as Fisher argues, the case hinged on the jury's acceptance of one version of events over the other, the prosecutor's purported misconduct did not so pervade the trial that Fisher was deprived of fundamental fairness. *See Canion*, 199 Ariz. at 236-37, ¶¶ 42, 44, 16 P.3d at 797-98.

CONCLUSION

¶12 For the foregoing reasons, we affirm Fisher's conviction and sentence.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Michael J. Brown, Presiding Judge

/s/
Philip Hall, Judge