IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RANDI CECILIA RUETER,
Appellant.

No. 2 CA-CR 2019-0155
Filed July 13, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20183140001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, and
Jocelyn Tellez-Amado, a student certified pursuant to
Rule 38(d), Ariz. R. Sup. Ct., Tucson
Counsel for Appellee

Erin E. Duffy, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Randi Cecilia Rueter appeals her convictions for possession of methamphetamine and possession of drug paraphernalia. She contends (1) the trial court improperly precluded a defense witness whose testimony would have contradicted the arresting officer's account of the traffic stop that led to her arrest, and (2) reversible error occurred when the arresting officer testified three times that Rueter had invoked her constitutional right to remain silent. We affirm.

Factual and Procedural Background

¶2 In January 2018, a state trooper stopped Rueter because her license plate lights were not working and her windshield was cracked. When the trooper approached the car and addressed Rueter, he smelled the strong odor of unburnt marijuana. The trooper asked Rueter where the marijuana was located, but Rueter denied having any, offering that her son, who she claimed had a medical marijuana card, sometimes smoked marijuana in the car.

¶3 The trooper asked Rueter to step out of the car, and Rueter complied, taking her purse with her. The trooper asked Rueter if there was marijuana in the purse, and after initially denying it, she admitted there was but claimed it was her son's. The trooper handcuffed Rueter and placed her in his patrol car, then searched her purse, which contained marijuana, a baggie of methamphetamine, and two pipes for smoking those drugs.

¶4 The trooper arrested Rueter, and a grand jury indicted her for possession of methamphetamine and possession of drug paraphernalia. After a three-day trial, a jury found Rueter guilty as charged. The trial court suspended the imposition of sentence and placed her on concurrent, eighteen month terms of probation. Rueter timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Preclusion of Impeachment Witness

¶5 Before trial, Rueter moved to suppress evidence of the contraband found in her purse, arguing, among other things, that the trooper lacked a sufficient basis to conduct the traffic stop. At the motion hearing, her employer testified that when he had picked up Rueter's car at the impound lot the day after her arrest, the license plate lights were working. The trial court denied the motion, then granted the state's oral motion to preclude the employer's testimony at trial, reasoning that the stop itself would not be at issue at trial.

¶6 On appeal, Rueter concedes that impeachment evidence on collateral matters is prohibited, but argues that the license plate lights were not a collateral matter because "[w]hat occurred during the stop and arrest was essential to the ultimate issue of guilt or innocence in this case." She contends that if the trooper were shown to have been untruthful about the traffic stop, he could not have been believed about finding the contraband in Rueter's purse. "We review a trial court's rulings on the admissibility of evidence for abuse of discretion." *State v. Lopez*, 234 Ariz. 465, ¶ 19 (App. 2014). "We review *de novo,* however, questions of law relating to admissibility." *Id.*

¶7 "[I]t is well settled that when impeaching a witness regarding an inconsistent fact collateral to the trial issues, the impeaching party is bound by the witness' answer and cannot produce extrinsic evidence to contradict the witness." *Id.* ¶ 25 (quoting *State v. Hill,* 174 Ariz. 313, 325 (1993)). Here, the trooper's testimony that the license plate lights had not been working had no relevance to the issues at trial: whether Rueter knowingly possessed drugs and paraphernalia. The trooper mentioned it only as background to explain why he had encountered Rueter. *See* 2 Kenneth S. Broun et al., *McCormick On Evidence* § 249 (8th ed. 2020) (officers generally "entitled to provide some explanation for their presence and conduct" to avoid misleading impression that they merely happened upon scene). Because the issue of whether the license plate lights worked had no independent relevance at trial, Rueter's only purpose of offering the employer's testimony was to contradict the trooper. Extrinsic evidence is generally precluded if its sole purpose is to impeach a witness on such a background matter. *See Lopez*, 234 Ariz. 465, ¶ 25 (extrinsic evidence to impeach by contradiction precluded "if it could not properly be offered for any purpose independent of the contradiction" (quoting *Hill,* 174 Ariz. at 325)).

¶8 If extrinsic evidence contradicting a witness is not independently relevant, it is admissible only when it is "proof of the type of fact which tend[s] to 'pull out the linchpin of the [impeached witness's] story.'" *Pub. Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 324-25 (1982) (quoting 1 M. Udall & J. Livermore, *Arizona Practice*: *Law of Evidence* § 44, at 77-78 (2d ed. 1982) (quoting C. McCormick, *Evidence* § 47, at 99 (E. Cleary ed. 1972))). In *Bleak*, at issue was whether the defendants had performed certain assessment work on a remote parcel of land. *Id.* at 324. One of the defendants testified that each time he had worked on the parcel he had reached it by driving his tractor up a riverbed. *Id.* The plaintiffs sought to have a hydrologist testify that the river flow was up to five feet deep when the defendant claimed to have worked. *Id.* The court acknowledged that neither the route the defendant took nor the water flow was necessarily independently relevant, but nonetheless found the hydrologist's testimony to be admissible as testimony contradicting a linchpin fact—a fact "which as a matter of human experience [the defendant] would not have been mistaken about if his story were true" that he had performed the work. *Id.* at 324-25 (quoting 1 Udall, *supra*, § 44, at 77-78 (quoting McCormick, *supra*, § 47, at 99)).

¶9 Here, whether the license plate lights were working was not such a linchpin fact. Even if the trooper were proved to have been mistaken or even deliberately untruthful about the license plate lights, it would still have been possible to reasonably believe that he had found the contraband in Rueter's possession as he had described. Thus, the general rule applied, rendering the employer's testimony inadmissible because it had no relevance other than to impeach the trooper's truthfulness by contradicting him.

¶10 Finally, Rueter contends that the evidence precluded here was similar to that ruled admissible in *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). In *Crane*, the Court ruled that, "[i]n the absence of any valid state justification," the state could not exclude "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690-91. Unlike here, the defendant in *Crane* was not merely precluded from offering extrinsic evidence; he was altogether precluded from inquiring into potentially coercive circumstances of the interview that had yielded the confession, such as the length of the interview and who had attended. *Id.* at 686. As the Supreme Court has since made clear, *Crane* does not generally preclude the application of state evidentiary rules that, by limiting the use of extrinsic evidence, "focus the fact-finder on the most important facts and conserve judicial resources by avoiding mini-trials on collateral issues." *Nevada v.*

Jackson, 569 U.S. 505, 509-10 (2013) (quotation omitted). We are thus unpersuaded that *Crane* contradicts the trial court's ruling.

¶11 In sum, the trial court did not abuse its discretion in precluding extrinsic evidence about the license plate lights.

References to Defendant's Invocation of Rights

¶12 The trooper referred to Rueter's invocation of her right to silence three times during his testimony. The first instance occurred after the trooper testified to a brief exchange with Rueter in which she initially denied having marijuana in her purse, then admitted it but claimed it belonged to her son. When the prosecutor asked what had happened next, the trooper replied he had informed Rueter of her rights pursuant to *Miranda*[1] and thereafter "Miss Rueter decided she didn't want to answer questions." Rueter did not object.

¶13 The trooper then testified about searching Rueter's purse and finding the drugs and paraphernalia, and the prosecutor asked whether he formally arrested Rueter at that point. The trooper replied that he had, and added, "[T]he original dialogue pertaining to the case or the charges after that, again that was just based on her wanting to remain silent after Miranda." Again, Rueter did not object.

¶14 Finally, on cross-examination, the following exchange occurred:

> [Rueter's attorney:] Okay. Did Miss Rueter ask to call anybody that night?
>
> [Trooper:] I don't recall what she asked for.
>
> [Rueter's attorney:] Did you—you didn't let her call anybody, correct?
>
> [Trooper:] That's correct. After she stated she didn't want to answer questions, I was done asking her anything.

Rueter objected, but the court overruled the objection. The state made no further references to Rueter's post-arrest silence.

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

¶15 On appeal, Rueter argues that the trooper's references to her silence constituted fundamental error, characterizing them as deliberate attempts by an experienced police officer to prejudice her by using her silence against her. She adds that even though the third reference constituted fundamental error, harmless-error review applies to that error because she timely objected. The state effectively concedes error,[2] but contends that the first two references did not constitute fundamental error warranting reversal and the third, objected-to reference was harmless error because it was merely cumulative of the first two references.

¶16 We review de novo a claim of an improper comment on a defendant's constitutional right to remain silent. *See State v. Newell*, 212 Ariz. 389, ¶¶ 27–37 (2006) (reviewing de novo application of *Miranda*); *State v. Nordstrom*, 230 Ariz. 110, ¶ 27 (2012) (constitutional claims reviewed de novo). Where, as here, a defendant does not object when the state first refers to his post-arrest silence but later during trial objects "in a manner sufficient to advise the court that the error was not waived," we deem error from the improper references preserved for appeal. *See State v. Downing*, 171 Ariz. 431, 434-35 (App. 1992) (quoting *State v. Briggs*, 112 Ariz. 379, 382 (1975)).

¶17 To decide whether a preserved error warrants reversal, we determine if it was harmless. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005); *State v. Green*, 200 Ariz. 496, ¶ 21 (2001). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Henderson*, 210 Ariz. 561, ¶ 18. To evaluate prejudice to a defendant from the state's improper references to her assertion of constitutional rights, we consider factors including: (1) whether "[the] defendant [was] forced to defend his invocation of constitutional rights through his own testimony," or was the error confined to "closing comments, which the jury [was] advised [were] not evidence"; (2) whether the references were moderate and "lacking significance when considered with the overall evidence"; (3) the degree to which the references would tend to mislead the jury and prejudice the defendant; (4) whether the references were deliberate or inadvertent; and (5) "the strength of the proof introduced to establish defendant's guilt," including whether it was "overwhelming" or "disputed circumstantial

[2]*See Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)) (state generally may not refer to defendant's post-arrest silence).

evidence that made defendant's credibility a factor." *State v. Palenkas*, 188 Ariz. 201, 213 (App. 1996).

¶18 Here, the improper references to Rueter's invocation of her right to remain silent were not confined to closing argument. But before the jury heard any of the references, it heard that Rueter had provided an innocent explanation for the contraband: it was her son's, and she did not know it was in her purse. Therefore the primary risk of prejudice from the references—that a juror might conclude that an innocent person in her predicament would have professed her innocence rather than remain silent—was attenuated. Moreover, the explanation the jury heard was consistent with Rueter's defense at trial. Thus, the improper references did not create a compelling need for her to testify to that innocent explanation.

¶19 The evidence of guilt at trial, which primarily consisted of the trooper's testimony and that of a criminalist who tested the seized items, was not overwhelming, but it was essentially undisputed. In Rueter's opening statement, she effectively conceded that the state would show that drugs and paraphernalia had been in her purse, suggesting only that the state would fail to show that she had possessed the items knowingly by virtue of its failure to test them for Rueter's fingerprints and DNA or otherwise investigate whether the items were her son's. Rueter did not meaningfully impeach the trooper's testimony that he had found her in possession of the contraband; during his cross-examination she instead attempted to establish that the state's investigation had been incomplete for the reasons she had touched on in her opening statement. In closing, Rueter did not contest that the state had proved she possessed the contraband, contending only that the state's burden went beyond "simply proving that [contraband] was in the purse" and required proof that she had possessed it knowingly. She again focused on her theme that the state had ended its investigation prematurely and had not ruled out the possibility that she had unwittingly accepted the contraband from her son or he had placed it in her purse. Rueter had presented no evidence to support this theory, however.

¶20 Although the trooper referred to Rueter's silence more than once, the references were brief and unaccompanied by commentary encouraging an inference of guilt, and we do not detect a deliberate trial strategy by the prosecutor. None of the references were elicited by the prosecutor; the trooper volunteered the reference in each instance. While we agree with Rueter to the extent she contends the veteran trooper ought to have known better, the state did not call attention to his improper remarks by inquiring further into them or referring to them in its closing argument. And once Rueter called attention to the error, no further

improper references occurred, despite the trial court's erroneous denial of the objection.

¶21 In sum, Rueter's guilt was established by ample evidence that was substantially undisputed; the improper references to her post-arrest silence, though repeated a few times, were moderate and do not appear to have been a deliberate strategy by the prosecutor; the risk that the jury would infer guilt from her silence was reduced by the fact that she had already provided an innocent explanation; and because that explanation was consistent with her defense, the references did not create a strong need for her to testify. In these circumstances, we conclude beyond a reasonable doubt that the error did not contribute to the verdict. *See Palenkas*, 188 Ariz. at 212-13.

¶22 We remind the state that improper references to a defendant's post-arrest silence will often create prejudice that compels a mistrial or reversal of a conviction. The state should make every effort to avoid improper references by counseling its witnesses before they testify. If a witness nonetheless improperly refers to the defendant's silence, the state would be well-advised to take immediate measures to ensure that the improper testimony does not recur, as each additional reference may present an additional opportunity for jurors to draw an unjustified inference.

Disposition

¶23 We affirm Rueter's convictions and terms of probation.