FILED BY CLERK
SEP -3 2009
COURT OF APPEALS
DIVISION TWO

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROXANA LEE SALGADO, Appellant.	2 CA-CR 2008-0188 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064498

Honorable Gus Aragón, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Frank P. Leto — Tucson
Attorneys for Appellant

P E L A N D E R, Judge.

¶1 In this appeal from her conviction for possession of drug paraphernalia, appellant Roxana Salgado argues the conviction must be reversed because the state violated her due process rights by commenting on and introducing testimony about her refusal to consent to a search. Although we find error, we also find it harmless and, therefore, affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdict. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). After receiving "some information" about a certain residence and a person named James Coughlin, Arizona Department of Public Safety officer Julian Sosa and other detectives went to the house to investigate. When they arrived there, Salgado came to the door, "cracked" it open, and then closed it, telling Sosa she would "be back in a moment." Salgado then came around from the back of the house to talk to Sosa, who asked to search the house. Salgado refused to consent to that, telling Sosa the home belonged to someone else and she was housesitting for him. A drug-detecting police dog alerted on the house, however, and officers secured the home with a protective sweep while a search warrant was obtained.

¶3 Pursuant to the warrant, officers searched the house and found, inter alia, equipment for growing marijuana; cash; various forms of identification, some bearing a fictitious name; growing stations with marijuana plants; marijuana; and drug paraphernalia. Salgado was arrested and charged with attempted possession of marijuana for sale,

transportation of marijuana for sale, production of marijuana, and possession of drug paraphernalia. After a jury trial, she was convicted of possession of drug paraphernalia and acquitted on all other counts. The trial court suspended the imposition of sentence and placed Salgado on three years' probation. This appeal followed.

Discussion

¶4 In the sole issue raised on appeal, Salgado contends "testimony about and comment on [her] refusal to consent to a warrantless search violated her due process right to a fair trial requiring reversal of her conviction."[1] Before trial, Salgado moved to suppress any evidence of the search of the home, arguing the protective sweep had been unlawful.[2] During the hearing on that motion, Sosa testified about how Salgado had "barely" opened the door to speak with him. He affirmed he had felt that "she did not want [him] or other police officers to enter by that door" and that she had been "evasive." The prosecutor also asked Sosa about Salgado's having come around from the back of the house and the significance he had placed on her actions. Salgado objected to the question, arguing she had no duty to let Sosa in the house and objecting to Sosa's attaching significance to her "asserting one of

---

[1]Based on what she deemed objectionable comment and testimony on her refusal to consent to a warrantless search, Salgado also moved for a mistrial below. *See* ¶ 6, *infra*. But she does not argue on appeal that the trial court erred in denying that motion. Therefore, any argument relating to that ruling is waived. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

[2]Salgado joined in the motion of her codefendant, Jennifer Salgado. As the state points out, that written motion is not included in the record before us. The motion, however, was discussed at the pretrial motions hearing and, therefore, we can ascertain at least some of its content.

her very basic rights." The trial court overruled the objection and ultimately denied the motion to suppress, a ruling not challenged on appeal.

¶5 During his opening statement at trial, the prosecutor discussed Salgado's actions, stating "[t]he impression that the officer forms is that she was trying to keep them away from the front of the house." The prosecutor also told the jury that Salgado had denied officers permission to search the house and that, although no one had seen Salgado doing anything illegal, her "attempts to misdirect" would lead the jurors to find her guilty. After the prosecutor finished his opening statement, Salgado objected to his "reference to [her] denying a request to search the house," arguing it was akin to an improper reference to a defendant's invocation of the right to remain silent. The trial court overruled the objection but stated it would "reconsider [the] motion if [Salgado] provide[d] . . . some law that supports it."

¶6 At trial, Sosa essentially repeated the testimony he had given at the pretrial hearing on Salgado's motion to suppress. He also testified, without objection, that Salgado had refused to consent to a search of the home. At the start of the next day of trial, Salgado renewed her objection to the prosecutor's reference in opening statement to her refusal to allow a search of the house and also argued Sosa's testimony on that subject the day before was constitutionally impermissible. Citing *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978), and *State v. Palenkas*, 188 Ariz. 201, 933 P.2d 1269 (App. 1996), she moved for a mistrial.

¶7 The trial court precluded further mention of Salgado's refusal of consent to a search but denied the motion for mistrial. The court did not strike Sosa's testimony but later instructed the jury:

> You must not conclude that a defendant is likely to be guilty because he or she did not consent to a warrantless search by the police. A defendant has an absolute constitutional right to refuse a search by the police without a warrant. The decision on whether or not to consent to a warrantless search is entirely the defendant's decision and cannot be considered or discussed by the jury in any way in reaching a verdict. You must not let this choice affect your deliberations in any way.

Although the prosecutor did not directly discuss Salgado's refusal again after the court's ruling, in his closing argument he said she had demonstrated "guilty knowledge" in that "she d[id] everything that she c[ould] to keep the officers away from the front of the house by going around the back."

¶8 Initially, we note Salgado did not object contemporaneously to Sosa's trial testimony that she had refused consent to search, objecting instead when she moved for a mistrial the next day. But, "'where an objection to a certain class of evidence is distinctly made and overruled, the objection need not be repeated to the same class of evidence subsequently received.'" *State v. Christensen*, 129 Ariz. 32, 36, 628 P.2d 580, 584 (1981), *quoting Tucker v. Reil*, 51 Ariz. 357, 368, 77 P.2d 203, 208 (1938); *see also Padilla v. S. Pac. Transp. Co.*, 131 Ariz. 533, 535, 642 P.2d 878, 880 (App. 1982). Applying that principle, we find the issue raised here was preserved by Salgado's timely objections to

Sosa's testimony during the pretrial motion hearing and to the prosecutor's comments in opening statement about her refusal of consent. The state does not argue otherwise.

¶9 "The extent to which counsel can go in opening statement is within the discretion of the court." *State v. Islas*, 119 Ariz. 559, 561, 582 P.2d 649, 651 (App. 1978). "We review evidentiary rulings for an abuse of discretion." *State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008). But "[e]videntiary rulings based on constitutional law . . . are reviewed de novo." *Id.* "Because [Salgado] objected below, we will review any error under the harmless error standard." *Id.* "'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 conviction. *Id.*, *quoting State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005).

¶10 We agree with Salgado that the trial court erred in allowing the state to introduce evidence of her refusal to consent to a search of the home and permitting the prosecutor to comment on that refusal. "Just as it is generally impermissible for a prosecutor to comment on a defendant's invocation of his Fifth Amendment right to silence, so is it generally impermissible to use a defendant's invocation of Fourth Amendment protections against him." *State v. Wilson*, 185 Ariz. 254, 258, 914 P.2d 1346, 1350 (App. 1996) (citations omitted); *see also Palenkas*, 188 Ariz. at 212, 933 P.2d at 1280. "The [Fourth] Amendment gives [a defendant] a constitutional right to refuse to consent to entry and search. H[er] asserting it cannot be a crime. Nor can it be evidence of a crime." *Prescott*, 581 F.2d at 1351 (citations omitted). Thus, as in *Palenkas*, "the prosecution's references to

defendant's invocation of h[er] fourth amendment rights to refuse to consent to a warrantless entry," and the introduction of evidence of that refusal, "violated defendant's due process rights to a fair trial." 188 Ariz. at 212, 933 P.2d at 1280.

¶11 In arguing for a contrary conclusion, the state maintains *Palenkas* does not apply here because Salgado "made no pretrial motion" and the prosecutor "violated no court order" in making his comments. Although Salgado did not expressly move in limine to exclude the comments and testimony in question, and the prosecutor did not violate any court order, the *Palenkas* court did not rest its conclusion solely on those circumstances. Rather, it stated broadly that the statements made by the prosecutor there were improper not only because they violated the court's ruling on the motion in limine, but also because they "violated defendant's due process rights to a fair trial by creating an inference that defendant's invocation of constitutional rights was evidence of . . . guilt." *Id.* The same is true here—the state attempted to use Salgado's assertion of her Fourth Amendment right against her, implying her guilt from that evidence and thereby implicating her right to a fair trial. *See Wilson*, 185 Ariz. at 258, 914 P.2d at 1350 (impermissible for state to "use a defendant's invocation of Fourth Amendment protections against him"); *see also Prescott*, 581 F.2d at 1351.[3]

---

[3]We note, however, that although testimony and related comments on Salgado's refusal to permit a search of the residence were impermissible, she has cited no authority for the proposition that the state's evidence and comment on her furtive behavior in cracking open the door and then emerging from the back of the house were also objectionable. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶12 "Having found a constitutional due process violation, we next turn to the question whether the error was of sufficient prejudice to require a new trial." *Palenkas*, 188 Ariz. at 212, 933 P.2d at 1280. As we have explained above, "[e]rror is 'harmless' when it can be said beyond a reasonable doubt that it did not contribute to or affect the verdict." *Id*. at 212-13, 933 P.2d at 1280-81; *see also Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607 ("Reviewing courts consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal."). In these circumstances, "a number of factors [may be examined] to determine whether defendant was prejudiced." *Palenkas*, 188 Ariz. at 213, 933 P.2d at 1281.

> First, was defendant forced to defend his invocation of constitutional rights through his own testimony? If the error occurred solely in closing comments, which the jury is advised are not evidence, the prejudice might be less. Second, were the comments "moderate in tone and import," and lacking significance when considered with the overall evidence? Third, to what degree did the remarks complained of "have a tendency to mislead the jury and to prejudice the accused?" Fourth, were the comments "deliberately or accidently placed before the jury?" Fifth, what was the strength of the proof introduced to establish defendant's guilt; was it otherwise overwhelming or was it disputed circumstantial evidence that made defendant's credibility a factor?

Id., *quoting People v. Redmond*, 633 P.2d 976, 979 (Cal. 1981), and *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) (citations omitted).

¶13 In this case, Salgado did not testify and, therefore, was not required "to defend h[er] invocation of constitutional rights through h[er] own testimony." *Id.* Likewise, the

comments here, at least compared to those in *Palenkas*, were moderate in import and tone. The prosecutor primarily commented on Salgado's behavior during her contact with police officers rather than her actual denial of consent to their search of the home. And, although Sosa testified Salgado had refused that consent, he did not suggest she was guilty based on that refusal or otherwise expound on it.

¶14 Regarding the third factor, we cannot say the comments here confused the jury or prejudiced Salgado. The jury was instructed that her refusal to consent was not evidence of guilt. And we presume the jury followed the instruction. *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007). In addition to the paraphernalia-possession charge of which she was ultimately convicted, Salgado was charged with several other counts related to the marijuana-growing operation found in the home. The jury acquitted her of those charges, suggesting it had rejected the state's argument that Salgado's evasive behavior at the door and subsequent refusal of consent to search the home indicated guilty knowledge on her part.

¶15 Regarding the fourth factor, however, the record tends to support Salgado's assertion that "the prosecutor's comments were not accidental." The state correctly points out that the trial court found the prosecutor had not made the comments "with any intentional or malicious conduct" and had not "intended to violate the defendant's constitutional rights." But even if that is so, the prosecutor's comments clearly were made deliberately and with the intent to suggest to the jury that Salgado's refusal of consent implied she was guilty. That

the prosecutor may have been unaware of the law on this point does not change the fact that he deliberately made the comments and elicited the testimony in question in violation of Salgado's rights. *Cf. State v. Keeley*, 178 Ariz. 233, 236, 871 P.2d 1169, 1172 (App. 1994) (finding deliberate error harmless "would just encourage similar constitutional error in the future"); *State v. Sorrell*, 132 Ariz. 328, 330, 645 P.2d 1242, 1244 (1982) (courts reluctant to find deliberate error harmless).

¶16 Lastly, we must consider the strength of the proof of Salgado's guilt. *Palenkas*, 188 Ariz. at 213, 933 P.2d at 1281. Police found a case containing a large number of glass pipes and a shrink-wrap machine in the master bedroom of the home.[4] The state presented evidence that at the time of the offense Salgado had a two-month-old baby and that a bassinet and baby supplies were found in the master bedroom. Several opened letters addressed to Salgado were also found in the room. A photograph of Salgado and Coughlin was on the mirror in the room. And a man outside the home when police arrived told Sosa that Salgado had been living in the house. In sum, there was substantial, unrefuted evidence that Salgado had been living in the master bedroom, where an extensive amount of paraphernalia was found. In view of the overwhelming evidence supporting the paraphernalia-possession charge of which Salgado was ultimately convicted and our conclusion that three of the four remaining factors weigh against a finding of prejudice, we conclude the state has met its

---

[4]One of the packages of marijuana found in the home was wrapped in vacuum-sealed plastic. Sosa also testified that shrink-wrap machines like the one found in the bedroom are used in the "illicit marijuana trade."

burden to show "beyond a reasonable doubt that [the error here] did not contribute to or affect the verdict." *Palenkas*, 188 Ariz. at 212-13, 933 P.2d at 1280-81.

Disposition

¶17 Salgado's conviction and the probationary term are affirmed.

____
JOHN PELANDER, Judge

CONCURRING:

____
JOSEPH W. HOWARD, Chief Judge

____
PHILIP G. ESPINOSA, Presiding Judge