

NOT DESIGNATED FOR PUBLICATION

No. 118,521

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHRISTOPHER J. CLARK,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed March 8, 2019.
Affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before POWELL, P.J., LEBEN, J., and KEVIN BERENS, District Judge, assigned.

PER CURIAM: Christopher Clark appeals his convictions for arson and aggravated arson. In two respects, he argues that the trial court's jury instructions were defective.

First, he argues that the district court should have given the jury a cautionary instruction about testimony by informants, something usually done when the police arrange in advance for someone to provide information about others in exchange for credit for cooperation. But here, the testimony was provided by someone who was simply in jail with Clark and who had no preestablished arrangement with investigators. The Kansas Supreme Court has only held that a cautionary instruction about the reliability of

informants is appropriate in one situation—when the witness was working for an agent of the State when they gained information about the defendant. That wasn't the case here.

Second, Clark argues that the district court should have given the jury a cautionary instruction about the potential unreliability of eyewitness testimony. But the witnesses here weren't eyewitnesses to the crime—they simply viewed footage from a neighbor's security camera that showed the events. Because these weren't eyewitnesses to the events, an instruction about the reliability of eyewitness testimony wasn't appropriate.

Clark also makes two other arguments, but they do not show reversible error at trial:

- Clark argues that the prosecutor erred by improperly commenting on the credibility of one of Clark's witnesses during his closing argument. But the prosecutor didn't state his personal belief about the veracity of the witness; he only encouraged the jury to make reasonable inferences from the evidence that the witness' testimony was not credible. Statements like that are permissible in closing arguments to the jury.
- Clark argues that the district court erred by admitting some evidence—a series of screenshots of Facebook messages—for which Clark suggests the State didn't provide sufficient authentication. But Clark didn't object to the admission of the screenshots at trial, so the issue isn't properly preserved for appeal.

We affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Early one morning in August 2016, Leanna Smith and several others were asleep in Smith's Wichita home when she woke up to see her bedroom window on fire. Smith

and the others in her home made it outside; she then saw the shed in her backyard go "up in flames."

A couple of days later, Christopher Clark was arrested and charged with one count of arson and one count of aggravated arson. Clark pleaded not guilty to both charges and requested a jury trial. His first trial ended in a mistrial because of a hung jury. Clark's second trial, and the basis for his claims on appeal, started about two months after the mistrial.

More than a dozen witnesses were called to testify at Clark's trial; we will summarize only the testimony relevant to the issues Clark has raised on appeal.

Leanna Smith's Testimony

Smith told the jury that she and Clark had known each other for a few months at the time of the fire and had used marijuana and methamphetamine together. She said that Clark lived with his grandfather, about a block away from where she lived.

Although Smith and Clark had been friends at first, Smith said that their relationship had gone awry a couple of weeks before the fire when, at around four or five o'clock in the morning, Clark had shown up at her house with another person. Smith wasn't sure why Clark and the other person were there, so she picked up a samurai sword and hit Clark, who happened to be the person closest to her, in the head with the flat side of the sword. After that incident, Smith said she didn't see Clark until the day before the fire took place.

Smith said that on the day after the fire, someone texted her a photo that came from a neighbor's surveillance video taken at the time of the fire. In the photo was a person standing behind Smith's house, a person Smith identified as Clark. Smith told investigators about the photo and explained that she believed Clark had been responsible for the fires.

Smith also told the jury that a man named Gage Gallegos had approached her and told her that Clark had been trying to pay him to set Smith's house on fire. She said that Gallegos showed her Facebook messages in which Clark had told Gallegos that someone had burned down Smith's house.

Gage Gallegos' Testimony

Gallegos told the jury that he and Clark "used to be old friends, maybe acquaintances," and that they had met each other in jail a couple of years before. Gallegos said Clark had been upset after the sword incident between Clark and Smith at Smith's home, so he asked Gallegos to help him set Smith's house on fire. He also said that Clark sent him a series of Facebook messages starting around the same time as the fire started. Then Gallegos told the jury that he went to Clark's house, where Clark admitted to setting the fire and then showed Gallegos what Clark had been wearing on the night of the fire.

John Delaney's Testimony

John Delaney met Clark while they were both detained at the Sedgewick County jail about a year before Clark's trial. Delaney said that he and Clark had been in the same housing pod together in jail and that Clark had told him "that [Clark] had gotten into it with some people at a house . . . and that [Clark] had went back and tried to burn the house down"

Delaney told the jury that Clark said that he had started the fire by putting gasoline into a water bottle with gauze and that he then left Smith's house by going "back out over the back fence." He also said that Clark told him that he had set the fire near the window of "the bedroom area" and that "the garage or something like that had burnt down too."

Delaney said Clark told him that Smith had hit him over the head with a sword. He also said Clark quoted Smith saying: "I bet you [Smith] won't try to cut my head off again."

The State then asked Delaney whether he and Clark had ever had discussions about Clark trying to set up an alibi. Delaney said that Clark told him that he had used Delaney's PIN to make a phone call in jail to set up an alibi. Delaney said that Clark had told him that he was worried about a series of Facebook messages that he sent "a guy named Gage."

Finally, Delaney explained what led to his testimony against Clark. He said that he and his attorney "sat down with an investigator from the fire department" and relayed what Clark had told him about starting the fires. Delaney then told the jury that he had reached a plea agreement with the State about his case in exchange for testifying against Clark. The plea agreement provided that the State would dismiss a couple of Delaney's charges and would recommend that the court sentence him to 46 months in prison—down from the guidelines sentence of 120 months.

Miki Hubbard's Testimony

Clark called Miki Hubbard, a mutual acquaintance of Clark and Smith, to testify. Hubbard told the jury that Clark was "absolutely not" the person from the surveillance video taken the night of the fire. On cross-examination, Hubbard admitted that she had one theft conviction and had used drugs with Smith.

The jury convicted Clark of both counts, and the district court sentenced Clark to 240 months in prison. Clark now appeals to this court.

ANALYSIS

I. The District Court's Failure to Give a Cautionary Jury Instruction Regarding the Testimony of John Delaney Was Not Error.

Clark argues that the district court erred by not giving the jury a cautionary instruction about Delaney's testimony. Clark characterizes Delaney as a "jailhouse snitch who came forward on his own to tell the police about an alleged confession by [Clark]." Delaney testified at trial and told the jury about Clark's confession. He also told the jury how, in exchange for testifying against Clark, the State would recommend that Delaney be sentenced to "just under" 5 years instead of 10 years for his own crime.

During the jury-instruction conference, Clark asked the district court to include a pattern jury instruction, PIK Crim. 4th 51.100, Informant Testifying in Exchange for Benefits. That instruction tells the jury that it "should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence." PIK Crim. 4th 51.100 (2017 Supp.). The court declined to include that instruction because it found that Delaney wasn't acting as an agent for the State.

The district court cited *State v. Lowe*, 276 Kan. 957, 80 P.3d 1156 (2003), in support of its decision. In *Lowe*, our Supreme Court said an earlier pattern instruction (one that says the same thing as PIK Crim. 4th 51.100) wasn't necessary because the witness "was not an informant because he was not acting as an agent for the State at the time he gained information about [the defendant]." 276 Kan. at 964. Here, as in *Lowe*, the trial court found that the witness was not acting as an informant for the State when he obtained the information about Clark's crimes that he testified about at trial.

Clark did preserve this issue for appellate review by requesting the instruction at trial, so we must decide whether the instruction was legally and factually appropriate. If the instruction was both legally and factually appropriate—and thus should have been given but wasn't—we would then determine whether the error caused prejudice to Clark or was harmless. See *State v. Salary*, 301 Kan. 586, Syl. ¶ 1, 343 P.3d 1165 (2015).

On appeal, Clark recognizes that *Lowe* doesn't support his argument. So he suggests that this court should either overrule *Lowe* or determine that a similar cautionary instruction should be given when a "jailhouse snitch" provides testimony—even though that witness wasn't working as an agent for the State when the defendant made the incriminating statement.

But we are of course bound by our Supreme Court's rulings unless there's some indication that the court is departing from its prior position. *State v. Ottinger*, 46 Kan. App. 2d 647, 655, 264 P.3d 1027 (2011). No such indication exists here. In fact, our Supreme Court rejected similar arguments in 2017 in *State v. Ashley*, 306 Kan. 642, 646-49, 396 P.3d 92 (2017).

The *Ashley* court rejected the argument that it should "backtrack and overrule a long line of cases that hold that a cautionary instruction is appropriate only when prisoner-witnesses are acting as agents of the State when they obtain the information about which they later testify." 306 Kan. at 647. The court said that in the line of cases *Ashley* cited—essentially the same ones that Clark asks us to go against—the Kansas Supreme Court "has consistently held that the informant cautionary instruction is not required when the information was passed to the witness . . . when the witness . . . had not been contacted by the State and was not intentionally given the role of investigator." 306 Kan. at 648.

Delaney wasn't working as an agent for the State when, according to Delaney, Clark made the incriminating statements. Under *Lowe* and *Ashley*, no cautionary instruction was required. We find no error here.

Even if the requested instruction had been appropriate, any error the district court committed by omitting the instruction would have been harmless, meaning not including the instruction didn't affect the trial's outcome. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 5, 256 P.3d 801 (2011). In *Ashley*, the court explained that a party may attack shaky but admissible evidence with cross-examination, contrary evidence, and careful instruction on the burden of proof. 306 Kan. at 648. Clark had all of those protections here.

Clark's attorney extensively cross-examined Delaney during the trial, and the jury was fully aware of the benefits Delaney was getting by cooperating with the State in testifying against Clark. He also presented evidence contrary to Delaney's testimony that Clark had admitted to committing the crimes. Clark called Randy Trimmell, who was incarcerated in the jail at the same time as Gallegos. Trimmell testified that Gallegos told him that he had made up the story about Clark confessing to committing the crime. Clark also called James Moore, who testified that Smith had told Moore that she didn't believe Clark had been responsible for the arson.

Clark's attorney emphasized this point in opening and closing arguments to the jury. In his opening statement, he told the jury that although Delaney was going to testify that Clark had admitted to committing the crimes, Delaney "ha[d] entered into an agreement with the State for a significantly reduced sentence . . . to testify against Mr. Clark." In closing, Clark's attorney implied that Delaney's testimony lacked credibility because of the benefit Delaney received by testifying. Finally, the court told the jury that the State carried the burden of proving Clark's guilt and fully explained the standard of proof that the State had to meet to support a conviction.

II. The District Court's Failure to Give a Cautionary Instruction About Eyewitness-Identification Testimony Was Not Error.

Clark makes one other argument about jury instructions—that the court should have cautioned the jury about the reliability of eyewitness testimony. Kansas has a pattern jury instruction, PIK Crim. 4th 51.110 (2017 Supp.), that gives jurors factors to consider when determining the reliability of eyewitness testimony:

"The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove [he] has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

- "1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitations on observation like an obstruction or poor lighting;
- "2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;
- "3. Whether the witness had observed the defendant(s) on earlier occasions;
- "4. Whether a significant amount of time elapsed between the crime charged and any later identification;
- "5. Whether the witness ever failed to identify the defendant(s) or made any inconsistent identification;
- "6. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification."

The district court denied Clark's request for this jury instruction because it didn't believe that Smith was an eyewitness "that would require or even trigger an eyewitness identification instruction." We agree.

Clark did request the jury instruction at trial, so he has preserved the issue for our review. See *Salary*, 301 Kan. 586, Syl. ¶ 1. But an eyewitness instruction was neither legally nor factually appropriate here. An eyewitness is "[s]omeone who personally sees an event[,] . . . usu[ally] a crime, and can describe it later." Black's Law Dictionary 707 (10th ed. 2014). But neither Smith (who testified it was Clark in the security video) nor Hubbard (who testified it wasn't Clark) personally saw Clark commit the crimes. They looked at the video or a screenshot taken from it, and the full video was admitted in evidence. Smith never claimed that she had seen Clark commit the crimes. Neither Smith nor Hubbard was an eyewitness to events, so an eyewitness instruction wasn't appropriate or required.

It's also important to note that both Smith and Hubbard knew Clark. Even when true eyewitness testimony is critical to the State's case, the Kansas Supreme Court doesn't require a jury instruction on eyewitness reliability when the witness personally knows the defendant. *State v. Mann*, 274 Kan. 670, 677-79, 56 P.3d 212 (2002); see also *State v. Hurt*, No. 114,984, 2017 WL 2834282, at *6 (Kan. App. 2017) (unpublished opinion), *rev. denied* 307 Kan. 990 (2018). In that situation, the defendant can challenge the accuracy of the identification through cross-examination. *Mann*, 274 Kan. 670, Syl. ¶ 2. We find no error in the failure to give a jury instruction on eyewitness reliability.

III. *Clark Has Not Shown Prosecutorial Error During the Closing Argument.*

Clark next argues that the prosecutor made an improper closing argument by commenting on the credibility of Miki Hubbard, who had testified that Clark wasn't the person in the photos taken from the surveillance video taken by Smith's neighbor. The prosecutor told the jury:

"[Y]ou have the opportunity to decide how credible you think [Hubbard] is. When [the State] asked [Hubbard] whether she'd ever done drugs with the defendant, did you notice she paused? There was a pause. And then you could tell do I lie or do I not lie . . .

because she then finally answered but she paused before she answered. That tells you she did not want to answer that question."

We examine claims of prosecutorial error in two steps. First, we ask whether the prosecutor erred. Second, if there was an error, we must decide whether the error prejudiced the defendant's right to a fair trial. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

In general, prosecutors may not offer juries their personal opinions on the credibility of witnesses. *State v. Peppers*, 294 Kan. 377, 396, 276 P.3d 148 (2012). The prosecutor's personal opinion would be unsworn testimony by the prosecutor, not proper comment on the evidence presented. See 294 Kan. at 396.

But that doesn't mean a prosecutor is forbidden from arguing about witness credibility based on the evidence presented. And the prosecutor may make statements to the jury that relate to what evidence a juror should use in assessing the witness' credibility. See *State v. Scaife*, 286 Kan. 614, 623-24, 186 P.3d 755 (2008); *State v. McDonald*, No. 116,925, 2018 WL 4039225, at *2 (Kan. App. 2018) (unpublished opinion), *petition for rev. filed* September 12, 2018. A prosecutor may advocate to the jury by presenting reasonable inferences from the evidence to argue that a story is either believable or unbelievable. *State v. Hart*, 297 Kan. 494, 505-06, 301 P.3d 1279 (2013).

The prosecutor's argument here was permissible—he was arguing a reasonable inference from the evidence the jury had observed that directly related to Hubbard's credibility. See *State v. Chanthaseng*, 293 Kan. 140, 148, 261 P.3d 889 (2011) ("A prosecutor may offer the jury an explanation of 'what it should look for in assessing witness credibility.'" [quoting *Scaife*, 286 Kan. at 624]). The prosecutor essentially told the jury to consider the fact that Hubbard hesitated before she answered whether she and Clark ever did drugs together, and then asked the jury to infer that Hubbard was lying because of her

hesitation. We don't know from a transcript how significant that pause may have been, but the jury did. The prosecutor didn't go beyond the bounds of proper closing argument here.

Even if her argument had gone beyond established limits, we would still find no reversible error because any error would have been harmless. See *Ward*, 292 Kan. 541, Syl. ¶ 6. The State presented an abundance of evidence against Clark. Smith identified Clark as the person in the picture from her neighbor's surveillance video based on her personal knowledge of Clark. Gallegos testified that Clark asked him to help set Smith's house on fire and discussed the Facebook messages from Clark showing Clark wearing the same clothes as those worn by the person who committed the crimes. And Delaney told the jury that Clark admitted to setting the fires when they were in jail together. Considering this and other evidence against Clark, any error that the prosecutor may have committed from this brief comment during closing argument didn't contribute to Clark's conviction.

IV. Clark Failed to Preserve for Appeal Any Challenge to the Admissibility in Evidence of the Facebook Screenshots.

Clark's final argument is that the district court erred by admitting screenshots of Facebook messages that Clark allegedly sent to Gallegos because the State didn't properly authenticate the exhibits. The State counters that Clark failed to preserve the issue for appellate review. We agree.

Under K.S.A. 60-404, a verdict or judgment may not be set aside or reversed because evidence was wrongly admitted unless the party harmed by that evidence objected to its admission at trial. Clark concedes that he didn't object to the State's exhibits at his second trial. But he argues he did enough to preserve the issue because he objected to those exhibits "on multiple occasions, including at the first trial," when the State first presented the screenshots. He also argues that the purpose of K.S.A. 60-404 was satisfied when "the district court commented that the evidence in the two trials was

substantially the same," thus showing that it "had sufficient opportunity to review its previous decisions on the admissibility of [the] exhibits"

Clark had filed a pretrial motion (called a motion in limine) before his first trial seeking to keep these exhibits out of evidence. The district court ruled that the exhibits would be admissible if the State provided a sufficient evidentiary foundation at trial. Clark's attorney objected at the first trial, giving the district court a chance to rule based on the foundation the State had provided—and the court found the evidence admissible. But Clark's attorney did not object at the second trial, depriving the trial court of the opportunity to consider the matter and also depriving the State of the chance to provide any more foundational evidence if the State found what it had presented thus far insufficient. Clark has not preserved this issue for appeal. See *State v. Robinson*, 306 Kan. 1012, 1030, 399 P.3d 194 (2017) (holding that the defendant didn't properly preserve his objection to the admission of evidence for appellate review because "he did not renew his motion in limine" and didn't make a contemporaneous objection at trial); *State v. Gaona*, 293 Kan. 930, 955-56, 270 P.3d 1165 (2012); *State v. Anthony*, 282 Kan. 201, Syl. ¶ 2, 145 P.3d 1 (2006). While we haven't found an appellate opinion in a criminal case in which a party failed to raise an evidentiary objection in a second trial after having raised it in the first trial, K.S.A. 60-404 applies to both civil and criminal proceedings. And in a civil case, *Davila v. BNSF Railway Co.*, No. 107,533, 2013 WL 1859208, at *8 (Kan. App. 2013) (unpublished opinion), our court declined to reach the merits of an evidentiary issue when the complaining party "did not make a timely and specific contemporaneous objection to any of the evidence it now challenges on appeal when it was offered during the second trial," thus failing to preserve the issue for appeal.

We affirm the district court's judgment.