NOT DESIGNATED FOR PUBLICATION

No. 125,226

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TIMOTHY MICHAEL MILLER,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Opinion filed September 1, 2023. Affirmed.

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

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., GARDNER and HURST, JJ.

PER CURIAM: A jury convicted Timothy Miller of knowingly possessing methamphetamine. Miller appeals, challenging the sufficiency of the evidence presented at trial, the court's instructions to the jury, and the appropriateness of various statements by the prosecutor during closing arguments. We affirm Miller's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2019, Leavenworth police responded to a welfare check involving Miller. The responding officer knew that Miller had an outstanding municipal warrant

and arrested him. While conducting a search incident to that arrest, the officer found a small plastic baggie in Miller's front pants pocket. Though the baggie appeared largely empty, it contained small amounts of a white, crystalline substance. The officer later testified that he immediately recognized the substance as methamphetamine. A subsequent test of the baggie by the Kansas Bureau of Investigation was positive for methamphetamine residue. The amount was undetermined because the KBI does not weigh drugs under .01 to .02 grams.

Nearly two years later, the State charged Miller with knowingly possessing methamphetamine. At trial in April 2022, the jury heard testimony from the officer who searched Miller and the KBI forensic scientist who tested the baggie. The jury then found Miller guilty as charged. The district court sentenced him to 34 months in prison.

DISCUSSION

On appeal, Miller challenges his conviction from three angles. He argues the evidence was not sufficient to show that he knowingly possessed methamphetamine, claiming the evidence at trial merely showed that he possessed an empty baggie. Miller also asserts that the district court erred when it instructed the jury about the mental state necessary for the crime of possession. Finally, Miller claims the prosecutor misstated the law at various times during closing arguments. We do not find these arguments persuasive.

1. *There was evidence presented at trial to show that Miller knowingly possessed methamphetamine.*

"'When a criminal defendant challenges the sufficiency of the evidence used to support a conviction, an appellate court looks at all the evidence "in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt."'" *State v. Zeiner*, 316 Kan. 346, 350, 515

P.3d 736 (2022). Appellate courts do not reweigh evidence, evaluate witness credibility, or resolve evidentiary conflicts. 316 Kan. at 350.

A conviction can rest on circumstantial evidence if the evidence allows the jury to draw reasonable inferences from the facts at issue. *State v. Banks*, 306 Kan. 854, 858-59, 397 P.3d 1195 (2017). The evidence "need not exclude every other reasonable conclusion." 306 Kan. at 859. For example, it is common to prove a defendant's intent solely through circumstantial evidence because direct evidence of someone's state of mind rarely exists. *State v. Gonzalez*, 311 Kan. 281, 288, 460 P.3d 348 (2020).

Kansas law prohibits possessing methamphetamine. K.S.A. 2022 Supp. 21-5706(a); K.S.A. 2022 Supp. 65-4107(d)(3). The State can prove possession through two alternative avenues:

- It can prove that the possession was intentional—that the person had "joint or exclusive control over an item with knowledge of and intent to have such control." K.S.A. 2022 Supp. 21-5701(q).

- It can prove the possession was knowing—that the person "knowingly ke[pt] some item in a place where the person ha[d] some measure of access and right of control." K.S.A. 2022 Supp. 21-5701(q); see PIK Crim. 4th 57.040 (2022 Supp.). A person acts knowingly "when such person is aware of the nature of such person's conduct or that the circumstances exist." K.S.A. 2022 Supp. 21-5202(i).

The State charged Miller—and the district court instructed the jury—under the second avenue: knowingly possessing methamphetamine. Thus, the State was required to prove beyond a reasonable doubt that Miller kept methamphetamine in a place where he had access and control and that he knew about it. Miller asserts the evidence showed, at best, that he knowingly possessed an empty baggie.

This court considered a similar argument in *State v. Allen*, 52 Kan. App. 2d 729, 372 P.3d 432 (2016), *rev. denied* 306 Kan. 1320 (2017). There, police searched the defendant's truck and found a scale and pipe with "'white powdery residue,'" which later tested positive for methamphetamine. 52 Kan. App. 2d at 730. This court found there was circumstantial evidence to uphold the defendant's possession-of-methamphetamine conviction, citing testimony that the residue was visible to the naked eye. 52 Kan. App. 2d at 731-33; see also *State v. Carpenter*, No. 117,579, 2018 WL 3596072, at *5-6 (Kan. App. 2018) (unpublished opinion) (upholding same conviction based on evidence that the baggie in the defendant's pocket contained visible residue and the defendant was linked to drug activity), *rev. denied* 310 Kan. 1064 (2019).

Applying those principles here, there was evidence presented at trial to show that Miller knowingly possessed methamphetamine. He had a baggie in his front pants pocket—a place he had access and control—and that baggie contained methamphetamine. As in *Allen*, while the amount of methamphetamine in the baggie was admittedly small, there was evidence that it was visible to the naked eye. The officer who searched Miller testified that he saw a "white, crystal-like substance" and immediately recognized it as methamphetamine. The officer testified that Miller admitted the baggie was his. And small amounts of a white crystal-like substance are visible in a photograph of the baggie that was submitted as evidence at trial.

As a court of review, an appellate court cannot reassess the officer's credibility or reweigh the jury's assessment of the evidence. See *Zeiner*, 316 Kan. at 350. Viewed in the light most favorable to the State, there was sufficient evidence submitted at trial to support the jury's finding that Miller knowingly possessed methamphetamine.

2. *The district court did not err when it instructed the jury.*

Miller also challenges the district court's instructions to the jury, arguing these instructions did not provide the jury enough information on the intent element of the possession charge. He asserts that the instructions were deficient in two ways—by omitting any instruction about what it means to *intentionally* possess something and by providing an incomplete instruction on *knowing* possession.

Miller never objected to the jury instructions, so this court reviews them for clear error. See *State v. Martinez*, 317 Kan. 151, 162, 527 P.3d 531 (2023). Thus, Miller must show that the challenged instructions were legally and factually inappropriate and then must "firmly convince us that the jury would have reached a different verdict if the instructional error had not occurred." See 317 Kan. at 162.

As we have indicated, possession can be intentional or knowing. See K.S.A. 2022 Supp. 21-5701(q). Miller was charged with knowingly possessing methamphetamine. At trial, the court provided the jury with two instructions on possession:

- Instruction No. 8 stated: "'Possession' means having joint or exclusive control over an item with the knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control."

- Instruction No. 9 stated: "The [S]tate must prove that the defendant committed the crime of possession of methamphetamine knowingly. A defendant acts knowingly when the defendant is aware of the nature of their conduct that the [S]tate complains about."

Miller first argues the jury instructions were legally inappropriate because the district court only instructed the jury on *knowing* possession—the crime charged—but did not provide any instruction on what might be meant by *intentional* possession. Miller notes that the broader definition of possession in Instruction No. 8 included both the intentional and knowing intent elements in K.S.A. 2022 Supp. 21-5701(q). But the court never explained what it meant to control something with "the intent to" have that control.

This court has consistently rejected arguments that a district court must define "intentionally" or "knowingly" in jury instructions. See, e.g., *State v. Collins*, No. 121,112, 2021 WL 936048, at *6 (Kan. App.) (unpublished opinion), *rev. denied* 313 Kan. 1043 (2021). This caselaw is consistent with courts' broader recognition that words that are "widely used and . . . readily comprehensible need not have a defining instruction." *State v. Norris*, 226 Kan. 90, Syl. ¶ 4, 595 P.2d 1110 (1979). Instead, a court need only define a word if its common meaning differs from its legal definition. *Collins*, 2021 WL 936048, at *6. *Knowingly* and *intentionally* do not fall into this category; they are "'widely used words'" that are "'readily comprehensible by individuals of common intelligence.'" 2021 WL 936048, at *6. Thus, we do not agree that an instruction on the definition of "intentional" was legally required.

More important, a definition of "intentional" was not factually appropriate in this case. The State charged Miller with knowing possession, not intentional possession, and the court informed the jury of this limitation in Instruction No. 9. An instruction on intentional possession would not have been appropriate under these circumstances. Thus, the district court did not err in omitting an instruction on intentional possession.

Miller next asserts that the district court's instruction on the definition of "knowingly" was incomplete. Kansas law states that a person may act "knowingly" two ways: in being "aware of the nature of such person's conduct *or* that the circumstances [surrounding the conduct] exist." (Emphasis added.) K.S.A. 2022 Supp. 21-5202(i). The

district court instructed the jury under the first definition—that "[a] defendant acts knowingly when the defendant is aware of the nature of their conduct that the State complains about"—but not the second.

As we have indicated, the district court was not required to provide a definition of "knowingly." Miller argues that because the district court nevertheless instructed the jury on what it means to act knowingly, its instruction should have included the full definition under K.S.A. 2022 Supp. 21-5202(i), including both alternative meanings. But Miller misreads the disjunctive nature of this definition—Kansas law requires proof that Miller was aware of the nature of the conduct *or* that the circumstances existed, not both. K.S.A. 2022 Supp. 21-5202(i); see PIK Crim. 4th 52.010 (2021 Supp.).

While the district court had no duty to define "knowingly," the definition it provided was consistent with Kansas law. See *Collins*, 2021 WL 936048, at *6. And the jury apparently concluded that Miller acted with the mental state articulated in that definition. Thus, Miller has not shown that the court's definition of "knowingly" was legally or factually inappropriate.

In sum, Miller has not identified any error in the district court's instructions, let alone a clear error that undermines the jury's verdict. Accord *Martinez*, 317 Kan. at 162.

3. *The State did not commit prosecutorial error during closing arguments.*

In his final argument on appeal, Miller asserts that the State committed prosecutorial error by misstating the law during closing arguments. In evaluating such a claim, this court first determines whether the prosecutor erred—that is, "whether the comments were outside the wide latitude that a prosecutor is allowed in discussing the evidence." *State v. Pribble*, 304 Kan. 824, 831-32, 375 P.3d 966 (2016). If the court finds error, then it determines "whether the improper comments prejudiced the jury against the

defendant and denied the defendant a fair trial." 304 Kan. at 832. Courts do not review prosecutors' statements in isolation, but in context with the rest of the closing argument and jury instructions. *State v. Burnett*, 293 Kan. 840, Syl. ¶ 7, 270 P.3d 1115 (2012).

Miller claims some of the prosecutor's statements during closing arguments improperly framed possession as a strict-liability crime. He points to the prosecutor's statement that Miller "possessed it; it was illegal." But the prosecutor did not misstate the law—it is illegal in Kansas to possess methamphetamine. See K.S.A. 2022 Supp. 21-5706(a). The statement also came just after the prosecutor summarized the evidence and the State's theory of the case. And the prosecutor separately explained, as did the jury instructions, the mental-culpability requirements for the crime. This statement did not, in isolation or in context, improperly frame possession as a strict-liability crime.

Miller points to two other statements made during the prosecutor's closing arguments that were similarly simplistic.

- The prosecutor stated, after summarizing the evidence, that "[the KBI report] says, Methamphetamine was detected from the lab. That's it. That's all the evidence, and that's all that's necessary."

- On rebuttal, the prosecutor argued that even trace amounts of methamphetamine are enough to find possession, stating "this methamphetamine is just like that, that was there, and he is guilty."

Again, our review of these statements in context shows that the prosecutor was not framing possession as a strict-liability crime. Moments before the first statement, the prosecutor discussed the definition of possession, consistent with the jury's instructions, arguing that Miller "had total access, total knowledge, . . . and control over that

methamphetamine." Viewed in context, along with the jury instructions explaining the requirements to prove possession, the prosecutor did not misstate the law. It was clear that the State had to prove the requisite mental state.

Finally, Miller argues that the prosecutor improperly attempted to shift the State's burden of proof to the defense. He points to the prosecutor's observation that "[t]here's no controverted evidence that it was not methamphetamine and that it was not in his pocket and he did not have that knowledge." Contrary to Miller's assertions, this statement did not shift the burden of proof. Rather, it acknowledged the absence of other evidence presented on these points.

Miller did not—and was not required to—present any evidence in his defense. But commenting on uncontested evidence does not shift the burden of proof, especially when those comments are made right after the district court instructed the jury that the State has the burden of proof. See *State v. Watson*, 313 Kan. 170, Syl. ¶ 2, 484 P.3d 877 (2021) (pointing out a lack of evidence does not shift burden of proof); see also *Pribble*, 304 Kan. at 832-33 (noting that while prosecutors must not misstate the law, they may draw reasonable inferences from the evidence).

Given the context of the prosecutor's statements and the jury instructions, Miller has not shown that the prosecutor's comments were outside the wide latitude attorneys have in presenting closing arguments. See 304 Kan. at 831-32; see also *State v. Sisson*, 302 Kan. 123, Syl. ¶ 6, 351 P.3d 1235 (2015) (appellate courts presume jurors follow their instructions).

Miller has not apprised this court of any error in his trial. We therefore affirm his conviction of possession of methamphetamine.

Affirmed.