NOT DESIGNATED FOR PUBLICATION

No. 125,543

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LASHAWN DAVIS,
Appellant.

MEMORANDUM OPINION

Appeal from Harvey District Court; MARILYN M. WILDER, judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE P.J., GARDNER and CLINE, JJ.

PER CURIAM: Lashawn Davis appeals her convictions for various drug offenses by asserting for the first time on appeal that law enforcement violated her *Miranda* rights during the traffic stop that instigated the charges. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). She also challenges the sufficiency of the evidence supporting her conviction for possession of methamphetamine.

We find Davis' evidentiary challenge unpersuasive and her *Miranda* challenge unpreserved under K.S.A. 60-404. We therefore affirm her convictions.

The traffic stop leading to Davis' convictions.

Davis was a passenger in a car pulled over by law enforcement for a tag light issue. When one of the officers questioned Davis about a clear glass smoking pipe located near where Davis was sitting, she admitted it was hers. The pipe contained burned residue, and there was "some crystalline substance" visible in the stem. Davis told the officer she had used the pipe to smoke methamphetamine a few days earlier. She also admitted there was marijuana in the vehicle, and it belonged to her.

After a search of the vehicle discovered 23 grams of marijuana, an officer advised Davis of her *Miranda* rights. According to the officer, Davis agreed to continue to speak to him with these rights in mind. The officer claimed Davis repeated her admission to recently using the pipe to smoke methamphetamine after her *Miranda* advisory.

Davis was charged with possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia. After unsuccessfully moving to suppress the evidence discovered in the traffic stop—based only on her claim that the stop was illegal—she was tried and found guilty on all three charges.

Davis raises two issues on appeal.

On appeal, Davis claims the district court erred by allowing the officer to testify about Davis' admissions as to the pipe and marijuana. Davis claims this testimony was inadmissible because the officer should have advised Davis of her *Miranda* rights before he questioned her. She also claims the evidence presented at trial was insufficient to sustain her conviction for possession of methamphetamine. She contends the State presented no evidence that she knew she possessed methamphetamine on the day of the search.

Davis waived her objection to the admission of the officer's testimony about the statements she made before receiving her Miranda *warnings.*

Davis admits she did not object to the admission of this testimony at trial. And she concedes that K.S.A. 60-404 generally precludes review of this issue for the first time on appeal. Yet she contends these are exceptional circumstances, and she asks that we exercise our discretionary authority to newly consider this issue to prevent a denial of her fundamental rights. See *State v. McIver*, 257 Kan. 420, 433, 902 P.2d 982 (1995) (noting this court's power to review an issue raised for the first time on appeal in exceptional circumstances, where consideration of the new issue is necessary to serve the interests of justice or to prevent the denial of fundamental rights).

This is not the first time our court has considered a request like Davis'. And when faced with the same arguments Davis makes here, we found the statutory requirements in K.S.A. 60-404 cannot be waived, even for the reasons Davis asserts. See *State v. Rhodes*, No. 101,838, 2010 WL 4668322, at *2 (Kan. App. 2010) (unpublished opinion).

In *Rhodes*, authorities questioned Rhodes in a hospital on the night of an accident before Mirandizing him. Rhodes unsuccessfully moved to suppress the statements he made to authorities, claiming the statements were inadmissible because he was incapable of freely and voluntarily waiving his rights. On appeal, he alternatively argued the district court erred because the police asked him questions that elicited incriminating information before he was Mirandized. We found Rhodes had waived both arguments under K.S.A. 60-404 because he did not object at trial on either basis to the investigator's testimony about his statements. 2010 WL 4668322, at *2.

In explaining our ruling, we noted that, only a few months before, in *State v. Shadden*, 290 Kan. 803, 839-41, 235 P.3d 436 (2010), the Kansas Supreme Court had again emphasized the importance of K.S.A. 60-404 and found a defendant failed to

preserve his claim that his *Miranda* rights were violated when he did not make a contemporaneous objection at trial. And we pointed out that in *Shadden* the court had "refus[ed] to accept the defendant's argument 'that the statutory requirement should be waived because consideration of the issue is necessary to serve the ends of justice or to prevent denial of fundamental rights.'" *Rhodes*, 2010 WL 4668322, at *2.

As the State points out, the Kansas Supreme Court has shown no indication that it is willing to sidestep K.S.A. 60-404. See, e.g., *State v. Hillard*, 313 Kan. 830, 840, 491 P.3d 1123 (2021) ("'In recent years, however, we have consistently been refusing to review an evidentiary issue without a timely and specific objection even if the issue involves a fundamental right.'"). This is true even for fundamental rights since, for instance, in *Hillard*, the court found a codefendant's lack of objection to the district court's limitation on cross-examination was unpreserved even though defendants are entitled to the right of cross-examination under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Davis does not address or even mention *Rhodes* or *Shadden* in her brief. Given the Kansas Supreme Court's repeated and unwavering cautions to follow K.S.A. 60-404's rule for preservation, we see no reason to decide this case any differently than we decided *Rhodes.* We find Davis' objection to the officer's testimony unpreserved for our review.

The visible residue in the pipe was sufficient evidence to support Davis' conviction.

Davis also challenges the sufficiency of the evidence supporting her conviction of possession of methamphetamine. When answering this question, we review "the evidence in the light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt." *State v. Coble*, 312 Kan. 615, 626-27, 479 P.3d 201 (2021). We cannot reweigh evidence, evaluate witness credibility, or resolve conflicts in evidence. Further, we recognize no distinction between

direct and circumstantial evidence in terms of probative value. Evidence in a conviction, even in cases with the most serious offenses, can be circumstantial. And inferences deduced from circumstantial evidence are permissible so long as the inferences are reasonable ones. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021).

Davis argues there was insufficient evidence to find she knowingly possessed methamphetamine on the day of the search. While she acknowledges the authorities found methamphetamine residue in the pipe, and she admits she told them she had possessed and ingested methamphetamine on the Thursday or Friday before the stop, she characterizes this as "scant circumstantial evidence" insufficient to prove she knowingly possessed methamphetamine.

Again, this is not the first time our court has faced arguments like the ones Davis makes. And, in those instances, our court found visible residue—like the kind discovered in the pipe here—was sufficient to sustain a conviction for possession of an illegal drug.

For example, in *State v. Allen*, 52 Kan. App. 2d 729, 372 P.3d 432 (2016), authorities found a white powdery residue on a scale. On appeal, Allen argued that since authorities "discovered only a small amount of methamphetamine residue on the scale, the residue constituted an oversight on his part and not something he knowingly possessed." 52 Kan. App. 2d at 732. We rejected that argument. 52 Kan. App. 2d at 732-33. We held a guilty verdict for possession of a controlled substance can be supported by evidence showing the substance was on or in an item and the substance itself was visible to the naked eye. 52 Kan. App. 2d 729, Syl. ¶ 3; see also *State v. Carpenter*, No. 117,579, 2018 WL 3596072, at *5-6 (Kan. App. 2018) (unpublished opinion) (finding white powder methamphetamine residue visible to the naked eye creates a reasonable inference possessor knew about the residue they possessed).

Davis does not dispute that there was methamphetamine residue in the pipe, nor does she dispute the officer's description that the residue was visible to the naked eye. She also acknowledges that our Supreme Court has held residue provides sufficient evidence of possession of an illegal drug. *State v. Brown*, 245 Kan. 604, 613-14, 783 P.2d 1278 (1989). We therefore find there is sufficient evidence to establish that Davis knowingly possessed methamphetamine on the day of the search and affirm her conviction.

Affirmed.