IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT MICHAEL TYZBIR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43076

FILED

MAR 2 9 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury trial, of possession of a schedule one controlled substance.[1] First Judicial District Court, Carson City; William A. Maddox, Judge. The district court sentenced appellant Scott Tyzbir to serve a prison term of 19 to 48 months. Tyzbir asks this court to reverse his conviction.

Tyzbir first claims that his Fourth Amendment right to privacy was violated when a deputy sheriff searched him incident to an arrest.[2] Tyzbir contends that his arrest occurred when he was handcuffed

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[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

[2]Our review of the record reveals that Tyzbir was not subject to a search incident to an arrest, but rather an inventory search conducted at the Carson City Jail. See Illinois v. Lafayette, 462 U.S. 640, 644 (1983) (stating that an inventory search is an administrative step following an arrest and preceding incarceration); Shipley v. California, 395 U.S. 818, 819 (1969) (stating that a search is incident to an arrest if it is conducted

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and placed in a patrol car and that it was an illegal arrest because the sheriff's deputies had not witnessed a crime, Thomas Box (who called the police) had not yet identified him as the suspicious person, and Box had not yet decided to have him arrested.

A "peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing, or is about to commit a crime."[3] The detention does not become a de facto arrest merely because a defendant is placed in handcuffs or in a police car.[4] However, if probable cause matures during the course of the detention, the detention can ripen into an arrest.[5] A private citizen may arrest a person "[f]or a public offense committed or attempted in his presence."[6]

The record before this court reveals that Deputy Jarrod Adams encountered Tyzbir while responding to Box's report of a suspicious person. When he attempted to contact Tyzbir, Tyzbir ran and tried to hide. Under these circumstances, Adams could reasonably

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substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest).

[3]NRS 171.123(1): see also Terry v. Ohio, 392 U.S. 1 (1968).

[4]State v. McKellips, 118 Nev. 465, 471, 49 P.3d 655, 660 (2002); see also Scott v. State, 110 Nev. 622, 631, 877 P.2d 503, 509 (1994).

[5]Rice v. State, 113 Nev. 425, 429, 936 P.2d 319, 321 (1997).

[6]NRS 171.126.

conclude that Tyzbir was engaged in criminal activity and could detain him for further investigation.[7] Tyzbir's detention ripened into an arrest when he was identified and arrested by Box. Therefore, we conclude that the arrest and subsequent search were legal. To the extent that Tyzbir claims that the Sheriff's Department failed to follow its inventory search procedures, we have determined that the search was administered in good faith and that any error was harmless.[8]

Second, Tyzbir claims that there was insufficient evidence to support a conviction. He contends that the chain of evidence was unusual and that "the evidence admitted at trial, 0.20 grams of methamphetamine, was so significantly different than the more than 9 grams originally booked into evidence, [that] the jury should not have found sufficient evidence to support a conviction."

The relevant inquiry for this court in reviewing a sufficiency of the evidence challenge is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[9] To

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[7]See State v. Stinnett, 104 Nev. 398, 401, 760 P.2d 124, 126 (1988) (holding that unprovoked flight provides sufficient cause to justify an investigative stop).

[8]See Weintraub v. State, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994).

[9]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

obtain a conviction for narcotics possession, the State must show that the defendant had dominion and control over the substance, the substance was a narcotic, and the defendant knew of its narcotic character.[10] Here, Tyzbir stipulated that he knew the narcotic character of the substance, so the State was only required to show that he had dominion and control over the substance and that it was a narcotic.

From the evidence adduced at trial, a rational juror could easily conclude that Tyzbir had dominion and control over the bindle, that the substance found in the bindle was the substance tested by forensic technicians, and that the substance was a narcotic. Deputy Ron Kennison testified that he found the bindle while searching Tyzbir and gave it to Patrol Sergeant Clay Wall. Wall testified that he received the bindle from Kennison prior to responding to a report of a possible suicide, so he locked the bindle in his patrol car and later directed Deputy Adams to retrieve it. Adams testified that he retrieved the bindle from Wall's patrol car, weighed it, and booked it into evidence. He further testified that he may have misread the scale and that he did not know if the scale was calibrated. Carson City Forensic Technician Kurt Urbanski testified that the substance in the bindle was presumptively methamphetamine. Washoe County Criminalist Richard Smith testified that based on the results of two tests he concluded that the substance was

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[10]See Sheriff v. Shade, 109 Nev. 826, 830, 858 P.2d 840, 842 (1993); see also NRS 453.336(1).

methamphetamine. We conclude that there was sufficient evidence to support a conviction.

To the extent that Tyzbir claims that the jury was improperly instructed on evidence tampering, substitution, and the chain of custody,[11] we find nothing in the record to suggest that this claim was properly preserved for appeal. Failure to object to an instruction generally precludes appellate review, but this court has discretion to consider an error if it was plain and affected the appellant's substantial rights.[12] No error occurred here because the instruction appropriately addressed how evidence suggesting the possibility of evidence tampering, substitution, or a questionable chain of custody was to be considered.[13]

Third, Tyzbir claims that the district court improperly denied his motion for a mistrial after the jury observed him being escorted in the courtroom from a holding area by a uniformed deputy sheriff. The decision whether to grant or deny a motion for a mistrial is well within the

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[11]Instruction 21 provided:

> It is not necessary to negate all possibilities of substitution or tampering with an exhibit, nor to trace its custody by placing each custodian upon the stand; it is sufficient to establish only that it is reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence.

[12]NRS 178.602; Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000).

[13]See Hughes v. State, 116 Nev. 975, 981, 12 P.3d 948, 952 (2000).

district court's sound discretion and will not be disturbed absent a clear showing of an abuse of that discretion.[14]

"Central to the right to a fair trial, guaranteed by the Sixth and Fourteen Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial.'"[15] "[C]ertain practices pose such a threat to the fairness of the factfinding process that they must be subject to close judicial scrutiny."[16] For example, the practice of forcing a defendant to wear prison clothes when appearing before a jury may affect a juror's judgment as the clothes present a "constant reminder of the accused's condition."[17] Likewise, it is generally an error to allow the jury to see a defendant shackled.[18] However, an inherently prejudicial practice may be permitted if it is justified by an essential state interest,[19] or it "may, in the setting of a particular case, be so unimportant and insignificant as to be deemed harmless."[20]

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[14]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

[15]Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

[16]Id. at 568 (internal quotes and citations omitted).

[17]Id.; see also Grooms v. State, 96 Nev. 142, 605 P.2d 1145 (1980).

[18]Daniel v. State, 119 Nev. 498, 517, 78 P.3d 890, 903 (2003).

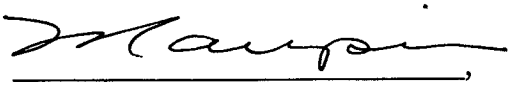
[19]Holbrook, 475 U.S. at 568-69.

[20]Chandler v. State, 92 Nev. 299, 301, 550 P.2d 159, 160 (1976).

We conclude that the district court did not abuse its discretion when it denied Tyzbir's motion for a mistrial. Tyzbir's uniformed deputy escort served an essential state interest by ensuring that Tyzbir did not escape. Moreover, the deputy's brief appearance in the courtroom with Tyzbir was insignificant and did not present a constant reminder of Tyzbir's condition, and therefore it was unlikely to affect a juror's judgment.

Having considered Tyzbir's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



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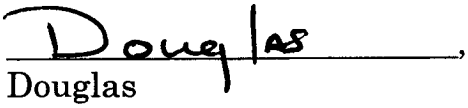

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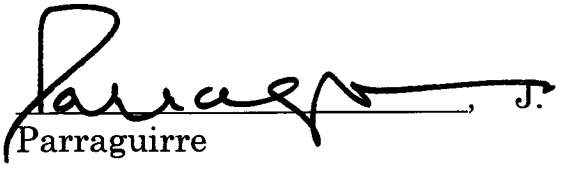

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Parraguirre

cc: Hon. William A. Maddox, District Judge
Kay Ellen Armstrong
Attorney General Brian Sandoval/Carson City
Carson City District Attorney
Carson City Clerk