IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWDA MALLINSON, AKA SHAWDA ANNETTE KNIESTEADT, AKA SHAWDA BATEMON, AKA SHAWDA THANES, AKA "SLIM SHADY",
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46346

FILED

APR 06 2007

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY [signature] CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a controlled substance. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge. The district court adjudicated appellant Shawda Mallinson as a habitual criminal and sentenced her to serve a prison term of 60 to 240 months.

First, Mallinson contends that the district court erred in admitting evidence of her prior drug sales. Specifically, Mallinson contends that the prior acts of drug trafficking were remote in time and failed to show her "knowledge that water could contain trace meth or that a plastic baggie might contain meth." We disagree.

Before admitting the evidence, the district court conducted a Petrocelli hearing[1] and considered the factors set forth in Tinch v. State.[2]

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[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[2]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

The district court also gave the jurors a limiting instruction.[3] This court has recognized that "where the charge is a narcotic offense, other prior similar offenses may sometimes be received to show the defendant's knowledge of the narcotic nature of the substance sold."[4] Here, Mallinson was charged with trafficking and possession of a controlled substance with the intent to sell, and the State had to prove that Mallinson knew the substances found in her home were methamphetamine.[5] Accordingly, the district court acted within its discretion in admitting the evidence.

Second, Mallinson contends that the district court erred in admitting her probation officer's testimony that Mallinson tested positive for methamphetamine. In particular, Mallinson contends that the testimony should have been excluded because she was denied the right to confront the individual that conducted the urinalysis. Even assuming that the district court erred in admitting the testimony of the probation officer, given the minimal significance of the testimony, the cumulative nature of the evidence, and the strength of the State's case, we conclude that the error did not affect the reliability of the jury's verdict and, therefore, was harmless beyond a reasonable doubt.[6]

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[3]See Tavares v. State, 117 Nev. 725, 730-31, 30 P.3d 1128, 1131-32 (2001).

[4]Lindsay v. State, 87 Nev. 1, 3, 478 P.2d 1022, 1023 (1971).

[5]See NRS 453.3385; NRS 453.336; NRS 453.337.

[6]See Medina v. State, 122 Nev. 346, ___, 143 P.3d 471, 477 (2006), cert. denied, ___ U.S. ___, 127 S. Ct. 1309 (U.S., Feb. 20, 2007).

Third, citing to Buschauer v. State,[7] Mallinson contends that her right to due process was violated at sentencing when the district court admitted unnoticed testimony from her mother-in-law and a police officer about Mallinson's prior bad acts. We conclude that any error involving the admission of unnoticed bad act testimony was harmless beyond a reasonable doubt.

In Buschauer, this court held that where a witness intends to testify at the sentencing hearing about a defendant's prior bad acts, the prosecutor must give the defendant reasonable notice of the bad act testimony.[8] If no notice is given, then the defendant is entitled to a continuance of the sentencing hearing unless the district court disclaims any reliance on the information.[9] Errors involving the admission of testimony at a sentencing hearing are subject to harmless-error analysis.[10]

In this case, although the sentencing court denied Mallinson's request for a continuance, it allowed defense counsel to make an offer of proof describing the testimony of her proposed witnesses. Additionally, the sentencing court disclaimed reliance on the testimony of Mallinson's mother-in-law. Further, in adjudicating Mallinson a habitual criminal, the district court reviewed her criminal history and found that the State had "found [no] way to stop her from committing crimes" and that, given her prior convictions arising from trafficking in methamphetamine, "she

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[7]106 Nev. 890, 804 P.2d 1046 (1990).

[8]Id. at 894, 804 P.2d at 1048.

[9]Id. at 894, 804 P.2d 1049.

[10]See id. at 895, 804 P.2d at 1049.

hurt the community." Accordingly, we conclude that the erroneous admission of unnoticed prior bad act testimony did not affect the sentence imposed.

Fourth, citing to Apprendi v. New Jersey,[11] Mallinson contends that the district court erred in failing to allow the jury to determine whether she was a habitual criminal. This court recently held that a district judge's imposition of a habitual criminal enhancement under NRS 207.010 does not violate Apprendi.[12] Accordingly, Mallinson's contention is without merit.

Finally, Mallinson contends that the district court abused its discretion in adjudicating her as a habitual criminal. Specifically, Mallinson contends that the State failed to admit into evidence certified copies of Mallinson's prior convictions. Mallinson also argues that the district court based its habitual criminal adjudication on its erroneous beliefs that the instant offense involved a "bunch of meth" and that Mallinson was selling methamphetamine. Mallinson also argues that the sentence constitutes cruel and unusual punishment because it is disproportionate to the crime of simple possession. Our review of the record of the sentencing hearing indicates that the district court did not err in adjudicating Mallinson as a habitual criminal, and that the sentence imposed does not constitute cruel and unusual punishment.[13]

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[11]530 U.S. 466 (2000).

[12]O'Neill v. State, 123 Nev. ___, ___ P.3d ___ (Adv. Op. No. 2, March 8, 2007).

[13]See McGervey v. State, 114 Nev. 460, 467, 958 P.2d 1203, 1208 (1998); Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976). We note that the exemplified copies of the prior convictions admitted into evidence indicate

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Having considered Mallinson's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_______________, J.
Parraguirre

_______________, J.
Hardesty

_______________, J.
Douglas

cc: Hon. Robert W. Lane, District Judge
Robert E. Glennen III
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County Clerk

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that Mallinson was represented by counsel at the prior proceedings. See Halbower v. State, 96 Nev. 210, 606 P.2d 536 (1980).