IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD B. FOXX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50129

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of trafficking in a controlled substance. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. The district court sentenced appellant Edward Foxx to serve a prison term of 12 to 36 months.

Foxx contends that the district court abused its discretion by admitting prior bad act evidence without conducting a Petrocelli[1] hearing. Foxx specifically claims that Linda Vierra's testimony about an anonymous allegation on a scrap of paper and Jason Carlson's rebuttal testimony regarding his previous methamphetamine use and purchases constituted prior bad act evidence. Foxx argues that the district court should have considered all of the Tinch[2] factors and made express findings before admitting this testimony.

"The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to

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

[2]Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997).

be given great deference."[3] Such determinations will not be reversed absent manifest error.[4] However, before admitting prior bad acts evidence, the district court must conduct a hearing outside the presence of the jury and determine whether "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the other act is not substantially outweighed by the danger of unfair prejudice."[5] Failure to conduct this hearing is a reversible error, unless "'(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence.'"[6]

Here, even assuming that Vierra's testimony regarding the scrap of paper was improperly admitted into evidence and that the district court's hearing on Carlson's rebuttal testimony was insufficient, we conclude that the trial result would have been the same if the district court had not admitted the evidence. In particular, we note that the jury heard evidence that deputy sheriffs impounded a digital scale that they found inside Foxx's residence and a small bag of suspected methamphetamine that Foxx produced from his pocket. A criminalist

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[3]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

[4]Id.

[5]Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005) (quoting Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65).

[6]Id. at 22, 107 P.3d at 1281 (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

determined that the bag contained 11.07 grams of methamphetamine and found another 0.5 grams of loose methamphetamine inside the digital scale. And Foxx told one of the deputy sheriffs that he bought an ounce of methamphetamine every couple of weeks and he sold what he did not use. Based on this evidence, we conclude that any error in admitting the challenged testimony was harmless.

In a related argument, Foxx contends that the district court erred by failing to instruct the jury on the use of the prior bad act evidence.

If prior bad act evidence is to be admitted into evidence, "the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial."[7] However, "we consider the failure to give such a limiting instruction to be harmless if the error did not have a substantial and injurious effect or influence the jury's verdict."[8]

Here, the district court failed to give limiting instructions before admitting the prior bad acts evidence and at the end of the trial. However, in light of the evidence against Foxx, we conclude that the failure to give a limiting instruction did not have a "substantial and injurious effect or influence the jury's verdict."[9]

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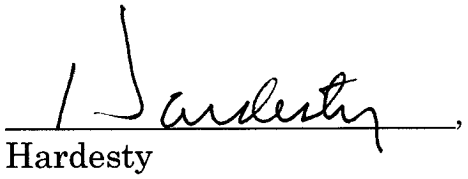
[7]Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[8]Rhymes, 121 Nev. at 24, 107 P.3d at 1282.

[9]Id.

Having considered Foxx's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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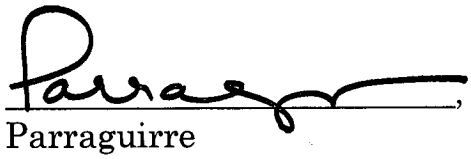

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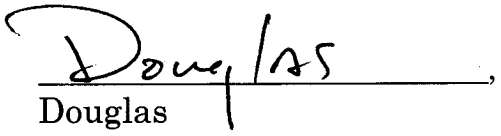
Parraguirre



_____, J.
Douglas

cc: Hon. Patrick Flanagan, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk