IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY ANN POMEROY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50481

FILED

SEP 05 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 an offer, attempt, or commission of an unauthorized act relating to a controlled or counterfeit substance and one count of conspiracy to commit a felony under the uniform controlled substances act.[1] Third Judicial District Court, Churchill County; Robert E. Estes, Judge. The district court sentenced appellant Kimberly Ann Pomeroy to serve a prison term of 12 to 48 months for her unauthorized act relating to a controlled substance and a concurrent prison term of 12 to 36 months for the conspiracy.

[1]The jury found Pomeroy guilty of (1) offer, attempt, or commission of an unauthorized act relating to a controlled or counterfeit substance; (2) conspiracy to commit a felony crime under the uniform controlled substances act; and (3) possession of a controlled substance. In the judgment of conviction, the district court erroneously convicted Pomeroy of all three counts and merged the punishment for possession with the punishment for conspiracy. The district court should have merged the possession count with the unauthorized act (sale) count as was discussed during the sentencing hearing and entered a judgment of conviction that convicted and sentenced Pomeroy of the sale and conspiracy counts.

First, Pomeroy contends that the district court abused its discretion by admitting prior bad act evidence without conducting a Petrocelli[2] hearing and by failing to instruct the jury on the use of this evidence as is required by Tavares v. State.[3] Pomeroy specifically claims that the confidential informant's testimony about her prior drug use was evidence of prior bad acts and highly prejudicial because it "could only be used by the jury in this case to show a propensity toward drug activity."

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.'"[4] 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 . . .; or (2) where the result would have been the same if the trial court had not admitted the evidence.'"[5] If prior bad acts evidence is to be admitted into

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[2]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[3]117 Nev. 725, 30 P.3d 1128 (2001), modified on other grounds by Mclellan v. State, 124 Nev. ___, 182 P.3d 106 (2008).

[4]Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

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

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."[6] "[W]e 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."[7]

Here, Pomeroy did not object to the testimony at the time it was offered, but she later moved to strike the testimony while outside the presence of the jury. The district court found that Pomeroy's prior drug use evidence was relevant to her knowledge of the narcotic substance, the evidence was clear and convincing because it consisted of Pomeroy's own statement against her penal interest, and Pomeroy opened the door to this evidence during her opening argument by raising entrapment and procuring agent defenses. The district court denied Pomeroy's motion to strike. Under these circumstances we conclude that the evidence of Pomeroy's prior drug use was admissible. We further conclude that the district court's failure to give a limiting instruction did not have a "substantial and injurious effect or influence the jury's verdict."[8]

Second, Pomeroy contends that insufficient evidence was adduced at trial to support her conviction for conspiracy to commit a felony under the uniform controlled substances act. Pomeroy specifically

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[6]Tavares, 117 Nev. at 733, 30 P.3d at 1133.

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

[8]Id.

claims that the State failed to present evidence that she and Donald Ray Sanders agreed to possess methamphetamine for the purpose of sale.[9]

The standard of review for a challenge to the sufficiency of the evidence to support a criminal conviction 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.'"[10]

Here, the jury heard evidence that Sanders came to the confidential informant's apartment and made several phones calls trying to find someone with the right quantity of methamphetamine. Sanders left the apartment for about an hour, returned, and made some more phone calls. Shortly thereafter, Pomeroy arrived at the apartment. The confidential informant had never seen Pomeroy before. Pomeroy said that she could get some methamphetamine, the confidential informant asked for an "eight ball" (about 3.5 grams), and Pomeroy said that it would cost $180. Pomeroy and Sanders left the apartment together.

The jury further heard testimony that the confidential informant went to the narcotics task force office where she was searched, wired, and given $180. When the confidential informant returned to her apartment, Pomeroy and Sanders were upstairs on the balcony of a

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[9]Pomeroy cites to Sanders v. State, 110 Nev. 434, 436, 874 P.2d 1239, 1240 (1994) ("Agreement among two or more persons is an essential element of the crime of conspiracy, and mere association is insufficient to support a charge of conspiracy.").

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

neighboring apartment waiting for her. Pomeroy and Sanders entered the confidential informant's apartment, Pomeroy pulled some methamphetamine and a scale from her fanny pack, weighed the methamphetamine, placed it in a small blue plastic baggy, and handed the baggy to the confidential informant. The confidential informant then gave Pomeroy $180. When the confidential informant subsequently explained that she had to leave, Pomeroy and Sanders left the apartment together.

We conclude that a juror could rationally infer from the evidence presented that Pomeroy conspired with Sanders to possess methamphetamine for the purpose of sale.[11] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[12]

Third, Pomeroy contends that the State failed to meet its burden to disprove the procuring agent defense. Pomeroy claims that the State failed to present any evidence that showed that she received an actual benefit from the transaction, the State's evidence established that she was entrapped into taking drugs from the confidential informant, and the State's evidence did not demonstrate that she was predisposed to commit the crime.

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[11]See NRS 453.401(1); Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (defining conspiracy and noting that it "is usually established by inference from the parties' conduct"), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

[12]See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

We established the procuring agent defense in Roy v. State when we held that a person cannot be found guilty of being a seller of narcotics when he or she has not acted for the supplier, but rather, solely for the recipient.[13] We have since held that "[t]he procuring agent defense can be maintained only if the defendant [was] merely a conduit for the purchaser and in no way benefited from the transaction."[14] And we have "held that the burden is on the State to establish that the defendant had a profit motive or other direct interest when she obtained the drugs for the recipient."[15]

Here, the State presented testimony that Pomeroy and the confidential informant met for the first time when Pomeroy came to the apartment and stated that she could get methamphetamine. While the two were making small talk, Pomeroy commented that she too was out of methamphetamine. After the transaction had been completed, the confidential informant offered to give Pomeroy and Sanders a cut of the methamphetamine for their personal use. At which point, Pomeroy took some methamphetamine, put it in a plastic baggy, and placed the baggy into her fanny pack.

Based on this testimony, we conclude that the State demonstrated that Pomeroy received a benefit from the transaction, Pomeroy was not entrapped into receiving the methamphetamine, and

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[13]87 Nev. 517, 519, 489 P.2d 1158, 1159 (1971).

[14]Dixon v. State, 94 Nev. 662, 664, 584 P.2d 693, 694 (1978).

[15]Dent v. State, 112 Nev. 1365, 1368, 929 P.2d 891, 892 (1996).

Pomeroy was predisposed to use methamphetamine. Consequently, the procuring agent defense was not available in this case.

Fourth, Pomeroy contends that the district court abused its discretion at sentencing by improperly considering her criminal history. Pomeroy claims that the district court incorrectly determined that this case succeeded a drug possession case in Hawthorne and that she had since "graduated to distributing those drugs."

We have consistently afforded the district court wide discretion in its sentencing decisions.[16] "'A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial.'"[17] However, we "will reverse a sentence if it is supported solely by impalpable and highly suspect evidence."[18]

The sentencing hearing transcript belies Pomeroy's contention that the district court relied solely on her Hawthorne drug conviction to reach its sentencing determination. We note that the sentence imposed falls within the parameters provided by the relevant statutes,[19] and we conclude that the district court did not abuse its discretion at sentencing.

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[16]See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

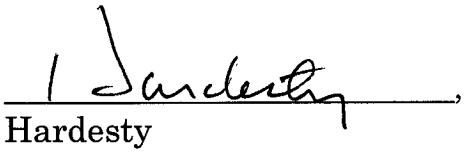
[17]Todd v. State, 113 Nev. 18, 25, 931 P.2d 721, 725 (1997) (quoting Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996)).

[18]Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996).

[19]See NRS 453.321(2)(a) (an offer, attempt, or commission of an unauthorized act relating to a controlled or counterfeit substance is a category B felony and is punishable by a prison term of 1 to 6 years); NRS 453.401(1) (a conspiracy to commit a felony under the uniform controlled substance act is a category C felony); NRS 193.130(2)(c) (a category C felony is punishable by a prison term of 1 to 5 years).

Having considered Pomeroy's contentions and concluded that she is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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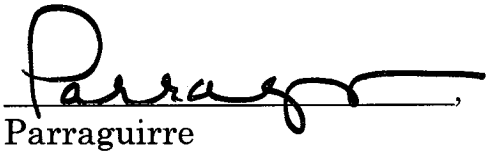

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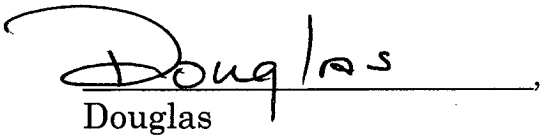

_____, J.
Douglas

cc: Hon. Robert E. Estes, District Judge
Stephen B. Rye
Attorney General Catherine Cortez Masto/Carson City
Churchill County District Attorney
Churchill County Clerk