

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS EDWIN RIVERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51305

FILED

MAY 01 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance. First Judicial District Court, Carson City; William A. Maddox, Judge. Appellant Thomas Rivera was sentenced to serve a prison term of 36 to 120 months.

Rivera contends that insufficient evidence was adduced at trial to support his conviction and that the district court erred by denying his motion to prohibit expert testimony. We conclude that Rivera's contentions lack merit.

Sufficiency of evidence

Rivera asserts that insufficient evidence was presented at trial to support his conviction. Specifically, Rivera argues that because Deputy Gibson's testimony at trial was inconsistent with his preliminary hearing testimony, he was not a credible witness; as Deputy Gibson was the only person to testify regarding Rivera's possession of methamphetamine, no rational trier of fact could determine that Rivera possessed methamphetamine beyond a reasonable doubt. We disagree.

In a criminal case, the standard of review 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.” McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Moreover, “it is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.” Id. And “circumstantial evidence alone may support a conviction.” Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Here, Deputy Gibson testified that he saw Rivera reach into the waistband of his pants and toss something “sparkly” with his left hand. Deputy Duarte testified that he located four bags of what appeared to be methamphetamine in the area where Deputy Gibson observed Rivera toss the items. Further, the State’s criminalist testified that each of the four bags contained methamphetamine, and that the total weight of the drug was 15.72 grams. Based on this evidence, we conclude that the jury could have found the essential elements of trafficking in a controlled substance weighing between 14 and 28 grams beyond a reasonable doubt. NRS 453.3385(2).

Denial of motion to prohibit expert testimony

Rivera next contends that the district court erred in denying his motion to prohibit the State’s criminalist from testifying because her name, curriculum vitae and report were not disclosed to Rivera until ten days before trial. We disagree.

If a party intends to call an expert witness, it must provide the other party, more than 21 days before trial, a written summary of the witness’s expected testimony, a copy of the witness’s curriculum vitae and a copy of all reports produced by that witness. NRS 174.234(2), declared unconstitutional in part by Grey v. State, 124 Nev. ___, ___, 178 P.3d 154,

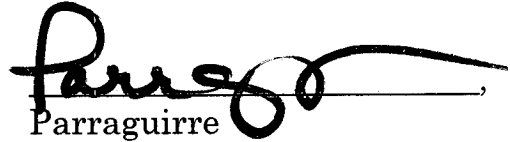
160 (2008). If a party fails to comply with this rule, the district court may order the discovery of the materials not previously disclosed, grant a continuance, bar the introduction of the materials not disclosed, or enter any other order it deems just. NRS 174.295(2). However, non-compliance with this rule does not necessitate exclusion of the evidence where the failure to comply is unintentional, and the court takes appropriate remedial measures to protect the defendant against prejudice. See State v. Tapia, 108 Nev. 494, 497-98, 835 P.2d 22, 24 (1992). The district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. McLellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008).

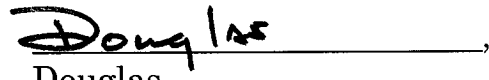
Here, the State came into possession of the methamphetamine seized from the scene on September 25, 2007, the date of Rivera's arrest. However, it did not submit the methamphetamine to the crime lab for processing until December 12, 2007. The State received the name of the criminalist who performed the testing and her report on January 4, 2008, and provided the information to Rivera that same day. As trial began on January 14, 2008, there is no question that the State failed to provide the information more than 21 days before trial in compliance with NRS 174.234(2). However, while the State could certainly have acted more expeditiously in submitting the evidence to the crime lab, there is no indication that it acted in bad faith. Further, the district court twice offered to continue the trial in order to alleviate any prejudice. Accordingly, we conclude that the district court did not abuse its discretion in denying Rivera's motion to exclude the testimony of the State's criminalist. See e.g., Lopez v. State, 105 Nev. 68, 77-79, 769 P.2d 1276, 1283-84 (1989) (holding that a defendant's late receipt of reports did not warrant mistrial where defense received documents at same time as

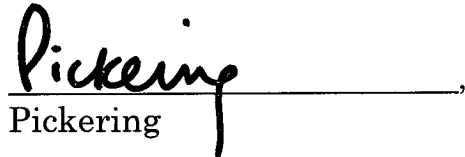
prosecution and there was no showing of intentional withholding of the evidence).

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

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: First Judicial District Court Dept. 2, District Judge
Kummer Kaempfer Bonner Renshaw & Ferrario/Carson City
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk