IN THE SUPREME COURT OF THE STATE OF NEVADA

KAREN BODDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51537

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of murder in the first-degree with the use of a deadly weapon. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

On appeal, Karen Bodden (Karen) argues that her conviction should be reversed because: (1) the district court erred when it denied her motion to suppress evidence seized pursuant to the September 10, 2006, search warrant; (2) the district court abused its discretion when it admitted evidence concerning the mitochondrial DNA sequence of hair found on Robin Bodden's (Rob) body; (3) the verdict was not supported by sufficient evidence; and (4) the cumulative errors denied her the right to a fair trial.

For the reasons set forth below, we affirm the district court's judgment of conviction. As the parties are familiar with the facts of this case, we do not recount them except as necessary to our disposition.

DISCUSSION

Karen argues that the district court improperly denied her motion to suppress evidence seized pursuant to the September 10, 2006, search warrant. We disagree.

The affidavit established probable cause

Karen asserts that the affidavit filed in support of the September 10, 2006, search warrant failed to establish probable cause that (1) the body found was Rob's; (2) that he had been a victim of homicide; or (3) that evidence pertaining to Rob's death would be found at the marital residence, its curtilage, or Karen's new residence.[1] We disagree.

"The Nevada Constitution and the United States Constitution require all government searches to be reasonable and all warrants to be based on probable cause." Weber v. State, 121 Nev. 554, 583, 119 P.3d 107, 126 (2005). "Probable cause requires 'trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for' are subject to seizure and at the place to be searched." Id. at 583, 119 P.3d at 127 (quoting Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994)).

In Keesee, this court held:

> When the issuance of a search warrant is based upon information obtained from a confidential informant, the proper standard for determining probable cause for the issuance of the warrant is whether, under the totality of the circumstances, there is probable cause to believe

[1]Karen also contends that the affidavit failed to establish that she murdered Rob. The affidavit, however, was not charging Karen with causing the death; it merely stated that evidence of Rob's death might be located at the marital residence, its curtilage, or at Karen's new residence. We conclude that Karen's assertion regarding failure to establish that she caused Rob's death is without merit.

> that contraband or evidence is located in a particular place.

Id. (citing Gates v. Illinois, 462 U.S. 213 (1983)).[2]

In the affidavit, Investigator Elges informed the justice of the peace that Karen had last seen Rob wearing blue jeans and a white-and-blue-checkered shirt, and that the found body appeared to be clothed in "jeans and a white and dark color patterned shirt." The affidavit also informed the justice of the peace that Rob had been missing for nearly one month.

Further, the body was found in a shallow grave in the desert, wrapped in moving blankets, secured by tape, with a black-handled knife nearby. Investigator Elges attested that Kelly Rosser, Rob's friend, believed that Rob had been a victim of foul play because Rob missed an appointment at the hangar on August 16, 2006, and had left his tools out in the hangar, which was inconsistent with Rob's character.

Investigator Elges also attested that a knife, consistent with the knives that he had observed in the marital residence, had been found near the body. The body had been restrained with clear packaging tape and was partially concealed with a blue moving blanket. Because Karen was in the process of moving from the marital residence, Investigator

---

[2]Karen also relies on Henry v. United States, 361 U.S. 98, 101 (1959), in which the United States Supreme Court stated that suspicion was inadequate to support an arrest warrant. Henry is distinguishable because it involves an arrest warrant, whereas this case involves a search warrant. Moreover, the proper analysis for whether a search warrant is based on probable cause was set forth in Gates.

Elges surmised that she had access to clear packaging tape and moving blankets.

We conclude that these facts established probable cause to believe that (1) the body found was Rob's; (2) that he had been a victim of homicide; and (3) that evidence pertaining to Rob's death would be found at the marital residence, its curtilage, or Karen's new residence.

The search warrant and affidavit were properly sealed

Karen asserts that the district court erred when it denied her motion to suppress evidence seized pursuant to the September 10, 2006, warrant. We conclude Karen's argument is without merit.[3]

NRS 179.045 governs the issuance, contents, and sealing of warrants. "Upon a showing of good cause, the magistrate may order an affidavit . . . to be sealed." NRS 179.045(3). It is within the district court's discretion to decide whether to seal an affidavit made in support of a warrant. See NRS 179.045(3). "The propriety of sealing search warrant documents turns on the government's need for secrecy . . . ." Matter of Searches of Semtex Indus. Corp., 876 F. Supp. 426, 429 (E.D.N.Y. 1995). In addition, "it is unnecessary for police authorities and judicial officers to recite a statement of probable cause on the face of [a] search warrant[ ] issued . . . upon [a] sealed affidavit . . . ." Gameros-Perez, 119 Nev. at 541,

---

[3]Karen relies upon State v. Allen, 119 Nev. 166, 69 P.3d 232 (2003), and asserts that State v. Gameros-Perez, 119 Nev. 537, 78 P.3d 511 (2003), is inapposite. Allen is distinguishable from this case because the search warrant in Allen was unsealed. 119 Nev. at 167-68, 69 P.3d at 233. Further, in Gameros-Perez, this court clarified the rules set forth in Allen. Gameros-Perez, 119 Nev. at 539-41, 78 P.3d at 512-14. We conclude that Gameros-Perez is the relevant authority in deciding this issue.

78 P.3d at 514. Further, "statements of probable cause in sealed affidavits must be incorporated by reference without being attached to the warrant, but remain sealed until some future time." Id.

We determine that the following evidence demonstrated a need for secrecy: (1) Karen's stories about Rob's disappearance were inconsistent; (2) Karen's stories about Rob's disappearance conflicted with statements by other individuals; (3) allegations that Karen had stolen money from Rob; (4) Karen's description of her marriage as "very rocky"; (5) the statement by Jennifer Stewart; (6) that Karen was upset that Rob's family had accused her of murdering him but not that he was missing; and (7) a knife appearing to be the one missing from the marital residence being found near Rob's body.

We also conclude that because the affidavit was sealed by the justice of the peace, the warrant did not need to: (1) recite a statement of probable cause on the face of the warrant, or (2) have the affidavit attached to it. Gameros-Perez, 119 Nev. at 541, 78 P.3d at 514. Further, the sealed affidavit was incorporated by reference in the warrant. Accordingly, the district court did not abuse its discretion in sealing the affidavit or err in denying Karen's motion to suppress evidence. [4]

---

[4]We decline to address Karen's contention that the State was required to provide a factual basis for sealing the affidavit in the ex parte motion as Karen fails to cite to any legal authority for her assertion. See Cunningham v. State, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978) (noting that when a party fails to cite to authority in support of their contentions, we need not review them on appeal). Moreover, Karen's argument fails on its merits because a justice of the peace may refer to the affidavit itself when deciding whether to seal it. See 8A Fed. Proc. Criminal Procedure § 22:204 (Law. ed. 2005).

The inventory order

Karen next claims that the State did not comply with NRS 179.075(1) and (3) when it failed to timely file an inventory and, therefore, the district court abused its discretion in denying her motion to suppress evidence.[5]

Timeliness of inventory

Karen asserts that the evidence seized pursuant to the September 10, 2006, warrant should have been excluded because the State failed to comply with the 10-day inventory filing period, instead filing amended warrant returns in March 2007. We disagree.

NRS 179.075 governs the execution and return of a warrant with inventory. NRS 179.075 states, in pertinent part:

> 1. The warrant may be executed and returned only within 10 days after its date.
>
> . . . .
>
> 3. The return shall be made promptly and shall be accompanied by a written inventory of any property taken.

Further, "the failure to . . . verify the inventory in [a] case ha[s] no relation at all to the command of the Fourth Amendment which bars unreasonable searches and seizures." United States v. Dudek, 530 F.2d 684, 691 (6th Cir. 1976). "The requirement of verification of the inventory . . . is . . . designed to allow for proper identification of property taken by the police under the warrant and to protect the owner's rights

---

[5]Karen also contends that the State was required to either request an extension or show good cause for its failure to timely file an inventory. We also decline to address this issue. See Cunningham, 94 Nev. at 130, 575 P.2d at 938.

therein." Id. Therefore, the State's failure to comply with the 10-day inventory filing period does not implicate the Fourth Amendment or the exclusionary rule. Dudek, 530 F.2d at 691; see, e.g., Powell v. State, 113 Nev. 41, 44, 930 P.2d 1123, 1125 (1997).[6]

We also conclude that Karen was not prejudiced by the State's failure to timely file its inventory. According to the September 11, 2006, warrant, the police recovered a Tupperware brand knife and tested some stains to see if they were blood. The inventories included in the amended warrant returns for the September 11, 2006, warrant, listed the Tupperware knife, stain/control swabs, and a red stain swab. Further, the rest of the property listed in the September 10, 2006, warrant—a butcher block, partial rolls of duct tape, clear packing tape, and moving blankets—were inventoried in the amended warrant returns. Consequently, Karen was able to ensure that the State had seized the proper property and adequately prepare for trial.

Inventory made in presence of a credible person

Karen further argues that the State violated NRS 179.075(3) because neither the September 19, 2006, warrant nor the March 29, 2007, amended warrant return indicated that the inventory was made either in

---

[6]Other courts have considered this same issue and determined that failure to return a timely inventory does not implicate the Fourth Amendment or the exclusionary rule. United States v. Hall, 505 F.2d 961, 963-64 (3d Cir. 1974); United States v. Kennedy, 457 F.2d 63, 67 (10th Cir. 1972); People v. Head, 36 Cal. Rptr. 2d 1, 2-4 (Ct. App. 1994); State v. Elam, 771 P.2d 597, 600-01 (N.M. Ct. App. 1989); State v. Wise, 252 S.E.2d 294, 295 (S.C. 1979).

her presence or the presence of a person other than the warrant's applicant.

Pursuant to NRS 179.075(3):

> The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken . . . .

Unless ambiguous, this court affords a statute its plain meaning. See Harris Assocs. v. Clark County Sch. Dist., 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003). NRS 179.075(3) does not provide that a warrant return must state that an inventory has been made either in the presence of (1) the applicant and person from whom the property was taken, or (2) a credible person other than the applicant or the person from whom the property was taken. Rather, the statute states that when the inventory is made, it must be done in the presence of one of these statutorily approved persons. We conclude that Karen's argument is without merit.[7]

---

[7]We have also considered Karen's argument that the State failed to properly verify the inventory pursuant to NRS 179.075(3), which also requires that the inventory "be verified by the officer." The amended warrant returns with inventories all state that they were "[s]ubscribed and [s]worn to before" a notary public. They also include Investigator Elges' signature. Accordingly, we conclude that the inventories were properly verified. See State v. Pray, 64 Nev. 179, 187, 179 P.2d 449, 453 (1947) (noting that to "verify" a document means to swear or affirm its truth under oath).

Fruit of the poisonous tree

Karen asserts that due to the alleged aforementioned errors committed by the State regarding the September 10, 2006, affidavit and warrant, all subsequent warrants and evidence seized pursuant to them were obtained illegally. Because we conclude: (1) that the September 10, 2006, warrant was based on probable cause; (2) that the affidavit was properly sealed; and (3) that the State's failure to file inventory did not implicate the Fourth Amendment, the evidence seized pursuant to the subsequent warrants need not be excluded.

The district court did not abuse its discretion in admitting evidence concerning the mitochondrial DNA sequence of hair found on the body

Karen argues that the district court erred when it denied her motion to exclude Thomas Fedor's expert testimony about the mitochondrial DNA sequence of the hair found on Rob's body. Karen further asserts that the district court's error was compounded when it precluded the State from questioning Fedor as to the statistical estimate of the frequency of the mitochondrial DNA match.

Mitochondrial DNA analysis evidence is admissible

Karen argues that Fedor's testimony was prejudicial and misled the jury and, therefore, should have been excluded. We disagree.

This court reviews the "district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008).

Pursuant to NRS 50.275, an expert may testify if his "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." "An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." Hallmark v. Eldridge, 124 Nev. ____,

____, 189 P.3d 646, 651 (2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. In determining if an expert's testimony is based on reliable methodology, the district court should consider "whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization." Id. at ___, 189 P.3d at 651-52. (internal citations omitted).

Mitochondrial DNA analysis, as numerous jurisdictions have noted, has been: (1) recognized by the relevant scientific field, (2) tested, (3) discussed in published articles, (4) generally accepted by the scientific community, and (5) is based on particularized facts. See, e.g., State v. Underwood, 518 S.E.2d 231, 239 (N.C. Ct. App. 1999); State v. Council, 515 S.E.2d 508, 518 (S.C. 1999). Further, the evidence was relevant in this case to demonstrate that Karen could not be excluded as the source of the hair sample retrieved from Rob's body. See U.S. v. Coleman, 202 F. Supp. 2d 962, 971 (E.D. Mo. 2002); Underwood, 518 S.E.2d at 238-39. We conclude that the evidence helped the jury in reaching its conclusion and, therefore, the district court acted within its discretion in allowing Fedor's testimony.

Statistical estimate

Karen claims that the district court's error in admitting the mitochondrial DNA analysis evidence was compounded when it precluded the State from questioning Fedor on the statistical frequency of the mitochondrial DNA match. We disagree.

Karen was not prohibited from questioning Fedor on the statistical frequency of mitochondrial DNA analysis. In fact, at the hearing regarding the admissibility of Fedor's expert testimony, the district court specifically stated that it would "leave the frequency of the sequencing within the database to the issue—to cross-examination by counsel." Further, the State questioned Fedor about mitochondrial DNA analysis on direct. We conclude that the district court's explicit instruction to counsel to address the issue on cross-examination, combined with State's questions on direct, provided Karen with an opportunity to question Fedor about the statistical frequency of mitochondrial DNA analysis.[8]

The verdict is supported by sufficient evidence

Karen asserts that the State failed to present sufficient evidence to uphold her conviction. We conclude that Karen's argument is without merit.[9]

An accused may not be convicted of a crime unless the State proves beyond a reasonable doubt "each fact necessary to constitute the crime with which he is charged." See Rose v. State 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). When reviewing challenges to the sufficiency of the

---

[8]We have also considered Karen's argument regarding the prosecutor's closing argument. We conclude that the district attorney did not improperly convert exclusionary mitochondrial DNA evidence into identifying evidence.

[9]Karen also challenges the State's theory of the case. We conclude, however, that because the State proved beyond a reasonable doubt the elements pursuant to NRS 193.165, NRS 200.010(1), and NRS 200.030(1) and, therefore, Karen's challenge must fail.

evidence on appeal, this court asks "'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.'" Id. (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (internal quotations omitted)). It is the jury's function to assess the evidence and credibility of the witnesses. Id. at 202-03, 163 P.3d at 414.

We conclude that the following evidence is sufficient to support Karen's conviction for willful, deliberate, premeditated murder with the use of a deadly weapon: (1) Karen did not report Rob missing; (2) Karen's conflicting stories about why Rob had disappeared; (3) Karen's stories were inconsistent with what others observed at the airport the morning of August 16, 2006; (4) Karen did not go to work the morning of August 16, 2006; (5) Karen's car was discovered at Rob's hangar the morning of August 16, 2006; (6) Karen had previously been convicted of embezzlement; (7) testimony and evidence establishing that Karen had been stealing money from Rob's business; (8) Rob's confronting Karen about stealing from him; (9) evidence that she continued to forge checks against his bank account after his disappearance; (10) Karen's description of their marriage as "rocky" and "loveless"; (11) the recovery of a knife from Karen's dishwasher that matched the knife found near Rob's body; (12) the tape, blankets, and paper towels found on Rob's body had similar characteristics to tape, blankets, and paper towels found in Rob's hangar; (13) Raven's testimony that Rob was shot twice in the head at close range; (14) evidence that Rob possessed two .22 caliber firearms, a rifle, and semi-automatic pistol; (15) evidence that at least one of the bullets recovered from Rob's head was consistent with .22 ammunition; (16)

Karen's comment to Jennifer Sclafani that she could not have moved Rob's body if she had murdered him; (17) Karen was one of only three people who had a key to Rob's hangar; and (18) Karen could not be excluded as being the source of hair found on Rob's body.[10]

Having considered Karen's claims and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Cherry

_____, J.
Hardesty

_____, J.
Saitta

[10]Karen asserts that the cumulative effect of the State's weak, circumstantial evidence, coupled with the district court's errors, denied her the right to a fair trial. Because we conclude that the district court (1) did not err in denying Karen's motion to suppress evidence seized pursuant to the September 10, 2006, search warrant; or (2) abuse its discretion in admitting evidence concerning the mitochondrial DNA sequence of hair found on Rob's body; and (3) that the verdict was supported by sufficient evidence, the district court did not commit error and, therefore, Karen's argument for cumulative error is without merit.

cc: Hon. David R. Gamble, District Judge
Erik R. Johnson
Attorney General Catherine Cortez Masto/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk