IN THE SUPREME COURT OF THE STATE OF NEVADA

HASSAN ROBERTS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54091

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of trafficking in a controlled substance (count I), two counts of possession of a controlled substance for the purpose of sale (counts II and III), and two counts of possession of a controlled substance (counts IV and V). Second Judicial District Court, Washoe County; Jerome Polaha, Judge. Appellant Hassan Roberts raises three issues on appeal.

First, Roberts asserts that the district court erred when it admitted evidence of his prior arrest for possession of ecstasy. Before evidence of the arrest was admitted, the district court held a Petrocelli[1] hearing, where a police officer testified that he stopped a vehicle in which Roberts was a passenger and found 25-30 ecstasy pills in a bag secured to

[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996) and superseded in part by statute as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

his underwear. As the instant charges also accused Roberts of possession of ecstasy, the district court admitted the prior act evidence to show appellant's intent and absence of mistake, further concluding that this prior act was relevant, proved by clear and convincing evidence, and not unduly prejudicial. See Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001), holding clarified by Mclellan v. State, 124 Nev. 263, 268, 182 P.3d 106, 110 (2008). Additionally, the district court provided proper limiting instructions contemporaneously with the admission of the prior act and at the close of evidence. See id. at 733, 30 P.3d at 1133. As Roberts argued that the backpack—in which the ecstasy and marijuana at issue in this case were found—belonged to someone else, we conclude that the district court did not abuse its discretion in admitting the challenged evidence for the limited purpose of proving absence of mistake or intent. See Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002); see also Mayer v. State, 86 Nev. 466, 468, 470 P.2d 420, 422 (1970) (noting that prior possession of narcotics is relevant to show intent to sell narcotics).

Second, Roberts argues that the district court failed to correct a prejudicial error when the State highlighted a reference to gang activity during a police officer's testimony. We conclude that any error was harmless considering the officer's clarification on cross-examination that Roberts' apprehension was not part of a gang-related action and the weight of inculpatory evidence—including Roberts' admission of ownership of the backpack. See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

Third, Roberts claims error in the district court's refusal to instruct the jury that he was entitled to an inference that evidence the police did not collect, or disposed of, would have been favorable to him. We

discern no error. The ecstasy and marijuana that Roberts was convicted of trafficking were found in two powder containers, which, in turn, were discovered in a backpack. Police left the backpack at the bus depot and disposed of the powder bottles at the police station. Roberts argues that both might have revealed exculpatory fingerprints or DNA evidence. Roberts, however, has failed to demonstrate that the police disposed of the powder bottles in bad faith, see State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989), or that he was prejudiced by their disposal beyond a "hoped-for conclusion from examination of the [missing] evidence," Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979).

Finally, although not raised by Roberts, the State acknowledges that Roberts' convictions for counts IV and II merge with his conviction for count I and his convictions for counts V and III likewise merge. See Love v. State, 111 Nev. 545, 546, 893 P.2d 376, 377 (1995); Vidal v. State, 105 Nev. 98, 100-101, 769 P.2d 1292, 1294 (1989). Therefore, we reverse Roberts' convictions for counts II, IV and V, and we remand this case to the district court to correct the judgment of conviction.

Having considered Roberts' contentions and concluded that no additional relief is warranted, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk