IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELLE ELAINE KIMBERLIN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35192

FILED

SEP 08 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance. The district court sentenced appellant to life in prison, with the possibility of parole after ten years, and credited appellant with eighty-six days for time served. The district court also ordered appellant to pay a $25.00 administrative fee and a $60.00 forensic fee. Pursuant to NRAP 34(f)(1), we have concluded that oral argument is not warranted.

Appellant argues that the following evidence was improperly admitted: (1) the marijuana found in the cigarette case; (2) all of the evidence obtained pursuant to the search warrant; (3) evidence obtained during the search of appellant's car; and (4) evidence of appellant's prior bad acts, namely evidence obtained in a drug raid of appellant's residence in Twin Falls, Idaho. A district court's determination to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong. Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999) (citing Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983)). As outlined below, we conclude that the district court did not manifestly abuse its discretion in

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admitting all of the evidence to which appellant takes exception.

First, we conclude that the search of the cigarette case did not exceed the scope of appellant's consent to search the trailer. Whether the scope of consent to search has been exceeded is a factual question for the district court, to be determined by examining the totality of the circumstances. See State v. Johnson, 116 Nev. ___, ___, 993 P.2d 44, 46 (2000). This court will defer to a district court's factual finding regarding the scope of the search if that finding is supported by substantial evidence. See id. at ___, 993 P.2d at 45-46. Because the record shows that Officer Hood asked if he could check the trailer for drugs and appellant consented twice without placing any restrictions on the scope of the search, we conclude that substantial evidence supports the district court's finding that Officer Hood did not exceed the scope of the search by looking in the cigarette case. Accordingly, the district court did not manifestly abuse its discretion in admitting the evidence found in the cigarette case.

Next, we conclude that the search warrant was valid, despite Officer Hood's failure to sign the affidavit submitted in support thereof. Officer Hood was sworn to the truthfulness of the affidavit in the presence of the issuing court. Therefore, we conclude that the requirement in NRS 179.045(1) that an affidavit be sworn was satisfied and the warrant was properly issued. Because the search warrant was valid, the district court did not manifestly abuse its discretion in denying appellant's motion to suppress the evidence obtained pursuant to the warrant.

Next, we reject appellant's argument that the search warrant should not have included the vehicle. Under the

"totality of the circumstances," and affording "great deference" to the court issuing the warrant, we conclude that the reports of vehicles coming and going from the trailer, coupled with Officer Hood's discovery of marijuana, provided "a substantial basis for concluding that probable cause existed" to include the vehicle within the scope of the warrant. Doyle v. State, 116 Nev. ___, ___, 995 P.2d 465, 471-72 (2000). Accordingly, the district court did not manifestly abuse its discretion in admitting the evidence obtained during the search of the vehicle.

We also reject appellant's contention that the probative value of the prior bad act evidence from the Twin Falls drug raid was substantially outweighed by the danger of unfair prejudice to appellant. See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Given that appellant pleaded not guilty and testified in pretrial hearings and at trial that she had no knowledge of the drugs found in her trailer, the Twin Falls evidence was particularly probative as to the issue of appellant's intent. Because the Twin Falls drug raid occurred only one month before appellant's arrest in the present case, and involved large quantities of drugs comparable to the quantities found in the present case, we cannot say that the district court's discretionary decision to admit the evidence was manifestly wrong. Accordingly, we affirm the district court's decision to admit the evidence.

In addition to the foregoing, appellant contends that the district court should have declared a mistrial when the prosecutor improperly attempted to impeach a defense witness by asking about a felony conviction for which the prosecutor did not have a copy of the judgment of conviction. We agree that because the prosecutor was not prepared to prove

the witness's conviction in the event of a denial, his question was improper. See Tomarchio v. State, 99 Nev. 572, 577-78, 665 P.2d 804, 808 (1983). However, given the overwhelming evidence of guilt presented in support of the trafficking charge, and the district court's curative instruction, we conclude that the error was harmless beyond a reasonable doubt. See id. at 578-79, 665 P.2d at 808 (concluding that the prosecutor's improper impeachment attempt was harmless error as to the question of defendant's guilt, although it was not harmless error as to the penalty phase of the trial). Therefore, the district court did not clearly abuse its discretion in denying appellant's motion for a mistrial. See McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998).

Finally, appellant contends that acquittal on the count of possession of marijuana for purposes of sale is inconsistent with the conviction on the count of methamphetamine trafficking and therefore the conviction should be reversed. This argument lacks merit because "inconsistent verdicts are permitted" and do not warrant reversal of a conviction. Greene v. State, 113 Nev. 157, 173, 931 P.2d 54, 64 (1997). In any event, the verdicts are not necessarily inconsistent. The elements of trafficking are distinct from the elements for possession for purposes of sale and different evidence was presented with respect to each count (for instance, the trafficking count was only brought with respect to the methamphetamine recovered while the possession count was only brought with respect to the marijuana). The jury could have concluded that appellant did not possess the marijuana for the purpose of sale because the officer smelled marijuana in the trailer, indicating that appellant possessed the marijuana for personal use.

Having considered all of appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Elko County Public Defender
Elko County Clerk