IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA RYAN GROW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65904

ORDER OF AFFIRMANCE

This is an appeal from Joshua Ryan Grow's conviction of Trafficking in a Schedule I Controlled Substance, 28 Grams or More, a category A felony. Grow contends the district court erred regarding certain jury instructions and the admissibility of certain evidence. He further argues that there was insufficient evidence to support the conviction and that cumulative error warrants reversal of the conviction. This court concludes that no error occurred and thus affirms the conviction. First Judicial District Court, Carson City; James Todd Russell, Judge.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, officers of the Nevada Department of Public Safety Investigations Division Tri-Net Narcotics Task Force arrested Billy Southern for selling illegal drugs. While speaking with Southern, the officers gave him the opportunity to cooperate as a confidential informant (also known as a "cooperating individual") in exchange for a reduced sentencing recommendation on his charges. Prior to selecting Southern as a confidential informant, Tri-Net conducted a "reliability check" to verify that he would be a reliable source. In the presence of the officers, Southern arranged, via a controlled buy, to purchase one ounce of methamphetamine from appellant Joshua Ryan Grow. On the same day,

Grow, along with his friend, Sonja Cortinas, arrived at Southern's residence, where they were immediately arrested by the officers. The officers searched Grow and found 5.6 grams of methamphetamine on his person. The officers found a container, which was disguised as a car speaker and filled with approximately one ounce of methamphetamine, underneath a coffee table in the living room. Grow, Southern, and Cortinas all denied ownership of the container. Upon further investigation, the officers concluded that Grow owned the container and charged him accordingly.

During trial, the State called a number of witnesses, including Officer Charles Stetler, who participated in Grow's arrest. While testifying, Stetler made direct[1] and indirect[2] references to Grow's criminal

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[1]During Stetler's testimony, he twice referenced Grow's criminal past. First, Stetler mentioned that he "dealt with [Grow] on previous occasions numerous times regarding, since 2006, when it came to a patrol, domestic incidences." Later, when explaining how he recognized Grow's voice over the phone when Southern arranged the controlled buy, Stetler stated the following:

> In my previous contacts with him, I've talked to him. I have spoken to him over the phone. I've contacted him in public, in casino settings and things of that nature, where I've had numerous contacts with him. I actually, I get along quite well with [Grow]. So we've had civilized discussions. It hasn't always been completely negative.

[2]Stetler also made indirect references to Grow as "a bigger fish." When explaining the process of using a confidential informant, Stetler stated how he would utilize a "smaller fish to catch the bigger fish." Defense counsel did not object to these references, nor did the district court intervene.

past. Defense counsel objected to the direct references but not the indirect ones. The district court instructed Stetler to be careful and admonished the jury to "disregard anything in respect to any prior incidences." Later, the State questioned Stetler about a piece of felt fabric that allegedly linked the vehicle that Grow drove with the container holding the methamphetamine. The State attempted to introduce the felt into evidence. Defense counsel objected,[3] and the court allowed the State to ask additional foundational questions. Ultimately, the court admitted the evidence after determining that the State had established an adequate foundation.

Following the close of evidence, defense counsel did not request a jury instruction on the theory of mere presence. Defense counsel also did not request any instructions advising the jury to use caution when weighing the testimony of addict-informers (i.e., Southern and Cortinas). At the conclusion of trial, the jury convicted Grow, and the district court sentenced him to 8 to 20 years[4] in the Nevada Department of Corrections.

ANALYSIS

On appeal, Grow advances five bases for reversing his conviction: (1) the district court erred when it failed to properly instruct

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[3]Part of defense counsel's objection related to Stetler's failure to gather the felt until approximately five months after Grow's arrest.

[4]We note that the district court imposed an illegal sentence under NRS 453.3385(3), which specifies that the eligible sentences for Grow's conviction are: life with eligibility for parole beginning when a minimum of 10 years has been served; or a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served. However, neither party raised this issue, thus the legality of the sentence is not properly before us in this appeal.

the jury; (2) there was insufficient evidence to support Grow's conviction for drug trafficking; (3) the district court erred when it admitted evidence relating to the piece of felt fabric that linked Grow with the container of methamphetamine; (4) the admission of bad act evidence relating to Grow violated his due process rights to a fair trial and constituted misconduct by the State; and (5) cumulative error warrants reversal of the conviction. We affirm Grow's conviction.

Jury instructions

Grow asserts the district court erred by failing to give two jury instructions. Upon request, a defendant in a criminal case is entitled to a jury instruction on his theory of the case, as long as some evidence, no matter how weak or incredible, exists to support it. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260 (1983). However, the failure to request a jury instruction precludes appellate review unless the alleged error is patently prejudicial and requires the court to act *sua sponte* to protect a defendant's right to a fair trial. *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996). Where trial counsel fails to preserve an issue, this court reviews for plain error, meaning we inquire (1) whether there was error; (2) whether the error was plain or clear; and (3) whether the error affected the defendant's substantial rights. *United States v. Cotton*, 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

Here, Grow did not ask the trial court to give the two instructions he now asserts should have been given, but asserts the court should nonetheless have given those instructions *sua sponte*. Thus, we review the district court's alleged failure to give those jury instructions for plain error.

First, Grow argues that the district court erred by not instructing the jury consistent with *Champion v. State*, 87 Nev. 542, 490 P.2d 1056 (1971). In particular, Grow contends the district court should have given an instruction admonishing the jury to exercise caution in weighing the testimony of addict-informers, especially when Southern and Cortinas were untrustworthy; their status as untrustworthy informants was known to the State; and but for the addict-informers' testimony, there was no evidence to demonstrate the exchange of drugs.

The State counters that a cautionary instruction was unnecessary in this case because the informants were not known to be unreliable; the addict-informers' testimony was corroborated by extensive evidence; the jury received a general cautionary instruction; and Grow cross-examined the informants and delved into their biases and motives for testifying. After reviewing the record, we agree with the State and conclude that the district court did not commit plain error in failing to give this instruction. While the *Champion* court held that the failure to give a cautionary instruction *sua sponte* constituted plain error in that case, not all circumstances, including those found here, require a cautionary instruction. *See King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (distinguishing *Champion* because the informant "was not known to be or deemed unreliable.").[5]

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[5]We note that it is unclear whether Cortinas qualifies as an addict-informer because Tri-Net officers did not ask her formally to act as a confidential informant, nor did they use her to set up the controlled buy, as they did with Southern. However, both parties refer to Cortinas as an informant in their briefs. Further, while Cortinas may not have participated to the extent that Southern did with regard to Grow's arrest and conviction, she cooperated with Tri-Force officers upon her arrest. For

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Second, Grow argues that the district court erred in failing to instruct the jury on "mere presence." At trial, defense counsel argued that Grow was merely present when the container was discovered and maintained that the drugs in the container were not his. Thus, Grow contends the failure to instruct the jury that mere presence is insufficient to establish guilt operated to deprive him of his due process rights. The State counters that Grow's substantial rights were not affected and he was not prejudiced because there was substantial evidence to show that Grow was a party to the offense and not merely present.

At trial, Grow did not request a "mere presence" instruction, and therefore our review is limited to determining whether "plain error" occurred. After reviewing the record, we again agree with the State and conclude that the district court did not commit plain error in failing to give this instruction. The State presented evidence that Grow was not merely present in the room where drugs were found, but rather that Grow brought the drugs with him from his car into the room. Under these circumstances, the failure to give a "mere presence" argument was not plain error.

Insufficient evidence

Grow next argues that there was insufficient evidence to support his conviction because he, Southern, and Cortinas all had equal opportunity, access, and ability to have placed the drug-filled container

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the purpose of this appeal, and without deciding the issue, we assume that Cortina qualifies as an addict-informer.

under the coffee table. According to Grow, insufficient evidence existed to establish that Grow was the one who trafficked the drugs.

Evidence is sufficient to support a conviction if "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." *Thompson v. State*, 125 Nev. 807, 816, 221 P.3d 708, 715 (2009) (internal quotation marks omitted). The verdict of a jury will not be overturned when substantial evidence exists to support it, and even circumstantial evidence alone can sustain a conviction. *Id.*; *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Thompson*, 125 Nev. at 816, 221 P.3d at 715 (internal quotation marks omitted). Moreover, it is for the jury to determine the degree of weight and credibility to give to witness testimony and other trial evidence. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Although mere presence at the scene of a crime cannot support an inference that a defendant is a party to an offense, presence combined with other circumstances, such as the defendant's presence, companionship, and conduct prior, during, and after the crime, may support this inference. *Winston v. Sheriff, Clark County*, 92 Nev. 616, 618, 555 P.2d 1234, 1235 (1976); *Walker v. State*, 113 Nev. 853, 869, 944 P.2d 762, 773 (1997).

We conclude that the jury, acting reasonably and rationally, could have found the elements of Trafficking in a Schedule I Controlled Substance, 28 Grams or More, a category A felony, pursuant to NRS

453.3385, beyond a reasonable doubt.[6] Based upon the evidence presented at trial, the jury could have concluded that Grow agreed via a phone call witnessed by Tri-Net officers to sell one ounce of methamphetamine. Prior to Grow's arrival, officers systematically and thoroughly searched Southern's living room and did not find the container in the area or on Southern himself. There were no traces of the container underneath the coffee table, and Tri-Net officers were confident that the container was not in the residence before Grow arrived. In addition, Grow's cell phone contained a photograph of the same container that officers found. Accordingly, substantial evidence exists to support Grow's conviction for drug trafficking.

Admission of felt fabric

Grow also argues that the felt fabric should not have been admitted into evidence because the chain of custody is non-existent; thus, the failure in the chain of custody results in insufficient evidence for a drug conviction. To prove chain of custody and competent identification of evidence, there must be a reasonable showing that the evidence was not substituted, altered, or tampered with, and the offered evidence must be the same or reasonably similar to the substance seized. *Burns v. Sheriff, Clark County*, 92 Nev. 533, 534, 554 P.2d 257, 258 (1976). Any gap in the chain of custody "goes to the weight of the evidence," *Sorce v. State*, 88

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[6]NRS 453.3385 provides, in relevant part, that "a person who knowingly or intentionally sells, manufactures, delivers or brings into this State or who is knowingly or intentionally in actual or constructive possession of . . . any controlled substance which is listed in schedule I . . . shall be punished . . . if the quantity involved . . . [is] 28 grams or more, for a category A felony. . . "

Nev. 350, 352–53, 497 P.2d 902, 903 (1972), and the jury, rather than the court, must assess the weight of the evidence. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Further, we review the district court's decision to admit evidence for abuse of discretion and will not reverse that decision absent manifest error. *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). We only overturn convictions based on erroneous evidentiary rulings for abuse of discretion if the error more likely than not affected the verdict. *See United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004).

We conclude that there was no manifest error in the district court's decision to admit the felt. Moreover, the admission of the felt, more likely than not, had no effect on the verdict. Even without the admission of the felt, the jury could reasonably find from the other evidence presented that Grow committed the charged crime.[7]

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[7]In his argument why the district court should not have admitted the felt, Grow appears to portray the State's inaction as a failure to preserve the vehicle in proper condition, while the State characterizes its inaction as a failure to gather the felt from the vehicle at the time of Grow's arrest. Under either analysis, the result is the same. With regard to the State's failure to preserve the vehicle, Grow does not establish that the State acted in bad faith, nor does he show that he suffered undue prejudice and the exculpatory value of the vehicle was apparent before its loss or destruction. *See Daniel v. State*, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003). Therefore, the State did not violate due process by failing to preserve the vehicle in proper condition. Similarly, with regard to the State's failure to gather the felt from the vehicle at the time of Grow's arrest, Grow does not establish that the fabric was material or that the State acted in negligence, gross negligence, or bad faith. *See Daniels v. State*, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998). Therefore, the State did not violate due process by failing to gather the felt from the vehicle at the time of Grow's arrest.

Bad act evidence

Further, Grow argues that the State agreed not to admit bad act evidence, but it did so anyway during trial, which led to a violation of Grow's due process rights. Grow particularly cites to the testimony of Officer Stetler, who mentioned his history with Grow.

Evidence of prior crimes or wrongs is not admissible to prove the defendant acted in conformity with the alleged bad acts; however, this evidence may be admissible for other purposes. NRS 48.045(2). We review a district court's decision whether to admit bad act evidence for abuse of discretion. *Salgado v. State*, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998). Any defect that does not affect substantial rights is harmless error. NRS 178.598.

Moreover, a district court can cure inadvertent or spontaneous references to other criminal activity. In *Sterling v. State*, the defendant was charged with, among other crimes, lewdness with a minor. 108 Nev. 391, 393, 834 P.2d 400, 401 (1992). One of the witnesses, the victim's grandmother, testified that she had once observed the defendant using drugs. *Id.* The prosecution did not solicit this statement, and the trial court immediately admonished the jury to disregard the statement. *Id.* at 402, 834 P.2d at 405. Accordingly, the Nevada Supreme Court held that inadvertent and unsolicited references that a witness discloses about a defendant's prior criminal activity can be cured by the district court's immediate admonishment to the jury to disregard the statement. *Id.*

We conclude that this case is analogous to *Sterling*. Here, while Stetler directly referenced Grow's criminal past twice during his testimony, these references were inadvertent and unsolicited. Similar to the witness in *Sterling*, Stetler made references to Grow's past criminal

activity without solicitation by the State. Further, the court immediately admonished the jury, which properly cured any potential prejudice. In addition, the indirect references to Grow as a "bigger fish" were necessary to explain the process of using a confidential informant in a simplistic way, rather than to cause prejudice to Grow. Therefore, Stetler's testimony did not violate Grow's due process rights to a fair trial and did not constitute misconduct by the State.

Cumulative error

Finally, Grow argues that all of the above alleged errors warrant reversal of the drug trafficking conviction. We will only overturn a conviction based on cumulative error when it violates a defendant's constitutional right to a fair trial. *Rose v. State*, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007).

Here, we conclude there were no prejudicial errors in this case; thus, there can be no cumulative error. Furthermore, any errors were harmless in view of the overwhelming evidence of Grow's guilt.

We therefore,

ORDER the judgment of conviction is AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. James Todd Russell, District Judge
Karla K. Butko
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk