IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANJENETTE LEE NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68927

FILED

JUN 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sale of a controlled substance near a school (count II) and possession of a controlled substance for sale (count IV). The district court sentenced appellant Anjenette Nelson to 12 to 36 months in the Nevada Department of Corrections for count II, with an enhanced sentence of 12 to 36 months to run consecutive to count II, and 12 to 32 months for count IV, to run concurrent with count II. Seventh Judicial District Court, Lincoln County; Gary Fairman, Judge.

On appeal, Nelson asserts six assignments of error, claiming deficiencies in the information, service of the search warrant, the production of evidence under *Brady*,[1] and the sufficiency of the evidence. Specifically, Nelson argues that (1) the State violated *Brady* by failing to disclose favorable evidence, (2) the district court abused its discretion by admitting prior bad act evidence under NRS 48.045(2), (3) the State presented insufficient evidence that Nelson sold drugs within 1,000 feet of a school, as required by NRS 453.3345(1)(c), (4) the information contained

[1]*Brady v. Maryland*, 373 U.S. 83 (1963).

an overly broad time range in violation of NRS 173.075(1), (5) probable cause did not support the search warrant, and (6) the district court erred by failing to suppress evidence based on improper service of the search warrant. We do not recount the facts of the case except as necessary to our disposition.

The State did not violate Brady

Nelson argues the State violated her rights under *Brady* because the State failed to disclose that another individual, Travis Brown, admitted to Deputy Umina that he supplied the methamphetamine found at Coby Budy's residence on March 5, 2014. Nelson argues she could have used this evidence to exculpate her by showing that someone other than herself supplied the methamphetamine found at Budy's residence and to impeach Deputy Umina's and Budy's credibility.

Under *Brady*, the State is required "to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). To prove a *Brady* violation, the accused must make three showings: (1) "the evidence at issue is favorable to the accused," (2) the State withheld the evidence, either intentionally or inadvertently; and (3) "prejudice ensued, i.e., the evidence was material." *Id.* at 67, 993 P.2d at 37. "Determining whether the state adequately disclosed information under *Brady* [ ] requires consideration of both factual circumstances and legal issues; thus, this court reviews *de novo* the district court's decision." *Id.* at 66, 933 P.2d at 36.

Although we are not convinced evidence of Brown's admission was favorable to Nelson, assuming it was, Nelson has failed to show that the State withheld the evidence. As this court concluded in *Sanford v. State*, No. 68932 (Order of Affirmance, Nev. Ct. App., April 20, 2016), the

record shows that Nelson raised a *Brady* objection on the first day of trial, before the district court received any evidence, that is substantially similar to the claim she raises now. By raising a *Brady* objection at that time, Nelson demonstrated her knowledge of the evidence in time to use it to cross-examine Deputy Umina and Budy. Accordingly, she cannot show the State violated *Brady*. *See United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) ("*Brady* does not necessarily require that the prosecution turn over exculpatory material *before* trial. To escape the *Brady* sanction, disclosure must be made at a time when disclosure would be of value to the accused." (internal quotation marks omitted)). Therefore, we conclude Nelson's *Brady* challenge must fail.

The district court did not commit plain error by admitting uncharged misconduct evidence

Nelson argues that Savannah Barnett's testimony that Nelson sold her methamphetamine at Barnett's house on Holt Street was evidence of a prior uncharged crime in violation of NRS 48.045(2).[2] Nelson did not object to Barnett's testimony at trial and thus, we review for plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). "Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error

[2]To the extent Nelson argues that the State violated her rights under *Brady* because it failed to disclose this evidence, we decline to address this argument because Nelson does not even claim the evidence was favorable to her. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

affects his or her substantial rights, by causing actual prejudice or a miscarriage of justice." *Id.* (internal quotation marks omitted).

Here, because the State did not request a *Petrocelli*[3] hearing prior to the introduction of Barnett's testimony, and because Nelson did not object to Barnett's testimony at trial, any error would have to arise from the district court's failure to sua sponte order a *Petrocelli* hearing. Without knowing, however, that Barnett would testify to a drug sale at her house on Holt Street, the district court could not have known to order a *Petrocelli* hearing in advance. Therefore, we conclude the district court did not commit plain error by failing to sua sponte order a *Petrocelli* hearing.

Even assuming error, we conclude the error is not reversible because the result of the trial would have been the same had the district court not admitted Barnett's testimony regarding the Holt Street sale. *See Rhymes v. State*, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005) (providing that a district court's failure to conduct a *Petrocelli* hearing is not reversible error if the result would have been the same had the district court not admitted the evidence). At trial, Budy testified that Nelson sold him methamphetamine from her residence on Tennille Street on a fairly regular basis between January and March 2014. Additionally, Perkins testified that she would go to Nelson's house and "[she] would share [methamphetamine] with her." *See* NRS 453.321(1)(a) (making it unlawful for a person to *give away* a controlled substance). Thus, Nelson has not demonstrated how the testimony affected her substantial rights by causing her actual prejudice or resulting in a miscarriage of justice. *See*

[3]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

Valdez, 124 Nev. at 1190, 196 P.3d at 477. Therefore, we conclude this claim must fail.

The State presented sufficient evidence that Nelson violated NRS 453.3345(1)(c)

Nelson argues that the State failed to present evidence that she sold drugs within 1,000 feet of a school, as required by NRS 453.3345(1)(c), because Barnett only testified that Nelson sold her methamphetamine on Holt Street and the State did not provide evidence as to the relation of Holt Street to a school.

In reviewing the sufficiency of the evidence, this court must determine "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) (internal quotation marks omitted). "This court will not disturb a jury verdict where there is substantial evidence to support it, and circumstantial evidence alone may support a conviction." *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002). NRS 453.321(1)(a) makes it unlawful for a person to "import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance," and NRS 453.3345(1)(c) imposes an enhanced sentence if the violation occurs "[w]ithin 1,000 feet of the perimeter of such a school ground or campus, playground, park, pool, recreational center for youth or a video arcade."

As discussed in the previous section, the State introduced evidence that Nelson sold meth from her residence on Tennille Street. The State also submitted several photos of Nelson's residence. In one photo, Budy identified Nelson's residence in relation to the Caliente Elementary School. Further, Deputy Umina testified that Nelson's residence sat on the corner of Tennille and Market Street, directly across

the street from Caliente Elementary School. Based on this evidence, we conclude that a rational juror could have found that Nelson sold meth from her residence and that her residence was within 1,000 feet of Caliente Elementary School.

The time range in the information did not violate NRS 173.075(1)

Nelson next contends the information is overly broad in violation of NRS 173.075(1) because it alleges a 5-month range, referring to count II wherein the State charged her for selling a controlled substance at or near a school "between November 2013 and March 2014." Nelson argues that the broad time range prevented her from establishing any alibi defenses and refuting the allegations in their entirety.

Nevada law requires that the information contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075(1). This requirement, however, does not require the State to allege exact dates if time is not an element of the crime charged. *See Wilson v. State*, 121 Nev. 345, 368, 114 P.3d 285, 301 (2005). If time is not an element of the crime, the State may give a time frame for the offense so long as "the dates listed are sufficient to place the defendant on notice of the charges." *Id.* at 369, 114 P.3d at 301.

Here, as in *Sanford*, we conclude that the information provided sufficient notice of the nature of the alleged offense. The information adequately informed Nelson of the period during which the offense was alleged to have occurred, presented coherent factual allegations that identifies the means by which she committed the offense, and did not accuse her of alternative offenses. *See, e.g., Cunningham v. State*, 100 Nev. 396, 400-01, 683 P.2d 500, 502 (1984) (concluding that an information which alleged that the defendant had committed one act "on or about the calendar year of 1981" and two acts "on or about the calendar

years of 1981 and 1982, but prior to November 15, 1982" provided sufficient notice to the defendant in a child sexual assault case). Because the information provided sufficient notice of the nature of the alleged offense and Nelson has not shown how the lack of precision caused prejudice, we conclude that the information complied with Nevada law.

Probable cause supported the search warrant

Nelson next argues, as she did below, that probable cause did not support the search warrant. Specifically, Nelson attacks the affidavit underlying the search warrant on the grounds that (1) it was not based on information from credible or reliable sources, and (2) it omitted information that bore on the reliability and credibility of the sources used—namely Budy and Barnett.

In evaluating an issuing court's decision to issue a search warrant, we do not conduct a de novo review; instead, we "decide whether the evidence viewed as a whole provided a substantial basis for the magistrate's finding of probable cause." *Keesee v. State*, 110 Nev. 997, 1001, 879 P.2d 63, 66 (1994). "This court will not overturn a magistrate's finding of probable cause for a search warrant unless the evidence in its entirety provides no substantial basis for the magistrate's finding." *Garrettson v. State*, 114 Nev. 1064, 1068-69, 967 P.2d 428, 431 (1998).

"It is well established that arrests and searches must be based upon probable cause." *Keesee*, 110 Nev. at 1001, 879 P.2d at 66. "Probable cause requires that law enforcement officials have 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: seizable and will be found in the place to be searched." *Id.* at 1002, 879 P.2d at 66. "A deficiency in either an informant's veracity and reliability or his basis of knowledge may be compensated for, in

determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Doyle v. State*, 116 Nev. 148, 158, 995 P.2d 465, 471 (2000).

Here, Deputy Umina's affidavit contained statements based on his personal observations and knowledge, as well as information received from four individuals—Perkins, Richard Neidigh, Budy, and Barnett. Nelson does not challenge the statements based on Deputy Umina's personal observations and knowledge or information he obtained from Neidigh. These statements included: (1) Deputy Umina's statement that he observed known felons, who had a history of drug use, entering and exiting Nelson's residence; (2) Deputy Umina's statement that Neidigh told him that Nelson traveled with him to Las Vegas to purchase an ounce of methamphetamine in February 2014, and that Nelson had then returned to Las Vegas several days later to purchase three ounces of methamphetamine; and (3) Deputy Umina's statement that Budy told him that he had regularly purchased methamphetamine from Nelson's residence over the past month. Therefore, we conclude the unchallenged information in the affidavit provides a substantial basis to support the finding of probable cause that Nelson had methamphetamine in her residence. *See Garrettson*, 114 Nev. at 1069, 967 P.2d at 431. Therefore, we conclude Nelson's argument must fail.

The district court did not err by failing to suppress evidence based upon the alleged improper service of the search warrant

Finally, Nelson contends that the district court erred by admitting evidence obtained from the search because Deputy Umina did not serve the affidavit containing the probable cause statement with the search warrant. "Suppression issues present mixed questions of law and fact." *State v. Beckman*, 129 Nev. ___, ___, 305 P.3d 912, 916 (2013) (internal quotation marks and citation omitted). "This court reviews

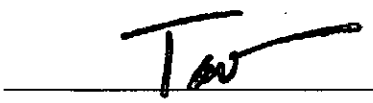
findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *Id.*

A search warrant must contain a probable cause statement or have the probable cause statement physically attached, unless the search warrant is supported by a sealed affidavit or "issued upon a recorded oral statement pursuant to section 2 of NRS 179.045." *See State v. Allen*, 119 Nev. 166, 171, 69 P.3d 232, 235 (2003). If the search warrant does not contain a probable cause statement or have the affidavit containing the probable cause statement attached, the district court must suppress evidence seized pursuant to the warrant. *See id.* at 172, 69 P.3d at 236 (concluding the district court properly suppressed evidence seized where the search warrant did not contain a statement of probable cause and the affidavit, which was not sealed, was not attached to the search warrant).

Below, the district court denied Nelson's motion to suppress based on improper service of the search warrant, finding that Deputy Umina's affidavit, filed in support of the opposition to the motion to suppress, and Detective John Cessford's case report, provided evidence that service of the warrant fulfilled the statutory requirements. Wise has not provided a copy of Deputy Umina's affidavit or Detective Cessford's case report in the record on appeal. Thus, we must presume that the record supports the district court's determination that officers properly served the search warrant. *See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (providing that when the objecting party fails to provide sufficient record on appeal, "the missing portions of the record are presumed to support the district court's decision"), *rev'd on other grounds*, 504 U.S. 127 (1992).

Accordingly, because we have reviewed each of Nelson's claims and determined they are without merit, we ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

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