

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENNIS JAMES SCOTT, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88225-COA

FILED

NOV 14 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Dennis James Scott, Jr., appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of possession of a schedule I or II controlled substance less than 14 grams, third or subsequent offense, and one count of sell, transport, or give, or attempt to sell, transport, or give a schedule I or II controlled substance, first offense. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

After Scott was pulled over for speeding, Washoe County Sheriff's Office Deputy Aaron Lynch smelled the odor of marijuana emanating from Scott's vehicle.¹ Scott admitted to possessing a legal amount of marijuana, and when Deputy Lynch requested permission to search the vehicle, Scott consented to a search of the passenger area only. During this search, Deputy Lynch found marijuana as well as a scale with a white powdery residue. Deputy Lynch then conducted a probable cause search of the entire vehicle and found two baggies with a white powdery substance that later tested positive for cocaine and methamphetamine. Scott was arrested and charged with two counts of possession of a schedule I or II controlled substance less than 14 grams, third or subsequent offense,

¹We recount the facts only as necessary for our disposition.

and one count of sell, transport, or give, or attempt to sell, transport, or give a schedule I or II controlled substance, first offense.

Prior to trial, the State moved to admit evidence of the marijuana as res gestae pursuant to NRS 48.035(3). The district court granted the State's motion over Scott's objection. The matter then proceeded to a two-day jury trial. During opening statements, the State referenced the scale with the white powdery residue, and Scott objected, asserting that the scale was other bad act evidence under NRS 48.045(2) that required a hearing outside the jury's presence to determine its admissibility. The district court overruled Scott's objection. After the State made several additional references to the scale, Scott orally moved for a mistrial, again arguing that the scale was inadmissible other act evidence under NRS 48.045(2). The district court denied Scott's motion, and Scott was ultimately convicted on all counts and sentenced to 19-48 months in prison. On appeal, Scott argues the district court abused its discretion in admitting evidence of the marijuana as res gestae and in denying his motion for a mistrial.

Any error in admitting evidence of the marijuana was harmless

Scott first contends that the district court abused its discretion when it relied on Nevada's res gestae statute to admit evidence that, in addition to the narcotics, he possessed a legal amount of marijuana in his vehicle. NRS 48.035(3), governing the admission of res gestae evidence, provides that "[e]vidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded." Res gestae "is an extremely narrow basis for admissibility," and such evidence may be admitted only if it "is *nearly impossible* for the witness to describe the crime without

referring to the uncharged act.” *Alfaro v. State*, 139 Nev., Adv. Op. 24, 534 P.3d 138, 149-50 (2023). “An uncharged act may only be admitted as res gestae if it is part of the same transaction—the same temporal and physical circumstances—as the charged act.” *Id.* (internal quotation marks omitted). This court reviews the district court’s decision to admit evidence for an abuse of discretion. *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

In this case, an odor of marijuana prompted Deputy Lynch to request permission to search Scott’s vehicle, which Scott granted as to the passenger area, that in turn quickly led to the discovery of the scale, the legal quantity of marijuana, and the illegal narcotics. Deputy Lynch’s discovery of the marijuana was arguably part of the same “transaction” as his discovery of the illegal narcotics. *See Alfaro*, 139 Nev., Adv. Op. 24, 534 P.3d at 149-50; *see also Dutton v. State*, 94 Nev. 461, 464, 581 P.2d 856, 858 (1979) (admitting evidence of a defendant’s possession of a stolen item exchanged at the same time as the stolen item for which he was charged), *overruled on other grounds by Gray v. State*, 100 Nev. 556, 558 n.1, 866 P.2d 313, 314 n.1 (1984). Further, evidence of the marijuana helps to explain the circumstances surrounding the discovery of the narcotics that led to Scott’s criminal charges. On the other hand, we cannot say that it would have been “nearly impossible” for Deputy Lynch to describe the discovery of the narcotics without also referencing the marijuana. Scott was initially pulled over for speeding and consented to the search, which minimized any necessity to reference the marijuana as the impetus for the search request.

Nonetheless, “[a] nonconstitutional error, such as the erroneous admission of evidence . . . , is deemed harmless unless it had ‘a substantial and injurious effect or influence in determining the jury’s verdict.’”

Newman v. State, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) (quoting *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001), *holding modified by Mclellan*, 124 Nev. at 270, 182 P.3d at 111); *see also* NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). An error will generally not affect a defendant’s substantial rights when there is overwhelming evidence of guilt. *See, e.g., Green v. State*, 119 Nev. 542, 548, 80 P.3d 93, 97 (2003) (“[W]e further conclude that this error did not affect Green’s substantial rights because there is overwhelming evidence of Green’s guilt of aggravated stalking.”).

In this case, any error in admitting evidence that Scott possessed a legal amount of marijuana in his vehicle was harmless. The marijuana did not implicate Scott in another crime because the parties agreed he possessed a legal amount. *See, e.g., Loya v. State*, No. 84425, 2023 WL 4056935, *2 n.4 (Nev. June 16, 2023) (Order of Affirmance) (finding no prejudice from a reference to the appellant’s marijuana use, in part, due to the state’s legalization of recreational marijuana). Further, there was other overwhelming evidence of Scott’s guilt. The jury was shown Deputy Lynch’s body camera footage that depicted the entire search of Scott’s vehicle, including the discovery of the scale and narcotics. In addition, during closing arguments, Scott told the jury that he did not dispute that the narcotics found in the two plastic baggies were, in fact, cocaine and methamphetamine. Rather, Scott’s theory of defense focused on the credibility of Deputy Lynch’s testimony and whether Scott was the individual who placed the narcotics in the vehicle, neither of which relate to the evidence of marijuana. Thus, because the marijuana had little bearing on whether Scott possessed, sold, transported, gave or attempted to

sell, transport, or give a controlled substance in this case, we conclude that admission of that evidence did not have a substantial and injurious effect or influence on the jury's verdict, and Scott is not entitled to relief.

The district court did not abuse its discretion in denying Scott's motion for a mistrial

Scott next argues that the district court abused its discretion in denying his oral motion for a mistrial. "A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). However, the decision to deny a motion for a mistrial is within the district court's sound discretion and the denial will not be reversed on appeal "absent a clear showing of abuse." *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).

Scott contends that a mistrial was warranted based on the State's repeated references to the scale, which he asserts constituted inadmissible bad act evidence under NRS 48.045(2). That statute provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith," though such evidence may be admissible for other non-propensity purposes. NRS 48.045(2). Prior to admitting bad act evidence under NRS 48.045(2), the district court must hold a hearing outside the presence of the jury to determine the evidence's admissibility. *See generally Tinch v. State*, 113 Nev. 1170, 1175-76, 946 P.2d 1061, 1064-65 (1997), *holding modified by Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012).

In this case, the scale was not bad act evidence under NRS 48.045(2). It did not implicate an "other act" or "collateral offense," but rather was evidence offered to prove Scott's attempt to sell, transport, or

give a controlled substance—“a burden which the [S]tate had to meet to prove its case.” *Salgado v. State*, 114 Nev. 1039, 1042, 968 P.2d 324, 326 (1998). Scott’s possession of the scale was contemporaneous with his possession of the illegal narcotics, and together they tended to establish that he was, at that time, attempting to sell, transport, or give those narcotics in violation of NRS 453.321(2)(a). Where Scott possessed the scale at the same time and in the same general location as the illegal narcotics, the scale was not other bad act evidence under NRS 48.045(2) that required a separate hearing to determine its admissibility.² *See Colon v. State*, 113 Nev. 484, 492, 938 P.2d 714, 719 (1997) (concluding the district court did not err in failing to hold a pretrial hearing to determine the admissibility of the defendant’s attempted marijuana purchase because “the State was required to disprove the procuring agency and that Colon had a predisposition to sell controlled substances”); *cf. Salgado*, 114 Nev. at 1042-43, 968 P.2d at 326-27 (determining that a pretrial hearing was required to determine the admissibility of the appellant’s *prior* “illegal drug transactions which are clearly collateral offenses”). Therefore, because the scale was not bad act evidence requiring a hearing to determine its admissibility, we conclude


²Even if evidence of the scale could be considered other bad act evidence, it is relevant, was proven by clear and convincing evidence, and its probative value in establishing Scott’s criminal intent to commit the charged crime—the attempt to sell, transport, or give a controlled substance—was not substantially outweighed by unfair prejudice. *See Gravelle v. State*, No. 81028, 2021 WL 1541332, *2 (Nev. Apr. 19, 2021) (Order of Affirmance) (finding no abuse of discretion in admitting other bad act evidence that officers had *previously* discovered a large quantity of marijuana and a scale that were relevant to establishing appellant’s knowledge and intent to traffic a controlled substance); *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988) (recognizing that the crime of “attempt” is a specific intent crime).

that the district court did not abuse its discretion in denying Scott's motion for a mistrial on this basis. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Kathleen A. Sigurdson, District Judge
Washoe County Alternate Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk