



IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN A. HERBAUGH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 91163

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a schedule I controlled substance, 400 grams or more; possessing a schedule I controlled substance for purpose of sales; and possessing a schedule I controlled substance less than 14 grams. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge. Appellant John Herbaugh raises two issues on appeal.

The district court did not err in denying Herbaugh's motion to suppress

Herbaugh argues the district court erred in failing to suppress drug evidence found in his vehicle after police stopped Herbaugh for speeding. "Suppression issues present mixed questions of law and fact. 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. The reasonableness of a seizure is a matter of law reviewed de novo." *State v. Beckman*, 129 Nev. 481, 485-86, 305 P.3d. 912, 916 (2013) (citation modified).

First, Herbaugh contends the arresting officer lacked probable cause for the traffic stop because the officer only visually estimated Herbaugh's speed. "A traffic stop is a seizure and therefore is subject to the Fourth Amendment's requirement of reasonableness." *McCord v. State*, 139 Nev. 598, 600, 540 P.3d 433, 436 (2023). Probable cause "exists when police

have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed.” *Doleman v. State*, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991). The officer was trained in visually estimating a vehicle’s speed and testified he estimated Herbaugh’s speed to be 75-mph in a 65-mph zone. The officer also observed Herbaugh pass several cars in quick succession. Because the totality of the circumstances, including the officer’s training, experience, and observations, supported the probable cause determination, we discern no error in the denial of Herbaugh’s suppression motion on this basis. *See State v. Rincon*, 122 Nev. 1170, 1173-74, 147 P.3d 233, 235-36 (2006).

Second, Herbaugh contends the arresting officer lacked independent reasonable suspicion to extend the stop beyond its original mission to conduct a canine sniff. “[A] dog sniff during a *lawful* traffic stop does not violate the Constitution so long as the sniff does not prolong the length of the stop.” *Beckman*, 129 Nev. at 487, 305 P.3d at 917. The district court found that the dog sniff did not extend the length of the stop because the officers were working on the traffic citation without delay until the dog alerted to the drugs. Accordingly, no relief is warranted on this ground.

The admission of evidence of Herbaugh’s prior conviction was harmless error

Herbaugh argues the district court abused its discretion in admitting evidence of his 2018 conviction for possession of methamphetamines to demonstrate lack of mistake and knowledge of the narcotic nature of the drugs. “A presumption of inadmissibility attaches to all prior bad act evidence.” *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005). But other act evidence can be admissible to show a defendant’s

lack of mistake, motive, and knowledge, among other purposes. NRS 48.045(2). To overcome the presumption of inadmissibility, the State must demonstrate “(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant’s propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.” *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). We review the district court’s admission of other act evidence for a manifest abuse of discretion. *Id.*

Herbaugh contends that the prior conviction was not relevant to show lack of mistake or knowledge and that its probative value was substantially outweighed by the danger of unfair prejudice. We agree that the district court abused its discretion. Herbaugh’s defense was that the drugs were left in his vehicle by someone else and he did not know they were there. Herbaugh’s 2018 conviction involved similar circumstances where Herbaugh was driving alone and was pulled over for speeding, and methamphetamine was discovered in his vehicle. That Herbaugh previously possessed methamphetamines does not tend to show he knew that bags containing methamphetamine were in his car. The prior conviction was therefore not relevant to demonstrate lack of mistake. *See Cirillo v. State*, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980) (“The absence of mistake exception is applicable only when the evidence tends to show the defendant’s knowledge of a fact material to the specific crime charged.” (internal quotation marks omitted)). And, though the prior conviction may have been relevant to demonstrating Herbaugh’s knowledge that the

substance in his vehicle was methamphetamine, *Overton v. State*, 78 Nev. 198, 205, 370 P.2d 677, 681 (1962) (holding that other act evidence was admissible to prove defendant's knowledge that the substance at issue was a narcotic), the conviction had minimal probative value given that Herbaugh admitted to possession of a smaller quantity of methamphetamine in the instant case. *See Tucker v. State*, 82 Nev. 127, 130, 412 P.2d 970, 971 (1966) (stating that "if other evidence has substantially established the element of the crime involved (motive, intent, identity, absence of mistake, etc.), the probative value of showing another offense is diminished, and the trial court should rule it inadmissible even though relevant"). This minimal probative value was outweighed by the danger of unfair prejudice from the propensity inference, especially given the similarity of the two crimes. The evidence therefore should not have been admitted.

The district court's error, however, is harmless. Overwhelming evidence supported the jury's determination that Herbaugh was guilty. *See* NRS 178.598; *Chavez v. State*, 125 Nev. 328, 344-45, 213 P.3d 476, 487-88 (2009) (holding error in admitting evidence harmless given the overwhelming evidence presented against the defendant). During the traffic stop, officers saw Herbaugh reach to the floorboard where the drugs were later found hastily tucked away. Officers also found a backpack in the car within reach of the driver's seat containing drug sale paraphernalia, several thousand dollars of cash in small denominations, and clothes in Herbaugh's size. A small quantity of methamphetamine was also later found on Herbaugh's person. Considering this evidence, no relief is

warranted based on the error in admitting the prior conviction.
Accordingly, we

ORDER the judgment of conviction AFFIRMED.

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Herndon, C.J.

A handwritten signature in dark ink, appearing to be 'Bell', with a stylized, cursive 'B'.

Bell, J.

A handwritten signature in dark ink, appearing to be 'Cadish', with a stylized, cursive 'C'.

Cadish, J.

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk