IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHARLEEN THELMA NICKLE,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2013-910
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, JUDGE:

Appellant Sharleen Thelma Nickle was tried by jury in the District Court of Grady County, Case No. CF-2012-94, and convicted of Possession of a Precursor with Intent to Manufacture a Controlled Dangerous Substance (Methamphetamine), After Former Conviction of a Felony, in violation of 63 O.S.2011, § 2-401(G)(1). The jury assessed punishment at fourteen years imprisonment. The Honorable John E. Herndon, Associate District Judge, who presided at trial, sentenced Nickle accordingly and ordered one year of post-imprisonment supervision. From this Judgment and Sentence, Nickle appeals raising the following issues:

(1) whether she was denied a fair trial and her right to confrontation by the admission of hearsay;

(2) whether she was denied a fair trial by the admission of other crimes and bad acts evidence;

(3) whether the district court erred in denying her motion to suppress and admitting evidence obtained during her warrantless arrest;

(4) whether she was denied a fair trial by the admission of irrelevant and highly prejudicial evidence; and

(5) whether the accumulation of errors deprived her of a fair trial and a reliable sentencing proceeding.

We find reversal is not required and affirm the Judgment and Sentence of the district court.

1.

Any error in the admission of hearsay testimony from the investigating officer about Nickle's purchase and attempted purchase of pseudoephedrine on the date of her arrest requires no relief. Much of the investigator's testimony was explanatory about the interdiction operation itself, the placement of officers, their roles in the operation and the electronic pseudoephedrine tracking system. This information was within his personal knowledge and was admissible non-hearsay. His statement that he was advised by others that Nickle had attempted to purchase pseudoephedrine from Wal-Mart was hearsay. The testimony, however, did not affect the outcome of the trial or in any way prejudice Nickle. Nickle admitted that she purchased generic Sudafed at CVS to sell to a methamphetamine manufacturer for $40.00. The box of pills was seized from her truck. It was possession of the precursor for the illicit purpose that constituted the crime in this case. The investigator's hearsay response about Nickle's attempted purchase at Wal-Mart did not affect the verdict. Nor did it affect the sentence in this case as Nickle received the minimum sentence. *See Grissom v. State,* 2011 OK CR 3, ¶ 25, 253 P.3d 969,

979 (holding error alone does not reverse convictions in Oklahoma, but error plus injury).

Nor do we find admission of the agents' testimony about Nickle's pseudoephedrine purchase history and the transaction log of her purchase history warrant relief. This evidence showed that Nickle made 33 purchases of pseudoephedrine and 9 attempted purchases from March 24, 2011 to February 16, 2012.[1]

Nickle argues Agent Don Vogt's testimony concerning her previous pseudoephedrine purchases constituted hearsay because he did not have personal knowledge of the purchases. She further argues that the actual transaction log of her purchases admitted as State's Exhibit 6 does not qualify under the business record exception.

Under 12 O.S.2011, § 2803(6) a business record is not hearsay if the record was made at or near the time of the event by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of the business to make the record. This can be established by (1) testimony of the records custodian or other qualified witness or (2) certification that complies with § 2902(11). Section 2902(11) provides that business records are self-authenticating if accompanied by a written

[1] The testimony and transaction log reflected Nickle's failed attempt to purchase 2.40 grams of pseudoephedrine at the Wal-Mart pharmacy in Chickasha at 1:59 p.m. on February 16, 2012. It further showed her successful purchase of 1.20 grams of pseudoephedrine at CVS twenty minutes later. Her purchase history provided officers with reason to suspect the pseudoephedrine she purchased was likely going to be used to make methamphetamine because her purchase history was inconsistent with legitimate use.

declaration under oath of the record custodian or other qualified witness "that the record was made, at or near the time of the occurrence of the matters set forth by or from information transmitted by a person having knowledge of those matters; was kept in the course of the regularly conducted business activity; and was made pursuant to the regularly conducted activity."

Agent Vogt testified that he is the Oklahoma Bureau of Narcotics [OBN] administrator of the pseudoephedrine system and prescription monitoring system. He explained that the pseudoephedrine system tracks the purchases of pseudoephedrine-related products sold by Oklahoma pharmacies. To purchase pseudoephedrine products, a person must produce a valid identification (ID) to a pharmacist who then records the ID information in an online computerized system. The pharmacy's software "is directly connected to [OBN's] system via web service." He reiterated that the ID and purchase information go directly into OBN's computer system. Based on the recorded information, OBN can generate a report on a person's pseudoephedrine purchase history. Vogt identified State's Exhibit 6 as a "standard record held by the Bureau." He said that it was a report kept in the normal course of business, and that as administrator he had access to those reports. He then explained that the report in State's Exhibit 6 pertained to Nickle and contained her name, address, date of birth and ID number. He went through her purchase history from March 2011 through February 2012.[2] He could not

[2] Agent Surber also testified about Nickle's purchase history detailed in State's Exhibit 6 and the frequency and timing of the transactions that made him suspicious. He discussed the

recall if he was the one who retrieved the report or if it was the district attorney or his assistant.

In *Tinney v. State,* 1985 OK CR 165, ¶ 11, 712 P.2d 65, 67, the appellant, who was convicted of stealing a television from a retailer, alleged that a proper foundation was not laid under the business records exception to the hearsay rule for the admission of a "log sheet." The log sheet showed when a television set was received by the retailer and when it was subsequently sold. The store manager testified as to what the log sheet meant and represented. This Court rejected the claim that the manager's testimony was inadmissible because he could not testify when the sheet was prepared, did not know with certainty whose writing was on the sheet, and was unsure of the time lag between the time a television set was sold and the actual posting of it on the log sheet. We stated "[t]he witness testifying to a business record's trustworthiness need not personally compile the document's information nor be the document's normal custodian. He must be able to testify to what the record means and represents." *Id.* The Court also noted the presence of independent evidence proving the defendant's guilt that rendered the log sheet cumulative. *Id.*

The recording of pseudoephedrine purchases under 63 O.S.Supp.2010, § 2-309C permits pharmacists to determine immediately whether the purchaser is eligible to purchase the product and OBN to monitor sales. The record is

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reasonable inferences that could be drawn from the information based on his training and experience.

made at the time of the purchase by a person with knowledge of the sale in the course of regularly conducted business. It is the regular practice to make the record because statute requires it. Agent Vogt was familiar with the records and their origin and creation. Based on his position at OBN and knowledge, he was qualified to testify and sponsor State's Exhibit 6 under the exception. As in *Tinney,* there was also independent evidence proving Nickle's guilt-*i.e,* her confession. The district court did not abuse its discretion in allowing the evidence.

Nickle also argues admission of the transaction log of her pseudoephedrine purchases and Agent Vogt's testimony related to it violated the Confrontation Clause. She claims the purchase log contained statements of non-testifying pharmacists regarding her purchases of pseudoephedrine that the pharmacists should have reasonably expected to be used for criminal prosecution.

The United States Supreme Court held in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 321, 129 S.Ct. 2527, 2538, 174 L.Ed.2d 314 (2009), that "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. The Court noted "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an

entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Id.* at 324, 129 S.Ct. 2539-40.

In *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause demands that all *testimonial* evidence be excluded unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Thus, the inquiry here is whether the tracking log records are testimonial under *Crawford.* This inquiry concerns a question of law that this Court reviews *de novo. Hanson v. State,* 2009 OK CR 13, ¶ 8, 206 P.3d 1020, 1025.

Using the examples of "testimonial" in *Crawford* and the "primary purpose" test outlined in *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), it is evident that the tracking log records at issue in this case are not "testimonial" for purposes of the Confrontation Clause. The real-time electronic log of pseudoephedrine purchases authorized under 63 O.S.Supp.2010, § 2-309C "is clearly a tool authorized to help monitor sales of pseudoephedrine, in part, to assist with the enforcement of" penal statutes. *State v. Davis,* 2011 OK CR 22, ¶ 7, 260 P.3d 194, 196. The reports generated by the tracking system are created for the administration of OBN's official duty of monitoring sales of pseudoephedrine and enforcing state and federal laws. The primary purpose of the electronic system, however, is to allow pharmacists to determine immediately whether the purchaser has exceeded the daily or

monthly amount of pseudoephedrine allowed by law and not to prove facts at a criminal trial. It is important to note that the purchase log reflecting Nickle's purchases would have been created regardless of her subsequent arrest and prosecution. The log is not testimonial. *See State v. Cady,* 425 S.W.3d 234, 246 (Mo.Ct.App. 2014). Because the records are not testimonial in nature, Nickle's right of confrontation was not violated, and the district court did not err in admitting the records. This claim is denied.

2.

Reviewing for plain error only, we also reject Nickle's complaint that the the district court erred in admitting evidence of her prior purchases of pseudoephedrine because the evidence did not qualify under the rules for admission of other crimes evidence and was more prejudicial than probative. 12 O.S.20011, §§ 2403 & 2404(B). *See Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (explaining elements of plain error).

The purchase history log corroborated the officer's testimony concerning the events leading to Nickle's arrest, and the evidence was clearly relevant and more probative than prejudicial. *See Harmon v. State,* 2011 OK CR 6, ¶ 48, 248 P.3d 918, 937 (*quoting Mitchell v. State,* 2010 OK CR 14, ¶ 71, 235 P.3d 640, 657) ("When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.") The number of times Nickle purchased or attempted to purchase pseudoephedrine evidenced on the

purchase log tended to prove that her motive and intent for the instant purchase was criminal. In addition, Nickle confessed she purchased the precursor to sell to a methamphetamine manufacturer and had done so several times before. The log corroborated her confession. *See* OUJI-CR2d 9-13 (defendant's confession alone does not justify conviction unless corroborated). Moreover, Nickle's purchase history on the log was intrinsic to this case. The agents' review of Nickle's purchase history led them to suspect Nickle and investigate. The challenged evidence was directly connected to the factual circumstances of the crime and provided necessary contextual and background information to the jury. The evidence was inextricably intertwined with the charged offense. As the Tenth Circuit explained in *United States v. Irving,* 665 F.3d 1184, 1212 (10th Cir.2011), admissibility of evidence related to other crimes or wrongs is limited only to evidence of acts extrinsic to the charged crime. "If the contested evidence is intrinsic to the charged crime, then Rule 404(b) is not even applicable" and the evidence is subject only to the balancing test in Rule 403. *Id.* For these reasons, the district court did not err in admitting this evidence.

3.

Review of a district court's decision on a motion to suppress is a mixed question of law and fact; we accept those of the district court's factual determinations supported by evidence and review the law *de novo. Coffia v. State,* 2008 OK CR 24, ¶ 5, 191 P.3d 594, 596.

Nickle argues her seizure and detention were unlawful because there was no traffic violation to justify it. She ignores the fact that the officers had reasonable suspicion of criminal activity to stop her and conduct a brief investigatory detention without the alleged traffic violation. To stop a vehicle, police must have reasonable, articulable suspicion that the car or its driver is in violation of the law. *McGaughey v. State,* 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136. "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow,* 528 U.S. 119, 125, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). To determine if a traffic stop violates the Fourth Amendment, we consider whether the officer's action was justified at its inception and whether the officer's subsequent actions were reasonably related in scope to the circumstances which justified the interference in the first place. *McGaughey,* 2001 OK CR 33, ¶ 24, 37 P.3d at 136.

The investigator stopped Nickle after her failed purchase of pseudoephedrine at Wal-Mart and her subsequent successful purchase of same at CVS. He believed Nickle's actions raised reasonable suspicion of criminal activity considering her suspect purchase history that included more than forty purchases or attempted purchases of the drug over the preceding year. Based on this evidence, the investigator's action was justified by reasonable suspicion at its inception and his subsequent actions were reasonably related to the scope of the investigatory detention. The record

further supports a finding that Nickle consented to the search of the pickup and that she made a voluntary confession. On this record, we find that the district court did not err in denying Nickle's motion to suppress.

4.

Nickle was not denied a fair trial by the admission of irrelevant evidence.[3] Because Nickle either raised objections different from those now offered on appeal or failed to object to the admission of the evidence altogether, review is for plain error only. *See Miller v. State,* 2013 OK CR 11, ¶ 104, 313 P.3d 934, 971. The evidence and testimony concerning items seized during the search of Nickle's pickup and testing of them was inextricably intertwined with the charged offense. As noted above, admissibility of evidence related to other crimes or wrongs is limited only to evidence of acts extrinsic to the charged crime. *Irving,* 665 F.3d at 1212. The evidence now challenged by Nickle was relevant and not more prejudicial than probative. Even if this Court agreed with Nickle, relief would be unnecessary given that she confessed the crime and received the minimum sentence. This claim is denied.

5.

There are no errors, considered individually or cumulatively, that merit relief in this case. *Jones v. State,* 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894;

[3] Nickle challenges the admission of the ladle and filler hose found in the back of the pickup, the lab report showing the presence of pseudoephedrine on the ladle (State's Exhibit 5), photographs showing the pseudoephedrine purchased at Wal-Mart by the passengers in Nickle's pickup (State's Exhibit 4), the testimony that there was anhydrous ammonia present in the brass fitting on the filler hose, and the OSBI request for lab analysis of the ladle (State's Exhibit 3).

DeRosa v. State, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY
THE HONORABLE JOHN E. HERNDON, ASSOCIATE DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
SMITH, P.J.: Concurs in Result
LUMPKIN, V.P.J.: Concurs
LEWIS, J.: Concurs

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SMITH, P.J., CONCUR IN RESULT

I concur in result based on the facts of this case. Whether or not the confrontation clause was violated in this instance did not contribute to the verdict.