IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMIAN TROY BLANTON A/K/A DAMON BLANTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43101

FILED

MAR 0 3 2005

JANETTE M. BLOOM
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 one count of burglary. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Damian Troy Blanton to serve a prison term of 12 to 30 months.

Blanton contends that reversal of his conviction is warranted because the district court failed to give a jury instruction on trespass as a lesser-included offense of burglary. We conclude that Blanton's contention lacks merit.

A defendant is not entitled to a jury instruction on a lesser crime unless it is a lesser-included offense of the charged crime under the elements test.[1] Recently, this court held that a defendant charged with burglary is not entitled to a jury instruction on trespass because it is not a lesser-included offense under the elements test.[2] Accordingly, in this case, we conclude that the district court did not err in rejecting Blanton's

[1]Smith v. State, 120 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 96, Dec. 23, 2004) (citing Blockburger v. State, 284 U.S. 299 (1932)); see also Walker v. State, 110 Nev. 571, 575, 876 P.2d 646, 649 (1994).

[2]Smith, 120 Nev. at ___, ___ P.3d at ___.

proposed jury instruction on trespass because it is not a lesser-included offense of burglary.

Blanton next contends that the district court abused its discretion in ruling that prior bad act evidence that Blanton had previously taken items from a record store was admissible on rebuttal as evidence of Blanton's intent.[3] Blanton contends that the evidence was not admissible because it was extremely prejudicial, not proven by clear and convincing evidence, and irrelevant character evidence. We disagree.

After conducting a Petrocelli hearing[4] and considering the three factors set forth in Tinch v. State,[5] the district court ruled that the prior bad act evidence was admissible, stating:

> [The evidence] is clear and convincing to me. It certainly is relevant. And the prejudice against the defendant is not outweighed by the probative value because it is offered for intent. So,

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[3]Ultimately, the evidence at issue was not admitted at trial because Blanton elected not to testify. Defense counsel explained that Blanton's decision not to testify was based, in part, on the district court's ruling allowing the prior bad act evidence only if Blanton testified. We note that, while the evidence was not admissible for purposes of impeachment under NRS 50.075, the evidence was admissible under NRS 48.045(2).

[4]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

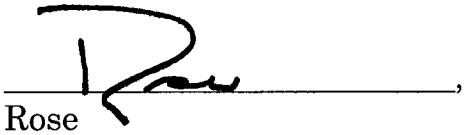
[5]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Blanton also argues that the district court applied the wrong standard in failing to consider whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Because the record is sufficient for this court to determine whether the Tinch factors have been satisfied, we conclude that the district court's failure to articulate the appropriate standard for considering the prejudicial nature of the evidence does not warrant reversal. See King v. State, 116 Nev. 349, 354-55, 998 P.2d 1172, 1175 (2000).

therefore, Mr. Lake can testify on rebuttal if need be by the State.

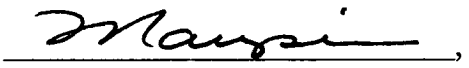
We conclude that the district court did not commit manifest error in ruling that the prior bad act evidence was admissible to prove intent.[6]

Having considered Blanton's contentions and concluded that they lack merit, we

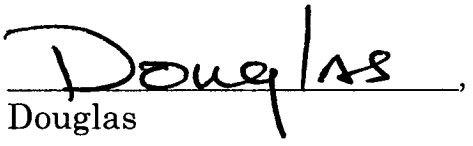
ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Steven R. Kosach, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[6]See Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998) ("The trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error.").