

IN THE SUPREME COURT OF THE STATE OF NEVADA

DERAR TSEGAYE GAYM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44850

FILED

FEB 09 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery constituting domestic violence. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. Gaym was sentenced to a prison sentence of 24-60 months.

Appellant Derar Gaym asserts the district court erred by admitting evidence of other bad acts, specifically his prior conviction for battery constituting domestic violence.¹

NRS 48.045(2) allows for the admission of bad acts evidence to show motive, intent, absence of mistake or accident, etc. The decision to admit such evidence lies with the discretion of the trial court and will not

¹Gaym's fast track statement states that "[d]efendant hereby incorporates by reference those authorities and arguments set forth in Defendant's "Opposition to State's Motion to Admit Evidence of Other Crimes, Wrongs or Acts." We caution counsel and note that "[b]riefs or memoranda of law filed in district courts shall not be incorporated by reference in briefs submitted to the Supreme Court." NRAP 28(e); Thomas v. State, 120 Nev. 37, 43 n.3, 83 P.3d 818, 822 n.3 (2004).

be disturbed absent manifest error.² The district court must determine whether "(1) the incident is relevant to the crime charged; (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."³ On appeal, we will give great deference to the trial court's decision to admit or exclude evidence and will not reverse the trial court absent a manifest error.⁴

Here, the trial court conducted a hearing outside the presence of the jury regarding the prior bad act evidence offered by the State. At the conclusion of the hearing, the trial court determined the evidence offered was admissible, but did not make a specific finding as to which exception(s) under NRS 48.045(2) it was basing its decision. Additionally, the trial court omitted any discussion of whether the probative value of the other act was outweighed by the danger of unfair prejudice. In the future, we urge the district court to follow the requirements pronounced in

²Kazalyn v. State, 108 Nev. 67, 71-72, 825 P.2d 578, 581 (1992) (receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); (Disagreement recognized on other grounds by Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000).

³Braunstein v. State, 118 Nev. 68, 72-73, 40 P.3d 413, 416-17 (2002) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

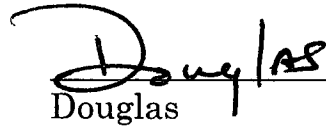
⁴See Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).


Tinch, specifically that a record be made regarding the basis for the admission of the evidence and whether the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

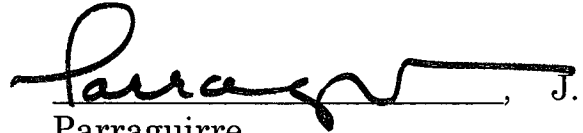
Nonetheless, we conclude that the district court's decision to admit the evidence does not constitute manifest error. The victim testified that Gaym "accidentally" punched her in the face and rammed her head into the wall while he was half asleep. The prior battery involving Gaym and the same victim only 6 months prior to this incident was relevant to show absence of mistake, motive and intent. This prior incident was shown by "clear and convincing evidence" because Gaym pleaded guilty to the battery constituting domestic violence. Although this information is prejudicial, its probative value to show the absence of mistake is not substantially outweighed by the danger of unfair prejudice. Therefore, we cannot say that the district court committed "manifest error" in its decision to admit such evidence.

Having considered Gaym's contentions and determined they are without merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Gaym was convicted pursuant to a guilty plea. The judgment of conviction should have stated that Gaym was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district court for correction of the judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

cc: Hon. Stewart L. Bell, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk