IN THE SUPREME COURT OF THE STATE OF NEVADA

REYNALDO GAMBOA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44955

FILED

OCT 0 4 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 each of burglary and grand larceny. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Reynaldo Gamboa to serve two concurrent prison terms of 60 to 170 months.

Gamboa first contends that the district court abused its discretion in granting the State's motion to admit prior bad act evidence. Specifically, Gamboa argues that evidence that he committed a prior burglary was highly prejudicial, and had only minimal probative value as to identity and intent because it occurred four years before the charged offense. We conclude that Gamboa's contention lacks merit.

Evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question.[1] Nevertheless, NRS 48.045(2) also states that evidence of other bad acts may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Prior to admitting

[1]NRS 48.045(2).

such evidence, the district court must determine during an evidentiary hearing whether the evidence is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value is substantially outweighed by the danger of unfair prejudice.[2] Further, "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[3]

In this case, the record indicates that the district court admitted the prior bad act evidence at issue after conducting a Petrocelli hearing[4] and considering the factors set forth in Tinch v. State[5] and NRS 48.045(2).[6] We conclude that the district court did not commit manifest error in admitting the prior bad act evidence. The evidence was relevant to negate Gamboa's claim that he was too intoxicated to form the intent to

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[2]See, e.g., Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); see also Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[3]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

[4]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[5]113 Nev. at 1176, 946 P.2d at 1064-65, modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[6]Gamboa also argues that the district court erred in failing to make a specific finding that the prior bad act was proven by clear and convincing evidence. While we note that specific district court findings are more conducive to appellate review, the record is sufficient for this court to determine that each Tinch factor is satisfied and, therefore, any lack of specificity in the district court's express finding is harmless. See Qualls, 114 Nev. at 903-04, 961 P.2d at 767.

steal when he broke a window of a retail store and took eight jackets.[7] Further, the prior bad act was proven by clear and convincing evidence. At trial, the State presented evidence that, four years prior, Gamboa had pleaded guilty to grand larceny for conduct similar to the charged offense, namely, throwing a rock through the window of a retail store and stealing miscellaneous items, including clothing. Finally, any danger of unfair prejudice was alleviated because in charging the jury the district court gave a limiting instruction.[8] Because the district court properly analyzed the admissibility of the prior bad act evidence by the standard set forth in NRS 48.045(2), we conclude that it did not abuse its discretion in granting, in part, the State's motion to admit prior bad act evidence.

In a related argument, Gamboa contends that reversal of his conviction is warranted because the district court failed to give a limiting instruction prior to the introduction of the prior bad act evidence. Although Gamboa concedes that defense counsel waived the right to have the limiting instruction given before the introduction of the prior bad act evidence, he argues that "[t]his Court should find that the duty of the trial court cannot be abrogated by trial counsel's preferences." We reject Gamboa's contention.

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[7]See Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996) (vehicular and store burglaries would be admissible in vehicular burglary trial to show felonious intent at time of entry).

[8]See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001) (discussing the importance of a limiting instruction).

In Tavares v. State, this court recognized that defense counsel may waive the requirement that a limiting instruction be given.[9] In particular, we stated:

> [I]n unusual circumstances, the defense may not wish a limiting instruction to be given for strategic reasons. In those circumstances, the desire of the defendant should be recognized as he is the intended beneficiary of the instruction and is in the best position to evaluate its consequence.[10]

Because defense counsel can best evaluate whether a limiting instruction should be waived, we decline Gamboa's request to prohibit such a practice.

Finally, Gamboa contends that reversal of his conviction is warranted because his constitutional rights to a fair trial and due process of law were violated when the district court gave jury instruction number 14, which provided:

> If an intoxicated person has the capacity to form the intent to commit larceny, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was induced to conceive it, or conceive it more suddenly by reason of his intoxication.

In particular, Gamboa contends that the jury instruction was confusing because it suggested that "the jury should focus not on determining whether the State had proven the necessary element of specific intent, but instead upon whether the capacity to form intent reduced the degree of the crime." We conclude that Gamboa's contention lacks merit.

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[9]Id. at 731, 30 P.3d at 1132.

[10]Id. (footnote omitted).

As a preliminary matter, we note that Gamboa failed to preserve this issue for appeal because he did not object to or challenge the constitutionality of the jury instruction in the proceedings below. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain or constitutional error.[11] In this case, we conclude that the giving of jury instruction number 14 did not amount to plain error.

NRS 193.220 provides that:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining the purpose, motive or intent.

Jury instruction number 13 properly informed the jurors that they may "consider evidence of intoxication as it is relevant to whether the Defendant formed" the specific intent to commit burglary and grand larceny. Additionally, jury instruction number 14 contained a correct statement of Nevada law by informing the jurors that if they found Gamboa had the capacity to form specific intent, his intoxication was no ground for reducing the degree of his crime.[12] Accordingly, reversal of Gamboa's conviction is not warranted.

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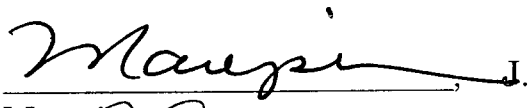
[11]See Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991); McCall v. State, 91 Nev. 556, 540 P.2d 95 (1975).

[12]See NRS 193.220; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003) (discussing plain error review); United States v. Olano, 507 U.S. 725, 734 (1993).

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

ORDER the judgment of conviction AFFIRMED.



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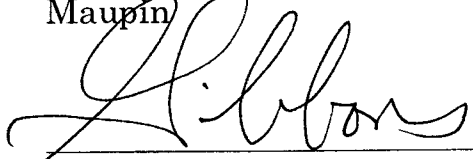

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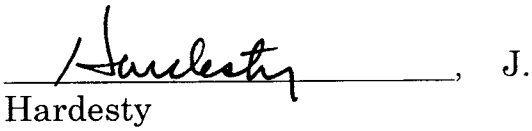

_____, J.
Hardesty

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk