

IN THE SUPREME COURT OF THE STATE OF NEVADA

LORENZO SMITH SCOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47870

FILED

JAN 04 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of invasion of the home. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant Lorenzo Smith Scott to serve a prison term of 18 to 60 months.

Scott first contends that the district court erred in allowing the State to endorse a witness on the day of trial. He argues that the endorsement of this witness prejudiced his case because the witness authenticated an audiotape entered into evidence, and if the district court had refused to allow the witness testimony, the audiotape could not have been entered into evidence.

""[T]he [e]ndorsement of names of witnesses upon an information is largely a matter of discretion with the court; and, in the absence of a showing of abuse, or that some substantial injury has resulted to the accused, an order permitting such [e]ndorsement, even after the trial has commenced, does not constitute of itself reversible error."¹ "[W]here the name and address of an unendorsed witness was

¹Jones v. State, 113 Nev. 454, 472, 937 P.2d 55, 66 (1997) (quoting State v. Monahan, 50 Nev. 27, 35, 249 P. 566, 569 (1926)).

known to a defendant and an opportunity was afforded to the defendant to interview the witness . . . there [is] no prejudicial error in permitting the witness to testify."²

In this case, the endorsement did not result in substantial injury or prejudicial error. Scott's counsel admitted prior to trial that he was aware of the witness, and there is no indication in the record that Scott was unable to interview the witness in preparation for trial. Accordingly, the district court did not abuse its discretion in allowing the witness testimony.

Scott next contends that the district court abused its discretion by admitting prior bad act evidence. Specifically, Scott contends that the admission of audiotapes of Scott threatening the victim and referring to an incident of vandalism of the victim's home denied him a fair trial. Scott contends that the audiotapes contained highly inflammatory statements, were irrelevant, and highly prejudicial.

NRS 48.045(1) provides that evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that the defendant acted in a similar manner on a particular occasion. But NRS 48.045(2) provides that such evidence may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before admitting such evidence, the district court must conduct a hearing on the record and determine: "(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

²Id. at 472, 937 P.2d at 67, (citing Dalby v. State, 81 Nev. 517, 519, 406 P.2d 916, 917 (1965)).

prejudice."³ On appeal, we will give great deference to the trial court's decision to admit or exclude evidence, and we will not reverse the trial court absent manifest error.⁴

Prior to trial, the district court held a Petrocelli⁵ hearing. The district court considered the factors set forth in Tinch v. State and determined that the audiotape evidence was admissible to establish motive and identity. This court has recognized that evidence of prior threats or hostile acts is admissible to show motive and identity.⁶ Accordingly, the district court did not commit manifest error in admitting the evidence.

In a related argument, Scott contends that the district court erred in admitting audiotapes of Scott threatening the victim without giving a contemporaneous limiting instruction.

We have previously stated that when a district court "admits uncharged bad acts into evidence, 'a limiting instruction should be given both at the time evidence of the uncharged bad acts is admitted and in the trial court's final charge to the jury.'"⁷ However, "the failure to give such a

³Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

⁴See 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).

⁵Petrocelli, 101 Nev. 46, 692 P.2d 503.

⁶See Hogan v. State, 103 Nev. 21, 732 P.2d 422 (1987); Solorzano v. State, 92 Nev. 144, 546 P.2d 1295 (1976).

⁷Rhymes v. State, 121 Nev. 17, 23, 107 P.3d 1278, 1282 (2005) (quoting Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001)).

limiting instruction [is] harmless if the error did not have a substantial and injurious effect or influence the jury's verdict."⁸

The record does not indicate that the district court's failure to give a contemporaneous limiting instruction had a substantial and injurious effect. The district court gave a limiting instruction after the audiotapes were admitted and before the jury was charged. Therefore, the jury was properly informed that the audiotape evidence could be considered only for the limited purpose of proving motive and identity. Further, the State presented convincing evidence that Scott committed the charged crime, including eyewitness testimony. Accordingly, the district court's failure to give a limiting instruction amounted to harmless error.

Last, Scott contends that evidence presented at the preliminary hearing was insufficient to bind him over on the home invasion charge. In particular, Scott claims that the justice court erred in denying his oral motion to dismiss because there was no evidence presented at the preliminary hearing that Scott actually entered the home.⁹

The trial court is the appropriate forum for determining whether probable cause exists.¹⁰ "The finding of probable cause may be

⁸Id. at 24, 107 P.3d at 1282 (citing Tavares, 117 Nev. at 732, 30 P.3d at 1132).

⁹NRS 205.067 defines invasion of home as "[a] person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, residence, or lawful occupant."


¹⁰Sheriff v. Shade, 109 Nev. 826, 828, 858 P.2d 840, 841 (1993).

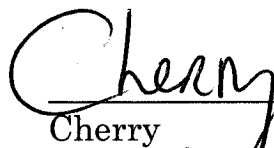
based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused."¹¹

At the preliminary hearing, the victim's son testified that, although he did not see Scott enter the residence, the front door was broken into the home. Subsequently, Scott's counsel moved to dismiss the home invasion charge arguing that there was no evidence that Scott actually entered into the residence. The justice court denied the motion, finding there was probable cause to believe that Scott entered the home when he used force to smash in the front door. We conclude that there was sufficient evidence in support of entry element of home invasion and, therefore, the justice court did not err in denying Scott's oral motion to dismiss the home invasion charge.

Having considered Scott's contentions and concluded they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

¹¹Id.

cc: Hon. Sally L. Loehrer, District Judge
Amesbury & Schutt
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk