

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW MCSHANE HEARN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49337

FILED

SEP 07 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY G. Alvarado
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of robbery with the use of a deadly weapon. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant Matthew McShane Hearn to serve two concurrent prison terms of 26 to 120 months with equal and consecutive prison terms for the deadly weapon enhancements.

Hearn contends that the district court abused its discretion in granting the State's motion to admit prior bad act evidence. Specifically, Hearn argues that the evidence of his involvement in the Colonial Bank robbery was not relevant to prove identity and modus operandi because there was "nothing intrinsically unique about [the] robberies." Hearn contends that the admission of evidence of his involvement in the Colonial Bank robbery undermined the presumption of innocence and violated his constitutional right to a fair trial. We conclude that Hearn'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 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 an extensive Petrocelli⁴ hearing and considering the factors set forth in Tinch v. State⁵ and NRS 48.045(2). We conclude that the district court did not commit manifest error in admitting the prior bad act evidence. The evidence was relevant to prove identity and modus operandi. The distinctive clothing

¹NRS 48.045(2).

²See 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).

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

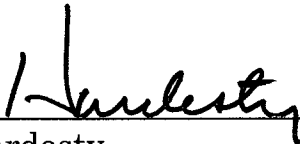
⁴Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

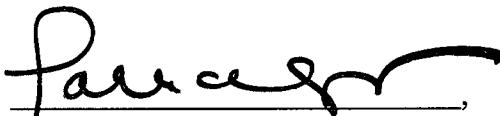
⁵113 Nev. 15 1176, 946 P.2d at 1064-65, modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

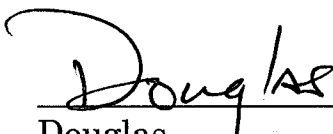
and mask worn by Hearn at the Colonial Bank robbery matched that worn by the robber in the instant charged robberies and the robberies were conducted in a similar unusual manner. Certain methods and traits were consistent in all three robberies. Further, the prior bad act was proven by clear and convincing evidence. Finally, any danger of unfair prejudice was alleviated because in charging the jury the district court gave a limiting instruction.⁶ Accordingly, we conclude that the district court did not abuse its discretion in granting the State's motion to admit prior bad act evidence.

Having considered Hearn's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

⁶See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001) (discussing the importance of a limiting instruction).

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk