

IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH EDWARD MONTOTO, III,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50589

**FILED**

OCT 13 2008

THOMAS L. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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, forgery, and attempted theft. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Ralph Edward Montoto, III, to serve three concurrent prison terms of 60-150 months.

The extent of Montoto's claims on appeal, without any argument, analysis, application to the facts of the case, or citation to the record,<sup>1</sup> consists of the following list:

1. Court admitting evidence of other crimes contrary to the law.
2. Court failed to give adequate limiting instructions at the time the state was allowed to present such evidence.
3. The Court's limiting instructions to the jury (#17 and #18) were inadequate.

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<sup>1</sup>See NRAP 28(e) (requiring references in briefs to matters in the record be supported by citation to appendix or transcript).

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Additionally, the appendix submitted by Montoto does not include the challenged jury instructions.<sup>2</sup> Nevertheless, although the fast track statement and appendix are deficient, we are able to conduct a meaningful review and conclude that Montoto's contentions are without 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.<sup>3</sup> NRS 48.045(2) states that evidence of other bad acts may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Nevertheless, the admission of other bad acts evidence is heavily disfavored.<sup>4</sup> Prior to admitting such evidence, the district court must determine during a hearing whether the evidence is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value is

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<sup>2</sup>NRAP 30(b) (requiring inclusion in appellant's appendix of matters essential to the decision of issues presented on appeal); Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989) (recognizing that appellant's failure to include in record on appeal evidence from trial court record relevant to issue raised constitutes a failure to preserve issue for appeal); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). We do note, however, that more than six months after briefing was completed in this appeal, the State submitted an appendix containing the two jury instructions in question.

<sup>3</sup>NRS 48.045(1).

<sup>4</sup>Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002).

substantially outweighed by the danger of unfair prejudice.<sup>5</sup> Pursuant to Tavares v. State, “the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial.”<sup>6</sup>

Montoto was charged with attempting to cash a fraudulent American Express traveler’s check at the Texas Station Hotel & Casino. Officer Lisa Jackson of the North Las Vegas Police Department testified at the preliminary hearing that Montoto, after being taken into custody and Mirandized, attempted to explain his conduct by claiming that he was solicited by email to cash the traveler’s checks, keep 10% for himself as payment for his services, and then “Western Union the rest back overseas.” Montoto refused to name his alleged employer. Montoto argued that he did not possess the intent to commit a burglary – that “he was cashing [the checks] based on an offer of employment that he received.”

The State filed a pretrial motion seeking permission to admit evidence of Montoto’s 2003 conviction for burglary. Montoto pleaded guilty to burglary in 2003 after attempting to cash a fraudulent check at a Bank of America. The district court conducted a hearing and found that Montoto’s prior conviction was proven by clear and convincing evidence and admissible to show intent and absence of mistake. We agree and

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<sup>5</sup>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).

<sup>6</sup>117 Nev. 725, 733, 30 P.3d. 1128, 1133 (2001).

conclude that the district court did not commit manifest error by admitting evidence of Montoto's 2003 burglary conviction.<sup>7</sup>

The district court, however, failed to provide the jury with a limiting instruction prior to the admission of the evidence. Nevertheless, we conclude that any error was harmless beyond a reasonable doubt.<sup>8</sup> This court has stated that "under Tavares we consider the failure to give such a limiting instruction to be harmless if the error did not have a substantial and injurious effect or influence the jury's verdict."<sup>9</sup> The State presented overwhelming evidence of Montoto's guilt. Additionally, the district court provided the jury with limiting instructions regarding the use of the prior bad act evidence prior to deliberations, and Montoto has failed to demonstrate that the instructions were inadequate or misstatements of the law.<sup>10</sup> Therefore, we conclude that the failure of the

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<sup>7</sup>See Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000) ("The decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error.").

<sup>8</sup>See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); see also U.S. v. Vgeri, 51 F.3d 876, 882 (9th Cir. 1995) (holding that the State must show "that the error more probably than not was harmless").

<sup>9</sup>Rhymes v. State, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005) (citing Tavares, 117 Nev. at 732, 30 P.3d at 1132).

<sup>10</sup>Jury instruction no. 17 provided:

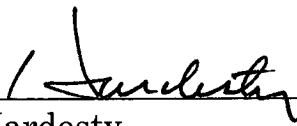
Evidence that the defendant committed an offense other than that for which he is on trial, if believed, was not received and may not be considered by you to prove that he is a person of bad character or

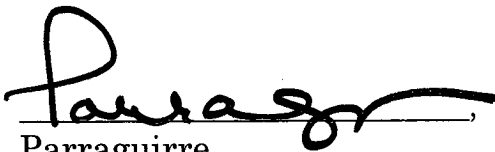
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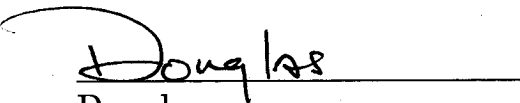
district court to provide a limiting instruction prior to the admission of the prior bad act evidence did not have a substantial effect or influence the jury's verdict.

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

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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*... continued*

to prove that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of proving the defendant's intent, motive, opportunity or the absence of mistake or accident. You must weigh this evidence in the same manner as you do all other evidence in the case.

Jury instruction no. 18 provided:

Evidence of other crimes cannot be considered by you for any purpose unless you first find the acts alleged have been proven by plain, clear and convincing evidence.

cc: Hon. Valorie Vega, District Judge  
Albright Stoddard Warnick & Albright  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk