

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN IAN UMBER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51061

**FILED**

MAR 27 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY Tracie K. Lindeman  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary and one count of battery. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant John Ian Umber was originally charged with one count each of burglary, invasion of the home, battery with intent to commit a crime, and sexual assault. After a three-day jury trial, Umber was found guilty of one count each of burglary and battery and not guilty on the charges of invasion of the home and sexual assault. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Prosecutorial misconduct

First, Umber argues that the prosecutor committed misconduct because he ridiculed and belittled Umber's theory of the case during closing argument and because he improperly expressed a personal opinion to the jury during closing argument. Umber also asserts that the district court abused its discretion by denying his motions for a mistrial based on the prosecutor's statements.

To determine if prejudicial prosecutorial misconduct occurred, we examine whether a prosecutor's statements so infected the proceedings

with unfairness the result was a denial of due process. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). We examine alleged prosecutorial misconduct in context and we have held that “a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.” Id. (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

“Denial of a motion for mistrial is within the trial court’s sound discretion.” Smith v. State, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994) (citing Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980)). We will not disturb the district court’s decision without a clear showing of abuse. Id. at 1103, 881 P.2d at 654.

Umber argues that the prosecutor committed misconduct by stating at closing argument, “That’s simply absurd to think that someone has the right to kick down your door because their name’s on a piece of paper they signed.” Umber contends that the prosecutor’s use of the word “absurd” was unduly inflammatory and had a prejudicial impact on the jury’s verdict. Further, Umber contends that the prosecutor’s statement to the jury that “[t]his isn’t a tough call ladies and gentlemen” reflected his personal opinion and was impermissible argument. Umber argues that the district court abused its discretion by denying his motion for mistrial based on the prosecutor’s use of these statements in his closing argument.

We disagree because we conclude that the prosecutor’s statements, when viewed in context, were not so infectious as to deny Umber his right to due process. Thus, we also conclude that the district court did not abuse its discretion in denying Umber’s motion for a mistrial based on these specific statements made by the prosecutor during closing argument.

Motion to dismiss the burglary charge

Second, Umber argues that the district court abused its discretion by denying his motion to dismiss the burglary count from his indictment. Umber contends that the burglary count should not have been allowed to stand because he had a legal, contractual, and possessory right to be in the house because he had co-signed the lease with the victim.

“We review a district court’s decision to grant or deny a motion to dismiss an indictment for abuse of discretion.” Hill v. State, 124 Nev. \_\_\_, \_\_\_, 188 P.3d 51, 54 (2008). We have held that a district court abuses its discretion if its actions are arbitrary or capricious or exceed the bounds of the law or reason. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Nevada’s burglary statute, NRS 205.060(1), states that a person is guilty of burglary if he or she, “by day or night, enters any house, room, [or] apartment . . . with the intent to commit . . . assault or battery on any person or any felony . . . .” The inquiry primary to our determination of whether a burglary charge was appropriate is whether Umber entered the property unlawfully. Bullis v. State, 83 Nev. 175, 176, 426 P.2d 423, 423 (1967).

Even though Umber’s name was on the lease, Umber had not lived in the residence for at least five months, the victim had changed the locks to the residence, and Umber used force to gain entry to the home on the night of the attack. We have held that under such circumstances there is no possessory interest in the property and a charge of burglary may stand. See Chappell v. State, 114 Nev. 1403, 1409, 972 P.2d 838, 841 (1998). As such, we conclude that the district court did not abuse its

discretion in denying Umber's motion to dismiss the burglary charge because the record reflects that Umber was not lawfully in the house.<sup>1</sup>

Prior bad act evidence

Third, Umber argues that his convictions should be overturned because the district court admitted evidence of prior bad acts. Specifically, Umber takes issue with the district court's admission of evidence of an alleged incident the night before the attack where he gained access to the victim's house using the claw end of a hammer, and evidence of the expired temporary restraining order the victim had against him.

"District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998). We will not disturb a trial court's ruling on this issue without a showing of a clear abuse of discretion. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), overruled on other grounds by Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006).

Generally, evidence of other crimes or wrongful acts is inadmissible at trial to show that a person acted in conformity with a character trait. See NRS 48.045(2). However, an exception to this rule is that such evidence can be admitted to show motive. Id.; see, e.g., Hogan v.

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<sup>1</sup>Umber also argues that the instruction given to the jury on burglary was ambiguous because the third sentence did not include the word "unlawful." We find this argument to be without merit since the other two sentences of the jury instruction sufficiently defined that unlawful entry was an element of burglary.

State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (holding that evidence of domestic violence, even if otherwise inadmissible under NRS 48.045(2), is admissible to demonstrate ill-will as a motive for a crime).

We conclude that the district court did not abuse its discretion by admitting the evidence of prior bad acts because these acts went to show Umber's motive for the crimes charged. It was within the district court's discretion to determine that this evidence went to establish Umber's motive, and, as such, Umber has failed to show that the district court's ruling was a clear abuse of that discretion.

Limiting evidence at the sentencing hearing

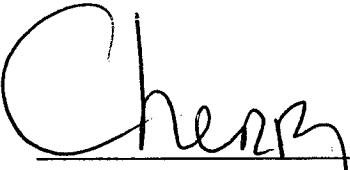
Fourth, Umber argues that the district court erred in denying his request to have his father speak on his behalf at his sentencing hearing, which was a violation of NRS 176.015. As previously stated, "[d]istrict courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Castillo, 114 Nev. at 277, 956 P.2d at 107-08. We have held that a district court abuses its discretion if its actions are arbitrary or capricious or exceed the bounds of the law or reason. Crawford, 121 Nev. at 748, 121 P.3d at 585.

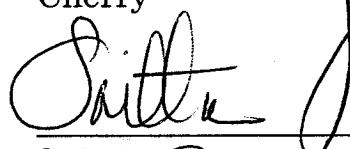
We conclude that the district court did not abuse its discretion in denying Umber's request to have his father speak on his behalf at his

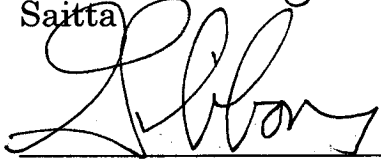
sentencing hearing because the district court did not violate NRS 176.015.<sup>2</sup>

In light of the foregoing, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Eighth Judicial District Court Dept. 15, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>2</sup>NRS 176.015(3) allows certain defined “victims” the right to appear and express their views during a sentencing hearing. See Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995). Umber makes no argument as to why his father should have been considered a victim for the purposes of his sentencing hearing.