

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN CHARLES AUSTERMAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55278

**FILED**

DEC 13 2010

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant John Austerman claims that the district court's erroneous admission of collateral bad act evidence and its failure to give instructions limiting the jury's consideration of that evidence require reversal of his conviction. We agree. Austerman was convicted of entering a health club with the intent to commit larceny. Surveillance video captured Austerman roaming around the club after operating hours and witnesses for the State testified that, based upon the lack of evidence of forced entry, Austerman most likely climbed over a fence and walked into the club through an unlocked door. When Austerman was arrested twelve days later, he had in his possession several items that the State termed "burglary tools," but which the investigating detective testified were

unrelated to the instant crime.<sup>1</sup> After the State moved to admit these items under NRS 48.045(2), the district court held a hearing and, despite agreeing that they were not connected to the crime at issue, found them relevant, sufficiently proved, and more probative than prejudicial.

However, because Austerman did not use tools to enter the health club, we are not convinced that evidence of possession of burglary tools twelve days after the crime is relevant to prove anything aside from his propensity to burgle—precisely the use for which we have concluded bad acts are presumptively inadmissible. See Tavares v. State, 117 Nev. 725, 730-31, 30 P.3d 1128, 1131 (2001), modified on other grounds by Mclellan v. State, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008). For that reason also, evidence of his possession of these items was unfairly prejudicial—prejudice that was compounded when, in contravention of an order of the district court, the investigator and the State repeatedly referred to these items as “burglary tools” throughout Austerman’s trial. We therefore conclude that the district court manifestly erred in admitting evidence of this collateral, uncharged bad act. See Walker v. State, 116 Nev. 442, 446, 997 P.2d 803, 806 (2000); see also NRS 205.080 (possession of burglary tools is a gross misdemeanor).

This error was compounded when the district court failed to instruct the jury—either contemporaneously with admission of these acts or at the close of evidence—on the limited consideration they could give Austerman’s possession of these “burglary tools.” See Tavares, 117 Nev. at 731, 30 P.3d at 1131-32 (explaining that district court must, sua sponte,

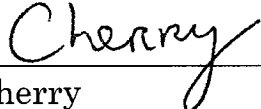
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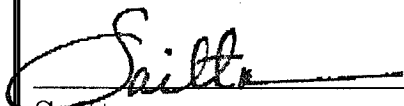
<sup>1</sup>These items included keys, flashlights, a screwdriver, and an identification card.


give limiting instruction even where State and defendant failed to request it). The State concedes that the failure to instruct was error, but argues it was harmless. While sufficient evidence may have been adduced to support a conviction for burglary, we are not convinced that the jury's verdict was not substantially influenced by the district court's failure to instruct the jury on how it could consider this highly prejudicial, and irrelevant, evidence. See id. at 732-33, 30 P.3d at 1132-33 ("On account of the potentially highly prejudicial nature of uncharged bad act evidence . . . it is likely that cases involving the absence of a limiting instruction on the use of uncharged bad act evidence will not constitute harmless error."). We therefore conclude that the error was not harmless and that Austerman's conviction must be reversed.<sup>2</sup>

Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

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

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

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

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<sup>2</sup>Because we conclude his conviction must be reversed, we do not consider his claim relating to sentencing error.

cc: Hon. Patrick Flanagan, District Judge  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe County Public Defender  
Washoe District Court Clerk