

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN HOLMES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35367

FILED

MAY 21 2001

JANETTE M. BLOOM
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 trial, of murder in the first degree with the use of a deadly weapon and attempted murder with the use of a deadly weapon. In this appeal, Holmes alleges that the district court committed numerous errors. Additionally, Holmes contends that there was insufficient evidence presented to convict him of the murder and attempted murder charges. We disagree with all of Holmes's contentions and affirm his conviction.

First, Holmes contends that the district court abused its discretion by admitting Derrick Smith's testimony that Holmes stabbed him with a screwdriver before going to Claudia Dukes's apartment.¹ We disagree. Although we need not reach the issue because of Holmes's failure to object

¹See *Qualls v. State*, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) (holding that the trial court's determination to admit or exclude prior bad act evidence is to be given great deference and will not be reversed absent manifest error); *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (holding that a district court determining whether prior bad acts are admissible under NRS 48.045(2) must conduct a hearing on the record to determine the following prerequisites: (1) whether the incident is relevant to the crime charged; (2) whether the act is proven by clear and convincing evidence; and (3) whether the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice).

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during trial,² we nonetheless conclude that the district court did not abuse its discretion. In particular, we conclude that the district court acted within its discretion in determining that the evidence was relevant to show Holmes's intent to kill in light of the close proximity in time to the charged act regardless of any dissimilarity between the prior bad act and the act charged.³ Additionally, we conclude that the district court did not abuse its discretion in concluding that the prior bad act was established by clear and convincing evidence and was not outweighed by the danger of unfair prejudice.⁴

Next, Holmes contends that the district court erred in allowing Smith to offer inadmissible hearsay testimony about his conversation with Snyder.⁵ We disagree. We conclude that the statement was admissible non-hearsay because it was not admitted to show the truth of the matter asserted, but rather to show what Smith's intentions were in going to Holmes's apartment to speak with him about what happened to

²See *Phipps v. State*, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995) (holding that the failure to object to the admission of evidence will generally preclude appellate review); *Stauder v. State*, 112 Nev. 1, 908 P.2d 1373 (1996) (holding that a defendant fails to preserve for review a district court decision to admit evidence when he moved to exclude the evidence at a first trial, but failed to similarly move for exclusion in the second trial).

³See NRS 48.045(2) (providing that prior bad acts may be admitted as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); *Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 806-07 (2000) (noting that similarity of acts and closeness in time affect the relevance inquiry of *Tinch*).

⁴See *Qualls*, 114 Nev. at 902, 961 P.2d at 766 (holding that the trial court's determination is to be given great deference).

⁵See *Petrocelli v. State*, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985) (holding that the determination of whether to admit evidence is within the sound discretion of the district court, whose determination will not be disturbed unless manifestly wrong).

his money.⁶ Accordingly, we conclude that the district court did not abuse its discretion in admitting the statement.

Additionally, Holmes contends that the district court abused its discretion in denying Holmes's motion for mistrial as a result of Deborah Acuna's reference to Holmes as a "gang banger."⁷ We disagree. The reference here was a brief, inadvertent statement not solicited by the prosecutor, and the district court immediately sustained Holmes's objection and instructed the jury to ignore the statement.⁸ Accordingly, we conclude that the district court did not abuse its discretion in denying the motion for mistrial.

Next, Holmes contends that the district court erred in admitting a color photograph of Dukes's torso with a metal rod inserted into her head to illustrate the path of the bullet.⁹ We disagree. In this case, the State had the burden of proving that Dukes died from an intentional gun shot to her head. Therefore, the photograph helped ascertain the cause,

⁶See NRS 51.035 and 51.065 (providing that hearsay is an out of court statement offered into evidence to prove the truth of the matter asserted and is generally inadmissible unless excepted by statute).

⁷See *Owens v. State*, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980) (holding that the denial of a motion for mistrial is within the trial court's sound discretion and the court's determination will not be disturbed in the absence of a clear showing of abuse).

⁸See *Allen v. State*, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975) (affirming a district court's denial of a motion for mistrial based on a witness's inadvertent reference to a defendant's prior bad acts where the reference was inadvertent and unsolicited, and the district court immediately admonished the jury to disregard the statement); *Ewish v. State*, 110 Nev. 221, 234, 871 P.2d 306, 315 (1994) (holding that a witness's brief references to defendant's gang affiliation were innocuous because they were not memorable and ambiguous).

⁹See *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997) (holding that the admission of photographs lies within the sound discretion of the district court).

severity, and manner of death.¹⁰ Accordingly, we conclude that the district court did not abuse its discretion in admitting the photograph.


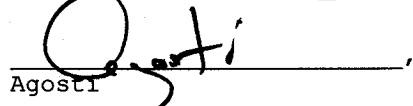
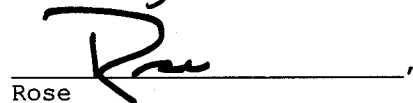
Finally, Holmes contends that there was insufficient evidence presented at trial to convict Holmes of the attempted murder of Toler and the murder of Dukes. We disagree. With respect to the attempted murder conviction, Toler testified that when he tried to escape, Holmes grabbed him and stuck the gun into his back before firing. Additionally, after Toler was shot and tried to escape through the window, Toler testified that Holmes again pointed the gun at him and pulled the trigger. With respect to the murder conviction, we note that the State proceeded on both a felony-murder theory and a premeditation theory. The evidence presented regarding the premeditation theory included: (1) the testimony from Smith and Acuna that Holmes became concerned that Smith or Dukes stole money from him; (2) Acuna's testimony that Holmes made threats toward a "bitch" who was presumably Dukes; (3) Shaw's testimony that Holmes had previously come to Dukes's apartment and that Shaw had become suspicious that something was wrong; (4) Smith's testimony that Holmes stabbed him, walked over to Dukes, and that Smith then heard a sound like firecrackers; and (5) Shaw's and Toler's testimony that while they were in Dukes's kitchen, they saw Holmes enter the apartment to talk with Dukes and then heard a gunshot from the living room where Dukes was later found dead. We conclude that when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded beyond a

¹⁰See Browne, 113 Nev. at 314, 933 P.2d at 192 (holding that despite gruesomeness, "photographic evidence has been held admissible when . . . utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction").

reasonable doubt that Holmes committed the willful, premeditated, and deliberate murder of Dukes.¹¹ Accordingly, we need not address the sufficiency of the evidence with respect to the felony-murder theory.¹²

Having concluded that all of Holmes's arguments lack merit, we

ORDER the judgment of the district court AFFIRMED.


Shearing J.

Agosti J.

Rose J.

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County District Attorney
David M. Schieck
Clark County Clerk

¹¹See *Hutchins v. State*, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (holding that on appeal, if the sufficiency of the evidence is challenged, "[t]he relevant inquiry for this court is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984))).

¹²See *Thomas v. State*, 114 Nev. 1127, 1145, 967 P.2d 1111, 1123 (1998) (holding that sufficient evidence was presented in a case where the State proceeded under alternate murder theories because, "regardless of whether sufficient evidence exists under a premeditation theory, [the defendant] was properly convicted of first degree murder under either the felony-murder or avoid-arrest theories").