IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL WINSETT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35995

FILED

NOV 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial. Appellant Michael Winsett was convicted of three counts of burglary, and one count each of grand larceny and robbery. Winsett alleges on appeal that the district court committed several errors. We disagree with all of Winsett's contentions and affirm his conviction.

First, Winsett contends that the district court abused its discretion in denying his motion to substitute his appointed counsel. We disagree. We conclude that the district court acted within its discretion in finding that Winsett's motion was untimely.[1] In particular, the district court acted within its discretion in finding that Winsett's motion had been filed for the purpose of delay because his reasoning that there was a breakdown in communication was unpersuasive. Further, granting the motion would have required a continuance of the trial, inconveniencing jurors as well as witnesses.[2]

We do note, however, that the district court erred by hearing Winsett's motion to substitute counsel when Winsett's appointed counsel was ill and unable to attend the hearing, and an alternate counsel was present in his place. Nonetheless, we conclude that the error was

[1]Thomas v. State, 94 Nev. 605, 607-08, 584 P.2d 674, 676 (1978) (reviewing district court decisions denying motions to substitute counsel under an abuse of discretion standard).

[2]See United States v. Corona-Garcia, 210 F.3d 973, 977 (9th Cir. 2000) (noting that delay in bringing the motion is weighed heavily against the defendant's request to substitute counsel when combined with unpersuasive arguments).

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harmless because the district court permitted Winsett to make a brief record concerning the factual basis for his motion.[3]

Next, Winsett contends that the district court abused its discretion in admitting prior bad-act testimony of officers who had previously arrested Winsett on charges of burglary, for which Winsett was convicted.[4] We agree; however, we conclude that the error was harmless.

In certain instances, admission of prior bad acts may be appropriate when used as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[5] In determining whether prior bad acts are admissible, the district court must conduct a hearing on the record to determine that: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[6]

After a thorough review of the record, we conclude that the district court was manifestly wrong in admitting Winsett's prior burglary conviction. The similarities between the charged burglaries and the prior burglary conviction do not demonstrate such "unique features" as to make the prior bad act probative of the perpetrator's identity; rather, these similarities are common in many burglaries.[7] Although we determine that the district court erred in admitting the testimony of the prior burglary conviction, we conclude that the error was harmless because there was overwhelming evidence of guilt when the fingerprint evidence is considered.[8]

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[3]See Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999) (noting that an error is harmless if in absence of the error the outcome would have been the same).

[4]Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) (noting that district court decisions in admitting evidence of prior bad acts are given great deference and will not be reversed absent manifest error).

[5]NRS 48.045(2)

[6]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996)).

[7]See Mayes v. State, 95 Nev. 140, 142, 591 P.2d 250, 252 (1979).

[8]Chappell v. State, 114 Nev. 1403, 1407, 979 P.2d 838, 840 (1998) (holding that the admission of prior bad acts may be harmless error where

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Finally, Winsett contends that his trial counsel provided ineffective assistance by: (1) refusing to test the State's fingerprint expert; and (2) failing to make an opening statement, lodging only two objections, and presenting no defense. Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court and are not appropriate for review on direct appeal, unless there has already been an evidentiary hearing.[9] In this case, there has been no evidentiary hearing, so appellant's claims are more appropriately raised in a post-conviction proceeding. Thus, we need not consider appellant's claims on direct appeal.

We conclude that Winsett's ineffective assistance of counsel claim is best left for post-conviction proceedings because an evidentiary hearing is necessary to determine his trial counsel's motives and strategy in this case. Notably, in a post-conviction proceeding, Winsett will have the opportunity to show that he received ineffective assistance of counsel and that he was prejudiced thereby, to the extent that the result of the proceedings would have been different.[10]

We conclude that Winsett's contentions lack merit. Accordingly we,

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

. . . *continued*
the result would have been the same if the district court had not admitted the evidence).

[9]See Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

[10]See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General/Carson City
Clark County District Attorney
Patti & Sgro
Clark County Clerk