IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARLIN J. IVY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65870

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery with a deadly weapon. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Marlin Ivy was convicted by a jury of battery with a deadly weapon, and on appeal argues reversal is required on multiple grounds. In this order we only consider Ivy's claims that (1) the district court abused its discretion by denying Ivy's motion for a mistrial based on juror misconduct, and (2) the district court abused its discretion by allowing the State to elicit testimony about a police patch.[1] While we

[1]Ivy also claims that insufficient evidence supports his conviction; however, this claim lacks merit because the evidence when viewed in the light most favorable to the State is sufficient to establish Ivy's guilt beyond a reasonable doubt as determined by a rational trier of fact. *See* NRS 200.481; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Ivy additionally argues the State's failure to disclose video surveillance was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). But, we are unable to make a determination on this issue, as Ivy failed to make an adequate record for review of the disappearance of the video received by the detective. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (holding this court will not consider matters that do not properly appear in the record on appeal).

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disagree the district court abused its discretion in refusing to grant a mistrial, we agree the district court abused its discretion by admitting testimony of Ivy's display of a police patch, thus failing to ensure a pro se defendant received a fair trial.

I.

Appellant Marlin Ivy, a customer at an adult bookstore, became involved in a verbal altercation with store employees when they refused to rent pornographic DVDs to him. Michael Studnicka, a sales clerk, informed Ivy that the account he was attempting to rent DVDs on had incurred late fees that needed to be paid before Ivy could rent movies. Manager Linda Sturgeon then ascertained Ivy was not the account holder and could not rent movies on the account. During this time, both Studnicka and Sturgeon noticed Ivy holding a police patch similar to what officers wear on the upper arms of their uniforms. Ivy did not explicitly claim to be a police officer, although he made several statements implying he was connected to police.

Brian Cooperman, another manager, became involved and called 9-1-1 when Ivy refused to leave the store. After Cooperman relayed information to the dispatch officer, Ivy moved to leave the store. Police dispatch suggested that Cooperman obtain Ivy's license plate number. Both Cooperman and Studnicka followed Ivy into the parking lot. Sturgeon, however, remained inside and did not witness what transpired in the parking lot.

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Finally, we have considered Ivy's claim that cumulative error requires reversal and we conclude it is without merit.

At trial, Studnicka and Cooperman alleged the following facts: As Ivy got into his car, Studnicka walked past Ivy to the back of Ivy's car to get the plate number, while Cooperman stood in front of the car. Ivy moved his head as if looking in the rearview mirror, put the vehicle in reverse, and hit Studnicka, who was standing directly behind the car, with enough force to roll Studnicka onto the trunk. Cooperman pulled his Taser out of his pocket and pointed it at Ivy. As Ivy accelerated forward to leave, Studnicka slid down the trunk, causing him to fall off the back of the car. Despite Ivy driving away from the bookstore, Studnicka was able to obtain Ivy's license plate number.

These events occurred after dark.[2] Studnicka allegedly sustained minor injuries but did not seek medical attention that night. Although the bookstore had multiple surveillance cameras, none captured the events in the parking lot and no surveillance video was admitted at trial. No physical evidence was admitted at trial to corroborate Studnicka and Cooperman's version of events or Studnicka's alleged injuries.

The State charged Ivy with battery with a deadly weapon. Prior to trial, Ivy was represented by counsel, but shortly before trial the district court granted Ivy's motion to represent himself pro se at trial, with prior counsel acting as standby counsel.

At trial, the State presented testimony from bookstore employees, police officers, and the detective, but presented no physical evidence. Ivy presented no witnesses, and did not testify. The State argued Ivy purposely escalated the confrontation with bookstore employees and intentionally backed his car into Studnicka. Ivy argued

[2]Testimony suggested the parking lot was well-lit.

Studnicka and Cooperman fabricated testimony and staged an accident because they disliked him as a customer.

During the trial recess immediately following Studnicka's testimony, Juror 10 approached Studnicka and Cooperman while all three were smoking on the courthouse balcony. Juror 10 engaged in an approximate five-minute conversation with Studnicka regarding weddings and dogs. When the district court learned of the incident, it held a hearing and individually questioned Juror 10 and all other jurors who potentially overheard the conversation. Ivy moved for a mistrial, arguing Juror 10 and Studnicka had bonded during their conversation. The district court ultimately determined all jurors, including Juror 10, could remain fair and impartial, and denied Ivy's motion.

After a five-day trial, the jury convicted Ivy of battery with a deadly weapon. Ivy appeals.

II.

We begin our analysis by noting a defendant, "whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court and prosecutor to see that he gets it." *Garner v. State*, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962). A defendant's decision to proceed pro se "increase[s] the [district] court's burden to ensure a fair trial." *Miller v. State*, 86 Nev. 503, 506, 471 P.2d 213, 215 (1970). Errors that are "patently prejudicial and inevitably inflame or excite the passions of jurors against the accused" are excluded from the general rule that this court will not consider arguments not preserved for appeal. *Rhodes v. State*, 91 Nev. 720, 724, 542 P.2d 196, 198 (1975). In particular, where prosecutorial misconduct is so prejudicial as to endanger the defendant's right to a fair trial, the trial court has a duty to intervene sua sponte. *See Sipsas v. State*, 102 Nev.

119, 125, 716 P.2d 231, 235 (1986). Further, if the State's case is not strong, evidence or misconduct that misleads the jury or appeals to the jury's sympathy, passion, or prejudice is magnified and more likely to be unduly prejudicial. *Garner*, 78 Nev. at 374, 374 P.2d at 530.

We are cognizant that in many cases errors prejudicing the defendant will ultimately be harmless given the overall progression of the case and the overwhelming evidence against the defendant. But we recognize that the harmless error rule should not be used to shield a trial judge or the prosecution from the effect of prejudicial errors affecting a defendant's substantial rights. *See Garner*, 78 Nev. at 375-76, 374 P.2d at 530-31.

In the present case, Ivy, a pro se defendant, faced designation as a habitual offender and a significant prison sentence. Although the State presented testimony from nine witnesses at trial, only two witnesses observed the altercation that night in the parking lot involving the charge of battery with a deadly weapon and these witnesses could not testify as to Ivy's thoughts or intent at the time he backed into Studnicka. Further, Ivy vehemently contested the State's version of events and any intent to batter Studnicka. Thus, although there was enough evidence to find battery with a deadly weapon, that evidence was hardly overwhelming under the facts of this case. With these facts in mind, we turn to Ivy's arguments.

Motion for a mistrial

Ivy argues the district court committed reversible error in denying his motion to declare a mistrial after Juror 10 engaged in clear misconduct. A juror engages in misconduct by failing to adhere to a court's admonishment. *See Valdez v. State*, 124 Nev. 1172, 1186, 196 P.3d 465, 475 (2008). To prevail on a motion for a mistrial, the defendant must

demonstrate both juror misconduct and "a reasonable probability or likelihood that the juror misconduct affected the verdict." *Meyer v. State*, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003). Upon a motion for a new trial, the district court must conduct a hearing, and in that hearing determine (1) whether the juror violated the court's admonishment, and (2) whether the misconduct is prejudicial. *Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005). In determining prejudice, the court must evaluate (a) "the quality and character of the misconduct," (b) "whether other jurors have been influenced by the discussion," and (c) "the extent to which a juror who has committed misconduct can withhold any opinion until deliberation." *Id.* at 163-64, 111 P.3d at 1082. "Absent clear error, the district court's findings of fact will not be disturbed." *Meyer*, 119 Nev. at 561, 80 P.3d at 453.

Here, Juror 10 engaged in clear misconduct by conversing with Studnicka despite the court's admonition not to speak with any witness. Upon learning of the misconduct,[3] the district court followed the procedure set forth in *Viray*. The district court concluded that Juror 10 initiated a conversation with Studnicka while on the smoking balcony, and then evaluated the quality and character of the misconduct. The district court found the short conversation between Juror 10 and Studnicka did not involve the facts of the case, and questioned Juror 10 regarding whether this conversation would affect either his evaluation of the witnesses' credibility or his ability to be impartial, to which Juror 10 replied he was not affected by the conversation.

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[3]We are cognizant this trial did not proceed smoothly, and the district court even expressed its frustration at one point, stating "[w]onder sometimes if some trials are cursed."

Further, the district court specifically questioned other jurors who may have overheard the conversation regarding whether they were influenced by the misconduct, and determined they could remain fair and impartial. Finally, the judge determined Juror 10, despite his misconduct, could remain fair and impartial. Although the facts of what transpired between Juror 10 and Studnicka are concerning, we recognize the district court followed the correct procedure in considering Ivy's motion for a mistrial, sufficiently questioned and observed the jurors involved, and carefully considered the facts. Accordingly, the district court's findings are entitled to our deference and we cannot say under these facts[4] the district court clearly erred in denying the motion for a mistrial.

Other bad acts evidence

Ivy argues testimony regarding his display of the police patch was inadmissible under NRS 48.045(2). The State counters the evidence was properly admitted under NRS 48.035 because the evidence was necessary for the State to give an accurate account of the crime. In admitting the testimony of Ivy's display of the police patch, the State seemingly argued for admission under both statutes and the district court did not clarify which statute it relied upon in admitting the evidence. We review the court's decision to admit or exclude evidence for abuse of discretion or manifest error. *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

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[4]For example, this is not a case where the juror and witness discussed the case, or where the juror was exposed to "significant extraneous information." *See Meyer*, 119 Nev. at 565, 80 P.3d at 455 (explaining that only in the most egregious of circumstances may extrinsic influence or intrinsic jury misconduct be grounds for a motion for a mistrial).

During trial, before opening statements, Ivy presented an oral motion in limine to exclude evidence of his displaying a police patch to bookstore employees, as the jury might believe that he committed an uncharged crime of impersonating a police officer. The State countered that this evidence was necessary in order to explain the crime. The district court held the evidence of the patch was admissible, finding that "the interactions and what leads them to call 9-1-1 and ultimately what leads them to walk outside of the store where he gets hit is . . . relevant to explain that[,] not for a person of bad character. . . . the evidence . . . [is] part of the incident that brings us here today and is — goes to intent, motive, lack of mistake, et. cetera." And, prior to admitting the evidence at trial, the district court gave the jury a limiting instruction pursuant to *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001).

Although bad act evidence may be admitted under NRS 48.045(2) for purposes other than proving propensity, or under NRS 48.035(3) (the res gestae statute) if necessary to tell the story of the crime, evidence is generally inadmissible if it is not relevant[5] or if the prejudicial effect substantially outweighs the probative value or would divert the jury from the real issues. NRS 48.035(1); *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 485, 851 P.2d 459, 463 (1993). Because it is unclear whether the district court admitted the evidence under NRS 48.045(2) or NRS 48.035(3), we consider both statutes. We conclude the district court abused its discretion in admitting the evidence of the police patch under either statute.

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[5]Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015

NRS 48.045(2)

NRS 48.045(2) allows for the admission of other bad acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," or for other relevant non-propensity purposes. *See Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1249 (2012) (holding the admission of other bad acts is not limited to the purposes listed in NRS 48.045(2)). The Nevada Supreme Court has been cautious in approving the admission of extraneous or unduly prejudicial uncharged bad act evidence and has reversed many convictions based upon its improper admission. *See, e.g., Newman v. State*, 129 Nev. ___, ___, 298 P.3d 1171, 1178 (2013) (holding evidence of a prior bad act was not admissible under NRS 48.045(2) where the purposes it was offered for, mistake and accident, were not at issue); *Fields v. State*, 125 Nev. 776, 783-84, 220 P.3d 724, 728-29 (2009) (holding the district court erred in admitting evidence that was irrelevant and prejudicial).

Before admitting bad act evidence, a district court must "determine whether: (1) the evidence is relevant, (2) the prior bad act is proven by clear and convincing evidence, and (3) the danger of unfair prejudice substantially outweighs the evidence's probative value." *Id.* at 782, 220 P.3d at 728. We review the admission of other bad act evidence for abuse of discretion. *Newman*, 129 Nev. at ___, 298 P.3d at 1178. Failure to make the necessary determinations on the record is an abuse of discretion and is reversible unless the record sufficiently demonstrates the evidence is admissible under the three factors listed above, or this court determines the jury would have reached the same verdict had the district court not admitted the evidence. *See Qualls v. State*, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

Here, the district court failed to make the requisite determinations on the record before admitting the police patch testimony. Critically, evidence of Ivy displaying a police patch while a bookstore employee was on the phone with 9-1-1 was not relevant to prove Ivy intended to commit the crime of battery with a deadly weapon. Displaying a police patch does not tend to show whether or not Ivy intentionally backed his car into Studnicka in the parking lot after the argument inside the store. Nor was this evidence relevant to show absence of mistake or accident as to the charges because Ivy's displaying a police patch during the 9-1-1 call is not relevant to the issue of whether Ivy committed the act of battery with a deadly weapon at a later time, outside in the parking lot. Finally, the testimony describing Ivy's display of a police patch was not relevant to prove a motive for Ivy's actions of backing a vehicle into Studnicka.

Importantly, the district court never expressed its findings on whether the bad act was proven by clear and convincing evidence, or whether the danger of unfair prejudice substantially outweighed the evidence's probative value. We note that testimony regarding Ivy's display of a police patch is prejudicial under these facts and has no relevance to the charge of battery with a deadly weapon.

The State's offer of this evidence implied Ivy was a person of bad character without a corresponding legal justification. Here, both the victim and witness testified that the patch was irrelevant to their perception of the events. Both Studnicka and Sturgeon testified that Ivy's displaying the police patch did not concern them, and, further, it did not affect their actions during the altercation outside in the parking lot. This character evidence only served to portray Ivy as a customer who

unlawfully impersonated a police officer while attempting to intimidate bookstore employees into renting him pornographic DVDs. Yet, the issue before the jury was whether Ivy willfully battered Studnicka with his car (the State's argument); or whether bookstore employees fabricated or staged the incident or, even if Ivy may have hit Studnicka with his vehicle, whether the act was unintentional and caused solely by Studnicka purposely standing behind Ivy's car (Ivy's argument).

Testimony regarding Ivy's display of the police patch was overly prejudicial to Ivy because this evidence effectively impeached his character since it is a crime to impersonate a police officer, making it more likely the jury would favor the State and find Ivy guilty.[6] This prejudicial effect is more pronounced because the State's case largely relied on the credibility of two employee witnesses, Cooperman and Studnicka, neither of whom could testify as to whether Ivy intentionally backed the car into Studnicka, a key question in this case. The evidence also confused the issues by leading the jury to wonder why Ivy had a police officer's patch. Accordingly, the danger of unfair prejudice substantially outweighed the minimal probative value.

For these reasons, we conclude that the district court abused its discretion in admitting this evidence pursuant to NRS 48.045(2) as this evidence is not relevant as to Ivy's intent, absence of mistake or accident, or his motive for committing battery with the use of a deadly weapon. Further, the district court failed to make detailed findings regarding its

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[6]Although the court issued a *Tavares* instruction, we cannot say the instruction sufficiently mitigated the prejudicial effect here.

admission pursuant to this statute, and this character evidence was overly prejudicial and not probative.

NRS 48.035(3)

The State argued below, and the district court agreed, that testimony regarding Ivy's display of the police patch was relevant "as part and parcel with this crime" because this evidence explained the bookstore employee's actions and countered Ivy's theory of the altercation. We conclude the district court manifestly erred by ruling this evidence was admissible under the res gestae doctrine because the State failed to show its witnesses could not describe the charged offense without referring to the uncharged bad act.

NRS 48.035(3) permits the district court to admit evidence that "is so closely related to . . . [the] crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime." This exception is narrowly construed and limited to the express provisions of NRS 48.035(3). *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005); *Tabish v. State*, 119 Nev. 293, 307, 72 P.3d 584, 593 (2003). The evidence must be so interconnected to the crime at issue that it would be impossible for the witness to describe the act in controversy without reference to the other act or crime. *Bellon*, 121 Nev. at 444, 117 P.3d at 181. Because the statute refers to a witness's ability to describe, rather than explain, the charged crime, evidence of other acts may not be admitted under NRS 48.035(3) "to make sense of or provide a context for a charged crime." *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005). We review the erroneous admission of evidence under NRS 48.035(3) for harmless error. *Bellon*, 121 Nev. at 445, 117 P.3d at 181.

Here, the account of what the employees did during the verbal altercation or what occurred afterwards in the parking lot could easily have been described without reference to Ivy's actions of showing a police patch during the phone conversation with 9-1-1.[7] In other words, testimony of the police patch was not so interconnected to the crime of battery with a deadly weapon that the witnesses could not describe the events relevant to the crime without reference to the patch. Evidence regarding Ivy's display of a police patch was, therefore, not admissible as res gestae under NRS 48.035(3).

Here, the central question for the jury was whether Ivy knew Studnicka was standing behind his car when Ivy put it in reverse, and consequently whether Ivy acted with criminal intent. Ivy's defense was that he lacked any criminal intent, and the evidence regarding Ivy's intent was entirely circumstantial. Because admission of the police patch served to portray Ivy as a generally bad person, it was prejudicial and damaging to Ivy's character, and, critically, could easily have swayed the jury on the central question of Ivy's knowledge of Studnicka's presence behind his car. Courts have long recognized the maxim that one cannot "unring a bell." *See, e.g., Zana v. State*, 125 Nev. 541, 545-46, 216 P.3d 244, 247 (2009). Under these circumstances, we conclude the error was not harmless but rather may have played an important part in jury's resolution of a key question. For these reasons, we are constrained to reverse the judgment.[8]

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[7]We note the 9-1-1 call should have been sanitized to remove any reference to Ivy's display of the police patch.

[8]Our review of the record reveals that other likely irrelevant and unduly prejudicial evidence was presented against Ivy, but this evidence was not objected to at trial or raised on appeal. We mention this evidence

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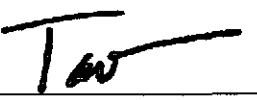
III.

Although the district court did not abuse its discretion in denying Ivy's motion for a mistrial, the district court abused its discretion in admitting evidence of the police patch. Accordingly, we

ORDER the judgment of conviction REVERSED, and we REMAND this matter to the district court for a new trial.

_____, C.J.
Gibbons



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in light of our decision to remand this case for a new trial. The State elicited testimony of specific DVD titles Ivy had previously rented from the bookstore. These titles were explicit and graphic, and one suggested incest. Further testimony showed Ivy's account had been closed and sent to collections for nonpayment and late fees, and that Ivy thereafter may have forced a female friend to open a new account so he could continue to rent pornographic movies. In this case, the testimony stating the title of just the first pornographic DVD would alert the court that intervention may be needed. *See Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986) (holding a district court must intervene sua sponte to prevent prejudicial prosecutorial misconduct that threatens the defendant's right to a fair trial); *Miller v. State*, 86 Nev. 503, 506, 471 P.2d 213, 215 (1970) (noting a defendant's decision to represent himself increases the court's burden to ensure a fair trial).

cc: Hon. Elissa F. Cadish, District Judge
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