

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE ABRAHAM TAFOLLA-FLORES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68405

FILED

DEC 16 2015

ORDER OF AFFIRMANCE

TRACEE K. LINDEMAN
CLERK OF SUPERIOR COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Appeal from judgment of conviction following a jury trial.
Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

RELEVANT FACTS AND PROCEDURAL HISTORY

Appellant Jose Abraham Tafolla-Flores was convicted of one count of Burglary and one count of Destruction or Injury to Property. The charges arose from an incident that occurred about two weeks before Christmas 2014.

The victim, Samuel Adams, had purchased Christmas presents for his wife, son and daughter and left them overnight in his car. The presents included a Fender acoustic guitar for his son, a Disney doll and pony play set for his daughter, and a navy blue plush fleece blanket for his wife. The next morning, Adams saw that the window of his car had been broken and saw the Appellant carrying the gifts from Adams' car to another car parked nearby. Adams chased the Appellant and grabbed him, but the Appellant jumped into the car and drove away, dragging Adams alongside for some distance. The wrapping paper on one of the presents was slightly torn during the struggle. Adams called the police and gave an accurate description of the perpetrator's clothes and car, and the Appellant was apprehended a few minutes later with the stolen presents still in his car.

During the ensuing trial, the Appellant waived his right to remain silent and testified. He denied being the perpetrator, explaining that the gifts were given to his sister by her godmother in California, and that his mom asked him to transport the gifts to his sister's home. When his attorney asked him, "You didn't know what was in the presents?" the Appellant responded with the following narrative:

I didn't know - - my mother is here and everybody were here. They told me give these to your sister. It is from my sister's godmother. So I'm like, all right, I will take them down. You know, I was like all right. Ain't no problem. I got nothing to hide.

It was about money. I have got money. But these presents, I feel bad for the guy what happened. I got money myself. There is no need for that, for me to do that.

Later, the Appellant clarified: "I mean that I had a job at the time. Me and my girlfriend work. We got two jobs."

After the direct examination concluded, the State requested a hearing outside the presence of the jury to argue that Appellant placed his character in issue through his testimony. The State made the following argument:

It is the State's position that during the testimony that we just heard the defendant placed his character into question, specifically when he stated that, "You know, why would I need to do this? I have a job," saying essentially that he is a good guy and that he doesn't need to do this burglary.

Therefore, having placed his character into issue, the State is permitted to cross examine him regarding specific instances of conduct.

The State argued that it should be able to use two specific instances on cross-examination: a 2012 guilty plea to attempted burglary after leaving his DNA behind in a car that was burglarized, and a 2011 conviction for gross misdemeanor possession of stolen property arising from an attempt to sell a speaker stolen from a vehicle. The district court ruled as follows:

All right. I think that in the course of answering the questions that were put to him and in his narrative, ongoing narrative, he expressed indignance [sic] at the fact that he was suspected of having stolen these things. And in effect what he was saying was he was run roughshod by the police officer and there was no apparent reason.

And he gave or wanted to give the impression that he doesn't do this stuff. And then he made the statement, "I didn't have to do this stuff because I was employed." Evidently he was employed when that case that he is awaiting sentencing on is — happened. [sic] So I am going to allow the questioning.

The State then cross-examined the Appellant, and he admitted that he had been in possession of stolen property in the 2011 case. He also agreed that he pleaded guilty in relation to the 2012 case because, "I was just trying to end that case."

When instructing the jury, the court gave a limiting instruction pursuant to *Tavares v. State*, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001) regarding the use of the prior bad acts that is not challenged in this appeal. After hearing the evidence, the jury convicted the Appellant.

ANALYSIS

This appeal raises a single issue: whether the district court abused its discretion in allowing the State to cross-examine the Appellant

regarding his previous criminal convictions. NRS 48.045(1) states as follows:

Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Evidence of a person's character or a trait of his or her character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence. . .

Here, the State argues to us, as it did to the district court, that the district court did not abuse its discretion because the Appellant placed his character into issue by testifying that he did not need to commit the charged crime because he "had money," was employed, and did not need to steal anything.

In *Jezdik v. State* the Nevada Supreme Court held that a testifying defendant opened the door to presentation of his prior bad acts when defense counsel asked Jezdik on direct examination, "Have you ever been accused of anything prior to these current charges?" and Jezdik responded, "No." 121 Nev. 129, 134, 110 P.3d 1058, 1062 (2005). The Nevada Supreme Court described the general rule regarding character evidence as follows:

[a]s a general matter, when a defendant chooses to introduce character evidence in the form of reputation or opinion evidence, the prosecution is similarly limited in its rebuttal evidence and can only inquire into specific acts of conduct on cross-examination.

Id. at 136, 110 P.3d at 1063.

In *Daniel v. State*, "[o]n direct examination, defense counsel asked appellant, 'So you didn't necessarily at that point [July 1997] have a

great reputation for violence, as far as you knew?" Appellant answered, "No, no, not that I knew of." 119 Nev. 498, 512, 78 P.3d 890, 899 (2003) (alteration in original). The Nevada Supreme Court held that Daniels had opened the door to cross-examination regarding "relevant specific acts," but those acts were limited to convictions and the State could not cross-examine the defendant on arrests that did not result in convictions. *Id.*, 78 P.3d at 900.

In the present case, the Appellant's direct testimony went considerably beyond merely denying committing the offense. Had he simply denied the offense and said no more, he would not have opened the door to questioning about his prior convictions. Instead, the Appellant went on to explain that he would not need to steal anything because he was employed and had his own money. Once he did that, he opened the door to cross-examination about his prior convictions which were all remarkably factually similar to the offense at hand (all involved breaking into automobiles and stealing items). The Appellant's explanation placed into issue his truthfulness as well as whether he had also been employed at the time of his other prior burglaries and thefts, and also whether the source of his money might have been those other burglaries and thefts rather than legitimate employment. At the very least, the district court did not abuse its discretion in interpreting the Appellant's explanation in this manner.

In case factually similar to the case at hand, the Ninth Circuit found that, under the federal analog to NRS 48.045, a defendant had opened the door to cross examination regarding his prior bad acts by testifying that he had legitimate sources of income, and was a "working man and a family man" and therefore did not need to sell cocaine for


money. *United States v. Mendoza-Prado*, 314 F.3d 1099, 1105 (9th Cir. 2002) (applying Fed. R. Evid. 404(a)(1)).

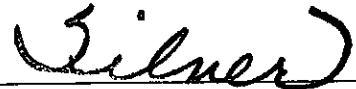
Here, some of the State's questions were overly prejudicial and went beyond impeachment under NRS 48.045(1) and therefore should have been stricken under NRS 48.035. Merely because the defendant opened the door to some cross-examination under NRS 48.045(1) does not mean that the prosecutor was entitled to go as far as he did. However, we conclude that, on balance, no abuse of discretion occurred. Furthermore, even if it could be said that some error occurred, the error would have been harmless because the evidence against the Appellant was overwhelming. He was positively identified as the perpetrator by the victim, his car matched the car used in the crime, he was apprehended with clothing in his car that matched that described to the police by the victim, and he was apprehended minutes after the crime a short distance away with the victim's Christmas gifts in his car (a Fender acoustic guitar, a Disney doll and pony play set, and a navy blue plush fleece blanket), still wrapped in the same wrapping paper (but now torn) that the victim had described to police at the scene and later identified as his (the victim even showed the original roll of wrapping paper to the police, and it matched the torn wrapping paper on the presents found in the Appellant's car). Furthermore, the Appellant did not have any children to buy such presents for himself.

For these reasons, we conclude that the district court did not abuse its discretion in concluding that the Appellant had opened the door to cross-examination regarding his prior convictions, and we therefore

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jerome M. Polaha, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk