

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TROY VANCE WISE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68785

FILED

AUG 10 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Hendrich*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of stolen property. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

The issues in this appeal arise out of the district court's admission of uncharged bad act evidence. We address (1) whether the district court abused its discretion by denying appellant Troy Wise's motion in limine to exclude evidence of alleged stolen property not listed in the information, and (2) whether the district court abused its discretion in admitting evidence of Wise's drug activity, including the exchange of drugs for property.¹

Wise challenges the admission of evidence related to alleged stolen property not listed in the information for two reasons. First, Wise contends the danger of unfair prejudice substantially outweighed the

¹We do not recount the facts of the case except as necessary to our disposition.

evidence's probative value.² Second, Wise argues the evidence was inadmissible under NRS 48.035(3). We review a district court's ruling on a motion in limine for an abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005).

Evidence of other crimes, wrongs, or acts is admissible under NRS 48.045(2) for a non-propensity purpose and NRS 48.035(3) as res gestae. If the district court admits evidence under NRS 48.045(2), a reviewing court will evaluate whether the district court abused its discretion in assessing the three *Tinch* factors. See *Bigpond*, 128 Nev. at 117, 270 P.3d at 1250-51. On the other hand, if the district court admits evidence under NRS 48.035(3), a reviewing court will evaluate whether the district court abused its discretion in concluding that the act or crime “[was] so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime.” NRS 48.035(3); see *State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) (clarifying that “the determinative analysis is not weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence,” but rather “whether witnesses can describe the crime charged without referring to related uncharged acts”).

²As Wise only challenges the district court's assessment of the third *Tinch* factor, see *Tinch v. State*, 133 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), our review does not extend to the first two *Tinch* factors. See *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012) (listing the three factors the district court must evaluate before admitting uncharged bad act evidence under NRS 48.045(2)).

Here, the district court's order does not identify the legal basis for its decision. In denying Wise's motion in limine to exclude evidence of uncharged stolen property, the district court's order states only that "the Court will permit the introduction of testimony regarding the other items of alleged stolen property found in Defendant's residence. The Court will permit discussion of such items as it relates to the nature and the state of [Wise's] residence." This language could indicate a non-propensity purpose under NRS 48.045(2), *res gestae* under NRS 48.035(3), or both. As the State argued the evidence was admissible under both statutes in its opposition to the motion, and Wise argued the evidence was inadmissible under both statutes, the parties' motions do not aid in our analysis.

The district court's order indicates it held a hearing on the parties' motions during which it heard oral arguments, but Wise did not provide the hearing transcript in the record on appeal. Thus, with only the parties' motions and the district court's terse order in the record on appeal, we cannot determine the basis for the district court's ruling and thus, properly assess whether it abused its discretion in admitting the evidence. Accordingly, we conclude Wise has failed to demonstrate that he is entitled to relief.³ *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (providing that appellant has the burden to make a proper appellate record).

³Nonetheless, even assuming the district court improperly admitted the evidence, we conclude the error was harmless in light of the overwhelming evidence of Wise's guilt. *See Bellon v. State*, 121 Nev. 436, 445, 117 P.3d 176 (2005).


Next, Wise argues that the district court improperly admitted evidence of uncharged drug activity under NRS 48.045(2). “A district court’s decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error.” *Fields v. State*, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009) (alteration in original) (quoting *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006)). “[A] manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *Jones v. Eighth Judicial Dist. Court*, 130 Nev. ___, ___, 330 P.3d 475, 481 (2014).


Although NRS 48.045(2) permits the district court to admit uncharged bad act evidence for non-propensity purposes, “[a] presumption of inadmissibility attaches to all prior bad act evidence . . . because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.” *Bigpond*, 128 Nev. at 116, 270 P.3d at 1249 (internal citation omitted). To overcome the presumption of inadmissibility, the district court must determine at a hearing outside the presence of the jury that “(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant’s propensity, (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.” *Id.* at 117, 270 P.3d at 1250.

Here, the district court admitted the evidence under NRS 48.045(2) and NRS 48.035(3), but Wise again only challenges the admission of the evidence under the third *Tinch* factor, relevant to admissibility under NRS 48.045(2). Accordingly, even if we were to conclude the district court improperly admitted the evidence under NRS

48.045(2),⁴ this conclusion would not entitle Wise to relief because the district court also admitted the evidence as res gestae and Wise does not challenge the admission of evidence under NRS 48.035(3) on appeal. Therefore, we conclude Wise has failed to demonstrate that he is entitled to relief.⁵ See *Shade*, 111 Nev. at 894, 900 P.2d at 331 (providing that the determinative analysis in admitting evidence under NRS 48.035(3) is not weighing the evidence's probative value against its prejudicial effect, but "whether witnesses can describe the crime charged without referring to related uncharged acts"). Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

⁴We note that since the record shows the district court followed the correct procedure under *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), we could reverse only upon a showing of manifest abuse. See *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005).

⁵We express no opinion concerning whether the district court properly admitted the evidence under NRS 48.035(3).

cc: Hon. Scott N. Freeman, District Judge
Washoe County Alternate Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk