IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELTON LASKA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69537

FILED

SEP 13 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of burglary. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Appellant Elton Laska argues that the district court erred in admitting certain evidence obtained at the time of his arrest and testimony relating thereto; that there was insufficient evidence to support his conviction; and that the district court erred in refusing to give his proposed jury instruction.[1]

First, Laska argues that photos of Laska, a photo of a ceramic spark plug found on his person taken at the time of his arrest, and an officer's testimony relating to the same were irrelevant, unduly prejudicial, and constituted improper bad act evidence under NRS 48.045.

The determination to admit or exclude evidence is within the district court's discretion and will be reviewed for "an abuse of discretion

[1]We do not recount the facts except as necessary to our disposition.

or manifest error." *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (citing *Means v. State*, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004)). Relevant evidence is that which 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. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury. NRS 48.035.

Here, the district court determined the photo of the ceramic spark plug was not more prejudicial than it was probative, and was relevant to show how Laska may have broken the glass door as seen in the surveillance video. The district court also determined the photos of Laska were relevant to show his appearance near the time of the subject incident and nothing else in the photos was otherwise prejudicial. Additionally, there was no reason the jury would expect this evidence was related to any other crime. *See Browning v. State*, 120 Nev. 347, 358, 91 P.3d 39, 47 (2004) (a mug shot had no appreciable prejudicial effect because jurors had no reason to assume it was taken in any other case but the one for which the defendant was being tried). Therefore, we cannot say the district court abused its discretion in determining the photos and testimony were relevant and more probative than prejudicial.

Laska also argues the photos and Officer Harrison's statements constituted other bad act evidence, under NRS 48.045, and that the district court failed to issue a limiting instruction under *Tavares v. State*, 117 Nev. 725, 733 (2001). District courts have considerable

discretion in determining the admissibility of other bad acts evidence, and we will affirm absent a manifest abuse of discretion. *Diomampo v. State*, 124 Nev. 414, 429-30, 185 P.3d 1031, 1041 (2008). NRS 48.045(2) prohibits evidence of other crimes, wrongs or acts to prove a person's character unless the evidence tends to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the photos of Laska are not evidence of other bad acts because the photos do not suggest any other chargeable offense. As noted above, the jury had no reason to believe the photos were taken in connection with any crime other than the instant offense. *See Browning*, 120 Nev. at 358, 91 P.3d at 4. Although possession of the ceramic spark plug might be considered a bad act (the State initially charged Laska with possession of a burglary tool for this very conduct), the photo and testimony about the ceramic spark plug found on Laska's person were not evidence of an "other" bad act offered to prove Laska's propensity to commit burglaries, pursuant to NRS 48.045. *See Bigpond*, 128 Nev. at ___, 270 P.3d at 1248-49 (exclusion under NRS 48.045 applies only when the evidence is offered to prove the character of a person and that the person acted in conformity).

Laska's possession of the ceramic spark plug tended to explain how the glass door was broken as shown in the surveillance video and made it more likely than not that Laska was the person depicted in the surveillance video. Additionally, the jury did not know and had no reason to believe the ceramic spark plug was related to any other crime. Thus, the evidence of the ceramic spark plug was not offered to show Laska's

propensity for criminal behavior and suggest that he acted in conformity therewith, but rather was offered as circumstantial evidence of the instant offense.[2] Because we conclude this evidence was not bad act evidence under NRS 48.045, we necessarily conclude the district court did not err in failing to give a limiting instruction pursuant to *Tavares*.[3]

Second, Laska asserts there was insufficient evidence to support his conviction. In reviewing a challenge to the sufficiency of the evidence, this court must determine "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." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is for the jury,

---

[2]Even if the evidence was subject to NRS 48.045, the district court held a *Petrocelli* hearing and determined the evidence was admissible. *See Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985); *Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1250 (2012). Although the district court did not state the evidence was offered for a non-propensity purpose or that it was proved by clear and convincing evidence, there is sufficient evidence in the record to support the district court's admission of the evidence. *See Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (the district court's failure to make the necessary findings does not mandate reversal if the record is sufficient to determine the evidence is admissible).

[3]We again note that even if the evidence was bad act evidence under NRS 48.045, the district court did give a limiting instruction in its final charge to the jury and any error in failing to give it when the evidence was admitted was harmless. *See Tavares*, 117 Nev. at 732-33, 30 P.3d at 1132-33 (a failure to give a *Tavares* limiting instruction is reviewed for harmless error).

the trier of fact, to determine the weight of the evidence and the credibility of the witnesses, and whether these are sufficient to meet the elements of the crime. *Id.* at 56, 825 P.2d at 573. NRS 205.060 states "[a] person who "by day or night, enters any . . . shop, warehouse, store . . . or other building . . . with the intent to commit grand or petit larceny . . . or any felony . . . is guilty of burglary."

Here, a jury acting reasonably could have viewed the video surveillance and determined Laska was the individual entering True Core Motors, a shop, by breaking the glass door while the shop was closed and taking the cash register once inside. Additionally, the jury heard evidence that at the time of his arrest, Laska possessed a ceramic spark plug tied to a string, which Officer Harrison testified in his experience such an item can be used to break glass in a similar manner to that depicted in the surveillance video. Based on these facts, a rational trier of fact could have found the essential elements of burglary and that Laska was the person depicted in the surveillance video, beyond a reasonable doubt.

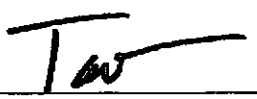
Lastly, Laska argues the district court erred when it refused to give his proposed jury instruction regarding evidence capable of two different interpretations. District courts have broad discretion to settle jury instructions and will be affirmed absent an abuse of that discretion. *Crawford v. State*, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003).

While the proposed jury instruction in this case was permissible, it was not error to refuse to give the instruction if the jury was properly instructed on the reasonable doubt standard. *Bails v. State*, 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976). Because the district court

properly instructed the jury on reasonable doubt, we cannot say the district court abused its discretion in refusing to give Laska's proposed instruction. Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Carolyn Ellsworth, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk