

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SCOTT MICHAEL HEIDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69301

FILED

SEP 21 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 burglary, battery with the intent to commit a crime, and robbery. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

On March 30, 2014, victim Sondra Lee Moyer was staying at the Caesars Palace Hotel. She awakened early that morning and left her room to get a coffee. When she returned a few minutes later, she saw a man going through her wallet. Moyer startled the man by screaming at him, the man screamed back, and they charged each other. Moyer threw her coffee at the man and the man grabbed Moyer and threw her to the ground. The man fled with about \$400 in cash.

Moyer called the hotel security office and the security office called the police. Moyer provided a description of the man who entered her room to the security officers and police officers, she identified the man in photographs pulled from the hotel's video surveillance system, and she later identified the man in a photographic lineup prepared by the police. The police recognized the man as Scott Heiden.

On June 16, 2014, the State charged Heiden with burglary, battery with the intent to commit a crime, and robbery. The justice court

found probable cause to bind Heiden over for trial in the district court, Heiden was arraigned in the district court, and Heiden entered a plea of not guilty to the charges. The State subsequently filed a pretrial motion to admit evidence of other crimes that Heiden committed on April 9, 2013, and December 10, 2013. The State argued this evidence was admissible to prove intent, identity, common scheme or plan, and for any other non-propensity purpose. Heiden opposed the motion.

On January 8, 2015, the district court conducted a *Petrocelli*¹ hearing during which it heard testimony from the State's witnesses and argument from the parties. The district court ruled the State could introduce evidence of the April 9, 2013, incident to show intent. The district court found this prior bad act was relevant to Heiden's intent to enter a hotel room to commit a crime therein, the incident had been proven by clear and convincing evidence, and the evidence was "more probative than prejudicial given the fact that the intent to commit a crime—to enter the room and commit a crime therein is one of the essential elements the State must prove." The district court subsequently entered a written order memorializing its prior-bad-act ruling.

On August 11, 2015, the parties presented their opening statements to the jury. The State informed the jury it would hear testimony regarding another incident and the reason for this testimony was to show that Heiden was in fact the person Moyer saw in her room. Heiden did not object to the State's statement or its description of the other incident. Instead, he firmly placed identity at issue by telling the jury the circumstances under which Moyer identified him as the man in

¹*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

her room did not meet the beyond-a-reasonable-doubt standard. Following the parties' opening statements, the district court asked Heiden if he was conceding the fact that he had been arrested or charged in the past. Heiden reminded the district court that it had previously conducted a *Petrocelli* hearing and ruled that this evidence was admissible.

The State called two witnesses to testify about the prior bad act during its case in chief. The State did not request a limiting instruction before introducing this testimony, and the district court did not issue a limiting instruction sua sponte as required by *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001).² A security investigator testified that the security department baited a hotel room in the Quad Hotel and Casino on April 9, 2013, in an effort to curb an increase in hotel room burglaries. They placed \$660 inside a wallet, placed the wallet and some casino chips on a table, left the door slightly ajar, and monitored the room with a surveillance camera. Heiden entered the room, took the wallet and chips, and was detained when he attempted to leave. A police officer testified he viewed the surveillance video of the bait room, asked Heiden what he was doing in the hotel, and listened as Heiden explained he had some buddies staying at the hotel. The officer further testified that Heiden later admitted he knew the room was not his buddies' room and he took the money and chips from the table. Heiden did not object to the testimony of these witnesses, and he did not cross-examine either witness.

The jury instructions were settled on the record. Jury instruction number 26 clearly expanded the scope of the district court's

²Heiden does not challenge the district court's failure to give a *Tavares* instruction.

prior-bad-act ruling by informing the jury it may consider the prior-bad-act evidence “for the limited purpose of proving the defendant’s intent, identity, and modus operandi.” Heiden did not object to this instruction. Moreover, he appears to have affirmatively approved of the instruction by informing the district court “we have no other concerns with the State’s instructions.”

The State capitalized on jury instruction number 26 during closing argument by stressing that Heiden was the one who committed the instant crimes of burglary, robbery, and battery with the intent to commit a crime because the evidence of his April 9, 2013, crime demonstrates that this is what he does and it establishes his identity and modus operandi. Heiden did not object to this argument. Ultimately, Heiden was convicted of burglary, robbery, and battery with the intent to commit a crime.

On appeal, Heiden claims the district court erred by admitting prior bad act evidence because his theory of defense did not place criminal intent at issue, the prior bad act was not sufficiently similar to the charged offense to establish identity, and the prior bad act was more prejudicial than probative. Heiden asserts the district court’s prior-bad-act ruling was unduly prejudicial because it was misused during the State’s opening statement, case in chief, and closing arguments and because the jury was improperly instructed it could consider the prior bad act as evidence of his intent, identity, and modus operandi.³

“A district court’s decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by

³Heiden does not raise independent claims of prosecutorial misconduct or jury instruction error.

this court absent manifest error.” *Somee v. State*, 124 Nev. 434, 446, 187 P.3d 152, 160 (2008). Before admitting prior bad acts evidence, the district court must conduct a hearing outside the presence of the jury, *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), *modified on other grounds by Sonner v. State*, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and superseded in part by statute as stated in *Thomas v. State*, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004), and determine whether “(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,” *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012).

Here, the district court conducted a *Petrocelli* hearing and made the following findings: The April 9, 2013, prior bad act was relevant to the issue of intent because it demonstrated that Heiden had previously entered a hotel room to commit a crime therein. The prior bad act was proven by clear and convincing evidence because the State’s witnesses testified credibly and Heiden accepted a plea offer in the prior case. And the prior bad act was more probative than prejudicial because one of the essential elements the State must prove to sustain the burglary charge is Heiden’s intent upon entering the victim’s hotel room.

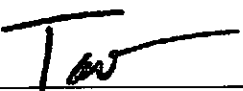
Contrary to Heiden’s assertions, the district court did not rule the prior-bad-act evidence was admissible to show identity and modus operandi. The district court ruled only that the evidence was admissible to show intent. Nothing in the record suggests the district court manifestly erred in this regard, and the district court’s ruling is supported

by Nevada law. *See Ford v. State*, 122 Nev. 796, 806, 138 P.3d 500, 507 (2006) (evidence of defendant's prior burglaries was admissible to show his intent to burglarize a home and/or absence of mistake); *Tillema v. State*, 112 Nev. 266, 269, 914 P.2d 605, 607 (1996) (evidence of defendant's prior burglary conviction for vehicle burglary was admissible to show common scheme or plan and his intent to feloniously enter vehicles); *Overton v. State*, 78 Nev. 198, 205, 370 P.2d 677, 681 (1962) (a defendant places every material allegation of the information in issue by pleading not guilty). We conclude the district court did not abuse its discretion by admitting the prior-bad-act evidence.

At no time during the trial did Heiden ask the district court to revisit its pretrial prior-bad-acts ruling, nor did he object to the admission of the prior-bad-act evidence, the proposed jury instructions on prior-bad-act evidence, or the State's closing argument discussing the prior-bad-act evidence. Thus, to the extent Heiden claims the prior-bad-act error occurred during the course of the trial, the alleged error was not preserved for appellate review. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

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