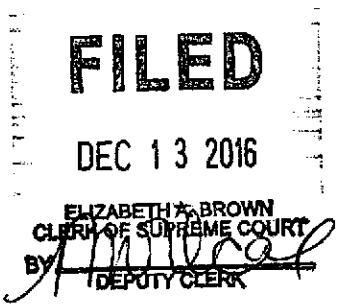
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOEL CRUZ RIVEROL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69274



ORDER OF AFFIRMANCE

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

Appellant Joel Riverol asserts that several errors occurred during the proceedings below, claiming that the district court erred by: (1) admitting evidence of an uncharged bad act under the res gestae doctrine codified at NRS 48.035(3), instead of holding a hearing to determine whether the evidence was admissible under the principles articulated in *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), and its progeny; (2) rejecting Riverol's proposed jury instructions, and (3) overruling his objections to two instructions that were provided to the jury. Riverol also contends that the State committed prosecutorial misconduct by making certain improper statements during its closing argument. We conclude that these contentions are unpersuasive and affirm the judgment.[1]

[1]Riverol makes other contentions that also lack merit. These contentions include: (1) the State failed to prove beyond a reasonable doubt that Riverol did not act in self-defense; (2) the prior bad act evidence

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was improperly admitted under NRS 48.035(3) because the State did not introduce it at the preliminary hearing, and "the State could have . . . implied [at trial] that Poirier believed Riverol [was] guilty of unnamed wrongdoing"; (3) the district court committed reversible error by failing to issue a limiting instruction concerning the prior bad act evidence until after it had been introduced; (4) the State violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce the Bridger Inn surveillance footage until the day before the parties delivered their opening statements; and (5) the delayed production of the videotape violated the NRS 174.295's discovery provisions.

We reject these contentions because: (1) a rational jury could have concluded that it was unreasonable for Riverol to believe that the victim posed an immediate danger of harm to him, *see Runion v. State*, 116 Nev. 1041, 1046, 13 P.3d 52, 55 (2000) (holding that an element of self-defense is that the defendant "reasonably believed that there was immediate danger of [unlawful bodily] harm"); (2) at the preliminary hearing stage, the State was required to show only that there was probable cause to bind Riverol over for trial, *see Sheriff v. Middleton*, 112 Nev. 956, 961, 921 P.2d 282, 285-86 (1996), and Riverol does not explain how the State could have implied that he was guilty of wrongdoing in a manner that could have rebutted his self-defense theory; (3) the district court's delay in issuing the limiting instruction did not have a "substantial and injurious effect or influence in determining the jury's verdict" because the district court issued the instruction before the State concluded its direct examination of the first witness who testified about the prior bad act, and the State and the district court repeatedly reminded the jury of the limited purpose of the evidence, *see Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (footnote omitted) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted); (4) Riverol fails to establish that the Bridger Inn video was favorable or material, the record shows that he could have independently procured it, and he failed to seek a continuance when the district court asked if he was requesting one, *see State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (discussing the elements of a *Brady* claim); *Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) (rejecting a *Brady* claim because, "[t]hrough diligent investigation, defense counsel could have obtained [certain] phone records independently"); *United States v. Bell*, 742 F.2d 509, 510-11 (1984)

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Factual Background[2]

Upon entering the lobby of the Bridger Inn, David Poirier saw an elderly woman who was "distraught" and "in tears" (*i.e.*, Janet Moore). Moore told Poirier that she was crying because someone had stolen "some items of her property[.]"[3] Shortly thereafter, a motel employee arrived and returned "some items of property" belonging to Moore. Nonetheless, Moore began to cry again, stating that some of her property was still missing.

Poirier then asked the motel employee where he had found the property, and the two men "back tracked [to] where [the employee] came from[.]" As Poirier and the motel employee approached the nearby Golden

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(rejecting a defendant's *Brady* claim in part because "[d]efense counsel did not even make a motion for continuance so that the materials could be obtained"); and (5) this court need not consider Riverol's NRS 174.295 claim because he raises it for the first time in his reply brief. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 523 n.13, 286 P.3d 249, 261 n.13 (2012) (noting that an appellate court need not consider an issue that is raised for the first time in a reply brief).

Furthermore, to the extent that Riverol asserts that the State introduced inadmissible hearsay and that the post-altercation surveillance footage is prejudicial and irrelevant, we reject these claims because they are not cogently argued and supported by relevant authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider claims that are not cogently argued and supported by relevant authority).

[2]The State presented evidence at trial that established the facts discussed in this section.

[3]In response to Riverol's contention that evidence relating to the theft of Moore's wheelchair was prejudicial, the district court ordered the State's witnesses to refer to her stolen wheelchair as simply "property."

Nugget Hotel, they saw that Riverol was walking toward the hotel's front entrance. The motel employee then informed Poirier that he had recovered Moore's property from Riverol. Thereafter, the motel employee and Poirier both yelled "stop[,]" and Riverol "stopped[,] . . . looked at [their] direction[,] . . . and . . . bolted" into the Golden Nugget.

Poirier pursued Riverol into the Golden Nugget. The pursuit led Poirier to a hallway on the second floor of the hotel, where he noticed that Riverol was carrying "a club of some kind." Poirier then tackled Riverol and placed him in a "full nelson choke hold." At that time, Scott Fisher, the hotel's banquet manager, approached the two men and asked them to "move away and get up." When neither Poirier nor Riverol complied with that request, Fisher bent down and grabbed the backs of their shirts in an attempt to separate them. Riverol then swung a "black pole . . . up towards [Fisher] and hit [him]" above his right eyebrow, which opened up "a pretty big cut" that began to bleed. Riverol then attempted to flee, but he was soon apprehended by the hotel's security personnel.

The District Court Did Not Erroneously Admit the Prior Bad Act Evidence Under the Res Gestae Doctrine Codified in NRS 48.035(3)

Riverol contends that the district court erroneously admitted evidence that he stole Moore's property[4] under the res gestae doctrine codified at NRS 48.035(3), and that the district court should have instead conducted a hearing in accordance with the *Petrocelli* line of cases to determine its admissibility. We reject Riverol's claim because the district

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[4]Riverol appears to challenge the "references to . . . the taking of a wheelchair from an elderly woman" made by witnesses at trial, along with the admission of surveillance footage from the Bridger Inn and the Golden Nugget.

court did not commit "manifest error" in admitting this evidence under NRS 48.035(3). *Bletcher v. State*, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995).

The supreme court has held that if the evidence in question is admissible under NRS 48.035(3), then there is no need to apply the three-pronged test of admissibility required by *Petrocelli* and its progeny. *See State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) (emphasis added) ("In reading NRS 48.035 as a whole, it is clear that where the *res gestae* doctrine is applicable, the determinative analysis *is not* a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence. If the doctrine of *res gestae* is invoked, the *controlling question* is whether witnesses can describe the crime charged without referring to related uncharged acts."). Here, the evidence suggesting that Riverol stole Moore's property satisfies NRS 48.035(3) because it shows "the immediate context of happenings near in time and place" to the charged offense, and the State could not "effectively prosecute" Riverol without presenting such evidence. *See Shade*, 111 Nev. at 893, 895, 900 P.2d at 330-31 (quoting *Allan v. State*, 92 Nev. 318, 320, 549 P.2d 1402, 1403 (1976)); *see also Sutton*, 114 Nev. at 1332, 972 P.2d at 336 (emphasis added) ("[I]n *Shade*, the State could not *effectively prosecute* Shade on any of the charged offenses without proffering evidence of Shade's uncharged heroin purchase and concomitant police surveillance activity[.]"). Specifically, the State needed to present evidence showing that Riverol stole Moore's wheelchair shortly before he committed the charged offense because it rebutted Riverol's self-defense theory—*i.e.*, because Riverol believed that a stranger had chased and tackled him without provocation, Riverol may have also believed that another

unprovoked stranger who pulled on Riverol's shirt while he was being tackled had intended to cause him harm as well.[5] The wheelchair evidence rebutted this theory because it demonstrated that Riverol should have known that: (1) Poirier was attempting to apprehend him for stealing Moore's property, and (2) Fisher could not have intended to help Poirier harm Riverol because Fisher had not pursued Riverol from the Bridger Inn. Thus, we conclude that the admission of this evidence under the res gestae statute does not constitute manifest error because Riverol's liability for battery with use of a deadly weapon was "predicated upon" the prior bad act, and we hold that the district court was not required to determine whether the evidence was admissible under *Petrocelli*'s three-pronged test.[6] *See Sutton*, 114 Nev. at 1332, 972 P.2d at 336 (distinguishing the evidence admitted under NRS 48.035(3) in *Shade* by noting that the State's case in *Sutton* was not "predicated upon" the evidence in question).

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[5]During a hearing on the admissibility of this evidence that took place after jury selection but before opening statements, Riverol indicated that he would present this factual theory to the jury. He also articulated this self-defense theory in his opening statement and in his closing argument.

[6]We note that even under our concurring colleague's interpretation of NRS 48.035(3), this evidence would have been admissible. The State bore the burden of proving beyond a reasonable doubt that Riverol did not act in self-defense because such a defense "negates the unlawfulness" element of battery. *See Barone v. State*, 109 Nev. 778, 780-81, 858 P.2d 27, 28-29 (1993); NRS 200.481(1)(a) (emphasis added) (defining battery as "any willful and unlawful use of force or violence upon the person of another"). Given that the evidence in question was essential to rebutting Riverol's self-defense theory, "an ordinary witness [could not have] describe[d] . . . the crime charged without referring to the other act or crime[.]" *See* NRS 48.035(3) (emphasis added).

Riverol Is Not Entitled to Relief on His Prosecutorial Misconduct Claims

The supreme court has explained that prosecutorial misconduct claims call for a "two-step analysis": (1) ascertaining "whether the prosecutor's conduct was proper"; and (2) "if the conduct was improper, [determining] whether the improper conduct warrants reversal." *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (footnotes omitted). "If the error is of constitutional dimension, then [the reviewing court] appl[ies] the *Chapman v. California* standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." *Id.* at 1189, 196 P.3d at 476 (footnote omitted) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). On the other hand, an error that is not of constitutional dimension requires reversal "only if the error substantially affects the jury's verdict." *See id.* (footnote omitted).

Riverol argues that the State committed prosecutorial misconduct by making the following statements in its closing argument: (1) discussing Riverol's "mindset" when referring to the Golden Nugget security personnel's attempts to apprehend him, (2) calling Riverol's pipe a "cane," and (3) contending that Riverol stole from an old woman. We hold that these statements do not merit reversal of Riverol's conviction.

First, the State did not commit prosecutorial misconduct by commenting that "[Riverol's] mindset on [the date of the altercation] was violence and whatever it takes to get away" because it was based on a reasonable interpretation of the Golden Nugget surveillance footage.[7]

[7]The footage depicts Riverol vigorously resisting the hotel security personnel's attempts to restrain him, and it also shows Riverol move his face close to a security guard's face, causing the security guard to flinch.

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Second, the State's references to Riverol's "cane" do not warrant reversal because there is no indication that these comments had *any* effect on the jury's verdict or that they unfairly prejudiced Riverol in any way, and Riverol does not explain how these comments were supposedly prejudicial. *See Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476-77 (noting that the harmless error standard requires an examination of the effect that the alleged misconduct had on the verdict). Third, the State's assertion that Riverol "st[ole] from an old woman" does not entitle Riverol to relief because he did not object to this statement during the proceedings below, and he did not suffer "actual prejudice or a miscarriage of justice" that is required to satisfy the plain-error review standard.[8] *See id.* at 1190, 196 P.3d at 477 (footnote omitted) (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)) (internal quotation marks omitted). Accordingly, Riverol's prosecutorial misconduct claims fail.

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See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989) ("It [is] entirely permissible for the prosecutor to . . . suggest reasonable inferences that might be drawn from [the] evidence.").

[8]The record shows that the State did not "blatantly attempt to inflame [the] jury[,]" *see Valdez*, 124 Nev. at 1191, 196 P.3d at 478 (footnote omitted) (quoting *Johnson v. State*, 122 Nev. 1344, 1356, 148 P.3d 767, 775-76 (2006)), but that it referred to the prior uncharged bad act in order to undermine Riverol's self-defense theory. Moreover, any prejudice resulting from this statement was mitigated by the fact that the district court repeatedly instructed the jury on the limited purpose of this evidence, and that the State acknowledged this limited purpose in its opening statement and in its closing argument.

The District Court Did Not Abuse Its Discretion or Commit Judicial Error by Rejecting Riverol's Proposed Jury Instructions or by Overruling His Objections to Two Jury Instructions

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (footnote omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)) (internal quotation marks omitted).

Riverol asserts that the district court erred by: (1) rejecting his proposed instruction relating to the interpretation of evidence generally;[9] (2) rejecting his proposed jury instruction that asserted that Poirier's attempt to apprehend Riverol did not constitute a citizen's arrest; (3) overruling his objection to Jury Instruction No. 18, which stated in part that the flight of a person after the commission of a crime may be considered when determining guilt; and (4) overruling his objection to Jury Instruction No. 21, which stated that self-defense was not available to an "original aggressor[.]" We uphold the district court's rulings.

In this case, the district court's rejection of Riverol's two proposed instructions does not constitute "an abuse of . . . discretion or judicial error." *Crawford*, 121 Nev. at 748, 121 P.3d at 585. First, the

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[9]This proposed instruction is substantially similar to part of a jury instruction that was issued in *Crane v. State*, 88 Nev. 684, 504 P.2d 12 (1972). Therefore, we refer to it as the "proposed *Crane* instruction." *See id.* at 687 n.4, 504 P.2d at 14 n.4.

district court was permitted to reject the proposed *Crane* instruction because the supreme court has repeatedly held that such an instruction is not required if the jury is properly instructed on the reasonable doubt standard, and Riverol does not even aver that the district court failed to do so. *See Hooper v. State*, 95 Nev. 924, 927 & n.3, 604 P.2d 115, 117 & n.3 (1979); *Bails v. State*, 92 Nev. 95, 97-98, 545 P.2d 1155, 1156 (1976); *Hall v. State*, 89 Nev. 366, 368, 371, 513 P.2d 1244, 1246-48 (1973). Second, the district court did not exceed its "broad discretion to settle jury instructions" when it refused to provide Riverol's citizen's arrest instruction to the jury, given that the State never suggested or argued that Poirier's conduct constituted a lawful citizen's arrest, and neither party presented evidence to determine whether that was the case. *Crawford*, 121 Nev. at 748, 121 P.3d at 585; *cf. Higgs v. State*, 126 Nev. 1, 20-22, 222 P.3d 648, 660-61 (2010) (upholding a district court's rejection of an adverse inference instruction relating to the spoliation of evidence because the evidence presented at trial did not satisfy the due process standard on spoliation).

Moreover, the district court did not err by overruling Riverol's objections to Jury Instruction Nos. 18 and 21.[10] With respect to Jury Instruction No. 18, the district court did not abuse its discretion or commit judicial error because the court and the State repeatedly explained that

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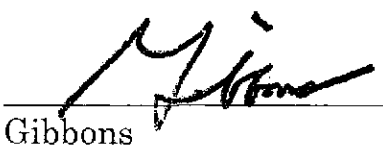
[10]De novo review is inapplicable to these claims because Riverol does not assert that Jury Instruction Nos. 18 or 21 incorrectly stated the law. *See Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008) (footnote omitted) ("While we normally review the decision to refuse a jury instruction for an abuse of that discretion or judicial error, we review de novo whether a particular instruction . . . comprises a correct statement of the law.").

the jury had been called upon to decide the battery with use of a deadly weapon and not the uncharged theft of Moore's property.[11] Further, we reject Riverol's claim that Jury Instruction No. 21 erroneously led the jury to believe that Riverol would not have been entitled to self-defense if he was the "original aggressor" with regard to his altercation with *Poirier*. Assuming (without deciding) that the jury should not have been permitted to make that inference, the district court's conclusion that the jury had not been misled was not "arbitrary or capricious" and did not "exceed[] the bounds of law or reason."[12] *Crawford*, 121 Nev. at 748, 121 P.3d at 585 (footnote omitted) (quoting *Jackson*, 117 Nev. at 120, 17 P.3d at 1000) (internal quotation marks omitted). Accordingly we,

ORDER the judgment of the district court AFFIRMED.



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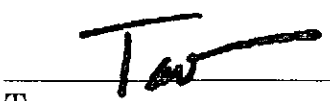

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[11]Specifically, the State clarified in its opening statement that Riverol was not charged "with taking any property[,]" and that the bad act evidence was offered only to explain why Poirier and Riverol later had a "wrestling match on the floor" of the Golden Nugget. The district court also instructed the jury that "evidence of other acts regarding . . . Riverol" was not offered to show that he "is a person of bad character or is predisposed to commit crimes[,]" and that the only crime with which Riverol had been charged was the battery with use of a deadly weapon.

[12]In particular, the district court instructed the jury that Fisher was the only victim named in the Amended Information, and the State already explained in its opening statement that the battery on Fisher was the only crime with which Riverol had been charged.

SILVER, J., concurring:

EDCR 3.20(a) requires that a motion to admit evidence of other bad acts be "served and filed not less than 15 days" before trial. Further, a district court "will only consider late motions based upon an affidavit demonstrating good cause and it may decline to consider any motion filed in violation of this rule." *Id.* Additionally, EDCR 3.28 provides that "[a]ll motions in limine to exclude or admit evidence must be *in writing* and noticed for hearing not later than calendar call, or if no calendar call was set by the court, no later than 7 days before trial." (Emphasis added). And, the district court "may refuse to consider any *oral* motion in limine and any motion in limine which was not *timely* filed." *Id.* (emphasis added).

Rather than timely filing a written motion to admit evidence of other bad acts or a motion in limine for the admission of evidence, the State waited until the jury was empaneled, and, with a jury anxiously waiting outside of the courtroom immediately prior to opening statements, prosecutors then ambushed the district court with an extremely distorted and disjointed oral offer of proof regarding prejudicial bad act evidence. This was done, despite the fact that Riverol was arrested in December and a preliminary hearing had been held months before the jury trial, which finally commenced in June of the following year—six months after Riverol's arrest. Based on police reports and witnesses' testimony at the preliminary hearing, the record reveals that the prosecutors were well aware that this evidence was necessary to explain to the jury what occurred in this case. The record also reflects that this information was known for a very long time prior to trial, and yet the State elected not to file a timely written motion as required by the rules. Unfortunately, as a

result of the bungled offer of proof and the arguing that ensued between counsel thereafter, the record shows a very confused district court struggling to make sense of the State's oral offer of proof, and then desperately attempting to make the best ruling it could "off the cuff" in determining relevancy and prejudice, all while the jury sat waiting outside the courtroom.

Based on very clear court rules, the district court would have been well within its discretion to outright deny the State's motion regarding the admissibility of this evidence, as the State's oral offer of proof prior to opening statements was procedurally defective. Instead, the district court elected to grant the State's oral motion. And, after reviewing the record before this court, I am compelled to write separately because I believe that the district court erred in making its hurried and unsupported ruling that the evidence of a prior crime was admissible pursuant to the doctrine of *res gestae*, as opposed to the district court making findings on the record after a *Petrocelli*[13] hearing, because this evidence was actually properly admissible under NRS 48.045(2).

Ironically, the State's only argument to the district court was that evidence of Riverol's prior crime of stealing property from an elderly woman at a different hotel—prior to the charged crime—was admissible under the doctrine of *res gestae*, and the State cited to only a single case—*Brackeen v State*, 104 Nev. 547, 763 P.2d 59 (1988). Yet, had the State timely filed and served upon Riverol a written motion, the district court would have had ample opportunity in chambers to conscientiously and thoughtfully observe that *Brackeen* actually held that bad act evidence

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

sought to be introduced by the State in *that* case was proper under NRS 48.045(2) for purposes of proving the identity of the perpetrator. In fact, in *Brackeen*, the Nevada Supreme Court only makes a passing and concluding comment *referring to NRS 48.045(2),* not the doctrine of *res gestae* under NRS 48.035, stating that the "State is entitled to present a full and accurate account of the circumstances surrounding the commission of a crime, and such evidence is admissible even if it implicates the accused in the commission of other crimes for which he has not been charged." 104 Nev. at 553, 763 P.2d at 63. *Brackeen* never discusses the doctrine of *res gestae,* but instead makes the foregoing conclusion in the context of evidence admissibility pursuant to NRS 48.045(2) regarding criminal bad act evidence.

The supreme court and this court have continually held that the doctrine of *res gestae* is implicated when a witness cannot describe the charged offense without referring to the uncharged bad act. Thus, 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 crime without referencing the other bad act. *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).

Clearly, the witnesses in this case could have described how Riverol hit the victim with a deadly weapon at the Golden Nugget Hotel without mentioning that, minutes before, Riverol stole property from an elderly woman at the Bridger Inn Hotel, as it was not impossible for witnesses to testify to what occurred within the Golden Nugget Hotel and Casino without describing the prior crime at the Bridger Inn. But, in my opinion, this criminal bad act evidence of Riverol's stealing property from an elderly woman at an earlier time and place is relevant and properly admissible because it is more probative than prejudicial and rebuts Riverol's claim that he was only acting in self-defense as an innocent bystander attacked out of the blue. Further, this bad act evidence was necessary for the State to prove the requisite intent necessary to sustain a conviction for Battery With a Deadly Weapon, where Riverol intentionally used force and violence against an unknowing Golden Nugget employee who merely tried to break up a scuffle on hotel property.

Nevertheless, this court will affirm a district court's order if the district court reached the correct result, albeit for the wrong reason. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P. 3d 1198, 1202 (2010). Accordingly, although I believe that the district court erred in its ruling, the evidence of another crime or bad act was nevertheless properly admitted at trial pursuant to NRS 48.045(2), and this error was harmless. Therefore, I respectfully concur with the majority in affirming the judgment of conviction.

Silver, J.

Silver

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