IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRUCE TIMOTHY SHELTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70729

FILED

APR 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Bruce Timothy Shelton appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit larceny, two counts of burglary, and grand larceny.[1] Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On appeal, appellant contends the district court erred in admitting evidence of three prior thefts in which appellant allegedly participated because they were more prejudicial than probative. *See Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

Under NRS 48.045(2), evidence of "other crimes, wrongs or acts" may be admitted only if: "(1) the . . . 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." *See Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). The district court's decision to admit such evidence "will not be overturned absent a showing that the decision is

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

manifestly incorrect." *See Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005) (footnote omitted).

Here, the district court admitted evidence of three uncharged thefts. Shelton apparently contends that the evidence of the three thefts was admitted to show "a motive, plan, or scheme." However, the district court instructed the jury to "consider this evidence for the limited purpose[s] of identity, modus operandi, or absence of mistake or accident."

The district court's balancing of the probative value of the prior thefts versus the danger of unfair prejudice is entitled to deference on appeal, and based upon the record we cannot conclude that its decision was manifestly incorrect. *See* NRS 48.035. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.
Silver

Tao, J.
Tao

GIBBONS, J., concurring in the judgment:

In the instant case, Shelton contends that the evidence of the three uncharged thefts "proved nothing to the jury other than that . . . [he] is apparently a jewel thief." To avoid convictions that are based on a defendant's supposed propensity to commit crime, our supreme court has held that "[a] presumption of inadmissibility attaches to all . . . bad act evidence." *See Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249

(2012) (quoting *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)) (internal quotation marks omitted). For that reason, I believe that Shelton's appeal requires a more detailed analysis than that conducted by the majority. Because I nonetheless conclude that Shelton's convictions should be affirmed, I concur in the judgment.

My colleagues correctly point out that the district court admitted this evidence for "the limited purpose[s] of identity, modus operandi, or absence of mistake or accident[,]"[2] and that Shelton challenges only the third prong of the *Petrocelli* test. Further, a careful analysis of the parties' briefing and the available record reveals that Shelton fails to establish that the district court erred in admitting this evidence.

At trial, the State contended that Shelton and his accomplices perpetrated "distraction thefts" at two different Zales jewelry stores in Las Vegas. Specifically, the State averred that in each theft, Shelton and Rodney Anistead distracted Zales employees by engaging them in conversation while Ronald Bell took either the keys to the display cases or the jewelry that was stored in those cases.[3] Although Shelton's opening statement did not clearly convey his theory of the case and he rested without calling any witnesses at trial, he did contend during closing

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[2]Apart from finding that each prong had been satisfied, the district court did not elaborate on its decision to admit evidence of the three uncharged thefts. Although the better practice is to specifically explain why each bad act is admissible, the district court's failure to do so does not alter the outcome of this particular case.

[3]The State further alleged that in each theft, Bell was assisted by an unidentified female accomplice.

argument that the State failed to prove that he was present when these two thefts were committed.[4]

In addition to evidence relating to the thefts at the Las Vegas Zales stores, the State presented evidence of the three uncharged thefts in question: (1) a theft perpetrated at a jewelry store in Maryland that occurred approximately two years before the instant offenses, (2) another theft at a jewelry store in Virginia that occurred approximately three weeks before the Las Vegas thefts, and (3) yet another theft that was perpetrated at a San Bernardino Zales store on the day after the Las Vegas offenses. With regard to the Maryland theft, Shelton's brief notes that he "covered" Bell while the latter "opened a display case and stole jewelry from inside[.]" In respect to the Virginia theft, a police sergeant who had investigated the crime testified that Shelton "took the attention of a sales associate" while Bell opened a display case and an unidentified female functioned as "a blocker and/or lookout[.]"

This evidence relating to the Maryland and Virginia thefts were highly probative of whether Shelton's presence during the Las Vegas thefts was a mistake or accident because it tended to show that he knew that he was preventing Zales employees from noticing that Bell and an unidentified female were stealing store property. *See Cirillo v. State*, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980) ("The 'absence of mistake' exception is applicable only when the evidence tends to show the

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[4]Shelton's opening brief apparently concedes that while each of the two instant thefts was committed, he was: (1) at the scene of the theft, and (2) interacting with a store employee. Although Shelton prefaces the facts section of his brief with "[t]he facts that follow are those presented by the State at trial[,]" he does not offer an alternative interpretation of the trial evidence.

defendant's knowledge of a fact material to the specific crime charged."); *cf. United States v. Dolliole*, 597 F.2d 102, 103-05, 108 (7th Cir. 1979) (concluding that evidence that the defendant had intended to be a getaway driver in two prior bank robberies was admissible to rebut his claim that he "had no knowledge prior to his arrest that [the alleged accomplice found in his vehicle] had robbed [a] bank"). Thus, the district court's balancing of the probative value of these two prior thefts against their danger of unfair prejudice was not manifestly incorrect. *See Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005).

Further, Shelton fails to demonstrate that the subsequent San Bernardino theft was not admissible to show the absence of mistake or accident because his briefing does not describe each perpetrator's role in that theft, and he does not mitigate that deficiency by providing the surveillance footage and/or photographs that witnesses relied upon in describing it.[5] Similarly, the district court's decision to admit the three uncharged thefts for the purposes of modus operandi or identity should not be disturbed because Shelton does not supply the surveillance footage and photographs upon which witnesses *extensively* relied when describing the instant offenses and the three other thefts.[6] *See Canada v. State*, 104 Nev. 288, 292-93, 756 P.2d 552, 554 (1988) (emphasis added) (quoting *Coty*

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[5]"[Appellant] ha[s] the 'responsibility to provide the materials necessary for this court's review.'" *See Fields v. State*, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009) (quoting *Jacobs v. State*, 91 Nev. 155, 158, 232 P.2d 1034, 1036 (1975)).

[6]I note that Shelton's failure to establish that this evidence was not admissible for these purposes is an independent basis for affirming his convictions.

v. State, 97 Nev. 243, 244, 627 P.2d 407, 408 (1981)) (internal quotation marks omitted) (holding that evidence of other bad acts is admissible for these purposes if it "demonstrates characteristics of conduct which are *unique* and *common* to both the defendant and the perpetrator whose identity is in question").

For the foregoing reasons, I concur in the judgment.

_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Law Office of Benjamin Nadig, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk