IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARREN RAY TOWNSEND, A/K/A DERREK SANCHEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74020

FILED

SEP 21 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Darren Ray Townsend appeals from a judgment of conviction, pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Townsend was charged with burglary for allegedly entering Tori Withers' Las Vegas home with the intent to commit a larceny therein.[1] At trial, the State presented evidence that Townsend entered Withers' home through a window in her bedroom, and when Withers confronted him, Townsend immediately fled out the same window. Ultimately, to prove that Townsend possessed the requisite intent for burglary, the State relied primarily on circumstantial evidence allowing the jury to infer that Townsend entered Withers' home with the intent to commit a larceny therein. This evidence included the fact that Townsend provided police with a false name, social security number, and date of birth when police asked him to identify himself upon apprehension.

The defense argued—and presented some evidence to support—that Townsend had previously been caught squatting at a vacant

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

house and that he entered Withers' home for the purpose of evading police and avoiding the consequences of his squatting, not to commit a larceny. Still, the jury convicted Townsend of burglary under NRS 205.060, and the district court sentenced him as a habitual offender to 5 to 15 years in prison under NRS 207.010(1)(a).

On appeal, Townsend asserts numerous grounds for reversing his conviction. He argues that: (1) the district court violated his right to a fair trial by admitting irrelevant and prejudicial bad-act evidence; (2) the district court made multiple decisions with respect to jury instructions that violated his right to a fair trial; (3) the district court violated his right to present a complete defense by excluding testimony supporting his theory of defense; (4) the State impermissibly shifted the burden of proof during its closing argument; and (5) cumulative error warrants reversal.[2]

We first consider whether the district court erred in admitting evidence that Townsend provided a false name, social security number, and date of birth to police. Townsend contends that such evidence was irrelevant and unduly prejudicial, especially in light of the district court's failure to give a limiting instruction. The State responds that the evidence was admissible as either an uncharged bad act to demonstrate consciousness of guilt or as res gestae, and that the failure to give a limiting instruction was harmless. We agree with the State and conclude

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[2]Townsend frames many of his arguments in constitutional terms. However, Townsend fails to support any of his constitutional arguments with relevant authority or argue them cogently, and thus this court need not address them. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

that the evidence was admissible either as an uncharged bad act or as res gestae.

Under NRS 48.045(2), "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." However, such evidence may be admissible for other purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* This court will not reverse the district court's decision to admit such evidence absent manifest error. *Diomampo v. State*, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008). We conclude that providing false identifying information to police upon apprehension is highly probative as to consciousness of guilt and intent, and thus the district court did not manifestly err in admitting the evidence. *See Bellon v. State*, 121 Nev. 436, 443, 117 P.3d 176, 180 (2005) (noting that NRS 48.045(2) "permits the admission of prior bad acts for limited purposes, such as to show consciousness of guilt"); *see also United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984) ("Concealment of identity is . . . a commonly recognized indicator of guilty knowledge.").[3]

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[3]We note that Townsend argues, and the State concedes, that the district court did not conduct a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), as required to admit evidence of an uncharged bad act. However, the district court did conduct a hearing outside the presence of the jury to determine whether to admit the evidence, and we will affirm a decision to admit bad-act evidence "when the record is sufficient to establish that the evidence is admissible under the test [for admitting bad-act evidence] or the trial result would have been the same had the trial court excluded the evidence." *Diomampo*, 124 Nev. at 430, 185 P.3d at 1041. Because we conclude that it is clear from the record that: (1) the false-name evidence is relevant to the crime

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Even if the evidence were not admissible as an uncharged bad act, we conclude that it would have been admissible as res gestae. Under the res gestae statute, the district court must allow a witness to testify regarding another uncharged act or crime if it "is 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 [uncharged] act or crime." NRS 48.035(3); *see Bellon*, 121 Nev. at 444, 117 P.3d at 181 (noting that "[t]he State may present a full and accurate account of the crime"). The flight of a person immediately after the commission of a crime is an act in controversy for purposes of the res gestae statute. *See Bellon*, 121 Nev. at 444-45; 117 P.3d at 181 (evaluating whether certain statements of the defendant were necessary to describe the defendant's flight from the jurisdiction following commission of a crime such that they would be admissible as res gestae). Because we conclude that Townsend's provision of a false name, upon apprehension and immediately following his attempt to flee, was an evasive action that is akin to and a logical extension of his initial flight attempt, we conclude that evidence of that act was admissible as res gestae. *See State v. Plunkett*, 62 Nev. 258, 279-80, 149 P.2d 101, 107-08 (1944) (noting that an "attempt at suicide by an accused is akin to flight" and that the

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charged and was offered for a non-propensity purposes; (2) the act was proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, we hold that the district court properly admitted the evidence in spite of any failure to hold a *Petrocelli* hearing. *Id.*; *see also Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012).

defendant's attempted suicide immediately following the murder of his child "was so clearly connected with the killing of the child as to constitute it a part of the res gestae").

We note that because the district court ostensibly admitted the false-name evidence below as bad-act evidence, the burden was on either the State or the district court sua sponte to address a possible limiting instruction, *see Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1131-32 (2001), *modified in part by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), and therefore Townsend did not technically have any burden to request a cautionary instruction under the res gestae statute. *See* NRS 48.035(3). However, because we conclude that the false-name evidence could be properly admitted if this court were to order a new trial, and because the State did not encourage the jury below to make any impermissible inferences from the evidence as to Townsend's criminal propensity,[4] we conclude that any error in failing to give a limiting instruction "did not have a substantial or injurious effect on the jury's verdict" and was thus harmless. *See Mclellan*, 124 Nev. at 271, 182 P.3d at 112 (reviewing failure to give a limiting instruction for harmless error).

Next, we consider whether the district court erred in giving or declining to give certain jury instructions. The district court has broad discretion to settle jury instructions, and this court reviews the decision whether to give a specific instruction for an abuse of discretion. *Jackson v.*

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[4]The State did not address the false-name evidence in its opening, and it mentioned the evidence in its closing only to argue that Townsend knew he was guilty and gave a false name in an attempt to avoid the consequences of his actions.

State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "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.* This court reviews de novo whether an instruction correctly states the law. *Clancy v. State*, 129 Nev. 840, 845, 313 P.3d 226, 229 (2013). After a careful review of the record, we conclude the district court's decisions whether or not to give certain jury instructions did not constitute any abuse of discretion or incorrectly apply the law.

Next, we consider whether the district court violated Townsend's right to present a complete defense by excluding testimony supporting his theory of defense. Specifically, Townsend challenges the district court's decision to sustain the State's objections on grounds of speculation and relevance to three different questions relating to Townsend's theory of defense, and he alleges that the district court erroneously refused to allow Townsend to lay the proper foundation.

Under NRS 48.025(2), only relevant evidence is admissible. Evidence is relevant if it 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. Generally, a witness may testify to a matter only if "[e]vidence is introduced sufficient to support a finding that the witness has personal knowledge of [it]." NRS 50.025(1)(a). Whether to admit or exclude evidence is within the sound discretion of the district court, and this court reviews such decisions for an abuse of discretion or manifest error. *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). However, the Constitution "guarantee[s] that a criminal defendant must have 'a meaningful opportunity to present a complete defense.'" *Coleman v. State*, 130 Nev.

229, 236, 321 P.3d 901, 906 (2014) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). We review the exclusion of evidence affecting a defendant's constitutional right to present a complete defense for harmless error, and such error is harmless only where we can determine beyond a reasonable doubt that it did not contribute to the verdict. *Id.* at 243, 321 P.3d at 911.

Our review of the record reveals that the State's objections were proper, and to the extent they were not, any error in sustaining them was harmless beyond a reasonable doubt. The evidence that Townsend sought to elicit through the questioning was presented in different forms throughout trial, and Townsend argued his theory of defense freely in closing argument. Moreover, the district court did not prevent Townsend from laying the proper foundation for any of the questions, as his counsel voluntarily moved on from those lines of questioning following the objections.

Next, we consider whether the State impermissibly shifted the burden of proof by stating in its rebuttal closing argument that there was no evidence to support Townsend's argument that he broke into Withers' home to hide or his argument that he would not have given his real name and phone number to Withers' neighbor if he intended to burglarize Withers' home. We conclude that the prosecutor's remarks did not impermissibly shift the burden of proof or call attention to Townsend's failure to testify—they merely addressed Townsend's theory of defense. *See Evans v. State*, 117 Nev. 609, 630-31, 28 P.3d 498, 513 (2001) (holding that the State did not impermissibly shift the burden of proof where the prosecutor asked, "where's the evidence?" in response to the defense's argument that other people might have committed the subject murders),

overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

Finally, we conclude that cumulative error does not warrant reversal, as the quantity and character of the error in this case is slight, even if the issue of guilt may be close and the offense charged may be grave. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). Because we conclude that all of Townsend's other arguments are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

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