IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNY SPLOND, A/K/A KENYA SPLOND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72545-COA

FILED

DEC 17 2018

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

ORDER OF AFFIRMANCE

Kenny Splond appeals a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, possession of stolen property, three counts of burglary while in possession of a firearm, and three counts of robbery with a deadly weapon. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Over a period of 12 days in 2014, Splond robbed three different stores.[1] On appeal, Splond argues that the district court erred by: (1) admitting evidence of an uncharged burglary and/or home invasion and a photograph of a firearm; (2) failing to suppress inadmissible evidence stemming from an improper traffic stop; and (3) improperly relying on an arbitrary presentence investigation report during sentencing.[2] We disagree.

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

[2]Splond also argues that his attorney did not inform him of the State's plea deal offer. Appellant may raise these claims in a timely filed first post-conviction proceeding; but, this court will not consider them on direct appeal. *Pellegrini v. State*, 117 Nev. 860, 882, 34 P.3d 519, 534 (2001). To the extent Splond argues that the district court should have compelled to State to offer the plea deal anew, he does not provide relevant authority for the assertion, and thus we do not consider the argument. *Maresca v. State*,

First, we address whether the district court erred in admitting evidence of an uncharged burglary and/or home invasion at trial. We review the trial court's determination to admit or exclude prior bad act evidence for an abuse of discretion. *See Chavez v. State*, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009). Because Splond failed to object to the evidence regarding the burglary and/or home invasion below, we review for plain error. *See id.* at 269, 182 P.3d at 110. Under that standard, reversal is proper if the error caused "actual prejudice or a miscarriage of justice," thereby affecting his substantial rights. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Relevant evidence is generally admissible unless the danger of unfair prejudice substantially outweighs its probative value. NRS 48.105; NRS 48.025; NRS 48.035(1). The State is entitled to present evidence necessary to prove the crime charged in the indictment. *Dutton v. State*, 94 Nev. 461, 464, 581 P.2d 856, 858 (1978) *disapproved on other grounds by Gray v. State*, 100 Nev. 556, 688 P.2d 313 (1984).

Here, the State only charged Splond with possession of stolen property—a firearm. On direct examination by the State, the victim testified that *on a date prior to the time* Splond was apprehended with a firearm, an unknown perpetrator forcefully broke into the victim's home and stole his revolver. The prosecutor then immediately asked, "Did you ever give that man [Kenny Splond] permission to go in your house?" to which the victim answered, "No, sir." Clearly, the prosecutor's question,

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103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

along with the victim's answer, unfairly and prejudicially insinuated that Splond committed the burglary and/or home invasion of the victim's home prior to the crimes alleged by the State in the information against Splond.[3]

Splond's attorney thereafter asked the district court for a bench conference. After the unrecorded bench conference, the district court gave a limiting instruction immediately after the victim's testimony and again at the end of trial. Because the district court gave the jury two limiting instructions as a result of the prosecutor's improper question, we conclude that the district court mitigated any prejudicial effect that may have occurred under these circumstances. *See Chavez v. State*, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009) (noting that a limiting instruction may cure prejudice associated with bad act evidence). Thus, based on the foregoing, we conclude that the district court did not abuse its discretion in admitting the victim's testimony that he did not give Splond permission to break into his home and take his revolver on a previous date not charged by the State.

Next, we address whether the district court erred in admitting a photograph of the firearm. Splond contends on appeal that the State photograph was improperly authenticated, irrelevant, and unfairly prejudicial. Splond only objected on authentication grounds below, so we review that issue for harmless error, but we review the relevance and unfair prejudice issues for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (harmless error); *Patano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485-86 (2006) (plain error).

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[3]In this instance, the prosecutor could have merely asked the victim if he had ever given Splond permission to possess the victim's revolver on the *date charged in the information*, as such a question would have been relevant to the charge of possession of a stolen firearm.

First, as to Splond's authentication objection, we conclude Splond fails to demonstrate any error under the facts of this case. Jeffrey Haberman, who previously worked at a gun store, testified that someone stole a .38 caliber Colt revolver he had inherited from his father from his residence. The State showed two different photographs of a revolver to Haberman at trial. Haberman identified the revolver in the pictures as his. Thereafter, the district court admitted both photographs into evidence, without objection by Splond. Then, through Haberman, the State admitted a certified copy of a Las Vegas Metropolitan Police Registration into evidence, which fully described the revolver, including the make, manufacturer, serial number, as well as showing the revolver was registered to Haberman. The State then showed Haberman a third photograph of a revolver. After the district court overruled Splond's foundational objection, Haberman testified that the photograph fairly and accurately depicted his revolver. Thus, under these facts, the district court did not err in admitting the third photograph as Haberman testified he recognized the revolver depicted in the photograph to be his revolver. *See* NRS 52.015(1) (addressing authentication generally); NRS 52.025 (a witness with personal knowledge of the matter may authenticate the evidence).

Second, we conclude Splond fails to demonstrate plain error because the photograph of the revolver was relevant to establish that Splond possessed the same stolen firearm immediately after one of the robberies. *See* NRS 48.015. And, under these facts, the admission of the photograph was not unfairly prejudicial in light of the other corroborating testimony given at trial. NRS 48.025; NRS 48.035. We therefore conclude the district court did not abuse its discretion in admitting the photograph.

Next, we consider whether the district court failed to suppress evidence stemming from an improper traffic stop. "This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013). Where an officer has probable cause to believe that a driver has committed a traffic infraction, a traffic stop does not violate the Fourth Amendment. *State v. Rincon*, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006); *Gama v. State*, 112 Nev. 833, 836, 920 P.2d 1010, 1012-13 (1996) *distinguished on other grounds by Beckman*, 129 Nev. 481, 305 P.3d 912.

Here, a police officer stopped Splond's vehicle after observing that the back of the vehicle was smashed and had parts hanging down as if it had been in an accident. The officer testified that driving a damaged vehicle is a citable offense. Therefore, we conclude the officer had probable cause to stop Splond, and the district court did not err in denying Splond's motion to suppress or in admitting the evidence obtained from the officer's traffic stop.

Finally, we address whether the district court improperly relied on the presentence investigation (PSI) report in sentencing Splond. The district court has wide discretion in sentencing, and we review for an abuse of that discretion. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will not interfere with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Splond fails to demonstrate that the district court relied on impalpable or highly suspect evidence. The district court acknowledged that the first PSI was incorrect and allowed Splond to correct the mistake. The district court also presided over the trial, heard all the evidence at the sentencing hearing, and rendered sentences for each conviction within the applicable statutory guidelines. Therefore, we conclude the district court did not abuse its discretion.[4] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., concurring:

I concur except with respect to the majority's assertion that the prosecutor acted improperly in asking the victim about a firearm having been stolen from his home during a burglary. The questioning was as follows:

> Q: Sir, I'm showing you State's 29. Is that the firearm the gun registration was referring to?
>
> A: Yes, sir, it is.
>
> Q: Tell me exactly how it was stolen.

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[4]Because we conclude Splond fails to demonstrate any error, we need not address his argument regarding cumulative error. Valdez, 124 Nev. at 1195, 196 P.3d at 481.

A: I came home one day, the back door has been pry—my patio door had been pried open. Somebody entered the house, stole the entire gun safe, ripped the front—I had a double dead bolt on the front door. That was ripped out of the door and then went right out. There's still drag marks on the concrete from the safe.

Q: You know a person named Kenny Splond?

A: No, sir.

Q: Have you even seen that man before?

A: I don't believe so.

Q: Did you ever give that man permission to go in your house?

A: No, sir.

Q: Did you ever give that man permission to borrow your firearm?

A: No, sir.

Q: Did you ever give permission for anyone to have this gun at issue?

A: No, sir.

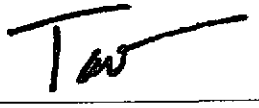
Splond argues that, because he was not charged with committing the burglary, the questioning appeared to implicate him in an uncharged "prior bad act" even though the district court never held a pre-trial hearing establishing the admissibility of the act pursuant to NRS 48.045 and *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

However, the requirements of *Petrocelli* do not apply here because the State did not accuse Splond of committing the burglary in question, and therefore it was not a "prior bad act" involving Splond under NRS 48.045. Indeed, the prosecutor never attempted to introduce any evidence during trial that Splond either committed the burglary or stole the firearm, and during closing argument the prosecutor emphasized that

"[w]e're not charging him with stealing the firearm. We're charging him with possession of stolen property." Consequently, NRS 48.045 simply does not apply here.

Rather, the prosecutor's questions established something else entirely. Splond was charged with the crime of possession of a stolen firearm, and conviction required proof of multiple things: that the firearm was stolen, that Splond had reason to suspect it might be, and that Splond did not have the owner's consent to possess the firearm. The prosecutor's questions were directed to showing that the firearm was stolen even if Splond had no involvement whatsoever in the burglary or theft; even if he did not steal the firearm himself (as the State openly conceded), evidence of the burglary was still necessary to prove that the firearm had been stolen by someone else before ending up in Splond's hands. Further, the questions established that Splond did not know the victim, did not have legal access to the gun before it was stolen, and could not have had the victim's consent to possess the firearm. All of these points were highly relevant to establish the essential elements of the charged crime and negate possible defenses that Splond could have raised.

Accordingly, the prosecutor's questioning was relevant to the crime charged and did not implicate Splond in any uncharged "prior bad act," and therefore I do not believe that any error occurred.



_____, J.

Tao

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk