

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT DWAYNE LEE,

No. 37118

Appellant,

FILED

vs.

MAR 06 2001

THE STATE OF NEVADA,

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

Respondent.

ORDER AFFIRMING AND REMANDING TO CORRECT JUDGMENT OF

CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary and petit larceny. The district court sentenced appellant to time served for the petit larceny conviction and to 48 to 120 months in prison for the burglary conviction.

Appellant went into Home Depot on December 27, 1999. When he was leaving the store, he set off the alarms by the store door. Store employees stopped him and found two thermostats on his person that had not been purchased. Appellant admitted that he took the thermostats and that someone he was working for had offered to pay him for the thermostats.

Appellant's sole contention is that the district court erred by admitting evidence of collateral offenses committed by appellant. We disagree.

NRS 48.045(1) provides that evidence of other wrongs cannot be admitted at trial solely for the purposes of proving that the defendant acted in a similar manner on a particular occasion. But NRS 48.045(2) provides that such evidence may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Before admitting such

evidence the trial court must conduct a hearing on the record and determine (1) that the evidence is relevant to the crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.¹ On appeal, we will give great deference to the trial court's decision to admit or exclude evidence and will not reverse the trial court absent manifest error.²

Appellant complains that in two particular instances the State presented testimony regarding other acts by appellant. First, appellant cites the following excerpt from the testimony by the Home Depot manager:

Q. Did he [appellant] say anything else in that regard in terms of not calling the police?

A. The conversation, I do remember having said, you know, what if the police—if there's nothing gone and you don't have a problem with it, I won't press charges, you know, you gave it back.

But we have had conversations with the police before and they would like us to—if we can detain and have somebody back that they can call and make a phone call to see if there is any type of history. And if they don't have problem, they don't want to take you.

(Emphasis added). Second, appellant cites the following excerpt from the testimony by the Home Depot loss prevention supervisor:

Q. So can you explain a little bit about what the standard procedure would be?

A. Okay. Standard procedure would be to again determine if the person had any money with which to be able to pay for this merchandise, depending on the individual—depending on the type of merchandise taken and other factors that

¹Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

²Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

that individual could perhaps be permitted to pay for that merchandise.

Appellant argues that because the police arrested him, the jury could infer from the above testimony that the police did not let appellant go because of his "history."

Appellant failed to object to this testimony. As a general rule, the failure to object precludes appellate review.³ There is a narrow exception to the contemporaneous objection rule: an appellate court may review plain errors that affect the defendant's substantial rights.⁴ In most cases, to establish that the error affected the defendant's substantial rights, the defendant must demonstrate prejudice.⁵ In other words, the error "must have affected the outcome of the district court proceedings."⁶

Based on our review of the record, we conclude that appellant cannot demonstrate plain error. First, it is not clear that the district court erred. It is not clear that the jury could reasonably infer from the testimony noted by appellant that appellant had engaged in prior criminal activity.⁷ Moreover, the prosecutor's questions did not seek information regarding prior bad acts by appellant. Second, even assuming that the district court erred, appellant cannot demonstrate prejudice. The State presented overwhelming

³Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962); see also NRS 47.040(1).

⁴NRS 178.602; NRS 47.040(2).

⁵United States v. Olano, 507 U.S. 725, 734 (1993).

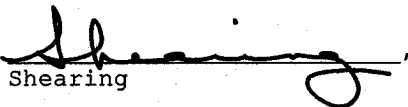
⁶Id.; see also Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996).

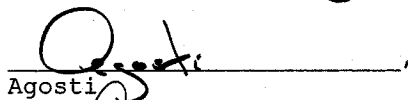
⁷See Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (noting that "the test for determining a reference to criminal history is whether 'a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity'" (quoting Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972))).

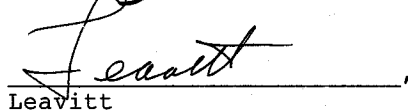
evidence of appellant's guilt, including appellant's statements that he went to Home Depot with the intent to steal the thermostats. We therefore conclude that the alleged error did not have a prejudicial impact on the verdict. Accordingly, we conclude that appellant's contention lacks merit.

However, our review of the judgment of conviction revealed a clerical error. The judgment of conviction states that appellant was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. Accordingly, we

ORDER the judgment of conviction AFFIRMED AND REMAND this matter to the district court for the limited purpose of entering a corrected judgment of conviction.


Shearing J.


Agosti J.


Leavitt J.

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk