IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHEN JOHN MICHAEL CHRISTIE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72976

FILED

MAY 18 2018

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

ORDER OF AFFIRMANCE

Stephen John Michael Christie appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of robbery; burglary; leaving the scene of an accident involving personal injury; possession of a stolen motor vehicle; two counts of burglary while in possession of a deadly weapon; eluding a police officer; possession of a firearm with serial number changed, altered, removed, or obliterated; possession of implements or tools commonly used for commission of burglary or larceny; and felon in possession of a firearm. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Over a three-day period, Christie possessed a stolen white Mitsubishi Endeavor, robbed a Walmart, rear-ended a vehicle, and fled the scene of that accident before abandoning the Mitsubishi and stealing a red Ford Escape, which he used to elude police. He was then apprehended with the help of citizen tips. Christie was charged with twelve criminal counts: two counts of robbery with use of a deadly weapon; assault with the use of a deadly weapon; burglary; leaving the scene of an accident involving personal injury; possession of a stolen motor vehicle; two counts of burglary while in possession of a deadly weapon; eluding a police officer; possession of a firearm with serial number changed, altered, removed, or obliterated;

possession of implements or tools commonly used for commission of burglary or larceny; and felon in possession of a firearm.[1]

Prior to trial, Christie moved to sever the counts into seven trials, which the district court denied. Also pretrial, the State moved to admit other-act evidence, and the district court conducted a *Petrocelli*[2] hearing; the evidence was later introduced and admitted at trial. The jury found Christie guilty on all counts except assault with a deadly weapon and the deadly weapon enhancements on the two robbery charges.

Christie now appeals, arguing that 1) the robbery conviction constitutes an inconsistent verdict; 2) the court abused its discretion in admitting other-act evidence at trial; 3) the burglary conviction is factually impossible; and 4) the court abused its discretion in denying his motion to sever.

First, we consider whether the robbery conviction constitutes an inconsistent verdict given that the jury rejected the deadly weapon enhancement on Count I and acquitted Christie of Count II (assault with a deadly weapon), which stemmed from the same factual situation. Christie contends the conviction was also not supported by sufficient evidence because the state presented no evidence that he used force or fear when he removed the items from Walmart or to overcome any resistance because the Walmart greeter did not pursue him after he left the store.

Consistent verdicts on separate counts are not required. *See Burks v. State*, 92 Nev. 670, 672 n.3, 557 P.2d 711, 712 n.3 (1976) (citing

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

[2]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded by statute in part*, NRS 213.085, *as recognized in Thomas v. State*, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004).

Dunn v. United States, 284 U.S. 390 (1932)). "The true rationale for the rule permitting inconsistent verdicts in a single trial is that a jury may convict on some counts but not on others not because they are unconvinced of guilt, but because of compassion or compromise." *Id.* (quoting *United States v. Greene*, 497 F.2d 1068, 1086 (7th Cir. 1974)). And, inconsistent verdicts are permitted where supported by sufficient evidence. *See Greene v. State*, 113 Nev. 157, 173-74, 931 P.2d 54, 64 (1997), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

In reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (internal quotation marks and emphasis omitted)). The jury weighs the evidence and the credibility of the witnesses and determines whether these are sufficient to meet the elements of the crime, and we will not disturb a verdict that is supported by substantial evidence. *Id.*

Under NRS 200.380(1), robbery is

> the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, . . . or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
>
> (a) Obtain or retain possession of the property;
>
> (b) Prevent or overcome resistance to the taking; or
>
> (c) Facilitate escape.

Generally, "a taking constitutes a robbery where the use of force follows the taking, and where the forcible conduct is part of a continuous transaction." *Abeyta v. State*, 113 Nev. 1070, 1078, 944 P.2d 849, 854 (1997).

Here, sufficient evidence supports the robbery conviction: the Walmart greeter testified that Christie ignored her greeting as he entered the store; Christie then left the store with various items without paying; she asked to see his receipt, and Christie ignored her; she did not further pursue him per store policy; Christie then got into a vehicle, drove past her at the front of the store, pointed a gun, and said "Is this what you want?" A reasonable jury could have found that the taking did not conclude until after Christie drove past the greeter as he intended to retain the items, prevent or overcome resistance to the taking, or facilitate escape by using fear through the brandishing of the gun. And, although the jury rejected the deadly weapon enhancement, a reasonable jury could have still concluded that by driving past while threatening the employees verbally, Christie exerted sufficient use of force or fear even without the gun. Thus, we conclude reversal is not warranted because sufficient evidence supports the jury's verdict.

Next, we consider whether the district court abused its discretion in admitting other-act evidence at trial—namely personal items of the Mitsubishi Endeavor's owner that were in her car before it was stolen and were later found with Christie's belongings after he eluded police. Christie argues that, because other testimony established him as the driver of the Endeavor, the challenged evidence was not necessary to establish identity and so was cumulative, highly prejudicial, and not relevant. Christie also argues that the district court erred by giving the limiting instruction after the evidence was admitted. He further contends the given

instruction reduced the State's burden of proof because it "reads as a presumption that the crimes have been proven." The State counters that the evidence was probative for identifying Christie in the charged crimes and any oversight regarding the giving of the limiting instruction was harmless because the district court gave the instruction two days later during trial and directed the instruction at the appropriate evidence.

We review a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). And we review a district court's decision settling jury instructions for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Evidence of uncharged bad acts may be admitted for limited purposes other than showing a defendant's bad character, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001) (quoting NRS 48.045(2)). To admit such evidence, the State has the burden of requesting a hearing outside the jury's presence under *Petrocelli*, 101 Nev. at 51-52, 692 P.2d at 507-08, to establish that: "(1) the incident is relevant to the crime charged; (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." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

If such evidence satisfies the above requirements, the State has "the duty to request that the jury be instructed on the limited use of prior bad act evidence." *Tavares*, 117 Nev. at 731, 30 P.3d at 1132, *holding modified by Mclellan*, 124 Nev. at 263, 182 P.3d at 106. But if the prosecutor fails to request the instruction, "the district court should raise the issue *sua*

sponte," relieving the defendant of the burden of requesting an instruction. *Id.* Further, "a limiting instruction should be given both at the time evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury." *Id.* at 733, 30 P.3d at 1133.

When reviewing non-constitutional errors, such as failure to give a limiting instruction on the use of uncharged bad-act evidence, this court uses the standard set out in *Kotteakos v. United States*, 328 U.S. 750, 756, 776 (1946), which is identical in substance to NRS 178.598. *Fields v. State*, 125 Nev. 785, 805, 220 P.3d 709, 722-23 (2009). Therefore, we will review cases involving the absence of the limiting instruction under NRS 178.598, which states that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *Tavares*, 117 Nev. at 732-33, 30 P.3d at 1132-33.

Applying the *Tinch* test here, first, the evidence is relevant because it identifies Christie as being in possession of the Endeavor, as the owner's personal items that were in the Endeavor were later found with Christie's belongings. *See generally Rippo v. State*, 113 Nev. 1239, 1258-59, 946 P.2d 1017, 1029 (1997) (holding district court did not abuse its discretion in admitting bad-act evidence in multi-count murder case of the defendant's use of one of the victim's credit cards because it was relevant to show the defendant's connection with the victims at the scene and tends to prove motive). Second, Christie's possession of the property was proven by clear and convincing evidence through testimony of the Endeavor's owner, the witness who saw Christie with a bag, and the officer who found the personal items in the bag with Christie's property. Third, the probative value of the evidence was not substantially outweighed by unfair prejudice because it established identity. Although other testimony at trial identified

Christie as the person driving the Endeavor, the other-act evidence supported the eyewitness testimony, most of which focused on the vehicle and offered only generic descriptions of the driver.

Therefore, the district court did not abuse its discretion in admitting the other-act evidence at trial. But even if there were error, it was harmless because Christie fails to show how his rights were substantially affected. *See Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005) ("Errors in the admission of evidence under NRS 48.045(2) are subject to a harmless error review."). And overwhelming evidence supported the convictions: numerous witnesses and surveillance videos placed Christie as the driver of the Endeavor and the Escape, Christie's DNA matched the DNA sample taken from the gun, and Christie's cellphone was found in the Escape.

Moreover, while we acknowledge that neither the State nor the district court provided the jury with the required limiting instruction prior to the evidence being admitted, failure to do so does not mandate reversal. *See Rhymes v. State*, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005) (holding that Rhymes' rights were not substantially affected when court failed to instruct the jury prior to admitting bad-act evidence but did so prior to the jury being charged because "the jury was provided with this critical information prior to its deliberation"). Here, the district court instructed the jury two days after the other-act evidence was admitted but before the State rested, and again with the other jury instructions. Therefore, because this court presumes that the jury followed those instructions, *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004), reversal is not required given that the jury received the critical information prior to deliberation. And again, any error was harmless because the evidence against Christie

was overwhelming. *See Mclellan*, 124 Nev. at 271, 182 P.3d at 112 (holding that the district court's failure to instruct the jury at the time bad-act evidence was originally admitted was harmless because the evidence against the defendant was overwhelming).

Further, Christie failed to object to the substance of the instruction below. Thus, in light of the overwhelming evidence of guilt, we conclude that Christie has not demonstrated that any substantive error in the instruction affected his substantial rights. The district court's instruction sufficiently directed the jury to limit its consideration of the other-act evidence, and it did not reduce the State's burden, because it clarified that the State was merely offering the evidence "for the limited purpose of showing the identity of the person who committed the charged crimes." Thus, the jury was left to accept or reject the State's offer. Therefore, reversal is not required because Christie failed to object to the substance of the instruction at trial, the instruction was directed at the corresponding evidence, and any error was harmless due to the overwhelming evidence against Christie.

Third, we consider Christie's argument that Count VIII, robbery with use of a deadly weapon, as charged, is factually impossible to achieve because it states that Christie intended to possess a stolen vehicle and also that the vehicle in question was owned by Jones West Ford. Thus, he maintains that if the car was owned by Jones West Ford then it is factually impossible for him to have intended to possess a stolen vehicle. The State counters that Christie failed to challenge the information below and that reversal is not required because he was aware of the State's theory on the charge since the preliminary hearing.

If a defendant "proceeds to trial without challenging the sufficiency of the information or indictment[,] an element of waiver is involved." *Collura v. State*, 97 Nev. 451, 453, 634 P.2d 455, 456 (1981). When a challenge is raised after the verdict, unless the defendant has been prejudiced by the defective charging document, the verdict cures any technical defects. *Laney v. State*, 86 Nev. 173, 178, 466 P.2d 666, 669-70 (1970); *see also* NRS 173.075(3) (stating error in the citation in the charging document is not grounds for reversal of a conviction "if the error or omission did not mislead the defendant to the defendant's prejudice"). This court "may look to the entire record to determine whether the accused had notice of what later transpired at trial." *Collura*, 97 Nev. at 453, 634 P.2d at 456.

Here, the record supports that Christie was aware of the State's theory and the factual allegations supporting the charge. But even if not, the guilty verdict cures any error, because Christie proceeded to trial without challenging the indictment and he now fails to show how he was prejudiced by any defect in the charging document. Therefore, we conclude that reversal is not warranted.

Last, we consider whether the district court erred in denying Christie's motion to sever the counts into seven trials. He contends that Counts I-VIII are temporally and factually distinct from Counts IX-XII and that the only link between those two sets of charges is the red Ford Escape, which does not require a single trial. The State counters that the district court was reasonable in denying severance because the alleged crimes were connected together temporally and "because the evidence of each would be cross-admissible in a trial on the other" to establish identity.

NRS 173.115 provides that joinder is proper when offenses are based "on the same act or transaction; or . . . on two or more acts or

transactions connected together or constituting parts of a common scheme or plan." Offenses are considered "connected together" when "evidence of either crime would be admissible in a separate trial regarding the other crime." *Rimer v. State*, 131 Nev. 307, 321, 351 P.3d 697, 708 (2015) (internal quotation marks omitted). This court reviews a district court's decision denying severance for an abuse of discretion, based "on the facts as they appeared at the time of the district court's decision." *Id.* at 320, 351 P.3d at 707. And this discretion is reviewed "by determining whether a proper basis for the joinder existed and, if so, whether unfair prejudice nonetheless mandated separate trials." *Id.*

Evidence of a crime may be admissible in a trial for another crime if it is admissible under NRS 48.045(2) and satisfies the first requirement in *Tinch*, 113 Nev. at 1176, 946 P.2d at 1064-65, namely that "the evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge." *Rimer*, 131 Nev. at 321, 351 P.3d at 708-09.

But even if the charges are appropriately joined under NRS 173.115, a district court should order separate trials if joinder would result in undue prejudice to the defendant. NRS 174.165(1); *Farmer v. State*, 133 Nev. ___, ___, 405 P.3d 114, 121 (2017). To necessitate separate trials, the joint trial of the charges must amount to a violation of due process. *Id.* To establish that joinder was prejudicial "requires more than a mere showing that severance might have made acquittal more likely." *Floyd v. State*, 118 Nev. 156, 164, 42 P.3d 249, 255 (2002) (quoting *United States v. Wilson*, 715 F.2d 1164-65, 1171 (7th Cir.1983)) (holding that the district court did not abuse discretion when the appellant did not show that the jury accumulated evidence against him, used one count to improperly determine guilt of

another, or that joinder prevented him from testifying on any other charges), *abrogated on other grounds by Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008).

Here, the acts charged were "connected together" because evidence of one charge would be cross-admissible as a separate trial on another charge. Further, the charges are largely connected, both temporally—over a three-day period—and factually. Moreover, identity is largely at issue here. Because the evidence presented would be relevant for the non-propensity purpose of establishing identity, the district court did not abuse its discretion in joining the crimes. Additionally, Christie fails to argue that the jury accumulated evidence against him, that it used one count to improperly determine guilt on another, or that joinder prevented him from testifying on any other charges.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Elliott A. Sattler, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk