

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN MANUEL LOPEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 72940

FILED

MAY 18 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Steven Manuel Lopez appeals from a judgment of conviction, entered pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Lopez was arrested after a witness noticed him attempting to open several car doors and rifling through a Honda SUV. The witness called 911 and gave the responding officer a description of Lopez, showed him a photograph of Lopez on a cellular telephone, and told the officer which direction Lopez went. Soon after, the officer spotted Lopez and observed Lopez open the door of a 1993 blue GMC truck. The officer saw Lopez enter the truck and rifle through its contents.<sup>1</sup> A jury found Lopez guilty of burglary and the district court sentenced him to serve a prison term of 30 to 120 months.

On appeal, Lopez argues that the district court erred by admitting bad act evidence that Lopez allegedly tried to open several car doors and entered and rifled through a Honda SUV as res gestae evidence. Further, Lopez argues the district court erred by allowing into evidence witness testimony concerning the cellular telephone photograph without

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<sup>1</sup>We do not recount the facts except as necessary to the disposition.

first requiring the State to produce the photograph pursuant to the best evidence rule.<sup>2</sup> Finally, Lopez contends that cumulative error warrants reversal. We disagree.

We first address whether the district court erred by admitting uncharged bad act testimony that Lopez allegedly tried to open several car doors, and entered and rifled through a Honda SUV, under the *res gestae* doctrine codified by NRS 48.035(3).

We review a district court's decision to admit or exclude bad act evidence for an abuse of discretion. *See Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013). When the defendant failed to object below, we review the admission of evidence for plain error. *See Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008) (holding that the "failure to

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<sup>2</sup>Lopez additionally argues that the district court erred by (1) denying his proposed two reasonable interpretations of evidence jury instruction, (2) giving a limiting instruction on *res gestae*, and (3) admitting into evidence multiple pairs of gloves, two backpacks, two flashlights, and a screwdriver that were found on Lopez during his arrest. We have carefully considered Lopez's arguments and conclude that they lack merit. First, the district court properly denied Lopez's proposed instruction because the jury was properly instructed on reasonable doubt. *Bails v. State*, 92 Nev. 95, 97-98, 545 P.2d 1155, 1156 (1976) (concluding a district court does not abuse its discretion by refusing to offer such an instruction where the jury is properly instructed regarding reasonable doubt); NRS 175.211. Second, the district court properly gave a limiting instruction to the jury regarding the *res gestae* evidence admitted. NRS 48.035(3); *State v. Shade*, 111 Nev. 887, 895, 900 P.2d 327, 331 (1995) (holding that the district court did not err by issuing a cautionary instruction to the jury regarding the *res gestae* evidence). Finally, evidence of the gloves, backpacks, flashlights, and screwdriver was properly admitted because it was relevant *res gestae* evidence where those items were found on Lopez's person at the time of the arrest, and the probative value was not substantially outweighed by the danger of unfair prejudice. *See* NRS 48.015; NRS 48.025; NRS 48.035.

object precludes appellate review of the matter unless it rises to the level of plain error” (internal quotation marks omitted)). Evidence of another bad act or crime is admissible under NRS 48.035(3) 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 act or crime.” See *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (clarifying that evidence is admissible as *res gestae* only where the witness cannot describe the crime without referencing the other bad act evidence). The supreme court has held that if the evidence in question is admissible under NRS 48.035(3), then there is no need to apply the three-pronged test of admissibility required by *Petrocelli*<sup>3</sup> and its progeny. See *State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) (“If the doctrine of *res gestae* is invoked, the *controlling question* is whether witnesses can describe the crime charged without referring to related uncharged acts.” (emphasis added)).

Here, Lopez objected to the testimony regarding the witness observing Lopez enter the SUV but did not object to testimony of Lopez pulling on other car door handles. Under either of the applicable standards of review, Lopez fails to show error. The record supports the district court’s decision admitting the evidence as *res gestae*. Notably, the testimony involved events occurring contemporaneously with the charged crime, and the witness could not have explained why he placed a 911 call without explaining that evidence, nor could the officer have effectively testified as to why he was looking for a suspect matching Lopez’s description without referencing Lopez’s other actions. See *Brackeen v. State*, 104 Nev. 547, 553,

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<sup>3</sup>*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

763 P.2d 59, 63 (1988) (holding that evidence of the defendant's unusual behavior and prior bad acts explained witness' heightened interest in him and was admissible *res gestae* evidence because it presented a full and accurate account of the circumstances surrounding the crime). Thus, we conclude that the district court did not abuse its discretion or plainly err by admitting the witness' and officer's testimony that Lopez allegedly pulled on several car door handles and entered and rifled through a Honda SUV as *res gestae* evidence.<sup>4</sup>

Lopez next argues that the district court erred by allowing testimony regarding a photograph depicted on a cellular telephone that the police officer looked at to assist in identifying the suspect without requiring the photograph to be produced and admitted as evidence under the best evidence rule. The best evidence rule provides: "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required . . . ." NRS 52.235; *see also Young v. Nev. Title Co.*, 103 Nev. 436, 440, 744 P.2d 902, 904 (1987) (holding that the best evidence rule did not bar admission where the content of the document was not at issue). Here, the content of the photograph was not at issue. Instead, the photograph was relevant to explain why the police officer believed Lopez was the suspect he was looking for. Therefore, the best evidence rule did not require production of the photograph.

Since we find no error and the issue of guilt is not close, we reject Lopez's cumulative error claim notwithstanding the seriousness of his conviction. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481


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<sup>4</sup>On appeal, Lopez only challenges the district court's admission of this evidence under NRS 48.035(3), however we note that the evidence was also admissible pursuant to NRS 48.045(2) as evidence of Lopez's intent.

(2008) (“When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” (internal quotation marks omitted)); *see also United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) (“If there are no errors or a single error, there can be no cumulative error.”). Accordingly we,

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Jennifer P. Togliatti, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk