IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE SANTOYO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78294-COA

FILED

MAR 05 2020

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

ORDER OF REVERSAL AND REMAND

Jorge Santoyo appeals from a judgment of conviction, pursuant to a jury verdict, of attempt to commit grand larceny of a motor vehicle (value less than $3,500) and attempt to commit robbery. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

On August 28, 2018, Jorge Santoyo entered the Nugget Casino in Dayton and asked an employee, Moises Vega, for help with his car but did not say what was wrong.[1] Vega asked Santoyo where his car was, and Santoyo pointed in the direction of a red Ford Escape parked on the side of the casino. Vega informed Santoyo that he was unable to help him because he was the only employee working. As part of his uniform, Vega's keys were attached to a lanyard. Santoyo saw the keys, reached for them, and briefly grasped them before Vega pushed him away. Santoyo continued to ask Vega for the keys, but Vega refused and asked Santoyo to leave the casino. An argument ensued, and sometime later, when Vega turned to call the police for assistance, Santoyo struck Vega in the head. Vega fell to the floor and sustained minor injuries. Santoyo did not try to grab Vega's keys while he was on the ground, and left the casino on foot.

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

There were no eyewitnesses to the incident, although one patron heard the sound of Vega being struck. This patron, however, said that she never heard Santoyo ask for the keys. Although there was security footage, two witnesses testified that the footage did not show Santoyo reaching for Vega's keys. Lyon County Sheriff's Office Deputies Huichapa and Kusmerz were later told by dispatch that the Ford Escape was reported stolen in California. As Deputy Kusmerz testified at trial, however, there was no evidence that linked Santoyo to the theft of the car.

Five hours after the incident at the casino, police received a report that Santoyo was sitting in a homeowner's car. Christopher Alizaga had backed both his and his wife's car out of their garage prior to them leaving for work. Alizaga left his car, a Dodge Avenger, unlocked and running in the driveway, with his daughter in the back seat. He left his wife's car, a Toyota Corolla, unlocked and not running, and went inside to give the keys to his wife. When Alizaga returned to the driveway, seconds later, he saw Santoyo sitting in the driver's seat of the Corolla with the door open, but saw no movements. Alizaga told Santoyo to leave or he would call the police. Santoyo voluntarily got out of the car, said that he was looking for a ride, and walked away from the residence. Alizaga went back inside his house and called the police. Santoyo was arrested within several minutes while walking on the sidewalk, and when searched, police found no tools, money or contraband. Santoyo made no statement to deputies. The Toyota Corolla was not tampered with or damaged in any way.

Santoyo was charged with attempted robbery of Vega and attempted grand larceny of Alizaga's motor vehicle. At two pretrial status hearings, the district court addressed Santoyo's motion in limine seeking to exclude evidence that the Ford Escape was stolen. At the first hearing, the State presented testimony from Deputy Kusmerz, but neither the district

court nor the parties expressly referred to this as a *Petrocelli*[2] hearing. Deputy Kusmerz testified that, after he arrived at the casino, Deputy Huichapa told him that the Ford Escape was reported stolen in California, which was later confirmed by Lyon County dispatch.

The State argued that evidence that the Ford Escape was stolen was admissible as res gestae or a prior bad act. The State explained that it was not charging Santoyo with possession of a stolen motor vehicle because (1) it had no witnesses, as the witness from California was in bad health, and (2) prosecutors in California asked the State not to charge him with the crime so that it did not impair their case. The State also argued that the evidence of the Ford Escape being stolen would be admissible as a prior bad act, specifically to show intent to commit the charged crimes of attempted larceny and attempted grand larceny, or a common scheme. The State asserted that Santoyo stole the car in California and ran out of gas in Dayton. The State argued that Santoyo tried to commit a robbery in the casino (i.e., by trying to steal Vega's keys), and after his failed attempt to steal the keys, he attempted to steal Alizaga's car.

Santoyo argued that evidence that the Ford Escape was stolen, whether used as prior bad act or as res gestae, was not proven by clear and convincing evidence, and that the events inside of the casino could be explained without referring to the status of the Ford Escape. The district court, referring to the Ford Escape, noted, "I don't think at this point that the State has proven anything by clear and convincing evidence that occurred in California." The district court then explained that, if the State wanted to

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[2]*See Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

refer to the stolen Ford Escape in its opening statement, it would need to prove the existence of the acts inside the casino before trial. Thus, the district court deferred making any preliminary ruling as to the admissibility of the stolen Ford Escape.

At a second pretrial hearing, after addressing other matters, the district court noted, "[this] brings us to your bad act motion," again without referring specifically to *Petrocelli*. Vega testified to the events inside the casino. The State argued that between the testimony of Deputy Kusmerz and Vega, the evidence that the Ford Escape was stolen was "part of the story of what happened," and therefore, was admissible as res gestae. The State again moved to admit evidence of the stolen vehicle as a prior bad act, this time also adding that the bad act showed motive. The State did not attempt to prove that Santoyo stole the vehicle or knew that it was stolen. Santoyo reasserted that the bad act was not proven by clear and convincing evidence.

The district court rejected Santoyo's arguments as to res gestae, and concluded that, even though Vega "wasn't specifically told" by Santoyo that the Ford Escape was stolen or left inoperable, it would "explain why [Santoyo] grabbed [the] keys and punched [Vega]." The district court further noted that "[i]t would be impossible" to testify about the robbery without describing that the Ford Escape was stolen. The district court, therefore, admitted the evidence as res gestae, and made no rulings or findings under *Petrocelli*. The State presented no documentary evidence to show that the Ford Escape was reported stolen or actually stolen, or that Santoyo had been charged with or convicted of stealing it.

In its opening statement, the State immediately referred to the Ford Escape as stolen. The State's first witness was Deputy Huichapa, who explained that he ran the Ford Escape's license plates, and that it, the Ford Escape, came back as stolen. Deputy Kusmerz also testified that the Ford

Escape was reported stolen out of California, which was confirmed by dispatch. Vega never testified that the Ford Escape was stolen.

The State also called Alizaga and asked what happened after he saw Santoyo sitting in his wife's car. Alizaga testified:

> I decided to call the cops. I'm not one to call the cops all the time on people or anything, but it just felt—it felt sketchy. Like, I've—taking like criminal justice class, *my instructor will always tell me if one person has done a crime before, then because they'll like they'll do it again.*

(Emphasis added.) Santoyo did not object, and the district court did not give a limiting instruction or otherwise admonish the jury to disregard the statement.

In the State's closing argument, it stated, "[Santoyo]'s driving that Ford Escape that was stolen out of Citrus Heights, California." The State noted that Santoyo was "looking for an opportunity" to steal other cars. The State explained that, after Santoyo left the casino, he "[p]robably saw the stolen car get towed. We know now that . . . at that point, the [sic] they're dealing with a stolen car." The jury instructions did not include any limiting instruction as to the use of the evidence of the status of the Ford Escape as a reported stolen vehicle, as a prior bad act, nor to Alizaga's comment regarding criminal propensity. The jury convicted Santoyo of both charges.

On appeal, Santoyo argues that (1) the district court abused its discretion in admitting evidence that the Ford Escape was stolen as res gestae, (2) the district court plainly erred by allowing the State to use the evidence that the Ford Escape was stolen as a prior bad act without *Petrocelli* findings, (3) the district court abused its discretion by failing to provide the jury with a limiting instruction as to the status of the Ford Escape as a stolen vehicle as a prior bad act, (4) the district court plainly erred in failing to admonish the jury or provide a limiting instruction as to inadmissible

criminal propensity testimony, (5) the erroneous admission of evidence was not harmless error, (6) sufficient evidence does not support either conviction, and (7) cumulative error warrants reversal.

We conclude that (1) the district court abused its discretion by admitting evidence under the res gestae doctrine that the Ford Escape was stolen, (2) this evidence was not independently admissible as a prior bad act because the district court did not make *Petrocelli* findings and the bad act was not proven with clear and convincing evidence, and (3) Alizaga's criminal propensity testimony was prejudicial, and the district court should have admonished the jury to disregard it. The admission of this evidence prejudiced Santoyo and was not harmless. Therefore, we reverse and remand for a new trial.

Standard of review

Santoyo argues that an abuse of discretion standard of review applies to the admission of the evidence of the Ford Escape being stolen as res gestae, but concedes that a plain error standard should apply to the State's use of this evidence as a prior bad act, as well as Alizaga's testimony, because Santoyo did not object at trial. The State agrees.

"'We [typically] review a district court's decision to admit or exclude evidence for an abuse of discretion,' but 'failure to object precludes appellate review of the matter unless it rises to the level of plain error.'" *Franks v. State*, 135 Nev. 1, 3, 432 P.3d 752, 754-55 (2019) (alteration in original) (quoting *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (internal quotation marks omitted)); *see also Hubbard v. State*, 134 Nev. 450, 454, 422 P.3d 1260, 1264 (2018) ("The decision of whether to admit or exclude [bad act] evidence is within the district court's discretion and will not be overturned absent a manifest abuse of that discretion."). If "the district court has thoroughly explored the objection during a hearing on a

pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal." *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

Here, the district court ruled that the evidence pertaining to the Ford Escape was admissible as res gestae, but it did not make any findings or rulings under *Petrocelli*. Because the district court made a definitive ruling as to the admissibility of the evidence as res gestae, Santoyo's motion in limine preserved this issue for appeal. Thus, we will review Santoyo's argument regarding the admissibility of the evidence pertaining to the Ford Escape under an abuse of discretion standard, and the admission of the witness testimony for plain error because Santoyo failed to object at trial.

The district court abused its discretion in admitting evidence that the Ford Escape was stolen as res gestae

Santoyo first argues that the district court abused its discretion by allowing deputies to testify that the Ford Escape was stolen, as res gestae evidence, because the State's witnesses could describe the charged acts without referring to the status of the car as stolen. The State avers that this evidence was properly admitted under NRS 48.035(3), and that the State only argued that the Ford Escape was stolen, not that Santoyo stole it.[3]

"Under the [res gestae] statute [NRS 48.035(3)], *a witness may only testify* to another uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime." *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (emphasis added). "Th[e] basis for admissibility [under

[3]In the State's closing, it implicitly argued that Santoyo stole the vehicle by stating, "[h]e's driving that Ford Escape that was stolen out of Citrus Heights, California." The State then noted that Santoyo was "looking for an opportunity [to steal another car]."

NRS 48.035(3)] is extremely narrow . . . ." *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 698-99, 405 P.3d 114, 119-20 (2017). "[T]he statute applies to testimony by an actual witness who cannot describe the charged crime without referring to another uncharged act; it does not contemplate a hypothetical witness or an abstract viewpoint from which two or more acts might be considered intertwined." *Id.* The supreme court has further noted that the res gestae doctrine "does not apply to evidence that helps *explain* a charged crime . . . but, rather, only applies to allow the admission of evidence of a prior crime when a witness cannot describe the charged crime without referring to the prior crime." *Camacho v. State*, Docket No. 73380, at *8 (Order of Affirmance, March 18, 2019) (internal quotation marks omitted).

Here, the crucial fact showing that this evidence was not "so closely related" that the "witness [Vega] cannot describe the act without referring to the other uncharged act or crime," *Bellon*, 121 Nev. at 444, 117 P.3d at 181, was that the State needed to present additional witnesses, Deputies Kusmerz and Huichapa, to testify that the car had been stolen. Further, the status of the Ford Escape was not "so closely related" to the charged crime that it prevented Vega from testifying to the facts of the attempted robbery. Vega only testified that Santoyo pointed at the Ford Escape and said that he needed help with his car. Vega did not testify that (1) Santoyo told him the car was stolen, (2) he knew the car was stolen, or (3) he even suspected that the car was stolen. Thus, under the doctrine of res gestae, the fact that the Ford Escape was stolen was unnecessary to prove the charge of attempted robbery against Santoyo for his attempt to take keys

away from Vega and obtain a vehicle.[4] Even if, as the district court noted, the status of the Ford Escape—i.e., that it was stolen—"explains the actions of [Vega]" as they relate to Santoyo's attempt to steal keys from him, permitting the status of the vehicle to explain motive is impermissible because it is then being used as bad act evidence and not res gestae evidence. In *Camacho,* the supreme court expressly observed that the res gestae doctrine does not apply when the evidence only helps "explain" the charged crime, but rather, it only applies when the charged crime *cannot* be described without referring to the prior crime. Docket No. 73380, at *7-8. Thus, even if the "fact" the Ford Escape was stolen might help explain the attempted robbery charge, as the dissent argues, it is improper to use the doctrine of res gestae to permit this fact to be admitted into evidence.[5]

Finally, there is also no factual basis in the record to connect the Ford Escape to the second charged crime as res gestae evidence, which was the attempted grand larceny of Alizaga's car five hours later at a different location. Alizaga provided no testimony whatsoever regarding the Ford

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[4]We agree that the video of the incident appears inconclusive as to whether Santoyo attempted to grab the keys from Vega, but acknowledge that Vega's testimony supports that this event occurred.

[5]In other words, if use of the res gestae doctrine was permissible at all, which we disagree with based on the record before us, it would be for the attempted robbery charge only, and a limiting instruction explaining this restriction would be essential in preventing misuse of the evidence. *But see infra* pages 15-17 and note 12, which explains why the admission of the fact that the Ford Escape was stolen in this case was not merely harmless error, because this "fact" permeated the trial from beginning to end. We cannot say, therefore, that Santoyo was fairly convicted of attempted robbery *as charged*, or instead was convicted because the jury improperly inferred that he had previously stolen the Ford Escape and had a criminal propensity.

Escape. Therefore, the res gestae statute cannot possibly be applied as to that charge.

In summary, as noted above, both victims could describe the charged offenses without referring to the Ford Escape as being stolen. Thus, we conclude that the district court abused its discretion by admitting evidence that the Ford Escape was stolen under the res gestae doctrine.

The evidence that the Ford Escape was stolen was not admissible as a prior bad act

Santoyo argues that the district court never made findings under *Petrocelli*—and because it already abused its discretion in admitting the evidence as res gestae—the district court plainly erred in allowing the State to use evidence that the Ford Escape was stolen as a prior bad act. The State makes no arguments as to prior bad acts, only arguing that the evidence was properly admitted as res gestae.[6] As noted above, Santoyo sufficiently preserved this issue for appeal, and thus, an abuse of discretion standard will apply.

"A presumption of inadmissibility attaches to all prior bad act evidence." *Hubbard*, 134 Nev. at 454, 422 P.3d at 1264 (quoting *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (internal quotation marks omitted)). To overcome the presumption of inadmissibility and admit the prior bad act evidence, the prosecution must show—in a *Petrocelli* hearing outside the presence of the jury—that "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the

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[6]By providing no argument as to prior bad acts, the State concedes the merits of Santoyo's argument. *See Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (concluding that respondent confessed error by failing to respond to appellant's argument).

probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Id.* (quoting *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012)). "[F]ollowing the *Petrocelli* hearing, the district court must state on the record its findings of facts and conclusions of law." *Armstrong v. State*, 110 Nev. 1322, 1324, 885 P.2d 600, 601 (1994).

Even though the district court must conduct a *Petrocelli* hearing, the failure to do so does not necessarily require reversal. *See, e.g., Rhymes v. State*, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005) ("[W]hen the district court fails to conduct a [*Petrocelli*] hearing[,] . . . that failure is reversible unless '(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in *Tinch* [*v. State*, 113 Nev. 1170, 946 P.2d 1061 (1997), *holding modified by Bigpond*, 128 Nev. 108, 270 P.3d 1244]; or (2) where the result would have been the same if the trial court had not admitted the evidence.'" (quoting *Qualls v. State*, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998))).

Even though the State moved to admit evidence that the Ford Escape was stolen as both a prior bad act and res gestae, the district court did not conduct a *Petrocelli* hearing, presumably because the district court concluded that the evidence was admissible as res gestae. Based on our conclusion that this evidence was inadmissible as res gestae, we review the record to determine whether, on these facts, this evidence was admissible as a prior bad act.

Here, the district court's failure to conduct a *Petrocelli* hearing is reversible. First, the record is not sufficient for us to make findings under *Petrocelli*. There is no documentary evidence in the record to show that the car was stolen. Further, the only testimony that the car was stolen came from Deputies Kusmerz and Huichapa, who both testified that the car was reported as stolen as relayed by dispatch. The district court expressed doubt

that the alleged fact, that the Ford Escape was stolen, or that Santoyo stole it, had been proven by clear and convincing evidence. Indeed, even if there had been clear and convincing evidence that the vehicle was stolen, there was no evidence to prove that Santoyo stole it or knew it was stolen. The vehicle's status as stolen might have been relevant and probative to prove intent, scheme or motive under NRS 48.045(2), but only if Santoyo stole the vehicle or knew it was stolen. *See* NRS 205.275(1). Further, the district court did not balance the probative value of this evidence against its prejudicial effect. For these reasons, we cannot utilize the record to conclude that this evidence was admissible as a prior bad act.[7]

Second, we cannot conclude that the result would have been the same had the district court not admitted this evidence. This evidence was highly prejudicial because it allowed the jury to use the uncharged act to conclude that Santoyo committed the charged act (i.e., to misuse the evidence). The State's closing argument also explicitly referred to this evidence as proving that Santoyo had the opportunity to commit the charged crimes, and thus, it was used as a prior bad act.[8] Therefore, we cannot affirm

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[7]Our disposition does not hold that this evidence is ultimately admissible or inadmissible, as upon remand, either finding may be made after a *Petrocelli* hearing. Rather, we conclude that—based upon this record—this evidence was improperly admitted at Santoyo's trial.

[8]The Nevada Supreme Court has noted that "[t]he improper admission of bad act evidence is common grounds for reversal." *Rosky v. State*, 121 Nev. 184, 194-95, 111 P.3d 690, 697 (2005) (citing *Braunstein v. State*, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002)). Proof of opportunity is one of the reasons identified in the statute authorizing use of bad act evidence, however, the State did not proffer this reason at the pretrial hearing. *See* NRS 48.045(2).

the admission of this evidence on the ground that it was properly admitted as a prior bad act under *Petrocelli*.[9]

The district court plainly erred in admitting Alizaga's testimony without an admonishment or limiting instruction

Santoyo argues that the district court plainly erred in failing to admonish the jury to disregard Alizaga's inadmissible testimony—"if one person has done a crime before, then . . . they'll do it again"—or to provide a limiting instruction after its admission.

Santoyo did not object at trial, and thus, we will apply a plain error standard of review. Under plain error review, the "appellant must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome)." *Id.* at 51, 412 P.3d at 49 (internal quotation marks omitted).

In this case, the admission of Alizaga's testimony, without a corresponding limiting instruction or admonishment, was plain error that affected Santoyo's substantial rights for two reasons. First, the State

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[9]Santoyo also argues that the district court abused its discretion in failing to provide a limiting instruction or otherwise admonish the jury as to the use of this evidence as a prior bad act. *See Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), *holding modified by Mclellan*, 124 Nev. 263, 182 P.3d 106. We need not reach the merits of this argument, however, because we already have concluded that this evidence was not properly admitted as a prior bad act. Further, evidence admitted as res gestae need not comply with *Petrocelli*. *See State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995).

concedes that it was error to allow the testimony, but argues that the error was harmless. Second, the evidence was not "admitted for a permissible limited purpose," but instead, "the evidence was presented or argued at trial for its forbidden tendency to prove propensity." *Fields v. State*, 125 Nev. 785, 790, 220 P.3d 709, 713 (2009) (noting that the use of evidence to prove propensity is "unfair prejudice"); *see also Propensity*, *Black's Law Dictionary* (11th ed. 2019) ("[T]he fact that a person is prone to a specific type of bad behavior.").

Here, Alizaga blatantly stated—in the presence of the jury—that, "if one person has done a crime before, then because they'll like they'll do it again." Thus, even though Santoyo did not object, the district court had a sua sponte duty to both admonish the jury and give a limiting instruction to disregard this testimony. *See Tavares*, 117 Nev. at 731, 30 P.3d at 1132. Thus, the admission of Alizaga's testimony—and the district court's failure to admonish or instruct the jury to disregard it—was a plain error that led to prejudice or a grossly unfair outcome (i.e., Santoyo's conviction and incarceration). The State concedes that the failure to admonish the jury to disregard Alizaga's testimony was error, but contends that it was harmless.[10] As the proceeding analysis shows, however, this evidence was harmful, as the State had already presented evidence regarding an unrelated stolen vehicle being connected to Santoyo, which would have a substantial and

[10]Alizaga's statement could be interpreted to mean that the reason he called the police was to prevent Santoyo from stealing another vehicle in the *future* versus the implication that he had already stolen or attempted to steal another vehicle. But, it doesn't really matter. This is because Alizaga's statement explicitly conveys to the jury that Santoyo is a bad actor—he has the propensity to steal—which is exactly the type of impermissible character testimony that at a minimum requires an admonishment and a limiting instruction.

injurious effect on the jury if the jury believed Santoyo was being described as a person with the propensity to commit crimes.

The evidentiary errors were not harmless

Having concluded that the district court (1) abused its discretion in admitting evidence that the Ford Escape was stolen, and (2) plainly erred in failing to admonish the jury after the testimony of Alizaga, this court must assess whether the errors were harmless.

Failure to give a limiting instruction for uncharged bad act evidence is nonconstitutional error, and thus, we review for harmless error. *See Tavares*, 117 Nev. at 732, 30 P.3d at 1132 (applying the test set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946)). "An error is harmless and not reversible if it did not have a substantial and injurious effect or influence in determining the jury's verdict." *Hubbard*, 134 Nev. at 459, 422 P.3d at 1267.

"We have often held that the use of uncharged bad act evidence to convict a defendant is *heavily disfavored* in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." *Tavares*, 117 Nev. at 730, 30 P.3d at 1131 (emphasis added). "The principal concern with admitting such acts is that the jury will . . . convict the accused because it believes the accused is a bad person." *Id.*

With the erroneous admission of the res gestae evidence that the Ford Escape was stolen, as well as Alizaga's testimony that a person who commits a crime will commit one again, the jury was allowed to make the forbidden inference—without a *Petrocelli* hearing—that (1) Santoyo had already committed a crime, and (2) it proved that he committed the two charged crimes. Further, the jury was not given a limiting instruction in this regard at the time the evidence was admitted, nor in the final jury

instructions. This inference had a substantial and injurious effect on the verdict because it allowed the jury to use uncharged misconduct evidence to convict Santoyo. Thus, the erroneous admission of this evidence led to Santoyo's conviction and incarceration.[11] Thus, the error in admitting this evidence was not harmless. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for a new trial.[12]

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[11]Insofar as the parties raise arguments that are not specifically addressed in this order—including those pertaining to the sufficiency of the evidence supporting Santoyo's convictions—we have considered the same and conclude they either do not present a basis for relief or need not be reached given the disposition of this appeal.

[12]Our dissenting colleague asserts that affirmance is proper—and that the result would have been the same if these bad acts had not been admitted—because (1) "the jury knew full well that the evidence linking Santoyo to the other vehicle was extremely weak," and (2) "[a]ll the evidence introduced here would be more than enough to convict Santoyo of both crimes without the flawed bad acts evidence . . . mean[ing], by definition, that the error induced by the bad acts evidence was 'harmless.'" The well-established rule, however, is that criminal propensity evidence—such as the evidence that was admitted here—is highly prejudicial because it creates the risk that "uncertain of guilt, [the jury] will convict anyway because a bad person deserves punishment." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (internal quotations omitted). The Nevada Supreme Court has reiterated that the admission of prior bad act evidence is heavily disfavored precisely because of the risk of unfair prejudice. *Newman v. State*, 129 Nev. 222, 230, 298 P.3d 1171, 1178 (2013). Thus, to affirm a conviction supported by improperly admitted prior bad acts, this court must conclude from the record that the result would have been the same had the evidence not been admitted. *Rhymes*, 121 Nev. at 22, 107 P.3d at 1281. The dissent argues that the evidence presented by the State, other than the bad act, was more than enough to convict Santoyo. We disagree. The evidence of Santoyo's guilt was not overwhelming as the dissent suggests. One can observe from the record as a whole, and not from individual portions taken out of context, that the case was so irresolute that the State had to rely on and emphasize

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., dissenting:

I agree with my colleagues that the district court erred in admitting evidence under NRS 48.045 that Santoyo previously stole a car in California, because the State failed to prove that it ever happened. The best

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the bad act evidence in its opening statement and closing arguments, and throughout the examination of multiple witnesses. The State may have repeatedly referenced this bad act precisely because it had the tendency to persuade the jury to prejudge Santoyo's guilt. *See Michelson v. United States*, 335 U.S. 469, 476 (1948). The dissent also presumes, without any substantiation, that the jury knew that any evidence linking Santoyo to the stolen vehicle was "extremely weak," despite two deputies testifying that the Ford Escape was reported stolen and was then impounded, and that Santoyo was in close proximity to it from Vega's testimony and as seen in the security video. The dissent also incorrectly notes that multiple eyewitnesses identified Santoyo as the perpetrator; the only people at the scene of the crime were Santoyo, Vega, and a bystander that testified that she did not observe the incident. Additional witnesses (the deputies) viewed the security footage after the incident, but the dissent admits that attempting to ascertain what the video tape showed is, at best, "an educated guess." The dissent also fails to address the improper propensity evidence offered by Alizaga that "if one person has done a crime before, then because they'll like they'll do it again." In sum, erroneous and prejudicial evidence was used against Santoyo, and concluding that the result would have been the same without this evidence requires a speculative interpretation of the record that is contrary to established caselaw. Thus, this case must be remanded for a new trial.

they could do is prove that officers were told by police dispatchers that it happened, but without more that's pure hearsay, and potentially double hearsay to boot.

But it doesn't matter in the end, for two interrelated reasons. First, Santoyo noted to the jury via a lengthy cross-examination that the State could not prove through anything but unconfirmed hearsay that he ever stole the car in California. For example:

> Q(cross-examining Officer Kusmerz): Now, is there anything in that vehicle that links my client to that vehicle [allegedly stolen in in California]?
> A: From what I recall, there was nothing in the vehicle that could specifically say who the suspect was.
> Q: Did you look for any handprints or any fingerprints?
> A: I did not look for handprints or fingerprints. . . .
> Q: And so, from your investigation that you completed on the outside and inside of this vehicle, there was no evidence that you collected that specifically linked my client to that vehicle; is that correct?
> A: That is correct.

So the jury knew full well that the evidence linking Santoyo to the other vehicle was extremely weak and consisted of little more than hearsay. That doesn't make right the admission of the evidence, because the State bore the burden of proving its truth to the high standard of clear and convincing evidence before seeking to admit it. Thus, the error remains error under the law. But it raises the question of how much, or even whether, the error affected the jury's verdict. Indeed, more than once during the trial the judge instructed the jury on what constitutes hearsay and how hearsay may, and may not, be properly used ("So ladies and gentlemen, this evidence, although it's usually considered hearsay, it's not direct evidence. It's just to explain her actions and why she did it that night. Okay? So only use it for that

purpose."). All of this undermines Santoyo's argument that merely because he was accused of stealing the California car ipso facto the jury must have believed it to be true and depended upon it as an integral part of its deliberations and its ultimate verdict.

This first observation interacts with the second reason. We do not reverse felony jury verdicts every time some error occurs no matter how minor, because criminal trials need not be perfect. *See Ennis v. State*, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (a defendant "is not entitled to a perfect trial"). We only reverse when an error was of such magnitude and touched so centrally upon the question of guilt that it was not harmless to the verdict, meaning that the jury would not have reached the same verdict without the error. *See Valdez v. State*, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008). Here, the evidence of Santoyo's guilt was overwhelming, and thus any error in admitting the California theft was harmless, especially when the jury already knew the California evidence to be weak.

In resolving any appeal from a criminal conviction, we must view the evidence in the light most favorable to the prosecution. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). Thus, where the facts in the record are disputed or can be interpreted in two different ways, we must read them in the way that most strongly supports the verdict, and cannot reverse a conviction based upon our own view of contested facts inconsistent with what the jury must have found to be true when it convicted the defendant.

Santoyo was convicted of crimes arising from two incidents that occurred within a few hours of each other. In the first, at around 1:00 a.m., he approached the victim (Vega) in a local casino and tried to grab keys dangling from his belt. When Vega refused, Santoyo punched him in the head, causing him to fall to the ground:

A(Vega): I carry the slot attendant keys that dangle from my pants. He tried to reach for those keys, and that's when I told him to get out. And then when he didn't get out, I turned around to go get the phone to call the sheriff's office and that's when he hit me . . . .
Q: And did he physically grab those keys?
A: Yes, with his hand.

Almost all of Vega's description of the crime was corroborated: a bystander heard the sound of the punch and saw Vega lying on the ground ("I heard some commotion . . . it was like a pop, a loud pop, I had turned over, and Moises [Vega] was on the floor. Obviously, he just got hit by something . . . the [other] guy was maybe a foot behind me . . . and then he went out the door"); a surveillance video showed the two speaking and then Santoyo punching Vega in the head as he turned; multiple witnesses testified that Vega immediately reported that Santoyo grabbed for the keys on his belt before punching him and that his story never changed; and immediately after the attack Vega was described as being dazed ("he wasn't all there[, like] a blow to the head daze") and was treated for visible traumatic injuries to his head and face (a photo of which was shown to the jury). Multiple eyewitnesses, including Vega, identified Santoyo as the perpetrator who spoke with Vega right before the crime and quickly fled the scene immediately afterwards, and his face and clothes (a red and black baseball cap, glasses, a red jacket, black jeans, and black shoes) can be clearly seen in other surveillance video from the casino.

Indeed, the evidence was so strong that Santoyo's counsel conceded that Santoyo was the perpetrator and that almost everything about the crime happened just as Vega and the other witnesses described. He only argued that the surveillance video did not clearly depict Santoyo actually grabbing for Vega's keys. But he failed to submit a copy of the video in the appellate record for our review, so we must assume that its contents

wholeheartedly support the conviction, because when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (appellant is responsible for making an adequate appellate record). At trial Santoyo argued that its contents undermine the conviction, but we "cannot properly consider matters not appearing in th[e] record" and thus we cannot assume that his argument was correct. *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997). Without a copy of the video it's impossible, as well as improper, for us to speculate about what it showed and, to the extent we can, we necessarily must conclude that it helps the State, not Santoyo.

Nevertheless, just to cover every possible base, I'll take something of an educated guess about what the video might have depicted, although quite emphatically it is nothing more than an incomplete guess that might be much more favorable to Santoyo than the missing video actually was. At trial the video was played for the jury and two witnesses described it while they viewed it. Both testified that the video was too blurry to show Santoyo grabbing at the keys. Vega testified as follows:

> Q: Can we see the keys that you were just speaking of or the lanyard?
>
> A: Yes, they're dangling on my right side.
>
> Q: That would be where the mouse is now?
> A: Yes.
> Q: And then I'll move past there. That was 1:28. As far as the — him trying to grab the keys, that happened off the video after that?
> A: It shows him when we're talking a little bit and that's when he grabbed them . . . . I'm not sure how well it shows the close-up because the cameras aren't too good. So, I don't think it actually showed him grabbing the keys.

A police officer (Officer Huichapa) testified while viewing the same video that it was too blurry to be able to clearly tell whether it showed Santoyo grabbing for Vega's keys. The officer was careful to note that the video did not show that there was no such grab, only that its quality was too low for him to be able to tell one way or the other "for sure":

> Q: You did not see my client reach for anyone's keys?
> A: No. Due to the poor video quality, I wasn't able to see that for sure.

Without a copy of the video, we'll never know for sure what it actually showed. It might have been too unclear to show anything at all, or it might have showed a blurry arm movement entirely consistent with a grab at the keys but not "for sure," which would still very much tend to corroborate Vega's account of the crime. If forced to speculate, our speculation must favor the State, meaning in this context that it must favor Vega. But we don't have to, because we know something more: during closing argument Santoyo's counsel very notably did not argue that the video unquestionably exonerated Santoyo and affirmatively showed that he never grabbed for Vega's keys. Instead, he proffered a much more carefully worded argument that the video was too unclear by itself for the jury to find that such a grab occurred beyond a reasonable doubt ("The video doesn't show that. The clearest thing we have, the video, does not show it."). This tells us quite a lot, because this is a very different argument than asserting that the video affirmatively proved Santoyo's innocence; it's an argument about blurriness, not exoneration. There's a world of difference between arguing that the video obviously showed the crime did not happen, and arguing that its quality was too poor to show anything obvious either way. And in response to a grainy video, the jury could easily have believed Vega, especially when quite literally

everything else he said was independently corroborated by other witnesses and the video: that the incident occurred when and where Vega said it did, that Santoyo approached him and spoke to him, that Santoyo was wearing the exact clothes that Vega correctly described to the police and that he was later arrested wearing, that Vega had keys visibly dangling from his belt, that Vega never wavered in reporting that Santoyo reached for his keys, that Santoyo punched him for no other apparent reason and then fled on foot, and that Vega suffered verifiable head injuries from the punch. Even Santoyo's counsel agreed that most of Vega's testimony was true ("Now, ladies and gentlemen, I don't make any excuses for my client punching Mr. Vega in the face"). Everything that Vega reported was independently confirmed by eyewitnesses and surveillance video with the exception of the grab for the keys, and that part of Vega's testimony never changed or wavered. Even the video did not contradict it, but was simply unclear due to poor quality. With everything else in Vega's testimony corroborated in multiple ways, the only defense Santoyo could mount was to suggest that he approached a complete stranger in the middle of the night and punched him in the back of the head for no reason whatsoever ("There's a conversation that happens. My client got angry. He punched him. That was it"), and then the stranger told the exact truth about what happened but weirdly added the lie that Santoyo grabbed for the keys before the punch, even though the stranger had no reason to tell such a lie and stood to gain nothing from it at all. But this makes considerably less sense than accepting that it was part of an attempted robbery, just as Vega reported immediately afterwards and consistently repeated all the way through trial.

In the second incident a few hours later across town, Santoyo attempted to steal a car from a second victim (Alizaga), who found Santoyo sitting in the front seat of his car in his driveway, confronted him and

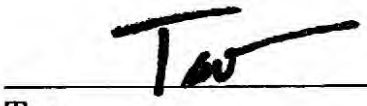
demanded that he leave. When Santoyo refused, Alizaga forcibly "pushed" him from the car and then called the police. Santoyo was arrested moments later walking away from the victim's house wearing the exact clothes that Alizaga described (which were also the same clothes depicted in the surveillance video from the earlier incident). When questioned, Santoyo had no explanation why he was walking on foot at 7:00 a.m. through a residential neighborhood that he did not live in and in which he knew nobody, and later at trial counsel proffered no explanation either. Alizaga affirmatively identified Santoyo as the perpetrator both at the scene and during trial. During trial, Santoyo's counsel conceded that Santoyo was the perpetrator and that the crime happened exactly as Alizaga described, but only argued intent: that Santoyo did not intend to steal the car but only intended to ask for a ride, even though he did not dispute that Santoyo was sitting in the driver's seat of Alizaga's car rather than the passenger seat or back seat, and further did not dispute that the two were complete strangers to each other and never spoke in their lives until after Alizaga discovered Santoyo already in the driver's seat of his car. In response to this line of questioning, even Alizaga characterized Santoyo's claim of needing a ride as "dumb."

This isn't a close case. The defense didn't call a single witness to testify, so the State's evidence was entirely undisputed. So the question of "harmless error" comes down to how strong the State's undisputed evidence was, not choosing between two competing versions of the facts. And the State's case wasn't built on dubiously long chains of circumstantial evidence; it was a conviction grounded firmly in eyewitness testimony, surveillance video, and an arrest immediately after the crime while memories were fresh. In Nevada, the testimony of a single witness to the crime is sufficient to sustain a conviction even if the testimony is wholly uncorroborated. *See Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). When the

testimony of two different victims is corroborated by as much evidence as there is here, it becomes not merely sufficient, but overwhelming. All of the evidence introduced here would be more than enough to convict Santoyo of both crimes even without the flawed bad acts evidence, and it will be more than enough to convict him at a retrial without the bad acts evidence. Which means, by definition, that the error induced by the bad acts evidence was "harmless" and the proper outcome of this appeal is for us to note the error, and then affirm the conviction. *See Valdez v. State*, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008). We sit to review judgments, not to grade every individual event that happened at trial. Even if some error occurred, when the evidence was (and will be) more than enough to sustain the conviction notwithstanding the error, then the trial may not have been perfect but the judgment of conviction was not wrong. In that event the proper outcome is affirmance, not to waste time and resources reversing and remanding for a second trial when the first trial did not produce an incorrect result and convict an innocent man.

> "Even if an effective retrial is possible, it imposes enormous costs on courts and prosecutors, who must commit already scarce resources to repeat a trial that has already once taken place. It imposes costs on victims who must relive their disturbing experiences. While prejudical [sic] error would require a retrial regardless of the inconvenience, those who participated in the initial proceedings should not be compelled to confront these dreadful events a second time if the first trial has been fair. Retrials, moreover, may lack the reliability of the initial trial where witness testimony was unrehearsed and witness recollections were more immediate."

Perry v. Leeke, 832 F.2d 837, 843 (4th Cir. 1987). Respectfully, I dissent and would affirm the judgment of conviction.



_____, J.
Tao

cc: Hon. John Schlegelmilch, District Judge
Walther Law Offices, PLLC
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