IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILL KERNAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78428-COA

ORDER OF REVERSAL AND REMAND

Will Kernan appeals from a judgment of conviction, pursuant to a jury verdict, of burglary. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Kernan lived next door to the victims, Jared and Hannah Diem, sharing a piece of landscaping between the two properties, but the Diems did not know Kernan well.[1] Before the incident, the Diems had installed a surveillance system with video cameras on the inside and outside of their home, with one camera affixed near the front door's doorbell and the other within the living room area of the home. Each video camera contained a zoom microphone, which allowed the surveillance system to focus on and capture a nearby sound, thereby enhancing the sound quality of that utterance if it was a voice.

On July 29, 2017, the night of the crime, the Diems left their home in their recreational vehicle and several hours later, at around 2:30 a.m., they received a notification on their phones, through the surveillance system's app, that movement had been detected in their home. They each opened the app to see a man walking through their home towards the bedroom. The man was wearing a hooded sweatshirt, pants, and shoes with

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

reflective material, and had a flashlight. Jared pressed a button on the app to initiate an audible alarm in the house while Hannah called 9-1-1 for assistance. Police officers arrived at the scene and one officer witnessed Kernan driving his truck quickly though the neighborhood without its headlights on, prompting the police to stop the truck. The officer discovered that Kernan's clothing matched the description given by the Diems. The police arrested Kernan, and the State charged Kernan with burglary, alleging only that he entered the home with the intent to commit larceny.

The investigation revealed that nothing had been stolen from the home and the contents had not been disturbed. Nevertheless, in order to help establish the specific intent to commit larceny necessary to sustain the charge of burglary, the State filed a motion to admit other acts under NRS 48.045(2). Specifically, the State sought to introduce two videos previously recorded by the surveillance system before the night in question. One video from October 9, 2016, recorded while the Diems were out of town, shows Kernan on their front porch and pointing a flashlight at the video camera. This video contains audio of Kernan asking off-screen, "What is that?" Another video, recorded two days later on October 11, 2016, consisted of an audio snippet with a derogatory comment about women in the neighborhood and a sexually explicit comment about Hannah.[2] The State averred that Kernan was the declarant who made the lewd and profane

[2]Although highly vulgar, we repeat the State's transcription of Kernan's purported declaration because the content is essential to be able to analyze the issue in this case. It was, "Oh that feels good. Oh my god. Oh fuckin' feels good. I feel groovy. I feel groovy. Ugly bitches. The whole neighborhood's full of ugly bitches, except for Hannah, she's stupid. She's got a big mouth, for sucking bald guys' cocks." We further note that Hannah's husband is bald while Kernan is not.

comments, arguing that he was sexually infatuated with Hannah. Further, that he entered the Diems' home intending to take a piece of Hannah's clothing or undergarments as a sexual memento, but was interrupted when the surveillance system's alarm was activated, prompting Kernan to flee from the home without taking anything. After hearing testimony from Jared Diem, the district court granted the State's motion, concluding that the video contents were established by clear and convincing evidence, they tended to show intent, preparation, plan, or motive, and the probative value was not substantially outweighed by the prejudicial effect.

Days before trial was to start, but only five days after the district court admitted the bad acts, Kernan filed a motion in limine arguing that the two videos should be suppressed under NRS 200.650 and 18 U.S.C. §§ 2510-2520 (2002). The district court denied Kernan's motion as untimely under Rule 7(a) of the Criminal Rules of Practice for the Second Judicial District Court, which prohibits parties from filing and serving motions in limine within 20 days prior to trial, even though the trial date had been continued more than 20 days beyond the date of Kernan's motion.

At trial, the State's opening statement quoted the explicit statements from the October 11 video. The jury heard testimony from Jared, Hannah, and two police officers. When Jared and Hannah testified, the State played the videos from October 9 and 11, and then asked each who they believed made the statement. Jared and Hannah both testified that they believed Kernan was the declarant in the October 11 video.

Before the end of trial, the State proposed an instruction that stated if a person unlawfully enters a house, he might be reasonably inferred to have entered with the intent to commit larceny, unless the unlawful entry is explained by evidence satisfactory to the jury to have been

made without criminal intent. Kernan proposed a jury instruction in response to support his theory of the case that an unlawful entry may only be the crime of trespass if the jury could not find the requisite specific intent to commit larceny necessary for burglary. Kernan argued that the jury instruction was appropriate because it supported his defense theory by countering the State's theory that Kernan was infatuated with Hannah and intended to steal an item of her clothing. The district court granted the State's request to instruct the jury on the inference of intent to commit larceny and rejected Kernan's proposed jury instruction. The court concluded that the defense instruction would confuse the jury because it contained a crime Kernan was not charged with, and trespass is not a lesser-included offense of burglary. It is notable that Kernan did not ask for a lesser-included offense instruction or verdict form, only a theory of the case instruction.

The jury found Kernan guilty of burglary. During sentencing, the district court heard statements from Kernan's mother and son, as well as the Diems. After considering several mitigating and aggravating circumstances, the district court noted that it wished Kernan supplied a mental-health evaluation that might have explained his conduct. The district court further stated that, "What's concerning to the Court is, there appears to be absolutely no level of understanding as to any of the issues that Mr. Kernan may have, which led to the conviction in this case. So the Court will not opt for a suspended sentence here." The district court denied Kernan's request for probation and sentenced him to 18 to 120 months of incarceration.

On appeal, Kernan argues that the district court abused its discretion when it allowed the State to admit the October 9 and 11 videos

because they were not relevant, were unfairly prejudicial, and the contents were not proven by clear and convincing evidence. He also argues that the videos were inadmissible under NRS 200.650 and NRS 179.505(1)(a) because they contain unlawfully intercepted private communications. He further argues that the district court abused its discretion by rejecting Kernan's proposed jury instruction because it barred him from presenting his defense theory and answering the inference of intent instruction. Kernan also contends that the district court violated his Fifth Amendment rights when it stated it wanted Kernan's mental-health evaluation to see if there was an explanation for his conduct, when he was maintaining his innocence.

We first consider Kernan's argument that the district court abused its discretion by admitting both videos displaying evidence of his prior bad acts because they were not relevant to prove intent to commit larceny, were highly prejudicial, and the State failed to prove their contents through clear and convincing evidence.[3]

"[A] person who, by day or night, enters any house . . . with the intent to commit grand or petit larceny . . . is guilty of burglary." NRS 205.060(1). Nevada's statutory scheme penalizes larceny based upon the value of property taken:

> Pursuant to NRS 205.240(1)(a)(1), 'a person commits petit larceny if the person . . . [i]*ntentionally steals, takes and carries away,* leads away or drives away . . . [p]ersonal goods or

[3]Kernan also contends that, under NRS 200.650, NRS 179.505(1)(a), and 18 U.S.C. §§ 2510-2520 (2002), the district court abused its discretion by admitting the October 11 video because it contained unlawfully intercepted communication. However, we need not consider this argument in light of our disposition.

> property, with a value of less than $ 650, owned by another person.' And, pursuant to NRS 205.220(1)(a), 'a person commits grand larceny if the person . . . [*i*]*ntentionally steals, takes and carries away*, leads away or drives away . . . [p]ersonal goods or property, with a value of $ 650 or more, owned by another person.'

Hodges v. State, Docket No. 74515 at *5 (Order of Affirmance, April 25, 2019) (emphasis added). "A district court's decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). NRS 48.045(2) bars parties from using "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that the person acted in conformity therewith."

The district court, however, may admit such evidence when offered "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* When deciding whether to admit evidence of a bad act, the district court must determine, in a *Petrocelli*[4] hearing outside the presence of the jury, 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), *modified by Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012).

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[4]*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).

Under the first prong of *Tinch*, the video evidence must be relevant to the July 29 crime and used for a nonpropensity purpose. *Bigpond*, 128 Nev. at 117, 270 P.3d at 1250; *see also* NRS 48.025(2). Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. When determining whether evidence of a prior bad act is admissible, the district court should consider, among other things, whether the evidence is too remote in time and relevant to the crime at issue. *Newman v. State*, 129 Nev. 222, 230-31, 298 P.3d 1171, 1178 (2013); *Berner v. State*, 104 Nev. 695, 698, 765 P.2d 1144, 1146 (1988), *holding modified by Tinch*, 113 Nev. 1170, 946 P.2d 1061.

Here, the State offered the evidence in an attempt to show motive, intent, preparation or plan. The State contended the evidence would demonstrate that Kernan was sexually infatuated with Hannah and that he intended to enter the home so he could go into the couple's bedroom and steal Hannah's underwear, or other clothing, as a sexual memento.[5] Kernan argues the evidence does not establish such an intent to commit larceny. We agree with Kernan.

The district court did not separately evaluate each video to determine its specific relevance to prove intent to commit larceny, or how they were relevant to establish preparation, plan, or motive to commit

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[5]The State did not argue that the evidence was necessary to prove the identity of the person whom entered the home. Instead, the State initially moved to introduce the surveillance video footage of Kernan on the porch to prove the identity of the individual making the lewd comments.

larceny.[6] The intent on the uncharged occasion has to relate to the intent on the charged offense. *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) ("Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses."). At the very most, the videos established that Kernan appeared on the front porch of the Diem's home more than nine months earlier, and briefly examined the camera with a flashlight. Then two days later, while not on the Diem's property, he made profane and lewd comments, both about women in the neighborhood, and Hannah.

These acts—when viewed in connection with the charged act—do not establish that, in July 2018, Kernan acted with the specific intent or motive when he entered the Diems' home, to steal her underwear or other clothing as a sexual memento. Further, even if he was infatuated with Hannah and sexually attracted to her, as the State argues but which the

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[6]The dissent contends that the videos reflected motive or intent because they showed Kernan's sexual thoughts about Hannah, and his planning to commit a burglary. We reiterate that Kernan's declarations do not create an inference that Kernan *intended to steal* Hannah's underwear. No corroborating evidence of such an intent was ever offered by the State and the comments on their face suggest nothing about larceny. Further, examining a camera on the porch does not show planning or intent to enter the home to steal Hannah's undergarments. It might, however, possibly reveal planning to commit an illegal act such as trespassing. Therefore, this evidence was used to show Kernan's bad character and not for a purpose relevant to the actual charged crime of entry with intent to commit larceny (i.e., the evidence was offered for an improper propensity purpose). The dissent has not shown any non-propensity inferential connection between Kernan's acts and declarations, and his purported intent to steal Hannah's underwear.

video does not actually reveal, nothing shows that he planned to *steal* her undergarments as opposed to looking at them or fondling them. Moreover, while the October 9 video shows Kernan looking at the home surveillance camera on the front porch, it does not prove planning or preparation for the crime of burglary as it was charged and argued in this case, namely with the specific intent to steal Hannah's underwear more than nine months later. Finally, Kernan's lewd comment pertaining to Hannah referenced a bald man involved with Hannah in a sexual act. Yet, Hannah's husband is bald, while Kernan is not, thereby failing to create the nexus that Kernan specifically intended to enter the home with the intent to steal Hannah's underwear.

These profane comments, although disturbing, are highly attenuated from the requisite intent to commit larceny, rendering them irrelevant as to any nonpropensity purpose (i.e., motive, intent, plan, or preparation). Thus, these acts were used to show that Kernan was a person of bad character and acted in conformity with his bad character on the charged occasion.[7] Therefore, the district court manifestly abused its

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[7]Our dissenting colleague avers that "NRS 48.045[(2)] [wa]s not needed because all of the evidence is from the same event." The dissent—to show that all evidence here could have been admitted without NRS 48.045(2)—creates a hypothetical example wherein the State has presented evidence that the defendant-killer (1) "buys a gun one day and tells the clerk he wants to kill his friend, [(2)] scouts the scene of the crime the next day, [(3)] kills the victim at the scene on the third day, and [(4)] confesses to the police on the fourth day." The dissent, notably, does not specify what substantive offense the hypothetical killer was charged with. If the hypothetical killer was charged with first degree murder pursuant to NRS 200.030(1)(a), the dissent is correct that this hypothetical evidence would be admissible—notwithstanding NRS 48.045(2)—because purchasing the gun and the scouting of the scene would be direct evidence of an element of

discretion in concluding that the videos were relevant and not too attenuated from the charged crime.[8]

We also address Kernan's argument that the evidence was unfairly prejudicial, as it is an independent basis to reverse the district court's ruling that the bad acts were admissible. *See also infra*, note 7

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the charged crime (i.e., premeditation), and the murder itself, as well as the confession to the murder, would be direct evidence of another element of the charged crime (i.e., the killing of a human being). The dissent cites to *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995), to argue that "an act is not an 'other act' if it is inextricably intertwined with the charged crime itself." Nevada's courts, however, use the "inextricably intertwined" analysis in the context of res gestae evidence. *See State v. Shade*, 111 Nev. 887, 895, 900 P.2d 327, 332 (1995) ("The excluded evidence was inextricably intertwined with the charged crimes . . . .").

Here, the acts are nothing like those in the dissent's hypothetical because (1) looking at a video camera on a porch more than nine months earlier with no attempt to disable it or enter the home, and (2) making rude and profane declarations about the women in the neighborhood and Hannah, but with no accompanying statements of a plan or a desire to enter the home and steal Hannah's underwear, is not direct evidence that proves that Kernan engaged in a series of events showing a crime that includes the intent to take and carry away Hannah's underwear (i.e., the elements to commit larceny). Further, unlike the hypothetical, any assertion that Kernan intended to commit theft of clothing was speculative and uncorroborated, and Kernan never stated or admitted to anything suggesting such an intent. Additionally, unlike the hypothetical murderer, Kernan never completed the crime, as he did not steal any property. Therefore, the dissent's hypothetical cannot apply to these facts, as each inferential link in the chain of hypothetical events did not occur, and as with any chain that suffers a missing link, it is broken. In addition, the acts here were not "inextricably intertwined" with the charged offense or part of any res gestae.

[8]Given our disposition, we need not reach the parties' arguments as to whether the existence of the bad acts was proven with clear and convincing evidence.

(addressing the State's argument that these acts did not fall under NRS 48.045(2)). Under the third prong of *Tinch*, even if evidence is relevant, it "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). "Unfair prejudice" is defined "as an appeal to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate the evidence." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (internal quotations omitted).

Here, after considering Jared's testimony, the parties' arguments, and the video contents, the district court noted that while the videos are somewhat prejudicial, the prejudice was not great because the videos only showed Kernan acting oddly but not in any way illegally, and their probative value was not substantially outweighed by the danger of unfair prejudice. Further, the district court gave the jury a limiting instruction stating that the videos could be considered only for nonpropensity purposes both before each video played and at the end of trial, reducing the risk of unfair prejudice. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (explaining that this court generally presumes that a jury follows the district court's instructions); *Tavares v. State*, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001) (requiring a limiting instruction to be read to the jury before the admission of evidence of prior bad acts and again prior to jury deliberations), *holding modified by Mclellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008); *cf. Berner*, 104 Nev. at 698, 765 P.2d at 1146 (finding that the district court abused its discretion by admitting highly prejudicial prior bad act evidence without giving any limiting instruction).

Nevertheless, because the evidence did not prove motive or intent to steal, it was not relevant, and it had no probative value to the charged crime of entry with intent to commit larceny. However, even if it was relevant, the videos were of minimal probative value. *See Ledbetter*, 122 Nev. at 263, 129 P.3d at 679. Thus, the prejudicial effect substantially outweighed their use as evidence because the comments in the video may have made it appear that Kernan viewed women only as sexual objects, thus appealing to the emotions of the jury members to incite anger or fear.

Therefore, the improper admission of these prior bad acts created 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); *see also Tavares*, 117 Nev. at 730, 30 P.3d at 1131 ("[T]he 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 . . . ."). Thus, the

district court manifestly abused its discretion[9] by admitting the videos for this separate reason.[10]

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[9]Our dissenting colleague contends—in an analysis analogous to *Hubbard v. State*, Docket No. 66185 at *20-32 (Order of Reversal and Remand, April 1, 2016) (Tao, J., concurring in part and dissenting in part)—that the district court did not manifestly abuse its discretion, and thus, reversal is improper. The supreme court, however, has previously concluded that the improper admission of prior bad acts—which have low probative value and are unfairly prejudicial—constitutes a manifest abuse of discretion. *See Hubbard v. State*, 134 Nev. 450, 458, 422 P.3d 1260, 1267 (2018) (aff'g the majority order from the court of appeals that concluded a manifest abuse of discretion occurred with the erroneous admission of prior bad acts). The analysis herein is sufficiently analogous to *Hubbard* to conclude that the district court manifestly abused its discretion by admitting these acts against Kernan, requiring reversal and remand.

[10]On appeal, the State avers, and the dissent agrees, that the bad acts evidence here was not subject to the *Petrocelli* framework because "the evidence itself, a statement made by Kernan . . . was not criminal in nature and was not made during the course of a criminal act." Thus, the State submits that this evidence should have only been analyzed for relevance pursuant NRS 48.025(1). We disagree. NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." By its plain language, NRS 48.045(2) does not apply exclusively to criminal acts, and instead, also applies to other wrongs or acts. *See, e.g., Haney v. State,* 124 Nev. 408, 411-12, 185 P.3d 350, 353 (2008) (explaining that no word in a statute should be rendered nugatory, and thus, each word should be given independent meaning). It appears that the Nevada Supreme Court has not provided a precise definition of other wrongs or acts that would fall within NRS 48.045(2). We note, however, that federal courts—in interpreting Federal Rule of Evidence 404(b)—have concluded that uncharged misconduct evidence is not "limited only to evidence of other crimes," and instead, applies to "any conduct of the defendant which may bear adversely on the jury's judgment of his character." *United States v. Cooper*, 577 F.2d 1079, 1088 (6th Cir. 1978); *see also Rodriguez v. State*, 128 Nev. 155, 160 n.4, 273 P.3d 845, 848 n.4 (2012) (noting that the federal decisions interpreting the Federal Rules of Evidence provide persuasive

Next, Kernan contends that the district court erred in refusing to give a proposed jury instruction incorporating his defense theory and to rebut the inference of intent instruction. Kernan's proposed jury instruction stated that if the jury found that Kernan entered the Diems' home with the intent to vex or annoy them, he would be guilty of trespass rather than burglary. In response, the State does not address this argument, but instead contends that the district court correctly rejected Kernan's proposed instruction because Kernan was not charged with trespass, and trespass is not a lesser-included offense of burglary. We review a district court's refusal to give a jury instruction for an abuse of discretion or judicial error. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Questions pertaining to whether an instruction correctly states the law presents a legal question that is reviewed de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Generally, "the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Margetts v. State*, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991). However, the district court may "refuse a jury instruction on the defendant's theory of the case that is substantially covered by other instructions." *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002). Further, "a district court must not instruct a jury on theories

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authority to Nevada's courts in interpreting Nevada's evidence statutes). Assuming, however, that these acts were only subject to a relevance analysis, we conclude that they were irrelevant, as articulated above. Further, because these acts were irrelevant to the charged offense, their probative value was nominal, and thus, they were unfairly prejudicial. *See* NRS 48.035(1); *see also Newman*, 129 Nev. at 230, 298 P.3d at 1178 ("[B]ad acts are often irrelevant and prejudicial . . . ." (internal quotations omitted)).

that misstate the applicable law." *Id.* "[I]f the uncharged offense contains a necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted." *Alotaibi v. State*, 133 Nev. 650, 653, 404 P.3d 761, 764 (2017). Nonetheless, "a criminal defendant is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." *Newson v. State*, 135 Nev., Adv. Op. 50, at *8, 449 P.3d 1247, 1251 (2019) (internal quotations omitted); *accord United States v. Boulware*, 558 F.3d 971, 974 (9th Cir. 2009).

Here, Kernan proposed the following jury instruction:

> Any person who, under circumstances not amounting to burglary, goes into any building of another with intent to vex or annoy the occupant thereof is guilty of trespass and not burglary. If you find that the evidence shows the defendant committed trespass but not burglary, you must return a verdict of not guilty.

The district court rejected this proposed jury instruction because it suggested that the jury could find Kernan guilty of trespass even though the State did not charge Kernan with trespass, and it was not required to do so because trespass is not a lesser-included offense of burglary. Notably, however, Kernan did not seek an instruction or verdict form that trespass is a lesser-included offense. Instead, Kernan sought this instruction based upon the evidence presented during trial and the instructions the court was giving, and the district court did not find that no evidence was presented during trial to support this trespass instruction. Additionally, the district court concluded that Kernan could still present his theory that the State failed to establish he had the requisite specific intent without suggesting that Kernan could be convicted of trespass.

The district court was incorrect in its rulings for three distinct reasons. First, while other jury instructions established that the State had the burden of proving that Kernan had the requisite specific intent to commit larceny to establish burglary, the court also instructed the jury pursuant to NRS 205.065 that the intent to commit larceny could be inferred from an unlawful entry unless the unlawful entry was explained by satisfactory evidence to have been made without criminal intent. Therefore, it was crucial to advise the jury that the law also recognized that an unlawful entry could constitute the crime of trespass if the intent was not to commit larceny, but was still an unlawful intent to vex or annoy the Diems. This proposition was not covered by other instructions and was of extra importance in this case in light of the inference of intent to commit larceny instruction. Thus, the district court disallowed Kernan's defense theory.

Second, the proposed jury instruction adhered to applicable law as it was drawn directly from the unlawful trespass statute. *See* 207.200(1)(a) ("[U]nder circumstances not amounting to a burglary . . . a person who goes . . . into any building of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act . . . is guilty of a misdemeanor."). Thus, Kernan should have been allowed an instruction as to his theory of the case. *Newson*, 135 Nev., Adv. Op. 50, at *8, 449 P.3d at 1251.

Third, it was true that Kernan was not charged with trespass and that trespass is not a lesser-included offense of burglary, but critically, Kernan did not seek a lesser-included offense instruction or verdict form. *See Smith v. State*, 120 Nev. 944, 946-47, 102 P.3d 569, 571 (2004) (holding that the defendant was not entitled to a jury instruction regarding trespass

when he was charged with burglary because trespass is not a lesser-included offense). The instruction did not advise the jury that it could find that Kernan guilty of committing a trespass. Rather it defined what a trespass was in contradistinction to a burglary. Therefore, the district court abused its discretion by refusing to give a jury instruction on the defense theory of the case.[11]

Finally, the State does not argue that any errors committed by the district court were harmless. Accordingly, we are constrained to find they were not harmless individually and collectively. *Polk v. State*, 126 Nev. 180, 183 n.2, 233 P.3d 357, 359 n.2 (2010); *accord United States v. Rodriguez*, 880 F.3d 1151, 1163 (9th Cir. 2018) ("[W]hen the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find." (internal quotations omitted)). Although we recognize that Kernan's behavior—if proven beyond a reasonable doubt—is disturbing, and empathize with the Diems insofar as

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[11]The dissent contends that the Nevada Supreme Court "addressed this exact set of circumstances" in *Smith*, 120 Nev. at 944, 102 P.3d at 569. In *Smith*, however, the defendant moved for the trespass instruction as a lesser-included offense of burglary, *id.* at 946, 102 P.3d at 570, rather than as an instruction for his theory of the case, *see Newson*, 135 Nev., Adv. Op. 50, at *8, 449 P.3d at 1251. Here, unlike in *Smith*, Kernan argued that the evidence of his vulgar comments—which is what the State used to support an instruction for burglary—could also reasonably show that his intent was to vex and annoy the Diems. Thus, because there was evidence in the record to support Kernan's defense theory, he was entitled to the trespass instruction. *See Newson*, 135 Nev., Adv. Op. 50, at *8, 449 P.3d at 1251. Further, the dissent does not address Kernan's argument, with which we agree, that this instruction was necessary in light of the "inference of intent to commit larceny" instruction the district court gave to the jury. Thus, the district court abused its discretion in this regard.

they lost the sense of security in their home (and in that regard, were true victims), we will not assess whether the erroneous admission of evidence here was harmless.[12] Accordingly, we

ORDER the judgment of conviction reversed and remand for proceedings consistent with this order.[13]

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., dissenting:

Respectfully, I dissent. The majority's Order would make more sense if we were a district court deciding a pre-trial motion in limine in the first instance. But we're not the district court, and in fact the district court decided things the opposite way. Yet the majority's Order overlooks the appellate standard of review that we're required to apply and gives no deference to the decision that the district court actually made.

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[12]"The 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)).

[13]Insofar as the parties raise arguments that are not specifically addressed in this order—including Kernan's argument that his Fifth Amendment rights were violated by the district court's sentencing decision—we have considered the same and conclude they need not be reached given the disposition of this appeal.

I.

This appeal centers around the admissibility of two surveillance videos. One, taken on October 9, 2016, shows Kernan approaching the victim's front door in the dark at 6 a.m. and using a flashlight to closely inspect a video camera that the victims had just installed and expressing surprise at discovering the new camera ("what is that?"). Notably, Kernan did this when the victim was out of town, suggesting that he did the inspection in the dark not because he was worried that the victims would see him, but that other people might. Kernan later admitted to the police that the figure was him, but proffered no explanation why he used a flashlight to examine the victim's door at that hour while the victims were not home. (AA186). The district court admitted the video. Was this video relevant to the fact that when Kernan later entered the victim's home on the night of the crime, he knew enough to take the small doggie door in the back door (where there was no camera) instead of the front door where the new camera was located? The majority says it is not, but I think the natural conclusion is otherwise.

The second video, taken on October 11, depicts nothing visually useful but captures Kernan somewhere off-screen making sexual comments about one of the victims, expressing his belief (in crude language) that the victim was the only sexually attractive woman in the neighborhood. The district court admitted the video. Was this video relevant to the charge that Kernan later broke into that victim's home for the sexually-motivated purpose of stealing her underwear? The majority says it is not, but I think the natural conclusion is otherwise.

I would say that on both counts the district court acted within its broad discretion. The district court admitted both under the framework of NRS 48.045, but it noted its doubt that NRS 48.045 even applied. I tend

to agree with the district court. NRS 48.045 is an "indirect" character evidence statute that deals with the admission of evidence from "other crimes, wrongs, or acts." The operative word here is "other"; evidence relating to a single crime or act is not evidence borrowed from any "other" crime or act. An act is not an "other" act if it is inextricably intertwined with the charged conduct itself. *See United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995); *United States v. Fermin*, 2000 WL 203794 (9th Cir. Feb. 22, 2000); *see also United States v Carpenter*, 923 F.3d 1172, 1180 (9th Cir. 2019) (observing that "other" acts generally consist of independent crimes). The statute is typically used to fill in or reinforce a defect in evidence; for example, if the State is missing evidence proving who committed the crime at hand but can prove that a particular defendant committed an exactly similar crime the day before in which there is evidence of his identity, NRS 48.045 allows the State to introduce the identity evidence from the "other" crime committed the day before to prove identity in the crime at hand. But when the State has direct evidence pertaining to the crime at hand, NRS 48.045 is not needed because all of the evidence is from the same event, not some "other" one. Hypothetically, if a killer buys a gun one day and tells the clerk he wants to kill his friend, scouts the scene of the crime the next day, kills the victim at the scene on the third day, and confesses to the police on the fourth day, there were not four "other" events each of which must be analyzed under NRS 48.045, but only one series of events over three days leading up to one crime plus evidence of a confession on the fourth. If the State has direct evidence for each step — say, the store clerk's eyewitness description of the defendant buying the gun, fingerprints he left while scouting the scene, surveillance video of the murder itself, and police interrogation video of the confession — the State need not utilize NRS

48.045 to introduce all of that evidence. Instead, it can just call the witnesses and have them testify directly about what they know about each step of the crime. Direct eyewitness evidence of intent and planning for a crime isn't "other" act evidence of intent and planning; it's just evidence of intent and planning. *See Tabish v. State*, 119 Nev. 293, 72 P.3d 584 (2003) (affirming murder conviction involving a long chain of planning and preparation over several months without requiring that such planning and preparation be subjected to NRS 48.045).

Here, all of the evidence collectively shows Kernan engaging in a single series of events directed toward the commission of a single burglary. On October 9, he scouted the scene with a flashlight; on October 11, he made a comment expressing his motive; and then in July he committed the crime. There were not multiple crimes or acts, but only one chain of related events all relating to a single crime. So I'm not sure that the district court was even required to engage in the onerous procedures of NRS 48.045.

But it doesn't matter much in the end. Even if the district court was not required to invoke NRS 48.045, the fact that it did gives us a more thorough record than we would have if it didn't, because using NRS 48.045 requires much more proof than not using it. So the record is actually better than it might otherwise have been.

Because the district court analyzed the videos under NRS 48.045, I'll work within its framework. Admitting an act under NRS 48.045 requires three things: proof that the act occurred by evidence that is "clear and convincing"; relevance to some issue in the case such as motive, intent, lack of mistake, identity or common plan or scheme; and that the probative value of the evidence outweighs any potential for unfair prejudice. *See Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012). Here, everyone

seems to agree that the first elements is met (after all, they're surveillance videos). The district court weighed the other two elements in favor of the State, and the question is whether that was error.

In reviewing decisions like this, the point is not what I would have done were I the district judge. Nor is the point what my colleagues would have done, as much as they seem to believe it is. The district court decided to admit the videos under NRS 48.045, and on appeal, the question is not whether the district court was right or wrong or whether we agree or disagree. It's not even whether the district committed an "abuse of discretion." Rather, on questions relating to NRS 48.045, we're required to give "great deference" to the district court, so the question is whether the district court committed a "manifest abuse of discretion." *Diomampo v. State*, 124 Nev. 414, 429-30, 185 P.3d 1031, 1041 (2008) ("[t]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference") (alteration in original); *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005) (reversal for admission of prior bad acts warranted only upon "manifest abuse of discretion"). "We will not interfere with a discretionary ruling of the district court absent a showing that the ruling was manifestly wrong." *Gallego v. State*, 101 Nev. 782, 789, 711 P.2d 856, 861 (1985).

What's a "manifest" abuse of discretion? Review for "abuse of discretion" is already one of the most deferential standards that exists in appellate law; it means that reversal is warranted only if "no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances."). But in cases involving prior bad acts

under NRS 48.045, even this isn't enough; to reverse we must find that the district court's error rose to the level of being "manifest." What constitutes a "manifest" abuse of discretion (as opposed to a standard-issue abuse of discretion) is not precisely defined, but clearly it's something even more deferential than is normally the case and, at a bare minimum, must mean that we do not freely substitute our judgment for that of the district court. Therefore, we cannot reverse if we merely disagree with the district court or feel that the judge could or should have weighed things differently and gone the other way; presumably, we cannot even reverse if we conclude that the judge abused his discretion. We can only reverse if the judge went beyond that and abused its discretion "manifestly."

And our deference goes further. Our already "great deference" to the district court is enhanced by the limited scope of "facts" we are permitted to consider in determining whether any manifest abuse of discretion occurred. 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). Part of the reason for this is because the district court (and the jury) heard the witness testimony while we cannot, and "[t]his court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). 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 district court's admission of the prior bad act evidence. We therefore cannot base our decision to affirm or reverse upon our own view of contested facts, nor upon facts or inferences that are inconsistent with what the judge found to be true when he admitted the bad

acts or what the jury must have found to be true when it convicted the defendant.

Finally, our already "great" deference to the district court is heightened by yet a third principle: while the district court is required to hold a *Petrocelli* hearing and make findings, the failure to do so is not by itself grounds for reversal. "[T]he failure to hold a proper hearing below and make the necessary findings will not mandate reversal on appeal if . . . the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of prior bad act evidence . . . ; or (2) where the result would have been the same if the trial court had not admitted the evidence." *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (internal quotation marks and footnote omitted); *see Qualls v. State*, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998). In other words, if the district court's precise reasoning was unclear or even incomplete, we must nevertheless affirm what it did so long as the facts are such that the district court could potentially have made the necessary findings to support its conclusion. In application, this means that where the district court's findings are deficient or non-existent, the task falls upon us to inspect the record ourselves and look for any findings that the district court could possibly have made to justify its decision. *See Ledbetter*, 122 Nev. at 260, 129 P.3d at 677 (affirming district court's decision to admit prior bad act evidence on grounds not cited by district court and even though the district court gave an incorrect reason for doing so). This requires us to uphold the district court so long as any plausible or arguable grounds exists anywhere in the record to do so, whether or not those grounds were argued to or relied upon by the district court, unless the record clearly demonstrates that there simply was no basis for its decision despite our independent search for one.

Put all of this together and we get one of the most deferential standards of review that can possibly exist. So when Kernan argues that the relevance of the videos is low and their potential prejudice high, that's the right argument to make to the district court, but it's the wrong argument to make on appeal. The only question that matters on appeal is whether reasonable minds could disagree regarding their relevance and prejudice. If reasonable minds could disagree, then giving "great deference" and reversing only for "manifest abuse of discretion" means we must conclude that the district court acted properly. And so far, of the four judges to hear this issue (between the district court and the three members of this court), there's an even split. That means affirmance. When reviewing a district court's admission of evidence under FRE 404(b), the Seventh Circuit described the deference afforded to the trial court:

> When the same evidence has legitimate and forbidden uses, when the introduction is valuable yet dangerous, the district judge has great discretion. There are no bright line rules; it is easy to identify polar cases but impossible to draw a line of demarcation. Appellate courts can contribute only modestly to the making of the best decision case by case. The decision must be made on the scene, and once the imponderables have been weighed there is little to be gained from weighing them again on appellate scales. The balance would not be systematically better the second time around, and the costs of second-guessing include new trials that may be less accurate as events become more remote. Trial judges have a comparative advantage because they alone see all the evidence in context, and the judicial system as a whole takes advantage of the division of labor.

United States v. Beasley, 809 F.2d 1273, 1278 (7th Cir. 1987).

II.

Kernan makes a number of arguments, most of which can be resolved by applying the deferential standard of review. But there are a few that merit some attention, because they seem to appeal to the majority.

The district court specifically stated that it viewed all of the videos carefully and weighed their relevance. The majority suggests otherwise. *See* Order p. 8 ("the district court did not separately evaluate each video to determine its specific relevance"). But the record reveals that it clearly did. *See* 3 AA 182, 186 (district court stating on the record that it viewed and weighed all of the videos separately). Kernan suggests this may not be so, but "[w]e will generally not consider on appeal statements made by counsel portraying what purportedly occurred below," especially when counsel's arguments contradict the record. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). If anything, it's the majority that fails to separately analyze the two videos, because its analysis consistently lumps both videos together as showing the same thing, even casually referring to both as "the evidence" (for example, "because the evidence did not prove motive or intent to steal, it was not relevant, and it has no probative value," Order, p. 10). But the two videos clearly depict very different things that played very different roles in the crime and therefore implicated different parts of NRS 48.045. The October 9 video reflected planning and preparation (showing Kernan closely inspecting the surveillance camera by flashlight), while the October 11 video reflected potential motive and intent (showing Kernan's sexual thoughts about the victim). Unlike the majority, the district court correctly analyzed the videos separately, not as one, and it articulated clear conclusions to which "great" deference is due.

Kernan particularly argues that the videos have no relevance because of the lapse of time (several months) between the October videos

and the July crime. The unstated but implicit assumption seems to be that relevance decreases as more time goes by. But whether a prior event was too remote in time to count under NRS 48.045 is a factual matter for the district court to decide that we're supposed to defer to. Indeed, the Nevada Supreme Court regularly affirms the use of evidence under NRS 48.045 much older than the evidence in this case. *See Foster v. State*, 116 Nev. 1088, 1096, 13 P.3d 61, 66 (2000) (concluding that the defendant's prior bad act from eight years prior to the crime charged was not too remote in time); *Margetts v. State*, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991) (affirming admission of the defendant's prior bad act from five years before the alleged crime); *Berner v. State*, 104 Nev. 695, 698, 765 P.2d 1144, 1146 (1988) (affirming conclusion that act that occurred four years before the charged crime was admissible under NRS 48.045); *Gallego v. State*, 101 Nev. 782, 789, 711 P.2d 856, 861 (1985) (finding that evidence from two years prior to the homicide charged was not too remote in time). The only question for us on appeal is not whether we would think the time lapse made the evidence less probative if we sat as the district court, but rather whether a reasonable person could reach different conclusions about its relevance. If reasonable minds could disagree, then we must defer to the district court. And here, reasonable minds could certainly disagree. It may be true for certain kinds of events that relevance can fade over time, depending upon context. But I'm not sure that's true at all when it comes to sexual deviancy, not when data shows that recidivism rates among sexual offenders remain high even after decades of incarceration. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of

Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997), as quoted in *Smith v. Doe*, 538 U.S. 84, 103 (2003), citing *McKune v. Lile*, 536 U.S. 24, 33, (2002). The majority isn't on very solid ground when it assumes that sexual urges come and go and change over time in the same way that the impulse to commit other non-sexual crimes might. That's especially so in this case when we're only talking about a delay of months, not years. *Cf. Berner*, 104 Nev. at 698, 765 P.2d at 1146 (act that occurred four years before charged crime was relevant and admissible under NRS 48.045). Where the question of relevance is predicated upon an assumption as thoroughly debatable as this one, when we reverse we're acting way outside of our lane as an appellate court and merely second-guessing the district court on factual matters rather than giving the "great deference" that we're supposed to.

But just for fun, let's put the legal standard aside, give deference to nobody, and go down the factual rabbit hole for a moment anyway. If we're going to second-guess the district court on factual matters, is it even true that the lapse of time in this case cuts in favor of Kernan? The October 9 video shows that Kernan brought a flashlight to the victim's home while it was dark in order to inspect the door when he knew they were not at home. The majority concludes that there isn't any probative value between this act and the subsequent burglary, but that begs the obvious question of what legitimate purpose Kernan possibly could have had in inspecting someone else's door in the dark by flashlight when they were not home. Could a reasonable mind conclude that the only purpose here was to plan a burglary? I would think so, because frankly I can't think of any other explanation that makes sense.

The video goes on to show that, upon examining the door by flashlight, Kernan discovered the surveillance camera for the first time by peering closely into its lens and wondering what it was. Once he realized what he was looking at, he must have known that his face was just recorded on video doing something that a normal passerby would not do. How dumb would he have to be to commit a burglary right after that? Wouldn't the guy whose face was just captured minutely inspecting the camera be the very first person the police would suspect in any subsequent burglary a few days later? A reasonable fact-finder could easily conclude that the lapse of time was an intentional part of Kernan's plan to wait a few months until he believed enough time had elapsed that the police might not link the burglary to the guy who earlier brought a flashlight over to inspect the scene. If a reasonable fact-finder could reach that conclusion (and it seems more than reasonable to me), then we have no legal basis to conclude that a "manifest abuse of discretion" occurred.

As for the October 11 video, it captures Kernan crudely expressing offensive sexual thoughts about the victim. The district court concluded that it was relevant to show Kernan's motive for the burglary, which was charged based on the predicate that he intended to steal the victim's undergarments. On appeal, the only question we can ask is not whether the district court was right or wrong, but only whether a reasonable mind could reach this conclusion even if other minds might have gone different ways. I would say that a reasonable mind could rather easily conclude that expressing inappropriate sexual thoughts about a victim is extremely relevant to proving that he might later act on those thoughts in a deviant way. For those who might disagree, here's a thought experiment: reverse the facts and ask, if he never expressed any sexual thoughts

whatsoever about the victim, doesn't that make it far less likely that he would want to steal her underwear? I would conclude that the district court committed no "manifest abuse of discretion" here.

But the majority says the district court was wrong, and it does so in the worst way possible: by incorrectly describing the contents of the October 11 video. According to the majority, the video merely recorded Kernan commenting upon "all" women equally as "sexual objects." By characterizing it this way, the majority reaches a very different conclusion that the district court did, that its probative value was low but its potential for prejudice very high. If that's what the video showed, I would agree, because there is no probative value in a video that just shows Kernan slandering all women while saying nothing in particular about the victim. But that's not what the video shows. Crudity aside (and without endorsing his abhorrent views for even a second), what Kernan actually says in the October 11 video is that the other women living in the neighborhood are unattractive to him with the exception of the victim, who is the only one he finds attractive ("The whole neighborhood's full of ugly b*tches except for [the victim]." (emphasis added)). Because the majority misunderstands his actual comments, it wrongly concludes that the comments fail to particularly single out the victim as his target, when in fact the comments do exactly that, just as the district court concluded. His comments are, indeed, very much targeted toward the victim and nobody else as the district court correctly concluded. But even if the video could be reasonably construed as the majority describes it, that only goes to show that it could be interpreted in two reasonable ways. But we're supposed to construe ambiguous evidence in the light most favorable to the State. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). At the very least, when

evidence could mean two different things, I don't know how disagreeing with the district court's interpretation satisfies the legal requirement that we give the district court "great deference" and reverse only upon an "abuse of discretion" that is "manifest."

III.

Finally, Kernan argues that the district court erred when it failed to give Kernan's proposed jury instruction:

> Any person who, under circumstances not amounting to burglary, goes into any building of another with intent to vex or annoy the occupant thereof is guilty of trespass, and not burglary. If you find that the evidence shows the defendant committed trespass, but not burglary, you must return a verdict of not guilty.

But Kernan's proposed instruction was legally wrong, because it suggested to the jury that trespass is a lesser-included offense of the crime of burglary when it is not.

In *Smith v. State*, 120 Nev. 944, 102 P.3d 569 (2004), the Nevada Supreme Court addressed this exact set of circumstances. A defendant charged with burglary requested an instruction instructing the jury to convict him of the crime of trespass but not burglary if he lacked the specific intent to commit burglary. 120 Nev. at 946, 102 P.3d at 570. The court held that the district court did not err in refusing to give the instruction because trespass is not a lesser-included crime to the crime of burglary: "if the uncharged offense contains a necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted." *Id.*

Here, Kernan cleverly tries to avoid *Smith* by proffering the exact same instruction rejected there but tinkering with it to change a mere few words, omitting the words that the jury "must convict" him of trespass

if he lacked the specific intent required by burglary and, instead, substituting that he is "guilty" of the crime of trespass if he lacked that specific intent. Clever. But not the point of *Smith*. As I read it, the point of *Smith* is simple: the crime of trespass should not be mentioned in a case in which it has not been charged and it is not a lesser-included crime of any crime that was charged. *Smith* is not about a weirdly narrow holding that the proposed instruction at issue was wrong only because it instructed that the jury must convict the defendant of the crime of trespass, but the same instruction would have been perfectly okay if it says that crime of trespass as what the defendant is actually "guilty" of. Quite to the contrary, the point of *Smith* is more broad: any instruction is wrong if it falsely informs the jury that trespass is a lesser-included offense of burglary when it is not such a thing under the law.

Unlike the majority, I don't see any legally important difference between an instruction that, on one hand, gives the jury the wrong law and falsely tells them that they must convict the defendant of a trespass instead of a burglary (the instruction in *Smith*) and, on the other hand, one that gives the jury the wrong law and falsely tells them that the defendant committed a trespass instead of a burglary (the instruction that Kernan proposed). If there's a principle of law behind concluding that one of these must be given but the other doesn't, I'm having trouble seeing what it could be, and the majority cites none. Consequently, I would conclude that *Smith* disposes of this issue neatly and the instruction should not have been given.

If Kernan's proposed instruction said anything legally correct at all, it merely said that the jury cannot convict him of the crime of burglary if he lacked the specific intent required. But this is idea is already clearly covered by other instructions, such as instructions 7-8, 16-17, 19-23, 25, and

28, all of which convey that specific intent is an element of the crime of burglary; that the State bears the burden of proving every element of the charged crime; and Kernan must be found not guilty if the State cannot prove that he acted with the requisite specific intent. A district court may "refuse a jury instruction on the defendant's theory of the case that is substantially covered by other instructions." *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002). Because Kernan's proposed instruction was legally wrong as is, and to the extent it stated any law it only stated what was already set forth in other instructions, no error occurred.

IV.

For all of these reasons, I would conclude that the district court acted within its broad discretion, and would affirm.

Tao, J.

Tao

cc: Hon. Barry L. Breslow, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk