IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM EDWARD FERGUSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83844-COA

ORDER OF AFFIRMANCE

William Edward Ferguson appeals from a judgment of conviction, entered pursuant to a jury verdict, of seven counts of burglary, two counts of petit larceny, and one count each of grand larceny and attempted grand larceny. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

Ferguson argues the district court abused its discretion by admitting into evidence statements Ferguson made to a former gaming control agent. We review the admission of evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

The State filed a motion in limine seeking to introduce, in relevant part, statements Ferguson made to the former agent six years before the instant crimes. The statements described how Ferguson trained to steal casino chips, which included wearing wrist weights and practicing with dominoes so that he could quickly grab the chips. The State offered the evidence as res gestae and nonpropensity, prior-bad-act evidence. The district court ruled that the State could introduce Ferguson's statements.

At trial, the former agent testified that Ferguson told him how Ferguson would practice picking up small objects with weights on his wrists

to train for taking the desired number of casino chips from a stack. Ferguson described his hands and touch as "like feathers" and would look for routes of entry and exit that did not have a lot of turns or go past security. Ferguson also described how he would check sight lines, that is, looking for tables that were visually isolated from the pit boss. In addition, Ferguson would look for weak dealers—either a dealer who is momentarily distracted or a dealer who is not good and does not actively try to protect the game.

Ferguson argues that the statements regarding his training, how he would choose tables to target, and how he took the chips were not admissible for any nonpropensity purpose and that any probative value was substantially outweighed by the danger of unfair prejudice. The State counters that the statements were admissible to show Ferguson's intent as well as to establish his identity, and it disagrees that the probative value of the evidence was outweighed by unfair prejudice.

Evidence of other crimes, wrongs, or acts cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question. NRS 48.045(1). However, such evidence may "be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). Before admitting the evidence as such, the district court must determine whether "(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).[1]

Showing intent is a proper purpose for admitting evidence of prior bad acts. However, where a defendant claims he was not present or involved in the crime, and the criminal actor's intent is clear from other evidence, prior bad act evidence is less relevant to establish intent to commit the crime charged. *See Hubbard v. State*, 134 Nev. 450, 450-51, 422 P.3d 1260, 1262 (2018). In addition, "events remote in time from the charged incident have less relevance in proving later intent." *Phillips v. State*, 121 Nev. 591, 601, 119 P.3d 711, 718 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026 n.52, 195 P.3d 315, 324 n.52 (2008); *see also Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 806-07 (2000) (holding that events that were six and ten years old were "clearly remote in time" and were thus less relevant to prove intent to commit the charged offense).

Ferguson denied committing the crimes or even being present when they occurred, and the jury was presented with surveillance videos depicting an actor clearly committing or attempting to commit chip theft. In addition, Ferguson's statements were made more than six years prior to the commission of the crimes charged. Therefore, we conclude the statements were only minimally relevant to establish Ferguson's intent to commit the crimes charged and, thus, that the danger of unfair prejudice

[1]Our review of this issue has been hampered by the district court's failure to make specific findings of fact in support of, or to articulate any reason for, admitting the evidence. *See id.* (holding the trial court "must" make such determinations).

substantially outweighed the probative value of Ferguson's statements for this purpose.

Establishing identity is also a proper purpose for admitting evidence of prior bad acts. The identity exception in NRS 48.045(2) applies "where a positive identification of the perpetrator has not been made[ ] and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial." *Rosky v. State*, 121 Nev. 184, 196-97, 111 P.3d 690, 698 (2005) (quoting *Mortensen v. State*, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999)).[2] "Evidence of prior criminal behavior may only be admitted to prove identity when its prejudicial effect is outweighed by the evidence's probative value *and* when that prior behavior demonstrates characteristics of conduct which are unique and common to both the defendant and the perpetrator whose identity is in question." *Coty v. State*, 97 Nev. 243, 244, 627 P.2d 407, 408 (1981) (emphasis in original).

The evidence did not establish that the manner in which Ferguson carried out his crimes was unique to him. A former agent testified it is common sense that in committing chip theft, one would look for the easiest way in and out of the casino. In addition, a current agent described how most suspects wait for the dealer to look away before taking the opportunity to commit the crime. The agent testified that "most times, you actually see suspects cruise around the incident area looking for dealers who are always turning, dealing with or distracted with other patrons at the table." Further, there was no testimony that looking for targets in

---

[2]The State argues that the evidence established Ferguson's modus operandi and, thus, his identity as the perpetrator. "[M]odus operandi evidence falls within the identity exception to NRS 48.045(2)." *Id.* at 196, 111 P.3d at 698.

isolated areas or taking chips from the top of the stack were characteristics unique to Ferguson. In short, looking for easy ingress and egress from a crime scene, bad or distracted dealers, and isolated areas from which to take chips does not describe unique criminal conduct that clearly identifies Ferguson as the perpetrator.

In addition, even if Ferguson's training methods and the resulting skill Ferguson acquired at removing chips from the top of a stack were unique, the former agent who described Ferguson's methods testified that he never had Ferguson demonstrate the methods, never tested them, and never consulted with anyone who was an expert in sleight of hand or taking chips from a table. Accordingly, we cannot conclude that the training and removal methods described by Ferguson were so unique that they clearly established a signature crime identifying him as the perpetrator. For these reasons, the prejudicial effect is not outweighed by the probative value of Ferguson's statements as they related to identity.

For the foregoing reasons, we conclude the district court abused its discretion by admitting Ferguson's statements.[3] Nevertheless, we will

---

[3]It is possible the evidence could have been admissible for another reason. *See Ledbetter v. State*, 122 Nev. 252, 260, 129 P.3d 671, 677 (2006) (holding this court will affirm the correct admission of prior-bad-act evidence even if the district court gave an incorrect reason for doing so). But here, the State has argued only one other ground for admission, which as discussed below, lacks merit. And we are unable to discern any other basis for admission of the evidence.

Ferguson's statements were not admissible as res gestae evidence. As discussed previously, Ferguson's statements were remote, and nothing in the record indicates he planned the instant crimes more than six years in advance. Accordingly, Ferguson's statements were not so closely related to the crimes for which he was charged that witnesses could not describe the

affirm a judgement of conviction if the error was harmless. *See Fields v. State*, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009). "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; *see also* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

At trial, Ferguson took the stand in his own defense and testified that he was not present in the casinos during the crimes. However, an employee eyewitness from one of the casinos identified Ferguson from a photo lineup as the man who took a chip from a roulette table. And the State presented multiple surveillance videos from each of the casinos purporting to depict the crimes and the suspect. Four current and/or former gaming control agents identified Ferguson as the man depicted in surveillance video from each of the casinos. A former agent who was familiar with Ferguson testified that he could identify Ferguson based on his stature, physique, and unique and distinctive run. Current agents who were also familiar with Ferguson identified him in the videos. One agent identified Ferguson in a video based on his face alone. He also described Ferguson's unique walk and that Ferguson employs a stance the agent associated with military service.[4] He described Ferguson in the stance in surveillance video from two of the incidents. Another current agent was able to identify Ferguson in a particular video based on the "pretty good" head and face shot.

---

crimes without referring to Ferguson's statements. *See Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005).

[4]Ferguson testified that he was a veteran.

While Ferguson challenged the quality of the surveillance video and the State's ability to prove his identity beyond a reasonable doubt at trial, he fails to provide this court with the video surveillance exhibits for review on appeal. Because of this and the above evidence of his guilt, Ferguson is unable to demonstrate that the district court's errors had a substantial and injurious effect or influence in his guilty verdict. *See Phenix v. State*, 114 Nev. 116, 119, 954 P.2d 739, 740 (1998) ("[T]he burden is on the appellant to show substantial prejudice."); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); *see also* NRAP 30(b)(3). We thus conclude that the errors were harmless.

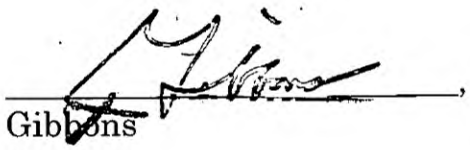
Next, Ferguson argues the district court erred by failing to give a limiting jury instruction related to the statements. If a district court admits prior bad act evidence, it should give an instruction to the jury on the limited use of such evidence both when the evidence is introduced and when the court gives its final charge to the jury. *Tavares v. State*, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001), *holding modified by Mclellan*, 124 Nev. at 270, 182 P.3d at 111 (clarifying the defense may waive such instructions). Here, the district court failed to instruct the jury both after admitting Ferguson's statements and when the court gave its final charge to the jury, and nothing in the record suggests Ferguson waived the instructions. Therefore, we conclude the district court erred.

However, this court will not reverse a conviction for the failure to give *Tavares* instructions if the error was harmless. *Id.* at 732, 30 P.3d. at 1132. In light of the state of the record before this court and the evidence therein of Ferguson's guilt, we conclude that the district court's failure to give the *Tavares* instructions was also harmless.

Finally, Ferguson argues that the cumulative effect of the district court's errors warrants reversal of his conviction. When evaluating a claim of cumulative error, this court considers: (1) the gravity of the crime charged, (2) whether the issue of guilt is close, and (3) the quantity and character of the error. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). While Ferguson's crimes were only moderately grave (he was convicted of several category B and C felonies), as discussed above, the issue of his guilt was not close. Moreover, the two errors arose from the admission of the same evidence. Therefore, we conclude Ferguson is not entitled to relief on this claim.

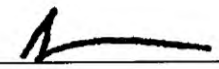
For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.[5]



_____, C.J.
Gibbons

_____, J.
Tao



_____, J.
Bulla

cc: Hon. Monica Trujillo, District Judge
Brown Mishler, PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[5]Ferguson also claimed his burglary convictions were not supported by substantial evidence, but he withdrew this claim in his reply brief.