IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUAN DARIUS F. HAMILTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87362-COA

FILED
DEC 13 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Juan Darius F. Hamilton appeals from a judgment of conviction, pursuant to a jury verdict, of battery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer L. Schwartz, Judge.

On May 25, 2023, Hamilton entered a Walmart to return a fan he purchased earlier that day. Because he did not have a receipt and paid cash for the purchase, the customer service representative could only offer Hamilton a gift card for his return instead of a cash refund. Displeased, Hamilton became increasingly agitated, bickering with store employees. An employee called asset protection officers for assistance. Two officers arrived and attempted to deescalate the situation. Eventually, Hamilton, having not received his refund, turned to exit the store. But on his way out, he grabbed a gum scraper from a custodial cart near the store's entrance and began swinging it in an irate manner toward a store greeter.[1] One of the asset protection officers, who was present during the initial confrontation,

[1]An asset protection officer described the gum scraper as "this sharp object, this stick with like this razor at the end that they use to scrape things off the ground."

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approached Hamilton and exchanged his identification card, which Hamilton had apparently left at the customer service desk, for the gum scraper. Hamilton then departed from the store.

Hamilton returned to the store shortly thereafter carrying a tire iron. The asset protection officers observed Hamilton's return and began following him. Hamilton headed toward the customer service desk and began hitting the cash registers with the tire iron. In order to disarm Hamilton, an officer placed Hamilton in a bear hug. The two struggled, falling to the floor. Although video from in-store surveillance existed, because of the angles of the cameras, the footage only showed Hamilton and the officer falling forward together onto the floor, and the officer standing up, stepping back, and placing his hand on his head.[2] The asset protection officer testified that he did not see Hamilton strike him with the tire iron. Nevertheless, when asked at trial if Hamilton hit him with the tire iron, he responded affirmatively and testified that Hamilton hit him, "Just right above my head." He also explained that he was "just kind of disoriented for a split second," and experienced "a little bit of dizziness." The video did not show when during the struggle the officer was hit with the tire iron or how it occurred.

The other asset protection officer, who observed the struggle, testified that Hamilton was not swinging at the officer who "had him wrapped up," but at some point, Hamilton had enough strength to swing the tire iron backwards hitting the officer in the head. Hamilton denied that he tried to hit the officer with the tire iron and contended that if the tire iron hit the officer, it was either accidental or in self-defense.

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[2]We note that the video admitted at trial was not produced as part of the record; however, the parties do not dispute what the video shows.

At some point, 9-1-1 was called, and two store customers told Hamilton that he had "better leave" because he had "broke the stuff," "the police are on their way," and "[y]ou need to get out of here." Hamilton left the store before law enforcement arrived.

In June, Hamilton returned to the store, apparently to shop for shoes, and was arrested for the May 25 incident. Hamilton was charged with battery with use of a deadly weapon.

The case proceeded to trial and the State moved to introduce the video evidence. Hamilton did not initially object but reserved his right to object based on the actual video footage to be shown to the jury. The State decided to play video footage to the jury that included Hamilton swinging the gum scraper. Outside the presence of the jury, Hamilton objected to the admission of this footage as a prior bad act because the jury could "infer criminal conduct." The State argued for its admission based on the doctrine of res gestae in that the video showed his criminal intent to harm others and was "so close in time and space to the actual crime itself." The district court admonished Hamilton for failing to bring a motion in limine to exclude the video evidence of the gum scraper incident, to which he responded that he did not anticipate this portion of the video being shown to the jury. And without conducting a *Petrocelli* hearing,[3] the court ruled that the video did not depict bad act evidence simply because it made Hamilton look bad and questioned whether it was a crime. The district court also seemingly agreed with the State that it was res gestae evidence.

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[3]*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).

Hamilton was not charged for swinging the gum scraper at the store employee.

During trial, Hamilton also objected on hearsay grounds to the admission of testimony from a store employee concerning the two customers' statements telling Hamilton to leave the store before the police arrived. The State did not dispute that these statements were hearsay but argued that they qualified for admission under the excited utterance exception to the hearsay rule. The district court ultimately allowed the statements to be admitted under this exception based on testimony from an employee that it was tense in the room, the video showed a tense situation, and the statements were made in response to that situation.

During the settling of jury instructions, Hamilton objected to two instructions proposed by the State. First, he objected to proposed Instruction 10, a transferred intent instruction, arguing that the doctrine of transferred intent was not applicable, and that the instruction would confuse the jury. Instruction 10 stated the following: "Where a person unlawfully attempts to batter a certain person or object, but by mistake or inadvertence batters a different person, the crime committed is the same as though the intended victim had been battered." As authority for this proposed instruction, the State cited *Ochoa v. State*, 115 Nev. 194, 981 P.2d 1201 (1999).

The State admitted that Hamilton was not attempting to hit one person and hit another but instead argued that Hamilton intended to hit an object—the cash registers—and that this intent could be transferred to his subsequent battery of the asset protection officer. The State acknowledged that it changed the language of Instruction 10 to fit the facts of the case. The State represented that "there's case law on point that says

[transferred intent] applies to any crime where [defendants] intend to do a crime at one thing but then they end up harming someone else." The State also explained that it intended to use the instruction to rebut Hamilton's defense of mistake or accident. The district court ultimately gave the transferred intent instruction over Hamilton's objection.

Hamilton also objected to Instruction 19, a flight instruction. Hamilton contended that the flight instruction was inapplicable because he was not asked to wait for law enforcement and was specifically told to leave the store. The district court gave the flight instruction over Hamilton's objection.

During closing arguments, Hamilton raised several defenses, including that he lacked the requisite intent to intentionally or willfully hit the asset protection officer with the tire iron. He primarily argued that if he *did* hit the asset protection officer with the tire iron, it was an accident because of the manner in which the asset protection officer was "manhandling" him. Therefore, Hamilton argued that he demonstrated reasonable doubt as to his intent to commit battery with use of a deadly weapon.

The State in its rebuttal closing responded to Hamilton's accident defense as follows:

> I intend to strike my co-counsel, but in the process I strike [defense counsel]. It's the same intent. It applies to property; no matter what. It doesn't matter. There's no difference. The intent transfers. The intent transfers from the cash register to [the asset protection officer]. So it doesn't matter. Even if you think maybe it was just an inadvertent thing on [Hamilton's] part, it doesn't matter.

After the three-day trial, the jury convicted Hamilton of battery with use of a deadly weapon. This appeal followed.

Hamilton raises five issues on appeal but we focus on two. First, whether the district court abused its discretion in giving Instruction 10 regarding transferred intent. Second, whether the court abused its discretion by wrongfully admitting bad act evidence. The State generally responds that the transferred intent instruction is supported by applicable law and transferred intent satisfies the general intent requirement for a conviction of battery. The State argues that even if the court erred in giving the transferred intent instruction, such an error was harmless. The State also argues that the alleged bad act evidence was properly admitted as res gestae evidence, or its admission was harmless error. We address both issues in turn.

Whether the district court abused its discretion in giving an instruction on transferred intent

Hamilton contends that the district court abused its discretion when it gave Instruction 10 on transferred intent. The district court has broad discretion in settling jury instructions. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Therefore, we review a court's decision to give or reject a proffered instruction for an abuse of discretion or judicial error. *Id.* However, this court reviews whether the instruction correctly stated the law de novo. *Davis v. State*, 130 Nev. 136, 141, 321 P.3d 867, 871 (2014). Because Instruction 10 was inapplicable on the facts of this case and incorrectly stated the law, we conclude that the district court erred by giving the instruction.

"The doctrine of transferred intent is a theory of imputed liability." *Ochoa*, 115 Nev. at 197, 981 P.2d at 1203. In *Ochoa*, the Nevada Supreme Court established that "the doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the specific intent to harm an intended victim whether or not the intended

victim is injured." *Id.* at 200, 981 P.2d at 1205. Ochoa had fired several shots at his intended victim, killing him, but one of those shots inadvertently injured a bystander. *Id.* at 195-96, 981 P.2d at 1202. Ochoa appealed his later conviction of attempted murder of the bystander based on a theory of transferred intent, arguing that the doctrine did not apply to the bystander because he had succeeded in killing his victim. The supreme court disagreed, seeing no reason why the doctrine would not apply "where the criminal charges relating to the intended and unintended victims differ but the specific intent required for the crimes remains the same." *Id.* at 199, 981 P.2d at 1205. Since both murder and attempted murder required the same specific intent—e.g., the intent to kill—the supreme court affirmed Ochoa's conviction. *Id.*

Although the State relied on *Ochoa* as authority for Instruction 10, *Ochoa* did not address the factual scenario at issue here: where the defendant intentionally damaged property and then, after completing that crime, he was alleged to have committed a battery in the course of a subsequent physical altercation. In *Ochoa*, the defendant was in the process of shooting at his intended victim when he inadvertently shot the bystander; thus, his intent to kill transferred to the injury he caused to the bystander. *Id.* (citing *State v. Stringfield*, 608 P.2d 1041 (Kan. Ct. App. 1980), and applying the doctrine of transferred intent in an aggravated battery case where "the defendant fatally shot the intended victim while *at the same time* wounding a child in the vicinity of the shooting" (emphasis added)). Witness testimony indicates that Hamilton was no longer damaging the cash registers after the asset protection officer restrained him in a bear hug. Therefore, the doctrine of transferred intent did not apply to

the battery that allegedly occurred during Hamilton's ensuing struggle with the asset protection officer.

We also agree with Hamilton that Instruction 10 incorrectly stated the law when it advised the jury that it was possible to "batter . . . [an] object." A "[b]attery" consists of "any willful and unlawful use of force or violence *upon the person of another*." NRS 200.481(1)(a) (emphasis added). By definition, Hamilton could not "batter" an object, and it was misleading to tell the jury that his intent to batter an object could transfer to a person.[4] Therefore, we conclude that the district court erred by giving the jury Instruction 10.[5]

Finally, having concluded that the district court erred in giving Instruction 10, we now determine whether the error was harmless. *See Nay v. State*, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007). As our supreme court has explained, "the *Chapman* harmless-error standard applies to review of instructional errors involving the omission or misdescription of an element of an offense." *Cortinas v. State*, 124 Nev. 1013, 1024-25, 195 P.3d 315, 323 (2008).[6] Here, the State was required to prove beyond a reasonable doubt that Hamilton willfully and unlawfully used force upon the asset protection officer. NRS 200.481(1)(a). However, a "battery charge cannot stand

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[4]We note that battery is proscribed within NRS Chapter 200, Crimes Against the Person, while damage to the type of property at issue here is proscribed within NRS Chapter 206, Malicious Mischief. *See* NRS 200.481 (battery); NRS 206.310 (property damage).

[5]We need not decide if the doctrine of transferred intent should be limited to specific intent crimes or may also be applied to general intent crimes based on our resolution that Instruction 10 was inapplicable on these facts and an incorrect statement of the law.

[6]*See Chapman v. California*, 386 U.S. 18, 23-24 (1967).

[where] the record reflects the alleged injury was accidentally inflicted." *McDonald v. Sheriff*, 89 Nev. 326, 327 n.1, 512 P.2d 774, 775 n.1 (1973); *see also Robey v. State*, 96 Nev. 459, 461, 611 P.2d 209, 210 (1980) ("The word 'willful' when used in criminal statutes . . . relates to an act or omission which is done intentionally, deliberately or designedly, as distinguished from an act or omission done accidentally, inadvertently, or innocently.").

In this case, the State relied on the erroneous transferred intent instruction in its closing to nullify Hamilton's accident defense when it argued, "[e]ven if you think maybe it was just an inadvertent thing on his part, it doesn't matter." As used by the State, the erroneous instruction allowed the jury to conclude, as a matter of law, that Hamilton's actions were willful and unlawful even if the jury believed that he hit the officer by accident. *See* NRS 194.010(7) ("All persons are liable to punishment except . . . [p]ersons who committed the act . . . through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence."). Therefore, we cannot say that the judicial error in giving Instruction 10 did not contribute to Hamilton's guilty verdict beyond a reasonable doubt. Because we conclude that the district court erred by giving Instruction 10, and the error was not harmless, we reverse Hamilton's conviction and remand for a new trial.

Whether the video of Hamilton swinging the gum scraper constituted bad act evidence that was improperly admitted

While we need not address Hamilton's argument concerning the improper admission of bad act evidence because we have already concluded that reversal of his conviction is warranted, we do so in order to eliminate

uncertainty in the event of a new trial.[7] *See Williams v. State*, 110 Nev. 1182, 1186, 885 P.2d 536, 538 (1994) ("Although we have already concluded that a new trial is mandated because of our ruling on the first issue, we have elected to also address the issue of the constitutionality of NRS 200.030 in order to eliminate uncertainty on the subject upon retrial.").

On appeal, Hamilton argues that the district court abused its discretion and violated his right to a fair trial by improperly admitting uncharged bad act evidence in the form of a video showing Hamilton swinging a gum scraper at a store greeter. Hamilton makes two arguments. First, contrary to the State's position, the conduct depicted in the video did not qualify as res gestae evidence. Second, even if the video was properly admitted as res gestae evidence, the district court's failure to give a limiting instruction to the jury prejudiced Hamilton. The State responds that the video was not prior bad act evidence because the gum scraper incident was so close in proximity and time to the charged act to constitute res gestae evidence. Specifically, the State contends that the video shows that there was only 1 minute and 49 seconds between the time Hamilton left the store after swinging the gum scraper at the store greeter and when he returned to the store with the tire iron. The State argues that showing Hamilton

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[7]In this regard, we briefly mention the flight instruction. We need not determine if the customers' statements were admissible as nonhearsay, excited utterances, or some other exception to the hearsay rule, because any error in admitting the statements was harmless. Independent of the customers' statements, we conclude that the district court did not abuse its discretion in giving the flight instruction as Hamilton, at a minimum, knew he had caused property damage in the store and left the scene before law enforcement arrived, evincing "a consciousness of guilt, for the purpose of avoiding arrest," as required to give the instruction. *Weber v. State*, 121 Nev. 554, 582, 119 P.3d 107, 126 (2005) (internal quotation marks omitted).

leaving the store angry is an essential part of the complete story because it helped explain to the jury Hamilton's return to the store with a tire iron and everything that followed. The district court agreed with the State and admitted the video of the gum scraper incident.

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "Evidence of prior bad acts is not admissible to prove the character of a person" or to show propensity to act "in conformity therewith." *Rosky v. State*, 121 Nev. 184, 194, 111 P.3d 690, 697 (2005) (internal quotation marks omitted). Under NRS 48.035(3), a witness may only testify to uncharged acts if the acts are so closely related to the crime charged that the witness cannot testify without referring to the uncharged acts. *See State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) ("If the doctrine of *res gestae* is invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts."); *see also Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) ("[T]he crime must be so interconnected to the act in question that a witness cannot describe the act in controversy without referring to the other crime." (internal quotation marks omitted)). Further, NRS 48.035(3) provides "an extremely narrow basis for admissibility," which is not satisfied by a mere showing "that the uncharged acts explain, make sense of, or provide a context for the charged crimes." *Alfaro v. State*, 139 Nev., Adv. Op. 24, 534 P.3d 138, 149 (2023) (internal quotation marks omitted).

There is no dispute that the gum scraper incident occurred prior to the charged act of battery with use of a deadly weapon. And we acknowledge that the time frame between the gum scraper incident and

Hamilton's return to the store with the tire iron was very short, less than two minutes according to the video. Nevertheless, we conclude that the district court abused its discretion by admitting the video as non-bad act evidence or res gestae evidence. Hamilton's charged conduct could easily have been described without referencing the gum scraper incident in contravention to the requirement for admissibility under NRS 48.035(3). The State argues that showing Hamilton's anger is part of the complete story.[8] But that is exactly the type of prior bad act or character evidence that should normally not be admitted—Hamilton's propensity to act in anger showing that he later acted in conformity therewith. Further, any alleged anger by Hamilton in committing the charged act could have been testified to by witnesses without reference to the uncharged act. Finally, the State's position that the gum scraper incident helped provide context for the charged crime is not a satisfactory reason to admit evidence under NRS 48.035(3).

In light of the foregoing, we conclude that evidence of the gum scraper incident qualified as bad act evidence, which the State does not directly dispute, and the district court erred in admitting it without first conducting a *Petrocelli* hearing. Particularly whereas here, the district court admitted the video based in part on the belief that evidence of other acts is not inadmissible simply because the evidence makes the defendant

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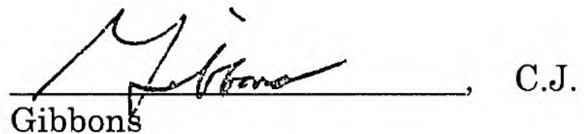
[8]At oral argument before this court the State presented a new argument not raised below or in the briefs—that the gum scraper incident also explained why the asset protection officer was holding an object when Hamilton returned to the store with the tire iron. This fact-based argument should have been presented to the district court in the first instance, and we decline to consider it for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989) ("This court will not consider issues raised for the first time on appeal.").

look bad. The district court also questioned whether the gum scraper incident was a crime, although the statute does not require it to be a crime to qualify as a bad act. NRS 48.045(2).

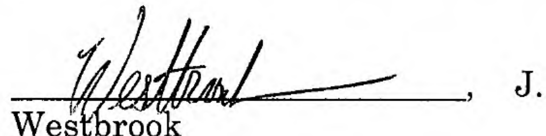
On remand, therefore, if the State intends to offer evidence of the gum scraper incident at a new trial, the district court shall conduct the requisite *Petrocelli* hearing and apply the bad act evidentiary standards before admitting the evidence. *See id.* If the court is persuaded that the bad act evidence should be admitted, then the State must request a *Tavares* instruction, or if the State fails to do so the court must give the instruction sua sponte prior to the admission of the evidence and again prior to the jury's deliberations. *Tavares v. State*, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001), *holding modified by Mclellan*, 124 Nev. 263, 182 P.3d 106. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[9]



_________________________, C.J.
Gibbons

_________________________, J.
Bulla



_________________________, J.
Westbrook

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[9]Insofar as the parties raise arguments that are not specifically addressed in this order, they need not be considered due to the disposition of this appeal or they do not present a basis for relief.

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