IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH MAURICE GRANT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42694

FILED

DEC 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdict, of one count of first-degree murder with the use of a deadly weapon and one count of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

The body of David Sygnarski was found on April 26, 2001, in a hotel room previously rented by Paulette Perry and Kenneth Grant. Hotel surveillance tapes show Sygnarski entering the room with Perry and Grant, Perry and Grant leaving and returning with cleaning supplies, and Perry and Grant leaving for good, but do not show Sygnarski leaving. Sygnarski's body was later found in the hotel room. The trials of Perry and Grant were bifurcated. At Grant's trial, the jury returned a verdict of guilty on the charges of murder and robbery. As the parties are familiar with the facts, we do not recite them further except as needed.

On appeal, Grant contends that the district court erred by admitting prior bad act evidence, the district court failed to give a limiting instruction prior to the admission of the prior bad act evidence, and the district court erred by permitting an incompetent witness to testify.[1]

[1]Grant also argues that (1) Jury Instruction No. 16 improperly instructed the jury on the deadly weapon enhancement, even though Jury

continued on next page . . .

Prior bad act evidence

Grant argues that the district court erred by admitting Harvey Baughman's testimony regarding unrelated prior bad acts committed by Grant and Perry six months before Sygnarski's murder. Under NRS 48.045(2), evidence of prior crimes, acts, or wrongs is admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Prior to admission, the trial court must determine whether: "'(1) the [evidence] 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.'"[2] The decision to admit prior bad act evidence rests with the sound discretion of the trial court and "will not be reversed absent manifest error."[3] The trial court must consider these factors in a Petrocelli hearing and record its findings regarding admission of the prior bad acts.[4] In the absence of a hearing, or in the absence of explicit

---

. . . *continued*
Instruction No. 25 did contain the correct instruction; (2) the State failed to prove the corpus delecti; (3) the State used inconsistent theories to prosecute Grant and Perry; (4) the reasonable doubt instruction was unconstitutional; and (5) cumulative error requires reversal. We conclude that these remaining contentions are without merit.

[2]Braunstein v. State, 118 Nev. 68, 72-73, 40 P.3d 413, 416-17 (2002) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)); see Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985).

[3]Braunstein, 118 Nev. at 72, 40 P.3d at 416.

[4]See Petrocelli, 101 Nev. at 51-52, 692 P.2d at 507-08.

findings, this court will review the record in its entirety to determine if the criteria for admissibility have been met.[5]

In this case, the district court made no explicit findings regarding Baughman's testimony. Baughman testified to Grant's and Perry's drug use and their assault of him. During the assault, Perry and Grant attacked Baughman after he had refused a request from Grant and Perry for money to buy drugs, and they eventually took $100 from Baughman's pockets. Baughman suffered a broken nose, ruptured groin, and other bruises in the attack. Grant and Perry fled when another car pulled off the road to investigate the commotion.

The State was entitled to use Baughman's testimony to introduce Grant's extensive drug use as a motive to obtain funds. The State was also entitled to demonstrate Perry's and Grant's modus operandi through the similarities between the previous assault of Baughman and the instant homicide. Both incidents involved an addictive motive to obtain funds to purchase drugs, indicia of a prostitute and a pimp performing a "trick-roll," and questionable claims of attempted sexual assault to justify an attack upon the victim. The district court could have reasonably concluded that this evidence was relevant, proved by clear and convincing evidence, and that the danger of unfair prejudice failed to substantially outweigh its probative value. Accordingly, we cannot conclude that the admission of Baughman's testimony was manifestly wrong.

However, Grant points out that the district court failed to give a limiting instruction regarding the prior bad act and argues that this was

---

[5]See Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998).

not harmless error. When admitting evidence of prior bad acts "a limiting instruction should be given both at the time evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury."[6] Under Tavares v. State and NRS 178.598, nonconstitutional errors such as this will be disregarded unless "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[7]

In the present case, the district court failed to give the limiting instruction at the time of admitting the prior bad act evidence. However, Instruction No. 35 did contain a limiting instruction. The evidence against Grant, as demonstrated by the surveillance tapes, overwhelmingly supported his conviction. Therefore, we conclude that the district court's failure to give a limiting instruction at the time of admitting the prior bad act evidence is harmless error.

The competency of Tephedhardt

Grant argues that Sygnarski's sister, Joan Tephedhardt, who had not seen Sygnarski in more than four years, was not competent to testify that Sygnarski always carried a watch, wallet, and other valuable personal items, creating an inference that Sygnarski had these items with him at the time of his demise. Under NRS 50.025(1), "[a] witness may not testify to a matter unless: (a) Evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Also, under NRS 48.059(2), habit evidence from a witness's "opinion or by specific instances of conduct" of Sygnarski is admissible.

---

[6]Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[7]Id. at 731-32, 30 P.3d at 1132 (citing NRS 178.598) (quoting Kotteakos v. U.S., 328 U.S. 750 (1946)).

In the present case, Tephedhardt testified that her brother lived with her during the late 80's and early 90's, and it was his habit to carry a wallet, money clip, and watch when he was not at home. We conclude that Tephedhardt's personal knowledge of Sygnarski's habits was not too remote in time and, therefore, Tephedhardt was a competent witness.

Overwhelming evidence supports the jury's verdict in this case, and Grant does not establish any reversible error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas

_____, J.
Rose

_____, J.
Parraguirre

cc: Hon. John S. McGroarty, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk