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IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY DEALVONE HUBBARD,	)	
	)	Case No.: 66185
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

SUPPLEMENTAL BRIEFING PURSUANT TO ORDER FILED ON OCTOBER 21, 2016

COMES NOW, Appellant CORY HUBBARD, by and through his counsel, Brent D. Percival, and timely submits this pleading as his Supplemental Brief establishing that the district court's admission of other crimes evidence, during Mr. HUBBARD's trial, was a manifest abuse of discretion.

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This brief is based upon the Appendix which was previously filed with this Court.

DATED this 31st day January, 2017.

Respectfully Submitted,

/s/ Brent D. Percival

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I. Relevant Procedural Posture:

Cory Hubbard, Willie Carter and Stelman Joseph were indicted for committing the crimes of conspiracy to commit robbery, burglary while in possession of a firearm, and seven counts of robbery with use of a deadly weapon.[1] Individually, Mr. Hubbard was also charged with committing attempt murder with use of a deadly weapon, assault with a deadly weapon and discharging a firearm within a structure.[2] All of the crimes were committed during the evening of August 22, 2013 at 657 Shirehampton Drive, Las Vegas against David Power, Darny Van, Asia Hood, Kenneth Flenory, Anthony Robert, Thavin Van and Trinity Briones.[3]

A. Pretrial litigation regarding admission of Washington state residential burglary conviction

Prior to Mr. Hubbard's trial, the state filed a Motion In Limine to admit the facts of a July 27, 2012 residential burglary which occurred in the state of Washington.[4]

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[1] I AA 01-09 (Indictment) and I AA 12-19 (Superseding Indictment adding Stelman Joseph as a defendant).

[2] I AA 08-09.

[3] I AA 01-09 and I AA 12-19.

[4] I AA 22-69; I AA 29 (date of commission of Washington crime).

The Washington state judgment of conviction and other court documents were attached to the state's other crimes motion.[5]

In the motion, the state requested that the Washington daytime residential burglary be admitted to prove motive, intent, identity, and absence of mistake/accident.[6] Further, the state sought admission of the Washington conviction to rebut a claim that Mr. Hubbard was an innocent bystander of an unrelated drive by and for any valid nonpropensity purpose.[7]

The vast majority of the state's legal argument and analysis related to the admission of the Washington crime in order to prove identity.[8]

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[5] I AA 38-69.

[6] I AA 31.

[7] Id. The state never enunciated any nonpropensity purpose for the admission of the Washington conviction. I AA 31-36.

[8] I AA 31-36. The motion cited: six cases in which the other act evidence was admitted solely to prove identity (Mayes v. State, Canada v. State, Reed v. State, Quiriconi v. State, Green v. State), one case in which the other act evidence was admitted to prove identity and motive (Fields v. State), one motive only case (Ledbetter v. State), one case in which the other act evidence was admitted to prove identity, plan, modus operandi and intent (Bolin v. State), one modus operandi case (Williams v. State), one common scheme or plan case (Brinkley v. State), and, of course, Bigpond v. State.

The only enunciated basis for the admission of the Washington crime as proof of intent was that,

> [d]efendant is charged with Burglary While in Possession of a Firearm. Thus, the intention with which he entered the residence is clearly at issue in this case. The evidence establishes ... he intended to steal items inside of the residence.[9]

At the first hearing on the motion, because Mr. Hubbard's counsel had not received a copy of the state's motion, the district court judge stated the facts regarding the Washington crime.[10] In discussing the standard of admissibility regarding this crime, the district court judge stated "[t]e requirements are, of course, clear and convincing evidence, and, of course, what is relevant and appropriate ...."[11]

At the next hearing, counsel for Mr. Hubbard argued that the facts of the Washington burglary established the crime was "as generic a residential burglary as there could be" and that it was "almost like any other residential burglary."[12]

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[9] I AA 35-36.

[10] I AA 72.

[11] I AA 73.

[12] I AA 81-82.

Counsel also specified the differences between the Las Vegas crimes and the Washington crime which did not involve any firearms, where no one was held hostage, where no one was taken at gunpoint."[13] The district court was also informed that nobody identified Mr. Hubbard as having been present during the Washington burglary and that only a Hispanic male was seen knocking on the door of the Washington residence.[14]

Mr. Hubbard's counsel concluded his argument by noting that "the only real legitimacy" admission of the conviction would have is to establish that Mr. Hubbard was "convicted of a residential burglary in Washington once, he must be guilty of this residential burglary."[15]

The district court then defined the prejudice determination regarding the admission of other crimes evidence as,

> prejudice [that] is not synonymous with damage to the defendant's case. It's actual prejudice, undue prejudice where the jury hears this and all of a sudden becomes blinded about the evidence in this case.[16]

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[13] I AA 83.

[14] I AA 82.

[15] I AA 84.

[16] Id. As established at pp.27-28, this is an incorrect assessment of the prejudice aspect of the other crimes analysis.

After this statement, the district court went on to further discuss the facts of the Las Vegas crime and Mr. Hubbard's defense which the judge recognized was "I don't know what happened. I'm going down the street and all of a sudden I got shot out of the clear blue."[17]

The judge then stated "[b]ut that [scenario] is not what we're dealing with. What we're dealing [with] is ... [whether] this residential burglary two years earlier [is] more appropriate than prejudice."[18] After recognizing that the Washington crime occurred less than two years earlier, the judge granted the state's motion.[19]

The judge indicated that because Mr. Hubbard was asserting that he wasn't at the scene of the crime and didn't commit the crimes that the Washington crime was admissible to prove absence of mistake.[20]

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[17] I AA 86.

[18] I AA 86. This is the second time that the district court judge enunciated his view of the analysis as requiring the Washington crime to be "appropriate". See I AA 73.

[19] Id.

[20] I AA 87 lines 11-13 and I AA 87 line 15.

When the state asserted that the Washington conviction should also be admissible regarding motive and intent,[21] the judge amended his ruling to include those purposes as a relevant basis for admission of the Washington conviction.[22] The judge never enunciated how or why the Washington crime was relevant to either Mr. Hubbard's motive or his intent.

B. Appellate Litigation:

During the present appeal, Mr. Hubbard challenged the admission of the Washington crime during his trial.[23] After the case was transferred to the Court of Appeals, the majority of that court concluded that the district court manifestly abused his discretion in admitting the Washington crime. Based in part on this conclusion, the Court of Appeals remanded Mr. Hubbard's case to the district court for further proceedings.[24]

The state filed a Petition for Review by this Court.[25]

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[21] I AA 87 line 14.

[22] I AA 87 line 14-15.

[23] See AOB pp.20-33.

[24] See Order of Reversal and Remand filed on April 1, 2016 pp.10-17.

[25] See Petition filed on April 19, 2016.

After briefing, this Court granted, in part, the state's Petition and ordered supplemental briefing. This Court specified that this briefing should focus on "whether the district court abused its discretion in admitting prior bad act evidence to prove absence of mistake or intent because" Mr. Hubbard "did not put absence of mistake or intent at issue" during his trial.

II. Relevant Facts Regarding Washington Crime:

On the morning of July 27, 2012, Kimberly Davis was present at the home she shared with her parents which was located at 7223 74th St., Marysville, Washington.[26] On that day, the house's door bell was rung numerous times and there was knocking on a window. Ms. Davis looked out and saw an unknown Hispanic male standing on the porch drinking a soda.[27] Ms. Davis did not answer the door. At this time, Ms. Davis also saw a nice white vehicle with tinted windows parked on her street.[28] The car departed as did the Hispanic male.

Later, Ms. Davis observed the white vehicle return and heard footsteps in the gravel outside her room.

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[26] IV AA 745.

[27] IV AA 746.

[28] Id.

When Ms. Davis heard the garage window being wrestled with, she called 911 and locked herself in a bathroom.[29] While in the bathroom, Ms. Davis heard people moving about the house; she also heard two or three black male voices.[30] Ultimately, Ms. Davis heard the men running to the front door.[31] Obviously, Ms. Davis never saw who entered her home through the garage.

Shortly after receiving information from Ms. Davis' 911 call, Washington police stopped a vehicle. Mr. Hubbard was in that car and also had a watch in his pocket. Ms. Davis' mother was brought to the car and identified the watch which was stolen from the house.[32] During the Washington trial, Ms. Davis testified regarding the facts underlying the commission of the crime and did not identify Cory Hubbard as one of the perpetrators of the daytime residential burglary.[33]

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[29] IV AA 748.

[30] IV AA 749.

[31] IV AA 750.

[32] IV AA 753.

[33] Ms. Davis "was notified by the police" that Mr. Hubbard had been caught and had her mom's watch in his pocket. IV AA 753.

During the Nevada trial, even though the state clearly knew that the Washington crime was a residential burglary, the state chose to ask Ms. Davis "do you recognize one of the suspects that was involved in that July 2012 home invasion in court today?"[34] This prejudicially charged question resulted in Ms. Davis pointing to Mr. Hubbard.[35]

Ms. Davis did not point at Mr. Hubbard because she recognized him as a participant in the burglary. Rather, she pointed at Mr. Hubbard because he was the defendant in the Washington trial and she testified at that trial.[36]

III. Mr. Hubbard's Defense at Trial:

After the state rested their case in chief,[37] Mr. Hubbard testified as the sole defense witness.[38]

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[34] Emphasis added. See I AA 30 (state's motion indicates that "Defendant was charged with one count of Residential Burglary ... Defendant was found guilty of Residential Burglary."); see also, I AA 38 (Washington Judgment and Sentence establishes "defendant found guilty ... by jury verdict of Residential Burglary..."); I AA 49 (verdict form).

[35] IV AA 751.

[36] IV AA 753-55.

[37] V AA 971.

[38] VI AA 978-1034.

Mr. Hubbard told the jury that in August of 2013, he had known Stelman Joseph, one of the alleged co-defendants/participants in the Las Vegas case, for approximately six to seven years.[39]

Just prior to August 22, 2013, Stelman Joseph set up a drug deal for Mr. Hubbard who arrived in Las Vegas on August 22, 2013 to complete the deal.[40] Mr. Hubbard was supposed to purchase two and one half gallons of promethazine and a couple of pounds of marijuana.[41]

After initially getting lost, Mr. Hubbard arrived at the arranged meeting place and an unknown male got into the front passenger seat of his car.[42] While Mr. Hubbard was inspecting the promethazine, another male came to his window, and when Mr. Hubbard looked at this guy, the male in the front passenger seat pulled out a gun.[43]

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[39] VI AA 981. Mr. Hubbard did not know Willie Carter who was also charged as a co-defendant/participant in the robbery. Id.

[40] VI AA 982-983.

[41] VI AA 984.

[42] Id.

[43] VI AA 986.

Mr. Hubbard gave his money to the unknown male in the front passenger but opened the driver door to hit the other male on that side of the car.[44] At this point, the guy with the gun shot Mr. Hubbard in the shoulder.[45] After being shot, Mr. Hubbard got out of the car, ran away and ended up at the Short Line Express.[46]

Mr. Hubbard explained to the jury that he was never inside the residence located at 657 Shirehampton Drive. Further, Mr. Hubbard had never seen that house before the photographs of the residence were admitted at trial.[47] Moreover, Mr. Hubbard never had any interaction with and did not know David Powers, Darny Van, Matthew Van, Thavin Van, Kenneth Flenory or Asia Hood; the first time he saw these persons was during the trial.[48] Finally, Mr. Hubbard told the jury that he did not have any involvement in the robberies that took place at 657 Shirehampton Drive.[49]

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[44] Id.

[45] VI AA 986-987.

[46] VI AA 987.

[47] VI AA 991.

[48] VI AA 992.

[49] VI AA 993.

The actual facts of Mr. Hubbard's defense at trial were different from the pretrial understanding of the defense which was that he was shot out of the blue for an unknown reason. Nonetheless, the conclusion of both factual scenarios was the same and therefore the defenses were the same - Mr. Hubbard did not commit any criminal acts at the Shirehampton residence during the evening of August 22, 2013.

IV. Argument: [50]

Historically and today, other crime evidence is presumptively inadmissible and is "heavily disfavored."[51] Therefore, "NRS 48.045(2) is merely an exception to the general presumption" of inadmissibility.[52]

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[50] Because the Washington case resulted in a conviction, this brief only challenges the first and third aspects of the other crime admissibility test set forth in Bigpond v. State, __ Nev. __, 270 P.3d 1244, 1249 (2012).

[51] See Newman v. State, __ Nev. __, 298 P.3d 1171, 1178 (2013), Bigpond, 270 P.3d at 1249, Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005), Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128 (2001) modified on other grounds by McLellan v. State, 124 Nev. 263, 182 P.3d 106 (2008), Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000).

[52] Tavares, 117 Nev. at 731.

Given this fact, the trial court is required to determine that the "prior bad act is relevant to the crime charged and for a purpose other than proving" an accused's propensity to commit criminal acts.[53]

Relevant evidence is evidence which 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."[54] In order for other crime evidence to make the existence of any fact that is of consequence to the determination of an accused's guilt of a charged crime, the identified purpose of the other crime evidence must be "at issue."[55]

This is not a new concept. Over the years, this Court has consistently recognized that other crimes evidence is inadmissible if the identified purpose is not "at issue".

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[53] Bigpond, P.3d at 1250. In Bigpond, this Court determined that NRS 48.045(2) is an inclusionary rather than exclusionary statute. Therefore, the basis for the admission of other crime evidence is not limited only to the purposes enunciated by the language of the statute. Nonetheless, other crime evidence which leads solely to the conclusion that the accused committed the charged crime because of his propensity to commit criminal acts is completely excluded by NRS 48.045(2).

[54] NRS 48.015.

[55] Newman, 298 P.3d at 1178.

In 1989, this Court specified that "if none of these statutory exceptions [of NRS 48.045(2)] are issues at trial, it is impermissible to introduce the other crime, wrong or act" into evidence.[56] In 2005, this Court concluded that when a victim identifies the defendant on multiple occasions and there was no doubt the defendant was the proper suspect and the defendant admitted the acts associated with the charged crimes in his own statement, identity was not at issue during trial and the other crime evidence was inadmissible.[57] One year later, this Court reaffirmed the inadmissibility of other crime evidence when identity, accident, mistake or unintentional conduct were not "at issue" during the trial.[58]

Finally, in 2013, this Court recognized that when a defendant does not mount a specific defense and the other crime/bad act evidence does not disprove the actual defense presented, prior bad acts should not be admitted. Therefore, when the statutory exception is irrelevant to the defense mounted, other crime/bad act evidence is inadmissible.[59]

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[56] Honkanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989).

[57] Rosky, 121 Nev. at 197.

[58] Ledbetter v. State, 122 Nev. 252, 260, 129 P.3d 671, 677 (2006).

[59] Newman, 298 P.3d at 1178 (2013)(citing Honkanen v. State, 105 Nev. 901, 902, 7884 P.2d 981, 982 (1989)).

These cases make clear that if the basis for the admission of the other crime evidence is not "at issue," the other crime evidence is not relevant. Admission of non-relevant evidence, particularly when the evidence is the conviction of a different residential burglary, must be manifest error.[60] Moreover, determining to admit prejudicial evidence of a residential burglary which occurred in another state when the evidence is irrelevant and inadmissible is a clearly erroneous application of NRS 45.045(2) and is a manifest abuse of discretion."[61] Finally, applying an erroneously definition of the prejudice determination required to admit other crimes evidence is also a manifest abuse of discretion.

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[60] See Fields v. State, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009), Diomampo v. State, 124 Nev. 414, 429–30, 185 P.3d 1031, 1041 (2008); Phillips v. State, 121 Nev. 591, 601, 119 P.3d 711, 718 (2005) receded from on other grounds Cortinas v. State, 124 Nev. 1013, 195 P.3d 315 (2008) Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995) overruled on other grounds by State v. Sixth Judicial Dist. Court In & For Cty. of Humboldt, 114 Nev. 739, 964 P.2d 48 (1998) holding modified by Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997); Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

[61] Jones v. Eighth Judicial Dist. Court, 130 Nev. __, __, 330 P.3d 475, 481 (2014).

Mr. Hubbard's trial judge admitted the Washington conviction even though intent was not at issue and even though Mr. Hubbard never enunciated any facts which indicated that he mistakenly entered the Shirehampton residence. Additionally, the trial judge applied the wrong standard of prejudice, it must blind the jurors to the evidence of the case and it must be appropriate, when determining to admit the Washington conviction. Therefore, the district court manifestly abused his discretion and this Court should remand the case to the district court for further proceedings consistent with the Order of Remand authored by the Court of Appeals.

A. The district court manifestly abused his discretion in admitting the Washington crime when the intent element of the burglary while in possession of a firearm crime was proved by the acts of robbery, larceny, assault with a deadly weapon and discharge of a firearm in a structure

Other crime evidence is presumptively inadmissible and is "heavily disfavored."[62] Therefore, if the issue of intent is established by the acts underlying other charged crimes, it should be unquestionable that the other crime evidence is inadmissible.

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[62] Newman, 298 P.3d at 1178, Bigpond, 270 P.3d at 1249, Rosky, 121 Nev. at 195, Tavares, 117 Nev. at 731, Walker, 116 Nev. at 445.

> Where intent is a necessary conclusion from the act, and the act charged is not equivocal, proof of other offenses to cast light upon intent, even though similar in nature, should not be permitted under any circumstances.[63]

In Mr. Hubbard's case, Count II of the indictment charged burglary while in possession of a firearm. This charge required the state prove that Mr. Hubbard (1) entered the residence at 657 Shirehampton (2) while in possession of a firearm (3) with intent to commit larceny and/or any felony and/or robbery.

Based on the language "with intent to commit", it would appear that the state was required to prove Mr. Hubbard's specific intent in order for a jury to convict of this crime. In actuality, that "element" of the burglary offense would be established by Mr. Hubbard's commission of larceny, robbery, assault with a deadly weapon and discharge of a firearm inside a structure.

The state's motion in limine informed the district court that on August 22, 2013 at approximately 8:45 p.m., the front doorbell, of the house at 632 Shirehampton Dr., rang and Darny Van opened the door. She saw a black male standing on the porch who asked her if Darnell was in the house.

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[63] Eric D. Lansverk, Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b), 61 Washington L. Rev. 1213, 1222 fn 46 (1986).

All of a sudden two other black males barged into the house from the right side of the door and a gun was put into her face. The guy who had rung the door bell entered the house after the other two black guys. Five of the occupants of the house were ordered about, property was taken by men with guns, shots were fired and ultimately the three black men left the residence through the front door.[64] This evidence clearly established that acts of robbery occurred at the Shirehampton residence.[65]

Moreover, the state's motion informed the district court that on August 22, 2013, Asia Hood was surfing the web and texting on an iPad and iPhone 3G. Those items were taken from Asia by Willie Carter. Additionally, Kenneth Flenory's cell phone was taken from him by a man holding a gun. Further, there was no evidence that the two phones or the iPad were ever returned.[66] Clearly, this evidence established that acts of larceny occurred on August 22, 2013.

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[64] I AA 24-27.

[65] Mr. Hubbard was convicted of committing seven (7) counts of robbery with use of a deadly weapon. VI AA 1167-1170. The Court of Appeals reversed three of these convictions due to insufficient evidence.

[66] Id.

Finally, the state's motion informed the district court that David Power "heard, and felt the wind of a bullet from the suspect's firearm go past his head."[67] This evidence established the charged felonies of assault with a deadly weapon and discharge of a firearm within a structure also occurred on August 22, 2013.[68]

Consequently, evidence of the Washington daytime residential burglary was unnecessary, irrelevant and inadmissible. Mr. Hubbard's intent in entering the residence was proven by the acts underlying the charged robberies, assault with a deadly weapon, discharge of a firearm and the uncharged act of larceny. Evidence of each of these crimes fulfilled the "intent" element of burglary. Admission of the Washington crime did nothing more than inform the jury that Mr. Hubbard committed the alleged Las Vegas burglary just like he committed the residential burglary in Washington. He did it once, he did it again; clearly a violation of NRS 48.045(1).

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[67] I AA 26.

[68] Mr. Hubbard was convicted of committing assault with a deadly weapon and discharging a firearm within a structure. VI AA 1167-1170.

From the facts contained within the state's motion and the language of the indictment, it should have been apparent to the district court that admission of the Washington residential burglary was not relevant to the intent element of the burglary while in possession of a firearm charge. By admitting irrelevant evidence, which is a clearly erroneous application of NRS 48.045(2), the district court manifestly abused his discretion.[69]

B. Intent is not "automatically at issue" even when a "specific intent" crime is alleged and Mr. Hubbard's defense did not raise intent "in substance" nor was it "at issue" during his trial therefore the district court manifestly abused his discretion in admitting the Washington conviction

As long ago as 1993, this Honorable Court specifically recognized that prejudicial other crimes/acts evidence is not admissible until the issue, for which the other crime evidence is alleged to be relevant, is actually raised.

> Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose.[70]

Every crime has an element of intent.

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[69] Jones, 330 P.3d at 481.

[70] Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843, 846 (1993).

Accordingly, unless intent is raised "in substance" or is "at issue" during a trial, other act evidence is inadmissible. Thus, intent is never automatically at issue.

Other state appellate courts have also recognized that intent is not automatically at issue when a crime has allegedly been committed.[71] This is true even when the crime alleged is deemed a "specific intent" crime.

In 2002, the Vermont Supreme Court recognized that even when a charged crime includes a "specific intent", intent is "frequently not 'genuinely at issue.'"[72] This is true because many times the defense presented at trial is that the person charged did not commit the acts.

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[71] See Barnett v. State, 893 A.2d 556, 559 (Del. 2006)(the state's proposition that in "any case requiring proof of intent, intent is automatically deemed to be at issue for the purposes of admitting other-crime evidence" is not supported by prior authority); see also State v. Brown, 44 Kan. App. 2d 344, 352, 236 P.3d 551, 558 (2010)(a defendant's not guilty plea is not sufficient to place the person's intent in dispute at trial for the purpose of admitting other crime/bad act evidence); and, State v. Hutton, 258 Or. App. 806, 812, 311 P.3d 909, 913 (2013)("intent is not a contested issue [for admission of other crime/bad act evidence] in every case merely by virtue of the fact that the state must prove that element.").

[72] State v. Lipka, 817 A.2d 27, 39 (Vt. 2002).

If this is the defense, that the charged person did not commit the acts, "a defendant has 'implicitly or practically conceded' that he acted with criminal intent if the jury found that he did commit the acts.[73] Therefore, even though a "specific intent" was required, intent was not raised "in substance" nor was it "at issue" during trial.

In 2015, the Appellate Court of Illinois also determined that intent is not "automatically at issue in any case where specific intent is an element of the crime."[74] The court saw the facts of the case under review as a prime example of why there could not be a bright line rule of automatic intent. In the case, it was clear that,

> whoever stole the bike in this case cut the lock, rode it away, removed the front wheel, shoved it into the trunk of a car, and drove that car away. Of course that person intended to steal the bike.[75]

Moreover, the defendant was not arguing that he stole the bike but did so negligently or recklessly, rather he asserted that he did not take the bike at all.[76]

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[73] Lipka, 817 A.2d at 40.

[74] People v. Clark, 35 N.E.3d 1060, 1067 (Ill. App. Ct. 2015).

[75] Clark, 35 N.E.3d at 1067.

[76] Clark, 35 N.E.3d at 1068.

Therefore, even though a “specific intent” was required, intent was not raised “in substance” nor was it “at issue” during trial.

The Supreme Court of Arizona has also decided that intent is not automatically at issue just because the crime requires a “specific intent”. The Court recognized that,

> the general rule prohibiting introduction of prior bad acts to show character would never apply to specific intent crimes because intent would always be at issue. This, we believe, cuts too deeply into the rule against character evidence. Moreover, it does so based on a nearly meaningless distinction. As the instant case amply demonstrates, sometimes even specific intent crimes do not put intent at issue.

The issue of the case was whether the defendant committed the acts at all, not what his state of mind was when he committed them.[77] Therefore, even though a “specific intent” was required, intent was not raised “in substance” nor was it “at issue” during trial.

During the entire trial litigation, Mr. Hubbard asserted that he did not commit any crime acts at the Shirehampton residence during the evening of August 22, 2013. He did not go to the residence, he was shot in another location by a different person and for reasons that had nothing to do with the crimes that occurred at the residence.

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[77] State v. Ives, 927 P.2d 762, 770 (1996).

Thus, Mr. Hubbard 'implicitly or practically conceded' that he acted with criminal intent if the jury found that he did commit the acts.[78] Therefore, even though a "specific intent" was required regarding the crime of burglary while in possession of a firearm, intent was not raised "in substance" nor was it "at issue" during the trial.

Because intent was not at issue during Mr. Hubbard's trial, the evidence regarding the Washington residential burglary was irrelevant and inadmissible. Admission of the Washington conviction, particularly when the district court failed to even enunciate how the conviction would be relevant to intent, was manifest error.

C. Mr. Hubbard was never going to assert a "mistake" defense therefore the district court abused his discretion by admitting the Washington conviction to prove absence of mistake

Mistake is not an element of any crime. It can never be at issue unless it is raised as a defense. Mistake, in the context of a criminal case, is asserted when a defendant admits he performed an act but believed that the circumstances to be such that the act was legal.

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[78] Lipka, 817 A.2d at 40.

Therefore, admissibility of another crime to prove the absence of mistake requires proof of a genuine claim of mistake and a showing that such a claim must be disputed.[79] If there is not a genuine claim of mistake, the other crime evidence cannot be relevant.

In Mr. Hubbard's case, in order for him to assert a "mistake" defense, regarding the burglary while in possession of a firearm charge, he would have had to testify that he entered the Shirehampton residence because he thought a party was being held there that he had been invited to. Or that friends had called him and told him to come over for dinner at a home in the neighborhood and he gone to the wrong address. Or that the drug deal that he came to town to complete was going to occur at that residence or at a nearby residence and he went to the wrong home.

During the entirety of the trial litigation, Mr. Hubbard never asserted any facts which indicated that he mistakenly entered the Shirehampton residence while armed with a firearm.

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[79] Taylor, 109 Nev. at 854; see also Eric D. Lansverk, Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b), 61 Washington L. Rev. 1213, 1223-25 (1986)

Therefore, the district court's admission of the Washington residential burglary as evidence of "lack of mistake" was manifest error.

D. Application of an incorrect standard of prejudice when determining to admit the Washington conviction was a manifest abuse of the district court's discretion

The term "unfair prejudice," regarding a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.[80] Therefore, the danger of prejudice analysis, required by NRS 48.045(2), focuses on whether the other act evidence may unduly influence a jury to convict based on the accused's propensity to commit crime rather than on the state's ability to prove all of the elements of the crimes charged.[81]

Mr. Hubbard's trial judge defined the prejudice determination regarding the admission of other crimes evidence as,

> prejudice [that] is not synonymous with damage to the defendant's case. It's actual prejudice, undue prejudice where the jury hears this and all of a sudden becomes blinded about the evidence in this case.

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[80] See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403).

[81] Walker, 116 Nev. at 447.

Requiring the Washington crime to "blind" the jury to the case evidence in order for the admission of that crime to prejudicially outweigh its probative value establishes that the district court judge did not understand or apply the correct standard of admissibility. Moreover, the phrase blinded by the evidence also clearly establishes that the district judge's interpretation of the third aspect of the NRS 45.045(2) made the standard almost impossible for Mr. Hubbard to establish.

Additionally, during the two separate hearings regarding the admission of the Washington crime, the district court judge stated the analysis focused on what was appropriate.[82] This Court has never used the word appropriate in discussing the third aspect of the admissibility of other crimes evidence.

By enunciating and applying an incorrect standard of prejudice, which is a clearly erroneous application of NRS 48.045(2), the district court manifestly abused his discretion.[83]

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[82] I AA 73 and I AA 86.

[83] Jones, 330 P.3d at 481.

V. Conclusion:

Mr. Hubbard's trial judge admitted the Washington conviction even though intent was not at issue and even though no facts existed that Mr. Hubbard mistakenly entered the Shirehampton residence. Additionally, the trial judge applied the wrong standard of prejudice when determining to admit the Washington conviction. Therefore, the district court manifestly abused his discretion and this Court should remand the case to the district court for further proceedings consistent with the Order of Remand authored by the Court of Appeals.

DATED this 31st day January, 2017.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in size 14 Arial font.

I further certify that this brief complies with the page-or type-volume limitations established by this Court's order because, it is:

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Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 31st day of January, 2017.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 31st day of January, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Chief Deputy District Attorney Steven Owens

Attorney General Adam Laxalt

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/s/ Brent D. Percival
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