IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY DEALVONE HUBBARD, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 66185

RESPONDENT'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE ISSUE

1. Did the district court abuse its discretion in granting the Motion in Limine to Admit Evidence of Other Bad Acts under NRS 48.045 to prove absence of mistake and intent in a case where specific intent crimes were charged?

STATEMENT OF THE CASE

On September 11, 2013, the State filed an Indictment against Appellant Cory Hubbard and Co-Defendant Willie Carter. 1 AA 1-11. The State charged Appellant with seven counts of Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165), one count of Conspiracy to Commit Robbery (Category B Felony – NRS 199.480, 200.380), one count of Burglary While in Possession of a Firearm (Category B Felony – 205.060), one count of Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165),

one count of Assault with Use of a Deadly Weapon (Category B Felony – NRS 200.471), and one count of Discharging a Firearm within a Structure (Category B Felony – NRS 202.287). 1 AA 1-11. After detectives learned the identity of Co-Defendant Stelman Joseph, a Superseding Indictment was filed on October 30, 2013, to include him in the charges. 1 AA 12-21.

On March 18, 2014, the State filed a Motion in Limine to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045. 1 AA 22. On April 1, 2014, the district court granted the State's Motion. AA 86. Jury Trial commenced on April 14, 2014. 7 AA 1214. On April 22, 2014, the jury found Appellant guilty of Count 1: Conspiracy to Commit Robbery, Count 2: Burglary, Counts 3-9: Robbery with Use of a Deadly Weapon, Count 14: Assault, and Count 15: Discharge of a Firearm within a Structure. 6 AA 1167-70. The jury found Appellant not guilty of the Attempt Murder with Use of a Deadly Weapon charge. The district court sentenced Appellant under the large habitual criminal statute to life without the possibility of parole for each count from 1-9 and 15; and to credit for time served on count 14. 6 AA 1171-73. All counts to run concurrent with each other with 308 days credit for time served. Id. The Judgment of Conviction was filed on July 1, 2014. Id.

Appellant filed his Notice of Appeal on July 29, 2014. 6 AA 1174. Appellant's Opening Brief was filed on August 5, 2015. The State filed its Answering Brief on August 31, 2015. Appellant filed a Reply Brief on December 3, 2015. On April 1,

2016, the Court of Appeals reversed and remanded the case to the district court on the issue of the admissibility of prior bad act evidence to prove intent. This decision was based on the Court of Appeals' premise that Appellant removed intent from issue because he did not actively argue it and, therefore, the State could not address intent. Hubbard v. State, Docket No. 66185, 2016 Nev. App. Unpub. LEXIS 51, *15 (Nev. Ct. App. Apr. 1, 2016).

On April 19, 2016, the State petitioned this Court for review of the Court of Appeals' decision. On October 21, 2016, the Court ordered supplemental briefing on the issue of whether prior bad acts may be admitted in a case charging specific intent crimes when a defendant does not "affirmatively" place intent at issue. Appellant's Supplemental Brief ("ASB") was filed on April 17, 2017. The State submits its Supplemental Brief herein.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in granting the motion to admit prior bad act evidence. In specific intent crimes, intent is not something that is put "at issue" by the defense. Rather, intent is an element of the offense that must be proven by the State and, as such, is always at issue. Moreover, in this case, Appellant did affirmatively put lack of mistake at issue based on his defense that he was accidentally shot during a drug deal. Thus, the district court did not abuse its

discretion in granting the motion to admit the prior bad act evidence. As such, the order of the district court should be affirmed.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE PRIOR BAD ACT EVIDENCE TO SHOW INTENT AND LACK OF MISTAKE UNDER NRS 48.045.

A. PRIOR BAD ACT EVIDENCE IS ADMISSIBLE REGARDING INTENT BECAUSE, IN SPECIFIC INTENT CRIMES, INTENT IS AN ELEMENT THAT MUST BE PROVEN.

As the United States Supreme Court has noted, "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." Estelle v. McGuire, 502 U.S. 62, 69, 112 S. Ct. 475, 481 (1991). Unlike in general intent crimes, intent is automatically at issue in specific intent crimes because it is the prosecution's burden to prove every element of the crime regardless of the kind of defense defendant asserts and whether the defendant contests an issue. United States v. Miller, 974 F.2d 953, 960 (8th Cir. 1992). Accordingly, when intent is an element that must be proven by the State, it is not necessary for the defendant to first contest intent before the State may address it.[1]

[1] Further, multiple federal circuit courts have explicitly addressed the comparison of the role of intent in general intent crimes versus specific intent crimes, and the disparate burden the State bears in the two cases. "The critical point is that for general-intent crimes, the defendant's intent can be inferred from the act itself,

Where the prosecution is required to prove specific intent, other acts evidence may be admitted because the intent of the accused is "more than a formal issue." Vivian M. Rodriguez, The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice, 48 U. MIAMI L. REV. 451, 456 (1993). Intent is a material element of the crime that the State must prove; thus, evidence of a prior crime may be admitted to establish intent. See United States v. Spillone, 879 F.2d 514, 518-20 (9th Cir. 1989).

The majority of federal circuit courts have held that intent is an element that the State must prove in a specific intent crime.[2] See, e.g., United States v. Misher,

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so intent is not 'automatically' at issue." United States v. Gomez, 763 F.3d 845, 858 (7th Cir. 2014). In specific intent crimes, in contrast, intent is an element that must be proven by the State before the defendant can be found guilty. Id. It is for this reason that the issue of intent in general intent crimes is not comparable to specific intent crimes.

[2] NRS 48.045 was adopted in 1971, when Nevada first formally adopted an evidence code by enacting Chapters 47 and 48 of the Nevada Revised Statutes. See Legislative History, Senate Bill ("SB") 12 (1971) (available at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1971/SB012,1971.pdf). Chapter 48 governs admissibility of evidence, and was modeled after the Federal Rules of Evidence. Id. at 29. The Legislature's intent in crafting Chapter 48 was to follow, "insofar as possible, the federal code." Id. The language of NRS 48.045, in particular, was taken wholesale from the then-proposed Rule 404(b) of the Federal Rules of Evidence. Because this Court has not yet addressed the issue of admissibility of prior bad acts evidence to establish intent when a defendant is charged with a specific intent crime, the State's discussion focuses on the position of the federal circuit courts in determining when such evidence is admissible under the corresponding federal rule, Rule 404(b) of the Federal Rules of Evidence. See, e.g., Stevenson v. State, 354 P.3d 1277, 1280 (2015) (quoting Advanced Sports

99 F.3d 664, 670 (5th Cir. 1996) (holding that intent is in issue when a defendant has pleaded not guilty in a drug conspiracy case); United States v. Mazzanti, 888 F.2d 1165, 1171 (7th Cir. 1989) ("In cases involving specific intent crimes, intent is automatically an issue, regardless of whether the defendant has made intent an issue in the case.") (internal quotations omitted); United States v. Nahoom, 791 F.2d 841, 845 (11th Cir. 1986) ("A defendant's plea of not guilty in a conspiracy case places his intent at issue, and intent remains at issue unless the defendant affirmatively removes it from the case.").[3]

Moreover, no federal circuit court has held that intent must be put "at issue" by a defendant before the State can address it. In fact, most have explicitly held the opposite — that a not guilty plea puts intent at issue automatically. This is because, in specific intent crimes, intent is an element of the crime that must be proven by the State before a defendant may be found guilty. The State's burden to prove every

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Info., Inc. v. Novotnak, 114 Nev. 336, 340, 956 P.2d 806) (reiterating that, when legislation is patterned after the law of another jurisdiction, the courts of the adopting state usually follow the construction placed on the statute in the jurisdiction of its inception.).

[3] For example, the Fourth Circuit has addressed this issue on multiple occasions and has consistently held that intent is automatically at issue when a defendant pleads not guilty, because intent then become an element that the State must affirmatively prove. E.g., United States v. Gardner, 313 F. App'x 668, 670 (4th Cir. 2009) ("A not-guilty plea places a defendant's intent at issue, and evidence of similar prior crimes can therefore be relevant to prove intent to commit the crime charged."); see also United States v. Sanchez, 118 F.3d 192, 196 (4th Cir. 1997) ("A not-guilty plea puts one's intent at issue and thereby makes relevant evidence of similar prior crimes when that evidence proves criminal intent.").

element of the crime is not relieved by a defendant's tactical decision not to actively argue an element of the offense. Estelle, 502 U.S. at 69, 112 S. Ct. at 481. Therefore, this Court should follow the majority of federal circuit courts and hold that intent is automatically at issue in specific intent crimes.

In this case, it appears that the Nevada Court of Appeals' decision to reverse the district court on the issue of the admissibility of prior bad act evidence to prove intent was based on the erroneous premise that Appellant removed intent from issue because he did not actively argue it.[4] Hubbard v. State, Docket No. 66185, 2016 Nev. App. Unpub. LEXIS 51, *15 (Nev. Ct. App. Apr. 1, 2016). However, this

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[4] This confusion might stem from quotes such as the following, from the Fifth Circuit: "If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded" United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (emphasis added). However, the Court of Appeals' interpretation of such quotes misunderstands the role of intent in specific intent crimes. This quote from the Fifth Circuit does not suggest that the defendant must put intent at issue before the State may address it; rather, it means that the intent element, at issue in specific intent cases, may be satisfied by an unequivocal stipulation by defendant as to intent, if that stipulation has probative value and is less prejudicial than the prior bad act evidence. Id. For example, the Sixth Circuit has held: "where there is thrust upon the government, either by virtue of the defense raised by the defendant or by virtue of the elements of the crime charged, the affirmative duty to prove that the underlying prohibited act was done with a specific criminal intent, other acts evidence may be introduced under Rule 404(b)." United States v. Johnson, 27 F.3d 1186, 1192 (6th Cir. 1994) (emphasis added); see also, e.g., United States v. Myers, 123 F.3d 350, 363 (6th Cir. 1997) (holding that intent was at issue even though the defendant's defense was that he did not commit the crime). Thus, weighing prior bad act evidence in light of a potential stipulation to intent goes to the probative value of the evidence itself, and not whether a defendant has "put intent at issue."

exemplifies why the distinction between specific intent and general intent crimes is critical to this discussion, and why Appellant's reliance on Newman v. State, 298 P.3d 1171 (2013), is misplaced. ASB at 14-16. Newman addressed battery, a general intent crime, where the defendant raised intent as a defense when he claimed a parental privilege to discipline his child. Appellant uses Newman to argue that intent is not at issue unless raised by the defendant. ASB at 15, 16. However, Newman is inapposite because burglary requires specific, not general, intent.

Appellant further confuses the issue when he argues that, because the State proved the underlying felony (robbery) in this case, the State no longer needs to prove the intent required to commit burglary. Appellant ignores that robbery and burglary are two distinct crimes, with different intent requirements, and instead attempts to craft an argument in which burglary should be addressed as a general intent crime. ASB at 19-20. State law is clear that burglary is a specific intent crime, in which the State must prove intent as an element of the burglary distinct from the underlying felony. NRS 205.060(1). Specifically, this Court has held that "burglary is complete upon the trespassory entrance into a building or vehicle with the intent to commit a felony, larceny, assault, or battery therein." Stowe v. State, 109 Nev. 743, 745, 857 P.2d 15, 16-17 (1993) (emphasis added). When any felony is committed after a building is entered with the specific intent to commit a felony, the perpetrator has committed both burglary and the subsequent felony and, therefore,

may be charged and sentenced for both offenses. Sheriff v. Stevens, 97 Nev. 316, 630 P.2d 256 (1981). However, where there was no intent when the building was entered, burglary was not committed, even if a felony was later committed therein. See, e.g., W.W. Thornton, Intent in Crime, 9 CRIM. L. MAC. & REP. 139, 145 (1887). Because the intent needed to establish burglary is distinct from that needed to establish the underlying felony (robbery, for example, is a general intent crime), "burglary does not merge with any crime committed during the commission of the burglary." Stowe, 109 Nev. at 745, 857 P.2d at 16-17; see NRS 205.070. Thus, while commission of the underlying felony may be used as evidence of the intent element of burglary, intent must still be proven by the State. The fact that someone committed a robbery is not sufficient to satisfy the State's burden of proving that burglary was also committed by (1) Appellant (2) entering the house (3) with the intent of committing that felony therein.

Therefore, the premise of the Court of Appeals' decision to reverse the district court was the erroneous belief that in a case charging specific intent crimes, the State cannot address intent until a defendant actively argues that there was no requisite intent. This is simply not correct. As such, the district court did not abuse its discretion in granting the motion below.

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B. EVIDENCE OF PRIOR BAD ACTS WAS ADMISSIBLE TO SHOW LACK OF MISTAKE BECAUSE THAT WAS AT ISSUE BASED ON THE DEFENSE PRESENTED.

Appellant argues that mistake "can never be at issue unless it is raised as a defense," and claims that it was not at issue here because he did not raise it. ASB at 26. This argument is without merit.

In Newman, this Court found that a prior bad act was improperly admitted to show absence of mistake or accident in a child abuse case because the defendant admitted to deliberately striking the victim. Newman v. State, 129 Nev. __, __, 298 P.3d 1171, 1178 (2013). However, Newman is distinguished by its facts and the nature of the crime. The Newman Court noted that the defendant had not "mount[ed] a conventional accidental injury defense," in which he argued that the injury to his child was accidental. Id. Instead, the defendant argued that he had struck his child, but had done so with an "intent to correct," as part of his parental privilege defense. Id. Thus, the prior incidents were irrelevant because the defendant admitted to an element of the crime. Id. The only reason absence of mistake or accident were not "at issue" was because the defendant admitted to that specific element of the crime. Id. Similarly, in Honkanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989), the Court found that absence of mistake and motive were not "at issue" when the defendant was charged with child abuse because he conceded that the incident

occurred. The only dispute was whether the conduct was as severe as the State had alleged. Id.

Additionally, the plain language of NRS 48.045 states that prior bad act evidence may be introduce to prove "absence of mistake or accident." It is not necessary that this absence of mistake or accident occur on the part of a defendant. People v. Spector, 194 Cal. App. 4th 1335, 1377, 128 Cal. Rptr. 3d 31, 64, 127 Cal. Rptr. 3d 31, 64 (2011) (holding that prior bad act evidence could be introduced as proof of absence of provocation by victim, i.e., that the victim's death had been neither an accident nor a suicide). The California Court of Appeals' holding was based on the Fourth Circuit's reasoning in United States v. Woods, 484 F.2d 127 (4th Cir. 1973). In Woods, the Fourth Circuit adopted the "doctrine of chances" to analyze admission of prior bad acts evidence to establish lack of accident. Id. The doctrine of chances is not a propensity argument; rather, it asks jurors "to consider the objective improbability of a coincidence in assessing the plausibility of a defendant's claim that a loss was the product of an accident or that he or she was accidentally enmeshed in suspicious circumstances." Edward Imwinkelried, An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances, 40 U. RICH. L.REV. 419, 439 (2006).

In this case, Appellant claimed that he was not at the scene of the robbery and attempted to explain that his gunshot wound was caused by something other than the robbery. As part of this defense, Appellant claimed that he was shot, accidentally, as part of a drug deal gone bad. 6 AA 983-87. However, earlier, in his statement to the police, Appellant indicated that he was shot while he was simply walking down the street. 6 AA 1018, 1023. As such, absence of mistake was relevant given Appellant's proffered defense that he was not at the scene and that he was accidently shot while simply walking down the street or during the course of a drug transaction.

Therefore, based on Appellant's defense, absence of mistake was at issue and evidence of prior acts was admissible for that purpose under NRS 48.045. As such, the district court did not abuse its discretion in granting the motion.

C. THE CRITERIA FOR ADMITTING PRIOR BAD ACT EVIDENCE WAS MET AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE MOTION.

For a prior bad act to be admissible to show Appellant's motive or for other nonpropensity purposes, the State must establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (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. E.g., Bigpond v. State, 270 P.3d 1244, 1250 (2012).

First, although Appellant attempts to distinguish his prior residential burglary from this case, his attempt fails. AOB at 21. In this regard, Appellant argues that there are no unique characteristics between his prior Washington residential burglary and this case. However, there are sufficient similarities and uniqueness between the Washington residential burglary and this case to establish identity. The similarities and uniqueness between each case are: (1) Appellant participated in the offenses with two other persons, (2) Appellant and his co-conspirators targeted homes as opposed to businesses, (3) they drove to the location and parked in front of the house, (4) they knocked or rang the bell of the residence prior to entering, (5) once Appellant and his co-conspirators entered the house, they began ransacking the place looking for property to steal and in fact did steal property, and (6) they fled the residence in the vehicle that was driven to the scene.

In addition, Appellant argues that his prior Washington crime was different because it was committed in the morning, with at least two to three males, one male was observed outside, the doorbell was rung many times, they broke into the house, no guns were observed, no shots fired, and it was a white vehicle used instead of a dark vehicle. AOB 9-11. Appellant's argument is unpersuasive. The only reason for those differences is because the victim in the Washington crime did not answer the door and hid in the bathroom. That caused the doorbell to be rung many times and for Appellant to break in. That is also the reason why no guns were observed and no

shots were fired. Here, one of the victims in the house actually answered the door which caused Appellant's approach towards the robbery to be much different. However, the significant underlying facts of the Washington crime and this case are still common and unique. In both cases, Appellant chose to drive to a residential home, park in front of the home, and rob it with two other males after ringing a doorbell. Further, Appellant also argues that both crimes are merely "general" residential "entries" to take personal property. However, not all residential entries involve three people who drive to the very front of the house and ring the doorbell before attempting to take personal property from the residence.

Second, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The probative value of the Washington burglary was great to prove intent and lack of mistake. The prior conviction is not unfairly prejudicial because it was not such an egregious crime that it invoked the juror's passion. It was simply a residential burglary where no one was even physically harmed. Therefore, the probative value was not substantially outweighed by unfair prejudice and the district court did not abuse its discretion when it admitted the Washington burglary.

For all these reasons, the district court did not abuse its discretion in granting the motion to admit evidence of Appellant's prior conviction relating to intent and absence of mistake. As an initial matter, intent is automatically at issue in specific

intent crimes, which were charged in this case. Second, Appellant's defense put absence of mistake squarely at issue. Finally, the State met the criteria for admission of Appellant's prior conviction. Accordingly, the district court did not abuse its discretion and the conviction should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully requests that the district court's order and the Judgment of Conviction be AFFIRMED.

Dated this 8th day of May, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **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 Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 3,804 words and 15 pages.
3. **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 this 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. 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 8th day of May, 2017.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of May, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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