IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CORY DEALVONE HUBBARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66185

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary, seven counts of robbery with the use of a deadly weapon, assault, and discharge of a firearm within a structure. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant Cory Hubbard raises two contentions on appeal. First, Hubbard argues that insufficient evidence supports four of the seven robbery convictions.[1] Second, Hubbard argues the district court abused its discretion by allowing testimony related to a 2012 burglary conviction from Washington State which was admitted pursuant to NRS 48.045(2).

This appeal arises from crimes committed on August 22, 2013, at David Powers and Darny Van's residence. On that evening, several family members and friends gathered at the residence, including: Matthew Van, Thavin Van, Trinity Van, Asia Van, Kenneth Flenory "KJ," and Anthony Roberts. Around 8:45 p.m., Darny heard the doorbell and answered the door. Three men pushed their way into the house. The

[1]Initially Hubbard challenged five of the seven robbery convictions; however, in his reply brief he conceded sufficient evidence supported one of the five challenged convictions.

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assailants allegedly were Hubbard, Willie Carter,[2] and Stelman Joseph. One of the men, described as a tall, slender, light-skinned black man (later determined to be Carter), pointed a gun at Darny.

Asia, Thavin, and Trinity were sitting in the living room when the men entered the house. Anthony emerged from an adjacent room. Carter then grabbed Anthony and Darny by their wrists and led them into the living room, where he told them to sit down. Once in the living room, Carter took Asia's iPhone and Darny's iPad from Asia's hands. Another man, described as short, heavy, and dark-skinned (argued by the State to be Hubbard and referred to hereinafter as Hubbard for consistency), approached Matthew and told him to cooperate, but Matthew escaped out the back door. Hubbard pursued and tackled KJ in the kitchen and took KJ's phone from him.

Meanwhile, David was upstairs in the master bedroom. When David heard the commotion downstairs, he grabbed a gun from the bedroom and ran toward the staircase. At the same time, Hubbard ran up the stairs. David fired two to three times, hitting Hubbard once in the left shoulder. Once shot, Hubbard immediately retreated down the stairs. Another perpetrator then shot at David and then the three men fled the house.

At about 9:00 on the same night, Hubbard entered the Short Line Express Market with blood on the upper left portion of his shirt. Both the police and paramedics confirmed Hubbard was shot in his left shoulder. The Short Line Express Market is approximately four miles from David and Darny's house. The surveillance cameras from the market did not record any vehicles dropping off a person matching Hubbard's

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[2]Carter's case was resolved before trial with a guilty plea agreement.

description. None of the robbery victims could identify Hubbard as the individual who committed the crimes.

Before trial, the court held a hearing to rule on the State's motion in limine to admit Hubbard's 2012 burglary conviction from Washington State. No witnesses attended the hearing, but the State attached to its motion certified copies of the court records, including the burglary judgment of conviction, along with the police reports. The State argued that several exceptions to the general rule prohibiting admission of character evidence under NRS 48.045 applied. Specifically, the State argued the conviction was relevant to prove motive, intent, identity, and absence of mistake/accident in its case.[3] Additionally, the State argued that the 2012 conviction would rebut Hubbard's defense that he did not participate in the burglary and received the gunshot wound while walking down the street.[4] The district court based its ruling in part on its belief that the State would seek to admit the certified copies of the burglary conviction at trial.

Over Hubbard's objections, the court granted the State's motion, stating that because Hubbard had asserted previously that he did not participate in the crime, the 2012 conviction was relevant to prove

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[3]Hubbard failed to file an opposition to the State's motion, but the State and Hubbard argued their positions at the hearing. The district court concluded the prior conviction was relevant to prove absence of mistake, and then responded affirmatively when the prosecutor also said motive and intent. At closing, the State focused only on absence of mistake and intent, but on appeal, also argues identity.

[4]The State speculated that Hubbard would mount this defense based on Hubbard's police statement regarding the gunshot. Although Hubbard testified at trial that he received a gunshot wound during a drug deal rather than by a drive-by shooting as he told police, his overall defense remained the same.

absence of mistake, motive, and intent. The district court stated: "[H]e [claims he] has nothing to do with this crime. So obviously the purpose of the evidence is to eliminate the possibility of mistake . . . all of the things that really are addressed by [NRS 48.045(2)] are involved in this type of evidence."

The district court made no specific findings explaining how the evidence was relevant for those purposes. Further, the district court recognized the 2012 conviction would be prejudicial, but it did not balance the probative value against the potential prejudice. The district court stated "I think there's a long ways in shaping how this is presented, and I'm going to let you work on how this information is going to be presented so as to minimize the potential for undue [prejudice]." The district court concluded the brief hearing without providing findings of fact and conclusions of law on the record beyond what is stated here and no order was filed.

At a status check hearing before trial, the State informed the court that it intended to call a victim of the 2012 burglary, Kimberly Davis, or an investigating officer[5] to testify to the events of the 2012 burglary, rather than rely on certified copies of the conviction. During its case in chief at trial, the State called Davis as a witness regarding some of the facts of the 2012 case. Before Davis testified, the district court administered a *Tavares*[6] instruction, instructing the jury to use the

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[5]The Washington trial involved seven prosecution witnesses and forty exhibits but the State neither called any police officers to testify, nor offered any of the exhibits.

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

information regarding the prior bad act only for purposes of intent, motive, or absence of mistake or accident.[7]

Davis testified at the Nevada trial that she heard the doorbell and knocking on the door and windows of her Washington home at about 10:30 a.m., and she saw one person at the door, a Hispanic male, but he left in a white car after several minutes of no response from her. However, he shortly returned and she became fearful by sounds that someone may be entering the home through the garage, so she locked herself in the bathroom and called 9-1-1. She testified that she heard two to three individuals in her home and that once they left, she discovered a jewelry drawer in her mother's bedroom had been dumped and some jewelry and pillow cases were missing. Davis also identified Hubbard in court, recognizing him because she previously testified against him at the 2012 trial. Importantly, however, Davis did not testify that she ever saw Hubbard at or near her home; rather she only saw one Hispanic male. Nor did she explain how Hubbard was connected to the burglary. The State did not offer the Washington judgment of conviction into evidence.

Although the district court indicated it would monitor how the State intended to present the evidence, it did not conduct a hearing outside the presence of the jury before Davis testified, or re-evaluate the admissibility of the evidence in light of Davis' testimony, as to its relevance, probative value and prejudicial effect. The district court held a bench conference during Davis's cross-examination testimony following a request from the State; however, the court did not make any further findings or rulings on the evidence as to the admissibility factors.

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[7]The record, however, does not contain the written jury instructions.

After the conclusion of the State's case in chief, Hubbard testified in his own defense, against his counsel's advice. The State then sought to impeach Hubbard's character for truthfulness using four prior felony convictions, including the 2012 burglary conviction. Since Hubbard admitted to each of the convictions, the State did not offer any of the convictions into evidence. During closing arguments, the State argued that the jury could use the 2012 conviction to prove absence of mistake (the mistake being that Hubbard was not shot while walking down the street or during an unrelated drug transaction but was shot during the robbery). The State also argued that the jury could infer from the 2012 conviction that Hubbard intended to take property or commit a larceny or robbery once he entered the house in Nevada. The State did not argue that the jury could use the 2012 conviction to prove motive or identity, as it had argued during the pretrial hearing.

The jury returned verdicts of guilty of conspiracy to commit robbery, burglary, seven counts of robbery with use of a deadly weapon, assault, and discharge of a firearm within a structure. The court sentenced Hubbard to ten concurrent life sentences without the possibility of parole, and to the number of days already served as to the simple assault conviction.[8] This appeal followed.

Sufficiency of the evidence

Hubbard first challenges the sufficiency of the evidence supporting four of the seven robbery convictions. Hubbard contends the State failed to prove the element of possession because it did not produce any evidence that Anthony, Thavin, or Trinity (all three are related to Darny) had a possessory interest in Kenneth's iPhone or Asia's iPhone or

[8]The court adjudicated Hubbard a habitual criminal pursuant to NRS 207.010.

Darny and David's iPad. The State argues that by sheer virtue of their familial or close relationship to Darny and David, all three victims had the right to control and use the iPad; however, the State provides no authority to support this assertion. The State also argues that it satisfied the possession element because it showed that Hubbard took property in the presence of those victims.

In reviewing the sufficiency of the evidence, "the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation marks and citation omitted). "Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, ..." NRS 200.380(1). In addition to proving the presence element of robbery, the State must prove the possession element. *See Phillips v. State*, 99 Nev. 693, 696, 669 P.2d 706, 707 (1983) (concluding that defendant could not be guilty of robbery where the State failed to prove the victim, a customer present during a jewelry store robbery, had a possessory interest in any of the items stolen from the jewelry store).

To satisfy its burden of proving the element of possession, the State may show that the defendant took property from the property owner or from someone with a special interest in the property. *State v. Ah Loi*, 5 Nev. 99, 101-02 (1869). The State may also present evidence that the victim had a possessory interest in the property. *See Klein v. State*, 105 Nev. 880, 885, 784 P.2d 970, 973 (1989) (providing that a defendant can be guilty of two counts of robbery where two victims share joint possession and control of the stolen property); *see also People v. Ramos*, 639 P.2d 908, 927-29 (Cal. 1982) (concluding conviction of two counts of robbery was

proper where the State proved both employees had joint possession of the property), *rev'd on other grounds*, 463 U.S. 992 (1983).

The sheer presence of the victim or the victim's familial relationship with the owner of personal property, without proof of a possessory interest, does not satisfy the possession element of robbery. *See Philips*, 99 Nev. at 696, 669 P.2d at 707. We therefore conclude a rational trier of fact could not have found the possession element beyond a reasonable doubt because the State failed to introduce any evidence that Anthony, Thavin, or Trinity had a possessory interest in the items stolen. *See Milton*, 111 Nev. at 1491, 908 P.2d at 686-87. On the other hand, a rational trier of fact could have found the element of possession with respect to the robbery count related to David because David testified that he owned the stolen iPad. *See Ah Loi*, 5 Nev. at 101-02 ("Robbery may be committed by the taking of property from . . . the general owner.").

Hubbard also challenges the sufficiency of the evidence related to David on the basis that the state failed to present sufficient evidence of the presence element. A thing is in the presence of a person if it is "so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." *Robertson v. Sheriff, Clark Cty.*, 93 Nev. 300, 302, 565 P.2d 647, 648 (1977). In *Robertson*, the Nevada Supreme Court adopted this broad definition of presence, concluding that the defendant took money from a cash register in the bartender's presence even though the bartender remained in the bathroom because the bartender was prevented by fear from retaining possession of the money. *Id.*

Applying this definition of presence to the case here, we conclude the State presented sufficient evidence that Hubbard took the iPad from David's presence because it presented evidence that David remained upstairs because he feared being shot, and he did approach the

staircase, so he was ultimately in the same room. Thus, like the bartender in *Robertson* who was prevented by fear from retaining possession of the money, David was prevented by fear from retaining possession of the iPad. Accordingly, we conclude a rational trier of fact could have found the possession and presence elements of the robbery beyond a reasonable doubt. *See Milton*, 111 Nev. at 1491, 908 P.2d at 686-87.

Admissibility of the facts surrounding the 2012 conviction

Hubbard next argues the district court abused its discretion by allowing Davis to testify regarding the 2012 conviction. Specifically, he argues (1) the district court failed to hold a hearing to determine the admissibility of his 2012 burglary conviction, and (2) the district court abused its discretion in allowing evidence of the 2012 burglary conviction under several exceptions to the general rule prohibiting evidence of prior bad acts.

The district court held a pretrial hearing and considered the State's motion in limine to admit Hubbard's 2012 burglary conviction, which the State supported by attaching to its motion certified copies of the judgment of conviction and court records and all the Washington police reports, and discussing whether the evidence had a nonpropensity use and its probative value. We therefore conclude the district court held a proper hearing to determine the admissibility of Hubbard's 2012 conviction. *See Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985). *Cf.* NRS 47.060 (judge shall determine preliminary questions regarding admissibility of evidence); 47.070 (judge may conditionally admit evidence; evidence conditionally admitted may be disregarded or excluded if the condition is not fulfilled); 47.080 (court shall conduct hearings outside of the presence of the jury regarding the preliminary admissibility of evidence).

Nevertheless, we note the circumstances changed from the time of the pretrial hearing to the time of the trial in that the State did not offer the same evidence—i.e. the court records, police investigative testimony, or possible testimony from the owner of the home who was the owner of the stolen property (Davis's mother); rather it only offered Davis's testimony, who happened to be home at the time of the burglary. Therefore, as discussed below, an evaluation of the evidence that the jury was about to hear was still necessary.

The decision to admit or exclude uncharged misconduct evidence (in this case, testimony related to the 2012 conviction) rests in the sound discretion of the trial court and will not be overturned absent manifest abuse of discretion. *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005). "[A] manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Jones v. Eighth Judicial Dist. Court*, 130 Nev. ___, ___, 330 P.3d 475, 481 (2014).

A district court manifestly abuses its discretion, however, by admitting evidence that has no nonpropensity use, and is therefore of insufficient probative value to justify the prejudice resulting from its introduction. *See Coty v. State*, 97 Nev. 243, 245, 627 P.2d 407, 408 (1981). We note at the outset that the district court in this case failed to state specific findings of fact and conclusions of law on the record or in writing; rather, the court made a very brief and general statement. *See Armstrong v. State*, 110 Nev. 1322, 1324, 885 P.2d 600, 601 (1994) (providing that following a *Petrocelli* hearing, the district court is required to state its findings of fact and conclusions of law on the record in order to provide an opportunity for a meaningful review of the district court's exercise of discretion).

Bad-act evidence is heavily disfavored and likely to be prejudicial or irrelevant. *Braunstein v. State*, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002). Therefore, the court must conclude the evidence is relevant under one or more nonpropensity uses. *Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012). NRS 48.045(2) enumerates several reasons for admitting otherwise inadmissible bad-act evidence. Under that statute, the State can seek to admit evidence of a defendant's other crimes, wrongs or acts to prove motive, intent, identity, absence of mistake, among other reasons. NRS 48.045(2); *see also Bigpond*, 128 Nev. at 116, 270 P.3d at 1250 (2012) (extending admissible evidence to include any relevant nonpropensity purpose beyond those listed in NRS 48.045(2)).

"Identification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis." *Newman v. State*, 129 Nev. ___, ___, 298 P.3d 1171, 1178 (2013). A nonpropensity purpose is only at-issue when the defendant raises the purported defense at trial. *See Honkanen v. State*, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989) (concluding the district court abused its discretion by admitting uncharged bad-act evidence based on the State's contention that the evidence proved absence of mistake and motive where the defendant admitted to committing the charged act and thus did not place absence of mistake or motive at issue). Importantly, however, district courts should not speculate as to every possible theory of defense; rather, the appropriate prophylactic measure is to conditionally rule the evidence inadmissible subject to the defendant actually raising the issue at trial.[9] *See generally Coty*, 97 Nev. at 244, 627 P.2d at 408. *See also*

[9]Our dissenting colleague relies on *Brooks v. State*, 103 Nev. 611, 747 P.2d 893 (1987), to illustrate that Hubbard could have asserted a

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NRS 47.060 ("Preliminary questions concerning the . . . admissibility of evidence shall be determined by the judge, subject to the provisions of NRS 47.070.").

In addition, the district court must determine that the probative value is not substantially outweighed by the prejudicial effect. *Bigpond*, 128 Nev. at 116, 270 P.3d at 1249. The Nevada Supreme Court has concluded a district court's decision to allow evidence where its probative value is substantially outweighed by its prejudicial effect is a manifest abuse of discretion. *See Phillips v. State*, 121 Nev. 591, 602, 119 P.3d 711, 719 (2005) (concluding district court manifestly abused its discretion by admitting prejudicial evidence portraying defendant as a violent individual because it was of slight probative value); *Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000) (stating district court erred by admitting evidence suggesting defendant had a dangerous and criminal character because the danger of prejudice substantially outweighed any probative value); *Coty*, 97 Nev. at 244-245, 627 P.2d at 408 (reversing district court's admissibility ruling where prejudicial effect

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"mere presence" defense to explain that he was duped into, or otherwise stumbled onto, the crime. The State did not assert this reason as a possible relevancy justification at the *Petrocelli* hearing, and more importantly, Hubbard did not raise this defense before or at trial; rather, he always claimed he was not present. Therefore, the uncharged misconduct evidence is irrelevant and inadmissible for this purpose. *See Newman*, 129 Nev. at ___, 298 P.3d at 1178 (holding evidence was inadmissible to disprove an accidental injury defense where defendant did not raise that defense). *Cf. Fields v. State*, 125 Nev. 785, 792, 220 P.3d 709, 714 (2009) (concluding uncharged bad-act evidence was relevant to disprove defendant's claimed ignorance of the murderous scheme). *See also* NRS 47.070.

of previous arrests and related criminal behavior substantially outweighed its probative value).

Thus, when it is unclear whether a defendant will present a defense theory at trial, the district court may conditionally rule that the uncharged bad-act evidence is admissible in the State's rebuttal argument if the defendant puts the nonpropensity purpose at issue. *See Armstrong*, 110 Nev. at 1325, 885 P.2d at 601 ("Introducing the former employer's testimony *to rebut* [defendant's assertion that her former employer had no problems with her employment and she was never charged with misconduct] was a proper 'other purpose' under NRS 48.045(2).") (emphasis added); *Fields*, 125 Nev. at 792, 220 P.3d at 713 ("A defendant's knowing participation in prior bad acts with alleged coconspirators may be admitted in a proper case *to refute claims* that the defendant's acts were nothing more than innocent acts of a friend . . . .") (emphasis added) (internal quotation marks and citation omitted).

At the hearing on the State's motion in limine, the State first argued the prior conviction was admissible to prove absence of mistake. "The absence of mistake exception is applicable only when the evidence tends to show the defendant's knowledge of a fact material to the specific crime charged." *Cirillo v. State*, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980) (internal quotation marks omitted). Thus, for instance, where knowledge of the controlled nature of a substance is an element of an offense charged, the State may introduce prior drug possession evidence to prove the defendant was not mistaken as to the nature of the controlled substance. *Id.* Here, the evidence proffered would not show Hubbard's knowledge as to any fact relevant to the charged crimes. Further, Hubbard's defense, that he was not present and did not commit the crimes, does not raise a question as to Hubbard's mistake as to any

material fact of the charged crimes. *See Cirillo*, 96 Nev. at 492, 611 P.2d at 1095.

The State next argued the 2012 conviction established Hubbard's motivation to commit the crimes because it showed his desire to obtain valuables and money, but did not allege specifically why Hubbard would be motivated to commit this burglary and robberies. The State must specifically allege why a defendant would be financially motivated to commit a crime. *Cf. Fields*, 125 Nev. at 791, 220 P.3d at 713 (concluding evidence of a prior agreement to kill a person in order to resolve a debt tended to show financial motivation in subsequent killing where the defendant was in severe debt and stood to financially benefit from the victim's death); *Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 79 (2004) (concluding evidence of the defendant's gang affiliation was relevant to prove the defendant's motive to murder a member of a rival gang). Therefore, we conclude, under the facts of this case, this generic financial motive, without other evidence showing a need for financial gain, is insufficient for any district court to overcome the presumption that propensity evidence is inadmissible. *See Rhymes*, 121 Nev. at 21, 107 P.3d at 1280 (providing that prior bad-act evidence is presumed to be inadmissible).

The State next contended the 2012 conviction established Hubbard's intent to commit the crime of burglary.[10] To be a valid nonpropensity use, intent must be at issue. *See Newman*, 129 Nev. at ___, 298 P.3d at 1178. Propensity evidence, however, is inadmissible to prove

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[10]The State may also be implying the evidence is relevant based on a common scheme or plan; however, the State did not argue that below, and the district court made no findings to support the admissibility under this nonpropensity purpose.

the intent element of the crime where the defense does not place intent at issue. *See Wallin v. State*, 93 Nev. 10, 11, 558 P.2d 1143, 1144 (1977); *see also United States v. Colon*, 880 F.2d 650, 657 (2d Cir. 1989) (stating intent is not truly in dispute for a specific-intent crime when defendant claims acts did not occur, but that intent is in dispute if defendant claims he acted innocently or mistakenly). Here, Hubbard did not put intent at issue because he argued he was not present and did not commit the crimes, but was instead shot during an unrelated drug transaction.

Moreover, intent to commit larceny, assault, or any felony in a house or room, which is a necessary element of burglary, is not seriously at issue when the evidence shows perpetrators armed with guns burst into a home, physically round up the occupants, demand and seize personal property, and fire shots. Admission of evidence in the case-in-chief that is related to a prior burglary conviction that is only superficially similar to the charged offenses to prove intent is wholly unnecessary under these circumstances and is not countenanced by Nevada law. Nevertheless, as the dissent notes, there is a split in authority among federal courts of appeal whether bad act evidence is admissible to support an element, even when that element is not in dispute. *See United States v. Crowder*, 141 F.3d 1202, 1211 (D.C. Cir. 1998) (citing cases). But even assuming intent was at issue, the only connection between the prior conviction and the charged crime is the putative similarity that tends to prove Hubbard's guilt of the charged offenses, which is propensity evidence; simply calling it relevant to prove intent does not make it so. We therefore conclude that the probative value of Davis's testimony is so slight that it does not justify the prejudicial effect resulting from its introduction. *See Coty*, 97 Nev. at 244-45, 627 P.2d at 408.

Fourth, the State claimed before the district court and this court, that the 2012 conviction established Hubbard's identity. The

district court, however, did not include identity in its findings during the hearing, nor did the court include identity as an appropriate use in the *Tavares* instruction.[11]

Where the State proffers uncharged misconduct to prove identity, it must show that the evidence contains some characteristic common with the subject evidence. *See Mayes v. State*, 95 Nev. 140, 143, 591 P.2d 250, 252 (1979). When common circumstances occur between similar crimes, however, the crimes cannot necessarily be construed as similar for *identification* purposes; uniqueness is often needed. *Id.*; *cf. Canada v. State*, 104 Nev. 288, 293, 756 P.2d 552, 555 (1988) (holding sufficient similarities existed where "both robberies took place in deserted bars very late at night; . . . the perpetrators first entered alone and ordered a beer in order to case the bar; . . . at least one of the perpetrators wore a mask; and . . . the perpetrators were armed with shotguns.").

Here, the crimes occurred in different states, a thousand miles apart, one in the morning and the other in the evening, and the perpetrators used different methods to enter the residences (the perpetrators in Washington removed a screen, opened a window and unlocked a garage side door, and entered the home without causing damage). The Las Vegas burglary and robberies centered on the use of confrontation, display of a firearm, and thus force or fear to obtain property. The Washington burglary, on the other hand, involved stealth and a daytime theft from an apparently unoccupied home. The only real similarities are that both crimes were carried out by multiple perpetrators

[11]The dissent also agrees there were insufficient similarities to establish relevance to prove identity.

and that property was stolen.[12] Therefore, we conclude the two crimes are of a similar type but do not have sufficient similarities to prove identity (or intent). *See Mayes*, 95 Nev. at 142, 591 P.2d at 252.[13]

Accordingly, we conclude the evidence was not relevant for any of the State's proffered nonpropensity uses, and no reasonable judge could have ruled it was relevant under NRS 48.045(2), even at the pretrial hearing. But since the pretrial ruling was only a preliminary ruling and the form of the evidence had materially changed, a further hearing should have been conducted outside the presence of the jury during the trial. *See* NRS 47.070 and 47.080. The lack of relevance would have been evident at that point in time. Moreover, the probative value was marginal at best, and thus the probative value was substantially outweighed by the danger of unfair prejudice. *Cf.* NRS 48.035(1); *Petrocelli*, 101 Nev. at 52, 692 P.2d at 508. Therefore, the district court manifestly abused its discretion in admitting testimony related to the 2012 conviction. *See Rhymes*, 121 Nev. at 21-22, 107 P.3d at 1281.

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[12]The speculation in the dissent that Hubbard actually entered the Washington home, and that he or an accomplice would have committed armed robbery had Davis not hid in the bathroom, is belied by the actual evidence presented at the *Petrocelli* hearing—the police reports reveal that the white car Davis saw was stopped a short time after the burglary and the occupants were arrested. Hubbard had Davis's mother's gold watch on his person. The police located no weapons on the suspects or in the vehicle and the prosecutor did not file weapons-related charges.

[13]The prejudice in this case is even greater because the district court did not instruct the jury to limit its use of the evidence to establishing identity because the court did not find the evidence relevant under NRS 48.045(2) as proof of identity. *See Tavares*, 117 Nev. at 733, 30 P.3d at 1133 ("[I]t is likely that cases involving the absence of a limiting instruction on the use of uncharged bad act evidence will not constitute harmless error.").

The State nevertheless argues that if the district court erred by admitting the evidence, the error was harmless because it could have introduced the evidence to impeach Hubbard on cross-examination pursuant to NRS 50.095(1). That statute, however, limits the use of prior felony convictions to attack a witness's credibility only; the State would have been precluded from using the evidence for any substantive purposes—i.e. to prove absence of mistake, motive, intent, or identity. *See Owens v. State*, 96 Nev. 880, 884, 620 P.2d 1236, 1239 (1980) ("Evidence that a witness has been convicted of a felony is admissible for the purpose of attacking credibility."). The State, however, argued in its closing when referring to the Washington crime, both the defendant's lack of credibility and the absence of mistake or accident. Moreover, the defendant may never have taken the witness stand if the evidence of the prior offense had not been revealed during the State's case in chief. *See Coty*, 97 Nev. at 245, 627 P.2d at 408 (concluding the district court's error in ruling evidence admissible on rebuttal effectively precluding the defendant from testifying had an unascertainable prejudicial effect and was, therefore, reversible).

Alternatively, the State argues any error in admitting the evidence is not reversible because the rest of the evidence supporting Hubbard's guilt is overwhelming. An error in admitting evidence is not reversible if the evidence supporting the defendant's guilt is overwhelming. *See Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1255 (2002); *Coffman v. State*, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977). Further, an error in admitting evidence is not reversible if the State demonstrates the error did not substantially affect the jury's verdict. *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008).

The State relies primarily on circumstantial evidence and Hubbard's lack of credibility to argue the evidence of Hubbard's guilt is

overwhelming. Here, Hubbard arrived at the Short Line Express Market with a gunshot wound in his left shoulder about 10 minutes after the crimes occurred at the residence. The State also produced evidence that Hubbard called Stelman two times just before the crimes were committed, and then several times after being arrested.

Importantly, however, none of the victims could positively identify Hubbard before trial (in a photo lineup) or during trial. KJ came the closest to identifying Hubbard, but only in the photo lineup process, and then he said on a scale of one to ten, he was only certain to an eight. Carter testified to pleading guilty to crimes listed in a second superseding indictment, which named Hubbard and Stelman as accomplices, but also testified that he did not know Hubbard and had only pleaded guilty for himself, without identifying Hubbard as present at the residence. Moreover, none of the surveillance cameras at the market, which was four miles from the residence, recorded a vehicle dropping Hubbard off.

Thus, we conclude the evidence against Hubbard is not overwhelming. Although the State presented sufficient evidence to support the convictions we do not vacate, we cannot conclude the State has proven that admission of the evidence did not substantially affect the jury's verdict.[14] *See id.* We therefore

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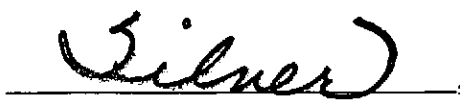
[14]The Nevada Court of Appeals is primarily an *error correction* court. In reversing the district court in this case, and in any case, we do not consider such factors suggested by our dissenting colleague, which may very well be an unfortunate result of reversal in any case, civil or criminal. Reversals, as well as affirmances, are the obvious result of our decision in every case before us. To that end, we strive to achieve fairness to the parties, but we cannot let economic cost, public opinion, or popularity of our decisions unduly influence the result of a direct appeal (as our dissenting colleague implies). *See, e.g.*, Nevada Code of Judicial Conduct Canon 2.4.

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

_____, C.J.
Gibbons

I concur.



_____, J.
Silver

TAO, J., concurring in part and dissenting in part:

I agree that the robbery convictions for the counts relating to Anthony, Thavin, or Trinity were not supported by substantial evidence. However, I would affirm the remaining convictions in this case because I disagree that Hubbard's "prior bad acts" were admitted improperly.

In the instant case, in 2013 Hubbard went to an occupied residence with a group of co-conspirators, knocked on the door, and waited for an answer. When the door was answered, the perpetrators burst inside with guns and robbed everyone.

In 2012, Hubbard was convicted of the crime of burglary when he: went to an occupied residence with a group of co-conspirators, knocked on the door, and waited for an answer. The resident of the house looked out the window, saw something she didn't like, and hid in a bathroom rather than answer the door, so there was no confrontation; but while she hid, the perpetrators burst into the house and ransacked it.[15]

[15]This conviction happened in Washington state. I don't claim to possess any great understanding of Washington state criminal law, but in

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The district court considered these two crimes to be sufficiently similar that the 2012 conviction tended to prove that Hubbard was more than an unwitting spectator to the instant 2013 crime (i.e., that he was not "merely present" at the scene by mistake or accident); and, because the crime of burglary is a specific-intent crime, the 2012 burglary tended to show that he possessed the requisite criminal intent upon entering the home and did not merely develop criminal intent after entry was already complete. The majority concludes that this was error. I cannot join this conclusion, because the majority's conclusion is not based upon the correct standard of review that should apply to this case.

When reviewing a district court's decision to admit evidence of prior bad acts, we are required to apply a set of principles articulated by the Nevada Supreme Court that, taken together, constitute one of the most deferential standards that exists anywhere in appellate law. First, we are required to give "great deference" to the district court and reversal is only appropriate if the district court committed a "manifest abuse of discretion." *Diomampo v. State*, 124 Nev. 414, 429-30, 185 P.3d 1031, 1041 (2008) ("[t]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference") (alteration in original); *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005) (reversal for admission of prior bad acts warranted only upon "manifest abuse of discretion").

Review for "abuse of discretion" is already one of the most deferential standards that exists in appellate law; it means that reversal is warranted only if "no reasonable judge could reach a similar conclusion

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Nevada, this crime would have qualified as a home invasion, not just a non-violent burglary.

under the same circumstances." *Leavitt v. Siems*, 130 Nev. ___, ___, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances."). But in cases involving prior bad acts, even this isn't enough; to reverse we must find that the district court's error rose to the level of being "manifest." What constitutes a "manifest" abuse of discretion (as opposed to a standard-issue abuse of discretion) is not precisely defined, but clearly it's something even more deferential than is normally the case and, at a bare minimum, must mean that we do not freely substitute our judgment for that of the district court. Therefore, we cannot reverse if we merely disagree with the district court or feel that the judge could or should have weighed things differently and gone the other way; presumably, we cannot even reverse if we conclude that the judge abused his discretion, but did not do so "manifestly."

Our "great deference" to the district court in cases like this is made even greater by the limited scope of "facts" we are permitted to consider in determining whether any manifest abuse of discretion occurred. In resolving any appeal from a criminal conviction, we must view the evidence in the light most favorable to the prosecution. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). Thus, where the facts in the record are disputed or can be interpreted in two different ways, we must read them in the way that most strongly supports the district court's admission of the prior bad act evidence. We therefore cannot base our decision to affirm or reverse upon our own view of contested facts, nor upon facts or inferences that are inconsistent with what the judge found to be true when he admitted the bad acts or what the jury must have found to be true when it convicted the defendant.

Finally, our already-considerable deference to the district court is heightened by yet a third principle: while the district court is

required to hold a *Petrocelli* hearing and make findings, the failure to do so is not by itself grounds for reversal. "[T]he failure to hold a proper hearing below and make the necessary findings will not mandate reversal on appeal if . . . the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of prior bad act evidence . . .; or (2) where the result would have been the same if the trial court had not admitted the evidence." *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (internal quotation marks and footnote omitted). *See Qualls v. State*, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998). In other words, if the district court's precise reasoning was unclear or even incomplete, we must nevertheless affirm what it did so long as the facts are such that the district court could potentially have made the necessary findings to support its conclusion. In application, this means that where the district court's findings are deficient or non-existent, the task falls upon us to inspect the record ourselves and look for any findings that the district court could possibly have made to justify its decision. *See Ledbetter*, 122 Nev. at 260, 129 P.3d at 677 (affirming district court's decision to admit prior bad act evidence on grounds not cited by district court and even though the district court gave an incorrect reason for doing so). It seems to me that this is hardly an exercise in strict neutrality and does not even really pretend to be one, but rather intentionally requires us to uphold the district court so long as any plausible or arguable grounds exists anywhere in the record to do so, whether or not those grounds were argued to or relied upon by the district court, unless the record clearly demonstrates that there simply was no basis for its decision despite our independent search for one.

All of which raises the question of why we would give so much deference to the district court on questions like this. I can't speak for the justices of the Nevada Supreme Court who wrote these principles, but it

seems to me that plausible reasons arise in the nature of how *Petrocelli* hearings are conducted. The Nevada Supreme Court requires that *Petrocelli* hearings be conducted before trial begins, at a time when no witness has testified, no evidence has been admitted, and the defense may not even have developed its trial strategy (and even if it has, it's not required to tell the court or the prosecutor what the strategy is). In effect, a *Petrocelli* ruling is not based on trial evidence, even when a witness testifies in person during a *Petrocelli* hearing; rather, it's based upon what is effectively an extended pre-trial proffer outside the presence of the jury regarding what the trial evidence is anticipated to be, and in making its decision the district court must surmise as to what the potential trial issues and defenses might be.

It's frequently the case that pre-trial proffers do not match the trial evidence perfectly; just about every seasoned trial attorney has experienced the frustration of having a lay witness testify one way before the trial and then another way after the trial begins.[16] For this reason, the Legislature has created some tools for the trial judge to employ when it turns out once trial commences that the court's pre-trial ruling was incorrect and everything it thought would happen didn't pan out. For example, the court can make its pre-trial ruling conditional upon what

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[16]Moreover, the defense can change its strategy in response to the court's ruling, and frequently does. Thus, in this case, the majority concludes that Hubbard did not actually challenge his intent at trial, but if the district court had not admitted his prior conviction, he might well have. It's precisely because pre-trial *Petrocelli* rulings have this element of fluidity to them that we have to be exceedingly careful about Monday-morning quarterbacking the trial judge's rulings.

happens at trial, and it can instruct the jury to disregard any improperly admitted bad act evidence.[17] *See* NRS 47.070.

But even with these tools as a backstop, as a general matter a practical danger exists in applying a standard of review on appeal that is too restrictive upon the trial court. It's easy enough for us to see how things played out when we have the full record of everything that happened at trial after the verdict is in, but we expect the district court to make a ruling without the benefit of that birds-eye view. Thus, the trial court is required by law to make a decision regarding both the relevance of a prior bad act and its potential prejudice before the court has many of the facts that it needs to make that decision correctly. If we review the trial court's decisions too closely and give it too little leeway on questions like this, then we have set up a structure that requires the trial court to make important decisions without all of the critical information, and the price of deciding wrongly is that a serious felony conviction will be voided and have to be re-tried at enormous mental, emotional, and financial cost to all involved.[18] I think that the process that the Nevada Supreme Court has

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[17]Notably, the district judge in this case did neither of these things, which strongly suggests that he was satisfied with his bad acts ruling even after hearing the trial evidence.

[18]"Even if an effective retrial is possible, it imposes enormous costs on courts and prosecutors, who must commit already scarce resources to repeat a trial that has already once taken place. It imposes costs on victims who must relive their disturbing experiences. While prejudical [sic] error would require a retrial regardless of the inconvenience, those who participated in the initial proceedings should not be compelled to confront these dreadful events a second time if the first trial has been fair. Retrials, moreover, may lack the reliability of the initial trial where witness testimony was unrehearsed and witness recollections were more immediate." *Perry v. Leeke*, 832 F.2d 837, 843 (4th Cir. 1987) (internal citations and quotation marks omitted).

created requires us to err on the side of giving trial judges more deference in making their calls rather than less.

In any event, the net effect of these judicial doctrines is that our review of the district court's decision on appeal is severely constrained: we may only reverse in this case if we conclude that the district court's ruling was not only unreasonable, but "manifestly" so, and it must be manifestly so based upon the view of the facts that is most favorable to the district court's conclusion and upon any findings that the district court could have made to support its conclusions even if it did not actually make those findings. This strikes me as an unusually high bar to meet, and I do not think it has been met in this case.

As a starting point, the majority's order lists some factual differences that it thinks render the 2012 conviction irrelevant (or of low probative value) to the instant 2013 crime, such as the time of day, the location of the crimes in different cities, and whatnot. But the question before us is not whether we think the facts underlying one crime are probative of one of the permitted purposes enumerated in NRS 48.045 (motive, intent, absence of mistake, identity, common plan or scheme). Rather, the district court has already decided that they are, and on appeal our inquiry is limited: we ask only whether the district court could reasonably have concluded that the 2012 crime was sufficiently relevant to one of the purposes of NRS 48.045 when the facts of the crimes are viewed in the light most favorable to the district court's ultimate conclusion.

Here, the majority concludes that the two crimes are similar only in that they "were carried out by multiple perpetrators and that property was stolen." That is certainly one way to reasonably characterize the two crimes. But in order to reverse the district court, it seems to me that we must reach yet another conclusion that the majority never reaches: that the majority's description is the only reasonable way to

characterize the similarities and differences between the two crimes; *there must be no other way to reasonably describe the crimes that is more supportive of the district court's conclusion.* If the two crimes can be reasonably characterized in any other way, then we must adopt the characterization that is most favorable to the district court's conclusion and proceed from there.

And here, there exists another reasonable way to consider these crimes that makes very clear that they are, in fact, strikingly similar and that the 2012 crime was highly related to elements of the 2013 crime. In both crimes, the defendant and several co-conspirators knocked on the door of an occupied home and awaited an answer. In the 2012 crime, nobody answered the door, so the perpetrators forced their way inside and stole valuables. In the instant 2013 crime, someone answered the door, so the perpetrators forced their way inside and robbed everyone inside at gunpoint. The principal material difference between the 2012 crime and the 2013 crime is that in the 2012 crime no guns were pointed at the victim. But I'm inclined to think that this was only because the victim hid rather than answer the door; had she answered the door just as the victims did in 2013, it's fair to conclude that both crimes would have gone down the exact same way, with everyone in both houses being violently robbed by force. At the very least, this is a conclusion that the district court could reasonably have drawn, and therefore it is the conclusion that we must draw in the district court's favor in resolving this appeal.

When the facts of this case are viewed this way, I disagree that there is enough in the record for us to say that the district court committed a "manifest abuse of discretion." The district court held a *Petrocelli* hearing and concluded that Hubbard's 2012 conviction met all of the requirements for an admissible "prior bad act" under NRS 48.045. Moreover, during the trial, Hubbard chose to testify and admitted to the

2012 conviction on cross-examination; thus, the 2012 conviction was proven to have been genuine far beyond the standard of "clear and convincing evidence" required by *Petrocelli*.

This part of the analysis is not where the majority and I disagree. Where we disagree is in the district court's conclusion that the 2012 conviction was relevant to prove Hubbard's motive, intent, and the lack of accident or mistake.[19] The majority considers this erroneous, and I do not.

We must start by giving "great deference" to the district court's conclusions. *See Braunstein v. State,* 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). In this case Hubbard was charged with the crime of burglary, which is a crime requiring proof of specific intent rather than mere general criminal intent. In other words, the State was required to prove, during its case-in-chief, that Hubbard possessed the specific intent to commit another predicate crime (such as larceny or robbery) at the very moment that he stepped in the door of the house; it would not be enough to prove that Hubbard developed criminal intent only after stepping in the door and seeing something worth stealing. Many courts have held that when a defendant is charged with a specific intent crime, his intent may be at issue whether he specifically attacks it or not, regardless of any defense he could choose to mount. As the United States Court of Appeals for the Seventh Circuit has explained:

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[19]On appeal the State also argues that the 2012 crime could have been admitted to prove Hubbard's identity in the 2013 crime. This wasn't argued below so the district court didn't address it. That's not in itself a bar, because when considering the admissibility of prior bad acts we look not only at what the district court actually did, but also at what it could possibly have done; but I need not address it here because I believe that the district court's conclusion regarding intent was enough.

> The specific-intent/general-intent distinction in the Rule 404(b) [the federal analog to NRS 40.045] context is sometimes misunderstood. The critical point is that for general-intent crimes, the defendant's intent can be inferred from the act itself, so intent is not 'automatically' at issue. The paradigm case involves a charge of distribution of drugs, a general-intent crime for which the government need only show that the defendant physically transferred the drugs; the jury can infer from that act that the defendant's intent was to distribute them. Hence our rule that because unlawful distribution of drugs is a general intent crime, in order for the government to introduce prior bad acts to show intent, the defendant must put his intent at issue first.
>
> In contrast, we have repeatedly rejected a similar rule for specific-intent crimes because in this class of cases intent is automatically at issue. . . . when intent is not 'at issue'—when the defendant is charged with a general-intent crime *and* does not meaningfully dispute intent—other-act evidence is not admissible to prove intent because its probative value will always be substantially outweighed by the risk of unfair prejudice. In contrast, when intent *is* 'at issue'—in cases involving specific-intent crimes or because the defendant makes it an issue in a case involving a general-intent crime—other-act evidence may be admissible to prove intent.

United States v. Gomez, 763 F.3d 845, 858-859 (7th Cir. 2014) (internal citations and quotations marks omitted).

Other federal circuits are in accord. *See United States v. Tan*, 254 F.3d 1204, 1212 n.8 (10th Cir. 2001) ("because specific intent cannot be inferred from the charged conduct, other act evidence may be especially probative in cases where the defendant is charged with a specific intent crime"); *United States v. Van Metre*, 150 F.3d 339, 350-51 (4th Cir. 1998) (bad acts evidence especially probative of specific intent); *United States v.*

Johnson, 27 F.3d 1186, 1192 (6th Cir. 1994) ("intent is in issue precisely because a specific intent, separate and apart from underlying prohibited conduct, is made an element of the crime charged.... In prosecuting specific intent crimes, prior acts evidence may often be the only method of proving intent.") (citations omitted); *United States v. Gruttadauro*, 818 F.2d 1323, 1327-28 (7th Cir. 1987) ("Evidence of prior bad acts is admissible to prove intent if intent is automatically in issue or if the defendant puts his or her intent in issue. We have said that intent is automatically in issue in a criminal case . . . if the crime is a 'specific intent' crime."). The Nevada Supreme Court has not yet adopted this principle, but I think it's difficult to say that the trial judge's decision here to admit a prior conviction to prove specific intent represented something that no reasonable judge could have done when entire panels of federal appellate judges have reached similar conclusions.

In this case, the district court concluded that Hubbard's participation in a similar 2012 group burglary of an occupied residence less than a year before this one was probative to demonstrating the existence of his specific intent in the 2013 crime, and I agree. Hubbard's specific intent could not simply be inferred from the fact that he entered the residence, and therefore the district court's decision to admit evidence of the 2012 crime to prove Hubbard's specific intent in the 2013 crime was not manifestly unreasonable.

The district court also concluded that the 2012 conviction was probative to prove the absence of mistake or accident. Because Hubbard perpetrated the crime with multiple co-conspirators and the State bears the burden of proving that he was a participant and not accidentally "merely present" at a crime perpetrated by others, *see Brooks v. State*, 103 Nev. 611, 613, 747 P.2d 893, 894 (1987) (defendant cannot be convicted for being merely present while others committed a crime), this conclusion was

not unreasonable as the 2012 conviction does tend to prove Hubbard's active participation and rebut any contention that Hubbard was duped into the crime by his friends or merely stumbled upon the scene of a robbery that he never saw coming. *See Fields v. State*, 125 Nev. 785, 792, 220 P.3d 709, 714 (2009) (the prior bad act evidence "tended to show that Fields was not an innocent or ignorant bystander to Linda's alleged murderous scheme, as he claimed. A defendant's knowing participation in prior bad acts with alleged coconspirators may be admitted in a proper case to refute claims that the defendant's acts were 'nothing more than innocent acts of a friend [or here, a husband], and not a knowing participation in a conspiracy,' and to show that '[d]efendant was not an innocent pawn taken by surprise' in the conspiracy charged") (alterations in original).

Finally, the district court concluded that any prejudice resulting from the admission of the 2012 conviction was outweighed by its probative value; this is a heavily fact-based conclusion, and I see no reason to substitute our judgment regarding the weight of the facts and how they balance against each other for that of the district judge who presided over the trial. A "close call" for the district court is, by definition, not a close call for us on appeal when our review is for abuse of discretion; if a fact-laden decision could reasonably have gone either way below, then by definition the issue was within the trial court's discretion and we have no reason to reverse it.

Thus, I would conclude that the district court's decision was not manifestly unreasonable, but rather well within the bounds of reason and rationality. Consequently, I respectfully depart from the view of my colleagues and would affirm the conviction on all counts except those relating to Anthony, Thavin, or Trinity.

Tao, J.

Tao

cc: Hon. James M. Bixler, District Judge
Brent D. Percival
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk