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Hubbard (Cory) v. State, 134 Nev. Adv. Op. 54 (Aug. 2, 2018) (en banc)

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CRIMINAL LAW: EVIDENCE, ADMISSIBILITY OF PRIOR BAD ACTS

Summary

The Court held that intent is automatically at issue for specific-intent crimes. Therefore, criminal defendants need not place intent or absence of mistake at issue before the State seeks to admit prior act evidence if the evidence is relevant to prove an essential element of the offense (i.e., intent for the crime of burglary). However, prior act evidence may still be inadmissible where its minimal probative value is substantially outweighed by the risk of unfair prejudice.

Background

On August 22, 2013, at about 8:45 p.m., the doorbell rang at a residence where several people were present. Upon answering the door, three men forcibly entered the residence brandishing firearms. The three men were alleged to be appellant Cory Dealvone Hubbard, Willie Carter, and Stelman Joseph. One of the assailants pointed a gun at the victims, taking their phones and other belongings. When one of the victims, Kenneth Flenory (“KJ”), ran for the front door, Hubbard allegedly tackled him. Another victim, David Powers, was upstairs during this altercation. David grabbed a gun and ran towards the staircase as Hubbard was coming up the stairs with a gun in his hand. David fired two or three times, hitting Hubbard in the left shoulder. One of the other two assailants shot at David, before all three assailants fled the residence.

Around 9:00 p.m. the same night, Hubbard entered a Short Line Express Market located about four miles from the residence. Hubbard had been shot in his left shoulder. In his statement to the police, Hubbard said he was shot randomly while walking down the street. The surveillance footage from the market did not show any vehicles dropping off an individual who matched Hubbard’s description. Except for KJ, none of the victims could positively identify Hubbard based on a photo lineup. KJ was 80-percent certain that Hubbard was one of the assailants.

Hubbard was charged with burglary “while in possession of one or more firearms, with intent to commit Larceny and/or any felony, and/or Robbery.” The State sought to admit evidence of Hubbard’s prior conviction for a residential burglary that occurred in the state of Washington in 2012. The State argued the evidence was admissible under NRS 48.045(2) to prove motive, intent, identity, and absence of mistake² and to rebut a claim that Hubbard was an innocent victim of a random, unrelated shooting. The district court allowed the State to present this evidence to prove absence of mistake, motive, and intent after Hubbard claimed he was not involved in the robbery.

At trial, all but one of the victims in the residence testified. Carter, who pleaded guilty to robbery with a deadly weapon, also testified and denied that Hubbard was involved in the crime.

¹ By Matthew J. McKissick.

² NEV. REV. STAT. § 48.045(2) (2017).

Testimony from a crime scene analyst indicated that none of Hubbard's DNA or fingerprints were found in the residence.

The victim of the 2012 burglary, Kimberly Davis, also testified. The district court gave the jury a limiting instruction that the evidence may only be considered to prove Hubbard's intent and/or motive to commit the crimes or the absence of mistake. Davis testified that, in 2012, she was home alone when she observed a man on her front porch and a white car on the street. The man repeatedly rang the doorbell, but she did not answer, and the man left. She saw the car return, heard the doorbell ring again, and then heard footsteps outside her window. Davis locked herself in the bathroom, she heard people enter the house, and someone attempted to force open the bathroom door without success. The intruders left, and Davis discovered several articles of jewelry and other items missing from the home. Davis never actually saw any of the intruders.

Hubbard was the only witness to testify in his defense and explained that he was shot during an unrelated drug deal that had been arranged by Joseph. Hubbard testified that he drove to a parking lot near the Short Express Market where a person with drugs entered his vehicle. While Hubbard was inspecting the drugs, another person came around his vehicle and shot him in the left shoulder. Hubbard testified that he had never been in the residence where the robbery occurred, he did not know any of the victims, and denied all involvement in the robbery. Hubbard admitted to being convicted of the 2012 burglary and that he had sustained three other felony convictions.

The State referenced the 2012 burglary in its closing argument, stating that the evidence could be used to prove Hubbard's intent to commit burglary and to prove he was not shot mistakenly or accidentally. Hubbard was convicted, adjudicated a habitual criminal, and sentenced to serve ten concurrent life sentences without the possibility of parole. Hubbard appealed, and the Court transferred the case to the court of appeals.

The court of appeals concluded that the district court manifestly abused its discretion in admitting the testimony of the 2012 burglary because it was not relevant for any of the State's proffered nonpropensity uses. The court of appeals held that Hubbard did not place his intent at issue by arguing that he was not present at the robbery, that the evidence against Hubbard was not overwhelming, and that the error in admitting the evidence was not harmless. Accordingly, the court of appeals reversed the judgment of conviction and remanded the case. The Court granted review on the limited issue of whether the district court abused its discretion in admitting the prior bad act evidence since the defense did not put intent or absence of mistake at issue.

Discussion

I. Admission of the 2012 burglary conviction

All prior bad act evidence is presumably inadmissible.³ To overcome this presumption, the State must show that: (1) the prior bad act is relevant and is offered "for a purpose other than

³ Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (quoting Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)).

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.”⁴ The district court’s decision to admit evidence will not be overturned absent a manifest abuse of discretion.⁵ The Court’s first step in any NRS 48.045(2) analysis is identifying the “at-issue, nonpropensity purpose” for admitting the evidence.⁶ The State offered the evidence to prove intent and absence of mistake, and the Court addressed each in turn.

A. *Intent*

Hubbard argued that intent is an element of every crime, so unless intent is raised “in substance” or is “at issue,” bad act evidence is inadmissible to prove it. Because intent was not at issue, evidence of the 2012 burglary was irrelevant. The State, on the other hand, argued that intent is automatically at issue in specific intent crimes, and therefore it is not necessary for defendants to contest intent before the prosecution addresses it.

The Court adopted *United States v. Gomez*, holding that intent is automatically at issue for specific intent crimes, and evidence of other acts may be admissible to prove intent.⁷ However, the rule is not one of automatic admission. The other-act evidence “must be relevant without relying on a propensity inference, and its probative value must not be substantially outweighed by the risk of unfair prejudice.”⁸ Also, the degree to which the issue is actually contested may affect the probative value of the other-act evidence.⁹

Here, the State charged Hubbard with burglary—a specific intent crime—and therefore had the burden of proving Hubbard’s specific intent upon entering the residence. The Court held that the 2012 burglary had minimal relevance to the issue of intent because the facts left little doubt that at the time the perpetrators entered the residence, they intended to commit a robbery. “When a person’s conduct leaves no real doubts as to the actor’s intent, it is difficult to see much need or justification for similar acts on that issue.”¹⁰ Hubbard did not argue that he entered the residence for an innocent reason and then formed the intent to commit robbery. Rather, Hubbard denied participating in the act at all. Under these facts, the evidence of the 2012 burglary had little relevance to proving intent, and the minimal probative value was substantially outweighed by the risk of unfair prejudice.

B. *Absence of mistake*

Hubbard argued that mistake can only be at issue when the defendant raises it as a defense, which he did not do. The State countered that NRS 48.045 permits prior act evidence to prove absence of mistake regardless of whether raised by the defendant, and the absence of

⁴ *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012).

⁵ *Rhymes v. State*, 121 Nev. 17, 21–22, 107 P.3d 1278, 1281 (2005).

⁶ *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013) (citing *United States v. Miller*, 673 F.3d 688, 698 (7th Cir. 2012)).

⁷ *United States v. Gomez*, 763 F.3d 845, 858 (7th Cir. 2014).

⁸ *Id.* at 859.

⁹ *Id.*

¹⁰ Clifford S. Fishman & Anne T. McKenna, 3 *Jones on Evidence* § 17:64 (7th ed. 2016).

mistake was relevant because Hubbard claimed he was not present and was shot during an unrelated incident.

Under NRS 48.045(2), the absence of mistake exception applies when “the evidence tends to show the defendant’s knowledge of a fact material to the specific crime charged.”¹¹ Thus, the absence of mistake exception may be relevant to prove either the *mens rea* or the *actus rea*. The exception is grounded in the law of probabilities.

Here, evidence of the 2012 burglary would have been relevant to prove that Hubbard entered the residence with felonious intent rather than by mistake, or as an innocent victim of the circumstances surrounding the robbery. However, the State did not make those arguments for admitting the evidence, and instead asserted that the evidence was relevant to prove that Hubbard was the perpetrator who was shot during the robbery and did not receive the wound during some unrelated accident. In essence, the State tried to use the evidence to prove *identity*—not absence of mistake. Thus, as with intent, the prior bad act had little relevance on the issue of absence of mistake.

Due to the lack of relevance that the 2012 burglary had to either intent or absence of mistake, the Court concluded that the evidence was used for impermissible propensity purposes. The evidence’s low probative value was substantially outweighed by its unfair prejudice, and the district court’s decision to admit it was a manifest abuse of discretion.

II. Harmless error

Any error in admitting evidence under NRS 48.045(2) is subject to harmless error review.¹² The State argued any error was harmless because (1) the State could have used the prior convictions to impeach Hubbard on cross-examination and (2) the evidence of guilt was overwhelming. The Court rejected both arguments.

First, the Court explained that prior felony convictions are admissible for impeachment purposes only. Impeachment evidence cannot be used as substantive evidence of guilt or to show propensity. Davis’ testimony regarding the 2012 burglary was admitted for a substantive purpose—to prove intent and absence of mistake. Moreover, the quality of the impeachment evidence (the prior convictions) was less prejudicial than Davis’ live testimony. Most importantly, had the district court excluded Davis’ testimony, Hubbard might have chosen not to testify. Thus, the Court concluded that the use of the impeachment evidence did not rendered harmless the erroneous admission of Davis’ testimony.

Second, the Court concluded that the evidence of guilt was not overwhelming: none of the victims could identify Hubbard in a photo lineup, except KJ who was only 80 percent certain; Carter, who pleaded guilty, testified that he did not know Hubbard; none of Hubbard’s DNA or fingerprints were found in the residence; and none of the surveillance footage at the market showed a vehicle dropping Hubbard off. Hubbard explained that he called Joseph because they were friends, that Joseph had arranged a drug deal but never showed up, and that he was not

¹¹ Cirillo v. State, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980).

¹² Rosky v. State, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005).

forthcoming with the police about his injury because of his previous negative experiences with the police. Based on these facts, the Court could not say with confidence that admitting evidence of the prior burglary conviction was harmless.

Conclusion

Applying *Gomez*, intent is automatically at issue for specific intent crimes. Therefore, criminal defendants need not contest intent before the prosecution seeks to address it using prior act evidence. However, the evidence may still be inadmissible if its minimal probative value is substantially outweighed by the risk of unfair prejudice. The district court manifestly abused its discretion in admitting the evidence of the defendant's 2012 burglary conviction, and the trial court's error was not harmless. Consequently, the Court reversed the judgment of conviction and remanded the case for further proceedings consistent with this opinion.

Dissent

J. Hardesty, with whom J. Pickering, agrees, concurring in part and dissenting in part:

The dissent agreed with the majority's adoption of *Gomez*—that intent is automatically at issue for specific intent crimes. However, the dissent did not agree that the district court abused its discretion by admitting evidence of the 2012 burglary on the issue of intent. To the dissent, the trial court's decision to admit or exclude evidence of prior bad acts should be given great deference.

Further, even if the district court erred in admitting the bad acts evidence, the error was harmless. An error is harmless when it does not have “a substantial and injurious effect or influence in determining the jury's verdict,”¹³ and in the dissent's view, the circumstantial evidence of Hubbard's guilt was overwhelming.

The record showed that Hubbard arrived at the Joseph's gated community at 7:53 p.m., called Joseph's phone at 7:54 p.m. while at the gate, and again at 7:58 p.m. At 8:43 p.m., the victim's neighbor's surveillance video showed an SUV, later identified as belonging to Joseph, pulling up to the victim's house. The victims testified that they were robbed at gunpoint. KJ identified Hubbard with 80-percent certainty, and other family members identified one of the men as having attributes that matched Hubbard's description. That man (allegedly Hubbard) ran up the stairs, but was shot by David in the left shoulder. The three men then fled the residence, and David was able to identify Joseph as one of the perpetrators. At the end of the neighbor's surveillance footage, Hubbard and Joseph are shown running back into the SUV and driving away, while Carter shot into the house and ran away on foot.

David called 911 at 8:51 p.m. to report the robbery. Five minutes later, at 8:56 p.m., Joseph called 911 to report that his friend had been shot, and this call was made near the location of the Short Line Express Market. Shortly after, Hubbard entered the Short Line Express Market, and at 8:58 p.m., the cashier called 911 to report Hubbard's gunshot wound. After being arrested, Hubbard called Joseph seven times at the same number Joseph used to make the 911 call.

¹³ *Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013).

The dissent concluded that the circumstantial evidence connecting Hubbard to the robbery was overwhelming. Thus, the same result would have been reached had the trial court not admitted the prior bad act evidence, and the dissent would have affirmed the judgement of conviction.