IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MANUEL ALEJANDRO TREJO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74074

FILED

SEP 21 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Manuel Alejandro Trejo appeals from a judgment of conviction, pursuant to a jury verdict, of burglary and possession of implements adapted for the use or commission of a crime. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Employees of the West Wendover refuse plant contacted police after noticing that some items had been stolen from an office on the premises. Officer Joshua Earl and at least two employees identified Trejo as the man seen in surveillance video breaking into the office and taking a pressure washer and a camera. Officer Earl obtained a search warrant for Trejo's home. While executing the warrant, Officer Earl attempted to open a shed on the property and saw Trejo trying to flee from the other side. Officer Earl searched the shed and the surrounding property and found the stolen items, as well as clothing and a backpack containing burglary tools that Earl recognized from the surveillance footage.

Trejo was charged with burglary and possession of implements adapted for the use or commission of a crime. A Justice of the Peace granted the State's motion to continue the preliminary hearing because Officer Earl was unavailable. After being bound over to district court, Trejo moved to suppress the evidence found during the search and filed a writ of habeas corpus alleging that the justice court erred in continuing the preliminary

hearing. The district court denied both. The State filed a motion seeking to allow "prior bad act" evidence that Trejo had completed community service at the refuse plant and therefore was familiar with the site.

A jury found Trejo guilty on both counts. Trejo appeals, arguing that 1) the search warrant was invalid; 2) the district court abused its discretion by allowing the "prior bad act" evidence in at trial; and 3) the justice court erred in granting the State's request for a continuance.

First, Trejo argues that the search warrant was not sufficiently based upon probable cause because the warrant did not adequately describe any nexus between the place to be searched (Trejo's home) and the items the police were searching for there (the stolen property). We disagree. "Whether probable cause is present to support a search warrant is determined by a totality of circumstances." *Doyle v. State*, 116 Nev. 148, 158, 995 P.2d 465, 471 (2000). "'Probable cause' requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched." *Keesee v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994). We review an issuing judge's determination of probable cause for an abuse of discretion. *Doyle,* 116 Nev. at 158, 995 P.2d at 471-72. Thus, we need only "determine whether there is a substantial basis for concluding that probable cause existed." *Id.* at 158, 995 P.2d at 472.

"The nexus between the place to be searched and the items to be seized may be established by the type of crime, the nature of the items, and the normal inferences where a criminal would likely hide [the evidence]." *United States v. Jacobs*, 715 F.2d 1343, 1346 (9th Cir. 1983) (alteration in original) (quotation marks omitted). Here, the totality of the

circumstances indicates that the police could reasonably infer that Trejo would try to hide the stolen items and the clothing that he wore during the crime somewhere inside his home. Thus, even though the crime did not otherwise involve his home, "a sufficient nexus can exist between a defendant's criminal conduct and his residence even when the affidavit supporting the warrant contains no factual assertions directly linking the items sought to the defendant's residence." *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005) (internal quotation marks omitted). Therefore, the district court did not abuse its discretion in denying Trejo's motion to suppress.

Next, Trejo argues that the district court erred by admitting evidence that Trejo had completed community service at the refuse plant. "'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" and is generally admissible. NRS 48.015; NRS 48.025. Evidence of prior bad acts is generally inadmissible. *See* NRS 48.045(2); *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001). Still, evidence of bad acts may be admitted for limited purposes other than showing a defendant's bad character, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). To admit such evidence, the State has the burden of requesting a hearing outside the jury's presence under *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), to establish that: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Tinch v. State*, 113 Nev. 1170, 1176, 946

P.2d 1061, 1064-65 (1997). "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

Here, the bad act evidence was relevant to help explain how the employees knew and could recognize Trejo, and how Trejo knew the plant's layout. Second, the parties stipulated that Trejo's prior community service was proven by clear and convincing evidence. Third, the probative value of the evidence was not substantially outweighed by unfair prejudice, since evidence that Trejo was doing community service at the plant does not, by itself, necessarily mean that he had committed any particular prior crime. The district court properly provided a limiting instruction after every reference to Trejo's community service, as well as at the conclusion of the trial along with the other jury instructions. *Tavares*, 117 Nev. at 733, 30 P.3d at 1133 (holding that "a limiting instruction should be given both at the time evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury"). Therefore, the district court did not abuse its discretion by admitting evidence of Trejo's community service. But even if the district court erred, it was harmless since overwhelming evidence supported the conviction. *See Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005) ("Errors in the admission of evidence under NRS 48.045(2) are subject to a harmless error review."). Specifically, at least two plant employees and Officer Earl identified Trejo as the thief caught in the surveillance video, and the stolen items and the identifying clothing were found on Trejo's property. Thus, any error was harmless.

Last, Trejo argues that that the district court erred in denying his writ petition challenging the justice court's grant of a continuance, arguing that the State failed to exercise due diligence to obtain the presence

of a witness before requesting the continuance. But a pretrial writ of habeas corpus is an improper avenue to challenge a discretionary ruling such as a grant of a continuance. *See State v. Nelson*, 118 Nev. 399, 403-04, 46 P.3d 1232, 1235 (2002). "[T]he district court may [only] review the legality of the detention on habeas corpus in circumstances where the continuance is alleged to have been granted in violation of the jurisdictional procedural requirements of *Hill* [*v. Sheriff*, 85 Nev. 234, 235, 452 P.2d 918, 919 (1969)] and *Bustos* [*v. Sheriff*, 87 Nev. 622, 623, 491 P.2d 1279, 1280 (1971)]." *Id.*

Here, Trejo's writ petition does not challenge the continuance on procedural grounds under *Hill* and *Bustos*, but rather challenges the merits underlying the State's motion to continue. Consequently, the district court appropriately denied Trejo's writ because it did not have jurisdiction to consider the justice court's discretionary ruling given Trejo's failure to allege that the continuance was granted in violation of procedural requirements.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk