

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHAN CHANNING SMART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82661-COA

FILED

JAN 24 2022

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

ORDER OF AFFIRMANCE

Jonathan Channing Smart appeals from a judgment of conviction, pursuant to a jury verdict, of battery on a protected person resulting in substantial bodily harm. Fourth Judicial District Court, Elko County; Mason Simons, Judge.

Uniformed police officers Bogdon and Gray of the Elko Police Department were looking for Smart because Officer Bogdon knew Smart had an outstanding warrant of arrest. They contacted Smart outside of an Elko casino after receiving a call from casino security that Smart was in the area.¹ Officer Bogdon immediately told Smart to place his hands behind his back and attempted to place Smart in handcuffs because he had a reputation for resisting law enforcement and running away from the police. Officer Bogdon grabbed Smart's right arm, and Officer Gray grabbed Smart's left arm, but Smart spun out of Officer Gray's grasp and resisted Officer Bogdon's efforts to handcuff him. Ultimately, Smart spun around Officer Bogdon so that Smart was standing behind Officer Bogdon.

Officer Bogdon performed a police maneuver to get Smart from behind him and place him on the ground. When performing this maneuver, Smart grabbed onto Officer Bogdon and pulled Officer Bogdon to the ground

¹We do not recount the facts except as necessary to our disposition.

with him. Officer Bogdon testified that as soon as he landed on the ground, it was immediately apparent that he sustained an injury. Officer Bogdon was later diagnosed with a broken tibia, broken fibula, and torn ligaments, requiring surgery. Officers' body cameras recorded this entire incident, and the State played portions of this footage at trial.

After officers successfully handcuffed Smart and pulled him to his feet, they discovered that he had been lying on a glass methamphetamine pipe, which Smart then attempted to destroy or conceal by stomping on it or kicking it with his foot. Subsequently, when officers attempted to place Smart into the back of the patrol vehicle, Smart kicked the vehicle's door and kicked the inside of the vehicle.

Prior to trial, the State filed an "Offer of Proof Concerning Other Crimes or Wrongs Committed By Defendant" and sought to introduce testimony at trial of the glass methamphetamine pipe and that Smart had resisted officers in the past. The State argued that evidence of the pipe went to Smart's intent to fight with or resist the officers to evade capture, and that evidence that police had general knowledge that Smart resisted officers in the past was necessary to explain Officer Bogdon's decision to immediately place Smart in handcuffs.

Smart subsequently filed an opposition where he argued that evidence of the pipe was not admissible under NRS 48.045(2) because it was irrelevant and unfairly prejudicial. Specifically, Smart argued that the pipe was irrelevant to the charged crime of battery on a protected person resulting in substantial bodily harm because he attempted to kick the pipe after Officer Bogdon was injured, and that such evidence was unfairly prejudicial because methamphetamine use affects many members of the Elko community. Smart also argued that the unfair prejudicial effect of his

prior incident of resisting arrest, which occurred approximately six months before, and accompanying violence substantially outweighed its probative value and that it was unnecessary to the narrative of the case.

The district court held a pretrial motions hearing concerning the State's offer of proof and Smart's opposition.² At the hearing, the State again argued that the pipe should be admitted to show intent because it provided Smart with a reason to flee or evade capture. The State conceded that the pipe was not *res gestae* evidence under NRS 48.035(3). The State also argued that Smart's prior instance of resisting arrest was "in a way" *res gestae* evidence and that Smart's kicking of the patrol vehicle after his arrest in this case was relevant to his intent of resisting. Smart responded that the "post facto act of allegedly kicking the pipe" was not relevant to the incident between Smart and Officer Bogdon, and that the risk of unfair prejudice from admission of the pipe was extremely high. Additionally, Smart argued that evidence of his prior instance of resisting arrest, including his kicking of the patrol vehicle, was highly prejudicial and not relevant. Smart continued that his kicking of the patrol vehicle in the present case is not relevant to the charged crime, is highly prejudicial, and has low probative value because the kicking of the patrol vehicle was simply Smart's reaction to his arrest.

Throughout this case and at trial, Smart's defense consistently was that he was not guilty of battery because he did not act willfully, and that Officer Bogdon was injured as the result of an accident. The district

²This hearing appeared to be a *Petrocelli* hearing. Both parties argued the *Petrocelli* elements, and the district court addressed these elements when it issued its rulings. *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

court ultimately permitted the State to introduce evidence of the pipe, noting that it went “to the narrative of what is going on with this incident” and showed Smart’s “intent to hide contraband or destroy evidence or evade capture in some fashion by the police.” The district court also acknowledged that the State and Smart agreed to admit Smart’s prior instance of resisting but limit the details to “just the fact that there had been prior resisting incidents or evading incidents” without going into any specifics. Finally, the district court permitted the State to introduce evidence of Smart kicking the patrol vehicle in this case, reasoning that the evidence went to Smart’s intent to evade and was consistent with the narrative of the case. The district court stated that it would give limiting instructions to minimize the prejudicial effect.³

Smart makes two broad arguments on appeal, each with multiple subparts: (1) that the district court abused its discretion in

³The limiting instruction given at trial and included in the jury instructions provided that:

Evidence was received tending to show that perhaps the defendant committed wrongs or acts other than that for which he is on trial. Such evidence was received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. The evidence was received and may be considered by you only for the limited purpose of determining if it tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or a common scheme or plan. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all the other evidence in the case. You are not permitted to consider such evidence for any other purpose.

admitting evidence that he possessed the glass methamphetamine pipe at the time of his arrest, and (2) that the district court abused its discretion by admitting bad act evidence pertaining to Smart resisting and evading arrest.

As to Smart's first argument concerning the glass methamphetamine pipe, he makes four specific contentions: (1) evidence of the pipe was not relevant to his charge of battery, (2) the evidence amounted to improper propensity evidence, (3) the evidence was not properly admitted as *res gestae*,⁴ and (4) the evidence the State offered was improper because it tended to inflame the passions of the jurors because the Elko community is deeply affected by methamphetamine use.

Within Smart's second argument concerning the bad act evidence, he makes five specific contentions: (1) his prior instance of resisting arrest was irrelevant to his charge of battery, (2) his kicking of the patrol vehicle in this case was irrelevant to his charge of battery, (3) the admission of his prior instance of resisting arrest amounted to improper propensity evidence, (4) his prior instance of resisting arrest was not properly admitted as *res gestae* evidence, and (5) the evidence that he kicked the patrol vehicle in this case tended to improperly inflame the passions of the jurors. We decline to address Smart's first, third, and fourth arguments, all of which concern his prior instance of resisting arrest. In his briefing on appeal, Smart cites to and quotes testimony from the pretrial hearing and such testimony was not heard by the jury at trial. Because the

⁴We decline to address Smart's third argument that the glass methamphetamine pipe was not properly admitted as *res gestae* evidence. Smart did not raise this issue before the district court and does not argue on appeal that it constitutes plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

jury did not hear the testimony, there is no error for this court to consider. Additionally, to the extent Smart argues that the jury should not have heard any testimony concerning his prior incident of resisting arrest, Smart has waived this issue on appeal because he stipulated to the admission of general knowledge of his prior resisting and evading incidents. *See, e.g., United States v. Molina*, 596 F.3d 1166, 1169 (9th Cir. 2010) (“A defendant who has stipulated to the admission of evidence cannot later complain about its admissibility unless he can show that the stipulation was involuntary.” (internal quotation marks omitted)).

Smart first contends that the presence of the glass methamphetamine pipe is irrelevant because it does not make the charged crime of battery any more or less probable than it would be without it. He continues that the pipe was improper propensity evidence and that such evidence inflamed the passion of the jurors because the Elko community is deeply affected by methamphetamine use. As to his second contention, Smart argues that the fact that he kicked the patrol vehicle afterwards is irrelevant since he was already under arrest and the charged crime of battery was completed. Additionally, he argues that this evidence of his “subsequent agitation” to being detained was unfairly prejudicial and inflamed the passions of the jury. The State argues that Smart’s kicking of the patrol vehicle after his arrest showed that Smart continued to resist and use force, both of which are probative to show his intent when he resisted Officer Bogdon. The State further argues that if there were any evidentiary errors, they were harmless in light of the overwhelming evidence of guilt. We disagree with Smart’s first contention and conclude his second contention need not be decided in light of harmless error doctrine.

“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); *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013) (same for bad-act evidence). At trial, only relevant evidence is admissible. NRS 48.025. Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination . . . more or less probable.” NRS 48.015. Generally, evidence of other crimes or bad acts cannot be admitted at trial solely for the purposes of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question. NRS 48.045(1). However, evidence of other crimes, wrongs, or acts may be admitted for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” NRS 48.045(2). Relevant evidence is inadmissible “if its probative value is substantially outweighed by the danger of unfair prejudice.” NRS 48.035(1). Unfair prejudice substantially outweighs relevance when “it encourages the jury to convict the defendant on an improper basis.” *Holmes v. State*, 129 Nev. 567, 575, 306 P.3d 415, 420 (2013).

Here, the district court could reasonably find that Smart was in possession of a glass methamphetamine pipe, and it was relevant and probative to proving the charge of battery on a protected person resulting in substantial bodily harm. Specifically, it helped demonstrate Smart’s motive and intent to willfully use force to evade capture and arrest to avoid additional charges that could stem from his possession of the pipe. See NRS 453.336, 453.554, and 453.570. As such, evidence of the pipe was relevant

for a non-propensity purpose including lack of accident.⁵ Finally, while the evidence was prejudicial, its probative value was not substantially outweighed by the danger of unfair prejudice in light of the limiting instruction given by the district court to the jury. *See McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2014) (holding that jurors are presumed to follow the court's instructions). Thus, the district court did not abuse its discretion in admitting evidence describing the pipe.

Additionally, Smart challenges the admission of the evidence regarding his kicking of the patrol vehicle in this case. Here, we need not determine whether Smart's act of kicking the patrol vehicle after his arrest was properly admitted because of the harmless error doctrine.

"Errors in the admission of evidence under NRS 48.045(2) are subject to a harmless error review." *Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005). "An error is harmless and not reversible if it did not have a substantial and injurious effect or influence in determining the jury's verdict." *Hubbard v. State*, 134 Nev. 450, 459, 422 P.3d 1260, 1267 (2018); *see also Chappell v. State*, 114 Nev. 1403, 1407, 972 P.2d 838, 840 (1998) (holding that a district court's error in admitting evidence of prior bad acts was harmless in light of the overwhelming evidence of the defendant's guilt).

Here, the State argued in its answering brief that even if the district court erred in admitting the evidence regarding the pipe and the kicking of the patrol vehicle, it was harmless because of the overwhelming evidence of the Smart's guilt. Smart did not file a reply brief to address the

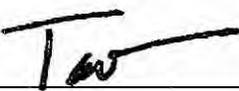
⁵To the extent that Smart argued his physical contact with the officer was an accident, the admission of this evidence may also have been relevant to rebut that claim.

State's harmless error contentions, and therefore, he has conceded that any error in admitting evidence about the presence of the pipe or kicking the patrol vehicle was harmless. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position"). Moreover, even if the district court erroneously admitted the pipe and kicking evidence, such error was harmless because there is overwhelming evidence in the record to support the jury's verdict, including body camera footage of the altercation. Thus, any error did not have a substantial and injurious effect or influence in determining the jury's verdict.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Mason Simons, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk