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### Franks (Kenneth) v. State, 135 Nev. Adv. Op. 1 (Jan. 3, 2019)

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CRIMINAL LAW: EVIDENCE, PRIOR BAD ACTS

**Summary**

The Court reviewed whether a district court's decision to allow the State to introduce prior incidents of uncharged sexual acts as evidence of the defendant's propensity for committing sexual offenses violated NRS 48.045(3) and concluded such evidence as long as it is first evaluated for relevance and its heightened risk of unfair prejudice.

**Facts and Procedural History**

On September 18, 2015, the defendant was charged with lewdness with a child under the age of fourteen. The defendant's niece alleged that in June 2015, he pulled down her pants and rubbed her genitals while they were wrestling and tickling.

During the State's questioning of the defendant's niece, she testified of four other instances where the defendant had touched her inappropriately. The district court did not hold a hearing regarding whether such testimony was admissible and the defendant did not object to the testimony.

The jury found the defendant guilty of the charged offense, and he was sentenced to ten years to life in prison. This appeal followed.

**Discussion**

*The district court did not plainly err by permitting the State to introduce evidence of Franks' prior acts that constitute separate offenses for purposes of showing propensity under NRS 48.045(3)*

*Standard of review*

The Court reviews questions of statutory interpretation de novo, and "when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent."<sup>2</sup> If a defendant fails to object to a district court's decision to admit or exclude evidence in the lower court, appellate review is precluded unless it rises to the level of plain error.<sup>3</sup> Reversal for plain error is only warranted if the error was prejudicial to the defendant's substantial rights.<sup>4</sup>

*Statutory Interpretation of NRS 48.045(3)*

NRS 48.045(3) went into effect on October 1, 2015. Despite the fact that the claim against the defendant was filed on September 18, 2015, his trial did not commence until November 28, 2016. Therefore, NRS 48.045(3) applied to his case.

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<sup>1</sup> By Scott Whitworth.

<sup>2</sup> *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

<sup>3</sup> *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

<sup>4</sup> *Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485–86 (2006).

The plain language of NRS 48.045(3) states that “[n]othing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense,” and allows for the admission of evidence of prior sexual bad acts “to prove the character of a person in order to show that the person acted in conformity” with the alleged sexual offense.<sup>5</sup>

Because the statute’s language is unambiguous, the Court determined that district courts are permitted to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense.

#### *Application of NRS 48.045(3)*

To ensure that criminal defendants are not “convict[ed] for crimes other than those charged . . . because a bad person deserves punishment,” the Court created a standard for what evidence is admissible in a criminal sexual conduct.<sup>6</sup>

To introduce evidence of a defendant’s prior bad sexual act: (1) the State must request the district court’s permission to introduce the evidence of the prior sexual offense for propensity purposes outside the presence of the jury and explain how the prior sexual offenses are relevant to the charged offense; (2) the district court must make a preliminary finding that the prior sexual offense is relevant for propensity purposes and that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred; and (3) the district court must weigh the risk of prejudicing the defendants case against the value of the evidence for propensity purposes.

Regarding the third requirement, the Court named several factors for the district court to consider including the: (1) similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts charged, (3) frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) necessity of the evidence beyond the testimonies already offered at trial.<sup>7</sup>

Here, the defendant was not substantially prejudiced when the district court allowed the admission of evidence of his past bad sexual acts, despite the fact that the district court did not follow the aforementioned safeguards because the evidence satisfies the listed factors. The defendant was charged with lewdness with a child under the age of fourteen, and the evidence being contested was testimony of the defendants’ sexual conduct was identical to the crime he was charged with and involved the same child.

Furthermore, even though the testimony of the additional sexual acts may not have been necessary to the State’s case, “evidence need not be absolutely necessary to the prosecution’s case in order to be introduced; it must simply be helpful or practically necessary.”<sup>8</sup>

#### *Sufficient evidence supporting Frank’s conviction*

The Court upheld the defendant’s conviction because, after viewing the evidence in the light most favorable to the prosecution, it found that a rational trier of fact could have found the

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<sup>5</sup> NRS 48.045(3) (2015).

<sup>6</sup> See *Old Chief v. U.S.*, 519 U.S. 172 181 (1997).

<sup>7</sup> *LeMay*, 260 F3d at 1027.

<sup>8</sup> *Id.* at 1029.

essential elements of the crime beyond a reasonable doubt. It is not the function of the Court to “assess the weight of the evidence and determine the credibility of witnesses.”<sup>9</sup>

### **Conclusion**

The Court concluded that the district court did not commit plain error by allowing the State to introduce evidence of the defendant’s past sexual acts for propensity purposes. Moreover, the Court found there was sufficient evidence to support the defendant’s conviction. Thus, the Court upheld the district court’s decision.

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<sup>9</sup> Rose v. State, 163 P.3d 408, 414 (2007).