IN THE SUPREME COURT OF THE STATE OF NEVADA
Docket No. 72988

KENNETH FRANKS
Appellant,

vs.

THE STATE OF NEVADA
Appellee.

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Carolyn Ellsworth, District Judge

APPELLANT'S OPENING BRIEF

Lisa A. Rasmussen, Esq.
Nevada Bar # 7491
Jim Hoffman
Nevada Bar # 13896
Law Office of Lisa Rasmussen
601 S. 10th Street, Ste. 100
Las Vegas, NV 89101
Tel. (702) 471-1436
Fax. (702) 489-6619
Email: Lisa@lrasmussenlaw.com
Email: Jim@RasmussenLaw.onmicrosoft.com
Attorneys for Appellant

Steven B. Wolfson
Clark County District Atty.
Nevada Bar #001565
Steven S. Owens
Chief Deputy District Atty.
Nevada Bar #4352
Regional Justice Center
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212
(702) 671-2750
Attorneys for Appellee

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned certifies that Kenneth Franks is the true name of a natural person, and that no corporation is involved in this litigation. Mr. Franks was previously represented in district court by Michael Becker, Esq., as well as Benson Lee, Esq..

/s Jim Hoffman
Attorney for Kenneth Franks

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JURISDICTIONAL/NRAP 17 STATEMENT

This matter is an appeal of the denial of a petition for post-conviction relief. This is a final judgment, and so this Court properly has jurisdiction under NRS 177.015(3). Under NRAP 4(b), the appeal must be noticed within 30 days of the judgment of conviction. The lower court judgment was filed on April 6, 2017, and the appeal was noticed on May 1, 2017.

Mr. Franks was convicted of a Category A felony and sentenced to life in prison, which means that this case is not presumptively retained by the Supreme Court or assigned to the Court of Appeals. NRAP 17(a)(2); NRAP(b)(1). In light of the seriousness of the sentence Mr. Franks asks that his appeal be retained by the Supreme Court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in admitting bad acts evidence to show "propensity."
2. Whether the district court erred in not holding a *Petrocelli* hearing before admitting bad acts evidence.
3. Whether the evidence was sufficient to support a conviction.

STATEMENT OF THE CASE

On September 18, 2015, Kenneth Franks was charged with one count of lewdness with a minor. After a jury trial, he was convicted on December 7, 2016. He was sentenced to 10 years to life, the mandatory statutory sentence, on March 29, 2017, and the judgment of conviction was filed on April 6, 2017. The notice of appeal was filed on May 1, 2017.

STATEMENT OF THE FACTS

In 2015, Kenneth Franks was a quiet 20 year-old who lived at home with his parents. Appeals Appendix ["AA"] 438. He studied computers online through ITT Tech, and was good enough at it to get a job offer from them while still in school. AA 461. He also spent most of his leisure time working and playing computer games, along with his brother. AA 324-28.

Sometimes, Kenneth's half-brother would come to visit, along with his daughter A.F. and her younger brother J.F. – Kenneth's niece and nephew.[1] AA 204-05. The kids would all play video games on these visits, either separately or together. AA 211-12. Kenneth would also tickle and wrestle with A.F. and J.F. AA 305-06.

[1] "A.F." is a pseudonym, used to keep a minor's identity confidential in compliance with NRS 200.3771. It was also used in the complaint. AA 2. Although there were never any allegations related to "J.F.," a pseudonym is also used to refer to him in order to further guard his and his sister's privacy.

These gatherings ended when a criminal complaint was filed against Kenneth, alleging that he committed lewdness with a minor. AA 2. Specifically, it was alleged that when A.F. and her brother came over to visit in June 2015, he had touched the outside of her genitals with his hand. AA 36. Kenneth denied this, rejected a plea offer from the State, and decided to try and prove his innocence at trial. AA 542.

A.F.'s Testimony

According to A.F., on the occasion in question, she and Kenneth were wrestling and he was tickling her in the computer room at Kenneth's parents' house. She stated that her pants and underwear were pulled down one after the other and his hand touched her genitals. AA 54-58. She stated that on another occasion, she had told him to stop (both tickling her and touching her genitals). AA 57. She also said that on one occasion, Kenneth's brother came in and told Kenneth to stop. AA 56.

A.F.'s testimony was clear on these points, but vague and filled with lack of recollection on many other points. For instance, she could not remember when the alleged incident had happened, not even whether it was before her summer vacation or not. AA 58. She could not remember whether the visit in question was

on a weekday or a weekend; who was at the house (besides Kenneth); or what she had done that day.[2] AA 75-76.

On direct examination, A.F. was provided with a transcript of the interview she gave police. This transcript provided her with a few more details. She remembered trying to grab the door and pull herself out of the computer room, while Kenneth held onto her legs. She also remembered that her brother, J.F., was on Kenneth's back during that time, and that she had not made any noise during these events. She remembered that eventually Kenneth stopped, and she was able to get up and run out of the room. AA 68-71. She still could not remember when the alleged incident had happened, however; she specifically did not remember telling the detective that it had happened near the end of her sixth-grade year. AA 67.

A.F.'s lack of recollection continued on cross-examination. She said she was "not really sure" whether she had gone to Kenneth's parents' house in June. AA 75-76. She was "not sure" whether the day of the alleged incident was a weekday or a weekend. AA 76. Even after reviewing the interview transcript, she still could not remember. AA 77. She remembered going shopping one day with her grandmother and Kenneth in the summer, but was not sure whether it was the

[2] A primary area of contention at the trial was whether the alleged touching could have taken place on a date in June 2015 or not. Since A.F. did not remember the actual date, much of the testimony was devoted to showing whether it could or could not have happened at a specific time.

same day that Kenneth allegedly touched her. AA 77-79. She also testified that she didn't remember why her brother was on Kenneth's back, but that he liked playing with Kenneth, and liked climbing on people's backs. AA 79-81.

On redirect, the State asked again whether the day of the alleged incident was a weekday or weekend. A.F. still could not remember, but on rereading the transcript said that she had told the detective it was a weekend. AA 116. A.F. also stated that she could not remember what her uncle M.F.[3] was doing at the time of the alleged touching. After rereading the transcript, the State asked if she could remember telling the detective that he was sleeping; she said she still could not. AA 117-118. On redirect, A.F. also stated that Kenneth had touched her five times, though she could not remember exactly when these happened. AA 119.

The Detective's Testimony

In the face of all these failures of recollection, the judge allowed the detective who interviewed A.F. to testify as to her statements during the interview. He said she told him that the last alleged touching happened toward the end of her sixth grade year, "which would have been around May or June 2015." AA 294. The detective also testified that A.F. had told him that M.F. was sleeping during the alleged incident; he could not remember whether she said that M.F. was

[3] "M.F." is Kenneth's brother, and was also a minor at the time these events took place, as well as the time of the trial. Thus, his name is also under a pseudonym.

sleeping in the room or not. AA 317. He also testified that A.F. told him that the incident happened on a weekend, toward the middle or end of June. AA 320-22.

The detective also testified about his interrogation of Kenneth. He testified that Kenneth was generally "cooperative" and that for a majority of the interview, he denied touching A.F.'s genitals. AA 318. The detective repeatedly asked whether he had ever touched his niece's genitals while wrestling with and tickling her. For "forty, almost fifty minutes" he denied that he had done so. AA 305. Eventually, under sustained questioning, he stated that it was possible that her pants had come down and his hands had grazed her genitals. AA 310.

J.F.'s Testimony

A.F.'s brother, J.F., also testified at trial. He stated that his uncle Kenneth would tickle both the children on their stomachs and under their arms. AA 181-82. He also remembered once seeing Kenneth tickle A.F. while her pants and underwear were down, allowing him to see her bottom. AA 182-83. J.F. stated that Kenneth pulled the pants and underwear down in one motion, while continuing to tickle A.F.. AA 184. He also stated that his sister continued to laugh throughout all of this, so he laughed too. AA 184-85.

At this point, J.F. climbed on Kenneth's back, because A.F. was laughing so hard he was concerned. AA 185-86, 193. J.F. further said that at some point Kenneth stopped tickling A.F., and she got up and went over to where J.F. was

sitting (in the computer room) and talked to him. AA 187. J.F. also said that his uncle M.F. was sleeping in the room at this point, so he tried to be quieter, but A.F. and Kenneth would not.[4] AA 186. Finally, he testified that he went out and immediately told his father what he had seen in the room. AA 186-87.[5]

Other Testimony

The rest of the testimony in the case was largely concerned with trying to pin down when, if ever, the alleged touching happened in June. A.F. and J.F.'s father (the only one who ever took them over to Kenneth's parents' house) testified that they went over there two or three times in June. AA 205. The detective testified that Kenneth told him the last time he had seen A.F. was in early June. AA 304.

M.F., Kenneth's brother, testified that he only saw his niece and nephew come over once in June 2015 (along with their father). He testified that they came over for about a half-hour on June 23 (a Tuesday). AA 331. On this occasion, Kenneth showed A.F. a video on the computer (specifically, a promotional video from E3, a large video game trade show which happens every year). AA 333, 345. M.F. also stated that he had never seen Kenneth touch A.F., or A.F. with her pants down, either on that date or any time in 2015 generally. AA 335-37.

[4] J.F.'s father also testified that M.F. typically slept in this room; however, in his own testimony M.F. denied that he ever did. AA 205, 347.
[5] J.F.'s father denied this in his testimony, and said that he did not find out about the incident until several months later. AA 219.

Kenneth's mother, Maria, also testified. She said that she only saw A.F. and J.F. come over once in June, on June 24. She took A.F., J.F., and Kenneth shopping for various clothes and school supplies; they also went to Costco and Circus Circus. Maria was able to testify to all of this with a high degree of accuracy, because of her habit of keeping a meticulous calendar and receipts from all purchases. AA 372-90.

Maria testified that the kids were only out of her sight at her house for two short periods. Once, she took a shower for about twenty minutes in the bathroom attached to the computer room. During this period, the kids stayed in the living room with her husband. AA 371. Additionally, for a short period she stood outside watering her garden while A.F. went inside to wash the mud off her new sneakers. AA 388-90.

There was also fairly extensive testimony related to the poor relationship between Maria and her oldest son (A.F.'s father, Kenneth's half-brother). The two were apparently distant, and money was a frequent point of contention between them, as well as Maria's previous life as a migrant worker, leaving A.F.'s father behind in the Philippines for long stretches of time. AA 395-98, 409-29.

SUMMARY OF THE ARGUMENT

During Kenneth's trial, the lower court admitted bad acts evidence, in the form of A.F.'s testimony about alleged previous incidents of touching. The lower court specifically instructed the jury that this evidence was admissible for "intent, motive, or propensity." This was an error, since bad acts evidence is strictly inadmissible to show propensity. The error was further compounded by the prosecution's repeated references to Kenneth's alleged propensity during its closing.

The lower court also erred in not conducting a *Petrocelli* hearing on the evidence, pursuant to *Bigpond v. State*. Such a hearing would have shown the evidence to be inadmissible, and prevented it from illegitimately influencing the jury's deliberations.

Finally, the prosecution's case was so thin as to present a sufficiency of the evidence issue. Especially after leaving out the improperly admitted propensity evidence, there was not enough evidence for a rational finder of fact to convict Kenneth.

ARGUMENT

I. The Lower Court Wrongly Admitted Bad Acts Evidence Without Considering the *Petrocelli/Bigpond* Factors.

During Kenneth Franks' trial, A.F. testified that he had touched her genitals multiple times, despite Kenneth only being charged with one offense. Thus, the other incidents were bad acts evidence. This is only admissible if the lower court follows a specific procedure, originally laid out in *Petrocelli v. State*, to determine that the evidence is more probative than prejudicial. The lower court failed to do so, and the evidence would not have met that test in the first place. Therefore, Kenneth's conviction should be reversed.

Kenneth was charged with only one count of lewdness with a minor. AA 2. However, A.F. testified that he touched her genitals five times. AA 118. This testimony was not preceded by a hearing on its admissibility, or even any informal deliberation by the court.

Bad acts evidence is governed by NRS 48.045. It is allowed into evidence, but not to prove the character of the defendant. Rather, it may be admitted for valid purposes such as to show intent or motive. NRS 48.045(2).

The primary case in this area is *Bigpond v. State*, 128 Nev. 108 (2012). In *Bigpond*, this Court set out the precise procedure which lower courts must follow

in order to admit bad acts evidence.[6] The court must find three factors: (1) the evidence is relevant to the crime charged, and for a non-propensity purpose; (2) the State can prove the act by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Bigpond*, 128 Nev. at 116-17.

The *Bigpond* Court warned that "Although we conclude that evidence of 'other crimes, wrongs or acts' may be admitted for any relevant nonpropensity purpose, we reemphasize that a presumption of inadmissibility attaches to all prior bad act evidence. The use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." *Id.* at 117 (internal citations and quotations removed). Thus, the Court cautioned that hearings are necessary to prevent against evidence being misused.

It is error for a lower court to fail to hold a hearing under *Bigpond.* However, this error is not always reversible. In *Rhymes v. State*, this Court reviewed the record *de novo* and found that even though there was no hearing in

[6] The original case in this vein was *Petrocelli v. State*, 101 Nev. 46 (1985), and such hearings are still commonly called "*Petrocelli* hearings." This Court first set out the three factor test in *Tinch v. State*, 113 Nev. 1170 (1997), and then refined the first factor in *Bigpond.*

the lower court, the record still showed that all three factors were met and so the error was harmless. 121 Nev. 17, 24 (2005).

However, in *Meek v. State* this Court reviewed the record *de novo* and found that the factors were not present. 112 Nev. 1288 (1996). At Meek's sexual assault trial, the State was allowed to present evidence of a previous sexual assault which was reported to the police but never charged. The lower court allowed this in without a hearing. Reviewing the record, the Court found that the State had failed to prove the existence of the previous act by clear and convincing evidence.

Specifically, the Court held that "While clear and convincing evidence can be provided by a victim's testimony alone, the other woman's statement to police was apparently insufficient evidence to establish probable cause of a crime by Meek. Therefore, we conclude that from the record before us, clear and convincing proof of the prior attack was not established." *Id.* at 1295. Therefore, the Court reversed Meek's conviction.

The standard for reversal was laid out in *Tavares v. State*, 117 Nev. 725 (2001). This Court applies the test for nonconstitutional error originally laid out in *Kotteakos v. United States*, 328 U.S. 750 (1946). "The test under *Kotteakos* is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' Thus, unless we are convinced that the accused suffered no prejudice as determined by the *Kotteakos* test, the conviction must be

reversed. On account of the potentially highly prejudicial nature of uncharged bad act evidence, however, it is likely that cases involving the absence of a limiting instruction on the use of uncharged bad act evidence will not constitute harmless error." *Tavares*, 117 Nev. at 732-33.

In Kenneth's case, the lower court failed to hold a hearing on the bad acts evidence outside the presence of the jury. This was clear error under *Bigpond*. The court failed to even consider any of the three factors. Thus, this Court should reverse Kenneth's conviction, unless the record can show that all three factors were met.

The record cannot show that all three factors were met. Specifically, the State did not prove that the four other incidents mentioned by A.F. happened by clear and convincing evidence.[7] The only evidence of their existence was a short reference by A.F. in her testimony. She stated that one time, she was playing the computer with her brother in the room, and Kenneth touched her over her clothes. There were no other details about that incident or any other incident, and she could not even remember what year it took place. AA 119.

This is not enough to meet the standard. Indeed, it is extremely noteworthy that neither police nor the State were confident enough in the existence of these events to charge Kenneth for them. As this Court noted in *Meek*, if the evidence

[7] In addition, the first factor was not met – the testimony was admitted to prove "propensity" in contradiction to *Bigpond*. *See* Section II *infra*.

was insufficient to even establish probable cause, then it is by definition insufficient to be proven clearly and convincingly. Thus, this evidence should not have been admitted.

In some instances, a complainant's testimony may be enough to meet the *Bigpond* factors. This is not one of those instances. A.F.'s testimony was too thin to meet the test, and so this evidence should not have been admitted. The lower court's failure to follow *Bigpond* is therefore grounds for reversal.

II. The Lower Court Wrongly Instructed the Jury to Consider Bad Acts Evidence for Propensity.

At Kenneth's trial, the lower court admitted testimony that Kenneth had previously touched A.F.'s genitals. In the jury instructions, the court ordered the jury to consider whether that testimony established that Kenneth had a propensity to commit crimes. In addition, the court allowed the State to stress this evidence of propensity during its closing argument. These were clear errors which tainted the jury's deliberations and necessitate reversal.

As stated above, Kenneth was charged with one count of lewdness with a minor, related to an alleged touching in June 2015. AA 2. However, at trial his niece A.F. testified that he had touched her five times altogether. AA 118.

The lower court did not give a limiting instruction at the time. At the end of the trial, the court did instruct the jury that this evidence could not be used to prove

that Kenneth was "a person of bad character or that he has a disposition to commit crimes." The jury was instructed that it could use the evidence to prove "intent, motive, or propensity." AA 548.

The State referred to this instruction twice in its closing. The first time, it simply mentioned the intent and motive aspects. AA 479. However, the second time, the State specifically highlighted the element of propensity. The prosecutor argued that "you can't take these other five instances to say the defendant's a horrible person.[8] But what you're allowed to do is look at that as motive, intent and propensity. And propensity is an inclination or natural tendency to behave in a particular way." AA 520.

Bad acts evidence is governed by NRS 48.045. This statute states that "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). While intent and motive both appear on this list, "propensity" notably does not. Inasmuch as "propensity" is synonymous with "character", it is strictly banned from consideration.

[8] This was a factual misrepresentation by the State. As already mentioned, A.F. testified that there were only five incidents total, not five other incidents plus the one Kenneth was actually charged for. AA 118.

Caselaw further supports this reasoning. In *Braunstein v. State*, this Court specifically considered the question of whether bad acts evidence could be used to demonstrate a propensity to commit sexual misconduct.

> We question whether the statute's reference to the admissibility of other crimes, wrongs or acts for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" should include the purpose of proving a "propensity for sexual aberration." Evidence of such a propensity sounds much more like the kind of inadmissible, bad character evidence prohibited by NRS 48.045(1)…
>
> We specifically overrule the legal proposition enunciated in *Findley* that evidence of other acts offered to prove a specific emotional propensity for sexual aberration is admissible and that, when offered, it outweighs prejudice. In so doing we ensure that the trial courts will always properly weigh the probative value of the evidence against the risk that the defendant will be unfairly prejudiced by its admission.[9]

Braunstein v. State, 118 Nev. 68, 74-75 (2002).[10]

The statute and caselaw both reflect a basic principle of black-letter evidence law. Evidence of prior bad acts is not admissible to prove propensity. The jury is supposed to consider whether a defendant committed the specific crime they are being charged with. The analysis is limited to that specific occasion, and cannot be extended to external factors.

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[9] The Court's reference to proper weighting was a reference to a *Petrocelli* hearing, which the lower court also failed to conduct in this case. *See* Section I, *supra*.

[10] *See also Bigpond v. State*, 128 Nev. 108, 114 (2012) ("NRS 48.045(2) provides that evidence of 'other crimes, wrongs or acts' is inadmissible to prove propensity but that it may be admissible 'for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'")

Bad acts evidence may be relevant to prove intent on a specific occasion, or motive on a specific occasion. But it inherently cannot be relevant to prove propensity on a specific occasion, because propensity is general rather than specific. Propensity evidence is an open invitation to the jury to make a decision based on whether they think "the defendant's a horrible person" or not. It runs counter to the fundamental principle of due process.

The lower court admitted bad acts evidence for the specific purpose of tending to show Kenneth's propensity to do bad things. The limiting instruction the court gave was incoherent – it told the jury not to consider Kenneth's character, but then a sentence later instructed them to do so. And the State further exacerbated this error by repeating the injunction to consider Kenneth's propensity.

Propensity evidence is not admissible to show propensity. This binding, black-letter principle was ignored by the lower court. This violated the statute, caselaw, and Kenneth's due process. It also encouraged the jury to make a verdict based on general impressions about Kenneth's character, instead of a consideration of the specific evidence in this specific case. This was clear error, and this Court should therefore reverse Kenneth's conviction on this ground.

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III. There Was Insufficient Evidence to Convict Kenneth.

The State's case against Kenneth was extremely thin. The evidence consisted of the testimony of two children, who contradicted each other and were unable to remember substantial facts about the alleged touching, including even basics such as when it happened. This evidence was also tainted by the improper admission of unsubstantiated bad acts evidence, and the court's improper order that the jury consider it for propensity purposes. This is legally insufficient to support Kenneth's conviction.

The legal standard for a sufficiency of the evidence claim is simple. "In reviewing the evidence supporting a jury's verdict, the question is not whether this Court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider. *Wilkins v. State*, 96 Nev. 367, 374 (1980).

A.F. and J.F. were unable to remember many details about the alleged touching. However, A.F. did testify that her pants were pulled down and Kenneth's hand touched her genitals. AA 54-58. J.F. also remembered seeing his sister's pants down. AA 182-83. During his police interrogation, Kenneth also stated that it was possible that A.F.'s pants had come down and that his hand had grazed her genitals. AA 310. Taking this testimony together, a reasonable jury

could have believed that Kenneth touched A.F.'s genitals beyond a reasonable doubt.

The evidence was uncontroverted that this touching happened while Kenneth was tickling A.F. Kenneth said so to the officer, and J.F. also said so in his testimony. AA 184, 310. J.F. also said that A.F. was laughing throughout, although she said she remained silent. AA 113, 184-85.

The question is thus one of intent. Assuming that touching did happen, what intent could a rational jury have ascribed to it on this evidence? Kenneth said that if any touching happened, it was an accident while the three were playing. This accidental theory is further strengthened by the fact that J.F. agreed that it happened while A.F. was being tickled.

By contrast, what evidence is there to support the theory that Kenneth intentionally touched her? There was no evidence to that effect, except for A.F.'s testimony that Kenneth had previously touched her. But as discussed above, this evidence was improperly admitted and should not have been considered by the jury. In any event, the intentional theory was undermined by the contradictions between A.F.'s testimony (that she was silently trying to get away, and that her pants and underpants came down all at once) and J.F.'s testimony (that his sister was laughing, and that Kenneth did not pull her garments down in one movement). Taken together, there was not enough evidence for a rational jury to find intent.

The other question is, did the alleged touching happen in June 2015 or not? The evidence showed that A.F. was only over at Kenneth's parents' house twice in June; on the 23rd and the 24th. The touching could not have happened on the 23rd, since A.F. was only over for a half hour and spent that entire time watching a video on the internet in the presence of Kenneth's brother M.F. AA 331, 333. M.F. unequivocally stated that there was no touching at this time. AA 335.

On the 24th, A.F. was under the watchful eye of her grandmother Maria almost the entire time she was at the house. There were only two exceptions. First, Maria took a shower for about twenty minutes, in the bathroom attached to the computer room where the touching allegedly happened. During this period, A.F., J.F., and Kenneth sat in the living room with Kenneth's father. AA 371. Second, Maria and the children were outside while she watered her garden; A.F. went inside for just "a little bit" to wash the mud off her new sneakers. AA 388-90.

A rational jury could not have believed that the touching happened during either of these periods. During the second period, A.F. would only have had enough time to go wash off her sneakers, not to go into the computer room and interact with Kenneth.[11] And during the first period, the children were out in the

[11] Assuming Kenneth even went inside with her, and assuming that his brother M.F. was at home but not in the computer room – neither of which is evidenced by the record.

living room with Maria's husband, not in the computer room.[12] The touching could not have happened on June 24th, and so it could not have happened in June at all; thus defeating an essential element of the State's case.

The jury could have rationally believed that a touching occurred. However, on this evidence it could not have rationally found beyond a reasonable doubt that the touching happened within the one-month period specified by the complaint. It also could not have rationally found that Kenneth intentionally touched A.F. without considering improperly admitted propensity evidence. It is therefore impossible that "the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider. *Wilkins*, 96 Nev. at 374. This was a violation of his state and federal due process rights, and therefore grounds for reversal.

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[12] This scenario also would have required Kenneth to (1) loiter in a room where his mother was about to step out of the shower and (2) deliberately commit a crime in that same room, risking almost certain discovery. Neither is remotely plausible.

CONCLUSION

The lower court erroneously admitted bad acts evidence, without considering its reliability under *Petrocelli*. The lower court aggravated this error by instructing the jury to consider that evidence for propensity purposes, in blatant violation of basic evidence law. This improper evidence led the jury to convict Kenneth Franks, when the State's case would otherwise have presented insufficient evidence to do so. Therefore, Kenneth respectfully asks this Court to reverse his conviction and direct acquittal, or provide any other remedy it believes appropriate.

Dated this 23rd day of October, 2017.

/s/ Jim Hoffman

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Jim Hoffman, Esq.
Nevada Bar No. 13896
Lisa A. Rasmussen, Esq.
Nevada Bar No. 7491
Law Office of Lisa Rasmussen
601 South Tenth Street, Suite 100
Las Vegas, NV 89101
Tel. (702) 471-1436
Fax. (702) 489-6619
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **Times New Roman 14**.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **4866** words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of October, 2017.

/s/ Jim Hoffman

_____

Jim Hoffman, Esq.
Nevada Bar No. 13896
Lisa A. Rasmussen, Esq.
Nevada Bar No. 7491
Law Office of Lisa Rasmussen
601 South Tenth Street, Suite 100
Las Vegas, NV 89101
Tel. (702) 471-1436
Fax. (702) 489-6619
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a copy of the foregoing Opening Brief to the following persons, via Electronic Filing, on the 23rd day of October, 2017. NB: The Appendix has been filed with this Court, attached to a Motion to Seal it. A copy of the Appendix will be delivered to the DA's office once this Court grants said Motion.

Steven S. Owens
Attorney for the Respondent

/s/ Jim Hoffman
Jim Hoffman, Esq.