IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH FRANKS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 72988

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction Following a Jury Trial and Verdict
Eighth Judicial District Court, Clark County

LISA A. RASMUSSEN, ESQ.
Nevada Bar #007491
JIM HOFFMAN
Nevada Bar #013896
Law Office of Lisa Rassmussen
601 S. 10th Street, Ste. 100
Las Vegas, Nevada 89101
(702) 471-1436

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH FRANKS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 72988

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction Following a Jury Trial and Verdict
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from a judgment of conviction based on a jury verdict that involves a conviction for an offense that is a Category A felony.

STATEMENT OF THE ISSUES

1. Whether Admission of Evidence Concerning Appellant's Prior Bad Acts Without a Hearing Does Not Constitute Plain Error.
2. Whether the District Court Did Not Wrongly Instruct the Jury to Consider Bad Acts Evidence for Propensity.
3. Whether there was Sufficient Evidence to Convict Appellant.

STATEMENT OF THE CASE

On September 22, 2015, Appellant Kenneth Franks (hereinafter "Appellant") was charged by way of Criminal Complaint with one count of Lewdness with a Child under the age of 14. 1 Appellant's Appendix (hereinafter "AA") 2. On December 17, 2015, Appellant unconditionally waived his right to a preliminary hearing, and on December 21, 2015, an Information was filed in District Court charging Appellant with Coercion: Sexually Motivated. Respondent's Appendix (hereinafter "RA") 1. On January 12, 2016, an Amended Information was filed charging Appellant with one count of Lewdness with a Child under the age of 14. RA 3. Appellant's jury trial began on November 28, 2016. On December 7, 2016, the jury returned a verdict of guilty for the above charge. 3 AA 530. Appellant was sentenced on March 29, 2017, to a period of ten (10) years to Life in the Nevada Department of Corrections, with a special sentence of lifetime supervision upon release, as well as required to register as a sex offender upon release. 3 AA 543. The Judgment of Conviction was filed on April 6, 2017. RA 5. On May 1, 2017, Appellant filed a Notice of Appeal, and on October 24, 2017, he filed his Opening Brief (hereinafter "AOB"). 3 AA 546.

STATEMENT OF THE FACTS

In 2015, when victim A.F. was eleven years old and in the sixth grade, she would visit her grandmother's house. 1 AA 50. At her grandmother's house lived

A.F.'s grandma, her grandmother's husband, and A.F.'s two uncles, M.F. and Appellant. 1 AA 47-48. Her brother, J.F., and her father would also go to the grandmother's house with A.F. 1 AA 52, 54. A.F. and J.F. would usually play games on their phone or handheld devices, often in the "game room" used by Appellant and Uncle M.F. 1 AA 52-53. In that room, sometimes while J.F. and Uncle M.F. were present, Appellant would pull down A.F.'s pants and use his fingers to rub her vaginal area. 1 AA 54-57. At trial, A.F. testified that Appellant inappropriately touched her five times, but provided the most specificity regarding the last time he touched her. 1 AA 118. A.F. testified that during the last instance, J.F. was on Appellant's back, and A.F. was grabbing onto the door to try and pull herself out of the room, but Appellant was holding her legs and pulling her. 1 AA 68-71. He pulled her pants down, and rubbed her vaginal area with his fingers. 1 AA 69, 57. J.F. also testified that while he was on Appellant's back, trying to help A.F., he saw Appellant pull down A.F.'s pants, and that he saw her bare buttocks. 1 AA 195, 182-83.

SUMMARY OF THE ARGUMENT

Appellant has failed to demonstrate that admitting evidence of his prior bad acts without a hearing constitutes plain error, that instructing the jury to consider his prior bad acts for propensity constitutes plain error, or that there was insufficient evidence to convict him.

First, although a hearing was not held prior to admitting Appellant's prior bad acts, the record is sufficient to indicate that the acts were permissible because they were relevant and were introduced for a non-propensity reason (along with a properly presented propensity argument); they were proved by clear and convincing evidence; and the risk of prejudice did not outweigh the probative value of admitting the acts. Moreover, the lack of a hearing is not grounds for reversal because even if the acts had not been admitted, Appellant would have been found guilty based on the other evidence presented.

Second, the jury was properly instructed to consider Appellant's prior bad acts for propensity. The Legislature recently amended NRS 48.045 to allow prior bad acts to be used to show propensity in sexual offense cases. This is indicated by the plain language of NRS 48.045(3) which states that *nothing* else in NRS 48.045 shall prevent the introduction of prior bad acts. The plain language indicates that this includes NRS 48.045(1) which prevents prior bad acts being used for propensity. Moreover, the legislative history shows that the Legislature was specifically asked to permit bad acts to be used for propensity, and was informed of this Court's ruling in Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002), before amending NRS 48.045.

Finally, there was sufficient evidence to convict Appellant. In order to determine Appellant's intent, not only did the jury properly consider that Appellant

touched A.F. multiple times, it also heard evidence that Appellant rubbed rather than grazed A.F.'s vaginal area, indicating that the touching was no mere accident. Moreover, the jury heard testimony regarding Appellant's inconsistent statements to police, including that he admitted to touching A.F.'s genitals. Regarding the timing of the touching, A.F.'s father testified that they went to his mother's house multiple times in June, 2015, and Appellant himself told police that he saw A.F. in early June. Thus, Appellant's claim that A.F. only went to her grandmother's house on June 23rd and 24th is belied by the record. Nonetheless, the jury could have found that Appellant touched A.F. on either June 23rd or 24th, given the time available to him.

For these reasons, the State respectfully asks that this Court order Appellant's Judgment of Conviction be AFFIRMED.

ARGUMENT

I.

ADMISSION OF THE EVIDENCE CONCERNING APPELLANT'S PRIOR BAD ACTS WITHOUT A HEARING DOES NOT CONSTITUTE PLAIN ERROR

At the outset, the State notes that Appellant did not raise an objection to the admission of his prior bad acts below, and therefore all but plain error is waived. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 578 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). This Court has consistently reaffirmed that "[t]he failure to specifically

object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n. 28, 138 P.3d 477, 486 n. 28 (2006) (quotation omitted). Moreover, appellate review requires that the district court be given a chance to rule on the legal and constitutional questions involved. Lizotte v. State, 102 Nev. 238, 239-40, 720 P.2d 1212, 1214 (1986). Where an appellant fails to preserve an issue on appeal, this Court reviews the issue for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Plain error review asks:

> To amount to plain error, the "error must be so unmistakable that it is apparent from a casual inspection of the record." Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524)). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 594 (2015).

Appellant argues that the District Court improperly admitted A.F.'s testimony regarding the number of times Appellant touched her because it did not hold a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). AOB 10. Generally, following a Petrocelli hearing, evidence of a defendant's prior bad acts

will be admissible where the district court determines that: "(1) the prior bad act is relevant to the crime charged and for a purpose other than 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." Bigpond v. State, 128 Nev. ___, 270 P.3d 1244, 1250 (2012). A district court's failure to conduct a Petrocelli hearing prior to the admission of bad acts testimony does not require reversal of a defendant's subsequent conviction if: "(1) the record is sufficient to determine that the evidence is admissible under [the modified standard set forth in Bigpond]; or (2) the result would have been the same if the trial court had not admitted the evidence." McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999). Either exception will prevent reversal of a conviction; here, both exceptions obtain.

A. BIGPOND STANDARDS

Prior to Bigpond, the first prong of the test for admissibility of bad acts did not include the language "and for a purpose other than proving the defendant's propensity." Bigpond, 128 Nev. at ___, 270 P.3d at 1249 (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). The Court in Bigpond interpreted NRS 48.045(2) and clarified that in order for evidence of prior bad acts to be admitted, there had to be a non-propensity purpose. Bigpond, 128. Nev. at ___, 270 P.3d at 1250. However, the Legislature has since amended NRS 48.045

and, as discussed infra, evidence of prior sexual offenses may be admitted to show propensity. Thus, the appropriate standard is the one found in Tinch, which simply requires the evidence to be relevant to the crime charged, which it is here. Nonetheless, as argued to the jury here, evidence of Appellant's prior lewdness with A.F. served not only to indicate his propensity to do so, but also to show his intent and absence of mistake. 3 AA 520-21. The evidence indicated that Appellant had a pattern of touching A.F.'s genitals when she was at her grandmother's house in the computer room. Because it happened more than once, it diminishes the possibility that it was somehow an accident, as Appellant claimed to the police. 2 AA 307-08. It also indicates that Appellant was aware of his actions and meant to touch A.F. This evidence was relevant to show that Appellant willfully committed this act, and that he did so with the intent to arouse, appeal to, or gratify his sexual desires.

Regarding prong two, Appellant cites to Meek v. State, 112 Nev. 1288, 930 P.2d 1104 (1996), to support his argument that since Appellant was not charged with the prior acts of lewdness with A.F. her testimony cannot be sufficient to provide clear and convincing evidence. AOB 12. However, Meek did not create a rule that prior bad acts must have been charged. Moreover, this Court has found that when a child victim testifies under oath as to prior instances of sexual abuse, the evidence satisfies the clear and convincing requirement. See Keeney v. State, 109 Nev. 220, 229, 850 P.2d 311, 317 (1993), overruled in part on other grounds Koerschner v.

State, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000) (holding that when a prior child victim could not remember the year the abuse occurred, but testified that the appellant rubbed her vagina with his "whole hand," and touched her vagina with "his part," the prior assault was proved by clear and convincing evidence). Indeed, this Court has ruled that a victim's testimony standing alone is enough to prove a crime beyond reasonable doubt, an even higher standard than clear and convincing. Mejia v. State, 122 Nev. 487, 493, 134 P.3d 722, 724 (2006). A.F.'s testimony alone could have been sufficient to convict Appellant of the prior instances of lewdness; the State's decision to not charge him with those crimes may have stemmed from a multitude of reasons and does not impact whether A.F.'s testimony showed the prior bad acts by clear and convincing evidence.

Finally, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. As noted by Appellant, the prior instances of lewdness were brought up only briefly, during A.F.'s testimony. AOB 13. At the beginning of her testimony, she stated that Appellant touched her more than once. 1 AA 55. She also referenced the "last time" that Appellant touched her when describing the time she tried to pull herself out of the room and her brother climbed on Appellant's back. 1 AA 68-69. Finally, she testified that Appellant touched her five times, one of which was over her clothing. 1 AA 118-19. The only questions relating to a specific instance other than the last instance were with regard to the time

Appellant touched A.F. over her clothing. 1 AA 120. This did not create such a danger of unfair prejudice as to substantially outweigh the probative value of the evidence. The prior bad acts involved the same victim, and the same conduct as what was charged. In fact, the only direct questioning on this point referred to an act which could be considered less severe, because Appellant touched A.F. over her clothing. Thus, the testimony regarding the prior bad acts was no more inflammatory than the evidence that was otherwise presented; there was no real danger that the jury might disbelieve the evidence of the charged offense but nevertheless convict because they were so outraged and inflamed by the uncharged offenses.

B. SAME RESULT

For the above reasons, reversal for lack of a Petrocelli hearing is not appropriate because A.F.'s testimony satisfies the Bigpond standards. Nonetheless, if this Court finds the Bigpond standards were not met, any error was harmless and Appellant would have been convicted even if the testimony were not elicited. Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error

is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001).

Here, A.F. testified in detail that, while tickling her on the ground, Appellant pulled down her pants and underwear to her knees and touched her bare genitals with his hand. 1 AA 68-71. J.F. corroborated this story, testifying that while Appellant was tickling A.F., Appellant pulled A.F.'s pants down to her knees and J.F. saw her bare buttocks. 1 AA 182-83. Moreover, A.F.'s mother testified that although A.F. received A's and B's prior to sixth grade, her grades went down in sixth grade and she became withdrawn; after the abuse was revealed and A.F. got counseling, her grades have since gone back up. 1 AA 146-47, 158. Similarly, A.F.'s father testified that although A.F. generally went straight to the game room when visiting her grandmother's house, he noticed that she began to stay in the living room instead. 1 AA 213. One time when A.F. wanted to stay in the living room, her father saw Appellant pull A.F. into the game room and, at the time, thought they were just roughhousing. 1 AA 214. Moreover, A.F.'s father once saw her crying while leaving her grandmother's house and she would not tell him why. 1 AA 213-14.

Taken as a whole, A.F.'s testimony of what Appellant did to her, which was supported by her brother's testimony, coupled with her change in behavior and habits, provided enough evidence for the jury to convict Appellant, even without considering the testimony regarding the prior lewd acts. Particularly since, under Mejia, A.F.'s testimony alone could have been used to convict Appellant, her testimony along with the other evidence allowed the jury to convict, even if it had not heard the testimony about the prior bad acts.

Because the Bigpond standards are satisfied, and because the result in this case would have been the same regardless of whether the prior bad acts testimony was provided, Appellant is not entitled to a reversal. This is particularly true when looked at through the lens of plain error; Appellant did not object below to the admission of this evidence, and the District Court did not have an opportunity to rule on it. Therefore, this Court must determine whether the error was readily apparent and if it impacted Appellant's substantial rights. Because the Bigpond test was satisfied, there was no error, particularly not error that was readily apparent. Moreover, assuming *arguendo* that there was error, it did not impact Appellant's substantial rights because the evidence was sufficient to convict him even absent the prior bad acts testimony. Thus, Appellant's conviction should be affirmed.

/ / /

/ / /

II.
THE DISTRICT COURT DID NOT WRONGLY INSTRUCT THE JURY TO CONSIDER BAD ACTS EVIDENCE FOR PROPENSITY.

Again, the State begins by noting that Appellant did not raise an objection below to the introduction of bad act evidence for propensity, and therefore all but plain error is waived. Dermody, 113 Nev. at 210-11, 931 P.2d at 1357; Guy, 108 Nev. at 780, 839 P.2d at 578; Davis, 107 Nev. at 606, 817 P.2d at 1173. Indeed, Appellant specifically had no objection to the jury instructions as given. 2 AA 467. Therefore, Appellant is only entitled to reversal "if the error is readily apparent and [he] demonstrates that the error was prejudicial to his substantial rights." Martinorellan, 131 Nev. __, __, 343 P.3d at 594.

NRS 48.045, as amended and effective as of October 1, 2015[1], provides:

> 1. Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion
> . . .
> *3. Nothing 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. As used in this subsection, "sexual offense" has the meaning ascribed to it in NRS 179D.097.*

[1] The addition of subsection (3) to NRS 48.045 applies to "a court proceeding that is commenced on or after October 1, 2015." A.B. 49, 2015 Leg., 78th Sess. §27 (2015). The Information in this case was filed on December 21, 2015. Thus, the District Court proceeding commenced after October 1, 2015, and this evidentiary provision applies here.

NRS 48.045 (emphasis added).

Further, NRS 179D.097 defines "sexual offense" as follows:

> 1. "Sexual offense" means any of the following offenses:
> …
> (b) Sexual assault pursuant to NRS 200.366.
> …
> (j) Open or gross lewdness pursuant to NRS 201.210.
> …
> (l) Lewdness with a child pursuant to NRS 201.230.
> …
> (p) Any other offense that has an element involving a sexual act or sexual conduct with another.
> …
> (r) An offense that is determined to be sexually motivated pursuant to NRS 175.547 or 207.193.
> (s) An offense committed in another jurisdiction that, if committed in this State, would be an offense listed in this subsection. . . .

The recent amendments to NRS 48.045 are similar to statutes drafted in a number of other states including: Cal. Evid. Code Sec. 1108; Ariz. R. Evid. 404; Alaska R. Evid. 404; Fla. Stat. Sec. 90.404; Official Code of Georgia Sec. 24-4-413; Illinois Compiled Statutes Sec. 5/115-7.3; Louisiana Statutes, Art. 412.2; and Utah Rule of Evidence 404; Kansas Statutes, Sec. 21.5502. As currently amended, NRS 48.045 is almost identical to amendments made to the California Evidence Code in the mid 1990s and subsequently upheld by the California Courts. Indeed, the Nevada Legislature was made aware of these similarities before voting to amend NRS 48.045. A.B. 49 Before the S. Comm. on Judiciary, 2015 Leg., 78th Sess. p.9

(May 8, 2015) (statement of Lisa Luzaich, Chief Deputy District Atty., Clark County). Additionally, the reasoning of the Nevada Legislature in enacting such amendments was similar to the reasoning of the California legislature.

California Evidence Code, section 1108 was added effective January 1, 1996. The statute has since been determined to be valid and constitutional. See People v. Fitch, 55 Cal. App. 4th 172, 177-86 (1997). Specifically, the California Supreme Court, in upholding section 1108, emphasized the legislative history behind section 1108: "the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." People v. Falsetta 21 Cal. 4th 903, 915 (1999). Indeed, the Court explained that the "'Legislature has determined the need for this evidence is 'critical' given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.'" Id. at 911 (citation omitted). Similarly, before amending NRS 48.045, the Nevada Legislature heard testimony that "[sex crimes] are secret offenses….[which] are committed behind closed doors with no witnesses."

A.B. 49 Before the S. Comm. on Judiciary, 2015 Leg., 78th Sess. p.7 (May 8, 2015) (statement of Lisa Luzaich, Chief Deputy District Atty., Clark County).

It is noted that, similar to the effect of the subject amendment on NRS 48.045, California's Section 1108 explicitly supersedes Evidence Code section 1101's prohibition of evidence of character or disposition. See People v. Soto, 64 Cal. App. 4th 966, 984 (1998). The purpose of Section 1108 is to permit trial courts to admit prior sexual assault evidence on a common sense basis, without a precondition of finding a "non-character" purpose for which it is relevant, so that juries are able to rationally assess such evidence. Id. at 983-84. This rational assessment "includes consideration of other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused." Id. at 984 (citation omitted). Evidence of prior sexual conduct is highly probative and is admissible as propensity evidence. As has been indicated in the analogous federal rules, the "presumption is in favor of admission." Id. at 989 (quoting United States v. Sumner, 119 F. 3d 658, 662 (8th Cir. 1997)). The California Supreme Court further held that Section 1108 "implicitly abrogates prior decision of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense." People v. Villatoro, 281 P.3d 390 (Cal. 2012); see also Falsetta, 21 Cal.4th at 911.

Likewise, before the Nevada Legislature voted to amend NRS 48.045, it was specifically asked to amend the statute to allow propensity evidence in sexual offense cases:

> Several states legislate in sexual offenses for propensity. In this situation, it is extremely powerful evidence, *and that is what we are asking this body to do.*

A.B. 49 Before the Assemb. Comm. on Judiciary, 2015 Leg., 78th Sess. p.29 (Feb. 13, 2015) (statement of Lisa Luzaich, Chief Deputy District Atty., Clark County) (emphasis added). Moreover, the Legislature was aware of the impacts of amending NRS 48.045, and the case law in place at the time. Amy Coffee from the Nevada Attorneys for Criminal Justice testified:

> …the bill says nothing that shall be construed to prohibit the admission of prior bad act evidence. Judges and district attorneys will interpret this language to mean that all prior bad acts come in as evidence…. The Nevada Supreme Court ruled on this issue in Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002). The Court took a serious review of this sex offense case and determined that a weighing of prior bad acts should be conducted to determine admissibility. The Committee should proceed with caution when rolling back the law.

A.B. 49 Before the S. Comm. on Judiciary, 2015 Leg., 78th Sess. p.21 (May 8, 2015) (statement of Amy Coffee, NV Attys. for Crim. Justice). Thus, in spite of being aware of this Court's ruling in Braunstein, the Legislature made the decision to amend NRS 48.045 to allow propensity evidence to be used in sexual offenses.

The admission of such evidence is, of course, subject to other provisions of the rules of evidence including NRS 48.025 which provides that "[a]ll relevant evidence is admissible . . .," and NRS 48.035 which provides in relevant part:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

Pursuant to NRS 48.045 and NRS 48.035, similar to Cal. Evid. Code Section 1108, as long as the current offenses and the prior offenses are ones defined as qualifying "sexual offenses," the prior offenses are admissible unless the trial court finds them to be inadmissible pursuant to NRS 48.035. See People v. Branch, 91 Cal. App. 4th 274, 281 (2001).

Here, Appellant was charged with Lewdness with a Child Under the Age of 14 pursuant to NRS 201.230. Additionally, A.F. testified that Appellant committed other similar acts, which would be considered sexual offenses as delineated by NRS 179.097. As such, pursuant to NRS 48.045(3), evidence of prior sexual offenses committed by Appellant upon A.F. were admissible as evidence of Appellant's sexual propensity for the purpose of proving that Appellant acted in conformity with such propensity in committing the sexual act upon A.F. in the subject case.

The admission of the evidence did not confuse or mislead the jury. When A.F. testified, it was clear that she could not remember the dates of the previous lewd acts. Because there was such an emphasis on the timeframe in this case, the jury

was well aware that it had to find that Appellant committed the charged offense in June 2015. Since there was absolutely no testimony regarding when the prior offenses took place, the jury would not have confused the prior offenses with the charged offense from June of 2015. Moreover, this was made clear by Jury Instruction 14, which stated that "[e]vidence that the defendant committed offenses on a date other than that for which he is on trial, if believed…may be considered by you only for the limited purpose of proving the defendant's motive, intent and propensity." 3 AA 549. Thus, the jury would not be confused or misled into thinking Appellant could be convicted based on the prior acts; rather, they were instructed to use the prior bad acts only for purposes permitted by NRS 48.045. Moreover, the evidence of other bad acts was more probative than prejudicial. The uncharged offenses were less inflammatory than the charged one; A.F. only discussed one previous instance in detail, and that instance involved Appellant touching A.F. over her clothing as opposed to pulling her pants and underwear down. Thus, the testimony regarding the prior bad acts was no more inciting than the evidence presented to support the charged offense. On the other hand, the probative value of proving Appellant's motive and intent was great. Evidence that Appellant deliberately touched A.F., and did so with the intent to arouse, appeal to, or gratify his sexual desires was highly probative.

Because the evidence was relevant, was not likely to confuse or mislead the jury, and was more probative than prejudicial, it was properly admitted and Appellant's Judgment of Conviction should be affirmed.

III.
THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT

The standard of review for sufficiency of the evidence is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 1280, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d

571, 573 (1992)); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (Court held it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court), cert. denied, 429 U.S. 895, 97 S. Ct. 257 (1976). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed) (overruled on other grounds). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319-20, 99 S. Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S. Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S. Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, this Court has

consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)).

Here, Appellant argues that the evidence was insufficient to convict him because the State did not prove intent nor that the act occurred in June of 2015. AOB 19-20. Regarding intent, as discussed supra, evidence that Appellant previously touched A.F.'s genitals was properly admitted and considered by the jury to determine his intent in touching her. However, even absent that evidence, a rational jury could find that there was no legitimate reason for Appellant to surreptitiously touch the genitals of A.F. and to disbelieve his claim of accidental touching. To the jury, Appellant reminded them that the State must prove intent, but never specifically argued that he did not have the requisite intent. Therefore, the only evidence regarding Appellant's claim of accidental touching came from his statement to police, which Detective Hoyt discussed. In that statement, Appellant initially informed police that he never pulled down A.F's pants. 2 AA 304. He later told police that perhaps her pants fell down, and because his hands were cold he did not feel her pants go down. 2 AA 307-08. After 40-50 minutes, he admitted to police that he did indeed pull down her pants and "graze" her vaginal area. 2 AA 305. Given the inconsistencies in his statement, as well as his admission that he touched A.F.'s genitals, a reasonable jury very well could have found that Appellant had the

requisite intent. Further, A.F. testified that when Appellant touched her his fingers were "rubbing," indicating that this was no mere accidental grazing. 1 AA 57.

Regarding the timing of this act of lewdness, Appellant argued at trial, and argues again here, that A.F. only went to her grandmother's house on June 23rd and 24th, and there was no opportunity for Appellant to touch her on either of those dates. AOB 20. However, Appellant fails to acknowledge that A.F.'s father testified that they went to his mother's house "several times" in June, 2015, clarifying that they likely went two or three times. 1 AA 205. Moreover, Appellant himself told police that the last time he saw A.F. was in *early* June. 2 AA 304 (emphasis added).

Furthermore, assuming *arguendo*, that A.F. truly did only go her grandmother's house on the 23rd and 24th, Appellant still could have touched her on one of those dates. Appellant's brother, M.F., testified that on June 23rd he saw Appellant show A.F. and J.F. a video on the computer, and then A.F. and her brother left the house. 2 AA 333-34. Appellant relies on that testimony to argue that he could not have possibly touched A.F. on that date. However, it is in the jury's province to judge the credibility of witnesses. A rational jury could have found it unreasonable to believe that M.F. recalled in perfect detail what his brother did a year before trial, or something about M.F.'s demeanor on the stand could have caused them to disbelieve him.

Additionally, the abuse also could have happened on June 24th. Appellant's mother testified that after the children arrived at her house, they stayed with her husband while she took a shower in the bathroom attached to the game room and that she did not see Appellant in that room. 2 AA 371-72. Appellant argues that it would have been foolhardy to commit a crime in the bedroom while his mother was in the attached bathroom and thus such is not plausible. AOB 21. While the State does not disagree that such an action would be foolish, the State also recognizes that people often make poor decisions when committing crimes.

The evidence presented at trial supports that A.F. was at her grandmother's house in June, 2015, on more days than the 23rd and 24th. Although Appellant's witnesses disputed that, the jury could have found A.F., her father, or Appellant's own statement to be more convincing. Moreover, even if the jury believed A.F. was only at her grandmother's house on those two days, the evidence indicated that Appellant had time to touch A.F. on either day. It is the jury's duty to assess the weight of the evidence and determine the credibility of the witnesses, and it properly did so here.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 22nd day of December, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
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 proportionately spaced, has a typeface of 14 points of more, contains 5,808 words and 24 pages.
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 22nd day of December, 2017.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 22nd day of December, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

LISA A. RASMUSSEN, ESQ.
JIM HOFFMAN, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

JEV/Ann Dunn/jg