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

KENNETH FRANKS
Appellant,

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Elizabeth A. Brown
Clerk of Supreme Court

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 REPLY BRIEF

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ARGUMENT

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

As discussed previously, during Kenneth's trial the lower court ignored the *Petrocelli/Bigpond* line of precedent and failed to hold a hearing about whether to admit testimony that Kenneth had previously touched A.F. This was error and should be reversed. Appellant's Opening Brief ("AOB") 10-14, *citing Petrocelli v. State*, 101 Nev. 146 (1985); *Bigpond v. State*¸128 Nev. 108 (2012).

In its Response, the State argues that even though the lower court failed to hold a hearing, this Court should nevertheless uphold the conviction because the evidence would have been admitted if the lower court actually had followed precedent. The State argues that the testimony was admissible under the second prong of *Bigpond* because it was proven by clear and convincing evidence.[1] Respondent's Answering Brief ("Response") 8-9. However, this argument does not hold water and does not excuse the lower court's decision to ignore binding caselaw.

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[1] The State makes two other arguments in this section of its response. The State argues that the evidence would have been admissible under the first prong of *Bigpond*, asserting that character evidence may be admitted for character after the amendment of NRS 48.045. Response 7-8. This argument is addressed in Section II *infra*. The State also argues that even without the contested testimony, Kenneth would still have been convicted and so the lower court's error is not grounds for reversal. Response 10-12. This argument is addressed in Section III *infra*.

The State's argument is primarily based on a strawman. The State asserts that Kenneth is arguing for a per se "rule that prior bad acts must have been charged." The State then proceeds to knock down this strawman by citing to cases in which bad acts evidence was admitted without any charges, and solely on the word of the complainant. Response 8-9.

This is disingenuous. Kenneth has never argued for such a rule. Indeed, the AOB explicitly quoted this Court's opinion that "clear and convincing evidence can be provided by a victim's testimony alone[.]" AOB 12, *quoting Meek v. State,* 112 Nev. 1288, 1295 (1996). But the *Meek* Court was clear that this is not always true. Inconsistent testimony carries less weight and is less likely to satisfy the standard. A.F.'s testimony was full of holes and contradictions, just as the *Meek* testimony was; therefore, it should not have been admitted and this Court should reverse, just as it did in *Meek*.[2]

Meek also reflects the common sense view that if the evidence is not strong enough to support independent charges, it probably is not strong enough to admit in an unrelated trial. This view is further supported by the Court's statement in

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[2] Conversely, the State's Response cites to *Keeney v. State* as a case where the Court did find testimony admissible. Response 8-9, *citing* 109 Nev. 220 (2000). But that case involved more detailed testimony about the prior bad act, which was partially corroborated by the defendant himself. Tellingly, the prosecutors had also charged the defendant with the prior bad act. 109 Nev. at 223. *Keeney* ultimately stands for the same proposition as *Meek*: that courts should admit evidence which can be proven to a clear and convincing standard, and reject evidence which cannot.

Kimberly v. State: "The mere fact that the grand jury did not consider [the complainant's] testimony sufficiently trustworthy to support a true bill is a sufficient reason to disqualify the testimony under the clear and convincing evidence standard." 104 Nev. 334, 338 (1988).

It is telling that the State merely asserts that there are lots of other reasons the prosecutors could have declined further charges in this case. The State conspicuously does not say what those reasons are, or provide any facts to support alternative judgments. The simplest explanation is the one apparent from the record: there were not enough details to indicate that the other touchings actually happened. The prosecutors were not confident enough to even bring those charges, which certainly means that the court could not have legitimately found them to be true. The testimony would not have been admitted in an actual *Petrocelli/Bigpond* hearing, and therefore this Court should not excuse the lower court's error.

The lower court failed to conduct a hearing on the bad acts evidence, and so violated this Court's precedent. If such a hearing had been conducted, it would have resulted in the exclusion of the evidence. Since the evidence in this case was otherwise so scant, the invalid evidence tipped the balance and led to Kenneth's improper conviction. This is plain error, and therefore this Court should reverse.

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

At the end of the trial, the district court instructed the jury to consider whether A.F.'s testimony proved that Kenneth had a "propensity" to commit crimes and allowed the State to stress that concept during its closing argument. As discussed in the AOB, these were plain errors which necessitate reversal. AOB 14-17.

In its Response, the State argues that NRS 48.045 should be interpreted to allow the admission of the contested testimony to prove Kenneth had a propensity to commit crimes. The State bases this argument on California law, as well as statements from the legislative history of the Nevada law. Response 13-20. However, these arguments are unavailing, as shown by an examination of the actual text of the statute.

The text of NRS 48.045 is clear. "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, except" for impeachment or when brought into evidence by the accused. NRS 48.045(1). It can also come in for a short enumerated list of reasons, such as intent, motive, and the like. However, courts are barred from admitting evidence "to prove the character of a person in order to show that the person acted in conformity therewith." NRS

48.045(2). Propensity evidence admitted to show propensity is so disfavored, the statute literally bans it twice.

The State argues that section 3 of the statute somehow allows propensity evidence in. However, this is not supported by the text. The law reads, "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." NRS 48.045(3). The section says that the rest of the statute cannot stop character evidence from being admitted. But it says absolutely nothing about what purposes that evidence may be used for. Those purposes listed in sections 1 and 2 are still clear, controlling law.

"If a statute is clear on its face a court cannot go beyond the language of the statute in determining the legislature's intent." *Thompson v. First Judicial District Court*, 100 Nev. 352, 354 (1984). The clear, facial text of section 3 does not say anything about suddenly allowing propensity evidence to be admitted for propensity. The plain text of the section says that propensity evidence cannot be barred, but it changes nothing about the limits on evidence once it is admitted. The passage of section 3 did not repeal sections 1 and 2.

In the instant case, Kenneth has never disputed that A.F.'s testimony was admissible under 48.045. It clearly goes to both intent and motive. The evidence

was properly admissible, and thus, section 3 of the statute is satisfied.[3] But the lower court admitted the evidence for a third, improper purpose to show Kenneth's propensity. This is specifically barred by the plain text of sections 1 and 2 (not to mention the caselaw discussed in the AOB). This was a clear violation of all three sections of the statute. This Court must not accept the State's invitation to ignore binding statutory text and hold the evidence admissible.

The State's arguments for a contrary interpretation of the statute are weak. First, the State points to two statements from hearings on the bill which would eventually become section 3. In one of the statements, a district attorney asserts that the bill would allow propensity evidence to come in. In the other statement, a public defender asserts that the bill could be interpreted to allow propensity evidence to come in. Response 17.

This is extremely weak evidence of the Legislature's intent, since neither of the statements came from actual legislators. As this Court has previously noted, "testimony before a committee is of little value in ascertaining legislative intent, at least where the committee fails to prepare and distribute a report incorporating the substance of the testimony." *Robert E. v. Reno Justice Court*, 99 Nev. 443, 446 (1983). Even if the speakers were giving their disinterested view of the bill

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[3] Although the evidence was properly admissible under the statute to show intent or motive, it was still not properly admitted, since the trial court failed to follow the proper procedure as laid out in *Bigpond*. *See* Section I *supra*.

(instead of attempting to "spin" it for their own purposes), that is clearly not probative of what the Legislature thought or how this Court should read the law. Instead, this Court should follow the clear text which the Legislature actually passed.

The State also argues that California has a similar statute, and that the courts there have read it to allow the introduction of character evidence for propensity. Response 14-16. However, Nevada is not California; the California interpretation of a statute is not binding on this Court.

Even if other states' caselaw were a useful guide to our statute, however, the State's interpretation would still not prevail. A number of other courts have considered analogous statutes and refused to admit character evidence for propensity.

"The policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds. A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. This concept is fundamental to American jurisprudence." *State v. Cox*, 787 N.W.2d 751 (Iowa 2010) (prohibiting admission for propensity under Iowa statute) (internal quotations and citations omitted); *see also State v. Ellison*, 239 S.W.3d 603 (Mo. 2007) (later overruled due to constitutional amendment); *State v. Gresham*, 269

P.3d 207 (Wash. 2012). This Court is not bound by authority from other states, but in persuasive terms California does not provide the only relevant example.

Finally, both the legislative history and the California cases the State cites share something in common. In all cases, the proponents of propensity evidence stressed that judges would still have the obligation to weigh evidence and decide whether it should be allowed in. However, in Kenneth's case the judge manifestly failed to perform this task. *See* Section I *supra*. Even if this Court finds that the evidence could have been admitted for propensity, the lower court failed to follow the proper procedure for doing so. Even under the State's reading of the statute, this evidence was still improperly allowed in.

As detailed at Section III *infra*, there was very thin evidence of Kenneth's guilt. The only way the jury was able to convict him was by focusing on the prejudicial, uncorroborated evidence that he touched A.F. on other occasions. The lower court's instruction not only allowed this focus, it invited it by specifically ordering the jury to decide whether Kenneth had a propensity to commit crimes. But as the Iowa Supreme Court said, "a defendant must be tried for what he did, not who he is." The lower court violated this fundamental precept when it violated NRS 48.045. This was plain error, and so this Court should reverse the conviction.

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III. There Was Insufficient Evidence to Convict Kenneth.

As discussed in the AOB, there was not a sufficient amount of evidence for a rational jury to convict Kenneth. Although the jury could validly have found that a touching occurred, the testimony could not rationally support a finding that Kenneth intended to touch A.F. beyond a reasonable doubt, nor that the touching actually occurred in the charged time frame. AOB 18-21. Although the State attempts to dispute this point, its arguments are unavailing.

First, the State argues that because A.F. described Kenneth's touching as "rubbing," this is conclusive proof of intent. The State also points to the "inconsistencies" in Kenneth's statement to the police as evidence of his intent. Response 22-23. However, neither of these pieces of evidence can support conviction beyond a reasonable doubt.

The record is clear that Kenneth steadfastly maintained that he never intentionally touched A.F. in a sexual manner. At the beginning of his interview, he stated that he never touched her genitals at all. Then, after hearing of A.F.'s statement, he admitted that he might have accidentally done so. To be sure, this is an inconsistency. A rational jury could have taken this inconsistency against Kenneth, and found that he did indeed touch A.F. (as the AOB acknowledges). But there was never any inconsistency about his intent: from start to finish,

Kenneth was clear that he never intentionally touched A.F. in the charged manner. There was no inconsistency on this issue to hold against Kenneth.

Additionally, J.F. testified that the touching occurred while Kenneth was tickling A.F. and she was laughing, which corroborated the statement Kenneth gave to the police. Tickling frequently involves rubbing motions. A.F.'s recollection that Kenneth "rubbed" her is totally consistent with an accidental touching - it is not enough to establish malign intent beyond a reasonable doubt. Taken in context of the contradictions in A.F.'s testimony and the paucity of other admissible evidence, this is not sufficient for any rational jury to convict beyond a reasonable doubt.

Second, the State argues that the jury could rationally have found that touching happened in June 2015 beyond a reasonable doubt. The State points to the testimony of A.F.'s father Amor, who said that they went over to Kenneth's house "two or three times" that month, as well as the statement given by Kenneth where he last remembered seeing A.F. in "early" June. The State also asserts that the jury could have concluded that M.F.'s memory was too good (and thus disbelieved his testimony that there was no touching on June 23rd). And the State asserts that since "people often make poor decisions while committing crimes," it somehow follows that Kenneth was committing a crime in a room where his

mother was about to step out of the shower. Response 23-24. This argument is similarly unpersuasive.

To begin, the testimony of A.F.'s father (they went over to Kenneth's house "two or three times" in June 2015) is completely consistent with the defense's argument that the touching could only have happened on June 23 or June 24. Those were the only two dates where anyone testified to any interaction between Kenneth and A.F. While Kenneth did make a passing statement to the police about "early June," there are no details in the record to substantiate that this actually happened. A.F. did not remember it, her brother did not remember it, Amor did not remember it – and these were all the State's witnesses. This passing reference was likely a misremembering on Kenneth's part, and in any event is not enough for a rational jury to rely on. Thus, only two dates were in question.

Next, the State asserts that "it is in the province of the jury to judge the credibility of witnesses" and so the jury could have rationally found M.F. incredible. But the State identifies no reason to doubt the credibility of M.F. except for his so-called "perfect detail" about what Kenneth was doing that day. And this is a misstatement of the record – M.F. simply testified that Kenneth was showing A.F. a video about video games. He did not specifically say what game the video was about, or what A.F.'s reaction was, or the contents of their conversation, or what Kenneth was doing for the other 23 and a half hours that day.

He simply stated that Kenneth showed her a video which lasted around a half hour. This is hardly "perfect detail" which would cause a rational jury to discount his credibility. The State is simply grasping at straws.

Last, the State asserts that "people often make poor decisions while committing crimes" and so it follows that Kenneth had no problem committing a crime in the computer room while his mother was taking a shower in the attached bathroom. But this is circular logic. The State assumes that Kenneth was actually committing a crime, and then appeals to that assumption as a reason to believe he was foolish enough to commit that crime. This is not a rational basis for a conviction.[4]

Third and finally, the State points to additional testimony as a reason to find sufficient evidence for a conviction. However, none of this testimony is sufficient to support a conviction beyond a reasonable doubt, or for that matter to excuse the lack of a *Petrocelli/Bigpond* hearing on A.F.'s bad acts testimony.[5]

In this vein, the State points to testimony from A.F.'s mother that A.F.'s grades suffered during sixth grade, the year the crime was allegedly committed. Response 11. However, A.F. herself testified that her grades suffered because she was bored by school and more interested in video games. AA 97-98. This is not

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[4] The State does not even mention the other assumption of their argument: that a teenage boy would loiter in a room where his naked mother would soon step out of the shower. Simple common sense shows this to be a staggeringly bad assumption.

[5] *See* Section I *supra*; Response 10-12.

any sort of inculpatory evidence against Kenneth. If anything, this testimony cuts in Kenneth's favor, since it shows that A.F. had a positive association with video games, an activity which she shared with Kenneth. A.F.'s low grades are not a rational basis for a conviction.

The State also mentions testimony from A.F.'s father, noticing that at some point she began to stay in the living room on visits to Kenneth's house, instead of going back to the computer room. Response 11. However, this testimony is undermined by the testimony of A.F.'s grandmother, who stated that Amor would sometimes act controllingly toward his children and make them stay in the living room. AA 395. In addition, M.F.'s testimony shows that A.F. would still go back to the computer room sometimes (as she did on June 23rd). Amor's testimony on this point is substantially undermined by other witnesses, which renders it incapable of supporting a conviction beyond a reasonable doubt.

Additionally, the State references one time when Amor saw Kenneth pull A.F. back into the computer room, which Amor believed was just roughhousing but now thinks may have been sinister. The State also mentions a time when Amor saw A.F. crying but did not know why. Response 11. But neither of these is substantial enough to prove anything. Adolescent girls sometimes cry for reasons which are opaque to their parents – this is not proof that a crime has been committed. And Kenneth and J.F. both stated that Kenneth frequently tickled and

roughhoused with A.F. in non-criminal circumstances. Given Amor's lack of knowledge (and A.F.'s lack of testimony about the negative nature of these occasions), these points are not enough to support conviction by a rational jury considering the evidence which it has a right to consider.

As established in the AOB and this Reply, the record does not contain sufficient evidence to support a conviction. The State's evidence to the contrary is weak and contradicted by other evidence. Overall, a rational jury could not have believed Kenneth to be guilty beyond a reasonable doubt. This problem was only compounded by the improper admission of unvetted propensity evidence which the jury did not have the right to consider, further leading them to convict on insufficient evidence. This is a violation of Kenneth's rights, and so this Court should reverse his conviction.

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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 19th day of January, 2018.

/s/ Jim Hoffman

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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**.

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[X] Proportionately spaced, has a typeface of 14 points or more, and contains **3434** 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 19th day of January, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a copy of the foregoing Reply Brief to the following persons, via Electronic Filing, on the 19th day of January, 2018.

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/s/ Jim Hoffman
Jim Hoffman, Esq.