

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTONIO JOSE RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86891-COA

FILED

JAN 19 2024

ORDER OF AFFIRMANCE BY 
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

Antonio Jose Rodriguez appeals from a judgment of conviction, pursuant to a jury verdict, of one count of open and gross lewdness. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

In January 2022, Rodriguez moved into the apartment next door to Jordyn Johnson.¹ Their apartments shared an entrance balcony that was visible from the public street below. One evening, Rodriguez initiated a conversation with Johnson on their shared balcony and asked Johnson if she lived alone. Johnson testified that during this conversation, Rodriguez was “looking [her] up and down” and she felt “uncomfortable.” Later that evening, Rodriguez knocked on Johnson’s door and asked her if she smoked marijuana; Johnson responded that she did not and that she could not talk because she had work early the following day.

The next morning, at 3:00 a.m., Rodriguez knocked on Johnson’s door again, but she did not answer. At 5:00 a.m., Johnson used her phone to check a security camera outside her apartment door and saw Rodriguez again standing at her front door. When Johnson returned home from work around 4:00 p.m., Rodriguez approached her and tried to start a conversation, but Johnson hastily entered her apartment. About thirty minutes later, Johnson’s phone received a motion-activated notification from her security

¹We recount the facts only as necessary for our disposition.

camera. The live video depicted Rodriguez standing in front of her door “with his pants below his knees, underwear down, genitalia and penis fully exposed . . . playing with it in his hand.” Occasionally, Rodriguez shifted his gaze from Johnson’s door to the public street below.

Johnson immediately called 9-1-1. She told the dispatcher that she was terrified because Rodriguez had not “left her alone in two days” and then recounted her prior interactions with him. Sparks Police Department Officer Robert Canterbury responded to the 9-1-1 call. When Officer Canterbury arrived, Johnson showed him the surveillance video of Rodriguez, which was saved and stored on Johnson’s phone. Rodriguez was subsequently arrested and charged with one count of open or gross lewdness, a gross misdemeanor.

The matter proceeded to a jury trial. Just before opening statements, Rodriguez preemptively objected to the State introducing any evidence of his interactions with Johnson that occurred before the lewdness incident because he contended that those interactions constituted other bad act evidence. Rodriguez also objected to the admission of Johnson’s 9-1-1 call because it contained her statements about the prior interactions. Rodriguez claimed that the interactions had no apparent relevance and did not demonstrate that “he did anything that was inappropriate.” The State responded that the prior interactions were not bad act evidence, but that even if they were, the evidence was admissible for the non-propensity purpose of establishing sexual motivation, an element of open and gross lewdness.

The district court overruled Rodriguez’s objection after reviewing the 9-1-1 call and security camera video. The court concluded that Johnson’s interactions with Rodriguez prior to the lewdness incident were not bad acts under NRS 48.045(2) and were both relevant and offered for the non-

propensity purpose of establishing motive. Further, it concluded that the probative value was not substantially outweighed by the danger of unfair prejudice. The district court also found, in the alternative, that the evidence was admissible as *res gestae* evidence under NRS 48.035(3).

At trial, Johnson testified about her interactions with Rodriguez before the lewdness incident, and the security camera video was admitted during her testimony without objection. The 9-1-1 call was also admitted, with the district court noting Rodriguez's previous objection. The jury found Rodriguez guilty of open or gross lewdness and sentenced him to 120 days in jail with 84 days credit for time served.

On appeal, Rodriguez challenges the admission of his interactions with Johnson prior to the lewdness incident. He contends that the district court improperly applied the *res gestae* doctrine and failed to conduct the proper analysis for the admission of other bad acts under NRS 48.045(2).

The district court's decision to admit evidence, including other bad act evidence, is reviewed for an abuse of discretion. *Chaparro v. State*, 137 Nev. 665, 669, 497 P.3d 1187, 1192 (2021). Evidence of a defendant's "other crimes, wrongs or acts" is inadmissible to establish the defendant's criminal propensity, but such evidence may be admitted if offered for a non-propensity purpose, including proof of motive, plan, intent, or the absence of a mistake or accident. NRS 48.045(2). To admit other bad act evidence for a non-propensity purpose, the State must establish "(1) the incident is relevant to the crime charged; (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." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *holding modified by Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012); *see also Petrocelli v. State*, 101 Nev. 46, 692 P.2d

503 (1985) (recognizing a hearing to determine the admissibility of other bad acts must be held outside of the jury's presence), *superseded on other grounds by statute as recognized in Alfaro v. State*, 139 Nev., Adv. Op 24, 534 P.3d 138, 149 (2023). Conduct is considered a "bad act" for purposes of NRS 48.045(2) when the evidence implicates prior misconduct on the defendant's part or collateral offenses for which they could have been charged. *Salgado v. State*, 114 Nev. 1039, 1042, 968 P.2d 324, 326 (1998); *Ayala v. State*, No. 69877, 2017 WL 1944321, *3 (Nev. May 9, 2017) (Order of Affirmance) (concluding that a witness' testimony about the defendant previously firing a handgun was not a bad act because it did not "implicate [the defendant] in a crime or other bad act or provide inadmissible character evidence").

In this case, the interactions between Rodriguez and Johnson did not implicate misconduct or collateral offenses for which Rodriguez could have been charged. *See Salgado*, 114 Nev. at 1042, 968 P.2d at 326.² As Rodriguez himself argued to the district court, Johnson's statements did not show that he did anything "inappropriate" during their interactions. Further, the evidence was not offered to prove that Rodriguez had a propensity to commit the crime charged. Therefore, the district court did not abuse its discretion when it found that these interactions were not other bad acts for purposes of NRS 48.045(2).³


²To the extent that Rodriguez's question to Johnson about her marijuana use could possibly have been considered a prior bad act, Rodriguez conceded the admissibility of this statement below, and therefore any such argument is waived. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (distinguishing waiver, which occurs where a defendant intentionally relinquishes a known right, from forfeiture, the failure to timely assert a right).


³Because the parties' interactions do not constitute other bad acts, we need not decide whether the district court correctly applied the *res gestae*


Because the parties' interactions did not constitute other bad act evidence, the district court was not required to evaluate the admissibility of such evidence under *Tinch's* three-part test. *Id.* Rather, the proper approach on review is whether the challenged evidence was relevant and whether its probative value was substantially outweighed by the danger of unfair prejudice. NRS 48.015-.035. Below, the district court found that Johnson's interactions with Rodriguez were relevant to the sexual motivation element of the charged crime and that it was not substantially outweighed by the danger of unfair prejudice. On appeal, Rodriguez does not challenge these findings or argue that the evidence was irrelevant or unfairly prejudicial.⁴ Therefore, the district court did not abuse its discretion in admitting the evidence of his interactions with Johnson, and Rodriguez is not entitled to relief. *Chaparro*, 137 Nev. at 669, 497 P.3d at 1192.

Accordingly, we

ORDER the judgement of conviction AFFIRMED.⁵


_____, J.
Bulla


_____, C.J.
Gibbons


_____, J.
Westbrook

doctrine. *See Alfaro v. State*, 139 Nev. Adv. Op. 24, 534 P.3d 138, 150-51 (2023) (clarifying that *res gestae* is an extremely limited basis to admit “uncharged acts”).

⁴Rodriguez concedes on appeal that the challenged evidence “could arguably be admissible for a number of purposes under [a prior bad acts analysis], such as identity or motive.”

⁵Insofar as Rodriguez has raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. David A. Hardy, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk