

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK BENNISH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40015

FILED

APR 19 2005

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual conduct with a prisoner and from an order of the district court denying a motion for a new trial. Eighth Judicial District Court, Clark County; Mark W. Gibbons, Judge. The district court sentenced appellant to a prison term of 12 to 30 months.

We note initially that this court lacks jurisdiction to review the district court's order denying appellant's motion for a new trial because appellant did not perfect a timely, separate appeal from that order. Specifically, the district court entered the judgment of conviction in this case on July 24, 2002. Appellant filed his motion for a new trial over 5 months later, on January 6, 2003. Although appellant filed a timely notice of appeal on July 31, 2002, from the judgment of conviction, he thereafter failed to file a timely notice of appeal from the district court's order of March 11, 2003, denying the motion for a new trial.¹ Therefore,

¹See NRS 177.015(1)(b) (providing for an appeal from an order "granting or refusing a new trial"); see also NRAP 4(b) (providing that a
continued on next page . . .

this court lacks jurisdiction to review appellant's assignments of error respecting the district court's order denying the motion for a new trial.

With respect to his conviction, appellant also contends that the district court erred by admitting evidence of prior bad acts. Specifically, appellant challenges the admission of testimony by three different deputy public defenders that appellant passed them flirtatious notes during court and that appellant kissed one of them outside a doorway to the courtroom.

"We have often held that 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."² To this end, NRS 48.045(1) provides that evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that the defendant acted in a similar manner on a particular occasion. The exception to the presumption that uncharged bad acts are inadmissible is contained in NRS 48.045(2), which provides that such evidence may be admissible for various other purposes, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

... continued

motion for new trial will extend the time for filing a notice of appeal from a judgment of conviction if the motion is made before or within 30 days after entry of the judgment of conviction).

²Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001) (citing Walker v. State, 116 Nev. 442, 445, 997 P.2d 805, 806 (2000)).

Before admitting such evidence, the trial court must conduct a hearing on the record and determine: (1) that the evidence is relevant to the crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.³ On appeal, we will give great deference to the trial court's decision to admit or exclude evidence and will not reverse the trial court absent manifest error.⁴

In the instant case, after conducting a Petrocelli hearing, the district court found that the evidence was relevant to show plan, identity, motive and preparation. Our review of the record however, reveals that the evidence of the prior incidents was not admissible under any of the exceptions under NRS 48.045(2).

Moreover, we note that the State argued below and on appeal that the evidence was admissible to show "a pattern of unacceptable conduct." The admission of the evidence for this purpose is prohibited by NRS 48.045(1), which precludes the admission of evidence of a person's character "for the purpose of proving that [the person] acted in conformity therewith on a particular occasion."


We therefore conclude that the district court abused its discretion by admitting evidence of other acts described by the three deputy public defenders. Because we cannot conclude beyond a reasonable

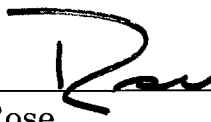
³Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).


⁴See Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

doubt that the verdict would have been the same in the absence of this error, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for further proceedings consistent with this order.

 _____, C.J.
Becker

 _____, J.
Rose

 _____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 7, District Judge
Christopher R. Oram
Herbert Sachs
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk