

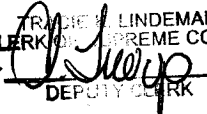
IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE EDDIE MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55261

FILED

JAN 13 2011

TRACIE L. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK


ORDER OF REVERSAL AND REMAND

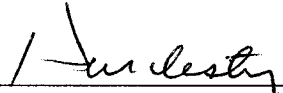
This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of lewdness with a child under the age of fourteen. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

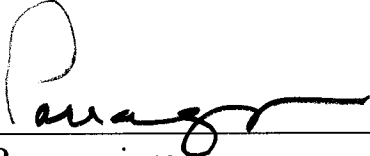
Among other contentions, Martinez argues that the district court abused its discretion in admitting evidence of an uncharged prior molestation. We agree. The record does not indicate that the district court made particularized findings regarding the relevancy of the prior bad act, whether the act was proven by clear and convincing evidence, and whether the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); see also Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (requiring the district court make findings concerning Tinch factors). This court may affirm in the absence of such findings where the record is sufficient to determine the admissibility of the evidence or the result of the trial is the same if the court had not admitted the evidence, see Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005); however, neither exception applies here.

First, the prior bad act testimony is based almost entirely on one witness's testimony, who recanted shortly after the alleged incident, and whose current account of prior abuse now differs from the first report; thus, the record does not indicate that the incident is supported by clear and convincing evidence. See In re Drakulich, 111 Nev. 1556, 1566-67, 908 P.2d 709, 715 (1995) (defining clear and convincing evidence). Second, as the evidence of the charged offenses were not overwhelming, we cannot conclude that the error was harmless. See Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1255-56 (2002). Accordingly, we

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


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk