

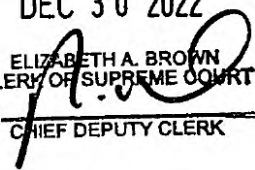
138 Nev., Advance Opinion 90
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
TIERRA DANIELLE JONES, DISTRICT
JUDGE,
Respondents,
and
JOHN EUGENE DOANE,
Real Party in Interest.

No. 84134

FILED

DEC 30 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

Original petition for a writ of mandamus and/or prohibition challenging a district court order denying a motion to admit evidence of a prior conviction.

Petition granted.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Taleen Pandukht, Chief Deputy District Attorney, Clark County,
for Petitioner.

Darin F. Imlay, Public Defender, and David Lopez-Negrete, Deputy Public Defender, Clark County,
for Real Party in Interest.

BEFORE THE SUPREME COURT, HARDESTY, C.J., STIGLICH and
HERNDON, JJ.

OPINION

By the Court, STIGLICH, J.:

This original petition for a writ of mandamus and/or prohibition concerns the admissibility of evidence of a defendant's separate sexual offense to show the defendant's propensity to commit a presently charged sexual offense under NRS 48.045(3). Although prior bad acts generally cannot be admitted to show a defendant's inclination to commit crimes, NRS 48.045(3) provides an exception to this general rule: evidence of separate sexual offenses can be admitted to show a defendant's propensity to commit sexual offenses. Recognizing the highly probative yet prejudicial nature of such evidence, in *Franks v. State*, we outlined procedural safeguards a district court must follow prior to admitting evidence of a separate sexual offense under NRS 48.045(3), including the weighing of the evidence's probative value against its prejudicial effect. 135 Nev. 1, 432 P.3d 752 (2019).

We now further clarify the mechanics of NRS 48.045(3). First, NRS 48.045(3) is applicable whenever a criminal defendant is charged with a sexual offense. Thus, the district court should consider only the charging document, and not the facts or evidence underlying the charge, in making its initial determination as to whether NRS 48.045(3) is implicated in the case. Second, we reiterate that the district court must ensure that *Franks'* procedural safeguards are followed before determining whether to admit evidence of a prior sexual offense under NRS 48.045(3).

In refusing to admit evidence of a prior conviction for a sexual offense in the instant case, the district court looked beyond the charges the defendant faced to determine that the State's evidence did not establish that a sexual offense occurred in the current prosecution. We conclude that this

was a clearly erroneous application of the law and therefore a manifest abuse of discretion. The district court also found the evidence inadmissible because its prejudicial effect outweighed its probative value. We conclude that this too was a manifest abuse of discretion, as the other sexual offense was more probative than prejudicial under the factors adopted in *Franks*. Accordingly, we grant the State's petition for a writ of mandamus requesting that we order the district court (1) to vacate its orders denying the State's motion to admit evidence of prior crimes and the State's motion to reconsider and (2) to enter an order granting the State's motion to admit evidence of prior crimes.

FACTS AND PROCEDURAL HISTORY

Real party in interest, John Eugene Doane, was charged by way of indictment with murder under alternative theories of willful, deliberate, and premeditated killing and felony murder occurring during the perpetration or attempted perpetration of a sexual assault. The charges stem from a cold case involving a 14-year-old victim who was discovered murdered in the desert in 1978. Evidence suggested that the victim was struck with an object and strangled to death. Although no evidence of sexual assault was apparent from the victim's autopsy, the victim's underwear had been removed from her body and contained semen. In 2019, the semen on the underwear was tested for DNA, and the DNA profile was matched to Doane, who was in prison in Nevada for crimes committed in 1979.

Before trial, the State filed a motion to admit Doane's 1979 conviction for sexual assault causing substantial bodily harm with the use of a deadly weapon. The facts underlying that conviction were that Doane offered a 14-year-old girl a ride to school, but after she got into his car, he threatened her and proceeded to drive her to the desert, where he

repeatedly sexually assaulted her, struck her with a rock, and strangled her until she was unconscious, leaving her with substantial permanent injuries. The State asserted that the 1979 offense was relevant and highly probative, as it and the instant offense both involved sexual acts against teen girls and occurred within three months of each other. The defense opposed the motion, arguing that the 1979 offense was qualitatively different from the charged offense and substantially more prejudicial than probative.

The district court denied the State's motion, determining that the State did not charge Doane with a crime constituting a "sexual offense" in the instant case and, therefore, NRS 48.045(3) did not apply. The State filed a motion for reconsideration, arguing that the felony-murder theory charged in this case, which was predicated on the perpetration or attempted perpetration of sexual assault, is a "sexual offense" as defined by NRS 48.045(3) and NRS 179D.097(1)(b). The district court denied the motion for reconsideration. In its written order, the district court determined that the facts did not support the State's theory that a sexual assault occurred in this case. The district court further stated that it had analyzed the 1979 offense under NRS 48.045(3) and *Franks*, had weighed the relevant considerations, and concluded that admitting the evidence "to further the State's theory [would] result[] in unfair prejudice that substantially outweighs its probative value." The State filed the instant petition for a writ of mandamus challenging the district court's denial of its motion and motion for reconsideration.¹

¹The State alternatively seeks a writ of prohibition. Because we conclude that the State is entitled to a writ of mandamus, we need not address the State's alternative request for relief.

DISCUSSION

The State's petition challenges the district court's orders denying the State's motion to admit Doane's prior conviction for propensity purposes pursuant to NRS 48.045(3) and the State's motion to reconsider. The State argues that its felony-murder theory, which is based on the perpetration or attempted perpetration of a sexual assault, clearly qualifies as a sexual offense and thus NRS 48.045(3) applies. The State asserts that the district court improperly considered the evidence underlying the charge, rather than the nature of the charge itself, in finding that this case does not involve a sexual offense. Additionally, the State argues that the district court erred in concluding that the danger of unfair prejudice substantially outweighed the probative value of the other bad act evidence under *Franks*. After first addressing a few preliminary considerations, we address each of the State's arguments in turn.

We exercise our discretion to consider this writ

The State argues that writ relief is warranted because it cannot appeal from a final judgment in a criminal case and therefore lacks a remedy at law to challenge the district court's evidentiary ruling. Doane does not argue that the State has an alternative remedy at law for challenging the district court's ruling.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). A writ will not issue if the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. Mandamus relief is an extraordinary remedy, and it is within the sole discretion of this court to entertain a writ

petition. *State v. Eighth Judicial Dist. Court (Taylor)*, 116 Nev. 374, 379, 997 P.2d 126, 130 (2000).

NRS 177.015, which outlines the availability of an appeal for a party aggrieved in a criminal action, does not provide for an appeal from a district court order denying the State's motion to admit evidence of a prior sexual offense, nor does it permit the State to appeal from an eventual jury verdict. This court has previously exercised its discretion to entertain a mandamus petition where the State could not appeal the challenged district court decision in a criminal case. *See, e.g., Taylor*, 116 Nev. at 379-80, 997 P.2d at 130. Likewise, here, the State cannot appeal the district court's determination, and it therefore lacks a plain, speedy, and adequate remedy at law. *See* NRS 34.170. Furthermore, the interplay between NRS 48.045(3) and the procedural safeguards set forth in *Franks* is an issue of statewide significance that requires clarification. *See State v. Fourth Judicial Dist. Court (Martinez)*, 137 Nev. 37, 38, 481 P.3d 848, 850 (2021) (citing the presentation of "an unsettled legal issue of statewide significance" as a reason to undertake merits-based writ review). Accordingly, we conclude that the State's petition warrants consideration.

Standard of review

A district court's decision to admit or exclude evidence is discretionary. *Armstrong*, 127 Nev. at 931, 267 P.3d at 780. Where a discretionary act is challenged, this court may issue a writ of mandamus to control a district court's decision that this court deems to be a manifest abuse, arbitrary, or capricious exercise of the district court's discretion. *Id.* at 931, 267 P.3d at 779. "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *Id.* at 932, 267 P.3d at 780 (alteration in original) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)).

The district court manifestly abused its discretion in ruling that Doane's prior conviction was inadmissible under NRS 48.045(3)

We now turn to the crux of this writ petition. We note at the outset that the district court's orders are not the paragon of clarity. In its order denying the State's motion to admit evidence of Doane's prior conviction, the district court concluded that NRS 48.045(3) was wholly inapplicable because "the evidence presented [did] not establish that a sexual assault occurred in the instant case and there [were] no charges of sexual assault in the instant case." It nevertheless cited *Franks* and the factors adopted in *Franks* in evaluating whether the evidence was unfairly prejudicial and ruled that Doane's prior conviction was inadmissible.

In its order denying the State's motion for reconsideration, the district court acknowledged that the State was pursuing a theory of felony murder that included the perpetration of a sexual assault. However, it ruled that "the facts do not support such a finding" for the purposes of admitting Doane's prior conviction. The court expressly stated that it had "weigh[ed] the relevant considerations" under NRS 48.045(3) and *Franks* and concluded that the resulting unfair prejudice of admitting the 1979 conviction substantially outweighed the conviction's probative value.

In this original proceeding, the parties frame the issues as though the district court made two alternative rulings: (1) that NRS 48.045(3) is inapplicable because the State's evidence does not support a charge of a sexual offense in the instant case, and (2) that admitting Doane's prior conviction would result in unfair prejudice substantially outweighing the conviction's probative value. We therefore address each of those two arguments below. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to

frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present.”).

The district court manifestly abused its discretion in looking beyond the charge Doane faced to consider whether the State’s evidence might support the charge

The State argues the district court manifestly abused its discretion in ruling that NRS 48.045(3) did not apply in this case. It argues the district court looked beyond the charges brought against Doane to make a ruling on the merits as to whether the State could prove a charge for a sexual offense. The State argues that such an inquiry is not a part of the *Franks* framework for admitting evidence of a separate sexual offense. It further argues that the grand jury found probable cause for a charge of murder committed during the perpetration of a sexual assault or attempted sexual assault and that there exists ample evidence to support that charge. Doane counters that the district court acted within its wide discretion in ruling that evidence of Doane’s prior conviction was inadmissible.

Other bad act evidence is generally inadmissible to prove a defendant’s propensity to commit the charged crime. NRS 48.045(2). However, “NRS 48.045(3) allows for the admission of evidence of a prior bad act constituting a sexual offense ‘to prove the character of a person in order to show that the person acted in conformity therewith’ that would otherwise be barred under NRS 48.045(2).” *Franks*, 135 Nev. at 4, 432 P.3d at 755 (quoting NRS 48.045(2)).²

²NRS 48.045(3) reads, in part, as follows: “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) applies in “a criminal prosecution for a sexual offense.” For the purposes of NRS 48.045(3), a “sexual offense” is any of the offenses listed in NRS 179D.097(1). That list includes the State’s theory of felony murder with which Doane was charged—murder “committed in the perpetration or attempted perpetration of sexual assault.” NRS 179D.097(1)(a). Accordingly, Doane was charged with a sexual offense, and NRS 48.045(3) applies.

In reaching the opposite conclusion, the district court found that the evidence and facts did not support the charge that a sexual assault had occurred. The relevant consideration for determining if NRS 48.045(3) applies to a criminal prosecution, however, is simply whether the defendant has been charged with a sexual offense, not whether there is sufficient evidence to support the charge. Nothing in the plain language of NRS 48.045(3) permits a district court to look beyond the charged crimes to consider the evidence the State may present to support the charges. See *Blackburn v. State*, 129 Nev. 92, 95, 294 P.3d 422, 425 (2013) (“Our analysis begins and ends with the statutory text if it is clear and unambiguous.”). Because the indictment clearly charged Doane with a sexual offense, the district court manifestly abused its discretion in finding that the prosecution did not involve a sexual offense and thus did not implicate NRS 48.045(3).

That NRS 48.045(3) is implicated in a criminal prosecution, however, does not end the district court’s inquiry into whether evidence of a separate sexual offense is admissible. Rather, as discussed below, before admitting evidence under NRS 48.045(3), the district court must apply the stringent procedural requirements that we outlined in *Franks*.

The district court manifestly abused its discretion in concluding that the resulting prejudice from admitting Doane's prior conviction substantially outweighed the prior conviction's probative value

The State argues the district court manifestly abused its discretion in ruling that evidence of Doane's prior conviction was inadmissible under *Franks* because it was unfairly prejudicial. It argues that each of the factors adopted in *Franks* for evaluating whether the evidence is unfairly prejudicial weighed in favor of admitting evidence of Doane's conviction. Doane counters that each factor weighed against admitting evidence of his conviction.

As explained above, in *Franks*, we recognized "that NRS 48.045(3) unambiguously permits the district court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense." 135 Nev. at 4, 432 P.3d at 755. However, because of the inherent risks involved with propensity evidence, we set forth procedural safeguards to guide district courts in deciding whether to admit evidence under NRS 48.045(3). *Id.* at 5-6, 432 P.3d 756. Before admitting evidence of a separate sexual offense under NRS 48.045(3), the district court must determine that (1) the other sexual offense is relevant to the crime charged, (2) the other offense is proven by a preponderance of evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* at 2, 432 P.3d at 754. As to the third prong, the district court should consider the factors articulated by the United States Court of Appeals for the Ninth Circuit in *LeMay*, which include the following:

- (1) the similarity of the prior acts to the acts charged,
- (2) the closeness in time of the prior acts to the acts charged,
- (3) the frequency of the prior acts,
- (4) the presence or lack of intervening circumstances, and
- (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. at 6, 432 P.3d at 756 (quoting *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (quotation marks omitted)).

Here, the district court did not specifically address each of these factors. Upon review, we conclude that the consideration of the *LeMay* factors as a whole demonstrates that the probative value of Doane's 1979 conviction is not substantially outweighed by the danger of any prejudice that admitting evidence of the conviction may cause. We note the importance for district courts to evaluate each *LeMay* factor in determining whether to admit evidence of a separate sexual offense. *See, e.g., Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1268-69 (9th Cir. 2000) ("In light of the sensitive nature of the evidence proffered, it is important that the district court fully evaluate the factors enumerated above, and others that might arise on a case-by-case basis, and make a clear record concerning its decision whether or not to admit such evidence."). Although the district court did not delineate its consideration of each factor, we now address each factor in turn.

Similarity of the other acts to the acts charged

In the charged offense, the 14-year-old victim was found in a remote area of the desert. She appeared to have been struck in the face and died by way of manual strangulation. Her underwear was removed, and Doane's semen was found on it. As to the facts underlying Doane's 1979 conviction, the victim, also 14 years old, was similarly taken to the desert, where Doane sexually assaulted her multiple times. And although the victim did not die from her injuries, Doane struck her in the face and strangled her until she lost consciousness. The facts of each offense are sufficiently similar that the first *LeMay* factor weighs in favor of admitting evidence of the prior conviction. *See, e.g., United States v. Halamek*, 5 F.4th 1081, 1089 (9th Cir. 2021) (finding sufficient similarity between two sexual

offenses where the victims were approximately the same age and were subjected to similar sexual acts); *United States v. Thornhill*, 940 F.3d 1114, 1118-19 (9th Cir. 2019) (finding sufficient similarity between a prior conviction for sexual abuse of a minor and the current charge of receipt of child pornography based on the similar ages of the victims and the kinds of abuse that occurred or were depicted).

Closeness in time between the other offense and the charged offense

We turn now to the second *LeMay* factor. Here, the acts leading to Doane's sexual assault conviction and the instant charged offense occurred only three months apart. This is a very short gap in time, particularly considering the extreme nature of the acts. This factor therefore also weighs in favor of admitting the evidence of Doane's prior conviction.

The frequency of the other offense

The third *LeMay* factor is not strongly implicated in this case, as the acts underlying his prior conviction occurred only once. This is dissimilar to other cases where, for example, a defendant subjected a victim to multiple instances of abuse over a period of time. See, e.g., *Halamek*, 5 F.4th at 1089 (stating that the defendant sexually abused his stepdaughter "a few times a week" over a period of time); *Franks*, 135 Nev. at 2, 432 P.3d at 754 (recounting that the defendant inappropriately touched his 12-year-old niece five times). Therefore, this factor does not weigh in favor of admitting evidence of Doane's prior conviction.

The presence or lack of intervening circumstances

The fourth *LeMay* factor is not implicated in this case. The State asserts that Doane's incarceration is an intervening circumstance because it prevented him from committing additional sexual assaults.

However, his incarceration began after the sexual offenses occurred and thus cannot be deemed an intervening circumstance. For his part, Doane argues that the gap between the two offenses “allows for a host of intervening circumstances,” but he fails to give an example of any.

The necessity of the evidence beyond the testimonies offered at trial

Finally, we turn to the fifth *LeMay* factor. As the Ninth Circuit explained in *LeMay*, evidence of a separate sexual offense “need not be *absolutely necessary* to the prosecution’s case”; rather, such evidence may be introduced if it is simply helpful or practically necessary. 260 F.3d at 1029. In *Franks*, we held that evidence of a defendant’s prior sexual offense is helpful to the State’s case if it establishes that the defendant had a propensity to commit the charged crime. 135 Nev. at 7, 432 P.3d at 757. Likewise, here, the evidence of Doane’s conviction for sexual assault will help the State establish that Doane had a propensity to commit the charged crime. The fifth *LeMay* factor therefore weighs in favor of admitting the evidence.

We conclude that three of the four relevant *LeMay* factors weigh in favor of admitting the evidence of Doane’s prior conviction. And while these factors are nonexhaustive, Doane has not provided any other factor that would cut in his favor against admitting the evidence. Accordingly, on balance and considering all of the circumstances, we conclude that the probative value of Doane’s prior conviction is not substantially outweighed by any unfair prejudice that would result in admitting evidence of the conviction under NRS 48.045(3) and *Franks*. The district court manifestly abused its discretion in ruling otherwise, and we therefore grant the State’s petition for a writ of mandamus.

CONCLUSION

NRS 48.045(3) is implicated in any case where a defendant is charged with a sexual offense and the State seeks to admit evidence of a separate sexual offense. Prior to admitting evidence of the other sexual offense, the district court must apply the procedural safeguards we outlined in *Franks*. Here, we conclude that the district court manifestly abused its discretion in finding that NRS 48.045(3) did not apply and in ruling that the evidence of Doane's prior conviction was inadmissible under NRS 48.045(3) and *Franks*. Accordingly, we grant the State's petition for a writ of mandamus. The clerk of this court shall issue a writ of mandamus instructing the district court to vacate its orders denying the State's motion to admit evidence of prior crimes and the State's motion to reconsider and enter an order granting the State's motion to admit evidence of prior crimes.

Stiglich, J.
Stiglich

We concur:

Hardesty, C.J.
Hardesty

Herndon, J.
Herndon