IN THE SUPREME COURT OF THE STATE OF NEVADA

SABINO VIDAL ROSALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86611

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted abuse or neglect of a child involving sexual exploitation and soliciting a child for prostitution. Second Judicial District Court, Washoe County; Kathleen A. Sigurdson, Judge.

Appellant Sabino Rosales first argues law enforcement committed outrageous government conduct during the reverse sting operation in violation of his due process rights, and thus, the district court should have sua sponte dismissed the information. Rosales concedes that this issue was not raised below, so we review for plain error. *Jeremias v. State,* 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) ("Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." (quoting *Green v. State,* 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))).

This court considers the totality of the circumstances, including the factors outlined in *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013), when evaluating whether government conduct is "so outrageous or

grossly shocking as to warrant dismissal." *Martinez v. State*, 140 Nev., Adv. Op. 70, 558 P.3d 346, 355 (2024) (internal quotation marks omitted) (addressing the same reverse sting operation at issue here and concluding that law enforcement's actions did not constitute outrageous governmental conduct). The *Black* factors look to:

> (1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

733 F.3d at 303. Because every individual's interaction with law enforcement will be different, even within the same sting operation, each case requires independent analysis "on the basis of its own facts and circumstances." *Martinez*, 140 Nev., Adv. Op. 70, 558 P.3d at 356. However, examining the totality of the circumstances, aided by applying the *Black* factors, we reach the same result as in *Martinez*.

While it is true that the first and second factors mostly favor Rosales because law enforcement did not have firsthand knowledge of Rosales or any criminal propensities before launching the sting, the remaining *Black* factors favor the government. Although the government created the reverse sting operation, the evidence establishes that Rosales was a generally willing purchaser of commercial sex, who reached out to the decoy profile on his own initiative and continued to pursue the transaction after learning the decoy was a minor without law enforcement coaxing him to do so. Further, there was little government participation in the crime outside of the creation of the sting operation, "and the nature of the serious

issues of sex trafficking underlying the actions taken in the reverse sting operation . . . definitively favor[ ] the State." *Id.* Therefore, like in *Martinez*, under the totality of the circumstances the conduct here was not so outrageous as to warrant dismissal, and we conclude that it was not plain error for the district court to not sua sponte dismiss the charges.

Next, Rosales argues that the district court improperly admitted other act evidence, specifically evidence connected to several encounters Rosales had with another reverse sting operation while awaiting trial.[1] Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character and show the person acted in conformity therewith, but may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). To overcome the "presumption of inadmissibility," *Rosky v. State,* 121 Nev. 184, 195, 111 P.3d 690, 697 (2005), the prosecution must demonstrate that: "(1) the [other] act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (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." *Bigpond v. State,* 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). The decision of whether to admit such evidence is within the district court's discretion and will not be overturned absent a manifest abuse of that discretion. *Rhymes v. State,* 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005).

Having carefully reviewed the record, we conclude that the evidence here was relevant for a permissible purpose, to show that Rosales'

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[1]The State did not argue, at trial or on appeal, that this evidence was admissible under NRS 48.045(3), and thus, we do not address that statute here.

intent in responding to the decoy ad was to pay for sex. The defense theory was that when Rosales responded to the ad in this case, he did not actually intend to pay for sex. The subsequent ads Rosales responded to were on the same website as the first ad, and even shared some of the same pictures, but were much more sexually explicit. Given his nearly identical behavior in responding to the more explicitly sexual ads, the evidence was relevant to showing Rosales' intent was the same in this case, to pay for sex. *See Mathis v. State,* 82 Nev. 402, 406, 419 P.2d 775, 777 (1966) (noting that "intent need not be proved by positive or direct evidence, but may be inferred from the conduct of the parties and the other facts and circumstances disclosed by the evidence" (quoting *State v. Thompson,* 31 Nev. 209, 217, 101 P. 557, 560 (1909))). In addition, the State showed clear and convincing evidence that Rosales committed the other acts. And given its relevance, the probative value of the evidence itself was not substantially outweighed by the danger of unfair prejudice. Accordingly, the district court did not manifestly abuse its discretion by admitting the other act evidence for the limited purpose of proving intent.

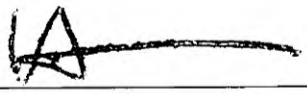
Rosales further argues, however, that the district court erred by failing to give a limiting instruction on the proper use of the other act evidence. We agree. When the State introduces other act evidence, it has "the duty to request that the jury be instructed on the limited use of [that] evidence. Moreover, when the prosecutor fails to request the instruction, the district court should raise the issue *sua sponte*." *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), *holding modified on other grounds by Mclellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008). If the district court fails to provide a *Tavares* limiting instruction, this court reviews whether "the error had substantial and injurious effect or influence

in determining the jury's verdict." *Id.* at 732, 30 P.3d at 1132 (internal quotation marks omitted). And unless this court is convinced that the accused suffered no prejudice as determined by this test, the conviction must be reversed. *Id.*

Here, the district court failed to give limiting instructions both before the introduction of the other act evidence and before the jury began deliberating. *See id.* at 733, 30 P.3d at 1133 ("[A] limiting instruction should be given both at the time evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury."). We are not convinced that the jury's verdict was not substantially influenced by the district court's failure to instruct the jury on how it could consider this evidence. *See id.* at 732-33, 30 P.3d at 1132-33 ("On account of the potentially highly prejudicial nature of uncharged bad act evidence . . . it is likely that cases involving the absence of a limiting instruction on the use of uncharged bad act evidence will not constitute harmless error."). The State referenced the other acts in its opening and closing arguments and a substantial portion of the evidence introduced at trial concerned the other acts. Three of the five witnesses called by the State testified regarding the other acts, and two of those witnesses testified about the other acts almost exclusively. Further, the testimony concerning the other act evidence was intertwined with the testimony concerning the charged conduct, making limiting instructions all the more important to help the jury delineate the charged conduct from the uncharged bad acts. *See id.* at 730, 30 P.3d at 1131 ("The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person."). We therefore conclude that Rosales was prejudiced by the

lack of limiting instructions. Thus, Rosales' convictions must be reversed. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order. [2]



_____, C.J.
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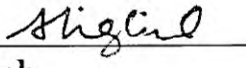

_____, J.
Stiglich

cc: Hon. Kathleen A. Sigurdson, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[2]Rosales also argues that the State presented insufficient evidence to support the convictions. We have considered this claim and conclude it lacks merit. And, given our disposition in this matter, we need not address Rosales' other claims of error.