IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILLIP SHAIN LAUB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88590-COA

ORDER OF AFFIRMANCE

Phillip Shain Laub appeals from a judgment of conviction, entered pursuant to a jury verdict, of attempt to use or permit a minor, age 14 or older, to be the subject of a sexual portrayal in a performance; attempted abuse or neglect of a child involving sexual exploitation; and soliciting a child for prostitution. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Laub argues the district court abused its discretion by allowing the State to introduce his statements to the undercover officer posing as a 16-year-old that he created pornographic videos with a 17-year-old female. At trial, the State sought to introduce his statements for non-propensity purposes, such as Laub's knowledge, intent, and plan. *See* NRS 48.045(2). The district court held a hearing pursuant to NRS 48.045(2) and found the statements admissible over Laub's objection.

On appeal, Laub asserts that his statements constitute other sexual act evidence to prove propensity pursuant to NRS 48.045(3) and that the State did not satisfy the procedural safeguards to admit such evidence pursuant to *Franks v. State*, 135 Nev. 1, 5-6, 432 P.3d 752-53, 756 (2019). Specifically, Laub argues that, because the State admitted it did not believe Laub made pornographic videos with a 17-year-old and because he testified

at trial he did not make pornographic videos, the State did not prove by a preponderance of the evidence that he created pornographic videos with a 17-year-old. *See id.* at 5, 432 P.3d at 756 (holding "the district court must make a preliminary finding . . . that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred"). Therefore, he claims the statements should not have been admitted. At trial, Laub did not argue against the admissibility of the evidence pursuant to NRS 48.045(3). Thus, he improperly changed his "theory underlying an assignment of error on appeal." *Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Therefore, we need not consider it.

Finally, on appeal, Laub fails to challenge the admissibility of his statements under NRS 48.045(2), and thus fails to make any argument that the district court abused its discretion by admitting the evidence under NRS 48.045(2). Therefore, we conclude that Laub is not entitled to relief. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Egan K. Walker, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk