IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE PHILLIP WATKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38793

FILED

FEB 05 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of indecent exposure. The district court sentenced appellant Wayne Phillip Watkins to serve a jail term of 12 months.

Watkins contends that the district court abused its discretion in allowing the State to present prior bad act evidence showing that, ten months before the charged offense, Watkins had exposed himself to a gas station attendant. In particular, Watkins contends that the district court abused its discretion in finding that the prior bad act, which he alleges was remote in time and dissimilar to the charged offense, was relevant to prove intent and absence of mistake. Additionally, Watkins contends that the district court improperly found that the prior bad act was relevant evidence of Watkins' propensity for sexually aberrant behavior. We

conclude that the district court did not commit manifest error in admitting the prior bad act evidence.[1]

The record reveals that the district court admitted the prior bad act evidence at issue after conducting a Petrocelli hearing[2] and considering the factors set forth in Tinch v. State[3] and NRS 48.045(2). The district court found that the evidence was relevant to negate Watkins' claim that he did not intend to expose himself to the victim, but that instead the victim had accidentally observed him privately masturbating. Although, in considering the admissibility of the evidence, the district court observed that the prior bad evidence was also relevant to show Watkins' sexually aberrant conduct of shocking female victims by

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[1]See Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) ("The trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error.").

[2]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[3]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (setting forth three factors for admissibility of prior bad act evidence, including whether: "(1) the incident is relevant to the crime charged; (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"). With regard to the Tinch analysis, Watkins argues that the district court misapplied the third factor because, in considering the prejudicial effect of the evidence, it failed to consider whether the probative value was substantially outweighed by the danger of unfair prejudice. Because the record is sufficient for this court to conclude that the Tinch factors have been satisfied, we conclude the district court's failure to articulate the appropriate standard for considering the prejudicial nature of the evidence does not warrant reversal. See King v. State, 116 Nev. 349, 354-55, 998 P.2d 1172, 1175 (2000).

displaying his erect genitalia, the district court did not admit the evidence on that basis.[4] In fact, before admitting the prior bad act evidence, the district court gave a limiting instruction, admonishing the jury that the evidence could only be used in considering whether Watkins intended to expose himself to the victim and, likewise, in considering whether the victim's observation of Watkins engaged in an act of masturbation was accidental. Because the district court properly analyzed the admissibility of the prior bad act evidence by the standard set forth in NRS 48.045(2), we conclude that the district court did not abuse its discretion in admitting the evidence.[5] Further, we reject Watkins' contention that the prior bad act was too remote in time or dissimilar to the charged offense to be admissible.[6]

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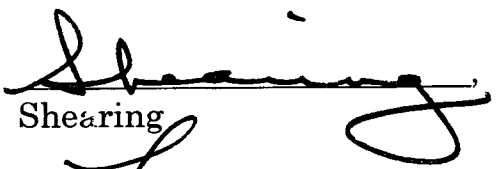
[4]See Braunstein v. State, 118 Nev. ___, 40 P.3d 413 (2002) (holding that the district court may not admit prior bad act evidence solely to prove that the accused had a propensity for sexually aberrant conduct). We note that this court's holding in Braunstein applies to Watkins because he objected below, thereby preserving the issue for review, and because his direct appeal was pending at the time Braunstein was filed. See Richmond v. State, 118 Nev. ___, 59 P.3d 1249 (2002).

[5]See Braunstein, 118 Nev. at ___, 40 P.3d at 417-18 (requiring the admissibility of prior bad act evidence in prosecutions involving sexual misconduct to be analyzed pursuant to the standard set forth in NRS 48.045(2)).

[6]See Findley v. State, 94 Nev. 212, 214, 577 P.2d 867, 868 (1978), overruled on other grounds by Braunstein, 118 Nev. at ___, 40 P.3d at 413 (proximity in time generally goes to credibility and "does not destroy the admissibility").

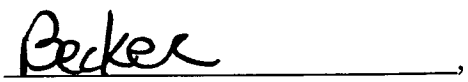
Having considered Watkins' contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk