NRS 48.045 Evidence of character inadmissible to prove conduct; exceptions; other crimes.

1. Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Evidence of a person's character or a trait of his or her character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;

(b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence; and

(c) Unless excluded by NRS 50.090, evidence of the character of a witness, offered to attack or support his or her credibility, within the limits provided by NRS 50.085.

2. **Evidence of other crimes, wrongs or acts** is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as **proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**

3. 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. As used in this subsection, "sexual offense" has the meaning ascribed to it in NRS 179D.097.

CASE LAW

Petrocelli and *Tinch*

In *Petrocelli*, the NV Supreme Court established a procedure for handling the admission of bad acts under NRS 48.045 (2). The Court focused on the need to hold a hearing outside the presence of the jury. *Petrocelli v. State*¸ 101 Nev. 46 (1985).

In *Tinch*, the NV Supreme Court clarified the purpose of the hearing and created standards for the trial court to follow. You may hear counsel refer to the "*Tinch* Factors." *Tinch v State*, 113 Nev. 1170 (1997).

Tinch Factors:

1. There is a hearing held outside the presence of the jury on the collateral issue.

2. The evidence is relevant to prove one of the exceptional, or "other" purposes specified in NRS 48.045 (2).

3. The State must show, by plain, **clear and convincing evidence** that the defendant committed the offense.

4. The judge must then balance the evidence to determine if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Bigpond

In *Bigpond,* the NV Supreme Court elaborated on the crimes, wrongs or acts that can be admitted. The procedure and analysis is now:

1. There is a hearing held outside the presence of the jury on the collateral issue.
2. The act is relevant to the crime charged and being offered for a purpose other than to show propensity. (Not limited to 48.045 (2) exceptions)
3. The act must be established by **clear and convincing evidence**.
4. The judge must then balance the evidence to determine if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

"Therefore, we now clarify that evidence of "other crimes, wrongs or acts" may be admitted under NRS 48.045(2) for a relevant non-propensity purpose other than those listed in the statute. To the extent that our prior case law is inconsistent with this holding, it is expressly overruled. *Bigpond v. State,* 128 Nev. 108 (2012).

Bigpond may arise in domestic battery cases. In *Bigpond*, the State sought to use the victim's prior accusations against the Defendant to provide a possible explanation for why the victim recanted her previous statements regarding the allegations in the case before the jury. The Supreme Court accepted the non-propensity purpose. The Court found that the State had proven the previous statements through clear and convincing evidence. The Court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Examples of different exception purposes:

- Modus operandi exception is generally proper in situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish identity of the person on trial. *Ledbetter v. State,* 122 Nev. 252, 260 (2006).
- The common scheme or plan exception is applicable when both the prior act evidence and the crime charged constitute an integral part of an overarching plan explicitly conceived and executed by the defendant. *Ledbetter v. State,* 122 Nev. 252, 260-61 (2006).
- In Nevada "whatever might 'motivate' one to commit a criminal act is legally admissible to prove 'motive' under NRS 48.045(2)," so long as the three-factor test for admissibility is satisfied. *Ledbetter v. State,* 122 Nev. 252, 262 (2006).
- For the absence of mistake or accident exception under NRS 48.045(2), we have stated that it applies when "the evidence tends to show the defendant's knowledge of a fact material to the specific crime charged," such as knowledge of the controlled nature of a substance, when such knowledge is an element of the charged offense. *Hubbard v. State,* 134 Nev. 450, 457-58 (2018)
    - Prior act evidence can also be used to rebut a defense of mistake or accident.
    - The absence of mistake or accident exception may be relevant to proving either the mens rea (the defendant concedes performing the act but claims to have done so mistakenly or with innocent intent) or the actus rea (the defendant concedes harm or loss but argues it resulted from an accident and not of his agency).

LEDBETTER INSTRUCTION. *Ledbetter v. State*, 122 Nev. 252, 260-61 (2006). (Some attorneys may refer to *Tavares*, 117 Nev. 725 (2001)).

The Supreme Court requires the trial court to instruct the jury prior to hearing evidence under this statute. The instruction must also be given in the final instructions. The Defendant may request that the instruction not be given before the testimony or in the final instructions.

Example instruction:

You may hear/(have heard) evidence through the (next witness)/(witnesses) regarding uncharged crimes, wrongs, or acts committed by (Defendant). Such evidence is not to be used by the jury to prove the character of a person in order or show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Best Practices:

1. You need to nail the Attorney down as to the exact purpose they seek to use it. If motion does not specify, then deny it. If you agree, then have attorney submit the instruction to only include the purpose or purposes for which you allowed the evidence in.

2. The limiting instruction must be given to the jury <u>both</u> at the time before admission and again when the case is submitted to the jury for deliberations.

3. **It is up to the judge to ensure that the instruction is read to the jury, not the attorneys.** However, if the Defense moves to not have the instruction read, the judge may skip the instruction.

CAVEATS

1. Is it evidence of other crimes, wrongs or acts? Smoking marijuana, visiting the brothel, drinking? Might not fall under this statute but still have to determine if admitting the act is prejudicial before you can let it in.

2. Applies to "a person" and is not limited to a Defendant. This does not happen often but the State may require the Defendant to put on evidence outside of the presence of the jury and follow the process for a defense witness.

3. Sexual offenses are treated differently under NRS 48.045 (3). This statute requires a hearing outside the presence of the jury as well as having different standards. *Franks v. State*, 135 Nev. Adv. Op. 1 (2019). 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. *Id.*

CREATE A GOOD RECORD

1. You have to go through the entire analysis **on the record** and make a finding on each point.

2. Clearly state the non-propensity purpose.

3. Use the exact language set forth in *Tinch*. "The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

4. Make sure the limiting instruction is correct and given before the testimony and as part of the instructions at the end of the case unless Defense Counsel asks not to give it on the record.

RES GESTAE- NRS 48.035 (3)

NRS 48.035 Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

3. Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime ***shall not be excluded***, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

Procedure

Arguments must be made outside the presence of the jury. The state should file a pretrial motion. If the theory raised during trial, then handle outside presence of jury.

Latin phrase which means "things done."

Res Gestae Case Law

The controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts.

If the court determines that the testimony is relevant to the charged crime and cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts. *State v. Shade,* 111 Nev. 887, 894 (1995).

Any one of them cannot be given without showing the others

When several crimes are intermixed or blended with one another, or connected such that they form an indivisible criminal transaction, and when full proof by testimony, whether direct or circumstantial, or ***any one of them cannot be given without showing the others,*** evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme. *Sutton v. State*, 114 Nev. 1327, 1331 (1998).

Shall not be excluded

In reading NRS 48.035 as a whole, it is clear that where the *res gestae* doctrine is applicable, the determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence. If the doctrine of *res gestae* is invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts.

State v. Shade, 111 Nev. 887, 894 (1995).

RES GESTAE - LIMITING INSTRUCTION

The Supreme Court does not give guidance. Nevada case law does not refer to specific language. Example- *State v Mahan*- 2019 WL 2291291

> Additionally, the district court gave a strong limiting instruction reemphasizing that Mahan was not charged with credit card theft or vehicle burglary, and that the evidence of those acts could not be used against him.

A suitable limiting instruction "explain[s] precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere."

State v. Rose, 206 N.J. 141, 161, 19 A.3d 985, 997 (2011)

Put the issue of an instruction on the attorney. If the attorney is raising a res gestae theory, have that attorney submit a proposed written instruction.

NRS 48.035 and NRS 48.045 (2)

1. The State has to specify which statute the State seeks to introduce the evidence under. On appeal it makes a difference and the State cannot argue six one way and a half dozen the other way if the trial court did one analysis and not the other.

2. Trial Court must go through each analysis for each theory and make the required findings.