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IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman

NORMAN FLOWERS,)
)
Appellant,)
)
v.)
)
THE STATE OF NEVADA,)
)
Respondent.)

Case No. 53159

RESPONDENT'S ANSWERING BRIEF

**Appeal From Order Denying Motion For New Trial
Eighth Judicial District Court, Clark County**

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176.515(1)9

48.045 10, 11, 12, 14

48.045(2) 13, 14

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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5 NORMAN FLOWERS,)
6 Appellant,)
7 v.) Case No. 53159
8 THE STATE OF NEVADA,)
9 Respondent.)

10
11 **RESPONDENT’S ANSWERING BRIEF**

12 **Appeal from an Order Denying Motion for New Trial**
13 **Eighth Judicial District Court, Clark County**

14 **STATEMENT OF THE ISSUE(S)**

15 Whether the district court abused its discretion in denying
16 Defendant’s Motion for New Trial.

17 **STATEMENT OF THE CASE**

18 On December 13, 2006, Defendant Norman Keith Flowers aka Norman Harold
19 Flowers, III (“Defendant”) was charged via a Grand Jury Indictment of committing the
20 following crimes against Sheila Quarles: Count 1- Burglary; Count 2- Murder; Count 3-
21 Sexual Assault; and Count 4- Robbery. (Volume 1 Appellant Appendix (“AA”) page 1-7).

22 On December 26, 2006, the State filed a Motion to Consolidate seeking to consolidate
23 this case with district court case C216032. (1 AA 8). In C216032, Defendant was charged
24 with two (2) counts of murder and two (2) counts of sexual assault (along with other
25 charges) for the deaths of Marilee Coote and Rena Gonzales. (1 AA 21-22). The Defendant
26 filed an Opposition on January 2, 2007. (1 AA 21-29). On January 8, 2007, District Court
27
28

1 Judge Joseph Bonaventure, sitting judge for case C216032, denied the State's motion. (1
2 AA 37).¹

3 On January 11, 2007, the State filed a Notice of Intent to Seek Death Penalty in this
4 matter. (1 AA 30-34).

5 On January 23, 2007, Defendant filed a Motion-In-Limine to Preclude Evidence of
6 Other Bad Acts and Motion to Confirm Counsel. (1 AA 35-46). In his motion, the Defendant
7 sought to keep out evidence of the Gonzales and Coote murders and to confirm attorney Bret
8 Whipple as his counsel. (1 AA 35-46).² The State filed an Opposition on February 2, 2007.
9 (1 AA 48-63). On February 5, 2007, the district court denied Defendant's motion to confirm
10 counsel. (3 AA 642). On April 13, 2007, District Court Judge Donald Mosley stated that he
11 believed the cases should be consolidated and wanted to wait to see what District Court
12 Judge Michael Villani did before making a ruling on Defendant's bad act motion. (2 AA
13 261).³ Judge Mosley found the motion moot. (3 AA 644).

14 Due to judicial retirements and shifting caseloads, this case was transferred to District
15 Court Judge Stewart Bell's department. On November 5, 2007, the State filed a Motion for
16 Clarification of Court's Ruling seeking to clarify if they could introduce evidence of
17 C216032 at trial in this matter. (1 AA 64-75). The Defendant filed an Opposition on
18 November 6, 2007. (1 AA 77-81). On November 15, 2007, the district court ordered a
19 Petrocelli hearing on the bad acts that State wanted to introduce at trial. (3 AA 646).

20 On August 1, 2008, a Petrocelli hearing was conducted for this matter. (3 AA 649).
21 The State sought to introduce evidence from Case C216032. (3 AA 649). The district court
22 found that the murder and sexual assault of Coote was sufficiently similar in nexus and time
23

24
25 ¹ See Blackstone Minutes for hearing on 01/08/2007 in Case C216032.

26 ² Mr. Whipple was originally retained by the Defendant for charges pertaining to Coote. (1
27 AA 56).

28 ³ Judge Villani was in the process of taking over Judge Bonaventure's case load, the judge
who originally denied the State's motion to consolidate. (2 AA 261).

1 to Quarles murder. (3 AA 649). The court also found that there was clear and convincing
2 evidence that the Defendant sexually assaulted and murdered Coote. (3 AA 649). Finally, the
3 district court found that probative value for purposes of intent and identity was not
4 outweighed any unfair prejudice. (3 AA 49). Therefore, the district court held that evidence
5 regarding the similarities between Coote and Quarles was to be allowed at trial. (3 AA 649).
6 However, the district court denied admission of evidence of the Rena Gonzales murder at
7 trial. (3 AA 649).⁴

8 A Motion to Reconsider the Ruling on Defendant's Motion-In-Limine to Preclude
9 Evidence of Other Bad acts was filed on September 29, 2008. (1 AA 120-123). The district
10 court denied Defendant's motion on October 15, 2008. (3 AA 653).⁵

11 The jury trial began on October 15, 2008. (3 AA 654). On October 22, 2008, the jury
12 found the Defendant guilty of Burglary, Murder and Sexual Assault. (3 AA 657). The jury
13 found the Defendant not guilty of Robbery. (3 AA 657). Per the Special Verdict form, the
14 Defendant was found guilty of Felony-Murder. (3 AA 183). On October 23, 2008, the
15 penalty hearing began for the first degree murder conviction. (3 AA 658). The jury found
16 several mitigating circumstances for the Defendant. (3 AA 184-85). On October 24, 2008,
17 the jury returned a verdict of Life in the Nevada State Prison Without the Possibility of
18 Parole. (3 AA 659).

19 On October 30, 2008, the Defendant filed a Motion for a New Trial. (1 AA 187-190).
20 The State filed an Opposition on November 10, 2008. (1 AA 236-247). On November 12,
21 2008, the district court denied Defendant's Motion. (1 AA 248-249).

22
23 ⁴ The State had argued that the Rena Gonzalez murder should come in because Ms. Gonzalez
24 was murdered the same day in the same apartment complex as Ms. Coote. 1 AA 67. Like the
25 other murders, Ms. Gonzales was sexually assaulted and strangled. 1 AA 67. Additionally,
26 personal property was taken from her apartment. 1 AA 67. However, unlike Ms. Coote and
27 Quarles, DNA evidence did not directly connect the Defendant to Ms. Gonzalez's murder. (1
28 AA 69; 2 AA 649).

⁵ Several other pretrial motions were filed in this matter but since they are not contested in
Defendant's brief they were not included in the Statement of Case.

1 On January 13, 2009, Defendant was sentenced to the Nevada Department of
2 Corrections as follows: Count 1- a maximum of one hundred twenty (120) months with a
3 minimum parole eligibility of forty-eight (48) months; Count 2- Life Without the Possibility
4 of Parole, to run consecutive to Count 1; and Count 3- Life Without the Possibility of Parole
5 with a minimum parole eligibility of one hundred twenty (120) months to run consecutive to
6 Count 2. (3 AA 661). Defendant received seven hundred sixty one (761) days credit for time
7 served. (2 AA 250-51). A Judgment of Conviction was filed on January 16, 2009. (2 AA
8 250-51). An Amended Judgment of Conviction was filed on February 12, 2009. (2 AA 254-
9 55).

10 On December 21, 2009, Defendant filed an Opening Brief in the direct appeal number
11 53159, wherein he argued, among other things, that the district court erred in admitting
12 evidence of the Coote murder at trial. See Opening Brief, pg 18-20. Defendant also argued
13 that statements he made to police while in custody for another offense was improperly
14 admitted at trial.⁶ See Opening Brief, pg. 24-27. The State responded to Defendant's
15 contentions in its Answering Brief in case number 53159 filed on February 19, 2010. That
16 issue is currently pending before this Court.

17 On March 4, 2010, Defendant filed a second motion for new trial. (4 AA 663-66).
18 The motion was based on allegedly newly discovered evidence, George Brass' conviction
19 for murder in an unrelated case. (4 AA 663-66). The state filed an Opposition on March 9,
20 2010. (4 AA 667-78). On March 17, 2010, the district court denied Defendant's motion
21 finding that Brass' conviction was not newly discovered evidence because the defense was
22 aware before Defendant's trial that Brass had been arrested and charged with murder and the
23 admissibility of that murder was not enhanced by the conviction. (4 AA 679, 682).
24 Defendant filed a Notice of Appeal on April 1, 2010.

25 //

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27

28 ⁶ Defendant uses this current appeal as an opportunity to reargue both the issues even though
he previously raised them in his direct appeal from the Judgment of Conviction.

1 **STATEMENT OF THE FACTS**

2 The State will adopt the Statement of Facts as presented to this Court in the State’s
3 February 19, 2010 Answering Brief in case 5159, but would specifically want to highlight
4 the following facts for the issue presented in this brief:

5 In March of 2005, Sheila Quarles (“Sheila”) was living with her mother Debra
6 Quarles (“Debra”) in a modest, one-bedroom apartment located at 1001 North Pecos (“Pecos
7 Apartment”). As a very social 18 year old, Sheila had a lot of different contacts. She was
8 involved in a sexual relationship with a young man named George Brass (“Brass”). (2 AA
9 494). Brass was a friend of the family. (2 AA 373). His mother was a friend of Debra and
10 Brass was also a close friend of Sheila’s older brother, Ralph. (2 AA 373-74). Sheila was
11 also involved in a sexual relationship with a young woman named Qunise Toney (“Qunise”).
12 (2 AA 408).

13 On March 24, 2005, Sheila stayed home from work and had several phone
14 conversations throughout the day. (2 AA 375). She talked to Qunise while Qunise was at
15 work. (2 AA 409). Sheila also talked to her mother several times that day. (2 AA 375).
16 During her last phone conversation with Sheila around 1:00 PM, Debra testified that the
17 phone went dead. (2 AA 375). Qunise testified that she received a phone call from Sheila’s
18 cell phone at 1:35 PM but no one responded when she answered. (2 AA 410). Qunise tried to
19 call Sheila back several times but ended up only getting Sheila’s voicemail. (2 AA 410).

20 Debra returned to the Pecos Apartment around three in the afternoon and found Sheila
21 submerged and non-responsive in the bathtub. (2 AA 377). Paramedics arrived at the Pecos
22 Apartment too late to render any aid or revive Sheila. (2 AA 365).

23 Several pieces of personal property were missing from the Pecos Apartment. Debra
24 testified that Sheila’s cell phone and bank card were missing. (2 AA 378). Additionally,
25 Debra noticed that some jewelry and pillow case from her bed were missing from the
26 apartment. (2 AA 378).

27 Sheila’s body had no major external injuries. (3 AA 520). There was also no sign of
28 forced entry into the apartment. (2 AA 478). Some items in the bathroom were knocked over

1 but there were no obvious signs of a struggle or fight. (2 AA 393, 479). However, the Las
2 Vegas Metropolitan Police Department (“LVMPD”) detectives noticed that Sheila had two
3 superficial injuries to her body. (2 AA 353). She had a bruise on her left abdomen and she
4 had a scrape on her knee. (2 AA 353).

5 Dr. Lary Simms (“Dr. Simms”), a forensic pathologist at the Clark County coroner’s
6 office testified at trial that Sheila suffered several internal injuries. (2 AA 349-360). Sheila
7 had two hemorrhages on her right scalp. (2 AA 351). This indicated that Sheila suffered
8 some a blunt force injury to her head around the time of her death. (2 AA 351-52). Sheila
9 also had several injuries to her neck area. (2 AA 351). The injuries to her neck indicated that
10 Sheila was manually strangled. (2 AA 351). The injuries were consistent with someone
11 applying pressure with his hands with the intent to cause injury. (2 AA 352).

12 Dr. Simms also testified that Sheila had multiple lacerations in her vaginal area which
13 indicated that Sheila was sexually assaulted. (2 AA 350). The doctor also noted that there
14 was no swelling associated with these injuries, which indicated that Sheila was sexually
15 assaulted very close to the time of her death since swelling takes about 20 to 30 minutes to
16 become visible. (2 AA 350-51). The coroner’s office found that Sheila’s cause of death was
17 from drowning with strangulation as a contributing factor and the matter was a homicide. (2
18 AA 354).

19 At the autopsy, DNA samples from semen were collected from Sheila’s vaginal area.
20 (2 AA 483). Kristina Paulette (“Paulette”), a forensic scientist for the LVMPD forensic lab
21 was able to generate a DNA profile of two unknown males from the vaginal swabs and
22 extracts taken from Sheila’s underwear. (3 AA 548).

23 Less than three months after Sheila’s murder, on May 3, 2005, Marilee Coote
24 (“Marilee”), a 45 year woman who lived in an apartment located on East Russell was found
25 dead in her apartment. (2 AA 422). Marilee was Defendant’s girlfriend’s neighbor. (3 AA
26 509). Similar, to Sheila’s case there were no signs of forced entry. (2 AA 439). Marilee was
27 found laying in her living room completely naked. (2 AA 410). Also similar to Sheila’s
28

1 murder, Marilee had no outward signs of injuries besides a thermal injury to Marilee's pubic
2 hair and inner thighs caused by application of heat to the area. (2 AA 355).

3 Dr. Simms testified at trial that Marilee suffered several injuries to her neck, similar
4 to Sheila, which indicated that she was manually strangled. (2 AA 355). The neck injuries
5 were consistent with someone applying pressure to inflict injury. (2 AA 357). Also similar to
6 Sheila, Marilee suffered an injury to her head from blunt trauma contemporaneous with the
7 time of her death. (2 AA 356). Again like Sheila, Marilee had injuries to her vaginal area
8 indicating that she was sexually assaulted. (2 AA 356). The police collected DNA samples
9 from semen collected in and near Marilee's vaginal area. (2 AA 442). The coroner's office
10 concluded that Marilee's death was caused by strangulation. (2 AA 359-60).

11 Through the investigation of Marilee's murder, the police requested and received a
12 DNA sample from the Defendant through a buccal swab. (2 AA 442). The police compared
13 the Defendant's DNA profile with the DNA profile created from DNA evidence collected
14 from Marilee and a carpet stain located under Marilee's legs. (3 AA 552). The police learned
15 that Defendant's DNA profile matched the DNA found in Marilee and on the carpet beneath
16 her. (3 AA 553). The frequency of the profile is rarer than one in 650 billion people. (3 AA
17 552). So to a scientific certainty, the Defendant was identified as the source of DNA found in
18 Marilee and on the carpet stain. (3 AA 552).

19 Defendant's DNA profile was entered into CODIS and it was revealed that
20 Defendant's profile was consistent with one of the contributors of DNA taken from the
21 vaginal swabs at Sheila's autopsy. (3 AA 522). Paulette testified at trial that Defendant could
22 not be excluded as the DNA source unlike 99.99% of the population. (3 AA 550).

23 The police talked to Debra and found out that the Defendant actually dated Debra in
24 the past. (2 AA 378). Debra told police that the Defendant had met Sheila before as well. (2
25 AA 378). She testified that the last time she saw the Defendant while Sheila was alive was
26 two weeks before Sheila's death. (2 AA 379). Sheila and Debra were outside their Pecos
27 Apartment when they spotted the Defendant. (2 AA 379). Defendant noted that Debra had
28 changed apartments in the complex. (2 AA 379). Debra asked the Defendant what he was

1 doing at the apartment complex and the Defendant told her that he was working at the
2 apartment complex as a maintenance man. (2 AA 379). At trial, the property manager for the
3 apartment complex testified that Defendant never worked at the complex. (3 AA 571-72).

4 Debra also testified that after Sheila's murder, the Defendant was very interested in
5 helping her cope with the grief of her daughter's loss and even drove her to appointments to
6 see a psychologist. (2 AA 379). Defendant asked Debra for updates regarding the
7 investigation of Sheila's case. (2 AA 379). At no point did the Defendant ever claimed or
8 mentioned to Debra that he had any type of sexual relationship with Sheila. (2 AA 379).

9 The police questioned Sheila's friends about other possible sexual relationships she
10 may have had with men. (2 AA 483-84). The police discovered from Sheila's friends that
11 Sheila also had a casual sexual relationship with Brass. (2 AA 494). The police questioned
12 Brass and he volunteered that he had a sexual encounter with Sheila in the morning on the
13 day she was murdered. (2 AA 484; 494). Brass told police that after the sexual encounter
14 with Sheila he left to go to work at Wal-Mart. (2 AA 494). DNA testing showed that Brass
15 could not be excluded as the second DNA contributor to the mixture of male DNA collected
16 from Sheila. (3 AA 551).

17 The police investigated Brass's alibi. They found out that on March 24, 2005, Brass
18 checked into work at noon, went to lunch at 4 PM, returned to Wal-Mart at 5 PM and finally
19 left work at 7:45 PM on March 24, 2005. (2 AA 498). There was no indication that anyone
20 changed Brass's time record. (2 AA 498). Moreover, the Wal-Mart where Brass worked at
21 was located good distance away from the Pecos Apartment with no convenient driving route.
22 (3 AA 527-28). Thus, Brass checked into work before Sheila's murder and left for lunch
23 after Sheila body was discovered.

24 On August 26, 2006, police interviewed the Defendant about Sheila's murder. (3 AA
25 524). At the time, the Defendant was incarcerated in the Clark County Detention Center due
26 to the Marilee Coote murder. (3 AA 666). Defendant had his Miranda rights read to him
27 from a card and the Defendant acknowledged that he understood his rights. (3 AA 524).
28 Defendant signed the Miranda card. (3 AA 524). Defendant was evasive while answering the

1 detective's questions regarding whether he knew Debra and Sheila. (3 AA 525). Initially,
2 Defendant even told the detective he did not know Sheila. (3 AA 526). After the detective
3 told the Defendant that Sheila was Debra's daughter, the Defendant told the detective that he
4 only knew Sheila by her nickname.(3 AA 526). Defendant told the detective that he had his
5 own problems and that he did not want to be involved in someone else's problems. (3 AA
6 526).

7 ARGUMENT

8 **THE DISTRICT DID NOT ERR IN DENYING** 9 **DEFENDANT'S MOTION FOR A NEW TRIAL**

10 The Supreme Court reviews the district court's grant or denial of a motion for a new
11 trial under an abuse of discretion standard. Funches v. State, 113 Nev. 916, 923, 944 P.2d
12 775, 779 (1997). Moreover, under NRS 176.515(1), "[t]he court may grant a new trial to a
13 defendant if required as a matter of law or on the ground of newly discovered evidence." The
14 court has the authority to grant a new trial based on the post-trial discovery of new evidence,
15 provided the evidence in question is: (1) newly discovered, (2) material to the defense, (3)
16 such that even with the exercise of reasonable diligence it could not have been discovered
17 and produced for trial, (4) non-cumulative, (5) such as to render a different result probable
18 upon retrial, (6) not only an attempt to contradict, impeach, or discredit a former witness,
19 unless the witness is so important that a different result would be reasonably probable, and
20 (7) the best evidence the case admits. Funches, 113 Nev. at 923-24, 944 P.2d at 779-80; see
21 also Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991).

22 **A. The district court properly ruled that Brass' involvement in an unrelated** 23 **murder is not new evidence.**

24 At the March 17, 2010 hearing on Defendant's Motion for New Trial, Defendant's
25 counsel admitted that they were aware of Brass' sexual encounter with Sheila before trial. (4
26 AA 680). Furthermore, the Defense was also aware of the pending murder charge against
27 Brass before the trial began but decided to proceed to trial. (4 AA 681). Brass was even in
28 custody when he testified and Defendant's counsels' office represented Brass' co-defendant,

1 Eugene Nunnery, in Brass' criminal matter. (4 AA 674, 681). After hearing argument, the
2 district court held that the conviction under these circumstances, when the Defense knew
3 before trial that Brass had been arrested and charged for murder, did not constitute new
4 evidence that would warrant a new trial. (4 AA 682). The district court decision was not
5 made in error.

6 Despite being aware of Brass' pending case, Defendant proceeded with the trial
7 instead of waiting for the outcome of Brass' murder trial. Additionally, Defendant could
8 have sought a continuance during the trial when it became known for certain that Brass
9 would testify but again he opted against filing such a motion. Instead, Defendant waited until
10 the outcome of his own trial as well Brass' trial and only then sought a new trial based on
11 Brass' testimony. Granting such a request would encourage defendants to seek out a quick
12 trial when a witness in their case has a pending charge with hopes of getting a second trial if
13 the first one does not turn out to their liking and the witness is eventually convicted of the
14 pending charge.

15 Moreover, in this case, if Defendant's counsel believed the underlying facts of Brass'
16 matter was relevant to Sheila's murder, they could have filed a motion under 48.045(2) to
17 explain how Brass' conduct in his own matter related to Sheila's murder. However, no
18 motion was ever filed, likely because the facts of the robbery/murder in Brass' matter were
19 quite different from the murder/sexual assault Defendant was charged with in his case. See
20 Argument I, Section C. Thus, the district court did not err in denying Defendant's Motion
21 since the conviction did not constitute new evidence.

22 **B. Brass' conviction is not sufficient basis upon which to grant a new trial.**

23 Even if this Court found that Brass' conviction constituted new evidence, it would not
24 have changed the outcome of the trial and therefore is not sufficient basis to grant a new
25 trial.

26 In this case, Sheila's murder must have occurred within a very specific time period.
27 Sheila's mom testified that she talked to Sheila on the phone until around 1 PM when the
28 phone suddenly went dead and that she arrived home around 3 PM where she found Sheila

1 non-responsive in the bathtub. Furthermore, Dr. Simms testified that Sheila's death and
2 sexual assault occurred around the same time due to lack of swelling around the multiple
3 laceration found in Sheila's vaginal area. Thus, the person who sexually assaulted Sheila
4 likely murdered her.

5 Both Brass' and Defendant's DNA were found on Sheila's vaginal swabs. During the
6 trial, the jury heard testimony from an assistant manager at Brass' workplace, who brought
7 Brass' time record for the day of the murder, which was introduced by the State without
8 objection. (2 AA 498). He testified that Brass checked into work at noon that day, went to
9 lunch at 4 PM, returned to Wal-Mart at 5 PM and finally left work at 7:45 PM on March 24,
10 2005. The State was able to demonstrate that Sheila had talked to someone over the phone
11 after Brass had clocked in at work and was murdered before he took his lunch break.

12 Moreover, testimony at trial showed that Brass was well acquainted with Sheila and
13 her family. Brass was good friends with Sheila's brother and Brass' mother was good friends
14 with Sheila's mother. Brass testified at trial that he a sexual relationship with Sheila. (2 AA
15 494). He admitted that he had a sexual encounter with Sheila around 10:30 in the morning.
16 (2 AA 494). Additionally, the jury heard testimony that Sheila's friends knew that she had a
17 casual sexual relationship with Brass. There was no evidence that Defendant had any type of
18 sexual relationship with Sheila prior to her murder.

19 Defendant is not asserting that he has any new evidence to dispute Brass or anyone
20 else's testimony regarding this subject. Instead he argues that knowledge of Defendant's
21 conviction would have been helpful to him at trial because the jury would have heard that he
22 had been convicted of murder. However, this is not enough for a new trial. See Hennie v.
23 State, 1114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998) (holding that new information which
24 directly contradicted testimony by key witnesses and which could not have been discovered
25 pretrial was sufficient to justify a new trial). Even if Brass had been convicted before
26 Defendant's trial, Defendant could have only admitted Brass' conviction and the year it was
27 sustained. The defense would have been precluded per NRS 48.045 from arguing that Brass
28

1 had a propensity for violence and thus was the person responsible for Sheila's murder and
2 sexual assault.

3 Finally, Brass' testimony was not critical to the case. As previously stated, Dr. Simms
4 stated that the sexual assault and the murder were contemporaneous. The State produced a
5 witness who spoke to Sheila after Brass had already checked in at work. The State, through
6 the assistant manager of Brass' work, could have established Brass was at work without his
7 testimony. Moreover, the State also produced at trial a witness who testified about Brass'
8 casual sexual relationship with Sheila. Thus, the State could have eliminated Brass a
9 potential culprit to Sheila's murder without his testimony. Therefore, Defendant could not
10 demonstrate that a different result was probable in this case. United States v. Steel, 759 F.2d
11 706, 713 99th Cir. 1985) (noting that requirement that newly discovered evidence would
12 probably result in an acquittal is a stringent standard requiring more than mere speculation);
13 Walker v. State, 113 Nev. 853, 873, 944 P.2d 762, 775 (1997) (district court did not err in
14 denying defendant's motion for new trial when it is not reasonably probable that the new
15 evidence would lead to a different result).

16
17 **C. Arguing to the jury that Brass was violent due to his murder conviction
would be improper character argument.**

18 Unlike Marilee Coote's murder, Defendant would have been unable to introduce the
19 facts underlying the Brass related murders at trial.

20 NRS 48.045(2) provides that "(e)vidence of other crimes, wrongs or acts is not
21 admissible to prove the character of a person in order to show that the person acted in
22 conformity therewith" but may be admissible to prove motive, opportunity, intent,
23 preparation, plan, knowledge, identity, or absence of mistake or accident. Flores v. State, 116
24 Nev. 659, 661 5 P.3d 1066, 1067 (2000). To be deemed an admissible bad act, the trial court
25 must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime
26 charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value
27 of the evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v.
28 State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-1065 (1997). The plain language of NRS

1 48.045(2) states that it applies to a “person” and not just to a “defendant” or an “accused”.
2 Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999) (upholding a district
3 court’s ruling not to admit other bad acts of a State witness).

4 As noted in the State’s Opposition to Defendant’s Motion for New Trial, the facts
5 underlying the Brass’ criminal conduct are quite different from what occurred in this case. (4
6 AA 674-75). In Brass’ case, the victims were not in their own residence when attacked, were
7 attacked while in a group, were not women, were not sexually assaulted, and were shot not
8 strangled.^{7 8} The State did not even accuse Brass of being the actual shooter in his case but
9 instead that he accompanied the shooter, Eugene Nunnery, in attempting to rob the victims
10 of money and valuables.⁹

11 On the other hand, as argued in the State’s Answering Brief in case number 53159,
12 Sheila’s and Marilee’s murders were quite similar. Both Marilee and Sheila were casual
13 acquaintances of the Defendant. They both knew the Defendant through women the
14 Defendant had dated. Defendant chose locations where people would not find his presence
15 suspicious.¹⁰ Both women were killed in their apartments while they were alone during the
16 daylight hours with no sign of forced entry. Both women’s bodies were found naked, face up
17 in their apartment. Additionally, small items of personal property were taken from both
18 women. The Defendant also attempted to destroy evidence by immersing it in water in both
19 cases. Even more telling was that both women were violently sexually assaulted and suffered
20 blunt trauma to their heads close in time with their murder. Manual strangulation was a
21

22 ⁷ See Amended Information in Case C227661B, found on Blackstone. The State asks that
23 this Court take judicial notice of these documents per NRS 47.130 and 47.150.

24 ⁸ See Transcripts of the Jury Trial in Case C227661B, Opening Statement, pages 11-28
25 found on Blackstone. The State asks that this Court take judicial notice of these documents
per NRS 47.130 and 47.150.

26 ⁹ See Transcripts of the Jury Trial in Case C227661B, Opening Statement, pages 17-19
27 found on Blackstone. The State asks that this Court take judicial notice of these documents
per NRS 47.130 and 47.150.

28 ¹⁰ At Sheila’s apartment complex Defendant told people that he worked for the owners as
maintenance man. At Marilee’s apartment complex, he was dating one of the tenants.

1 factor in both deaths. While the coroner's office found that Sheila cause of death was
2 drowning, the coroner's office also found that strangulation was a contributing factor.
3 Finally, and possibly most important, DNA evidence obtained by vaginal swabs of both
4 decedents directly tied the Defendant to both murders, which occurred less than three months
5 apart. Thus, testimony regarding details of Marilee's murder was plainly relevant to the
6 identity and intent.

7 It is clear that while Sheila and Marilee's murders are similar enough for the identity
8 and intent exceptions to NRS 48.045(2) to apply, there is no exception applicable to the facts
9 underlying Brass' matter. Per NRS 48.045(2), evidence of other acts is not admissible to
10 prove the person acted in conformity with those acts. Thus, it would have been improper to
11 introduce evidence of Brass' case at this trial or argue that as a convicted murderer, he was a
12 possible suspect for Sheila's murder. Therefore, the district court was correct in denying
13 Defendant's Motion for New Trial.

14 CONCLUSION

15 For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

16 Dated this 28th day of June 2010.

17 Respectfully submitted,

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21 BY */s/ Nancy A. Becker*

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of June 2010.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 30, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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