IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAEVON MANNING, Appellant, v. THE STATE OF NEVADA, Respondent.	No. 65856 **E-File**	Electronically Filed Feb 20 2015 08:35 a.m. Tracie K. Lindeman Clerk of Supreme Court

FAST TRACK STATEMENT

1. **Name of party:** James Daevon Manning.

2. **Attorney submitting fast track statement:** WILLIAM M. WATERS, #9456, Clark County Public Defender's Office, 309 S. Third St., Ste. 226, Las Vegas, Nevada 89155, (702) 455-4685.

3. **Appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C290624.

5. **Judge issuing order appealed from:** Douglas Herndon.

6. **Length of trial.** Three days.

7. **Conviction(s) appealed from:** Ct. 2 – Battery with the Intent to Commit a Crime.

8. **Sentence:** $25 Admin. fee; $150 DNA analysis fee; genetic testing, $250 Indigent Defense Civil Assessment fee; $1,614.62 in restitution payable to Victims of Crimes; 24-60 months in prison; 362 days CTS.

9. **Date district court announced decision:** 05/13/14.

10. **Date of entry of written judgment:** 05/15/14.

11. **Habeas corpus:** N/A.

12. **Post-judgment motion:** N/A.

13. **Notice of appeal filed:** 06/11/14.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP4(b).

15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015.

16. **Disposition below:** Judgment upon verdict of guilt.

17. **Pending and prior proceedings in this court:** N/A.

18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? Identify issues or circumstances that override**

any presumptive assignment to the Court of Appeals or require retention by the Supreme Court. Issues should be identified and explained with specific reference to arguments in the Fast Track Statement. This case is not presumptively assigned to the Court of Appeals because Appellant went to trial and was convicted of a Category B felony. Rule 17(b)(1) of the Nevada Rules of Appellate Procedure does not include trials involving B felonies within the presumptive assignment to the court of appeals.

21. **Procedural history.** On May 21, 2013, the State of Nevada charged Appellant via criminal complaint with: Robbery; Battery with the Intent to Commit a Crime; Robbery, Victim 60 Years of Age or Older; and Battery with the Intent to Commit a Crime. Appellant's Appendix p. 1-2 ("AA I 1-2"). The State alleged counts 1 and 2 occurred on March 27, 2013, and counts 3 and 4 occurred on March 29, 2013. Id. at 1-2.

Appellant first appeared in Las Vegas Justice Court department 5 on May 22, 2013. Id. at 3. The magistrate set bail, appointed the Clark County Public Defender to represent Appellant, and scheduled a preliminary hearing for June 5, 2013.[1] Id. At the preliminary hearing the State called one witness, Thor Berg ("Berg"). Id. at 5. Following the hearing the magistrate dismissed counts 1 and 2 and held Appellant to answer on counts 3 and 4. Id.

[1] The preliminary hearing was continued June 19, 2013. Id.

In district court the State filed an Information charging Appellant with Robbery, Victim over 60 Years of Age and Battery with the Intent to Commit a Crime. Id. at 7-8. Appellant pleaded not guilty and invoked his right to a speedy trial. Id. at 148. The court scheduled calendar call for August 14, 2013, and jury trial for August 19, 2013. Id.

On July 30, 2013, Appellant filed a Motion to Compel Disclosure of Brady[2] Material. Id. at 12. Appellant requested the State provide a copy of any video surveillance from the Citizen's Area Transit ("CAT") bus from March 29, 2013. Id. at 21. The State responded that it was "not in possession of video surveillance from the March 29, 2013 incident and does not believe any exists." Id. at 24, 31.

At the hearing regarding the discovery motion Appellant advised that he possessed a photographic still image taken from inside the bus on March 29, 2013, which had been given to him by the State during the initial discovery process and therefore there must be a video. Id. at 176. Concerned, the court continued the hearing until calendar call on August 14, 2013. Id. at 177.

At calendar call the State informed the court that it had emailed Detective Emby about the missing video. Id. at 179. Emby replied that

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[2] Brady v. Maryland, 373 U.S. 83 (1963).

although there were still images taken from the video recording equipment on the CAT bus on March 29, 2013, there was no video showing what actually happened on the bus.[3] Id. The State then announced ready for trial. Id. at 181. Appellant felt uncomfortable announcing ready for trial given the unresolved discovery issue so the court re-set trial to October 14, 2013. Id. at 182, 188.

Meanwhile, on October 7, 2013, Appellant's counsel requested an evaluation to determine if Appellant was competent to stand trial. *See* Id. at 153, 189-191. The court transferred Appellant's case to district court department 7 for an evaluation and stayed all proceedings pending the results. Id. at 190.

Department 7 deemed Appellant competent to stand trial and returned his case to department 11. Id. at 154, 193. Department 11 reset Appellant's trial for January 13, 2014 Id. at 155, 201.

On January 8, 2014, the district court transferred Appellant's case to the overflow judge in department 17 to assign Appellant's case to another department for trial. AA I 162, AA II 228. On January 10, 2014, department

[3] Later during the hearing the State advised the detective checked the evidence vault and there was no video surveillance impounded from the CAT bus for the March 29, 2013 incident. Id. at 186.

17 assigned Appellant's case to department 3 for trial on January 13, 2014. AA I 163.

Appellant's trial lasted three (3) days. The jury acquitted Appellant of count one, Robbery Victim 60 Years of Age or Older but convicted Appellant of count 2, Battery with the Intent to Commit a Crime (Robbery). Id. at 131, 168. The court scheduled a sentencing hearing for March 20, 214.[4] Id. at 168. At the sentencing hearing the court sentenced Appellant to a term of 24 to 60 months in the Nevada Department of Corrections with 362 days credit for time served.[5] Appellant timely filed his Notice of Appeal on June 11, 2014. AA I 145.

22. **Statement of facts.** On March 29, 2013, Berg was riding the CAT bus from Sunset Station Hotel and Casino to Sam's Town Hotel and Casino along Boulder Highway in Las Vegas, Nevada. AA III 369. The bus was crowded. Id. at 372.

When the bus approached Sam's Town Berg left his seat and walked towards the front exit. Id. at 370. While other persons entered and exited the

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[4] On January 24, 2014, Appellant filed a Motion for Judgment of Acquittal, or in the Alternative, Motion for a New Trial. Id. at 132. The district court denied the motion after a hearing on February 4, 2014. Id. at 169, AA III 616. That motion is not at issue in this appeal.

[5] For reasons unclear from the record Appellant's sentencing hearing was continued from April 24, 2014 to May 13, 2014.

bus, Appellant allegedly reached into Berg's pocket. Id. at 370, 379. Berg also claimed Appellant used his knee to apply pressure to the back of Berg's leg which caused Berg to fall. Id. at 371-72.

Afterwards, Berg noticed his money ($10.00 to $12.00), CAT bus pass, Clark County Health card, Amazon.com identification card, and various casino players cards were missing from his pocket. Id. at 371, 383. Berg had been carrying the aforementioned property loosely in his pocket. Id. at 384.

Paramedics and police eventually arrived to the bus stop. Id. Police officers initially detained three individuals at a pizza restaurant located across the street from the bus stop. Id. at 373. Police took Berg to a "show-up" identification of the suspects and Berg advised that the alleged assailant was not one of the men detained. Id. Berg then completed a voluntary statement. Id.

Callie Mae Borley ("Borley") was a passenger on the same bus on March 29, 2013. Id. at 403. Borely claimed she noticed Appellant "scoping" other persons on the bus, including Berg. Id. at 403-04. Although Berg noted he did not carry a wallet, Borley claimed Berg had a wallet hanging out of Berg's pocket. Id. When the bus stopped at Sam's Town, Borley alleged Appellant punched Berg's while grabbing Berg's wallet. Id. at 405-06, 413. Borely called 911to report the incident. Id. at 413.

Metro officer Steinbach arrived first to the scene. Id. at 389. Stienbach spoke to Berg and allegedly spoke to other witnesses. Id. However, Stienbach did not remember whether he spoke to the most important witness, the bus driver who was sitting a foot away during the alleged incident. Id. at 390, 394. Steinbach also failed to take statements from any of the other witnesses who were on the bus. Id. at 394-96. Most importantly, Steinbach claimed he did not collect the video surveillance from the bus because it "wasn't his responsibility." Id. at 399.

According to Appellant, on March 29th he traveled on the CAT bus from Henderson, NV, to his friend Jeremy Watson's house on Boulder Highway. Id. at 493. As the bus became crowded Appellant vacated his seat and moved towards the front of the bus near Berg. Id. at 494. When the bus arrived at Appellant's stop, Appellant walked/ran into Berg while exiting the bus. Id. at 494, 523. Appellant admitted, "I was just trying to get off the bus, you know, like he was kind of in the way, you know. I just kind of walked past him, I didn't mean to like -- I guess he fell kind of dramatic to me, but he had fallen. I caught him because I did kind of go past him rough, but I didn't realize he was so fragile." Id. at 523. Appellant denied stealing anything from Berg or putting his hand in Berg's pocket. Id. at 494.

23. **Issues on appeal.**

I. The State acted with gross negligence or bad faith when it lost or failed to preserve video surveillance evidence; II. The District Court erred when it allowed the State to impeach Appellant with uncharged bad acts; III. The district court committed reversible error by failing to instruct the jury on the lesser-included offense of misdemeanor battery; IV. Cumulative error warrants reversal.

24. **Legal argument, including authorities:**

I. <u>The State violated Appellant's Due Process right when it lost or destroyed evidence and/or failed to collect and preserve evidence</u>.

1. <u>Lost or destroyed evidence</u>.

"The loss of material and potentially exculpatory evidence by a law enforcement agency can deprive a defendant of the opportunity to corroborate his or her testimony, thereby severely prejudicing the defense." <u>Cook v. State</u>, 114 Nev. 120, 124, 953 P.2d 712, 714 (1998). "A conviction may be reversed when the State loses evidence if (1) the defendant is prejudiced by the loss **<u>or</u>**, (2) the evidence was lost in bad faith by the government." <u>Sparks v. State</u>, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988) (emphasis added).

To establish prejudice the defendant must show "that it could be reasonably anticipated that the evidence would have been exculpatory and

material to the defense." Id. The evidence's materiality "must be evaluated in the context of the entire record." The question is whether when so evaluated a reasonable doubt exists which was not otherwise present." Id., *citing* U.S. v. Agurs, 427 U.S. 97, 112-13 (1976).

a) Possession

During any initial police investigation where video evidence is available, patrol officers will take possession of the evidence and place it in the evidence vault so that detectives can later access the video. AA III 466. Officers can also upload images to Metro's station briefing log. Id. Here, when assigned the case, Emby noticed photographic stills from the video were in Metro's station briefing log. Id. Accordingly, Emby assumed Steinbach possessed the video. Id.

Emby called the evidence vault to retrieve the video. Id. However, the vault advised no video had been impounded. Id. At some point Emby called the bus company for the video but was told, "the bus company surveillance had -- went out of business." Id. Essentially, the video did exist at one point but because it hadn't been archived by the surveillance company the video could not be recovered.[6] Id. at 467.

[6] The State never presented evidence regarding how long Emby waited before he contacted the surveillance company.

In order to upload the video stills to the station briefing log Steinbach had actual or constructive possession of the video surveillance from the bus on March 29, 2013. There cannot be still photographs if there was no video and the stills could not be in Metro's log without Stienbach or some officer uploading them. Accordingly, the video was in the State's actual or constructive possession and was subsequently lost.

i) Bad Faith

This Court hasn't explicitly defined what constitutes "bad faith" in the context of loss or destruction on evidence. However, bad faith is "generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *See* <http://thelawdictionary.org/bad-faith/>, last accessed February 17, 2015.

Police officers do not have a duty to collect all potential evidence in a criminal case. *See* Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998). However, at minimum, when video evidence documenting the alleged crime is given to police, justice requires the police take steps to maintain the evidence. The integrity of the criminal justice system demands officers do at

least this much. Here, because Stienbach had a duty to store the evidence he possessed the eventual loss is due to Stienbach's bad faith.[7]

ii) Prejudice

Assuming this Court doesn't find bad faith, the loss of the video nevertheless prejudiced Appellant. Lost evidence is prejudicial when "it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense." Sparks, 104 Nev. at 319, 759 P.2d at 182.

The still photographs were very good quality. *See* AA III 676-679. Consequently, the video would have also been good quality. "Conveniently" for the State the stills did not show the interaction between Appellant and Berg. However, the video would have shown the interaction.

Borely and Berg's account of the incident differed significantly. Borely claims Berg had a wallet hanging out of his pocket and Appellant punched Berg. AA II 404, 406. However, Berg claimed Appellant used his knee to cause Berg to fall down while simultaneously taking Berg's loose collection

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[7] Contrast Appellant's case with Jackson v. State, 291 P.3d 1274, 1284, 128 Nev. Adv. Op. 55 (2013), where this Court noted the loss of evidence wasn't in bad faith because **compiling and providing** only parts of a larger video was due to efficiency concerns. Here, the State never provided any explanation as to why Stienbach allowed the video to become lost and didn't provide even portions of the video unlike in Jackson.

of identification cards and cash. Id. at 370, 372. Importantly, all three witnesses; Berg, Borely, and Appellant testified that it was crowded on the bus.

The video was exculpatory because it would have shown Appellant aggressively leaving the crowded bus, and knocking Berg down in the process. The video would not have shown Appellant reaching his hand into Berg's pocket, punching Berg, or using his knee to purposely cause Berg to fall.

The only independent evidence supporting Berg's allegation came from Borely. However, by acquitting Appellant of Robbery the jury rightly rejected Borely's contradictory testimony. If shown the video the jury would have acquitted Appellant entirely. Accordingly, due to the State's loss of evidence Appellant's conviction should be vacated.

2. Failure to collect evidence

If this Court believes that Steinbach never actually possessed the video, although Appellant contends there's no other explanation for how the stills were uploaded to the station briefing log, Steinbach nevertheless failed to collect the video and his actions were either due to bad faith or gross negligence.

To establish a due process violation when the State fails to gather evidence the defendant must first show that the evidence was material. Daniels, 114 Nev. at 267, 956 P.2d at 115. Evidence is material if "there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Id. If the evidence is material, the court must then determine whether the State's failure to collect the evidence was due to bad faith, gross negligence, or mere negligence. Id.

When the State's failure is the result of mere negligence, the defendant is given no relief and must simply cross-examine the State's witness regarding the failure. Gordon v. State, 121 Nev. 504, 510, 117 P.3d 214, 218 (2005). In cases of gross negligence, the defendant is "entitled to a presumption that the evidence would have been unfavorable to the State." Id. Finally, in cases of bad faith the remedy is dismissal. Id.

Here, the video was absolutely material. State's witnesses Berg and Borley gave different testimony regarding what happened between Berg and Appellant. However, both generally testified that Appellant reached his hand into Berg's pocket. Yet, the jury acquitted Appellant of robbery. The video would have either shown appellant merely knock Berg down without taking anything or it would have shown Appellant put his hand in Berg's pocket. Accordingly, Appellant would have been acquitted entirely or had been

convicted. Either way, "the result of the proceedings would have been different."

As discussed *supra*, Stienbach lost the evidence in bad faith. If this Court disagrees, at minimum Stienbach acted with gross negligence. First, Metro has a briefing log for officers to upload documentary evidence. The briefing log proves that Metro trains its officers to secure and upload documentary evidence. Second, Detective Emby knew how important the video was the moment he began his investigation when he immediately called the evidence vault to retrieve and review the video. AA III 466.

All police officers are trained in evidence collection techniques. Failure to characterize Stienbach's performance as gross negligence suggests police officers have no standards whatsoever. Moreover, if there are no consequences when police officers, who have the best and only chance to preserve vital evidence, fail to collect evidence, officers will have no incentive to do so. Consequently, judicial resources are wasted and innocent persons are wrongfully convicted.

Lastly, police are not only responsible for finding suspects but also determining whether a crime was even committed. For this reason society gives police exclusive control over criminal investigations. With this power

comes a concomitant responsibility to ensure that all evidence -- whether it inculpates or exonerates, is collected and preserved.

Appellant did not rob or intend to rob Berg. However, Stienbach's grossly negligent actions robbed Appellant of a chance at exoneration and ultimately his freedom. Based upon the aforementioned arguments, Appellant respectfully requests this Court reverse his conviction.

II. The District Court committed reversible error by allowing the State to impeach Appellant with uncharged bad acts.

"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." NRS 48.045(2). Accordingly, use of prior bad act evidence is "heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001).

"The district court's decision to admit or exclude evidence is reviewed for an abuse of discretion." Balthazar-Monterrosa v. State, 122 Nev. 606, 619, 137 P.3d 1137, 1145 (2006). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005), *quoting* Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000

(2001). This Court reviews the improper admission of bad act evidence under harmless error. Newman v. State, 298 P.3d 1171, 1181-82, 129 Nev. Adv. Op. 24 (2013).

After Appellant's arrest on May 18, 2013, Detective Kavon interviewed Appellant at the Clark County Detention Center. AA III 639. Kavon only questioned Appellant regarding a March 27, 2013, incident on a bus involving two black males where one allegedly snatched a woman's cell phone.[8] Id. at 641. Kavon never questioned Appellant about the March 29, 2013, incident involving Berg.

During the interview Kavon showed Appellant a photograph depicting Appellant and another person on a CAT bus. Id. at 663. In response, Appellant offered a rambling explanation advising that he was on the bus on March 27, 20013, with Nicholas Thompson when Appellant "snatched" a woman's cell phone. Id. at 653.

Appellant further explained that Thompson, also known as "Baby Insane" was an extremely violent individual whom Appellant had witnessed rob other persons and who treated Appellant as his "pawn" by attempting to

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[8] This incident was the basis for counts 1 and 2 in the original criminal complaint filed on May 21, 2013, which were dismissed at the preliminary hearing. AA I 1, 5.

force Appellant to do illegal things. Id. at 642-60. Appellant did not admit to robbing or taking anything from Berg on March 29, 2013.

At trial, Appellant testified he was alone on the CAT bus on March 29, 2013. Id. at 522. Appellant testified that he did not rob Berg. Id. at 494-95. Instead, Appellant explained that he forcefully made contact with Berg while Appellant exited the bus causing Berg to fall. Id. at 494, 523. On cross examination the State sought to question Appellant concerning the other alleged uncharged crimes involving Thompson that Appellant mentioned during Kavon's interview. Id. at 495. Appellant objected. Id.

During discussion outside the jury's presence the State explained it desired to use Appellant's statement to show, "there were repeated times where this individual [Thompson] forced him [Appellant] to do things to people specifically, and he instilled fear into the Defendant." Id. at 496-97. After extensive argument the court allowed the State to introduce Appellant's statements concerning the other alleged crimes he or Thompson may have committed because, "if there is information out there which may be prejudicial to him but it's nonetheless relevant to the case, they may be entitled to ask him about it." Id. at 505.[9]

[9] Appellant objected to the admission of the evidence as "irrelevant and improper prior bad acts." AA III 500. The court indicated the issue did not

Thereafter, the State questioned Appellant regarding other crimes primarily perpetuated by Thompson.[10] Id. at 516-24. Additionally, the State questioned Appellant regarding his association with Thompson and whether Appellant told Kavon that Thompson forced Appellant to do illegal things. Id. at 519. When Appellant answered he didn't remember telling these things to Kavon, the State read portions of Appellant's statement to the jury. Id. at 516-24.

As a preliminary matter, the district court abused its discretion by allowing the State to present the bad act evidence under the general proposition that any time a defendant testifies bad act evidence, if relevant, is

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involve bad acts under NRS 48.045(2), because a motion to admit bad acts only applies, "in their [the State's] case in chief." Id. at 501. However, the court ultimately decided that the statement was relevant to "common scheme or plan" and gave the Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001) limiting instruction. Id. at 512-513. The court also invited the State to call rebuttal witnesses to present extrinsic evidence of the other incidents, which wouldn't necessarily be allowed under any statute except NRS 48.045(2). Id. at 511. Although the court claimed NRS 48.045(2) wasn't controlling, the court's actions belie its claim.

[10] NRS 48.045(1) and 58.085(3) also involves the admissibility of evidence of a defendant's other conduct. Here, the State never asked to admit the evidence under either NRS 48.045(1) or NRS 58.085(3). The district court did not find the evidence admissible under these statutes either. Accordingly, Appellant has chosen not to argue the applicability of these statutes in this brief. Likewise, Appellant contends that Respondent should be precluded from arguing the applicability of NRS 48.045(1), NRS 58.085(3) or NRS 51.035 in its Response. *See* Mason v. Cuisenaire, 122 Nev. 43, 48, 128 P.3d 446, 449 (2006), "failure to raise an argument in the district court proceedings precludes a party from presenting the argument on appeal."

automatically admissible. Id. at 505. In actuality, the mere fact that evidence is relevant does not automatically mean it is admissible.

NRS 48.025(1)(a) notes that relevant evidence is admissible unless "otherwise prohibited by this title." NRS 48.025(1)(a) is within title 4 of the NRS which governs witnesses and evidence. NRS 48.045(2) is also within title 4. Accordingly, NRS 48.045(2) limits the admission of generally relevant evidence of other bad acts.

The district court's decision to introduce bad act evidence solely because the evidence was generally relevant was arbitrary, capricious, and exceeded the bounds of law. The decision did not acknowledge that NRS 48.045(2) limits otherwise relevant evidence. Accordingly, Appellant requests this court reverse his conviction.

Although the court based its decision upon a general finding that the evidence was "relevant," and did not logically explain what statute or case allowed the State to admit evidence of Appellant's otherwise inadmissible bad acts -- and disclaimed that NRS 48.045(2) did not apply, the court nevertheless conducted a quasi-analysis under NRS 48.045(2). The court also gave the Tavares limiting instruction applicable to evidence admitted under NRS 48.045(2). Accordingly, Appellant will discuss the applicability of NRS 48.045(2).

1. NRS 48.045(2)

If other bad act evidence is relevant for any non-propensity purpose the evidence **may** be admissible. Big Pond v. State, 270 P.3d 1244, 1245, 128 Nev. Adv. Op. 10 (2012). (Emphasis added). However, before the jury receives bad act evidence the district court **must** conduct a hearing outside the jury's presence to decide whether the bad act is relevant, proven by clear and convincing evidence, and whether the act's probative value is not substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

The court must conduct the hearing even when the other bad act evidence is merely contained within a defendant's statement to police or confession. *See* Walker v. State, 112 Nev. 819, 823-24, 921 P.2d 923, 926 (1996). Additionally, "[t]he Petrocelli[11] hearing must be conducted on the record to allow this court a meaningful opportunity to review the district court's exercise of discretion." Id. When the district court fails to conduct the hearing, the failure is reversible error unless, "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result

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

would have been the same if the trial court had not admitted the evidence." Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005).

Here, the district court did not conduct a Petrocelli hearing prior to admitting the bad act evidence. The court entertained argument but generally advised that the hearing was not required because the State hadn't sought admission in its case in chief. AA III 503-04.

To Appellant's knowledge this Court has never held that the hearing only applies in situations where the State seeks admission of bad acts in its case in chief. Although the State could certainly request a hearing prior to trial to present the evidence in its case in chief, this Court's precedent doesn't exclude situations like the instant case from requiring a hearing before the evidence's admission.

The current record is insufficient to determine that the evidence would have been admissible had the court conducted the hearing. Moreover, the trial result would have been substantially different had the court not allowed the jury to hear damning information concerning vague, unsubstantiated, other crimes that Appellant may have committed or witnessed Thompson commit. Based solely upon the court's refusal to conduct a hearing Appellant's case should be reversed.

Nevertheless, if this Court desires to analyze the issue under NRS 48.045(2), even though the district court failed to conduct a hearing, Appellant maintains that the evidence was irrelevant, not proven by clear and convincing evidence, and was substantially more prejudicial than probative.

a) Relevancy

"Identification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis." Newman, 298 P.3d at 1178. Here, the State never articulated a non-propensity reason for admission. Instead, the State argued it wanted to establish that Appellant did the exact same thing "so many times" at the behest of Thompson that he had a propensity to commit crimes including the alleged robbery against Berg. *See* AA III 497.

When the State couldn't articulate a non-propensity purpose, the court became the prosecutor and articulated its own non-propensity purpose. The court decided the evidence was "relevant to whatever was motivating Mr. Manning[]" and "in proving whether there is a common scheme or plan." Id. at 511-12.

Appellant told Kavon he witnessed Thompson commit street level robberies. Id. at 643, 646-49, 655-56. Also, Thompson would force Appellant to do things while Thompson stood by threateningly. Id.

According to Appellant, those things only happened when Appellant was with Thompson. Id. On March 29, 2013, Appellant was alone on the bus. Id. at 522. If Appellant's motivation to do things came from his fear of Thompson, then because Thompson was not present on March 29, 2013, Appellant would not be motivated to rob Berg.

Furthermore, there was no common scheme or plan between the Berg situation and Appellant's vague admissions about doing bad things. Two separate and distinct crimes are only part of a common scheme when there is an "overarching plan explicitly conceived and executed by defendant." Ledbetter v. State, 122 Nev. 252, 260, 129 P.3d 671, 678 (2006). Here, according to Appellant's statement, he never devised a plan to rob people and then executed that plan. Instead, Thompson conceived a plan to steal cell phones from people and make others like Appellant into his "bitch." AA III 650.

If Thompson had been on trial for robbing Berg then perhaps the bad act evidence would be relevant. However, Appellant was on trial and his statement to Kavon does not demonstrate that Appellant conceived a plan and robbing Berg was part of that plan. Accordingly, the district court's decision that the evidence was relevant to motive and common scheme or plan was clearly erroneous.

b) Clear and convincing evidence

"Before evidence of prior bad acts may be admitted, there must be clear and convincing evidence that **such acts actually occurred**." Winiarz v. State, 107 Nev. 812, 818, 820 P.2d 1317, 1321 (1991) (Emphasis added). Here, Appellant attempted to explain to the district court that even if it thought the evidence was relevant the State still had to prove the bad acts occurred by clear and convincing evidence. *See* AA III 510. The court erroneously claimed that the mere fact that Appellant made the vague, fantastical, statement was sufficient proof that the acts occurred. Id. at 507, 511. Because Nevada law requires the State actually prove the bad act occurred, not simply that a defendant made a statement admitting to bad acts, the court's decision was arbitrary, capricious, and outside the bounds of law.

c) The prejudice outweighed any probative value

Appellant's rambling statement to Kavon regarding Thompson had nothing to do with whether Appellant robbed Berg. Instead, the statement needlessly painted Appellant as someone who associates with persons of ill repute. This assumption likely contributed to the jury's decision to convict Appellant of anything even though the evidence regarding the specific allegation was lacking. Essentially, the prejudicial effect of the evidence far outweighed any possible probative value.

The district court's decision to allow the State to admit evidence of bad acts was reversible error. The district court essentially created a rule, found nowhere in Nevada law, that when a criminal defendant chooses to testify the defendant automatically opens himself to impeachment with other bad acts no matter how nebulous or tenuous to the actual charges the defendant is facing. Because this is not the state of the law in Nevada, the court's decision was arbitrary, capricious, and an abuse of discretion.

Finally, the decision was not harmless. An error is harmless unless it "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" Newman, 298 P.3d at 1182, *quoting* Tavares, 117 Nev. at 732, 30 P.3d at 1132. Had the jury not heard about Appellant's association with Thompson and the vague "bad things" Thompson supposedly made Appellant do, the Jury would have acquitted Appellant entirely. Accordingly, Appellant requests this Court reverse his conviction.

III. The district court committed reversible error by failing/refusing to instruct the jury on the lesser included offense of Battery.

According to NRS 175.501, a defendant "may be found guilty... of an offense necessarily included in the offense charged." An offense is necessarily included in the charged offense when the charged offense "cannot be committed without committing the lesser offense." Estes v. State, 122

Nev. 1123, 1143, 146 P.3d 1114, 1127 (2007) (*internal citations omitted).* Interpreting NRS 175.501, this Court has noted two situations where a defendant would be entitled to a lesser included offense jury instruction.

First, when any evidence is presented whatsoever which absolves a defendant of guilt for a greater offense yet supports guilt for a lesser offense the district court must instruct the jury on the lesser offense "without request." Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966). In these mandatory situations the defendant need not request the instruction and the district court's failure to instruct the jury on the lesser offense is not subject to harmless or plain error review. *See generally* Rosas v. State, 122 Nev. 1258, 1265, 147 P.3d 1101 (2007).

Alternately, "if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must, if requested, instruct on the lower degree or lesser included offense." Lisby, at 188, 414 P.2d at 595. In these situations the defendant must ask for the lesser included offense instruction. Id. If, upon request, the defendant is entitled to the instruction and the district court refuses the instruction the court's decision is not subject to harmless or plain error review. *See* Rosas, 122 Nev. at 1258, 147 P.3d at 1101.

Here, the State charged Appellant with Robbery and Battery with Intent to Commit a Crime. AA I 7-8. Nevada defines Battery as "any willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). Similarly, Battery with the Intent to Commit a Crime is codified in NRS 200.400(1)(a) and defines battery identically to NRS 200.481.

To convict Appellant of Battery with the Intent to Commit a Crime (Robbery) the State had to prove that Appellant: (1) committed a battery; and (2) during the battery Appellant had the specific intent to rob Berg. Accordingly, Appellant could not commit Battery with the Intent to Commit a Crime without first committing a Battery. Therefore, Battery is a lesser included offense of Battery with the Intent to Commit a Crime.

1. The district court was required to give a lesser included offense instruction regarding battery without request.

At trial Appellant presented evidence which absolved him of guilt for Battery with the Intent to Commit a Crime but supported guilt for the lesser included offense of Battery. Specifically, Appellant made physical contact, i.e. a battery, with Berg when he exited the bus. AA III 494, 523. Appellant noted that Berg "was in the way" when Appellant walked out the door. Id. at 523. However, Appellant denied taking anything from Berg or intending to

take anything from Berg. Id. Therefore, Appellant unlawfully used force upon Berg by purposely bumping into Berg causing Berg to fall.

Based upon Appellant's testimony there was evidence absolving him of guilt for Battery with the Intent to Commit a Crime while supporting guilt for simple Battery. Accordingly, the district court was required to instruct the jury on the lesser included offense of Battery without request. Having failed to do so, the district court committed reversible error.

2. Appellant requested a lesser included offense instruction and there was evidence presented whereby Appellant could have been convicted of the lesser offense of Battery.

If this Court determines the district court wasn't required to instruct the jury on the lesser included offense of Battery without request, Appellant nevertheless presented evidence supporting a theory of defense consistent with the lesser offense. Therefore, the district court should have granted Appellant request for battery as a lesser included offense jury instruction. AA III 558.

As previously discussed, Appellant testified it was crowded on the CAT bus on March 29, 2013. Id. at 494, 523. Appellant had physical contact with Berg when Appellant exited the bus. Id. Appellant noted that Berg "was in the way" when Appellant walked out the door causing Berg to fall. Id. at 523. However, Appellant denied taking anything from Berg or intending to take

anything from Berg. Id. In closing argument Appellant summarized this theory of defense by highlighting Appellant's testimony: "I pushed into the old man. I ran past him because I was trying to get off the bus. That was rude. That was really rude. He [Appellant] should have said, excuse me sir. Or gone out another exit." Id. at 584.

Based upon his testimony, Appellant presented evidence -- however slight, to support a reasonable theory of defense that he battered Berg but did not rob nor intend to rob Berg. In support of this theory Appellant requested a lesser included jury instruction for Battery. Id. at 558.

In denying Appellant's request the court instead suggested that if the jury convicted Appellant of both Robbery and Battery with the Intent to Commit Robbery then the court would consider vacating one of the convictions. Id. at 559. The court's reasoning is completely at odds with NRS 175.501 and this Court's precedent. Therefore, the decision was clearly erroneous.

Here, Appellant presented evidence supporting the lesser included offense of Battery. Concession that he committed a Battery was part of Appellant's reasonable theory of defense. Additionally, Appellant specifically requested the court instruct the jury on the lesser included offense

of Battery. Because the district court refused, Appellant respectfully requests this Court reverse his conviction.

IV. Cumulative Error Warrants Reversal

"Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000), *citing* Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994). "When evaluating a claim of cumulative error, we consider the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

1. The Issue of Guilt

The jury correctly acquitted Appellant of Robbery based upon the utter lack of evidence supporting the allegation. However, because Appellant knocked Berg down while attempting to exit the bus the jury convicted Appellant of the only charge which remotely made sense, Battery with the Intent to Commit a Crime. Had the court properly instructed the jury on the lesser offense of Battery, the jury certainly would have convicted Appellant only of Battery.

Additionally, the closeness of the case could not overcome the prejudice of the district court's erroneous decision to allow the jury to hear unsubstantiated evidence of vague other bad acts. *See* Valdez v. State, 124 Nev. 1172, 1196, 196 P.3d 465, 481 (2008).

2. The Quantity and Character of the Error

The district court's failure to properly instruct the jury affected Appellant's substantial right to a fair trial and is not subject to harmless error review.[12] Additionally, the court compounded the State's violation of Appellant's due process rights when it lost the video by failing to instruct the jury that the State's failure required the jury to draw a negative inference against the State. Finally, the district court erred by allowing the State to impeach Appellant with vague and tenuous bad acts involving Appellant and Thompson. This error affected Appellant's fair trial rights and independently warrants reversal.

3. The Gravity of the Crime

Although initially charged with Robbery, which is a serious crime, the jury only convicted Appellant of Battery with the Intent to Commit a Crime.

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[12] *See* Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983), "If a defense theory of the case is supported by some evidence which, if believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes it from the jury's consideration and constitutes reversible error."

Had the jury been given the lesser included instruction on Battery, it would have only convicted Appellant of Battery.

All crimes are arguably "serious." Other than obvious crimes such as murder and sexual assault, it is difficult to quantify where Battery with the Intent to Commit Robbery falls within the spectrum of crimes and their respective seriousness. In any event, here, the evidence was so lacking that one cannot argue without reservation that the verdict would have been the same without the aforementioned errors.

25. **Preservation of issues:** Issue I: Preserved, AA I 106; Issue II: Preserved, AA III 495-514; Issue III: Preserved, AA III 559; Issue IV: N/A.

26. **Issues of first impression or of public interest:** N/A.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *__/s/ William M. Waters__*
WILLIAM M. WATERS, #9456
Deputy Public Defender

VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

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3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 19th day of February, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of February, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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c/o High Desert State Prison
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BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office