

IN THE SUPREME COURT OF THE STATE OF NEVADA

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CORY DEALVONE HUBBARD,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

Case No.: 66185
District Court No.: C-13-292507-1

APPELLANT'S OPENING BRIEF

**Appeal from Judgment of Conviction
Eighth Judicial District Court**

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY DEALVONE HUBBARD,)	
)	Case No.: 66185
Appellant,)	District Court No.: C-13-292507-1
)	
vs.)	NRAP 26.1 DISCLOSURE
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	
_____)	

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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No publically held company associated with this corporation;

///

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DATED this 25th day of July, 2015.

Respectfully Submitted:

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the present appeal pursuant to NRS 177.015(3). This appeal arises from the filing of the Judgment of Conviction, after a jury trial, which was entered on July 1, 2014.¹ A timely Notice of Appeal was filed on July 29, 2014.²

CASE ROUTING STATEMENT

According to NRAP Rule 17(b)(1), the present matter is not presumptively assigned to the Court of Appeals as it involves a direct appeal from a judgment of conviction based upon a jury verdict for Category B offenses.

STATEMENT OF THE ISSUES

Whether Mr. Hubbard's Fourteenth Amendment Right to Due Process Has Been Violated by His Convictions for Robbery with Use of a Deadly Weapon, as Charged in Counts 3 and 6 Through 9, Because the State Failed to Adduce Any, Much less Sufficient, Evidence That the Named Victims Had Any Personal Property Taken from Them?

¹ See p.1171-1173. Appellant's Appendix Volume I. Hereinafter, the referenced volume and relevant pages shall be denoted as AA. For example, the relevant citation for the Judgment of Conviction is I AA 1171-73.

² VI AA 1174-1180.

Whether admission of the Facts Underlying Mr. Hubbard's Washington State Conviction for Residential Burglary Rendered His Trial Fundamentally Unfair and Violated Mr. Hubbard's Federal Constitutional Right to Due Process as Guaranteed by the Fifth and Fourteenth Amendments?

STATEMENT OF THE CASE

On September 11, 2013, Cory Hubbard and Willie Carter were indicted, by the grand jury, for allegedly committing the crimes of conspiracy to commit robbery, burglary while in possession of a firearm, and seven counts of robbery with use of a deadly weapon.¹ Individually, Cory Hubbard was charged with committing attempt murder with use of a deadly weapon, assault with a deadly weapon and discharging a firearm within a structure.² The crimes were allegedly committed on August 22, 2013 against David Power, Darny Van, Asia Hood, Kenneth Flenory, Anthony Robert, Thavin Van and Trinity Briones.³ On September 19, 2013, Mr. Hubbard invoked his right to trial within sixty days.⁴

After Stelman Joseph was arrested for his alleged involvement in the crimes, on October 30, 2013, a second superseding indictment was filed charging Cory Hubbard with the same crimes.⁵

¹ I AA 01-09.

² I AA 08-09. Willie Carter was also charged individually with these same three charges. I AA 07-08.

³ I AA 01-09.

⁴ VII AA 1182.

⁵ I AA 12-19.

On October 31, 2013, Mr. Hubbard was arraigned on the superseding indictment and, again, asserted his right to have trial within sixty days.⁶

A pretrial writ of habeas corpus was filed on Mr. Hubbard's behalf. The district court verified that Mr. Hubbard wanted the writ filed and that he understood that filing the writ would waive the right to trial within sixty days. Mr. Hubbard affirmatively waived his right to trial within sixty days on December 5, 2013.⁷

On March 31, 2013, Willie Carter plead guilty to three charges alleged in the second superseding indictment. One count robbery with use of a deadly weapon in which Darny Van, Asia Hood, Kenneth Flenory and David Powers were identified as the victims of the robbery. A second count of robbery with use of a deadly weapon in which Anthony Roberts, Thavin Van and Trinity Briones were identified as the victims of that robbery.⁸ Mr. Carter also plead guilty to one count of attempt murder with use of a deadly weapon.⁹

⁶ VII AA 1190.

⁷ VII AA 1200.

⁸ 4.17 p.102, 106, 107

⁹ 4.17 p.111

Mr. Carter was ultimately sentenced to a total of twelve to thirty years in the Nevada Department of Corrections.¹⁰

On March 18, 2014, the state filed a Motion In Limine to admit the facts of a Washington residential burglary that occurred on July 27, 2012.¹¹ The district court heard argument from the parties, granted the state's motion. However, the district court decided that an evidentiary hearing would not be conducted because Mr. Hubbard had been convicted of the crime and the state had certified copies of the Washington record for the conviction.¹²

Mr. Hubbard's trial began on April 14, 2014 with jury selection.¹³ As the jury was seated early in the evening on April 14, 2014, evidence was adduced on April 15, 16, 17, 21, and 22, 2014.¹⁴ At 7:35 p.m. on April 22, 2014, the jury returned to the court room and the clerk announced the verdicts: guilty of conspiracy to commit robbery, burglary and all seven counts of robbery with use of a deadly weapon.¹⁵

¹⁰ 04.17. P.118

¹¹ I AA 22-69.

¹² I AA 77-92.

¹³ VII AA 1214.

¹⁴ VII AA 1216-1223.

¹⁵ VII AA 1124; see also VI AA 1167-1170 (verdict form).

Mr. Hubbard was found not guilty of attempt murder with use of a deadly weapon. Mr. Hubbard was convicted of the lesser included offense of simple assault and also found guilty of discharging a firearm within a structure.¹⁶

At the time of sentencing, the district court found that Mr. Hubbard was eligible for sentencing as a habitual criminal.¹⁷ On all of the counts of conviction, but the lesser included simple assault charge, the district court imposed a sentence of life without the possibility of parole. Each sentence was ordered to run concurrently with each other. The court order credit for time served for the assault conviction.¹⁸

On July 29, 2014, a timely notice of appeal was filed.¹⁹

STATEMENT OF FACTS

In August of 2013, David Powers lived with his girlfriend, Darny Van, in a five bedroom residence located at 657 Shirehampton in Las Vegas, Nevada.²⁰

¹⁶ Id.

¹⁷ VII AA 1225.

¹⁸ VI AA 1171-1173.

¹⁹ VI AA 1174-1180.

²⁰ I AA 137-39; I AA 218-19.

On the evening of August 22, 2013, besides David and Darny, six other people were present at the Shirehampton residence. Five of the people were related to Darny: Matt Van, her brother, Thavin Van, her aunt, Trinity, Thavin's daughter who was three years old,²¹ Kenneth Flenory known as KJ, another brother, and Asia Hood, her sister.²² Finally, Anthony "Tiger" Roberts, a friend of David's, was also inside the residence.²³ David knew everyone, besides himself, was downstairs but not exactly where they were in the house.²⁴

As it turned out, Kenneth was in the kitchen eating doughnuts.²⁵ Anthony Roberts was in the downstairs guest bedroom, which was more like a recording studio than a bedroom, just off the foyer/entry of the house.²⁶ Matthew was downstairs.²⁷

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²¹ I AA 221.

²² I AA 139-40; I AA 219-221.

²³ I AA 221-22.

²⁴ I AA 141.

²⁵ I AA 247 and 363.

²⁶ III AA 423.

²⁷ I AA 332.

While Darny, Thavin, Trinity, and Asia were all in the living room.²⁸ Darny, Thavin and Asia were all sitting on a couch.²⁹ Thavin was on both her phone and iPod while three year old Trinity was playing and running around the living room area.³⁰ Asia was playing on one of the two iPads that were owned by David and Darny.³¹ Darny was on her phone, using her blue tooth earpiece, speaking with another sister who was in California.³²

While Darny was on the phone, the front doorbell rang at approximately 8:45 p.m. Darny opened the door, saw a black male standing on the porch who asked her if Darnell was in the house.³³ All of a sudden two other black males barged into the house from the right side of the door and a gun was put into her face.³⁴ The guy who had rung the door bell entered the house after the other two black guys.³⁵

²⁸ I AA 223.

²⁹ I AA 224-25.

³⁰ I AA 278-280.

³¹ II AA 279.

³² I AA 225 and 238.

³³ I AA 225-28.

³⁴ I AA 228-29.

³⁵ I AA 229-230.

After all three men were inside the house, a taller slender guy - who was identified as Willie Carter³⁶ - had a firearm, grabbed Darny's left wrist. At that time, Anthony Roberts came out of the downstairs bedroom and Carter grabbed him also.³⁷ Carter then went into the living room dragging Darny in after him.³⁸ Once in there, Carter went over to Asia and her iPhone 3G and iPad out of her hands.³⁹ Next, Carter went toward where Thavin and her baby Trinity were and pointed the gun in their faces.⁴⁰ As Carter went toward Thavin, Darny was able to run out of the living room and into a closet where she hid behind a ping pong table.⁴¹ A few minutes after Darny got into the closet, Asia joined her.⁴²

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³⁶ I AA 291.

³⁷ I AA 240; I AA 242 (firearm).

³⁸ II AA 242 and I AA 265.

³⁹ I AA 242-43; I AA 311-12.

⁴⁰ I AA 243; I AA 283.

⁴¹ I AA 243-44.

⁴² I AA 245-46; see also I AA 318.

While Darny was hiding in the closet, she heard three gunshots fired that were fired back to back.⁴³ When Darny came out of the closet, she saw all three men running out of the house.⁴⁴

During this time frame, Kenneth ran from the kitchen toward the front door.⁴⁵ When Kenneth got near the front door, he was stopped by a guy who put a gun in his face and then made him kneel down on the floor.⁴⁶ At this point, the guy took Kenneth's cell phone out of his hand.⁴⁷ Anthony Roberts also ended up in the same area as Kenneth and was also put on his knees.⁴⁸ While the man with the gun went through Anthony's pockets, he got distracted because the shooting started. The man did not end up taking any of Anthony's property.⁴⁹

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⁴³ I AA 246.

⁴⁴ I AA 253.

⁴⁵ I AA 364-65.

⁴⁶ I AA 366-67.

⁴⁷ I AA 367.

⁴⁸ III AA 427.

⁴⁹ III AA 428.

David Powers was upstairs in the master bedroom when he heard someone shouting “get the fuck on the floor, get the hell down.”⁵⁰ After hearing this, David went to the top of the stairs, directly outside the bedroom, looked downstairs and saw everyone getting on the floor.⁵¹ Davis also saw two black men who should not have been inside the house; he also saw one or two firearms.⁵² As David looked downstairs, one of the guys saw him and told a different male to “go upstairs and get him.”⁵³

David saw the guy beginning to run up the stairs towards him; he went into the master bedroom, grabbed the .40 caliber pistol off of the night stand, ran out of the room, and fired two or three shots.⁵⁴ When David shot his weapon, he observed the guy was running up the stairs, pumping his arms, had a firearm in his hand and was within four or five steps of reaching the master bedroom.⁵⁵

⁵⁰ I AA 141.

⁵¹ I AA 142.

⁵² I AA 143-44

⁵³ I AA 143.

⁵⁴ I AA 146 and I AA 193. David and Darny each had a firearm on the top of their night stand; one was a .40 caliber Smith and Wesson while the other was a .22 caliber. I AA 138. Both were semi-automatic weapons. Id.

⁵⁵ I AA 145-46.

Immediately after David shot, the guy jerked back, grabbed his left shoulder-side area, and ran back down the stairs towards the kitchen area.⁵⁶

As soon as this guy got to the bottom of the stairs, a different male reached around the wall downstairs and fired a shot at David.⁵⁷ David felt the bullet fly by the left side of his face.⁵⁸ Then, while David was still upstairs in the loft area, another shot was fired inside the house as the guys ran out.⁵⁹

Once he knew the men had left, David went downstairs, made sure everyone was alright, and went out the front door to see if anyone was still outside.⁶⁰ After doing all of this, David then picked up his phone and called 911.⁶¹

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⁵⁶ I AA 147-48 and I AA 195.

⁵⁷ I AA 148 and I AA 195.

⁵⁸ I AA 148-49.

⁵⁹ I AA 149-50 and III AA 432.

⁶⁰ I AA 150-51 and III AA 430.

⁶¹ I AA 151.

Later, at approximately 9:00 p.m., a black male came inside the Short Line Express market, located at 8096 South Durango, and said he was bleeding and needed help.⁶² An employee at the market called 911.⁶³ American Medical Response responded to the Short Line market, arriving at 9:11 p.m., examined the black male and found that he had been shot one time.⁶⁴ AMR transported the black male to UMC trauma.⁶⁵ This person was identified as Cory Hubbard.⁶⁶

SUMMARY OF ARGUMENT

Mr. Hubbard was charged and convicting of committing seven counts of robbery with use of a deadly weapon. Only two of the alleged victims testified during Mr. Hubbard's trial that personal property was actually taken from them. An iPhone 3G and iPad were taken from Asia Hood.⁶⁷ While a cellular phone was taken from Kenneth Flenory.⁶⁸

⁶² III 441 and 448.

⁶³ III AA 453.

⁶⁴ III AA 465, 467, 497 and 504.

⁶⁵ III AA 469.

⁶⁶ III AA 593.

⁶⁷ Count 4 of the superseding indictment.

⁶⁸ Count 5 of the superseding indictment.

While each of the other four alleged victims of the robbery charges - David Powers, Darny Van, Thevin Van, and Antony Roberts - testified during the trial, not one of them stated that personal property had been taken from them on August 22, 2013. David Powers and Darny Van were never even asked by the prosecution whether any of their personal property was taken on August 22nd.⁶⁹ While Anthony Roberts and Thevin Van specifically denied that anything had been taken from them.⁷⁰ Finally, one of the alleged victims - Trinity Briones - was three years old on August 22, 2013 and, understandably, was not called to testify during Mr. Hubbard's trial.⁷¹ Therefore, and in violation of Mr. Hubbard's federal constitutional rights, insufficient evidence was introduced to sustain Mr. Hubbard's convictions on Counts 3, 6, 7, 8 and 9 as charged in the Superseding Indictment. These convictions must be reversed.

Additionally, during Mr. Hubbard's trial, Kimberly Davis was permitted to testify by the district court regarding a residential burglary that occurred on July 27, 2012 in Marysville, Washington.

⁶⁹ Counts 1 and 4 of the superseding indictment.

⁷⁰ Counts 5 and 6 of the superseding indictment.

⁷¹ Count 9 of the superseding indictment.

Mr. Hubbard was convicted of committing this crime based on the evidence gathered by law enforcement. Although Ms. Davis testified at Mr. Hubbard's trial, she could not identify Mr. Hubbard as a participant in the crime because never saw him either enter or leave the residence; she was locked inside her bathroom when the burglars entered. The district court admitted Ms. Davis' testimony as evidence of identity. However, the Washington residential burglary and the crimes arising from the entrance into the 657 Shirehampton, Las Vegas residence did not have any characteristics of conduct which are unique and common to both Mr. Hubbard, who was convicted in Washington, and the Las Vegas perpetrator. Therefore, admission of Ms. Davis' testimony as evidence of identity was a manifest abuse of the district court's discretion which rendered the trial fundamentally unfair. Mr. Hubbard's Fifth and Fourteenth Amendment rights to due process of law were violated during his trial and his convictions should be reversed.

Additionally, the district court admitted Ms. Davis' testimony as evidence of Mr. Hubbard's intent, motive and absence of mistake. Again, the Washington residential burglary and the crimes arising from the entrance into the 657 Shirehampton, Las Vegas residence were not significantly similarity in any manner to each other.

Therefore, admission of Ms. Davis' testimony as evidence of intent, motive and absence of mistake rendered the trial fundamentally unfair. Mr. Hubbard's Fifth and Fourteenth Amendment rights to due process of law were violated during his trial and his convictions should be reversed.

ARGUMENT

I. Mr. HUBBARD'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS HAS BEEN VIOLATED BY HIS CONVICTIONS FOR ROBBERY WITH USE OF A DEADLY WEAPON, AS CHARGED IN COUNTS 3 AND 6 THROUGH 9, BECAUSE THE STATE FAILED TO ADDUCE ANY, MUCH LESS SUFFICIENT, EVIDENCE THAT THE NAMED VICTIMS HAD ANY PERSONAL PROPERTY TAKEN FROM THEM

Standard of Review: After viewing the evidence in the light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt.⁷²

An essential element of the due process clause of the Fourteenth Amendment of the United States Constitution requires the state prove a defendant's guilt beyond a reasonable doubt.⁷³

⁷² Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). This court has adopted this standard of review for reviewing the sufficiency of evidence underlying convictions in criminal cases. See Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006)(citing McNair v. State, 108 Nev. 53, 56, 825 P.2d 571 (1992).

⁷³ Jackson, 443 U.S. at 317.

Mr. Hubbard was charged with committing seven counts of robbery with use of a deadly weapon. Each count alleges that personal property, which is identified as “an iPad, and/or one or more cell phones and/or unknown property”, was taken on August 22, 2013. The victims of the alleged robberies are: Darny Van (count 3); Asia Hood (count 4); Kenneth Flenory (count 5); David Powers (count 6); Anthony Roberts (count 7); Thavin Roberts (count 8); and, Trinity Briones (count 9).⁷⁴

In order to prove Mr. Hubbard committed the crime of robbery, the state was required to provide the jury with evidence that: (1) identified property owned or controlled by a specified person; (2) was either taken directly from the specified person or was taken while the person was present; and (3) the taking was accomplished by either force or violence or fear of injury.

Robbery requires that the “victim” of a robbery have a possessory interest in the item taken.⁷⁵

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⁷⁴ I AA 12-21.

⁷⁵ Philips v. State, 99 Nev. 693, 696, 669 P.2d 706 (1983).

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is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.⁷⁶

The facts adduced during Mr. Hubbard's trial clearly establish that he could only have been convicted of count 2 and 3 - the robberies of Asia Hood and Kenneth Flenory.

During trial, Asia Hood testified that a man with a gun told her to give him her electronics. Asia gave the man her iPhone 3G and the iPad she was playing on. Asia never got these items back. (210 and 215) There is evidence in the record which can sustain Mr. Hubbard's conviction of count 4 of the superseding indictment. Additionally, during trial, Kenneth Flenory testified that his cellular phone was taken out of his hand after he got to the front door area of the house. (266) There is also evidence in the record which can sustain Mr. Hubbard's conviction of count 5 of the superseding indictment.

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⁷⁶ Barkley v. State, 114 Nev. 635, n.1 638, 958 P.2d 1218, 1219 (1998).

However, the record is either barren of evidence or contains direct evidence that personal property was not taken from the person of Darny Van, David Powers, Anthony Roberts, Thavin Van or Trinity Briones as charged in the superseding indictment in counts 3 and 6 through 9.

First, Darny Van testified that she was speaking on her cell phone when she answered the door.⁷⁷ Darny never testified that this phone or any other item of her personal property was taken. In fact, the prosecution never even asked Darny if anything was taken from her on August 22, 2013.⁷⁸ There is absolutely no evidence to sustain Mr. Hubbard's conviction of count 3 of the superseding indictment.

Second, David Powers did come downstairs from the area of the master bedroom until after the men fled from the house and none of the men ever got up the stairs.⁷⁹ David never testified that he lost any personal property on the evening of August 22, 2013; he, too, was not even asked whether any item was taken from him.⁸⁰

⁷⁷ II AA 225-237.

⁷⁸ II AA 218-274.

⁷⁹ I AA 136-151.

⁸⁰ I AA 136-216.

As with count 3, the record is absolutely barren of evidence to sustain Mr. Hubbard's conviction of count 6 of the superseding indictment.

Third, Anthony Roberts testified during trial that he had a few dollars and a cellular phone in his pockets. While his pockets were searched, no items were taken from him.⁸¹ Moreover, even though Kenneth Flenory was kneeling right beside Anthony, he did not see a cell phone being taken from Anthony's hand.⁸² As with counts 3 and 5, the state failed to introduce any evidence to sustain Mr. Hubbard's conviction of count 7 of the superseding indictment.

Fourth, Thavin Van testified during trial and was specifically asked "[d]id the guy with the gun take anything from you?" Ms. Van said "[n]o."⁸³ Again, the record refutes any allegation that personal property was taken from Thavin and Mr. Hubbard's conviction of count 8 is unconstitutional.

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⁸¹ III AA 428.

⁸² II AA 368.

⁸³ I AA 287.

Finally, Trinity Briones was only three years old on August 22, 2013 and was not called to testify during the trial.⁸⁴ Therefore, the record is utterly barren of any evidence that personal property was taken from this baby. Again, the state has utterly failed to produce any evidence to sustain Mr. Hubbard's conviction of count 9 of the superseding indictment.

Finally, within minutes after the participants fled from 657 Shirehampton, law enforcement located Willie Carter in a neighbor's yard just to the southwest of the Powers/Van residence.⁸⁵ Carter was placed into handcuffs and patted down for weapons.⁸⁶ Carter did not have any of the items that were taken from the Shirehampton residence.⁸⁷ While, a cell phone was found in Carter's pocket but it did not belong to anyone who had been inside the Powers/Van residence during the invasion.⁸⁸

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⁸⁴ II AA 276.

⁸⁵ III AA 534-36 and V AA 930.

⁸⁶ III AA536.

⁸⁷ 04.21 p29

⁸⁸ III AA 538 and V AA 934-34.

After reviewing the forgoing facts, no reasonable fact finder could have found the essential elements of robbery as alleged in counts 3 and 6 through 9. Therefore, this Court must reverse Mr. Hubbard's convictions for these crimes.

II. ADMISSION OF THE FACTS UNDERLYING Mr. HUBBARD'S WASHINGTON STATE CONVICTION FOR RESIDENTIAL BURGLARY RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR AND VIOLATED Mr. HUBBARD'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS

Standard of Review: This court reviews the admission of evidence, pursuant to NRS 48.045, for a manifest abuse of discretion.⁸⁹

The improper introduction of evidence may violate due process if it renders a trial fundamentally unfair.⁹⁰

⁸⁹ Bigpond v. State, __ Nev. __, 270 P.3d 1224, 1250 (2012).

⁹⁰ See McKinney v. Rees, 993 F.2d 1378, 1380 (9th Cir. 1993)(concluding that use of character evidence to show propensity may violate due process); see also, Jervis v. Hall, 622 F.2d 19, 22 (1st Cir.1980) (admission of prior-crime evidence is subject to constitutional attack if no legitimate state purpose was served by the admission of the evidence); Collins v. Scully, 755 F.2d 16, 18 (2d Cir.1985) ("In order to prevail on a claim that an evidentiary error deprived the defendant of due process under the Fourteenth Amendment he must show that the error was so pervasive as to have denied him a fundamentally fair trial.") (citing United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)); Stockton v. Virginia, 852 F.2d 740, 748 (4th Cir.1988) (admission of evidence which impugns the fundamental fairness of the trial may violate the due process clause); Lucas v. Johnson, 132 F.3d 1069, 1079 (5th Cir.1998) (erroneous admission of

[T]he use of uncharged bad act evidence to convict a defendant 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. ... In order to overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (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.⁹¹

- A. The Washington crime did not demonstrate characteristics of conduct that were unique to Mr. Hubbard and the perpetrator of the Las Vegas crimes and both the Washington crime and the Las Vegas crimes were general crimes committed on a daily basis by people other than Mr. Hubbard

evidence which plays a crucial, critical and highly significant role in a trial may violate the due process clause); Burton v. Renico, 391 F.3d 764, 774 (6th Cir.2004) (“For the admission of evidence to violate constitutional due process, it must be shown that admitting the evidence violates fundamental fairness ...”) (internal quotations omitted); Pierson v. O’Leary, 959 F.2d 1385 (7th Cir.1992) (improper admission of evidence renders a trial fundamentally unfair if its prejudicial effect outweighs its probative value “such that its admission likely changed the outcome of the trial”), abrogated on other grounds, Cabrera v. Hinsley, 324 F.3d 527 (7th Cir.2003); Hobbs v. Lockhart, 791 F.2d 125, 127 (8th Cir.1986) (admission of evidence may be so prejudicial as to deny due process); Duvall v. Reynolds, 139 F.3d 768, 787 (10th Cir.1998) (the erroneous admission of evidence that renders a trial fundamentally unfair violates due process); Dobbs v. Kemp, 790 F.2d 1499, 1503 (11th Cir.1986) (evidentiary errors may result in a trial which is rendered fundamentally unfair).

⁹¹ Bigpond, 270 P.3d 1249-50. Citations omitted and emphasis added.

In order for other act evidence to be admissible to prove identity, both this Court and the Ninth Circuit Court of Appeals have recognized that the characteristics of both the prior act and the charged crime need to be distinctive and unique.⁹² This Court has specified that,

[e]vidence of prior criminal behavior may only be admitted to prove identity when ...that prior behavior demonstrates characteristics of conduct which are unique and common to both the defendant and the perpetrator whose identity is in question.⁹³

Similarly, the Court of Appeals for the Ninth Circuit has recognized that “if the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise.”⁹⁴

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⁹² While the Ninth Circuit Court of Appeals reviews the admissibility of evidence pursuant to Federal Rule of Evidence 404(b), NRS 48.045(2) was based upon the Draft Federal Rule 4-04 and the statute, as codified, contains almost identical language to Rule 404(b). See, Bigpond v. State, 270 P.3d at 1248. Therefore, cases discussing admissibility of evidence pursuant to Rule 404(b) are applicable and instructive regarding the analysis that must be applied to the admission of evidence pursuant to NRS 48.045(2).

⁹³ Coty v. State, 97 Nev. 243, 244, 627 P.2d 407, 408 (1981); Mayes v. State, 95 Nev. 140, 591 P.2d 250 (1980). Emphasis added.

⁹⁴ United States v. Perkins, 937 F.2d 1397, 1400 (9th Cir.1991) (quoting United States v. Powell, 587 F.2d 443, 448 (9th Cir.1978)).

It is essential that the characteristics of the prior and charged crimes be distinct because,

[t]he difference between the proper use of other acts evidence to prove identity and the improper use of such evidence to prove propensity is a subtle matter. It is proper to infer that two distinctive crimes (e.g., two armed bank robberies committed by a person wearing Mickey Mouse ears) were committed by the same person; it is improper to infer that two merely similar crimes (e.g., two armed bank robberies) were, since the latter conclusion depends upon an inference about character.⁹⁵

During Mr. Hubbard's trial, the district court admitted evidence regarding a July 27, 2012 daytime residential burglary that occurred in the state of Washington because it was relevant to proving that Mr. Hubbard committed the Las Vegas criminal acts on August 22, 2013.⁹⁶ A side by side comparison of the facts of the Las Vegas crimes and the Washington crime demonstrates that absolutely no inference of identity can be made and the trial court manifestly abused its discretion by admitting the Washington crime evidence.

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⁹⁵ United States v. Luna, 21 F.3d 874, 882 (9th Cir. 1994).

⁹⁶ I AA 22-69; I AA 30-31 (specifying state's basis for admission of evidence).

Las Vegas crimes:

Committed at approximately
8:45 p.m.⁹⁷

By three black males⁹⁹

Three black males actually observed
inside of residence¹⁰¹

One door bell ring, no knocking¹⁰³

Entered through the front door¹⁰⁵

Washington crime:

Committed at approximately
10:30 a.m.⁹⁸

At least two to three males
identified as black by voices¹⁰⁰

One Hispanic male observed outside
of residence¹⁰²

Door bell rung numerous times;
knocking on door many times¹⁰⁴

Broke into house through the
garage¹⁰⁶

⁹⁷ 04.16 p39 and 122

⁹⁸ IV AA 745.

⁹⁹ 04.16 p127-28

¹⁰⁰ Ms. Davis heard at least two to three black male voices but she couldn't tell what they were saying. IV AA 749.

¹⁰¹ 04.16 p127-28, p181, 233, 256; 04.17 40

¹⁰² IV AA 746.

¹⁰³ 04.16 p 154

¹⁰⁴ Id.

¹⁰⁵ I AA 225-29 and 238.

¹⁰⁶ IV AA 749.

Up to two guns observed ¹⁰⁷

No guns observed ¹⁰⁸

One gun carried by invaders was
seen to be discharged ¹⁰⁹

No shots fired

Dark vehicle used during crime -
arrived, crimes committed and
vehicle departed ¹¹⁰

White vehicle used during crime -
arrived and departed when door not
opened, returned later and crime
committed ¹¹¹

Neither the Washington crime nor the Las Vegas crimes have any characteristics of conduct which are unique and common to both Mr. Hubbard, who was convicted in Washington, and the Las Vegas perpetrator whose identity was in question during trial.¹¹² These crimes are both general residential entries to take personal property. They are committed by men, women and juveniles of all races and ages on a daily basis.¹¹³

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¹⁰⁷ 04.16 p43; p182; 265

¹⁰⁸ Ms. Davis did not testify that the Hispanic man, on her porch who was ringing the bell and knocking, had a gun. Rather, she specified he “was drinking a soda or something.” IV AA 746.

¹⁰⁹ 04.16 47, 255, 268

¹¹⁰ 04.21 PM P23-24

¹¹¹ IV AA 747 and 748.

¹¹² Coty, 97 Nev. at 244.

¹¹³ I AA 83-84.

No inference of the identity of the person who committed the Las Vegas crimes can be drawn from Mr. Hubbard's conviction of the Washington crime.

Further, both of these general crimes are committed in Las Vegas, throughout the state of Nevada and in all of the other states in the United States on a daily basis. Both crimes are similar to numerous other residential entries to obtain personal property which are committed by persons other than Mr. Hubbard. The identity of the person who committed the Las Vegas crimes can not constitutionally be drawn from Mr. Hubbard's conviction of the Washington crime.¹¹⁴

Therefore, admission of the Washington evidence, in order to identify Cory Hubbard as the perpetrator of the Las Vegas crimes, was a manifest abuse of the trial court's discretion and denied Mr. Hubbard his federal constitutional right to due process as guaranteed by the Fifth and Fourteenth Amendments.

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¹¹⁴ Perkins, 937 F.2d at 1400 (9th Cir.1991).

- B. The Washington crime and Las Vegas crimes were not significantly similar and therefore could not establish Mr. Hubbard's intent, motive and absence of mistake¹¹⁵

In order for the Washington facts to be admissible as evidence of Mr. Hubbard's state of mind, ie. intent, motive, and absence of mistake, both this Court and the Court of Appeals for the Ninth Circuit have recognized that there must be a significant similarity between the other bad act evidence and the charged crimes.¹¹⁶ Again, the side by side comparison of the facts of the two crimes establish that they are too dissimilar to establish state of mind.

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¹¹⁵ I AA 22-69; see I AA 30-31 (specifying state's basis for admission of evidence).

¹¹⁶ See, Rhymes v State, 121 Nev. 17, 22 (2005)(in affirming the admission of the uncharged acts, the Supreme Court noted the "strong similarity" between the defendant's use of his job as a masseuse to enable him to commit the uncharged acts and the fact that defendant discussed his employment as a masseuse and his massaging the leg of the victim in the charged crime). See also, United States v. Spillone, 879 F.2d 514, 519 (9th Cir. 1989) (court holds that if used to prove intent, the prior act must be similar to the offense charged citing United States v. Marashi, 913 F.2d 724, 735 (9th Cir. 1990).

Las Vegas crimes:

Committed at approximately
8:30 p.m.

By three black males

Three black males actually observed
inside of residence

One door bell ring, no knocking

Entered through the front door

One or two guns observed

One gun carried by invaders was
fired

Dark vehicle used during crime -
arrived, crimes committed and
vehicle departed

Washington crime:

Committed at approximately
10:30 a.m

By a Hispanic male and one/two or
more black males

One Hispanic male observed outside
of residence; other participants
described as black only by voice

Door bell rung numerous times;
knocking on door many times

Broke into house through the
garage

No guns observed

No shots fired

White vehicle used during crime -
arrived and departed when door not
opened, returned later and crime
committed

The only similarity between the Washington crime and the Las Vegas crimes was the fact that they were entries into residential buildings to take personal property. The facts of both crimes are not significantly similar to each other and could not constitutionally be admitted to establish Mr. Hubbard's intent, motive or absence of mistake.

Therefore, admission of the Washington evidence in order to prove Mr. Hubbard's mental state - motive, intent and absence of mistake - was a manifest abuse of the trial court's discretion and denied Mr. Hubbard's federal constitutional right to due process of law as guaranteed by the Fifth and Fourteenth Amendments.

- C. The district court failed to conduct an evidentiary hearing prior to admitting the testimony of Kimberly Davis regarding the facts of the Washington residential burglary

In 2012, this Honorable Court specifically notified all prosecutors and district courts in Nevada that "in order to overcome the presumption of inadmissibility, the prosecutor must request a hearing" and establish, in pertinent part: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity; and (2) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.¹¹⁷

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¹¹⁷ Bigpond, 270 P.3d 1249-50. Because Mr. Hubbard was convicted of the crime of residential burglary in Washington, the crime was established by clear and convincing evidence.

Prior to Mr. Hubbard's trial, the state filed a Motion In Limine requesting the facts underlying Mr. Hubbard's Washington state conviction for committing a daytime residential burglary on July 27, 2012 be admitted.¹¹⁸ While the district court heard argument from counsel for the parties regarding admission of this evidence, an actual evidentiary hearing regarding the evidence was neither requested by the state nor conducted by the district court before Kimberly Davis, the victim of the Washington crime, took the stand during Mr. Hubbard's trial.¹¹⁹ The court incorrectly determined that a hearing with live witnesses was unnecessary because the state had obtained certified copies of the records of the Washington conviction.

The district court should have held an evidentiary hearing to determine whether the probative value of the testimony to be provided by Kimberly Davis, the Washington victim, was not substantially outweighed by the prejudice to Mr. Hubbard.

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¹¹⁸ I AA 22-69.

¹¹⁹ I AA 80-87 (p.86 - court granted motion). See also, IV AA 743-755 (district court read appropriate jury instruction to jury [IV AA 743-44] and Ms. Davis immediately took the stand and testified).

If the district court had conducted the required hearing, the court and counsel for Mr. Hubbard would have learned that the state intended to ask Ms. Davis “do you recognize one of the suspects that was involved in that July 2012 home invasion in court today?” which resulted in Ms. Davis pointing to Mr. Hubbard.¹²⁰

Ms. Davis never saw anyone who actually entered her house on July 27, 2012. She saw a white vehicle drive up and park in front of the residence at 7223 74th St., Marysville, Washington.¹²¹ She saw a Hispanic male knocking on her door and ringing the bell. She saw the Hispanic man and the white car drive away. Later, Ms. Davis observed the white vehicle return, heard footsteps outside her room in gravel, called 911, locked herself into a bathroom, heard someone entering the house through the garage, heard people speaking and moving around and, finally, heard all the people running for the front door.¹²²

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¹²⁰ IV AA 751.

¹²¹ IV AA 745.

¹²² IV AA 746-750.

Ms. Davis never saw Cory Hubbard at her residence on July 27, 2012. Ms. Davis did not go to the location where Mr. Hubbard was stopped in a vehicle shortly after she called 911, nor did she identify the watch that had been stolen and was located in Mr. Hubbard's pocket - her mother did.¹²³ Ms. Davis could only point out Cory Hubbard in Nevada because he was the defendant in the Washington trial and she testified at that trial.¹²⁴ Ms. Davis' testimony in Washington related solely to the facts underlying the commission of the crime and not to the identity of perpetrator. Mr. Hubbard's connection to the Washington crime was established by the evidence gathered by law enforcement.¹²⁵

If the court had conducted a hearing, it would have been plainly obvious that Ms. Davis absolutely could **not identify Cory Hubbard as a participant** in the Washington robbery. Moreover, this fact was well known by the prosecutors.

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¹²³ IV AA 753.

¹²⁴ Id.

¹²⁵ Ms. Davis "was notified by the police" that Mr. Hubbard had been caught and had her mom's watch in his pocket. IV AA 753.

Admission of Ms. Davis' testimony which resulted in her pointing out Cory Hubbard which then allowed the prosecution to adduce, on re-direct, that she had testified against Mr. Hubbard in a separate hearing in Washington,¹²⁶ reinforcing the false implication that she recognized him, was excessively prejudicial. Failure to conduct an evidentiary hearing and the admission of Ms. Davis' testimony were a manifest abuse of the trial court's discretion and denied Mr. Hubbard's federal constitutional right to due process of law as guaranteed by the Fifth and Fourteenth Amendments.

CONCLUSION

Based upon the forgoing, it is respectfully requested that this Honorable Court find that the state did not adduce sufficient evidence of counts 3 and 6 through 9 and therefore reverse Mr. Hubbard's convictions on these counts.

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Additionally, based upon the erroneous admission of other crime evidence, it is respectfully requested that this Court reverse all of Mr. Hubbard's other convictions and remand the matter to the district court for a new trial on counts 1, 2, and 15.

DATED this 25th day July, 2015.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using WordPerfect X6 in size 14 Arial font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[] Proportionately spaces, has a typeface of 14 points or more, and contains 6759 words.

Finally, 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 the brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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 25th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25th day of July, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Chief Deputy District Attorney Steven Owens

Attorney General Adam Laxalt

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