

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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Elizabeth A. Brown  
Clerk of Supreme Court

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DEVOHN MARKS,

Appellant,

*vs.*

THE STATE OF NEVADA,

Respondent.

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Docket No. 80469

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Appeal from a Judgment of Conviction  
Following a Jury Trial and Verdict  
Eighth Judicial District Court, Clark County  
The Honorable Carolyn Ellsworth, District Judge  
Case No. C-18-337017-2

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**APPELLANT'S OPENING BRIEF**

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### **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant:
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2. Publicly-held Companies Associated:
  - a. N/A
3. Law Firm(s) Appearing in the Court(s) Below:
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  - b. Matsuda & Associates, Ltd.
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DATED this 6 of November, 2020.

/s/ Jess Matsuda

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## **TABLE OF CONTENTS**

Table of Authorities .....	iii
Jurisdictional Statement .....	iv
Routing Statement .....	iv
Statement of the Issues Presented for Review .....	iv
Statement of Facts .....	1
Statement of the Case .....	4
Summary of the Argument .....	5
Argument on the Issues .....	5
I. The District Court Erred When It Admitted Prior Bad Act Evidence Related to Case Number C-11-272989-3 .....	5
A. Factual History .....	6
B. Argument .....	7
C. Conclusion .....	8
Conclusion .....	9
Attorney's Certificate of Compliance .....	10
Certificate of Service .....	11

## **TABLE OF AUTHORITIES**

### **Nevada Statutes and Rules**

Nev. R. App. P. 17 .....	iv
Nev. Rev. Stat. § 177.015.....	iv
Nev. Rev. Stat. § 48.045 .....	5, 7

### **Nevada Supreme Court Cases**

<i>Berner v. State</i> , 104 Nev. 695, 765 P.2d 1144 (1988) .....	7
<i>Petrocelli v. State</i> , 101 Nev. 46, 692 P.2d 503 (1985) .....	7
<i>Tinch v. State</i> , 113 Nev. 1170, 946 P.2d 1061 (1997) .....	7
<i>Tucker v. State</i> , 82 Nev. 127, 412 P.2d 970 (1966).....	7
<i>Walker v. State</i> , 116 Nev. 442, 997 P.2d 803 (2000).....	7

### **JURISDICTIONAL STATEMENT**

This is an appeal from a verdict following a jury trial held before the Honorable Carolyn Ellsworth in the Eighth Judicial District Court and the subsequent Judgment of Conviction. (9 Appellant's Appendix [AA] 159–61.) This Court has jurisdiction to hear this appeal pursuant to NRS 177.015(3), which provides for the right to appeal a final judgment in a criminal case.

### **ROUTING STATEMENT**

This appeal is presumptively retained by the Supreme Court because it relates to convictions for category B felonies. NRAP 17(b)(2)(A).

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. The district court erred when it admitted prior bad act evidence related to case number C-11-272989-3.

## **STATEMENT OF FACTS**

The facts that follow are those presented by the State at trial. Shaylene Bernier worked graveyards as a bartender at the Torrey Pines Pub, located at 6374 West Lake Mead, Las Vegas, Clark County, Nevada. (5 AA 12:20–14:22.) Ms. Bernier was working the night of October 28, 2018, leading into the morning of October 29, 2018. (*Id.* at 26:12–18.) In addition to one regular she knew as Antwaine, there were three others she knew as Gerry Ferony, Kathy Petcoff, and Myer Goldstein in the bar that evening. (*Id.* at 27:9–28:3.) Antwaine would come into the bar a couple of times a week, beginning two weeks prior to that night. (*Id.* at 28:4–9.) Antwaine came in that night after 2:00 AM and left at about 5:15 AM. (*Id.* at 29:20–30:22.) As Antwaine left out the side door, two men came in that door armed with guns and demanding money. (*Id.* at 32:11–33:9.) Ms. Bernier complied and gave the gunmen the bar's money. (*Id.* at 35:3–36:1.) When the gunmen left, Ms. Bernier called 911. (*Id.* at 37:2–9.)

Gerald Ferony was born November 11, 1947. (*Id.* at 52:12–53:14.) He frequents the Torrey Pines Pub at the graveyard shift. (*Id.* at 54:14–18.) On October 29, 2018, at about 4:00 AM, Mr. Ferony arrived at the Torrey Pines Pub. (*Id.* at 56:12–19.) Also in the bar were Kathy, Myer, and another gentleman. (*Id.* at 57:6–8.) The other gentleman walked out the side door, then two

masked men rushed in, one of whom hit Mr. Ferony in the head with a gun. (*Id.* at 58:4–61:1.) The man demanded Mr. Ferony’s wallet, which he turned over. (*Id.* at 63:10–22.)

Myer Goldstein is a daily customer of the Torrey Pines Pub and was a patron in the early morning of October 29, 2018. (*Id.* at 78:20–80:10.) A gentleman that had been coming in for the past couple of weeks went out a side entrance; two men came in, wearing masks. (*Id.* at 84:9–86:7.) One went behind the bar, demanding money. (*Id.* at 87:9–19.) One of them demanded Mr. Goldstein’s wallet, then took it out of Mr. Goldstein’s pocket. (*Id.* at 88:21–89:4.) One of the men hit Mr. Goldstein in the head with a gun afterward. (*Id.* at 89:14–22.)

Antwaine Johnson testified that he and Appellant Devohn Marks knew each other because they lived in the Bloom Apartments near the intersection of Tenaya and Cheyenne. (*Id.* at 171:5–173:1.) The two would hang out and smoke marijuana a couple of times every other week. (*Id.* at 173:2–174:21.) The two exchanged phone numbers; Mr. Johnson’s cell phone number was (424) 375-1085. (*Id.* at 175:19–176:12.) In October of 2018, Mr. Johnson wasn’t working, and he was supporting his daughter; Mr. Marks said he knew a bar that had some money in it that they could get. (*Id.* at 177:4–179:7.) There was a third man involved, but Mr. Johnson never knew his name. (*Id.*

at 180:5–6.) The plan was for Mr. Johnson to get a headcount of the people in the bar, figure out where the money was kept, then text Mr. Marks when to begin. (*Id.* at 181:9–182:4.) At the time, Mr. Johnson was driving a white Chevrolet Monte Carlo. (*Id.* at 185:5–7.) Mr. Johnson would then leave out the side door. (*Id.* at 189:7–14.) This took place around 5:15 AM on October 29, 2018. (*Id.* at 187:3–190:1.) While Mr. Johnson was in the bar, he called Mr. Marks at around 2:18 AM so Mr. Marks could listen to what was going on. (*Id.* at 190:18–192:3.) Mr. Johnson texted Mr. Marks that he was going to leave the bar. (*Id.* at 193:20–194:1.) The two continued to text up until 5:15 AM. (*Id.* at 192:4–24.) Mr. Johnson eventually deleted those text messages. (*Id.* at 195:23–196:9.) He walked to the side door, opened it, and then the other two men pushed in past him; he dropped to the floor as they robbed the bar. (*Id.* at 194:2–8.) He ultimately received \$200.00 or \$300.00 from the proceeds. (6 AA 32:4–17.)

Las Vegas Metropolitan Police Detective David Miller testified that he was assigned to investigate the robbery. (7 AA 86:16–88:15.) Based on his suspicions of Mr. Johnson, Detective Miller obtained a pen register for Mr. Johnson’s cell phone. (*Id.* at 104:7–105:3.) He saw some 117 to 118 text messages between Mr. Johnson’s cell phone and one particular number from 3:28 AM and 5:12 AM, just minutes before the robbery. (*Id.* at 108:4–12.) That



number was (323) 427-3092. (*Id.* at 108:16–20.) That cell phone number belonged to Mr. Marks. (*Id.* at 108:21–23.) Detective Miller also testified that he recalled another robbery Mr. Marks was involved in from 2011 involving Fred’s Tavern; that bar was also “cased.” (*Id.* at 118:11–119:5.)

Mr. Marks testified that he lost his phone on October 26, 2018. (8 AA 85:19–86:25, 92:15–95:6.)

### **STATEMENT OF THE CASE**

On January 10, 2019, the grand jury convened and issued a true bill against Mr. Johnson and Mr. Marks for conspiracy to commit burglary; burglary while in possession of a deadly weapon; conspiracy to commit robbery; robbery with use of a deadly weapon, victim 60 years of age or older; robbery with use of a deadly weapon; robbery with use of a deadly weapon; robbery with use of a deadly weapon, victim 60 years of age or older; and battery with use of a deadly weapon. (1 AA 37:18–38:5.) The State filed a corresponding Superseding Indictment on January 11, 2019. (*Id.* at 57–62.)

The State filed a Motion to Admit Evidence of Other Bad Acts on February 12, 2019. (*Id.* at 64.) In that motion, the State sought to admit evidence of prior convictions in 2011 under case numbers C272989 and C273034. (*Id.* at 65–66.) The Court conducted a *Petrocelli* hearing on May 17, 2019. (*Id.* at

181.) The State filed a supplemental motion on May 30, 2019. (*Id.* at 216.) The Court granted the motion. (*Id.* at 229:6–15.)

Trial commenced on July 8, 2019. (2 AA 1.) Trial concluded on July 26, 2019, when the jury found Mr. Marks guilty on all counts. (9 AA 1, 115–16.) On December 18, 2019, the district court sentenced Mr. Marks to an aggregate of 264 to 660 months. (*Id.* at 143:20–146:13, 160–61.) This appeal follows.

### **SUMMARY OF THE ARGUMENT**

The district court erred when it permitted the State to introduce character evidence of a prior bad act: a robbery charge he pled to in 2011.

### **ARGUMENT ON THE ISSUES**

#### **I. The District Court Erred When It Admitted Prior Bad Act Evidence Related to Case Number C-11-272989-3.**

The district court held a hearing to determine the admissibility of testimony relating to a 2011 robbery of a Fred’s Tavern, to which Mr. Marks pled guilty. Following that hearing, the district court held that the character evidence was admissible as identity evidence pursuant to NRS 48.045. (1 AA 229:6–15.) The district court erred in this conclusion, as this evidence was far more prejudicial than probative.

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### **A. Factual History**

In 2011, Mr. Marks was involved in a series of armed robberies that culminated in the February 4, 2011, robbery of Fred's Tavern at Tropicana and Decatur in Las Vegas, Clark County, Nevada, where Miriam Byrd was working as a bartender. (6 AA 53:20–54:22.) Ms. Byrd arrived at work at 7:30 AM. (*Id.* at 55:13–15.) When she arrived, there was one other person in the bar: John, the graveyard bartender. (*Id.* at 56:1–4.) There was another young gentleman who came in to the bar during the shift change, looked around, then walked out. (*Id.* at 56:10–17.) Then four or five men came in with guns and ordered Ms. Byrd and John to the floor. (*Id.* at 57:9–58:25.) They took money from the bar and Ms. Byrd's and John's cell phones. (*Id.* at 59:10–60:8.) When they left, John called the police. (*Id.* at 60:13–16.) When police arrived, they took Ms. Byrd out to three different locations to conduct show-ups, and she identified all three perpetrators. (*Id.* at 61:10–62:8.)

Las Vegas Metropolitan Police Officer Charles Jivapong testified that he was assigned a call for a felony in progress on the morning of February 4, 2011, ultimately locating the suspect vehicle. (*Id.* at 65:5–68:24.) The vehicle stopped and the occupants fled, but Officer Jivapong was able to detain the driver. (*Id.* at 70:9–19.) The driver was Devohn Marks. (*Id.* at 71:7–13.)

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## **B. Argument**

As a matter of fundamental fairness and due process, NRS 48.045 prohibits the introduction of character evidence to prove the defendant acted in conformity therewith, but permits the introduction of evidence to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See Tucker v. State*, 82 Nev. 127, 131, 412 P.2d 970, 972 (1966). In determining whether to admit evidence of other bad acts, the trial court must first determine at a hearing whether (1) the other acts are relevant; (2) the other acts are proven by clear and convincing evidence; and (3) the other acts are more probative than they are prejudicial. *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985); *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Particularly important is the last factor: prior bad acts can unduly influence a jury and lead to a conviction based on propensity rather than on the State's case. *Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000) (citing *Berner v. State*, 104 Nev. 695, 696-97, 765 P.2d 1144, 1145-46 (1988)). A trial court's decision to admit character evidence is reviewed for manifest error. *Petrocelli*, 101 Nev. at 52, 692 P.2d at 508.

In this case, the State argued that the two robberies were similar enough in nature to warrant admission for the purpose of establishing Mr.

Marks' identity. (1 AA 71:26–72:24.) First, Mr. Marks had dissimilar roles in these cases, as he was the inside man in the Fred's Tavern case and was one of the gunmen in the instant case. Secondly, the robbers in the first case did not wear masks, while the robbers in the second case did, further distinguishing the cases. Lastly, Mr. Marks submits that there are only so many ways in which one could rob a bar, rendering academic any other "similarities" that the State relied on when making its motion before the district court. Instead, this evidence was more prejudicial than probative, as the only thing these two robberies really had in common was Mr. Marks.

### **C. Conclusion**

Because all these robberies really had in common was Mr. Marks, Mr. Marks would argue that the character evidence admitted was more prejudicial than probative of identity. For that reason, Mr. Marks would ask this Court to reverse the ruling of the lower court.

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### **CONCLUSION**

For these reasons, Mr. Marks submits this case calls for reversal of the verdict and sentence and a remand for a new trial with instructions to exclude evidence of case number C-11-272989-3.

DATED this 6 of November, 2020.

/s/ Jess Matsuda

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**ATTORNEY'S CERTIFICATE OF COMPLIANCE**

I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Georgia font using Microsoft Word, is 16 pages and 2681 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)-(6), as well as the page length requirements of NRAP 32(a)(7)(A). I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found. 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 6 of November, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6 of November, 2020, I served this document on the following:

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**AFFIRMATION**

Pursuant to NRS 239B.030, this document contains no social security numbers.

/s/ Jess Matsuda

Jess Y. Matsuda, Esq.

11-6-20

Date