IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVOHN MARKS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80469

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(b)(2) because it is a direct appeal from a Judgment of Conviction for Category B felonies.

STATEMENT OF THE ISSUE

1. Whether the District Court erred when it admitted prior bad act evidence related to case number C-11-272989-3.

STATEMENT OF THE CASE

On January 11, 2019, the State charged Devohn Marks ("Appellant"), by way of a Superseding Indictment, to wit: Count 1 - Conspiracy to Commit Burglary; Count 2 - Burglary While in Possession of a Deadly Weapon; Count 3 - Conspiracy to Commit Robbery; Count 4 - Robbery With Use of a Deadly Weapon, Victim 60

Years of Age or Older; Count 5 - Robbery With Use of a Deadly Weapon; Count 6 - Robbery With Use of a Deadly Weapon; Count 7 - Battery With Use of a Deadly Weapon, Victim 60 Years of Age or Older; and Count 8 - Battery With Use of a Deadly Weapon. I Appellant's Appendix ("AA") 57-63. Appellant was also charged with his co-defendant: Antwaine Johnson ("Johnson"). Id.

On February 12, 2019, the State filed a Motion to Admit Evidence of Other Bad Acts. I AA 64-167. On February 19, 2019, Appellant filed an Opposition. I AA 168-71. On May 17, 2019, a hearing pursuant to Petrocelli v. State was conducted, after which supplemental briefing was ordered by the district court. I AA 181-215. On May 30, 2019, the State filed a Supplemental Motion to Admit Evidence of Other Bad Acts. I AA 216-23. On June 24, 2019, the district court ruled that evidence of Appellant's prior bad acts would be allowed to be admitted at trial to show motive, intent, and/or identity. I AA 224-31. On October 17, 2019, the district court filed the Order Granting State's Supplemental Motion to Admit evidence of Other Bad Acts. Respondent's Appendix ("RA") 01-03.

On July 8, 2019, the jury trial commenced. II AA 01. On July 26, 2019, the jury returned a verdict of guilty as to Count 1 - Conspiracy to Commit Burglary, guilty as to Count 2 - Burglary While in Possession of a Deadly Weapon, guilty as to Count 3 - Conspiracy to Commit Robbery, guilty as to Count 4 - Robbery with Use of a Deadly Weapon, Victim 60 Years of Age or Older, guilty as to Count 5 -

Robbery with Use of a Deadly Weapon, guilty as to Count 6 - Robbery with Use of a Deadly Weapon, guilty as to Count 7 - Battery with Use of a Deadly Weapon, Victim 60 Years of Age or Older, and guilty as to Count 8 - Battery with Use of a Deadly Weapon. IX AA 114-16.

On December 18, 2019, the district court sentenced Appellant as follows: Count 1 - three hundred sixty-four (364) days in the Clark County Detention Center ("CCDC"); Count 2 - a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months in the Nevada Department of Corrections ("NDC"), concurrent with Count 1; Count 3 - a maximum of seventy-two (72) months and a minimum of twenty-four (24) months NDC, concurrent with Count 2; Count 4 - a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months NDC, plus a consecutive term of a maximum of sixty (60) months and a minimum of twenty-four (24) months for both enhancements, consecutive to Count 3; Count 5 - a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months NDC, plus a consecutive term of a maximum of sixty (60) months and a minimum of twenty-four (24) months for the deadly weapon enhancement, consecutive to Count 4; Count 6 - a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months NDC, plus a consecutive term of a maximum of sixty (60) months and a minimum of twenty-four (24) months for the deadly weapon enhancement, consecutive to Count 5; Count 7 - a maximum

of one hundred twenty (120) months and a minimum of thirty-six (36) months NDC, plus a consecutive term of a maximum of sixty (60) months and a minimum of twenty-four (24) months for the victim 60 years of age or older enhancement, concurrent with Count 6; and Count 8 - a maximum of one hundred twenty (120) months and a minimum of thirty-six (36) months NDC, concurrent with Count 7; with one hundred seventy-nine (179) days credit for time served. IX AA 143-46. The aggregate total sentence was a maximum of four hundred eighty (480) months and a minimum of one hundred ninety-two (192) months NDC. Id. The district court also ordered that Appellant pay restitution in the amount of $250.00 to the Dugout Lounge Inc. dba Torrey Pines Pub, imposed jointly and severally with the co-defendant. IX AA 143-50. The Judgment of Conviction (Jury Trial) was filed on December 23, 2019. IX AA 154-56. An Amended Judgment of Conviction and Restitution (Jury Trial) was filed on March 16, 2020. IX AA 159. On June 17, 2020, the Second Amended Judgment of Conviction and Restitution was filed to show that the corrected aggregate sentence was a maximum of six hundred twelve (612) months and a minimum of two hundred forty (240) month in NDC. RA 04-06.

On January 17, 2020, Appellant filed a Notice of Appeal. IX AA 157-58.

STATEMENT OF THE FACTS

A. Torrey Pines Pub Robbery:

Shaylene Bernier was working as a bartender for Torrey Pines Pub during the late evening hours of October 28, 2018, and early morning hours of October 29, 2018; at that time, she would work the graveyard shift, which was from midnight until 8:00 a.m. V AA 13-14, 26. From Sunday to Thursday, the bartender would be the only employee present after 2:00/3:00 a.m. V AA 24.

The bar itself had three (3) main doors. There was one (1) for the kitchen, one (1) that let out to the side parking lot, and one (1) that was the main entrance. V AA 17. All three (3) doors would be kept locked during the graveyard shift. Id. After 11:30 p.m. a patron would walk up to the main entrance door and would have to be buzzed in to enter the bar, after the person showed identification. V AA 21, 111. There were cameras located in this area, so the bartender could see who was seeking entry. V AA 23. When a customer would leave the bar, during Shaylene's shift, they would typically leave out the front door. V AA 25. As to the side door, no one could enter it from the outside during the graveyard shift; Robert Bonner, the owner of the bar, testified that the door would lock at either 10:00 p.m. or 11:00 p.m. V AA 23, 59, 111.

Shaylene also testified that there were two (2) registers for sales and one (1) for gaming payouts. V AA 15. The money would be kept in the middle of the bar, in a cooler. V AA 17. Security cameras were present inside the bar and would record

during Shaylene's shift. V AA 25. Bonner testified that he had sixteen (16) surveillance cameras, at the time of the crime, that were high definition. V AA 110.

According to Shaylene she had regular customers during the graveyard shift; she defined "regular" as someone who would come in daily to gamble and drink. V AA 24. During her shift, it was not uncommon for regulars to leave through the side door; Shaylene acknowledged that they were not supposed to, but they would because it was late and their cars would be parked on that side. V AA 26.

On October 29, 2018, around 5:00 p.m., there were four (4) regulars present inside the bar: Gerald/Gerry Ferony ("Gerry"), Kathy Petcoff ("Kathy"), Myer Goldstein ("Myer"), and a newer customer named Antwaine Johnson. V AA 27, 57. Johnson had been visiting the bar for two (2) weeks, and Shaylene knew his name because she checked his ID. V AA 28-29, 84. As to Johnson, he would arrive, alone, wearing a fluorescent safety vest. V AA 29. On the early morning of the crime, Johnson had arrived after 2:00 a.m. and sat down to gamble. V AA 29-30.

Gerry Ferony arrived at approximately 4:00 a.m. V AA 56. Typically, he arrived during the graveyard shift four (4) to six (6) times a week. V AA 54. He normally would drink and play video poker. Id. On the morning of the crime Gerry ordered drinks, started to gamble, and conversed with others present in the bar. V AA 56. Johnson was sitting across from him, "kitty-corner". V AA 57. Kathleen Petcoff would gamble at the bar two (2) or three (3) times a week. V AA 100. Meyer

Goldstein would visit the bar every day and, depending on his work shift, he would be there at either 10:40 p.m. or 12:40 a.m. until 5:00 or 6:00 a.m. V AA 80. Myer personally would not drink, but would visit to socialize with his friends. V AA 81. Typically, he would sit in a corner in the northeast section of the bar. V AA 83.

At approximately 5:15 a.m., Johnson got to up to leave, so Shaylene gave him a bottle of water, which was typical for her. V AA 30-31. Gerry watched as Johnson walked behind him and exited out the side door. V AA 58. Myer testified that he watched as Johnson got up to leave, but only heard him go out the side door. V AA 84. As Johnson exited, he was pushed back in by two (2) men and knocked down to the ground. V AA 59. Shaylene did not watch Johnson leave the bar, but the next thing she remembered was two (2) men coming in and yelling. V AA 32-33. Myer also testified that two (2) men rushed in. V AA 84. Testimony revealed that both men had a gun. V AA 61. Myer testified that he also heard the men yelling that "this is a hold up" and to "put your hands up". V AA 86.

One (1) man got behind the bar and started demanding money. V AA 33. Both were wearing masks and hoodies, so no one could see their faces, but multiple witnesses testified that the two (2) persons sounded like men. V AA 33, 35, 59, 86[1], 103. The robber behind the bar demanded money; he had a gun in his hand, that he

[1] Both Shaylene and Myer testified that the men sounded as though they were African American, and Myer added that he believed the men sounded as though they were twenty (20) or thirty (30) years old. V AA 50, 87.

pointed at Shaylene, and a garbage bag in his other hand to collect money. V AA 34. Myer witnessed as the robber demanded money while behind the bar. V AA 87. Shaylene gave him the money from the slot drawer, the register, and the cooler; she was subsequently moved to the last register in order to retrieve money. V AA 35. A total of $2,446.00 was taken. V AA 113.

Gerry testified that the other robber came up to him, pointed the gun in his face, and told him to put his hands up. V AA 60. Gerry was subsequently hit in the head with the gun, in the back right near the top of the crown. V AA 62[2]. Gerry started bleeding and fell out of his chair onto the floor[3]. V AA 63. While he was on the floor, the robber demanded Gerry's wallet; Gerry pointed out that it was in his right hip pocket, and the robber took it. Id. The robber then went past Gerry and towards the other two (2) customers. Id. Myer was then approached by a robber who demanded his wallet; the robber removed the wallet himself and proceeded to strike Myer with his gun. V AA 89-90. Kathleen did not remember much but did hear someone say that this was a "hold up", that Gerry ended up on the floor, and that she

[2] Myer remembered seeing Gerry on the ground. V AA 88.

[3] Gerry was taken to the hospital where he received treatment. V AA 68. Photos of Gerry in the hospital were also admitted. V AA 69. Gerry testified that he had the staples in his head for about ten (10) days; not only was he in pain when he was hit, but he was in worse pain when the staples had to be removed. V AA 71.

was tapped on the back. V AA 102. Kathleen was unable to say much, as she testified that she "blocked everything out." V AA 107.

Surveillance video from the night of the crime showed the patrons and bartender in the bar. V AA 39-40. The video also corroborated the bartender's and customers' rendition of events. V AA 40-44, 64-67, 91-96, 105-107.

After the robbers fled, and after 9-1-1 was dialed, officers arrived at the scene. V AA 37. Officer Weston Ferguson, from the Las Vegas Metropolitan Police Department ("LVMPD"), was one (1) of the first officers to arrive. V AA 146. He initially attempted to locate the suspects, as they were reported leaving on foot, but was unable to find them. V AA 146. Officer Jonathan Tomaino, from LVMPD, was also one (1) of the first officers to arrive at the scene. V AA 155. The scene was taped off, and officers took time to speak with the victims. V AA 147. The victims were separated and spoken with; the officers learned that almost all of the victims had items taken from them. V AA 157. The officers determined that it was a "takeover style robbery", so robbery Detectives for LVMPD were contacted. V AA 159.

Officer Ferguson testified that there was something odd about Johnson, as he was the "victim" who opened the door for the robbers. V AA 150. He also gave inconsistent facts and was the only victim who was neither battered nor had items stolen. Id. Myer also noticed that Johnson was left untouched and unbothered by the

two (2) robbers. V AA 90. Officer Tomaino testified that Johnson seemed to be extra cooperative and was pointed out as the one who opened the side door. V AA 160. During the course of his investigation, Officer Tomaino learned that the suspects hid behind Johnson's car prior to entering the bar. V AA 161.

Detective David Miller testified that he arrived at Torrey Pines Pub around 6:00 a.m. VII AA 88. As Detective Miller explained, this type of robbery is referred to as a takeover-style robbery. VII AA 100. He contacted patrol officers, learned that the scene had been secured, and learned that the witnesses had been identified. VII AA 89. Officers indicated to him that during the preliminary investigation, there were reasons to be suspicious of Johnson's behavior; after reviewing the surveillance video, Detective Miller agreed with this determination. VII AA 90. While reviewing the video, it appeared that Johnson was playing video poker, but Detective Miller later learned that he was not actually playing after speaking with Bonner. VII AA 94. Detective Miller further noted that the surveillance video revealed that Johnson had held the side door open longer than necessary to exit. VII AA 95, 98.

Detective Joseph Winn impounded Johnson's cellphone and Detective Miller secured a pen register for the phone on November 6, 2018. VI AA 89; VII AA 104. There were over one hundred (100) messages missing from Johnson's phone compared to what he showed the Detective; the messages also occurred around the time of the robbery. VII AA 103-04, 108. The number Johnson communicated with

belonged to Appellant. VII AA 108. In the month of October, there were over one thousand (1,000) times of contact between Appellant and Johnson. VII AA 110.

Michael Bosillo ("Bosillo"), a Custodian of Records Testifier for T-Mobile, testified that he is responsible for the care, custody, and control of all cell phone records that are generated in the normal course of business. VII AA 08. Bosillo testified about the operation of cell towers, signal strength, and how cell phone tower pings work. VII AA 11-15. He further explained how cellphone data works for phone calls and text messages, and that there is a database. VII AA 21-23. In this case, the target phone number, for the T-Mobile phone records, belonged to Johnson. VII AA 31-32. One particular record showed that there was communication between Appellant and Johnson at 2:18 a.m. on October 29, 2018. VII AA 43-44. Another phone call occurred at 7:32 a.m. on October 29, 2018. VII AA 47. Ana Diaz, a Verizon Wireless Custodian of Records also testified the phone number starting with a 323 area code, ending in 3092, belonged to Appellant. VII AA 54-55, 65-68. Detective Eugenio Basilotta, with the Technical and Surveillance Squad ("TASS") for LVMPD, testified at trial about his role with electronic surveillance, how pen registers work, and about phone records. VIII AA 05-06, 09-12. Appellant's cell phone records revealed that he was near the bar during early morning of the crime. VIII AA 66-70.

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B. Johnson and Appellant's Involvement:

Johnson testified that he lived in the same apartment complex as Appellant, and personally knew him. V AA 171-73. Johnson would observe Appellant walking his dog, at the gym, and hung out with him "a couple of times." V AA 173. The two (2) also exchanged phone numbers; according to Johnson his number had an area code of "424" and ended in "1085" while Appellant had a "323" area code phone number. V AA 175-76.

Prior to the robbery, Johnson lost his job, and it was not easy for him to find another; he also was responsible for his daughter. V AA 177. Johnson confided in Appellant that he lost his job. V AA 177-78. Appellant remarked that he knew of a way that they could obtain money by robbing a local bar. V AA 178. Appellant informed Johnson that he personally scoped out this bar, on a few occasions, and explained that there was money in a cooler. V AA 179. As part of the scheme, another co-conspirator was involved, but Johnson did not know his name or his phone number. V AA 179-80

The plan was for Johnson to get a headcount of who was present in the bar, and to see if he could figure out where the money was. V AA 181. Johnson was also supposed to act as though he was a customer by playing games, buying drinks, and wear a vest to appear as though he worked in construction. V AA 182. Overall, his purpose was to see how empty the bar would become as the night went on. V AA

183. Johnson sat in the bar approximately six (6) or eight (8) times, and always sat in the same place. V AA 184, 186. Johnson would communicate with Appellant through texts, in order to provide him with updates. V AA 185.

At some point, a decision was made that the robbery would occur on October 29, 2018; Johnson's job was to walk through the side door to let Appellant and the unknown co-conspirator inside the bar. V AA 187. Appellant and the unknown co-conspirator's roles were to enter the bar, tell everyone to get down on the floor, and take the money. Id. That day in particular, Johnson communicated via texts with Appellant. V AA 189. At one point, he had Appellant on the phone[4] so he could listen in to what was going on in the bar. V AA 189-90. The phone call occurred at approximately 2:18 a.m. V AA 192. After the call ended, Johnson continued to text Appellant. Id. Johnson informed Appellant that there were fewer people in the bar than previously, so when Appellant asked if Johnson wanted to "go in and do it" Johnson responded with a yes. V AA 193. That was when Johnson got up and acted as though he was leaving by slowly opening the side door. V AA 193-94. Johnson was then pushed in and he got on the floor; nothing was taken from him. V AA 194. Johnson could not see what happened but knew when Appellant and the other co-conspirator left as he heard their footsteps. V AA 195. Johnson jumped off the floor

[4] Shaylene testified that Johnson had been on his phone. V AA 30. Shaylene also testified that she saw him hit buttons, which led her to believe he was gambling. V AA 31.

and checked to see if everyone was okay; that was when he noticed that Gerry had been struck. Id. Johnson testified that he asked Appellant why he hit one (1) of the victims, and Appellant responded that the victim was talking too much. V AA 208.

After the robbery, Johnson deleted the text messages and phone calls that occurred between him and Appellant. V AA 195-96. He wanted to make sure that there was no evidence of them conversing. V AA 196. Johnson testified that he also had a phone conversation with Appellant after the incident about how the money would be split up. V AA 196-97.

At approximately 7:00 a.m., Johnson met with a Detective again, who arrived at his apartment complex; prior to this, Johnson gave him his cell phone number. V AA 200. In December 2018, Johnson was arrested, and was told that there were phone records, but Johnson did not admit to any involvement. V AA 201. Ultimately, a proffer was made to gather information, and, with a lawyer, Johnson told the truth and confirmed the conspiracy. V AA 202-03; VII AA 111. Detective Miller also put together a photo line-up to see if Johnson could identify Appellant, and Johnson selected Appellant's picture. VII AA 112-14.

Appellant testified at trial that he knew Johnson and they exchanged phone numbers. VIII AA 87-88. The last time he had contact with Johnson was the Friday before Halloween, October 26, 2018, which was the weekend his girlfriend left for California. VIII AA 92. According to Appellant, he lost his phone that day. VIII AA

94. Appellant was initially smoking with Johnson in Johnson's car, went to the gym, and, upon speaking with his girlfriend, he realized he lost his phone. Id. According to Appellant he stayed home that weekend to clean and was unable to locate his phone. Id.

Cross-examination revealed that Appellant initially told Detective Miller that he did not have any friends/associates in his apartment complex. VIII AA 115. He also adamantly denied that he knew Johnson. VIII AA 118. Upon being showed a photo of Johnson, Appellant admitted that he knew him. VIII AA 120. As to allegedly losing his phone, when speaking with Detective Miller, Appellant could not remember if he lost his phone on October 26, 2018 or October 27, 2018. VIII AA 121.

In rebuttal, Detective Miller testified that during his conversation with Appellant on November 15, 2018, Appellant indicated that his phone was lost or stolen around the time of the crime. IX AA 05-07. Appellant also acknowledged that he had a curfew, since he was released from prison, and adamantly stated that he never missed curfew; accordingly, he could not have committed the robbery. IX AA 08-09. Furthermore, Appellant claimed that he did not have any friends in his apartment complex, nor did he associate with anyone. IX AA 09. Finally, in reference to his "lost" cellphone, Appellant explicitly stated that, he would not say

that he lost the phone on the October 27, 2018, but he lost it around that date. IX AA 10.

C. <u>Prior Bad Act- Fred's Tavern Robbery:</u>

Miriam Byrd, formally Odell, testified at trial that she worked at Fred's Tavern back on February 4, 2011; she was the daytime bartender and would work from 8:00 a.m. until 4:00 p.m. VI AA 54. She would arrive at 7:30 a.m. so that she could count the money in the drawer; there was a cash drawer and a register for sales. VI AA 55. John, the graveyard bartender was present. VI AA 56. On that particular day, a young African American man walked in and started looking around as though he was looking for someone; when asked if he needed help, he responded with a no. VI AA 56-57. The man left after five (5) minutes. VI AA 57. While Miriam, who was behind the bar, and John were talking, several males rushed in with guns and told them to lay down on the floor. <u>Id.</u> The bartenders complied, and Miriam observed as people jumped over the bar to the cash drawer. <u>Id.</u> The men were African American and did not have their faces covered. VI AA 59. Miriam testified that their phones were stolen and that there was $7,777.00 in the cash drawer. VI AA 60. After the men left, they called 9-1-1. <u>Id.</u> John was able to see the getaway car and described it for the police. VI AA 61. Later, Miriam went to three (3) locations for a show-up to identify the suspects. <u>Id.</u>

On February 4, 2011, then Officer Charles Jivapong, now Sergeant, was working in the area when a call came out that there was a robbery. VI AA 65-66. The suspects were apprehended as well as the getaway vehicle. VI AA 68. After a minor pursuit, the vehicle stopped and the suspects bailed out the vehicle; Appellant, the driver, was detained. VI AA 70-71. Detective Jeffrey Swanbeck, now Sergeant, was the robbery Detective called out to the scene of the crime. VI AA 72-73. The robbery was described as a takeover-style robbery; normally one (1) person would go in to look around, leave, and then the others arrived to rob those present. VI AA 76. As Detective Swanbeck described it,

> …when I say takeover style, it pretty much means what it says. They went in. They go into the bar or bank or any type of establishment. So suspects will run in, they'll jump the counters. They'll show guns. They are very intention with what they do. When they jump the counters, they'll point the guns at individuals, the victims and, you know they'll lay them on the ground. They pretty much take them hostage for the time that they're in there.

Id. Ultimately, over $7,600.00 was recovered. VI AA 77.

Detective Swanbeck spoke with Appellant who informed him that the vehicle was registered to his mother. VI AA 79. Appellant admitted that he cased the bar; he then went back to the car as the other males went inside to complete the robbery. VI AA 80.

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SUMMARY OF THE ARGUMENT

The district court did not err in admitting prior bad evidence from C-11-272989-3 ("C272989") because the State proved, with clear and convincing evidence, that the robbery in C272989 was relevant to the robbery in this case. Moreover, the evidence was more probative than prejudicial. Therefore, the district court did not err in allowing for evidence relating to this prior conviction to show motive, intent, or identity.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT ADMITTED PRIOR BAD ACT EVIDENCE RELATED TO CASE NUMBER C-11-272989-3

Appellant claims that the district court erred by admitting prior bad act evidence, because the evidence was "far more prejudicial than probative." AOB 5. This Court will review a district court's decision to admit or exclude evidence for an abuse of discretion. Daniel v. State, 119 Nev. 498, 513, 78 P.3d 890, 901 (2003); citing Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000). The admissibility of prior bad acts is within the sound discretion of the trial court and will not be overturned on appeal unless the decision is manifestly wrong. Canada v. State, 104 Nev. 288, 291-293, 756 P.2d 552, 554 (1988).

NRS 48.045(2) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as

> proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to admitting such evidence, the State must establish that (1) the prior act is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the evidence is more probative than prejudicial. Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995), overruled on other grounds by State v. Sixth Judicial District Court, 114 Nev. 739, 964 P.2d 48 (1998).

This Court has specifically approved the procedure of holding a hearing outside the presence of the jury in which the State must present its reasons why the other offense is admissible under NRS 48.045(2) and apprising the trial judge of the quantum and quality of its evidence proving that the defendant committed the other offense. Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 508 (1985). Under Petrocelli, clear and convincing proof of collateral acts may be established by an offer of proof outside the presence of the jury combined with quality of evidence actually presented to the jury. Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998).

In Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009), this Court affirmed the district court's determination to admit evidence that the Defendant owed debts to the victim and that he had previously engaged in a conversation about killing a man to whom he owed money. This Court agreed with the district court's decision that such evidence was admissible as proof of motive, to disprove his contention that he was

just an innocent bystander to his wife's scheme, and to prove identity. Id. at 789-95, 220 P.3d at 713-16.

Likewise, in Ledbetter v. State, 122 Nev. 252, 262-263, 129 P.3d 671, 678-679 (2006) this Court held that it was proper for the district court to admit evidence of other bad acts to establish the Defendant's motive to repeatedly subject his stepdaughter to sexual assaults. The bad act evidence in that case consisted of evidence that Defendant sexually assaulted other young female members of his own family. Id. at 257-58, 129 P.3d at 676. In reaching its decision, this Court noted that the evidence was relevant to motive, proven by clear and convincing evidence (due to four (4) different witness' testimony) and highly probative as it showed Defendant's sexual attraction to, and an obsession with, young female members of his family. Id. at 259-64, 129 P.3d at 677-80.

Most recently, in Bigpond v. State, 128 Nev. 108, 270 P.3d 1244 (2012), this Court affirmed the district court's decision to admit evidence of prior acts of domestic violence pursuant to NRS 48.045(2). In upholding the trial court's decision, the Court specifically acknowledged that evidence may be admitted pursuant to NRS 48.045 for reasons other than those delineated in the statute. Id. at 110, 270 P.3d at 1245. The Court found that the evidence was admissible because the history of domestic violence provided context to the relationship between the

victim and Defendant and the victim's possible reasons for recanting her testimony. Id. at 110-11, 270 P.3d at 1245-46.

As to the identity exception, this Court has held that "evidence of other crimes has strong probative value when there is sufficient evidence of similar characteristics of conduct in each crime to show the perpetrator of the other crime and the perpetrator of the crime for which the defendant has been charged is one and the same person." Mayes v. State, 95 Nev. 140, 142, 591 P.2d 250, 251 (1979). Difficulty in identifying the perpetrators, coupled with a high degree of similarity between the crimes, makes evidence of other bad acts *more probative than prejudicial*. Canada, 104 Nev. at 293, 756 P.2d at 555 (emphasis added). Furthermore, evidence admitted pursuant to the common scheme or plan exception is admissible when it tends to prove the crimes charged by revealing that the defendant planned to commit the crimes. Brinkley v. State, 101 Nev. 676, 679, 708 P.2d 1026, 1028 (1985). "The remarkable similarity of the modus operandi in the testimony regarding the other crimes, and their relative proximity in time to the charged offense establish the probative value of such evidence." Williams v. State, 95 Nev. 830, 833, 603 P.2d 694, 697 (1979). Courts have permitted the use of such evidence under NRS 48.045(2) in many similar cases.

For example, in Reed v. State, 95 Nev. 190, 591 P.2d 274 (1979), the defendant was charged with Burglary. The victim testified that she was in her motel

room at the Orbit Inn Motel when she heard the window open, saw a hand reach in and turn the doorknob, and then two (2) men entered the room and took her purse and cup of change. Id. at 192, 591 P.2d at 275. In addition, the victim testified that she thought the defendant was the man who stood at the door. Id. A palm print and a fingerprint from the point of entry matched the defendant. Id. This Court held that the admission of evidence concerning two (2) other burglaries committed by the Defendant in the same area and around the same time was properly permitted for the purpose of establishing the Defendant's identity. Id. at 193, 591 P.2d at 276.

Similarly, in Quiriconi v. State, 96 Nev. 766, 769-70, 616 P.2d 1111, 1113 (1980) wherein the Defendant's trial on the charge of sexual assault took place nearly four (4) years after the assault occurred, this Court upheld the admission of testimony from two (2) of his previous victims that tended to establish his identity. Specifically, this Court noted that the testimony of the victims as to the description of the car driven by Defendant, the manner in which the Defendant identified himself as "Mike from California," the identity of the gun, and the manner in which the Defendant approached them tended to establish the identity. Id. In addition, it specifically held that the district court properly found that the probative value of such evidence outweighed the claimed prejudicial effect. Id.

Moreover, in Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998), abrogated by Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002), the Defendant

stood trial on charges of first degree kidnapping with use of a deadly weapon, sexual assault with use of a deadly weapon, and murder with use of a deadly weapon. After a Petrocelli hearing the State was permitted to introduce evidence of the Defendant's prior rape and kidnapping convictions which had occurred twenty years earlier. Id. at 514-14, 960 P.2d at 792. This Court upheld the district court's determination that such evidence was admissible to prove identity. Id. at 521, 960 P.2d at 796[5]. This Court noted that there were sufficient similarities between Bolin's 1975 rape and kidnapping convictions and the victim's murder to warrant the admission of his prior bad act for the purposes of establishing identity. Id. Those similarities included: (1) in each case the victim was abducted late at night after finishing her shift at work and the offenses carried through to the morning; (2) both victims were about the same height, age, build, and hair color; (3) each victim was ambushed; (4) each victim was robbed of her wedding ring and valuables; (4) the defendant used the victims' cars in commission of the crimes in each case; and, (5) in each case the victim was subjected to a brutal attack after the victims were taken to a remote location. Id.

[5] This Court limited its "holding solely to the propriety of admitting evidence of Bolin's prior bad acts for the purpose of establishing identity pursuant to NRS 48.045(2)" and declined "to address Bolin's arguments that his prior convictions were improperly admitted on other grounds such as intent, plan, similar modus operandi, or sexual aberration." Bolin, 114 Nev. at 521, 960 P.2d at 796.

Also, in Green v. State, 94 Nev. 731, 587 P.2d 38 (1978), this Court held that evidence of a robbery allegedly committed by Defendant on the day before the robbery for which he was being tried was admissible, over objection, as relevant to prove identity. The Defense theory was "mistaken identity" and the State's evidence to prove identity was not conclusive, as two (2) of three (3) eyewitnesses were unable positively to identify accused. Id. at 732, 587 P.2d at 39.

Finally, in Canada, 104 Nev. 288, 756 P.2d 552 (1988), two (2) defendants (Lester Canada and Michael Smith) were accused of jointly participating in two armed robberies. They were tried together in separate jury trials for each robbery. Defendants in that case challenged their convictions as to the Sit 'N Bull lounge robbery on the grounds that evidence of the Charleston Heights robbery should not have been admitted to prove their identities because such evidence was more prejudicial than probative. Id. at 290, 756 P.2d at 553. Their specific challenges to its admission were premised upon (1) the witnesses' less than definite identifications of the suspects in the Sit 'N Bull robbery; and, (2) the alleged absence of uniqueness in the modus operandi exhibited in the two robberies. Id. at 292, 756 P.2d at 554. In upholding the district court's decision to admit the evidence this Court noted, "Contrary to the assertions of Canada and Smith, the difficulty in identifying the perpetrators of the Sit 'N Bull robbery argues for, rather than against, the admission of evidence of the Charleston Heights robbery." Id., 104 Nev. at 292, 756 P.2d at

554. Furthermore, the Court rejected the defendants' arguments that there was nothing unique about the two (2) robberies and identified the following similarities: (1) both robberies took place in deserted bars very late at night; (2) in each robbery, one of the suspects entered alone and ordered a beer to allow him to case the bar; (3) in each robbery, at least one of the suspects wore a mask; (4) in each robbery the suspects were armed with shotguns; and, (5) "the modus operandi common to the two (2) robberies was unique in comparison with other robberies in the manner in which the perpetrators savaged their victims." Id. at 293, 756 at 555.

A. Petrocelli Hearing Testimony.

On May 17, 2019, Miriam Byrd and Detective Swanbeck testified at the Petrocelli Hearing. I AA 181-82, 191. On February 3, 2011, Byrd was working as a bartender at Fred's Tavern. I AA 184. Byrd remembered that she was initially joking with John, another bartender, about the $7,777.00 in the register. I AA 185. At one point, a young African American man walked in and started looking around; when asked if he needed help, he responded with a no. I AA 186. After the male left, several African American males rushed in with weapons. I AA 187. The men were not wearing anything to cover their faces. I AA 190. One male jumped over the bar and stole cash from the registers; while Byrd was on the ground, her cellphone was stolen. I AA 187.

Detective Swanbeck testified that he received a call about the robbery, that there was a "quasi-pursuit[,]" and the suspects had bailed out the getaway vehicle. I AA 193-94. Upon further investigation, it was revealed that Appellant was part of the robbery. I AA 194. Appellant confessed to his role in the robbery: he was the driver, and the person who initially cased out the bar; after supplying the intel about the bar, his co-conspirators went inside the tavern. I AA 196.

At the conclusion of the hearing, the district court agreed that the prior bad acts were relevant to the crime charged and the evidence presented had been proven to be relevant through clear and convincing evidence. I AA 200-02, 208, 227. However, the district court requested further briefing with regards to the prejudicial versus probative inquiry prong in this process. I AA 200-02, 208. With regard to a determination of prejudice, the State submitted the following:

> "Prejudicial" is not synonymous with "damaging." Rather, evidence is unduly prejudicial…only if it "uniquely tends to evoke an emotional bias against the defendant as an individual and…has very little effect on the issues" or if it invites the jury to prejudge "a person or cause on the basis of extraneous factors." Painting a person faithfully is not, of itself, unfair.

People v. Johnson, 185 Cal.App.4th 520, 534 (2010); I AA 219.

On June 24, 2019, the district court noted that,

> …there are many similarities and the Defendant in the case was in custody, and so it's – it happens very shortly after he is released from prison.
>
> And so all of those things to me, in looking at the additional case law…I think that there is sufficient information for the Court to, doing

> that balancing analysis, find that it is – you know I've already said it's relevant. I've already said that the prior conviction and testimony of that witness is clear and convincing, and so now it's – it's just is it more prejudicial than probative. I think given all these similarities and the fact that identification is an important part of this case because of the mask, that I'm going to allow it.

I AA 228. The court ultimately granted the State's Motion, and made the following findings:

> the prior case is similar to the instant case. In both cases, three people committed the robberies in bars. There is evidence in both cases that the locations were cased for days before the robberies occurred. In both cases, the robbers waited for the opportune time to rob, specifically when the bars had fewer occupants. In each case, one robber jumped over the counter to steal money from the register. Additionally, in both cases, employees and patrons of the bar were robbed of personal property.
>
> Identification is an important part of the instant case because the accused robbers were wearing masks. In *Canada v. State*, the Supreme Court held that difficulty in identifying the perpetrators, coupled with a high degree of similarity between the crimes, makes evidence of other bad acts more probative than prejudicial. 104 Nev. 288, 293 (1988). Because identity is an issue, the crimes are similar, and there is evidence in this case other than the prior bad acts, the prior conviction is more probative than prejudicial. Therefore, the prior conviction will be allowed to show motive, intent, or identity.

RA 02.

B. The District Court Did Not Err in Granting the State's Motion to Admit Evidence of Other Bad Acts.

Appellant claims that the two (2) robberies were dissimilar because Appellant had a different role, the culprits in the Fred's Tavern did not wear masks while the culprits in this case wore masks, and "there are only so many ways in which one

could rob a bar, rendering academic any other similarities[.]" AOB 8. Accordingly, Appellant's sole contention is that the prior bad act evidence was more prejudicial than probative. AOB 5.

Here, Appellant not only committed a similar type "takeover-style" robbery in this case and in C272989, but the evidence showed that Appellant changed the way the robbery in this case was conducted. According to Miriam Byrd, Appellant did not wear a mask when he initially walked into Fred's Tavern to scope out the area. I AA 186; VI AA 56-57. Now in the instant case, Appellant learned from the error of his ways, from the previous robbery, by wearing a mask to avoid any visual identification. The Torrey Pines Pub robbery was another takeover-style robbery where one (1) co-conspirator cased the bar. V AA 181, 187-89. Although Appellant wore a mask in this case, a non-propensity purpose of allowing for this evidence would be permissible under Bigpond to provide context to the current robbery and explain why Appellant chose to wear a mask.

Contrary to Appellant's claim, there were numerous similarities between the Fred's tavern and Torrey Pines Pub robberies; specifically, in each case, Appellant and his co-conspirators committed a takeover-style robbery of a bar. I AA 186-87; V AA 32-35, 84-86. Moreover, the facts in Canada, were very similar to the instant case. In this matter, the following similarities were present: 1) each time, Appellant participated in the offenses with two (2) or more persons. I AA 186-87; V AA 179-

80; RA 02; 2) each time, Appellant and his co-conspirators targeted bars as opposed to homes or victims on the street. I AA 186; V AA 178-81; 3) each time, they extensively planned the robbery and cased the location for information for days, and the information was conveyed to people waiting outside. I AA 101, 196; V AA 178-81, 187-94; RA 02; 4) each time, they waited until an opportune time and then robbed the victims inside the bar. I AA 101, 196; V AA 193-94; RA 02; 5) in each case, one (1) of the robbers jumped over the counter and stole money from the bar itself; I AA 187; V AA 33; RA 02; and 6) in each case, the employees/patrons of the bar were also robbed for their personal property. I AA 187; V AA 63, 89-90; RA 02. The similarity between these offenses were significant and were highly probative to show the identity of Appellant as one of the masked and gloved robbers. Further, as stated *supra*, the inability of the victims in the instant case to identify Appellant (because he wore a mask) points to allowing evidence of his prior bad act robbery to show Appellant's identity in the instant case. Canada at 293, 756 P.2d at 555.

Finally, Appellant's prior robbery demonstrated that he possessed the knowledge to plan in advance and commit a takeover-style robbery of a local bar. I AA 101, 196; V AA 178-81, 187-94; RA 02. Moreover, Appellant knew to send someone in to case the bar, had the patience to wait until an opportune time to rob the bar, and that he was familiar with the security measures in place at local bars. I AA 101, 196; V AA 23, 59, 111, 178-81, 187, 193-94; RA 02. For these reasons, the

district court did not err in introducing evidence from the prior robbery, in C272989, as a prior bad act to show motive, intent, or identity.

C. Harmless Error.

Assuming *arguendo,* that the district court erred, any error was harmless based upon the overwhelming evidence of Appellant's guilt. Under NRS 178.598, any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness, based on whether the error had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001).

Here, multiple victims testified about the acts leading up to the robbery that occurred on October 29, 2018. Prior to the robbery, for a couple of weeks, Johnson would visit the Torrey Pines Pub in order to gauge the number of persons in the bar during the graveyard shift. V AA 28-29, 84, 181-86. His role was to case the bar prior to the robbery and on the actual day of the robbery. V AA 181-86. On October 29, 2018, when the time was right, Johnson exited the bar through the side exit. V

AA 58, 84, 193-94. Victims testified that this door was locked from the outside during the graveyard shift. V AA 23, 59, 111. As Johnson slowly opened the door, Appellant and their co-conspirator rushed in. V AA 32-33, 84, 193-94. Previously, Appellant and the co-conspirator waited outside by Johnson's car. V AA 161. Both Appellant and the unknown co-conspirator were wearing masks and gloves, and both were armed with firearms. V AA 33, 35, 59, 61, 86, 103.

One (1) of the co-conspirators jumped over the bar in order to demand money. V AA 33-34. Victims testified about having guns pointed at them, and an elderly patron was violently pistol whipped. V AA 34, 60, 62. Appellant later admitted that he was the co-conspirator who struck this victim. V AA 208. During the course of the robbery, Johnson acted as though he was a victim, and even stuck around until police arrived. See V AA 160. However, Detectives learned that Johnson was part of the scheme due to his phone records that showed numerous communications with Appellant in the hours and month leading up to the robbery. VII AA 103-04, 108-10. Furthermore, surveillance video corroborated the victims' and Johnson's testimony about what occurred on October 29, 2018. V AA 40-44, 64-67, 91-96, 105-107.

Most damaging to Appellant's case was the fact that Johnson testified about his personal involvement, how he knew Appellant prior to the robbery, and that Appellant came up with the plan to rob the bar. V AA 171-97. Furthermore, cell

phone evidence was admitted showing that Appellant was near the bar during the time of the robbery. VIII AA 66-70. Due to the testimony of the victims, Johnson's confession, and phone records, there was overwhelming evidence of Appellant's guilt. For these reasons, if this Court were to find that the district court erred, any error was harmless.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 3rd day of December, 2020.

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CERTIFICATE OF COMPLIANCE

1. **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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,249 words.
3. **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 this 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. 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 3rd day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 3, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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