No. 80469

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVOHN MARKS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal

From the Eighth Judicial District Court, Clark County
The Honorable Carolyn Ellsworth, District Court Judge

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. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Attorney of Record for Appellant:

    a. Mario D. Valencia

2. Publicly-held Companies Associated:

    a. N/A

3. Law Firm(s) Appearing in the Court(s) Below:

    a. Clark County District Attorney's Office
    b. Matsuda & Associates, Ltd.
    c. Law Office of Ben Nadig, Chtd.

Dated: June 22, 2021.

/s/ Mario D. Valencia
MARIO D. VALENCIA
Attorney for Devohn Marks

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Jurisdictional Statement

This is a direct appeal from a judgment of conviction entered in the Eighth Judicial District Court, Clark County, Nevada, following a jury trial. The Court has jurisdiction over this appeal pursuant to NRS 177.015(3). The written Judgment of Conviction and Restitution (Jury Trial) was entered on December 23, 2019.[1] 9 Appellant's Appendix (AA) 154-56. Defendant-appellant, Devohn Marks, filed a timely notice of appeal on January 17, 2020. 9 AA 157-58; NRAP 4(b)(1)(A).

Routing Statement

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

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[1] The original judgment of conviction listed Marks' aggregate total sentence as 192-480 months. 9 AA 156. On March 16, 2020, after receiving a letter from the Nevada Department of Corrections (NDOC) that the aggregate total sentence in the judgment was incorrect, the district court entered an Amended Judgment of Conviction and Restitution – *nunc pro tunc* (Jury Trial), increasing Marks' aggregate total sentence to 264-660 months; a significant difference from the original judgment. 9 AA 161. A few months later, the district court received another letter from NDOC that the aggregate total sentence was still incorrect. The district court then entered a Second Amended Judgment of Conviction and Restitution (Jury Trial) on June 17, 2020, lowering Marks' aggregate total sentence from 264-660 to 240-612 months, but it was still more than what was in the original judgment. Respondent's Appendix (RA) 6. Marks' attorney did not appeal from the amended or second amended judgments.

Statement of Issues Presented for Review

1. The State's entire case against Marks was the uncorroborated testimony of accomplice, Antwaine Johnson. Is that sufficient to convict Marks?

2. There were two robbers. One of them hit two of the patrons in the bar and took their wallets. None of them identified Marks as that robber. The accomplice testified this was never part of the plan, and he didn't see who robbed the individuals. Marks' DNA and fingerprints weren't in the bar. Is this sufficient to convict Marks of battery and robbery against these individuals (*i.e.*, counts 4, 6, 7, and 8?

3. Marks had a 2011 conviction for robbery. There were significant differences between that robbery and the one in this case. They were not so similar as "establish[ ] a signature crime so clear as to establish the identity of the person on trial." The court, nevertheless, allowed it into evidence and failed to instruct the jury of its limited evidentiary use before they heard the prior-bad-act evidence. Did the district court abuse its discretion and was its decision manifestly wrong; thus, violating Marks' constitutional rights to due process and a fair trial?

4. Well before trial, Marks repeatedly requested substitution of counsel because there was a complete collapse of the attorney-client relationship. His court-appointed attorney refused to file pretrial motions and meet with him to prepare for trial. The court denied Marks' requests because, as an indigent defendant, Marks had no right to choose his attorney; not for trial. For sentencing, however, the court felt differently. Did the court violate Marks' Sixth Amendment right to counsel by denying his requests for substitution of counsel before trial?

5. The district court did not instruct the jury that, in order to convict Marks, the accomplice's testimony had to be corroborated by other evidence connecting him to the crimes. Was the failure to give that instruction "patently prejudicial" here, resulting in a violation of Marks' constitutional rights to due process and a fair trial?

Statement of the Case[2]

On January 11, 2019, the State filed a Superseding Indictment charging Marks with Conspiracy to Commit Burglary (Count 1), Burglary while in Possession of a Deadly Weapon (Count 2), Conspiracy to Commit Robbery (Count 3), Robbery with Use of a Deadly Weapon, Victim 60 years of age or older (Count 4), Robbery with Use of a Deadly Weapon (Count 5), Robbery with Use of a Deadly Weapon (Count 6), Battery with Use of a Deadly Weapon, Victim 60 years of age or older (Count 7), and Battery with Use of a Deadly Weapon (Count 8). 1 AA 57-63. Antwaine Johnson was also charged with Marks. *Ibid*.

On February 12, 2019, the State filed a Motion to Admit Evidence of Other Bad Acts. 1 AA 64-167. Marks opposed the motion. 1 AA 168-171. The district court held a *Petrocelli* hearing on the matter and then requested supplemental briefing. 1 AA 181-215. The State filed its Supplemental Motion to Admit Evidence of Other Bad Acts on May 30, 2019. 1 AA 216-223. Marks did not file a supplemental brief. On June 24, 2019, the district court ruled that evidence of Marks' prior-bad-acts (*i.e.*, his 2011 robbery conviction) was admissible to prove

[2] The Statement of the Case and the Statement of Facts are taken (quoted) in large part from the State's answering brief previously filed on December 3, 2020, because there's no dispute as to these portions of the record. Marks has added some procedural history and facts that are important and relevant to this appeal.

identity. 1 AA 224-331. The written order granting the State's Supplemental Motion to Admit Evidence of Other Bad Acts was not entered, however, until October 17, 2019. RA 1-3.

Before trial, Marks repeatedly informed the district court there was complete collapse of the attorney-client relationship: his court-appointed attorney refused to file pretrial motions and meet with him to prepare for trial. *See e.g.* 1 AA 210-214. The district court simply informed Marks to discuss the matter with his lawyer. 1 AA 214. On June 24, 2009, again before trial, Marks submitted a written motion for substitution of counsel that, for some reason, was not filed by the court until July 5, 2019. 10 AA 22-27. Again, the court denied Marks' request. 10 AA 11, 15-16.

Marks' jury trial began on July 8, 2019. 2 AA 01. On July 26, 2019, the jury returned a verdict of guilty on all counts. 9 AA 114-116.

On August 22, 2019, Marks filed another motion to remove counsel and requested to represent himself at sentencing. 10 AA 28-39. This time, the district court granted Marks' request. 10 AA 71.

On December 18, 2019, the district court imposed the following sentences.

Count 1: 364 days in the Clark County Detention Center (CCDC);

Count 2: 48 – 120 months in the Nevada Department of Corrections

(NDOC), concurrent with Count 1;

Count 3: 24 – 72 months in NDOC, concurrent with Count 2;

Count 4: 48 – 120 months in NDOC, plus *a consecutive* 24 – 60 months for both enhancements, *consecutive* to Count 3;

Count 5: 48 – 120 months in NDOC, plus *a consecutive* 24 – 60 months for the deadly weapon enhancement, *consecutive* to Count 4;

Count 6: 48 – 120 months in NDOC, plus *a consecutive* 24 – 60 months for the deadly weapon enhancement, *consecutive* to Count 5;

Count 7: 36 – 120 months in NDOC, plus *a consecutive* 24 – 60 months for the victim 60 years of age or older enhancement, concurrent with count 6; and

Count 8: 36 – 120 months in NDOC, concurrent with Count 7

Marks' aggregate total sentence, according to the district court, was 192 to 480 months. 9 AA 143-146. The district court gave Marks 179 days credit for time served. *Id*.

Marks also was ordered to pay $250 in restitution to the Dugout Lounge, Inc. dba Torrey Pines Pub, imposed jointly and severally with Johnson, Marks' codefendant. 9 AA 143-150. The Judgment of Conviction and Restitution (Jury Trial) was filed on December 23, 2019. 9 AA 154-156. An Amended Judgment of Conviction and Restitution – *nunc pro tunc* (Jury Trial) was filed on March 16, 2019. 9 AA 159. A Second Amended Judgment of Conviction and Restitution

(Jury Trial) was filed on June 17, 2020 to show that the aggregate sentence was 240 to 612 months in NDOC. RA 04-06.

Marks filed a notice of appeal from the original judgment on January 17, 2020. 9 AA 157-158.

Statement of the Facts

The 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 worked the graveyard shift, which was from midnight until 8:00 a.m. 5 AA 13-14, 26. From Sunday to Thursday, the bartender would be the only employee present after 2:00 or 3:00 a.m. 5 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. 5 AA 17. All three 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 showing identification. 5 AA 21, 111. There were cameras located in this area, so the bartender could see who was trying to come in. 5 AA 23. When a customer would leave the bar, during Bernier's shift, they would typically leave out the front door. 5 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. 5 AA 23, 59, 111.

Bernier also testified that there were two (2) registers for sales and one (1) for gaming payouts. 5 AA 15. The money for payouts was kept in the middle of the bar, in a cooler. 5 AA 17. Security cameras were present inside the bar and would be recording during Bernier's shift. 5 AA 25. Bonner testified that he had sixteen (16) high definition surveillance cameras at the time of the crime. 5 AA 110.

According to Bernier, she had regular customers during the graveyard shift; she defined "regular" as someone would come in daily to gamble and drink. 5 AA 24. During her shift, it was not uncommon for regulars to leave through the side door even though they weren't supposed to, but they would because it was late and their cars were parked on that side. 5 AA 26.

On October 29, 2018, around 5:00 a.m., there were four (4) regulars inside the pub: Gerald Ferony, Kathy Petcoff, Myer Goldstein, and a newer regular named Antwaine Johnson. 5 AA 27, 57. Johnson had been coming to the pub for two (2) weeks, and Bernier knew his name because she checked his ID. 5 AA 28-29. Johnson would come in alone wearing a fluorescent safety vest. 5 AA 29. On

the day of the crime, Johnson came in after 2:00 a.m. and sat down to gamble. 5 AA 29-30.

Ferony arrived at approximately 4:00 a.m. 5 AA 56. He would go to the pub four (4) to six (6) times a week during the graveyard shift. 5 AA 54. He normally would drink and play video poker. *Id*. On the morning of the crime, Ferony ordered drinks, started to gamble, and conversed with others present in the bar. 5 AA 56. Johnson was sitting across him, "kitty-corner." 5 AA 57. Petcoff would gamble at the bar two (2) or three (3) times a week. 5 AA 100. 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. 5 AA 80. Goldstein personally would not drink, but would visit to socialize with his friends. 5 AA 81. Typically, he would sit in a corner in the northeast section of the pub. 5 AA 83.

At approximately 5:15 a.m., Johnson got up to leave, so Bernier gave him a bottle of water, which was typical for her. 5 AA 30-31. Ferony watched as Johnson walked behind him and exited out the side door. 5 AA 58. Goldstein testified that he watched as Johnson got up to leave, but only heard him go out the side door. 5 AA 84. Berneir did not watch Johnson leave the pub, but the next thing she remembered was two (2) men coming in and yelling. 5 AA 32-33. Goldstein also testified that two (2) men rushed in. 5 AA 84. Both men had a gun.

5 AA 61. Goldstein testified that he also heard the men yelling that "this is a hold up" and "put your hands up." 5 AA 86.

One (1) man got behind the bar and started demanding money. 5 AA 33. Both were wearing masks and hoodies, so no one could see their faces, but multiple witnesses testified that the two (2) individuals sounded like men.[3] 5 AA 33, 35, 59, 86, 103. The robber behind the bar demanded money — he had a gun in his hand, that he pointed at Bernier, and a garbage bag in his other hand to collect money. 5 AA 34. Goldstein witnessed as the robber demanded money while behind the bar. 5 AA 87. Bernier 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. 5 AA 35. A total of $2,446 was taken. 5 AA 113.

Ferony testified that the other robber came up to him, pointed the gun in his face, and told him to put his hands up. 5 AA 60. Ferony was then hit on the head with the gun, on the back right near the top of the crown. 5 AA 62. Ferony started bleeding and fell out of his chair onto the floor.[4] 5 AA 63. While he was on the

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[3] Bernier and Goldstein testified that the men sounded as though they were African American, and Goldstein added that he believed the men sounded as though they were twenty (20) or thirty (30) years old. 5 AA 50, 87.

[4] Goldstein remembered seeing Ferony on the ground. 5 AA 88. Goldstein was taken to the hospital where he received treatment. 5 AA 68. Photos of Ferony in the hospital were also admitted. 5 AA 69. Ferony testified that he had the

floor, the robber demanded Ferony's wallet; Ferony pointed out that it was in his right hip pocket, and the robber took it. *Id*. The robber then went past Ferony towards the other two (2) customers. *Id*. Goldstein was then approached by a robber who demanded his wallet; the robber removed the wallet himself and proceeded to strike Goldstein with his gun. 5 AA 89-90. Petcoff did not remember much but did hear someone say this is a "hold up," recalled Ferony ended up on the floor, and that she was tapped on the back. 5 AA 102. Petcoff was unable to say much, as she testified she "blocked everything out." 5 AA 107.

Surveillance video from the night of the crime showed the patrons and bartender in the bar. 5 AA 39-40. The video also corroborated the bartender's and customers' rendition of events. 5 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. 5 AA 37. Officer Weston Ferguson, from the Las Vegas Metropolitan Police Department (LVMPD) was one (1) of the first officers to arrive. 5 AA 146. He initially attempted to locate the suspects, as they were reported leaving on foot, but was unable to find them. *Id*. Officer Jonathan Tomaino, from LVMPD, was also one (1) of the first officers to arrive on the scene. 5 AA 155. The scene was

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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. 5 AA 71.

taped off, and officers took time to speak with the victims. 5 AA 147. The victims were separated and spoken with; the officers learned that some of the victims had items taken from them. 5 AA 157. The officers determined that it was a "takeover style robbery," so robbery Detectives for LVMPD were contacted. 5 AA 159.

Officer Ferguson testified that there was something odd about Johnson, as he was the "victim" who opened the door for the robbers. 5 AA 150. He also gave inconsistent facts, was not battered, and did not have anything stolen from him. *Id*. Goldstein also noticed that Johnson was left untouched and unbothered by the two (2) robbers. 5 AA 90. Officer Tomaino testified that Johnson seemed to be extra cooperative and was pointed out as the one who opened the side door. 5 AA 160. During the course of his investigation, Officer Tomaino learned that the suspects hid behind Johnson's car before entering the pub. 5 AA 161.

Detective David Miller testified that he arrived at Torrey Pines Pub around 6:00 a.m. 7 AA 88. As Detective Miller explained, this type of robbery is referred to as a takeover-style-robbery. 7 AA 100. He contacted police officers, learned that the scene had been secured, and learned that the witnesses had been identified. 7 AA 89. Officers indicated to him that, during the preliminary investigation, there were reasons to be suspicious of Johnson's behavior. 7 AA 90. After reviewing the surveillance video, Detective Miller agreed with them. *Id*. In the video, it appeared

that Johnson was playing video poker, but Detective Miller later learned from Bonner that Johnson wasn't really playing video poker. 7 AA 94. Detective Miller further noted that the surveillance video showed that Johnson held the side door open longer than necessary to exit. 7 AA 95, 98.

Detective Joseph Winn impounded Johnson's cell phone, and Detective Miller obtained a pen register for the phone on November 6, 2018. 6 AA 89; 7 AA 104. Apparently, there were over one hundred (100) text messages missing from Johnson's cell phone compared to what he showed the detective; these were messages from around the time of the robbery. 7 AA 103-104, 108. These messages were sent from (424)375-1085 (the phone number Johnson claimed was his) to a phone number associated with Marks, *i.e.*, (323) 427-3092. 7 AA 105-106, 108, 110. In the month of October 2018, there were over one thousand (1,000) times of contact between these numbers. 7 AA 110.

According to Michael Bosillo, a custodian of records for T-Mobile, the target phone number for the T-Mobile records was (424) 375-1085. 7 AA 31-32. The subscriber for that phone number was Keyontrey S. McBride. 7 AA 105-106. Johnson told Detective Miller, however, that was the phone number he used. *Id*. The subscriber for the number (323) 427-3092 was listed as Marks, according to Ana Diaz, a Verizon Wireless custodian of records. 7 AA 54-55, 65-68.

Detective Miller was asked about subscribers' names on cell phone records, and he testified as follows:

> Q. So regardless of the name on here being Keyontrey, this was the phone number you understood to be Antwaine Johnson's phone; correct?
>
> A. Yes. Through our experience, it's not uncommon at all to have different names on numbers that we are looking into.

7 AA 106. In other words, it's not uncommon to have a phone number associated with a subscriber who does not use that number. *Id*.

Moreover, both Bosillo and Diaz (the custodians of records for T-Mobile and Verizon) testified that the phone records do not show the "content" of text messages, who sent or received the text messages, and they do not show the location from where the text messages were sent because they connect with a switch, not a cell tower. 7 AA 21-22, 50, 51, 58, 78, 83-84.

Lastly, 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. 8 AA 5-6, 9-12. According to Detective Basilotta's interpretation of the phone records, on October 29, 2018, there were some "incoming" phone calls from (424) 375-1085 to (323) 427-3092. 8 AA 66-70. The incoming call "from" (424) 375-1085 shows that

number was "possibl[y]" in the area of Torrey Pines Pub. 8 AA 68-69 (When asked if that phone was "near" Torrey Pines Pub, Detective Basilotta testified "It's fair to say it's possible.").

Johnson's story

Johnson testified that he lived in the same apartment complex as Marks, and that he knew him. 5 AA 171-173. Johnson would see Marks walking his dog, at the gym, and hung out with "a couple of times." 5 AA 173. They exchanged phone numbers, according to Johnson, and his number had an area code "424" and ended in "1085," and Marks had a "323" area code number. 5 AA 175-176.

Prior to the robbery, Johnson lost his job and it was not easy for him to find another one. 5 AA 177. He also was responsible for his daughter. *Id*. Johnson confided in Marks that he lost his job. 5 AA 177-178. Marks allegedly said he knew of a way that they could get money by robbing a local bar. 5 AA 178. According to Johnson, Marks told him he personally scoped out the bar on a few occasions, and explained that there was money in a cooler. 5 AA 179. There was also another individual involved but Johnson did not know his name or his phone number. 5 AA 179-180.

According to Johnson, the plan was for him to get a headcount of who was in the bar, and to see if he could figure out where the money was. 5 AA 181.

Johnson was also supposed to act as though he was a customer by playing games, buying drinks, and wearing a vest to appear as though he worked in construction. 5 AA 182. Overall, his purpose was to see how empty the bar would become as the night went on. 5 AA 183. Johnson sat in the bar approximately six (6) or eight (8), and always sat in the same place. 5 AA 184, 186. Johnson said he would communicate with Marks through texts in order to provide him with updates. 5 AA 185.

At some point, a decision was made that the robbery would occur on October 29, 2018. 5 AA 187. Johnson's job was to walk through the side door to let Marks and the other unknown individual into the bar. *Id*. Marks and the other individual were supposed to enter the bar, tell everyone to get down on the floor, and take the money. *Id*. Johnson said he communicated with Marks by text. 5 AA 189. At one point, he said he called Marks so he could listen in to what was going on in the bar. 5 AA 189-190. The phone call was at about 2:18 a.m. 5 AA 192. After the call ended, Johnson said he continued to text Marks. *Id*. Johnson informed Marks that there were fewer people in the bar than previously, so when Marks asked if Johnson wanted to "go in and do it," Johnson responded with a yes. 5 AA 193. That was when Johnson got up and acted as though he was leaving by slowly opening the side door. 5 AA 193-194. Johnson was then pushed in and

he got on the floor; nothing was taken from him. 5 AA 194. Johnson could not see what happened but he knew when the other robbers left because he heard their footsteps. 5 AA 195. Johnson got up from the floor and checked to see if everyone was okay. *Id*. That's when he noticed that Ferony had been hit on the head. *Id*. Johnson testified that he later asked Marks why he hit one (1) of the victims on the head. 5 AA 208. Marks never said or admitted it he hit anyone on the head, but told Johnson it was happened because "he was talking too much or something like that." *Id*.

After the robbery, Johnson says he deleted the text messages and phone calls between him and Marks. 5 AA 195-196. He wanted to make sure that there was no evidence of them communicating. 5 AA 196. Johnson testified that he also had a phone conversation with Marks after the robbery about how the money would be split up. 5 AA 196-197.

At about 7:00 a.m., Johnson met with Detective Miller again, who arrived at the his apartment complex. 5 AA 200. Before this, Johnson gave him his cell phone number. *Id*. In December 2018, Johnson was arrested, and was told that there were phone records, but Johnson did not admit to any involvement. 5 AA 201. Ultimately, a proffer was made to gather information and, with the help of a lawyer, Johnson told Detective Miller and the prosecutors about the conspiracy. 5

AA 202-203; 7 AA 111. Detective Miller also put together a photo line-up to see if Johnson could identify Marks, and Johnson picked Marks' picture. 7 AA 112-114.

Marks' testimony

Marks also testified at trial. He testified he knew Johnson and they exchanged phone numbers. 8 AA 87-88. The last time he had contact with Johnson was around October 26, 2018, the Friday before Halloween. 8 AA 92. That weekend his girlfriend left for California. *Id*. Marks testified he lost his cell phone that day. 8 AA 94. Marks remembered smoking with Johnson in Johnson' car, then going to the gym, and — after talking with this girlfriend in person before she left – realizing his phone was gone. 8 AA 94. *Id*. Marks stayed home that weekend but never found his cell phone. *Id*.

Detective Miller testified again in rebuttal. He said he interviewed Marks on November 15, 2018, and Marks told him he lost his phone, or it was stolen, around the time of the crime. 9 AA 5-7. Marks denied being involved in the robbery. 9 AA 8-9. Marks initially said he didn't "associate" with anyone in his apartment complex. 9 AA 9. And, he didn't know someone named "Antwaine." 8 AA 118-119. But when Detective Miller showed him a picture of Antwaine Johnson, Marks recognized his face. 8 AA 119. He knew Johnson as "Fane," not by his full

name "Antwaine." 8 AA 119-120. And with regard to his cell phone, Marks couldn't say for sure whether he lost it on October 26 or 27, 2018. 9 AA 10. He just knew it was around that date. *Id*.

Argument

I. There was insufficient evidence to convict Marks because the State's entire case against him was the uncorroborated testimony of accomplice and codefendant, Antwaine Johnson, which is legally insufficient for a conviction.

There was insufficient evidence to convict Marks. The State's entire against him was accomplice's Antwaine Johnson's uncorroborated testimony, and that is legally insufficient for a conviction.

A. Standard of review

"The standard of review [when analyzing the sufficiency of evidence] in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006).

B. The law relevant to this issue

"In order for a defendant to be convicted on the testimony of an accomplice, the state must present other, independent evidence that tends to connect the

defendant with the crime:

> A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence *which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense*; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof. NRS 175.291(1) (emphasis added)."

Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995).

Corroborating evidence must independently connect the defendant with the offense; evidence does not suffice as corroborative if it merely supports the accomplice's testimony. *Ibid*. If there is no independent, inculpatory evidence — evidence tending to connect the defendant with the offense — " 'there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to him.' " *Ibid*. (citing *Austin v. State*, 87 Nev. 578, 585, 491 P.2d 724, 728-29 (1971) (quoting *People v. Shaw*, 17 Cal.2d 778, 112 P.2d 241, 255 (1941)). "[W]here the connecting evidence 'shows no more than an opportunity to commit a crime, simply proves suspicion, or is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient.' " *Id*., 111 Nev. at 1250-51, 903 P.2d at 803-04 (citing *State v. Dannels*, 226 Mont. 80, 734 P.2d 188, 194 (1987) (quoting *State v. Mitchell*, 192 Mont. 16, 625 P.2d 1155, 1158 (1981)).

C. The only "evidence" against Marks was the uncorroborated testimony of accomplice, Antwaine Johnson, and that is insufficient for a conviction.

The State's only "evidence" against Marks was the uncorroborated testimony of accomplice, Antwaine Johnson. None of the victims identified (or could identify) Marks as one of the robbers. The robbers were wearing masks to hide their faces. 5 AA 33, 35, 59, 86, 103. Not even Johnson could see who was underneath the mask, and he was lying on the ground throughout the robbery, so he didn't see who robbed the pub or the victims. 5 AA 194-195. None of Marks' DNA or fingerprints were found in the pub, or on a door, or car, or gun, or anywhere else. None of the money taken was ever found or linked to Marks. There was no surveillance video or photos showing Marks near the pub or in the pub the night/early morning of the robbery. In short, there was no evidence connecting Marks to the crimes other than accomplice Johnson's uncorroborated testimony, but this insufficient to support a conviction. NRS 175.291(1).

The State will argue that Johnson's testimony was supported by cell phone records. The State is wrong. The cell phone records do not show the "content" of any alleged text messages between Johnson and Marks, do not show who sent or received the text messages, and do not show the location from where the text messages were sent because they connect with a switch, not a cell tower. 7 AA

21-22, 50, 51, 58, 78, 83-84. Furthermore, according to Detective Miller, the subscriber's name cell phone records — for example, Keyontrey S. McBride being listed as the subscriber for Antwaine Johnson's cell phone number — does not mean the subscriber is the individual actually using that phone number.[5] 7 AA 105-106. So, even though Marks was listed as the subscriber on the Verizon cell phone records, it was not proof (according to the State's own witness) that he actually used that number.

The cell phone records, therefore, do not corroborate accomplice Johnson's testimony. *Heglemeier*, 111 Nev. at 1250-51, 903 P.2d at 803-04. And Johnson's testimony alone is insufficient to convict Marks. NRS 175.291(1); *cf. Robertson v. State*, 2021 WL 1964229, No. 81400 (Nev. May 14, 2021) (Unpublished) (a text message defendant sent to an accomplice the day of the incident asking if he

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[5] Q. And it looks like in the middle we see it says subscriber details, subscriber name, a Keyontrey S. McBride; is that right?

A. Yes.

* * *

Q. So regardless of the name on here being Keyontrey, this was the phone number you understood to be Antwaine Johnson's phone; correct?

A. Yes. Through our experience, it's not uncommon at all to have different names on numbers that we are looking into.

7 AA 105-106.

wanted to "hit a house," surveillance video showing defendant in a car identified by a witness as being in the immediate vicinity of the crime scene at the time the crimes occurred, and defendant's fingerprints on that car, and a gun found at his house that had his DNA on it and contained bullets that matched casings found at the crime scene corroborated accomplice testimony).

II. Even assuming the cell phone records corroborated Johnson's testimony, there is insufficient evidence to convict Marks of robbery with use of a deadly weapon, victim 60 years of age or older (count 4 – Gerald Ferony), robbery with use of a deadly weapon (count 6 – Myer Goldstein), battery with use of a deadly weapon, victim 60 years of age or older (count 7 – Gerald Ferony), and battery with use of a deadly weapon (count 8 – Myer Goldstein).

Even assuming the cell phone records corroborated Johnson's testimony, there is insufficient evidence to convict Marks of Counts 4, 6, 7, and 8; the robbery and battery charges related to Gerald Ferony and Myer Goldstein, individually.

A. Standard of review

"The standard of review [when analyzing the sufficiency of evidence] in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006).

B. The insufficiency of the evidence for these convictions

Ferony testified he couldn't identify the robbers. 5 AA 59. But one of the robbers pointed a gun at him, then hit him over the head with the gun, causing Ferony to fall to the floor. 5 AA 62-63. That same robber then took Ferony's wallet. 5 AA 63. According to Ferony, that same robber then went over to Goldstein, but he didn't see what happened after that. 5 AA 63-64.

Goldstein also couldn't identify the robbers, except that they "sounded like black men." 5 AA 86. And he didn't know which one — the one that had been behind the counter or the one that hit Ferony — said to him "give me your wallet." 5 AA 88-89. But someone took his wallet. 5 AA 89.

And Johnson testified that he didn't see at all what happened during the robbery because, when the robbers came into the pub, they pushed him to the floor, and he stayed on the floor the whole time until he "heard" them leave. 5 AA 194-95. It wasn't until he got up off the floor that he noticed Ferony had been hit on the head. 5 AA 195. He felt bad about that. *Ibid*. Johnson testified that after the robbery he asked Marks why Ferony was hit on the head. 5 AA 208. According to Johnson, Marks said it was because he was "talking too much" or "getting mouthy" — Johnson really was "not too sure what [he] said" — but Marks never said ("he didn't admit") it was him that hit Ferony, or that he was the one that took

Ferony's and Goldstein's wallets. *Ibid*. There is no evidence proving who did that. Furthermore, Johnson testified it was never part of the "plan" — *i.e.*, the conspiracy or agreement — to hurt anyone or take their personal property. 6 AA 48. It was just to rob the bar. 5 AA 181-87.

In short, there was no evidence presented at trial to show it was Marks who hit Ferony and Goldstein, or even had the specific intent of doing so. *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) ("The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt."); *Byars v. State*, 130 Nev. 848, 863, 336 P.3d 939, 949 (2014) (battery conviction requires the State to prove "*the defendant* actually intend[ed] to commit a willful and unlawful use of force or violence upon the person of another.") (emphasis added). Nor was there any evidence presented to prove beyond a reasonable doubt that Marks actually took Ferony's and Goldstein's wallets from them. *Rose*, 123 Nev. at 202, 163 P.3d at 414; NRS 200.380(1) (robbery is the "unlawful *taking* of personal property *from the person of another*, or in the person's presence) (emphasis added).

Furthermore, there was no evidence presented to prove that Marks conspired or agreed with anyone to rob and batter Ferony and Goldstein. *Cf.* 1 AA

59-62 (showing one of the alternative theories Marks was charged with relating to these crimes was "a conspiracy to commit this crime, with *the intent* that this crime be committed") (emphasis added). On the contrary, the State's key witness (Antwaine Johnson) testified that was never part of the conspiracy. 6 AA 48. Nor was there any evidence presented of Marks "aiding and abetting in the commission of [these] crime[s], *with the intent that [these] crime[s] be committed*, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit [these] crime[s]." 1 AA 59-62 (emphasis added). Marks convictions on Counts 4, 6, 7 and 8, therefore, should be reversed and his sentences for these crimes vacated.

III. The district court abused its discretion by allowing the State to present irrelevant and highly prejudicial prior-bad-act evidence to the jury in order to convict Marks in this case. The error was not harmless and resulted in a violation of Marks' constitutional rights to due process and a fair trial.

The district court abused its discretion by allowing the State to present irrelevant and highly prejudicial evidence of a 2011 robbery of Fred's Tavern (*i.e.*, the prior-bad-act evidence), to which Marks had pleaded guilty, to convict him in this case. According to the district court, the prior-bad-act evidence was needed to prove "identity." (*See* TR 6/24/19 Hearing at 4:15-17, 5:14-17, 6:6-15). But, the prior robbery (Fred's Tavern) and this robbery (Torrey Pines Pub) were not so

similar as to "establish[ ] *a signature crime so clear* as to establish the identity of the person on trial," *Rosky v. State*, 121 Nev. 184, 196-197, 111 P.3d 690, 698 (2005) (emphasis added), and the State's key witness, Antwaine Johnson (Marks' accomplice and codefendant) identified Marks at trial. The prior-bad-act evidence, therefore, was irrelevant and much more prejudicial than probative. It should have been excluded. *See* NRS 48.035(1). The district court's decision to admit it into evidence was manifestly incorrect.

A. Standard of review

"This court reviews a district court's decision to admit or exclude [other]-bad-act evidence under an abuse of discretion standard," *Flowers v. State*, 136 Nev. Adv. Op. 1, *5, 456 P.3d 1037, 1043 (2020) (quoting *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013)), and will not reverse except on "a showing that the decision is manifestly incorrect." *Id*. (quoting *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005)). The question of whether the error violated Marks' constitutional rights to due process and a fair trial, *see* U.S. Const. amends. VI and XIV, § 1, however, is reviewed de novo. *Mesi v. Mesi*, 136 Nev. Adv. Op. 89, 478 P.3d 366, 369 (2020) (citing *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007)).

B. The law governing the prohibition and limited use of prior-bad-act evidence at trial

NRS 48.045(2) prohibits the use of evidence of "other crimes . . . to prove the character of a person in order to show that the person acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*.; *Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012) (holding that NRS 48.045(2)'s list of permissible nonpropensity purposes is not exclusive). Nevertheless, "[a] presumption of inadmissibility attaches to all prior bad act evidence." *Hubbard v. State*, 134 Nev. 450, 454, 422 P.3d 1260, 1264 (2018) (citing *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006)). The use of prior-bad-act evidence to convict a defendant "is heavily disfavored" because it is "often irrelevant and prejudicial." *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001).

"[T]o 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."

Bigpond, 128 Nev. at 117, 270 P.3d at 1250. The district court must make these determinations on the record and outside the presence of the jury. *McLellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). Furthermore, the district court "should give the jury a specific instruction explaining the purposes for which the evidence is admitted *immediately prior to* its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes." *Tavares*, 117 Nev. at 733, 30 P.3d at 1133 (emphasis added). It is the prosecutor's duty to request that the jury be instructed on the limited use of prior-bad-act evidence. *McLellan*, 124 Nev. at 269, 182 P.3d at 110-111.

C. The district court erroneously determined that evidence of the 2011 robbery of Fred's Tavern was admissible to prove Marks' "identity" because the 2011 robbery was significantly different than the one in this case, and the State's key witness identified Marks at trial.

"Identification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis." *Newman*, 129 Nev. at 231, 298 P.3d at 1178. At a hearing outside the presence of the jury, the district court erroneously determined that evidence of the 2011 robbery of Fred's Travern, to which Marks had pleaded guilty, was admissible to prove his "identity" in this case. 1 AA 227:15-17, 228:14-17, 229:6-15. But the

2011 robbery was significantly different from the robbery in this case. The two certainly were not similar enough to "establish[ ] *a signature crime so clear* as to establish the identity of the person on trial." *Rosky*, 121 Nev. at 196-197, 111 P.3d at 698 (emphasis added). Furthermore, the State's key witness identified Marks at trial.

1. The State's key witness identified Marks at trial, so the prior-bad-act evidence was irrelevant and really presented to show propensity.

Although it's true that none of the victims in this case identified Marks as one of the robbers, 5 AA 47, 74, 86, 96-97, 108, the State's key witness, Antwaine Johnson, identified Marks at trial. 5 AA 171-72. Johnson testified that he'd known Marks for about six months before the robbery, and that the two of them (along with a third unidentified individual) planned the Torrey Pines Pub robbery. 5 AA 171-73, 179-82. The plan was for Johnson to act as a customer by playing games, buying drinks, and wearing a vest to appear as though he worked in construction. 5 AA 182. What Johnson was really doing, however, was casing the pub to figure out where the money was and how empty the bar would become as the night went on. 5 AA 181, 183. Johnson cased the bar six (6) or eight (8) times before the robbery. 5 AA 184, 186. On the day of the robbery, while Johnson was in the bar for hours pretending to be a customer, he was allegedly communicating with

Marks through text messages and phone calls so that Marks could know what was going on in the bar. 5 AA 189-190. Johnson was then supposed to let Marks and the other individual into the bar to rob it. 5 AA 187. To "corroborate" Johnson's testimony, the State presented Johnson's cell phone records and records for a cell phone registered in Marks' name to show there was communication between these phone numbers before and on the day of the robbery. 7 AA 31-32, 43-44, 47, 54-55, 65-68, 110.

The State must have believed the cell phone records did not corroborate Johnson's testimony; thus, in their mind, the need for this prior-bad-act evidence of the 2011 robbery. Otherwise, what the State had without the prior-bad-act evidence was presumably enough to establish identity. *See e.g.*, *Crawford v. State*, 294 Ga. 898, 900-902, 757 S.E.2d 102, 104-105 (2014) (accomplice's corroborated testimony sufficient to establish identity of defendant); *State v. Caldwell*, 977 S.W.2d 110, 115-116 (Tenn. Ct. App. 1997) (same).

The prior-bad-act evidence therefore was irrelevant and really presented to show propensity; thus, it was inadmissible. NRS 48.035(1) & (2); NRS 48.045(2).

2. Moreover, the 2011 robbery and the Torrey Pines Pub robbery were not so similar as to "establish[ ] a signature crime so clear as to establish the identity of the person on trial."

Furthermore, the 2011 robbery of Fred's Tavern was not so similar to the

robbery in this case as to "establish[ ] *a signature crime so clear* as to establish the identity of the person on trial." *Rosky*, 121 Nev. at 196-197, 111 P.3d at 698 (emphasis added). There are significant differences between the two robberies.

a. *The factual circumstances surrounding the 2011 robbery of Fred's Tavern*

On February 4, 2011, Marks was involved in a 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 54. Ms. Byrd arrived at work at 7:30 a.m. 6 AA 55. When she arrived, there was one other person in the bar, John, the graveyard bartender. 6 AA 56. During their shift change, a young African-American "gentleman" walked into the bar, looked around "like he was looking for a drunk friend," and then walked out. 6 AA 56-57. He was in the bar for less than five minutes. 6 AA 57. Shortly thereafter, four (4) or five (5) men came in with guns and ordered Ms. Byrd and John to the floor. 6 AA 57. They were all African-American. 6 AA 59. They were not wearing masks, so Ms. Byrd could see their faces. *Id*. The men took money from the bar and Ms. Byrd's and John's cell phones (not their wallets or purse). 6 AA 57-59. It seems they took the phones to prevent Ms. Byrd and John from calling the police, but there was a cordless phone on the wall. 6 AA 60. When they left, John used that phone to call the police. *Id*.

When the police arrived, they took Ms. Byrd to three different locations for show-up identifications, and she identified the perpetrators. 6 AA 61.

Officer Charles Jivapong, from the Las Vegas Metropolitan Police Department (Metro), testified he was assigned a call for a felony in progress on the morning of February 4, 2011, ultimately locating the suspects' vehicle. 6 AA 65. The vehicle stopped and the occupants fled, but Officer Jivapong was able to detain the driver. 6 AA 70. Marks was the getaway driver. 6 AA 71. Marks admitted he was also the person who walked into the bar and looked around before the other guys ran in to rob it. 6 AA 80.

Marks pleaded guilty to the robbery and served his time. 1 AA 105-32.

b. There are significant differences between the 2011 robbery and the robbery in this case.

The district court was not persuaded that evidence of the 2011 robbery was admissible because it was a "takeover-style" robbery, like the robbery in this case. 1 AA 227:12-15. In fact, the court did not find that "helpful" to her NRS 48.045(2) analysis, and with good reason.[6] *Ibid*. According to detective Miller,

[6] The district court also determined the two robberies were remote in time. 1 AA 206:10-11 ("Here we don't have proximity in time. We have a long time between the two [robberies]."). This court has consistently noted that the more remote in time the prior-bad-act evidence is from the charged offense the less relevant it is. *See e.g.*, *Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000).

"takeover-style" robberies are not unique. They are "very common" or "customary." 1 AA 228; 7 AA 100, 116-17.

Instead, the district court determined the prior-bad-act evidence was admissible to prove "identity" because of the "similarities" between the two robberies. But the district court's "similarities" findings were clearly erroneous.

For example, the district court found:

- That three (3) people committed both robberies. 1 AA 226. But that is clearly wrong. The 2011 robbery was committed by four (4) or five (5) people. 6 AA 57.

- That the locations for both robberies "were cased for days before the robbery." 1 AA 226-27. This too is clearly wrong. In the 2011 robbery, Marks walked into the bar, looked around, and then immediately walked out. 6 AA 56-57. He was in the bar for less than five (5) minutes. 6 AA 57; *see also* 1 AA 189 (Ms. Byrd testified it was "maybe a minute.").

- That in both robberies the robbers "waited" until "there were fewer people in the bar" before robbing it. 1 AA 227. However, there is no evidence of that in the 2011 robbery. Marks was in the bar for less than five (5) minutes before it was robbed. 6 AA 57; *see also* 1 AA 189 (Ms. Byrd testified it was "maybe a minute.").

- That in both cases the employees or patrons were robbed of their personal property. 1 AA 227. While this is technically true, it overlooks significant differences between what was taken and how. In the 2011 robbery, the robbers did not pistol whip the employees and take their wallets, like the robbers did in this case. 5 AA 62-63, 89-90. And no one was physically hurt, like they were in this case. 5 AA 63. Rather, the robbers took the employees' cell phones to keep them from calling the police. 6 AA 60.

There are other significant differences between the two robberies. In this case, Johnson, while posing as a customer, was communicating with his accomplices through text messages and phone calls (for hours). 5 AA 189-190. That did not happen in the 2011 robbery. Johnson let the robbers into the bar through a secured side door. 5 AA 193-194. That did not happen in the 2011 robbery. Johnson pretended to be a "victim" of the robbery. *See e.g.*, 5 AA 150, 160-161. That too did not happen in the 2011 robbery. The robbers in this case wore masks to conceal their identity. 5 AA 33, 35, 59, 86, 103. That did not happen in the 2011 robbery. And there was no getaway driver and car in this case, like there was in the 2011 robbery. 6 AA 65, 70-71.

The district court's determination that the two robberies were so similar that they "establish[ ] *a signature crime so clear* as to establish the identity of the person on trial" was clearly wrong. *Rosky*, 121 Nev. at 196-197, 111 P.3d at 698 (emphasis added); *Rhymes*, 121 Nev. at 21-22, 107 P.3d at 1281.

3. The prior-bad-act evidence was far more prejudicial than it was probative because, as shown above, it had little to no probative value and was really presented to show propensity, which is improper.

As shown above, the prior-bad-act evidence had little to no probative value. Thus, the danger of unfair prejudice far outweighed its marginal (at best) probative

value. *United States v. Espinoza-Baza*, 647 F.3d 1182 (9th Cir. 2011) ("[w]here the evidence is of very slight (if any) probative value, . . . even a modest likelihood of unfair prejudice or a small risk of misleading the jury" will justify excluding that evidence.") (quoting *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir.1992)). Even the district court recognized there was a "danger of improperly putting" the prior-bad-act evidence "in front of the jury that somebody has already committed a robbery" because it "could cause the jury to wrongfully find someone guilty." 1 AA 207. She was right. Given the lack of relevance that the 2011 robbery had to establishing identity, it becomes clear that the evidence was instead being used for an impermissible propensity purpose, *i.e.*, if Marks committed a robbery before, he must have done so in this case. Thus, its low probative value was substantially outweighed by unfair prejudice. *Hubbard v. State*, 134 Nev. 450, 458, 422 P.3d 1260, 1267 (2018).

Compounding the prejudicial impact of the prior-bad-act evidence on the jury was the district court's repeated failure to "give the jury a specific instruction explaining the purposes for which the evidence [wa]s admitted *immediately prior to its admission* and [then to] give a general instruction at the end of the trial reminding the jurors that [the prior-bad-act] evidence may be used only for limited purposes." *Tavares*, 117 Nev. at 733, 30 P.3d at 1133 (emphasis added).

The timing of when this instruction is given, as this court noted in *Tavares*, is key:

> We are also convinced that a limiting instruction should be given both at the time evidence of the [other] bad act is admitted and in the trial court's final charge to the jury. As one leading commentor has stated:
>
> > [An instruction given at the time of admission] can be directed specifically at the evidence in question and can take effect before the jury has been accustomed to thinking of it in terms of the inadmissible purpose. Instructions given at the end of the case will be more abstract, may apply to a number of items of evidence, and are buried in a mass of other instructions.
>
> Therefore, to maximize the effectiveness of the instructions, we hold that the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted *immediately prior to its admission* and should give a general instruction at the end of trial reminding the jurors that certain evidence may be used only for limited purposes.

Id. (emphasis added) (internal citations and quotations omitted).

The State's first witness to testify about the 2011 robbery was Ms. Byrd. The district court did not to give the jury the specific instruction required by *Tavares*, however, before Ms. Byrd testified. 6 AA 53. It was only *after* she testified that the instruction was given. 6 AA 63. Three other witnesses testified about the 2011 robbery: Officer Jivapong, Detective Swanbeck, and Detective Miller. At no time, either immediately before or after their testimonies, did the

district court give the jury the *Tavares* instruction. *See* 6 AA 65-72, 72-83; 7 AA 118-19.

The district court's repeated failure to give the *Tavares* instruction to the jury *immediately prior to* (and with most of the witnesses, even right after) each of the witness's testimony had a substantial and injurious effect or influence on the jury's verdict, since the jury did not know the limited purpose for which the testimony was admitted and would have thought of it in terms of the inadmissible purpose (*i.e.*, propensity). *Tavares*, 117 Nev. at 733, 30 P.3d at 1133.

Thus, the district court's decision to admit the prior-bad-act evidence, coupled with its repeated failure to give the *Tavares* instruction before the evidence was presented to the jury, was manifestly incorrect and unfairly prejudiced Marks. His convictions therefore should be reversed. *McLellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008) ("unless we are convinced that the accused suffered no prejudice as determined by the *Kotteakos* test [*i.e.*, whether the error "had substantial and injurious effect or influence in determining the jury's verdict"], the conviction must be reversed.") (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

D. The error was not harmless.

Because the district court's decision to admit evidence of the 2011 robbery

was a manifest abuse of discretion, any error in admitting the evidence under NRS 48.045(2) is subject to harmless error review. *Rosky*, 121 Nev. at 198, 111 P.3d at 699. An error is harmless and not reversible if it did not have a substantial and injurious effect or influence in determining the jury's verdict. *Newman*, 129 Nev. at 236, 298 P.3d at 1181. The State bears the burden of proving that the error was harmless. *Belcher v. State*, 136 Nev. Adv. Op. 31, 464 P.3d 1013, 1023 (2020).

As shown above, the prior-bad-act evidence had slight (if any) probative value. It was really introduced to show propensity and, since the jury was not given the requisite *Tavares* instruction before the prior-bad-act evidence was presented, that is exactly what they would have thought it was for. "The introduction of evidence concerning the nature of a prior conviction similar to the substantive charges in the pending case carries a singular risk of substantial unfair prejudice that can jeopardize the defendant's right to a fair trial." *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997).

Moreover, the evidence of guilt in this case was not overwhelming. None of the victims could identify Marks as one of the robbers. 5 AA 47, 74, 86, 96-97, 108. Marks' DNA or fingerprints were not found in the pub. And Johnson's testimony was not corroborated by the cell phone records, since the records do not show the "content" of text messages, who sent or received the text messages, and

do not show the location from where the text messages were sent because they connect with a switch, not a cell tower. 7 AA 21-22, 50, 51, 58, 78, 83-84. Moreover, the lead detective in this case, detective Miller, testified that just because a subscriber's name is on the cell phone records — for example, Keyontrey S. McBride being listed as the subscriber for Antwaine Johnson's cell phone number — does not mean the phone number is actually used by the subscriber.[7] 7 AA 105-06. So, even though Marks was listed as the subscriber on the Verizon cell phone records, it was not proof (according to the State's own witness) that he actually used that number.

Clearly then, the error in admitting the prior-bad-act evidence of Marks' 2011 robbery conviction was not harmless and his convictions in this case should be reversed. *See Hubbard*, 134 Nev. at 459-461, 422 Nev. at 1267-1269; *see also Fields v. State*, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009) (a conviction must be reversed unless the court is convinced that the defendant suffered no prejudice as a result of the error).

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[7] *See* footnote 5, *supra*. (direct quote of Detective Miller's trial testimony on this issue).

IV. The district court violated Marks' Sixth Amendment right to counsel by denying his repeated motions — before trial — to dismiss his court-appointed attorney and appoint alternate counsel.

The district court abused its discretion and violated Marks' federal constitutional right (Sixth Amendment right) to counsel by denying his repeated requests, before trial, for substitution of counsel. Marks' court-appointed attorney refused to file any pretrial motions and never visited Marks (not once) to prepare for trial, even though Marks was facing eight (8) felony counts. Such "representation" was clearly ineffective.[8] Marks had no trust in his attorney. There was a complete collapse of the attorney-client relationship between them, which was evident, thus the refusal to substitute counsel for Marks violated his Sixth Amendment rights. *Young v. State*, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004) (citing *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

[8] To be sure, this court has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless. *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-1021 (2006). Trial counsel's failure to meet with Marks to prepare for trial and to prepare a defense, however, is professionally unacceptable, and cannot possibly be considered sound trial strategy. *See e.g.*, *Bemore v. Chappell*, 788 F.3d 1151, 1163-64 (9th Cir. 2015) (failure to investigate possible defense, to minimally prepare witness to testify, and instead just simply reviewing reports was ineffective). Arguably, therefore, an evidentiary hearing on this matter is needless. Furthermore, trial counsel's ineffectiveness — if the court declines to address it on appeal — is still relevant to the conflict between counsel and Marks, which strongly pointed to the fact that alternate counsel should have been appointed for Marks.

A. Standard of review

The Court reviews the denial of a motion for substitution of counsel for abuse of discretion. *Young*, 120 Nev. at 968, 102 P.3d at 576; *Garcia v. State*, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005). A decision that is "arbitrary or capricious or . . . exceeds the bounds of law or reason" is an abuse of discretion. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). *Young* set forth three factors to consider when reviewing a district court's denial of a motion for substitution of counsel. The three factors are: (1) the extent of the conflict between the defendant and his or her counsel, (2) the timeliness of the motion and the extent to which it will result in inconvenience or delay, and (3) the adequacy of the court's inquiry into the defendant's complaints. *Garcia*, 121 Nev. at 337, 113 P.3d at 842-43.

B. The law applicable to this issue

A defendant's right to substitution of counsel is not without limit. *Young*, 120 Nev. at 968, 102 P.3d at 576 (citation omitted). Absent a showing of sufficient cause, a defendant is not entitled to the substitution of court-appointed counsel at public expense. *Garcia*, 121 Nev. at 337, 113 P.3d at 842. However, when "a motion for new counsel is made considerably in advance of trial, the [district] court may not summarily deny the motion but must adequately inquire into the

defendant's grounds for it." *Ibid*. An adequate inquiry requires an analysis of the three factors set forth in *Young*. 120 Nev. at 968-69, 102 P.3d at 576. Nevertheless, when there is a complete collapse of the attorney-client relationship, the refusal to substitute counsel violates a defendant's Sixth Amendment rights. *Garcia*, 121 Nev. at 337, 113 P.3d at 842 (citing *Young*, 120 Nev. at 968-69, 102 P.3d at 576).

C. There was a complete collapse of the attorney-client relationship between Marks and his court-appointed trial attorney; thus, the failure to substitute counsel violated his Sixth Amendment rights.

Marks repeatedly complained to the district court about his court-appointed counsel's lack of case preparation, communication, and overall neglect of the case. For example, at the *Petrocelli* hearing on the State's motion to admit bad act evidence — which was held about five (5) months after the Superseding Indictment was filed and about three (3) months before trial (*compare* 1 AA 57 *with* 1 AA 181 and 2 AA 1) — Marks explained how counsel refused to file pretrial motions, failed to provide him with discovery materials, and had yet to met with Marks to discuss the case and prepare for trial. 1 AA 210-14. Instead of addressing these issues, the district court simply responded:

> You need to talk to your lawyer. And your lawyer is here and you are here and now is the opportunity for you to speak with him in the holding cell because I'm going to start a trial at 10:30, but this gives

> you the opportunity to speak. Actually, you could do it right here in the courtroom until I need to come back in and start my trial; okay? All right."

1 AA 214.

About a month later, on June 24, 2019, Marks submitted a pro se Motion to Dismiss Counsel but, for some reason, it was not filed by the district court until July 5, 2019. 10 AA 22-27.

Calendar call was July 3, 2019. 10 AA 1-21. Marks informed the district court he was "[v]ery unhappy" with counsel. 10 AA 2. Counsel had not visited him "one time." *Ibid*. As Marks put it, "he doesn't even have my side of the situation. My side of the story. I haven't discussed anything with him at all." *Ibid*. He added, "I don't understand how I'm going to discuss a defense with my attorney when the only time I see him is for three minutes in court." 10 AA 10. He concluded: "I don't feel comfortable going forward with him as my attorney period. I don't. I'm not confident in his abilities. He hasn't come to visit me. I just don't feel comfortable with him. And I would like to be assigned new counsel." 10 AA 11.

The district court responded as follows:

> THE COURT: Well, again, he's a competent lawyer. And he's a good lawyer and I'm not going to remove him as counsel.

THE DEFENDANT: So I can't remove him as counsel understanding that he's yelled at me before and we've had misunderstandings on multiple different levels? And this is who's supposed to represent me at trial? The same person who I've had conflict and confrontation with prior to trial? And I'm supposed to feel comfortable going to trial with this man representing my life? I don't feel comfortable with him representing — this is my life. This is my freedom.

THE COURT: Okay. Well, you don't — when you have appointed counsel there's — you have a right to competent counsel. And it doesn't mean you have to like him, or you know, get along with him.

* * *

THE COURT: It just means —

* * *

THE COURT: — you have to — you do need to talk to him so he can help you. But you don't get a choice of, gee, do I, you know, have a warm and fuzzy relationship with my lawyer. You don't get to do that.

If you paid for your lawyer you could shop around and find somebody that you thought was wonderful and you felt comfortable with. But here you don't have to feel comfortable. You just have to work with him so that he can give you the best possible defense available.

10 AA 11-12. And when the court suggested Marks was simply having difficulty talking strategy with his lawyer, Marks made it clear there was no difficulty because his lawyer hadn't even discussed or "attempted to discuss" trial strategy

with him. 10 AA 13. Moreover, during their brief in-court-interactions (*i.e.*, conversations in the courtroom or in the holding cell), trial counsel was confrontational with him and yelled at him. 10 AA 12, 15.

As it had done previously during the *Petrocelli* hearing, the district court again requested counsel discuss the case with Marks in the holding room and the court would recall the case. 10 AA 11-15. After the case was recalled, the district court asked how it had gone, and Marks told her the meeting was not helpful. 10 AA 15. Trial counsel agreed it was "very hard" for the two to communicate. 10 AA 16. Nevertheless, the district court refused to substitute counsel for Marks.

Marks went to trial with his attorney and was convicted on all counts. After the trial, on August 22, 2019, Marks filed another pro se Motion to Dismiss Counsel. 10 AA 28-39. Marks explained how he was prejudiced by counsel because he refused to visit him prior to trial and failed to discuss the discovery or defense strategy with him. 10 AA 30-32. Marks also attached jail records showing counsel did not visit him before trial. 10 AA 33-34. So, Marks requested to represent himself at sentencing. 10 AA 52-61, 70.

This time, the district court granted Marks' request. 10 AA 71. Why now and not before trial, is not entirely clear, but the damage was done. Marks was forced to proceed to trial with an attorney who never met with him to prepare for

trial, and in whom Marks had zero confidence.

1. The Young *factors*

a. <u>The extent of the conflict</u>

As detailed above, there was a complete collapse of the attorney-client relationship. Trial counsel never visited Marks to discuss the case and prepare for trial (not once). He refused to file any pretrial motions. He would yell at, demean, and be sarcastic toward Marks. Counsel's "visits" with Marks were court-imposed and extremely brief, occurring in the moments before (or during) court hearings. Marks was very unhappy with counsel, had no confidence in him, and did not feel comfortable at all going to trial represented by him.

b. <u>Timeliness of the motion and potential inconvenience or delay</u>

Marks' requests for substitution of counsel were timely and would not have inconvenienced or delayed the trial for too long, or in an prejudicial way to the court or the State. Marks began requesting new counsel about three (3) months before trial, and only five (5) months after the superseding indictment was filed. A month later, Marks again requested substitution of counsel, and then a third time at calendar call.

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c. Adequacy of the court's inquiry into Marks' complaints

As discussed in detail above, at the hearings on Marks' motions, the district court did not meaningfully address his complaints. Rather, the court downplayed Marks concerns that he had not met with his attorney to prepare for trial and discuss the defense and strategy, or that he had no confidence in his attorney, and did not feel comfortable going to trial with such an attorney. The court's "solution" was to simply to have counsel and Marks meet for a few minutes during court in the holding cell, and to make it clear that Marks had no right to change counsel because he was indigent. 10 AA 12. It would be different if he had money and could pay for an attorney. *Ibid*. Therefore, the court made it clear there was no way she was going to remove counsel. This clearly violated Marks' Sixth Amendment rights. *Garcia*, 121 Nev. at 337, 113 P.3d at 842 ("when there is a complete collapse of the attorney-client relationship, the refusal to substitute counsel violates a defendant's Sixth Amendment rights").

V. The district court erred by failing to instruct the jury concerning accomplice corroboration.

Despite the State's case relying almost exclusively on the testimony of codefendant and accomplice Antwaine Johnson, the district court failed to instruct the jury that in order for Marks to be convicted based on Johnson's testimony, that

testimony had to be corroborated.

NRS 175.291 prohibits a conviction based upon the uncorroborated testimony of an accomplice. Thus, the jury should have been instructed that Marks could not be convicted on Johnson's testimony unless his testimony was corroborated by other independent evidence connecting Marks to the crime. NRS 175.291.

To be sure, the jury was instructed on the definition of corroborating evidence. 8 AA 172. But, they were not instructed that Marks could not be convicted based on Johnson's testimony (*i.e.*, an accomplice's testimony) unless they all determined there was corroborating evidence to support his testimony.

Marks' trial attorney did not request such an instruction. Therefore, appellate consideration is precluded unless the instruction was so necessary that the failure to give it was "patently prejudicial." *Globensky v. State*, 96 Nev. 113, 117, 605 P.2d 215, 218 (1980) (citing *Gebert v. State*, 85 Nev. 331, 333–34, 454 P.2d 897, 898-99 (1969)).

Here, the instruction was so necessary to the case that failure to give it was patently prejudicial. The State's case against Marks was based solely on Johnson's

testimony and the phone records that allegedly corroborated it.[9] Without his testimony, the State had no case against Marks. Thus, the requirement that Johnson's testimony be corroborated in order to convict Marks was crucial for the jury to know and understand. Failing to give the instruction was patently prejudicial and a violated Marks' constitutional rights to a fair trial and due process. *See* U.S. Const. amends. VI and XIV, § 1.

Conclusion

For these reasons, Marks' convictions should be reversed and his sentences vacated. The case should be remanded to the district court for a new trial.

DATED: June 22, 2021.

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[9] As argued in this brief, however, the phone records did not corroborate Johnson's testimony.

Certificate of Compliance

1. I hereby 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 further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion 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 upon is 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.

2. 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 it has been prepared in a proportionally spaced typeface using WordPerfect X9 in 14-point font of the Times New Roman style.

3. I further certify that this brief complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionally spaced, has a typeface of 14 points and contains no more than 11,431 words.

Dated: June 22, 2021.

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Certificate of Service

I hereby certify and affirm that this document, APPELLANT'S OPENING BRIEF, was filed electronically with the Nevada Supreme Court on June 22, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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