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 because it is a direct appeal from a Judgment of Conviction for category B felonies. NRAP 17(b)(2)

STATEMENT OF THE ISSUES

I. Whether the State presented sufficient evidence to convict Appellant because Antwaine Johnson's testimony was corroborated.

II. Whether the State presented sufficient evidence to convict Appellant of Robbery with Use of a Deadly Weapon, Victim 60 Years of Age or Older (Count 4), 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) pursuant to conspiracy liability.

III. Whether the district court did not abuse its discretion by allowing the State to present prior bad act evidence.

IV. Whether Appellant's Sixth Amendment right to counsel was not violated when the district court denied Appellant's pre-trial motions.

V. Whether the district court did not err in instructing the jury regarding accomplice testimony.

STATEMENT OF THE CASE

Devohn Marks ("Appellant") was charged by way of Superseding Indictment on January 11, 2019 with Count 1 - Conspiracy to Commit Burglary (Gross Misdemeanor - NRS 205.060, 199.480), Count 2 - Burglary While in Possession of a Deadly Weapon (Category B Felony - NRS 205.060), Count 3 - Conspiracy to Commit Robbery (Category B Felony - NRS 200.380, 199.480), Count 4 - Robbery With Use of a Deadly Weapon, Victim 60 Years of Age or Older (Category B Felony - NRS 200.380, 193.165, 193.167), Count 5 - Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165), Count 6 - Robbery With Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165), Count 7 - Battery With Use of a Deadly Weapon, Victim 60 Years of Age or Older (Category B Felony - NRS 200.481, 193.167), and Count 8 - Battery With Use of a Deadly Weapon (Category B Felony - NRS 200.481). 1AA057–062.

On February 12, 2019, the State filed a Motion to Admit Evidence of Other Bad Acts. 1AA064–167. Appellant filed his Opposition on February 19, 2019. 1AA168–71. A Petrocelli hearing was conducted on May 17, 2019, after which supplemental briefing was ordered. 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. 1AA224–29.

Appellant's jury trial commenced on July 8, 2019. 2AA001. From July 8, 2020, through July 10, 2019, jury selection was conducted by the parties, ultimately resulting in an empaneled jury. 2AA001–4AA082. The Court was then dark until July 22, 2019. 4AA101. On July 26, 2019, the jury returned a verdict of guilty as to all counts. 9AA114–16. Appellant was remanded into custody without bail and the matter was referred to the Division of Parole and Probation ("P&P") for preparation of a Presentence Investigation Report ("PSI").

On August 22, 2019, Appellant filed a Motion to Dismiss Counsel and Move in Pro-Se. RA001. The Court granted Appellant's Motion on October 7, 2019. RA013.

On October 11, 2019, Appellant filed a Motion for New Trial and a Motion for Judgment of Acquittal. The State filed an Opposition on November 1, 2019, and a Supplemental Opposition on November 15, 2019. On December 2, 2019, Appellant filed a Reply. On December 18, 2019, the district court denied the Motions. 9AA117.

On that same date, Appellant was sentenced to pay restitution in the amount of $250.00 payable to and in favor of the Dugout Lounge Inc. dba Torrey Pines Pub imposed jointly and severally with the co-defendant, and further sentenced 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, concurrent with Count 1; Count 3 - a maximum of seventy-two (72) months and a minimum of twenty-four (24) months, concurrent with Count 2; Count 4 - a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months, 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, 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, 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, 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, concurrent with Count 7; with one hundred seventy-nine (179) days

credit for time served. 9AA154–56. The aggregate total sentence is a maximum of four hundred eighty (480) months and a minimum of one hundred ninety-two (192) months. 9AA156.

The Judgment of Conviction was filed on December 23, 2019. 9AA156.

On March 11, 2020, pursuant to correspondence received from the Nevada Department of Corrections, the district court amended the Judgment of Conviction to reflect an aggregate total sentence of two hundred sixty-four (264) months to six hundred sixty-four (664) months. 9AA159. The Amended Judgment of Conviction and Restitution (Jury Trial) was filed on March 16, 2020. 9AA159. On June 15, 2020, pursuant to further correspondence regarding the aggregate sentence imposed, the district court ordered the aggregate sentence to be amended to a minimum of two hundred forty (240) months and a maximum of six hundred twelve (612) months.

The Second Amended Judgment of Conviction and Restitution was filed on June 17, 2020.

The Notice of Appeal was filed on January 17, 2020. 9AA157.

STATEMENT OF THE FACTS

A. Torrey Pines Pub Robbery:

Shaylene Bernier was working as a bartender for the 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. 5AA13–14, 26. From Sunday to Thursday, the bartender would be the only employee present after 2:00-3:00 a.m. 5AA24.

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. 5AA17. All three (3) doors would be kept locked during the graveyard shift. 5AA17. To enter after 11:30 p.m., a patron would walk up to the main entrance door and have to be buzzed in, after the person showed identification. 5AA21, 111. There were cameras located in this area, so the bartender could see who was seeking entry. 5AA23. When a customer would leave the bar, during Shaylene's shift, they would typically leave out the front door. 5AA25. 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. 5AA23, 59, 111.

Shaylene also testified that there were two (2) registers for sales and one (1) for gaming payouts. 5AA15. The money would be kept in the middle of the bar, in a cooler. 5AA17. Security cameras were present inside the bar and would record during Shaylene's shift. 5AA25. Bonner testified that he had sixteen (16) surveillance cameras, at the time of the crime, that were high definition. 5AA110.

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. 5AA24. 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. 5AA26.

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. 5AA27, 57. Johnson had been visiting the bar for two (2) weeks, and Shaylene knew his name because she checked his ID. 5AA28–29, 84. As to Johnson, he would arrive alone wearing a fluorescent safety vest. 5AA29. On the early morning of the crime, Johnson had arrived after 2:00 a.m. and sat down to gamble. 5AA29–30.

Gerry Ferony arrived at approximately 4:00 a.m. 5AA56. Typically, he arrived during the graveyard shift four (4) to six (6) times a week. 5AA54. He normally would drink and play video poker. 5AA54. On the morning of the crime Gerry ordered drinks, started to gamble, and conversed with others present in the bar. 5AA56. Johnson was sitting across from him, "kitty-corner." 5AA57. Kathy Petcoff would gamble at the bar two (2) or three (3) times a week. 5AA100. Myer Goldstein would visit the bar every day and depending on his work shift, he would be there from either 10:40 p.m. or 12:40 a.m. until 5:00 or 6:00 a.m. 5AA80. Myer personally would not drink but would visit to socialize with his friends. 5AA81. Typically, he would sit in a corner in the northeast section of the bar. 5AA83.

At approximately 5:15 a.m., Johnson got up to leave, so Shaylene gave him a bottle of water, which was typical for her. 5AA30–31. Gerry watched as Johnson walked behind him and exited out the side door. 5AA58. Myer testified that he watched as Johnson got up to leave, but only heard him go out the side door. 5AA84. As Johnson exited, he was pushed back in by two men and knocked down to the ground. 5AA59. Shaylene did not watch Johnson leave the bar, but the next thing she remembered was two men coming in and yelling. 5AA32–33. Myer also testified that two men rushed in. 5AA84. Testimony revealed that both men had a gun. 5AA61. Myer testified that he also heard the men yelling that "this is a hold up" and to "put your hands up." 5AA86.

One man got behind the bar and started demanding money. 5AA33. Both were wearing masks and hoodies, so no one could see their faces, but multiple witnesses testified that the two persons sounded like men. 5AA 33, 35, 59, 86,[1] 103. The robber behind the bar demanded money; he had a gun in his hand, that he pointed at Shaylene, and a garbage bag in his other hand to collect money. 5AA34. Myer witnessed as the robber demanded money while behind the bar. 5AA87. Shaylene gave him the money from the slot drawer, the register, and the cooler; she was

[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. 5AA50, 87.

subsequently moved to the last register to retrieve money. 5AA35. A total of $2,446.00 was taken. 5AA113.

Gerry testified that the other robber came up to him, pointed the gun in his face, and told him to put his hands up. 5AA60. Gerry was subsequently hit in the head with the gun, in the back right near the top of the crown. 5AA62. Gerry started bleeding and fell out of his chair onto the floor.[2] 5AA 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. 5AA63. The robber then went past Gerry and towards the other two customers. 5AA63. 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. 5AA89–90. Kathy 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 was tapped on the back. 5AA102. Kathy was unable to say much, as she testified that she "blocked everything out." 5AA107.

Surveillance video from the night of the crime showed the patrons and bartender in the bar. 5AA39–40. The video also corroborated the bartender's and customers' rendition of events. 5AA40–44, 64–67, 91–96, 105–107.

[2] Gerry was taken to the hospital where he received treatment. 5AA68. Photos of Gerry in the hospital were also admitted. 5AA69. 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. 5AA71.

After the robbers fled, and after 9-1-1 was dialed, officers arrived at the scene. 5AA37. Officer Weston Ferguson, from the Las Vegas Metropolitan Police Department ("LVMPD"), was one of the first officers to arrive. 5AA146. He initially attempted to locate the suspects, as they were reported leaving on foot, but was unable to find them. 5AA146. LVMPD Officer Jonathan Tomaino was also one of the first officers to arrive at the scene. 5AA155. The scene was taped off, and officers took time to speak with the victims. 5AA147. The victims were separated and spoken with; the officers learned that almost all of the victims had items taken from them. 5AA157. The officers determined that it was a "takeover style robbery," so robbery detectives for LVMPD were contacted. 5AA159.

Officer Ferguson testified that there was something odd about Johnson, as he was the "victim" who opened the door for the robbers. 5AA150. He also gave inconsistent facts and was the only victim who was neither battered nor had items stolen. 5AA150. Myer also noticed that Johnson was left untouched and unbothered by the two robbers. 5AA90. Officer Tomaino testified that Johnson seemed to be extra cooperative and was pointed out as the one who opened the side door. 5AA160. During the course of his investigation, Officer Tomaino learned that the suspects hid behind Johnson's car prior to entering the bar. 5AA161.

Detective David Miller testified that he arrived at Torrey Pines Pub around 6:00 a.m. 7AA88. As Detective Miller explained, this type of robbery is referred to

as a takeover-style robbery. 7AA100. He contacted patrol officers, learned that the scene had been secured, and that the witnesses had been identified. 7AA89. 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. 7AA90. 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. 7AA94. Detective Miller further noted that the surveillance video revealed that Johnson held the side door open longer than necessary to exit. 7AA95, 98.

Detective Joseph Winn impounded Johnson's cellphone and Detective Miller secured a pen register for the phone on November 6, 2018. 6AA89; 7AA104. There were over one hundred messages missing from Johnson's phone compared to what he showed the Detective; the messages also occurred around the time of the robbery. 7AA103–04, 108. The number Johnson communicated with belonged to Appellant. 7AA108. In the month of October, there were over one thousand instances of contact between Appellant and Johnson. 7AA110.

Michael Bosillo ("Bosillo") a Custodian of Records Testifier for T-Mobile, testified about the operation of cell towers, signal strength, and how cell phone tower pings work. 7AA11–15. He further explained how cellphone data works for phone calls and text messages, and that there is a database. 7AA21–23. In this case, the

target phone number for the T-Mobile phone records belonged to Johnson. 7AA31–32. One particular record showed that there was communication between Appellant and Johnson at 2:18 a.m. on October 29, 2018. 7AA43–44. Another phone call occurred at 7:32 a.m. on October 29, 2018. 7AA47. 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. 7AA54–55, 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. 7AA05–06, 09–12. Appellant's cell phone records revealed that he was near the bar during early morning of the crime. 7AA66–70.

B. <u>Johnson and Appellant's Involvement:</u>

Johnson testified that he lived in the same apartment complex as Appellant, and personally knew him. 5AA171–73. Johnson would observe Appellant walking his dog, at the gym, and hung out with him "a couple of times." 5AA173. The two 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. 5AA175–76.

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. 5AA177. Johnson confided in Appellant that he lost his job. 5AA 177–78. Appellant remarked that he knew of a

way that they could obtain money by robbing a local bar. 5AA178. Appellant informed Johnson that he personally scoped out this bar on a few occasions and explained that there was money in a cooler. 5AA179. As part of the scheme, another co-conspirator was involved, but Johnson did not know his name or phone number. 5AA179–80.

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. 5AA181. Johnson was also supposed to act as though he was a customer by playing games, buying drinks, and wear a vest to seem as though he worked in construction. 5AA182. Overall, his purpose was to see how empty the bar would become as the night went on. 5AA183. Johnson sat in the bar approximately six or eight times, and always sat in the same place. 5AA184, 186. Johnson would communicate with Appellant through text to provide him with updates. 5AA185.

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. 5AA187. 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. 5AA187. That day in particular, Johnson communicated via text with Appellant. 5AA189. At one point, he had Appellant on the phone so he could listen in to what was going on in the bar. 5AA189–90. The phone call occurred at

approximately 2:18 a.m. 5AA192. After the call ended, Johnson continued to text Appellant. 5AA192. 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. 5AA193. That was when Johnson got up and acted as though he was leaving by slowly opening the side door. 5AA193–94. Johnson was then pushed in, and he got on the floor; nothing was taken from him. 5AA194. Johnson could not see what happened but knew when Appellant and the other co-conspirator left as he heard their footsteps. 5AA195. Johnson jumped up from the floor and checked to see if everyone was okay; that was when he noticed that Gerry had been struck. 5AA195. Johnson testified that he asked Appellant why he hit one of the victims and Appellant responded that the victim was talking too much. 5AA208.

After the robbery, Johnson deleted the text messages and phone calls between him and Appellant. 5AA195–96. He wanted to make sure that there was no evidence of them conversing. 5AA196. Johnson testified that he also had a phone conversation with Appellant after the incident about how the money would be split up. 5AA196–97.

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. 5AA200. In December 2018, Johnson was arrested, and was told that there were

phone records, but Johnson did not admit to any involvement. 5AA201. Ultimately, a proffer was made to gather information, and with a lawyer, Johnson told the truth and confirmed the conspiracy. 5AA202–03; 7AA111. Detective Miller also put together a photo line-up to see if Johnson could identify Appellant and Johnson selected Appellant's picture. 7AA112–14.

Appellant testified at trial that he knew Johnson and they exchanged phone numbers. 8AA87–88. 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. 8AA92. According to Appellant, he lost his phone that day. 8AA94. Appellant was initially smoking with Johnson in Johnson's car, went to the gym, and upon speaking with his girlfriend, realized he lost his phone. 8AA94. According to Appellant he stayed home that weekend to clean and was unable to locate his phone. 8AA94.

Cross-examination revealed that Appellant initially told Detective Miller that he did not have any friends or associates in his apartment complex. 8AA115. He also adamantly denied that he knew Johnson. 8AA118. Upon being showed a photo of Johnson, Appellant admitted that he knew him. 8AA120. 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. 8AA121.

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. 9AA05–07. Appellant also acknowledged that he had a curfew, since he was recently released from prison, and adamantly stated that he never missed curfew; accordingly, he could not have committed the robbery. 9AA08–09. Furthermore, Appellant claimed that he did not have any friends in his apartment complex, nor did he associate with anyone. 9AA09. 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. 9AA10.

C. Prior Bad Act - Fred's Tavern Robbery:

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. 6AA54. 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. 6AA55. John, the graveyard bartender was present. 6AA56. 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. 6AA56–57. The man left after five (5) minutes. 6AA57. 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. 6AA57. The bartenders complied and Miriam

observed as people jumped over the bar to the cash drawer. 6AA57. The men were African American and did not have their faces covered. 6AA59. Miriam testified that their phones were stolen and that there was $7,777.00 in the cash drawer. 6AA60. After the men left, they called 9-1-1. 6AA60. John was able to see the getaway car and described it for the police. 6AA61. Later, Miriam went to three locations for a show-up to identify the suspects. 6AA61.

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. 6AA65–66. The suspects were apprehended as well as the getaway vehicle. 6AA68. After a minor pursuit, the vehicle stopped and the suspects bailed out of the vehicle; Appellant, the driver, was detained. 6AA70–71. Detective Jeffrey Swanbeck, now Sergeant, was the robbery Detective called out to the scene of the crime. 6AA72–73. The robbery was described as a takeover-style robbery; normally one person would go in to look around, leave, and then the others arrived to rob those present. 6AA76. 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 intentional 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.

6AA76. Ultimately, over $7,600.00 was recovered. 6AA77.

Detective Swanbeck spoke with Appellant who informed him that the vehicle was registered to his mother. 6AA79. Appellant admitted that he cased the bar; he then went back to the car as the other males went inside to complete the robbery. 6AA80.

SUMMARY OF THE ARGUMENT

The State presented sufficient evidence at trial to sustain Appellant's convictions. Antwaine Johnson, one of Appellant's co-conspirators, testified that he and Appellant, along with an unknown third male, agreed upon and planned the robbery of the Torrey Pines Pub. Johnson's testimony was sufficiently corroborated by extensive cell phone records showing that he and Appellant were in communication the month before the robbery, as well as the morning of the robbery, to include one minute prior. Appellant's phone was also located near the bar at the time of the robbery. The State also presented sufficient evidence to sustain Appellant's convictions of Counts 4, 6, 7, and 8 because Appellant was charged under alternative theories of liability.

The district court did not abuse its discretion by allowing the State to present prior bad act evidence that Appellant had plead guilty to a very similar robbery that occurred in 2011 and admitted his role in that conspiracy. The evidence was admitted to establish Appellant's identity because the victims in the instant case were unable to identify the masked robbers. Any error would be harmless however, due to the

overwhelming amount of evidence proving Appellant's guilt. Appellant's Sixth Amendment right to counsel was not violated when the district court denied his pre-trial motions because Appellant failed to establish he was entitled to a substitution of court-appointed counsel. The district court did not err in instructing the jury with respect to the requirement that accomplice testimony be corroborated by some other evidence.

ARGUMENT

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT APPELLANT BECAUSE ANTWAINE JOHNSON'S TESTIMONY WAS CORROBORATED

Appellant claims that there was insufficient evidence to convict him of the charges because "the State's entire [case] against him" was uncorroborated accomplice testimony. AOB at 16. Appellant's claim is without merit and must be denied, as Johnson's testimony was sufficiently corroborated.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258–59, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing 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." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (in all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an appellate court), cert. denied, 429 U.S. 895, 97 S. Ct. 257 (1976). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319–20, 99 S. Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S. Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id.

at 319, 99 S. Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)).

NRS 175.291(1) states, "[a] conviction shall not be had on the testimony of an accomplice unless the accomplice 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." Corroborative evidence "need not in itself be sufficient to establish guilt—it will satisfy the statute if it merely tends to connect the accused to the offense." Cheatham v. State, 104 Nev. 500, 504–05, 761 P.2d 419, 422 (1988).

Additionally, "corroborative evidence may be either direct or circumstantial, and can be taken from the evidence as a whole." Id. Inferences are permitted in corroboration of accomplice testimony. LaPena v. Sheriff, Clark County, 91 Nev. 692, 694–95, 541 P.2d 907, 909 (1975). This inference need not be found in a single fact or circumstance; if several combined circumstances show a defendant's criminal involvement, the requirement for corroboration is satisfied. Id. However, evidence is insufficient where it "'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.'" Heglemeier v. State, 111 Nev. 1244, 1250–51, 903 P.2d 799, 803–04 (1995) (quoting State v. Dannels, 226 Mont. 80, 734 P.2d 188, 194 (1987)).

Importantly, corroborating evidence sufficient to allow a conviction based on testimony of accomplice need not in itself be sufficient to establish guilt. Evans v. State, 113 Nev. 885, 891–92, 994 P.2d 253, 257 (1997). Instead, corroborating evidence need only connect the accused to the offense. Id. Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380. (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)).

Here, there was sufficient corroborative evidence connecting Appellant to the crimes of which he was convicted. For example, Michael Bosillo, a custodian of records for T-Mobile testified for the jury with respect to how cell phones communicate with cell towers. 7AA008–023. Bosillo testified that the phone numbers 424-375-1085 and 323-427-3092 texted and called each other numerous times, including on the day of the robbery. 7AA042–049. Specifically, however, Bosillo pointed out that on October 29, 2018, at 2:18:23 A.M., a roughly twenty-five-minute conversation occurred between the two numbers. 7AA043–044. Further, on October 29, 2018, at 7:32:05 A.M., the number ending in 1085 made an outgoing

call to the number ending in 3092, which resulted in an "abnormal completion." 7AA047–048. An 'abnormal completion' means that the receiver of the phone call did not answer the call. 7AA049.

Next, the jury heard from Ana Diaz, a Verizon wireless custodian of records. 7AA054. Ms. Diaz testified that the number of 323-427-3092 was registered to an individual with the last name of Marks. 7AA065–068. Ms. Diaz also testified that the phone number registered to Appellant was disconnected on October 29, 2018. 7AA082.

Detective David Miller, the lead robbery detective on the case, testified that Johnson told detectives his phone number was 424-375-1085. 7AA106. Detective Miller further told the jury that there were approximately 118 text messages or calls between Appellant's number and Johnson's number between 3:28 a.m. and 5:12 a.m. the morning of the robbery; however, only the pen register reflected these records, as Johnson deleted the messages and calls from his phone. 7AA107–08. Moreover, Appellant's number and Johnson's number were in contact 1,222 times during the month of October. 7AA110.

Lastly, Detective Eugenio Basilotta testified that he reviewed records for both the T-Mobile and Verizon accounts. 8AA029. Detective Basilotta testified that during the late evening hours of October 28, 2018, and the early morning hours of October 29, 2018, there were 566 instances of contact between Appellant and

Johnson's numbers. 8AA076. Call detail records for Appellant's phone number reflected that Appellant's phone was in the area of 7075 West Gowan and 6374 West Lake Mead Boulevard, the Bloom apartments and Torrey Pines Pub, respectively, at and around the time of the robbery. 8AA031, 057, 060–70.

This testimony directly corroborates Johnson's testimony that he and Appellant consistently texted and called each other the morning of the robbery—to include the twenty-five-minute-long phone call in which Johnson and Appellant were on a phone call so Appellant could eavesdrop on the interior of the bar, as well as the unanswered phone call Johnson made to Appellant around 7 A.M. to discuss splitting the proceeds.

The evidence which corroborated Johnson's testimony and connected Appellant to the robbery consists of a myriad of cell phone records as discussed above. While Appellant claimed at trial that he lost his phone around October 26, 2018, Appellant did not report the phone stolen to police. 8AA092–93, 111–12. However, Appellant did report the phone stolen to Verizon on October 29, 2018, the morning of the robbery. 8AA111–12. Moreover, Appellant was unsure of when he lost his phone when he was interviewed by Detective Miller less than a month after he supposedly misplaced his phone. 8AA121.

Appellant's phone number contacted Johnson thousands of times before the robbery, to include one minute immediately preceding the robbery. Johnson testified

as to the frequency and length of texts and calls between him and Appellant, and the phone records corroborate his testimony. Despite Appellant's claim he lost his phone, the jury was free to assess the weight and credibility of all the evidence presented and determine whether, beyond a reasonable doubt, they believed Appellant was guilty of the crimes charged. Given that accomplice testimony is sufficient if it "merely tends to connect the accused to the offense," the cell phone records confirming Johnson's iteration of events meets the standard. Cheatham, 104 Nev. at 504–05, 761 P.2d at 422. Therefore, Appellant's claims must be denied.

II. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF COUNTS 4, 6, 7, AND 8 PURSUANT TO CONSPIRACY LIABILITY

A conspiracy is "an agreement between two or more persons for an unlawful purpose." Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (citing Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979)). A charge of conspiracy is usually established by inference from the conduct of the parties. A conspiracy "may be supported by a 'coordinated series of acts' in furtherance of the underlying offense sufficient to infer the existence of an agreement." Doyle, 112 Nev. at 879, 921 P.2d at 911. Knowledge of the conspiracy may be demonstrated by circumstantial evidence. United States v. Aron, 463 F.2d 779 (9th Cir. 1972); Windsor v. United States, 384 F.2d 535, 536 (9th Cir. 1967). What the Nevada

Supreme Court believes is necessary for a conviction in a conspiracy is illustrative of the instant case:

> [C]onspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. In particular, a conspiracy conviction may be supported by a coordinated series of acts in furtherance of the underlying offense sufficient to infer the existence of an agreement.

Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (internal citations omitted) (overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)). Additionally, the Nevada Supreme Court has previously and consistently upheld convictions based solely on circumstantial evidence. Circumstantial evidence is admissible at trial and a conviction may be based solely on circumstantial evidence. Crawford v. State, 92 Nev. 456, 456, 552 P.2d 1378, 1378 (1976).

For general intent crimes, such as battery and robbery, "aiders and abettors are criminally responsible for all harms that are a natural, probable, and foreseeable result of their actions." Mitchell v. State, 114 Nev. 1417, 1427, 971 P.3d 813, 820 (1998) (overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002)). Further, "so long as the partnership in crime continues, the partners act for each other in carrying it forward; an overt act of one partner may be the act of all without a new agreement specifically directed to that act." State v. Wilcox, 105 Nev. 434, 436, 776 P.2d 549, 550 (1989).

Appellant asserts there was insufficient evidence to convict him of Count 4: Robbery with Use of a Deadly Weapon, Victim 60 Years of Age or Older for the

robbery of Gerald Ferony, Count 6: Robbery with Use of a Deadly Weapon for the robbery of Myer Goldstein, Count 7: Battery with Use of a Deadly Weapon for the battery of Gerald Ferony, and Count 8: Battery with Use of a Deadly Weapon for the battery of Myer Goldstein. However, he is incorrect. Here, the State alleged Appellant was guilty of these counts under one of more of the following principles of criminal liability: (1) by directly committed the crime; and/or (2) by aiding or abetting in the commission of the crime with the intent that the crime be committed, and/or (3) pursuant to a conspiracy to commit the crime with the intent that the crime be committed, while acting in concert with Johnson and the other unknown co-conspirator. 1AA059.

Johnson testified that shortly before the robbery, he lost his job and after informing Appellant of this, Appellant "offered he knew a way to get some money." 5AA178. Specifically, Appellant had scoped out a bar and knew there was money in a cooler. 5AA178–79. Johnson further testified that he agreed to come up with a plan with Appellant and another male, whose name is unknown. 5AA179. The unknown male was always with Appellant when the three would discuss the plan. 5AA180–81. Johnson testified about the specific plan:

> The plan basically was just for me to just get a headcount to see who was all in the bar and kind of get a image of where I could see if any money was around or where it was hidden that, if I can look in the cooler and see if it was in there. That kind of was just the plan and then kind of just wait till everything died down at the bar. That was

> the plan, just to – and then once that – once everything was clear, I would give [Marks] a text message and tell him that it's good.

5AA181.

Johnson discussed the plan of posing as a regular customer with Appellant and the other unknown co-conspirator. 5AA183. During his visits casing the bar, Johnson would keep Appellant informed of the happenings inside the bar via text message. 5AA185. After the three men decided the robbery would ultimately take place on October 29th, Johnson told the jury that Appellant's role was to go into the bar, tell everyone to lay down, get the money, and leave. 5AA187. The other man had the same role. 5AA187.

While Appellant argues that the State did not present sufficient evidence to convict him of Counts 4 and 6, both Robbery with Use of a Deadly Weapon, his argument lacks merit. Johnson testified that he, along with Appellant and the unknown male, agreed on the plan as discussed above. Appellant was clearly aware that the group's intent was to enter the bar and conduct a robbery. Notwithstanding the fact that the witnesses could not identify which of the two robbers was Appellant, Appellant is guilty of those charges nonetheless. The State presented sufficient evidence, and the jury was persuaded beyond a reasonable doubt, that Appellant and the two men agreed upon this plan and carried it out on October 29, 2018. Appellant is guilty of these counts because the act of one conspirator pursuant to, or in furtherance of, the common design of the conspiracy is the act of all conspirators.

Wilcox, 105 Nev. at 436, 776 P.2d at 550. Moreover, an armed robbery was the agreed-upon object of their conspiracy.

With respect to Counts 7 and 8, both Battery with Use of a Deadly Weapon, Appellant complains again that the State did not present sufficient evidence. However, this argument lacks merit as well. Because these crimes are general intent crimes, Appellant can still be held responsible even assuming the unknown co-conspirator actually battered the victims, because battery with use of a deadly weapon is a harm that is a "natural, probable, and foreseeable result" of an armed robbery. Mitchell, 114 Nev. at 1427, 971 P.3d at 820. Further, Johnson testified that when he asked Appellant why he hit Ferony, Appellant responded by saying "the old man was getting mouthy," or something along those lines. 5AA208.

Appellant relies upon Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) and Byars v. State, 130 Nev. 848, 863, 336 P.3d 939, 949 (2014) in arguing that the State must have proven beyond a reasonable doubt that Appellant actually intended to commit robbery and battery in order to be convicted. While Appellant's iteration of the law is correct, Appellant ignores the fact that those cases do not deal with conspiracies and thus are not applicable to these circumstances. Importantly, this Court has already held that an act of one conspirator in furtherance of the object of the conspiracy is the act of all conspirators, regardless of whether there was a subsequent agreement as to that act. Wilcox, 105 Nev. at 436, 776 P.2d at 550.

The State presented sufficient evidence to sustain Appellant's convictions for Counts 4, 6, 7, and 8, and thus this claim must be denied.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO PRESENT PRIOR BAD ACT EVIDENCE

Appellant claims that the district court erred by admitting prior bad act evidence because the evidence was "far more prejudicial than probative." AOB at 32. 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, 291–93, 756 P.2d 552, 554 (1988).

Section 48.045(2) of the Nevada Revised Statutes 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 and identity, and to disprove his contention that he was just an innocent bystander to his wife's scheme. Id. at 789–95, 220 P.3d at 713–16.

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 the 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 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 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 years after the assault occurred, this Court upheld the admission of testimony from two 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 the 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, 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.[3] 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 acts 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

[3] 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.

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.

Also, in Green v. State, 94 Nev. 731, 587 P.2d 38 (1978), this Court held that evidence of a robbery allegedly committed by the defendant on the day before the robbery for which he was being tried was admissible, over objection, as relevant to prove identity. The theory of defense was "mistaken identity" and the State's evidence to prove identity was not conclusive, as two of three 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 defendants were accused of jointly participating in two armed robberies. They were tried together in separate jury trials for each robbery. Both 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 arguments that there was nothing unique about the two 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. 1AA181–82, 191. On February 3, 2011, Byrd was working as a bartender at Fred's Tavern. 1AA184. Byrd remembered that she was initially joking with John, another bartender, about the $7,777.00 in the register. 1AA185. 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. 1AA186. After the male left, several African American males rushed in with weapons. 1AA187. The men were not

wearing anything to cover their faces. 1AA190. One male jumped over the bar and stole cash from the registers; while Byrd was on the ground, her cellphone was stolen. 1AA187.

Detective Swanbeck testified that he received a call about the robbery, that there was a "quasi-pursuit[,]" and the suspects had bailed out of the getaway vehicle. 1AA193–94. Upon further investigation, it was revealed that Appellant was part of the robbery. 1AA194. 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. 1AA196.

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 relevant through clear and convincing evidence. 1AA200–02, 208, 227. However, the district court requested further briefing with regard to the prejudicial versus probative inquiry prong. 1AA200–02, 208.

On June 24, 2019, the district court found:

> . . . 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.

1AA228. The court ultimately granted the State's Motion, and made the following findings:

> [T]he 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.

RA015.

Appellant claims that the 2011 Fred's Tavern robbery for which he pled guilty and the 2018 Torrey Pines Pub robbery for which he was on trial were not similar enough to establish a clear signature crime as to establish identity. AOB at 27. Further, Appellant argues that Johnson's identification of Appellant at trial rendered the prior-bad-act evidence irrelevant. AOB at 27. Accordingly, Appellant's

contention is that the prior bad act evidence was more prejudicial than probative. AOB at 32.

Here, Appellant not only committed a similar "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. 1AA186; 6AA56–57. Now in the instant case, Appellant learned from the error of his ways, after the previous robbery, by wearing a mask to avoid any visual identification. The Torrey Pines Pub robbery was another takeover-style robbery where one co-conspirator cased the bar. 5AA181, 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. 1AA186–87; 5AA32–35, 84–86. Moreover, the facts in Canada were very similar to the instant case. In this case, the following similarities were present: 1) each time, Appellant participated in the offenses with two or more persons; 1AA186–87; 5AA179–80; RA015; 2) each time, Appellant and his co-conspirators targeted bars as opposed to

homes or victims on the street; 1AA186; 5AA178–81; 3) each time, they extensively planned the robbery and sent one person in to case the location for information for days, and the information was conveyed to people waiting outside; 1AA101, 196; 5AA178–81, 187–94; RA015; 4) each time, they waited until an opportune time and then robbed the victims inside the bar; 1AA101, 196; 5AA193–94; RA015; 5) in each case, one of the robbers jumped over the counter and stole money from the bar itself; 1AA187; 5AA33; RA015; and 6) in each case, the employees/patrons of the bar were also robbed of their personal property; 1AA187; 5AA63, 89–90; RA015. The similarities 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 this 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 this case.

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. 1AA101, 196; 5AA178–81, 187–94; RA015. 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 was familiar with the security measures in place at local bars. 1AA101, 196; 5AA23, 59, 111, 178–81, 187, 193–94; RA015. 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.

Appellant alleges that the district court further erred by failing to instruct the jury immediately prior to the admission of prior-bad-act evidence. AOB at 33. However, the jury was properly instructed that evidence of Appellant's prior robbery was not to be used for the purpose of concluding he committed the instant robbery. Following Miriam Byrd's testimony about the Fred's Tavern robbery, the Court informed the jury:

> The testimony of this witness is not offered to prove that the defendant committed a robbery. It's, you know, it's not offered to prove that he acted in conformity. It's offered for other proof such as identification. So you'll be further instructed on that in your written instructions.

6AA063. Directly after being so admonished, the jury took a fifteen-minute-recess and then heard from Officer Charles Jivapong and Detective Jeffrey Swanbeck about the 2011 robbery. 6AA063–82.

The jury was also instructed with respect to the evidence of Appellant's prior robbery in the jury instructions. Jury instruction No. 21 reads as follows:

> Evidence that the Defendant committed offenses other than that for which he is on trial, if believed, was not received and may not be considered by you to prove that he is a person of bad character or to prove that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of proving the Defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. You must weigh this evidence in the same manner as you do all other evidence in the case.

> Evidence that the Defendant was previously convicted of felony crimes may be considered by you for the purpose of weighing his credibility.

8AA185.

While Appellant emphasizes the instruction should be given "immediately prior to its admission," in addition to a general instruction at the end of trial, Tavares held that "a limiting instruction should be given *both at the time the evidence of the uncharged bad acts is admitted* and in the trial court's final charge to the jury. Rhymes v. State, 121 Nev. 17, 23, 107 P.3d 1278, 1282 (2005) (citing Tavares, 117 Nev. at 733, 30 P.3d at 1133). Here, the district court complied with Tavares because the jury was instructed directly following Ms. Byrd's testimony, which was at the time the evidence was admitted. Further, the instruction was immediately prior to the other prior-bad-act witnesses.

The jury was therefore sufficiently instructed that any evidence of Appellant's guilt with respect to the 2011 Fred's Tavern robbery was not to be considered by them to assume Appellant was guilty of the robbery for which he was on trial.

B. 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. 5AA28–29, 84, 181–86. His role was to case the bar prior to the robbery and on the actual day of the robbery. 5AA181–86. On October 29, 2018, when the time was right, Johnson exited the bar through the side exit. 5AA58, 84, 193–94. Victims testified that this door was locked from the outside during the graveyard shift. 5AA23, 59, 111. As Johnson slowly opened the door, Appellant and their co-conspirator rushed in. 5AA32–33, 84, 193–94. Previously, Appellant and the co-conspirator waited outside by Johnson's car. 5AA161. Both Appellant and the unknown co-conspirator were wearing masks and gloves, and both were armed with firearms. 5AA33, 35, 59, 61, 86, 103.

One of the co-conspirators jumped over the bar in order to demand money. 5AA33–34. Victims testified about having guns pointed at them, and an elderly patron was violently pistol whipped. 5AA34, 60, 62. Appellant later admitted to Johnson that he was the co-conspirator who struck this victim. 5AA208. During the course of the robbery, Johnson acted as though he was a victim, and even stuck around until police arrived. See 5AA160. 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. 7AA103–04, 108–10. Furthermore, surveillance video corroborated the victims' and Johnson's testimony about what occurred on October 29, 2018. 5AA40–44, 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. 5AA171–97. Furthermore, cell phone evidence was admitted showing that Appellant was near the bar during the time of the robbery. 7AA66–70. 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.

IV. APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED WHEN THE DISTRICT COURT DENIED APPELLANT'S PRE-TRIAL MOTIONS

Appellant alleges that the district court abused its discretion by denying his requests for substitution of counsel. AOB at 38. Determining whether friction between a defendant and his attorney justifies substituting counsel is within the trial court's sound discretion, and this Court will not disturb its decision on appeal absent a clear abuse of discretion. Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978). Generally, a district court should not summarily reject a motion for new counsel where such motion is made considerably before trial without first conducting an "adequate inquiry" into the defendant's complaints. Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 842 (2005) (quoting Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004)). However, absent good cause shown, 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; Young, 120 Nev. at 968, 102 P.3d at 576.

This Court has defined good cause as "a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead . . . to an apparently unjust verdict." Gallego v. State, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001), overruled on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). Good cause is not "determined solely according to the subjective standard of what the defendant perceives," nor is "[t]he mere loss of confidence in appointed counsel . . . good cause." Id. While a defendant's lack of trust in counsel is a factor

in the determination, a defendant must nonetheless provide the court with legitimate explanations for it. Id. (citing McKee v. Harris, 649 F.2d 927, 932 (2nd Cir. 1981)).

Moreover, a defendant may not request substitute counsel based on his refusal to cooperate with present counsel because "'[s]uch a doctrine would lead to absurd results.'" Thomas, 94 Nev. at 608, P.2d 674 at 676 (quoting Shaw v. United States, 403 F.2d 528, 529 (8th Cir. 1968)). Because counsel alone is responsible for tactical decisions regarding a defense, a mere disagreement between counsel and a defendant regarding tactics cannot give rise to an irreconcilable conflict. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). In particular, where a defendant disagrees with counsel's reasonable defense strategy and wishes instead to present his own ill-conceived strategy, no conflict arises. See Gallego, 117 Nev. at 363, 23 P.3d at 237. Rather, attorney-client conflict warrants substitution "only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Id.

This Court has articulated three factors to consider when reviewing a district court's denial of a motion to substitute counsel: (1) the extent of the conflict, (2) the motion's timeliness and the extent of inconvenience or delay, and (3) the adequacy of the court's inquiry into the defendant's complaints. Young, 120 Nev. at 968–69, 102 P.3d at 576–78.

Fully analyzing the aforementioned factors requires going back to May 17, 2019, at a Pre-Trial Evidentiary Hearing regarding the State's Motion to Admit

Evidence of Other Bad Acts. There, Appellant begins to express dissatisfaction with his counsel, Jess Matsuda, Esq., merely three weeks after counsel's appointment. Following the hearing and argument, the following discussion took place:

> THE DEFENDANT: May I please address the Court, Your Honor, before we're done?
> THE COURT: Do you want him to address the Court?
> MR. MATSUDA: I advised him not to, but he wants to.
> THE COURT: Okay.
> THE DEFENDANT: I want to address the Court, Your Honor. Well, I spoke with my attorney about the *Marcum* notice that was supposed to be served to me before I was indicted. He informed me that the State sealed the motion. I asked him for a written order, a copy of the written order because the courts are supposed issue a written order to the District Attorney in order to withhold the notice from a Defendant. I didn't get granted my right to testify in front of Grand Jury before I was indicted, for one.
> And also, I'm trying to figure out is it legal for the State to admit my alleged accomplice as evidence against me at a Grand Jury hearing and allow him to testify against me and in front of a jury that had already returned a true bill against him. That would seem extremely prejudicial on my behalf at that Grand Jury hearing.
> THE COURT: Well, I'm – yes, they could submit accomplice testimony.
> THE DEFENDANT: But would they be – would he be able to testify in front of the same Grand Jury that returned a true bill against him? I mean, that would give birth to the – to a pre-determination of guilt. I mean, if you're already listening to somebody tell you about somebody else and you're listening to somebody that you already know you returned a true bill against, then how is that not unfair on my behalf?
> And then also, his Grand Jury hearing was held on December 20th. Mine was on January 10th. So, my thing is I want to see why I wasn't granted the right to testify before the Grand Jury. I need the documents on that. I asked for the Grand Jury transcripts from January 10th; I still haven't received those. I asked for the search warrant from my phones; I still haven't received those. I haven't received anything that I've asked for. I haven't received any visit from my attorney. He

> sent his private investigator to come see me, but I need to talk to him to be able to get everything to – so we can be on the same page as far as defending myself.
> THE COURT: Okay. So, counsel, are you – have you addressed your client's concerns?
> MR. MATSUDA: I did. I just provided to him what I have with me right now. I did reach out to Mr. Giordani about the *Marcum* notice issues. I did provide Mr. Marks some additional discovery that I have. A lot of discovery's on a disc. He is up in NDOC, so it is a little bit more difficult for me to see Mr. Marks. I did send my investigator to relay an information. So, that's where we are.
> THE COURT: Okay.
> THE DEFENDANT: He hasn't really addressed the *Marcum* notice to me though. Like, he told me that they sealed it, but I need paperwork on that. I need to see that for myself. I – because I want to file a motion for not being served a *Marcum* notice.
> THE COURT: But your lawyer files motions.
> THE DEFENDANT: Yeah, I understand that.
> THE COURT: And he will decide what motions are appropriate to file based upon the law. And I'm –
> . . .
> THE COURT: I'm not giving you legal advice. I can't give you legal advice. 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 be starting 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.

1AA210–14. The transcripts evince that the district court talked to Appellant *at length*, four (4) full transcript pages to be specific, with respect to what his exact concerns with counsel were. Appellant was upset that the State sealed its *Marcum* notice, and Appellant desired a copy of some sort, despite counsel advising him what happened.

The next relevant interaction took place on June 24, 2019, at another evidentiary hearing regarding the State's Motion to Admit Evidence of Other Bad Acts:

> THE DEFENDANT: May I please make a statement before we're done today?
> . . .
> THE COURT: On what subject?
> THE DEFENDANT: Regarding the *Marcum* notice. I've presented it to the courts prior to now, and I'm doing it again. I was never served a *Marcum* notice, so I was never afforded the right to testify in front of the grand jury before being indicted. That's a critical part of the process and even being able to have me where I am today that is a right of mine that was violated. NRS 172.241 gives the defendant the right to testify before being indicted for a reason because I could have presented evidence that could have exonerated me from this case and we wouldn't be standing here today. I never received a *Marcum* notice. I didn't know anything about this case or this crime prior to being arrested. I was arrested after being indicted, so I would like to exercise my right to testify before the grand jury.
> THE COURT: And you wanted to testify before the grand jury?
> THE DEFENDANT: Absolutely.
> THE COURT: Okay. Well it's – you have a lawyer and he can file an appropriate motion if he feels that there's nothing before the Court on that. And, of course, it's your right to testify at trial if you wish, but I don't have anything, any motion pending at this point to rule concerning *Marcum* and notices and any of that. I have no information on that, so speak with your counsel.

1AA230. Again, Appellant took concern with not being provided with a copy of his *Marcum* notice, and the court listened to and addressed Appellant's concerns, and reiterated the need for Appellant to communicate with his counsel.

Next, on the first day of jury trial, July 8, 2019, the district court stated:

> We're outside the presence of the venire panel at this time. I just wanted to note that on the 5th of July, a motion, filed by the defendant in proper person, was filed to – a motion. It's styled Motion to Withdraw Counsel. Mr. Marks signed that motion on June 24th, 2019, so I'm not sure why it didn't get filed until July 5th. But it doesn't – it's a form. It indicates that there's an affidavit attached, but there's no – that it's based upon an attached affidavit, but there is no affidavit attached. And so it got set by the clerk's office for the 29th, which obviously would be after we start jury selection. And I believe we already addressed this last week; is that correct, Mr. Marks?
> [Appellant agrees]
> THE COURT: Okay. And so I'll just advance this and deny it, as we already discussed all the issues that he had concerning this last week when I saw him in court.

2AA002.

On December 18, 2019, following his jury trial, Appellant appeared before the district court for sentencing, as well as his pro per Motion for a New Trial and Motion for Judgment of Acquittal. 9AA117. Appellant and the district court's dialogue occurred as follows:

> THE DEFENDANT: No ma'am, at this point there's nothing to add. But there is something I would like to present to Your Honor that I had just received. It was actually part of my discovery. I had just received from Matsuda like last week. It was – now I understand that this is a hearing for me to argue my motion and I'm prepared to argue. But I just felt the need and the severity to present this to you because I don't know if you got a chance to see this. But I remember I had made multiple – I raised multiple issues regarding a Marcum notice.
> And I understand we're past that point, so I'm not going to, you know, go in depth into that issue. But I remember the State had argued that they sealed the notice. And I was arguing that I had never, you know, received any motion or copy of a motion, order, or anything like that. And when I got my documents from Matsuda's office it was actually two copies of a motion that says the State's motion for determination of

> adequate cause to withhold notice pursuant to NRS 172.241 subsection 3. And I noticed that there was no file stamp on it.
> The case number says A-17-760797-P which would indicate that that case number is from 2017 which is not my case number. There's a co-Defendant, there's a second defendant on this motion named Ruben Green [phonetic] who is not a part of my case. The date of the hearing says that it was January 11th, 2019 and the time of the hearing was 11 a.m. However my grand jury indictment hearing occurred on January 10th of 2019, so the State to have dated this hearing to have been heard the day after the actual Grand Jury occurred, the days aren't adding up.
> And then it says that this motion was drafted on July 9th 2019 and I actually wanted to send it up there to you so you could actually visually see if yourself. Because, I mean, if there was no seal of the notice and if there wasn't an adequate motion filed in regard to the sealing of a notice but the State argued on record that they sealed the notice, I mean, that's extreme prosecutorial misconduct.
> I mean, I've raised multiple issues that I wasn't served a Marcum notice for this specific reason to have a motion filed to dismiss the indictment based on the lack of notice. And the State's response to that was that they sealed the notice. And nowhere in my case summary in the index is there a hearing regarding the withholding of the notice. But I have it right here where it's actually a motion signed by Giordani with everything that I explained to you and if you would like to take a look at it before we proceed with his hearing and I can argue my motion.

9AA118–20. Again, Appellant raises his complaints with respect to the alleged *Marcum* issue and the district court listens at length, despite having heard Appellant's argument before. The court questions Mr. Matsuda as to whether he had addressed Appellant's concerns and encouraged Appellant to continue working with his attorney. 1AA210–14, 230.

As to the first Young factor, the extent of the conflict, it is clear from the above transcript excerpts that Appellant was more concerned with the sealed *Marcum* notice than with developing his defense. The conflict had little to do with counsel's

ability to defend Appellant and more to do with Appellant's refusal to concede a minor point. Second, Appellant's Motion to remove Mr. Matsuda was filed on July 5, 2019, before trial began on July 8, 2019. 2AA002. The Motion was clearly not timely and would have resulted in a delay of Appellant's trial. Moreover, when addressed by the court as to his Motion, Appellant agreed that his concerns were already addressed. 2AA002.

As to the third Young factor, the court clearly conducted sufficient inquiry into Appellant's concerns with Mr. Matsuda as evidenced by the above transcript excerpts. Each time the district court engaged with Appellant, it appeared his issue with not being served with the sealed *Marcum* notice took over any other concerns regarding his defense. Nonetheless, Mr. Matsuda remained steadfast in explaining things to, and attempting to discuss the case with, Appellant. However, Appellant refused to allow Mr. Matsuda to do so. Despite their disagreements, Appellant failed to establish good cause to have Mr. Matsuda replaced. There was not a complete breakdown in their communication nor was there any irreconcilable conflict. As Mr. Matsuda was appointed because the Public Defender had a conflict, Appellant was not entitled to a substitution of counsel absent good cause. Because Appellant cannot show good cause, the district court properly denied his various pre-trial motions and this claim must be denied.

V. THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY REGARDING ACCOMPLICE TESTIMONY

Appellant complains that the district court erred by not instructing the jury that Appellant could not have been convicted based on Johnson's testimony unless that testimony was corroborated by other independent evidence connecting Appellant to the crime. AOB at 46. Appellant's claim is belied by the record and must be denied.

A portion of Jury Instruction 8 reads as follows:

> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect a defendant with the commission of the offense.

8AA172. While Appellant argues that the jury was not instructed that he could not be convicted unless Johnson's testimony was corroborated, the above instruction required the jury to remove Johnson's testimony from the case entirely, and then determine whether any outside evidence connected Appellant to the crime. Because the jury is assumed to have followed this instruction, they would have completely ignored Johnson's testimony in its entirety, and then determined whether there was any other evidence connecting Appellant to the crimes. Newman v. State, 129 Nev. 222, 237, 298 P.3d 1171, 1182 (2013); Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). If they determined no evidence connected Appellant to the crimes aside from Johnson's testimony, Appellant would not have been convicted. However, the jury clearly believed that there was evidence proving Appellant's guilt

above and beyond Johnson's testimony as reflected by their verdict. Accordingly, Appellant's claim must be denied, and his Judgment of Conviction affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Appellant's Judgment of Conviction.

Dated this 21st day of July, 2021.

Respectfully submitted,

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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 13,954 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 21st day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 21, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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