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 REPLY BRIEF

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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.

Given that none of the victims identified Marks, there was no DNA, fingerprints, or money from the pub linking Marks to the offense, nor was there any surveillance video and/or photos linking Marks to the robbery, the State is forced to rely on the cell phone information to try to corroborate Johnson's testimony. *Answering Brief* at 22– 24; 5 AA 33, 35, 59, 86, 103, 194–95. But the cell phone records in this case are legally insufficient to corroborate accomplice Johnson's testimony.

First, the State never proved that Marks' phone number was (323) 427-3092. To be sure, the cell phone records list Marks as the subscriber for that number, 7 AA 64-66, 68, but the State's own witnesses and evidence proved that means nothing. *See e.g.*, 7 AA 105-106. For example, Detective Miller testified, and the cell phone records showed, that the subscriber for the (424) 375-1085 number — the number that was in contact with (323) 427-3092 — was Keyontrey S. McBride. *Ibid*. Yet, it wasn't McBride that was using that number. *Ibid*. It was accomplice Johnson. *Ibid*. The State cannot overcome this foundational problem:

that a subscriber's name on phone records does not equate to the person who actually uses that phone number. *See* 7 AA 106 (it is not "uncommon" to have a subscriber not be the individual who actually uses that phone number).

Second, the cell 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. The cell phone records, therefore, do not reveal if the messages or phone calls were about criminal activity. In fact, the cell phone records show, as the State points out on appeal, that the two numbers were in contact over 1,200 times during the entire month of October 2018. *Answering Brief* at 23. So the mere fact that the two numbers were in communication on October 28 and 29, 2018 — like they were all the other days in October — is not evidence or corroboration of a crime; especially since accomplice Johnson testified the robbery was planned in person, not by text messaging. 5 AA 175, 179-181.

Third, the State's claim that Detective Basilotta testified call records reveal Marks' phone *was* in the area of the Torrey Pines Pub around the time of the robbery is false. *Answering Brief* at 23-24 (emphasis added). As shown above, the State never proved it was Marks' phone. And, what Detective Basilotta actually

said under oath was that "it's *possible*" the phone was in that area, but there is no way to tell where exactly the phone was located. 8 AA 69 (emphasis added). This is especially true considering towers can service areas up to four miles from the tower. 8 AA 64. It's also important to note that Marks lived in that general vicinity, at the Bloom Apartments. 8 AA 64, 69; 9 AA 7-8.

The cell phone evidence at best "simply proves suspicion, or is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant" and is thus "deemed insufficient" to corroborate accomplice Johnson's testimony. *Heglemeier v. State*, 111 Nev. 1244, 1250–51, 903 P.2d 799, 803–04 (1995) (citations omitted).

Fourth, the State's assertion "that *accomplice testimony* is sufficient if it 'merely tends to connect the accused to the offense'" is a misstatement (and a misunderstanding) of the law. *Answering Brief* at 24 (emphasis added). The accomplice's testimony alone, even if it connects the accused to the offense, is insufficient to sustain a conviction. *See* NRS 175.291(1). The accomplice's testimony must be "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." *Ibid*.;

Cheatham v. State, 761 P.2d 419, 422, 104 Nev. 500 (1988) ("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."). This difference is key because, contrary to the State's argument, accomplice Johnson's testimony alone is not enough to convict, and the cell phone records do not connect Marks to the commission of the offense. *See* NRS 175.291(1).

Marks' convictions, therefore, should be reversed and his sentences vacated.

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).

The State's main argument is that Marks is guilty of the robbery and battery crimes involving Goldstein and Ferony because the "the act of one conspirator pursuant to, or in furtherance of, the common design of the conspiracy is the act of all conspirators." *Answering Brief* at 28. But the State doesn't explain how robbing and battering the individual patrons was "pursuant to, or in furtherance of, the common design of the conspiracy." The conspiracy in this case was to rob the Torrey Pines Pub. *Answering Brief* at 27-28 (citing 5 AA 181, 183, 185, 187). It

was *not* (and never was) to rob and batter the patrons, as the State's star witness, accomplice Johnson, testified. 6 AA 48. In fact, the plan was to wait until most, if not all, of the patrons left the pub — *i.e.*, until "everything died down . . . and then once that — once everything was clear" — to rob the bar. 5 AA 181. Robbing and battering Goldstein and Ferony was not "pursuant to, or in furtherance of, the common design of the conspiracy."

These crimes also weren't "reasonably foreseeable consequence[s] of the *object* of the conspiracy." *Bolden v. State*, 124 P.3d 191, 201, 121 Nev. 908 (2005), overruled in part on other grounds by *Cortinas v. State*, 124 Nev. 1013, 1026–27, 195 P.3d 315, 324 (2008). In *Bolden*, the Court explained:

> Although we affirm Bolden's conviction for the general intent crimes of home invasion and robbery, we conclude that in future prosecutions, vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy. We caution the State that this court will not hesitate to revisit the doctrine's applicability to general intent crimes if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy.

Given that the State's main witness testified it was *not* the plan to batter or rob the patrons, 6 AA 48, the State's argument that Marks is guilty of these crimes under vicarious coconspiracy liability is meritless. First, they weren't in furtherance of the "object of the conspiracy." Second, they were not reasonably

foreseeable consequences, as the record reveals. Accomplice Johnson was surprised by and upset because of these crimes, as they most certainly were not the object of the conspiracy. 5 AA 195; 6 AA 48.

The State also argues there is sufficient evidence to support these convictions because Johnson testified that when he asked Marks why he hit Ferony, Marks responded "the old man was getting mouthy." *Answering Brief* at 29 (citing 5 AA 208). The State, however, is playing fast and loose with the facts to give the impression that Marks admitted hitting Ferony, but that is false. Accomplice Johnson unequivocally testified that Marks never admitted he was the one who hit Ferony. 5 AA 208. Thus, there is no evidence proving that Marks actually committed these crimes.

Marks' convictions on Counts 4, 6, 7 and 8, therefore, should be reversed.

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.

A. 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.

The district court erroneously determined that evidence of a 2011 robbery at

Fred's Tavern was admissible to prove Marks' "identity" in this case. 1 AA 227:15-17, 228:14-17, 229:6-15. But, in order to be admissible to establish "identity," the robbery at Fred's Tavern and the Torrey Pines Pub robbery had to be 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). They weren't, as the record clearly shows. The district court's decision that the prior-bad-act evidence was admissible to establish "identity," therefore, was manifestly incorrect. *Flowers v. State*, 136 Nev. Adv. Op. 1, *5, 456 P.3d 1037, 1043 (2020) (quoting *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005)).

The district court's "similarities" findings are set forth in Marks' opening brief, along with an explanation (with quotes and citations to the record and the facts) of why the findings are clearly erroneous. *Opening Brief* at 31-32. For convenience, the "similarities" findings are listed again below. They were:

- 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.

Since the State cannot dispute the record as noted above, which plainly shows the "similarities" findings are clearly erroneous, the State makes much of the fact that both robberies were "takeover-style" robberies. *Answering Brief* at 39-40. Yet, that fact is irrelevant and played no part in the district court's decision. "Takeover-style" robberies are not unique. They are "very common" or "customary." 1 AA 228; 7 AA 100, 116-17. Moreover, 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 district court did not find this information "helpful" to her NRS 48.045(2) analysis. 1 AA 227:12-15. The district court also determined the two robberies

were remote in time. 1 AA 206:10-11; *Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000) (the more remote in time the prior-bad-act evidence is from the charged offense the less relevant it is).

The State also argues that the prior-bad-act evidence was admissible to show Marks "learned from the error of his ways." *Answering Brief* at 39. Marks did not wear a mask in the Fred's Tavern robbery, but he allegedly learned from his mistake by wearing a mask in the Torrey Pines Pub robbery to avoid any visual identification, the State argues. *Ibid*. This is pure conjecture. The State's contention that the prior-bad-act evidence was admissible under *Bigpond* to provide context and "explain why Appellant chose to wear a mask" is meritless. *Ibid*. (referencing *Bigpond v. State*, 128 Nev. 108, 110, 270 P.3d 1244, 1245 (2012). It's obvious why any robber would wear a mask — *i.e.*, to conceal identity — the jury did not need to hear about a prior robbery to understand why the robbers wore a masks.

The State also blatantly misrepresents facts on appeal in order to fabricate "similarities" between the Fred's Tavern and Torrey Pines Pub robberies. For example, the State claims that "each time [meaning for each robbery], they [the robbers] extensively planned the robbery and sent one person in to case the location for information ***for days***." *Answering Brief* at 40 (emphasis added). This

is blatantly false. As it relates to the Fred's Tavern robbery, Ms. Byrd, the State's own witness, testified that the man cased the bar for less than five minutes. 6 AA 57.

As noted in the briefs and established by the record, the Fred's Tavern and Torrey Pines Pub robberies were not so similar that they "established 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. The district court's decision that evidence of the Fred's Tavern robbery was admissible to prove Marks' identity was manifestly incorrect, and denied him of his constitutional rights to due process and a fair trial.

B. The district court's repeated failure to instruct the jury "immediately prior to" the prior-bad-act evidence being presented to them was legally improper (*i.e.*, legal error) and solidified the prejudicial impact of the prior-bad-act evidence.

Given the acknowledged prejudicial impact of prior bad act evidence, Marks was entitled to have the jury properly instructed in accordance with *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001). The State agrees 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." *Answering Brief* at 42 (emphasis added). The State claims that by instructing the jury ***after*** Ms. Byrd's testimony, the district court properly instructed the jury. *Ibid*. But, that is incorrect.

Tavares requires the district court 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 district court, therefore, was required to instruct the jury "immediately prior to" Ms. Byrd's testimony, not after. The district court was also required to give the same instruction regarding the prior-bad-act evidence "immediately prior to" Officer Jivapong's testimony, Detective Swanbeck's testimony, and Detective Miller's testimony. The district court failed to do that. In fact, the district court didn't even give the instruction immediately after their testimonies, like it did with Ms. Byrd. *See* 6 AA 65-72, 72-83; 7 AA 118-19.

Pursuant to *Tavares,* the reoccurrence and the timing of the instruction immediately ***before*** the presentation of any prior-bad-act evidence is essential. Adopting the State's contention — *i.e.*, that instructing the jury about the purpose of the prior-bad-act evidence once ***after*** Ms. Byrd testified, and not at all (either before or after) Officer Jivapong, Detective Swanbeck, and Detective Miller testified is adequate — renders *Tavares* meaningless. As this Court made clear in *Tavares*, the reason a district court is required to instruct the jury "immediately

prior to" hearing any prior-bad-act evidence is so they can understand and be accustomed to thinking of the prior-bad-act evidence in terms of its admissible purpose. *Tavares*, 117 Nev. at 733, 30 P.3d at 1133.

Given the fact that there is a "presumption of inadmissibility that attaches to all prior bad act evidence," and that the use of prior-bad-act evidence "is heavily disfavored" because it is "often irrelevant and prejudicial," *see Hubbard v. State*, 134 Nev. 450, 454, 422 P.3d 1260, 1264 (2018); *Tavares*, 117 Nev. at 730, 30 P.3d at 1131, coupled with the fact that the jury was not properly instructed "immediately prior to" the presentation of such evidence, only made its admission that much more prejudicial; especially since it had no probative value. The error in admitting such evidence was not harmless. *See 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)).

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

The State's argument that any error in admitting the prior-bad-act evidence

was harmless "based on the overwhelming evidence" of Marks' guilt is meritless. *Answering Brief* at 42.

The State's "overwhelming evidence" is nothing more than the uncorroborated testimony of accomplice Johnson. *Id*. at 43-44. To be sure, the victims testified that a robbery took place, but none of them testified Marks committed that robbery, or was involved in it. *Ibid*. The only one that said that was accomplice Johnson, and his testimony alone is insufficient to convict Marks. NRS 175.291(1). There were no fingerprints, DNA, photos, videos, or any other evidence linking Marks to the crimes. 5 AA 47, 74, 86, 96-97, 108. And, as shown above and in the opening brief, the cell phone records do not corroborate accomplice Johnson's testimony. *See* Section I, *supra*.

Morever, the State's assertion on appeal that Marks admitted to accomplice Johnson that he was the individual who struck Ferony on the head is patently false. *Answering Brief* at 44. Johnson testified under oath that Marks "didn't admit" he was the individual who hit Ferony. 5 AA 208:8-14.

Similarly, the State's claim that the cell phone records show Marks *was* near the bar at the time of the robbery is not exactly what Detective Basilotta said at trial. *Answering Brief* at 44. The State is stretching the truth. What Detective Basilotta actually said was that "it's *possible*" the phone was in that area, but there

is no way to tell where exactly the phone was located. 8 AA 69 (emphasis added). Furthermore, the cell towers service areas up to four (4) miles from the tower. 8 AA 64. And, it's also worth noting that Marks lived in the Bloom Apartments, which are in the general vicinity of Torrey Pines Pub. 8 AA 64, 69; 9 AA 7-8.

The fact is the State had no case against Marks, since accomplice Johnson's uncorroborated testimony is insufficient for a conviction. NRS 175.291(1). To ensure a conviction, therefore, the State resorted to painting Marks as a robber, by introducing evidence of the Fred's Tavern robbery to show propensity, which is improper. NRS 48.045(2). Evidence of the Fred's Tavern robbery had zero probative value with regard to the Torrey Pines Pub robbery. It was purely prejudicial. Even the district court recognized there was a "danger of improperly putting . . . in front of the jury that somebody has already committed a robbery" because it "could cause a jury to wrongfully find someone guilty." 1 AA 207. And the district court's failure to instruct the jury "immediately prior to" the prior-bad-act evidence being admitted only served to solidify the danger of wrongfully convicting Marks simply because he previously had committed a robbery, and the prejudicial impact of its admission. *See e.g.*, *Angle v. State*, 113 Nev. 757, 762, 942 P.2d 177, 181 (1997) ("district court's decision to permit mention of the prior conviction but then give a limiting instruction [was] insufficient . . . to remove the

prejudicial impact of the admission").

Therefore, under either standard — *Knipes* (for non-constitutional error) or *Chapman* (for constitutional error) — allowing the State to present witnesses and introduce evidence of the prior Fred's Tavern robbery was not harmless. *Answering Brief* at 43 (citing *Knipes v. State*, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008); *Chapman v. California*, 386 U.S. 18, 24 (1967)).

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 State boils down Marks' argument to the fact that he was upset that the State sealed the *Marcum* notice and he wanted a copy of it, which wasn't being provided to him. *Answering Brief* at 47-51. The State, therefore, details Marks' conversations with the court concerning the *Marcum* notice, but ignores all the other reasons and concerns Marks expressed for requesting new counsel *before* trial. *Answering Brief* at 47-51.

To be sure, Marks believed the *Marcum* issue was important, but his concerns and conflict with trial counsel were much more than that.

Marks was forced to proceed to trial with counsel who did not visit with him on a single occasion and made no attempts to do so in preparation for trial, despite the fact that he was facing trial on multiple felony counts. 1 AA 210-14; 10

AA 10-11, 30-34. Marks was further forced to proceed to trial with counsel who refused to file pretrial motions, failed to provide him with discovery, and who was confrontational with him. 1 AA 210-14. This resulted in a complete collapse of the attorney-client relationship. Under the totality of the circumstances, the district court's refusal to substitute counsel for Marks *before* trial 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)).

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

The jury was never instructed that they could not convict Marks on accomplice Johnson's testimony, unless his testimony was "corroborated by other evidence which in itself, and without the aid of the testimony of [ ] accomplice [Johnson], tends to connect [Marks] with the commission of the offense." NRS 175.291(1). Nowhere in Jury Instruction No. 8 does it say that. 8 AA 172.

Rather, Jury Instruction No. 8 simply defines corroborating evidence, and explains how an accomplice may be corroborated, but it does not instruct the jury that, in order to convict, the accomplice's testimony ***must be*** corroborated. *See* 8 AA 172; *Answering Brief* at 53. Likewise, the jury was never instructed that the prior-bad-act evidence was not evidence corroborating accomplice Johnson's

testimony, and could not be considered as such. *See* 8 AA 161-198.

Failing to give these instructions was patently prejudicial and violated Marks' constitutional rights to a fair trial and due process. *Globensky v. State*, 96 Nev. 113, 117, 605 P.2d 215, 218 (1980) (citation omitted); 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: August 18, 2021.

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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 4,058 words.

Dated: August 18, 2021.

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Certificate of Service

I hereby certify and affirm that this document, APPELLANT'S REPLY BRIEF, was filed electronically with the Nevada Supreme Court on August 18, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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