IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVOHN MARKS,	)	No. 80469
	)	
Appellant,	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
_____	)	

PETITION FOR REHEARING

In accordance with NRAP 40(c)(2), appellant Devohn Marks petitions for rehearing. An Order of Affirmance was entered on March 17, 2022. *See* Ex. 1 (Order of Affirmance). On March 30, 2022, the Court granted Marks' request for an extension of time to have until May 4, 2022 to file a petition for rehearing.

Grounds of Rehearing

The court may consider rehearing in the following circumstances:

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

NRAP 40(c)(2). As is shown below, such grounds exist in this case, warranting rehearing.

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Argument

I. The panel overlooked and misapprehended material facts in the record that show accomplice Johnson's testimony was not corroborated, and it misapplied and failed to consider a controlling statute and decisions on this issue.

A conviction cannot stand 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; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof." NRS 175.291(1).

According to the panel, accomplice Johnson's testimony was corroborated by the following evidence: (1) Johnson testified he helped plan the crime and Marks was one of the robbers, (2) the victims testified two masked assailants battered them, took their property, and took money from the register, (3) surveillance video and cell phone records were consistent with the accounts of the robbery and Johnson's testimony, and (4) phone records showed Marks and Johnson communicated routinely in the month before the robbery, including minutes before the crime. *See* Ex. 1 at 2. The only way to reach this conclusion, however, is to overlook or misapprehend material facts in the record.

To begin with, three of the points identified by the panel do not constitute corroborating evidence of Johnson's testimony. Johnson's own testimony that Marks helped plan and participated in the robbery is not corroborating evidence. *See* NRS 175.291(1) (defining corroborating evidence as "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") (emphasis added). Neither is the victims' testimonies that two "masked assailants" battered them, took their property, and took money from the register. Their testimonies merely show the "commission of the offense or the circumstances thereof," but not that Marks committed the offense because none of them identified him as one of the assailants. 5 AA 33, 35, 59, 86, 103; *see also* NRS 175.291(1) ("the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof"). The surveillance video is the same. While it shows the commission and circumstances of the offense (*e.g.*, two masked assailants committing a robbery), it does not identify Marks as an assailant. *Ibid*. Thus, it too is not corroborating evidence. *Ibid*. (defining corroborating evidence as "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") (emphasis added). The panel misapprehended these materials facts in the record and

misapplied NRS 175.291(1).

The panel also overlooks or misapprehends material facts in the record to conclude that the cell phone records show Marks and Johnson communicated routinely in the month before the robbery, including minutes before the crime, and that such alleged communication constitutes corroborating evidence.

First, the cell phone records do not show that Marks and Johnson communicated routinely in the month before the robbery, including minutes before the crime. To be sure, the cell phone records show that the "subscriber" for the number (323) 427-3092 was an individual with the last name Marks. 7 AA 65-68. But that does mean it was Marks who used that phone number. On the contrary, the State introduced evidence through its own witnesses, like Detective Miller, that "it's not uncommon at all" to have the subscriber be different from the individual who actually uses the cell phone. *See* 7 AA 105-106. In fact, Johnson was not the subscriber for the phone number he used (424) 375-1085. *See* 7 AA 106. The subscriber for that phone number was Keyontrey S. McBride. *See* 7 AA 105-106. Moreover, the Nevada Supreme Court, like other courts in the country, acknowledges that "a person cannot be identified as the author of a text message based solely on evidence that the message was sent from a cellular phone bearing the telephone number assigned to that person because 'cellular telephones are not

always exclusively used by the person to whom the phone number is assigned.' " *Rodriguez v. State*, 128 Nev. 155, 161, 273 P.3d 845, 849 (2012) (citation omitted). The panel overlooked these material facts in the record, and failed to consider the *Rodriguez* decision.

Second, the cell phone records do not show who actually sent or received the text messages, and the content of those messages. 7 AA 21-22, 50-51, 78, 83-84. Without such information, it is impossible to say the cell phone records themselves, *without the aid of Johnson's testimony*, connect Marks with the commission of a robbery. *See* NRS 175.291(1) (corroborating evidence is "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").

Lastly, while not specifically mentioned by the panel as corroborating Johnson's testimony, the cell tower records also do not corroborate Johnson's testimony. The cell tower records, themselves, without the aid of Johnson's testimony, do not connect Marks with the commission of a robbery. *Ibid*. Detective Basilotta testified the cell tower records show "it's possible" the phone associated with number (323) 427-3092 was in the area of the bar, but not certain, because cell towers service areas of up to four miles in distance. 8 AA 64, 69. Furthermore, Marks lived within that vicinity; so, if he was using that phone

number and it was pinging off those towers, that wouldn't be surprising. It certainly isn't proof of wrong doing. *See e.g.*, *Heglemeier v. State*, 111 Nev. 1244, 1250-51, 903 P.2d 799, 803-04 (evidence that simply proves suspicion, or is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant is not sufficient to corroborate an accomplice's testimony).

As shown above, the panel overlooked and misapprehended material facts in the record, and misapplied or failed to consider a controlling statute and decisions on this issue to conclude there was corroborating evidence of Johnson's testimony. Rehearing is warranted. NRCP 40(c)(2).

II. The panel's decision overlooks and misapprehends material facts in the record to find that evidence of Marks' 2011 robbery conviction was admissible at trial to prove his "identity" as one of the robbers in this case.

The panel determined evidence of Marks' 2011 robbery conviction was admissible to prove his "identity" in this case because the two robberies share significant similarities. Ex. 1 at 4-5 (citations omitted). These similarities, according to the panel, are: (1) both robberies involved multiple assailants robbing bars that they had cased for days before each robbery; (2) both robberies were conducted when there were very few people in the bar; and (3) during each robbery an assailant jumped over the bar and also robbed the patrons. *Ibid*. In

reaching this determination, however, the panel overlooks and misapprehends material facts in the record.

A. *In the 2011 robbery, the bar was not "cased for days" like the bar in this case*.

The record clearly shows that the bar in the 2011 robbery was not cased for days. 6 AA 56-57. Marks walked into that bar, looked around, and *immediately* walked out. *Ibid*. One witness testified Marks was in the bar for "maybe a minute" before he walked out and the bar was robbed.[1] 1 AA 189. Another said it was less than five minutes. 6 AA 57. The panel clearly overlooked or misapprehended this material fact in the record.

B. *There were no patrons robbed in the 2011 case*.

The panel incorrectly states that in both robberies the patrons were robbed. Ex. 1 at 4-5. There is no evidence in the record that in 2011 patrons were robbed. Rather, the *employees*' cell phones were taken, presumably so they wouldn't call the police. 6 AA 60. The robbers did not take the employees' wallets. They did not pistol whip them. And none of the employees were hurt.

The robbers in this case, on the other hand, robbed the patrons, not the

[1] Marks admitted he was the person who walked into the bar and looked around before the other guys ran in to rob it. 6 AA 80. He pled guilty to the crime and served his time. 1 AA 105-32.

employees. They took their wallets, not their cell phones. 5 AA 63, 89-90. They pistol whipped them, and hurt them. 5 AA 62-63, 89-90. None of that happened in 2011.

These are material facts that are in the record — showing the two robberies are significantly different (not significantly similar) — that the panel overlooked or misapprehended.

C. *There are other significant differences between the two robberies that the panel overlooked or misapprehended.*

There also are other significant, material differences between the two robberies that the panel overlooked or misapprehended.

- The district court erroneously concluded both robberies were committed by three people. 1 AA 226. The record clearly shows, however, that the 2011 robbery was committed by four or five people. 6 AA 57.

- In the 2011 case, Marks was the individual who walked into the bar, looked around, and then immediately walked out. 6 AA 80. He was not one of the individuals who actually robbed the bar. In this case, Johnson cased the bar for days, and he claimed Marks was one of the actual robbers.

- In this case, the robbers were wearing masks. 5 AA 33, 35, 59, 86, 103. In the 2011 case, the robbers were not wearing masks. 6 AA 59.

- In this case, Johnson posed as a customer (or regular) for weeks at the bar. *See* 5 AA 182, 184, 186. He waited for hours on the day of the robbery, texting (he says with his coconspirators) to let them know the situation inside. *See* 5 AA 189-190-93. He then let the robbers in

> through a side door, and pretended to be one of the victims. 5 AA 150, 160, 187, 193-194. None of that happened in the 2011 robbery. It was totally different!

These overlooked and misapprehended material facts in the record show that the 2011 robbery and the robbery in this case are significantly different. They are much more different than they are similar. What little similarities they share certainly do not "establish[ ] *a signature crime so clear* as to establish the identity of the person on trial."[2] *Rosky v. State*, 121 Nev. 184, 197, 111 P.3d 690, 698 (2005). Rehearing is warranted.

D. *The panel also misapplied Nevada Supreme Court decisions directly controlling on this issue.*

In fact, the only similarities left are: (1) that both robberies were conducted when there were few people in the bar, and (2) an assailant jumped over the bar to access the register. *See* Ex. 1 at 4-5. But, as noted by the panel, these similarities are not unique. They are "common" in other bar robberies.

Nevertheless, for some reason, the panel concluded:

> But when considered cumulatively, these factors are sufficient to support the district court's conclusions that the robberies were *similar enough* to be probative of appellant's identity.

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[2] *Cf. Canada v. State*, 104 Nev. 288, 293, 756 P.2d 552, 554-55 (1988) (both robberies occurred in deserted bars, late at night, after one perpetrator purchased a beer, and in both there were two robbers, armed with shotguns, at least one masked, and the victims were violently battered).

Ibid. (emphasis added) (citing *Mayes v. State*, 95 Nev. 140, 142, 591 P.2d 250, 251-52 (1979)). To arrive at this conclusion, however, the panel overlooks or misapplies Nevada Supreme Court decisions controlling on this issue.

Such evidence is not admissible simply because the prior crime and the charged offense share similarities. *Mayes*, 95 Nev. at 142, 591 P.2d at 251 ("It is apparent that the indicated inference [of identity] does not arise * * * from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant."). Lots of crimes, including bar robberies, share many similarities as the panel notes. Ex. 1 at 5 (noting that casing locations, conducting the robbery when there are few witnesses, and an assailant jumping over the bar to access the register are common factors in bar robberies) (citations omitted).

Thus, to be admissible (i.e., probative of identity), the similarities between the prior crime and the charged offense must combine in such a way that they establish "a signature crime so clear" — i.e., a calling card,[3] if you will — that

[3] "a sign or evidence that someone or something is or has been present *broadly*: an identifying mark." https://www.merriam-webster.com/dictionary/calling%20card (last visited April

they "logically operate to set [the prior crime and the charged offense] apart from other crimes of the same general variety and, in so doing," establishes the identity of the person on trial. *Mayes*, 95 Nev. at 142, 591 P.2d at 252; *Rosky*, 121 Nev. at 196-197, 111 P.3d at 698.

The panel overlooked or misapplied this controlling legal principle from prior Nevada Supreme Court decisions. The panel fails to explain how the few similarities it listed — admittedly common in other bar robberies — nevertheless "establish[ ] *a signature crime so clear* as to establish" Marks' identity as a robber in this case, when considered cumulatively. *Rosky*, 121 Nev. at 196-197, 111 P.3d at 698 (emphasis added).

1. The panel also overlooked or misapplied controlling case law on why the 2011 robbery conviction evidence was unfairly prejudicial.

Evidence of Marks' prior 2011 robbery conviction was unfairly prejudicial. Marks pled guilty to his involvement in the unrelated 2011 robbery, and served his sentence for that offense. 1 AA 105-132. The State's witnesses and evidence about that crime "provided powerful details about the nature of an unrelated [robbery] for which [Marks] was convicted" some seven years earlier. *See e.g.*, *Hubbard v. State*, 134 Nev. 450, 460, 422 P.3d 1260, 1268 (2018).

20, 2022).

The panel ignores, as the Nevada Supreme Court noted in *Hubbard*, that "the introduction of evidence concerning the nature of a *prior conviction* similar to the substantive charges in the pending case *carries a singular risk of substantial unfair prejudice* that can jeopardize the defendant's right to a fair trial." *Ibid*. (emphasis added) (citing *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997) (explaining that such propensity evidence "generally carries a risk of unfair prejudice to the defendant" in that it may "lure a juror into a sequence of bad character reasoning" including that the prior act "rais[ed] the odds that he did the later bad act now charged")).

The Court in *Hubbard* added:

> As recognized in *Old Chief*, " '[a]lthough "propensity evidence" is relevant, the risk that a jury will convict for crimes other than those charged — or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment — *creates a prejudicial effect that outweighs ordinary relevance*.' "

Hubbard, 134 Nev. at 460, 422 P.3d at 1268 (emphasis added) (citing *Old Chief*, 519 U.S. at 181) (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)).

The panel overlooked, misapplied or failed to consider this controlling case law. Instead, it concluded that Marks was not unfairly prejudiced because: "The prior robbery was not substantially violent or offensive as to 'rouse the jury to

overmasting hostility.'" Ex. 1 at 5-6 (citations omitted). Rehearing is warranted.

E. *The error was not harmless*.

The error in allowing this evidence to be introduced at trial was not harmless. *See* Ex. 1 at 6. As noted above, Johnson's uncorroborated testimony is insufficient to convict Marks, and the cell phone tower evidence, at best, merely shows that "it's possible" someone using the phone number (323) 427-3092 was within a four-mile radius of the bar around the time of the robbery. 8 AA 64, 69. Thus, the State had no evidence to convict Marks.

Furthermore, the prior robbery conviction evidence clearly affected Marks' substantial right to a fair trial, and thus cannot be harmless. *See Hubbard*, 134 Nev. at 460, 422 P.3d at 1268; *cf*. NRS 178.598 ("Any error . . . which does not affect substantial rights shall be disregarded.").

III. <u>The panel overlooked or misapprehended material facts in the record to determine that Marks is liable for battery with use of a deadly weapon under a conspiracy theory.</u>

According to the panel, "[w]hile it is unclear whether appellant personally battered and robbed two patrons, he is nonetheless liable for those offenses as they were a 'reasonably foreseeable consequence of the object of the conspiracy.'" Ex. 1 at 2 (citations omitted). The panel, however, overlooked or misapprehended a material fact that belies this conclusion.

Johnson, the State's key witness and accomplice in this case, testified that it was never part of the "plan" (i.e., conspiracy) to hurt anybody. 6 AA 48. On the contrary, the plan was just to get the money "and *not hurt anybody*." *Ibid*. (emphasis added). Since the affirmative plan, according to the State's evidence, was "not [to] hurt anybody" and it was never part of the plan to hurt somebody, how can battery with use of a deadly weapon be a "reasonably foreseeable consequence of the *object of the conspiracy*"? Ex. 1 at 2 (emphasis added) (citations omitted). This is a material fact that was overlooked or misapprehended by the panel. Rehearing is warranted.

Conclusion

For these reasons, the panel should grant rehearing of Marks' appeal.

DATED: April 21, 2022.

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Certificate of Compliance Pursuant to Rules 40 and 40A

1. I hereby certify that this petition for rehearing 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:

X It has been prepared in a proportionally spaced typeface using WordPerfect X9 in 14 point font, Times Roman style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is:

X Proportionately spaced, has a typeface of 14 points or more, and contains 3,094 words.

DATED: April 21, 2022.

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Certificate of Service

I hereby certify and affirm that a true and correct copy of the foregoing **Petition for Rehearing** was filed electronically with the Nevada Supreme Court on April 21, 2022. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

TALEEN PANDUKHT
Chief Deputy District Attorney

/s/ Mario D. Valencia
MARIO D. VALENCIA

EXHIBIT 1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVOHN MARKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80469

FILED

MAR 17 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict of conspiracy to commit burglary; conspiracy to commit robbery; burglary while in possession of a deadly weapon; robbery with the use of a deadly weapon, victim 60 years of age or older; two counts of robbery with the use of a deadly weapon; battery with the use of a deadly weapon, victim 60 years of age or older; and battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Eric Johnson, Judge. Appellant raises four contentions on appeal.[1]

First, appellant argues that insufficient evidence supports the jury's verdict. When reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571,

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This court will not disturb a verdict supported by substantial evidence. *Id.* A conviction may not rest solely on the testimony of an alleged accomplice unless that testimony "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." NRS 175.291(1)

We conclude that sufficient evidence supports the convictions. An accomplice, Antwaine Johnson, testified that appellant helped plan the crime, communicated with Johnson in the time leading up to the robbery, and was one of the armed and masked assailants that committed the burglary and robberies. The victims, one of whom was 69 years old, testified that the two masked assailants battered them, took their property, and took money from the register. Surveillance video and cell phone records were consistent with the accounts of the robbery and Johnson's testimony. The cell phone records showed that appellant and Johnson communicated routinely in the month before the robbery, including minutes before the crime. While it is unclear whether appellant personally battered and robbed two patrons, he is nonetheless liable for those offenses as they were a "reasonably foreseeable consequence of the object of the conspiracy." *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005) (internal quotation marks omitted), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). In addition, appellant and several others participated in an armed robbery of a bar seven years earlier. Based on this evidence, we reject appellant's assertion that Johnson's testimony was not sufficiently corroborated, *see Heglemeier v. State*, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995) (providing that

corroborating evidence is that which "independently connect[s] the defendant with the offense," and may be direct or circumstantial), and conclude that the State put forth sufficient evidence for a rational juror to find beyond a reasonable doubt that appellant committed the charged offenses, *see* NRS 193.165 (providing additional penalty for crimes committed with the use of a deadly weapon); NRS 193.167 (providing additional penalty for batteries and robberies committed against persons 60 years of age or older); NRS 200.380(1) (defining robbery); NRS 200.400(1)(a) (defining battery); NRS 205.060(1) (defining burglary).

Second, appellant argues that the district court abused its discretion in admitting evidence of his participation in a burglary and robbery of another bar seven years before the instant crime. *See Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005) (reviewing the decision to admit evidence of prior bad acts for abuse of discretion). Evidence of other bad acts is inadmissible to prove the defendant acted in conformity therewith. NRS 48.045(2). However, it may be admissible to prove identity, *id.*, when additional evidence is necessary to establish the identity of the perpetrator, *Reed v. State*, 95 Nev. 190, 193, 591 P.2d 274, 276 (1979).

While Johnson identified appellant at trial, he was an admitted coconspirator and therefore his testimony alone, including his identification, was not sufficient to identify appellant. NRS 175.291(1). Accordingly, prior bad act evidence establishing the identity of the perpetrator became more probative. *See Reed*, 95 Nev. at 193, 591 P.2d at 276. "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). The less similar the charged conduct is with the proffered uncharged conduct, the less probative it is to establishing identity. *Cf. id.* As "similarities can be shown between many acts," *Meek v. State*, 112 Nev. 1288, 1294, 930 P.2d 1104, 1108 (1996), admissible prior uncharged offenses must have "unique features common to the charged and uncharged offenses," or a combination of common factors that appear distinct when considered cumulatively, *Mayes*, 95 Nev. at 142, 591 P.2d 251-52 (quoting *People v. Halston*, 444 P.2d 91, 99-100 (Cal. 1968)). "The question is whether significant similarities remain after the acts are considered in some detail." *Meek*, 112 Nev. at 1294, 930 P.2d at 1108. For example, in *Canada v. State*, two bar robberies were considered sufficiently similar because both robberies occurred in deserted bars late at night after one of the perpetrators purchased a beer to case the location, and the bars were subsequently robbed by two perpetrators armed with shotguns, at least one of whom was masked, who violently battered the victims. 104 Nev. 288, 293, 756 P.2d 552, 554-55 (1988).

Here, the 2011 robbery was probative as to the identity of the perpetrator of the charged offenses. Both robberies involved multiple assailants robbing bars that they had cased for days before each robbery, both robberies were conducted when there were very few people in the bars, and during each robbery an assailant jumped over the bar and also robbed

the patrons.[2] The factors upon which the district court relied to conclude that the robberies were sufficiently similar, though not, in and of themselves, rare. Bar robberies commonly involve casing locations, *see, e.g.*, *Johnson v. People*, 384 P.2d 454, 458 (Colo. 1963); *People v. Flint*, 490 N.E.2d 1025, 1026-27 (Ill. Ct. App. 1986); conducting the robbery when there are few witnesses, *see, e.g.*, *Johnson*, 384 P.2d at 458; *Flint*, 490 N.E.2d at 1026-27; *Randolph v. State*, 117 Nev. 970, 974-75, 36 P.3d 424, 427-28 (2001); and an assailant jumping over the bar to access the register, *see, e.g.*, *People v. Cato*, 56 P.2d 1245, 1246 (Cal. Dist. Ct. App. 1936); *State v. Sam*, 761 So. 2d 72, 75 (La. Ct. App. 2000); *Randolph*, 117 Nev. at 974-75, 36 P.3d at 427-28; *State v. Jenkins*, 969 P.2d 1048, 1049 (Or. Ct. App. 1998). But when considered cumulatively, these factors are sufficient to support the district court's conclusion that the robberies were similar enough to be probative of appellant's identity. *See Mayes*, 95 Nev. at 142, 591 P.2d 251-52. The witness testimony, police reports, and judgment of conviction proved the prior bad act by clear and convincing evidence. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See* NRS 48.035(1). As discussed, there was overwhelming evidence linking appellant with the prior similar robbery. Although the offenses were committed seven years apart, the instant offense was committed only seven months after appellant was released from custody. The prior robbery was not substantially violent or offensive as to

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[2]As it was not included in the appendices filed on appeal, we presume that the surveillance video of the Torrey Pines robbery supports the district court's conclusions. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

"rouse the jury to overmasting hostility." *Randolph v. State*, 136 Nev. 659, 665, 477 P.3d 342, 349 (2020) (quoting *State v. Castro*, 756 P.2d 1033, 1041 (Haw. 1988)); *see also Old Chief v. United States*, 519 U.S. 172, 180 (1997) ("'[U]nfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). Accordingly, the district court did not abuse its discretion in admitting the evidence of the prior robbery.[3] Additionally, considering Johnson's testimony and the cell phone tower evidence any error in admitting the prior bad act evidence was harmless. *See* NRS 178.598.

Third, appellant argues that the district court abused its discretion in denying his motion for new counsel. *See Anderson v. State*, 135 Nev. 417, 424, 453 P.3d 380, 386 (2019) (reviewing denial of motion for substitute counsel for abuse of discretion). Appellant did not demonstrate that the disagreement between counsel and appellant over the decision to litigate pretrial motions rose to the level of a "complete collapse of the attorney-client relationship." *Young v. State*, 120 Nev. 963, 969, 102 P.3d 572, 576 (2004); *see also Gallego v. State*, 117 Nev. 348, 363, 23 P.3d 227, 238 (2001) (recognizing that a dispute over trial strategy alone does not amount to a conflict of interest), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). The district court's inquiry was sufficient to address the concerns raised by appellant and counsel. The

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[3]To the extent appellant argues that the district court failed to provide a limiting instruction before admitting evidence of the prior robbery, he did not object below and has not shown plain error affecting his substantial rights. *Tavares v. State*, 117 Nev. 725, 729, 30 P.3d 1128, 1130-31 (2001).

court addressed appellant's concerns over several hearings while providing counsel and appellant repeated opportunities to discuss appellant's concerns and trial strategy. Therefore, we conclude that the district court adequately inquired into the grounds for the motion to withdraw, appellant's reason for seeking withdrawal lacked merit, and the conflict did not prevent counsel from presenting an adequate defense or result in an unjust verdict. *See Young*, 120 Nev. at 968, 102 P.3d at 576 (noting that this court considers "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion" when reviewing a district court decision (quoting *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998))).

Fourth, appellant argues that the district court should have instructed the jury that accomplice testimony must be corroborated. We discern no plain error. *See Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) ("Failure to object or to request an instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect a defendant's right to a fair trial."). The given instruction, which exhaustively defined corroborating evidence, contained language that implicitly required that the testimony be corroborated. Thus, appellant did not demonstrate that the failure to include this language in the instruction was patently prejudicial. *See Gerbert v. State*, 85 Nev. 331, 333-34, 454 P.2d 897, 898-99 (1969) (recognizing that instruction that accomplice testimony must be corroborated was not so necessary that the failure to give it is patently prejudicial). Further, as discussed above, there was sufficient evidence introduced at trial to corroborate Johnson's testimony.

Having considered appellant's contentions and concluding that they lack merit, we

ORDER the judgment of conviction AFFIRMED.[4]

_____, C.J.
Parraguirre

_____, J.
Stiglich

_____, Sr.J.
Gibbons

cc: Hon. Eric Johnson, District Judge
Mario D. Valencia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.