IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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May 16 2022 03:14 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 80469

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy District Attorney, TALEEN R. PANDUKHT, and files this Answer to Petition for Rehearing and this Court's Order Directing Answer to Petition for Review, filed on May 4, 2022.

This Answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 16th day of May, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar # 001565

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
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MEMORANDUM
POINTS AND AUTHORITIES

ARGUMENT

I. APPELLANT FAILS TO MEET THE BURDEN FOR REHEARING UNDER NRAP 40

NRAP 40(c)(2) sets forth two (2) circumstances in which the Supreme Court considers rehearings:

> (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.

Appellant bears the burden of stating "briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended." NRAP 40(a)(2). A review of the Instant Petition reveals that Appellant has failed to meet his burden. Instead, the factors listed for rehearing demonstrates that this Court should decline to exercise its discretion to rehear the appeal. The three-Justice panel properly considered the record and the applicable laws and rules in issuing its Order of Affirmance.

A. This Court Considered All Material Facts and Controlling Law When Holding that Antwaine Johnson's Testimony Was Corroborated

Appellant argues that this Court overlooked material facts and controlling law when it concluded there was sufficient evidence to corroborate Antwaine Johnson's

(hereinafter "Johnson") testimony. Petition for Rehearing, at 2-6. 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)).

This Court relied on numerous corroborating facts:

> 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 . . . . 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.

Order of Affirmance, at 2. Appellant unpersuasively attempts to compartmentalize each corroborating circumstance. However, several combined circumstances showing Appellant's connection satisfies the requirement for corroboration. LaPena, 91 Nev. at 694–95, 541 P.2d at 909. As such, this Court did not misapprehend material facts by doing just that.

Appellant mainly focuses on whether the cell phone records tend to connect him to the crime. Appellant's cell phone records alone corroborate Johnson's testimony. 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, Ana 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.

Ultimately, Appellant's contention that there was insufficient evidence to identify him as the user of the phone is meritless. Appellant's phone number contacted Johnson thousands of times before the robbery, including one minute immediately preceding the robbery. Furthermore, the call detail records establish that, around the time of the robbery, the phone registered to Appellant was around the apartment complex he lived at and the Torrey Pines Pub. 8AA031, 057, 060–-70. Johnson testified as to the frequency and length of texts and calls between him and Appellant, and the phone records corroborate his testimony. 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. As such, this Court did not overlook any material facts or misapply any statutes or decisions. Accordingly, this Court should deny Appellant's Petition for Rehearing.

B. This Court Considered All Material Facts and Controlling Law When Holding that Appellant's Prior Robbery Conviction was Admissible

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).

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.

1. Appellant Fails to Establish this Court Overlooked Material Facts

Appellant first argues this Court overlooked a material fact by stating that Appellant's 2011 robbery involved the defendants casing the bar for days. Petition for Rehearing, at 7. In its initial motion, the State provided the district court with a police report that supported this contention. 1AA100. The police report stated that a detective spoke with a manager regarding the defendants casing the bar:

> Det. Stout then spoke with the Manager of Fred's Tavern. The Manager believes that the subjects that robbed the bar have been casing the bar over the past few days. He pulled up video from a day prior showing the same suspects in

> the bar. The suspects did not buy anything and just walked around.

1AA100. In its findings, the district court explained the similarities between the robberies:

> [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.

RA015. Accordingly, this Court did not overlook any material fact as it was present in the police report and recognized by the district court.

Even if the casing of the 2011 robbery did not occur for days, Appellant fails to explain how it is material. This Court explained the key considerations in its decision:

> Bar robberies commonly involve casing locations; conducting the robbery when there are few witnesses; and an assailant jumping over the bar to access the register. 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.

Order of Affirmance, at 5 (citations omitted). The important similarity is that both robberies involved a coconspirator entering and casing the location. Whether the

casing occurred for days is immaterial to the Court's decision. Accordingly, Appellant fails to establish that this Court overlooked any material facts.

Appellant then argues that this Court misapprehended details regarding the employment status of the victims. Appellant is correct that during the 2011 robbery only employees were present.[1] However, by focusing on whether during the 2011 robbery, the victims were employees instead of patrons, or that cell phones were taken instead of wallets, Appellant misunderstands the significance of the comparison. The importance is that as part of the robberies, Appellant and his coconspirators took personal property from the individuals within the bar. It makes no difference whether the individuals were employees or patrons. As such, Appellant fails to demonstrate that this Court misapprehended a *material* fact.

Finally, Appellant raises multiple differences between the two robberies. A comparison between any two events will always contain factually different circumstances. For example, Appellant did not rob the same bar and the individuals in the bars were not the same people. The important consideration is not whether differences exist, but rather whether 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, 95 Nev. at 142, 591 P.2d at 251.

[1] 6AA075-76

Numerous similarities existed between the robberies: (1) both robberies involved Appellant and multiple co-conspirators; 1AA186–87; 5AA179–80; RA015; (2) both robberies involved Appellant and his co-conspirators robbing bars as opposed to homes or victims on the street; 1AA186; 5AA178–81; (3) both robberies involved Appellant and his co-conspirators casing the bar for information, and then conveying the information to people waiting outside; 1AA101, 196; 5AA178–81, 187–94; RA015; (4) during both robberies, they waited until an opportune time and then robbed the victims inside the bar; 1AA100-01, 196; 5AA193–94; RA015; (5) both robberies involved one of the robbers jumping over the counter and stealing money from the bar itself; 1AA187; 5AA33; RA015; and (6) both robberies involved taking the personal property of the people inside the bar; 1AA187; 5AA63, 89–90; RA015. While Appellant attempts to point out minor differences, the similarities between these offenses were significant and highly probative to show the identity of Appellant as one of the masked and gloved robbers. As such, Appellant fails to establish this Court overlooked any material facts. Accordingly, this Court should deny Appellant's Petition for Rehearing.

2. Appellant Fails to Establish this Court Misapplied Nevada Supreme Court decisions

Appellant first argues that this Court misapplied prior decisions. Petition for Rehearing, at 9. Appellant states that "evidence is not admissible simply because the

prior crime and the charged offense share similarities." Petition for Rehearing, at 10. This Court did not conduct its analysis looking at only whether there were similarities. Instead, the Court analyzed whether the similarities were "sufficient evidence of similar characteristics of conduct." Order of Affirmance, at 3.

As discussed above, there were numerous similarities between the two robberies. Appellant is merely unsatisfied that this Court recognized those similarities as sufficient. This recognition does not constitute the misapplication of legal precedent. As such, Appellant fails to establish this Court misapplied prior law.

Appellant then argues that this Court ignored Hubbard v. State, 134 Nev. 450, 422 P.3d 1260 (2018), in its Order. Petition for Rehearing, at 11-13. For evidence to be admitted under NRS 48.045(2), the evidence must be more probative than prejudicial. Cipriano 111 Nev. at 541, 894 P.2d at 352 (1995). This Court analyzed whether the district court abused its discretion in finding that the evidence was more probative than prejudicial:

> The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. 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 'rouse the jury to overmasting hostility."

Order of Affirmance, at 5-6 (citations omitted).

A review of Old Chief v. U.S., 519 U.S. 172, 117 S. Ct 644 (1997) illustrates why it is inapplicable to this case. In Old Chief, the defendant wanted to stipulate to the underlying felony for his felon in possession of a firearm charge. 519 U.S. at 174-75, 117 S. Ct at 647-48. The Assistant United States Attorney refused to stipulate to that fact and introduced the prior conviction at trial. Id. at 177, 117 S. Ct at 648. The Supreme Court of the United States held that "although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission." Id. at 186, 117 S. Ct 653. Here, Appellant did not stipulate to his identity. As such, the evidence of his prior robbery was incredibly probative to the current case

Appellant's reliance on Hubbard is also misplaced. In Hubbard, this Court concluded that the district court's admission of prior bad acts evidence was an abuse of discretion. 134 Nev. at 458, 422 P.3d at 1267. This Court then analyzed whether this constituted harmless error. Id. at 459, 422 P.3d at 1267. This Court reasoned that testimony regarding an unrelated offense "created a prejudicial effect that outweighs ordinary relevance." Id. at 460, 422 P.3d at 1268. However, the Court's discussion here was only relevant to its harmless error analysis. This analysis occurs only after this Court concluded that the evidence should not have been admitted. Appellant

attempts to use the Court's reasoning in the analysis of whether the prior bad act should have been admitted.

Appellant's reasoning that the admission of evidence "similar to the substantive charges in the pending case carries a singular risk of substantial unfair prejudice" is inconsistent with the existence of admitting evidence of prior bad acts to establish identity. As discussed above, for evidence to be admitted the State must present "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, 95 Nev. at 142, 591 P.2d at 251. The State cannot simultaneously provide evidence that two offenses are sufficiently similar and fail to demonstrate that the evidence is similar to the present case. As such, Appellant fails to establish this Court misapplied prior law. Accordingly, this Court should deny Appellant's Petition for Rehearing.

3. Appellant Fails to Establish that this Court Overlooked Material Facts Regarding its Harmless Error Analysis

Appellant argues that this Court failed to consider material facts during its harmless error analysis. Petition for Rehearing, at 13. 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). As discussed above, this correctly concluded that Johnson's testimony was corroborated.

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, this Court correctly decided that any error was harmless. Accordingly, this Court should deny Appellant's Petition for Rehearing.

C. This Court Considered All Material Facts When Holding that Appellant is Liable for Battery with Use of a Deadly Weapon

Appellant argues this Court overlooked Johnson's testimony that it was never part of the plan to hurt anybody. Petition for Rehearing, at 14. A coconspirator is liable for general intent crimes when the crime is a "reasonably foreseeable consequence' of the object of the conspiracy." Bolden v. State, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005), receded from on other grounds by Cortinas v. State, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). Battery with use of a deadly weapon is a general intent crime. See Byars v. State, 130 Nev. 848, 864, 336 P.3d 939, 949 (2014). "[E]ach predicate crime specifically enumerated in Nevada's felony-murder statute . . . is inherently dangerous to human life. State v. Contreras, 118 Nev. 332, 338, 46 P.3d 661, 664 (2002) (Maupin, J., concurring). Here, Appellant and Johnson conspired to commit robbery and burglary. Both offenses are inherently dangerous to human life. As inherently dangerous crimes, it makes no difference that did not plan to hurt anyone. The willful and unlawful use of force is always a reasonably foreseeable consequence of a robbery or burglary. As such, this Court considered all material facts in its decision. Accordingly, this Court should deny Appellant's Petition for Rehearing.

CONCLUSION

Appellant fails to meet his burden to demonstrate that this Court should exercise its discretion to rehear his appeal. For the foregoing reasons, the State respectfully requests that Appellant's Petition for Rehearing be denied.

Dated this 16th day of May, 2022.

Respectfully submitted,

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BY */s/ Taleen Pandukht*

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CERTIFICATE OF COMPLIANCE

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 it 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 petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more and contains 4,103 words and 375 lines of text.

Dated this 16th day of May, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 16, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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