IN THE SUPREME COURT OF THE STATE OF NEVADA

RAEKWON ROBERTSON,

Appellant,

v.

STATE OF NEVADA,

Respondent.

CASE NO: 85932

APPELLANT'S REPLY BRIEF

Appeal From Denial of Post-Conviction Habeas Petition

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Raekwon Robertson is represented by Steven S. Owens, Esq, of Steven S. Owens, LLC, who is a sole practitioner and there are no parent corporations for which disclosure is required pursuant to this rule.

DATED this 14th day of April, 2023.

/s/ Steven S. Owens

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ARGUMENT

The only citations to the record that appear in the State's Answering Brief are references to the district court's Findings of Fact, Conclusions of Law and Order which is found at 8 AA 1769-1790. In turn, the district court's Findings of Fact, which were prepared by the State, are a verbatim regurgitation of the facts and argument from the State's Response to the Supplemental Habeas Petition. 8 AA 1741-1762. Nowhere does the State cite to the actual trial transcripts in support of any of the facts it alleges. This fails to comply with the citation rules of NRAP 28(e). See also, *Evans v. State*, 117 Nev. 609, 28 P.3d 498, 522 (2001). This deficiency and error is repeated throughout the Answering Brief such that this Court cannot rely upon any of the facts alleged by the State.

I. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO OTHER BAD ACT EVIDENCE OF TEXT MESSAGE ABOUT "HITTING A HOUSE"

The State simply and inaccurately reduces the challenged text message down to, "Sace is in." Answering Brief, p. 14. [1] The text message itself was sent by Appellant and queried of DeShawn Robinson whether he and his brother "DJ" or Demario Lofton-Robinson wanted to "hit a house tonight" with Appellant and co-defendant Wheeler. 3 AA 596-605. The State does not dispute that no house was

[1] "Sace" is actually the nickname for co-defendant Davontae Wheeler, whereas Appellant was known by the name of "Ray Logan." 5 AA 1023-1024.

hit that night. The State's reliance *upon res gestae* is misplaced because the "complete story of the crime" doctrine must be ***construed narrowly*** and only applies where another uncharged act or crime is so closely related to the act in controversy ***that the witness cannot describe the act without referring to the other uncharged act or crime***. *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) [emphasis added]. No such analysis took place in the present case either at trial, or in the district court's habeas findings. 3 AA 596-605; 8 AA 1781-1782. Appellant's assertion that the encounter, robbery, and murder of the victim in the case could all have been described to the jury without specifically referring to the defendants' intention of getting together that night in order to "hit a house," remains unrebutted.

Alternatively, the State argues the text message would have been admissible as a prior bad act to show intent. However, the State's own theory of relevance belies an improper propensity purpose:

> The message constitutes evidence of the parties' shared intent to seek pecuniary gain through criminal means, namely burglary. The existence of this intent ***makes it more probable*** that Appellant and his accomplices would subsequently establish a shared intent to seek pecuniary gain by perpetrating robbery.

Answering Brief, p. 16 [emphasis added]. The claim of a probable "shared intent" is nothing more than a bald argument to admit criminal character and disposition to show propensity. Furthermore, "[A] presumption of inadmissibility attaches to all prior bad act evidence." *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697

(2005). "[T]he use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001). If counsel had raised this issue and a proper legal analysis been done, the evidence would not have been admitted. Because the prejudicial effect of a planned home invasion far exceeds that of the crime of opportunity that was actually committed, the outcome of the trial would have been different.

II. COUNSEL FAILED TO SEEK SEVERANCE OF TRIAL FROM CO-DEFENDANT WHEELER

In response to the severance issue, the State maintains that the defenses were not mutually exclusive and that Appellant suffered no prejudice attributable to the joint trial. Answering Brief, pp. 16-18. In its analysis and conclusion regarding prejudice, the State and the district court below utterly failed to consider or address Appellant's arguments as to judicial economy:

> Nevertheless, prejudice to the defendant is not the only relevant factor: a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials. Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial.

Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002). Under the unique facts of this case, although four defendants were indicted together, only two proceeded to a joint

trial. There was a de facto severance of two of the defendants because one was unavailable at Lake's Crossing and the other became a cooperating witness for the State. Appellant alleged below that he would have accepted the plea offer but it was contingent on Wheeler also accepting because of the joint trial. 1 AA 100-108, 120-4. So, had the district court granted a severance, there would have been virtually no impact on the efficient administration of justice and no prejudice to the State as Appellant would have pleaded guilty. When weighed against the prejudice to Appellant of being tried jointly with Wheeler, there is a reasonable probability a severance motion would have been granted. Counsel was ineffective in failing to seek severance from co-defendant Wheeler in the trial of this case and the district court erred in finding otherwise.

III. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT TRIAL AS DISPROVING SPECIFIC INTENT

The State seeks to summarily dismiss this argument as raising only bare and naked assertions and because the investigation and calling of witnesses is a virtually unchallengeable strategic decision of counsel. While deference must be given to counsel's strategic choices, the State and district court's analysis is far too simplistic and dismissive. Both in his Opening Brief and in his habeas pleadings below, Appellant identified specific witnesses by name and attached statements of what their testimony would have been had they been called at trial. Neither the State nor

the district court even attempt an analysis of how such testimony would have affected the outcome of the trial, particularly as to issues of specific intent. Calling a decision by counsel as "strategic," especially without first conducting an evidentiary hearing, is not some kind of shorthand way of avoiding a proper *Strickland* analysis.

Ordinarily, who should be called as a witness is a tactical decision within the discretion of counsel. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (citing *Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066). However, it constitutes ineffective assistance of counsel when important witnesses are not investigated and presented to the jury when their testimony would have changed the outcome of the case. *Id*. Counsel has a duty to investigate and interview important witnesses. *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993). The district court erred in denying this claim.

IV. COUNSEL FAILED TO INVESTIGATE AND RAISE APPELLANT'S MENTAL HEALTH ISSUES AT SENTENCING IN MITIGATION

The State argues that because Appellant decided not to personally address the court at sentencing, "[c]learly, Appellant and counsel had engaged in a prior discussion during which they jointly made the strategic decision to withhold mitigation evidence or other argument." Answering Brief, p. 22. This reasoning is flawed and highlights the need for, yet absence of, an evidentiary hearing. Appellant

can waive his right to speak at sentencing without waiving his right to have counsel present mitigating evidence and argument.

The State next claims that mitigating evidence would not have made a difference in the sentence due to the strength of the State's case in aggravation. However, at no time does the State nor the district court below consider or weigh in its analysis the considerable mitigating evidence of bipolar disorder, schizophrenia, mild mental retardation, learning disability, paranoia and ADHD, and how this might reduce Appellant's relative culpability. Defendants must "be sentenced individually, taking into account the individual, as well as the charged crime." *Martinez v. State*, 114 Nev. 735, 737, 961 P.2d 143, 145 (1998).

Nor does the State's analysis consider that Appellant received a life sentence plus a maximum sentence for the deadly weapon. To say that Appellant, even with his substantial mental health issues, deserved a maximum sentence the same as the most aggravated of defendants with no diminished mental health or other mitigating circumstances, creates a gross inequity which fails to account for a defendant's unique and personal circumstances. The district court erred in denying this claim.

V. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL

The State does not dispute the lack of communication from counsel on direct appeal, but instead argues there was no prejudice as Appellant had nothing of value to add to the appeal. This overlooks the several pro se habeas petitions filed

personally by Appellant in this case which identified issues which should have been raised by direct appeal counsel. 7 AA 1606-1637. This included the admissibility of the text messages and a fair cross-section violation among other issues. *Id*. If counsel's communication were not deficient, Appellant would have insisted on inclusion of these issues in the direct appeal and the outcome would have been different.

The State claims that appellate counsel, as a matter of professional judgment and discretion, decided not to raise the issues that Appellant now insists should have been raised. However, the State cannot possibly know this. What appellate counsel may or may not have intentionally decided to do is outside the scope of the record as there was no evidentiary hearing. The State cannot say that the omission of certain issues by counsel was the result of considered judgment as opposed to deficient performance and error. Appellate counsel may have a duty to "winnow" out weaker issues, but there is nothing in the record to suggest that appellate counsel even recognized or contemplated these issues, much less intentionally omitted them as weaker claims.

On the merits of the claims, the State only emphasizes a few selectively favorable facts without even addressing contrary facts raised by Appellant which undermine the State's narrative and the sufficiency of the evidence. The State also summarily states that the fair cross-section issue is futile and has no merit without

conducting the proper three-prong legal analysis or distinguishing any of the case law cited by Appellant. Finally, the State's response to the admissibility of the text message simply double-downs on it as *res gestae* as opposed to other bad act evidence. The State's errors are the same as the district court's errors as it entirely adopted the State's argument and reasoning in denying the petition.

CONCLUSION

Wherefore, Robertson respectfully requests this Court reverse the judgment of the district court below and direct that the petition for post-conviction relief be granted.

DATED this 14th day of April, 2023.

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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 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)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 2,234 words and 9 pages.
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 14th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 14, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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ALEXANDER CHEN
Chief Deputy District Attorney

/s/ Steven S. Owens
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