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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DONALD ALVA OLIVER,

Petitioner,

v.

WILLIAM GITTERE,¹ *et al.*,

Respondents.

Case No. 2:17-cv-03008-MMD-DJA

ORDER

I. SUMMARY

Pro se Petitioner Donald Alva Oliver, who is serving an aggregate sentence of 12 to 30 years after being found guilty of various charges stemming from two robberies, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (*See* ECF No. 13-57.) This matter is before the Court for adjudication of the merits of the remaining grounds in Oliver’s petition, which allege that the prosecution failed to turn over exculpatory evidence and the charges should have been severed. (ECF No. 7 (“Petition”).) For the reasons discussed below, the Court denies the Petition and a Certificate of Appealability.

II. BACKGROUND²

On June 27, 2012, around 7:00 p.m., George Williams went to the Village at Karen apartment complex in Las Vegas, Nevada “to meet two girls . . . to drink and smoke weed.” (ECF No. 13-36 at 31, 35-36.) After parking in the complex’s parking lot, Williams spoke

¹The state corrections department’s inmate locator page states that Oliver is currently incarcerated at Ely State Prison. William Gittere is the warden for that facility. At the end of this order, the Clerk of Court is directed to substitute Gittere as a Respondent for the prior Respondent Brian Williams under Rule 25(d) of the Federal Rules of Civil Procedure.

²The Court makes no credibility findings or other factual findings regarding the truth or falsity of this evidence from the state court. The Court’s summary is merely a backdrop to its consideration of issues presented in the case. Any absence of mention of a specific piece of evidence does not signify the Court overlooked it in considering Oliver’s claims.

1 with one of the women through his vehicle's window. (*Id.* at 41.) Following that short
2 conversation, Oliver "approached [the] driver's side . . . with a gun telling [Williams] to get
3 out [of] the car." (*Id.*) Williams complied. (*Id.* at 43.) While Williams was lying on the ground
4 with Oliver pointing a gun at his head, "a white Tahoe [SUV] pulled directly in front of"
5 Williams' vehicle, blocking it in the parking spot, and a man exited the vehicle and started
6 searching William's vehicle. (*Id.* at 45-46.) Oliver then handed the gun to the other man
7 and started searching William's vehicle. (*Id.* at 47.) After taking William's car keys, house
8 key, cell phone, wallet, heirloom ring, and hat, Oliver and the other man entered the SUV
9 and drove away. (*Id.* at 51, 57.)

10 Williams identified Oliver from a photographic lineup but was unable to identify the
11 second robber. (ECF No. 13-39 at 112, 115.) Oliver's right palm print was found at the
12 crime scene. (ECF No. 13-40 at 63.) Oliver pawned William's heirloom ring shortly after
13 the robbery, but it was recovered by the Las Vegas Metropolitan Police Department
14 ("LVMPD") and returned to Williams. (ECF Nos. 13-39 at 116; 13-40 at 29.)

15 Two weeks later, on July 10, 2012, S.S., who was 16 years old, was with Oliver at
16 S.S.'s apartment in Las Vegas, Nevada. (ECF No. 13-40 at 79, 81.) S.S. told Oliver that
17 he was planning to sell Belinda Kappert some prescription painkillers. (*Id.* at 84-85.) Oliver
18 told S.S. that he was going to rob Kappert. (*Id.* at 85.) Oliver later returned with "[m]oney
19 and pills" that Oliver indicated he obtained from Kappert. (*Id.* at 86-87.)

20 Kappert testified that she was in her vehicle in the apartment complex's parking lot
21 waiting to purchase painkillers when Oliver entered her vehicle from the front passenger
22 door and another man entered her backseat and started "grabbing everything that [she]
23 had out." (ECF Nos. 13-40 at 98; 13-41 at 3, 5.) Oliver and Kappert fought over Kappert's
24 purse, but after Kappert was hit in the head, she let her purse go, and Oliver and the other
25 man exited the vehicle and ran away. (ECF No. 13-41 at 3-4.) Kappert picked Oliver from
26 a photographic lineup but testified that she was unable to identify the second robber. (*Id.*
27 at 15-16; ECF No. 13-44 at 43-44.)

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1 The jury found Donald Oliver guilty of two counts of conspiracy to commit robbery,
2 robbery with the use of a deadly weapon, two counts of burglary, robbery, and battery
3 with the intent to commit robbery. (ECF No. 13-57.) Oliver’s challenge to his conviction
4 was denied on direct appeal. (ECF No. 14-5.)

5 **III. LEGAL STANDARD**

6 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in
7 habeas corpus cases under the Antiterrorism and Effective Death Penalty Act (“AEDPA”):

8 An application for a writ of habeas corpus on behalf of a person in custody
9 pursuant to the judgment of a State court shall not be granted with respect
10 to any claim that was adjudicated on the merits in State court proceedings
unless the adjudication of the claim --

11 (1) resulted in a decision that was contrary to, or involved an
12 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in the
15 State court proceeding.

16 A state court decision is contrary to clearly established United States Supreme Court
17 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that
18 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state
19 court confronts a set of facts that are materially indistinguishable from a decision of [the
20 Supreme] Court.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*,
21 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state
22 court decision is an unreasonable application of clearly established Supreme Court
23 precedent within the meaning of 28 U.S.C. § 2254(d) “if the state court identifies the
24 correct governing legal principle from [the Supreme] Court’s decisions but unreasonably
25 applies that principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting *Williams*, 529
26 U.S. at 413). “The ‘unreasonable application’ clause requires the state court decision to
27 be more than incorrect or erroneous. The state court’s application of clearly established

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1 law must be objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal
2 citation omitted).

3 The Supreme Court has instructed that “[a] state court’s determination that a claim
4 lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’
5 on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101
6 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court
7 has stated “that even a strong case for relief does not mean the state court’s contrary
8 conclusion was unreasonable.” *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen*
9 *v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as a “difficult to meet”
10 and “highly deferential standard for evaluating state-court rulings, which demands that
11 state-court decisions be given the benefit of the doubt” (internal quotation marks and
12 citations omitted)).

13 **IV. DISCUSSION**

14 **A. Ground 1—alleged *Brady* violation**

15 In the remaining portion of Ground 1, Oliver alleges that his Fifth and Fourteenth
16 Amendment rights to due process were violated because the State of Nevada failed to
17 disclose S.S.’s law enforcement interview and Kappert’s identification of the second
18 robber.³ (ECF No. 7 at 3.)

19 **1. Background Information**

20 Prior to trial, Oliver moved to compel the disclosure of exculpatory evidence. (ECF
21 No. 13-19.) Oliver specifically requested “[c]olor copies of the photo-lineups” and “any
22 and all statements made by any State witness, or any other person, at any time that [were]
23 in any manner inconsistent with the written and/or recorded statements previously
24 provided to the defense.” (*Id.* at 10.) The State opposed, responding in part, that it would
25 provide copies of the photo-lineups and had provided copies of witness statements and
26 reports. (ECF No. 13-21 at 6-7.) At a calendar call, Oliver’s counsel reported that she had
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28 ³This Court previously found that the portion of Ground 1 alleging judicial partiality
was unexhausted, and Oliver chose to abandon it. (ECF Nos. 21 at 5; 23.)

1 reviewed the discovery and “in talking with [the prosecutor], [she] th[ought] he was able
2 to provide everything that [she had] requested.” (ECF No. 13-26 at 3.)

3 On the first morning of trial, a Monday, Oliver’s counsel told the state district court
4 that she “received a telephone call from the district attorney’s office” on “Friday at about
5 4:30 in the afternoon” indicating that the prosecutor learned from a detective that S.S.
6 “had actually made a full taped interview” that was not disclosed to the defense. (ECF No.
7 13-31 at 6.) Oliver’s counsel moved to exclude S.S.’s testimony and statement because
8 “the testimony and th[e] information that[was] contained in the voluntary statement [was]
9 significantly different than what he initially told the police on the night of one of these
10 incidents.” (*Id.* at 6-7.)

11 The prosecutor responded that he did not learn of the statement until he “had
12 pretried [sic] one of [the] officers,” but “[a]s soon as [he] learned of this statement, [he]
13 called [Oliver’s counsel] and told her about it.” (*Id.* at 7.) The prosecutor also argued that
14 the statement was not exculpatory, and S.S. had been properly noticed as a witness. (*Id.*)
15 Oliver’s counsel rebutted:

16 My concern is I - - I do believe that it’s potentially exculpatory. He
17 does, in the statement, just to give the Court a brief - - put some context on
18 it. This witness indicates that he would call individuals to buy drugs. And
19 then when they would come, he would contact my client and others to let
20 them know that there was a potential robbery victim. That’s his statement.
21 There was also a police report that was attached because at one point he
22 was arrested.

23 My concern is, you know, he’s a juvenile. Because I received this
24 Friday afternoon, I haven’t been able to obtain certified copies or get
25 juvenile records. First of all, it’s not like you can just go over and order
26 juvenile records or get any of the outcome or what the - - you know, any of
27 what happened in the juvenile court related to this case because he also
28 was charged and pled to a conspiracy robbery is my understanding from
what the district attorney has told me. But I don’t have any of the details of
what the conditions or if he was on probation, what those kind of things are
in order to impeach him when he does testify if the Court was to allow it.

So I think there are definitely some things. You know, he is possibly
a suspect I would be able to point out and say, he’s just trying to cover his
own skin and that’s why he’s testifying and blaming my client in this
situation. So those - - those are some of the, you know, things that I think

1 for the defense why it's exculpatory and why I think it should be precluded
2 because I haven't had the opportunity to be able to do that investigation.

3 (*Id.* at 8-9.) The state district court excluded S.S.'s interview statement but allowed S.S.
4 to testify. (*Id.* at 10.)

5 On the fourth day of trial, during cross-examination of Officer Corie Rapp of the
6 LVMPD, Oliver's counsel asked Rapp whether Belinda Kappert was shown any
7 photographic lineups other than the one in which she identified Oliver. (ECF No. 13-44 at
8 53.) Rapp indicated that he had and that Kappert had identified the second robber. (*Id.*)

9 Oliver's counsel moved to dismiss the charges against Oliver or, alternatively, for
10 a mistrial, explaining that she could have used this information to impeach Kappert. (ECF
11 No. 13-44 at 58–59, 64.) Oliver's counsel elaborated: “[Kappert] testified at a grand jury,
12 at a preliminary hearing, and [at the trial], all under oath, that she was not able to identify
13 the person in the back[seat]. And now we're hearing for the first time she's circled
14 someone.” (*Id.* at 59.) The prosecutor argued that the evidence was not exculpatory
15 because it “ha[d] nothing to do with” Oliver, whom Kappert identified before the second
16 lineup. (*Id.* at 60-61.) Oliver's counsel rebutted that the evidence was exculpatory as
17 impeachment evidence because Kappert's credibility and identifications were crucial and
18 having this information may have “influence[d] the way that [she] proceeded with cross-
19 examining [Kappert] and perhaps presenting [the] entire defense in this case.” (*Id.* at 63.)

20 The state district court recessed and then explained the basis of its decision to
21 deny Oliver's counsel's request:

22 Since I don't do lots of criminal trials, I wanted to check with others
23 that have more experience to decide if my decision in the case was
24 consistent with what other criminal judges might do. So that being said, I
25 agree that the information probably should have been turned over. I don't
26 know that it's a Brady violation, because I don't know that it's exculpatory
27 as it relates to your client. I do understand the argument that it may have
28 changed the way that you presented your case, at least with regard to
Belinda . . . Kappert. So I'm going to deny your request for a mistrial or
dismissal. But if you would want to recall Ms. Kappert, or if you want to call
her in your case, if you want to subpoena her for tomorrow, so that you can
additionally cross-examine her on the inconsistencies, I'm okay with that.

1 (ECF No. 13-44 at 64–65.)

2 Oliver’s counsel declined the option to recall Kappert. (ECF No. 13-44 at 66.)

3 **2. Standard for a *Brady* claim**

4 “[T]he suppression by the prosecutor of evidence favorable to an accused upon
5 request violates due process where the evidence is material either to guilt or to
6 punishment irrespective of the good faith or bad faith of the prosecution.” *Brady v.*
7 *Maryland*, 373 U.S. 83, 87 (1963). Because a witness’s “reliability . . . may well be
8 determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls
9 within [the *Brady*] rule.” *Giglio v. United States*, 405 U.S. 150, 154 (1972). “There are
10 three components of a true *Brady* violation: The evidence at issue must be favorable to
11 the accused, either because it is exculpatory, or because it is impeaching; that evidence
12 must have been suppressed by the State, either willfully or inadvertently; and prejudice
13 must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

14 The materiality of the evidence that has been suppressed is assessed to determine
15 whether prejudice exists. *See Hovey v. Ayers*, 458 F.3d 892, 916 (9th Cir. 2006).
16 Evidence is material “if there is a reasonable probability that, had the evidence been
17 disclosed to the defense, the result of the proceeding would have been different.” *United*
18 *States v. Bagley*, 473 U.S. 667, 682 (1985). “The question is not whether the defendant
19 would more likely than not have received a different verdict with the evidence, but whether
20 in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of
21 confidence.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Accordingly, “[a] ‘reasonable
22 probability’ of a different result is . . . shown when the government’s evidentiary
23 suppression ‘undermines confidence in the outcome of the trial.’” *Id.* (quoting *Bagley*, 473
24 U.S. at 678).

25 **3. State court determination**

26 In affirming Oliver’s judgment of conviction, the Nevada Supreme Court held:

27 First, appellant Donald Alva Oliver contends that the district court
28 erred by denying his oral motion to dismiss or, alternatively, for a mistrial,
based on the State’s failure to turn over allegedly exculpatory evidence prior

1 to trial. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Oliver made his
2 motion after the State’s final witness, Officer Corie Rapp, testified about
3 information not provided to the defense—that the victim of the robbery
4 occurring on July 10, 2012, identified Oliver’s coconspirator after reviewing
5 a photographic lineup. We disagree with Oliver’s contention.

6 Determining whether the State adequately disclosed information
7 pursuant to *Brady* involves questions of both fact and law which we review
8 de novo. See *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003).
9 Here, the district court heard arguments from counsel and denied Oliver’s
10 motion. The district court stated that “the information probably should have
11 been turned over,” but ultimately found that the victim’s identification of the
12 second suspect in the robbery was not exculpatory. Moreover, we conclude,
13 in light of the evidence presented, there is not a “reasonable possibility” that
14 a more timely disclosure of the information in question would have affected
15 the outcome of Oliver’s trial. See *Mazzan v. Warden*, 116 Nev. 48, 66, 993
16 P.2d 25, 36 (2000); see also *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d
17 91, 95 (2012) (“To prove a *Brady* violation, the accused must make three
18 showings: (1) the evidence is favorable to the accused, either because it is
19 exculpatory or impeaching; (2) the State withheld the evidence, either
20 intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence
21 was material.” (quotation marks omitted)), cert. denied, ___ U.S. ___, 133
22 S. Ct. 988 (2013). Therefore, we further conclude that the district court did
23 not err by determining that the State did not violate *Brady* or abuse its
24 discretion by denying Oliver’s motion to dismiss or, alternatively, for a
25 mistrial. See *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (we
26 review a district court’s denial of a motion to dismiss for an abuse of
27 discretion); *Rose v. State*, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007)
28 (we review a district court’s denial of a motion for a mistrial for an abuse of
discretion).

[FN1] To the extent it was raised, we also conclude that Oliver
fails to demonstrate that he is entitled to relief based on the
late disclosure of a taped interview of a third individual
involved in the July 10th robbery.

(ECF No. 14-5 at 2-3.)

4. Conclusion

As the Nevada Supreme Court reasonably determined, Oliver fails to demonstrate
prejudice from the State’s late disclosure of either piece of evidence: S.S.’s law
enforcement interview or Belinda Kappert’s identification of the second robber.

Turning first to S.S.’s law enforcement interview. It appears that the contents of
that interview were inculpatory. Oliver’s counsel explained that S.S. indicated in that
interview that “he would call individuals to buy drugs[, a]nd then when they would come,

1 he would contact [Oliver] and others to let them know that there was a potential robbery
2 victim.” (ECF No. 13-31 at 8.) However, if Oliver’s counsel used S.S.’s interview to
3 impeach his trial testimony that it was Oliver’s idea to commit the robbery (see ECF No.
4 13-40 at 84-85), the interview was potentially exculpatory. Importantly, though, S.S. also
5 testified that he was arrested and prosecuted in juvenile court for conspiracy to commit
6 robbery based on his participation in the robbery of Kappert. (ECF No. 13-40 at 87.) As
7 such, the jury was aware that S.S.’s testimony indicating a lack of a conspiracy was
8 incredible. Consequently, Oliver fails to establish there was a reasonable probability that,
9 had S.S.’s interview statement—which also established there was a conspiracy between
10 Oliver and S.S.—been earlier disclosed to the defense, the result of his trial would have
11 been different. *See Bagley*, 473 U.S. at 682.

12 Turning to Belinda Kappert’s identification of the second robber. Kappert testified
13 that she “wasn’t able to make a positive ID” of the second robber. (ECF No. 13-41 at 16.)
14 Based on Officer Rapp’s testimony that Kappert “was able to identify another suspect in
15 [a] second lineup” (ECF No. 13-44 at 69), Kappert’s testimony was subject to
16 impeachment. However, because the jury was aware that Kappert’s testimony regarding
17 her identification of the second robber was incredible based on Rapp’s testimony, Oliver
18 fails to establish there was a reasonable probability that, had Kappert’s second
19 photographic identification been disclosed prior to the trial such that his counsel could
20 have impeached Kappert during cross-examination—rather than through Rapp’s
21 testimony—the result of his trial would have been different. *See Bagley*, 473 U.S. at 682.
22 In fact, during closing arguments, Oliver’s counsel highlighted Kappert’s incredibility on
23 the issue, commenting that Kappert “testified multiple times, including here in court today,
24 that she could not identify that second suspect. And you heard from our last officer here
25 today that he did bring over another lineup and she did circle someone.” (ECF No. 13-51
26 at 53-54.)

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1 Therefore, because Oliver fails to demonstrate prejudice to support his *Brady*
2 claims, the Nevada Supreme Court reasonably denied Oliver relief. Oliver is not entitled
3 to federal habeas relief for Ground 1.

4 **B. Ground 2—misjoinder**

5 In the remaining portion of Ground 2, Oliver alleges that his Fifth and Fourteenth
6 Amendments rights to due process were violated when the state district court failed to
7 sever the two robbery incidents.⁴ (ECF No. 7 at 5.)

8 **1. Background information**

9 Prior to trial, Oliver moved to sever the charges, arguing that “there [was] no
10 mutually cross-admissible evidence” connecting the two robberies. (ECF No. 13-15 at 3.)
11 The state district court denied the motion, finding that Oliver was not unfairly prejudiced
12 by the joinder, the evidence of each robbery would be cross-admissible, and there was
13 sufficient evidence that the alleged robberies constituted a common scheme or plan.
14 (ECF No. 13-22 at 3.)

15 **2. Standard for a misjoinder violation**

16 In the context of joinder of counts and defendants, the United States Supreme
17 Court has stated: “Improper joinder does not, in itself, violate the Constitution. Rather,
18 misjoinder would rise to the level of a constitutional violation only if it results in prejudice
19 so great as to deny a defendant his Fifth Amendment right to a fair trial.” *United States v.*
20 *Lane*, 474 U.S. 438, 466 n.8 (1986). The Ninth Circuit has declared this comment
21 constitutes *dicta*. See *Collins v. Runnels*, 603 F.3d 1127, 1132 (9th Cir. 2010) (discussing
22 “trial severance where a co-defendant presents a mutually antagonistic defense”).
23 Therefore, because there is no clearly established Supreme Court precedent, it is not
24 clear that the Nevada Supreme Court acted contrary to United States Supreme Court
25 precedent in denying Oliver’s claim. See 28 U.S.C. § 2254(d)(1); see also *Wright v. Van*
26 *Patten*, 552 U.S. 120, 126 (2008) (explaining that “it cannot be said that the state court

27 ⁴This Court previously found that the portion of this ground relating to judicial
28 impartiality was unexhausted, and Oliver chose to abandon it. (ECF Nos. 21 at 5; 23.)

1 unreasonably applied clearly established Federal law” when United States Supreme
2 Court precedent “give[s] no clear answer to the question presented” (internal quotation
3 marks and alterations omitted)); *Martinez v. Yates*, 585 Fed.App’x. 460, 460 (9th Cir.
4 2014) (“There is no clearly established Supreme Court precedent dictating when a trial in
5 state court must be severed.”).

6 Assuming, *arguendo*, that the United States Supreme Court’s footnote in *Lane*
7 could be considered Federal law, Oliver must demonstrate the misjoinder of counts
8 “resulted in an unfair trial.” *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) (quoting
9 *Sandoval v. Calderon*, 241 F.3d 765, 771-72 (9th Cir. 2001)); *see also Bean v. Calderon*,
10 163 F.3d 1073, 1084 (9th Cir. 1998); *Park v. California*, 202 F.3d 1146, 1149 (9th Cir.
11 2000). As to prejudice, it must be determined “if the impermissible joinder had a
12 substantial and injurious effect or influence in determining the jury’s verdict.” *Davis*, 384
13 F.3d at 638 (quoting *Sandoval*, 241 F.3d at 772). In making that determination, “the Ninth
14 Circuit focuses particularly on cross-admissibility of evidence and the danger of ‘spillover’
15 from one charge to another, especially where one charge or set of charges is weaker than
16 another.” *Id.*

17 3. State court determination

18 In affirming Oliver’s judgment of conviction, the Nevada Supreme Court held:

19 Second, Oliver contends that the district court erred by denying his
20 pretrial motion to sever the charges. Oliver claims that charges stemming
21 from the two robberies were improperly joined for trial because the offenses
22 were not “connected together” and “there is no mutually cross-admissible
evidence.” We disagree.

23 Under NRS 173.115(2), the State may charge two or more offenses
24 in the same information, with a separate count for each offense, if the
25 offenses are “[b]ased on two or more acts or transactions connected
26 together or constituting parts of a common scheme or plan.” If it appears
27 that a defendant will be prejudiced by joinder, the district court may grant a
28 severance. *See* NRS 174.165(1). Here, the district court conducted a
hearing and found that “due to the close proximity in time and location and
the similar modus operandi, there is sufficient evidence that the alleged
robberies constitute a common scheme or plan.” *See Middleton v. State*,
114 Nev. 1089, 1107, 968 P.2d 296, 308 (1998). The district court

1 determined that “evidence of each robbery would be cross-admissible in
2 separate trials” pursuant to NRS 48.045(2), *see Weber v. State*, 121 Nev.
3 554, 573, 119 P.3d 107, 120 (2005), and that Oliver was “not unfairly
4 prejudiced by joinder of the charges,” *see id.* at 574-75, 119 P.3d at 121;
5 *see also Middleton*, 114 Nev. at 1108, 968 P.2d at 309 (“Misjoinder requires
6 reversal only if the error has a substantial and injurious effect on the jury’s
7 verdict.”). We conclude that the district court did not abuse its discretion by
8 denying Oliver’s motion to sever the charges. *See Weber*, 121 Nev. at 570,
9 119 P.3d at 119 (we review a district court’s decision to join or sever charges
10 for an abuse of discretion).

11 (ECF No. 14-5 at 4-5 (footnote omitted).)

12 **4. Conclusion**

13 As the Nevada Supreme Court, the final arbiter of Nevada law, reasonably
14 determined, the evidence of the June 27, 2012 robbery incident and July 10, 2012 robbery
15 incident would have been cross-admissible under Nevada law. *See* NRS § 48.045(2)
16 (“Evidence of other crimes, wrongs or acts . . . may . . . be admissible . . . as proof of
17 motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake
18 or accident.”). Indeed, both robberies had the same operative set of facts: the victims,
19 who were either in possession of illegal substances or buying illegal substances, were
20 lured to apartment complexes, and Oliver and a co-conspirator robbed them while they
21 were in their parked vehicles. (*See* ECF Nos. 13-36 at 35-47; 13-41 at 2-6.)

22 Moreover, there is no indication in the record that the jury failed to distinguish
23 between the evidence presented in the two robberies, and there was no significant
24 disparity in the relative strength of the two cases because Oliver was identified by both
25 victims during photographic lineups. (*See* ECF Nos. 13-39 at 112; 13-44 at 43-44.)
26 Finally, because the jury was instructed that “[e]ach charge and the evidence pertaining
27 to it should be considered separately” (ECF No. 13-48 at 6), “any prejudice was . . .
28 limited.” *Davis*, 384 F.3d at 639. Accordingly, because Oliver’s trial was not rendered
fundamentally unfair by the joinder of the two robbery incidents, the Nevada Supreme
Court reasonably denied Oliver’s claim. Oliver is therefore not entitled to federal habeas
relief for Ground 2.

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1 **V. CERTIFICATE OF APPEALABILITY**

2 This is a final order adverse to Petitioner Donald Oliver. Rule 11 of the Rules
3 Governing Section 2254 Cases requires the Court to issue or deny a certificate of
4 appealability (“COA”). Therefore, the Court has *sua sponte* evaluated the claims within
5 the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v.*
6 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Under 28 U.S.C. § 2253(c)(2), a COA
7 may issue only when the petitioner “has made a substantial showing of the denial of a
8 constitutional right.” With respect to claims rejected on the merits, a petitioner “must
9 demonstrate that reasonable jurists would find the district court’s assessment of the
10 constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
11 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA
12 will issue only if reasonable jurists could debate (1) whether the petition states a valid
13 claim of the denial of a constitutional right and (2) whether this Court’s procedural ruling
14 was correct. *Id.*

15 Applying these standards, the Court finds that a certificate of appealability is
16 unwarranted.

17 **VI. CONCLUSION**


18 It is therefore ordered that Donald Oliver’s petition for a writ of habeas corpus under
19 28 U.S.C. § 2254 (ECF No. 7) is denied.

20 It is further ordered that a certificate of appealability is denied.

21 The Clerk of Court is directed to substitute William Gittere for Respondent Brian
22 Williams.

23 The Clerk of Court is further directed to enter judgment accordingly and close this
24 case.

25 DATED THIS 15th Day of November 2021.

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27 
28 _____
MIRANBA M. DU
CHIEF UNITED STATES DISTRICT JUDGE