untrue. Therefore, the district court did not abuse its discretion by denying Mr. Strickland's motion for attorney fees pursuant to NRS 7.085(1) and NRS 18.010(2)(b).[2]

Accordingly, we affirm the district court's orders.[3]

PICKERING, C.J., and HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

LUCIAETTA MARIE IVEY, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT JUDGE, RESPONDENTS, AND PHILLIP DENNIS IVEY, JR., REAL PARTY IN INTEREST.

No. 59297

March 28, 2013 299 P.3d 354

Original petition for a writ of mandamus or prohibition challenging a district court order denying a request to recuse a district court judge in a family law action.

Petitioner sought a writ of mandamus or prohibition challenging a district court order denying a request to recuse a district court judge in a family law action. The supreme court, GIBBONS, J., held that: (1) denial of wife's motion to recuse judge did not violate her due process rights, and (2) contributions to judge's reelection campaign were not significant enough to raise a reasonable question as to judge's impartiality.

Petition denied.

Pecos Law Group and *Bruce I. Shapiro* and *Shann D. Winesett*, Henderson, for Petitioner.

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[2]Moreover, sanctions were not appropriately requested in this case under NRCP 11. NRCP 11(c)(1)(A) requires a party to file a motion for sanctions separately from other motions or requests. Mr. Strickland filed a motion for attorney fees that mentioned NRCP 11 but did not file a separate motion for sanctions based on NRCP 11. Even if Mr. Strickland had filed the NRCP 11 request in the appropriate form, the district court did not abuse its discretion in denying the request because Mr. Stubbs made a good faith argument for clarification or change to existing law and made a reasonable and competent inquiry before filing the claim, as discussed above.

[3]We have considered the parties' remaining arguments and conclude they are without merit.

Chesnoff & Schonfeld and *David Z. Chesnoff* and *Richard A. Schonfeld*, Las Vegas, for Real Party in Interest.

1. MANDAMUS.
   A petition for a writ of mandamus is the appropriate vehicle to seek disqualification of a judge.
2. MANDAMUS.
   Mandamus is available to compel the performance of an act that the law especially enjoins as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. MANDAMUS.
   The supreme court will generally not issue a writ of mandamus when a petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170.
4. CONSTITUTIONAL LAW.
   The Due Process Clause guarantees the right to a fair trial before a fair tribunal. U.S. CONST. amend. 14.
5. CONSTITUTIONAL LAW.
   Determining whether a judge's recusal is compelled by the Due Process Clause does not require proof of actual bias; instead, a court must objectively determine whether the probability of actual bias is too high to ensure the protection of a party's due process rights. U.S. CONST. amend. 14.
6. CONSTITUTIONAL LAW.
   When an individual with a personal interest in a specific case has a significant and disproportionate influence in putting a judge on the case by contributing funds to the judge's campaign while the case is pending, a court must examine the size of the contribution in comparison to the total campaign contribution amount, the total sum spent during the election, and the effect that the contribution may have had on the election's outcome in order to determine whether the risk of actual bias results in a due process violation; the court must also review the timing of the campaign contributions in relation to the judge's election and the status of the contributor's case. U.S. CONST. amend. 14.
7. CONSTITUTIONAL LAW.
   Determination of whether the risk of actual bias when an individual with a personal interest in a specific case contributes funds to the judge's campaign while the case is pending violates a party's due process rights must be done on a case-by-case basis. U.S. CONST. amend. 14.
8. CONSTITUTIONAL LAW; JUDGES.
   Denial of wife's motion to recuse judge, who was presiding over divorce action in which she moved to reopen discovery, did not violate her due process rights, although judge received $5,000 in contributions from husband and in-kind contribution from husband's attorney, where husband's donations amounted to 7 percent of judge's total cash contributions, combination of husband's contributions and contributions of others connected to the divorce totaled 14 percent of the total cash contributions, and attorney's in-kind contribution equaled 25 percent of the total in-kind contributions to the campaign, contributions were made after the conclusion of the divorce, and wife did not move to reopen discovery until more than a year after the divorce decree was entered and the contributions were made. U.S. CONST. amend. 14.

9. JUDGES.
   A judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification.
10. JUDGES.
    Individual cash contributions ranging from $500 to $5,000 to reelection campaign for judge, who presided over divorce action, by husband and others associated with divorce were not significant enough to raise a reasonable question as to judge's impartiality, where contributions were within the statutory limits for campaign contributions and contributions occurred after husband and wife filed joint petition for divorce and judge entered the divorce decree. NRS 1.230, 294A.100.
11. JUDGES.
    Campaign contributions made within statutory limits cannot constitute grounds for disqualification of a judge.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

The case underlying this original writ petition involves post-divorce-decree proceedings between real party in interest Phillip Dennis Ivey, Jr., and petitioner Luciaetta Marie Ivey. More than a year after Luciaetta's and Phillip's divorce, Luciaetta filed a ''Motion For An Order To Show Cause Why Defendant Should Not Be Held In Contempt Of Court, To Reopen Discovery, And For Attorney's Fees; And For Related Relief'' (motion to reopen discovery). Luciaetta then filed a motion to disqualify Judge William Gonzalez from hearing the motion to reopen discovery. In Luciaetta's motion to disqualify, Luciaetta asserted that Judge Gonzalez's recusal was required under the Due Process Clause of the United States Constitution and under Nevada law. Luciaetta claimed that Judge Gonzalez hearing the motion would create an appearance of impropriety because Phillip and others connected to the Ivey divorce contributed to Judge Gonzalez's reelection campaign. After a hearing, respondent Judge Jennifer P. Togliatti denied Luciaetta's motion to disqualify Judge Gonzalez, and Judge Gonzalez went on to preside over Luciaetta's motion to reopen discovery. As a result, Luciaetta petitioned this court for a writ of mandamus or prohibition vacating Judge Togliatti's order and disqualifying Judge Gonzalez from hearing the motion to reopen discovery. Because we conclude that the failure to disqualify Judge Gonzalez did not violate Luciaetta's due process rights or Nevada law, we deny Luciaetta's petition.

FACTS AND PROCEDURAL HISTORY

After seven years of marriage, Phillip and Luciaetta filed a joint petition for divorce. During the divorce proceedings, attorney

David Chesnoff represented Phillip. Phillip also hired attorney John Spilotro to represent Luciaetta and paid Spilotro a flat fee of $10,000. On December 29, 2009, Judge Gonzalez entered a divorce decree ending the marriage.

According to the divorce decree, Luciaetta and Phillip entered into a Marital Settlement Agreement that outlined the distribution of the community property and Phillip's and Luciaetta's obligations following the divorce. Under the Marital Settlement Agreement, Phillip was to pay Luciaetta $180,000 per month as alimony from the income that he received from his interest in Tiltware, LLC, an Internet poker company. The Marital Settlement Agreement stated that Phillip's obligation to pay alimony would end if he ever stopped receiving income from Tiltware. The Marital Settlement Agreement also contained a provision that acknowledged that Phillip and Luciaetta received the advice of independent counsel in connection with the terms of the agreement.

After the entry of Phillip's and Luciaetta's divorce decree, Judge Gonzalez successfully ran for reelection as a judge for the family division of the district court in Clark County. During Judge Gonzalez's campaign for reelection, he received a total of $71,240 in cash donations and a total of $14,216.65 for in-kind contributions. Phillip and others connected to the Iveys' divorce contributed to these totals for Judge Gonzalez's campaign. In February 2010, Chesnoff donated $1,000 in cash to Judge Gonzalez and a few months later made an in-kind contribution of $3,543.54 by holding a fundraiser. In April 2010, Chesnoff's wife contributed $2,500 in cash, while Chesnoff's law partner donated $1,000 in cash. Spilotro's law firm contributed $500 in cash to Judge Gonzalez during the month of April as well. Finally, Phillip donated $5,000 in cash to Judge Gonzalez's campaign on April 17, 2010.

The cash contributions from all of these individuals amounted to $10,000 and were approximately 14 percent of the total cash contributions to Judge Gonzalez's campaign. Chesnoff's in-kind donation equaled 25 percent of the total in-kind contributions to Judge Gonzalez's campaign. Phillip's $5,000 donation was the largest amount contributed by any individual person, but two political action committees donated $5,000 as well. Phillip's contribution amounted to 7 percent of the total cash contributions to Judge Gonzalez's campaign.

In May 2011, a dispute arose over Phillip's monthly alimony payments. Following the dispute, Luciaetta filed a motion to reopen discovery. Judge Gonzalez was assigned to hear Luciaetta's motion.

Prior to the hearing, Luciaetta filed an affidavit requesting that Judge Gonzalez recuse himself from hearing the motion to reopen discovery because the campaign contributions created an appearance of impropriety. In response, Judge Gonzalez filed an affidavit acknowledging the campaign contributions, but noting that under

Nevada law, the receipt of campaign donations alone does not serve as grounds for disqualification. Judge Gonzalez also stated in the affidavit that he met with Phillip only one time at an event several months after he entered the Iveys' divorce decree and that he never discussed the divorce with Phillip or his attorney outside of court.

Luciaetta then filed a motion to disqualify Judge Gonzalez from hearing her motion to reopen discovery based on the Due Process Clause of the United States Constitution and Nevada law. Judge Togliatti held a hearing on Luciaetta's motion to disqualify and subsequently denied the motion. Judge Togliatti determined that based on both federal and Nevada law, the campaign contributions did not rise to such a level as to create an appearance of impropriety requiring Judge Gonzalez's recusal.

Luciaetta now petitions this court for writ relief, requesting that this court vacate the order denying the motion to disqualify Judge Gonzalez and order that the case be assigned to a different department because Judge Gonzalez hearing the motion to reopen discovery violated due process and Nevada law.[1]

DISCUSSION

Standard of review

[Headnotes 1-3]

Luciaetta has petitioned this court for a writ of mandamus or prohibition. ''[A] petition for a writ of mandamus is the appropriate vehicle to seek disqualification of a judge.'' *Towbin Dodge, LLC v. Dist. Ct.*, 121 Nev. 251, 254-55, 112 P.3d 1063, 1066 (2005). Mandamus is available ''to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station,'' NRS 34.160, or to control an arbitrary or capricious exercise of discretion. *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Generally, this court will not issue a writ of mandamus when a petitioner

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[1]Phillip asserts that Luciaetta's writ petition is moot because Luciaetta did not seek a stay of the district court proceedings and the matter has now reached its conclusion. We disagree. This court determines only actual, live controversies and will not render opinions on issues that cannot affect the outcome of a case. *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004). As a result, a case may become moot by the occurrence of subsequent events that eliminate any actual controversy. *Id.* After filing the writ petition, Luciaetta did not seek a stay of the post-divorce proceedings with the district court or this court. Thus, Judge Gonzalez continued to preside over the underlying proceedings and ultimately denied Luciaetta's motion to reopen discovery. While Judge Gonzalez already denied Luciaetta's motion, we conclude that an actual controversy still exists because, if rendered in violation of Luciaetta's due process rights, that decision could be void. As a result, Luciaetta's writ petition is not moot.

has ''a plain, speedy and adequate remedy in the ordinary course of law.'' NRS 34.170. No such legal remedy exists here. Accordingly, we exercise our discretion to determine whether Judge Gonzalez should have been disqualified from hearing and ruling on Luciaetta's motion.

Judge Gonzalez hearing Luciaetta's motion to reopen discovery did not violate Luciaetta's due process rights

Luciaetta argues that the United States Supreme Court's decision in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), requires Judge Gonzalez's recusal under the Due Process Clause. We disagree.

[Headnotes 4-7]

The Due Process Clause guarantees the right to a fair trial before a fair tribunal. *Id.* at 876 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Determining whether a judge's recusal is compelled by the Due Process Clause does not require proof of actual bias; instead, a court must objectively determine whether the probability of actual bias is too high to ensure the protection of a party's due process rights. *Id.* at 883-84 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). When an individual with a personal interest in a specific case ''ha[s] a significant and disproportionate influence'' in putting a judge on the case by contributing funds to the judge's campaign while the case is pending, the United States Supreme Court has concluded that the risk of actual bias is great. *Id.* at 884. In such a situation, a court must examine the size of the contribution in comparison to the total campaign contribution amount, the total sum spent during the election, and the effect that the contribution may have had on the election's outcome. *Id.* A court must also review the timing of the campaign contributions in relation to the judge's election and the status of the contributor's case. *Id.* at 886. Thus, determining whether the risk of actual bias violates a party's due process rights must be done on a case-by-case basis. *See id.* at 884-86.

The *Caperton* decision addressed whether the Due Process Clause required a West Virginia Supreme Court justice's recusal when substantial third-party expenditures had been made supporting the justice's election by a party to a case pending before the court. *Id.* at 872. In concluding that the justice's failure to disqualify himself violated due process, the United States Supreme Court noted that while not every contribution by a litigant or attorney creates such a high risk of actual bias requiring recusal, the *Caperton* circumstances were an ''exceptional case.'' *Id.* at 884. The party in *Caperton* contributed $3,000,000 to a committee advocating the justice's election in place of an incumbent justice, 300

percent more than the justice's own campaign committee spent on the election and $1,000,000 more than the total amount spent by both candidates' campaign committees combined. *Id.* The Court also noted that the timing of the contributions was critical, as they were made prior to the party's appeal of the district court judgment, when it was reasonably foreseeable that the case would be before the newly elected justice. *Id.* at 886. Thus, the Court determined that the timing of the contributions, along with the disproportionate influence that the donations had in placing the justice on the case, created such a high risk of actual bias that the justice's failure to disqualify himself violated due process. *Id.* at 886-87.

[Headnote 8]

We conclude that the donations by Phillip and others connected to the Ivey divorce do not rise to the ''exceptional'' level of the campaign contribution at issue in *Caperton*. *See id.* at 884. First, the donations at issue are much smaller than the $3,000,000 contribution in *Caperton*. Phillip's $5,000 donation amounted to 7 percent of Judge Gonzalez's total campaign contributions. Phillip's donation combined with the others' contributions amounted to $10,000 and constituted 14 percent of the total cash contributions to Judge Gonzalez's campaign. The in-kind donation of Phillip's attorney equaled 25 percent of the total in-kind contributions to Judge Gonzalez's campaign. We recognize that these donations are greater than the contributions of other individuals to Judge Gonzalez's campaign. However, these amounts do not reach the extraordinary level of the sum at issue in *Caperton*. *See id.*

Second, the timing of these contributions is less suspicious than the timing of the *Caperton* donations. Phillip and the others contributed to Judge Gonzalez's campaign only after the conclusion of the divorce. Luciaetta points out that the contributions occurred prior to the expiration of the six-month time limit in NRCP 60(b). Despite the contributions occurring within this six-month period, and although post-decree motions are not uncommon in divorce proceedings, the particular facts of this appeal do not demonstrate such a high risk of bias that due process required Judge Gonzalez's recusal. Phillip and Luciaetta filed a joint petition for divorce, which indicated that Phillip and Luciaetta had executed a Marital Settlement Agreement that divided their community property and set forth their obligations post-divorce. Luciaetta was represented by counsel during the negotiation of the Marital Settlement Agreement and throughout the divorce proceedings. Although Luciaetta notes that Phillip was paying for her representation during the divorce, Luciaetta signed the Marital Settlement Agreement, which specifically states that both Phillip and Luciaetta recognize that they had the opportunity to receive the independent advice of counsel. Furthermore, Luciaetta did not bring her motion to reopen discovery until June 6, 2011, more than a year after the di-

vorce decree was entered and the contributions were made. As a result, Judge Togliatti did not abuse her discretion by finding that Judge Gonzalez hearing Luciaetta's motion to reopen discovery would not violate Luciaetta's due process rights.

Judge Gonzalez hearing Luciaetta's motion to reopen discovery did not violate Nevada law

Luciaetta argues that if Judge Gonzalez's disqualification is not required under the Due Process Clause, the district court should have disqualified Judge Gonzalez under more stringent Nevada law—NRS 1.230 and the Nevada Code of Judicial Conduct (NCJC). We disagree.

[Headnote 9]

In Nevada, ''a judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification.'' *Millen v. Dist. Ct.*, 122 Nev. 1245, 1253, 148 P.3d 694, 700 (2006). NRS 1.230 prohibits a judge from presiding over any matter when actual or implied bias exists on the part of the judge. The relevant provisions of NCJC Rule 2.11(A) provide:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> (2) The judge knows that the judge . . . is:
>
> . . . .
>
> (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding . . . .
>
> (3) The judge knows that he or she . . . has an economic interest in the subject matter in controversy or in a party to the proceeding.

NCJC defines ''[d]e minimis'' as ''an insignificant interest that could not raise a reasonable question regarding the judge's impartiality.'' NCJC Terminology (2011). This court has recognized ''that a contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification.'' *Las Vegas Downtown Redev. v. Dist. Ct.*, 116 Nev. 640, 644, 5 P.3d 1059, 1062 (2000) (ordering judge who recused himself to hear case).[2]

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[2]After filing her writ petition, Luciaetta later filed a motion to supplement her petition with a memorandum from the American Bar Association (ABA) on potential changes to the provisions of the ABA Model Code concerning judicial disqualification. We granted Luciaetta's motion and allowed her to file

[Headnotes 10-11]

We conclude that the campaign contributions at issue here were not significant enough to ''raise a reasonable question'' as to Judge Gonzalez's impartiality. The individual contributions of Phillip and the others ranged from $500 to $5,000. These amounts are within the statutory limits for campaign contributions. *See* NRS 294A.100 (stating that a person shall not contribute more than $5,000 to a candidate within a certain time). Furthermore, the contributions occurred after Phillip and Luciaetta filed the joint petition for divorce and Judge Gonzalez entered the divorce decree. Thus, the campaign contributions are not exceptional. *See Las Vegas Downtown Redev.*, 116 Nev. at 645, 5 P.3d at 1062 (stating that contributions ranging from $150 to $2,000 to a district court judge's campaign were not extraordinary and did not require the judge's disqualification). Without more, the campaign contributions are insufficient to demonstrate that actual or implied bias existed on the part of Judge Gonzalez. Campaign contributions made within statutory limits cannot constitute grounds for disqualification of a judge under Nevada law. *See In re Petition to Recall Dunleavy*, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (explaining that ''intolerable results'' would occur if litigants could disqualify a judge because an attorney for the opposing party donated to the judge's campaign).[3] Therefore, Judge Togliatti did not abuse her discretion by finding that Nevada law does not require Judge Gonzalez's disqualification.

CONCLUSION

We conclude that Judge Gonzalez was not disqualified from presiding over Luciaetta's motion based on the contributions made to Judge Gonzalez's campaign because doing so violated neither Luciaetta's due process rights nor Nevada law. Accordingly, we deny Luciaetta's writ petition.

CHERRY, J., concurs.

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the ABA memorandum as a supplemental appendix. Having reviewed the supplemental appendix, we conclude that it does not affect our analysis of Nevada law and judicial disqualification.

[3]The Nevada Constitution specifically requires the election of district court judges. Nev. Const. art. 6, § 5. Furthermore, the citizens of Nevada defeated a recent ballot initiative to change the selection process for judges from election to appointment. *See* Nevada Ballot Questions 2010, Nevada Secretary of State, Question No. 1; Nevada Secretary of State, 2010 Official Statewide General Election Results, *available at* http://www.nvsos.gov/soselectionpages/results/2010StatewideGeneral/ElectionSummary.aspx. Campaign contributions are necessarily a part of judicial elections.

HARDESTY, J., with whom PICKERING, C.J., and PARRAGUIRRE and DOUGLAS, JJ., agree, concurring:

I concur that the petition should be denied for the reasons expressed by the majority. I write separately, however, to address our concurring colleague's criticism of the Nevada Code of Judicial Conduct's (NCJC) current campaign contribution rules. Although the concurrence voices concerns about the rules, it offers no solutions and fails to engage the administrative docket process, as this court did in 2009, to solicit comments from the judiciary, the bar, and the public to consider potential amendments. *See* Nevada Rules on the Administrative Docket (NRAD) 3.2, 7.

In 2009, this court initiated a thorough review of the NCJC, which included a study of the Code's campaign finance rules and due process considerations in light of the United States Supreme Court's decision in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009). A committee appointed by this court, comprised of members of Nevada's judiciary, the bar, and professors from the William S. Boyd School of Law, filed a supplement to its final report on August 13, 2009, recommending two bright-line rules for judicial disqualification because of campaign contributions that substantially deviated from campaign contribution provisions contained in Nevada's campaign finance statutes. *See In the Matter of the Amendment of the Nevada Code of Judicial Conduct*, ADKT No. 427 (Supplement to Final Report, August 13, 2009). The first proposed rule change would have required disqualification by a judge who received financial support ''within the previous 6 years from a party, or a party's affiliate[ ] . . . , or a party's lawyer or the law firm of a party's lawyer in an aggregate amount that exceeds $50,000.'' *Id.* The second suggestion would have required disqualification if the judge ''received aggregate campaign support exceeding 5 [percent] of the judge's total financial [support] within the previous 6 years from a party, or a party's affiliated entities . . . , or a party's lawyer or the law firm of a party's lawyer,'' and required disqualification if the support ''create[d] a reasonable question as to the judge's impartiality.'' *Id.*

Following extensive public comment, all justices, including our concurring colleague, voted to adopt the Revised Nevada Code of Judicial Conduct without inclusion of either of the committee's recommended amendments to the judicial campaign finance rules. *See In the Matter of the Amendment of the Nevada Code of Judicial Conduct*, ADKT No. 427 (Order, December 17, 2009). The Nevada Constitution gives our citizens the right to elect their judges and justices. Informed exercise of this right requires campaigns, which in turn require campaign finances. As this court

learned in 2009 when it engaged in the administrative docket process, there are no easy answers when one weighs the duty of a judge to sit on a case against a party's due process right to an impartial adjudication in a state that has chosen to elect its judges. But the due process considerations are, at this juncture, limited by the exceptional circumstances discussed in *Caperton*. While individual cases may require disqualification because of unique campaign-based relationships, *Caperton* did not compel per se rules that are stricter than statutory campaign limits. As our concurring colleague concedes, this case is substantially different from *Caperton* as all of the campaign contributions to Judge Gonzalez at issue here were within statutory limits and made after this court entered its order amending the NCJC without the committee's recommended changes. Under these circumstances, it would be unreasonable to conclude that Judge Togliatti abused her discretion by finding that Nevada law does not require Judge Gonzalez's disqualification.

SAITTA, J., concurring:

Though I agree with the majority's ultimate conclusion, I write separately in order to voice my concerns with the current judicial campaign contribution rules. The error asserted in this case clearly does not rise to a level that violates either party's due process right to a fair trial before a fair tribunal. Further, as discussed by the majority, the contributions made to Judge Gonzalez's reelection campaign were all within the statutory limit. Therefore, under our current codical scheme, recusal or disqualification was not specifically required. However, I find it necessary to voice my concerns regarding the potential that the circumstances in this matter lend an air of impropriety to the proceedings.

It is arguably the most significant responsibility of a judge to ''act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety.'' NCJC R. 1.2. The comments to this rule recognize that impropriety and appearances of impropriety, or ''[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge,'' diminish the public's confidence in the judiciary. *Id.* cmt. 3. The test for an appearance of impropriety is ''whether the conduct would create in reasonable minds a perception that the judge violated [the Nevada] Code [of Judicial Conduct] or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.'' *Id.* cmt. 5. Perhaps the most significant challenge to the judiciary's independence and impartiality is the increase in the volume and amount of campaign contributions.

Generally, ''a contribution to a presiding judge by a party or an attorney does not . . . constitute grounds for disqualification.'' *Las Vegas Downtown Redev. v. Dist. Ct.*, 116 Nev. 640, 644, 5 P.3d 1059, 1062 (2000). Thus, it appears that a judge's duty to sit is not overcome by campaign contributions within the statutory limit. *See id.* Presently, NRS 294A.100(1) imposes a $10,000 aggregate limit on individuals making campaign contributions. Consequently, a judge must constantly balance the duty to sit, *Millen v. Dist. Ct.*, 122 Nev. 1245, 1253, 148 P.3d 694, 699 (2006), with the duty to ''respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.'' NCJC preamble. I propose that the judge's duty to sit ''should not be construed to suggest that judges should refuse to disqualify themselves in apt circumstances or that close cases should routinely be resolved against disqualification. On the contrary, close questions should ordinarily be resolved in favor of disqualification in order to preserve public confidence in the judicial system.'' Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 Buff. L. Rev. 813, 957-58 (2009).

As my concurring colleagues point out, this court, following an administrative process including public hearings and participation by leading scholars, adopted the Revised Nevada Judicial Code. At that time, we chose not to adopt bright-line rules to guide judges in making the difficult decision to recuse themselves following substantial campaign contributions. Although I joined my colleagues in adopting the revisions to the code, the instant case reveals that it is perhaps time to revisit the current rules and their application to real cases in controversy. In our current political landscape, we must be cognizant of the potential appearance of impropriety arising from the type of campaign contributions made in this case—numerous contributions within the statutory limit made by a group of individuals who all have interests in a single case. Ongoing judicial review, indeed our core function, commands that we reconsider prior decisions in light of the case presented.

Here, Phillip, his attorney, his attorney's spouse, and his attorney's law partner contributed a total of $9,500. Luciaetta's attorney also contributed $500. In total, these contributions made up only 14 percent of the total cash donations to Judge Gonzalez's reelection campaign. Phillip's attorney also made a $3,543.54 in-kind contribution by holding a fundraiser. This amount constituted 25 percent of the total in-kind contributions made to Judge Gonzalez's reelection campaign. Although the monetary value of these contributions are not so significant that they rise to the level described in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), the fact that so many individuals associated with the Iveys' divorce contributed to Judge Gonzalez's campaign lends a definite air of impropriety, especially in light of the fact that it was possi-

ble that future matters related to the divorce would come before him.

The divorce decree specifically approves of the marital settlement agreement, which contained specific provisions relating to Luciaetta's alimony. Significantly, alimony would only continue so long as Phillip was receiving income from Tiltware, LLC. Thus, it is clear that the district court could at some point be called on to redefine the parties' rights under the marital settlement agreement if Phillip stopped receiving income from his company, which, in fact, is what happened. Therefore, although the divorce decree was final, the district court maintained jurisdiction to modify any previous adjudication of Phillip and Luciaetta's property rights. *See* NRS 125.150(7). Further, under Nevada's one family, one judge rule, the same judge must preside over any matters involving the same family. NRS 3.025(3).

A significant portion of the majority opinion focuses on *Caperton*, the United States Supreme Court's most recent and expansive decision regarding due process and judicial campaign contributions. I agree with the majority in its determination that Luciaetta's right to a fair trial before a fair tribunal was not violated by the various contributions made to Judge Gonzalez's reelection campaign. And I reiterate that under the current contribution rules, Judge Gonzalez did nothing wrong. However, as noted in *Caperton*, ensuring that the parties' due process rights are upheld is only the '' 'constitutional *floor*,' '' and individual states are free to set more rigorous standards on judicial disqualification based on campaign contributions. 556 U.S. at 889 (emphasis added) (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)). Thus, it is the individual state's responsibility to take further action to ensure that the public's confidence in the integrity of the judiciary is strong. ''The citizen's respect for judgments depends . . . upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.'' *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

Following *Caperton*, a number of states have adopted new disqualification rules. Several states have promulgated new rules or comments that either cite to *Caperton* or to the specific factors relied upon in the decision. *See, e.g.*, Ark. Code of Jud. Conduct R. 2.11 cmt. 4A (LexisNexis 2012); Ga. Code of Jud. Conduct Canon 3E(1)(d) (LexisNexis 2012); N.M. R. Ann. R. 21-211 cmts. 6 & 7 (2012); Tenn. Sup. Ct. R. 10, R. of Jud. Conduct 2.11 cmt. 7 (LexisNexis 2012); Wash. Code of Jud. Conduct R. 2.11(D) (West 2011).

Prior to *Caperton*, the American Bar Association amended the Model Code of Judicial Conduct regarding campaign contributions as grounds for judicial disqualification as follows:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> . . . .
>
> (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than $[insert amount] for an individual or $[insert amount] for an entity [is reasonable and appropriate for an individual or an entity].

Model Code of Jud. Conduct R. 2.11(A) (2011). In adopting this provision, Arizona set the time period at four years and the contribution level at the maximum campaign contribution allowed in the state. Ariz. Sup. Ct. R. 81, Code of Jud. Conduct R. 2.11(A)(4) (West 2010). Utah set its threshold at a much lower level: three years and $50. Utah Code of Jud. Conduct R. 2.11(A)(4) (LexisNexis 2012).

Other states like Alabama, California, and New York have adopted explicit statutes or rules that require a judge's recusal if the party or attorney appearing before the judge has contributed a certain dollar amount and did so within a specific period of time before or after the judge's election. Ala. Code § 12-24-2(c) (LexisNexis 2005); Cal. Civ. Proc. Code § 170.1(a)(9)(A) (West Supp. 2012); N.Y. Ct. R. § 151.1(B) (McKinney 2012). The New York rule also imposes a collective contribution cap, which limits the amount of contributions that a law firm, individual lawyer, and individual clients can contribute as a group. N.Y. Ct. R. § 151.1(B)(2) (McKinney 2012).

As stated above, it is not my wish to insinuate that Judge Gonzalez or Judge Togliatti have acted improperly in their review of Luciaetta's motion to disqualify Judge Gonzalez. As our Code of Judicial Conduct stands today, there is no bright-line test to apply to judicial contributions. Rule 2.11 of the Nevada Code of Judicial Conduct lacks any iteration of the rules described above. This lack of definition fails to provide a concrete rubric against which to analyze such contributions.

Here, Phillip contributed the single largest contribution by an individual and, in addition to his individual contribution, his attorney, his attorney's wife, and his attorney's law partner all contributed somewhat substantial amounts of money to Judge Gonzalez's campaign. Further, although these contributions came after the divorce decree, it was entirely foreseeable that Phillip and Luciaetta would have to appear before Judge Gonzalez in future

matters relating to alimony payments. These circumstances create an appearance of impropriety that the judiciary should strive to avoid. By adopting some variation of the judicial contribution rules promulgated in other jurisdictions, this court could lend clarity not only to judges and justices, who rely on contributions to fund their campaigns, but also to the citizens who rely on the integrity and impartiality of the judiciary.

MICHAEL D. PATTERSON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 54408

April 4, 2013 298 P.3d 433

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, murder with the use of a deadly weapon, and discharging a firearm at or into a vehicle. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Defendant was convicted in the district court of conspiracy to commit murder, murder with use of deadly weapon, and discharging firearm at or into vehicle. Defendant appealed. The supreme court, HARDESTY, J., held that: (1) preliminary hearing was critical stage of criminal prosecution for murder and related crimes at which defendant's Sixth Amendment right to counsel attached; (2) denial of defendant's request to substitute retained counsel for appointed counsel at preliminary hearing, in violation of defendant's right to counsel of his choice, was abuse of discretion; (3) violation of defendant's right to counsel of his choice at preliminary hearing was subject to harmless-error review; (4) denial of defendant's request for substitution of retained counsel for court-appointed counsel at preliminary hearing, in violation of defendant's Sixth Amendment right to counsel of choice, was harmless; and (5) State's failure to disclose FBI memoranda encouraging agents to record interviews did not constitute *Brady v. Maryland*, 373 U.S. 83 (1963), violation.

Affirmed.

[Rehearing denied July 24, 2013]

PARRAGUIRRE, J., dissented in part.

Law Office of Lisa Rasmussen, PC, and *Lisa A. Rasmussen*, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Carrie A. Morton*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   Preliminary hearing was critical stage of criminal prosecution for murder and related crimes at which defendant's Sixth Amendment right to counsel attached. U.S. CONST. amend. 6.
2. CRIMINAL LAW.
   Pretrial proceedings are often considered to be critical stages of criminal proceedings, for the purposes of the Sixth Amendment right to counsel, because the results might well settle the accused's fate and reduce the trial itself to a mere formality. U.S. CONST. amend. 6.
3. CRIMINAL LAW.
   A pretrial proceeding is critical, such that the Sixth Amendment right to counsel attaches, if potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. U.S. CONST. amend. 6.
4. CRIMINAL LAW.
   The supreme court reviews the justice court's denial of a nonindigent defendant's request to substitute retained counsel as counsel for an abuse of discretion. U.S. CONST. amend. 6.
5. CRIMINAL LAW.
   Denial of defendant's request to substitute retained counsel for appointed counsel at preliminary hearing, in violation of defendant's right to counsel of his choice, was abuse of discretion, in prosecution for murder and related crimes, where the trial court did not take into consideration possible prejudice to defendant or assess whether disruption in proceedings caused by substitution, based on retained counsel's request for continuance of preliminary hearing in order to more fully prepare, was unreasonable. U.S. CONST. amend. 6.
6. CRIMINAL LAW.
   The Sixth Amendment right to counsel encompasses two different rights, namely, the right to effective assistance of counsel and the right of a nonindigent defendant to be represented by the counsel of his or her choice. U.S. CONST. amend. 6.
7. CRIMINAL LAW.
   The inquiry that is used to evaluate an attempt by an indigent defendant to substitute one appointed attorney for another is designed to determine whether an attorney-client conflict is such that it impedes the adequate representation that the Sixth Amendment guarantees to all defendants, including those who cannot afford to hire their own attorneys. U.S. CONST. amend. 6.
8. CRIMINAL LAW.
   The Sixth Amendment right to counsel of one's choice is implicated when a criminal defendant seeks to replace court-appointed counsel with privately retained counsel, or previously retained counsel with newly retained counsel, or privately retained counsel with court-appointed counsel. U.S. CONST. amend. 6.
9. CRIMINAL LAW.
   A defendant is generally free to replace existing counsel with retained counsel. U.S. CONST. amend. 6.

10. CRIMINAL LAW.
    The right to counsel of one's choice is not absolute, and a court has wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. U.S. CONST. amend. 6.
11. CRIMINAL LAW.
    The appropriate test to determine whether the trial court abused its discretion in denying a nonindigent defendant's request to substitute retained counsel in place of appointed counsel, in violation of the defendant's Sixth Amendment right to counsel of his choice, is whether denying the substitution (1) would have significantly prejudiced defendant, or (2) was untimely and would result in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case. U.S. CONST. amend. 6.
12. CRIMINAL LAW.
    Violation of defendant's right to counsel of his choice at preliminary hearing on charges for murder and related crimes was subject to harmless-error review. U.S. CONST. amend. 6.
13. CRIMINAL LAW.
    ''Trial errors'' are subject to harmless-error review because these errors may be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt; whereas ''structural defects'' affect the framework within which the trial proceeds, rather than simply an error in the trial process itself, and therefore, are grounds for reversal because they defy analysis by harmless-error standards.
14. CRIMINAL LAW.
    The complete denial of counsel at trial is a structural error under the Sixth Amendment. U.S. CONST. amend. 6.
15. CRIMINAL LAW.
    Not all errors involving the right to counsel are reversible per se. U.S. CONST. amend. 6.
16. CRIMINAL LAW.
    Denial of defendant's request for substitution of retained counsel for court-appointed counsel at preliminary hearing on charges for murder and related offenses, in violation of defendant's Sixth Amendment right to counsel of choice, was harmless, where retained counsel was permitted to sit at counsel table with appointed counsel and to provide input, and defendant failed to show how having retained counsel representing him as counsel of record instead of appointed counsel at preliminary hearing would have produced different outcome of trial, in view of overwhelming evidence of guilt. U.S. CONST. amend. 6.
17. CRIMINAL LAW.
    An error is ''harmless'' if the reviewing court can determine, beyond a reasonable doubt, that the error did not contribute to the defendant's conviction.
18. CRIMINAL LAW.
    Federal Bureau of Investigation's (FBI) memoranda encouraging agents to seek permission to record interviews was not material evidence for purpose of impeachment, and thus, State's failure to disclose memoranda did not constitute *Brady* violation, in trial for murder, where encouragement to seek permission to record interviews necessarily implied that it was FBI's policy not to record interviews, which was consistent with agent's testimony.

19. CRIMINAL LAW.
Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.

20. CRIMINAL LAW.
A defendant's rights are violated under *Brady v. Maryland*, 373 U.S. 83 (1963), when: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) the evidence was material.

21. CRIMINAL LAW.
Evidence is ''material'' to the defendant's guilt or innocence, thus, requiring the disclosure of the evidence to the defendant under *Brady v. Maryland*, 373 U.S. 83 (1963), if there is a reasonable probability of a different result at trial if the defense had known of the withheld evidence.

22. CRIMINAL LAW.
The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually. U.S. CONST. amend. 14.

23. CRIMINAL LAW.
When evaluating a claim of cumulative error, the supreme court considers the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.

Before HARDESTY, PARRAGUIRRE and SAITTA, JJ.

OPINION

By the Court, HARDESTY, J.:

Appellant Michael Patterson was convicted of conspiracy to commit murder, murder with the use of a deadly weapon, and discharge of a firearm into a vehicle. He now appeals arguing, among other things, that his Sixth Amendment right to counsel was violated when he was denied his counsel of choice at his preliminary hearing before the justice court.

We recognize that the preliminary hearing is a ''critical'' stage of criminal proceedings at which a defendant's Sixth Amendment right to counsel attaches, and we conclude that the justice court's denial of Patterson's request to be represented by retained counsel at the preliminary hearing violated Patterson's qualified right to counsel of his choice. In particular, the justice court failed to conduct a sufficient inquiry into the request. We further conclude, however, that the denial of Patterson's counsel of choice at the preliminary hearing is subject to harmless-error review, and that the error was harmless. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Patterson's conviction stems from the shooting death of Bobby Wilkerson in Las Vegas. Video surveillance footage of a parking lot

on the night of Wilkerson's death revealed that a person exited the passenger side of a vehicle, approached the driver's side of Wilkerson's car, and then jumped back into the passenger side of the other vehicle and drove away. Wilkerson then exited his car and fell to the ground. He was later found lying outside of his car with a shotgun wound to his head.

Wilkerson's mother informed the police that her son was planning to meet with Patterson that evening to resolve a dispute concerning a puppy that Patterson sold to Wilkerson. The police located the vehicle pictured in the surveillance footage that left the scene in the apartment complex where Patterson lived. The vehicle belonged to Patterson's roommate, who told the police that she frequently let her boyfriend[1] and Patterson use it. A search of Patterson's cell phone records revealed that he made frequent calls to Wilkerson's cell phone, but the calls stopped the night of the shooting.

The police then issued an arrest warrant for Patterson, and he was later apprehended in Chicago, Illinois, by FBI Agent Pablo Araya. During his interrogation by Agent Araya, Patterson allegedly confessed to shooting Wilkerson and described where in his apartment he hid the shotgun used in the killing. This interrogation was not recorded, but following the interrogation, the police found the shotgun in Patterson's apartment in the exact location he stated in his alleged confession.[2] Agent Araya's testimony was the only evidence of the interrogation presented at trial.

Attorney Richard Tannery was appointed to represent Patterson on his criminal charges. Patterson retained another attorney, Garrett Ogata, to represent him the evening prior to his preliminary hearing before the justice court.[3] At the preliminary hearing, Ogata sought substitution as counsel of record for Patterson. Ogata also requested that the justice court continue Patterson's preliminary hearing so that he could complete his preparation for the case. Without asking Patterson any questions concerning Ogata's representation, the justice court denied Ogata's request because Ogata was not prepared to proceed immediately, and Patterson's appointed attorney, Tannery, was present and prepared to represent him. However, the justice court allowed Ogata to sit at counsel's table and provide input to Tannery. Following the preliminary hearing, it appears that Ogata spoke with Tannery several times but

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[1]The boyfriend was charged as a codefendant, but is not a party to this appeal. He allegedly drove the vehicle the night of the shooting.

[2]Patterson was arrested in Chicago and extradited to Nevada after his interrogation.

[3]Patterson's mother retained Ogata. However, Patterson met with Ogata a week and a half earlier to discuss representation.

Ogata never requested that he be substituted as Patterson's counsel of record for trial. Patterson was ultimately convicted on all charges. This appeal follows.

DISCUSSION

On appeal, we address whether denial of a defendant's request to be represented by retained counsel at the preliminary hearing stage, when the defendant has been represented by appointed counsel up to that point, violates the Sixth Amendment right to counsel of choice, and if so, whether such a violation is subject to harmless-error review. We conclude that there was a Sixth Amendment violation, and reaffirming our prior jurisprudence, we hold that the error is subject to harmless-error review. We further conclude that the State did not violate *Brady v. Maryland*, 373 U.S. 83 (1963), regarding disclosure of evidence.[4]

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[4]Patterson also seeks reversal of his conviction on the grounds that (1) the district court abused its discretion when it denied Patterson's motion to suppress his arrest warrant because it did not set forth specific factual or legal findings in its order; (2) the arrest warrant did not contain sufficient probable cause; and (3) the district court improperly denied Patterson a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), regarding the voluntariness of his confession. With regard to the motion to suppress and the arrest warrant, we conclude that these arguments are without merit, as there was ''a substantial basis for concluding that probable cause existed.'' *Doyle v. State*, 116 Nev. 148, 158, 995 P.2d 465, 472 (2000). Moreover, although the lack of factual findings in an order may prevent appellate review and may be grounds for reversal, *see Somee v. State*, 124 Nev. 434, 443, 187 P.3d 152, 158 (2008), we further conclude that the arrest warrant attached to the motion in limine sufficiently enabled us to review the district court's decision. Additionally, we decline to consider Patterson's *Jackson v. Denno* argument because Patterson had the burden to request such a hearing and he never made that request. *See Wilkins v. State*, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980) (''[F]ailure to request a voluntariness hearing below precludes appellate consideration.''). Patterson further argues that the district court erred by: (1) failing to record several bench conferences, (2) failing to properly handle juror's questions, (3) failing to have Patterson present during a telephone conference between the court and counsel, and (4) giving improper jury instructions on manslaughter. We conclude that these arguments are without merit and require no further discussion. Finally, Patterson argues that the district court erred by admitting rap lyrics that were inadmissible bad acts evidence. We note that Patterson never objected to the admission of these lyrics at trial. *See Flores v. State*, 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (2005) (''[F]ailure to object will [generally] preclude appellate review of an issue' unless plain error affecting the defendant's substantial rights is shown.'' (second alteration in original) (quoting *Leonard v. State*, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001))). Furthermore, even if we were to agree with his contention that the admission of the rap lyrics was plain error, we conclude that Patterson has failed to show ''actual prejudice or a miscarriage of justice.'' *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (''In conducting plain error review, . . . the burden is on the defendant to show actual prejudice or a miscarriage of justice.'').

The preliminary hearing is a ''critical'' stage at which a defendant's Sixth Amendment right to counsel attaches

[Headnotes 1-3]

The Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to counsel, U.S. Const. amend. VI, and that right is protected against state action by the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; *Gideon v. Wainright*, 372 U.S. 335, 341-45 (1963). The United States Supreme Court has ''construed the Sixth Amendment guarantee [of counsel] to apply to 'critical' stages of the proceedings.'' *United States v. Wade*, 388 U.S. 218, 224 (1967). Pretrial proceedings are often considered to be ''critical'' stages because ''the results might well settle the accused's fate and reduce the trial itself to a mere formality.'' *Id.*; *see also Powell v. Alabama*, 287 U.S. 45, 57 (1932) (stating that the right to counsel ''during perhaps the most critical period of the proceedings . . . that is to say, from the time of [a criminal defendant's] arraignment until the beginning of [the defendant's] trial . . .'' is as important ''as [it is] at the trial itself''). A pretrial proceeding is ''critical'' if ''potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.'' *Wade*, 388 U.S. at 227.

The Supreme Court has recognized that the presence of counsel at a preliminary hearing may avoid prejudicial effect to the defendant's rights because: (1) skilled cross-examination of the State's witnesses may expose fatal flaws in the State's case, give rise to impeachment evidence for the subsequent trial, and preserve testimony from unavailable witnesses for later use at trial; (2) an attorney is better equipped than a lay defendant to ''effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial''; and (3) an attorney is in a better position than a lay defendant to make arguments concerning matters like psychiatric evaluations or bail at preliminary hearings. *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (plurality).

In addition, this court has previously recognized that preliminary hearings can give rise to Sixth Amendment concerns. *See Messmore v. Fogliani*, 82 Nev. 153, 154-55, 156, 413 P.2d 306, 306-07 (1966) (holding that an unrepresented defendant's Sixth Amendment rights to counsel and to confrontation of witnesses were violated when witness testimony taken during the preliminary hearing was introduced into evidence at trial). We have also recognized that a preliminary hearing is an adversarial proceeding at which a defendant's Sixth Amendment right to counsel attaches. *See Kaczmarek v. State*, 120 Nev. 314, 326, 91 P.3d 16, 25 (2004)

(''[T]he Sixth Amendment right to counsel does not even attach in a case until adversarial proceedings have commenced . . . ' ''whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'' '' '' (quoting *Fellers v. United States*, 540 U.S. 519, 523 (2004) (quoting *Brewer v. Williams*, 430 U.S. 387, 398 (1977)))); *see also Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007).

[Headnote 4]

Because the preliminary hearing is a ''critical'' stage in the criminal proceeding at which a defendant's Sixth Amendment right to counsel attaches, we must examine the justice court's denial of Patterson's request for counsel of his choice to determine whether error occurred. We review the justice court's denial of Patterson's request to substitute Ogata as counsel for an abuse of discretion. *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004).

[Headnotes 5-8]

The Sixth Amendment right to counsel encompasses two different rights, namely, the right to effective assistance of counsel and the right of a nonindigent defendant to be represented by the counsel of his or her choice. *U.S. v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010). The first right (to effective assistance of counsel) is at issue where an indigent criminal defendant seeks to replace court-appointed counsel with new appointed counsel. *Id.* at 978. Thus, the three-part inquiry that is used to evaluate an attempt to substitute one appointed attorney for another, *see Young*, 120 Nev. at 968-69, 102 P.3d at 576, ''is designed to determine whether [an] attorney-client conflict is such that it impedes the adequate representation that the Sixth Amendment guarantees to all defendants, including those who cannot afford to hire their own attorneys,'' *Rivera-Corona*, 618 F.3d at 979. But the other Sixth Amendment right is at issue where a criminal defendant seeks to replace court-appointed counsel with privately retained counsel, or previously retained counsel with newly retained counsel, or privately retained counsel with court-appointed counsel. In that context, the focus is on the right to counsel of one's choice. *Id.*

[Headnotes 9-11]

Generally, a defendant is free to replace existing counsel with retained counsel. *Miller v. Blackletter*, 525 F.3d 890, 895 (9th Cir. 2008). The right to counsel of one's choice is not absolute, however, and a court has ''wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar.'' *Gonzalez-Lopez*, 548 U.S. at 152; *see also Ryan v. Dist. Ct.*, 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (''[C]riminal defendants 'who can afford to retain counsel have a qualified right to obtain counsel of their choice.' '' (quoting

United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984))). Thus, the appropriate test to determine whether the justice court abused its discretion in denying Patterson's request to substitute retained counsel (Ogata) in place of appointed counsel (Tannery) is whether denying the substitution: (1) would have significantly prejudiced Patterson, or (2) ''was untimely and would result in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' '' *People v. Lara*, 103 Cal. Rptr. 2d 201, 211-12 (Ct. App. 2001) (quoting *People v. Ortiz*, 800 P.2d 547, 552 (Cal. 1990)).

At the commencement of the preliminary hearing, Patterson requested to substitute his court-appointed counsel, Tannery, with his retained counsel, Ogata. Ogata informed the justice court that he had been retained the day before the preliminary hearing and had reviewed about half of the discovery in the case. The justice court denied Patterson's request for chosen counsel because Ogata was unprepared, Tannery was present and prepared to represent Patterson, and the State had an out-of-state witness (FBI agent Araya) present to testify. However, the justice court's reasons for denying Patterson's request did not take into consideration any prejudice to Patterson or assess whether Ogata's substitution would cause an unreasonable disruption in the proceedings.

Although Ogata's substitution may have caused some inconvenience and delay because Patterson's request was made at the preliminary hearing, the justice court failed to ''balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution.'' *Lara*, 103 Cal. Rptr. 2d at 212. For example, the justice court did not inquire as to the amount of time Ogata would need to prepare for the preliminary hearing or the inconvenience to the State or its out-of-state witness resulting from a short delay. Furthermore, any delay in the preliminary hearing to allow Patterson's chosen counsel time to prepare likely would have been minimal given Ogata's review of some of the discovery and the significantly lesser evidentiary burden required to be met at the preliminary hearing, *see Sheriff v. Middleton*, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996) (stating that the State need only present ''marginal'' or ''slight'' evidence at the preliminary hearing to establish probable cause that a crime occurred and that the defendant is the person who committed the crime).

This court has previously noted that an abuse of discretion occurs whenever a court fails to give due consideration to the issues at hand. *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (citing to *Jones Rigging and Heavy Hauling v. Parker*, 66 S.W.3d 599, 602 (2002)); *see also United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983) (holding that ''as a general rule, the existence of discretion requires its exercise''). Here, the justice court failed to make an adequate inquiry and give due

consideration to the prejudice to Patterson or the extent of the delay or inconvenience that the substitution of Ogata would have caused. This was an abuse of discretion.[5]

We must now determine whether the deprivation of Patterson's Sixth Amendment right to counsel of choice at the preliminary hearing was a structural error warranting reversal of Patterson's judgment of conviction, or trial error subject to harmless-error review.

The denial of Patterson's Sixth Amendment right to retain his counsel of choice at his preliminary hearing was trial error and is thus reviewed for harmless error

[Headnote 12]

Patterson contends that the denial of his Sixth Amendment right to counsel of choice at the preliminary hearing is a structural error that requires reversal of his conviction. We disagree.

[Headnote 13]

There are two classes of constitutional errors, ''trial error[s]'' and ''structural defects.'' *Gonzalez-Lopez*, 548 U.S. at 148; *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 309-10 (1991). ''[T]rial error[s]'' are subject to harmless-error review because these errors ''may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'' *Fulminante*, 499 U.S. at 307-08. Conversely, ''structural defects'' ''affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'' *Id.* at 309-10. Such errors are grounds for reversal because they ''defy analysis by 'harmless-error' standards.'' *Id.* at 309.

[Headnote 14]

It has long been established that the complete denial of counsel at trial is a structural error under the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). Furthermore, the Supreme Court has held that the ''deprivation of the right to counsel of choice . . . unquestionably qualifies as structural error'' when it occurs at the trial court level because ''the erroneous denial of counsel bears directly on the framework within which the trial proceeds.'' *Gonzalez-Lopez*, 548 U.S. at 150 (internal quotations omitted). Therefore, we recognize that had Patterson erro-

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[5]Patterson claims that his Sixth Amendment right to counsel was also violated at the district court level when the district court allowed Tannery to continue as Patterson's attorney even though Ogata had approached the prosecutors the morning of the trial and informed them that he was Patterson's attorney. We disagree. The district court was never asked to review what occurred at the justice court level, and Ogata never formally requested that he be substituted as counsel of record after the preliminary hearing.

neously been denied his retained counsel of choice at trial, it would have been a structural error requiring reversal of the judgment of conviction.

[Headnote 15]

However, as we have noted, not all ''errors involving the right to counsel are reversible per se,'' and we have distinguished *Gideon* and its progeny from cases where the error did not result in total deprivation of counsel. *Manley v. State*, 115 Nev. 114, 123, 979 P.2d 703, 708-09 (1999) (applying harmless-error review to a claim that the defendant's Sixth Amendment right to counsel was violated by prosecutorial questions abridging the attorney-client privilege because the defendant was ''represented by counsel at all times'' and such an error ''did not affect the framework within which the trial proceeded''). In addition, we have expressly held that ''refusal by the magistrate to permit [a criminal defendant] to have counsel of his own choosing'' at a preliminary hearing ''falls into the category of harmless error'' where the defendant was represented by counsel. *State v. Rollings*, 58 Nev. 58, 63, 68 P.2d 907, 909 (1937), *overruled on other grounds by Sturrock v. State*, 95 Nev. 938, 943, 604 P.2d 341, 345 (1979), *receded from by Lisle v. State*, 114 Nev. 221, 954 P.2d 744 (1998). In further support of our position, the Supreme Court has held that at the preliminary hearing stage, ''[t]he test to be applied is whether the denial of counsel at the preliminary hearing was harmless error.'' *Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (majority).[6] Accordingly, we reaffirm our prior jurisprudence and specifically hold that violations of a defendant's Sixth Amendment right to counsel of choice at a preliminary hearing are reviewed for harmless error.

[Headnotes 16, 17]

An error is harmless if this court can determine, beyond a reasonable doubt, that the error did not contribute to the defendant's conviction. *Hernandez v. State*, 124 Nev. 639, 653, 188 P.3d 1126, 1136 (2008). Patterson has not demonstrated how the justice court's denial of his counsel of choice at the preliminary hearing contributed to his conviction, particularly since Ogata was allowed to sit at counsel's table during the hearing and provide input to Tannery.

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[6]Other jurisdictions have similarly held that violations of a defendant's Sixth Amendment right to counsel of choice at the preliminary hearing stage are reviewed for harmless error. *See Ditch v. Grace*, 479 F.3d 249, 254 (3d Cir. 2007); *U.S. v. Lott*, 433 F.3d 718, 723 (10th Cir. 2006); *State v. Brown*, 903 A.2d 169, 178 (Conn. 2006).

Furthermore, Patterson has not demonstrated how having Ogata as counsel at the preliminary hearing instead of Tannery would have produced a different result at trial when the State presented overwhelming evidence of Patterson's guilt. This evidence included proof that Wilkerson met with Patterson on the night of his death, the vehicle from the surveillance video belonged to Patterson's roommate, the gun used to kill Wilkerson was found concealed in Patterson's apartment, and Patterson frequently called Wilkerson before the shooting but all calls to Wilkerson's cell phone from Patterson's phone ceased after the shooting. In addition, FBI Agent Araya testified that Patterson confessed to shooting Wilkerson. Based on this evidence, we can conclude, beyond a reasonable doubt, that the justice court's denial of Patterson's counsel of choice did not contribute to Patterson's conviction. Therefore, we hold that the justice court's denial of Patterson's right to counsel of choice was harmless error.

The State did not commit a Brady violation

[Headnotes 18-21]

Patterson contends that his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated because of the State's failure to provide information that the FBI never records interviews, which could have been used to impeach Agent Araya's testimony. '' '*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.' '' *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012) (quoting *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003)). A defendant's rights are violated under *Brady* where: ''(1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) . . . the evidence was material.'' *Id*. (internal quotations omitted). Evidence is material if ''there is a reasonable probability of a different result [at trial] if the defense had known'' of the withheld evidence. *Lay v. State*, 116 Nev. 1185, 1196, 14 P.3d 1256, 1264 (2000).

Here, the purported impeachment evidence consisted of FBI memoranda stating that FBI agents are encouraged to seek permission to record interviews. However, encouragement to seek permission to record interviews necessarily implies that the FBI's default policy is not to record interviews. Thus, this evidence does not impeach Araya's testimony that the FBI's policy is not to record interviews. Furthermore, we cannot conclude that there was a reasonable probability that the result would have been different had this evidence been disclosed. Therefore, we conclude that the State did not commit a *Brady* violation.

[Headnotes 22, 23]

Having determined that none of Patterson's claims warrant reversal, we affirm the judgment of conviction.[7]

SAITTA, J., concurs.

PARRAGUIRRE, J., concurring in part and dissenting in part:

I concur with most of the majority's determination, but I part company in their finding that the justice court abused its discretion in failing to adequately consider the delay or inconvenience the substitution of counsel would occasion.

Here, after Ogata sought to substitute as counsel and continue the preliminary hearing set that day, the justice court conducted a bench conference and thereafter stated several factors that directly implicated the inconvenience that a delay would cause. Particularly, the court noted that Tannery was qualified to handle the case and was prepared to proceed, and that both the State and codefendant's counsel were prepared to move forward. Additionally, the court recognized the presence of the State's out-of-state witness and implicit therein, the resulting inconvenience. Finally, the court noted that it did not believe that bifurcating the hearing was appropriate.

Under these circumstances, I do not find that the justice court abused its discretion.

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[7]Patterson contends that the cumulative errors during his trial warrant reversal of his conviction. We disagree. '' 'The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.' '' *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (quoting *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)). ''When evaluating a claim of cumulative error, we consider the following factors: '(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.' '' *Id*. (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). Despite the serious nature of the crimes charged, the State presented compelling evidence of Patterson's guilt and we are not convinced that the cumulative effect of the two errors acknowledged in this opinion—the denial of retained counsel of his choice at the preliminary hearing and the admission of the rap lyrics (addressed *supra* note 4)—deprived Patterson of his constitutional right to a fair trial. As a result, we conclude that Patterson's cumulative error challenge is unavailing.

HOLCOMB CONDOMINIUM HOMEOWNERS' ASSOCIATION, INC., A NEVADA NONPROFIT CORPORATION, APPELLANT, *v.* STEWART VENTURE, LLC, A NEVADA LIMITED LIABILITY COMPANY; LUTHER DAVID BOSTRACK, INDIVIDUALLY; MARTHA ALLISON, INDIVIDUALLY; PAUL MCKINZIE, INDIVIDUALLY; AND Q & D CONSTRUCTION, INC., A NEVADA CORPORATION, RESPONDENTS.

No. 57024

April 4, 2013 300 P.3d 124

Appeal from a district court order dismissing a construction defect action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Condominium association brought construction defect action against parties involved in the construction of condominium development. The district court dismissed the action on statute of limitations grounds and denied, as futile, association's motion to amend the complaint. Association appealed. The supreme court, HARDESTY, J., held that: (1) as matter of first impression in the state, a party can contractually agree to a limitations period shorter than that provided by statute in certain circumstances; (2) statute specifically authorizing a contractual reduction of the breach of warranty statute of limitations did not apply to association's negligence-based claims; (3) arbitration agreement that included a provision reducing the statute of limitations was not a ''separate instrument'' within meaning of statute authorizing such a contractual reduction; and (4) determination that contractual provision reducing the statute of limitations was unenforceable required reversal of the district court's denial of association's motion to amend.

Reversed and remanded.

Robert C. Maddox & Associates and *Robert C. Maddox, Nancy A. Cyra, Bruce E. Cyra, Nancy H. Jasculca*, and *Eva G. Segerblom*, Reno, for Appellant.

Hoffman, Test, Guinan & Collier and *David J. Guinan*, Reno, for Respondent Martha Allison.

Hoy & Hoy, PC, and *Michael D. Hoy*, Reno, for Respondent Paul McKinzie.

Kelly L. Turner, Reno, for Respondent Stewart Venture, LLC.

Lee, Hernandez, Landrum, Garofalo & Blake, APC, and *David S. Lee, Natasha A. Landrum*, and *Kelly L. Kindelan*, Las Vegas, for Respondent Q & D Construction, Inc.

Luther David Bostrack, Reno, in Proper Person.

1. Appeal and Error.
   Standard of review on appeal from the district court's dismissal, on statute of limitations grounds, of condominium association's construction defect action against parties involved in the construction of condominium development was that applicable to an order granting a motion to dismiss for failure to state a claim, rather than one awarding summary judgment, even though the district court allowed association, on its motion for reconsideration, to offer testimony to show what evidence it could produce if the motions to dismiss were treated as summary judgment motions, where the district court did not rely on any of the additional evidence in entering its order to dismiss. NRCP 12(b)(5), 56.
2. Pretrial Procedure.
   A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that the plaintiff could prove no set of facts that would entitle him or her to relief; this is a rigorous standard, as the court construes the pleading liberally, drawing every inference in favor of the nonmoving party. NRCP 12(b)(5).
3. Limitation of Actions.
   A district court may dismiss a complaint for failure to state a claim upon which relief can be granted when an action is barred by the statute of limitations. NRCP 12(b)(5).
4. Appeal and Error.
   When the facts are uncontroverted, the application of the statute of limitations is a question of law that the supreme court reviews de novo.
5. Contracts.
   Nevada has long recognized a public interest in protecting the freedom of persons to contract.
6. Limitation of Actions.
   A party may contractually agree to a limitations period shorter than that provided by statute as long as there exists no statute to the contrary, and the shortened period is reasonable and subject to normal defenses, including unconscionability and violation of public policy.
7. Limitation of Actions.
   A contractually modified limitations period is unreasonable if the reduced limitations period effectively deprives a party of the reasonable opportunity to vindicate his or her rights; thus, a limitations provision that requires the plaintiff to bring an action before any loss can be ascertained is per se unreasonable.
8. Limitation of Actions.
   A contractual total waiver of a limitations period is unreasonable per se because it effectively deprives a party of the reasonable opportunity to vindicate his or her rights.
9. Limitation of Actions.
   Statute authorizing a contractual reduction of the breach of warranty statute of limitations to two years if the reduction is in a separate instrument did not apply to condominium association's negligence, negligence per se, and negligent misrepresentation claims against parties involved in the construction of condominium development, and thus, trial court could not rely on statute to find that association's negligence-based claims were time-barred; enforceability, as to those claims, of the reduced statute of limitations contained in arbitration agreement executed by each condo-

minium owner depended on whether the contractually modified limitations period was reasonable. NRS 116.4116.

10. APPEAL AND ERROR.
Statutory interpretation is a question of law that the supreme court reviews de novo.

11. STATUTES.
When interpreting statutes, the court's main concern is the intent of the Legislature.

12. LIMITATION OF ACTIONS.
Arbitration agreement executed by condominium owners in connection with their purchase of condominium units, which included a provision reducing the statute of limitations for construction defect claims to two years, was not a ''separate instrument'' within meaning of statute authorizing such a contractual reduction of the breach of warranty statute of limitations if the reduction is in a separate instrument and, thus, was not effective to reduce the six-year limitations period to two years; arbitration agreement was attached to the purchase contract, and purchase contract's language incorporated the arbitration agreement in three places. NRS 116.4113, 116.4114, 116.4116.

13. LIMITATION OF ACTIONS.
A ''separate instrument'' under statute authorizing a contractual reduction of the breach of warranty statute of limitations to two years if the reduction is in a separate instrument is any legal document defining rights, duties, or liability that is not attached to or incorporated into the primary agreement itself. NRS 116.4116.

14. PLEADING.
Leave to amend pleadings should be freely given. NRCP 15(a).

15. APPEAL AND ERROR.
The supreme court will not disturb a district court's denial of leave to amend absent an abuse of discretion.

16. APPEAL AND ERROR.
Determination that provision in arbitration agreement, executed by condominium owners in connection with their purchase of condominium units, which reduced the statute of limitations for construction defect claims to two years, was unenforceable because it was not contained in a ''separate agreement'' required reversal of the district court's denial, as futile, of condominium association's motion to amend its construction defect complaint against parties involved in the construction of condominium development to add additional claims; the district court's denial was based on its finding that the contractual limitations period barred all claims not commenced within two years. NRS 116.4116.

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider whether statutory limitations periods for constructional defect claims may be contractually modified by parties to residential unit purchase agreements. We conclude that,

in general, statutory limitations periods may be reduced by contract provided there is no statute to the contrary and the reduced limitations period is reasonable and does not violate public policy.

The parties dispute whether a provision in an arbitration agreement validly reduced the limitations period for appellant Holcomb Condominium Homeowners' Association's (HCHA) constructional defect negligence and warranty claims. NRS 116.4116 expressly permits a contractual reduction of its six-year limitations period for warranty claims to not less than two years if, with respect to residential units, the reduction agreement is contained in a ''separate instrument.'' Since the reduction provision is within an arbitration agreement that is attached to and incorporated into a purchase contract, we conclude that the reduction provision does not qualify as a ''separate instrument'' and the arbitration agreement provision is unenforceable for HCHA's breach of warranty claims. As such, the district court improperly dismissed HCHA's breach of warranty claims as contractually time-barred.

We further conclude that the district court improperly relied upon NRS 116.4116, which only governs warranty claims, in dismissing HCHA's negligence-based claims, and in declining to allow HCHA to amend its complaint to add additional claims for intentional conduct on the ground that these claims were also contractually time-barred. Accordingly, we reverse the district court's orders and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

Holcomb Condominiums is a common interest community that was developed by respondent Stewart Venture, LLC. Respondents Paul McKinzie, Luther David Bostrack, and Q & D Construction, Inc., allegedly were involved in the development and construction of the condominiums, while respondent Martha Allison represented both the individual purchasers and Stewart Venture in the sale of the condominiums during July and August, 2002. Appellant HCHA is the homeowners' association for Holcomb Condominiums.

In 2007, HCHA served a notice of constructional defect claims pursuant to NRS 40.645. In 2009, HCHA filed, on behalf of itself and all Holcomb Condominium homeowners, a constructional defect complaint against respondents, alleging a variety of defects and claims for negligence, negligence per se, negligent misrepresentation, and breach of express and implied warranties.

Stewart Venture and Allison moved to dismiss HCHA's complaint pursuant to NRCP 12(b)(5), asserting that the complaint was time-barred by a contractual two-year limitations period found in nearly identical arbitration agreements attached to each of the

homeowner's purchase contracts.[1] The arbitration agreements attached to the purchase contracts contain a provision reducing the applicable statutory limitations periods for constructional defect claims to two years from substantial completion of the homeowner's property. In particular, the provision states

> II. TIME LIMITATIONS TO COMMENCE ACTION FOR DISPUTE
>
> In the event that a Dispute arises, Buyer and Seller hereby waive the statute of limitations and statute of repose commencement requirements contained in Nevada Revised Statutes Chapter 11.190 to 11.206 inclusive, and Chapter 116.4116, and instead agree to submit all Disputes, under the procedures provided herein, within two (2) years from substantial completion of the Buyer's Property within the project. This limitation applies, without limitation, to known or unknown claims, claims which could have or could not have been discovered by a reasonable inspection, and claims which result from willful misconduct or which were fraudulently concealed.

The first lines of each arbitration agreement state that the agreement is a part of the purchase contract. In addition, paragraph 19 of the purchase contract states that the arbitration agreement is ''attached'' and ''incorporated'' into the purchase contract, and paragraph 25 requires the homeowner's initials to confirm that he or she received the arbitration agreement ''incorporated herein and attached hereto.''

The district court found that the arbitration agreements met the ''separate instrument'' requirement of NRS 116.4116 and that the reduced limitations period provision was not unconscionable. Thus, the court dismissed HCHA's complaint as time-barred by the two-year contractual limitations period. The court also denied as futile HCHA's oral request to amend its complaint to add causes of action for willful misconduct and fraudulent concealment based on missing roof underlayment because it found that this claim would also be time-barred by the contractual limitations period.

HCHA then filed a motion for reconsideration of the district court's order and moved in writing to amend its complaint to add causes of action for willful misconduct and fraudulent concealment. HCHA asserted that the proposed claim was the result of

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[1]The parties do not address whether the district court had authority to resolve issues relating to the interpretation of the arbitration agreements even though the homeowners and Stewart Venture agreed to submit future disputes to arbitration. Thus, we do not address whether the issues on appeal should have first been submitted to arbitration pursuant to the arbitration agreements.

newly discovered evidence, which could not have been discovered previously because the roofing shingles were not removed until after the court heard HCHA's original motion. The district court denied both of HCHA's motions. It found that HCHA presented no evidence to alter the court's original findings that the arbitration agreements complied with the ''separate instrument'' requirement of NRS 116.4116, or that the proposed claim would also be time-barred by the contractual limitations period. HCHA now appeals.

DISCUSSION

On appeal, we are asked to determine whether the homeowners and Stewart Venture validly contracted to reduce the limitations periods applicable to HCHA's claims, and whether the district court properly refused to allow new claims for intentional conduct because they also would be barred by the contractual limitations period. To do so, we must determine in the first instance whether statutory limitations periods may be contractually modified. We conclude that, generally, statutory limitations periods may be contractually reduced, as long as there is no statute to the contrary and the reduced limitations period is reasonable and does not violate public policy.

NRS 116.4116 allows parties to contractually reduce the limitations periods for constructional defect warranty claims to two years provided the agreement to do so is contained in a ''separate instrument.'' We determine that the arbitration agreements containing the reduced limitations period that are attached to and incorporated into the purchase contracts do not satisfy the ''separate instrument'' requirement of the statute. Therefore, we conclude that the district court improperly dismissed HCHA's breach of warranty claims as contractually time-barred.

Standard of review

[Headnotes 1-4]

Under NRCP 12(b)(5)'s failure-to-state-a-claim dismissal standard, ''[a] complaint should not be dismissed unless it appears to a certainty that the plaintiff could prove no set of facts that would entitle him or her to relief.'' *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003). This is a rigorous standard, ''as this court construes the pleading liberally, drawing every inference in favor of the nonmoving party.'' *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629, 218 P.3d 847, 850 (2009). ''A court [may] dismiss a complaint for failure to state a claim upon which relief can be granted [when an] action is barred by the statute of limitations.'' *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998); NRCP 12(b)(5). When the facts are uncontroverted, as we must so deem them here, the application of the statute of limitations is a question of law that this court re-

views de novo. *Citizens for Cold Springs*, 125 Nev. at 629, 218 P.3d at 850; *Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996).[2]

Contractual reduction of statutory limitations periods

Whether a party may contractually modify a statutory limitations period is an issue of first impression in Nevada. However, in other jurisdictions, ''it is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.'' *Order of Travelers v. Wolfe*, 331 U.S. 586, 608 (1947); *see, e.g.*, *William L. Lyon & Assoc. v. Superior Court*, 139 Cal. Rptr. 3d 670, 679-80 (Ct. App. 2012); *Country Preferred Ins. Co. v. Whitehead*, 979 N.E.2d 35, 42-43 (Ill. 2012); *Robinson v. Allied Property and Cas. Ins.*, 816 N.W.2d 398, 402 (Iowa 2012); *Creative Playthings v. Reiser*, 978 N.E.2d 765, 769-70 (Mass. 2012); *DeFrain v. State Farm*, 817 N.W.2d 504, 512 (Mich. 2012); *Hatkoff v. Portland Adventist Medical Cent.*, 287 P.3d 1113, 1121 (Or. Ct. App. 2012). The policy underlying this rule is the recognition of parties' freedom to contract. *See Nuhome Investments, LLC v. Weller*, 81 P.3d 940, 945 (Wyo. 2003) (holding that enforcing a contractual limitations period ''comport[s] with the concept of freedom of contract''); *see also Notre Dame v. Morabito*, 752 A.2d 265, 273 (Md. Ct. Spec. App. 2000) (adopting this general rule ''[i]n light of the[ ] well-settled holdings recognizing that parties' freedom to contract should be given effect absent clear policy considerations to the contrary'').

[Headnotes 5, 6]

Because Nevada has long recognized a public ''interest in protecting the freedom of persons to contract,'' *Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967), we join these jurisdictions and hold that a party may contractually agree to a limitations period shorter than that provided by statute as long as there exists no statute to the contrary and the shortened period is reasonable, and subject to normal defenses including unconscionability and violation of public policy. *See generally Rivero v. Rivero*, 125 Nev.

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[2]McKinzie contends that the appropriate standard of review in this matter is the standard applied to an order granting summary judgment under NRCP 56, because after HCHA provided homeowner affidavits in support of its motions for reconsideration, the district court allowed HCHA to offer testimony to show what evidence it could produce if the motions to dismiss were treated as NRCP 56 motions for summary judgment. However, we conclude that the appropriate standard of review is that of an order granting an NRCP 12(b)(5) motion to dismiss, because the district court did not rely on any of HCHA's additional evidence when entering its order to dismiss.

410, 429, 216 P.3d 213, 226 (2009) (''Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy.'').

[Headnotes 7, 8]

A contractually modified limitations period is unreasonable if the reduced limitations period ''effectively deprives a party of the reasonable opportunity to vindicate his or her rights.'' *Hatkoff*, 287 P.3d at 1121; *see also William L. Lyon & Assoc.*, 139 Cal. Rptr. 3d at 680 (''''Reasonable'' in this context means the shortened period nevertheless provides sufficient time to effectively pursue a judicial remedy.' '' (quoting *Moreno v. Sanchez*, 131 Cal. Rptr. 2d 684, 695 (Ct. App. 2003))). Thus, ''a limitations provision that requires the plaintiff to bring an action before any loss can be ascertained is per se unreasonable.''[3] *Furleigh v. Allied Group Inc.*, 281 F. Supp. 2d 952, 968 (N.D. Iowa 2003).

[Headnote 9]

In this case, the district court dismissed HCHA's asserted claims for negligence, negligence per se, negligent misrepresentation, and breach of express and implied warranties. In doing so, it relied upon NRS 116.4116's provisions permitting reduction of the applicable statutory limitations period to two years as long as such reduction is in a ''separate instrument.'' However, NRS 116.4116 only applies to HCHA's breach of warranty claims and does not apply to HCHA's claims for negligence, negligence per se, and negligent misrepresentation. Therefore, we conclude that the district court erred in relying on this statute to find that HCHA's negligence-based claims were time-barred. Accordingly, we reverse the district court's order as to HCHA's negligence-based claims and remand these claims to the district court for it to determine whether the contractually modified limitations period was reasonable given the above factors.[4]

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[3]The provision in the arbitration agreement stated that the statutory limitations periods in NRS 11.190-11.206 and NRS 116.4116 were ''waive[d].'' Although it appears from the language of the provision that the parties actually intended to reduce, and not waive, the limitations periods, a total waiver of a limitations period is unreasonable per se because it ''effectively deprives a party of the reasonable opportunity to vindicate his or her rights.'' *See Hatkoff v. Portland Adventist Medical Cent.*, 287 P.3d 1113, 1121 (Or. Ct. App. 2012).

[4]We note that, on appeal, HCHA argues that the arbitration agreement is unconscionable because the reduced limitations period is unreasonable. Because we conclude that reversal is warranted on other grounds, we do not reach HCHA's unconscionability argument. Further, HCHA does not raise this argument in the context of contractual modification of limitations periods. The parties do not address whether contractual modification of the limitations period for HCHA's negligence claims was prohibited by a statute to the contrary, was unreasonable within the test we have set forth above, or was against public policy.

Because NRS 116.4116 expressly permits reduction of the statutory limitations period to two years, the relevant consideration is whether the reduction complies with the terms of the applicable statute. The factors to be considered for purely contractual modification are therefore not relevant to this analysis. Thus, HCHA's breach of warranty claims will be time-barred if the arbitration agreement otherwise complies with NRS 116.4116's requirements.

NRS 116.4116's ''separate instrument'' requirement

[Headnotes 10, 11]

''Statutory interpretation is a question of law that [this court] review[s] de novo.'' *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 460, 282 P.3d 751, 756 (2012). When interpreting statutes, the court's main concern is the intent of the Legislature. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010).

[Headnote 12]

Respondents argue that the arbitration agreement constitutes a ''separate instrument'' because it is separate from the body of the main agreement. We disagree. NRS 116.4116 permits parties ''to reduce the period of limitation to not less than 2 years'' for breach of warranty claims arising under NRS 116.4113 or NRS 116.4114. NRS 116.4116(1). When residential-use units are involved, such agreements ''must be evidenced by a separate instrument executed by the purchaser.'' *Id*. However, the term ''separate instrument'' is not defined in NRS Chapter 116 or in the Uniform Common Interest Ownership Act (UCIOA). *See* NRS 116.4116; NRS 116.005-116.095 (providing definitions for NRS Chapter 116); Uniform Common Interest Ownership Act §§ 1-103, 4-116 (2009).

[Headnote 13]

Because there is no statutory definition, we must look to the plain meaning of the term ''separate instrument.'' *See Consipio Holding*, 128 Nev. at 460, 282 P.3d at 756. *Black's Law Dictionary* defines ''separate'' as ''individual; distinct; particular; disconnected,'' 1487 (9th ed. 2009), and ''instrument'' as ''[a] written legal document that defines rights, duties, entitlements, or liabilities.'' *Id*. at 869. Applying these definitions, we conclude that a ''separate instrument'' under NRS 116.4116 is any legal document defining rights, duties or liability that is not attached to or incorporated into the primary agreement itself.[5]

Our approach is consistent with that of another court addressing this issue. In *301 Clifton v. 301 Clifton Condominium Association*,

[5]The parties do not argue, and we do not address, whether NRS 116.4116 requires that the reduced limitations provision be in an instrument completely separate from any other instrument (including an arbitration agreement).

the Court of Appeals of Minnesota considered a similar statute adopted from the same provision of the UCIOA. 783 N.W.2d 551, 566-67 (Minn. Ct. App. 2010). The court noted that the *American Heritage College Dictionary* defined ''separate'' as something that is ''set or kept apart; disunited.'' *Id.* at 567. Applying this definition, the court held that an ''attached exhibit'' shortening the limitations period to two years was not a ''separate instrument'' because it was ''incorporated into the purchase agreement by the language of the contract.'' *Id.*

Although the arbitration agreement is an ''instrument'' that defines the parties' rights and liabilities, it is attached to the purchase contract, and the purchase contract's language incorporates the arbitration agreement in three places. First, the opening paragraph of the purchase contract states that it and all of the attached addenda constitute one single agreement; second, paragraph 19 states that the arbitration agreement is ''attached . . . and incorporated'' into the purchase contract; and last, paragraph 25 requires the homeowner's initials to confirm that he or she received the arbitration agreement ''incorporated herein and attached hereto.'' In addition, the first lines of the arbitration agreement state that it is a part of the purchase contract. Thus, the arbitration agreement was not ''distinct'' or ''disconnected'' because it was attached to and incorporated into the purchase contract by the language of the agreement and the purchase contract. Therefore, we conclude that the arbitration agreement is not a ''separate instrument'' under NRS 116.4116.

Because the arbitration agreement is not a ''separate instrument'' under NRS 116.4116, the reduced limitations provision is not enforceable and did not effectively reduce the limitations period to two years for HCHA's breach of warranty claims. *See 301 Clifton*, 783 N.W.2d at 567. Absent valid contractual modification, the limitations period for a breach of warranty claim in a constructional defect action is six years from the date the ''purchaser to whom the warranty is first made enters into possession'' of the unit. NRS 116.4116(1)-(2)(a). As noted above, HCHA provided the first notice of its constructional defect breach of warranty claims five years after substantial completion of the units. Thus, HCHA's breach of warranty claims under NRS 116.4113 and NRS 116.4114 were timely, and the district court improperly dismissed HCHA's breach of warranty claims as time-barred.[6]

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[6]HCHA also asserts that the contractually reduced limitations period does not apply to it because it was not a party to the agreements. Because we reverse and remand the district court's orders on other grounds, we do not reach this issue.

HCHA's motion to amend its complaint

[Headnotes 14, 15]

HCHA argues that the district court abused its discretion by denying as futile the motion to amend its complaint because the contractual limitations period does not apply to HCHA's proposed causes of action for willful misconduct and fraudulent concealment. Leave to amend should be '' 'freely given,' '' *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (quoting NRCP 15(a)), and this court will not disturb a trial court's denial of leave to amend absent an abuse of discretion. *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004).

[Headnote 16]

In this case, the district court denied as futile HCHA's motion to amend its complaint because it found that the contractual limitations period barred all claims not commenced within two years. Because we conclude that this provision was unenforceable, the district court's denial of the motion to amend on this basis was improper. On remand, the district court must determine whether leave to amend should be given.[7]

Accordingly, we reverse and remand this matter to the district court for further proceedings consistent with this opinion.

PICKERING, C.J., and SAITTA, J., concur.

MAJUBA MINING, LTD., A NEVADA CORPORATION, APPELLANT, *v.* PUMPKIN COPPER, INC., NKA NEVADA COPPER, INC., A NEVADA CORPORATION, RESPONDENT.

No. 58149

April 4, 2013 299 P.3d 363

Appeal from a district court order in a quiet title action. Third Judicial District Court, Lyon County; David A. Huff, Judge.

Quiet title action was brought involving mining claims. The district court entered order. Mining claimant appealed, and its adversary moved to dismiss the appeal. The supreme court, CHERRY, J., held that declaration by Bureau of Land Management that mining claimant's unpatented claims were void for failure to pay federal claim maintenance fees rendered the action moot.

Motion granted; dismissed.

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[7]For this same reason, we also reverse the district court's denial of HCHA's second motion to amend its complaint.

Law Offices of John P. Schlegelmilch, Ltd., and *John P. Schlegelmilch*, Yerington, for Appellant.

Erwin & Thompson LLP and *Thomas P. Erwin*, Reno, for Respondent.

1. ACTION; MINES AND MINERALS.
   Declaration by Bureau of Land Management that mining claimant's unpatented mining claims were forfeit and void by operation of law for failure to pay federal claim maintenance fees rendered moot pending quiet title action against another mining company; claimant no longer had mining claims to protect in a quiet title action. Omnibus Budget Reconciliation Act of 1993, § 10104, 30 U.S.C. § 28i; 43 C.F.R. §§ 3830.91(a)(3), 3834.11(a)(2).
2. ACTION.
   The supreme court has a duty to decide actual controversies by a judgment that can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law that cannot affect the matter in issue before it.
3. ACTION.
   Cases presenting live controversies at the time of their inception may become moot by the occurrence of subsequent events.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

In this opinion, we consider whether a mining claimant's failure to comply with federal claim maintenance fees renders a controversy over superior title moot. This appeal was taken from a district court order in a quiet title action. While this appeal was pending, the Bureau of Land Management (BLM) issued two separate decisions declaring 27 unpatented mining claims asserted by appellant Majuba Mining, Ltd., forfeit and void by operation of law because Majuba failed to comply with the statutory mining claim maintenance requirement. 30 U.S.C. § 28i (2006) (''Failure to pay the claim maintenance fee . . . shall conclusively constitute a forfeiture of the unpatented mining claim . . . by the claimant and the claim shall be deemed null and void by operation of law.''); 43 C.F.R. § 3830.91(a)(3) (2011) (claimants will forfeit their mining claims or sites by failing to ''[p]ay the annual maintenance fee on or before the due date''). Under federal law, Majuba was required to pay an annual mining claim maintenance fee for each of its asserted claims. 43 C.F.R. § 3834.11(a)(2) (2011) (a claimant ''must pay an annual maintenance fee on or before September 1st of each year in order to maintain a mining claim or

site for the upcoming assessment year''). For assessment year 2012, Majuba failed to deliver a maintenance fee to the BLM for each of its 27 asserted claims. As a result of Majuba's inaction in this regard, respondent Pumpkin Copper, Inc., filed a motion to dismiss the appeal, arguing that the appeal was rendered moot when the BLM declared Majuba's asserted claims forfeit and void by operation of law.

[Headnotes 1-3]

We must determine whether the controversy over superior title is moot. *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (providing that ''[t]he question of mootness is one of justiciability''). We have a duty to ''decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before [us].'' *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). We recognize ''that cases presenting live controversies at the time of their inception may become moot by the occurrence of subsequent events.'' *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004). Here, the controversy that existed at the beginning of this litigation concerning superior title is no longer at issue because Majuba's asserted claims do not exist as a matter of law and, thus, Majuba no longer has mining claims to protect in a quiet title action. *Cf. Daly v. Lahontan Mines Co.*, 39 Nev. 14, 23, 151 P. 514, 516 (1915) (a plaintiff must have rights to real property and must redeem those rights within the time period proscribed by statute in order to maintain a claim for quiet title). We need not reach Majuba's arguments on appeal because we conclude that this appeal is moot. *See All Minerals Corp. v. Kunkle*, 105 Nev. 835, 838, 784 P.2d 2, 5 (1989); *Pac. L. Co. v. Mason Val. M. Co.*, 39 Nev. 105, 113-14, 153 P. 431, 433-34 (1915). Accordingly, Pumpkin Copper's motion to dismiss is granted, and we dismiss this appeal.

HARDESTY and PARRAGUIRRE, JJ., concur.

JOSEPH TRUESDELL, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 58628

April 4, 2013 304 P.3d 396

Appeal from a judgment of conviction, pursuant to a jury verdict, of invasion of the home in violation of a temporary protection order. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Defendant was convicted in the district court of home invasion in violation of temporary protection order (TPO). Defendant appealed. The supreme court, GIBBONS, J., held that: (1) as matter of first impression, defendant could not collaterally attack validity of TPO in subsequent criminal trial for home invasion in violation of TPO; (2) evidence was sufficient to support conviction; (3) home invasion statute was not unconstitutionally vague; (4) trespass was not lesser included offense of home invasion; (5) malicious injury to property was not lesser included offense of home invasion; (6) statute criminalizing violation of TPO did not require proof that defendant understood TPO, only that he willfully violated it; (7) prosecutor's comment that defendant was attempting to confuse jury was improper argument; (8) improper comments during closing argument to effect that defendant was trying to confuse jury did not substantially affect verdict; (9) enhancement to sentence for home invasion based on commission of felony in violation of TPO was not plain error; and (10) order that defendant pay $500 fee to Indigent Defense Fund was not plain error.

Affirmed.

[Rehearing denied May 31, 2013]

[En banc reconsideration denied July 18, 2013]

Philip J. Kohn, Public Defender, and *Howard Brooks* and *Sharon G. Dickinson*, Deputy Public Defenders, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, for Respondent.

1. PROTECTION OF ENDANGERED PERSONS.
   Defendant could not collaterally attack validity of temporary protection order (TPO) in subsequent criminal trial for violation of TPO.
2. CRIMINAL LAW.
   The interpretation of a statute is a question of law that the supreme court reviews de novo.
3. CRIMINAL LAW.
   The supreme court reviews issues relating to the constitutionality of a statute de novo.

4. Protection of Endangered Persons.
   Until a restraining order is dissolved or modified or expires by its terms, it must be obeyed. NRS 33.080(2).
5. Protection of Endangered Persons.
   Evidence was sufficient to support conviction for home invasion in violation of temporary domestic violence protection order (TPO), which required defendant to stay at least 100 yards away from complainant's apartment but allowed him to return to apartment a single time with a police officer to collect his personal belongings; proof of service of TPO, signed by police officer and containing defendant's signature and fingerprint, indicated that officer served defendant, who thereafter went to complainant's apartment, kicked in door, and entered complainant's bedroom. NRS 33.020, 193.166(1)(a), 205.067(1).
6. Constitutional Law; Trespass.
   Home invasion statute was not unconstitutionally vague based on defendant's claims that it did not contain intent requirement, where it was general intent crime. NRS 205.067(1).
7. Constitutional Law; Trespass.
   Home invasion, which prohibited person from entering inhabited dwelling of another with permission of owner, resident, or lawful occupant was not unconstitutionally vague by not specifically requiring that defendant enter home of another; statute, by its plain language did not criminalize home invasion by a person who forcibly entered his or her own home if he or she was lawful occupant or resident of home. NRS 205.067(1).
8. Criminal Law.
   The supreme court will only find a criminal law void for vagueness when the statute fails to provide sufficient notice of the conduct that is prohibited or when the statute fails to provide definitive standards and results in arbitrary enforcement.
9. Indictment and Information.
   Trespass was not lesser included offense of home invasion, where trespass required proof that defendant entered any building of another with specific intent to ''vex or annoy the owner or occupant thereof, or to commit any unlawful act,'' whereas home invasion required only proof that defendant's forcible entry was without permission of owner, resident, or lawful occupant. NRS 205.067(1), 207.200(1)(a).
10. Indictment and Information.
    Malicious injury to property was not lesser included offense of home invasion, where malicious injury to property required proof of element that home invasion did not, namely, that property belonged to another. NRS 205.067(1), 206.310.
11. Criminal Law.
    The supreme court examines claims of prosecutorial misconduct by first determining whether alleged prosecutorial behavior was improper; if the conduct was improper, the court then reviews the comments for harmless error.
12. Criminal Law.
    When prosecutorial misconduct does not involve constitutional error, the supreme court only determines whether the error substantially affected the jury's verdict.
13. Criminal Law.
    While the evidence must support a prosecutor's statements relating to the facts of the case, the prosecutor may also assert inferences from the evidence and argue conclusions on disputed issues.

14. PROTECTION OF ENDANGERED PERSONS.
    Statute criminalizing violation of temporary protection order (TPO) did not require proof that defendant understood TPO, only that defendant willfully violated it. NRS 193.166(1)(a).
15. CRIMINAL LAW.
    Prosecutor's comment that defendant was attempting to confuse jury was improper argument in trial for home invasion in violation of temporary restraining order.
16. CRIMINAL LAW.
    Prosecutor's improper comments during closing argument to effect that defendant was trying to confuse jury did not substantially affect verdict in trial for home invasion in violation of temporary protection order, where comments on confusion were very limited and State immediately moved on after district court sustained defendant's objection to comments.
17. CRIMINAL LAW.
    Enhancement to sentence for home invasion based on commission of felony in violation of temporary protection order (TPO) was not plain error based on defendant's claim that it violated prohibition against double jeopardy because it punished same conduct, where home invasion did not require proof that defendant violated TPO. U.S. CONST. amend. 5; NRS 193.166(1)(a), 205.067(1).
18. TRESPASS.
    A person does not have to violate a temporary protection order in order to commit home invasion; instead, a person must forcibly enter an inhabited dwelling without permission. NRS 205.067(1).
19. TRESPASS.
    Although a home invasion may occur in the course of the defendant's violation of a temporary protection order (TPO), a defendant may also invade a home in a variety of different ways not involving a TPO. NRS 205.067(1).
20. CRIMINAL LAW.
    Order that defendant pay $500 fee to Indigent Defense Fund was not plain error based on the district court's failure to make express findings regarding defendant's ability to pay and burden that payment of fee would cost, absent any showing as to how payment of fee affected defendant's substantial rights. NRS 178.3975(1).

Before GIBBONS, PARRAGUIRRE and DOUGLAS, JJ.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider whether a party may collaterally attack a temporary protective order in a separate criminal proceeding for violation of that order. We conclude that a party must initially challenge the validity of a temporary protective order under NRS 33.080(2) before the court that issued the order. Further, the party may not collaterally attack the order's validity in a separate proceeding. In light of this, and because all of appellant's other arguments on appeal lack merit, we affirm the district court's judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Appellant Joseph Truesdell lived in an apartment with Mika Bennett and her two children in Las Vegas. The apartment lease did not list Truesdell as a resident of the address. On October 26, 2010, Truesdell struck Bennett during an argument. He was arrested and jailed and then later pleaded no contest to the domestic violence charges against him.

On October 28, 2010, Bennett contacted SafeNest, a domestic violence advocate organization, to obtain a temporary protective order (TPO) against Truesdell. The same day, the district court granted a five-day TPO against Truesdell based on a typed application that contained the details Bennett relayed to SafeNest but did not state who filled out the application or how the district court received it. The TPO required Truesdell to stay at least 100 yards away from Bennett's apartment but allowed him to return a single time with a police officer to collect his personal belongings.

Corrections Officer Theodore Wylupski served Truesdell with the TPO at the Clark County Detention Center the same day. On November 1, 2010, while the TPO was still valid, Truesdell was released from jail and went back to the apartment without a police officer. Despite the TPO, Bennett allowed Truesdell to enter the apartment, where they argued for an hour and a half. Truesdell then left at Bennett's request.

On November 2, 2010, Truesdell returned to the apartment and started knocking on the door. Bennett called 911. Truesdell then began kicking the door. Bennett never gave Truesdell permission to enter the apartment and did not unlock the door. Eventually, he kicked in the door and walked Bennett into the bedroom where her two children slept, but hastily left a few minutes later after several neighbors approached the apartment. Thereafter, police officers found and arrested Truesdell.

On November 4, 2010, the State filed a complaint against Truesdell, alleging he committed one count of invasion of the home. After the preliminary hearing, where Bennett testified that she called SafeNest to obtain the TPO against Truesdell, the State filed an information against Truesdell alleging he committed invasion of the home in violation of a TPO.

On the first day of Truesdell's three-day trial, he requested a continuance in order to litigate the validity of the TPO. Truesdell claimed that he was unaware of the TPO application until a day or two before trial, when the State provided him with a copy. Based on that application, Truesdell argued the procedure for obtaining a TPO by phone violated his due process rights. The district court denied his motion, but told the parties they could address the issue prior to sentencing, as the constitutionality of a TPO was a question of law.

During the trial, Bennett testified about the events of November 2, 2010, and identified Truesdell as the one who kicked down her door. Officer Wylupski also testified that he did not specifically recall serving Truesdell with the TPO, but was able to identify his signature on a proof of service that also contained Truesdell's signature and fingerprint. Officer Wylupski also testified to the general procedure he follows when serving a person with a TPO. In its closing argument, the State argued that the jury did not have to find that Truesdell understood the TPO in order to determine whether he committed home invasion in violation of a TPO. Instead, the State asserted that the jury only had to find that Truesdell willfully violated the TPO. The district court allowed these comments over Truesdell's objections. Following the closing arguments, the jury found by special verdict that Truesdell was guilty of invasion of the home in violation of a TPO.

After the trial, Truesdell did not file a motion with the district court regarding the TPO's validity and did not address the issue during his sentencing. The district court imposed a 12- to 48-month sentence on Truesdell for the home invasion charge and a concurrent 12- to 36-month sentence for the violation of the TPO. The district court also ordered Truesdell to pay $500 to the Indigent Defense Fund. He now appeals.

DISCUSSION

Because a party cannot collaterally attack a TPO in a separate criminal proceeding and because the other issues raised by Truesdell lack merit, we affirm his conviction.

Truesdell may not collaterally attack the TPO's validity in a subsequent prosecution for violating the TPO

[Headnotes 1-3]

Truesdell argues that SafeNest's procurement of the TPO on Bennett's behalf, after speaking with her by telephone, violates the procedure set forth in NRS 33.020(5) and violates his due process rights. The interpretation of a statute is a question of law that we review de novo. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009). We also review issues relating to the constitutionality of a statute de novo. *State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011).

Whether a party may collaterally attack the validity of a TPO in a subsequent criminal proceeding for violation of that TPO is a question of first impression in Nevada. We take this opportunity to clarify that a party may not collaterally attack the validity of a TPO in a subsequent criminal proceeding based on violation of the TPO.

Many jurisdictions follow the collateral bar rule, which precludes a party from collaterally attacking a protection order in a later proceeding for violating the order, even to question the constitutionality of the statute that authorized the protection order. *See State v. Chavez*, 601 P.2d 301, 302 (Ariz. Ct. App. 1979) (indicating that parties could not collaterally attack the constitutionality of an injunction by an appeal from their convictions of criminal contempt for violating that injunction); *State v. Grindling*, 31 P.3d 915, 919 (Haw. 2001) (concluding that the defendant could not collaterally attack the underlying factual basis of a temporary restraining order in a later criminal proceeding for violating the order); *Wood v. Com.*, 178 S.W.3d 500, 512-13 (Ky. 2005) (concluding that appellant could not collaterally attack the validity of an emergency protective order in a later proceeding for violating that order and this preclusion did not violate appellant's due process rights because a statute allowed appellant to directly challenge the order); *State v. Small*, 843 A.2d 932, 935 (N.H. 2004) (" 'The general underlying premise [against collateral attacks] is that a person subject to an injunctive order . . . should be bound to pursue any objection to the order through the constituted judicial process available for that purpose.' " (quoting *State v. Grondin*, 563 A.2d 435 (N.H. 1989))); *City of Seattle v. May*, 256 P.3d 1161, 1163-64 (Wash. 2011) (concluding that the collateral bar rule prohibited a defendant from challenging the validity of permanent domestic violence order in a later prosecution for violation of that order, unless the defendant could show that the order was void).

Other courts, however, have concluded that such collateral attacks on a court order are permitted in certain circumstances. *See People v. Gonzalez*, 910 P.2d 1366, 1373-76 (Cal. 1996) (interpreting California's criminal contempt statute and determining that a person may challenge the constitutional validity of a court order in a later contempt proceeding); *Gilbert v. State*, 765 P.2d 1208, 1209-11 (Okla. Crim. App. 1988) (addressing the defendant's vagueness arguments on a domestic violence statute and due process claims relating to the issuance of an emergency protective order in an appeal from an order revoking the defendant's suspended sentences based on continued violations of the order); *State v. Orton*, 904 P.2d 179, 182 (Or. Ct. App. 1995) (concluding that the collateral bar doctrine could not preclude the defendant from raising issue of whether statute pertaining to a violation of a protection order was unconstitutionally vague because the issue was not susceptible to litigation during the proceeding when the order was issued).

Although Nevada law allows a party to collaterally attack prior convictions that are offered by the State to prove the defendant is a habitual criminal or to enhance a charge to a felony, *see Hobbs*

v. State, 127 Nev. 234, 241-42, 251 P.3d 177, 181-82 (2011) (reviewing validity of defendant's prior misdemeanor convictions that were used to enhance charged offense to a felony under NRS 200.485); *Arajakis v. State*, 108 Nev. 976, 982-83, 843 P.2d 800, 804 (1992) (examining defendant's claims relating to the validity of prior convictions used to adjudicate and sentence defendant as habitual criminal), a collateral attack on a court order in a later proceeding that involves a violation of that order presents a different set of circumstances.

First, in certain circumstances involving an offense enhancement, the validity of the prior conviction is a necessary element that the State had to prove in order to enhance an offense. *See, e.g.*, NRS 200.485(4) (requiring the State to prove facts of a prior offense for battery constituting domestic violence in order for offense enhancement to be imposed). In contrast, the validity of a TPO is not an element that the State must prove for the crime of home invasion or for a sentence enhancement for the violation of a TPO. *See* NRS 193.166(1)(a); NRS 205.067(1).

[Headnote 4]

Second, the enhancement cases do not implicate the policy behind the collateral bar rule—that a court order must be obeyed so long as it remains in effect, and therefore, disobedience results in a violation of the order. *See Wood*, 178 S.W.3d at 512-13; *Small*, 843 A.2d at 935. Nevada law provides a means for a party to challenge a TPO issued against him or her in the court that issued the order. *See* NRS 33.080(2) (''On 2 days' notice to the party who obtained the temporary order, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.''). Until the order is dissolved or modified or expires by its terms, it must be obeyed.

Therefore, we conclude a party must challenge a TPO's validity before the court that issued the order and may not collaterally attack the TPO's validity in a subsequent prosecution for its violation. As Truesdell did not challenge the TPO in the issuing court, we cannot consider his arguments pertaining to the TPO's validity in this appeal.[1]

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[1]Truesdell alleges that the district court abused its discretion in refusing to grant a continuance. He requested the continuance in order to investigate the constitutional issues that the TPO raised. However, because the issue of the TPO's validity was a question of law, we conclude Truesdell was not prejudiced by this action. *See Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010) (explaining that in order to demonstrate a district court's abuse of discretion when denying a continuance, the challenging party must demonstrate the denial had a prejudicial effect on the case).

The other issues Truesdell raises on appeal also lack merit

Sufficient evidence existed to convict Truesdell of home invasion in violation of a TPO

[Headnote 5]

Truesdell claims that the State failed to prove beyond a reasonable doubt that he committed home invasion in violation of a TPO because (1) the TPO was invalid, (2) Bennett waived any claim of a TPO violation by allowing him to enter the apartment the previous night, and (3) the evidence does not support that Officer Wylupski served Truesdell with the TPO or that Truesdell understood the TPO's contents. We disagree and conclude that, viewing the evidence in the light most favorable to the prosecution, a rational juror could have been convinced of Truesdell's guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Middleton v. State*, 114 Nev. 1089, 1102, 968 P.2d 296, 306 (1998).

NRS 205.067(1) states, ''A person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home.'' A district court may impose a sentence enhancement for a TPO violation when an individual commits a felony in violation of a TPO ''against domestic violence issued pursuant to NRS 33.020.'' NRS 193.166(1)(a).

Bennett obtained a five-day TPO against Truesdell on October 28, 2010, that prohibited him from being within 100 yards of the apartment. The proof of service, which contains Officer Wylupski's signature, as well as Truesdell's signature and fingerprint, demonstrates that an officer served Truesdell with the TPO. Officer Wylupski also testified as to the procedures that he generally follows when serving a person with a TPO. Truesdell did not challenge the validity of the TPO in the issuing court; and on November 2, 2010, prior to the TPO's expiration, he went to the apartment where Bennett was living and forcibly entered the apartment without permission in violation of the TPO. Based on this evidence, a rational trier of fact could have found the essential elements of home invasion in violation of a TPO beyond a reasonable doubt. *See Middleton*, 114 Nev. at 1102, 968 P.2d at 306.

Nevada's home invasion statute is constitutional

[Headnotes 6-8]

Truesdell also argues that NRS 205.067(1), the home invasion statute, is unconstitutionally vague because it does not contain an intent requirement and fails to state that a person must enter the

home of another. We disagree and review for plain or constitutional error because Truesdell failed to object below. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008). We will only find a criminal law void for vagueness when the statute fails to provide sufficient notice of the conduct that is prohibited or when the statute fails to provide definitive standards and results in arbitrary enforcement. *State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011).

We have previously stated that invasion of the home is a general intent crime. *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005) (referring to home invasion as a general intent crime), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1016, 195 P.3d 315, 317 (2008). Therefore, the statute contains an intent requirement. Furthermore, the plain language of NRS 205.067(1) requires that a person ''forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant.'' Therefore, a person cannot commit the crime of home invasion by forcibly entering his or her own home if that person is a lawful occupant or resident of the home. NRS 205.067(1) consequently provides sufficient notice of the conduct that it prohibits and does not encourage arbitrary enforcement.[2]

The district court did not abuse its discretion by refusing to approve Truesdell's jury instructions

[Headnotes 9, 10]

Truesdell argues that the district court abused its discretion by denying his proposed jury instructions for trespass and malicious destruction of private property as lesser included offenses of home invasion. We disagree because trespass and malicious destruction of property are not lesser included offenses of home invasion. *See Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1266 n.22 & 1269, 147 P.3d 1101, 1107 n.22 & 1109 (2006). Although we characterized trespass as a ''lesser offense'' to invasion of the home in *Knight v. State*, we did not specifically state whether it was a lesser included or lesser related offense of home invasion. 116 Nev. 140, 142-43, 993 P.2d 67, 69-70 (2000). Trespass contains an element that is not part of the home invasion

[2]Truesdell claims the district court committed plain error by failing to sua sponte bifurcate the trial because the evidence relating to the TPO created substantial prejudice against him by implying prior criminal misconduct. We disagree and conclude that Truesdell has not demonstrated that the failure to bifurcate the trial based on the TPO violation affected his substantial rights, as the evidence was sufficient to convict him of home invasion without the TPO. *See Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008) (when a defendant fails to raise the issue below, this court reviews for plain error and will only reverse when clear error affects the defendant's substantial rights).

statute: that a person goes into any building of another with the specific intent to ''vex or annoy the owner or occupant thereof, or to commit any unlawful act.'' NRS 207.200(1)(a). Home invasion does not require forcible entry into the dwelling of another, only that the forcible entry occurs without permission. NRS 205.067(1). Therefore, we conclude trespass is not a lesser included offense of home invasion. Likewise, malicious injury to property contains an element that home invasion does not: that the property belongs to another. NRS 206.310. Home invasion only requires a forcible entry of an inhabited dwelling, not necessarily of another.

The majority of the prosecutor's statements were proper and any comments that were improper did not affect Truesdell's conviction

[Headnotes 11, 12]

Truesdell contends that the State committed prosecutorial misconduct during closing arguments by mentioning facts not in evidence, misstating the law, and disparaging the defense. We disagree. We examine claims of prosecutorial misconduct by first determining whether the prosecutor's behavior was improper. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). If the conduct was improper, we next review the comments for harmless error. *Id*. When prosecutorial misconduct does not involve constitutional error, we only determine whether the error substantially affected the jury's verdict. *Id*. at 1189, 196 P.3d at 476.

[Headnotes 13, 14]

While the evidence must support a prosecutor's statements relating to the facts of the case, the prosecutor may also assert inferences from the evidence and argue conclusions on disputed issues. *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005). Here, the prosecutor's arguments regarding the service of the TPO were reasonable inferences from the evidence and do not amount to improper conduct. The prosecutor's statement that the State only had to prove that Truesdell received service of the TPO correctly reflected the law. NRS 193.166(1)(a) does not require the State to prove that Truesdell understood the TPO, only that he willfully violated the TPO. Therefore, these comments were proper.

[Headnotes 15, 16]

On the other hand, the prosecutor's statements that the defense was attempting to confuse the jury amounted to misconduct, but the comments did not substantially affect the verdict. *See Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008) (a prosecutor's disparagement of defense counsel or the legitimate tactics of defense counsel is improper conduct). The State's comments on

confusion were very limited and after the district court sustained Truesdell's objection, the State immediately moved on. Therefore, we conclude that while improper, the State's remarks constitute harmless error and did not substantially affect the jury's verdict.

The district court did not plainly err when imposing the sentence enhancement for the TPO violation

[Headnote 17]

Truesdell argues that his conviction violates due process, the Double Jeopardy Clause, and constitutes cruel and unusual punishment because the sentence enhancement for the TPO violation punishes the same conduct that the State relied upon to prove that he committed home invasion. We disagree and review this matter for plain error since Truesdell failed to object to the district court's imposition of a sentence enhancement for the TPO violation. *See Mclellan*, 124 Nev. at 269, 182 P.3d at 110.

[Headnotes 18, 19]

Under NRS 205.067(1), a person does not have to violate a TPO in order to commit home invasion; instead, a person must forcibly enter an inhabited dwelling without permission. Although a home invasion may occur in the course of the defendant's violation of a TPO, a defendant may also invade a home in a variety of different ways not involving a TPO. *See Cordova v. State*, 116 Nev. 664, 667-68, 6 P.3d 481, 483-84 (2000) (determining that a defendant's sentence enhancement pursuant to NRS 193.165(3) was not improper because use of a deadly weapon is not a necessary element of second-degree murder because a person could commit the crime in a variety of ways not involving a deadly weapon). Therefore, the district court did not commit plain error by applying the sentence enhancement under NRS 193.166(1)(a) for commission of a felony in violation of a TPO against domestic violence.

The district court did not plainly err by ordering Truesdell to pay $500 to the Indigent Defense Fund

[Headnote 20]

Truesdell alleges the district court committed plain error by ordering him to pay $500 to the Indigent Defense Fund without making any findings regarding his ability to pay such an amount, or the reasons why the amount was appropriate. We disagree and review for plain error since Truesdell failed to object to the district court's imposition of the fee. *See Mclellan*, 124 Nev. at 269, 182 P.3d at 110.

A district court may order a defendant to pay all or part of the expenses that the state incurred by providing the defendant with an

attorney, but must consider the defendant's financial resources and the burden the payment will cause. NRS 178.3975(1). While the district court in this case did not make specific findings when ordering Truesdell to pay the Indigent Defense Fund, he does not demonstrate how this payment affects his substantial rights.[3] Therefore, we conclude the district court did not commit plain error by requiring Truesdell to pay $500 to the Indigent Defense Fund.[4]

We have considered Truesdell's remaining arguments and conclude they are without merit. Accordingly, we affirm the district court's judgment of conviction.

PARRAGUIRRE and DOUGLAS, JJ., concur.

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[3]NRS 178.3975(3) allows Truesdell to petition the district court for relief from this reimbursement obligation at any time. *See Taylor v. State*, 111 Nev. 1253, 1259, 903 P.2d 805, 809 (1995) (noting that NRS 178.3975 provides adequate safeguards to prevent an indigent defendant from being required to pay for his defense), *overruled on other grounds by Gama v. State*, 112 Nev. 833, 836, 920 P.2d 1010, 1013 (1996).

[4]We reject Truesdell's claim that cumulative error warrants reversal. *See Rose v. State*, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007) (outlining factors for cumulative error).