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.

ROCK BAY, LLC; AND MAYBOURNE, INC., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE STEFANY MILEY, DISTRICT JUDGE, RESPONDENTS, AND REDWOOD RECOVERY SERVICES, LLC; AND ELEVENHOME LIMITED, REAL PARTIES IN INTEREST.

No. 61646

April 4, 2013 298 P.3d 441

Original petition for writ of prohibition challenging district court orders refusing to quash subpoenas as to petitioners.

Limited liability company (LLC) and other company, which were not parties to underlying litigation, petitioned for writs of prohibition challenging district court orders refusing to quash subpoenas filed by judgment creditors seeking financial records. The supreme court, HARDESTY, J., held that: (1) relationship between the judgment debtor and the nonparty LLC raised reasonable suspicion as to the good faith of asset transfers between the two such that judgment creditor was entitled to conduct discovery of LLC's assets, (2) there was nothing about the relationship between com-

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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).

pany and judgment debtor that raised suspicion sufficient to allow judgment creditors access to company's financial records, and (3) judgment creditors were entitled to subpoena bank records of LLC.

Petition denied in part and granted in part.

Gordon Silver and *Eric D. Hone* and *Joel Z. Schwarz*, Las Vegas, for Petitioners.

Jolley Urga Wirth Woodbury & Standish and *L. Christopher Rose* and *Brian C. Wedl*, Las Vegas, for Real Parties in Interest.

1. PROHIBITION.
   A writ of prohibition is an extraordinary remedy, and therefore the decision to entertain a petition lies within the supreme court's discretion.
2. PROHIBITION.
   A petitioner for a writ of prohibition bears the burden of demonstrating that extraordinary relief is warranted.
3. PROHIBITION.
   A writ of prohibition may be granted when the district court exceeds its jurisdiction; thus, it is an appropriate remedy for the prevention of improper discovery. NRS 34.320.
4. PROHIBITION.
   The supreme court would consider petition for writ of prohibition challenging district court orders refusing to quash subpoenas filed by judgment creditors seeking financial records on nonparties to underlying litigation; an appeal was not available because the petitioners were not parties to the original action and because a post-judgment order denying a motion to quash was not substantively appealable. NRS 34.170, 34.320; NRAP 3A(a), (b).
5. COURTS.
   When interpreting Nevada's Rules of Civil Procedure, the supreme court turns to the rules of statutory interpretation.
6. APPEAL AND ERROR.
   Statutory interpretation is a question of law that is reviewed de novo.
7. STATUTES.
   When a statute is clear and unambiguous, the court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.
8. EXECUTION.
   Obtaining post-judgment discovery from nonparties is generally limited to a judgment debtor's assets, and a judgment creditor may not inquire into the nonparties' own assets. NRCP 69(a).
9. COURTS; EXECUTION.
   Statute allowing for post-judgment discovery to aid in the execution of judgment is modeled after its federal counterpart, and thus, cases interpreting the federal rule are strongly persuasive. NRCP 69(a).
10. EXECUTION.
    Because the purpose of post-judgment discovery is to locate the judgment debtor's assets, discovery of a nonparty's assets is permissible if it will lead to discovery of hidden or concealed assets of the judgment debtor. NRCP 69(a).

11. EXECUTION.
    Discovery of a nonparty's assets under rule allowing for post-judgment discovery to aid in execution of judgment is permissible in certain limited circumstances; these circumstances include a situation where the relationship between the judgment debtor and the nonparty is sufficient to raise a reasonable doubt about the bona fides of the transfer of assets between them, or where the nonparty is the alter ego of the judgment debtor. NRCP 69(a).
12. EXECUTION.
    Relationship between the judgment debtor and the nonparty limited liability company (LLC) raised reasonable suspicion as to the good faith of asset transfers between the two such that judgment creditor was entitled to conduct discovery of LLC's assets; judgment debtor reserved the name for LLC in Nevada, there was evidence of money being transferred between LLC's and the judgment debtor's bank accounts, LLC was voluntarily dissolved shortly after the judgment creditors registered their judgment in Nevada, and LLC was registered as doing business under the name of one of the judgment debtor entities. NRCP 69(a).
13. EXECUTION.
    There was nothing about the relationship between company and judgment debtor that raised suspicion sufficient to allow judgment creditors access to company's financial records; there was no evidence that company ever held or transferred assets with the judgment debtor or that company was debtor's alter ego. NRCP 69(a).
14. EXECUTION; PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
    In the context of post-judgment discovery, a nonparty's privacy interests must be balanced against the need of the judgment creditor for the requested information; thus, a nonparty's financial assets are generally protected where the information sought was critical to the financial health of the nonparty's business and was being requested by a direct competitor. NRCP 69(a).
15. EXECUTION; PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
    For purposes of post-judgment discovery, the need of a judgment creditor to examine a nonparty's financial records outweighs the nonparty's privacy interest when there are reasonable doubts as to the good faith of the transfer of assets between the nonparty and the judgment debtor, and the judgment creditor is not a competitor of the nonparty. NRCP 69(a).
16. EXECUTION.
    Judgment creditors were entitled to subpoena bank records of limited liability company (LLC) pursuant to post-judgment discovery rule in creditors' effort to execute judgment; the judgment creditors were not competitors of LLC, and the financial records requested from bank were relevant and pertained to financial account activity that occurred throughout the underlying litigation. NRCP 69(a).

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

OPINION

By the Court, HARDESTY, J.:

In this opinion, we must determine when discovery of a nonparty's assets is permissible under NRCP 69(a), which permits

post-judgment discovery in aid of execution of a judgment. We conclude that discovery of a nonparty's assets under NRCP 69(a) is not permissible absent special circumstances, which include, but are not limited to, those in which the relationship between the judgment debtor and the nonparty raises reasonable suspicion as to the good faith of asset transfers between the two, or in which the nonparty is the alter ego of the judgment debtor.

FACTUAL AND PROCEDURAL HISTORY

In March 2011, real parties in interest Redwood Recovery Services, LLC, and Elevenhome Limited (collectively, the judgment creditors) obtained judgments in Florida against Jeffrey Kirsch and various entities that he created throughout the United States (collectively, the judgment debtors).[1] The judgment debtors form limited liability companies with third-party investor funds and purchase pools of residential mortgages, which are then resold for a profit. According to the judgment creditors, the judgments were based on the judgment debtors' unfulfilled promises to pay back promissory notes and obligations owed under a settlement agreement obtained in March 2008 and amended in August 2008.

In addition to the judgment debtor entities, Kirsch created other companies, including Rock Bay, which is a small limited liability company that administers pools of investor-purchased residential mortgages. Rock Bay was organized in Delaware in August 2008, around the time that the amended settlement agreement was signed, and that same year, Kirsch reserved the name and registered Rock Bay as a Nevada company. Rock Bay was listed as ''doing business as'' American Residential Equities, LLC, which is the name of one of the judgment debtors.

According to the 2010 and 2011 annual lists of officers and directors filed with the Secretary of State, Rock Bay's managing member is Maybourne, which is a Nevada corporation organized in 2008 by the judgment debtors' in-house counsel. Kirsch was listed as an officer of Maybourne, and he signed Rock Bay's 2009 initial list as Maybourne's president and the 2010 annual list as Rock Bay's authorized signatory.

After the Florida litigation began, a series of monetary transfers occurred between Rock Bay and the judgment debtors. In December 2011, when the judgment creditors were unsuccessful in executing their Florida judgments on the judgment debtors' assets, they domesticated the Florida judgments in Nevada. Rock Bay was voluntarily dissolved by Kirsch approximately one week later. Undeterred, the judgment creditors served a subpoena on the Las Vegas accounting firm of McNair & Associates, which performed

[1]The judgment debtors are not parties to this writ proceeding.

accounting services for the judgment debtors, Rock Bay, and Maybourne. The subpoena sought all McNair records related to the judgment debtors, Rock Bay, and Maybourne.

Rock Bay and Maybourne moved to quash the McNair subpoena on the ground that they were not parties to the underlying litigation. The district court denied the motion to quash because it found that the relationship between Rock Bay and the judgment debtors raised reasonable suspicion of good faith as to the asset transfers because Kirsch had reserved Rock Bay's name in Nevada, there were multiple transfers of money between Rock Bay and the judgment debtors after the Florida litigation began, and Rock Bay was voluntarily dissolved shortly after the Florida judgments were registered in Nevada. The district court further found that there was a reasonable inference of a relationship between Maybourne and the judgment debtors because Maybourne has the same address as the judgment debtors, Maybourne's incorporator was in-house counsel for the judgment debtors, and Kirsch was initially registered as a corporate officer of Maybourne. As such, the district court declined to quash the McNair subpoena as to Rock Bay and Maybourne.[2]

The judgment creditors then subpoenaed Rock Bay's financial records from U.S. Bank. Rock Bay filed a motion to quash the U.S. Bank subpoena or, in the alternative, to limit the scope of discovery to the judgment debtors' assets. It argued that the U.S. Bank subpoena sought highly sensitive financial information that was protected from disclosure. The district court denied the motion to quash for the same reasons that it denied the prior motion to quash the McNair subpoena, and it declined to limit the scope of the subpoena because it found that disclosure would not harm Rock Bay. This petition for a writ of prohibition followed.

DISCUSSION

[Headnotes 1-3]

Writ relief is an ''extraordinary remedy, and therefore the decision to entertain a petition lies within the discretion of this court.'' *State v. Dist. Ct. (Jackson)*, 121 Nev. 413, 416, 116 P.3d 834, 836 (2005). A petitioner bears the burden of ''demonstrat[ing] that extraordinary relief is warranted.'' *Valley Health System v. Dist. Ct.*, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011). A writ of prohibition may be granted when the district court exceeds its jurisdiction. NRS 34.320. Thus, it is an ''appropriate remedy for the prevention of improper discovery.'' *Valley Health System*, 127 Nev. at 171 n.5,

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[2]The subpoena also sought the records related to another nonparty, Sloan Park, LLC, who is not a party to this writ proceeding because the district court quashed the subpoena as it related to Sloan Park's independent records.

252 P.3d at 678 n.5; *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

[Headnote 4]

However, this relief, designed to prevent the district court from acting beyond its authority, is not available when there is a ''plain, speedy and adequate remedy in the ordinary course of law.'' NRS 34.170; *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 665, 856 P.2d 244, 246 (1993). Although the right to appeal is generally an adequate legal remedy that would preclude writ relief, *Pan v. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004), an appeal is not available here because petitioners are not parties to the action below, NRAP 3A(a), and because a post-judgment order denying a motion to quash is not substantively appealable. NRAP 3A(b). Further, while we typically decline to consider writ petitions challenging discovery orders unless certain exceptions exist, *Valley Health System*, 127 Nev. at 171, 252 P.3d at 678-79, here, the writ is necessary to prevent improper post-judgment disclosure of private information, the issues are novel and important to Nevada jurisprudence, and those issues might avoid appellate review were we not to consider them now. *See, e.g.*, *Callie v. Bowling*, 123 Nev. 181, 160 P.3d 878 (2007) (explaining when a judgment creditor must proceed against a nonparty in an independent action). Thus, we exercise our discretion to entertain this writ petition.

Discovery of nonparty assets under NRCP 69(a) is permissible in limited circumstances

[Headnotes 5-7]

When interpreting Nevada's Rules of Civil Procedure, we turn to the rules of statutory interpretation. *Webb v. Clark County School Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). ''Statutory interpretation is a question of law that we review de novo.'' *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 460, 282 P.3d 751, 756 (2012). ''When a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.'' *Id.*

NRCP 69(a) provides that ''[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.'' Rock Bay and Maybourne concede that this rule permits the judgment creditors to obtain discovery from nonparties, but they argue that such discovery must be limited. To the extent discussed herein, we agree.

[Headnotes 8-10]

As the federal courts have recognized when examining this issue, obtaining post-judgment discovery from nonparties is generally

limited to a judgment debtor's assets, and a judgment creditor may not inquire into the nonparties' own assets. *See Caisson Corporation v. County West Building Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974) (holding that inquiries of nonparties under FRCP 69(a) ''must be kept pertinent to the goal of discovering concealed assets of the judgment debtor and not be allowed to become a means of harassment'' of the nonparties); *Burak v. Scott*, 29 F. Supp. 775, 776 (D.D.C. 1939) (holding that ''a judgment creditor [does not have] any right to . . . require the disclosure of assets of persons other than the judgment debtor'' under FRCP 69).[3] However, this general rule should not be ''applied mechanically.'' *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 562 (S.D.N.Y. 1977). Because the purpose of post-judgment discovery is to locate the judgment debtor's assets, discovery of a nonparty's assets is permissible if it will lead to discovery of ''hidden or concealed assets of the judgment debtor.'' *Caisson Corporation*, 62 F.R.D. at 334.

[Headnote 11]

Thus, we conclude that discovery of a nonparty's assets is permissible in certain limited circumstances. These circumstances include, for example, a situation ''where the relationship between the judgment debtor and the nonparty is sufficient to raise a reasonable doubt about the bona fides of the transfer of assets between them,'' *Magnaleasing*, 76 F.R.D. at 562; *see also Alpern v. Frishman*, 465 A.2d 828, 829 (D.C. 1983), or where the nonparty is the alter ego of the judgment debtor. *See Falicia v. Advanced Tenant Services, Inc.*, 235 F.R.D. 5, 9 (D.D.C. 2006) (holding that post-judgment discovery of nonparties was permissible in light of evidence suggesting that the nonparties were ''mere extensions'' and ''possible successor entities of a judgment debtor''). We now must determine whether there were certain limited circumstances present in this case to support the district court's denial of the motions to quash the subpoenas seeking discovery of Rock Bay's and Maybourne's assets.

Denial of the motions to quash

The judgment creditors subpoenaed all of McNair's records related to the judgment debtors, Rock Bay, and Maybourne. They also subpoenaed Rock Bay's financial records from U.S. Bank.

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[3]NRCP 69(a) is modeled after its federal counterpart, FRCP 69(a)(2), and thus, cases interpreting the federal rule are strongly persuasive. *See Executive Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (''Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.' '' (quoting *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990))).

The district court ultimately declined to quash these subpoenas after finding that there was a reasonable inference of a close relationship between the judgment debtors, Rock Bay, and Maybourne.

The McNair subpoena

[Headnote 12]

Rock Bay argues that the district court abused its discretion by declining to quash the McNair subpoena because there was no evidence supporting its conclusion that the asset transfers between Rock Bay and the judgment debtors might not have been in good faith. We disagree.

The district court found that the apparent relationship between Rock Bay and the judgment debtors, and the overall timing of events, raised reasonable suspicion as to the good faith of the asset transfers because Kirsch reserved the name for Rock Bay in Nevada, there was evidence of money being transferred between Rock Bay's and the judgment debtors' bank accounts, and Rock Bay was voluntarily dissolved shortly after the judgment creditors registered their judgment in Nevada. In addition, there was evidence before the district court that Rock Bay was registered as doing business under the name of one of the judgment debtor entities, the signer of Rock Bay's operating agreement was the judgment debtors' in-house counsel, and the form listing Maybourne as the managing member of Rock Bay was signed by Kirsch. We conclude that the relationship established by this evidence is sufficient to raise a reasonable suspicion as to the good faith of the asset transfers between Rock Bay and the judgment debtors. As the district court acted within its discretion in so concluding, it has not exceeded its authority over Rock Bay such that a writ of prohibition is warranted as to the McNair subpoena.[4]

[Headnote 13]

However, we cannot reach the same conclusion as to Maybourne. As Maybourne points out, there is no evidence that Maybourne ever held or transferred assets with the judgment debtors. In addition, the judgment creditors never argued or established that Maybourne was the judgment debtors' alter ego.[5] Thus, because

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[4]We decline to consider Rock Bay's argument as to the confidentiality of the records sought by the McNair subpoena because Rock Bay did not argue that the McNair records were confidential and private before the district court. *See In re AMERCO Derivative Litigation*, 127 Nev. 147, 155 n.6, 252 P.3d 681, 697 n.6 (2011) (''[W]e decline to address an issue raised for the first time'' before this court.).

[5]In order to show that Maybourne was the alter ego of the judgment debtors, the judgment creditors would have needed to establish by a preponderance of the evidence that (1) Maybourne is '' 'influenced and governed by' '' the judgment debtors, (2) there is a '' 'unity of interest and ownership' '' between the

the judgment creditors did not demonstrate anything about the relationship between Maybourne and the judgment debtors that raises suspicion sufficient to require access to Maybourne's financial records, the district court improperly declined to quash the McNair subpoena as to Maybourne.

The U.S. Bank subpoena

[Headnote 14]

Rock Bay also argues that the district court exceeded its authority in allowing the U.S. Bank subpoena to endure because in it, the judgment creditors impermissibly sought to acquire highly confidential and private financial information.[6] Although Nevada does not recognize a privilege for financial documents, *see* NRS Chapter 49 (detailing Nevada's evidentiary privileges), this court has recognized that ''public policy suggests that . . . financial status [should] not be had for the mere asking.'' *Hetter v. District Court*, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994). In the context of post-judgment discovery, courts have recognized that a nonparty's privacy interests ''must be balanced against the need of the judgment creditor'' for the requested information. *Blaw Knox Corp. v. AMR Industries, Inc.*, 130 F.R.D. 400, 403 (E.D. Wis. 1990). Thus, a nonparty's financial assets are generally protected where ''the information sought was critical to the financial health of the non-party's business and was being requested by a direct competitor.'' *Falicia*, 235 F.R.D. at 10.

[Headnote 15]

However, the need of a judgment creditor to examine a nonparty's financial records outweighs the nonparty's privacy interest where, as in this case, there are reasonable doubts as to the good faith of the transfer of assets between the nonparty and the judgment debtor, and the judgment creditor is not a competitor of the nonparty. *Id.* at 9-10. In *Falicia*, the court held that disclosure of a nonparty's bank records was appropriate because there was a ''reasonable belief that inspection of the bank records by the [judgment creditor] could lead to the discovery of concealed assets of

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two such that they are essentially the same company, and (3) '' 'adherence to the corporate fiction of a separate entity would, under the circumstances, sanction [a] fraud or promote injustice.' '' *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846-47 (2000) (alteration in original) (quoting *Polaris Industrial Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987)).

[6]Maybourne also challenges the U.S. Bank subpoena on the basis of confidentiality and privacy. However, it appears that Maybourne was not included in the U.S. Bank subpoena, and Maybourne moved to quash only the McNair subpoena. Therefore, we do not consider Maybourne's argument. *See In re AMERCO*, 127 Nev. at 155 n.6, 252 P.3d at 697 n.6.

the judgment debtors.'' *Id.* at 10. After considering the content and recipient of the requested documents, the court concluded that protection of the nonparty's financial information was not warranted because the judgment creditors were not competitors of the judgment debtors. *Id.*

[Headnote 16]

Similarly, in this case, the judgment creditors are not competitors of Rock Bay. Moreover, the financial records requested from U.S. Bank are relevant and pertain to financial account activity that occurred throughout the underlying litigation, as Rock Bay was not created in Nevada until after the judgment creditors commenced the Florida lawsuit. Therefore, we conclude that the district court did not act in excess of its jurisdiction when it declined to quash the U.S. Bank subpoena.[7]

Accordingly, we grant the petition as to Maybourne because the district court improperly declined to quash the McNair subpoena as to Maybourne. Thus, we direct the clerk of this court to issue a writ of prohibition instructing the district court to quash the McNair subpoena as it pertains to Maybourne. However, we deny the petition as to Rock Bay because the relationship between Rock Bay and the judgment debtors raises reasonable suspicion as to the good faith of the asset transfers between them, and because no privacy interest will be impacted in a way sufficient to overcome the judgment creditors' interest in discovering any concealed assets.[8]

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

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[7]The parties also dispute whether Rock Bay previously rejected a confidentiality agreement. In support of this argument, the judgment creditors rely on a letter their counsel sent to Rock Bay stating that the nonparties had not answered the judgment creditors' request for a proposed confidentiality agreement. However, Rock Bay argues that the proposed agreement was not sufficient, and that the agreements it alternatively proposed were similarly rejected by the judgment creditors. We do not address this issue because it is a question of fact, and it was not raised in the district court. *See State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (''This court does not act as a finder of fact . . . .''); *In re AMERCO*, 127 Nev. at 155 n.6, 252 P.3d at 697 n.6.

[8]As such, we deny as moot Rock Bay's and Maybourne's petition for rehearing of the order denying their motion for a stay.

LEOPOLDO GONZALEZ, PETITIONER, *v*. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHELLE LEAVITT, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 62361

April 4, 2013 298 P.3d 448

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss a criminal information.

The supreme court held that the district court could not consider the jury's inability to reach a verdict on the sexual assault count in analyzing defendant's double jeopardy claim.

Petition for writ of mandamus granted.

Las Vegas Defense Group, LLC, and *Michael V. Castillo* and *Michael L. Becker*, Las Vegas, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of discretion.
2. MANDAMUS.
   A writ of mandamus will not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170.
3. MANDAMUS.
   Because a writ of mandamus is an extraordinary remedy, the decision to entertain a petition for the writ lies within the supreme court's discretion; in deciding whether to exercise that discretion, the court may consider, among other things, whether the petition raises an important issue of law that needs clarification.
4. MANDAMUS.
   A district court's failure to apply controlling legal authority is a classic example of a manifest abuse of discretion that may be controlled through a writ of mandamus; although defendant had another remedy, because he could raise the double-jeopardy issue on appeal from a judgment of conviction, that remedy was not adequate to protect the right afforded by the Double Jeopardy Clause, to not be placed twice in jeopardy. U.S. CONST. amend. 5; NRS 177.015, 177.045.
5. JUDGMENT.
   When an issue of ultimate fact has once been determined by a valid and final judgment of acquittal, it cannot again be litigated in a second trial for a separate offense.

6. JUDGMENT.
   The defendant has the burden to demonstrate that the issue of fact that the defendant seeks to foreclose from consideration was actually decided by the jury in the first trial.
7. JUDGMENT.
   To determine whether an issue of ultimate fact was decided by the jury during the first trial, the court must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.
8. JUDGMENT.
   Because a jury speaks only through its verdict, its inability to reach a verdict is a nonevent, and consideration of the hung counts has no place in the issue-preclusion analysis.
9. DOUBLE JEOPARDY.
   The district court could not consider the jury's inability to reach a verdict on the sexual assault count in previous prosecution in analyzing defendant's double jeopardy claim after prosecutor sought new trial on sexual assault charge following jury's acquittal of defendant on charge of lewdness with a child under the age of 14. U.S. CONST. amend. 5.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

Per Curiam:

At issue in this petition for extraordinary writ relief is the proper analysis of a Double Jeopardy Clause claim when it is based upon the doctrine of collateral estoppel. We conclude that *Ashe v. Swenson*, 397 U.S. 436, 444 (1970), sets forth the proper analysis for determining whether an issue of ultimate fact has been decided and cannot be relitigated in a subsequent trial: The district court must examine the record of the first trial and determine whether a rational jury could have grounded its verdict on some other issue of fact. And, in conducting this analysis, the district court may not consider the jury's inability to reach a verdict on the other counts. Because the district court improperly analyzed petitioner's double jeopardy claim, we grant the petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

Petitioner Leopoldo Gonzalez was charged with sexual assault of a minor under the age of 14 and lewdness with a child under the age of 14. During the trial that followed, the jury acquitted Gonzalez of the lewdness count and deadlocked on the sexual assault count. The district court declared a mistrial on the sexual assault count and set a date for a new trial. Gonzalez subsequently moved to dismiss the information, arguing in relevant part that the Dou-

ble Jeopardy Clause and collateral estoppel rule prohibit a second trial for sexual assault because he was acquitted of lewdness and both offenses were based upon the same event.[1] The State opposed the motion, asserting that lewdness and sexual assault are not the same offense for double jeopardy purposes and the collateral estoppel rule was not implicated because the jury did not necessarily determine an issue of ultimate fact as to the sexual assault count when it acquitted Gonzalez on the count of lewdness with a child. The district court heard argument and denied the motion based on the jury's inability to reach a verdict on the sexual assault count. This original petition for a writ of mandamus or prohibition followed.

DISCUSSION

Gonzalez argues that he is entitled to relief from the district court order denying his motion to dismiss the information because the district court failed to apply the analysis required by *Ashe v. Swenson*, 397 U.S. 436 (1970), when determining whether the jury's verdict on the lewdness count estopped the State from relitigating the issue of sexual touching in the sexual assault count.

[Headnotes 1-3]

We have original jurisdiction to issue writs of mandamus and prohibition. Nev. Const. art. 6, § 4. A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of discretion. *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). The writ will not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170. And, because a writ of mandamus is an extraordinary remedy, the decision to entertain a petition for the writ lies within our discretion. *Hickey v. District Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). In deciding whether to exercise that discretion, we may consider, among other things, whether the petition raises an important issue of law that needs clarification. *Armstrong*, 127 Nev. at 931, 267 P.3d at 779-80.

[Headnote 4]

Here, Gonzalez asserts that the district court failed to apply the controlling legal authority. If true, this is a classic example of a manifest abuse of discretion that may be controlled through a writ of mandamus. *See id.* at 932, 267 P.3d at 780 (explaining that ''[a] manifest abuse of discretion is a clearly erroneous interpretation of

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[1]The information alleged that Gonzalez committed sexual assault by ''placing his mouth and/or tongue on or in the [victim's] genital opening,'' and he committed lewdness ''by licking the [victim's] genital area.'' It is clear from the record that both offenses were based on the same act of sexual touching.

the law or a clearly erroneous application of a law or rule'' (internal quotation marks and brackets omitted)). Although Gonzalez has another remedy because he could raise the double-jeopardy issue on appeal from a judgment of conviction, NRS 177.015; NRS 177.045, that remedy is not adequate to protect the right afforded by the Double Jeopardy Clause—to not be placed twice in jeopardy. And the petition raises an important issue of law that needs clarification. Accordingly, we exercise our discretion to consider the merits of the petition.

[Headnotes 5, 6]

''[C]ollateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments.'' *Harris v. Washington*, 404 U.S. 55, 56 (1971); *see Ashe*, 397 U.S. at 445-46. '' '[W]hen an issue of ultimate fact has once been determined by a valid and final judgment' of acquittal, it 'cannot again be litigated' in a second trial for a separate offense.'' *Yeager v. United States*, 557 U.S. 110, 119 (2009) (quoting *Ashe*, 397 U.S. at 443). An ''ultimate fact'' is ''[a] fact essential to the claim or the defense.'' *Black's Law Dictionary* 671 (9th ed. 2009). The defendant has the burden to demonstrate that the issue of fact that he seeks to foreclose from consideration was actually decided by the jury in the first trial. *Dowling v. United States*, 493 U.S. 342, 350 (1990).

[Headnotes 7, 8]

To determine whether an issue of ultimate fact was decided by the jury during the first trial, the court must ''examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'' *Ashe*, 397 U.S. at 444 (internal quotations omitted); *see also Yeager*, 557 U.S. at 119-20 (same); *Dowling*, 493 U.S. at 350 (same). The court may not consider a jury's inability to reach a verdict on some of the counts; ''[b]ecause a jury speaks only through its verdict,'' its inability to reach a verdict is a ''non-event,'' and ''consideration of [the] hung counts has no place in the issue-preclusion analysis.''[2] *Yeager*, 557 U.S. at 120-22.

[Headnote 9]

The district court order denying Gonzalez's motion to dismiss the information does not contain any findings of fact or conclusions of law. However, it is clear from the transcript of the hearing on the motion that the district court erroneously based its analysis of

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[2]The Supreme Court now generally uses the term ''issue preclusion'' instead of ''collateral estoppel.'' *See Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008).

the collateral estoppel claim on the jury's inability to reach a verdict on the sexual assault count. Because the district court's decision to deny Gonzalez's motion was clearly based on an incorrect interpretation or application of controlling legal authority, we conclude that extraordinary relief in the form of a writ of mandamus is appropriate. *See Armstrong*, 127 Nev. at 932, 267 P.3d at 780.[3]

CONCLUSION

We grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying petitioner's motion to dismiss and reconsider the motion based on the controlling legal authority as set forth in this opinion.

JON ROBERT SLAATTE, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 60799

April 18, 2013 298 P.3d 1170

Appeal from a judgment of conviction. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

Defendant pleaded guilty in the district court to one count of lewdness with a child under 14 years of age, and he appealed. The supreme court held that because the judgment of conviction contemplated restitution in an uncertain amount, it was not final, and thus was not appealable.

Dismissed.

Derrick M. Lopez, Gardnerville, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Mark B. Jackson*, District Attorney, and *Thomas W. Gregory*, Chief Deputy District Attorney, Douglas County, for Respondent.

1. CRIMINAL LAW.
Judgment of conviction that imposes restitution in an uncertain amount is not an appealable final judgment. NRS 176.105(1)(c), 177.015(3).

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[3]We have stated that a writ of prohibition will be issued to preclude a retrial that would violate the Double Jeopardy Clause. *Glover v. Dist. Ct.*, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009). Here, however, we cannot determine on the record before us whether retrial is precluded. The issue is better resolved in the first instance by the district court, applying the controlling legal authority. For this reason, we deny Gonzalez's alternative request for a writ of prohibition.

2. Sentencing and Punishment.
   Any concern by sentencing court about victim's ongoing counseling expenses did not override its statutory obligation to award restitution in certain terms and to do so in the judgment of conviction. NRS 176.105(1), 177.015(3).
3. Criminal Law.
   Because the judgment of conviction contemplated restitution in an uncertain amount, it was not final and, therefore, was not appealable. NRS 176.105(1), 177.015(3).

Before Pickering, C.J., Hardesty and Saitta, JJ.

OPINION

Per Curiam:

In this appeal, we address a threshold jurisdiction issue: Is a judgment of conviction that imposes restitution in an uncertain amount an appealable final judgment? We conclude that it is not, and, as a result, we dismiss this appeal for lack of jurisdiction.

Appellant Jon Robert Slaatte pleaded guilty to one count of lewdness with a child under 14 years of age. The district court sentenced him to life in prison with the possibility of parole after ten years. The district court also determined that restitution should be imposed as part of the sentence, but the court did not set an amount of restitution. Instead, the judgment entered by the court orders Slaatte to appear at 9 a.m. on a Tuesday law-and-motion calendar within 60 days after his release from prison ''to have this Court determine what restitution for victim compensation that will be ordered at that time.'' Slaatte filed a timely notice of appeal.

Slaatte argues that Nevada law requires that the district court set an amount of restitution when it determines that restitution is appropriate as part of a sentence. Because the district court failed to comply with that requirement, Slaatte urges this court to ''set aside or reverse the district court's order regarding restitution.'' For its part, the State concedes error and urges the court to remand this matter to the district court so that it can specify the amount of restitution imposed as part of the sentence.

We agree with the parties that the district court clearly erred. NRS 176.033(1)(c) requires the district court to ''set an amount of restitution'' when it determines that restitution ''is appropriate'' as part of a sentence. When the district court determines that restitution is appropriate as part of a sentence, it must include the amount and terms of the restitution in the judgment of conviction. NRS 176.105(1)(c) (''the judgment of conviction must set forth . . . any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment''). Consistent with these statutory requirements, this court has held that a district court is not al-

lowed ''to award restitution in uncertain terms.'' *Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993). In cases where a district court has violated this proscription, this court historically has remanded for the district court to set an amount of restitution. *E.g.*, *Washington v. State*, 112 Nev. 1067, 1075, 922 P.2d 547, 551-52 (1996); *Smith v. State*, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996); *Roe v. State*, 112 Nev. 733, 736, 917 P.2d 959, 960-61 (1996); *Botts*, 109 Nev. at 569, 854 P.2d at 857.

[Headnote 1]

None of our prior decisions addressed whether the judgment was final given its failure to comply with NRS 176.105(1). If such a judgment is not appealable as a final judgment, *see* NRS 177.015(3), we lack jurisdiction over this appeal. *See Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (explaining that court has jurisdiction only when statute or court rule provides for appeal). Our recent decision in *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012), is controlling. In that case, we considered whether a judgment of conviction that imposed restitution but did not specify the amount of restitution was sufficient to trigger the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus. *Id.* at 263, 285 P.3d at 1055. Based on the requirement in NRS 176.105(1)(c) that the amount of restitution be included in the judgment of conviction if the court imposes restitution, we concluded ''that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment'' and therefore it does not trigger the one-year period for filing a habeas petition. *Id.* Given our decision in *Whitehead* that such a judgment is not a final judgment, we necessarily conclude that it also is not appealable.

[Headnotes 2, 3]

In this case, the district court clearly determined that restitution should be imposed as part of the sentence. The court, however, did not specify the amount of restitution, as required for a final judgment. We acknowledge that the district court appears to have been concerned with setting an amount of restitution because of the possibility that the victim, who had been in counseling, would incur additional counseling expenses in the future.[1] Any concern about ongoing counseling expenses, however, does not override the district court's statutory obligation to award restitution in certain terms and to do so in the judgment of conviction. *See Washington*,

[1]The record suggests that the parties and the district court had some concern that as of the date of sentencing there had not been any expenses for counseling that could properly be included as restitution. Because the district court has not imposed a specific amount or identified who it must be paid to, those concerns are not before us, and we therefore express no opinion on those matters.

112 Nev. at 1074-75, 922 P.2d at 551 (concluding that district court, which ordered defendant to ''pay any future counselling costs for victim,'' erred by failing to set specific dollar amount of restitution for such costs (internal quotation marks omitted)). Because the judgment of conviction contemplates restitution in an uncertain amount, it is not final and therefore is not appealable. Accordingly, we lack jurisdiction over this appeal. The appeal is dismissed on that basis.[2]

SHAWN TIMOTHY NEWMAN, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 56151

April 18, 2013 298 P.3d 1171

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery by strangulation and willfully endangering a child as a result of child abuse. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Defendant was convicted in the district court of battery by strangulation and child endangerment. Defendant appealed. The supreme court, PICKERING, C.J., held that: (1) evidence of prior incidents where defendant struck younger son was not relevant to show absence of mistake or accident; (2) evidence that defendant had previously struck younger son was probative of issue whether defendant's intent in striking older son was to correct older son's misbehavior or to inflict pain, for purposes of parental privilege defense; (3) child protective services' report referencing two incidents in which defendant had allegedly struck younger son was not clear and convincing evidence that such incidents occurred, as required for admission of such evidence as prior bad acts; (4) evidence that defendant had previously been aggressive towards hospital staff, together with evidence that defendant had a verbal altercation with witness who challenged his use of corporal punishment, was not relevant to rebut parental privilege defense; (5) evidence was not sufficiently similar transaction evidence relevant to rebut defendant's claim that he acted in self-defense when he committed battery by strangulation; (6) evidence of verbal altercation with witness about defendant's use of corporal punishment on his son was not relevant to rebut evidence of defendant's character; (7) evidence of prior altercation with witness was not relevant to rebut defendant's claim of self-defense to charge for

[2]We provided Slaatte with an opportunity to show cause why this appeal should not be dismissed for lack of jurisdiction. He has not responded.

battery; and (8) error in admission of prior-bad-act evidence was harmless.

Affirmed.

[Rehearing denied May 10, 2013]

[En banc reconsideration denied July 18, 2013]

CHERRY, J., dissented in part.

Jeremy T. Bosler, Public Defender, and *Cheryl Bond*, Appellate Deputy Public Defender, Washoe County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Gary H. Hatlestad*, Chief Appellate Deputy District Attorney, Washoe County, for Respondent.

1. CRIMINAL LAW.
   The supreme court normally will not consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless. U.S. CONST. amend. 6.
2. CRIMINAL LAW.
   The list of permissible nonpropensity uses for prior-bad-act evidence is not exhaustive; nonetheless, while evidence of other crimes, wrongs, or acts may be admitted for a relevant nonpropensity purpose, the use of uncharged bad-act evidence to convict a defendant remains heavily disfavored, because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. NRS 48.045(2).
3. CRIMINAL LAW.
   A presumption of inadmissibility attaches to all prior-bad-act evidence. NRS 48.045(2).
4. CRIMINAL LAW.
   To overcome the presumption of inadmissibility of prior-bad-act evidence, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. NRS 48.045(2).
5. CRIMINAL LAW.
   When evidence of prior bad acts has been offered for a nonpropensity purpose, the district court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes. NRS 48.045(2).
6. CRIMINAL LAW.
   The supreme court reviews a district court's decision to admit or exclude prior-bad-act evidence under an abuse of discretion standard. NRS 48.045(2).
7. CRIMINAL LAW.
   Evidence that defendant had struck younger son on prior occasions was not relevant to show absence of mistake or accident, in trial for child

endangerment, where defendant never denied that he used corporal punishment but admitted striking his children deliberately. NRS 48.045(2).

8. Criminal Law.
   Identification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step in the analysis of its admissibility. NRS 48.045(2).
9. Criminal Law.
   The admissibility of evidence of other crimes, wrongs, or acts to establish absence of mistake or accident is well established in child abuse cases, because proof that a child has experienced injuries in many purported accidents is evidence that the most recent injury may not have resulted from yet another accident. NRS 48.045(2).
10. Criminal Law.
    Evidence that defendant had previously struck younger son was probative of his intent in striking older son, for purposes of parental privilege defense to charge for child endangerment, namely, to determine whether defendant's intent was to correct misbehavior or to inflict pain.
11. Assault and Battery; Infants; Parent and Child.
    In Nevada, the parental privilege defense exists by virtue of common law.
12. Assault and Battery; Infants; Parent and Child.
    The intent underlying parental discipline and battery are not the same; a parent who disciplines a child in a physical manner intends to correct or alter their child's behavior, and that corrective intent is lacking in a battery.
13. Assault and Battery; Infants; Parent and Child.
    Often the only way to determine whether the punishment by a parent is a noncriminal act of discipline that was unintentionally harsh or whether it constitutes the crime of child abuse is to look at the parent's history of disciplining the child; in such cases, a parent's other disciplinary acts can be the most probative evidence of whether his or her disciplinary corporal punishment is imposed maliciously, with an intent to injure, or with a sincere desire to use appropriate corrective measures.
14. Assault and Battery; Infants; Parent and Child.
    The parental privilege defense comes down to punishment—whether it was cruel or abusive—or whether it amounted to a parent's use of reasonable and moderate force to correct his or her child.
15. Criminal Law.
    Child protective services' report referencing two incidents in which defendant had allegedly struck younger son was not clear and convincing evidence that such incidents occurred, as required for admission of such evidence as prior bad acts, in trial for child endangerment of older son, where incidents were merely mentioned in report as ''information only'' and ''unsubstantiated.'' NRS 48.045(2).
16. Criminal Law.
    Evidence that defendant had previously been aggressive towards hospital staff while older son was hospitalized, together with evidence that defendant had a verbal altercation with witness after witness objected to defendant's use of corporal punishment on younger son at store, was not relevant to rebut parental privilege defense to charge for child endangerment.
17. Criminal Law.
    Evidence that defendant had previously been aggressive towards hospital staff while older son was hospitalized, together with evidence that

defendant had a verbal altercation with witness after witness objected to defendant's use of corporal punishment on younger son at store, was not sufficiently similar transaction evidence relevant to rebut defendant's claim that he acted in self-defense when he committed battery by strangulation, where neither of two prior incidents went beyond exchange of angry words or involved defendant physically attacking stranger on mistaken belief that his own life was in danger.

18. CRIMINAL LAW.

When a defendant chooses to introduce character evidence in the form of reputation or opinion evidence, the prosecution is similarly limited in its rebuttal evidence and can only inquire into specific acts of conduct on cross-examination. NRS 48.045(1)(a).

19. CRIMINAL LAW; WITNESSES.

The exception to the rule that extrinsic evidence, other than a conviction, may not be offered to impeach a defendant's character evidence, except when the State seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the defendant's direct examination, is limited; it applies when the defendant introduces evidence giving the jury a false impression through an absolute denial of misconduct and then relies on the collateral-fact rule to frustrate the State's attempt to contradict this evidence through proof of specific acts. NRS 48.045(1)(a), 50.085(3).

20. CRIMINAL LAW.

Evidence of verbal altercation between defendant and witness about defendant's use of corporal punishment on his son was not relevant to rebut evidence of defendant's character, in prosecution for battery by strangulation and child endangerment, where defendant never claimed to be a peace-loving or nonviolent man, but openly admitted to being aggressive and churlish, especially when he was being criticized for disciplining his children. NRS 48.045(1)(a), 48.055, 50.085(3).

21. CRIMINAL LAW.

Evidence of verbal altercation between defendant and witness about defendant's use of corporal punishment on his son was not relevant to rebut defendant's claim of self-defense to charge for battery by strangulation of victim who had attempted to stop defendant's use of corporal punishment on child, where witness's testimony only showed that defendant was confrontational and used swear words, and witness's altercation with defendant did not elevate to physical attack on witness. NRS 48.045(1)(a), 48.055, 50.085(3).

22. CRIMINAL LAW.

It is improper to use evidence of specific acts with which the accused has not previously been confronted. NRS 48.055.

23. CRIMINAL LAW.

The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.

24. CRIMINAL LAW.

The harmless-error doctrine promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

25. CRIMINAL LAW.

A nonconstitutional error, such as the erroneous admission of evidence, is deemed ''harmless'' unless it had a substantial and injurious effect or influence in determining the jury's verdict.

26. CRIMINAL LAW.

Error in admission of prior-bad-act evidence that defendant had previously struck his younger son, which was not relevant to show absence of mistake or accident, was harmless, in trial for battery by strangulation and child endangerment; jury heard nothing with respect to those incidents other than prosecution's question to defendant as to whether he recalled either incident, to which defendant replied ''no,'' jury was instructed not to speculate and that question was not evidence, and defendant admitted striking child. NRS 48.045(2).

27. CRIMINAL LAW.

Error in admission of evidence of defendant's prior altercation with witness who had confronted him about his use of corporal punishment, which was not relevant to rebut defendant's character or to rebut claim of self-defense, was harmless, in trial for battery by strangulation, where conviction rested on defendant's admission that he put his hands around victim's throat for 30 seconds or more, defendant's testimony was corroborated by numerous eyewitnesses, and prosecutor made almost no use of witnesses' testimony. NRS 48.045(1), 48.055, 50.085.

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

OPINION

By the Court, PICKERING, C.J.:

Appellant Shawn Newman appeals his conviction, on jury verdict, of one count of willfully endangering a child as a result of child abuse, a gross misdemeanor, and one count of battery by strangulation, a felony. The charges grew out of an incident in which Newman yelled at his son, Darian, in public; when Newman took off his belt to strike the boy, a witness, Thomas Carmona, tried but failed to stop him. Newman and Carmona fought until Newman grabbed Carmona's neck to choke him into submission. At trial, Newman admitted these facts and that he acted intentionally. His defense was justification: parental discipline privilege as to the child abuse charge; and, to some extent, self-defense as to the battery charge.

[Headnote 1]

Newman raises two issues on appeal, both rooted in NRS 48.045's prohibition against using character or prior-bad-act evidence to prove criminal propensity. First, the prosecution introduced evidence that Newman had struck his other son, Jacob, in public and that Newman got into a heated argument with nursing staff about Jacob while Darian was hospitalized for an appendectomy. The district court deemed this evidence admissible under NRS 48.045(2) to show absence of mistake or accident as to the child abuse charge. Second, the prosecution presented a surprise rebuttal witness, Connie Ewing, who reported that she, too, had a heated but nonphysical exchange with Newman over his disciplin-

ing a young boy outside a local Walmart. The district court allowed this testimony as rebuttal under NRS 48.045(1)(a) and NRS 48.055, to rebut Newman's testimony that he strangled Carmona in self-defense.[1]

Evidence of one of the episodes involving Jacob was properly admitted to refute Newman's claim of parental privilege. The other episodes involving Jacob were not proven by clear and convincing evidence, as required by our case law, and it was an abuse of discretion to admit the Ewing testimony. Nonetheless, Newman's guilt was established by his own admissions and overwhelming evidence. We therefore conclude that the errors were harmless and affirm.

I.

A.

The incident underlying this appeal occurred on September 14, 2009. At the time, Newman was a single father raising two sons: twelve-year-old Darian and six-year-old Jacob. Darian had started middle school the previous week. Jacob's day care opened at 7 a.m. and Darian needed to be to middle school by 7:30 a.m. The family's apartment was close to both. Darian had recently gotten a bike with gear-speeds. The plan was for Darian, who felt uncomfortable riding double with Jacob, to walk Jacob and the bicycle to Jacob's day care and to ride from there to middle school. The timing was tight and the first week this plan did not work out. One day, Newman went looking for Darian along what he thought was his route but could not find him. Another day, Darian got lost and was tardy.

Six weeks earlier, in late July, Darian had been hospitalized for appendicitis. A secondary infection developed that extended his hospital stay to 19 days. The wound was dressed, not sutured closed, meaning it had to be cleaned and the dressing changed daily while the open incision healed. On September 14, the wound had mostly closed but still required daily dressing, which Newman attended to.

On the day of the incident, Newman followed Darian in his truck to see his son's exact route. All went well until Darian, who

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[1]Newman also argues ineffective assistance of trial counsel based on his lawyer's statement to the district court, arguing against the admission of Ewing's testimony, that she would have urged Newman not to testify if she had known about Ewing. We normally do not ''consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless.'' *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). The district court did not hold an evidentiary hearing and one would be needed to determine whether Newman would have testified no matter what his lawyer said. Therefore, we do not reach his ineffective-assistance-of-counsel claim.

had his new bike in third gear, could not make it up a hill. Newman got out of his truck, put and rode the bike in lower gear to show Darian how the gearing worked, and then held the bike for Darian to try. For whatever reason—Newman testified he saw Darian deliberately slip his foot off the pedal, while Darian told a responding officer he was tired and his stomach hurt—Darian did not succeed, even in the lower gear. Admittedly angry, Newman started yelling at Darian. He gave Darian an ultimatum: ride the bike up the hill or be spanked. Darian let go of his bike, went to a low wall nearby, and bent over to be spanked.

From his home across the street, Thomas Carmona heard the commotion and saw Newman take off his belt. Carmona ran over to stop him from striking the boy. They argued over Newman's right to physically discipline his child and then fought. The fight did not end until Newman pinned Carmona to the ground in a stranglehold. Carmona and Newman accused each other of throwing the first blow. Newman is bigger than Carmona and, unlike Carmona, looked none the worse for wear after their fight. Carmona and another eyewitness described Newman as in a rage and Darian as crying uncontrollably. One witness testified that Darian said his father terrified him.

When the police arrived, they found a red welt on Darian's buttocks, which they photographed. They also photographed Darian's abdominal bandage and healing incision. Paramedics examined Darian and Carmona but did not take either to the hospital. Carmona's Adam's apple was sore and it hurt to swallow for some days afterward.

B.

Trial took four days. The prosecution presented its case-in-chief through eyewitness, responding officer, and expert medical testimony without using any prior-bad-act evidence. After the prosecution rested, the district court advised Newman of his right to testify in his own defense. The prosecution warned that it would explore prior bad acts if Newman testified that parental privilege justified his discipline of Darian.

The district court then heard from the lawyers on the prior-bad-act issue. No testimony was presented; the lawyers argued from a child protective services (CPS) report that the appellate record does not include. The transcript reveals that the CPS report lists two of the three incidents involving Jacob as ''information only'' under a heading, ''unsubstantiated reports,'' and that the police investigated one of the incidents but could not verify it. Despite this, the district court determined that the following incidents were established by clear and convincing evidence and could be used by the prosecution if Newman testified: (1) Newman hit Jacob in No-

vember 2006, February 2009, and late July or early August 2009 when Darian was in the hospital; and (2) Newman had an ugly verbal run-in with hospital staff during Darian's stay. Although the court deemed this evidence more probative than prejudicial, it did not identify a permissible nonpropensity purpose for admitting it until later in the trial, when it held that the evidence tended to show absence of mistake or accident as to the child abuse charge.

Newman elected to testify. His direct-examination testimony hewed close to the events of September 14. He gave background concerning Darian's appendectomy and recuperation and explained why he followed Darian by truck instead of just driving him to school that day. He admitted that he gave Darian the choice of riding up the hill or being spanked; that he struck Darian on the buttocks with his belt, raising a welt; and that he fought with Carmona and put him in a stranglehold when Carmona would not back off. Finally, Newman testified that Carmona attacked him, not the reverse. He conceded being angry and loud but denied being out of control.

On cross-examination, the prosecution asked Newman about the hospital incidents in late July/early August 2009. Newman admitted that he ''smacked'' Jacob on the back of the head for bouncing on Darian's bed and that he eventually got into such a heated argument with hospital staff over Darian's care and his and Jacob's use of a break room that he was told to leave and not come back. The prosecution had Newman acknowledge that he ''grew up on the streets,'' is ''on the hard side,'' and can be perceived as ''an aggressive, loud, obnoxious kind of person.'' He said, ''I don't hide anything I do. I will spank my children in public as I will in private.'' Newman described his progressive discipline of his sons, ranging from raised voice, to corner time, to spanking. He also described the special tutoring he had arranged for Darian and later Jacob at the University of Nevada Reno and expressed pride in Darian's reading level. When the prosecution asked Newman about the November 2006 and February 2009 incidents with Jacob mentioned (but not substantiated) in the CPS report, Newman said he did not recall either.

The defense then called the psychologist who counseled Darian after the charges in this case led to Darian and Jacob being removed from Newman's care. The psychologist characterized Newman's parenting style as between ''authoritarian'' and ''autocratic'' but also opined that Darian and Newman had ''a fairly normal parent/child relationship.'' He testified that he had no qualms when Darian and Jacob were returned to Newman's care shortly before trial.

After the defense rested, the prosecution alerted the court and the defense counsel to Connie Ewing, who came forward after reading about the case in the newspaper. She related an incident in-

volving a stranger she now recognized as Newman yelling and hitting a boy outside Walmart in early September 2009. When she demanded that he stop, Newman told her to ''mind [her] own f#$%ing business.'' Ewing went inside to complain to the Walmart greeter and then security and Newman followed. Two security guards flanked Ewing while she and Newman argued about single parenting and appropriate discipline. No physical contact occurred and eventually Newman left. Over defense objection, the district court admitted this evidence to rebut Newman's testimony that Carmona attacked him first. The prosecution did nothing to prove the November 2006 and February 2009 incidents involving Jacob that Newman testified he did not know about or recall.

In closing, neither side argued the prior-bad-act evidence involving Jacob. The Ewing testimony was alluded to but briefly. During deliberation, the jury sent out two questions, both concerning the child abuse count. Ultimately, it returned a verdict of guilty and the district court sentenced Newman to a maximum term of 60 months incarceration for the battery with a consecutive term of 12 months for child endangerment.

II.

[Headnotes 2, 3]

NRS 48.045(2) prohibits the use of evidence of ''other crimes, wrongs or acts . . . to prove the character of a person in order to show that the person acted in conformity therewith.'' Such evidence ''may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'' *Id.* NRS 48.045(2)'s list of permissible nonpropensity uses for prior-bad-act evidence is not exhaustive. *Bigpond v. State*, 128 Nev. 108, 115, 270 P.3d 1244, 1249 (2012). Nonetheless, while ''evidence of 'other crimes, wrongs or acts' may be admitted . . . for a relevant nonpropensity purpose,'' *id.* at 116, 270 P.3d at 1249 (quoting NRS 48.045(2)), '' '[t]he use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.' '' *Id.* (quoting *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001)). Thus, '' '[a] presumption of inadmissibility attaches to all prior bad act evidence.' '' *Id.* (quoting *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)).

[Headnotes 4, 5]

''[T]o overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear

and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.'' *Bigpond*, 128 Nev. at 117, 270 P.3d at 1250. In addition, the district court ''should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes.'' *Tavares*, 117 Nev. at 733, 30 P.3d at 1133.

[Headnote 6]

This court reviews a district court's decision to admit or exclude prior-bad-act evidence under an abuse of discretion standard. *Fields v. State*, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009).

A.

[Headnotes 7-9]

Identification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis. *See United States v. Miller*, 673 F.3d 688, 697 (7th Cir. 2012) (addressing Fed. R. Evid. 404(b), the cognate to NRS 48.045(2)). Here, the district court ultimately declared that it was admitting the prior-bad-act evidence involving Jacob to show absence of mistake or accident. ''The admissibility of evidence of other crimes, wrongs, or acts to establish . . . absence of mistake or accident is well established, particularly in child abuse cases.'' *United States v. Harris*, 661 F.2d 138, 142 (10th Cir. 1981). This is because ''[p]roof that a child has experienced injuries in many purported accidents is evidence that the most recent injury may not have resulted from yet another accident.'' *Bludsworth v. State*, 98 Nev. 289, 292, 646 P.2d 558, 559 (1982).

But Newman did not mount a conventional accidental injury defense to the child abuse charge. He admitted striking Darian and doing so deliberately. Thus, proof that Newman previously struck Darian's brother Jacob does not tend to disprove accidental injury, a common defense to a child abuse charge. Neither mistake nor accident was at issue, and the prior incidents involving Jacob should not have been admitted for these irrelevant purposes. *See Honkanen v. State*, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989) (reversing a child abuse conviction based on an error in admitting evidence of prior abuse to show absence of mistake where, as here, the parent did not claim accident or mistake explained the injuries).

[Headnote 10]

The prosecution argues that, even if not properly admitted to show absence of mistake or accident, the prior-bad-act evidence in-

volving Jacob was admissible to refute Newman's parental privilege defense by demonstrating that Newman did not have the intent to correct that forms the heart of that defense.

[Headnote 11]

A number of states have codified the parental privilege defense. *See Willis v. State*, 888 N.E.2d 177, 181 n.5 (Ind. 2008) (identifying jurisdictions with parental privilege statutes). Nevada has not, so in Nevada the privilege exists by virtue of common law, *see* NRS 1.030; 3 William Blackstone *Commentaries* 120 (1862) (''battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice,'' *quoted in Willis*, 888 N.E.2d at 180-81), and by virtue of the ''fundamental liberty interest [a parent has] in maintaining a familial relationship with his or her child [which includes] the right . . . 'to direct the upbringing and education of children.' '' *Willis*, 888 N.E.2d at 180 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

This appeal does not require us to decide the exact boundaries of the common law parental privilege defense in Nevada, because neither side contests the instruction the district court gave on it. *See Willis*, 888 N.E.2d at 181-82 (comparing the different parental privilege formulations offered by Model Penal Code § 3.08(1) (1985) and Restatement (Second) of Torts § 147(1) (1965)). At minimum, as both sides concede, the defense required the prosecution to establish that Newman did not '' 'intend[ ] to merely discipline [Darian but] . . . to injure' '' or endanger him. *State v. Hassett*, 859 P.2d 955, 960 (Idaho Ct. App. 1993) (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5:10 (1993)); *see State v. Thorpe*, 429 A.2d 785, 788 (R.I. 1981) (the privilege is lost ''at the point at which a parent ceases to act in good faith and with parental affection and acts immoderately, cruelly, or mercilessly with a malicious desire to inflict pain'').

[Headnotes 12, 13]

The intent underlying parental discipline and battery are not the same. ''A parent who disciplines a child in a physical manner intends to correct or alter their child's behavior. That corrective intent is lacking in a battery.'' *Ceaser v. State*, 964 N.E.2d 911, 917 (Ind. Ct. App. 2012), *transfer denied*, 969 N.E.2d 86 (Ind. 2012). ''[O]ften the only way to determine whether the punishment is a non-criminal act of discipline that was unintentionally harsh or whether it constitutes the [crime] of child abuse is to look at the parent's history of disciplining the child.'' *State v. Taylor*, 701 A.2d 389, 396 (Md. 1997). In such cases, ''[a] parent's other disciplinary acts can be the most probative evidence of whether his or her disciplinary corporal punishment is imposed maliciously, with

an intent to injure, or with a sincere desire to use appropriate corrective measures.'' *Id.*; *see People v. Taggart*, 621 P.2d 1375, 1384-85 (Colo. 1981) (recognizing that prior acts of excessive discipline may be admissible to ''negat[e] any claim of accident or justification''), *abrogated on other grounds by James v. People*, 727 P.2d 850, 855 (Colo. 1986), *overruled by People v. Dunaway*, 88 P.3d 619, 624 (Colo. 2004); *Ceaser*, 964 N.E.2d at 917 (''By arguing that she exercised her parental privilege in disciplining M.R., Ceaser necessarily represents that her intent was to correct M.R.'s behavior through corporal punishment, rather than to simply batter her daughter,'' making admissible the defendant's prior conviction for battering her child); *State v. Morosin*, 262 N.W.2d 194, 197 (Neb. 1978) (recognizing as ''peculiarly applicable to child abuse cases'' the principle that, '' '[w]here an act is equivocal in its nature, and may be criminal or honest according to the intent with which it is done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act' '' (quoting 1 *Wharton's Criminal Evidence* § 350, at 520 (11th ed.))).

[Headnote 14]

The parental privilege defense comes down to ''punishment—was it cruel or abusive''—or did it amount to a parent's ''use [of] reasonable and moderate force to correct [his] child[ ]''? *State v. Wright*, 593 N.W.2d 792, 801 (S.D. 1999) (applying South Dakota's statutory parental privilege, S.D. Codified Laws § 22-18-5). Here, the district court should have identified the relevant nonpropensity purpose for admitting evidence of the prior incidents involving Jacob before weighing its probative value against its potential for unfair prejudice. It also incorrectly held that the prior incidents involving Jacob tended to show absence of mistake or accident, neither of which was at issue. Nevertheless, the evidence did have probative value in assessing Newman's intent in inflicting corporal punishment on Darian, which Newman's assertion of the parental privilege defense placed squarely in issue.[2]

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[2]We recognize that *Honkanen v. State*, 105 Nev. 901, 784 P.2d 981 (1989) (3-2), suggests a contrary rule. Thus, after rejecting absence of mistake as a basis for admitting prior instances of abuse in a child abuse prosecution because the parental privilege defense asserted did not raise an issue of mistake, *Honkanen* also notes that, ''Furthermore, contrary to the district attorney's suggestion on appeal, neither was appellant's intent [in issue].'' *Id.* at 902, 784 P.2d at 982. This passing reference in a 3-2 decision does not settle the intent issue, because *Honkanen* did not consider the difference between intent to injure or inflict pain and intent to correct. Additionally, *Honkanen*'s rationale may be outdated in light of the 2001 amendments to NRS 48.061, which expand the use of bad-act evidence in domestic violence cases, 2001 Nev. Stat., ch. 360, § 1, at 169; *see* NRS 33.018(1)(a) (defining ''domestic violence'' to include battery on an accused's minor child), and *Bigpond*, which recognizes that character evidence can be admissible so long as it has a credible, non-

B.

Identification of an at-issue, nonpropensity purpose for admitting this evidence is only the first step of a proper NRS 48.045(2) analysis. *United States v. Miller*, 673 F.3d at 697. In addition, the prosecution must establish the prior bad act by clear and convincing evidence and demonstrate that its probative value ''is not substantially outweighed by the danger of unfair prejudice.'' *Bigpond*, 128 Nev. at 116-17, 270 P.3d at 1249.

[Headnote 15]

Judged by these standards, the district court did not abuse its discretion in admitting evidence that Newman cuffed Jacob on the back of his head at the hospital in late July or early August 2009. Newman admitted the incident, and it had enough probative value to justify the district court's determination that its worth outweighed the risk of unfair prejudice. But the same cannot be said of the November 2006 and February 2009 incidents involving Jacob. These incidents were merely mentioned in a CPS report as ''information only'' and ''unsubstantiated.'' As such, they were not established by the clear and convincing evidence required to sustain their admission.

C.

[Headnotes 16, 17]

It was also error for the district court to admit the evidence that Newman was aggressive to hospital staff and Ewing under NRS 48.045(2). Although the district court suggested that this evidence went toward absence of mistake or accident, it had no logical relevance to Newman's parental privilege defense. It also appears too factually dissimilar to the battery-by-strangulation charge to have been admissible to refute Newman's claim that he acted in self-defense in strangling Carmona. Specifically, neither the hospital nor the Walmart incidents went beyond an exchange of angry words. In neither instance did Newman physically attack a stranger based on a mistaken belief that his life was in danger. Although Newman claimed he was fighting for his life, he never argued that he did not intend to hurt Carmona, accidentally grabbed his throat, or was otherwise not at fault for Carmona's injuries.

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propensity purpose, such as explaining the relationship dynamics between a domestic-violence victim and the accused. 128 Nev. at 111, 270 P.3d at 1246; *see also Harris v. State*, 195 P.3d 161, 182 (Alaska Ct. App. 2008) (recognizing that the holding in *Harvey v. State*, 604 P.2d 586, 590 (Alaska 1979), a case similar to *Honkanen*, had been abrogated by the amendment of Alaska's Rule 404(b) to allow admission of prior incidents of domestic violence as an exception to the general rule against admitting such evidence).

III.

[Headnotes 18, 19]

NRS 48.045(1)(a) permits the prosecution to offer ''similar evidence'' to rebut evidence offered by an accused ''of a person's character or a trait of his or her character.'' Normally, such proof is by ''testimony as to reputation or in the form of an opinion,'' NRS 48.055; ''when a defendant chooses to introduce character evidence in the form of reputation or opinion evidence, the prosecution is similarly limited in its rebuttal evidence and can only inquire into specific acts of conduct on cross-examination.'' *Jezdik v. State*, 121 Nev. 129, 136, 110 P.3d 1058, 1063 (2005); *see* NRS 48.055(1). And, under the collateral-fact rule, extrinsic evidence, other than a conviction, may not be offered to impeach a defendant's character evidence, NRS 50.085(3), except ''when the State 'seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the accused's direct examination.' '' *Jezdik*, 121 Nev. at 138, 110 P.3d at 1064 (quoting 1 Kenneth S. Broun et al., *McCormick on Evidence* § 49, at 202 (5th ed. 1999)). But the exception is limited. It applies when the defendant ''introduce[s] evidence giving the jury a false impression through an absolute denial of misconduct'' and then relies on the collateral-fact rule to ''frustrate the State's attempt to contradict this evidence through proof of specific acts.'' *Id*. at 139, 110 P.3d at 1065.

Here, the district court admitted Ewing's testimony to rebut character evidence from Newman. It also held that the collateral-fact rule did not apply because the Ewing incident resembled Newman's confrontation with Carmona and occurred less than two weeks earlier. We disagree for three reasons.

[Headnotes 20, 21]

First, Ewing's testimony about an extrinsic event did not rebut character evidence from Newman. The crux of Ewing's testimony was that Newman is a violent, aggressive man. This was not appropriate rebuttal because Newman never claimed to be a peace-loving or nonviolent man. Jezdik opened the door to a specific rebuttal by swearing on direct examination to having never committed a crime. *Jezdik*, 121 Nev. at 134, 110 P.3d at 1062. On direct examination, Newman stuck close to the facts and made no affirmative claim to good character. And under cross-examination, he openly admitted to being aggressive and churlish, especially when criticized for disciplining his children. Nor did Ewing's testimony negate self-defense. Whereas Newman testified that he is capable of violence when faced with a life-threatening situation, Ewing's testimony only showed that Newman is confrontational and given to swear words. Although Ewing's testimony may have

been relevant if Newman had physically attacked her and then claimed self-defense, the evidence showed that the altercation at the Walmart store only involved words, not blows, and thus differed fundamentally from the incident with Carmona.

Second, evidence of Newman's character was collateral. As we noted in *Lobato v. State*, the use of specific acts of conduct raises issues under the collateral-fact rule when coupled with a specific contradiction. 120 Nev. 512, 519, 96 P.3d 765, 770 (2004). Here, although enough evidence supported a self-defense instruction as to the battery-by-strangulation charge, this did not make Newman's penchant for verbal combativeness an issue. By allowing Ewing's testimony, the district court improperly allowed evidence of one of Newman's prior bad acts—his confrontation with Ewing—for the sole, irrelevant purpose of showing he is not a peace-loving man.

[Headnote 22]

Finally, Ewing's testimony did not comply with the requirements of NRS 48.055. She did not give an opinion or discuss Newman's reputation, but rather testified about a specific event. The testimony was not proper because Ewing discussed a specific instance of conduct that was not, and could not have been, previously raised by Newman or explored by the prosecution in its cross-examination of him. And as we held in *Roever v. State*, it is improper to use evidence of specific acts that the accused has not previously been confronted with. 114 Nev. 867, 871, 963 P.2d 503, 505 (1998).

Therefore, we conclude that the district court abused its discretion in admitting Ewing's rebuttal testimony. We now consider whether the district court's errors were harmless or warrant reversal.

IV.

[Headnotes 23-25]

''The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.'' *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). It also ''promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'' *Id*. A nonconstitutional error, such as the erroneous admission of evidence at issue here, is deemed harmless unless it had a '' 'substantial and injurious effect or influence in determining the jury's verdict.' '' *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fields v. State*, 125 Nev. 776, 784-85,

220 P.3d 724, 729-30 (2009) (reviewing erroneous admission of evidence, pursuant to NRS 48.045, as nonconstitutional error); *Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1255-56 (2002) (reviewing the failure to exclude evidence in a *Petrocelli* hearing for harmless error); *Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005) (''Errors in the admission of evidence under NRS 48.045(2) are subject to a harmless error review.'').

[Headnote 26]

We have carefully reviewed the record in this case and conclude that the error in allowing the prosecution to ask Newman about the November 2006 and February 2009 incidents involving Jacob was harmless. The jury heard nothing with respect to those incidents beyond the prosecution asking Newman if he recalled either; the prosecution accepted Newman's answer that he did not. The jury was instructed that it ''must not speculate to be true any insinuations suggested by a question asked a witness'' and that ''[a] question is not evidence.'' We must presume that the jury followed those instructions. *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). Under those circumstances, and given Newman's frank admissions and overwhelming evidence on the child abuse charge, the error in allowing the prosecution to ask about the November 2006 and February 2009 incidents cannot be said to have had a substantial and injurious effect on the verdict.

[Headnote 27]

In the unique circumstances of this case, we also find the error in admitting the Ewing testimony and allowing Newman to be questioned about his trespass from the hospital to have been harmless. Newman's battery-by-strangulation conviction rested on his testimony admitting that he put Carmona in a stranglehold and held his hands around his throat for 30 seconds or more—testimony that numerous eyewitnesses corroborated. Newman's defense focused on the absence of substantial bodily harm to Carmona, and only minimally on self-defense. And the prosecution made almost no use of the Ewing testimony. For these reasons, we are convinced that the error in admitting the Ewing testimony and allowing the prosecution to question Newman about his trespass from the hospital did not have a substantial and injurious effect on the verdict.

The erroneously admitted evidence was a miniscule and unnecessary part of the prosecution's case and merely repeated what jurors already knew based on admissible evidence—that Newman is an admittedly aggressive, obnoxious man who hits his children and bullies anyone who criticizes his parenting. As the district court observed, this case was only conceptually challenging, as the facts were remarkably clear. While we will not hesitate to reverse a

judgment of conviction when evidentiary error taints an accused's right to a fair trial, such did not occur here.

We therefore affirm.

HARDESTY, J., concurs.

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

The majority correctly holds that some of the episodes involving Newman's son, Jacob, were not proven by clear and convincing evidence as required by our caselaw, and that it was an abuse of discretion to admit the testimony of surprise rebuttal witness Connie Ewing. The analysis of these errors by the majority is outstanding and can be considered a landmark holding in the often contested area of NRS 48.045's prohibition against using character or prior-bad-act testimony to prove criminal responsibility.

My problem with the majority is the holding that these errors were harmless and that said errors did not taint Newman's right to a fair trial.

I would hold that these substantial errors rooted in NRS 48.045 and the prohibition against using character or bad-act-testimony to prove criminal responsibility are structural and require reversal of appellant's convictions and the granting of a new trial without the prosecution using these structural errors of inadmissible and highly prejudicial evidence.

It is also important to note that after appellant testified in his own behalf and the defense rested, the trial court permitted Connie Ewing to testify after she came forward after reading about the case in the newspaper. This was not only ''trial by ambush,'' but also was clearly inadmissible testimony. How can the majority justify this testimony as harmless error?

The majority further states that ''in closing neither side argued the prior-bad-act evidence involving Jacob'' and that ''the Ewing testimony was alluded to but briefly.'' To me this justification for concluding that the errors were harmless is not supported in the law or the facts of this case and is not relevant to the issue of harmless error.[1]

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[1]*See Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) (noting that the jury was instructed that '' '[s]tatements, arguments and opinions of counsel are not evidence in the case' '' (alteration in original)); *Greene v. State*, 113 Nev. 157, 169, 931 P.2d 54, 61 (1997) (reiterating the district court's admonishment that '' 'arguments of counsel are not evidence, as I've told you earlier, and neither are the personal beliefs of counsel as to—as to the implications of that evidence' ''), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); *Flanagan v. State*, 112 Nev. 1409, 1420, 930 P.2d 691, 698 (1996) (highlighting the jury instruction that '' '[s]tatements, arguments and opinions of counsel are not evidence in the case' '' (alteration in original)); *Bonacci v. State*, 96 Nev. 894, 896-97, 620 P.2d 1244, 1246 (1980) (reiterating the district court's admonishment that '' 'arguments of counsel are not evidence' '').

One last thought:

> in any test of harmless error, and in any case, an appellate court has only probabilities to go on, not certainties. Nonetheless, when it undertakes to evaluate the probabilities in terms of an error's effect on the judgment, instead of merely looking at the result as the test of harmlessness, the judicial process at the trial level as well as in appellate review stands to make a long-term gain in fairness without any long-term loss in efficiency. In the long run there would be closer guard against error at the trial, if appellate courts were alert to reverse, in case of doubt, for error that could have contaminated the judgment.[2]

In light of the burden of proof beyond a reasonable doubt on a prosecutor in a criminal case and the nature of the errors confirmed by the majority, I would reverse appellant's convictions and grant him a new trial.

TAMMY EGAN, APPELLANT, *v.* GARY CHAMBERS, DPM, AN INDIVIDUAL; AND SOUTHWEST MEDICAL ASSOCIATES, INC., A NEVADA CORPORATION, RESPONDENTS.

No. 56674

April 25, 2013 299 P.3d 364

Appeal from a district court order dismissing a professional negligence action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Patient, whose foot was amputated following surgical procedure, brought professional negligence action against podiatric physician and physician's employer. The district court dismissed action, and patient appealed. The supreme court, CHERRY, J., held that: (1) professional negligence actions are not subject to affidavit-of-merit requirement; and (2) statute, providing that the district court shall dismiss without prejudice, actions for medical malpractice or dental malpractice filed without an affidavit of merit, did not apply to patient's professional negligence claims against podiatric physician, overruling *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009).

Reversed and remanded.

Brent D. Percival, Esq., P.C., Las Vegas, for Appellant.

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[2]Roger J. Traynor, *The Riddle of Harmless Error* 22-23 (1970).

Hutchison & Steffen, LLC, and *Michael K. Wall* and *L. Kristopher Rath*, Las Vegas, for Respondents.

1. HEALTH; NEGLIGENCE.
   Professional negligence actions are not subject to affidavit-of-merit requirement set forth in statute, providing that, if action for medical malpractice or dental malpractice is filed in the district court, the district court shall dismiss the action if the action is filed without medical expert affidavit supporting the allegations contained in the action; language of statute makes no mention of professional negligence, overruling *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009). NRS 41A.071.
2. STATUTES.
   When a statute is clear on its face, the courts will not look beyond the statute's plain language.
3. HEALTH.
   Statute, providing that the district court shall dismiss, without prejudice, actions for medical malpractice or dental malpractice filed without an affidavit of merit, did not, by its plain terms, apply to patient's professional negligence claims against her podiatrist; statute referred expressly to medical malpractice, which in turn was defined as pertaining to physicians, hospitals, and hospital employees, and podiatrists were not licensed pursuant to statutory chapter governing physicians. NRS 41A.009, 41A.071.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

In this opinion, we reexamine whether NRS 41A.071's affidavit-of-merit requirement applies to claims for professional negligence.[1] In 2009, we considered the identical question in *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009). Despite the plain language of NRS 41A.071, we concluded in *Fierle* that professional negligence actions were subject to the affidavit-of-merit requirement. *Id.* at 736-38, 219 P.3d at 911-12. While we acknowledge the important role that stare decisis plays in Nevada's jurisprudence, we recognize that we broadened the scope of NRS 41A.071, expanding the reach of the statute beyond its precise words. We now conclude that professional negligence actions are not subject to the affidavit-of-merit requirement based on the unambiguous language

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[1]NRS 41A.071 provides that:

> If an action for *medical malpractice or dental malpractice* is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.

(Emphasis added to reflect the omission of professional negligence.)

of NRS 41A.071 and, consequently, we overrule, in part, our holding in *Fierle*. The district court therefore erred when it dismissed appellant's professional negligence complaint for lack of a supporting affidavit of merit. Accordingly, we reverse the district court's order and remand this matter to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

In 2007, appellant Tammy Egan visited a physician concerning ongoing pain she was having in her left foot and was referred to respondent Gary Chambers, a doctor of podiatric medicine, for surgery. Chambers, who was employed by respondent Southwest Medical Associates, Inc. (SMA), performed several surgical procedures on Egan's left foot and ankle in July 2007. Following the operation, Egan complained of darkened skin and blisters around the surgical areas, and after several follow-up visits, Chambers discovered gangrene in Egan's left foot. Chambers referred Egan to another podiatric physician, who ultimately performed three additional surgical operations on her foot in August and September 2007, including amputating the left great toe and part of the left foot. Following the procedures and follow-up treatment, the podiatric physician concluded that Egan would suffer permanent disability and would not be able to return to her previous employment as a waitress.

In July 2008, Egan filed a district court complaint for professional negligence against Chambers and SMA.[2] Although Egan's complaint alleged that Chambers' medical treatment fell beneath the standard of care expected of a practicing podiatric physician in Clark County, podiatrists are not considered ''physicians'' under NRS Chapter 41A for medical malpractice claim purposes, and thus, Egan filed the complaint without a supporting NRS 41A.071 affidavit of merit. Subsequently, Egan filed an amended complaint, also without a supporting affidavit of merit.

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[2]Egan's complaint asserted causes of action for both professional negligence and breach of contract. However, because both causes of action were based on Chambers' alleged ''failure to perform medical care which rose to the level of compliance with the established care owed to [Egan],'' her entire complaint in fact sounded in tort, and issues regarding NRS 41A.071's affidavit requirement thus apply equally to both causes of action. *See State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.3d 359, 361 (1972) (noting that, in determining whether an action is based on contract or tort, this court looks at the nature of the grievance to determine the character of the action, not the form of the pleadings); *Stafford v. Schultz*, 270 P.2d 1, 6 (Cal. 1954) (stating that a patient's action for injuries based on the physician's negligent treatment of the patient is an action sounding in tort and not upon a contract); *Christ v. Lipsitz*, 160 Cal. Rptr. 498, 501 (Ct. App. 1979) (‘‘ ‘It is settled that an action against a doctor arising out of his negligent treatment of a patient is an action sounding in tort and not one based upon a contract.’ ’’ (quoting *Bellah v. Greenson*, 146 Cal. Rptr. 535, 542 (Ct. App. 1978))).

While Egan's case was pending before the district court, this court issued its decision in *Fierle* concluding that an affidavit of merit is required under NRS 41A.071 for both medical malpractice and professional negligence complaints, including when claims based on medical malpractice and professional negligence are asserted against a professional medical corporation. *Fierle*, 125 Nev. at 734-36, 737-38, 219 P.3d at 911, 912. This court concluded, therefore, that, like medical malpractice complaints, professional negligence complaints filed without a supporting affidavit of merit were void ab initio and must be dismissed. *Id*. at 741, 219 P.3d at 914.

Relying on *Fierle*, Chambers and SMA[3] moved to dismiss Egan's complaint in February 2010. The district court granted the motion and dismissed Egan's complaint without prejudice in July 2010. At that point, absent the availability of some type of equitable relief, Egan admittedly was unable to file a new complaint because the statute of limitations for her claims had expired. *See* NRS 41A.097(2). This appeal followed.

DISCUSSION

[Headnotes 1, 2]

Applying de novo review, we take this opportunity to reconsider whether NRS 41A.071's affidavit-of-merit requirement applies to professional negligence claims. *See I. Cox Constr. Co. v. CH2 Investments*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013) (holding that this court reviews questions of statutory construction de novo). When a statute is clear on its face, we will not look beyond the statute's plain language. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012); *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004).

[Headnote 3]

NRS 41A.071 provides that the district court shall dismiss, without prejudice, actions for ''medical malpractice or dental malpractice'' filed without an affidavit of merit. The plain language of NRS 41A.071 makes no mention of professional negligence. NRS 41A.071 refers expressly to ''medical malpractice,'' which in turn is defined as pertaining to physicians, hospitals, and hospital employees. NRS 41A.009. ''Physician'' is defined as a person licensed under NRS Chapters 630 or 633. NRS 41A.013. Podiatrists are not licensed pursuant to NRS Chapters 630 or 633; rather, they

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[3]As there are no allegations that SMA is a hospital, the claims against SMA also do not fall within the definition of ''medical malpractice.'' *See* NRS 41A.009 (including hospitals and their employees in the definition of medical malpractice).

are licensed pursuant to NRS Chapter 635. As such, NRS 41A.071 does not, by its plain terms, apply to Egan's claims against her podiatrist. *See Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013) (''[I]n the face of that plain language, we cannot come to another construction.'').

Although stare decisis plays a critical role in our jurisprudence, *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007), our reading of NRS 41A.071 reveals no statutory ambiguity as previously suggested in *Fierle*. We now recognize that our prior decision conflated ''medical malpractice'' with ''professional negligence'' when we read NRS 41A.071 to apply to all professional negligence claims. In so doing, our construction of NRS 41A.071 unnecessarily reached beyond its plain language. Applying *Fierle* to professional negligence claims would be substantially inequitable and contrary to the plain language of the statute. As a result of *Fierle*'s flawed application, we must overrule, in part, our holding in that case and clarify that NRS 41A.071 only applies to medical malpractice or dental malpractice actions, not professional negligence actions. *See ASAP Storage*, 123 Nev. at 653, 173 P.3d at 743 (stating that '' '[l]egal precedents of this court should be respected until they are shown to be unsound in principle' '' (alteration in original) (quoting *Grotts v. Zahner*, 115 Nev. 339, 342, 989 P.2d 415, 417 (1999) (ROSE, C.J., dissenting))); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (when governing decisions prove to be ''unworkable or are badly reasoned,'' they should be overruled). Therefore, Egan's professional negligence action against Chambers and SMA must proceed on the merits.

CONCLUSION

For the reasons articulated above, we hold that the plain language of NRS 41A.071 indicates that professional negligence actions are not subject to its affidavit-of-merit requirement, and to the extent that our decision in *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009), conflicts with this holding, we overrule it. Accordingly, we conclude that the district court erred when it dismissed Egan's professional negligence claim against Chambers and SMA for lack of a supporting affidavit of merit.[4] We reverse the district court's dismissal order and remand this case for further proceedings consistent with this opinion.

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

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[4]In light of our resolution of this appeal, we need not reach Egan's remaining contentions.