Here, without briefing, argument, or even notice, the district court granted summary judgment in favor of Wiley on his contract claims. This amounts to the type of sua sponte summary judgment of which this court and federal courts have disapproved. We therefore conclude that the district court erred in granting summary judgment on Wiley's fifth and eighth causes of action for breach of contract and intentional interference with contract, respectively. Accordingly, we grant Renown's petition, in part, and order the clerk of this court to issue a writ of mandamus directing the district court to vacate that portion of its order granting summary judgment to Wiley on his fifth and eighth causes of action. We decline to consider the other issues and arguments presented in Renown's writ petition and therefore deny the remainder of the petition. *Davis*, 129 Nev. at 118, 294 P.3d at 417.

Gibbons, C.J., and Hardesty, Parraguirre, Douglas, and Saitta, JJ., concur.

ABRON MARCUS BUCHANAN, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 62343

October 2, 2014 335 P.3d 207

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary and robbery. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

The supreme court, Douglas, J., held that denial of motion to strike jury venire, after evidentiary hearing had been granted but before conducting hearing, was structural error.

Reversed and remanded.

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

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

1. Criminal Law; Jury.

The district court's denial of motion to strike jury venire, brought on ground that venire containing no black prospective jurors in violation of defendant's constitutional right under Sixth Amendment to a jury selected from fair cross section of the community, after the district court had granted evidentiary hearing before conducting hearing, was structural error,

in burglary and robbery trial; the district court judge, by indicating that she would conduct an evidentiary hearing and consider testimony from the jury commissioner but then deciding the fair-cross-section challenge before doing so, and making that decision based on a record devoid of any factual information regarding the venire selection process, had predetermined the challenge and created the appearance of improper judicial bias. U.S. CONST. amend. 6.

2. JURY.

Although the Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community, a criminal defendant is entitled to a jury venire selected from a fair cross section of the community. U.S. CONST. amend. 6.

3. JURY.

To establish a prima facie violation of the fair-cross-section guarantee under the Sixth Amendment, a criminal defendant must show: (1) that the group alleged to be excluded is a distinctive group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. U.S. CONST. amend. 6.

4. JURY.

If a criminal defendant establishes a prima facie violation of the constitutional right under the Sixth Amendment to a jury selected from a fair cross section of the community, the burden shifts to the government to show that the disparity is justified by a significant state interest. U.S. CONST. amend. 6.

5. CRIMINAL LAW; JURY.

When a defendant moves the court to strike a jury venire for violation of his constitutional right under the Sixth Amendment to a jury selected from a fair cross section of the community, and the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion. U.S. CONST. amend. 6.

Before HARDESTY, DOUGLAS and CHERRY, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this opinion, we address whether, after a district court grants an evidentiary hearing on a pretrial motion to strike a jury venire, it is structural error to deny that motion before completing the evidentiary hearing. We hold that it is.

FACTS AND PROCEDURAL HISTORY

Buchanan was charged with burglary, robbery, and abuse or neglect of an older person. Upon seeing the jury venire enter the courtroom for voir dire, Buchanan's counsel lodged an immediate objection, seeking to strike the venire for an alleged violation of Buchanan's constitutional right to a jury selected from a fair cross section of the community. Buchanan's counsel argued that because

the jury venire contained no Black prospective jurors, it was not representative of Clark County's population. Buchanan's counsel then questioned the Eighth Judicial District Court's jury-selection process and whether it was reaching a fair cross section of the community in Clark County.

The prosecutor conceded that the group alleged to be excluded, Black citizens, constitutes a distinctive group, and that Buchanan's venire did not contain a fair and reasonable representation of that group. Thus, the only dispute regarding Buchanan's fair-cross-section challenge was whether the underrepresentation of Black citizens in the jury venire was due to systematic exclusion in the jury-selection process. The prosecutor contended that it was not. Before Buchanan's counsel could rebut the prosecutor's claim in an attempt to prove systematic exclusion, the district court judge ended arguments, stating that she would put the jury commissioner under oath to determine how the jury venire was selected and whether Black citizens were being systematically excluded. Immediately after granting this evidentiary hearing, but before holding it, the district court judge sua sponte denied Buchanan's motion because she did not believe the jury-selection process systematically excluded Black citizens.

Thereafter, the jury panel was selected and sworn in. Buchanan's counsel then asked the district court judge about interviewing the jury commissioner. The district court judge stated that she had already denied the motion and planned on waiting until Buchanan's trial was over before holding the hearing with the jury commissioner. After a two-day trial, the jury found Buchanan guilty of burglary and robbery. The next day, the district court judge allowed the parties to question the acting jury commissioner for the Eighth Judicial District Court.

DISCUSSION

[Headnote 1]

Buchanan argues that the district court committed structural error under *Brass v. State*, 128 Nev. 748, 291 P.3d 145 (2012), by making its determination prior to a full hearing on his fair-cross-section challenge. The State contends that *Brass* is inapposite.[1]

Whether the district court's actions in this case constituted structural error is a question of law that we review de novo. *See Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009).

In *Brass*, defendant's counsel lodged a *Batson*[2] objection during voir dire after the prosecutor used a peremptory challenge to strike

[1]We note that *Brass* involved a *Batson* challenge, and that this case centers on a fair-cross-section challenge; however, both situations raise the issue of what constitutes proper district court conduct when jury-selection challenges are raised.

[2]*Batson v. Kentucky*, 476 U.S. 79 (1986).

a Black prospective juror from the jury venire. 128 Nev. at 752, 291 P.3d at 148. Only after dismissing the prospective juror at issue did the district court conduct its hearing on the *Batson* challenge. *Id.* We concluded that "when a defendant asserts a *Batson* violation, it is a structural error to dismiss the challenged juror prior to conducting the *Batson* hearing because it shows that the district court predetermined the challenge before actually hearing it." *Id.* at 750, 291 P.3d at 147. In making this decision, we expressed our concern "that the dismissal of a prospective juror before holding a *Batson* hearing may present the appearance of improper judicial bias." *Id.* at 753 n.4, 291 P.3d at 149 n.4.

[Headnotes 2-4]

Here, Buchanan's counsel lodged an objection and moved the court to strike the jury venire based on an alleged violation of Buchanan's fair-cross-section right. Although "[t]he Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community," a criminal defendant "is entitled to a [jury] venire *selected* from a fair cross section of the community." *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005) (emphasis added). To establish a prima facie violation of the fair-cross-section guarantee, a criminal defendant must show:

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;[3] and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[4]

Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996) (emphasis omitted) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). If a criminal defendant establishes a prima facie showing,

---

[3]The U.S. Supreme Court has not yet approved any particular method or threshold for satisfying this requirement. *See Berghuis v. Smith*, 559 U.S. 314, 329-30 (2010). This court has stated that comparative disparities over 50% indicate that a group is underrepresented. *Williams*, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9.

[4]In *Berghuis*, the U.S. Supreme Court emphasized that a defendant merely pointing to multiple factors that might contribute to a distinctive group's underrepresentation in jury venires is insufficient to show systematic exclusion. 559 U.S. at 332. Instead, a defendant must show that underrepresentation is inherent in the particular selection process. *Evans v. State*, 112 Nev. 1172, 1186-87, 926 P.2d 265, 275 (1996); *see also Duren v. Missouri*, 439 U.S. 357, 367 (1979) (concluding that Missouri's law exempting women from jury service and the way that Jackson County administered that law were systematic causes of women's underrepresentation in jury venires).

"the burden shifts to the government to show that the disparity is justified by a significant state interest." *Id.* at 1187, 926 P.2d at 275.

During the district court's initial sidebar addressing Buchanan's motion to strike the venire, the prosecutor conceded the first two elements of the fair-cross-section test, leaving only the issue of whether the Eighth Judicial District Court's jury-selection process systematically excluded Black citizens. After hearing initial arguments on that issue, the district court judge granted Buchanan an evidentiary hearing with the jury commissioner to determine how Buchanan's jury venire was selected and whether the process used systematically excluded Black citizens. But the district court judge then denied Buchanan's motion to strike the jury venire for violating his fair-cross-section right before conducting that hearing. Thus, Buchanan was not afforded a complete hearing on his pretrial motion before the district court judge decided the issue.

[Headnote 5]

While Buchanan's case is factually distinguishable from *Brass*, the district court judge's actions elicit the same concerns. By indicating that she would conduct an evidentiary hearing and consider testimony from the jury commissioner but then deciding the fair-cross-section challenge before doing so, and making that decision based on a record devoid of any factual information regarding the venire selection process, the district court judge predetermined the challenge and created the appearance of improper judicial bias. This was structural error and requires reversal. *See Neder v. United States*, 527 U.S. 1, 8 (1999) (recognizing that trial judge bias constitutes structural error); *see also Brass*, 128 Nev. at 752, 291 P.3d at 148. We therefore hold that when a defendant moves the court to strike a jury venire, and the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion.[5]

Because we reverse the district court's decision on the independent grounds of structural error, we decline to consider Buchanan's challenge to the sufficiency of the evidence supporting his convictions. *See United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir.

[5]During the belated hearing, the jury commissioner testified that the Eighth Judicial District Court's jury-selection process relies on random selections, without regard to race or gender, from a database created with information from the DMV and Nevada Energy. We do not determine whether this process disproves systematic exclusion of Black citizens in Clark County because the district court committed independent reversible error by making its decision before understanding this process. *See Miller v. Burk*, 124 Nev. 579, 588-89, 188 P.3d 1112, 1118-19 (2008) (stating that this court will not decide constitutional issues in an appeal unless necessary).

1989) (acknowledging that the Supreme Court "has never held that a reviewing court must review the sufficiency of the evidence whenever a defendant raises the issue on appeal"), *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221, 1225-26 (7th Cir. 1990).

Based on the foregoing, we reverse Buchanan's convictions for robbery and burglary and remand this matter to the district court for a new trial.

HARDESTY and CHERRY, JJ., concur.

MASON-MCDUFFIE REAL ESTATE, INC., A NEVADA CORPORATION DBA PRUDENTIAL NEVADA REALTY, APPELLANT, *v.* VILLA FIORE DEVELOPMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENT.

No. 61233

October 2, 2014 335 P.3d 211

Appeal from a district court judgment in a contract action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Commercial landlord filed action against tenant for breach of lease. Tenant filed counterclaims, alleging that it was constructively evicted. Following a bench trial, the district court entered judgment in favor of landlord. Tenant appealed. The supreme court, PARRAGUIRRE, J., held that tenant did not give landlord notice and opportunity to cure water intrusion, as was required for constructive eviction.

Affirmed.

Olson, Cannon, Gormley, Angulo & Stoberski and *Michael E. Stoberski* and *Matthew A. Cavanaugh*, Las Vegas, for Appellant.

Fahrendorf, Viloria, Oliphant & Oster, LLP, and *Patrick R. Millsap*, Reno, for Respondent.

1. LANDLORD AND TENANT.
   Whether constructive eviction has occurred is a factual determination to be made by the trier of fact.
2. APPEAL AND ERROR.
   The supreme court will not disturb a district court's finding regarding constructive eviction if it is supported by substantial evidence.
3. EVIDENCE.
   Substantial evidence, as is required to support a district court's factual determination, is that which a reasonable mind might accept as adequate to support a conclusion.
4. LANDLORD AND TENANT.
   A party alleging constructive eviction must prove three elements: first, the landlord must either act or fail to act; second, the landlord's action or

inaction must render the whole or a substantial part of the premises unfit for occupancy for the purpose for which it was leased; and third, the tenant must actually vacate the premises within a reasonable time.

5. Landlord and Tenant.
   A commercial tenant alleging that it was constructively evicted must show that it provided the landlord notice of and a reasonable opportunity to cure the defect, in addition to showing that the landlord either acted or failed to act, that the landlord's action or inaction rendered the whole or a substantial part of the premises unfit for occupancy for the purpose for which it was leased, and that the tenant vacated the premises within a reasonable time.
6. Landlord and Tenant.
   Substantial evidence supported finding that commercial tenant did not give landlord notice and opportunity to cure ongoing water intrusion problems before vacating premises after severe water intrusion event, as was required for constructive eviction, even though evidence was presented that tenant notified landlord of prior water intrusion problems, that landlord had attempted repairs, and that landlord's maintenance employees were at premises at time of severe intrusion; evidence was presented that maintenance employees did not perform work on property at time of severe intrusion, that landlord responded to tenant's calls promptly and believed problems were resolved, that tenant had documentation of ongoing problems that was not provided to landlord, and that there was no notice to landlord that its attempted repairs were ineffective.

Before Pickering, Parraguirre and Saitta, JJ.

OPINION

By the Court, Parraguirre, J.:

In this appeal, we are asked whether a commercial tenant may be constructively evicted without first providing the landlord notice of and a reasonable opportunity to cure the defect. We conclude that constructive eviction requires that a landlord be given notice of and a reasonable opportunity to cure a defect, and substantial evidence supports the district court's finding that the landlord in this case did not receive notice that the defect continued after repairs were attempted. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Mason-McDuffie Real Estate, Inc., leased commercial real property in Reno from respondent Villa Fiore Development, LLC. Following a significant water intrusion event in December 2007, Mason-McDuffie vacated the property and ceased paying rent. Thereafter, Villa Fiore filed a complaint in the district court against Mason-McDuffie, alleging that Mason-McDuffie breached the lease. Mason-McDuffie filed an answer and counterclaims, alleging that Villa Fiore constructively evicted Mason-McDuffie by failing to maintain the roof. At a bench trial, the following evidence was presented.

Before Villa Fiore owned the property, Mason-McDuffie leased the property from nonparty Joe Hitch. In 2006, Valerie Mapes, Mason-McDuffie's manager at the time, repeatedly complained to Hitch about water intrusion. In March 2006, Mason-McDuffie sent Hitch a letter describing Hitch's failure to maintain the roof as a material breach of the lease, and Hitch arranged extensive roof repairs in the summer of 2006. After these repairs were made, Mason-McDuffie reported one new leak in a different area, and additional repairs were made in February or March 2007. Hitch received no further complaints about the roof.

Villa Fiore bought the property from Hitch in June 2007. Hitch told Gary Arthur, Villa Fiore's managing member, about the roof's past problems and that the problems had been fixed. Mapes told Arthur that the roof had leaked in the past but not recently. Villa Fiore assumed the landlord's duties under the lease, including the duty to maintain the roof and protect the interior from water intrusion. In the event that Villa Fiore breached the lease, the lease entitled Mason-McDuffie to pay third parties to cure any defects caused by Villa Fiore's breach and withhold rent in the amount of these payments if Villa Fiore failed to cure the defects within 30 days after receiving written notice of the defects. The lease was to expire in July 2009.

Arthur testified that Mapes called him in October 2007 and told him that the roof was leaking. Arthur went to the property that day, and Mapes showed him two or three areas where water was coming into the building through the roof. A roofing contractor made repairs that day. A few weeks later, Mapes reported roof leaks in different locations. Arthur saw leaks inside the property, but no one could identify their sources outside. Nevertheless, a roofing contractor performed repairs and expressed confidence that the repairs would be effective.

Arthur testified that he was never informed of other water intrusion or mold at the property before Mason-McDuffie vacated the property in December 2007. Arthur testified that he gave Mapes an emergency maintenance phone number. He also asserted that Villa Fiore's maintenance employees told him whenever they performed work at the property, but they never reported additional water intrusion problems. Arthur never received any reports from roofers or mold inspectors hired by Mason-McDuffie.

In contrast, David Hansen, Mason-McDuffie's sales manager in 2007, testified that water intrusion occurred every time it rained, beginning in August 2007. Hansen testified that Mapes called Arthur repeatedly and a maintenance person typically responded. Mason-McDuffie arranged two mold inspections in November 2007, and one indicated that mold was present in the building while the other indicated that mold was not present. Hansen did not know whether the mold reports were ever given to Arthur or Villa Fiore.

In December 2007, a severe water intrusion event occurred at the property. Hansen testified that Villa Fiore maintenance workers brought buckets to catch water. Hansen testified that Mapes and Mason-McDuffie's attorney tried to call Arthur, but he did not believe that Arthur ever came to the property in response. Mason-McDuffie never sent a letter to Arthur or Villa Fiore like the letter that Mason-McDuffie sent to Hitch in March 2006. Hansen never personally tried to contact Arthur. Mason-McDuffie hired engineers to examine the roof, and the engineers reported that portions of the roof needed to be replaced as soon as possible. This report was not provided to Arthur or Villa Fiore, but Hansen did not know why. In mid-December 2007, Mason-McDuffie vacated the property.

On January 3, 2008, Arthur passed by the property and saw a note on the door stating that Mason-McDuffie had moved. A few days later, Arthur received a letter from Mason-McDuffie stating that Mason-McDuffie considered itself constructively evicted due to the water intrusion. Upon receiving the letter, Arthur called Mapes, and the two exchanged voicemail messages, but they had no further contact. Arthur subsequently sought a new tenant for the property. The new tenant also experienced water intrusion problems, and Villa Fiore eventually replaced the roof in 2009.

The district court did not expressly decide whether Mason-McDuffie was constructively evicted, but found that severe water intrusion justified Mason-McDuffie's vacating the property. The district court also found that Mason-McDuffie did not provide the information that it had in November 2007 regarding the ongoing water intrusion and related mold problems to Villa Fiore before vacating the property. Finally, the district court found that Mason-McDuffie did not provide Villa Fiore written notice of the ongoing water intrusion. The district court concluded that the lease obligated Mason-McDuffie to provide Villa Fiore written notice of and 30 days to cure the water intrusion before exercising any other potential remedies. Because Mason-McDuffie did not comply with the notice and cure provision, the district court entered judgment in favor of Villa Fiore. Mason-McDuffie now appeals.

DISCUSSION

The district court based its judgment in Villa Fiore's favor on its finding that Mason-McDuffie failed to comply with the notice and cure provision of the lease and its conclusion that the lease required Mason-McDuffie to comply with this provision before seeking other remedies, including constructive eviction. Mason-McDuffie first argues that the district court misconstrued the lease. Next, Mason-McDuffie argues that under a theory of constructive eviction, a tenant is not required to provide its landlord with notice of and a reasonable opportunity to cure a defect before vacating the premises.

Finally, Mason-McDuffie contends that the district court's findings support an implicit finding of constructive eviction.

We assume without deciding that the lease did not require Mason-McDuffie to comply with the notice and cure provision before asserting constructive eviction. We conclude, however, that constructive eviction requires that a commercial tenant provide a landlord with notice of and a reasonable opportunity to cure a defect. Because the district court's finding that Mason-McDuffie did not provide Villa Fiore notice of the ongoing nature of the water intrusion is supported by substantial evidence, we conclude that the district court's factual findings do not support a finding of constructive eviction. Accordingly, we affirm.

Standard of review

[Headnotes 1-3]

Whether constructive eviction requires notice of and an opportunity to cure a defect is a question of law that we review de novo. *See Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. 632, 637, 333 P.3d 229, 232 (2014) (recognizing that the interpretation of caselaw is a question of law that this court reviews de novo). "Whether constructive eviction has occurred is a factual determination to be made by the trier of fact." *Krieger v. Elkins*, 96 Nev. 839, 841, 620 P.2d 370, 372 (1980). We will not disturb such a finding if it is supported by substantial evidence. *Id.*; *see also Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) (stating that this court will not overturn factual findings that are supported by substantial evidence). Substantial evidence is " 'that which a reasonable mind might accept as adequate to support a conclusion.' " *Otak Nev., L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (quoting *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 73, 270 P.3d 1259, 1262 (2012)).

Constructive eviction requires that the landlord have notice of and a reasonable opportunity to cure the defect

[Headnote 4]

We have required a party alleging constructive eviction to prove three elements. First, the landlord must either act or fail to act. *Yee v. Weiss*, 110 Nev. 657, 660, 877 P.2d 510, 512 (1994). Second, the landlord's action or inaction must render "the whole or a substantial part of the premises . . . unfit for occupancy for the purpose for which it was leased." *Id.* Third, the tenant must actually vacate the premises within a reasonable time. *Schultz v. Provenzano*, 69 Nev. 324, 328, 251 P.2d 294, 296 (1952).

Villa Fiore argues that there is a fourth essential element of constructive eviction, that the tenant provide the landlord notice of and a reasonable opportunity to cure the defect. We have not previously

discussed this proposed element, but it is not foreclosed by our decisions. Accordingly, we look to other jurisdictions for guidance. *See City of Las Vegas v. Cliff Shadows Prof'l Plaza, L.L.C.*, 129 Nev. 1, 9 n.4, 293 P.3d 860, 865 n.4 (2013) ("This court has often relied on the decisions of other jurisdictions when, as here, it is faced with issues of first impression."). Other jurisdictions have stated that constructive eviction cannot occur unless the landlord has notice of and a reasonable opportunity to cure the defect. *E.g.*, *Home Rentals Corp. v. Curtis*, 602 N.E.2d 859, 863 (Ill. App. Ct. 1992) ("[A] tenant may not abandon premises under the theory of constructive eviction without first affording the lessor a reasonable opportunity to correct the defects in the property."); *Pague v. Petroleum Prods., Inc.*, 461 P.2d 317, 319 (Wash. 1969) ("In order for a vacating tenant to claim constructive eviction, it is essential that he give the landlord notice of the act or condition complained of and an opportunity to remove or correct the condition."); *see also* Restatement (Second) of Prop.: Landlord & Tenant § 5.4 (1977) (stating that a tenant may seek remedies for a landlord's failure to make repairs if "the landlord does not correct the situation within a reasonable time after being requested by the tenant to do so").

A landlord cannot be expected to cure a defect if the landlord is unaware that the defect exists. *See Krieger*, 96 Nev. at 841, 620 P.2d at 372 (stating that substantial evidence supported the district court's finding of constructive eviction where the landlord was "notified of the problems . . . but failed to make any repairs"). Requiring a commercial tenant to provide a landlord notice of and a reasonable opportunity to cure a defect in the leased premises as an element of constructive eviction encourages the parties to discuss and potentially resolve deficient conditions in leased premises outside of the courts. *See Conference Ctr. Ltd. v. TRC—The Research Corp. of New England*, 455 A.2d 857, 863-64 (Conn. 1983) (recognizing that requiring notice and an opportunity to cure under a theory of constructive eviction is desirable because it provides "an opportunity for dialogue to establish whether the parties intend to repudiate or to fulfill their contractual obligations"). In contrast, declining to impose such an element would require landlords to intrude upon tenants' right to possess leased premises in order to guard against claims of constructive eviction by conducting frequent inspections. *See State v. White*, 130 Nev. 533, 538 n.3, 330 P.3d 482, 486 n.3 (2014) (stating that "a landlord does not have an absolute right to enter a property he or she owns because the landlord conveys the right of possession to the tenant"). Requiring a tenant to provide notice of and a reasonable opportunity to cure a defect as an element of constructive eviction thus protects both landlords' expectations in rental income and tenants' rights to possess the leased premises free from excessive intrusions by the landlord.

[Headnote 5]

Therefore, we hold that a commercial tenant alleging that it was constructively evicted must show, in addition to the three elements stated in *Yee* and *Schultz*, that it provided the landlord notice of and a reasonable opportunity to cure the defect. *See, e.g.*, *Home Rentals Corp.*, 602 N.E.2d at 863.[1]

The district court's findings are supported by substantial evidence, but they do not support a finding of constructive eviction

[Headnote 6]

Applying this rule to the circumstances presented here, we conclude that the district court's factual findings are supported by substantial evidence, but these findings do not support Mason-McDuffie's argument that it was constructively evicted.

The district court found, based on substantial evidence, that severe water intrusion rendered the property unfit for occupancy in December 2007, and it is undisputed that Mason-McDuffie vacated the property in a reasonable time. Given that the lease expressly imposed upon Villa Fiore the duty to maintain the roof, we also assume for the purpose of argument that the district court implicitly found that Villa Fiore failed to maintain the roof, thus causing the severe water intrusion. *See Luciano v. Diercks*, 97 Nev. 637, 639, 637 P.2d 1219, 1220 (1981) ("[T]his court will imply findings of fact and conclusions of law so long as the record is clear and will support the judgment."). Thus, the three elements of constructive eviction set forth in *Yee* and *Schultz* were satisfied. *See Otak Nev.*, 129 Nev. at 805, 312 P.3d at 496; *Krieger*, 96 Nev. at 841, 620 P.2d at 372.

But the district court also found that Mason-McDuffie knew that the water intrusion and related mold problems were ongoing in November 2007 but never provided this information to Villa Fiore before vacating the premises. Although Hansen testified that Villa Fiore maintenance employees were at the property in December 2007, Arthur testified that Villa Fiore employees always told him when they performed work at the property and no one did so in December 2007. Hansen testified that Mapes tried to call Arthur in December 2007 to no avail. But Arthur testified that he responded to Mapes' calls promptly in the past and that he believed the problems were resolved because no one told him about water intrusion after Octo-

[1]Mason-McDuffie argues that notice and a reasonable opportunity to cure are not required for constructive eviction, relying on *Milheim v. Baxter*, 103 P. 376, 377 (Colo. 1909). The court in *Milheim* concluded that, under the circumstances of that case, notice was not required because the landlord already "had full knowledge" of and no intent to cure the defect. *Id. Milheim* thus stands only for the proposition that a tenant need not provide the landlord with notice of a defect if the landlord already knows of the defect through other means and has failed to cure it. *See id.*; *Krieger*, 96 Nev. at 841, 620 P.2d at 372. Therefore, this argument is unpersuasive.

ber 2007. Mason-McDuffie also had documentation of the ongoing water intrusion that it, inexplicably, never provided to Arthur or Villa Fiore. Thus, the district court's finding that Mason-McDuffie did not provide the information regarding the failure of the roof that it had in November 2007 to Villa Fiore before vacating the property is supported by substantial, although conflicting, evidence.

Mason-McDuffie argues that it provided Villa Fiore notice of and an opportunity to cure the prior water intrusion and that this satisfied any notice and opportunity to cure obligation that Mason-McDuffie had under a theory of constructive eviction. Notice that the water intrusion continued despite Villa Fiore's attempted repairs was important because without further complaints from Mason-McDuffie, Villa Fiore would have no reason to believe that the repairs were ineffective. *See SGM P'ship v. Nelson*, 705 P.2d 49, 52 (Haw. Ct. App. 1985) (requiring a tenant to give a landlord notice that attempted repairs were insufficient in order to assert constructive eviction based on the insufficiency of the repairs). Because Villa Fiore attempted repairs and the district court found on substantial evidence that Mason-McDuffie did not inform Villa Fiore that these repairs were ineffective, we conclude that Mason-McDuffie's notice of prior water intrusion was insufficient to satisfy its notice and cure obligation under a theory of constructive eviction. *See id.*

While the evidence in this case is conflicting, it nevertheless constitutes substantial evidence supporting the district court's finding that Mason-McDuffie did not inform Villa Fiore that the water intrusion and related problems continued after the last repairs in October 2007 before vacating the property in December 2007. Thus, Mason-McDuffie did not satisfy the fourth element of constructive eviction, notice of and a reasonable opportunity to cure the defect.

CONCLUSION

Because the district court found that Mason-McDuffie did not provide Villa Fiore notice of and a reasonable opportunity to cure the ongoing water intrusion, the district court's factual findings do not support Mason-McDuffie's argument that it was constructively evicted. As a result, we need not address whether Mason-McDuffie was required to comply with the lease's notice and cure provision in order to successfully assert constructive eviction, and we affirm the judgment. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

PICKERING and SAITTA, JJ., concur.

D.R. HORTON, INC., a Nevada Corporation; DHI MORTGAGE COMPANY, LTD., a Texas Limited Partnership fka CH MORTGAGE COMPANY, LTD., a Nevada Limited Partnership, Appellants/Cross-Respondents, *v.* STEVEN M. BETSINGER, Respondent/Cross-Appellant.

No. 59319

October 16, 2014 335 P.3d 1230

Appeal and cross-appeal from a final district court judgment entered on remand in a tort action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Putative mortgagor filed suit against vendor, mortgagee, and branch manager, alleging fraud and deceptive trade practices involving the sale of a house. The district court entered judgment on jury verdict in favor of mortgagor and awarded him compensatory and punitive damages. Mortgagor appealed, and vendor, mortgagee, and branch manager cross-appealed. The supreme court, 126 Nev. 162, 232 P.3d 433 (2010), affirmed in part, reversed in part, and remanded. On remand, the district court awarded punitive damages to mortgagor. Vendor, mortgagee, and branch manager appealed. The supreme court, Cherry, J., held that: (1) on remand of issue of punitive damages, fact-finder was required to determine both entitlement to damages and amount; and (2) vendor was not entitled to award of attorney fees pursuant to offer of judgment rule.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied December 16, 2014]

McDonald Carano Wilson LLP and *Pat Lundvall, Debbie A. Leonard*, and *Kerry St. Clair Doyle*, Las Vegas, for Appellants/Cross-Respondents.

Feldman Graf, P.C., and *David J. Feldman* and *John C. Dorame*, Las Vegas, for Respondent/Cross-Appellant.

1. Damages.

Statute that required any trier of fact who determined that punitive damages were warranted to also determine amount of damages to award required fact-finder, on remand, when fact-finder was limited to solely making determination regarding punitive damages, to first determine whether punitive damages were justified and then to determine the amount of damages to award, rather than only determining the amount of damages; the phrase "before the same trier of fact" indicated that a single judge or jury was required to determine both whether punitive damages were to be assessed and, in a subsequent proceeding, the amount of such damages. NRS 42.005(3).

2. COURTS.
   The law-of-the-case doctrine only applies to issues previously determined, not to matters left open by the supreme court.
3. STATUTES.
   In interpreting a statute de novo, the supreme court will not look beyond the plain language when it is clear on its face.
4. DAMAGES.
   The issue of exemplary damages is separate and distinct from that of actual damages, for they are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff.
5. COSTS.
   Vendor was not entitled to award of attorney fees pursuant to offer of judgment rule in action by putative mortgagor against vendor, mortgagee, and mortgagee's branch manager stemming from failed real estate sales transaction, where, although award of compensatory damages to mortgagor was less than vendor's offer of judgment, vendor waited nine months to file a motion for attorney fees and did so the night before a second trial was to commence against mortgagee.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

This appeal arises from punitive damages proceedings on remand after we issued our decision in *Betsinger v. D.R. Horton, Inc. (Betsinger I)*, 126 Nev. 162, 232 P.3d 433 (2010), a case that involved fraud and deceptive trade practices in the context of a real estate purchase and loan arrangement. On appeal, we consider whether the proceedings on remand violated NRS 42.005(3), which requires any trier of fact who determines that punitive damages are warranted to also determine the amount of damages to award. Specifically, we consider whether NRS 42.005(3) applies in a remand situation so as to require the second jury on remand to reassess whether punitive damages are warranted before that jury may determine the amount of punitive damages to be awarded. We conclude that NRS 42.005(3) is unambiguous in imposing this requirement. Thus, when the fact-finder is limited to solely making a determination regarding punitive damages, NRS 42.005(3) requires that fact-finder to first determine whether punitive damages are justified—*i.e.*, whether there is clear and convincing evidence of a defendant's oppression, fraud, or malice—and then to determine the amount of damages to award. Because the jury on remand in this case was prevented from

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, did not participate in the decision of these matters.

determining whether punitive damages were justified, we reverse the district court's punitive damages award and remand for a new trial. We also affirm the denial of attorney fees to D.R. Horton.

FACTS AND PROCEDURAL HISTORY

This case arose from a failed attempt to purchase a home in Las Vegas, the details of which are more fully set forth in *Betsinger I*, 126 Nev. 162, 232 P.3d 433 (2010). Briefly, respondent/cross-appellant Steven Betsinger contracted to purchase a house from appellant/cross-respondent D.R. Horton, Inc., and applied for a loan to fund that purchase with D.R. Horton's financing division, appellant/cross-respondent DHI Mortgage, Ltd. *Id*. at 163, 232 P.3d at 434. After DHI Mortgage refused to fund the loan at the interest rate originally offered, Betsinger canceled the purchase contract. When D.R. Horton failed to return Betsinger's earnest-money deposit, he sued, asserting claims for fraud and deceptive trade practices based on allegations that D.R. Horton caused him to cancel the purchase agreement with false assurances that his deposit would be returned and that it and DHI Mortgage used a "bait and switch" tactic to lure him into making the deposit in the first place. After a trial, the jury found in favor of Betsinger and awarded him compensatory damages against D.R. Horton and DHI Mortgage consisting of actual damages and emotional distress damages, as well as punitive damages against DHI Mortgage.[2] *Id.* at 164, 232 P.3d at 434-35.

All parties appealed, and we reversed the judgment as to consequential damages because of Betsinger's failure to present evidence of any physical manifestation of emotional distress. *Id.* at 166, 232 P.3d at 436. We accordingly reduced the compensatory damages award to the amount of Betsinger's actual damages, $10,727 ($5,190 from D.R. Horton and $5,537 from DHI Mortgage). *Id.* at 164, 167, 232 P.3d at 434, 436. Because it was impossible to determine what the jury would have awarded Betsinger in punitive damages against DHI Mortgage given the reduction in the compensatory damages award, we declined to arbitrarily reduce the punitive damages amount. Instead, we concluded that "the punitive damages award must be remanded for further proceedings because we cannot be sure what the jury would have awarded in punitive damages as a result of the substantially reduced compensatory award." *Id.* at 167, 232 P.3d at 437.

On remand, questions arose as to the appropriate scope of the trial in light of this court's remand instructions. Specifically, confusion

[2]The jury also awarded emotional distress damages and punitive damages against another defendant, who was DHI Mortgage's branch manager, for his role in the "bait and switch." *Betsinger I*, 126 Nev. at 164, 232 P.3d at 434-35. Given this court's resolution of the first appeal, that defendant was not involved in the remanded proceedings.

arose regarding whether the jury needed to first consider DHI Mortgage's liability for punitive damages, or if the jury was simply to consider the amount of punitive damages warranted. Ultimately, the district court instructed the jury that it was to decide "what amount, if any, Mr. Betsinger is entitled to for punitive damages."[3] Based on this instruction, the jury returned a verdict against DHI Mortgage and in favor of Betsinger with respect to punitive damages in the amount of $675,000. The district court subsequently entered judgment against D.R. Horton in the amount of $5,190 plus interest and denied D.R. Horton attorney fees. Judgment was entered against DHI Mortgage in the amount of $5,537 plus interest and $300,000 in punitive damages, the total after NRS 42.005(1)(b)'s punitive damages cap was applied. Thereafter, D.R. Horton and DHI Mortgage appealed, and Betsinger cross-appealed.

DISCUSSION

Although the parties raise numerous arguments on appeal and cross-appeal, this opinion need analyze only two of those arguments. We first address DHI Mortgage's argument that the district court's jury instruction regarding punitive damages violated NRS 42.005(3)'s "same trier of fact" requirement. We then turn to whether the district court should have awarded D.R. Horton attorney fees.

NRS 42.005(3) requires the same fact-finder to determine whether liability exists for punitive damages and, if so, the amount of damages

[Headnotes 1, 2]

NRS 42.005 governs when punitive damages are authorized and the process by which those damages are to be awarded. In particular, subsection 1 authorizes punitive damages when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice." NRS 42.005(1). Subsection 3, in turn, sets forth the process by which those damages are to be awarded:

> If punitive damages are claimed pursuant to this section, *the trier of fact shall make a finding of whether such damages will be assessed.* If such damages are to be assessed, a subsequent proceeding must be conducted *before the same trier of fact to determine the amount of such damages* to be assessed.

NRS 42.005(3) (emphases added). On appeal, DHI Mortgage asserts that NRS 42.005(3) unambiguously provides that a single jury must determine both a defendant's liability for punitive damages—*i.e.*,

[3]We note that the requirements of NRS 42.007(1) did not need to be met coming into the second trial because the first jury had previously determined that DHI Mortgage had engaged in fraud and in deceptive trade practices. *Betsinger I*, 126 Nev. at 164, 232 P.3d at 434.

whether clear and convincing evidence demonstrates that the defendant is guilty of oppression, fraud, or malice—*and* the amount of any award. Thus, according to DHI Mortgage, the district court erred as a matter of law by permitting the second jury to consider only the amount of damages to be awarded. In response, Betsinger contends that NRS 42.005(3)'s "same trier of fact" requirement should not apply when a case has been remanded. In particular, Betsinger contends that DHI Mortgage's reading of NRS 42.005(3) is untenable, as it would essentially entitle DHI Mortgage to a new trial on its underlying liability for fraud, since the jury considering whether punitive damages are warranted would necessarily need to find that DHI Mortgage was guilty of oppression, fraud, or malice.[4]

[Headnotes 3, 4]

In interpreting this statute de novo, we will not look beyond the plain language when it is clear on its face. *Pub. Agency Comp. Trust v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011); *Pankopf v. Peterson*, 124 Nev. 43, 46, 175 P.3d 910, 912 (2008). Here, the plain language of NRS 42.005(3), specifically the phrase "before the same trier of fact," indicates that a single judge or jury must determine *both* whether punitive damages should be assessed and, in a subsequent proceeding, the amount of such damages. NRS 42.005(3). Because this language is plain and clear, we decline to delve into legislative history. *Pankopf*, 124 Nev. at 46, 175 P.3d at 912. As for Betsinger's contention that NRS 42.005(3) necessarily leads to a retrial of the entire action, we disagree. In many instances, such as in this case's first trial, the fact-finder who determines whether compensatory damages are warranted will be the same one as determines liability for and the extent to which punitive damages are warranted. Nevertheless, "[t]he issue of exemplary damages is separate and distinct from that of actual damages, for they are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff," *Brewer v. Second Baptist Church of L.A.*, 197 P.2d 713, 720 (Cal. 1948), and thus, we think, they may be tried separately on remand. Nothing in the statute purports to govern the procedure on remand, and there is no reason why issues concerning compensatory damages, already affirmed by this court in *Betsinger I*, must be relitigated to determine issues concerning the punitive

[4]Betsinger also contends that DHI Mortgage should be barred by the law-of-the-case doctrine from arguing that the trial on remand violated NRS 42.005(3). "Th[is] doctrine only applies to issues previously determined, not to matters left open by the appellate court." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003). To the extent that Betsinger is contending that we determined in *Betsinger I* that a new trial was warranted on the *amount* of punitive damages only, we do not read *Betsinger I* as having made such a narrow determination.

damages sought.[5] *See Wickliffe v. Fletcher Jones of Las Vegas, Inc.*, 99 Nev. 353, 357, 661 P.2d 1295, 1297 (1983) (recognizing, without discussing any statutory language, that in a retrial on remand based on failure to give a punitive damages instruction, a litigant should not have to readdress issues concerning liability and amount of compensatory damages when those issues were not challenged on appeal), *superseded by statute on other grounds as stated in Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 741 n.39, 742-43, 192 P.3d 243, 253 n.39, 254-55 (2008).

But where, as in this case's second trial, the fact-finder is tasked only with making a determination regarding punitive damages, NRS 42.005(3) unambiguously requires that fact-finder to first determine whether punitive damages are warranted—*i.e.*, whether there is clear and convincing evidence of a defendant's oppression, fraud, or malice—before determining the amount of punitive damages to award. Thus, we agree with DHI Mortgage that the district court's interpretation and application of our remand instruction in *Betsinger I* deprived it of its right under NRS 42.005(3) to have the jury determine whether punitive damages were warranted. Even if the district court's instruction that the jury was to determine "what amount, if any, Mr. Betsinger is entitled to for punitive damages" may have permitted the jury to determine that $0 was an appropriate award, this instruction did not require the jury to make the threshold determination of whether punitive damages could be awarded. We emphasize that, under NRS 42.005(3), the trier of fact who determines the amount of punitive damages to be awarded must also make the initial determination of whether punitive damages are warranted.

Attorney fees

[Headnote 5]

Finally, we consider D.R. Horton's separate appeal of the district court's order denying its post-remittitur motion for attorney fees as untimely. We conclude that the district court did not abuse its discretion in declining to award attorney fees under the offer of judgment rule. *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012); *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988). In addition to reversing and remanding for determination of punitive damages as to DHI Mortgage, *Betsinger I* reduced the compensatory damages award against D.R. Horton to an amount less than its pretrial offer of judgment to Betsinger. 126 Nev. at 167, 232 P.3d at 436. However,

[5]While we agree with Betsinger that, in some instances, there will be an overlap of evidence presented in an initial trial and in a second trial ordered on remand for punitive damages only, we believe that this is the only reasonable application of NRS 42.005(3)'s unambiguous requirement.

after this reduction triggered D.R. Horton's ability to seek attorney fees, D.R. Horton waited nine months to file a motion for attorney fees, and did so the night before the second trial was to commence against DHI Mortgage. Thus, we cannot conclude that the district court abused its discretion in determining that D.R. Horton's nine-month delay was unreasonable, and we affirm the district court's decision denying attorney fees to D.R. Horton.

CONCLUSION

Under NRS 42.005(3), a defendant is entitled to have the same finder of fact who determines the amount of punitive damages to be awarded also make the threshold determination of whether punitive damages are warranted. Because that did not happen here, we reverse and remand for a new trial on punitive damages.[6]

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

MICHAEL DWAYNE BYARS, AKA MARCUS JONES, AKA JEFFERY ROSHAWE BYARS, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 61348

October 16, 2014 336 P.3d 939

Appeal from a judgment of conviction, pursuant to a jury verdict, of prohibited possession of a firearm by an unlawful user of a controlled substance, addict, or felon; using or being under the influence of a controlled substance; and two counts of battery by a prisoner in lawful custody or confinement. Tenth Judicial District Court, Churchill County; Robert E. Estes, Judge.

The supreme court, PARRAGUIRRE, J., held that: (1) natural dissipation of marijuana from defendant's bloodstream did not create per se exigency justifying warrantless blood draw; (2) as a matter of first impression, statute that allowed officer to use reasonable force to take driver's blood was unconstitutional; but (3) officer obtained evidence in good faith, such that suppression was not required; (4) State adequately proved corpus delicti of defendant's charge for felon in possession of a firearm; (5) felony being under the influence conviction and prior conviction for misdemeanor driving under the

[6]Having considered all of the other issues raised by the parties, we conclude that they either lack merit or need not be addressed given our disposition of this appeal.

influence did not violate Double Jeopardy; (6) evidence was sufficient to support battery convictions; and (7) State's remarks during closing argument were not prejudicial.

Affirmed in part, reversed in part, and remanded.

Steve E. Evenson, Lovelock, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Arthur E. Mallory*, District Attorney, and *Benjamin D. Shawcroft*, Deputy District Attorney, Churchill County, for Respondent.

1. Searches and Seizures.
   Warrantless search is reasonable only when it falls within recognized exception. Const. art. 1, § 18; U.S. Const. amend. 4.
2. Searches and Seizures.
   Exigent circumstances exception to warrant requirement applies when exigencies of the situation make needs of law enforcement so compelling that warrantless search is objectively reasonable under Fourth Amendment. U.S. Const. amend. 4.
3. Automobiles.
   Natural dissipation of marijuana from bloodstream of defendant, who was suspected of driving under the influence of a controlled substance, did not create per se exigency justifying forced, warrantless blood draw under exigent circumstances exception to Fourth Amendment warrant requirement; waiting for warrant would not result in losing evidence of defendant's intoxication, record suggested that time was not factor in officer's decision to take defendant's blood without warrant, and there was no indication that officer was prevented from seeking warrant telephonically or that time was of the essence in securing blood. U.S. Const. amend. 4.
4. Searches and Seizures.
   Consent to search provides exception to both Fourth Amendment's probable cause and warrant requirements. U.S. Const. amend. 4.
5. Criminal Law.
   The supreme court reviews constitutionality of a statute de novo.
6. Constitutional Law.
   The supreme court presumes that statute is constitutional, thus party challenging statute has heavy burden to show that it is unconstitutional.
7. Automobiles.
   Statute that allowed police officer to use reasonable force to take driver's blood without warrant when officer had reasonable belief that driver was under influence of alcohol or controlled substance violated constitutional prohibition against unreasonable searches and seizures, even though implied consent statute provided that driver gave consent to blood draw by driving vehicle on state roads; implied consent statute did not allow driver to withdraw consent, such that driver's consent would not be considered voluntary, and statute allowing for blood draw permitted officers to conduct a search without a warrant or exception to warrant requirement. Const. art. 1, § 18; U.S. Const. amend. 4; NRS 484C.160(1), (7).
8. Searches and Seizures.
   A necessary element of consent to search, as exception to Fourth Amendment warrant requirement, is the ability to limit or revoke the consent. U.S. Const. amend. 4.

9. Searches and Seizures.
A consent to search, as exception to Fourth Amendment warrant requirement, must be freely given, and the person must be free to withdraw or limit the consent. U.S. Const. amend. 4.

10. Criminal Law.
United States Constitution does not provide for exclusion of evidence obtained in violation of Fourth Amendment; instead, exclusionary rule is judicial remedy designed to deter law enforcement from future Fourth Amendment violations. U.S. Const. amend. 4.

11. Criminal Law.
Suppression of evidence obtained pursuant to a warrant should be ordered only on case-by-case basis and only in those unusual cases in which exclusion will further purposes of the exclusionary rule. U.S. Const. amend. 4.

12. Criminal Law.
Police officer relied on implied consent statute in good faith when he ordered warrantless blood draw of defendant, who was suspected of driving under the influence of a controlled substance, such that suppression of blood draw was not required under exclusionary rule in trial for possession of a firearm by unlawful user of a controlled substance and using or being under the influence of a controlled substance, even though blood draw violated constitutional prohibition against unreasonable searches and seizures; officer's reliance on implied consent statute was reasonable, as officer relied on presumptive constitutionality of statute and precedent upholding constitutionality of warrantless blood draws under exigent circumstances exception to warrant requirement, and deterrent purpose of exclusionary rule would not be served by excluding evidence. Const. art. 1, § 18; U.S. Const. amend. 4; NRS 202.360(1), 453.411(3)(a), 484C.160.

13. Criminal Law.
Corpus delicti of a crime must be proven independently of defendant's extrajudicial admissions, which at a minimum requires prima facie showing by State permitting reasonable inference that crime was committed.

14. Criminal Law.
State adequately proved corpus delicti of defendant's charge for felon in possession of a firearm, since State provided prima facie evidence that supported reasonable inference that defendant committed crime; admission by defendant during his initial appearance that he had identified himself as alias and had been convicted of prior felonies was corroborated by two judgments of conviction for alias used by defendant. NRS 202.360(1)(a).

15. Double Jeopardy.
Double Jeopardy Clause protects against three distinct abuses: (1) second prosecution for same offense after acquittal, (2) second prosecution for same offense after conviction, and (3) multiple punishments for same offense. U.S. Const. amend. 5.

16. Double Jeopardy.
Defendant's convictions for misdemeanor driving under the influence of a prohibited substance (DUI) and felony being under the influence of a controlled substance did not violate Double Jeopardy Clause; State secured conviction for misdemeanor DUI for per se violation based on theory that threshold amount of marijuana was found in defendant's blood, which was separate element from under-the-influence element of felony being under the influence. U.S. Const. amend. 5; NRS 453.411, 484C.110(3).

17. Criminal Law.
In reviewing the sufficiency of the evidence in a criminal case, the supreme court determines whether any rational trier of fact could have found

essential elements of the crime beyond a reasonable doubt after viewing evidence in a light most favorable to prosecution.

18. Assault and Battery.
To prove that defendant committed battery, prosecutor must show that defendant actually intended to commit a willful and unlawful use of force or violence upon the person of another, however slight. NRS 200.481(1)(a).

19. Assault and Battery.
Evidence that defendant intentionally used force upon another was sufficient to support convictions for battery, even though blows to police officers did not result in injuries to officers or their uniforms; prosecution introduced evidence that defendant flailed and struck officers who assisted in restraining defendant for blood draw. NRS 200.481(1)(a), (2)(f).

20. Assault and Battery.
Defendant was in custody when he committed batteries against police officers who were trying to restrain him for blood draw, as required for enhancement for batteries committed on officer while in lawful custody or confinement to apply; officer placed defendant under arrest, secured defendant in restraining belt, and then transported defendant to hospital against his will. NRS 193.022, 200.481(2)(f).

21. Criminal Law.
The district court has discretion to join or sever charges, and the supreme court reviews for harmless error the district court's misjoinder of charges. NRS 173.115.

22. Criminal Law.
The district court did not abuse its discretion in refusing to sever felon in possession charge from remaining counts for possession of a firearm while under the influence, using or being under the influence of a controlled substance, and battery upon officer by a prisoner in lawful custody or confinement, since remaining counts were related to same transaction or occurrence. NRS 173.115, 200.481(2)(f), 202.360(1), 453.411(3)(a).

23. Criminal Law.
State's remarks during closing argument at trial for possession of a firearm while under the influence, using or being under the influence of a controlled substance, battery upon an officer by a prisoner in lawful custody or confinement, and possession of firearm by felon were not prejudicial, such that defendant was not denied fair trial on such basis; State's remarks did not include any assertion of fact that was not supported by the record. U.S. Const. amend. 14; NRS 200.481(2)(f), 202.360(1), 453.411(3)(a).

24. Criminal Law.
Plain error review is appropriate to determine whether State's remarks during closing argument were prejudicial to defendant, when defendant did not object to remarks during trial.

25. Criminal Law.
To determine if prosecutor's misconduct was prejudicial, the supreme court examines whether prosecutor's statements so infected proceedings with unfairness as to result in denial of due process. U.S. Const. amend. 14.

26. Criminal Law.
When determining whether State's remarks during closing argument were prejudicial to defendant, statements should be considered in context, and criminal conviction is not to be lightly overturned on the basis of prosecutor's comments standing alone.

27. Criminal Law.
Prosecutors may not argue facts or inferences not supported by evidence.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are asked to determine whether the warrantless, forced blood draw on a driver suspected of driving under the influence of a controlled substance violates the Fourth Amendment. In light of the U.S. Supreme Court's decision in *Missouri v. McNeely*, we conclude that the natural dissipation of marijuana in the blood stream does not constitute a per se exigent circumstance justifying a warrantless search. 569 U.S. 141, 164 (2013) (plurality opinion). We further conclude that despite NRS 484C.160, the state's implied consent statute, the blood draw in this case was unlawful because appellant did not submit to the blood draw, and NRS 484C.160(7), which permits officers to use force to obtain a blood sample from a person, is unconstitutional because it permits officers to conduct a search without a warrant, valid consent, or another exception to the warrant requirement. Nevertheless, we conclude that the blood draw was taken in good faith, thus the exclusionary rule does not apply. We therefore conclude that the Fourth Amendment violation does not warrant reversal of the judgment of conviction.

We do, however, reverse the portion of the judgment of conviction finding the defendant guilty on the count of unlawful user of a controlled substance in possession of a firearm. The district court merged that offense with the felon-in-possession count for sentencing and the State concedes on appeal that the district court should not have adjudicated the defendant guilty on both counts.

FACTS

On January 12, 2012, Nevada Highway Patrol Trooper William Murwin pulled Michael Byars over for speeding on U.S. Highway 50 in Churchill County. Upon approaching Byars, Trooper Murwin smelled marijuana. Byars admitted to having smoked marijuana five hours before. Trooper Murwin performed field sobriety tests and arrested Byars on the belief that he was under the influence of a controlled substance.

Trooper Murwin and another trooper performed an inventory search of Byars' car and found a handgun in a storage area of the car. Trooper Murwin then read Byars Nevada's implied consent law and informed Byars that he would perform a blood test. Byars refused to submit to the test, but cooperated with Trooper Murwin until they reached the hospital and the blood draw was actually performed. During the blood draw, Byars struggled, striking Trooper Murwin

in the head with his elbow and a sheriff's deputy in the abdomen and side with his legs. The blood draw showed that Byars had THC (tetrahydrocannabinol, the psychoactive constituent of marijuana) in his blood.

The State charged Byars with being an unlawful user of a controlled substance in possession of a firearm, a category B felony under NRS 202.360(1); unlawful use or being under the influence of a controlled substance, a category E felony under NRS 453.411(3)(a); two counts of battery by a prisoner in lawful custody or confinement, a category B felony under NRS 200.481(2)(f); and being a felon in possession of a firearm, a category B felony under NRS 202.360(1)(a).

The district court bifurcated Byars' trial for the first four counts and the fifth count, felon in possession of a firearm. During the portion of Byars' trial on the felon-in-possession charge, the State introduced two judgments of conviction for Marcus Jones and then introduced testimony from Byars at a prior justice court appearance that Marcus Jones was his alias and that those convictions were his. The State did not introduce additional evidence identifying Byars as Marcus Jones.

Byars was convicted of all counts, and the district court merged Count 1 with Count 5 for purposes of sentencing, imposing a single sentence. In addition, Byars was convicted in a prior proceeding of driving under the influence of a controlled substance, a misdemeanor.

On appeal, Byars argues that: (1) the warrantless blood draw violated the Fourth Amendment prohibition on unreasonable searches and seizures; (2) the "unlawful user of, or addicted to, any controlled substance" element of unlawful possession of a firearm under NRS 202.360(1)(c) cannot be satisfied by proving a single use of a controlled substance; (3) the State did not present sufficient evidence to establish the *corpus delicti* of the felon-in-possession charge; (4) the convictions for misdemeanor DUI and the felony under-the-influence charge violated the Double Jeopardy Clause; (5) the State did not present sufficient evidence to support the battery convictions; (6) Byars was not in custody when the batteries occurred; (7) the district court abused its discretion by denying Byars' motion to sever the charges; and (8) the prosecutor's remarks during closing argument prejudiced Byars' right to a fair trial.

DISCUSSION

The warrantless blood draw violated the Fourth Amendment

[Headnote 1]

Byars argues that, in light of the U.S. Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141, 164 (2013) (plurality opinion), the warrantless blood draw violated the Fourth Amendment prohibition on unreasonable searches and seizures. The

Fourth Amendment to the United States Constitution and Article 1, Section 18 of the Nevada Constitution protect individuals from unreasonable searches and seizures. A warrantless search is reasonable only where it falls within a recognized exception. *McNeely*, 569 U.S. at 148. The State argues that the warrantless search in this case was reasonable under either of two exceptions: exigent circumstances and consent.

The exigent circumstances exception to the warrant requirement does not apply

[Headnote 2]

The exigent circumstances exception to the warrant requirement applies where " 'the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.' " *Id.* at 148-49 (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)). Applying that exception, the U.S. Supreme Court upheld the constitutionality of a warrantless blood draw in *Schmerber v. California*, where an officer reasonably believed that the delay involved in securing a warrant would result in the dissipation of alcohol in a driver's blood. 384 U.S. 757, 772 (1966). Some courts "interpreted *Schmerber* as concluding that the naturally rapid dissipation of alcohol in the bloodstream creates an emergency that justifies a warrantless blood draw." *State v. Shriner*, 751 N.W.2d 538, 546-47 & 547 n.11 (Minn. 2008) (discussing majority and minority views of *Schmerber*), *abrogated by McNeely*, 569 U.S. at 164; *see also State v. Smith*, 105 Nev. 293, 296, 774 P.2d 1037, 1039 (1989) (citing *Schmerber* in support of the conclusion that warrantless administration of a breath test did not violate the Fourth Amendment "because evidence such as breath samples may be lost if not immediately seized"). Other courts, however, understood *Schmerber* to require a review of the totality of the circumstances, not just the rapid dissipation of alcohol, to determine whether there was an exigency. *See, e.g.*, *State v. Rodriguez*, 156 P.3d 771 (Utah 2007). The Supreme Court recently resolved this split of authority in *McNeely*, holding that the natural dissipation of alcohol from the bloodstream is a relevant consideration in an exigent circumstances analysis but is not a per se exigent circumstance that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood draws in drunk-driving cases. 569 U.S. at 164-65.

The *McNeely* Court reasoned that a per se rule of exigency based on the natural dissipation of alcohol is inappropriate because it would apply the exception in circumstances that are inconsistent with the policy justifications that make a warrantless search based on an exigency reasonable. *Id.* at 150-55. The Court observed that

a warrantless search in exigent circumstances is reasonable because " 'there is compelling need for official action and no time to secure a warrant.' " *Id.* at 149 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). Accordingly, there is no justification for applying the exigent circumstances exception when "officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search." *Id.* at 152.

The Court reiterated that the question of the reasonableness of a warrantless search should be answered on a case-by-case basis considering the totality of the circumstances. *Id.* at 156. The case, however, did not lend itself to development of the various factors that might inform a decision about the reasonableness of a warrantless blood draw because Missouri had not offered any argument based on the totality of the circumstances, such as whether a warrant could be obtained within a reasonable amount of time. *Id.* at 165 (explaining that "the arguments and the record [did] not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant"). Because the totality of the circumstances was not litigated in the case, the Court affirmed the Missouri Supreme Court's decision that there were no exigent circumstances and that the warrantless blood draw was unconstitutional. *Id.*

[Headnote 3]

Although *McNeely* involves alcohol intoxication and this case involves marijuana, we conclude that the reasoning of *McNeely* applies here and that, like the natural dissipation of alcohol, the natural dissipation of THC from the blood does not create a per se exigency. Looking to the totality of the circumstances, we conclude that the State failed to establish exigent circumstances to justify the warrantless blood draw. First, the State did not demonstrate that waiting for a warrant would result in losing evidence of Byars' intoxication. In fact, there is reason to believe that traces of marijuana in the bloodstream would take longer to dissipate than alcohol, thus the fact that Byars was suspected of marijuana use instead of alcohol use militates in favor of finding that there were no exigent circumstances justifying the warrantless search.[1] *See State v. Jones*, 111 Nev. 774, 776, 895 P.2d 643, 644 (1995) (noting that cocaine had a slower dis-

[1]The State's toxicologist testified that Byars had 4.5 nanograms of THC per milliliter of blood, which is 2.5 nanograms higher than the statutory amount for intoxication. NRS 484C.110(3)(g). According to the toxicologist, 4.5 nanograms "probably represent[s] the tail-end of the smoking." Even though Byars had stated that he smoked five hours prior, there are no facts in the record establishing that the evidence would dissipate significantly before a warrant could be obtained.

sipation rate than alcohol in holding that a warrant was required before performing a blood test on a pedestrian suspected of being under the influence of a controlled substance). Furthermore, the facts in the record suggest that time was not a factor in the officer's decision to take Byars' blood without a warrant. According to Trooper Murwin, he waited about 30 minutes before a second K-9 officer arrived to sniff the car for drugs, then drove Byars to a hospital to have the blood collected, which Trooper Murwin acknowledged to be a lengthy process. There is no indication in the record that Trooper Murwin was prevented from seeking a warrant telephonically or that time was of the essence in securing the blood. There is also no indication in the record that the length of the warrant process would endanger the evidence Trooper Murwin sought to collect. And we have held that delays in securing warrants do not factor into the exigent circumstances analysis. *Jones*, 111 Nev. at 776, 895 P.2d at 644.[2] Accordingly, we conclude that the warrantless blood draw in question was not justified by the exigent circumstances exception to the warrant requirement.

The consent exception to the warrant requirement does not apply

[Headnote 4]

The State argues that even if the natural dissipation of THC does not create an exigent circumstance, the search was reasonable based on consent as provided by the implied consent statute, NRS 484C.160(1). Consent to a search also provides an exception to both the Fourth Amendment's probable cause and warrant requirements. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Byars argues that he did not consent and that NRS 484C.160(7), which allows a police officer to use reasonable force to take a driver's blood where the officer has a reasonable belief that the driver was under the influence of alcohol or a controlled substance, is unconstitutional.

[Headnotes 5, 6]

We review the constitutionality of a statute de novo. *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002). We presume that a statute is constitutional, thus the party challenging a statute has a heavy burden to show that it is unconstitutional. *Id.* We have never addressed whether a forced blood draw taken pursuant to NRS 484C.160(7) is constitutional.

---

[2]Byars argues that *Jones* supports this court creating a per se warrant requirement where controlled substance use is suspected due to the slower dissipation rate of some controlled substances. Although we recognize that *Jones* supports our conclusion that a warrant was required in this particular case, we note that a case-by-case examination of the totality of the circumstances is still the appropriate way to determine whether a warrant is required, especially given the lack of any empirical data on the dissipation rate of THC in this case.

[Headnote 7]

According to the State, even though Byars refused to submit to the blood draw, he had consented to it by choosing to drive on Nevada roads. NRS 484C.160(1) provides that "any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his or her consent to an evidentiary test of his or her blood, urine, breath or other bodily substance" if a police officer has reasonable grounds to believe that the person was driving or in actual physical control of a vehicle while under the influence of alcohol or a controlled substance or was engaging in other conduct prohibited by certain statutes. If a driver does not submit to a test and the police officer has reasonable grounds to believe that the person was under the influence of alcohol or a controlled substance or engaging in other specified conduct, "the officer may direct that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested." NRS 484C.160(7).

[Headnotes, 8, 9]

The State's argument that consent is valid based solely on Byars' decision to drive on Nevada's roads is problematic because the statute makes the implied consent irrevocable. A necessary element of consent is the ability to limit or revoke it. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."); *see also United States v. McMullin*, 576 F.3d 810, 815 (8th Cir. 2009) (holding that the occupant of a house "must make an unequivocal act or statement to indicate the withdrawal of the consent"). Just as consent must be freely given, a person must be free to withdraw or limit it. *United States v. McWeeney*, 454 F.3d 1030, 1035-36 (9th Cir. 2006) (holding that law enforcement officers may not "coerce a citizen into believing that he or she had no authority to enforce" the right to withdraw consent).

A number of jurisdictions have upheld implied consent statutes where refusing to submit to a blood test results in criminal or administrative penalties. *See, e.g.*, *People v. Harris*, 170 Cal. Rptr. 3d 729, 734 (Ct. App. 2014) (upholding the state's implied consent statute, which attaches a criminal penalty to refusal, noting that "it is no great innovation to say that implied consent is legally effective consent, at least so long as the arrestee has not purported to withdraw that consent"); *State v. Brooks*, 838 N.W.2d 563, 570, 572-73 (Minn. 2013) (concluding that the state's implied consent statute, which criminalizes refusal to consent, is constitutional, and that the decision to submit to the test "is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test"). The critical distinction between such jurisdictions and Nevada is that NRS 484C.160(7) allows a police officer to force a

blood draw where a driver refuses to submit to a test, thus a Nevada driver who falls under the criteria set forth in NRS 484C.160(7) is not given a choice between submitting to a test or facing a penalty. We have found no jurisdiction that has upheld an implied consent statute that allows an officer to use force to obtain a blood sample upon the driver's refusal to submit to a test.

The State argues that the plurality in *McNeely* tacitly approved of Nevada's implied consent statute as an alternative to the exigent circumstances justification for a warrantless blood draw. The plurality in *McNeely* noted that in order to serve the important interest of preventing impaired driving, all 50 states "have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the [s]tate, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *McNeely*, 569 U.S. at 161. "Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most [s]tates allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* At no point does the plurality appear to retreat from the warrant requirement for nonconsensual blood draws, and the Court's description of implied consent laws does not appear to endorse our particular statutory scheme.

In fact, the U.S. Supreme Court relied on *McNeely* in reversing a Texas appellate court's determination that a forced blood draw was constitutional based solely on consent derived from an implied consent statute. *Aviles v. Texas*, 134 S. Ct. 902, 902 (2014), *vacating Aviles v. State*, 385 S.W.3d 110 (Tex. App. 2012). The defendant in *Aviles* was stopped for suspicion that he was driving under the influence. *Aviles v. State*, 385 S.W.3d at 112. Upon learning that Aviles had two prior DUI convictions, the officer requested a breath or blood specimen which Aviles refused. *Id.* The officer compelled a blood draw under Tex. Transp. Code Ann. § 724.012(b) (West 2011), which provides that an officer " 'shall require the taking of a specimen of the person's breath or blood' " if the suspect has at least two prior DUI convictions. *Id.* at 112-13 (quoting Tex. Transp. Code Ann. § 724.012(b) (West 2011)). The Texas Court of Appeals considered the defendant's appeal prior to the *McNeely* decision, and concluded that such a search without a warrant was justified based on consent alone, relying on prior Texas precedent. *Id.* at 115-16.

Aviles filed a petition for a writ of certiorari with the U.S. Supreme Court. After issuing *McNeely*, the U.S. Supreme Court granted certiorari and issued a brief order vacating the Texas Court of Appeals' opinion and remanding "for further consideration in light of *Missouri v. McNeely*." *Aviles*, 134 S. Ct. at 902. Although this very short order appears to hold limited precedential value on its

own, it undermines support for the conclusion that consent alone is a viable justification for a warrantless search where the subject of the search does not have the option to revoke consent.

Thus, we conclude that NRS 484C.160(7) allows a police officer to engage in a warrantless, nonconsensual search in violation of the Fourth Amendment. The implied consent provision in NRS 484C.160(1) does not overcome the statute's infirmity because the statute does not allow a driver to withdraw consent, thus a driver's so-called consent cannot be considered voluntary. Accordingly, we conclude that NRS 484C.160(7) is unconstitutional.

The good-faith exception to the exclusionary rule applies

The State argues that Trooper Murwin relied on the implied consent statute in good faith, thus suppression is not required. In *United States v. Leon*, the U.S. Supreme Court held that where the police rely in good faith on a warrant issued by a neutral magistrate, evidence seized pursuant to that warrant would not be suppressed. 468 U.S. 897, 919-20 (1984). The Court has also found such a good-faith exception where the police reasonably rely on a statute later found unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 349-51 (1987). We conclude that the good-faith exception applies here.

[Headnotes 10, 11]

The U.S. Constitution does not provide for exclusion of evidence obtained in violation of the Fourth Amendment. *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Instead, the exclusionary rule is a judicial remedy designed to deter law enforcement from future Fourth Amendment violations. *Leon*, 468 U.S. at 906. Accordingly, "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* at 918; *see also State v. Allen*, 119 Nev. 166, 172, 69 P.3d 232, 236 (2003) ("Exclusion is only appropriate where the remedial objectives of the exclusionary rule are served."). While *Leon* is applicable to situations where a police officer has an objectively reasonable good-faith belief in the validity of an improperly issued warrant, the U.S. Supreme Court extended that same logic to legislatures in *Krull*. Presuming that legislatures do not intentionally pass unconstitutional laws, the Court determined that a government agent was justified in relying on the presumption that a statute authorizing warrantless administrative searches was constitutional. *Krull*, 480 U.S. at 349-51. The Court has also refused to apply the exclusionary remedy where a police officer relies in good faith on appellate precedent that is later overturned. *Davis v. United States*, 564 U.S. 245-48 (2011).

[Headnote 12]

We conclude that exclusion in the present case would not act as a deterrent to unconstitutional police conduct, thus the exclusionary remedy is not mandated. The record does not contradict the State's assertion that Trooper Murwin relied in good faith on the constitutional validity of NRS 484C.160, and such reliance appears reasonable, as prior to *McNeely*, the U.S. Supreme Court had upheld the constitutionality of warrantless blood draws under the exigent circumstances exception to the warrant requirement. *Schmerber v. California*, 384 U.S. 757, 772 (1966). While *McNeely* concluded that *Schmerber* did not create a per se exigency, Trooper Murwin relied on the presumptive constitutionality of the statute and prior U.S. Supreme Court precedent, thus the deterrent purpose of the exclusionary rule would not be served by excluding the evidence in this case. *See Allen*, 119 Nev. at 172, 69 P.3d at 236.[3]

The district court erred by convicting Byars of being an unlawful user in possession of a firearm after merging the count with the conviction for felon in possession of a firearm

Byars argues that a person cannot be convicted of being an unlawful user or addict in possession of a firearm under NRS 202.360(1)(c) where the State only proves a single use of a controlled substance. We need not reach this issue. The district court merged the sentence for unlawful user in possession of a firearm with the sentence for felon in possession of a firearm but did not merge the underlying convictions. On appeal, the State concedes that the district court should not have found Byars guilty of being an unlawful user in possession of a firearm after merging the count with the conviction for felon in possession of a firearm. In light of the State's concession, we reverse the portion of the judgment of conviction adjudicating Byars guilty of being an unlawful user or addict in possession of a firearm and remand for the district court to correct the judgment of conviction. *See Hewitt v. State*, 113 Nev. 387, 391 & n.4, 936 P.2d 330, 333 & n.4 (1997) (reversing a conviction for a lesser-included offense where the district court did not merge the lesser offense with the greater offense but did not sentence the defendant for the lesser-included offense, and noting that because the defendant was not sentenced for the lesser-included offense, the effect of the reversal of the conviction should be to correct the judgment of conviction), *overruled on other grounds by Martinez v. State*, 115 Nev. 9, 12 n.4, 974 P.2d 133, 135 n.4 (1999). We therefore need not

[3]Because the good-faith exception to the exclusionary remedy applies, we need not determine whether the admission of the blood draw evidence was harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

address Byars' argument that a single use does not justify a conviction under NRS 202.360(1)(c).

The State adequately proved the corpus delicti of the felon-in-possession charge

Byars argues that the State did not prove the *corpus delicti* of the felon-in-possession-of-a-firearm charge. We conclude that this argument is unpersuasive.

[Headnote 13]

We have held that "[t]he *corpus delicti* of a crime must be proven independently of the defendant's extrajudicial admissions." *Doyle v. State*, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). At a minimum, this requires a prima facie showing by the State " 'permitting the reasonable inference that a crime was committed.' " *Id.* (quoting *People v. Alcala*, 685 P.2d 1126, 1136 (Cal. 1984), *superseded by statute on other grounds as stated in People v. Falsetta*, 986 P.2d 182, 186 (Cal. 1999)).

[Headnote 14]

Here, the State asserted that Byars went by the alias Marcus Jones and introduced two judgments of conviction from a Las Vegas district court for Marcus Jones, born on March 14, 1974. The State also introduced testimony from the court clerk for the Justice Court of New River Township that Byars told the court during his initial appearance that he was convicted in Las Vegas of those charges under the name Marcus Jones, and that he was born on March 14, 1974. The State then played the audio of that appearance for the jury.

As the record demonstrates, the admission by Byars during the initial appearance that he had identified himself as Marcus Jones, was born on March 14, 1974, and had been convicted of prior felonies in Las Vegas was corroborated by two judgments of conviction for a Marcus Jones, born on March 14, 1974, in Las Vegas. Accordingly, we conclude that the State provided prima facie evidence that supported a reasonable inference that the crime, felon in possession of a firearm, was committed. *See Doyle*, 112 Nev. at 892, 921 P.2d at 910.

The convictions for misdemeanor DUI and felony being under the influence of a controlled substance do not violate the Double Jeopardy Clause

Byars argues that his convictions for misdemeanor DUI and felony being under the influence of a controlled substance violated the Double Jeopardy Clause of the Fifth Amendment and that the convictions are redundant. We conclude that neither argument is persuasive.

Double jeopardy

[Headnote 15]

"[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Williams v. State*, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002) (alteration in original) (internal quotations omitted). The U.S. Supreme Court has held that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

[Headnote 16]

NRS 453.411 provides that it is unlawful to knowingly use or be under the influence of a controlled substance except in accordance with a legal prescription. A conviction for driving under the influence of a prohibited substance under NRS 484C.110(3) requires the State to prove that a person (1) drove or was in "actual physical control of a vehicle on a highway or on premises to which the public has access," (2) with an amount of a prohibited substance in his or her blood or urine, (3) that is equal to or greater than an amount of the prohibited substance found in NRS 484C.110(3) (for marijuana, this is 2 nanograms per milliliter of blood). NRS 484C.110(2) alternatively allows for a conviction where the person is under the influence of a controlled substance.

This court has held that a violation of NRS 484C.110 on the theory that an illegal amount of a controlled substance is found in the blood (referred to as a "per se violation") is a separate violation from driving a vehicle while impaired. *Williams*, 118 Nev. at 549, 50 P.3d at 1124. According to this court in *Williams*, "each of these subsections defines a separate offense for purposes of double jeopardy analysis." *Id.* Thus, we conclude that where the State secures a conviction for a per se violation, as the State did here, the State is proving a separate element (a threshold amount of marijuana in the blood) than the under-the-influence element of NRS 453.411. For that count, the State introduced testimony that the level of marijuana in Byars' blood would cause a person to be impaired in addition to proving that Byars had the threshold statutory amount for a DUI conviction.

Accordingly, we conclude that the two convictions did not violate the Double Jeopardy Clause.

Redundancy

Byars argues that in addition to violating the Double Jeopardy Clause, the two convictions are redundant. Byars cites to a number of Nevada cases for the proposition that a defendant is not subject

to multiple convictions for the same conduct. This court has disapproved of the "same conduct" theory, however, specifically mentioning the three cases cited by Byars in support of his argument. *Jackson v. State*, 128 Nev. 598, 610-11, 291 P.3d 1274, 1282 (2012) (naming *Salazar v. State*, 119 Nev. 224, 228, 70 P.3d 749, 751-52 (2003), *Skiba v. State*, 114 Nev. 612, 616, 959 P.2d 959, 961 (1998), and *Albitre v. State*, 103 Nev. 281, 283-84, 738 P.2d 1307, 1309 (1987), and overruling these cases and their progeny). In light of our prior disapproval, we conclude that Byars' argument in this regard lacks merit.

Sufficient evidence supports the convictions for battery

Byars argues that sufficient evidence did not support his two convictions for battery. Specifically, Byars argues that the State did not provide evidence that he intended to strike the two officers during the forced blood draw and the contact did not cause any injury to either the officers or their uniforms. We conclude that this argument is unpersuasive.

[Headnote 17]

In reviewing the sufficiency of the evidence in a criminal case, we determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[Headnote 18]

Battery is "any willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). Looking to California, whose battery statute Nevada's is based upon, we have interpreted battery broadly to be "the intentional and unwanted exertion of force upon another, *however slight*." *Hobbs v. State*, 127 Nev. 234, 239, 251 P.3d 177, 179-80 (2011) (emphasis added). California has further clarified that battery is a general intent crime. *People v. Lara*, 51 Cal. Rptr. 2d 402, 405 (Ct. App. 1996). Thus, the prosecutor need only prove that "the defendant actually intend[ed] to commit a willful and unlawful use of force or violence upon the person of another." *Id.* (internal quotations omitted).

[Headnote 19]

Here, the prosecution introduced evidence that Byars made clear before the blood draw that he would resist and that he stated, "Watch. Watch. I know what I can do. Watch." Byars flailed during the blood draw, striking Trooper Murwin and a sheriff's deputy who assisted in restraining Byars for the blood draw. While Byars contests some of the specific details of Trooper Murwin's testimony, he does not contest that he made contact with the officers. Furthermore, the fact that the blows did not result in injuries to the officers or their uniforms is not relevant to the question of whether a battery occurred.

Hobbs, 127 Nev. at 239-40, 251 P.3d at 180. Thus, we conclude that the State has provided sufficient evidence to support the jury's verdict beyond a reasonable doubt that Byars intentionally used force upon another, however slight. *Hobbs*, 127 Nev. at 239, 251 P.3d at 180; *McNair*, 108 Nev. at 56, 825 P.2d at 573.

Byars was in custody when he committed the batteries

Byars argues that he was not in lawful custody when the batteries were committed. We disagree.

[Headnote 20]

A battery committed on a peace officer while in lawful custody or confinement is a felony under NRS 200.481. In the context of defining lawful custody or confinement under NRS 200.481, we have noted that a person is a prisoner "when one is '*held*' in custody under process of law or under lawful arrest." *Dumaine v. State*, 103 Nev. 121, 124, 734 P.2d 1230, 1232 (1987) (quoting NRS 193.022 and NRS 208.085). This requires a person to either submit to the control of an arresting officer or be taken and held in control. *Id.* Here, Trooper Murwin placed Byars under arrest, secured him in a restraining belt, and then transported him to the hospital against Byars' will. Accordingly, we conclude that Byars was in custody for the purposes of the battery enhancement.[4]

The district court did not abuse its discretion by refusing to sever the first four counts

Byars argues that the district court's denial of his motion to sever the first four counts prejudiced his right to a fair trial.

[Headnote 21]

A district court has discretion to join or sever charges, and we review for harmless error a district court's misjoinder of charges. *Weber v. State*, 121 Nev. 554, 570-71, 119 P.3d 107, 119 (2005). NRS 173.115 provides that multiple offenses may be charged together where they are "[b]ased on the same act or transaction; or . . . [b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

---

[4]Byars also argues that his resistance to the officers was lawful because the blood draw was unconstitutional under *McNeely*. The only authority Byars cites for this proposition is *Rosas v. State*, 122 Nev. 1258, 1262, 147 P.3d 1101, 1104 (2006). In *Rosas*, the defendant argued that he was entitled to an instruction on self-defense for a charge of battery upon an officer. *Id.* We agreed that a defendant is entitled to such an instruction where there is some evidence to support it. *Id.* At no point did we decide the underlying factual issue of self-defense in *Rosas*, and in the present case, Byars did not seek any such instruction from the district court. Accordingly, we conclude that *Rosas* is inapposite and Byars' argument is otherwise without merit. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (noting that this court need not consider allegations of error not cogently argued or supported by any pertinent legal authority).

Byars cites *McIntosh v. State*, 113 Nev. 224, 227, 932 P.2d 1072, 1074 (1997), for the proposition that a motion to sever should be granted where the charges have doubtful relevance to each other. In *McIntosh*, we determined that the district court abused its discretion by allowing the State to introduce evidence that the defendant was in possession of a firearm when the only crime charged was possession or being under the influence of a controlled substance. *Id. McIntosh* did not involve a motion to sever, and there was no firearm-related charge.

[Headnote 22]

Here, the district court bifurcated the felon-in-possession charge in order to prevent prejudice to Byars as a result of testimony about his prior felony convictions but refused to sever the remaining counts. The remaining counts (two battery-upon-an-officer counts, possession of a firearm while under the influence, and being under the influence) are all related to the same transaction or occurrence—specifically, Byars' marijuana use and the related efforts to secure a blood sample. Accordingly, we conclude that the district court did not abuse its discretion in refusing to sever those counts.

Remarks during the State's closing argument were not prejudicial

[Headnotes 23, 24]

Byars argues that the State's remarks during closing argument were prejudicial and denied him a fair trial. Byars' counsel did not object to the State's remarks during trial. Accordingly, plain error review is appropriate. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[Headnotes 25-27]

To determine if a prosecutor's misconduct was prejudicial, we examine whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process. *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). "The statements should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" *Id.* (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)). "[P]rosecutors 'may not argue facts or inferences not supported by the evidence.'" *Id.* at 48, 83 P.3d at 825 (quoting *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987)). The specific statements cited by Byars are as follows:

- "That's how dangerous the circumstance was. [The firearm] was loaded at that time."
- "[H]e's an unlawful user in possession of that firearm. Dangerous combination."
- "And just think of how dangerous it is with somebody under the influence of marijuana to be in possession of a

firearm when an officer, who thought he was just giving a speeding ticket out, came up to that vehicle.

How dangerous is that when he was impaired? When he was impaired, not thinking straight."

- In regard to the battery counts: "Who's looking after these people who are in custody? They need greater protection for the dangerous circumstances that can be created by dangerous individuals."
- "What if in fighting he gets one—one of the officer's firearms to go off, kills somebody? Still inadvertent? Not a battery?"

None of these statements include any assertion of fact that is not supported by the record. The argument that the defendant was dangerous is well within bounds because the State appears to refer to the very dangers that justify the criminalization of the behaviors that the State alleged that Byars engaged in. Thus, given the nature of the statements and the high bar for overturning a jury verdict due to a prosecutor's statements at closing argument, we conclude that Byars was not denied a fair trial. *See Thomas*, 120 Nev. at 47, 83 P.3d at 825.

CONCLUSION

Given the U.S. Supreme Court's decision in *Missouri v. McNeely*, we conclude that the natural dissipation of THC from Byars' blood did not, standing alone, create exigent circumstances justifying a warrantless blood draw. We further conclude that NRS 484C.160(7) is unconstitutional because it permits officers to use force to take a suspect's blood without a warrant, valid consent, or another exception to the warrant requirement. Nevertheless, we conclude that Trooper Murwin obtained the evidence in good faith, thus the evidence should not be excluded.

We conclude that the district court erred by merging the sentence for being an unlawful user in possession of a firearm with the sentence for felon in possession of a firearm but not merging the underlying convictions. Accordingly, we reverse the portion of the judgment of conviction finding Byars guilty of being an unlawful user in possession of a firearm and remand for the district court to correct the judgment of conviction. We affirm Byars' conviction in all other respects.

Gibbons, C.J., and Pickering, Hardesty, Douglas, Cherry, and Saitta, JJ., concur.