CONCLUSION

We conclude that the district court properly gave less deference to the Province's choice of a Nevada forum. Applying this less deference standard, the district court did not abuse its discretion by dismissing the Province's complaint for forum non conveniens because, among other reasons, this case lacks any bona fide connection to this state, adequate alternative fora exist, and the burdens of litigating here outweigh any convenience to the Province. Finally, we hold that the district court imposed appropriate conditions on dismissal to ensure the existence of an adequate alternative forum for this litigation. Therefore, we affirm the district court's order dismissing the complaint for forum non conveniens.

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

STANLEY EARNEST RIMER, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 58711

June 11, 2015 351 P.3d 697

Appeal from a judgment of conviction, pursuant to a jury verdict, of involuntary manslaughter, child abuse or neglect resulting in substantial bodily harm, and five counts of child abuse or neglect. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The supreme court, DOUGLAS, J., held that: (1) child abuse and neglect was a continuing offense; (2) joinder of charges was permissible; (3) evidence was sufficient for convictions; (4) abuse and neglect statute was not unconstitutionally vague; (5) the district court did not abuse its discretion in declining to sever joint trial; (6) the district court did not abuse its discretion in denying continuance on the eve of trial; and (7) prosecutor did not commit misconduct during closing argument by using the term "beatings," rather than "spankings."

Affirmed.

CHERRY, J., with whom SAITTA, J., agreed, dissented. GIBBONS, J., dissented.

Philip J. Kohn, Public Defender, and *Nancy Lemcke*, Deputy Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District

Attorney, and *David L. Stanton*, Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   Child abuse and neglect is a continuing offense for statute of limitations purposes; nature of the offense demonstrates that the Legislature intended for child abuse and neglect to be treated as a continuing offense, cumulative nature of the offense is reflected in many of the statutory provisions, and, although offense could be committed through a single act, it is more commonly violated through the cumulative effect of many acts over a period of time. NRS 171.085(2), 200.508.
2. Criminal Law.
   Statutes of limitation ordinarily begin to run when a crime has been completed.
3. Criminal Law.
   A crime is complete for statute of limitations purposes as soon as every element in the crime occurs.
4. Criminal Law.
   The hallmark of the continuing offense is that it perdures beyond the initial illegal act, and that each day brings a renewed threat of the evil the Legislature sought to prevent, even after the elements necessary to establish the crime have occurred.
5. Criminal Law.
   The proper standard for identifying a continuing offense is the legislative-intent test under which an offense is continuing only when the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that the Legislature must assuredly have intended that it be treated as a continuing one.
6. Criminal Law.
   The decision to join or sever charges falls within the district court's discretion.
7. Criminal Law.
   The supreme court reviews the exercise of discretion in joinder of charges by determining whether a proper basis for the joinder existed and, if so, whether unfair prejudice nonetheless mandated separate trials.
8. Criminal Law.
   The supreme court bases its review of joinder of charges on the facts as they appeared at the time of the district court's decision.
9. Criminal Law.
   If the supreme court concludes that the charges were improperly joined, it reviews for harmless error and reverses only if the error had a substantial and injurious effect or influence in determining the jury's verdict.
10. Criminal Law.
    Joinder of involuntary manslaughter, child abuse or neglect resulting in substantial bodily harm, and five counts of child abuse or neglect charges was permissible; evidence demonstrated a pattern of abuse and neglect that would have been relevant and admissible in separate trials for each of the charges. NRS 173.115.
11. Criminal Law.
    The admissibility of evidence of other crimes, wrongs, or acts is an evidentiary issue that may arise at any time during the course of a trial, and the district court's evaluation of that evidence's relevance, reliability, and risk of unfair prejudice is necessary to ensure that the evidence is subjected

to some form of procedural safeguard before it has a chance to influence the jury; in contrast, the joinder of offenses is a procedural issue that is decided before a trial and does not compel the same safeguards as evidence that is introduced after a trial has started.

12. Criminal Law.

In a joinder decision, there is no need to prove a defendant's participation in the charged crimes by clear and convincing evidence because all crimes charged, and therefore, amenable to the possible joinder, are the considered products of grand jury indictments or criminal informations and, therefore, are of equal stature.

13. Criminal Law.

Weighing the probative value of the evidence against the danger of unfair prejudice does not provide a meaningful safeguard against improper joinder because it fails to account for the public's weighty interest in judicial economy, and the question of unfair prejudice can be addressed separately through the prejudicial joinder statute. NRS 174.165(1).

14. Criminal Law.

The district court considering joinder of charges must consider whether the evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge.

15. Criminal Law.

The district court did not abuse its discretion in rejecting the argument that child abuse or neglect charges unfairly bolstered involuntary manslaughter charge because defendant was directly implicated in the abuse charges, but only indirectly implicated in the death charge, in prosecution for involuntary manslaughter and multiple counts of child abuse or neglect, where all of the charges were strong and none of the charges were so weak as to suggest a due process violation. U.S. Const. amend. 14; NRS 174.165(1).

16. Criminal Law.

For relief on the basis of prejudicial joinder, the defendant must demonstrate to the district court that the joinder would be unfairly prejudicial; this requires more than a mere showing that severance may improve his or her chances for acquittal. NRS 174.165(1).

17. Criminal Law.

Prejudicial joinder statute does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion. NRS 174.165(1).

18. Criminal Law.

To require severance, defendant must demonstrate that a joint trial would be manifestly prejudicial; the simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process. U.S. Const. amend. 14; NRS 174.165(1).

19. Criminal Law.

To resolve a motion to sever, the district court must first determine whether the joinder is manifestly prejudicial in light of the unique facts of the case and then decide whether the joinder is so manifestly prejudicial that it outweighs the dominant concern of judicial economy and compels the exercise of the court's discretion to sever. NRS 174.165(1).

20. Homicide; Infants.

Evidence that defendant placed his children in harm's way by subjecting them to deplorable living conditions, dispensing excessive corporal punishment, and concealing their unsafe and unhealthy environment from child protection agency, and failed to provide adequate care and supervi-

sion for his special-needs child, on whom he failed to check during the 17-hour period that preceded the discovery of the child's body, were sufficient for child abuse and neglect and involuntary manslaughter convictions. NRS 200.070, 200.508.

21. Criminal Law.

The supreme court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

22. Homicide; Indictment and Information; Infants.

Indictment satisfied constitutional and statutory notice requirements in prosecution for involuntary manslaughter, child abuse or neglect resulting in substantial bodily harm, and five counts of child abuse or neglect, where indictment made reference to the statutes under which defendant was charged, alleged the time, place, and method or manner in which the offenses were committed, and advised defendant of what he needed to know to prepare his defense. Const. art. 1, § 8; U.S. Const. amend. 14; NRS 173.075(1).

23. Criminal Law.

The supreme court reviews constitutional challenges to the sufficiency of an indictment de novo.

24. Constitutional Law; Infants.

Abuse and neglect statute was not unconstitutionally vague; statute plainly authorized criminal penalties for an adult who either willfully or passively placed a child in a situation where the child could suffer physical pain or mental suffering as the result of abuse or neglect, and adequately defined its terms so that a person of ordinary intelligence would have notice of the prohibited conduct. NRS 200.508.

25. Constitutional Law; Criminal Law.

The supreme court reviews the constitutionality of a statute de novo, presuming that a statute is constitutional.

26. Criminal Law.

The district court did not abuse its discretion in declining to sever joint trial of defendant and his wife, in prosecution for involuntary manslaughter and multiple counts of child abuse or neglect; defendant informed the court that there were no Confrontation Clause issues, and defendant's defense that he was ill in bed and relinquished all parenting responsibilities to wife, and her defense that she had myotonic dystrophy and relied on others in the household to care for victim, were not so inconsistent or inherently prejudicial that they required severance. U.S. Const. amend. 6.

27. Criminal Law.

The supreme court reviews a district court's determination of whether to sever a joint trial for abuse of discretion.

28. Criminal Law.

A joint trial must be severed if there is a serious risk that it would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence.

29. Criminal Law.

The district court did not abuse its discretion in denying continuance on the eve of manslaughter trial to allow for substitution of court-appointed counsel with private counsel, where the case had been pending some two and one-half years, trial date was firm and fit everyone's schedule, and defendant had known of the trial date for approximately three months. U.S. Const. amend. 6.

30. Criminal Law.
Although the Sixth Amendment right to counsel includes the right to retain counsel of one's own choosing, this right is not absolute. U.S. Const. amend. 6.

31. Criminal Law.
The denial of a continuance may infringe upon the defendant's right to counsel of choice, but only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel. U.S. Const. amend. 6.

32. Jury.
The district court did not err in overruling manslaughter defendant's objection to prosecutor's peremptory strike of an African-American woman on the basis that there was such limited contact during the jury selection and so few questions asked of her, where challenged veniremember had in fact been questioned, and she had made statements that provided a sufficient reason for excluding her from the jury panel.

33. Jury.
The *Batson v. Kentucky*, 476 U.S. 79 (1986), analysis requires that the opponent of the peremptory challenge make a prima facie case of discrimination before the proponent of the challenge must assert a neutral explanation for the challenge.

34. Jury.
A defendant satisfies the requirements of the *Batson v. Kentucky*, 476 U.S. 79 (1986), first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

35. Criminal Law.
The supreme court reviews a district court's decision to admit or exclude evidence for an abuse of discretion.

36. Criminal Law.
The district court did not abuse its discretion in refusing to admit statements by manslaughter defendant's wife against her penal interests; statements were not made under circumstances that dispelled the notion that they were fabricated. NRS 51.345.

37. Criminal Law.
Although the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, defendants must comply with established evidentiary rules designed to assure both fairness and reliability in the ascertainment of guilt and innocence. U.S. Const. amend. 6.

38. Criminal Law.
The statutory test for determining the admissibility of statements against penal interest is whether the totality of the circumstances indicates the trustworthiness of the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant. NRS 51.345.

39. Criminal Law.
The term "qualified person" in statute allowing admission of reports maintained in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is broadly interpreted, and the proponent of the record need only make a prima facie showing of its authenticity so that a reasonable juror could find that the record is what it purports to be. NRS 51.135.

40. Criminal Law.
Manslaughter defendant failed to make a prima facie showing that church records were authentic, as required for their admission, where a

ward bishop testified that he had no personal knowledge of whether the proffered record was an accurate copy of the records kept by the church. NRS 51.135.

41. Criminal Law.

Manslaughter defendant was entitled to argue that the State had the ability to call certain witnesses, and that its decision not to call them was something that the jury could consider when evaluating sufficiency of evidence to convict, but defendant could not comment on the evidentiary value of witnesses' testimony, as it had not been admitted into evidence.

42. Criminal Law.

A defense attorney is permitted to argue all reasonable inferences that arise from the evidence presented at trial, including negative inferences that may arise when the State fails to call important witnesses or present relevant evidence and has some special ability to produce such witnesses or evidence.

43. Criminal Law.

Prosecutors and defense attorneys may not premise their arguments on facts that have not been admitted into evidence.

44. Criminal Law.

Record on appeal was insufficient for the supreme court to resolve child abuse defendant's claim that district court erred by rejecting his proposed instruction on the statute of limitations, where the record did not include the rejected defense instructions nor indicate why they were rejected.

45. Criminal Law.

In analyzing alleged prosecutorial misconduct on appeal, the supreme court first determines whether prosecutor's conduct was improper, and second, if the conduct was improper, whether it warrants reversal.

46. Criminal Law.

Any harm by prosecutor using the term "beatings" rather than "spankings" during examination of witnesses was cured when the district court sustained child abuse defendant's objections.

47. Criminal Law.

Prosecutor did not commit misconduct during closing argument by using the term "beatings" rather than "spankings" in prosecution for involuntary manslaughter and multiple counts of child abuse or neglect; he was free to argue facts or inferences supported by the evidence and to offer conclusions on disputed issues during closing argument.

48. Criminal Law.

Prosecutor did not engage in misconduct by eliciting testimony that a child protection investigator went to manslaughter defendant's home in response to a complaint regarding one of defendant's children who was not the victim of the charged offense, where the district court determined that nothing was said that would have led the jury to believe that there was a bad act involving the other child, cautioned prosecutor to avoid situations involving other bad acts, and overruled defendant's objection.

49. Criminal Law.

Prosecutor's hypothetical question to defense witness in child abuse prosecution, regarding whether it would have caused expert concern if physician refused to perform a surgery because child was so dirty that he needed to be bathed before the surgery, was not prosecutorial misconduct; opposing parties were allowed to explore and challenge the basis of an expert witness's opinion. NRS 50.285(2).

50. Criminal Law.

Prosecutor's closing argument, asking what evidence or witnesses there were that manslaughter defendant and his wife were sick on the day

that their child died, was not improper; prosecutor was merely pointing out that the defense failed to substantiate its theory with supporting evidence.

51. Double Jeopardy.

Double Jeopardy Clause was not violated by convictions for both involuntary manslaughter and child abuse or neglect resulting in substantial bodily harm; offenses each required proof of an element that the other did not, as involuntary manslaughter required proof of a homicide, and child abuse and neglect required proof of an intentional act that either caused or allowed a child to suffer harm or be placed in a situation where he or she could suffer harm. U.S. Const. amend. 5; NRS 200.070, 200.508(1), (2).

52. Criminal Law.

An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record.

53. Criminal Law.

At a minimum, for an error to be plain, it must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

Appellant Stanley Earnest Rimer raises numerous claims of error on appeal. We focus on two: (1) whether child abuse and neglect is a continuing offense for purposes of the statute of limitations, and (2) whether multiple charges can be properly joined in a single trial if they evince a pattern of abuse and neglect.

To determine whether child abuse and neglect is a continuing offense, we apply the legislative-intent test set forth in *Toussie v. United States*, 397 U.S. 112 (1970). We conclude that the Legislature intended for child abuse and neglect to be treated as a continuing offense and therefore the statute of limitations did not begin to run until the last act of abuse or neglect was completed.

To determine whether multiple charges can be properly joined in a single trial if they evince a pattern of abuse and neglect, we revisit our joinder jurisprudence. We explain that charges are connected together if evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge. We conclude that multiple charges that evince a pattern of abuse and neglect are connected together and can be properly joined in a single trial to show intent or lack of accident or mistake. And we reiterate that even when charges have been properly joined, some form of relief may be necessary to avert unfair prejudice to the defendant. There was, however, no unfair prejudice demonstrated in this case sufficient to warrant severance.

We conclude that none of the many claims that Rimer presented for our review warrant relief, and we affirm the judgment of conviction.

FACTS

Stanley and Colleen Rimer had eight children: Jason, Spencer, Enoch, Quaylyn, Aaron, Crystal, Brandon, and Stanley, III. Their youngest child, Jason, was born on March 11, 2004, and was found dead on June 9, 2008. At the time of Jason's death, Spencer was 9, Enoch was 11, Quaylyn was 14, Aaron was 15, and Crystal was 17 years old, and Brandon and Stanley were adults.

Jason was born with congenital myotonic dystrophy, a chronic condition that affected his muscles and made it difficult for him to breathe, swallow, talk, and walk. Even at four years old, he walked like a baby, required diapers, and communicated mostly by fussing or screaming. He was treated by a neurologist, a gastroenterologist, a cardiologist, an orthopedist, a speech pathologist, a physical therapist, and a nutritionist. For a while, he was fed through a gastrostomy tube (G-tube) that was inserted through his abdomen so that food could be delivered directly to his stomach. He was happy and liked to play with other children.

During Jason's lifetime, the Rimer home was frequently cluttered: the kitchen and bathrooms went days without being cleaned, the kitchen sink was often filled with dirty dishes, and the laundry room and bedrooms were normally piled with dirty clothing. There were also occasions where dog and bird excrement dirtied the carpet and remained there for days without being removed. Although the Rimers routinely hired housekeepers and carpet cleaners, the house and its carpets quickly became dirty again.

The clutter increased with the decline of Rimer's construction business and the financial slump that followed. Rimer closed his office and vacated his storage units and moved their contents into the house. The presence of construction tools and paint buckets in the house created obvious safety hazards. Although the Rimer family tried to reduce some of the clutter and generate revenue through yard sales, the house was extremely cluttered at the time of Jason's death: the household furniture had been moved or stacked for carpet cleaning, the kitchen sink was full of dirty dishes, and the fish tanks were green with algae.

The Rimer family continuously struggled with lice. The children were often sent home from school because they had head lice. Usually, they were treated with a lice-killing shampoo and sent back to school, where they were inspected by a nurse before being allowed back in the classroom. For a while, the children's grandmother contributed to this recurring problem by refusing to be treated for lice. There also came a time when the lice-killing shampoo was no longer strong enough to kill the lice, but Rimer was able to find a product online that solved the problem.

The Rimer family did not go hungry. They had refrigerators downstairs in the kitchen and upstairs in the master bedroom. And

there were also cases of food in the garage and pallets of food in the living room. They had frozen, refrigerated, canned, and dried food. The children routinely ate food that required little preparation or cooking, and when that sort of food ran out, they went upstairs and asked their parents for more. There was always food downstairs, but sometimes it was only the sort of food that required cooking and no one wanted to cook. Colleen did most of the cooking for the family. On one or two occasions, Quaylyn was punished by receiving only bread and water.

Rimer had a tiered approach to disciplining his children. First, he would place his children in a "timeout" by requiring them to stand in a corner for 5 to 30 minutes, then he would take away their video-game privileges, and finally he would spank them. But if a timeout was not severe enough for the level of misbehavior, the child might be sent to bed without dinner, and if the child's misbehavior involved fighting, the initial punishment might be a spanking.

Rimer spanked his children on their behinds with boat paddles, paint sticks, belts, and his bare hands. The number of spanks in a spanking could range from 1 to 50. Rimer had two wooden boat paddles: one was three to four feet long and the other was two to three feet long. He purchased the second paddle to replace the first paddle and drew shark's teeth on it with a permanent-ink marker. He broke both paddles while spanking his children and repaired them with duct tape. Rimer explained to his children what they did wrong and why they were getting spanked before he spanked them.

Rimer also struck his children. Crystal had seen her father strike Aaron, Quaylyn, Enoch, and Spencer on the chest, stomach, back, and arms for fighting, stealing, or displaying a bad attitude, and she had observed bruises on their arms. Quaylyn said that his father once punched him with a closed fist for misbehaving. Brandon testified that it was pretty common for his father to mete out discipline in anger and before he had calmed down. The worst word that Rimer's children recall him using was "damn," but he sometimes asked his children if they were stupid when they had done something wrong, and he occasionally called Quaylyn "the devil."

Child Protective Services (CPS) received reports accusing Rimer and Colleen of neglecting their children. Walter Hanna, a special education teacher, made several reports concerning Aaron. Aaron suffered from a severe learning disability and was assigned to Hanna's classroom. Hanna called CPS when Aaron came to school with body lice,[1] without shoes, or without lunch money or a free-lunch form so that he could eat. Likewise, Nicole Atwell, a Nevada Early Intervention Services employee, reported her concerns about Jason.

[1]Although Aaron came to school with head lice four or five times a year, both Hanna and the school principal were alarmed when Aaron came to school with body lice.

Atwell had previously warned Colleen that Jason should not be fed through his mouth because there was a danger that he might aspirate the food, which could lead to pneumonia or feeding difficulties. When Atwell learned that Jason was being bottle-fed instead of being fed through his G-tube, she felt that Colleen's failure to heed her warning was medical neglect and reported that neglect to CPS.

CPS investigated these and other allegations of neglect and went to the Rimers' house on several occasions. Rimer told his children not to speak with CPS and even rewarded one his sons for refusing to speak to an investigator. He would not allow CPS investigators to go beyond the house's foyer or to speak with his children outside his presence. He also threatened the investigators and complained about their investigations to their supervisors and an assistant manager. Ultimately, CPS investigators concluded that the children were not neglected or at risk and closed the investigations.

Jason was cared for by his mother, brothers, and sister. They changed his diapers, they bathed him, and they fed him. Often, however, Jason's diapers were full and needed changing, the area around his G-tube had not been adequately cleaned and was unsanitary, and his fingernails were dirty. Colleen suffered from adult-onset myotonic dystrophy, digestive tract ailments, and incontinence. She complained that she did not have the strength to lift Jason and stated that she relied upon her sons to get Jason in and out of the family vehicles. Nothing in the trial transcript indicates that Rimer had an active role in Jason's care.

On Sunday, June 8, 2008, Rimer brought Brandon, Aaron, Quaylyn, Enoch, and Spencer to church in his pickup truck. Rimer gave the opening prayer during the church service and then returned home alone. Colleen brought Jason to church in her Ford Excursion. She later brought Aaron, Quaylyn, Enoch, Spencer, and Jason home from church while Brandon remained behind to talk with the bishop about his upcoming church mission. Colleen and the children arrived home at 2:15 p.m. Colleen told Aaron to get Jason out of the Excursion, but neither she nor anyone else ensured that Jason was actually out of the vehicle. Unable to unfasten his seatbelt and open the door, Jason was left trapped and helpless inside the vehicle.

As the afternoon progressed, the children played video games inside and Colleen went upstairs to take a nap. At some point, Colleen asked the children about Jason and asked for their help finding him. She then returned upstairs. Towards evening, Colleen left the house to give Brandon a ride home from the church. She drove the pickup truck because the Excursion was low on gas. Upon returning home, she went back to sleep. Quaylyn wondered where Jason was and looked for him in the rooms downstairs. He did not tell anyone that he could not find Jason, and he assumed that Jason was upstairs with his parents. Quaylyn later went upstairs to speak with his parents about Boy Scout camp. He spoke to his father through a partially

opened door and was unable to tell if Jason was in the bedroom. The children made peanut butter and jelly sandwiches for dinner and slept in the family room because their bedrooms were too hot. They did not consider Jason's absence unusual because he routinely stayed with his parents in their bedroom. Nothing in the trial transcript indicates that Rimer left the bedroom after coming home from church.

On Monday, June 9, 2008, Quaylyn began the morning by getting ready for Boy Scout camp. Colleen was going to take him to the bishop's house and from there they would go to the campground. They were running late, so Colleen told Quaylyn to get in the Excursion. Quaylyn used the key pad to unlock the driver's door and pushed the unlock button to open the passenger doors. When he opened the back door, he saw Jason. At first he thought Jason was sleeping, but when he touched him he knew that Jason was dead.

Brandon awoke to Quaylyn screaming that Jason was dead. Brandon did not believe Quaylyn and went to see for himself. He peered inside the Excursion and saw Jason's body lying on the middle seat. Rimer asked Brandon if Jason was dead and then started the Excursion and rolled down the windows; he did not touch Jason. Brandon returned to the house. He tried to call the bishop, but Rimer took the phone away, told him that his mother was on the phone with the authorities, and asked him to bring Jason's body into the house.

Clark County Fire Department rescue personnel arrived on the scene as Brandon was carrying Jason's body into the house. The rescue personnel observed that Brandon was visibly upset, Quaylyn was crying, and Colleen was upset and sobbing. They described Rimer's demeanor variously as calm, emotionless, in disbelief, and in shock. They entered the house and found Jason laid face up on a couch in the front room. Jason was not breathing, his face had a blanched appearance, his nose was obscured by a "white mucus type substance," and his body was in rigor mortis. They preserved the scene for the police.

Thereafter, Las Vegas Metropolitan Police Department crime scene analysts documented the scene, police detectives interviewed Colleen, and a county medical examiner conducted a forensic autopsy of Jason's body. The medical examiner, Dr. Alane Olsen, determined that the manner of death was homicide because it occurred when other people left the small, disabled child in a car from which he could not escape, and she concluded that the cause of death was environmental heat stress that was brought on by the build-up of heat inside the car. She did not detect any other trauma to Jason's body, but she observed that his fingernails were dirty and his shirt was filthy.

After eight days of trial and three days of deliberation, a jury found Rimer guilty of involuntary manslaughter, child abuse and neglect causing substantial bodily harm, and the five child-abuse-

and-neglect counts. The district court imposed various consecutive and concurrent sentences amounting to a prison term of 8 to 30 years. This appeal followed.

DISCUSSION

I. *Continuing offenses doctrine*

[Headnote 1]

Rimer claims that the district court erred by refusing to dismiss child-abuse-and-neglect counts 3 through 7 because they violated the statute of limitations by relying upon conduct that occurred outside the three-year statutory limit. The State responds that the district court properly denied the motion to dismiss after concluding that NRS 200.508 plainly contemplates that child abuse and neglect is a continuing offense and the statute of limitations does not begin to run until the commission of an offense is completed.[2]

[Headnotes 2, 3]

"Statutes of limitation ordinarily begin to run when a crime has been completed." *Campbell v. Griffin*, 101 Nev. 718, 722, 710 P.2d 70, 72 (1985). "A crime is complete as soon as every element in the crime occurs." *United States v. Musacchio*, 968 F.2d 782, 790 (9th Cir. 1991). The statute of limitations for felony child abuse and neglect is three years. NRS 171.085(2). Here, the indictment was filed on July 23, 2008, and it alleged that Rimer had committed five felony counts of child abuse and neglect through various acts that occurred between March 11, 2004, and June 9, 2008. Because the alleged period of misconduct exceeded the three-year statute of limitations and the indictment left open the possibility that some of the misconduct occurred outside of the statute, prosecution of the child-abuse-and-neglect counts was barred unless child abuse and neglect is a continuing offense.

[Headnotes 4, 5]

"The hallmark of the continuing offense is that it perdures beyond the initial illegal act, and that each day brings a renewed threat of the evil [the Legislature] sought to prevent even after the elements necessary to establish the crime have occurred." *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999) (internal quotations omitted). To this end, we have determined that insurance fraud, failure to appear, and escape are continuing offenses. Although our decisions

---

[2]Child-abuse-and-neglect counts 3 through 7 were charged as violations of NRS 200.508(1), which provides in relevant part that

> [a] person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect . . . is guilty of a . . . felony.

have not articulated a standard for identifying continuing offenses, they have focused on the relevant statutory language and legislative intent based on the nature of the offense. *See Perelman v. State*, 115 Nev. 190, 192, 981 P.2d 1199, 1200 (1999) ("[T]he statutory language of NRS 686A.291, taken as a whole, treats insurance fraud as a continuing offense."); *Woolsey v. State*, 111 Nev. 1440, 1444, 906 P.2d 723, 726 (1995) ("[B]ased on the fact that NRS 199.335 is intended to punish those on bail who violate the conditions of their bail by failing to appear before the court when commanded, we conclude that failure to appear is a continuing offense . . . ."); *Campbell v. Griffin*, 101 Nev. 718, 721-22, 710 P.2d 70, 72 (1985) (adopting the reasoning in *United States v. Bailey*, 444 U.S. 394, 413 (1980), to conclude that the Legislature intended for escape to be treated as a continuing offense). Consistent with those decisions, we hold that the proper standard for identifying a continuing offense is the legislative-intent test set forth in *Toussie v. United States*, 397 U.S. 112 (1970). Under this test, we will consider an offense to be a continuing offense only when "the explicit language of the substantive criminal statute compels such a conclusion, *or* the nature of the crime involved is such that [the Legislature] must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115 (emphasis added).

The explicit language of NRS 200.508 does not compel a conclusion that child abuse and neglect is a continuing offense; however, the nature of the offense demonstrates that the Legislature must have intended for child abuse and neglect to be treated as a continuing offense. Child abuse and neglect "is damage to a child for which there is *no* reasonable explanation. Child abuse is usually *not* a single physical attack or a single act of molestation or deprivation. It is typically a pattern of behavior. Its effects are cumulative. The longer it continues, the more serious the damage." Brian G. Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 Chi.-Kent L. Rev. 641, 643 (1978) (footnotes omitted); *see also* Lloyd Leva Plaine, Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 Geo. L.J. 257, 258-59 (1974) ("The parents or parent substitutes are the perpetrators in the vast majority of the cases [and] . . . [p]rosecution usually occurs only after a child is killed or so seriously injured that the state decides the welfare of the child would be served best by prosecution of the alleged perpetrator.").

The cumulative nature of the offense is reflected in many of the statutory provisions. For example, individual injuries to a child may not rise to the level of abuse because they do not fit the definition of "physical injury" set forth in NRS 200.508(4)(d), but the cumulative effect of those injuries may be permanent or temporary disfigurement or impairment of a bodily function or organ of the body,

and therefore it is the continuing course of conduct that amounts to "abuse or neglect" under the statute. Similarly, it typically would require a pattern of behavior to cause "an injury to the intellectual or psychological capacity or the emotional condition of a child" that is "evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior." NRS 432B.070 (defining "mental injury"), *referenced in* NRS 200.508(4)(a) (defining "abuse or neglect").

Given the nature of this offense, it is apparent that the child-abuse-and-neglect statute may be violated through a single act but is more commonly violated through the cumulative effect of many acts over a period of time. *See People v. Ewing*, 140 Cal. Rptr. 299, 301 (Ct. App. 1977) (discussing child abuse based on a course of conduct). Consequently, we conclude that the Legislature intended for child-abuse-and-neglect violations, when based upon the cumulative effect of many acts over a period of time, to be treated as continuing offenses for purposes of the statute of limitations. We further conclude that the district court did not err by ruling that counts 3 through 7 of the amended indictment were continuing offenses and that the statute of limitations did not begin to run until the last alleged act of abuse or neglect was completed.

II. *Joinder and severance*

Rimer claims that the district court erred by denying his pretrial motion to sever the child-abuse-and-neglect counts (the abuse charges) from the second-degree-murder and child-abuse-and-neglect-causing-substantial-bodily-harm counts (the death charges). Rimer argued in the court below that the abuse charges and the death charges were improperly joined under NRS 173.115 and, alternatively, even if the initial joinder was proper, severance was required by NRS 174.165(1) because the joinder was unfairly prejudicial.

A. *Standard of review*

[Headnotes 6-9]

The decision to join or sever charges falls within the district court's discretion. *Weber v. State*, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005). We review the exercise of this discretion by determining whether a proper basis for the joinder existed and, if so, whether unfair prejudice nonetheless mandated separate trials. *Id.* at 571, 119 P.3d at 119. We base our review on the facts as they appeared at the time of the district court's decision. *See People v. Boyde*, 758 P.2d 25, 34 (Cal. 1988); *People v. Brawley*, 461 P.2d 361, 369-70 (Cal. 1969) ("[T]he propriety of the denial of a motion for separate trials must, of course, be tested as of the time of the submission of the motion, and the question of error cannot be determined in the context of subsequent developments at the trial." (citations omitted)). And,

if we conclude that the charges were improperly joined, we review for harmless error and reverse only if "the error had a substantial and injurious effect or influence in determining the jury's verdict." *Tabish v. State*, 119 Nev. 293, 302, 72 P.3d 584, 590 (2003) (internal quotations omitted); *see also United States v. Lane*, 474 U.S. 438, 449 (1986).

B. *Bases for joinder*

A proper basis for joinder exists when the charges 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." NRS 173.115. Here, the abuse charges and the death charges are not based on the same act or transaction and the facts do not demonstrate that Rimer had a single scheme or plan encompassing the abuse of his children and the death of his four-year-old son. Consequently, the charges are only properly joined if they are "connected together."

1. *Connected together*

[Headnote 10]

In *Weber*, we clarified that "for two charged crimes to be 'connected together' under NRS 173.115(2), a court must determine that evidence of either crime would be admissible in a separate trial regarding the other crime." 121 Nev. at 573, 119 P.3d at 120. We also stated that evidence of a crime may be admissible in a trial for another crime if it is admissible under NRS 48.045(2) and satisfies the requirements in *Tinch* by being "relevant, . . . proven by clear and convincing evidence, and [having] probative value that is not substantially outweighed by the risk of unfair prejudice." *Id.* (citing *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). However, in stating this test for the admissibility of evidence of other crimes, we failed to consider the difference between the procedural issue of joinder of offenses and the evidentiary issue of admitting evidence of "other crimes." *See Solomon v. State*, 646 A.2d 1064, 1066 (Md. Ct. Spec. App. 1994) (observing that the procedural issues of joinder and severance are not the same as the evidentiary issue of "other crimes" evidence and they call for different analyses).

[Headnote 11]

The admissibility of evidence of " 'other crimes, wrongs or acts' " is an evidentiary issue that may arise at any time during the course of a trial, and the district court's evaluation of that evidence's relevance, reliability, and risk of unfair prejudice is necessary to ensure that the evidence is subjected to some form of procedural safeguard before it has a chance to influence the jury. *See Petrocelli v. State*, 101 Nev. 46, 51 n.3, 51-52, 692 P.2d 503, 507 n.3, 507-08 (1985)

(quoting NRS 48.045(2)), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004). In contrast, the joinder of offenses is a procedural issue that is decided before a trial and does not compel the same safeguards as evidence that is introduced after a trial has started. *See generally Brown v. State*, 114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998) (recognizing joinder as a procedural rule).

[Headnotes 12-14]

In a joinder decision there is no need to prove a defendant's participation in the charged crimes by clear and convincing evidence because "[a]ll crimes charged, and, therefore, amenable to the possible joinder, are the considered products of grand jury indictments or criminal informations" and therefore are "of equal stature." *Solomon*, 646 A.2d at 1070; *accord State v. Cutro*, 618 S.E.2d 890, 894 (S.C. 2005). Similarly, weighing the probative value of the evidence against the danger of unfair prejudice does not provide a meaningful safeguard against improper joinder because it fails to account for the public's weighty interest in judicial economy, *see Tabish*, 119 Nev. at 304, 72 P.3d at 591; *Solomon*, 646 A.2d at 1071, and the question of unfair prejudice can be addressed separately through the prejudicial joinder statute, NRS 174.165(1). However, the district court must still consider whether the evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge, *see generally Bigpond v. State*, 128 Nev. 108, 116-17, 270 P.3d 1244, 1249-50 (2012) (modifying the first *Tinch* factor to reflect the narrow limits of the general rule of exclusion), but we conclude that this is the only *Tinch* factor that the district court must consider when deciding whether charges are "connected together" for purposes of joinder.

2. *Admissibility and relevancy*

"The admissibility of evidence of other crimes, wrongs, or acts to establish intent and an absence of mistake or accident is well established, particularly in child abuse cases," *United States v. Harris*, 661 F.2d 138, 142 (10th Cir. 1981), where the State must often "prove its case, if at all, with circumstantial evidence amidst a background of a pattern of abuse," *United States v. Merriweather*, 22 M.J. 657, 663 (A.C.M.R. 1986) (Naughton, J., concurring). *See Bludsworth v. State*, 98 Nev. 289, 291, 646 P.2d 558, 559 (1982) (evidence of prior injuries is admissible as "independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than accidently, injured on the day in question"); *Ashford v. State*, 603 P.2d 1162, 1164 (Okla. Crim. App. 1979) (evidence of "past injuries [is] admissible to counter any claim that the latest injury happened through accident or simple negligence. The pattern of abuse is relevant to show the intent of the act."); *State v. Widdison*, 4

P.3d 100, 108 (Utah Ct. App. 2000) ("Evidence of prior child abuse, both against the victim and other children, is admissible to show identity, intent, or lack of accident or mistake."); *see also State v. Taylor*, 701 A.2d 389, 395-96 (Md. 1997) (gathering cases). Here, the abuse charges and the death charges were connected together because evidence from these charges demonstrated a pattern of abuse and neglect that would have been relevant and admissible in separate trials for each of the charges. Accordingly, we conclude that the joinder of these charges was permissible under NRS 173.115.

C. *Prejudicial joinder*

[Headnotes 15, 16]

Even when charges have been properly joined, some form of relief may be necessary to avert unfair prejudice to the defendant. NRS 174.165(1) provides that "[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses . . . in an indictment . . . , the court may order an election or separate trials of counts, . . . or provide whatever other relief justice requires." The defendant must demonstrate to the district court that the joinder would be unfairly prejudicial; this requires more than a mere showing that severance may improve his or her chances for acquittal. *Weber*, 121 Nev. at 574-75, 119 P.3d at 121. Courts construing NRS 174.165(1)'s federal cognate

> have identified three related but distinct types of prejudice that can flow from joined counts: (1) the jury may believe that a person charged with a large number of offenses has a criminal disposition, and as a result may cumulate the evidence against him or her or perhaps lessen the presumption of innocence; (2) evidence of guilt on one count may "spillover" to other counts, and lead to a conviction on those other counts even though the spillover evidence would have been inadmissible at a separate trial; and (3) defendant may wish to testify in his or her own defense on one charge but not on another.

1A Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure* § 222 (4th ed. 2008). We have recognized that the first of these types of prejudice may occur when charges in a weak case have been combined with charges in a strong case to help bolster the former. *Weber*, 121 Nev. at 575, 119 P.3d at 122.

[Headnotes 17-19]

Like its federal counterpart, NRS 174.165(1) "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). "To *require* severance, the defendant must demonstrate that a joint trial would be manifestly prejudicial. The simultaneous trial of the of-

fenses must render the trial fundamentally unfair, and hence, result in a violation of due process." *Honeycutt v. State*, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002) (emphasis added) (internal quotations omitted), *overruled on other grounds by Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). To resolve a motion to sever, the district court must first determine whether the joinder is manifestly prejudicial in light of the unique facts of the case and then decide "whether [the] joinder is so manifestly prejudicial that it outweighs the dominant concern [of] judicial economy and compels the exercise of the court's discretion to sever." *Tabish*, 119 Nev. at 304, 72 P.3d at 591 (internal quotations omitted).

Here, the district court expressly rejected the argument that the abuse charges unfairly bolstered the death charges because Rimer was directly implicated in the abuse charges but only indirectly implicated in the death charges. Our review of the record shows that all of the charges were strong and none of the charges were so weak as to suggest a due process violation. Accordingly, we conclude that the district court did not abuse its discretion in this regard.

III. *Remaining claims*

We briefly address Rimer's remaining claims although none of them warrant reversal.

A. *Sufficiency of the evidence*

[Headnotes 20, 21]

Rimer claims that the State failed to present evidence that he caused his children to suffer unjustifiable physical pain or mental suffering, permitted or allowed the abuse or neglect that resulted in Jason's death, and committed an act that led to Jason's death. We review the evidence in the light most favorable to the prosecution and determine whether a "rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Here, the jury heard testimony that revealed a pattern of child abuse and neglect. Rimer placed his children in harm's way by subjecting them to deplorable living conditions, dispensing excessive corporal punishment, and concealing their unsafe and unhealthy environment from CPS. Rimer failed to provide adequate care and supervision for his special-needs child, Jason, who required constant attention and yet was often left filthy, in need of clean diapers, and suffering from an unhealthy G-tube site. And, Rimer withdrew to his bedroom and failed to check on the condition and whereabouts of his special-needs child during the 17-hour period that preceded the discovery of the child's body. We conclude that sufficient evidence supports Rimer's convictions for child abuse and neglect and involuntary manslaughter. *See* NRS 200.070;

NRS 200.508. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports its verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

B. *Sufficiency of the indictment*

[Headnotes 22, 23]

Rimer claims that the indictment failed to articulate cognizable offenses of second-degree murder and child abuse and neglect resulting in substantial bodily harm, failed to give sufficient notice of the charges that he had to defend against at trial, and contained inflammatory surplusage because it described Jason as a "baby." We review constitutional challenges to the sufficiency of an indictment de novo. *West v. State*, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003). Here, the indictment made reference to the statutes under which Rimer was charged; alleged the time, place, and method or manner in which the offenses were committed, and advised Rimer of what he needed to know to prepare his defense. We conclude that the indictment satisfies the constitutional and statutory notice requirements, *see* U.S. Const. amend. VI; Nev. Const. art. 1, § 8; NRS 173.075(1); *Jennings v. State*, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000), and, further, that the district court did not abuse its discretion by ruling that the term "baby" was not surplusage, *see* NRS 173.085.

C. *Constitutionality of NRS 200.508*

[Headnotes 24, 25]

Rimer claims that NRS 200.508 is unconstitutionally vague because no reasonable person would understand the prohibition on child abuse and neglect to include leaving a child in the care of his or her mother or criminalizing foul odors, cluttered houses, dirty aquariums, low food supplies, sending children to bed without supper, calling children nonprofane names, spanking children, or failing to expediently eradicate a lice problem. "We review the constitutionality of a statute de novo, presuming that a statute is constitutional." *Clancy v. State*, 129 Nev. 840, 847, 313 P.3d 226, 231 (2013). Nevada's child-abuse-and-neglect statute plainly authorizes criminal penalties for an adult who either willfully or passively places a child "in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect," NRS 200.508(1), (2), and adequately defines its terms so that a person of ordinary intelligence would have notice of the prohibited conduct. *Smith v. State*, 112 Nev. 1269, 1276, 927 P.2d 14, 18 (1996), *abrogated on other grounds by City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 862-63, 59 P.3d 477, 480 (2002), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 482 n.1, 245 P.3d 550,

553 n.1 (2010). Consequently, we conclude that Rimer has failed to make a clear showing that the statute is unconstitutional as applied to him or otherwise overcome the statute's presumed constitutionality. *See Clancy*, 129 Nev. at 847, 313 P.3d at 231 (setting forth the test for unconstitutional vagueness).

D. *Joinder of codefendant*

[Headnotes 26-28]

Rimer claims that the district court's failure to sever the joint trial deprived him of a fair trial because Colleen's inculpatory statement to police detectives was admitted into evidence, he and Colleen had mutually exclusive defenses, and the nature of their defenses gave rise to an inference that they were both guilty. We review a district court's determination of whether to sever a joint trial for abuse of discretion. *Chartier v. State*, 124 Nev. 760, 763-64, 191 P.3d 1182, 1184-85 (2008). A joint trial must be severed " 'if there is a serious risk that [it] would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Marshall v. State*, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) (quoting *Zafiro*, 506 U.S. at 539). Here, Rimer informed the district court that there were no *Bruton*-type problems, *see Bruton v. United States*, 391 U.S. 123, 126 (1968) (holding that a defendant's constitutional right to confront his accusers is violated when a nontestifying codefendant's statement incriminates him and is used at their joint trial), and the district court determined that Rimer's defense—that he was sick in bed and relinquished all parenting responsibilities to Colleen—and Colleen's defense—that she had myotonic dystrophy and relied on others in the household to care for Jason—were not so inconsistent or inherently prejudicial that they require severance, *see generally Marshall*, 118 Nev. 644-48, 56 P.3d 377-80 (discussing inconsistent defenses). We conclude that the district court did not abuse its discretion in this regard.

E. *Counsel of choice*

[Headnotes 29-31]

Rimer claims that the district court interfered with his constitutional right to counsel of his choice by denying his motion for a continuance. Although the Sixth Amendment right to counsel includes the right to retain counsel of one's own choosing, this right is not absolute. *United States v. Gonzales-Lopez*, 548 U.S. 140, 144 (2006). For example, "the denial of a continuance may infringe upon the defendant's right to counsel of choice, '[but] only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel.'" *United States v. Carrera*, 259 F.3d 818, 825 (7th Cir. 2001) (citation omitted) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)). Here,

Rimer informed the district court on the eve of trial that he was substituting his court-appointed counsel with private counsel. He explained that private counsel had a different strategy and asked for a 90-day continuance. The district court denied the continuance because the case was old and had been pending since 2008, a firm trial date that fit everyone's schedules was set on November 4, 2010, and Rimer had known since November that his case would go to trial on February 14, 2011. We conclude that the district court did not abuse its discretion in this regard. *See United States v. Garrett*, 179 F.3d 1143, 1144-45 (9th Cir. 1999) (reviewing a district court's decision to deny a continuance that implicated defendant's right to counsel of choice for abuse of discretion).

F. *Peremptory challenge*

[Headnotes 32-34]

Rimer claims that the district court erred by overruling his objection to the prosecutor's use of a peremptory challenge. "An equal-protection challenge to the exercise of a peremptory challenge is evaluated using the three-step analysis adopted . . . in *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)]." *Nunnery v. State*, 127 Nev. 749, 783, 263 P.3d 235, 257-58 (2011). The *Batson* analysis requires that the opponent of the peremptory challenge make a prima facie case of discrimination (first step) *before* the proponent of the challenge must assert a neutral explanation for the challenge (second step). *Purkett v. Elem*, 514 U.S. 765, 767 (1995). "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005); *see also Watson v. State*, 130 Nev. 764, 775, 335 P.3d 157, 166-67 (2014) (discussing *Batson*'s first step). Rimer lodged his *Batson* challenge on the record after jury selection was settled off the record. Rimer challenged the prosecutor's decision to strike an African-American woman because "there was such limited contact during the jury selection, [and] so few questions asked of her." The prosecutor expressly declined to give reasons for his peremptory challenge until the district court determined whether a prima facie case of discrimination had been made. The district court found that one of the two African Americans in the venire had been seated on the jury, there was no showing that the prosecutor systematically excluded anybody, the challenged veniremember had in fact been questioned, and she had made statements that provided a sufficient reason for excluding her from the jury panel. This record supports our conclusion that Rimer's challenge was decided and denied at the first step of the *Batson* analysis. We see no clear error in that decision. *See Watson*, 130 Nev. at 775, 335 P.3d at 165 (observing that appellate court will not reverse district court's decision as to discriminatory intent unless it is clearly erroneous).

G. *Evidentiary rulings*

[Headnote 35]

Rimer claims that the district court made several erroneous evidentiary rulings. He preserved two of these alleged errors for appellate review. *See* NRS 47.040(1). "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

[Headnotes 36-38]

Rimer claims that the district court erred by refusing to admit statements that Colleen made against her penal interests because they supported his defense. "[Although] the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations omitted), defendants must comply with established evidentiary rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence," *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). "[T]he statutory test for determining the admissibility of statements against penal interest under NRS 51.345 is whether the totality of the circumstances indicates the trustworthiness of the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant." *Walker v. State*, 116 Nev. 670, 676, 6 P.3d 477, 480 (2000). Here, the district court found that Colleen's statements were not made under circumstances that dispelled the notion that they were fabricated, and Rimer has not demonstrated an abuse of discretion in this regard.

[Headnotes 39, 40]

Rimer also claims that the district court erred by refusing to admit church records into evidence because they were records of a regularly conducted activity.[3] Reports maintained "in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian *or other qualified person*, [are] not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." NRS 51.135 (emphasis added). The term "qualified person" is broadly interpreted and the proponent of the record need only make a prima facie showing of its authenticity so that a reasonable juror could find that the record is what it purports to be. *Thomas v. State*, 114 Nev. 1127, 1148, 967 P.2d 1111, 1124 (1998). Here, a ward bishop

[3]To the extent that Rimer claims that the church records were admissible under NRS 51.185 (records of religious organizations), he did not argue this hearsay exception in the court below and we decline to consider it on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

testified that he had no personal knowledge of whether the proffered record was an accurate copy of the records kept by the church. The district court reasonably concluded from this testimony that Rimer failed to make a prima facie showing of authenticity. Rimer has not demonstrated an abuse of discretion in this regard.

H. *Negative inference argument*

[Headnotes 41-43]

Rimer claims that the district court erred by refusing to allow him to argue that the jury could draw negative inferences from the State's failure to call Spencer and Enoch as witnesses, present evidence regarding the contents of the second refrigerator and freezer on the first floor, and present evidence regarding the chemical containers that allegedly endangered the Rimer children. A defense attorney is permitted to argue all reasonable inferences that arise from the evidence presented at trial, including negative inferences that may arise when the State fails to call important witnesses or present relevant evidence and has some special ability to produce such witnesses or evidence. *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 705, 220 P.3d 684, 694 (2009). However, prosecutors and defense attorneys may not premise their arguments on facts that have not been admitted into evidence. *Id.* Here, the State decided not to call Spencer and Enoch as witnesses, and defense counsel decided not to hold the children over the weekend and call them to testify during the following week. The district court ruled that Rimer could argue that the State had the ability to call Spencer and Enoch as witnesses and its decision not to call them as witnesses is something that the jury should consider when evaluating whether there is sufficient evidence to sustain guilty verdicts. The district court further ruled that Rimer could not comment on the evidentiary value of evidence that was not admitted into evidence. We conclude that the district court did not abuse its discretion in this regard.

I. *Proposed jury instruction*

[Headnote 44]

Rimer claims that the district court erred by rejecting his proposed instruction on the statute of limitations as it pertained to child-abuse-and-neglect counts 3 through 7. Rimer asserts that the district court's rejection of this instruction and its refusal to require the jury to be unanimous as to the theory of conduct that it finds to be abusive or neglectful deprived him of the ability to present a statute-of-limitations defense. It appears that jury instructions were settled off the record and then the parties' objections and the rejected instructions were memorialized on the record. However, the record does not include the rejected defense instructions nor indicate why they were rejected. Without an adequate record, we are unable to resolve this claim on the merits. *See Thomas v. State*, 120 Nev. 37,

43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

J. *Prosecutorial misconduct*

[Headnote 45]

Rimer claims that the prosecutor committed various acts of misconduct throughout the trial. He preserved four of these claims for appeal. We analyze claims of prosecutorial misconduct in two steps: first, we determine whether the prosecutor's conduct was improper, and second, if the conduct was improper, we determine whether it warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "[We] will not reverse a conviction based on prosecutorial misconduct if it was harmless error." *Id.*

[Headnotes 46, 47]

First, Rimer claims that the prosecutor committed misconduct by characterizing spankings as beatings. However, any harm arising from the prosecutor's use of the term "beatings" during his examination of the witnesses was cured when the district court sustained Rimer's objections, and the prosecutor did not commit misconduct by using the term during closing argument because he was free to argue facts or inferences supported by the evidence and to offer conclusions on disputed issues during closing argument. *See Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005).

[Headnote 48]

Second, Rimer claims that the prosecutor committed misconduct by eliciting testimony that a CPS investigator went to the Rimer home in response to a complaint involving Crystal. The record reveals that the district court determined that nothing was said that would lead the jury to believe that there was a bad act involving Crystal, cautioned the prosecutor to avoid situations involving other bad acts, and overruled Rimer's objection. Nothing in the record suggests that the prosecutor's conduct was improper in this regard.

[Headnote 49]

Third, Rimer claims that the prosecutor committed misconduct by conveying facts not in evidence through a hypothetical question posed to a defense expert. Dr. Carl Dezenberg testified that he did not have any concerns about the care that Jason was receiving from his family. In an attempt to undermine Dr. Dezenberg's testimony, the prosecutor asked,

> Would it have caused you concern if you had learned that on the day that Jason was presented to have his G-tube removed by Dr. Reyna that Dr. Reyna refused to do surgery because Jason was so dirty he needed to have him bathed before [he] was willing to perform the surgery?

The district court allowed the question after determining that it was being posed as a hypothetical question. The prosecutor's question did not constitute misconduct because opposing parties are allowed to explore and challenge the basis of an expert witness's opinion. *See* NRS 50.285(2) (an expert may base his opinion on facts and data that are not admissible in evidence); *Blake v. State*, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005) ("It is a fundamental principle in our jurisprudence to allow an opposing party to explore and challenge through cross-examination the basis of an expert witness's opinion."); *Anderson v. Berrum*, 36 Nev. 463, 469, 136 P. 973, 976 (1913) ("On cross-examination it is competent to call out anything to modify or rebut the conclusion or inference resulting from the facts stated by the witness on his direct examination.").

[Headnote 50]

Fourth, Rimer claims that the prosecutor committed misconduct by arguing that the defense failed to prove that the Rimers were sick on the day of Jason's death. During the opening statements, both Rimer and Colleen claimed that the evidence would show that they were sick and spent most of the day in bed. The prosecutor acknowledged these statements during closing argument and asked, "what evidence is there to suggest that they were sick. How about a witness." This argument was not misconduct because the prosecutor was merely pointing out "that the defense failed to substantiate its theory with supporting evidence." *Evans v. State*, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001); *see Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

K. *Felony adjudication*

Rimer argues that the district court erred by adjudicating him guilty of felony child abuse and neglect as to counts 3 through 7 because the State failed to request a special verdict form so that the jurors could designate the theories of liability they found beyond a reasonable doubt, the Department of Parole and Probation treated the counts as gross misdemeanors, and defense counsel asked the district court to adjudicate the counts as gross misdemeanors. However, the plain language of the amended indictment demonstrates that Rimer was accused of committing a felony under NRS 200.508(1) because it states that he committed the child abuse and neglect by *causing* a child to suffer harm or by *placing* a child in a

situation where he may have suffered harm. *See Ramirez v. State*, 126 Nev. 203, 208-09, 235 P.3d 619, 623 (2010) (explaining the difference between the criminal offenses described in NRS 200.508 subsections (1) and (2)). Rimer was not accused of committing child abuse and neglect under NRS 200.508(2), the jury was properly instructed on counts 3 through 7, and the jury found Rimer guilty of each of these counts. Accordingly, the district court did not abuse its discretion by adjudicating Rimer guilty of felony child abuse and neglect. *See Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009) (reviewing a district court's sentencing decision for abuse of discretion).

L. *Double jeopardy*

[Headnote 51]

Rimer argues that his involuntary-manslaughter and child-abuse-and-neglect-resulting-in-substantial-bodily-harm convictions violate the Double Jeopardy Clause and are redundant because they punish the exact same act—Jason's death. However, each of these offenses requires proof of an element that the other does not: involuntary manslaughter requires proof of a homicide, *see* NRS 200.070, and child abuse and neglect requires proof of an intentional act that either causes or allows a child to suffer harm or be placed in a situation where he or she may suffer harm, *see* NRS 200.508(1), (2). Accordingly, Rimer's convictions do not violate the Double Jeopardy Clause's prohibition against multiple punishments for the same offense, *see Blockburger v. United States*, 284 U.S. 299, 304 (1932) (establishing an elements test for determining whether separate offenses exist for double jeopardy purposes), and they are not redundant because neither statute indicates that cumulative punishment is precluded, *see Jackson v. State*, 128 Nev. 598, 611, 291 P.3d 1274, 1282 (2012) (applying the *Blockburger* test to redundancy claims when the relevant statutes do not expressly authorize or prohibit cumulative punishment).

M. *Plain error review*

[Headnotes 52, 53]

Many of Rimer's claims of error were not preserved for appellate review. He either failed to object and state the specific grounds for his objection during trial, or the grounds that he now urges on appeal are different from those he presented below. *See Thomas v. Hardwick*, 126 Nev. 142, 155-57, 231 P.3d 1111, 1120-21 (2010) (discussing unpreserved challenges to the admission of evidence); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (discussing unpreserved challenges to prosecutorial conduct); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (discussing unpreserved challenges to jury instructions). Nonetheless, we have dis-

cretion to review for plain error. *See* NRS 178.602; *Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 775-76 & n.12, 263 P.3d 235, 253 & n.12 (2011). "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (citations omitted) (internal quotations omitted).

Rimer claims that the district court erred by allowing portions of the grand jury transcript to be read into the record and admitting evidence of other bad acts, evidence of purported misconduct that occurred outside the time frame alleged in the indictment, the opinion testimony of lay witnesses, and photographs that were prejudicial and cumulative. Rimer also claims that the district court improperly instructed the jury on child endangerment, the definition of the statutory term "permit," the presumption of innocence, and the unanimous verdict requirement. And Rimer further claims that the prosecutor committed misconduct by inviting references to Rimer's custodial status, eliciting testimony that a crime scene investigator was treated for scabies, arguing facts not in evidence, arguing that the State did not need to prove each allegation as to each named victim, arguing that Rimer had no choice but to speak to authorities after Jason's death, and exhorting the jurors not to let the system fail Jason again.

We have carefully reviewed each of these claims and, to the limited extent that there was error, we conclude that the error did not affect Rimer's substantial rights and therefore he has not demonstrated plain error. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (An error that affects the substantial rights of a defendant is one that "affected the outcome of the district court proceedings.").

N. *Cumulative error*

Rimer claims that cumulative error requires reversal of his convictions. However, because Rimer has failed to demonstrate any trial error, we conclude that he was not deprived of a fair trial due to cumulative error.

CONCLUSION

Having determined that the district court did not err by concluding that child abuse and neglect is a continuing offense for purposes of the statute of limitations, that the criminal counts were properly joined because they evinced a pattern of abuse and neglect that would have been relevant and admissible in separate trials for each

charge, and that none of the remaining claims warrant relief, we affirm Rimer's judgment of conviction.

HARDESTY, C.J., and PARRAGUIRRE and PICKERING, JJ., concur.

CHERRY, J., with whom SAITTA, J., agrees, dissenting:

While the majority characterizes the procedural and prosecutorial errors during Rimer's trial as innocuous, the cumulative effect of these errors warrants reversal. Rimer's trial was unfairly prejudiced from the outset due to the misjoinder of counts and trials. The district court failed to take the most basic precautions of a limiting instruction or a *Petrocelli* hearing. Moreover, because the State decided to prosecute Rimer for child abuse or neglect under the continuing offense doctrine, Rimer's rights under the Double Jeopardy Clause, *see* U.S. Const. amend. V, were violated when he was twice convicted for abuse and neglect of four-year-old Jason. Therefore, I dissent.

Continuing offense doctrine

Even assuming that child abuse or neglect is a continuing offense and therefore extends the statute of limitations in the instant case, I would nonetheless reverse one of the charges against Rimer for acts of abuse and neglect against Jason. If child abuse or neglect is a continuing offense, then both charges against Rimer for abusing and neglecting Jason cannot stand.

The Double Jeopardy Clause "protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnote omitted). Other appellate courts have held that continuing offenses are, by definition, single offenses, even though comprised of multiple, discrete acts. *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000) ("In cases when the nature of the charged offense is meant to punish a continuing course of conduct, . . . election of offenses is not required because the offense is, by definition, a *single offense*." (emphasis added)); *see also People v. Ewing*, 140 Cal. Rptr. 299, 301 (Ct. App. 1977) (holding that "[a]lthough the child abuse statute may be violated by a single act, more commonly it covers repetitive or continuous conduct" (citation omitted)); *People v. Hogle*, 848 N.Y.S.2d 868, 871 (N.Y. Crim. Ct. 2007) (holding that "[e]ndangering the welfare of a child may be characterized as a continuing offense over a period of time 'made up of a continuity of acts or of omissions, neither of which may be enough by itself, but each of which comes in with all the rest to do the harm and make the offense'" (citation omitted) (quoting *Cowley v. People*, 83 N.Y. 464, 472 (N.Y. 1881))). Here, Rimer was convicted of two counts of abusing or neglecting Jason under a single course of conduct. Rimer's acts and omissions of abuse or neglect that led to Jason's death are therefore included within the

same course of conduct as those of failing to provide the proper care necessary for Jason's well being. Because it is all part of a single course of conduct, only one conviction is permitted.

Because a course of conduct is a "single offense," *see Adams*, 24 S.W.3d at 294, Rimer cannot be punished twice for a single course of conduct. I would therefore reverse the redundant conviction for child abuse or neglect of Jason.

Misjoinder of charges and codefendant's trial

Under NRS 173.115, NRS 48.045(2), and the admissibility standards delineated in *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), evidence of Rimer's abuse of Jason's older siblings unfairly prejudiced Rimer. Accordingly, the district court should have severed the abuse counts from those pertaining to Jason's death. Evidence that Rimer abused the older children is not cross-admissible because it lacks relevancy to Jason's death. Such evidence only "show[s] an accused's criminal character and the probability that he committed the crime." *Shults v. State*, 96 Nev. 742, 748, 616 P.2d 388, 392 (1980).

Rimer's alleged abuse of his other children cannot be linked to Rimer's failure to inquire into Jason's whereabouts on the day of Jason's death. NRS 48.045(2). A parent's motive to inflict physical abuse on his or her child is not remotely similar to a parent's motive to neglect his or her child's whereabouts—especially when, as here, the evidence shows that the parent believes that others are caring for the child.

Similarly, evidence that Rimer abused his older children does not demonstrate "absence of mistake or accident" for the charges involving Jason's death. *Id*. Not only does the evidence of abuse pertain to other alleged victims, the acts that the majority believes to be related—corporal punishment and ignoring a child's whereabouts—are clearly distinct. They cannot possibly constitute part of a single series of events. Evidence "that a child has experienced injuries in many purported accidents is evidence that the most recent injury may not have resulted from yet another accident." *Bludsworth v. State*, 98 Nev. 289, 292, 646 P.2d 558, 559 (1982). However, instances of *intentional* acts against older children lack relevance when the youngest child was the subject of an unintentional accident.

Evidence of additional abuse beyond Rimer's alleged abuse of Jason unfairly portrayed Rimer as a "bad father." Allowing this evidence implied that he was an abusive father, in general, by suggesting that he was prone to do that which "bad fathers" may do. Even if evidence for the counts of the older children's physical abuse might have some probative value for the charges pertaining to Jason's death, joinder of these counts terminally infected the proceedings with "the danger of unfair prejudice." The substantial and injurious effect of the evidence should have compelled the trial judge to exercise his discretion to sever the charges. *Tinch*, 113 Nev. at 1176, 946

P.2d at 1064-65; *see Tabish v. State*, 119 Nev. 293, 304, 72 P.3d 584, 591 (2003); *Bludsworth*, 98 Nev. at 292, 646 P.2d at 559.

The inappropriate joinder of Rimer's and Colleen's trials is of equal and weighty concern. These defendants had antagonistic, irreconcilable, and mutually exclusive defenses. *See Marshall v. State*, 118 Nev. 642, 645-46, 56 P.3d 376, 378 (2002); *Rowland v. State*, 118 Nev. 31, 45, 39 P.3d 114, 122-23 (2002). Rimer's defense (that he relied on Colleen to take care of Jason) directly contradicts Colleen's defense (that, because she suffered from adult-onset myotonic dystrophy, she relied on others to care for Jason). While Colleen's defense diffused her individual responsibility among other members of the household, Rimer's defense turned on Colleen's role as Jason's caretaker. Thus, if the jury accepted Colleen's defense, it would inevitably reject Rimer's defense.

This misjoinder compromised Rimer's right to a fair trial. *See Marshall*, 118 Nev. at 646, 56 P.3d at 379 (stating that joinder is "prefer[able] as long as it does not compromise a defendant's right to a fair trial"). The joinder also unfairly prejudiced Rimer because the jury could not reasonably be expected to "compartmentalize the evidence as it relate[d] to separate defendants." *Lisle v. State*, 113 Nev. 679, 689, 941 P.2d 459, 466 (1997) (internal quotation omitted), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). In a decision requiring such a delicate determination as whether a defendant's negligence is criminal and requires conviction, the distortion of a jury's ability to evaluate guilt or innocence demands reversal. *See, e.g.*, *Tabish*, 119 Nev. at 305, 72 P.3d at 591 ("[P]rejudice created by . . . failure to sever the charges is more likely to warrant reversal in a close case.").

Omission of a limiting instruction to the jury

Next we consider the omission of a limiting instruction for the prior bad acts evidence admitted against Rimer. *See Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110-11 (2008) (holding that admission of prior bad acts evidence requires a limiting instruction, unless waived by the defendant prior to admission). Both the State and the district court share blame for this error. *See id.* After the district court admitted such evidence, the prosecutors ignored their duty "to request that the jury be instructed on the limited use of prior bad act evidence." *See id*. More importantly, the district court failed to heed this court's direction and "raise the issue *sua sponte*" after the State neglected its duty to do so. *See id*.

This court has recognized that "[w]hen . . . potential prejudice is present, it can usually be adequately addressed by a limiting instruction to the jury." *Tabish*, 119 Nev. at 304, 72 P.3d at 591. Particularly in the face of imminent unfair prejudice, the district court should have taken appropriate steps to properly instruct the jury.

Though this procedural safeguard would not have been adequate to ameliorate the unfair prejudice arising from joinder of counts and trials, the court nonetheless should have taken steps to inhibit any possible prejudice resulting from joinder. *See id*. (holding that, given the graphic nature of the evidence, a limiting instruction was insufficient "to mitigate the prejudicial impact of the joinder on the jury's consideration of appellants' guilt on the remaining counts"). Not doing so is an additional ground for reversal.

Prosecutorial misconduct

Three statements made by the prosecutor constitute egregiously improper conduct. First is the State's use of the term "beat" in reference to corporal punishment. This was an impermissible mischaracterization of the testimony. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). The district court acknowledged the prosecution's mischaracterization and sustained objections to the use of "beat." The court additionally instructed the prosecution to use the word "discipline" instead of the word "beat." Regardless, the prosecutor continued to use the word "beat" and refused to alter his vocabulary despite the court's instructions. This is blatant misconduct.

Second, the prosecution committed misconduct by suggesting facts not in evidence when it posed hypothetical questions involving Jason's G-tube. Though the prosecutor correctly stated that NRS 50.285(2) permits the use of hypothetical questions, such questions cannot contain facts that are not supported by the evidence. *See Wallace v. State*, 84 Nev. 603, 606, 447 P.2d 30, 32 (1968). This is also misconduct.

Finally, the prosecutor's argument that the defense failed to present witnesses establishing that Rimer was ill on the day that Jason died impermissibly shifted the burden of proof. This court has determined that it is generally improper to comment on the defense's failure to call witnesses or produce evidence, yet this is exactly what the prosecutor did. *See Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996). This, too, constitutes misconduct.

Plain errors

Several instances of unobjected-to procedural errors are equally troublesome. First, the district court should have sua sponte ordered a *Petrocelli* hearing for the unobjected-to prior bad acts, namely that Rimer threatened CPS, paid or asked his children not to speak to CPS, and allegedly hit his daughter. Without a *Petrocelli* hearing to determine whether (1) the evidence is relevant, (2) the prior bad act "is proven by clear and convincing evidence," and (3) the danger of unfair prejudice substantially outweighs the evidence's probative value, *Tinch*, 113 Nev. at 1176, 946 P.2d at 1064-65, "this court [has] be[en] deprived of the opportunity for meaningful review of the trial

court's admissibility determination." *Qualls v. State*, 114 Nev. 900, 903, 961 P.2d 765, 766-67 (1998).

Under plain error review, the failure to conduct a *Petrocelli* hearing and the prosecutorial misconduct warrant reversal. We note, that reversal is not always necessary when a district court fails to hold a *Petrocelli* hearing. *McNelton v. State*, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999). However, the district court's failure here compels reversal as "(1) the record is [not] sufficient to determine that the [prior bad act] evidence is admissible under *Tinch*; [and] (2) the result would [not] have been the same if the trial court had not admitted the evidence." *Id.* Evidence of threats to CPS and allegedly asking his children not to speak to CPS solely served as character evidence by framing Rimer as a bad person. Rimer's actions and frustrations toward an agency interested in protecting children does not automatically indicate that he did not properly protect his children. Because the evidence bears no relevance to the issue of whether he committed acts of abuse, neglect, or homicide, the evidence is inadmissible under the first *Tinch* standard. *See* 113 Nev. at 1176, 946 P.2d at 1064-65 (holding that the prior bad act evidence must, first, be relevant to be admissible). Next, even assuming relevance, the prejudicial effect of the evidence far outweighs its probative value. *See id.*

Two additional unobjected-to prosecutorial statements are erroneous, as the record did not support the assertions. *See Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992). First, the prosecutor's statement that the house was a "house of horrors" is neither substantiated by the evidence nor a permissible inference. Second, the State's claim that the system failed Jason and its exhortation that the jury prevent this from occurring again is severely inflammatory. This court has held that "[t]here should be no suggestion that a jury has a *duty* to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality." *Evans v. State*, 117 Nev. 609, 633, 28 P.3d 498, 515 (2001) (emphasis added) (internal quotations omitted).

The unobjected-to prosecutorial misconduct warrants reversal because the error " 'had a prejudicial impact on the verdict when viewed in context of the trial as a whole.' " *See Gaxiola v. State*, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) (quoting *Rowland*, 118 Nev. at 38, 39 P.3d at 118). Given the extremely inflammatory nature of those statements, "the misconduct is 'clearly demonstrated to be substantial and prejudicial.' " *Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (quoting *Sheriff v. Fullerton*, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996)). The jury's return of a lesser offense of involuntary manslaughter may reflect that this misconduct was

ineffective, however, the prosecutor's inappropriate statements may have compelled the jury to return some sort of guilty verdict.

Cumulative error

Under a cumulative error analysis, (1) the misjoinder of counts and trials, (2) the erroneous omission of a limiting instruction on prior bad acts evidence, and (3) the numerous instances of prosecutorial misconduct are grounds for reversal because of their "substantial and injurious effect or influence in determining the jury's verdict." *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (internal quotations omitted).

Conclusion

Given the breadth of the numerous, unfair, and dangerous prejudicial errors that impacted Rimer's trial, the conviction should have been reversed. Therefore, I dissent.

GIBBONS, J., dissenting:

I dissent.

WILLIAM J. BERRY, APPELLANT, *v.*
PAMELA FEIL; AND DENNIS BROWN, RESPONDENTS.

No. 64750

June 11, 2015 357 P.3d 344

Appeal from a district court order dismissing a civil rights action. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

Inmate brought § 1983 action against prison law library supervisor and inmate library clerk, alleging that they failed to mail his confidential legal mail and conspired to hide evidence of the alleged transgression and that supervisor retaliated against him for filing a grievance against her by refusing his requests for legal supplies and confiscating his books. The district court dismissed action. Inmate appealed. The court of appeals held that: (1) Prison Litigation Reform Act's (PLRA) exhaustion requirement applies to inmate § 1983 actions in state court, and (2) mandatory exhaustion requirement of the PLRA prohibits a district court from staying a § 1983 action challenging prison conditions to allow inmate to exhaust administrative remedies.

Affirmed.

William James Berry, Ely, in Pro Se.

Adam Paul Laxalt, Attorney General, and *Clark G. Leslie*, Senior Deputy Attorney General, Carson City, for Respondent Pamela Feil.

Dennis Brown, Lovelock, in Pro Se.

1. Courts.
   Although § 1983 actions provide a mechanism for parties to obtain relief for violations of their federal rights, both state and federal courts have jurisdiction over actions initiated pursuant to that statute. 42 U.S.C. § 1983.
2. Civil Rights.
   Prison Litigation Reform Act's exhaustion requirement applies to inmate § 1983 actions in state court. 42 U.S.C. § 1983; Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C. § 1997e(a).
3. Action; Pretrial Procedure.
   Mandatory exhaustion requirement of the Prison Litigation Reform Act prohibits a district court from staying a § 1983 action challenging prison conditions to allow inmate to exhaust administrative remedies; rather, the district court is required to dismiss complaint. 42 U.S.C. § 1983; Prison Litigation Reform Act of 1995, § 101(a), 42 U.S.C. § 1997e(a).

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

Per Curiam:

In this opinion, we address whether civil rights complaints filed by inmates under 42 U.S.C. § 1983 (2012) in Nevada state courts are subject to the exhaustion of administrative remedies requirement imposed by the federal Prison Litigation Reform Act of 1995's (PLRA) amendment of 42 U.S.C. § 1997e(a) (1996). We must further determine whether Nevada district courts are required to stay inmate § 1983 claims filed prior to the exhaustion of administrative remedies so that the inmate can exhaust all available administrative remedies, or whether complaints filed before exhaustion is complete must be dismissed. Below, the district court dismissed appellant's complaint, concluding that § 1997e(a)'s exhaustion requirement applied to appellant's § 1983 claims, that appellant had failed to exhaust his administrative remedies, and that there was no basis for the court to stay his claims to allow him to exhaust those remedies.

Because the PLRA's exhaustion requirement applies to any inmate § 1983 civil rights claims regarding prison conditions, regardless of what court the complaint is filed in, the district court properly applied the exhaustion requirement to this case. And since appellant's complaint alleged federal civil rights claims and not state tort claims, the district court did not have the discretion to stay the case

to allow appellant to exhaust his administrative remedies. Indeed, because the PLRA makes prefiling exhaustion mandatory for § 1983 civil rights claims challenging conditions of confinement, the district court was required to dismiss, rather than stay, appellant's complaint. Thus, the district court did not err in dismissing appellant's complaint based on his failure to exhaust his administrative remedies prior to filing the complaint.

BACKGROUND

Appellant William J. Berry, an inmate, filed the underlying civil rights complaint against respondents Pamela Feil, the Lovelock Correctional Center law library supervisor, and Dennis Brown, an inmate library clerk, in the Sixth Judicial District Court pursuant to 42 U.S.C. § 1983. In his complaint, Berry alleged that Feil and Brown failed to mail his confidential legal mail and conspired to hide evidence of this alleged transgression, and that Feil retaliated against Berry for filing a grievance against her by refusing his requests for legal supplies and confiscating his books. Based on these allegations, the complaint asserted violations of Berry's right to free speech under the First Amendment to the United States Constitution and his rights to due process and unobstructed access to the courts under the Fifth and Fourteenth Amendments.

Feil subsequently moved to dismiss the complaint for failure to exhaust administrative remedies. While Feil acknowledged that Berry filed grievances regarding the incidents alleged in his complaint, she asserted he nonetheless failed to exhaust his administrative remedies because he did not complete all the steps of the grievance process as required by federal law. In response, Berry moved to strike the motion to dismiss. Although he did not file a separate, specifically labeled opposition to the motion to dismiss, his motion to strike included substantive arguments addressing the grounds on which Feil sought to have his complaint dismissed, and thus, despite its title, it effectively operated as both a motion to strike and an opposition to Feil's motion. The district court subsequently dismissed Berry's entire complaint without prejudice based on his failure to exhaust his administrative remedies.[1] This appeal followed.

ANALYSIS

Congress enacted the Prison Litigation Reform Act of 1995 in an effort to curb a sharp rise in prisoner litigation that had occurred in the years preceding its passage. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). Among other things, the PLRA amended 42 U.S.C. § 1997e(a) to provide that "[n]o action shall be brought with respect

[1]After the district court dismissed the complaint, Brown filed a motion seeking to dismiss himself from the action. Because the district court had already dismissed the complaint, no action was taken in response to that motion.

to prison conditions under [42 U.S.C. § 1983] or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803, 110 Stat. 1321-71 (1996) (codified as amended at 42 U.S.C. § 1997e(a) (1996)).

In its order dismissing the complaint, the district court noted that § 1997e(a) limits inmates' abilities to file civil rights actions relating to prison conditions by requiring them to first exhaust all available administrative remedies. Thus, because it found Berry failed to exhaust his administrative remedies, the district court concluded Berry's complaint must be dismissed pursuant to the PLRA. On appeal, Berry argues the district court erred in applying the PLRA's exhaustion requirement to his state court civil rights action, even though his case was brought under § 1983. He further argues that, rather than dismissing his action, the district court was required to stay his case to allow him to exhaust his administrative remedies.[2]

We address each of Berry's arguments below in turn. In addressing these contentions, we must accept all of the factual allegations in the complaint as true and draw all inferences in favor of Berry. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (explaining that, on appeal, a court rigorously reviews a dismissal for failure to state a claim, accepting all of the factual allegations in the complaint as true and drawing all inferences in favor of the plaintiff).

Applicability of 42 U.S.C. § 1997e(a) to inmate 42 U.S.C. § 1983 civil rights actions filed in Nevada district courts

[Headnotes 1, 2]

Berry filed a district court civil rights action under 42 U.S.C. § 1983, alleging violations of his constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. Under § 1983, a civil rights action may be initiated to seek redress from a person acting under color of law of any state or the federal government who has deprived that party of a right, privilege, or immunity protected by the Constitution or laws of the United States. *See Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007). Although § 1983 actions provide a

[2]In addressing whether he exhausted his administrative remedies, Berry broadly states that an issue on appeal is "[d]id the district court erroneously conclude that [Berry] failed to exhaust [his] administrative remedies?" Berry, however, does not present any arguments explaining how he believes he had exhausted his administrative remedies. Given his failure to provide cogent arguments on this point, we do not address this assignment of error. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (recognizing that appellate assertions not cogently argued need not be considered on appeal).

mechanism for parties to obtain relief for violations of their federal rights, both state and federal courts have jurisdiction over actions initiated pursuant to that statute. *Haywood v. Drown*, 556 U.S. 729, 731 (2009). And as set forth above, the PLRA's amendment of § 1997e(a) requires the exhaustion of all available administrative remedies before inmates can bring § 1983 civil rights claims challenging conditions of confinement.

Below, the district court relied on § 1997e(a) in dismissing Berry's underlying action based on its determination Berry had failed to exhaust his administrative remedies prior to filing his civil rights complaint. On appeal from this determination, Berry insinuates that § 1997e(a) does not apply to his complaint because it was brought in state, rather than federal court. Contrary to Berry's argument, however, federal and state courts that have been confronted with this issue have widely recognized that the PLRA's exhaustion requirement applies to § 1983 actions filed in state courts. *See, e.g.*, *Johnson v. Louisiana ex rel. La. Dep't of Pub. Safety & Corr.*, 468 F.3d 278, 280 (5th Cir. 2006); *Baker v. Rolnick*, 110 P.3d 1284, 1288-89 (Ariz. Ct. App. 2005).[3]

For example, in *Johnson*, the United States Court of Appeals for the Fifth Circuit addressed an inmate's § 1983 civil rights complaint that had been removed from state court to federal court, where it was subsequently dismissed on exhaustion grounds under § 1997e(a). 468 F.3d at 279. On appeal from the dismissal order, the inmate-plaintiff argued that § 1997e(a)'s exhaustion requirement did not apply because his complaint was originally brought in state court. *Id.* The Fifth Circuit rejected this argument, however, determining that the language of § 1997e(a) did not limit its application to only those claims filed in federal court. *Id.* at 280.

The Arizona Court of Appeals came to the same conclusion in addressing an appeal from the dismissal of an inmate's § 1983 civil rights action. *Baker*, 110 P.3d at 1285. In challenging the dismissal of his complaint, the inmate-plaintiff in *Baker* argued § 1997e(a) did not apply to actions filed in state courts. *Id.* at 1287. The *Baker* court rejected this argument, however, and affirmed the dismissal of the complaint, relying on § 1997e(a)'s "broad and unequivocal" declaration that "no action shall be brought without exhaustion of remedies" and Congress's intent to have state courts uniformly apply federal civil rights laws. *Id.* at 1288 (internal quotations omitted).

---

[3]Other courts have likewise acknowledged the applicability of the PLRA's exhaustion requirement to § 1983 actions filed in state courts. *See Richardson v. Comm'r of Corr.*, 863 A.2d 754, 756 & n.1 (Conn. App. Ct. 2005); *Toney v. Briley*, 813 N.E.2d 758, 760 (Ill. App. Ct. 2004); *Higgason v. Stogsdill*, 818 N.E.2d 486, 490 (Ind. Ct. App. 2004); *Kellogg v. Neb. Dep't of Corr. Servs.*, 690 N.W.2d 574, 579 (Neb. 2005); *Martin v. Ohio Dep't of Rehab. & Corr.*, 749 N.E.2d 787, 790 (Ohio Ct. App. 2001).

We find the reasoning of these decisions persuasive. Not only does § 1997e(a) not include language restricting its applicability to federal court actions, *see Johnson*, 468 F.3d at 280, but it specifically declares "[*n*]*o action shall be brought* with respect to prison conditions under section 1983 of this title" by any inmate until all available administrative remedies have been exhausted. 42 U.S.C. § 1997e(a) (emphasis added). And as the *Baker* court recognized, the "unequivocal" plain language utilized in § 1997e(a) makes that statute applicable to all § 1983 actions brought by incarcerated individuals to challenge the conditions of their confinement, regardless of whether those actions are filed in state or federal court. *Baker*, 110 P.3d at 1288; *see also Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009) (applying the plain language rule to determine whether a released inmate must still exhaust administrative remedies under § 1997e(a) when filing a civil rights action regarding prison conditions); *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (providing that, to determine legislative intent, Nevada courts first look to the statute's plain language).

Consistent with these decisions, we likewise conclude the PLRA's exhaustion requirement set forth in § 1997e(a) applies to inmate § 1983 civil rights actions challenging prison conditions filed in Nevada state courts. *See Johnson*, 468 F.3d at 280; *Baker*, 110 P.3d at 1288. Here, Berry does not dispute that his complaint, which alleged, among other things, that Feil and Brown tampered with his legal mail and that Feil retaliated against him for filing a grievance against her, challenged his conditions of confinement. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised by a party on appeal are deemed waived); *see also Porter v. Nussle*, 534 U.S. 516, 532 (2002) ("[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."). Under these circumstances, the district court did not err in applying § 1997e(a)'s exhaustion requirement to Berry's claims.

Nevada district courts may not stay inmate civil rights claims brought under 42 U.S.C. § 1983 to allow exhaustion of administrative remedies

[Headnote 3]

Berry next argues that, in dismissing his underlying civil rights action, the district court impermissibly refused to stay his claims so he could exhaust his administrative remedies.[4] While Berry's argu-

[4]Within this argument, Berry also asserts the district court abused its discretion by not allowing him to amend his complaint. Because Berry never requested leave to file an amended complaint, however, he has waived any

ment on this point is somewhat vague, he appears to be referring to NRS 41.0322(3), which provides that "[a]n action filed by a person in [the custody of the Nevada Department of Corrections seeking to recover compensation for loss or injury] before the exhaustion of the person's administrative remedies must be stayed by the court in which the action is filed until the administrative remedies are exhausted" unless the person has failed to timely file an administrative claim. In addressing this issue below, the district court held NRS 41.0322(3) did not mandate a stay of Berry's complaint to allow him to exhaust his administrative remedies because he did not raise any state tort claims.

NRS 41.0322(3) applies only to inmate claims for "loss of the person's personal property, property damage, personal injuries or any other claim arising out of a tort pursuant to NRS 41.031." *See* NRS 41.0322(1). Here, Berry's complaint did not allege any state tort claims, and instead, sought relief only for asserted violations of his civil rights under § 1983. Thus, as the district court recognized in dismissing the complaint, NRS 41.0322(3) is inapplicable to Berry's § 1983 civil rights claims and did not require the district court to stay these claims to allow him to exhaust his administrative remedies.[5]

Moving beyond NRS 41.0322(3), our examination of the Nevada Revised Statutes reveals no statute that could be read as requiring or even authorizing a district court to stay inmate civil rights complaints to allow inmates to exhaust available administrative remedies. Moreover, the federal courts have recognized that, under the PLRA, if an inmate has not exhausted administrative remedies before filing a § 1983 civil rights action pertaining to the conditions of the inmate's confinement, dismissal of the complaint is mandatory, *see, e.g.*, *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001), *overruled on other grounds by Porter v. Nussle*, 534 U.S. 516, 532 (2002), and thus a district court may not stay such an action to allow an inmate to exhaust any available administrative remedies. *McCoy v. Goord*, 255 F. Supp. 2d 233, 254 (S.D.N.Y. 2003).

In *Neal*, the United States Court of Appeals for the Second Circuit addressed whether the PLRA required the dismissal of an inmate's pre-exhaustion § 1983 civil rights complaint. 267 F.3d at 122. The Second Circuit noted that § 1997e(a) had previously allowed district

---

amendment-based arguments. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that a point not urged in the district court is waived on appeal).

[5]Despite rejecting Berry's NRS 41.0322(3)-based argument, the district court nonetheless examined his claims under that statute in a hypothetical context and concluded that his case would still be dismissed pursuant to that statute as Berry failed to timely pursue his administrative remedies. Because we conclude NRS 41.0322(3) does not apply to Berry's § 1983 claims, we need not address the district court's decision in this regard.

courts to continue a civil rights case for up to 180 days to allow for the exhaustion of available administrative remedies, but, through the PLRA, Congress had amended § 1997e(a) to provide that "[n]o action shall be brought [by an inmate] with respect to prison conditions under section 1983 of this title or any other Federal law" until all available administrative remedies are exhausted. 42 U.S.C. § 1997e(a); *see also Neal*, 267 F.3d at 122 (discussing the amendments to § 1997e(a)). In affirming the dismissal of the underlying § 1983 action, the court concluded this amended language clearly and unambiguously requires the exhaustion of administrative remedies prior to commencing a § 1983 civil rights complaint. *Neal*, 267 F.3d at 122. The *Neal* court further emphasized that Congress's removal of the continuance provision from § 1997e(a) "lends strong support to the conclusion that dismissal is warranted." *Id.*

Following the Second Circuit's decision in *Neal*, the United States District Court for the Southern District of New York looked to *Neal*'s anyalysis of the PLRA in addressing whether an inmate's pre-exhaustion § 1983 complaint may be stayed, rather than dismissed, to allow the inmate to exhaust administrative remedies. *McCoy*, 255 F. Supp. 2d at 254. And in resolving this issue, the *McCoy* court determinted that "[i]n the context of § 1983 and the PLRA . . . the district court may not stay the action pending exhaustion, as Congress eliminated the authority to do so by enacting the PLRA. Pre-suit exhaustion is thus required." *Id.* (citation omitted).

State courts have likewise recognized the PLRA's elimination of the 180-day continuance period and the resulting requirement that inmate-plaintiffs exhaust their administrative remedies prior to initiating a § 1983 civil rights complaint in order to avoid dismissal of their actions.[6] *See State v. Circuit Court for Dane Cnty.*, 599 N.W.2d 45, 48 n.6, 49 (Wis. Ct. App. 1999). In line with the conclusions reached by the *Neal*, *McCoy*, and *Dane County* courts, we determine that the mandatory exhaustion requirement set forth in § 1997e(a) requires inmate-plaintiffs to exhaust their administrative remedies prior to filing any § 1983 civil rights complaints in Nevada state courts challenging the conditions of their confinement. We

[6]In Tennessee, inmates have, by statute, 90 days from the date a complaint regarding any claim subject to review by the prison grievance committee is filed to exhaust their administrative remedies. Tenn. Code Ann. § 41-21-806(a), (c) (West 2014). Addressing the interplay between this statute and § 1997e(a), the Tennessee Court of Appeals concluded the Tennessee statute applies to § 1983 claims and is not preempted by § 1997e(a). *Pendleton v. Mills*, 73 S.W.3d 115, 129 (Tenn. Ct. App. 2001). As detailed above, however, NRS 41.0322(3) applies only to state tort claims and, unlike Tennessee, Nevada has no statute that could be viewed as inconsistent with the PLRA's mandatory, prefiling exhaustion requirement. As a result, the preemption concerns discussed in *Pendleton* are not involved here.

further conclude that this mandatory exhaustion requirement prohibits a district court from staying such a complaint to allow an inmate-plaintiff to exhaust administrative remedies. *See Neal*, 267 F.3d at 122. Instead, when an inmate files a § 1983 civil rights complaint in a Nevada district court challenging conditions of confinement without first having exhausted all available administrative remedies, the district court is required to dismiss the complaint.

As set forth above, Berry does not dispute that his § 1983 civil rights claims challenged the conditions of his confinement. And while Berry baldly asserts the district court erred in concluding he failed to exhaust his administrative remedies, he provides no argument or explanation as to how he had exhausted these remedies. Thus, the district court did not err in refusing to stay Berry's claims and dismissing the underlying matter based on Berry's failure to exhaust his administrative remedies prior to filing the action. Accordingly, we affirm the district court's dismissal of Berry's § 1983 civil rights action.[7]

EXCELLENCE COMMUNITY MANAGEMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* KRISTA GILMORE, INDIVIDUALLY; AND MESA MANAGEMENT, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 62189

June 25, 2015 351 P.3d 720

Appeal from a district court order denying a preliminary injunction in an employment matter. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Limited liability company that provided condominium and homeowners' association management services brought action against former employee and her new employer seeking preliminary injunction to enforce employment agreement, which prohibited her from revealing trade secrets and disclosing company's confidential information for 24 months after termination of employment and which contained nonsolicitation clause, pending the district court's

[7]While Berry summarily presents several other issues on appeal, he fails to provide any substantive arguments regarding these issues and the bases of his appellate concerns on these points cannot be gleaned from the summary issue statements he has provided. Under these circumstances, we decline to consider the remaining issues that Berry presents on appeal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that a court need not consider appellate assertions not supported by cogent arguments).

resolution of case. The district court denied motion for preliminary injunction. Company appealed. The supreme court, HARDESTY, C.J., held that: (1) sale of 100 percent of membership interest in limited liability company did not create a new entity, and thus, sale did not affect enforcement of employment contract containing a restrictive covenant; and (2) company failed to establish irreparable harm and, thus, was not entitled to preliminary injunction.

Affirmed.

Durham Jones & Pinegar and *Michael D. Rawlins* and *Bradley S. Slighting*, Las Vegas, for Appellant.

Alessi & Koenig, LLC, and *Huong X. Lam*, Las Vegas, for Respondents.

1. INJUNCTION.
   A preliminary injunction is proper when moving party can demonstrate that it has a reasonable likelihood of success on merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice.
2. APPEAL AND ERROR.
   Because the district court has discretion in determining whether to grant a preliminary injunction, the supreme court will only reverse the district court's decision when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.
3. APPEAL AND ERROR.
   In an appeal from a preliminary injunction, the supreme court reviews questions of law de novo.
4. CORPORATIONS AND BUSINESS ORGANIZATIONS.
   Sale of 100 percent of membership interest in limited liability company did not create a new entity, and thus, sale did not affect enforcement of employment contract containing a restrictive covenant.
5. INJUNCTION.
   Limited liability company that provided condominium and homeowners' association management services failed to establish that it would suffer irreparable harm for which compensatory damages were not an adequate remedy if the district court did not enter a preliminary injunction enforcing an employment agreement with former employee, which prohibited her from revealing trade secrets or disclosing confidential information, and thus, company was not entitled to preliminary injunction; former employee's job as condominium and homeowners' association manager did not require any unique skills, there was conflicting evidence as to whether she solicited or directly provided services to any of company's customers after she was terminated, and damages were quantifiable for customers company had lost to date.
6. INJUNCTION.
   Irreparable harm required for issuance of preliminary injunction is an injury for which compensatory damage is an inadequate remedy.

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

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we must determine whether the sale of 100 percent of the membership interest in a limited liability company affects the enforcement of an employee's employment contract containing a restrictive covenant. We conclude that it does not because such a sale does not create a new entity. Thus, we extend our holding in *HD Supply Facilities Maintenance, Ltd. v. Bymoen*, 125 Nev. 200, 210 P.3d 183 (2009), and agree with the Pennsylvania Superior Court that the sale of membership interests in a limited liability company is "akin to a sale of stock [in a corporation] rather than an asset sale." *Missett v. Hub Int'l Pa., LLC*, 6 A.3d 530, 537 (Pa. Super. Ct. 2010). Accordingly, the employer limited liability company may enforce a restrictive covenant in an employment contract without its employee's consent of assignment. However, we conclude that the district court in this case did not abuse its discretion in denying a preliminary injunction because appellant failed to demonstrate irreparable harm for which compensatory damages are an inadequate remedy. We affirm.

FACTS AND PROCEDURAL HISTORY

Excellence Community Management (ECM) is a Las Vegas-based Nevada limited liability company (LLC) that provides condominium and homeowners' association (HOA) management services. Respondent Krista Gilmore was employed by ECM as a community association manager from 2005 to 2012 and was directly responsible for managing multiple associations. In April 2011, Gilmore signed an employment agreement that prohibited her from revealing trade secrets and disclosing ECM's confidential information for a period of 24 months after termination of her employment. The employment agreement also included an 18-month nonsolicitation clause and an 18-month noncompetition clause, requiring Gilmore to refrain from soliciting persons or entities contractually engaged in business with ECM. The employment agreement did not include an assignment clause.

At the time Gilmore signed the employment agreement, ECM was owned and operated by Jamie and Warren McCafferty. In May 2011, 90 percent of the McCaffertys' membership interest in ECM was purchased by First Service Residential Management Nevada (FSRM). One year later, the McCaffertys sold or relinquished their remaining membership interest in ECM to FSRM. The purchase agreement between the McCaffertys and FSRM specifically stated that the McCaffertys "will sell, assign and transfer the [p]urchased [i]nterest to [FSRM], and [FSRM] will purchase

the [p]urchased [i]nterest from the [McCaffertys], free and clear of any [e]ncumbrance."

In early June 2012, Gilmore submitted her resignation to ECM and informed ECM that, upon final termination of her employment, she would begin working for respondent Mesa Management, LLC. Upon receiving Gilmore's notification, ECM's president decided to terminate Gilmore. Approximately three weeks later, ECM sent Gilmore a cease-and-desist letter, which alleged that Gilmore violated her 2011 employment agreement by contacting ECM's clients to inform them she was no longer employed by ECM and soliciting them to hire Mesa. Notwithstanding ECM's cease-and-desist letter, Mesa's owner sent a solicitation letter to numerous HOA boards announcing the start of Gilmore's employment with Mesa.

ECM filed a complaint seeking damages and injunctive relief against Gilmore and Mesa, and subsequently filed a motion for a preliminary injunction to enforce the employment agreement pending the district court's resolution of the case. During the preliminary injunction hearing, the district court asked ECM whether, if successful on its case, money damages could be calculated and could make ECM whole. Counsel conceded that money damages would make ECM whole, but also pointed to caselaw from other jurisdictions holding that irreparable harm is presumed where an employee has breached a restrictive covenant.

The district court denied ECM's motion for preliminary injunction for two reasons. First, the court relied upon *Traffic Control Services, Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 87 P.3d 1054 (2004), to conclude that the agreement was not assignable to FSRM absent a clause permitting the assignment or an agreement with the employee consenting to the assignment. Second, the district court determined that a preliminary injunction was unwarranted because ECM had failed to show irreparable harm for which compensatory damages were not an adequate remedy.

ECM appealed, arguing that the district court erred in relying on *Traffic Control* in denying ECM's motion for a preliminary injunction because the LLC membership sale that took place in this case was not an asset sale for which an employee must consent to the assignment of his or her employment agreement to the asset purchaser. Furthermore, ECM contends that the district court abused its discretion in determining that the requirements for a preliminary injunction were not met because there was insufficient evidence of irreparable harm.

DISCUSSION

[Headnotes 1-3]

ECM appeals the district court's denial of a preliminary injunction. A preliminary injunction is proper where the moving party can

demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice. *See* NRS 33.010; *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). Because the district court has discretion in determining whether to grant a preliminary injunction, this court will only reverse the district court's decision when "the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Boulder Oaks*, 125 Nev. at 403, 215 P.3d at 31 (internal quotation omitted). In an appeal from a preliminary injunction, this court reviews questions of law de novo. *Id.*

The 100-percent membership sale of the LLC did not result in the creation of a new entity

[Headnote 4]

The district court relied upon *Traffic Control*, 120 Nev. 168, 87 P.3d 1054, to conclude that the employment agreement was not assignable to FSRM absent a clause permitting the assignment because a new entity was introduced after the sale. ECM argues that *HD Supply Facilities Maintenance, Ltd. v. Bymoen*, 125 Nev. 200, 210 P.3d 183 (2009), and the case it primarily relied upon, *Corporate Express Office Products, Inc. v. Phillips*, 847 So. 2d 406 (Fla. 2003), provide that in the type of corporate transaction where 100 percent of the shares of a corporation are sold, the enforceability of any restrictive covenants are unaffected, because under such circumstances, there is no new employer. ECM further argues that the membership interest sale of an LLC, such as was conducted here, is equivalent to a stock sale in a corporation, not an asset sale as was the case in *Traffic Control*. We agree and conclude that the 100-percent membership sale of the LLC that took place in this case is equivalent to the sale of 100 percent of the stock in a corporation. Neither transaction results in a new entity.

In *HD Supply*, we recognized that the rule of nonassignability of an employee's covenant not to compete, articulated in *Traffic Control*, was limited to asset purchase transactions. 125 Nev. at 203-04, 210 P.3d at 185. We explained that the *Traffic Control* rule was "grounded in the law of contractual assignments," and as such, it "logically applies in the contractual setting of an asset purchase transaction because, in an asset purchase, 'the transaction introduces into the equation an entirely different entity, the acquiring business.'" *Id.* at 205, 210 P.3d at 186 (quoting *Corporate Express*, 847 So. 2d at 412). Thus, "the acquiring corporation in an asset purchase becomes, in effect, a wholly new employer," which makes it distinct from other corporate transactions, such as mergers, where the employer does not change. *Id.* at 206, 210 P.3d at 186-87.

In distinguishing between asset sales and mergers, this court relied upon *Corporate Express*'s discussion of "whether different forms of corporate transactions affect whether consent is necessary to effect a valid assignment of a covenant not to compete." *HD Supply*, 125 Nev. at 205-06, 210 P.3d at 186. In addition to analyzing mergers, the *Corporate Express* court also addressed 100-percent stock purchases. 847 So. 2d at 411. The court explained that, unlike in asset sales where an entirely different entity is introduced into the equation, in a 100-percent stock sale there is no new entity because "the existence of a corporate entity is not affected by changes in its ownership," and, instead, "the corporation whose stock is acquired continues in existence, even though there may be a change in its management." *Id.* at 411-12. While *HD Supply* did not discuss 100-percent stock sales because doing so was not relevant to the inquiry in that case, this court's adoption of the reasoning from *Corporate Express* also extends to 100-percent stock sales. 125 Nev. at 205-06, 210 P.3d at 186.

In this case there was not a 100-percent stock sale, but rather a 100-percent membership sale of an LLC. Gilmore contends that a 100-percent membership sale of an LLC is more equivalent to an asset sale than a stock sale. Gilmore points out that the Nevada statutes on LLCs never use the word "stock" but instead purposefully define a new term, "member's interest." NRS 86.091. We disagree.

A " '[m]ember's interest' " is defined as "a share of the economic interests in a limited-liability company, including profits, losses and distributions of assets." NRS 86.091. However, Gilmore's argument fails to address the fact that LLCs, like corporations, have perpetual existence and are distinct from their managers and members. NRS 86.155; NRS 86.201(3). Those features mandate that we treat assignability of employment agreements in a sale of the LLC membership interests like we treat assignability of employment agreements in a stock sale. Even after the sale, the same employer exists. *See Missett v. Hub Int'l Pa., LLC*, 6 A.3d 530, 537 (Pa. Super. Ct. 2010) (holding that a company's purchase of all of the membership interests in an LLC was "akin to a sale of stock rather than an asset sale"). Thus, as no new entity is introduced and the LLC continues in existence after the acquisition of a 100-percent membership interest, the reasoning from *Corporate Express* would similarly be applied in Nevada to the sale of LLC membership interests. *See Corporate Express*, 847 So. 2d at 411-12. Accordingly, we conclude that the district court erred in relying on *Traffic Control* to deny ECM's motion for a preliminary injunction because Gilmore's employment agreement was enforceable by ECM without an assignment clause.

Nevertheless, the district court's decision to deny the request for a preliminary injunction was also based upon its conclusion that "[s]ufficient evidence was not presented by [ECM] to show irreparable harm for which compensatory damages [were] an inadequate

remedy." Thus, we next address whether the district court abused its discretion in making that determination.

ECM failed to show it would suffer irreparable harm for which compensatory damages would not suffice

[Headnote 5]

ECM contends that "[n]umerous other courts have held that when a former employer solicits clients in breach of a noncompetition agreement, the breach results in irreparable harm to the former employer." In doing so, ECM urges this court to presume irreparable harm resulting from the loss of several of its customers. We decline to do so.

[Headnote 6]

Irreparable harm is an injury "for which compensatory damage is an inadequate remedy." *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). Other jurisdictions have held that where a party competes with the former employer despite a restrictive covenant, or an employee misappropriates trade secrets or confidential customer information, courts may presume irreparable harm. *See Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc.*, 323 F. Supp. 2d 525, 532 (S.D.N.Y. 2004) ("Generally, when a party violates a non-compete clause, the resulting loss of client relationships and customer good will built up over the years constitutes irreparable harm."); *Hillard v. Medtronic, Inc.*, 910 F. Supp. 173, 179 (M.D. Pa. 1995) ("To the extent that the restrictive covenant is being violated, [the former employer] is suffering irreparable harm by the potential loss of customers posed by [the former employee]'s activities."). Irreparable harm is also presumed where a party misappropriates a trade secret. *Johnson Controls*, 323 F. Supp. 2d at 532-33. This presumptive rule recognizes the difficulty in calculating money damages to redress the loss of a client relationship "that would produce an indeterminate amount of business in years to come." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999). However, "[u]nder limited circumstances, such as where the loss to an employer can be quantified in terms of a specific amount of lost sales, no irreparable harm is threatened." *Johnson Controls*, 323 F. Supp. 2d at 532.

Some courts have clarified that such a presumption is not automatic and irreparable harm ultimately depends on the underlying facts of the case. *See, e.g.*, *Baker's Aid v. Hussmann Foodservice Co.*, 830 F.2d 13, 15-16 (2d Cir. 1987); *Veramark Techs., Inc. v. Bouk*, 10 F. Supp. 3d 395, 400-01 (W.D.N.Y. 2014); *Golden Krust Patties, Inc. v. Bullock*, 957 F. Supp. 2d 186, 194 (E.D.N.Y. 2013). And upon further examination of the cases cited by ECM on appeal and in the district court proceedings, we note that in each case there was undisputed evidence presented to demonstrate that the former employee solicited, and in some cases obtained contracts with, the former employer's customers. *See Ticor*, 173 F.3d at 67 (stating

that employee admitted to soliciting business before the six-month noncompete restriction ended); *Johnson Controls*, 323 F. Supp. 2d at 531 (stating that former employees admitted they solicited and provided service to former employer's customers); *Hillard*, 910 F. Supp. at 179 (stating that evidence in the record demonstrated that the former employee was actively soliciting the former employer's customers).

Additionally, where courts have concluded that a loss of client relationships constitutes irreparable harm, those courts have also concluded that the employee provided unique services. *See, e.g.*, *Ticor*, 173 F.3d at 70 ("New York, following English law, recognizes the availability of injunctive relief where the non-compete covenant is found to be reasonable and the employee's services are *unique*." (emphasis added)); *Johnson Controls*, 323 F. Supp. 2d at 532 ("[W]here an employee with unique client relationships violates a non-compete clause, injunctive relief is ordinarily appropriate because if the unique services of such employee are available to a competitor, the employer obviously suffers irreparable harm." (internal quotation omitted)).[1] In the instant case, although Gilmore was employed by ECM for seven years, based on the evidence in the record, it does not appear that Gilmore's job as a condominium and HOA manager required any "unique" skills.

Furthermore, there is conflicting evidence in the record as to whether Gilmore solicited or directly provided services to any of ECM's customers. ECM argued that Gilmore had solicited business from ECM clients and disclosed confidential information. ECM provided a declaration from its president alleging that 3 of the 11 associations that Gilmore managed while at ECM had terminated their contracts with ECM and hired Mesa, and two other associations were in the process of terminating their service contracts with ECM and were considering Mesa as an alternative at the time the litigation commenced.

ECM's president also asserted in her declaration that Gilmore and Mesa improperly engaged in discussions with two other ECM-managed HOAs. In support of this contention, ECM presented evidence of an e-mail exchange between Gilmore and a board member of the Ventana Canyon HOA that alluded to Gilmore hoping to remain the association's manager. And the ECM president alleged that while attending an HOA meeting for another ECM client, a Mesa representative solicited the HOA and implied that although Gilmore

---

[1]Other courts have analyzed the "unique" factor as part of the reasonableness or validity of a restrictive covenant. *See, e.g.*, *7's Enters., Inc. v. Del Rosario*, 143 P.3d 23, 29-32 (Haw. 2006) (adopting unique or specialized training requirement as part of reasonable test for noncompetition clauses); *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 426 (Utah 1983) (holding that to obtain injunctive relief, employer must show covenant is necessary to protect the goodwill of the business and that employee's services were unique).

could not be the community manager, Mesa intended to have Gilmore work on their account "behind the scenes."

Gilmore and Mesa countered by providing declarations from various board members of the HOAs that Gilmore had represented and managed while employed at ECM and which subsequently left ECM. All asserted that the reason their associations terminated their contracts with ECM was because of ECM's change in ownership from the McCaffertys to FSRM, not because Gilmore had solicited their business. In response to the e-mail with the Ventana Canyon board member, Gilmore explained that the board member voluntarily disclosed to her that Ventana had already decided to terminate ECM and had solicited proposals from other management companies, including Mesa. In response to ECM's allegation that Mesa's president stated that Gilmore could work "behind the scenes," Mesa submitted an affidavit from its president wherein she stated that she told the HOA that Gilmore could not be their community manager and did not indicate that Gilmore would work behind the scenes.[2] Furthermore, Gilmore and Mesa demonstrated that no confidential information was shared. The information allegedly revealed consisted of the names of the HOAs Gilmore managed at the time she was terminated, which was available to the public on the Secretary of State's website.

Unlike the cases ECM cites, Gilmore and Mesa have not conceded that there was a breach of a restrictive covenant. To the contrary, the facts here are disputed, and the district court eventually found that Gilmore did not solicit the HOAs identified during the preliminary injunction hearing. The district court further found that, unlike many of the cases cited by ECM, if ECM is successful in its case, ECM's damages were quantifiable for customers it had lost to date. Thus, the court concluded that the evidence was insufficient to demonstrate irreparable harm.

We conclude that the district court did not abuse its discretion in denying ECM's motion for a preliminary injunction on the basis that ECM failed to show that it would suffer irreparable harm for which compensatory damages were not an adequate remedy if the district court did not enter a preliminary injunction. *See Boulder Oaks*, 125 Nev. at 403, 215 P.3d at 31 (providing that this court reviews a district court's decision regarding a preliminary injunction for an abuse of discretion).

Accordingly, we affirm the district court's order denying the request for a preliminary injunction.

PARRAGUIRRE and CHERRY, JJ., concur.

---

[2]While there is discrepancy as to whether Mesa stated that Gilmore would assist with the contract, this court will not reweigh the credibility of witnesses on appeal. *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

KEVIN JAMES LISLE, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 55173

June 25, 2015 351 P.3d 725

Appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Petitioner, whose conviction for murder in the first degree with use of a deadly weapon in a drive-by shooting and sentence of death were affirmed on direct appeal, 113 Nev. 540, 937 P.2d 473 (1997), and denial of whose petition for post-conviction relief was affirmed on appeal, sought writ of habeas corpus. The district court dismissed. Petitioner appealed. The supreme court, PARRAGUIRRE, J., held that: (1) petitioner failed to demonstrate good cause and prejudice for filing untimely petition; (2) petitioner failed to demonstrate actual innocence; (3) petitioner failed to demonstrate actual innocence of death penalty; and (4) as a matter of first impression, actual-innocence inquiry must focus on the objective factors that make a defendant eligible for the death penalty, rather than mitigating evidence.

Affirmed.

[Rehearing denied October 22, 2015]

CHERRY and SAITTA, JJ., dissented.

Rene L. Valladares, Federal Public Defender, and *Michael Pescetta, David Anthony*, and *Albert Sieber*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

1. HABEAS CORPUS.

Petitioner failed to demonstrate good cause and prejudice for filing untimely petition for writ of habeas corpus, as required to overcome procedural bar to untimely petitions, when he failed to demonstrate that his underlying *Brady v. Maryland*, 373 U.S. 83 (1963), claims were raised within a reasonable amount of time after discovery of the withheld evidence, as he received some of the evidence 13 years before filing the petition, and did not specify facts that demonstrated that he raised the *Brady* claim within a reasonable time after discovering the withheld evidence, and claim of ineffective assistance of counsel in prior post-conviction proceeding was filed nearly six years after remittitur issued in that appeal and, thus, was not timely asserted. U.S. CONST. amend. 6.

2. CRIMINAL LAW.

A successful *Brady v. Maryland*, 373 U.S. 83 (1963), claim has three components: the evidence at issue is favorable to the accused; the evidence

was withheld by the State, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.

3. Criminal Law.
   The second and third components of a *Brady v. Maryland*, 373 U.S. 83 (1963), violation, that the evidence was withheld by the State and prejudice ensued, parallel the good cause and prejudice showings required to excuse the procedural bars to an untimely and/or successive post-conviction habeas corpus petition.
4. Habeas Corpus.
   Proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice, for purposes of habeas petition; but, a *Brady v. Maryland*, 373 U.S. 83 (1963), claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense.
5. Habeas Corpus.
   A fundamental miscarriage of justice, as would allow the district court to reach merits of any constitutional claims that would otherwise be barred as untimely, requires a colorable showing that the petitioner is actually innocent of the crime or is ineligible for the death penalty, which generally requires the petitioner to present new evidence of his innocence.
6. Habeas Corpus.
   Petitioner for writ of habeas corpus failed to demonstrate actual innocence of murder in the first degree with use of a deadly weapon in a drive-by shooting, as would have allowed the district court to reach merits of any constitutional claims that would otherwise have been barred as untimely, if failure to consider those claims would have resulted in a fundamental miscarriage of justice, when the key evidence at trial was witness's testimony that they were present and identified petitioner as the shooter.
7. Habeas Corpus.
   Petitioner for writ of habeas corpus failed to demonstrate actual innocence of death penalty, as would have allowed the district court to reach merits of any constitutional claims that would otherwise have been barred as untimely, if failure to consider those claims would have resulted in a fundamental miscarriage of justice, when petitioner pointed to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance.
8. Habeas Corpus.
   An actual-innocence inquiry raised in habeas corpus petition must focus on the objective factors that make a defendant eligible for the death penalty, that is, the objective factors that narrow the class of defendants for whom death may be imposed, rather than mitigating evidence; mitigating evidence is categorically different in its nature and breadth than the elements of the capital crime and statutory aggravating circumstances that the supreme court determined could be the basis for showing innocence of the death penalty, and opening the actual-innocence gateway to include new mitigating evidence does not present a workable analog.

Before the Court En Banc.

OPINION

By the Court, Parraguirre, J.:

A jury found appellant Kevin James Lisle guilty of first-degree murder with the use of a deadly weapon in the drive-by shooting

of Kip Logan and sentenced him to death. Under Nevada law, Lisle may collaterally challenge his conviction and sentence in a post-conviction petition for a writ of habeas corpus. There are two procedural bars to filing a petition that are relevant here: the petition must be filed within a certain period of time unless the petitioner shows cause for his delay; and the petitioner is limited to one petition absent a demonstration of good cause and actual prejudice. Where a petitioner cannot demonstrate cause and prejudice, we have recognized an exception to these bars against untimely and successive petitions: the petitioner must show that the failure to consider the petition on its merits would result in a fundamental miscarriage of justice, meaning the imprisonment of a person who is actually innocent of the offense for which he was convicted or the execution of a person who is actually innocent of the death penalty.

Lisle filed a petition that was untimely and successive. The district court dismissed the petition on the ground that it was procedurally barred. In this appeal from the district court's order, we must determine whether a petitioner can demonstrate that he is actually innocent of the death penalty by presenting new evidence of mitigating circumstances. We hold that he cannot. In the context of a challenge to a death sentence, the actual-innocence exception to the procedural bars is focused on the elements of first-degree murder and the aggravating circumstances, not mitigating circumstances, because it is the former that determine death eligibility. Because we conclude that Lisle's claims do not warrant relief, we affirm the district court's order dismissing his petition.

FACTS AND PROCEDURAL HISTORY

The facts underlying Lisle's conviction are set forth in detail in this court's 1997 opinion affirming Lisle's conviction and sentence. *Lisle v. State*, 113 Nev. 540, 937 P.2d 473 (1997), *decision clarified on denial of reh'g*, 114 Nev. 221, 954 P.2d 744 (1998). In this opinion, we recount only those facts necessary to an understanding of the issues presented.

On the evening of October 22, 1994, John Melcher was driving on a Las Vegas freeway and pulled his van alongside a Mustang driven by Kip Logan. Lisle, the front passenger in Melcher's van, shot and killed Logan. Adam Evans[1] was in the van's back seat, and he and Melcher testified against Lisle at trial. The jury found Lisle guilty of first-degree murder with the use of a deadly weapon, found a single aggravating circumstance (the murder was committed by a person who knowingly created a great risk of death to more than one person), found "other mitigating circumstances," and concluded that the mitigating circumstances did not outweigh the aggravating circumstance. The jury sentenced Lisle to death. This court

[1]The 1997 opinion refers to him as Anthony Evans.

affirmed the judgment and sentence, and the remittitur issued on November 16, 1998.

Lisle then filed a timely post-conviction petition for a writ of habeas corpus, and the district court appointed counsel to supplement and litigate the petition. The district court denied the petition, and this court affirmed the district court's order. *Lisle v. State*, Docket No. 36949 (Order of Affirmance, August 21, 2002). The remittitur from that appeal issued on September 17, 2002. Lisle filed his second post-conviction habeas petition on August 25, 2008, claiming that he received ineffective assistance of trial, appellate, and post-conviction counsel. The district court dismissed the petition as procedurally barred, and this appeal followed.

DISCUSSION

Lisle's petition was procedurally barred. The petition was untimely because it was filed nearly 10 years after the remittitur issued from the appeal of his judgment of conviction. *See* NRS 34.726(1). The petition was also successive where it raised claims that could have been brought in earlier proceedings, and an abuse of the writ where it raised claims new and different from those in his first post-conviction habeas petition. *See* NRS 34.810(1)(b)(2); NRS 34.810(2). To excuse the procedural bars so that his petition would be considered on the merits, Lisle raised several claims alleging good cause and prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b), (3); *see also State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 94-95 (2012) (explaining that "good cause for delay" under NRS 34.726(1) requires that the delay is not the petitioner's fault and that the petitioner will be unduly prejudiced). He also argued that, in the absence of good cause, he was actually innocent of the crime and of the death penalty such that the failure to consider the merits of his petition would result in a fundamental miscarriage of justice. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Because we conclude that Lisle failed to demonstrate either good cause to excuse the procedural bars or that he was actually innocent, we do not reach the merits of his claims challenging his conviction and sentence.

Lisle failed to demonstrate good cause and prejudice

[Headnotes 1-4]

Lisle argues that the district court erred in dismissing his petition as procedurally barred because he established good cause and prejudice by showing that the State withheld impeachment evidence regarding witnesses Melcher, Evans, and Larry Prince in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). We have acknowledged that a *Brady* violation may provide good cause and prejudice to excuse the procedural bars to a post-conviction habeas petition. *See*

Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). A successful *Brady* claim has three components: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Id.* The second and third components of a *Brady* violation parallel the good cause and prejudice showings required to excuse the procedural bars to an untimely and/or successive post-conviction habeas petition. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). "[I]n other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." *Id*. But, "a *Brady* claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense." *Huebler*, 128 Nev. at 198 n.3, 275 P.3d at 95 n.3; *see also Hathaway v. State*, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003) (holding that good cause to excuse an untimely appeal-deprivation claim must be filed within a reasonable time of learning that the appeal had not been filed).

Lisle has the burden of demonstrating the elements of the *Brady* claim as well as its timeliness. *Bennett*, 119 Nev. at 599, 81 P.3d at 8; *Mazzan*, 116 Nev. at 67, 993 P.2d at 37. He did not meet these burdens. He failed to demonstrate that his *Brady* claims were raised within a reasonable amount of time after discovery of the withheld evidence. Lisle admitted that he received some of the evidence regarding Melcher in 1995, 13 years before he filed the instant petition.[2] Although Lisle alleged that he was forced to seek discovery in federal court to obtain records from the Clark County District Attorney's Office and the Las Vegas Metropolitan Police Department, that such efforts began shortly after December 2003 and continued until May 2007, and that as a result, no less than four orders were issued in his favor, he did not specify when he received the remaining evidence regarding Melcher, Evans, or Prince or that he received it as a result of the federal discovery litigation. Accordingly, Lisle did not specify facts that demonstrated that he raised the *Brady* claim within a reasonable time after discovering the withheld evidence.

Lisle's other good-cause claims were similarly unavailing. Like the *Brady* claim, Lisle's good-cause claim based on the alleged in-

[2]One week after trial, Lisle learned of Melcher's second interview with police, and on direct appeal, he challenged the State's failure to disclose the contents of that interview. This court concluded that the evidence had "little or no impeachment value" and was not material under *Brady*. *Lisle*, 113 Nev. at 548, 937 P.2d at 478. Lisle's claims are therefore barred by the doctrine of the law of the case. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). We decline Lisle's invitation to reconsider our previous conclusion because he failed to demonstrate that this court's prior decision was clearly erroneous or that any new or different evidence was substantial. *See Tien Fu Hsu v. Cnty. of Clark*, 123 Nev. 625, 630-31, 173 P.3d 724, 728-29 (2007).

effective assistance of first post-conviction counsel, *see Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996), was untimely because it was not asserted within a reasonable time after it became available: the petition was filed nearly six years after the remittitur issued in the appeal from the denial of his first post-conviction habeas petition, *see Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506; *Pellegrini*, 117 Nev. at 869-70, 34 P.3d at 526 (holding that the time bar at NRS 34.726 applies to successive petitions); *see also State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005) (holding that a petitioner "must plead and prove specific facts that demonstrate good cause" to excuse an abusive petition). Lisle's remaining good-cause claims—that *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), excused any procedural bars to his claim challenging the premeditation jury instruction; that counsel, not Lisle, caused any delays; and that this court's alleged inconsistent application of the procedural bars and Lisle's health problems excused all of the procedural bars—also lacked merit. *See Nika v. State*, 124 Nev. 1272, 1286-87, 1289, 198 P.3d 839, 849-50, 851 (2008) (disagreeing with *Polk* and holding that the premeditation instruction set forth in *Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000), did not apply to cases that were final when *Byford* was decided); *Hathaway*, 119 Nev. at 252, 71 P.3d at 506 (holding that a petitioner must show an impediment external to the defense to overcome procedural bars); *cf. Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that mental deficiency and lack of legal knowledge do not constitute good cause), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 180-81, 69 P.3d 676, 681 (2003); *Riker*, 121 Nev. at 236, 112 P.3d at 1077 (holding that this court does not arbitrarily "ignore[ ] procedural default rules" and that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory").

Lisle failed to demonstrate actual innocence

[Headnote 5]

Where a petition is procedurally barred and the petitioner cannot demonstrate good cause, the district court may nevertheless reach the merits of any constitutional claims if the petitioner demonstrates that failure to consider those constitutional claims would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. A fundamental miscarriage of justice requires "a colorable showing" that the petitioner "is actually innocent of the crime or is ineligible for the death penalty." *Id.* This generally requires the petitioner to present new evidence of his innocence. *House v. Bell*,

547 U.S. 518, 536-37 (2006); *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Lisle did not demonstrate actual innocence of the crime

[Headnote 6]

Lisle argues that he was actually innocent of the murder and presented new evidence in the form of affidavits from his family members to show that he did not have facial hair at the time of the murders. Lisle's defense at trial was mistaken identity and that Melcher was the actual shooter, and his theory in the instant petition is that the presence of facial hair was the key factor at trial in determining the shooter's identity. Although there was conflicting testimony regarding who had how much facial hair, the key evidence at trial was not facial hair but rather the testimony of Melcher and Evans, who both admitted to being present at the crime and identified Lisle as the shooter. Accordingly, Lisle failed to demonstrate that, in light of his family's affidavits, no reasonable juror would have found him guilty of first-degree murder. *See Schlup*, 513 U.S. at 327 ("[T]he petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."); *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537 (citing *Schlup*, 513 U.S. at 327).

Lisle did not demonstrate actual innocence of the death penalty

[Headnote 7]

Lisle argues that he is actually innocent of the death penalty on two grounds: First, he argues that there was insufficient evidence of the single aggravating circumstance found by the jury. Second, he argues that had the jury been presented with the new evidence of mitigating circumstances that he provided to the post-conviction court, no rational juror would have found him eligible for the death penalty.

The first ground underlying Lisle's actual-innocence claim, based on a challenge to the aggravating circumstance, lacks merit. Lisle points to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance. *See House*, 547 U.S. at 536-37; *Schlup*, 513 U.S. at 316. Nor do his arguments present any issue of first impression as to the legal validity of the aggravating circumstance. *Cf. Leslie v. Warden*, 118 Nev. 773, 779-82, 59 P.3d 440, 445-46 (2002) (applying actual-innocence exception based on legal validity of an aggravating circumstance); *Bennett*, 119 Nev. at 597-98, 81 P.3d at 6-7 (applying actual-innocence exception based in part on legal validity of an aggravating circumstance). Accordingly, Lisle has not demonstrated actual innocence based on his challenge to the aggravating circumstance, and we conclude that the

district court did not err in declining on this basis to reach Lisle's procedurally barred claims.

[Headnote 8]

The second ground underlying Lisle's actual-innocence claim presents an issue of first impression for this court: can a claim of actual innocence of the death penalty offered as a gateway to reach a procedurally defaulted claim be based on a showing of new evidence of mitigating circumstances? Although we have not answered that question,[3] the United States Supreme Court addressed it in *Sawyer v. Whitley*, 505 U.S. 333 (1992), in the context of a successive federal habeas petition challenging a Louisiana death sentence.

The *Sawyer* Court rejected the idea that the actual-innocence exception to procedural default should extend to the existence of new mitigating evidence. 505 U.S. at 345. The Court's conclusion was based primarily on two observations. First, extending actual innocence to include new mitigating evidence would reduce the exception "to little more than what is already required to show 'prejudice,' a necessary showing for habeas relief for many constitutional errors," such as ineffective assistance of counsel. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The Court reasoned that a petitioner should have to "show something more . . . than he would have had to show to obtain relief on his first habeas petition" to get "a court to reach the merits of his claims on a successive habeas petition." *Id*. Second, the subjective nature and breadth of mitigating circumstances "would so broaden the [actual innocence] inquiry as to make it anything but a 'narrow' exception to the principle of finality." *Id.* We agree that these observations counsel against opening the actual-innocence gateway to include new mitigating evidence, for otherwise the exception would swallow the procedural defaults adopted by the Legislature.

Lisle, however, argues that applying language in *Sawyer* to Nevada's death penalty scheme leads to the conclusion that, in Nevada, a petitioner should be allowed to demonstrate actual innocence of the death penalty by showing the existence of new mitigating evidence. In particular, Lisle focuses on the *Sawyer* Court's conclusion that "[s]ensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself[,] a showing that there was no aggravating circumstance *or that some other condition of eligibility had not been met*." *Id.* (emphasis added). Lisle suggests that there is another "condition of eligibility" in Nevada, the weighing determination—

[3]On occasion we have assumed, without deciding, that new mitigating evidence could be offered to establish actual innocence of the death penalty as a gateway to consideration of a procedurally defaulted claim. *See, e.g.*, *Wilson v. State*, 127 Nev. 740, 745 n.2, 267 P.3d 58, 61 n.2 (2011).

whether mitigating circumstances are not sufficient to outweigh the aggravating circumstance(s). As support, Lisle points to a statement by this court that under Nevada law a defendant is "death-eligible" only if, in addition to at least one aggravating circumstance, the sentencing body " 'finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.' " *Johnson v. State*, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002) (quoting NRS 175.554(3)), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 770-72, 263 P.3d 235, 250-51 (2011).[4] Based on Lisle's analysis, new mitigation evidence could provide the basis for a claim that a petitioner is actually innocent of the death penalty.

A careful review of *Sawyer* leads us to reject Lisle's analysis. Although this court has characterized the weighing determination as one of two findings required to make a defendant "death-eligible" in Nevada, the *Sawyer* Court used the word "eligibility" to refer to a more limited aspect of the process for imposing a death sentence. The Supreme Court has required that the capital sentencing process "narrow the class of murderers subject to capital punishment . . . by providing specific and detailed guidance to the sentencer" and allow for "consideration of the character and record of the individual offender and the circumstances of the particular offense." *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) (internal quotations omitted); *see also Arave v. Creech*, 507 U.S. 463, 471 (1993) (reiterating that a state's narrowing process "must 'channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death' " (quoting *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990))). The Court has referred to the narrowing component of the capital sentencing process as the "eligibility" phase and the individualized-consideration component as the "selection" phase. *See, e.g.*, *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) ("In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. In the selection phase, the jury determines wheth-

[4]*See also Servin v. State*, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001) (stating that to determine whether a defendant is death-penalty eligible, "(1) the jury must unanimously find, beyond a reasonable doubt, at least one enumerated aggravating circumstance; and (2) each juror must then individually determine that mitigating circumstances, if any exist, do not outweigh the aggravating circumstances. At this point, a defendant is death-eligible . . . ."); *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000) (discussing the two necessary findings for a defendant to be eligible for death under Nevada's capital sentencing scheme: "the jury must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists, and each juror must individually consider the mitigating evidence and determine that any mitigating circumstances do not outweigh the aggravating").

er to impose a death sentence on an eligible defendant." (citation omitted)).

The Court's analysis in *Sawyer* comports with this understanding of the "eligibility" and "selection" phases of the capital sentencing process. After discussing the narrowing requirement and explaining that it was met under the Louisiana statute by the elements of the capital offense and the finding of at least one statutory aggravating factor, *Sawyer*, 505 U.S. at 341-42, the *Sawyer* Court characterized that process as establishing "eligibility for the death penalty," *id.* at 342. The Court then explained that once the elements of the offense and at least one statutory aggravating factor had been found, the "emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant." *Id.* at 343. At that point, "[c]onsideration of aggravating factors together with mitigating factors, in various combinations and methods dependent upon state law, results in the jury's or judge's ultimate decision as to what penalty shall be imposed." *Id.* The Court's explanation of the two-part sentencing process demonstrates that "eligibility" is used in *Sawyer* as a descriptor for the aspect of the capital sentencing process in which the class of defendants who may be subject to the death penalty is narrowed.

In contrast, this court used the term "eligibility" in the case cited by Lisle to refer to both aspects of the capital sentencing process—narrowing and individualized consideration. Our use of "eligibility" in this fashion does not reflect an expansion of the narrowing aspect of the capital sentencing process in Nevada to include individualized consideration. To the contrary, we have focused on the same factors as the Supreme Court in evaluating whether Nevada has sufficiently narrowed the class of defendants who may be sentenced to death—the elements of the offense and the statutory aggravating circumstances. *See, e.g.*, *Hernandez v. State*, 124 Nev. 978, 983-84, 194 P.3d 1235, 1239 (2008) (discussing narrowing based on definition of murder by torture), *overruled on other grounds by Armenta-Carpio v. State*, 129 Nev. 531, 532, 306 P.3d 395, 396 (2013); *McConnell v. State*, 120 Nev. 1043, 1065-67, 102 P.3d 606, 621-23 (2004) (discussing narrowing based on elements of first-degree felony murder and aggravating circumstance based on a murder committed in the course of certain felonies). Our use of "eligibility" to refer to both aspects of the capital sentencing process stems from a relatively unique aspect of Nevada law that precludes the jury from imposing a death sentence if it determines that the mitigating circumstances are sufficient to outweigh the aggravating circumstance or circumstances. NRS 175.554(3); NRS 200.030(4). Although this statutory requirement limits the jury's discretion to sentence a person to death, it is not part of the narrowing aspect

of the capital sentencing process.[5] Rather, its requirement to weigh aggravating and mitigating circumstances renders it, by definition, part of the individualized consideration that is the hallmark of what the Supreme Court has referred to as the selection phase of the capital sentencing process—the "[c]onsideration of aggravating factors together with mitigating factors" to determine "what penalty shall be imposed," *Sawyer*, 505 U.S. at 343.[6]

The very nature of the weighing determination further supports our conclusion that the weighing determination is not what the *Sawyer* Court had in mind when it referred to a "condition of eligibility" other than aggravating circumstances that may be relevant to the actual-innocence gateway. In particular, the mitigating circumstances are not statutorily limited to an obvious class of relevant evidence, and the weighing determination itself is a moral determination, not an objective determination of facts.

First, as the *Sawyer* Court recognized, mitigating evidence is categorically different in its nature and breadth than the elements of the capital crime and statutory aggravating circumstances that the Court determined could be the basis for showing innocence of the death penalty. For example, the *Sawyer* Court observed that "[s]ensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself[,] a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met," because proof or disproof of the elements of the crime and the statutory aggravating circumstances are "confined by the statutory definitions to a relatively obvious class of relevant evidence." 505 U.S. at 345. In contrast, mitigating evidence cannot be confined by statute to a relatively obvious class of relevant evidence, *see Buchanan*, 522 U.S. at 276 (observing "that the sentencer may not be precluded from considering . . . any constitutionally relevant mitigating evidence"); NRS 200.035 (listing statutory mitigating circumstances

---

[5]Addressing the use of "other matter" evidence at a capital penalty hearing, this court has stated that "use of [other matter] evidence would undermine the constitutional narrowing process which the enumeration and weighing of specific aggravators [against mitigating evidence] is designed to implement." *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000). Neither *Hollaway* nor cases citing to it analyzed whether the weighing determination was a necessary part of the "constitutional narrowing process." *See, e.g.*, *Butler v. State*, 120 Nev. 879, 895, 102 P.3d 71, 82 (2004); *Evans v. State*, 117 Nev. 609, 637, 28 P.3d 498, 517 (2001). To the extent that *Hollaway* and its progeny could be read to hold such, they are overruled.

[6]The way that Nevada law uses the weighing of mitigating and aggravating circumstances to limit the jury's discretion to sentence a person to death is not mandated by Supreme Court precedent. The Supreme Court does not require the states to "affirmatively structure in a particular way the manner in which juries consider mitigating evidence" and has suggested "that complete jury discretion is constitutionally permissible." *Buchanan*, 522 U.S. at 276.

and "[a]ny other mitigating circumstance"); rather, it includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also McCleskey*, 481 U.S. at 304 (indicating that " 'compassionate or mitigating factors stem[ ] from the diverse frailties of humankind' " (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion))). And mitigation evidence can be a double-edged sword that may indicate diminished culpability but at the same time may indicate an increased risk of future dangerousness that merits the death penalty. *See Brewer v. Quarterman*, 550 U.S 286, 292-93 (2007).

Second, the *Sawyer* Court focused on the importance of objective standards in applying the actual-innocence inquiry in the context of the death penalty. As the Court explained, "[t]he phrase 'innocent of death' is not a natural usage of those words." *Sawyer*, 505 U.S. at 341; *see also Smith v. Murray*, 477 U.S. 527, 537 (1986) (acknowledging that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense"). Therefore, "to construct an analog to the simpler situation represented by the case of a noncapital defendant" and make the very narrow exception for actual innocence "workable[,] it must be subject to determination by relatively objective standards." *Sawyer*, 505 U.S. at 341. The elements of a capital offense and the aggravating circumstances are "objective factors or conditions." *See id.* at 347. They therefore provide a workable standard for applying the actual-innocence gateway in the context of a death sentence. *Id.* In contrast, the weighing of mitigating and aggravating circumstances does not allow for objective standards because it is a moral determination and, as such, it " 'cannot be reduced to a scientific formula or the discovery of a discrete, observable datum.' " *Nunnery v. State*, 127 Nev. 749, 775, 263 P.3d 235, 252 (2011) (quoting *Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002)). Opening the actual-innocence gateway to include new mitigating evidence thus does not present a workable analog.

Although we are not bound by the United States Supreme Court's decisions in interpreting state law, *see Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (reiterating the converse, that "a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus"), we find persuasive the Supreme Court's reasoning with its focus on the objective factors that narrow the class of offenders subject to the death penalty because that focus ensures rational reviewability and restrains the actual-innocence inquiry as a narrow gateway through which a petitioner may obtain review of claims that otherwise would be procedurally defaulted. We therefore conclude that an actual-innocence inquiry in Nevada must focus on the

objective factors that make a defendant eligible for the death penalty, that is, the objective factors that narrow the class of defendants for whom death may be imposed. To hold otherwise would allow the exception to swallow the procedural bars. Accordingly, the district court did not err in rejecting Lisle's effort to circumvent the procedural bars to his petition by asserting a claim that he was actually innocent of the death penalty based on new mitigation evidence.

CONCLUSION

Lisle failed to demonstrate good cause to excuse his procedurally barred post-conviction petition for a writ of habeas corpus. Lisle also failed to demonstrate that he was actually innocent of either the crime or the death penalty. We therefore affirm the district court's order dismissing his post-conviction petition for a writ of habeas corpus.

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

CHERRY and SAITTA, JJ., dissenting:

In our view, the district court erred in denying the petition as procedurally barred without conducting an evidentiary hearing to determine the credibility of Lisle's new evidence of actual innocence. If it found that new evidence to be credible, it is more likely than not that no reasonable juror would have convicted Lisle or sentenced him to death in light of the new evidence, and he would therefore have overcome the procedural bars to having his underlying constitutional claims heard on the merits. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (stating the standard for demonstrating actual innocence).

Lisle presented new evidence that he was actually innocent of first-degree murder. Only four people besides the victim were present for the murder: Lisle; John Melcher and Adam Evans, who were in the vehicle with Lisle; and Jose Gonzales, the passenger in the victim's car. Lisle's primary defense at trial that Melcher was the shooter was supported by circumstantial evidence as well as by Gonzales's identification of Melcher as the shooter. Gonzales's statement also indicated that the shooter had scraggly facial hair, and the State sought to impeach his identification of Melcher as the shooter by eliciting extensive—although not uniform—testimony that Melcher did not have facial hair but that Lisle did.

Perfunctorily acknowledging the conflicting testimony about facial hair, the majority dismisses its importance because it considers the testimony of Evans and Melcher to be the "key" evidence in the case. However, by failing to acknowledge Evans' and Melcher's motives to fabricate their testimony, the majority did not consider

the new evidence in light of all of the evidence. *See Schlup v. Delo*, 513 U.S. 298, 328 (1995) ("The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence." (quotation marks omitted)). Melcher and Evans had both been arrested in connection with the murder but struck deals with the State in exchange for testifying. Had the jury heard credible new evidence that Lisle, unlike the shooter, did not have facial hair, they more likely than not would have acquitted him.

Even if the new evidence of Lisle's innocence of the murder was not credible, he also presented new evidence of mitigating circumstances to demonstrate that he was actually innocent of the death penalty. Relying on *Sawyer v. Whitley*, 505 U.S. 333 (1992), the majority concludes that new evidence regarding aggravating circumstances can demonstrate actual innocence of the death penalty but that new evidence of mitigating circumstances cannot. We disagree.

The *Sawyer* Court affirmed the idea suggested in earlier cases that a defendant could be "actually innocent" of the death penalty but limited the inquiry to "those elements that render a defendant eligible for the death penalty." *Sawyer*, 505 U.S. at 343, 347. Eligibility for the death penalty in Nevada is set out in NRS 175.554(3), which states, "The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." The plain meaning of a statute controls its interpretation. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). Here, the plain language of NRS 175.554(3) is that a defendant is eligible for the death penalty only if two elements are met: the jury finds at least one aggravating circumstance and the jury finds no mitigating circumstances outweigh the aggravating circumstance(s). Only after the jury has found the defendant death-eligible does it decide *whether* death should be imposed. *See* NRS 175.554(2)(c). This court has for decades unequivocally and consistently followed this straightforward interpretation of Nevada's death penalty scheme. *See, e.g.*, *Servin v. State*, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001) ("In order to determine that a defendant is eligible for the death penalty, (1) the jury must unanimously find, beyond a reasonable doubt, at least one enumerated aggravating circumstance; and (2) each juror must then individually determine that mitigating circumstances, if any exist, do not outweigh the aggravating circumstances."); *accord Butler v. State*, 120 Nev. 879, 895, 102 P.3d 71, 82 (2004); *Johnson v. State*, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 770-72, 263 P.3d 235, 250-51 (2011); *Evans v. State*, 117 Nev. 609, 634, 28 P.3d 498, 515 (2001); *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); *Middleton v. State*, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15

(1998); *Geary v. State*, 110 Nev. 261, 267, 871 P.2d 927, 931 (1994); *Gallego v. State*, 101 Nev. 782, 790, 711 P.2d 856, 862 (1985).

Where the meaning of a statute is plain on its face, we do not look beyond that meaning. *Lucero*, 127 Nev. at 95, 249 P.3d at 1228. Yet the majority opinion does just that. Rather than rely on the plain meaning of Nevada statutes, the majority jumps to policy concerns the *Sawyer* Court expressed, then engages in semantic gymnastics in order to conclude that Nevada's death penalty scheme is something other than what the statutes plainly make it. The *Sawyer* Court and the majority appear to be concerned with making the actual-innocence inquiry "workable." But if to make the death penalty and its attendant post-conviction proceedings "workable" means that we ignore new evidence that demonstrates that a defendant should not have been sentenced to death, then perhaps the death penalty itself is not workable.

In the instant case, Lisle produced detailed reports from two mental health experts who made extensive findings regarding the existence and impact of years of childhood abuse and neglect that Lisle suffered at the hands of his mother, her boyfriends, and his older brother; injury to his brain; and a list of untreated but often well-documented mental health issues. This new evidence went far beyond the tepid mitigation evidence offered at trial that consisted of lay witnesses describing Lisle's basically good demeanor as a child and how much he meant to them, that his mother was unkind, and that he suffered isolated incidents of abuse from his older brother and his mother's boyfriends. This new evidence of mitigating circumstances also would have rebutted the State's evidence depicting Lisle as a criminal from age 11, instead recasting many of the specific instances elicited by the State at the sentencing hearing as misguided juvenile attempts to meet his own basic needs (including food and shelter) and explaining the remaining events as products of his childhood abuse and/or untreated mental and neurological disorders. This new mitigation information is, if credible, clear and convincing evidence that Lisle was not death-eligible. *See Pellegrini*, 117 Nev. at 887, 34 P.3d at 537 (stating the standard for a claim of actual innocence of the death penalty).

Lisle presented new evidence demonstrating his actual innocence of both the murder and the death penalty. Had that evidence been presented to the jury, it is more likely than not that no reasonable juror would have convicted him or sentenced him to death. We would therefore remand this matter to the district court to conduct an evidentiary hearing to determine the credibility of Lisle's new evidence.

TIMOTHY R. BURNSIDE, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 56548

June 25, 2015 352 P.3d 627

Appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

The supreme court, GIBBONS, J., held that: (1) State was not required to notice as an expert witness detective who made map of cell phone sites, (2) defendant failed to show prejudice from failure of State to list as expert witness cellular telephone company records custodian, (3) instruction requiring proof of every material element was not so misleading or confusing as to warrant reversal, (4) the district court did not abuse its discretion by not further investigating defendant's allegation that juror was sleeping, (5) State failed in penalty phase to prove beyond a reasonable doubt aggravating factor of prior violent felony, but (6) State's failure did not warrant reversal of the death sentence, and (7) death penalty was not excessive.

Affirmed.

[Rehearing denied October 22, 2015]

CHERRY, J., dissented. SAITTA, J., dissented.

David M. Schieck, Special Public Defender, and *JoNell Thomas, Alzora Jackson*, and *Michael W. Hyte*, Deputy Special Public Defenders, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, and *Marc P. DiGiacomo* and *Nancy Becker*, Deputy District Attorneys, Clark County, for Respondent.

1. CRIMINAL LAW.
   The key to determining whether testimony about information gleaned from cell phone records constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony: whether the testimony concerns information within the common knowledge of or capable of perception by the average layperson, or requires some specialized knowledge or skill beyond the realm of everyday experience. NRS 50.265, 50.275.
2. CRIMINAL LAW.
   Map showing locations of cell phone sites that handled calls from cell phones registered to defendant and codefendant during the relevant time period and testimony of detective who made the map were not based on specialized knowledge or reasoning that could be mastered only by a specialist, and, therefore, State was not required to notice the detective as an expert witness in capital murder trial. NRS 50.265, 50.275.

3. Criminal Law.

Testimony of cellular telephone company records custodian regarding how cell phone signals were transmitted from cell sites, that generally a cell phone transmitted from the cell site with the strongest signal, which was typically the cell site nearest to the cell phone placing the phone call, and that there were circumstances when the cell site nearest the cell phone was not used, such as when there was an obstruction between the cell phone and cell site or when a nearby cell site was busy, was expert testimony of which State was required to provide notice to defendant in capital murder trial. NRS 50.265, 50.275.

4. Criminal Law.

Defendant failed to show prejudice from failure of State to list as expert witness cellular telephone company records custodian, who testified in capital murder trial regarding how cell phone signals were transmitted from cell sites, that generally a cell phone transmitted from the cell site with the strongest signal, which was typically the cell site nearest to the cell phone placing the phone call, and that there were circumstances when the cell site nearest the cell phone was not used, such as when there was an obstruction between the cell phone and cell site or when a nearby cell site was busy. NRS 174.234(2).

5. Criminal Law.

Instruction requiring State to prove every material element was not so misleading or confusing as to warrant reversal of murder in the first-degree conviction, despite defendant's contention that instruction lessened State's burden of proof by not explaining which elements were "material"; the district court instructed jury on the elements of each of the offenses charged and that State had the burden to prove those elements, and no other instruction or any argument by the parties suggested that State's burden on any element or offense was less than beyond a reasonable doubt.

6. Criminal Law.

The phrase "material element" used in jury instruction on presumption of innocence, stating that the presumption placed upon State the burden of proving beyond a reasonable doubt every "material element" of the crime charged, is unnecessary because State must prove all elements of an offense beyond a reasonable doubt, and therefore, the phrase should be omitted from this instruction.

7. Criminal Law.

The district court did not abuse its discretion in refusing to sever defendant's capital murder trial from codefendant's, although it precluded defendant's cross-examination of codefendant's mother regarding incriminating statements that defendant made to her, when testimony of codefendant's mother was not of such significance that severance was required, and codefendant's statements were not testimonial because they were made in furtherance of a conspiracy. NRS 175.041.

8. Criminal Law.

Nontestimonial statements are not subject to the Confrontation Clause. U.S. Const. amend. 6.

9. Criminal Law.

The district court did not abuse its discretion in capital murder trial by not further investigating defendant's allegation that juror was sleeping or granting relief on that basis, when each time counsel advised the district court that a juror was sleeping, the judge responded that she had been keeping a close eye on the jurors to ensure that they were paying attention and did not see any of them sleeping, and defendant did not bring the matter to the district court's immediate attention, but waited until sometime later, and

even then he did not explain how long the juror had been sleeping, identify what portions of the trial or critical testimony the juror had missed, specify any resulting prejudice, or request a remedy of any kind.

10. Criminal Law.

The district court's own contemporaneous observations of the juror may negate the need to investigate further by enabling the court to take judicial notice that the juror was not asleep or was only momentarily and harmlessly so.

11. Criminal Law.

The district court did not abuse its discretion in capital murder trial by allowing annotations to be made to video surveillance images and by permitting police detectives to narrate the video surveillance tapes as they were played for the jury, describing what the tapes depicted, where detectives' testimony that defendant and codefendant were the individuals in the surveillance videos and the alias annotations were based on other identification evidence that was admitted before the detectives testified, the identification evidence included descriptions of the clothes the men were wearing when the murder occurred and the testimony of witness, who was familiar with defendant and codefendant and their aliases, and the narration assisted the jury in making sense of the images.

12. Criminal Law.

Eyewitness identification of defendant was not so unreliable as to be inadmissible in capital murder trial, although there were inaccuracies or variations in the eyewitness's descriptions and she never identified defendant before trial, when the identification was based on defendant's attire at the relevant time, rather than his physical attributes, the description was corroborated by other witnesses and video evidence, and any weakness in the testimony went to its weight, rather than its admissibility.

13. Criminal Law.

Codefendant's statements to his mother, which were overheard by witness, that he had to leave town and needed money and luggage and to retrieve the vehicle allegedly used in the murder were in furtherance of the conspiracy to the extent that getting away with the principal crime was necessarily one of the objectives of a conspiracy, and, thus, they were not inadmissible as hearsay in capital murder trial. NRS 51.035(3)(e).

14. Criminal Law.

Before a coconspirator's statement may be admitted, independent prima facie evidence must establish that a conspiracy existed.

15. Criminal Law.

Prima facie evidence established a conspiracy between defendant and codefendant to rob victim, as required for admission of codefendant's statements to his mother, which were overheard by witness, that he had to leave town and needed money and luggage and to retrieve the vehicle used during murder in the first degree and that he was told that there was a "$5,000" hit on his head and that his friend killed the person who told him about the hit, where defendant and codefendant followed and watched victim, and defendant shot victim.

16. Criminal Law.

Statements made by a coconspirator to a third party who is not then a member of the conspiracy are in furtherance of the conspiracy only if they are designed to induce that party to join the conspiracy or act in a way that would assist the conspiracy's objectives; such statements are not in furtherance of the conspiracy if they were intended to be nothing more than idle chatter or casual conversation about past events. NRS 51.035(3)(e).

17. Criminal Law.

Whether a particular statement to a third party was intended to induce that party to join or assist the conspiracy and, hence, was in furtherance of it, must be determined by careful examination of the context in which it was made. NRS 51.035(3)(e).

18. Criminal Law.

A statement may be in furtherance of a conspiracy, even though it is susceptible of alternative interpretations and was not exclusively, or even primarily, made to further the conspiracy, so long as there is some reasonable basis for concluding that it was designed to further the conspiracy. NRS 51.035(3)(e).

19. Criminal Law.

Codefendant's statements to his mother that he was told that there was a "$5,000" hit on his head and that his friend killed the person who told him about the hit were not hearsay in capital murder trial, when statements could reasonably be construed as part of an attempt to get his mother to assist the conspiracy by helping him evade arrest and conceal evidence, and conveying the gravity of the situation could have been designed at least in part to convince his mother to help. NRS 51.035(3)(e).

20. Criminal Law.

Any error in admission of codefendant's statements to his mother that he was told that there was a "$5,000" hit on his head and that his friend killed the person who told him about the hit was not prejudicial in capital murder trial, when codefendant did not directly implicate defendant in his statement, and there was substantial evidence supporting defendant's guilt. NRS 51.035(3)(e).

21. Criminal Law.

If challenged out-of-court statement by a nontestifying codefendant is not testimonial, then *Bruton v. United States*, 391 U.S. 123 (1968), which held that the admission in a joint trial of a nontestifying codefendant's incriminating statement that expressly refers to the defendant violates the Sixth Amendment Confrontation Clause, even if the jury is instructed to consider the confession only against the nontestifying codefendant, has no application because the Confrontation Clause has no application. U.S. Const. amend. 6.

22. Criminal Law.

Codefendant's statements to his mother that he was told that there was a "$5,000" hit on his head and that his friend killed the person who told him about the hit, and he had to leave town and needed money and luggage and to retrieve the vehicle used during murder, were nontestimonial, and, thus, their admission in capital murder trial did not violate the Confrontation Clause, when they were not contained in formalized testimonial materials such as an affidavit, deposition, or prior testimony, were not made to law enforcement in the course of interrogation, were not made under circumstances that would lead a reasonable person to believe that they would be used prosecutorially, and they were made in furtherance of a conspiracy. U.S. Const. amend. 6.

23. Burglary; Robbery.

Evidence was sufficient to support convictions for robbery with the use of a deadly weapon and burglary, despite evidence that codefendant had seized victim's silver cigar case, when State had charged defendant with robbery with the use of a deadly weapon as a direct participant, coconspirator, and aider and abettor and with burglary as a direct participant and aider and abettor, and evidence was more than sufficient to establish beyond a reasonable doubt that defendant was a coconspirator or aider and abettor in the robbery and an aider and abettor in the burglary.

24. Sentencing and Punishment.

Robbery as a general intent crime does not offend the constitutional narrowing requirement when used to support a felony-murder theory; the narrowing function is served by the requirement that the jury find one or more statutory aggravating circumstances before death is available as a sentence for murder in the first degree. NRS 200.030(4)(a), 200.380.

25. Criminal Law.

Instruction in capital murder trial regarding jury's consideration of a coconspirator's statements in furtherance of a conspiracy was not confusing nor would it mislead jury to believe that defendant could be convicted under a conspiracy theory based on slight evidence rather than constitutionally required beyond-a-reasonable-doubt standard, when instruction solely addressed the jury's consideration of a coconspirator's statements in furtherance of the conspiracy as evidence against another member of the conspiracy, outlined the preconditions to the jury's consideration of the evidence, including slight evidence that a conspiracy existed, and did not suggest that defendant could have been convicted of conspiracy or a conspiracy theory of liability based on slight evidence instead of the constitutionally required beyond a reasonable doubt standard, and two other instructions advised the jury that State had to prove defendant's guilt beyond a reasonable doubt.

26. Criminal Law.

Solicitation is a crime of communication, that is, the harm is the asking, and nothing more need be proven.

27. Conspiracy.

Conspiracy is committed upon reaching the unlawful agreement, and nothing more needs to be proven. NRS 199.490.

28. Sentencing and Punishment.

Attempt offenses of felonies involving the use or threat of violence are not excluded as circumstances by which murder of the first degree may be aggravated; unlike solicitation and conspiracy, attempt requires performance of an overt act toward the commission of the crime, which sets attempt apart from solicitation and conspiracy because the overt act might involve the use or threat of violence. NRS 193.330(1), 200.033(2)(b).

29. Sentencing and Punishment.

To determine whether a particular prior attempt offense satisfies statute that makes murder in the first degree aggravated, the supreme court must look at the overt act and determine whether State sufficiently proved that the overt act involved the use or threat of violence; in doing so, State is limited in the evidence that can be used to establish that an offense involves the use or threat of violence. NRS 193.330(1), 200.033(2)(b).

30. Sentencing and Punishment.

When prior conviction, which is under consideration as a potential circumstance by which murder of the first degree may be aggravated because the offense involved the use or threat of violence, is based on a guilty plea, the fact-finder may consider the statutory definition of the offense, charging documents, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge. NRS 200.033(2)(b).

31. Sentencing and Punishment.

State failed in penalty phase of capital murder trial to prove beyond a reasonable doubt aggravating factor of prior violent felony, although defendant had a prior conviction for attempted battery with substantial bodily harm, and State introduced preliminary hearing testimony of battery victim, who testified that defendant attacked her by hitting, punching, and kicking

her, and breaking her jaw and eye bones, when State did not introduce evidence that defendant's conviction for the attempted battery involved the use or threat of violence. NRS 200.033(2)(b).

32. Sentencing and Punishment.
State's failure in penalty phase of capital murder trial to prove beyond a reasonable doubt aggravating factor of prior violent felony conviction for attempted battery with substantial bodily harm did not warrant reversal of the death sentence, when felony aggravating circumstance based on robbery was valid, jury found no mitigating circumstances, and evidence of attempted battery was admissible as other matter. NRS 175.552(3), 200.030(4)(a).

33. Sentencing and Punishment.
Impalpable, brief, ambiguous statement suggesting that defendant was a pimp did not have a substantial influence on jury's sentencing determination in penalty phase of capital murder trial and, thus, did not require relief from sentence of death.

34. Sentencing and Punishment.
Admission of evidence that defendant was affiliated with a gang was not plain error in penalty phase of capital murder trial, when the gang references were integral to the criminal activities described, and those activities were relevant to jury's capital sentencing determination.

35. Sentencing and Punishment.
Admission of presentence investigation report related to defendant's prior felony conviction for battery with substantial bodily harm was not plain error in penalty phase of capital murder trial, when defendant did not contend that any information in it was impalpable or highly suspect.

36. Sentencing and Punishment.
Admission of photograph of defendant holding an assault rifle was not plain error in penalty phase of capital murder trial, although the photograph was of dubious relevance.

37. Criminal Law.
Plain error requires that an error be so unmistakable that it is apparent from a casual inspection of the record.

38. Sentencing and Punishment.
Any error in admission of statements by victim's girlfriend that she had been subjected to ridicule during court appearances was not plain error in penalty phase of capital murder trial, when the comments were spontaneous and unsolicited.

39. Sentencing and Punishment.
Admission of detective's testimony concerning statements by a witness who observed two African-American men sitting in a car after the shooting, laughing, gesturing with their hands, and making siren noises was not plain error in penalty phase of capital murder trial.

40. Sentencing and Punishment.
Any error in prosecutor's statement to jury in penalty phase of capital murder trial that defendant was not eligible for the death penalty was not plain error; whether prosecutor's statement was incorrect was unclear, as defendant's eligibility for the death penalty depended on the availability of aggravating circumstances and whether jury found him guilty of premeditated murder or felony murder or both. NRS 200.030.

41. Sentencing and Punishment.
Robbery aggravating circumstance was valid in penalty phase of capital murder trial, even if defendant was not involved in codefendant's decision to take victim's cigar case, when defendants acted in concert to rob victim. NRS 200.033(4).

42. Sentencing and Punishment.
A jury is not obligated to find a mitigating circumstance merely because unrebutted evidence supports it in penalty phase of capital murder trial.

43. Sentencing and Punishment.
The sentencer in a capital case must consider all mitigating evidence presented by the defense.

44. Criminal Law.
The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually. U.S. Const. amend. 6.

45. Sentencing and Punishment.
Any errors in penalty phase of capital murder trial considered cumulatively did not result in an unfair penalty hearing.

46. Sentencing and Punishment.
Death penalty was not excessive for defendant, who shot victim multiple times, acted in a cold, calculated, and premeditated manner, and had a criminal record, which disclosed multiple instances of violence, including one attack in particular that demonstrated that defendant was a dangerous and violent man, although defendant presented credible mitigation evidence revealing a somewhat troubled childhood. NRS 200.033(2)(b).

Before the Court En Banc.

OPINION

By the Court, Gibbons, J.:

Appellant Timothy Burnside, along with his companion Derrick McKnight, robbed and shot to death Kenneth Hardwick. A jury convicted Burnside of first-degree murder with the use of a deadly weapon, burglary, conspiracy to commit robbery, and robbery with the use of a deadly weapon and sentenced him to death. In this opinion, we focus primarily on three issues.

First, we consider whether the district court erred by admitting testimony related to cell phone records and cell phone signal transmissions because the State failed to notice its witnesses as experts. We conclude that the cell phone company employee's testimony related to how cell phone signals are transmitted constituted expert testimony because it required specialized knowledge. In contrast, we conclude that a police officer's testimony about information on a map that he had created to show the location of the cell towers used by the defendants' cell phones constituted lay testimony. Although the State did not notice the cell phone company employee as an expert, we conclude that the error does not warrant reversal of the judgment of conviction.

Second, we consider whether the district court erroneously instructed the jury that the State had the burden of proving the "material elements" of an offense beyond a reasonable doubt without defining "material elements." Although the phrase "material ele-

ments" is unnecessary and should be omitted in future instructions, we conclude that the instruction is not so misleading or confusing as to warrant reversal.

Third, we consider whether Burnside's prior conviction for attempted battery with substantial bodily harm constitutes "a felony involving the use or threat of violence to the person of another" for purposes of the aggravating circumstance set forth in NRS 200.033(2)(b). We conclude that a conviction for an attempt to commit a violent felony may fall within the purview of NRS 200.033(2)(b) if the State establishes that the overt act required for the attempt involved the use or threat of violence. Consistent with our decision in *Redeker v. Eighth Judicial District Court*, 122 Nev. 164, 172, 127 P.3d 520, 525 (2006), because the prior conviction was based on a guilty plea, the fact-finder could consider the charging documents, "written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" underlying the prior conviction. Based on the evidence that could be considered in this case, the State failed to establish that Burnside's prior conviction for attempted battery with substantial bodily injury involved the use or threat of violence. Accordingly, this aggravating circumstance is invalid. The jury's consideration of this invalid aggravating circumstance does not, however, warrant reversal of the death sentence as the jury found no mitigating circumstances to weigh against the remaining aggravating circumstance and could consider the prior conviction and the circumstances underlying it in selecting the appropriate sentence in this case.

After considering these and Burnside's remaining claims of error and reviewing the death sentence as required by NRS 177.055(2), we conclude that Burnside is not entitled to relief from the judgment of conviction and death sentence. We therefore affirm the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

The victim in this case, Kenneth Hardwick, was a former professional basketball player who was known to carry quite a bit of cash, wear expensive clothing and jewelry, and carry cigars in a silver traveling humidor. In the early morning of December 5, 2006, Hardwick was at the Foundation Room Lounge at the Mandalay Bay Resort and Casino in Las Vegas. Around 3:30 a.m., Burnside and McKnight entered the Foundation Room Lounge. About 30 minutes later, Hardwick left the Foundation Room Lounge and got in an elevator. McKnight followed Hardwick into the elevator. After exiting the elevator, Hardwick approached the west valet stand to retrieve his car, and McKnight reunited with Burnside in the casino and then walked to the parking garage near the west valet stand. At

the valet stand, Hardwick noticed that an acquaintance was involved in a disagreement over a missing valet ticket, and he attempted to negotiate the dispute. Meanwhile, Burnside and McKnight got into a white Mazda, parked in a no-parking zone, and watched Hardwick for about an hour. When Hardwick eventually exited the parking structure, Burnside and McKnight followed him.

A short time later, Hardwick pulled up to a Jack-in-the-Box drive-thru window. At the time, Hardwick was speaking on his cell phone with his child's mother, who heard loud bangs over the phone. A video recording obtained from a surveillance camera showed a man wearing a "puffy" black jacket point a gun and shoot into Hardwick's car several times. Hardwick approached the drive-thru window, indicating that he had been shot. Hardwick suffered four gunshot wounds to his chest and both arms. While the gunshot wound to his chest caused the most damage to his body, all of the wounds resulted in great blood loss and contributed to his death.

Two Jack-in-the-Box employees heard the gunshots. One of the employees called 9-1-1 and reported that two men were involved in the shooting. One of the employees saw one of the men retrieve a silver case from Hardwick's car.

Another witness heard the gunshots as she was walking to her car in a nearby parking lot. Shortly thereafter, she noticed a white car pull up next to her. The passenger exited the car, placed a gun in the car, and took off a black "puffy" jacket and put it in the car. The driver got out of the car and also removed a black "puffy" jacket and put it in the car. The two men ran in the direction of the Jack-in-the-Box. As the witness went to call 9-1-1, she observed the two men walking around the drive-thru at the Jack-in-the-Box. After placing the 9-1-1 call, she observed the two men running back to the white car. About a week later, the police showed the witness a set of photographs, and she tentatively identified McKnight as the driver of the white car but was unable to identify the passenger. Subsequently, after reviewing still photographs taken from the surveillance videos obtained from the Mandalay Bay, she was able to identify Burnside and McKnight as the men she saw after the shooting based on their clothing.

Other evidence linked Burnside to Hardwick's murder. The clothing that Burnside and McKnight were wearing when they were recorded by the Mandalay Bay surveillance cameras matched the clothing worn by the men in the Jack-in-the-Box video surveillance. McKnight's mother owned a white Mazda, which she had loaned to McKnight. In December 2006, McKnight approached a family friend, Albert Edmonds, and asked Edmonds to store a car in Edmonds' garage. Edmonds agreed. The following day, McKnight's mother retrieved the car from Edmonds' garage. During a search of Edmonds' home, police found 9mm ammunition in a room in

which McKnight had stayed in December 2006. Eight 9mm shell casings had been recovered from the Jack-in-the-Box drive-thru, all fired from a single firearm. During a search of Burnside's mother's home, the police recovered a day planner with a handwritten entry dated February 16, 2007, that suggested that Burnside's photograph had been shown on "Crime Stoppers." Additionally, Burnside's and McKnight's cell phone records showed that calls made from or received by their cell phones in the hours surrounding the murder were handled by cell phone towers near the Mandalay Bay.

The State charged Burnside with murder with the use of a deadly weapon, burglary, conspiracy to commit robbery, and robbery with the use of a deadly weapon. The jury convicted him of first-degree murder with the use of a deadly weapon and the remaining charged offenses.

The State also sought the death penalty for the murder. It alleged two aggravating circumstances: (1) Burnside had a prior conviction for a violent felony (attempted battery with substantial bodily harm in 2002), and (2) the murder was committed during the perpetration of a robbery.[1] The prosecution's evidence in aggravation primarily related to the circumstances of the crime as support for the felony aggravating circumstance under NRS 200.033(4). Respecting the prior-violent-felony conviction, the prosecution introduced the preliminary hearing testimony of the prior victim, Tyyanna Clark. Burnside pleaded guilty to attempted battery with substantial bodily harm. As other matter evidence admissible under NRS 175.552(3), the prosecution introduced evidence of Burnside's conduct in prison and his juvenile and adult criminal history, which included arrests and/or convictions/citations for a litany of violent and nonviolent offenses. Finally, the prosecution presented victim-impact testimony from Hardwick's girlfriend, older brother Clifford, and his nephew Jamil. The jury learned that Hardwick had gone to college on a basketball scholarship, played professional basketball, and had four children. He was described as the "heart and soul" of the family and the life of the party with an infectious personality. He spoke with his parents and children daily. The witnesses also described the emotional devastation that Hardwick's family experienced over his loss.

Burnside's mitigation evidence focused primarily on his childhood, which was described by several family members. Although Burnside's siblings lived with their mother, he lived with an aunt when he was a young boy. His mother explained that she loved him but that his aunt lived nearby, was very attached to him, and wanted

[1]The State included a third aggravating circumstance in its notice of intent to seek the death penalty—that the murder was committed during the perpetration of a burglary—but withdrew that aggravating circumstance at the start of the penalty hearing.

him to live with her. Burnside was very happy living with his aunt; family members testified that she spoiled him. A cousin who lived with him at the time described him as moody, smart, funny, and humble. When Burnside was eight years old, his aunt passed away. Devastated by her death, he became aggressive and difficult to handle. Through the rest of his minority, Burnside moved around frequently and lived with different relatives. Like other members of his family, he became involved with drugs and alcohol. According to one of his brothers, an uncle was brutally murdered and "that's what messed up all of us." Burnside got into a fight at age 15 and was shot three times. Two years later, he was stabbed several times at a casino in Las Vegas. He was stabbed yet again in another incident several years later. His mother testified that Burnside was smart and an A student, but his school records showed that he occasionally received Bs, Cs, and Fs, with some improvement when he was at the Spring Mountain Youth Camp. His family expressed their love for him and asked the jury to spare his life.

The defense also called a corrections officer to describe the conditions in prison. Based on Burnside's record as a youth offender, which included infractions for fighting and property violations ("things associated with gang activity"), the witness opined that Burnside could be safely housed at Ely State Prison for life.

The jury found both aggravating circumstances. Although the defense offered 17 mitigating circumstances, none of the jurors found any mitigating circumstances. After concluding that "the aggravating circumstance or circumstances outweigh[ed] any mitigating circumstance or circumstances," the jury imposed a death sentence for the murder.[2] This appeal followed.

DISCUSSION

Burnside argues that a plethora of errors occurred during the guilt and penalty phases of the trial. Although we address all of the claimed errors, we focus on three in particular. As to the guilt phase, we focus on his claims that (1) the district court erred by admitting testimony related to cell phone tower transmissions because the testimony fell within the realm of expert testimony and the State had not noticed its witnesses as experts and (2) the district court erroneously instructed the jury that the State had the burden of proving the "material elements" of an offense beyond a reasonable doubt without defining "material elements." As to the penalty

[2]The district court later sentenced Burnside to concurrent terms of 26 to 120 months for burglary and 16 to 72 months for conspiracy to commit robbery and two consecutive terms of 40 to 180 months for robbery with the use of a deadly weapon to be served concurrently to the burglary and conspiracy-to-commit-robbery sentences.

phase, we focus on his challenge to the validity of the prior-violent-felony-conviction aggravating circumstance based on his conviction for attempted battery with substantial bodily injury.

Guilt phase claims

Admission of cell phone tower records and testimony

Burnside argues that the district court abused its discretion by admitting the defendants' cell phone records, which showed the location of cell phone towers that handled their cell phone calls, and by allowing a cell phone company records custodian to testify about those records and signal transmissions and a detective to testify about a map he created to show the locations of the cell phone towers. He complains that this evidence amounted to expert testimony, and because the State failed to notice the cell phone records custodian and the detective as expert witnesses, the evidence should have been excluded.

The State's notices of expert witnesses did not list any cell phone records custodians; its notice of lay witnesses identified records custodians from four cell phone companies. When a records custodian for Sprint/Nextel began testifying at trial about cell phone tower locations, defense counsel objected because the witness had not been included in the State's notices of expert witnesses. Similarly, when the defense learned at trial that a detective would testify about information on a map that he had created to show the location of the cell phone towers used by the defendants' cell phones on the night of the murder, defense counsel objected that the detective would be providing expert testimony but the State had not noticed him as an expert. The district court overruled both objections, concluding that the Sprint/Nextel records custodian and the detective were not offering expert testimony.

[Headnote 1]

Our review of the district court's ruling hinges on whether the witnesses testified as lay witnesses or as expert witnesses. The scope of lay and expert witness testimony is defined by statute. A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275. The key to determining whether testimony about information gleaned from cell phone records constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information

within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? *See Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed. R. Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney*, 839 A.2d 38, 46 (N.H. 2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

[Headnote 2]

We first consider the detective's testimony. The detective reviewed the cell phone records and cell site information and used that data to create a map showing the locations of the cell phone sites that handled calls from the cell phones registered to Burnside and McKnight during the time period relevant to the murder. The map showed that several calls were made between Burnside's and McKnight's cell phones during the early morning hours of December 5, 2006, and the signals related to those calls were transmitted from cell sites near the Mandalay Bay. Burnside did not object to the admission of the map but objected to the detective's testimony explaining the information reflected on the map on the ground that he was not an expert. We conclude that the map and the detective's testimony were not based on specialized knowledge or reasoning that can be mastered only by a specialist and therefore the State was not required to notice the detective as an expert witness. *See United States v. Baker*, 496 F. App'x 201, 204 (3d Cir. 2012) (concluding that federal agent's testimony as to his use of computer mapping software to create map of defendant's location from cell phone records did not involve expert testimony); *United States v. Evans*, 892 F. Supp. 2d 949, 953 (N.D. Ill. 2012) (concluding that federal agent could provide lay opinion testimony regarding his creation of maps showing location of cell towers used by defendant's cell phone in relation to other locations relevant to crime because creating maps did not "require scientific, technical, or other specialized knowledge"); *Gordon v. State*, 863 So. 2d 1215, 1219 (Fla. 2003) (concluding that police officer's comparison of locations on cell phone records to locations on cell site maps did not constitute expert testimony). Therefore, the district court did not err by admitting the detective's testimony as that of a lay witness.

[Headnotes 3, 4]

The Sprint/Nextel record custodian's testimony is a different matter. The witness explained how cell phone signals are transmitted from cell sites and that generally a cell phone transmits from the cell site with the strongest signal, which is typically the cell site nearest to the cell phone placing the phone call. He also explained that there are circumstances when the cell site nearest the cell phone is not used, such as when there is an obstruction between the cell phone and cell site or when a nearby cell site is busy. This testimony is not the sort that falls within the common knowledge of a layperson but instead was based on the witness's specialized knowledge acquired through his employment. Because that testimony concerned matters beyond the common knowledge of the average layperson, his testimony constituted expert testimony. Other courts have reached the same conclusion. *See, e.g.*, *United States v. Yeley-Davis*, 632 F.3d 673, 684 (10th Cir. 2011) (concluding that "testimony concerning how cell phone towers operate constituted expert testimony because it involved specialized knowledge not readily accessible to any ordinary person"); *Wilder v. State*, 991 A.2d 172, 198 (Md. Ct. Spec. App. 2010) (concluding that to admit evidence of cell phone cite location, prosecution must offer expert testimony to explain functions of cell phone towers, derivative tracking, and techniques of locating and/or plotting origins of cell phone calls using cell phone records); *Wilson v. State*, 195 S.W.3d 193, 200-02 (Tex. Ct. App. 2006) (involving admission of cell phone records custodian's expert testimony explaining transmission of cell phone signals and which cell phone towers received signals from defendant's cell phone). Therefore, the State was required to provide notice pursuant to NRS 174.234(2) that the records custodian would testify as an expert witness. It failed to do so, instead including the records custodian on its notice of lay witnesses. Burnside, however, has not explained what he would have done differently had proper notice been given, and he did not request a continuance. *See* NRS 174.295(2). We are not convinced that the appropriate remedy for the error would have been exclusion of the testimony. *See id.* But even if that were the appropriate remedy, we also are not convinced that the admission of the evidence substantially affected the jury's verdict considering that the cell phone evidence was cumulative to the Mandalay Bay video surveillance evidence and the testimony of Stewart Prestianni, both of which placed Burnside and McKnight at Mandalay Bay during the relevant time period, *see* NRS 178.598 (harmless error rule); *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) (observing that nonconstitutional error requires reversal "only if the error substantially affects the jury's verdict"); *see also Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

"Material elements" of the charged offenses

[Headnote 5]

Burnside challenges an instruction that is often used in criminal trials in this state: "The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense." He complains that the instruction does not explain which elements are "material" and therefore left the jury to speculate which elements were "material." According to Burnside, the instruction thereby lessens the State's burden of proof. Although this court has upheld the challenged language on numerous occasions, *see, e.g.*, *Nunnery v. State*, 127 Nev. 749, 785-86, 263 P.3d 235, 259-60 (2011); *Morales v. State*, 122 Nev. 966, 971, 143 P.3d 463, 466 (2006); *Crawford v. State*, 121 Nev. 744, 751-52, 121 P.3d 582, 586-87 (2005); *Gaxiola v. State*, 121 Nev. 638, 649-50, 119 P.3d 1225, 1233 (2005); *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998), we have not addressed the particular argument raised here.

An Oklahoma court has considered an instruction similar to the one used in this case. In *Phillips v. State*, the defendant complained that an instruction advising the jury that "the State is required to prove beyond a reasonable doubt 'the material allegations of the Information', and that the defendant is presumed innocent of the crime charged against him and innocent of 'each and every material element constituting such offense' [was] reversible error" because "the instruction allowed the jury to deduce [that] the presumption of innocence did not apply to every element of the offense, but only to the elements it deemed material." 989 P.2d 1017, 1037-38 (Okla. Crim. App. 1999). The court acknowledged that the "material allegations" language might be confusing. *Id.* at 1038. But the court rejected the defendant's characterization of the instruction in light of other instructions that set forth the specific elements of the charged offense and made clear that the presumption of innocence carried through all elements of the offense. *Id.* Therefore, according to the court, any error in the instruction was harmless. *Id.* We agree with the Oklahoma court.

[Headnote 6]

Here, the district court instructed the jury on the elements of each of the offenses charged and that the State had the burden to prove those elements. No other instruction or any argument by the parties suggested that the State's burden on any element or offense was less than beyond a reasonable doubt. Absent an instruction advising that it could do so, we are not convinced that the phrase "material element" caused the jury to speculate that it could choose which of

the elements should be proven beyond a reasonable doubt and which ones need not be. Taking the instructions as a whole, they sufficiently conveyed to the jury that the State had the burden of proving beyond a reasonable doubt each element of the charged offenses and the phrase "material element" did not signal to the jury that the State carried a lesser burden of proof on any element or charged offense. Although the phrase "material element" is unnecessary because the State must prove all elements of an offense beyond a reasonable doubt, *see Watson v. State*, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994); *State v. Reynolds*, 51 P.3d 684, 686 (Or. Ct. App. 2002) ("In a sense, the term 'material element' in its legal usage is something of a redundancy. If an allegation is truly an 'element' of a crime, by definition, it is 'material.' But the point of the legislature's use of the term seems clear enough: A 'material element' is one that the state *must* prove to establish the crime charged."), and therefore should be omitted from future instructions, we conclude that the instruction is not so misleading or confusing as to warrant reversal.

Remaining guilt phase claims

Severance

[Headnotes 7, 8]

Burnside argues that the district court abused its discretion by refusing to sever his trial from McKnight's and that he was prejudiced as a result of that error in three respects. First, he argues that he was compelled to share peremptory challenges with McKnight despite their disparate goals during jury selection. However, there is no constitutional right to peremptory challenges; they "arise from the exercise of a privilege granted by the legislative authority." *Anderson v. State*, 81 Nev. 477, 480, 406 P.2d 532, 533 (1965). In Nevada, the "legislature has seen fit to treat several defendants, for [the purpose of peremptory challenges], as one party." *Id.*; *see* NRS 175.041. Second, he argues that the evidence against him was marginal compared to that against McKnight. His characterization of the evidence is not borne out by the record. Third, he contends that the joint trial precluded his cross-examination of McKnight's mother, Valerie Freeman, about incriminating statements McKnight made to her and precluded him from cross-examining McKnight about those statements. Freeman's testimony was not of such significance that severance was required, and, as addressed below, McKnight's statements were not testimonial because they were made in furtherance of a conspiracy. Because nontestimonial statements are not subject to the confrontation clause, *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010), Burnside had no constitutional right to cross-examine McKnight about those statements, *see Crawford v. Washington*, 541 U.S. 36, 55-56 (2004). Accordingly, the district court did not abuse its discretion

in this regard. *See Chartier v. State*, 124 Nev. 760, 764, 191 P.3d 1182, 1185 (2008) (applying abuse of discretion standard to NRS 174.165(1) severance issue).

Allegation that a juror was sleeping

[Headnotes 9, 10]

Burnside complains that the district court abused its discretion by not conducting a hearing after being alerted that a juror was sleeping during trial. Defense counsel advised the district court on three occasions during the guilt phase that juror 6 appeared to be sleeping. Each time, the trial judge responded that she had been keeping a close eye on the jurors to ensure that they were paying attention and did not see any of them sleeping. We conclude that Burnside has not shown that the district court abused its discretion by not further investigating his allegation or granting relief. *See United States v. Sherrill*, 388 F.3d 535, 537 (6th Cir. 2004) (reviewing district court's decision in denying defendant's request to interview jury about allegation of sleeping jury for abuse of discretion). As another court has explained, the trial "court's own contemporaneous observations of the juror may negate the need to investigate further by enabling the court to take judicial notice that the juror was not asleep or was only momentarily and harmlessly so." *Samad v. United States*, 812 A.2d 226, 230 (D.C. 2002) (internal quotation marks omitted); *see also United States v. Carter*, 433 F.2d 874, 876 (10th Cir. 1970) (concluding that where trial judge indicated that she watched subject juror closely and was convinced that juror was not asleep, "[t]he conduct of the juror in open court was a matter of which the trial court had judicial knowledge and could take judicial notice"). Because the trial judge in this case regularly observed the jurors and never saw juror 6 sleeping, there was no need to investigate further. Other circumstances support our conclusion that further investigation was unwarranted: Burnside did not bring the matter to the district court's attention when the juror was believed to be sleeping, but waited until sometime later, and even then he did not explain how long the juror had been sleeping, identify what portions of the trial or critical testimony the juror had missed, specify any resulting prejudice, or request a remedy of any kind. Considering the district court's contemporaneous observations and the totality of the surrounding circumstances, we cannot fault the district court's handling of the situation.

Annotation and narration of surveillance videotapes

[Headnote 11]

Burnside argues that the district court abused its discretion by allowing annotations to be made to video surveillance images and by permitting police detectives to narrate the video surveillance tapes

as they were played for the jury, describing what the tapes depicted. Burnside complains that the police detectives who identified him as one of the people in the videos had no prior familiarity with him and therefore could not properly identify him and the narration and annotation of the video with his and McKnight's aliases invaded the province of the jury. We conclude that the district court did not abuse its discretion in this regard.

The police detectives' testimony that Burnside and McKnight were the individuals in the surveillance videos and the alias annotations were based on other identification evidence that was admitted before the detectives testified. The identification evidence included descriptions of the clothes the men were wearing when the murder occurred and the testimony of Stewart Prestianni, who was familiar with Burnside and McKnight and their aliases. This is not a situation where the detectives independently identified Burnside and McKnight, which would require that they have some prior knowledge or familiarity with the men or were qualified experts in videotape identification. *Cf. Edwards v. State*, 583 So. 2d 740, 741 (Fla. Dist. Ct. App. 1991) (concluding that police officer's testimony that he recognized defendant in videotape of drug sale was inadmissible because there was no showing that officer had prior knowledge or familiarity with defendant or was qualified as expert in videotape identification); *see generally Rossana v. State*, 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997) (observing that lay witness's opinion testimony concerning identity of person in surveillance photograph is admissible under NRS 50.265 "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury" (internal quotation omitted)); *State v. Belk*, 689 S.E.2d 439, 443 (N.C. Ct. App. 2009) (concluding that police officer's lay opinion that defendant was depicted in video surveillance was inadmissible because officer was in no better position than jury to identify defendant as person in surveillance video).

The narration of the surveillance videos assisted the jury in making sense of the images depicted in the videos. *Mills v. Commonwealth*, 996 S.W.2d 473, 488-89 (Ky. 1999) (concluding that police officer's narration of crime scene video was admissible because it assisted jury's evaluation of images displayed on videotape, noting that other witnesses had identified defendant and victim in videotape), *overruled in part on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336, 346-48 (Ky. 2010). The surveillance videos from Mandalay Bay and Jack-in-the-Box were a compilation of several hours of videotape and involved a multitude of cameras and views. Given the complexities of the surveillance cameras and the piecing together of videos from hours of recordings, we conclude that narration of the surveillance videos shown to the jurors assisted them in understanding the evidence and therefore the district court

did not abuse its discretion in allowing the narrative testimony. *Accord United States v. Young*, 745 F.2d 733, 761 (2d Cir. 1984) ("Generally speaking, a trial judge has broad discretion in deciding whether or not to allow narrative testimony. We see no reason to apply a different rule here, where the narrative testimony accompanied and explained videotaped evidence." (citations omitted)).

Burnside also argues that the district court erred by refusing to give his proposed written limiting instruction advising jurors that their interpretation of the actions depicted in the videos is controlling, not the interpretation or opinions of the State's witnesses. Considering the instruction given during Detective Ridings' testimony[3] and other instructions on matters related to witness credibility and believability, witnesses with special knowledge, and drawing reasonable inferences from the evidence, we conclude that Burnside failed to show that the district court abused its discretion by rejecting his requested instruction. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

Identification testimony

[Headnote 12]

Burnside argues that the district court abused its discretion by admitting the identification testimony provided by the witness who was in the parking lot near the Jack-in-the-Box because her out-of-court descriptions of him were inaccurate and thus her in-court identification of him was unreliable. He also argues that her identification of him from still photographs from the Mandalay Bay video is problematic because the photographs showed only him and McKnight rather than as part of a traditional photographic lineup and the interview where she was shown the still photographs was not recorded so it is unclear whether the interviewing officer used coercive or suggestive tactics to obtain the witness's identification.[4]

At the time of the shooting, the witness had just finished her shift at a K-mart near the Jack-in-the-Box where Hardwick was shot. As she was walking through the parking lot to her car, she heard four to five gunshots. After calling her boyfriend, the witness noticed a white car pull into the K-Mart parking lot and park near her car. Two

[3]During Detective Ridings' testimony, jurors were admonished that he was expressing his opinion as to the content of the Mandalay Bay surveillance video and that they would have the opportunity to review the videos in the jury room and draw their own conclusions as to what the video showed. Burnside agreed below that the district court's admonishment was appropriate.

[4]Burnside initially argued in his opening brief that the district court abused its discretion by not compelling the State to disclose the witness's contact information and not complying with the remedies required for nondisclosure of witness information provided in NRS 174.295(2). In his reply brief, he concedes that the State filed a notice of witnesses pursuant to NRS 174.234(1)(a) that included a physical address for the witness.

men exited the car. The passenger took off a "puffy" black jacket and placed it and a "black police gun" in the car. He was wearing dark denim jeans and a striped shirt with a logo on the back. The witness described him as African American with braided hair, average height, and in his 20s. The driver also took off his jacket. He was wearing dark denim jeans and a light-colored hoodie with some sort of graphic design on it. The witness described the driver as African American with braided hair and in his 20s. The two men conversed and walked and then ran toward the Jack-in-the-Box. The witness went inside K-Mart and called 9-1-1. After placing the 9-1-1 call, she observed the two men running back to the white car.

During the investigation, the witness spoke with police detectives several times, and she was shown two or three photographic lineups. In only one of the photographic lineups was she able to identify the driver of the white car. Subsequently, a police detective showed her still photographs taken from surveillance video. She was "shocked" by the photographs because the clothing worn by one of the men in one of the photographs matched the clothing worn by the passenger in the white car—the man with the gun. In another still photograph, she identified the two men pictured as the men she saw on the night of the shooting because "[t]hey are wearing what I saw that night."

The witness testified three times. At McKnight's preliminary hearing, she identified him as the driver. At Burnside's preliminary hearing, she did not identify him as a suspect in the shooting. At trial, she testified that she recognized Burnside and McKnight as the two men involved in the shooting based on her observations of them in the K-Mart parking lot and her previous court appearances.

Burnside's challenge is primarily focused on inaccuracies or variations in the witness's descriptions and the fact that she never identified him before trial; therefore, her identification testimony should have been excluded as unreliable. We conclude that the district court did not abuse its discretion. Although the witness never identified Burnside as a suspect before trial and her description of the assailants was inconsistent to a degree, her identification of Burnside was based on his attire at the relevant time, not his physical attributes. Her description of Burnside's clothing was corroborated by other witnesses and the video evidence. We conclude that her identification was not so unreliable as to be inadmissible. Any weakness in her identification testimony goes to the weight to be afforded to the testimony rather than its admissibility. *Page v. State*, 88 Nev. 188, 193, 495 P.2d 356, 359 (1972); *Collins v. State*, 88 Nev. 9, 13, 492 P.2d 991, 993 (1972). The jurors were aware of the alleged discrepancies in the witness's identification testimony, as they were the subject of cross-examination, and it was for the jury to determine what weight to give that testimony. As to the police detective's use of the still photographs rather than a traditional photographic lineup

and failure to record the interview, we conclude that Burnside has not demonstrated that those circumstances show that the police detective's methods were unduly suggestive or indicate that he used coercive or suggestive tactics to extract an identification.

Admission of coconspirator statements

Burnside argues that the district court abused its discretion by admitting Valerie Freeman's testimony about statements that she heard McKnight make to his mother, Charmaine Simmons. He argues that the testimony was inadmissible hearsay and violated *Bruton v. United States*, 391 U.S. 123 (1968).

Freeman testified about a conversation between McKnight and Simmons that she overheard several days after Hardwick's murder. A crying McKnight told Simmons that he had to leave town and asked her for money and luggage. Simmons then asked Freeman for money and luggage; Freeman refused Simmons' request for luggage but gave her $20 to give to McKnight. Freeman also indicated that she vaguely recalled some discussion between her and Simmons about retrieving Simmons' car—a white Mazda. Freeman further testified that McKnight asked his mother for money and told his mother that he and a friend were at a club when an unidentified man told McKnight that there was "a $5,000 hit on his head." McKnight told his mother that when the unidentified man left the club, McKnight's friend followed the man and killed him.

Coconspirator statements under NRS 51.035(3)(e)

[Headnotes 13-15]

Burnside contends that Freeman's testimony about McKnight's statements is hearsay and does not fall under NRS 51.035(3)(e), which provides that "[a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Burnside's argument is focused not so much on whether there was sufficient evidence of a conspiracy as on whether the statements were "in furtherance of the conspiracy."[5] NRS 51.035(3)(e).

McKnight's statements about luggage, money, and retrieving his mother's car suggest that he was attempting to evade capture and conceal evidence (the white Mazda that was captured on the surveillance tapes). Because "[t]he duration of a conspiracy is not limited to the commission of the principal crime, but can continue during the period when coconspirators perform affirmative acts of

[5]Before a coconspirator's statement may be admitted, independent prima facie evidence must establish that a conspiracy existed. *Crew v. State*, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984); *Fish v. State*, 92 Nev. 272, 274-75, 549 P.2d 338, 340 (1976). We conclude that prima facie evidence established a conspiracy between Burnside and McKnight to rob Hardwick.

concealment," *Foss v. State*, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976); *see Crew v. State*, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984), McKnight's efforts to evade capture and conceal evidence were in furtherance of the conspiracy to the extent that getting away with the principal crime is necessarily one of the objectives of a conspiracy. *See Crew*, 100 Nev. at 46, 675 P.2d at 991 (holding that coconspirator's statements to third party relating to his plan to move bodies after murder were admissible under NRS 51.035(3)(e) because plan "was intended to avoid detection" and therefore was in furtherance of conspiracy to commit murder); *see also Wood v. State*, 115 Nev. 344, 349, 990 P.2d 786, 789 (1999) (defining when statements to a third party are made in furtherance of a conspiracy). Therefore, we conclude that the challenged statements fall within the scope of NRS 51.035(3)(e).

[Headnotes 16-18]

With regard to McKnight's statements about the $5,000 hit on his head and his friend killing the man who relayed the hit to McKnight, the parties dispute whether these statements were related to this case or another murder involving McKnight. We have observed that "statements made by a co-conspirator to a third party who is not then a member of the conspiracy are in furtherance of the conspiracy only if they are designed to induce that party to join the conspiracy or act in a way that would assist the conspiracy's objectives." *Wood*, 115 Nev. at 349, 990 P.2d at 789. Such statements are not in furtherance of the conspiracy "if they were intended to be nothing more than idle chatter or casual conversation about past events." *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994). "Whether a particular statement to a third party was intended to induce that party to join or assist the conspiracy, hence was 'in furtherance' of it, must be determined by careful examination of the context in which it was made." *Id.* A statement may be in furtherance of a conspiracy "even though it is 'susceptible of alternative interpretations' and was not 'exclusively, or even primarily, made to further the conspiracy,' so long as there is 'some reasonable basis' for concluding that it was designed to further the conspiracy." *Id.* (quoting *United States v. Shoffner*, 826 F.2d 619, 628 (7th Cir. 1987)).

[Headnotes 19, 20]

McKnight's statements about the hit and subsequent killing are susceptible to alternative interpretations. They could be viewed as a conversation about past events simply to explain the situation he faced to his mother rather than to further the objectives of the conspiracy. But when considered in the context of the rest of the conversation with his mother, the statements can reasonably be construed as part of an attempt to get his mother to assist the conspiracy by helping him evade arrest and conceal evidence. Conveying to his

mother the gravity of the situation (that someone had been killed, ostensibly to protect McKnight), could have been designed at least in part to convince his mother to help. *Cf. Shores*, 33 F.3d at 444-45 (holding that trial court could reasonably construe coconspirator's statements to cellmate as being designed to induce cellmate, who was long-time criminal with connections to organized crime, to join or provide assistance to conspiracy by fabricating defense and finding someone to kill another conspirator, even though statements also could be construed as "casual conversation about past events" to explain the charges that he faced to his cellmate). We therefore conclude that the statements were admissible under NRS 51.035(3)(e). But even assuming error in their admission, no prejudice resulted because McKnight did not directly implicate Burnside in his statement and there was substantial evidence supporting Burnside's guilt. We therefore conclude that admission of the challenged evidence did not have a substantial influence on the verdict. *See Knipes v. State*, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

Bruton

[Headnote 21]

Burnside also argues that Freeman's testimony about McKnight's statements violated *Bruton*. *Bruton* holds that the admission in a joint trial of a nontestifying codefendant's incriminating statement that expressly refers to the defendant violates the Sixth Amendment Confrontation Clause, even if the jury is instructed to consider the confession only against the nontestifying codefendant. 391 U.S. at 124 & n.1, 126. *Bruton* is premised on the Confrontation Clause. *Id*. at 126. Since *Bruton* was decided, the Supreme Court has held that the Confrontation Clause does not apply to out-of-court statements that are nontestimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). *Bruton* therefore must be viewed "through the lens of *Crawford*." *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010). In other words, if the challenged out-of-court statement by a nontestifying codefendant is not testimonial, then *Bruton* has no application because the Confrontation Clause has no application. *See, e.g.*, *United States v. Smalls*, 605 F.3d 765, 768 n.2 (10th Cir. 2010); *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009); *United States v. Avila Vargas*, 570 F.3d 1004, 1008-09 (8th Cir. 2009); *People v. Arceo*, 125 Cal. Rptr. 3d 436, 446-47 (Cal. Ct. App. 2011); *Thomas v. United States*, 978 A.2d 1211, 1224-25 (D.C. 2009); *State v. Usee*, 800 N.W.2d 192, 197-98 (Minn. Ct. App. 2011).

[Headnote 22]

McKnight's statements are nontestimonial. They were not contained in formalized testimonial materials such as an affidavit, depo-

sition, or prior testimony; were not made to law enforcement in the course of interrogation; and were not made under circumstances that would lead a reasonable person to believe that they would be used prosecutorially. *See Flores v. State*, 121 Nev. 706, 716-20, 120 P.3d 1170, 1176-80 (2005) (discussing illustrations of testimonial hearsay). Moreover, as explained above, the statements were made in furtherance of a conspiracy and by their very nature are not testimonial. *See Crawford*, 541 U.S. at 56; *see also Avila Vargas*, 570 F.3d at 1009. Therefore, Burnside had no constitutional right to confront McKnight regarding the statements and his *Bruton* challenge lacks merit.

Evidence supporting robbery and burglary

[Headnote 23]

Burnside argues that insufficient evidence supports his convictions for robbery with the use of a deadly weapon and burglary. The State charged Burnside with robbery with the use of a deadly weapon as a direct participant, coconspirator, and aider and abettor and with burglary as a direct participant and aider and abettor. Although the evidence indicates that McKnight seized the silver cigar case from Hardwick, the evidence is more than sufficient to establish beyond a reasonable doubt that Burnside was a coconspirator or aider and abettor in the robbery and an aider and abettor in the burglary. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Furbay v. State*, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000); *Doyle v. State*, 112 Nev. 879, 891, 921 P.2d 901, 910 (1996), *overruled on other grounds in Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004).

Robbery as specific intent offense

Burnside contends that the district court erred by overruling his objection to the robbery and felony-murder instructions on the ground that robbery is a specific intent offense. He recognizes that this court determined in *Litteral v. State*, 97 Nev. 503, 508, 634 P.2d 1226, 1228-29 (1981), *disapproved on other grounds in Talancon v. State*, 102 Nev. 294, 721 P.2d 764 (1986), that robbery is a general intent crime but urges the court to overrule *Litteral* and return robbery to its common law classification as a specific intent offense given the "ambiguity of [NRS 200.380], the common law history, and the rule of lenity." We are not persuaded to retreat from *Litteral*.

[Headnote 24]

Alternatively, Burnside argues that even if robbery is a general intent offense, we should treat it as a specific intent offense when it is used to support a felony-murder charge. The Legislature saw fit to view robbery as involving dangerous conduct that creates a foreseeable risk of death. It is that risk that makes robbery an ap-

propriate felony to support a felony-murder charge. And although felony murder is defined broadly in Nevada given the number of felonies included in the statute, *McConnell v. State*, 120 Nev. 1043, 1065, 102 P.3d 606, 622 (2004), the narrowing function is served by the requirement that the jury find one or more statutory aggravating circumstances before death is available as a sentence for first-degree murder, NRS 200.030(4)(a). *See McConnell*, 120 Nev. at 1066, 102 P.3d at 622. Therefore, robbery as a general intent crime does not offend the constitutional narrowing requirement when used to support a felony-murder theory.

Instruction on admissibility of coconspirator statement

[Headnote 25]

Burnside contends that the district court's instruction regarding the jury's consideration of a coconspirator's statements in furtherance of a conspiracy confused and misled the jury to believe that he could be convicted under a conspiracy theory based on slight evidence rather than the constitutionally required beyond-a-reasonable-doubt standard. The instruction solely addresses the jury's consideration of a coconspirator's statements in furtherance of a conspiracy as evidence against another member of the conspiracy, outlining the preconditions to the jury's consideration of the evidence, including slight evidence that a conspiracy existed. *See McDowell v. State*, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987); *Peterson v. Sheriff, Clark Cnty.*, 95 Nev. 522, 524, 598 P.2d 623, 624 (1979). The instruction does not suggest that Burnside may be convicted of conspiracy or a conspiracy theory of liability based on slight evidence instead of the constitutionally required beyond-a-reasonable-doubt standard. And two other instructions advised the jury that the State had to prove Burnside's guilt beyond a reasonable doubt. Accordingly, the district court did not abuse its discretion in overruling Burnside's objection to the instruction. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Penalty hearing claims

Validity of the prior-violent-felony-conviction aggravating circumstance

Relying on *Hidalgo v. Eighth Judicial District Court*, 124 Nev. 330, 332, 184 P.3d 369, 372 (2008) (holding that solicitation to commit murder is not a felony involving use or threat of violence under NRS 200.033(2)(b)), and *Nunnery v. Eighth Judicial District Court*, 124 Nev. 477, 478, 186 P.3d 886, 886 (2008) (holding that conspiracy to commit robbery is not a felony involving use or threat of violence to another under NRS 200.033(2)(b)), Burnside argues that an attempt offense, in this case attempted battery with substan-

tial bodily harm, is not a violent felony for the purposes of NRS 200.033(2)(b) and therefore the prior-violent-felony-conviction aggravating circumstance is invalid. He also argues that insufficient evidence was introduced pursuant to *Redeker v. Eighth Judicial District Court*, 122 Nev. 164, 127 P.3d 520 (2006), to prove the aggravating circumstance.

We have acknowledged or upheld an aggravating circumstance under NRS 200.033(2)(b) based on a conviction of an attempt to commit a crime of violence. *See, e.g.*, *Nunnery v. State*, 127 Nev. 749, 786, 263 P.3d 235, 260 (2011) (concluding that evidence of two attempted murder convictions and attempted robbery conviction supported prior-violent-felony-conviction aggravating circumstance); *Thomas v. State*, 122 Nev. 1361, 1375, 148 P.3d 727, 736 (2006) (concluding that prior-violent-felony-conviction aggravating circumstance under NRS 200.033(2)(b) was proved by admission of judgment of conviction for attempted robbery); *Rhyne v. State*, 118 Nev. 1, 13, 38 P.3d 163, 171 (2002) (upholding prior-violent-felony-conviction aggravating circumstance based on conviction for attempted assault with deadly weapon); *accord Oats v. Singletary*, 141 F.3d 1018, 1031 (11th Cir. 1998) (concluding that second-degree attempted murder constitutes prior violent felony supporting aggravating circumstance that defendant was previously convicted of "felony involving the use or threat of violence to the person" (internal quotation marks omitted)); *Winkles v. State*, 894 So. 2d 842, 847 (Fla. 2005) (upholding prior-violent-felony aggravating circumstance based on attempted robbery conviction). However, we have not expressly taken up the question of whether an attempt to commit a violent crime satisfies NRS 200.033(2)(b).

[Headnotes 26-28]

Burnside equates an attempt offense with the offenses of solicitation and conspiracy. His argument is essentially this: Like solicitation and conspiracy, attempt offenses are inchoate offenses that can be committed without the infliction of violence or an explicit threat of violence, and therefore, attempt offenses cannot satisfy NRS 200.033(2)(b). Although Burnside correctly characterizes attempt as an inchoate offense, attempt is distinguishable from solicitation and conspiracy. We reasoned in *Hidalgo* and *Nunnery* that solicitation to commit murder and conspiracy to commit robbery, respectively, do not satisfy NRS 200.033(2)(b) because those offenses do not involve the use or threat of violence against another, regardless of the purpose of the solicitation or conspiracy. *Hidalgo*, 124 Nev. at 334-35, 184 P.3d at 373; *Nunnery*, 124 Nev. at 480, 186 P.3d at 888. Solicitation is a crime of communication, that is, "the harm is the asking—nothing more need be proven." *Hidalgo*, 124 Nev. at 334-35, 184 P.3d at 373 (internal quotations omitted). Similarly,

the crime of conspiracy is "committed upon reaching the unlawful agreement," and nothing more needs to be proven. *Nunnery*, 124 Nev. at 480, 186 P.3d at 888-89 (internal quotation marks omitted); *see* NRS 199.490 (providing that proof of an overt act is not necessary to show conspiracy). Unlike solicitation and conspiracy, attempt requires "performance of an overt act toward the commission of the crime." *Johnson v. Sheriff, Clark Cnty.*, 91 Nev. 161, 163, 532 P.2d 1037, 1038 (1975); *Larsen v. State*, 86 Nev. 451, 453, 470 P.2d 417, 418 (1970); *see* NRS 193.330(1) (defining attempt as "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it"); *Riebel v. State*, 106 Nev. 258, 260, 790 P.2d 1004, 1006 (1990) ("Mere preparation is insufficient to prove an attempt to commit a crime."). It is that critical distinction that sets attempt apart from solicitation and conspiracy because the overt act, in the context of an attempt to commit a violent crime, might involve the use or threat of violence. *See generally Weber v. State*, 121 Nev. 554, 586, 119 P.3d 107, 129 (2005) (acknowledging that use or threat of violence often occurs in sexual assault but neither is element of offense and upholding prior-violent-felony-conviction aggravating circumstance where trial record reflected no evidence of overt violence or threats by defendant against victim during two sexual assaults but showed that victim experienced trauma and violence during defendant's first sexual assault of her and totality of evidence was sufficient to support inference that both sexual assaults included at least implicit threats of violence). We therefore conclude that attempt offenses should not be excluded from the purview of NRS 200.033(2)(b) as a matter of law.

[Headnotes 29, 30]

To determine whether a particular attempt offense satisfies NRS 200.033(2)(b), we must look at the overt act and determine whether the State sufficiently proved that the overt act involved the use or threat of violence. In doing so, the State is limited in the evidence that can be used to establish that an offense involves the use or threat of violence. *Redeker*, 122 Nev. 164, 127 P.3d 520. In *Redeker*, we concluded that where it is not readily apparent from the statutory elements that an offense involves the use or threat of violence, the fact-finder may look beyond the statutory elements to determine whether the prior offense involved the use or threat of violence for purposes of NRS 200.033(2)(b). 122 Nev. at 172, 127 P.3d at 525-26. However, the type of evidence that can be considered in making that determination is not limitless. *Id.* Where the prior conviction at issue is based on a guilty plea, the fact-finder may consider the statutory definition of the offense, "charging document[s], written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" underly-

ing the prior conviction to determine whether the offense involved the use or threat of violence for purposes of NRS 200.033(2)(b). *Id.* at 172, 127 P.3d at 525 (internal quotation marks omitted); *see Hidalgo*, 124 Nev. at 335-36, 184 P.3d at 374.

[Headnote 31]

With this backdrop, we turn to the question of whether the State proved beyond a reasonable doubt that Burnside's conviction for attempted battery with substantial bodily harm satisfied NRS 200.033(2)(b). The State introduced the preliminary hearing testimony of Tyyanna Clark, who explained that Burnside attacked her by hitting, punching, and kicking her, breaking her jaw and eye bones. However, preliminary hearing testimony is not the type of evidence identified in *Redeker* as competent evidence to show that the offense involved the use or threat of violence. The State also introduced exhibit 257, which contained information related to Burnside's juvenile and adult history, including the judgment of conviction for the attempted battery of Clark but no other related documents that referenced him. The judgment of conviction does not include any information indicating that the attempted battery involved the use or threat of violence. The other documents related to that offense in exhibit 257—another judgment of conviction, a guilty plea agreement, and two copies of a charging document—involve Burnside's brother, Tommie, who participated in the attack on Clark. Because the State did not introduce evidence consistent with *Redeker* to establish that Burnside's conviction for the attempted battery of Clark involved the use or threat of violence, the prior-violent-felony aggravating circumstance was not proved and therefore must be struck.

[Headnote 32]

We must now determine whether Burnside's death sentence can be upheld in the absence of the prior-violent-felony aggravating circumstance. *Archanian v. State*, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006) ("A death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review."); *see Clemons v. Mississippi*, 494 U.S. 738, 741 (1990). Because the felony aggravating circumstance based on robbery is valid and the jury found no mitigating circumstances, Burnside remains death eligible, *see* NRS 200.030(4)(a), and the invalid aggravating circumstance would not have affected the jury's weighing of the aggravating and mitigating circumstances. And although Burnside's conviction for attempted battery with substantial bodily injury cannot be used as an aggravating circumstance, it was admissible as other matter evidence under NRS 175.552(3) and therefore was properly considered by the jury in selecting the appropriate sentence for Hardwick's murder. For

these reasons, the invalid aggravating circumstance does not warrant reversal of the death sentence.[6]

Remaining penalty hearing claims

District court's refusal to bifurcate the penalty hearing

Burnside argues that the district court abused its discretion by denying his motion to bifurcate the penalty hearing. We have refused to require bifurcated proceedings in capital penalty hearings, *see, e.g.*, *McConnell v. State*, 120 Nev. 1043, 1061-62, 102 P.3d 606, 619 (2004); *Gallego v. State*, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011), and Burnside offers no novel argument justifying a fresh look at our jurisprudence in this area.

Evidence that Burnside was a pimp

[Headnote 33]

Burnside complains that the district court abused its discretion by admitting a statement suggesting that he was a pimp because the statement was vague and unsupported by the evidence. Although the statement was impalpable given its ambiguity, *see Sherman v. State*, 114 Nev. 998, 1012, 965 P.2d 903, 913 (1998), it was brief and did not have a substantial influence on the jury's sentencing determination, *see Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (considering whether error "had substantial and injurious effect or influence in determining the jury's verdict" when reviewing nonconstitutional error); *see also* NRS 178.598 (harmless error rule), considering Burnside's significant criminal history.

Admission of gang evidence

[Headnote 34]

Burnside argues that the district court improperly admitted evidence that he was affiliated with a gang because there was no suggestion that Hardwick's murder was gang-related and the State failed to provide notice of its intent to introduce the evidence. Because Burnside failed to object below, we review for plain error affecting his substantial rights. NRS 178.602; *Archanian v. State*, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). Relying on *Dawson v. Delaware*, 503 U.S. 159 (1992), in *Lay v. State*, we concluded that "[e]vidence of affiliation with a particular group is only relevant at the penalty phase of a criminal trial when membership in that group is linked to the charged offense, or is used as other than general character evidence." 110 Nev. 1189, 1196, 886 P.2d 448, 452

[6]Because the prior-violent-felony aggravating circumstance is invalid, we need not address Burnside's other challenges to that aggravating circumstance.

(1994). Some of the documents admitted during the penalty phase refer to an offense or action that was gang-related, and a police detective testified that Burnside's criminal history included an incident where Burnside defaced private property and that the offense was gang-related. Admission of this evidence was not plain error as the gang references were integral to the criminal activities described and those activities are relevant to the jury's capital sentencing determination. *See id.* (concluding that evidence concerning "prior offenses or acts committed in connection with the gang" was relevant at capital sentencing hearing as it showed that defendant "had a violent disposition"). In contrast, some documents made general references to Burnside's affiliation with gangs. That evidence falls into the category of general character evidence and therefore was inadmissible. But in light of Burnside's lengthy criminal history and the gang connection relevant to some of that history, we conclude that the error did not affect his substantial rights. Nor has he established plain error related to notice as the State provided notice that it would introduce evidence of his juvenile criminal history.

Admission of statement in presentence investigation report

[Headnote 35]

Burnside contends that the district court abused its discretion by admitting the presentence investigation report (PSI) related to his prior felony conviction for battery with substantial bodily harm because it was confidential and included prejudicial information such as gang references, his alleged monikers, and several charges that were later dismissed. Because Burnside did not object below, we review for plain error affecting his substantial rights. NRS 178.602; *Archanian*, 122 Nev. at 1031, 145 P.3d at 1017. He has not demonstrated plain error for two reasons. First, as Burnside acknowledges, we concluded in *Nunnery v. State* that the use of PSI reports in capital penalty hearings does not violate the general confidentiality provisions in NRS 176.156. 127 Nev. at 768-69, 263 P.3d at 249. Second, although he argues that he was prejudiced by the admission of the PSI report, he does not contend that any information in it was impalpable or highly suspect. *Nika v. State*, 124 Nev. 1272, 1296, 198 P.3d 839, 856 (2008) (stating that evidence of uncharged prior bad acts is admissible in capital penalty hearing if not impalpable or highly suspect).

Admission of photograph of appellant holding an assault rifle

[Headnote 36]

Burnside complains that the district court erred by admitting a photograph of him holding an assault rifle because its admission

violated his constitutional right to bear arms and the photograph was irrelevant and unfairly prejudicial. Burnside failed to raise the constitutional issue below, and we conclude that he has not demonstrated plain error. *See* NRS 178.602; *Archanian*, 122 Nev. at 1031, 145 P.3d at 1017. And although we conclude that the photograph was of dubious relevance, any error was harmless. *See* NRS 178.598; *see also Kotteakos*, 328 U.S. at 776-77. Accordingly, no relief is warranted on this claim.

Juvenile delinquency records

Burnside argues that the State improperly received his sealed juvenile records, the juvenile court erred in providing the records to the State, and the district court erred by admitting those records during the penalty hearing. He further contends that he was prejudiced by their admission because the records admitted were extensive and the State relied heavily on them in its closing arguments. Because he did not object to the release of his juvenile records to the State or the district court's admission of them, we review his claim for plain error affecting his substantial rights. NRS 178.602; *Archanian*, 122 Nev. at 1031, 145 P.3d at 1017. We conclude that Burnside cannot establish plain error for the following reasons.

First, this appeal is from the judgment of conviction. We can only review matters that appear in the trial record. The trial court's order did not release the juvenile records to either party, and, in fact, the court recognized that it lacked jurisdiction to do so. And while the order indicates that both parties should be provided the records, the trial court also directed that its order would be "submitted with the Juvenile Court Order for the records to be released to the parties under the applicable guidelines." It is apparent that the trial court recognized that any release of records would be accomplished in accordance with applicable rules. Any error in releasing the records does not rest with the trial court but rather the juvenile court if in fact it entered an order releasing the records, which is not apparent from the trial record.

Second, although Burnside represents that the juvenile court clearly provided the State with copies of or granted the State access to the juvenile records, the trial record suggests that the State obtained the juvenile records from the defense. In particular, the trial record includes a receipt sent by the defense to the State in which the State acknowledged "RECEIPT of a copy of the juvenile records of Defendant Burnside" on April 28, 2009. The receipt does not identify what documents were included in the copy provided by the defense, but it indicates that Burnside turned over some or all of the juvenile records to the State. To the extent that the defense disclosed the records, Burnside cannot now complain. *See State v.*

Gomes, 112 Nev. 1473, 1480, 930 P.2d 701, 706 (1996) (providing that error in admitting evidence was not reversible where defense invited error); *Ybarra v. State*, 103 Nev. 8, 16, 731 P.2d 353, 358 (1987) (same); *Milligan v. State*, 101 Nev. 627, 637, 708 P.2d 289, 296 (1985) (same). But in any event, we cannot say from the record before us that the State improperly obtained the juvenile records.

Third, although several documents in Burnside's juvenile records are marked confidential or are stamped "Use and Dissemination of this Record is regulated by Law," none of the juvenile records are identified as sealed. Therefore, Burnside's supposition that the juvenile records admitted at the penalty hearing were sealed is not borne out by the trial record. In fact, a review of the law governing the sealing of juvenile records suggests that the records may not have been sealed. First, Burnside does not allege that he or a probation officer petitioned for his records to be sealed before he turned 21 and the record before us does not demonstrate that Burnside's juvenile records were sealed before he turned 21 as permitted under NRS 62H.130. Second, there is an exception to the general rule that "when a child reaches 21 years of age, all records relating to the child must be sealed automatically," NRS 62H.140, which may have prevented the automatic sealing of some, if not all, of Burnside's juvenile records before he turned 30 years of age (he was not yet 30 at the time of the trial in this case). In particular, if a child is adjudicated delinquent for "[a]n unlawful act which would have been a felony if committed by an adult and which involved the use or threatened use of force or violence," NRS 62H.150(6)(b), and the records relating to that act were not sealed by the juvenile court before the child reached 21 years of age, as provided in NRS 62H.130, then the "records must not be sealed before the child reaches 30 years of age," NRS 62H.150(1). Because it appears that Burnside was adjudicated delinquent for robbery, which would have been a felony if committed by an adult and involved the use or threatened use of force or violence, and he was not yet 30 years of age when the records were disclosed, it seems unlikely that his juvenile records related to the robbery offense had been sealed. While his juvenile records relating to other criminal activity may not have satisfied NRS 62H.150(6), we cannot say that admission of that evidence constituted plain error given the state of the record before us.

[Headnote 37]

Plain error requires that "an error must be so unmistakable that it is apparent from a casual inspection of the record." *Garner v. State*, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002), *and by Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008). We simply cannot discern on this record, where no objection was voiced and therefore the necessary record was not developed, that the State

improperly obtained Burnside's juvenile records or that the district court erred in admitting them.[7]

Admission of evidence purportedly not included in the State's notice of evidence in aggravation

[Headnotes 38, 39]

Burnside argues that the district court erred by admitting evidence that was not included in the State's notice of evidence in aggravation. Because he did not object, his claim is reviewed for plain error affecting his substantial rights. NRS 178.602; *Archanian*, 122 Nev. at 1031, 145 P.3d at 1017. First, Burnside argues that the district court erroneously allowed Hardwick's girlfriend to testify that she had attended all court appearances in the case and had been subjected to ridicule during those appearances because the State's notice of evidence in aggravation did not reveal that the State intended to elicit misconduct allegedly committed by him or McKnight during court proceedings. The challenged comments were spontaneous and unsolicited, and we conclude that he has not demonstrated plain error.[8] Second, he argues that the State provided no notice of Detective Benjamins' testimony concerning statements by a witness who observed two African-American men sitting in a car after the shooting, laughing, gesturing with their hands, and saying "woo, woo, woo" (siren noises). Even assuming that this evidence should have been noticed, considering other evidence showing the senseless and calculated nature of the murder, we conclude that he has not established plain error.

Prosecutorial misconduct

[Headnote 40]

Burnside argues that the prosecutor committed misconduct in two instances. First, he contends that the prosecutor misrepresented to the jury that McKnight was not eligible for the death penalty and that he was prejudiced by the misrepresentation because the jury rejected his proffered mitigating circumstances related to the fact that McKnight was not facing the death penalty and had another unrelated murder charge pending. Because he failed to object, this court reviews for plain error. NRS 178.602; *Archanian*, 122 Nev. at 1031, 145 P.3d at 1017. Whether the prosecutor's statement that McKnight was not subject to the death penalty was incorrect as a

[7]We have not addressed *Clay v. Eighth Judicial Dist. Court*, 129 Nev., Adv. Op. 91, 313 P.3d 232 (2013), cited by Burnside, because that opinion has been withdrawn.

[8]We further conclude that Burnside failed to establish plain error respecting the testimony of Hardwick's girlfriend on the ground that it exceeded the scope of permissible victim-impact evidence given the spontaneous and brief nature of the challenged comments.

matter of law is unclear as his eligibility for the death penalty depended on the availability of aggravating circumstances, *see* NRS 200.030, and whether the jury found him guilty of premeditated murder or felony murder or both, *see McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). To the extent that the challenged comment was incorrect, we conclude that Burnside has not shown that it affected his substantial rights or induced the jury to reject his proffered mitigating circumstance. Second, he argues that during closing argument, the prosecutor improperly argued that the jury would give value to Hardwick's life and compensation to his family by returning a death sentence. We conclude that the challenged comments, considered in context, merely pointed out the senseless nature of the murder, highlighted the damage Hardwick's murder inflicted on his family, and entreated the jury to impose a death sentence. The comments were not improper.

Validity of robbery aggravating circumstance

[Headnote 41]

Burnside argues that the robbery aggravating circumstance is invalid because there was no evidence proving that he "was in any way involved in McKnight's decision to take the cigar case or otherwise take property from Hardwick" and liability for the robbery cannot be imputed to him, as imputed liability is not provided for in NRS 200.033. We disagree. NRS 200.033(4) applies where "[t]he murder was committed while the person was engaged, *alone or with others*, in the commission of, or an attempt to commit or flight after committing or attempting to commit" certain felonies, including robbery. (Emphasis added.) The plain language of the statute contemplates the situation presented here where the evidence shows that Burnside and McKnight acted in concert to rob Hardwick.[9]

Mitigation instruction

Burnside complains that the definition of mitigation was incomplete and that the term "moral culpability" used in the instruction

[9]To the extent Burnside argues that the State presented hearsay evidence to support the aggravating circumstance, our decision in *Summers v. State*, 122 Nev. 1326, 1327, 148 P.3d 778, 779 (2006), allows for the admission of hearsay in capital penalty hearings. And we have affirmed *Summers*' holding in challenges to the admission of hearsay evidence related to the eligibility prong of Nevada's death penalty scheme. *See, e.g.*, *Thomas v. State*, 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006); *Johnson v. State*, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006). We are not persuaded to alter our course in this regard. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of *stare decisis*, we will not overturn [prior decisions] absent compelling reasons for so doing." (footnote omitted)).

was confusing and unconstitutionally vague because a reasonable juror would not understand that phrase to mean that any factor, "whether or not associated with the underlying offense," could be considered as mitigation. He contends that the prejudicial effect of the phrase was exacerbated by the prosecutor's arguments minimizing the importance of mitigation and erroneous suggestions that mitigation must be related to the underlying offense, as evidenced by the jury's failure to find a single mitigating circumstance.

The instruction used in this case is the same instruction that we recently considered in *Watson v. State*, 130 Nev. 764, 335 P.3d 157 (2014). In that case, we concluded that there was no "reasonable likelihood that the jury misunderstood the . . . instruction to preclude it from considering any aspect of [a defendant's] character or record as a mitigating circumstance regardless of whether it reflected on his moral culpability." *Id.* at 785, 335 P.3d at 173. We reach the same conclusion here. Considerable time was spent presenting mitigation evidence that was unrelated to the circumstances of the offense; the bulk of Burnside's mitigation evidence centered on his upbringing and the hardships he encountered during his childhood. Consistent with that presentation, the jury was given a verdict form listing 17 proposed mitigating circumstances, 14 of which related to his background, family circumstances, and character. It is not reasonably likely that the jury thought that it could not consider all of the mitigation evidence that had been presented or that it had been given a verdict form that included mitigating circumstances that it was not permitted to consider. That the jury did not find any mitigating circumstances does not in itself signal that the jury believed it was precluded from considering Burnside's background, character, and other circumstances unrelated to the offense. Rather, it is just as likely that the jurors were not persuaded that the proffered mitigating circumstances would justify a sentence less than death. And nothing in the prosecutor's arguments suggested to the jury that it could not consider evidence of Burnside's character and record. For these reasons, as in *Watson*, we conclude that Burnside is not entitled to relief based on this instruction.

Weighing equation

Burnside argues that the jurors were improperly instructed on the weighing of mitigating and aggravating circumstances because that determination is a finding of fact that is necessary to make death an available sentence and therefore that weighing is subject to the beyond-a-reasonable-doubt standard under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). We held in *Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 241,

250-53 (2011), that the weighing of aggravating and mitigating circumstances "is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard of proof" and therefore is not subject to *Apprendi* and *Ring*. Accordingly, Burnside's claim lacks merit.

Jury's failure to find mitigating circumstances

[Headnotes 42, 43]

Burnside contends that the jury's failure to find any mitigating circumstances, despite clear and uncontroverted evidence, violated several of his constitutional rights. While he presented evidence to support each of the 17 mitigating circumstances he proffered, the jury is not obligated to find a mitigating circumstance merely because unrebutted evidence supports it. *See Gallego v. State*, 117 Nev. 348, 366-67, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery*, 127 Nev. at 750, 263 P.3d at 235; *Thomas v. State*, 114 Nev. 1127, 1149, 967 P.2d 1111, 1125 (1998). Burnside urges us to overrule *Gallego* because it is contrary to federal constitutional authority that requires jurors to consider mitigation. *Gallego* does not hold that the jury may ignore mitigation. "It is well established that the sentencer in a capital case must consider all mitigating evidence presented by the defense." *Thomas*, 114 Nev. at 1149, 967 P.2d at 1125; *see Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (noting that sentencer may determine weight to be given mitigation evidence, but it "may not give it no weight by excluding such evidence from [its] consideration"). Nothing in the record suggests that the jury ignored the evidence, and we see no basis to depart from our conclusion that the weight given to mitigation evidence, even if unrebutted, rests with the jury.

Constitutionality of the death penalty

Burnside argues that the death penalty is unconstitutional on three grounds, all of which this court has previously rejected: (1) the death penalty scheme does not genuinely narrow the class of defendants eligible for death, *see Nunnery*, 127 Nev. at 782, 263 P.3d at 257; *Leonard v. State*, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); (2) death constitutes cruel and unusual punishment, *see Gallego*, 117 Nev. at 370, 23 P.3d at 242; *Colwell v. State*, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996); *Shuman v. State*, 94 Nev. 265, 269, 578 P.2d 1183, 1186 (1978); and (3) executive clemency is unavailable, *see Nunnery*, 127 Nev. at 782, 263 P.3d at 257; *Colwell*, 112 Nev. at 812, 919 P.2d at 406-07. He has offered no novel or persuasive argument worthy of deviating from this court's firm posture on those matters.

Cumulative error

[Headnotes 44, 45]

Burnside argues that cumulative error requires reversal of his convictions and death sentence. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). As to the guilt phase, because Burnside demonstrated a single error—the district court erred by concluding that the testimony relating to cell phone transmissions did not constitute expert testimony, thus requiring the State to provide notice of the witness as an expert—there are not multiple errors to cumulate. *McKenna v. State*, 114 Nev. 1044, 1060, 968 P.2d 739, 749 (1998) (concluding that sole error "does not, by itself, constitute cumulative error"). And while his penalty hearing was not free from error, we conclude that any errors considered cumulatively did not result in an unfair penalty hearing.

Mandatory appellate review of the death sentence

[Headnote 46]

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravating circumstances found; (2) the verdict was rendered under the influence of passion, prejudice or any other arbitrary factor; and (3) death sentence is excessive. First, as explained above, the prior-violent-felony aggravating circumstance is invalid because the State failed to prove beyond a reasonable doubt that Burnside's conviction for attempted battery with substantial bodily harm involved the use or threat of violence under NRS 200.033(2)(b), but the felony aggravating circumstance based on robbery was proved through evidence presented during the guilt phase of trial. Second, nothing in the record indicates that the jury acted under any improper influence in imposing death. Third, the death sentence is not excessive. The crime was carefully considered—Burnside, along with McKnight, observed and followed Hardwick for a considerable time. The evidence indicated that Burnside shot Hardwick a number of times and that he acted in a calculated, cold-blooded manner and was not provoked (in fact, the evidence suggests that Hardwick had no warning of the impending shooting and robbery). And Burnside's criminal record disclosed multiple instances of violence. His attack on Tyyanna Clark in particular demonstrates that Burnside is a dangerous and violent man. During the attack on Clark, Burnside demanded money, hit her with his fists and feet, stomped on her face, dragged her along the ground, threw her onto a car, and pulled her pants down. Clark suffered a broken jaw and broken eye bone. We

recognize that Burnside presented credible mitigation evidence revealing a somewhat troubled childhood, but that evidence does not diminish the calculated, cold-blooded, and unprovoked killing of Hardwick or Burnside's propensity toward violent behavior. Under the circumstances, we conclude that based on the crime and the defendant before us, the death sentence is not excessive. *See generally Dennis v. State*, 116 Nev. 1075, 1084-87, 13 P.3d 434, 440-42 (2000) (discussing and applying excessiveness analysis).

Because review of this appeal reveals no errors that warrant reversal of Burnside's convictions or death sentence, we affirm the judgment of conviction.

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

CHERRY, J., dissenting:

I dissent. I would reverse the judgment of conviction and remand this matter to the district court for a new penalty hearing based on the erroneous instruction given to the jury concerning the definition of mitigating circumstances. The jury received the same erroneous instruction at issue in our decision in *Watson v. State*, 130 Nev. 764, 335 P.3d 157 (2014). As I observed in that case, the instruction "is simply inconsistent with the statutory language defining mitigating circumstances" because the statute reflects a broader "definition of mitigating circumstances [that] includes facts concerning the defendant or any other circumstance that the jury might find mitigating." *Id*. at 792, 335 P.3d at 177 (CHERRY and SAITTA, JJ., dissenting). Because of this disconnect between the instruction and the mitigation statute, NRS 200.035, the instruction likely confused the jury and improperly limited its consideration of mitigating evidence. *Id*. at 793, 335 P.3d at 177-78. In *Watson*, the instruction was particularly problematic because the jury found no mitigating circumstances despite the presentation of evidence showing that Watson suffered from mental illness and received psychiatric treatment. *Id*. at 794, 335 P.3d at 178-79.

All of the concerns that I expressed in *Watson* apply with equal force in this case. The jury was presented with compelling mitigation evidence. Burnside lived with a loving aunt until her death when he was eight years old. While living with her, Burnside was a very happy child and attended church and a local Catholic school. His aunt's death left him devastated, and he became aggressive and hard to handle. As a result, Burnside was shuffled from one relative to another. Family members related that he was smart and a good student in school. He wanted to live with his mother and struggled to understand why he did not live with her when all of his siblings

resided with her. Like many of his family members, Burnside became involved in drugs and alcohol. Though the jury was presented with 17 mitigating circumstances related to this evidence, largely centered on the lack of parental involvement in his upbringing, the trauma of losing his beloved aunt, his exposure to criminals and violence at an early age, his separation from his siblings and his status as a victim of violence, and the present support of his family, the jury found none of the mitigating circumstances proffered.

In my view, Burnside's efforts to convince the jury that he deserved a sentence less than death were thwarted by a mitigation instruction that likely led the jurors to believe that evidence of his troubled childhood was immaterial to their sentencing determination. Dismissing the jury's rejection of the proffered mitigating circumstances simply as an indicator of the quality of the mitigation case presented, as the majority does here, ignores the significant flaw in the mitigation instruction. That conclusion also ignores a critical constitutional precept—"[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence," *Boyde v. California*, 494 U.S. 370, 378-79 (1990), which encompasses any aspect of the defendant's character and record *in addition to* the circumstances of the offense, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see Browning v. State*, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008) (observing that focus of capital penalty hearing is defendant's character, record, and circumstances of offense); *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998) ("[A] defendant's character and record are relevant to the jury's determination of the appropriate sentence for a capital crime."). Justice demands clear, constitutionally sound instruction to guide the jury's discretion in imposing punishment in a capital case, and justice dictates more than mere conjecture concerning the effect of a confusing and inaccurate mitigation instruction. As in *Watson*, there is a reasonable likelihood that the instruction prevented the jury from considering relevant mitigation evidence in this case and therefore a new penalty hearing is required.

Although the mitigation instruction is by far the most troubling error committed in this case, I believe that three other matters reinforce the need for a new penalty hearing. In particular, two pieces of evidence were erroneously admitted—a statement suggesting that Burnside was a pimp and a photograph of him holding an assault rifle. This evidence was impalpable and irrelevant. Additionally, the prosecutor's argument that McKnight was not eligible for the death penalty was gratuitously misleading and possibly led to the jurors' rejection of Burnside's proffered mitigating circumstance that McKnight was not facing the death penalty. While standing alone these errors are insufficient to warrant a new penalty hearing,

the admission of irrelevant and impalpable evidence, further painting Burnside as a bad person, and misleading argument served to highlight the imbalance in the proceedings created by an improper instruction that likely led the jury to disregard the bulk of his mitigation evidence.

The cumulative effect of the errors identified above is further amplified by the particular nature and circumstances of the murder in this case. All first-degree murders are appalling and that is true here as well. However, the death penalty is reserved for those defendants who are characterized as the "worst of the worst." *See Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))). Something about the crime or Burnside's character must propel him to the level of the "worst of the worst." The murder here involved a robbery where the victim was shot and killed. The facts and circumstances are not especially egregious or shocking on the spectrum of death penalty cases. That the facts and circumstances created a less than compelling call for the death penalty heightens the impact of the errors committed and resulted in a penalty hearing where Burnside was hampered in his efforts to counter the prosecution's entreaty to the jury that a death sentence was justified in this instance.

All of these elements—the flawed mitigation instruction, the admission of irrelevant and impalpable evidence, the prosecutor's misleading argument, and the weak evidentiary support for a death sentence—combined to produce an unfair penalty hearing. Therefore, I would remand this case for a new penalty hearing. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.").

Finally, the Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a trial by a fair and impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A sleeping juror strikes at the heart of a defendant's constitutional right to a fair trial. *See United States v. McKeighan*, 685 F.3d 956, 973 (10th Cir. 2012) (observing that "[a] defendant could be deprived of the Fifth Amendment right to due process or the Sixth Amendment right to an impartial jury if jurors fall asleep and are unable to fairly consider the defendant's case"). Although Burnside's claim concerning a sleeping juror does not require reversal in this instance, I remind district court judges to tread carefully in this area and take every precaution to fully explore a claim that a juror is sleeping during proceedings.

SAITTA, J., dissenting:

I dissent. For the reasons expressed in my dissent in *Watson v. State*, 130 Nev. 764, 335 P.3d 157 (2014), regarding the erroneous mitigation instruction—the same instruction given here, I would reverse the judgment of conviction and remand this matter to the district court for a new penalty hearing. As I observed in *Watson*, there is a significant disconnect between the instruction and the broad definition of mitigation articulated in NRS 200.035. Here, as in *Watson*, that disconnect likely confused the jury and improperly limited its consideration of the mitigating evidence presented. In a case where the circumstances of the murder make the death penalty a close call, the jury's rejection of all 17 of Burnside's mitigating circumstances notwithstanding the compelling mitigation evidence introduced exposes the prejudicial impact of a flawed mitigation instruction. Because there is a reasonable likelihood the instruction interfered with the jury's consideration of the mitigation evidence introduced, the penalty hearing was fundamentally unfair and the death sentence cannot be upheld with any confidence. Consequently, a new penalty is necessary.