was not under his employer's control while at his friend's ranch." Such analysis ignores reality—that Jason was on a business trip—and the law: A traveling employee is under his employer's control for the duration of his or her business trip, NRS 616B.612(3).

Review for substantial evidence presupposes a full and fair proceeding, which in turn presupposes correct application of law. *Revert v. Ray*, 95 Nev. 782, 786-87, 603 P.2d 262, 264-65 (1979). The correct legal principles should have guided the inquiry towards the facts made relevant by those principles. *Cf. Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 491, 215 P.3d 709, 724 (2009) (noting that, in the summary judgment context, "[t]he substantive law determines which facts are material"), *modified on other grounds by Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 293 P.3d 869 (2013). We therefore vacate the district court's order denying the Bumas' petition for judicial review, with instructions to remand the matter to the appeals officer to conduct a hearing for additional fact-finding, to be guided by the traveling employee rule and its exception for distinct personal errands as set out in this opinion.

Gibbons, C.J., and Hardesty, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

VEGAS UNITED INVESTMENT SERIES 105, INC., a Nevada Domestic Corporation, Appellant, *v.* CELTIC BANK CORPORATION, Successor-in-Interest to SILVER STATE BANK by Acquisition of Assets From the FDIC as Receiver for SILVER STATE BANK, a Utah Banking Corporation Organized and in Good Standing With the Laws of the State of Utah, Respondent.

No. 74163

December 19, 2019 453 P.3d 1229

Appeal from a district court judgment following a bench trial in a judicial foreclosure action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Affirmed.

Roger P. Croteau & Associates, Ltd., and *Roger P. Croteau* and *Timothy E. Rhoda*, Las Vegas, for Appellant.

Sylvester & Polednak, Ltd., and *Allyson R. Noto* and *Kelly L. Schmitt*, Las Vegas, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

NRS Chapter 116 codifies the Uniform Common-Interest Ownership Act and sets forth statutory regulations applying to common-interest communities in Nevada, such as property owners' associations (POAs). NRS Chapter 116 generally applies to all residential Nevada POAs—i.e., homeowners' associations (HOAs)—but does not automatically apply to nonresidential POAs. Nonresidential POAs may elect to apply such provisions by expressly incorporating NRS Chapter 116's provisions, either in whole or in part. As this incorporation is elective, NRS Chapter 116 applies to nonresidential POAs *only* to the extent provided for by the incorporated statutory provisions.

Here, the conditions, covenants, and restrictions (CC&Rs) of the subject nonresidential property state that the association may enforce delinquent assessment liens pursuant to NRS 116.3116-.31168. The CC&Rs only incorporated NRS 116.3116-.31168,[1] however, and not the entirety of NRS Chapter 116. Specifically, the CC&Rs did not incorporate the provisions that might invalidate a mortgage savings clause or provide for assessments supporting a lien that would have superpriority status. Appellant Vegas United Investment Series 105, Inc., purchased the property at a foreclosure sale conducted pursuant to the procedures set forth in NRS 116.3116 in foreclosing on delinquent POA assessment liens. Because the lien did not have a superpriority portion and the mortgage savings clause, which provided that foreclosure on a delinquent assessment lien would not affect the priority of a prior mortgage, was still valid, respondent Celtic Bank's existing mortgage on the subject property was not extinguished. The district court therefore reached the correct outcome when it determined that Vegas United took the property subject to Celtic Bank's interest, and we affirm.

FACTS AND PROCEDURAL HISTORY

In 2005, nonparty Gibson Road, LLC, borrowed $748,000 from Celtic Bank's predecessor-in-interest in order to buy commercial property located in Henderson, Nevada. Gibson Road executed a first priority deed of trust to secure payment of the note. The note and deed of trust were assigned to Celtic Bank in 2009. The prop-

[1]The 2015 Legislature substantially revised NRS 116.3116-.31168. 2015 Nev. Stat., ch. 266, §§ 1-7, 9, at 1333-45, 1349. Any discussion in this opinion regarding these statutes as they applied to the nonjudicial foreclosure sale here refers to the version of statutes in effect before those amendments, when the foreclosure sale took place. *See Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. 28, 28 n.2, 388 P.3d 970, 971 n.2 (2017).

erty purchased is located within two common-interest communities (CICs) that encompass the same business park, Gibson Business Park Property Owners' Association (Park POA) and Gibson Business Center Property Owner's Association, Inc. (Center POA), each of which has adopted CC&Rs. Center POA adopted CC&Rs in 2004.[2]

Gibson Road failed to pay both its POA assessments and its mortgage. In 2011, Center POA's agent Red Rock Financial Services recorded a lien for delinquent assessments and then a notice of default.[3] In February 2014, Red Rock recorded and posted a notice of foreclosure sale, announcing a March 2014 sale date. Vegas United was the high bidder at the nonjudicial foreclosure sale with a bid of $30,000. In March 2015, Celtic Bank recorded a notice of default for nonpayment of mortgage payments and subsequently filed a complaint for judicial foreclosure of the property. Vegas United counterclaimed to quiet title, alleging that the nonjudicial foreclosure extinguished Celtic Bank's deed of trust, and asserted a slander of title claim.

The district court conducted a bench trial and entered a judgment in favor of Celtic Bank. The district court ruled that the CC&Rs incorporated the procedures for enforcing delinquent assessment liens from NRS 116.3116-.31168 but not the substantive provisions pertaining to the priorities of competing security interests. Accordingly, the district court concluded that the foreclosure sale did not extinguish Celtic Bank's deed of trust and that the Bank was entitled to foreclose on its first security interest. Vegas United now appeals.

DISCUSSION

Vegas United argues on appeal that the 2014 nonjudicial foreclosure was conducted pursuant to the 2004 CC&Rs and NRS 116.3116-.31168, the delinquent assessment lien accordingly had superpriority status, the CC&Rs' mortgage savings clause was unenforceable as a matter of law, and Center POA's nonjudicial foreclosure sale therefore extinguished Celtic Bank's deed of trust.[4]

Following a bench trial, we review the district court's legal conclusions de novo and uphold its factual findings so long as they are

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[2]Park POA separately adopted CC&Rs in 1989 and amended them in 1994. Its CC&Rs are not at issue here.

[3]The lien referenced CC&Rs with instrument number 1994024000285, which does not correspond with any recorded CC&Rs in Nevada. The 1994 amendment to Park POA's CC&Rs has instrument number 19941024000285. As we resolve this appeal on other grounds, we do not address whether this error affected the adequacy of the notice provided or the validity of the foreclosure sale.

[4]Vegas United also argues that the foreclosure notices were sufficient and that Celtic Bank's payment of the property's outstanding tax liability was irrelevant. Because these issues do not affect our disposition, we decline to address them.

not clearly erroneous and are supported by substantial evidence. *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

The CC&Rs partially incorporated provisions from NRS Chapter 116

We use the rules governing contract interpretation to interpret a CIC's declaration of its CC&Rs. *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004). When the facts are not disputed, contract interpretation is subject to de novo review as a question of law. *Id.* at 73, 84 P.3d at 666. "Contractual provisions should be harmonized whenever possible," *Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996), and no provision should be rendered meaningless, *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998).

NRS Chapter 116 only applies to a nonresidential CIC—that is, properties subject to a nonresidential POA—to the extent that the community's declaration incorporates NRS Chapter 116's provisions in whole or in part pursuant to NRS 116.12075. NRS 116.1201(1), (2)(b); *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 404, 215 P.3d 27, 31 (2009). By so stating in its declaration, a POA may elect to apply either (a) the entirety of NRS Chapter 116, (b) specifically NRS 116.001-.2122 and NRS 116.3116-.31168, or (c) exclusively NRS 116.3116-.31168. NRS 116.12075(1); *see also* NRS 278A.170 (providing that a CIC may apply the procedures set forth in NRS 116.3116-.31168 to enforce payment of association common-space maintenance assessments).

Center POA's CC&Rs comport with this statutory scheme and incorporate NRS 116.3116's delinquent assessment lien enforcement procedure. Recital D of the CC&Rs provides that real property within the POA shall only be subject to NRS Chapter 116 to the extent permitted by NRS 278A.170, which permits incorporating the chapter's assessment payment enforcement provisions. Section 10.2 of Center POA's CC&Rs provides that the POA may record a delinquent assessment lien and foreclose upon it "pursuant to a sale conducted in accordance with the provisions of (i) Covenants Nos. 6, 7 and 8 of NRS 107.030 and/or (ii) NRS 116.3116 to NRS 116.31168, inclusive, or any successor laws hereafter in effect." While NRS 107.030 is not at issue here, Section 10.2 partially incorporated NRS Chapter 116 in the CC&Rs, electing to apply NRS 116.3116-.31168 but no other provisions of NRS Chapter 116. *See* NRS 116.12075(1) (providing that a POA electing to adopt provisions of NRS Chapter 116 may designate either NRS 116.3116-.31168 or two other sets of provisions). Where a contract incorporates a statutory provision by reference, that statutory language is interpreted as though set out in the contract just as any other contract term. 11 *Williston on*

Contracts § 30:19 (4th ed. 2012). Accordingly, Section 10.2 incorporated the NRS 116.3116 delinquent lien enforcement procedures, qualified by Section 10.2's subsequent statement that such a lien shall not be valid as against a prior-recorded mortgagee.[5] *See Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d 377, 380 (2012) (providing that contracts must be read as a whole to avoid negating any provision). Therefore, the nonjudicial foreclosure sale was conducted pursuant to the procedure set forth in NRS 116.3116-.31168, as constructed with regard to the CC&Rs as a whole.[6]

Mortgage savings clauses are not necessarily unenforceable in nonresidential POAs

In applying NRS 116.3116 here, we must resolve the apparent conflict between NRS 116.3116(2)'s superpriority provision and the mortgage savings clause contained in the CC&Rs, which purported to prevent an action pursuant to an enforcement mechanism set forth in the CC&Rs from invalidating a preexisting mortgage.

First, we conclude that mortgage savings clauses are not necessarily unenforceable in CC&Rs for a nonresidential POA. While this court has held that a mortgage savings clause in HOA CC&Rs is unenforceable as against NRS 116.3116(2)'s superpriority provision, that decision rested on both the application of NRS 116.1104, which precluded any contractual provision from curtailing the application of NRS Chapter 116, and the applicability of the entirety of NRS Chapter 116 to residential CICs. *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757-58, 334 P.3d 408, 418-19 (2014). Here, the Center POA's CC&Rs incorporated only NRS 116.3116-.31168, and such limited incorporation is permitted by statute. Accordingly, the basis relied upon in *SFR Investments* is not present here, and the CC&Rs must be interpreted to give force to both provisions, harmonizing their meaning without negating either.[7]

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[5]Section 10.2 of the 2004 CC&Rs specifically provides:

> The Lien provided in this Section shall not be valid as against a bona fide purchaser (or bona fide Mortgagee) of the Lot in question unless the Lien shall have been filed in the Public Records prior to the recordation in the Public Records of the deed (or Mortgage) conveying the Lot in question to such purchaser (or subjecting the same to such Mortgage).

[6]The district court erroneously concluded that the incorporation of NRS 116.3116 cannot include the superpriority effects when NRS 116.3116 is incorporated through reference from NRS 278A.170 because NRS 278A.170 does not discuss the priority of such liens. As we acknowledge above, where a statutory provision is incorporated by reference, each part of that provision is treated as though it were written in the contract as a term. Because we affirm on different bases, this error does not affect our disposition.

[7]Our conclusion in this regard is limited to nonresidential POAs electing to apply NRS 116.3116-.31168 pursuant to NRS 116.12075(1)(c), without en-

Where CC&Rs permit both foreclosure of delinquent assessment liens and mortgage savings clauses, such provisions must be harmonized

The Center POA's CC&Rs emphasize that enforcement of a delinquent assessment lien should not impair a prior recorded mortgage. Article XIII of Center POA's CC&Rs provides that:

> No violation of any provision of this Declaration, nor any remedy exercised hereunder, shall defeat or render invalid the lien of any Mortgage made in good faith and for value upon any portion of the Project, nor shall any Lien created hereunder be superior to any such Mortgage unless such Lien shall have been recorded in the Public Records prior to the recordation in the Public Records of such Mortgage; provided however, that any Mortgagee or other purchaser at any trustee's or foreclosure sale shall be bound by and shall take its property subject to this Declaration as fully as any other Owner of any portion of the Project.

Section 10.2 qualifies the exercise of the NRS 116.3116 procedure by stating that a lien so enforced "shall not be valid" as against a prior recorded mortgage. NRS 116.3116(2) (2013) itself relevantly states this:

> A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> . . .
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . .
>
> . . .
>
> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . .

NRS 116.3116(2) indicates that the superpriority exception against first security interests applies to certain charges and expenses incurred pursuant to NRS 116.310312 or NRS 116.3115. Neither of

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compassing nonresidential POAs that choose to incorporate provisions of NRS Chapter 116 pursuant to NRS 116.12075(1)(a)-(b). Such broader incorporation of NRS Chapter 116 may fall within *SFR Investments*' reasoning.

these statutes applies to Center POA's CC&Rs, however, because neither statute was among those statutes incorporated from NRS Chapter 116. Whatever assessment payments were due pursuant to Center POA's CC&Rs, those assessment payments did not rest on a statutory basis encompassed by NRS 116.3116(2). As such, no portion of the delinquent assessment lien foreclosed upon had superpriority status pursuant to NRS 116.3116(2) as against Celtic Bank's prior recorded deed of trust. Moreover, to read NRS 116.3116(2)—as incorporated here as a covenant in the CC&Rs—to impair the priority of Celtic Bank's deed of trust would conflict with Article XIII of Center POA's CC&Rs and result in an unharmonious interpretation of the CC&Rs. Accordingly and consistent with the intent expressed in the mortgage savings clause to not impair prior recorded mortgages, the district court reached the correct disposition when it ruled that Vegas United took its interest subject to Celtic Bank's deed of trust when it purchased the property. *See Saavedra Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (affirming a district court order reaching the correct result, albeit for the wrong reason).

CONCLUSION

Because Center POA's CC&Rs expressly elected to apply NRS 116.3116-.31168, those provisions were incorporated in the CC&Rs. No other provisions of NRS Chapter 116 were incorporated, however, as that statutory scheme envisions elective incorporation, either in part or in whole, by nonresidential POAs. Accordingly, NRS 116.1104 did not apply to render the CC&Rs' mortgage savings clause unenforceable, nor did the CC&Rs apply other NRS Chapter 116 provisions supporting assessments that would have superpriority status pursuant to NRS 116.3116(2). As a result, no portion of the delinquent POA assessment lien had superpriority status as against Celtic Bank's first security interest. Therefore, Vegas United took its interest subject to Celtic Bank's deed of trust. We affirm the district court's order.

Hardesty and Silver, JJ., concur.

KEANDRE VALENTINE, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 74468

December 19, 2019 454 P.3d 709

Appeal from a judgment of conviction, pursuant to a jury verdict, of seven counts of robbery with the use of a deadly weapon, three counts of burglary while in possession of a deadly weapon, two counts of possession of credit or debit card without cardholder's consent, and one count each of attempted robbery with the use of a deadly weapon and possession of document or personal identifying information for the purpose of establishing a false status or identity. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Vacated and remanded.

Darin F. Imlay, Public Defender, and *Sharon G. Dickinson*, Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Krista D. Barrie*, Chief Deputy District Attorney, and *Michael R. Dickerson*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

A defendant has the right to a jury chosen from a fair cross section of the community, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This court has addressed the showing a defendant must make to establish a prima facie violation of this right. We have said little, however, about when an evidentiary hearing may be warranted on a fair-cross-section claim. Faced with that issue in this case, we hold that an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement. Because the defendant in this matter made specific factual allegations that could be sufficient to establish a prima facie violation of the fair-cross-section requirement and those allegations were not disproved, the district court abused its discretion by denying Valentine's request for an evidentiary hearing. None of Valentine's other claims warrant a new trial. We therefore vacate the judgment of conviction and remand for further proceedings as to the fair-cross-section challenge.

BACKGROUND

Appellant Keandre Valentine was convicted by a jury of multiple crimes stemming from a series of five armed robberies in Las Vegas, Nevada. Before trial, Valentine objected to the 45-person venire and claimed a violation of his right to a jury selected from a fair cross section of the community. He argued that two distinctive groups in the community—African Americans and Hispanics—were not fairly and reasonably represented in the venire when compared with their representation in the community. Valentine asserted that the underrepresentation was caused by systematic exclusion, proffering two theories as to how the system used in Clark County excludes distinctive groups. His first theory was that the system did not enforce jury summonses; his second theory was that the system sent out an equal number of summonses to citizens located in each postal ZIP code without ascertaining the percentage of the population in each ZIP code. Valentine requested an evidentiary hearing, which was denied. The district court found that the two groups were distinctive groups in the community and that one group—Hispanics—was not fairly and reasonably represented in the venire when compared to its representation in the community. However, the district court found that the underrepresentation was not due to systematic exclusion, relying on the jury commissioner's testimony regarding the jury selection process two years earlier in another case and on this court's resolution of fair-cross-section claims in various unpublished decisions. The court thus denied the constitutional challenge.

DISCUSSION

Fair-cross-section challenge warranted an evidentiary hearing

Valentine claims the district court committed structural error by denying his fair-cross-section challenge without conducting an evidentiary hearing. We review the district court's denial of Valentine's request for an evidentiary hearing for an abuse of discretion. *See Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (reviewing denial of request for an evidentiary hearing on a postconviction petition for a writ of habeas corpus); *accord United States v. Schafer*, 625 F.3d 629, 635 (9th Cir. 2010) (reviewing denial of request for an evidentiary hearing on a motion to dismiss an indictment); *United States v. Terry*, 60 F.3d 1541, 1544 n.2 (11th Cir. 1995) (reviewing denial of request for an evidentiary hearing on fair-cross-section challenge to statute exempting police officers from jury service).

"Both the Fourteenth and the Sixth Amendments to the United States Constitution guarantee a defendant the right to a trial before a jury selected from a representative cross-section of the community." *Evans v. State*, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996). While this right does not require that the jury "mirror the community and

reflect the various distinctive groups in the population," it does require "that the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id*. at 1186, 926 P.2d at 274-75 (internal quotation marks omitted). "Thus, as long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." *Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005).

A defendant alleging a violation of the right to a jury selected from a fair cross section of the community must first establish a prima facie violation of the right by showing

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

Evans, 112 Nev. at 1186, 926 P.2d at 275 (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). To determine "[w]hether a certain percentage is a fair representation of a group," this court uses "the absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community." *Williams*, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9. And to determine whether systematic exclusion has been shown, we consider if the underrepresentation of a distinctive group is "inherent in the particular jury-selection process utilized." *Evans*, 112 Nev. at 1186-87, 926 P.2d at 275 (internal quotation marks omitted). Only after a defendant demonstrates a prima facie violation of the right does "the burden shift[ ] to the government to show that the disparity is justified by a significant state interest." *Id*. at 1187, 926 P.2d at 275.

Here, Valentine asserted that African Americans and Hispanics were not fairly and reasonably represented in the venire. Both African Americans and Hispanics are recognized as distinctive groups. *See id*.; *see also United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir. 1996). And the district court correctly used the absolute and comparative disparity between the percentage of each distinct group in the venire and the percentage in the community to determine that African Americans were fairly and reasonably represented in the venire but that Hispanics were not. *See Williams*, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9 ("Comparative disparities over 50% indicate that the representation of [a distinct group] is likely not fair and reasonable."). The district court denied Valentine's challenge as to Hispanics based on the third prong—systematic exclusion.

We conclude the district court abused its discretion in denying Valentine's request for an evidentiary hearing. Although this court has not articulated the circumstances in which a district court should hold an evidentiary hearing when presented with a fair-cross-section challenge, it has done so in other contexts. For example, this court has held that an evidentiary hearing is warranted on a postconviction petition for a writ of habeas corpus when the petitioner has "assert[ed] claims supported by specific factual allegations [that are] not belied by the record [and] that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002); *see also Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Most of those circumstances are similarly relevant when deciding whether an evidentiary hearing is warranted on a defendant's fair-cross-section challenge, given the defendant's burden of demonstrating a prima facie violation. In particular, it makes no sense to hold an evidentiary hearing if the defendant makes only general allegations that are not sufficient to demonstrate a prima facie violation or if the defendant's specific allegations are not sufficient to demonstrate a prima facie violation as a matter of law. *See Terry*, 60 F.3d at 1544 n.2 (explaining that no evidentiary hearing is warranted on a fair-cross-section challenge if no set of facts could be developed that "would be significant legally"). But unlike the postconviction context where the claims are case specific, a fair-cross-section challenge is focused on systematic exclusion and therefore is not case specific. Because of that systematic focus, it makes little sense to require an evidentiary hearing on a fair-cross-section challenge that has been disproved in another case absent a showing that the record in the prior case is not complete or reliable.[1] With these considerations in mind, we hold that an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement.[2]

Applying that standard, we conclude that Valentine was entitled to an evidentiary hearing as to his allegation of systematic exclusion of Hispanics. Valentine did more than make a general assertion of systematic exclusion. In particular, Valentine made specific allegations that the system used to select jurors in the Eighth Judicial District Court sends an equal number of jury summonses to each postal ZIP code in the jurisdiction without ascertaining the percent-

[1]For the reasons stated herein, it was error for the district court to rely upon the jury commissioner's prior testimony in denying Valentine's challenge. That is not to say a district court may never rely upon prior testimony when appropriate.

[2]We note that, in order to meet the burden of demonstrating an evidentiary hearing is warranted, a defendant may subpoena supporting documents and present supporting affidavits. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

age of the population in each ZIP code. Those allegations, if true, could establish underrepresentation of a distinctive group based on systematic exclusion. *Cf. Garcia-Dorantes v. Warren*, 801 F.3d 584, 591-96 (6th Cir. 2015) (discussing a prima facie case of systematic exclusion where a computer used a list to determine the percentage of jurors per ZIP code, but because of a glitch, the list included a higher number of persons from certain ZIP codes that had smaller proportions of African Americans than the community at large). And those allegations were not addressed in the jury commissioner's prior testimony that the district court referenced.[3] Accordingly, the district court could not rely on the prior testimony to resolve Valentine's allegations of systematic exclusion. Having alleged specific facts that could establish the underrepresentation of Hispanics as inherent in the jury selection process, Valentine was entitled to an evidentiary hearing.[4] Accordingly, the district court abused its discretion by denying Valentine's request for an evidentiary hearing.[5] We therefore vacate the judgment of conviction and remand to the district court for an evidentiary hearing. *Cf. State v. Ruscetta*, 123 Nev. 299, 304-05, 163 P.3d 451, 455 (2007) (vacating judgment of conviction and remanding where district court failed to make factual findings regarding motion to suppress and where record was insufficient for appellate review). Thereafter, Valentine's fair-cross-section challenge should proceed in the manner outlined in *Evans*, 112 Nev. at 1186-87, 926 P.2d at 275. If the district court determines that the challenge lacks merit, it may reinstate the judgment of conviction, except as provided below.

Sufficiency of the evidence

Valentine argues the State presented insufficient evidence to support his convictions for robbery with the use of a deadly weapon in counts 4 and 9. In considering a claim of insufficient evidence, we

[3]Even if the jury commissioner's previous testimony addressed Valentine's specific allegations of systematic exclusion, reliance on the old testimony would have been misplaced. In particular, the prior testimony mentioned that the system was "moving towards a new improved jury selection process" and legislative amendments regarding the juror selection process were implemented close in time to Valentine's trial. *See* 2017 Nev. Stat., ch. 549, §§ 1-5, at 3880-84. While prior testimony relevant to a particular fair-cross-section challenge may obviate the need for an evidentiary hearing, a district court should be mindful that it not rely upon stale evidence in resolving such challenges.

[4]It is unclear that Valentine's allegations regarding the enforcement of jury summonses would, if true, tend to establish underrepresentation as a result of systematic exclusion. *See United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006) ("Discrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*."). Accordingly, he was not entitled to an evidentiary hearing as to those allegations.

[5]We reject Valentine's contention that the district court's failure to hold an evidentiary hearing evinced judicial bias resulting in structural error.

"view[ ] the evidence in the light most favorable to the prosecution" to determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

NRS 200.380(1) defines the crime of robbery as

> [T]he unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery.[6]

Additionally, we have held that the State must show that the victim had possession of or a possessory interest in the property taken. *See Phillips v. State*, 99 Nev. 693, 695-96, 669 P.2d 706, 707 (1983).

The challenged robbery counts stem from a similar fact pattern. Beginning with count 4, Valentine was charged with robbing Deborah Faulkner of money; Valentine was also charged with robbing Darrell Faulkner, Deborah's husband, of money in count 3. Valentine was convicted of both counts. However, when viewed in a light most favorable to the prosecution, the evidence produced at trial was insufficient to support a robbery charge as it related to Deborah. While the evidence established that Valentine took $100 that Darrell removed from his own wallet, the evidence demonstrated that Valentine demanded Deborah to empty her purse onto the ground but actually took nothing from it. There was no evidence that Deborah had possession of, or a possessory interest in, the money from Darrell's wallet.[7] Thus, the State presented insufficient evidence for count 4, and the conviction for that count cannot be sustained.

Similarly, in count 9, Valentine was charged with robbing Lazaro Bravo-Torres of a wallet and cellular telephone; Valentine was also charged with robbing Rosa Vasquez-Ramirez, Lazaro's wife, of a purse, wallet, and/or cellular telephone in count 11. Valentine was convicted of both counts. Yet viewing the evidence in a light most favorable to the prosecution, the evidence did not establish that Valentine robbed Lazaro. Specifically, Lazaro testified that he

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[6]The Legislature amended NRS 200.380, effective October 1, 2019. 2019 Nev. Stat., ch. 76, § 1, at 408. While the amendments do not affect our analysis in this matter, we have quoted the pre-amendment version of NRS 200.380 that was in effect at the time of the events underlying this appeal. 1995 Nev. Stat., ch. 443, § 60, at 1187.

[7]We are unconvinced by the State's argument that the singular fact of Darrell and Deborah being married, without more, demonstrated that the money in Darrell's wallet was community property of the marriage such that Deborah had a possessory interest in it. *See* NRS 47.230(3).

told Valentine he did not have cash or a wallet on him and that his phone, located in the center compartment of the truck, was not taken but was used by the couple after the incident was over. Conversely, Rosa testified that Valentine took her purse along with the items in it. The evidence presented by the State did not establish that Lazaro had possession of, or a possessory interest in, the items taken,[8] and thus the conviction for count 9 cannot be sustained.

Prosecutorial misconduct regarding DNA evidence

Valentine contends that the State engaged in prosecutorial misconduct during closing argument when discussing the deoxyribonucleic acid (DNA) evidence. In considering a claim of prosecutorial misconduct, we determine whether the conduct was improper and, if so, whether the improper conduct merits reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

During the trial, the State presented an expert witness to testify about the DNA results from a swab of the firearm found in the apartment where Valentine was discovered. The expert testified generally about the procedures her laboratory uses for DNA analysis. She explained that samples are tested at the same 15 locations, or loci, on the DNA molecule and a DNA profile results from the alleles, or numbers, obtained from each of the 15 locations.[9] When complete information from each of the 15 locations is obtained, the result is a full DNA profile; anything less produces a partial DNA profile. The results of the DNA testing process appear as peaks on a graph, and it is those peaks that the expert interprets and uses to make her determinations. In considering the information on a graph, the expert indicated that her laboratory uses a threshold of 200—anything over 200 is usable information, while anything below 200 is not used "because it's usually not reproducible dat[a]," meaning if the sample was tested again, "it's so low that [she] might get that same information, [she] might not."[10] The expert maintained that sometimes DNA information is obtained "but it's not good enough for us to make any determinations on. So in that case we call it inconclusive."

As to the results of the swab from the firearm, the expert testified that she "did not obtain a useable profile, so there was no compar-

[8]We again reject the State's argument that the mere fact that Lazaro and Rosa were married demonstrated that Lazaro had a possessory interest in Rosa's purse or the items therein. *See id*.

[9]The expert added that her laboratory also looks at an additional location, the amelogenin, in order to determine the gender of the individual represented in the sample.

[10]The expert also testified that anything below 40 indicated that there was no actual DNA profile. She explained that her laboratory uses the thresholds "to make sure that when we say that there is a good, usable DNA profile, that it's actually a good, useable DNA profile."

ison made." She stated that the laboratory thresholds were not met and thus "the profile was inconclusive." The only conclusion the expert was able to make was that the partial DNA profile obtained from the firearm swab was consistent with a mixture of at least two persons and that at least one of the persons was male.

During the expert's testimony, the State offered three exhibits: one was a summary, side-by-side comparative table of the DNA information collected from the firearm swab and from Valentine; and two were graphs of the specific information collected from the firearm swab and Valentine, both graphs showing peaks of information alongside a scale indicating the laboratory's threshold limits. Valentine objected to the admission of the graphs, arguing that they could be confusing to the jury, that the jurors should not be drawing their own conclusions from the graphs, and that he did not want the jurors to think they could discern something from the graphs that the expert could not. The district court overruled Valentine's objection, finding the graphs relevant to the expert's methodology and reliability.[11]

Regarding the summary, side-by-side table, the expert testified that every tested location of the firearm swab, save for the location used to determine gender, resulted in either an "NR," meaning no DNA profile was obtained from that particular location, or an asterisk, indicating information was present but "it was so low that [she was] not even going to do any comparisons or say anything."

Regarding the graphs, the State went through the tested locations of the firearm swab and, while continuously commenting that the results were below the laboratory's 200 threshold, asked the expert to identify the alleles for which there were peaks of information. In going through the peaks of information from the firearm swab, the State also intermittently mentioned the corresponding locations and, ostensibly matching, alleles found in Valentine's DNA profile. During cross-examination, the expert repeated the 200 threshold and explained that she does not look at information below that threshold, even if it is close, because it could be incorrect. Valentine asked the expert if she had anything she wanted to add in response to the State's line of questioning regarding each of the locations tested, and the expert reiterated the following:

> [T]he profile [from the firearm swab] was inconclusive, and we call it inconclusive because there wasn't enough DNA. . . .

[11]Valentine argues the district court abused its discretion in admitting the graphs. We cannot say the admission of the graphs to show methodology and reliability was an abuse of discretion. But while the graphs may have been relevant for such purposes, the manner in which the information was used by the State, as discussed below, strongly undermined the district court's reasoning for admitting the evidence. *See* NRS 47.110 (discussing the limited admissibility of evidence and, upon request, the need for an instruction to restrict the jury's consideration to the proper scope).

> [A]nd we call that inconclusive . . . because if I re-ran that exact same sample, I don't know what kind of results I would come up with. It may be the same, it may be different. So that's why we're not saying that the DNA profile definitely came from the defendant, because it's inconclusive to me.
>
> . . . .
>
> [The thresholds] exist for a reason.
>
> . . . .
>
> Because we don't want to present information that may not be correct or overemphasize something, you know, saying yes, this person is there, when it may not be true because our data is not supporting that it's a strong DNA profile. So we want to be sure when we say there's a match, that it is, in fact, a match.
>
> We don't want to make the wrong conclusions on the item that we're looking at.
>
> . . . .

Despite the expert's testimony, the State pointed to the two graphs and argued that the jurors could assess for themselves whether Valentine's DNA profile matched the DNA profile from the firearm swap. During closing argument, the State made the following comments:

> You heard about the DNA evidence in this case. Now, the scientist came in. She told you she could not make any results. The results that she had for the swab of the gun were below the threshold. But we went through every single one. *And that's something you need to also take a look at when you go back there, just to see what you think for yourself.* When we went through and looked at the items *below the 200 threshold*, but above the 40 threshold *this is what we found*. We found that the swab of the handgun revealed a 12 and a 13 allele. Mr. Valentine, a 12 and a 13 allele. The swab also [had] a 28 allele on the next [location]. A 28 allele on that same [location] for Mr. Valentine.

(Emphases added.) Valentine objected and argued that the State's own expert said that such a comparison was improper. The district court overruled the objection, finding the prosecutor was merely arguing that some weight should be given to the evidence and stating it was up to the jury to decide the weight to give the evidence. The State continued:

> [I]t's worth taking into consideration. You are here for two weeks. Look at all the evidence. This is part of the evidence. You heard that under each [location] there is a number of alleles. And here, though, yeah, maybe the threshold is under 200, *there's something here*. *But just consider for yourself*.

> Next, we have the [location] on the swab of the handgun, 15 and 16. Mr. Valentine also at 15 and 16. Next [location] at 7; Mr. Valentine also at 7. Next [location] at 12 and 13; Mr. Valentine also at 12 and 13. So on and so forth, *matching*.
>
> . . . .
>
> Ladies and gentlemen, it's just worth considering. Take a look at it. *See what you think. Make your own determination*.[12]

(Emphases added.)

Without reservation, we conclude the prosecutor's closing argument was improper. "[A] prosecutor may argue inferences from the evidence and offer conclusions on contested issues" during closing argument, but "[a] prosecutor may not argue facts or inferences not supported by the evidence." *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotation marks omitted). Here, the State presented an expert witness to testify as to the DNA results obtained from the swab of the firearm. *See United States v. McCluskey*, 954 F. Supp. 2d 1224, 1253 (D.N.M. 2013) ("[J]urors can understand and evaluate many types of evidence, but DNA evidence is different and a prerequisite to its admission is technical testimony from experts to show that correct scientific procedures were followed." (internal quotation marks omitted)). The purpose of expert testimony "is to provide the trier of fact [with] a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987); *see also* NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify to matters within the scope of such knowledge."). But after presenting its expert to testify about a subject outside the ordinary range of knowledge for jurors, the State disregarded that testimony and invited the jury to make inferences that the expert testified were not supported by the DNA evidence. The State asked the jury to consider evidence about which the expert was emphatic she could make no conclusions, save for her overall conclusion that the evidence was consistent with a mixture of at least two persons, at least

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[12]In his closing argument, Valentine attempted to rebut the State's presentation of the evidence:

> The DNA analysis, she seemed to really know her stuff. State's expert. They put her on. What did she testify to? Well, she testified to a lot with the State and she looked extremely uncomfortable, which was clarified on cross that, a lot of this, well, the peaks, there's a little bit of peak that sort of matches him. She was very uncomfortable about that because as she said on cross, that's not how it works. It's not reliable under a certain level. They can't say inside—for scientific certainty that it's even possible. It's even plausible, because they might get totally different results if they run it again. That's why she was uncomfortable testifying to that.

one of whom was male. The State then asked the jury to compare the unusable profile to Valentine's DNA profile. This is precisely what the expert said she could not do because it would be unreliable. *See Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008) (holding that expert witness "testimony will assist the trier of fact only when it is relevant and the product of reliable methodology" (footnote omitted)). No evidence was introduced, statistical or otherwise, regarding the significance or meaning of the data that fell below the 200 threshold. To the contrary, the only evidence presented was that such information produced an unusable profile and was not considered by the expert. It is hard to imagine what weight could be ascribed to evidence that was described only as inconclusive, unusable, and incomparable. Rather, the State's use of the expert's testimony can better be viewed as taking advantage of the "great emphasis" or the "status of mythic infallibility" that juries place on DNA evidence. *People v. Marks*, 374 P.3d 518, 525 (Colo. App. 2015) (internal quotation marks omitted). Simply put, the prosecution argued facts not in evidence and inferences not supported by the evidence. This was improper.

We nevertheless conclude that the improper argument would not warrant reversal of Valentine's convictions because it did not substantially affect the jury's verdict. *See Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476. There was evidence presented that Valentine handled the gun and multiple victims identified Valentine as the perpetrator. Thus, the error was harmless, and Valentine is not entitled to a new trial based on the prosecutorial misconduct.[13]

CONCLUSION

The district court abused its discretion in denying Valentine's request for an evidentiary hearing on his fair-cross-section challenge. We therefore vacate the judgment of conviction and remand for the district court to conduct an evidentiary hearing and resolve the fair-cross-section challenge. None of Valentine's other arguments require a new trial. Accordingly, if the district court determines on remand that the fair-cross-section challenge lacks merit, it may reinstate the judgment of conviction except as to the convictions for counts 4 and 9, which were not supported by sufficient evidence.[14]

Hardesty and Silver, JJ., concur.

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[13]We have considered Valentine's remaining contentions of error and conclude no additional relief is warranted.

[14]This opinion constitutes our final disposition of this appeal. Any future appeal following remand shall be docketed as a new matter.

IN THE MATTER OF THE APPLICATION OF EDWARD TARROBAGO FINLEY, FOR AN ORDER TO SEAL RECORDS.

EDWARD TARROBAGO FINLEY, APPELLANT, *v.* CITY OF HENDERSON; AND THE STATE OF NEVADA, RESPONDENTS.

No. 76715-COA

December 26, 2019 457 P.3d 263

Appeal from a district court order denying a petition to seal criminal records. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Reversed and remanded.

The Wright Law Group and *John Henry Wright* and *Christopher B. Phillips*, Las Vegas, for Appellant.

Steven B. Wolfson, District Attorney, and *John T. Niman*, Deputy District Attorney, Clark County, for Respondent State of Nevada.

Nicholas Vaskov, City Attorney, and *Marc M. Schifalacqua*, Senior Assistant City Attorney, Henderson, for Respondent City of Henderson.

Before the Court of Appeals, GIBBONS, C.J., TAO and BULLA, JJ.

OPINION[1]

By the Court, TAO, J.:

As an act of grace, the Nevada Legislature has decided that persons convicted of certain types of crimes (both misdemeanors and many felonies) may, in certain circumstances and if they have not committed any new crimes for a certain length of time, ask the judiciary to have their convictions "sealed," which means that the convictions are "deemed never to have occurred," thereby restoring a panoply of civil rights that convicted felons otherwise do not enjoy. *See* NRS 179.285. Not all convictions are eligible to be sealed—for example, sex offenses and crimes against children are never eligible to be sealed no matter how old the convictions. *See* NRS 179.245(6). But for many other offenses, if the person has proven able to successfully turn their life around and live crime-free long enough, the Legislature has enacted a series of statutes designed to give courts the power to seal convictions for those deemed "rehabilitated" and

[1]We originally resolved this appeal in an unpublished order of reversal and remand. Appellant subsequently filed a motion to publish the order as an opinion. We grant the motion and replace our earlier order with this opinion. *See* NRAP 36(f).

who deserve "second chances." *See* NRS 179.2405 (declaring the public policy behind sealing statutes).

Iterations of these criminal record sealing statutes have been around a long time, but in recent years the Legislature has changed the procedures that must be followed to obtain such sealing. Previously, petitioners had to file a separate petition in each court in which they were convicted of any crime, and that court could seal only the convictions that it issued. If the person was convicted of different crimes in different levels of the judiciary (e.g., municipal court, justice court, or district court), then they had to file separate petitions in each court to address the convictions issued by that court. But recently the Legislature decided to permit a convicted person to file a single consolidated petition in a single district court asking to seal convictions involving multiple cases from different courts.

The question raised by this appeal is this: on the one hand, criminal convictions are eligible to be sealed only if the person was not convicted of any subsequent crimes for a certain prescribed period of time thereafter (ranging from one year to ten years after the expiration of the prior sentence), *see* NRS 179.245(1), (5); and on the other hand, once sealed, a conviction is "deemed never to have occurred," *see* NRS 179.285. Normally, an earlier conviction followed very quickly by another conviction renders the first conviction ineligible for sealing. But suppose enough time elapses so that the latest conviction is eligible to be sealed. Once that later conviction is sealed and "deemed never to have occurred," does that then make an earlier conviction eligible to also be sealed (since it is no longer chronologically followed by another later conviction), even though it would not have been eligible prior to sealing the later conviction? And can entire chains of otherwise ineligible successive convictions now all be sealed by unwinding the convictions one after another in reverse chronological order all the way back in time to the person's first conviction?

The plain words of the statutes provide our answer: as enacted, the statutes vest district courts with considerable discretion in handling petitions involving multiple convictions. If they wish, district courts may evaluate successive convictions in reverse chronological order, thereby potentially sealing earlier convictions that would not have been eligible had the court instead considered the convictions in forward chronological order (i.e., by deeming the later convictions to have never occurred). On the other hand, the statutes do not require that district courts handle a train of multiple successive convictions this way. Quite to the contrary, NRS 179.295 "does not prohibit" courts from considering previously sealed convictions when determining whether to grant a petition to seal other criminal records. In other words, even if a later conviction has been sealed, the district court may still consider it in deciding whether earlier convictions should be sealed or not, and may rely upon the later

sealed conviction to conclude that the petitioner was not truly rehabilitated and refuse to seal the earlier conviction.

FACTUAL AND PROCEDURAL HISTORY

Edward Tarrobago Finley filed a consolidated petition in district court to seal records associated with multiple different criminal convictions in multiple different courts throughout Clark County. The State of Nevada (through the Clark County District Attorney) and the City of Henderson (the City) opposed Finley's petition on various grounds, only one of which matters to this appeal. The City argued that one of Finley's convictions, a 2004 non-felony battery domestic violence conviction, was ineligible to be sealed because Finley was convicted of new felony offenses within the seven-year time period specified in NRS 179.245(1)(e) for him to remain crime-free in order to have the 2004 non-felony conviction sealed.

Following a brief hearing, the district court issued a written order denying Finley's petition. The district court concluded that, because Finley was convicted of new crimes within the seven-year waiting period required to invoke the district court's discretion to seal a non-felony battery domestic violence conviction, the 2004 conviction was ineligible for sealing. The district court further concluded that Finley had not satisfied the requisite waiting periods for the new offenses and therefore also failed to invoke the court's discretion to seal those convictions. Finley now appeals.

ANALYSIS

On appeal, Finley primarily argues that the district court's interpretation of the governing statutes[2] produced an absurd result and rendered a particular statute (NRS 179.2595) meaningless. Specifically, he argues that the district court should have considered whether he was eligible to have his records sealed by considering each of his convictions individually in reverse chronological order (i.e.,

[2]Some of the relevant statutes in this case—NRS 179.245, .2595, .285, and .295—were recently amended. *See* 2019 Nev. Stat., ch. 77, § 2, at 411; 2019 Nev. Stat., ch. 256, §§ 1.5, 1.7, at 1460-61; 2019 Nev. Stat., ch. 633, §§ 37, 40-41, at 4405, 4408-09. We cite the current versions herein. We note—and the State concedes—that the district court applied the incorrect version of NRS 179.245 when considering Finley's petition as to his felony convictions; it applied the 2015 version of the statute even though the Legislature amended it in 2017 in a manner that impacts whether Finley was eligible to petition to have certain records sealed, *see* 2017 Nev. Stat., ch. 378, § 7, at 2413 (decreasing the waiting period for crimes of violence from 15 years to 10 years), and Finley filed his petition in 2018. The district court concluded that, because Finley was not discharged from probation for his December 2004 felonies until December 2007, he was not entitled to petition to have those records sealed until December 2022 (15 years later). However, Finley filed his petition following the requisite 10-year period, and thus, the district court should have considered—and must consider on remand—whether to seal Finley's December 2004 felonies.

it should have started with his most recent conviction, determined whether to seal that record, and if so, proceeded to evaluate the next most recent conviction). Finley argues that this is so because under NRS 179.285, once a record is sealed, all proceedings recounted in that record are deemed never to have occurred, meaning that a district court working in reverse chronological order could not consider those proceedings (if sealed) when determining whether a petitioner is eligible to have an earlier record sealed. Finley argues that he could have achieved this result by incrementally filing multiple petitions in each separate court in which he was convicted in reverse chronological order, and that the district court's failure to consider his convictions in that order defeated the purpose of NRS 179.2595, which allows petitioners to file, in one district court, one omnibus petition for all of the records they want sealed.

Because resolving this issue requires interpreting Nevada's criminal record sealing statutes, and because the parties overlooked part of the statutory scheme, we take this opportunity to clarify the statutes and the broad discretion that they provide courts tasked with deciding whether to seal criminal records.

Standard of review

This court generally reviews a district court's decision whether to seal criminal records for an abuse of discretion. *See State v. Cavaricci*, 108 Nev. 411, 412, 834 P.2d 406, 407 (1992). However, we review a district court's interpretation of statutes de novo. *State, Dep't of Motor Vehicles & Pub. Safety v. Frangul*, 110 Nev. 46, 48-51, 867 P.2d 397, 398-400 (1994) (interpreting criminal record sealing statutes). When interpreting a statute, we will not look beyond its plain language if it is "clear on its face." *Pawlik v. Deng*, 134 Nev. 83, 85, 412 P.3d 68, 71 (2018) (quotation marks omitted). Moreover, when possible, we must interpret a statute in harmony with other statutes "to avoid unreasonable or absurd results." *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). "If a statute is ambiguous, meaning that it is susceptible to differing reasonable interpretations, [it] should be construed consistently with what reason and public policy would indicate the Legislature intended." *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006) (quotation marks omitted).

Nevada's criminal record sealing statutes

The Nevada Legislature has expressly "declare[d] that the public policy of this State is to favor the giving of second chances to offenders who are rehabilitated and the sealing of the records of such persons in accordance with NRS 179.2405 to 179.301, inclusive." NRS 179.2405. In implementing its stated policy, the Legislature crafted a statute that distinguishes between a petitioner's "eligibil-

ity" to seek sealing and the district court's "discretion" to decide whether to seal or not. The process involves multiple steps. A court must first determine whether a petitioner statutorily qualifies to file a petition seeking sealing. If so, it then must consider whether the particular convictions targeted by the petition are statutorily eligible to be sealed. Only if both of these are met does the district court then proceed to the final step, which is to exercise its discretion to decide whether sealing is appropriate. In no instance does the statute ever require any court to seal any conviction; under the statute, a court always possesses the discretion to refuse to seal any conviction even when it is eligible to be sealed. It all works as follows.

The first test of eligibility is timeliness: a petition must be timely and not premature. A petitioner may only file a petition to seal a particular conviction if a certain number of years has passed from the date of his or her release from actual custody, the date of his or her discharge from parole or probation, or the date when he or she is no longer under a suspended sentence, whichever occurs latest. NRS 179.245(1). The statute sets forth different waiting periods depending upon the class or severity of the crime, with category A felonies and certain violent crimes being assigned the longest period (ten years), and certain non-violent misdemeanors being assigned the shortest period (as short as one year). *Id.* NRS 179.245(6) also identifies certain types of crimes that are never eligible for sealing no matter how much time has passed, including such crimes as sexual assault, DUI involving death, and crimes against children. As relevant to Finley, an individual convicted of non-felony battery constituting domestic violence must wait seven years. NRS 179.245(1)(e). If not enough time has elapsed, then the person is not eligible to request that the conviction be sealed, and the inquiry ends there and the petition must be dismissed.

If enough time has elapsed and the petition is timely, then the eligibility inquiry proceeds to the next step. NRS 179.245(2) sets forth the contents that a petitioner must include in the petition. The petitioner must include his or her "current, verified records received from the Central Repository for Nevada Records of Criminal History." NRS 179.245(2)(a). The petitioner must also include a list of entities or other custodians of records that he or she reasonably knows to possess records of the conviction he or she is seeking to have sealed, as well as information that "accurately and completely identifies the records to be sealed," including the petitioner's date of birth, the specific conviction to which the records sought to be sealed pertain, and the date of arrest for that specific conviction. NRS 179.245(2)(c)-(d).

NRS 179.245(3) and (4) then require that the court notify the law enforcement agency that arrested the petitioner for the relevant crime, as well as the attorneys that prosecuted the petitioner (including the Attorney General). The prosecuting attorney may stip-

ulate to the sealing of the records, in which case the court may seal the records pursuant to NRS 179.245(5) without a hearing. NRS 179.245(4). If the prosecuting entity does not stipulate to the petition, then the court "must" conduct a hearing on the matter. *Id.* At the hearing, the court analyzes the contents of the petition and examines the relevant convictions in order to determine whether or not the petitioner was subsequently convicted of another offense within the prescribed waiting period that would disqualify a conviction from being sealed. NRS 179.245(5). If the court finds that the person was convicted of other crimes (other than minor moving or standing traffic violations) within the waiting period, a conviction cannot be sealed; it fails the test of eligibility. *See id.*; *Cavaricci*, 108 Nev. at 412, 834 P.2d at 407 (concluding that a petitioner had "failed to invoke the district court's discretionary power [to order a record sealed]" where he failed to satisfy the relevant waiting period in a prior version of NRS 179.245).

If, and only if, no such subsequent convictions occurred during the waiting period, then the discretionary phase of the analysis kicks in, and "the court may order sealed all records of the [corresponding] conviction." NRS 179.245(5). It is not, however, required to. If the court exercises its discretion to order a record sealed,

> [a]ll proceedings recounted in the record are *deemed never to have occurred*, and the person to whom the order pertains may properly answer accordingly to any inquiry, including, without limitation, an inquiry relating to an application for employment, concerning the arrest, conviction, dismissal or acquittal and the events and proceedings relating to the arrest, conviction, dismissal or acquittal.

NRS 179.285(1)(a) (emphasis added).

Finally, as relevant here, "[i]f a person wishes to have more than one record sealed and would otherwise need to file a petition in more than one court," that person may instead "file a petition in district court for the sealing of all such records." NRS 179.2595(1). This includes "records in the justice or municipal courts." NRS 179.2595(2).

These are the procedures set forth in the statutes for determining whether a court may seal a conviction. The next question at stake in this appeal relates to the legal consequences that follow once a conviction is sealed.

Nevada courts have discretion to consider sealed convictions for purposes of determining whether a prior conviction is eligible to be sealed

Finley argues that, if his most recent conviction was sealed, that sealing would make his earlier convictions eligible for sealing, and the district court should then unroll his prior convictions in reverse

chronological order all the way to the beginning of his criminal record. But Finley overstates the legal effect of sealing.

The Nevada Supreme Court has remarked that, once a record is sealed, "all proceedings in the record and all events and proceedings relating to the [conviction] are deemed never to have occurred." *Frangul*, 110 Nev. at 51, 867 P.2d at 399 (quotation marks omitted). This applies to the sealing process itself. *See* NRS 179.245(7) (providing that if the court grants a petition to seal records pursuant to that section, it may also seal "all records of the civil proceeding in which the records were sealed"). Moreover, the court has held that the purpose of Nevada's record-sealing statutes is "to remove ex-convicts' criminal records from public scrutiny and to allow convicted persons to lawfully advise prospective employers that they have had no criminal arrests and convictions with respect to the sealed events." *Baliotis v. Clark Cty.*, 102 Nev. 568, 570, 729 P.2d 1338, 1340 (1986); *see also Zana v. State*, 125 Nev. 541, 545, 216 P.3d 244, 247 (2009) ("[S]ealing orders are intended to permit individuals previously involved with the criminal justice system to pursue law-abiding citizenship unencumbered by records of past transgressions.").

But this principle is not quite as broad as it may appear. For example, the court has held that it applies only to events related to criminal proceedings, not to the underlying conduct giving rise to the proceedings or separate civil proceedings stemming from that conduct.[3] *See Frangul*, 110 Nev. at 50-51, 867 P.2d at 399-400. "[The sealing statute] erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others." *Zana*, 125 Nev. at 546, 216 P.3d at 247. In *Baliotis*, the court noted that "[t]here is no indication that the statute[s] w[ere] intended to require prospective employers or licensing authorities to disregard information concerning an applicant that is known independently of the sealed records." 102 Nev. at 570, 729 P.2d at 1340. Accordingly, the court held that "persons who are aware of an individual's criminal record" are not required "to disregard independent facts known to them," even if the individual is otherwise authorized to disavow those facts. *Id.* at 571, 729 P.2d at 1340. However, where proof of the conviction itself is at issue—at least in the context of impeaching a witness at trial with a prior conviction—the court concluded that a sealed conviction is deemed never to have occurred and thus will not suffice as proof of that conviction, even though the State may still possess independent

[3]Finley argues that the statute should be construed in his favor under the rule of lenity, but the rule of lenity is "a rule of construction that demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor." *State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011) (alterations and internal quotation marks omitted). A petition to seal records is a civil proceeding, not a criminal prosecution, and furthermore the statutes are not ambiguous so no rule of construction is needed to interpret them.

records of it. *Yllas v. State*, 112 Nev. 863, 866-67, 920 P.2d 1003, 1005 (1996).

Here, Finley argues that his most recent conviction may be sealed because the requisite amount of time has passed. He then contends that once that conviction is sealed, it is deemed never to have occurred, and thus a district court may not consider that conviction when determining whether another previous conviction may also be sealed. He argues that once the latest conviction is sealed, that makes the preceding conviction eligible to be sealed even if it otherwise would not have been subject to sealing because of the later conviction. From there, he contends that once that later conviction is sealed, that makes the next preceding one eligible to be sealed, and so on, and so on, backwards in time. Finley avers that he could have effectuated this process by filing a petition to seal in each court in which he was convicted going back in time so that he could one-by-one remove each conviction from the next court's consideration of whether he was eligible to file a petition to seal.

Though seemingly logical, the flaw in Finley's argument lies in a portion of the statute that neither he nor the other parties cited either below or on appeal to this court. NRS 179.295 generally governs the extent to which courts may permit the inspection of sealed records in certain circumstances. NRS 179.295(4) states that "[t]his section does not prohibit a court from considering a conviction for which records have been sealed pursuant to . . . [NRS] 179.245 . . . [or] 179.2595 . . . in determining whether to grant a [criminal record sealing] petition . . . for a conviction of another offense." Thus, this statute clarifies that even though a conviction is normally deemed nonexistent for most purposes once sealed, the court can still consider it for purposes of determining whether other previous convictions may be sealed. In other words, the sealing of the latest conviction in time does not necessarily render a previous conviction eligible to be sealed just because the latest conviction has been removed from the record. Because NRS 179.295(4) utilizes discretionary language (i.e., the court is "not prohibit[ed]" from considering a sealed conviction), a court may use the sealing of a later conviction in order to seal an earlier conviction, but it is not required to do so.

Consequently, a court possesses discretion to use the sealing of later convictions in order to go backwards in time and seal prior convictions that otherwise could not have been eligible to be sealed, but it may also exercise its discretion to refuse to seal prior convictions based upon convictions it just sealed. This discretion is emphasized in two different places in the statutory scheme: in NRS 179.295(4), which permits ("does not prohibit") a court to consider a sealed conviction in order to determine whether another conviction is subject to sealing; and also in NRS 179.245(5), under which even "[i]f the court finds" there are no convictions within the applicable period, including other convictions that may have been sealed, the court "may" (or may not) order the conviction sealed. Accord-

ingly, a court may do what Finley wants, which is to unroll and seal every conviction in reverse chronological order all the way back to the first conviction, or it may choose not to do so by exercising the discretion granted under either statute, or both.

We therefore conclude the district court erred by finding that all of Finley's convictions were ineligible to be sealed, and we reverse and remand this matter to the district court to conduct the analysis set forth above. It appears from the existing record that Finley satisfied the requisite waiting periods to file a sealing petition with respect to all of the listed convictions, as more than ten years have passed since the relevant date of release from those convictions, and Finley might not have been convicted of any offense following his release from probation for his most recent convictions, including his 2004 battery domestic violence conviction (with one significant caveat).[4] They thus appear eligible for sealing. If the district court finds this to be true as a factual matter, the district court must then consider whether to exercise its discretion to seal Finley's most recent convictions. Should the district court determine that sealing is warranted for those convictions, it may then exercise its discretion whether or not to consider those sealed convictions when determining whether Finley has satisfied the requisite waiting periods for other prior convictions.

CONCLUSION

Because the parties did not cite all of the proper statutes governing Finley's petition and the district court did not apply all of the controlling statutes, the court incorrectly concluded that all of Finley's convictions were ineligible for sealing. Accordingly, we reverse the district court's order denying Finley's petition and remand for further proceedings consistent with this opinion.

Gibbons, C.J., and Bulla, J., concur.

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[4]In its briefing, the City suggests for the first time on appeal that Finley was convicted of offenses in other states during the requisite waiting periods, thereby rendering some of his convictions ineligible for sealing regardless of what happens to his latest conviction in Nevada. Because these were mentioned for the first time on appeal, nothing about them appears in the record below and the district court never considered them. Whether those convictions were accurately described or not presents a factual question that we cannot resolve on appeal, and thus the district court must resolve those factual issues in the first instance on remand and determine the extent to which the out-of-state events might affect the disposition of Finley's petition. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299-301, 279 P.3d 166, 172-73 (2012) (noting that "[a]n appellate court is not particularly well-suited to make factual determinations in the first instance" and remanding for an evidentiary hearing before the district court).

JEFFREY BENKO, a Nevada Resident; CAMILO MARTINEZ, a Nevada Resident; ANA MARTINEZ, a Nevada Resident; FRANK SCINTA, a Nevada Resident; JACQUELINE SCINTA, a Nevada Resident; SUSAN HJORTH, a Nevada Resident; RAYMOND SANSOTA, an Ohio Resident; FRANCINE SANSOTA, an Ohio Resident; SANDRA KUHN, a Nevada Resident; JESUS GOMEZ, a Nevada Resident; SILVIA GOMEZ, a Nevada Resident; DONNA HERRERA, a Nevada Resident; JESSE HENNIGAN, a Nevada Resident; SUSAN KALLEN, a Nevada Resident; ROBERT MANDARICH, a Nevada Resident; JAMES NICO, a Nevada Resident; PATRICIA TAGLIAMONTE, a Nevada Resident; and BIJAN LAGHAEI, Appellants, *v.* QUALITY LOAN SERVICE CORPORATION, a California Corporation; MTC FINANCIAL INC., dba TRUSTEE CORPS, a California Corporation; MERIDIAN FORECLOSURE SERVICE, a California and Nevada Corporation, dba MTDS, INC., dba MERIDIAN TRUST DEED SERVICE; NATIONAL DEFAULT SERVICING CORPORATION, an Arizona Corporation; and CALIFORNIA RECONVEYANCE COMPANY, a California Corporation, Respondents.

No. 73484

December 26, 2019 454 P.3d 1263

Appeal from a district court order dismissing the case for failure to state a claim. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed.

[Rehearing denied February 21, 2020]

Law Offices of Nicholas A. Boylan, APC, and *Nicholas A. Boylan*, San Diego, California, for Appellants.

Bryan Cave Leighton Paisner LLP and *Lawrence G. Scarborough, Jessica R. Maziarz*, and *Kathryn E. Bettini*, Phoenix, Arizona; *Smith Larsen & Wixom* and *Kent F. Larsen* and *Katie M. Weber*, Las Vegas, for Respondent California Reconveyance Company.

Kolesar & Leatham, Chtd., and *Michael R. Brooks*, Las Vegas; *Burke, Williams & Sorensen, LLP*, and *Richard J. Reynolds* and *Allan E. Ceran*, Santa Ana, California, for Respondent MTC Financial Inc.

McCarthy & Holthus LLP and *Kristin A. Schuler-Hintz*, Las Vegas, for Respondent Quality Loan Service Corporation.

Tiffany & Bosco, P.A., and *Jason C. Kolbe* and *Kevin S. Soderstrom*, Las Vegas, for Respondent National Default Servicing Corporation.

Before the Supreme Court, EN BANC.

OPINION

By the Court, HARDESTY, J.:

NRS Chapter 649 governs agencies engaged in debt collection in Nevada, while NRS Chapter 107 governs the deed of trust system and the nonjudicial foreclosure process. In this appeal, we determine whether trustees who exercise a power of sale under a deed of trust pursuant to NRS Chapter 107 are engaging in collection activities under NRS Chapter 649, such that they must be licensed under that chapter.[1]

Appellants, Jeffrey Benko and 18 other individuals (collectively referred to as Benko), brought a putative class action alleging that respondents, all of whom are current or former NRS Chapter 107 trustees, engaged in unlicensed debt collection agency activities by pursuing nonjudicial foreclosures on their homes. The district court dismissed the complaint, finding that the plain language of NRS Chapter 107 authorizes the actions allegedly performed by respondents. We agree.

While deed of trust trustees engage in activities that would otherwise meet the definition of a debt collection agency under NRS Chapter 649, the comprehensive scheme of NRS Chapter 107 demonstrates that the Legislature intended to exempt deed of trust trustees from NRS Chapter 649 licensing requirements. Because Benko's allegations concern conduct that falls within the scope of NRS Chapter 107, we conclude that respondents were not required to be licensed under NRS Chapter 649. Therefore, we affirm the district court's order of dismissal.

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[1]We note at the outset that the allegations set forth in the operative complaint occurred between 2008 and 2011. As we explain within this opinion, the Legislature has since addressed the question of whether trustees who exercise a power of sale under a deed of trust pursuant to NRS Chapter 107 must be licensed pursuant to NRS Chapter 649 with the enactment of NRS 107.028 in 2011. 2011 Nev. Stat., ch. 311, §§ 5.8, 5.9 at 1746-48. Since the allegations set forth in the operative complaint predate the enactment of NRS 107.028, this opinion concerns the governing statutory law applicable during that time period. We further note that any amendments made to certain statutes relied on in this opinion between 2008 and 2011 do not alter our analysis, nor do the parties argue as much.

FACTS AND PROCEDURAL HISTORY

Benko filed a putative class action against respondents Quality Loan Service Corporation; MTC Financial, Inc.; Meridian Foreclosure Services;[2] National Default Servicing Corporation; and California Reconveyance Company (collectively referred to as respondents), alleging claims of statutory consumer fraud under NRS 41.600, based on violations of NRS 649.075 and NRS 649.171, and unjust enrichment. Benko's statutory fraud claim relied on allegations that respondents acted as collection agencies when they pursued payment of claims owed or due, or asserted to be owed or due, to the lenders, and they did not hold the requisite license to act as a collection agency. Based on respondents' alleged illegal collection practices, Benko further claimed that respondents were unjustly enriched by substantial payments. Respondents sought to dismiss the claims, maintaining that they were not required to be licensed as collection agencies in their capacity as trustees under NRS Chapter 107.

The district court dismissed the case as a matter of law and directed judgment in favor of respondents because "[t]rustees are subject to NRS Chapter 107 and do not need to be licensed as collection agencies" and the "enforcement of security interests in real property does not constitute doing business in the State of Nevada." The district court found that NRS Chapter 107 empowers deed of trust trustees to contract and perform duties to accomplish nonjudicial foreclosure, that NRS Chapter 649 intends to exclude deed of trust trustees engaged in nonjudicial foreclosure from its licensing requirements, that enforcing a security interest in real property is not claim collection under NRS 649.010, and that, because enforcing a security interest does not constitute doing business, trustees do not need to be licensed.

Benko appeals, arguing that respondents engaged in activities under NRS Chapter 649 and were therefore not exempt from licensure.[3]

DISCUSSION

The issue before us is whether Benko raised viable causes of action because respondents, as deed of trust trustees, were required to

[2]Of note, Meridian Foreclosure Services has not entered an appearance in this appeal.

[3]Benko also argues that the deed of trust trustees breached their fiduciary duty. However, Benko never asserted this as a cause of action in the complaint. Therefore, we conclude this issue was not preserved for appeal and do not address it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that failure to raise a point in the district court deems it waived and prevents this court from considering it on appeal).

be licensed under NRS Chapter 649 in order to conduct nonjudicial foreclosures pursuant to NRS Chapter 107. We review an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). We presume that all alleged facts in the complaint are true and draw all inferences in favor of the complainant. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* All legal conclusions in making an NRCP 12(b)(5) ruling are reviewed de novo. *Id.*

The comprehensive scheme of NRS Chapter 107 demonstrates that the Legislature intended to exempt deed of trust trustees from NRS Chapter 649 licensing requirements

Benko argues that nonjudicial foreclosure of a deed of trust falls within the definition of debt collection under NRS Chapter 649 and, thus, the district court erred in finding that respondents were exempt from NRS Chapter 649 licensure.

"When the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning." *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007). When two statutes conflict, we attempt to read the statutes in a way that harmonizes them. *State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 368, 294 P.3d 1223, 1227 (2012); *see also Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 202-03 (2005) ("When two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, an ambiguity is created and we will attempt to reconcile the statutes.").

As an initial matter, we agree with Benko that nonjudicial foreclosure of a deed of trust falls within the meaning of debt collection under NRS Chapter 649. Though the district court erroneously determined otherwise, the court did not have the benefit of the recent United States Supreme Court decision in *Obduskey v. McCarthy & Holthus LLP*, ___ U.S. ___, ___, 139 S. Ct. 1029, 1036-38 (2019). In *Obduskey*, the Court specifically concluded that a law firm hired by the creditor to engage in nonjudicial foreclosure would satisfy the primary definition of a debt collector under the federal Fair Debt Collection Practices Act (FDCPA) as a business that "regularly collects or attempts to collect, directly or indirectly, debts," were it not for additional statutory language limiting the scope of the primary definition. ___ U.S. at ___, ___, 139 S. Ct. at 1033, 1036-37 (quoting 15 U.S.C. § 1692a(6) (2012)). As the Court explained, "a home loan is an obligation to pay money, and the purpose of a mortgage is to secure that obligation. Foreclosure, in turn, is the process in which property securing a mortgage is sold to pay off the loan bal-

ance due." *Id.* at ___, 139 S. Ct. at 1036 (internal citation and quotation marks omitted). Concluding that "foreclosure is a means of collecting a debt," the Court noted that a business pursuing nonjudicial foreclosures fell within the FDCPA's primary definition of a debt collector, as there is no requirement that the payment of the debt come from the debtor, only that the debt collector seek collection of a debt "owed or due to another," "directly or indirectly." *Id*. (internal quotation marks omitted); 15 U.S.C. § 1692a(6) (2012).

NRS Chapter 649 similarly defines a debt "[c]ollection agency" as "all persons engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to another." NRS 649.020(1). "Claim" is defined as "any obligation for the payment of money or its equivalent that is past due." NRS 649.010.

Like the FDCPA, NRS 649.020(1) includes in its definition those who indirectly attempt to collect past due payments, which would encompass respondents. NRS 649.020(1) also does not require that the collection of debt come from the debtor, only that a collection agency seek "payment of a claim owed or due." "So, even if nonjudicial foreclosure were not a *direct* attempt to collect a debt, because it aims to collect on a consumer's obligation by way of enforcing a security interest, it would be an *indirect* attempt to collect a debt." *Obduskey*, ___ U.S. at ___, 139 S. Ct. at 1036-37. Accordingly, in light of *Obduskey,* the district court erred in concluding that nonjudicial foreclosures do not amount to seeking payment of a claim, and the parties' reliance on caselaw to the contrary is misplaced.[4]

Nevertheless, we conclude that businesses engaged in nonjudicial foreclosures in Nevada do not need to be licensed as debt collectors under NRS Chapter 649 because NRS Chapter 107's comprehensive statutory scheme specifically governs nonjudicial foreclosures and thus trumps the more generalized application of NRS Chapter 649 and because it is the most logical way to harmonize the conflicting

[4]The Supreme Court's conclusion that a business enforcing a security interest through nonjudicial foreclosure is a debt collector runs counter to lower federal court caselaw that is cited by the parties and was relied on by the district court. *See Ho v. ReconTrust Co., NA*, 858 F.3d 568, 572 (9th Cir. 2017) ("[f]ollowing a trustee's sale, the trustee collects money from the home's purchaser, not from the original borrower," and it is therefore not considered debt collection); *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) (stating that "[f]oreclosing on a trust deed is distinct from the collection of the obligation to pay money" because the lender was "foreclosing its interest in the property," and the "[p]ayment of funds [was] not the object of the foreclosure action"); *see also Erickson v. PNC Mortg.*, No. 3:10-CV-0678-LRH-VPC, 2011 WL 1626582, at *2 (D. Nev. Apr. 27, 2011) ("It is well established that non judicial foreclosures are not an attempt to collect a debt under the Fair Debt Collection Practice Act and similar state statutes.").

provisions of NRS Chapters 649 and 107. To hold otherwise would permit two distinct and conflicting schemes to regulate the nonjudicial foreclosure process. This cannot logically be so.[5]

First, the Legislature created a comprehensive statutory scheme governing a trustee's role in nonjudicial foreclosures. A deed of trust operates as a three-party security interest, whereby the trustee holds legal title to the borrower's property as security for the obligations owed to the lender. *See* NRS 107.020; NRS 107.028; NRS 107.080. The Legislature conferred the power of sale upon trustees. NRS 107.080 (2007). Specifically, when a borrower defaults, the trustee may pursue nonjudicial foreclosure pursuant to the procedures set forth in NRS Chapter 107. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 513, 286 P.3d 249, 254-55 (2012); NRS 107.080 (2007). NRS Chapter 107 explicitly prohibits a trustee from executing its power of sale before it has complied with "certain statutory requirements." *Edelstein*, 128 Nev. at 513, 286 P.3d at 254-55; NRS 107.080 (2007). In addition to specifying the things required of deed of trust trustees, NRS Chapter 107 also defines the consequences of such trustees' failure to comply. For example, NRS 107.080(5) (2007) provides that a sale made pursuant to NRS Chapter 107 may be declared void if the trustee did not substantially comply with the provisions of the chapter. *See also* NRS 107.077(3), (9) (1999) (detailing that trustees are subject to civil and criminal liability for failure to record a reconveyance of the deed of trust).

In contrast to the specific scheme set forth in NRS Chapter 107, NRS Chapter 649 empowers the Commissioner of the Division of Financial Institutions (FID) to regulate collection agencies in general. *See* NRS 232.510(2)(b) (2007) (establishing FID); NRS 649.051 (authorizing the commissioner to enforce NRS Chapter 649); NRS 649.053 (empowering the commissioner to adopt regulations necessary to carry out the provisions of NRS Chapter 649). Because NRS 107.080 (2007) specifically identifies the duties of a trustee engaged in nonjudicial foreclosure, while NRS Chapter 649 generally governs agencies engaged in debt collection in Nevada, we conclude the Legislature intended that trustees may engage in nonjudicial foreclosures pursuant to NRS Chapter 107 without licensure

[5]Respondents additionally argue that the Legislature occupied the field of nonjudicial foreclosure via NRS Chapter 107 and thus preempted NRS Chapter 649 from applying to persons acting in the capacity of trustee under a deed of trust. We reject respondents' argument because preemption applies to conflicts between federal, state, or local government control—not to conflicting terms within Nevada statutes. *See Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) ("The preemption doctrine . . . provides that federal law supersedes conflicting state law . . . ."); *City of Reno v. Saibini*, 83 Nev. 315, 319, 429 P.2d 559, 561 (1967) (discussing the Legislature's power to preempt local law or otherwise delegate authority to local municipalities).

under NRS 649.020. *See State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 129 Nev. 775, 778, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute." (internal quotations marks omitted)); *cf. Obduskey*, ___ U.S. at ___, 139 S. Ct. at 1039 (stating that statutory "exclusion of the enforcement of security interests must also exclude the legal means required to do so" (internal quotation marks omitted)).

Second, the conflicting provisions of NRS Chapters 107 and 649 further support our conclusion that businesses engaged in nonjudicial foreclosure do not need to be licensed as debt collectors in Nevada. NRS Chapter 107 proscribes a trustee from executing its power of sale until it has complied with the statutory requirements. *See* NRS 107.080 (2007); *Edelstein*, 128 Nev. at 513, 286 P.3d at 254-55. Among these requirements, trustees must first execute a notice of breach and an election to sell the property to satisfy the obligation and must include in the notice of sale a litany of information that puts the property owner on notice of the amount owed. NRS 107.080(2)(b), (3) (2007). Prior to exercising its power of sale on an owner-occupied residence, a trustee must also provide to the title holder of record the contact information of someone with authority to negotiate a loan modification and of a local housing counseling agency approved by the United States Department of Housing and Urban Development, as well as a form giving the option to enter into or waive mediation. NRS 107.086(2) (2009).

In contrast, NRS 649.375 prohibits a number of actions that traditionally accompany nonjudicial foreclosure—for example, advertising the sale of a claim, publishing a list of debtors, or offering counseling in conjunction with debt collection. *See* NRS 649.375(6)-(8). Because the trustee is obligated under NRS Chapter 107 to offer mediation and publish and post information about the sale, which necessarily reveals the identity of the debtor, before foreclosing, yet would be prohibited from taking such actions under NRS Chapter 649 as a debt collector, there is a clear conflict between the statutes. Reading these statutory provisions in harmony, we conclude that the Legislature intended to exempt deed of trust trustees from qualifying as debt collectors so long as they are acting within their power as trustees under NRS 107.080 (2007). *See Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 203 (2005) ("[W]e will attempt to read [conflicting] statutory provisions in harmony, provided that this interpretation does not violate legislative intent.").

Moreover, NRS 649.020's definition of "collection agency" further demonstrates the Legislature's intent to exclude deed of trust trustees from NRS Chapter 649's licensing requirements. The only reference to nonjudicial foreclosure in NRS Chapter 649 concerns a "community manager" foreclosing on an assessment lien in the common-interest community and condominium hotel contexts.

NRS 649.020(3). Based on this singular reference to nonjudicial foreclosure, we can infer that the Legislature's exclusion of deed of trust trustees from NRS Chapter 649's licensure requirements was intentional. *See In re Estate of W.R. Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006) (recognizing "the fundamental rule of statutory construction that [t]he mention of one thing implies the exclusion of another" (alteration in original) (internal quotation marks omitted)).[6]

The district court correctly granted respondents' motion to dismiss for failure to state a claim because all of Benko's allegations fall within the scope of NRS Chapter 107

Having concluded that deed of trust trustees need not qualify as debt collectors so long as they are acting within their power as trustees under NRS Chapter 107, we now turn to the allegations set forth in the complaint. We determine that each of Benko's allegations falls within the scope of NRS Chapter 107.[7]

First, Benko alleges that respondents pursued claim collection through the reinstatement of defaulted debts, forbearance agreements for the defaulted debts, or loan modification agreements, or otherwise requested or directed payment of a defaulted claim. A trustee must communicate the amount of the defaulted debt and all fees imposed by the power of sale. NRS 107.080(2)(b), (3) (2007). Thus, NRS Chapter 107 contemplates that the trustee—as both the common agent of the lender and the borrower, and the person conducting the foreclosure sale—would collect money from the bor-

[6]The parties discuss at length, and the district court mentioned, NRS 107.028, which provides ten categories of those who may serve as a nonjudicial foreclosure trustee, including a collection agency. Respondents argue that NRS 107.028 does not mandate that a deed of trust trustee be licensed as a collection agency because, by including a collection agency as one of the ten types of qualified trustees, the Legislature acknowledged that a trustee need not be licensed pursuant to NRS Chapter 649. As the parties note, NRS 107.028 did not become effective until October 2011. 2011 Nev. Stat., ch. 311, §§ 5.8, 5.9 at 1746-48. In the third amended complaint, Benko alleged that notices of default on the various properties at issue were filed between 2008 and 2011. As such, we do not rely on NRS 107.028 to reach our conclusion that the Legislature has not required that deed of trust trustees qualify as debt collectors. However, we note that this provision supports this conclusion because requiring a trustee to possess a collection agency license would render the remaining credentialed categories meaningless. *See Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363-64, 325 P.3d 1276, 1279 (2014) (stating that this court avoids interpretations that would render words or phrases in a statute superfluous or meaningless).

[7]The allegations in the complaint were plaintiff-specific, so the actual complaint has various allegations by different plaintiffs. However, because it is a putative class action—and in the interest of consistency—any specific plaintiff's allegation is said here to have been alleged by Benko.

rower or otherwise discuss the foreclosure status of the property and related arrangements. Such activity does not amount to claim collection.

Second, Benko asserts that respondents forwarded monies collected from defaulted claims to the lender. NRS 107.030(7) (2005) permits a deed of trust to adopt by reference a provision empowering a trustee to apply the proceeds from a foreclosure sale to the defaulted debts. Accordingly, NRS Chapter 107 expressly contemplates such activity.

Third, Benko alleges that respondents acquired the security for the defaulted debt to pursue claim collection. While NRS 107.081(1) (2005) prohibits the trustee, as the agent conducting the sale, from having any interest in the property or in others purchasing the property, NRS 107.080(1) (2007) confers the power of sale upon the trustee. Thus, to the extent Benko alleges that respondents collected a claim by conducting the sale of the property, such act is within the statutory power of the trustee.

Fourth, Benko maintains that debt collection includes the basic foreclosure process of filing default notices. For the reasons stated above, we disagree that deed of trust trustees engaged in nonjudicial foreclosure need to be licensed pursuant to NRS Chapter 649. Moreover, NRS 107.080 (2007) explicitly empowers a trustee to initiate and complete the nonjudicial foreclosure process. NRS 107.080(1) (2007) ("[A] power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which the transfer is security."). Thus, we conclude that Benko's allegations fall within the scope of NRS Chapter 107 such that NRS Chapter 649 does not apply in this instance.

CONCLUSION

While deed of trust trustees engage in activities that would otherwise meet the definition of a collection agency under NRS Chapter 649, the comprehensive statutory scheme of NRS Chapter 107 demonstrates that the Nevada Legislature did not intend that deed of trust trustees be subjected to NRS Chapter 649 licensing requirements when they are engaged in nonjudicial foreclosures. Because NRS Chapter 107's comprehensive statutory scheme specifically governs nonjudicial foreclosure, preventing the more generalized application of NRS Chapter 649, and because it is the most logical way to harmonize the conflicting provisions of NRS Chapters 649 and 107, we conclude that respondents were not required to be licensed under NRS Chapter 649. And because Benko's allegations fall within the bounds of NRS Chapter 107, we hold that Benko has not pleaded a cognizable cause of action. Thus, we affirm the district

court's order granting respondents' motion to dismiss for failure to state a claim.[8]

Gibbons, C.J., and Pickering, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

IVONNE CABRERA, aka YVONNE CABRERA, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 74341

December 26, 2019 454 P.3d 722

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, burglary while in possession of a deadly weapon, and two counts each of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Affirmed in part, reversed in part, and remanded.

Law Office of Patricia M. Erickson and *Patricia M. Erickson*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Marc P. DiGiacomo* and *Alexander G. Chen*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

Nevada law recognizes that a person should not be punished for a criminal act that was committed under duress. But there are limits to the defense. As codified in NRS 194.010(8), duress cannot be as-

[8]Because we conclude that trustees engaged in nonjudicial foreclosure do not need to be licensed as debt collectors, we do not reach the question of whether respondents were exempt from licensure under NRS 80.015. Neither do we address the claim for unjust enrichment. Further, we do not grant Benko leave to amend his complaint because it was waived. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that failure to raise a point in the district court renders it waived and prevents this court from considering it on appeal).

serted as a defense to a crime that "is punishable with death." We are asked to consider, for the first time, whether that limiting language can be interpreted to include crimes that are not punishable with death but require proof of intent to commit a crime that is punishable by death. Considering the statute's plain language, we conclude that it cannot be interpreted to limit the duress defense with respect to crimes that are not punishable with death regardless of the relationship between those crimes and another crime that is punishable with death. Accordingly, the district court did not err in precluding appellant Ivonne Cabrera from asserting duress as a defense to the crime of first-degree murder because that offense is punishable with death, but the court did err in precluding Cabrera from asserting duress as a defense to the other charged crimes, which were not punishable with death. Because we are not convinced the error was harmless, we reverse the judgment as to the convictions of attempted murder with the use of a deadly weapon, conspiracy to commit murder, and burglary while in possession of a deadly weapon and remand for further proceedings as to those charges. We otherwise affirm the judgment of conviction.

FACTS

A dispute between appellant Ivonne Cabrera and a group of her friends involving the return of a borrowed car ended with a shooting that left two people dead and two others injured. The deadly series of events started when Cabrera loaned her car to Eric Morales and the car was wrecked while Morales was driving it. Morales lent his car to Cabrera until her car could be fixed. Shortly thereafter, Morales began texting Cabrera asking for his car back. Not wanting to return the car, Cabrera hid it at a friend's house. Later that evening, Cabrera used Morales's car to pick up Jose Gonzales. Cabrera drove to the apartment where Morales lived with Melissa Marin, James Headrick, and Ashley Wantland. Armed with a gun, Gonzales entered the apartment through a bathroom window and opened the front door for Cabrera. Cabrera tricked Headrick into opening his bedroom door, where he and Wantland had been asleep. Gonzales entered the room and shot both Headrick and Wantland. Meanwhile, Cabrera knocked on Marin's bedroom door. When Morales opened the door, Gonzales entered and shot Morales and Marin while, according to Marin's trial testimony, Cabrera stood in the doorway. Morales and Headrick died.

Cabrera and Gonzales were charged with two counts each of murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon, conspiracy to commit murder, and burglary while in possession of a deadly weapon. The State sought the death penalty for the murder charges. Gonzales eventually pleaded guilty, but Cabrera proceeded to trial. Through pretrial motion practice, the

State learned that Cabrera intended to assert a duress defense—that Gonzales forced her to drive him to the apartment and help him gain access to the bedrooms once they were in the apartment. The State filed two motions in limine: one to preclude Cabrera's use of a duress defense to the murder charges and another to preclude her use of a duress defense to the other charges. Cabrera opposed the motions. The district court granted the State's motions in part, holding that NRS 194.010(8) precluded the duress defense to first-degree murder and to any of the charges that involved an underlying intent to commit murder. Then, on the eve of trial, the State amended the information to include two additional theories of burglary, to wit, burglary with intent to commit assault and/or battery. The district court indicated it would give the duress instruction on those two theories but also inform the jury that duress was not a defense to any of the other charges. In light of this ruling, Cabrera informed the court she would not argue duress as to any of the charges. Nonetheless, consistent with its pretrial ruling, the district court instructed the jury that duress was not a defense to the charges of murder, attempted murder, conspiracy to commit murder, and burglary based on the intent to commit murder but that it could be a defense to burglary based on the intent to commit assault and/or battery. During closing arguments, while Cabrera did not argue duress, the State highlighted it, indicating to the jury it was available as a defense to burglary, but Cabrera still chose not to use it.

The jury found Cabrera guilty of all charges but declined to impose a death sentence for either murder, instead selecting sentences of life in prison without the possibility of parole. The district court subsequently sentenced Cabrera to various terms of years for the other convictions. Cabrera now appeals from the judgment of conviction.

DISCUSSION

Cabrera argues that she should have been allowed to argue duress as a defense to all of the charges. We agree except as to the first-degree murder charges.

The duress defense is an ancient common law affirmative defense "which provides the defendant a legal excuse for the commission of the criminal act." *United States v. LaFleur*, 971 F.2d 200, 204 (9th Cir. 1991). Under the common law rule, duress is not a defense to murder. *Id.* at 205; *see also* 40 Am. Jur. 2d *Homicide* § 107 (2019) ("It is generally held that neither duress, coercion, nor compulsion are defenses to murder . . . ." (citations omitted)). A majority of states follow the common law rule. *See LaFleur*, 971 F.2d at 205; *see also* Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 San Diego L. Rev. 159, 172 (2006) ("The general

common-law rule is that duress cannot be a defense to murder. Most states follow this common-law rule, either by statute, or through case precedent." (citations omitted)).

Nevada codified the duress defense at NRS 194.010(8). Accordingly, whether Cabrera should have been allowed to assert duress as a defense to all of the charges presents a question of statutory interpretation. Our review therefore is de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). We begin with the statute's text. *See Douglas v. State*, 130 Nev. 285, 286, 327 P.3d 492, 493 (2014). "The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court can not go beyond the statute in determining legislative intent." *Lucero*, 127 Nev. at 95, 249 P.3d at 1228 (internal quotations omitted).

NRS 194.010(8) states the following:

> All persons are liable to punishment except those belonging to the following classes:
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> . . . .
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> 8. Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

The statute plainly states that duress is not a defense when "the crime is punishable with death."

Cabrera was charged with a crime that is punishable with death—two counts of first-degree murder. NRS 200.030(4)(a). She nonetheless argues that the duress defense should be available to her on the murder charges because she was merely an aider and abettor and did not actually pull the trigger. That distinction, however, makes no difference under NRS 194.010(8). One who aids and abets another person in committing a murder is liable for the murder as a principal. NRS 195.020; *Randolph v. State*, 117 Nev. 970, 978, 36 P.3d 424, 429-30 (2001) ("[P]ursuant to NRS 195.020, anyone who aids and abets in the commission of a crime is liable as a principal."). Thus, because first-degree murder is punishable with death and an aider and abettor is liable to the same extent as the principal, an aider and abettor to first-degree murder can be punished with death, thereby activating NRS 194.010(8)'s limitation on the duress defense. Accordingly, the district court did not err in precluding Cabrera from asserting a duress defense to the first-degree murder charges.[1]

[1]To the extent Cabrera suggests that she has a constitutional right to present a duress defense or that the limit on the duress defense set forth in NRS 194.010(8) is unconstitutional, we decline to reach those arguments because she has not cited relevant authority in support of her contention. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be

The district court, however, also precluded Cabrera from asserting a duress defense to the other charges she faced that were not punishable with death: conspiracy to commit murder, two counts of attempted murder with the use of a deadly weapon, and burglary while in possession of a deadly weapon. The State urges this court to hold that duress is not a defense to those crimes because each required proof that Cabrera intended to commit a murder. The State relies heavily on *State v. Mannering*, 75 P.3d 961 (Wash. 2003), in support of this proposition. In *Mannering*, the Supreme Court of Washington addressed its duress statute, which stated that the duress defense was unavailable for murder or manslaughter. *Id*. at 963-64. The *Mannering* court held that although the duress statute said the defense is only unavailable for murder or manslaughter, not applying the exclusion to attempted murder would result in an "absurd and strained interpretation[ ]" of the statute. *Id.* at 964. The court reasoned that attempted murder was not specifically listed in the criminal statutes, but rather the crime of attempted murder was derived from combining the murder and attempt statutes. *Id.*

NRS 194.010(8) is different from the Washington duress statute. Nevada's duress statute does not limit the defense by reference to certain crimes, like murder and manslaughter, but rather limits the defense by reference to the potential punishment (death). So, unlike in Washington, the fact that attempted murder is a combination of both the murder statute (NRS 200.030) and the attempt statute (NRS 193.330) is irrelevant to whether the duress defense is precluded under NRS 194.010(8). Instead, NRS 194.010(8) requires courts to look to whether the charge to which the defendant wants to assert a duress defense is punishable with death. If the crime is not punishable with death, the defendant can assert a duress defense. And because this court cannot go beyond the plain meaning of a statute when it is clear on its face, we cannot adopt the reasoning outlined in *Mannering* because it does not comport with NRS 194.010(8)'s plain language.[2] We hold that because duress may be raised as an affirmative defense to any crime not punishable with death, the district

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addressed by this court."). In particular, the cases she cites do not establish a constitutional right to present a duress defense that is precluded by state law. Nor does it appear that the district court excluded any evidence based on its interpretation of NRS 194.010(8).

[2]For the same reason, similar rationales articulated by other courts under their state statutes or the common law are not persuasive. *See Kee v. State*, 438 N.E.2d 993, 994 (Ind. 1982) (holding that attempted murder is a combination of the attempt and murder statutes, and therefore the duress defense is unavailable); *People v. Henderson*, 854 N.W.2d 234, 239 (Mich. Ct. App. 2014) ("Given that a defendant may not justify homicide with a claim of duress, it logically follows that a defendant cannot justify conduct intended to kill simply because he or she failed in the effort."); *State v. Finnell*, 688 P.2d 769, 774 (N.M. 1984) (adopting the common law duress rule for both murder and attempted murder charges).

court erred in precluding Cabrera from asserting duress as a defense to the charges other than burglary with the intent to commit assault and/or battery, for which she could not be punished with death, and then instructing the jury that duress is not a defense to those crimes.

The district court's instructional error is subject to harmless-error review. *See Wegner v. State*, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000) (applying harmless-error review to erroneous instruction on the elements of an offense), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006); *see also* NRS 178.598 (providing in general that trial errors are subject to harmless-error review); *accord State v. Reece*, 349 P.3d 712, 726 (Utah 2015) (observing that harmless-error review applies to "the complete failure to instruct the jury on an affirmative defense"). We decline to decide whether the standard for constitutional or nonconstitutional error applies here, *see Tavares v. State*, 117 Nev. 725, 732 & nn.14, 17, 30 P.3d 1128, 1132 & nn.14, 17 (2001) (discussing the different harmless-error standards), *modified in part on other grounds by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), because even under the less strict standard for nonconstitutional error, the instructional error here is not harmless.

Cabrera presented ample evidence to support a duress defense. Cabrera recounted her perspective of the events that took place on the night in question. She stated that Gonzales had just been released from prison. He jumped in her car abruptly without permission. She was scared. He pointed a gun at her, and she felt like she "had no choice." Based on this evidence, a properly instructed jury could have reasonably concluded that Cabrera acted under duress, and therefore, could not be held liable for the charges other than first-degree murder. Moreover, this error was compounded when the district court gave the instruction that duress could be a defense to burglary with the intent to commit assault and/or battery, but not the other charges. In its closing argument, the State highlighted the fact Cabrera did not use duress as a defense, thereby turning what would have been a shield for Cabrera, into a sword against her. We therefore conclude that the instructional error had a "substantial and injurious effect or influence in determining the jury's verdict," such that it was not harmless with respect to the charges other than first-degree murder.[3] *Id.* at 732, 30 P.3d at 1132 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (stating harmless-error standard for nonconstitutional errors).

[3]It is unclear whether the instructional error here would be harmless with respect to the first-degree murder convictions had the State obtained those convictions based solely on a felony-murder theory. We are not faced with that situation because the jury unanimously found that the murders were willful, deliberate, and premeditated.

We have considered Cabrera's remaining arguments and conclude that they are without merit or moot. Specifically, we conclude that Cabrera has not demonstrated that the district court violated her constitutional right to a speedy trial where Cabrera was responsible for part of the delay and did not demonstrate that the delay prejudiced her defense. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972) (identifying four factors that courts must weigh to determine if the right to a speedy trial has been violated); *see also Reed v. Farley*, 512 U.S. 339, 353 (1994) ("A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here."). Further, to the extent that the district court admitted but did not redact parts of the custodial interrogation, the court did not abuse its discretion because such statements were not hearsay, as they were not offered to prove the truth of the matter asserted. *See Deutscher v. State*, 95 Nev. 669, 683-84, 601 P.2d 407, 416-17 (1979) ("Hearsay evidence is evidence of a statement made other than by a witness while testifying at the hearing, which *is offered to prove the truth of the matter asserted*." (emphasis added)). Finally, Cabrera's argument regarding two of the aggravating circumstances is moot because she was not sentenced to death.

CONCLUSION

Because first-degree murder is punishable by death and duress is not a defense to any crime punishable by death, the district court did not err in precluding Cabrera from using duress as a defense to the murder charges. Thus, we affirm the judgment of conviction as to these charges. Conversely, because duress is a valid defense to any crime not punishable by death, we conclude the district court erred when it precluded Cabrera from using it as a defense to the attempted murder, conspiracy to commit murder, and burglary with the intent to commit murder charges. Furthermore, because we conclude this error was not harmless, we reverse the judgment of conviction as to these charges and remand for further proceedings consistent with this opinion.

Hardesty and Silver, JJ., concur.