NORMAN DAVID BELCHER, JR., Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 72325

June 4, 2020 464 P.3d 1013

Appeal from a judgment of conviction, pursuant to a jury verdict, in a death penalty case. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Affirmed in part and reversed in part.

[Rehearing denied October 23, 2020]

Stiglich, J., with whom Parraguirre and Silver, JJ., agreed, dissented in part.

Christopher R. Oram Law Office and *Christopher R. Oram*, Las Vegas, for Appellant.

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

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[2]Nothing in this opinion should be construed as commenting on the merits of Shoen's reinstatement petition.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Hardesty, J.:

In this case, we conclude that the district court erred in denying a motion to suppress statements made by the appellant because he was in custody at the time and had not been advised of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). That error does not require reversal of the judgment of conviction, however, if it was harmless. Although the State bears the burden of proving the error was harmless, the State made no effort to meet that burden in its appellate brief filed in this case. We can treat the State's failure to argue harmlessness as a waiver of the issue or a confession that the error was not harmless, as we did in *Polk v. State*, 126 Nev. 180, 233 P.3d 357 (2010). But because there may be extraordinary cases in which no interest would be served by reversing a judgment of conviction without considering harmlessness, we take this opportunity to adopt three factors to help determine whether we should consider an error's harmlessness when the State has not argued harmlessness in a death penalty case. Those factors are the length and complexity of the record, the certainty that the error is harmless, and the futility and costliness of reversal and further litigation. After weighing those factors, we conclude that sua sponte harmless-error review is appropriate in this matter and that the complained-of error is harmless. We also conclude that one of the convictions for robbery was not supported by sufficient evidence and therefore reverse that conviction. Because no other issue warrants relief, we affirm the judgment of conviction in all other respects.

FACTS

William Postorino sold drugs and forged prescriptions, recruiting people, including appellant Norman Belcher, to fill prescriptions and furnish him with drugs for resale. In early December 2010, Belcher purchased prescriptions from William, but he could not fill them. Belcher demanded that William return the money he paid for some of the prescriptions. After a series of threatening text messages from Belcher, William returned the money and ended his business relationship with Belcher.

Not long after the disagreement between William and Belcher, an armed intruder kicked in the front door of William's home at 2:30

[1]The Honorable Jim C. Shirley, Judge of the Eleventh Judicial District Court, was designated by the Governor to sit in place of The Honorable Elissa F. Cadish, who is disqualified from participating in this matter. Nev. Const. art. 6, § 4(2).

in the morning. William was not home, but his 15-year-old daughter Alexus, roommate Nick Brabham, and Nick's friend Ashley Riley were there. When Nick responded to the forced entry, he was shot in the abdomen. Nick fell down and pulled himself into a closet. The intruder then shot Alexus several times. Ashley managed to escape, jumping out of a second-story window. The intruder took property from the home, including a laptop, safe, and 60-inch television. Nick survived his injuries, but Alexus succumbed to hers.

William's neighbors observed a man outside the residence before the shooting, and then again after the shooting, loading objects, including a heavy metal object, into a white car. A rented white Nissan Versa was stopped for speeding about 18 miles from William's home at 3:16 on the morning of the break-in and shooting. The driver, later identified as Belcher, was ticketed and allowed to leave. Several hours later, the Versa was set on fire. Video of the area showed Belcher walking away from the burning car. Nick identified Belcher as the shooter about a month after the shooting, when he emerged from a coma.

According to Belcher's romantic partner, Bridgette Chaplin, Belcher made comments before the shooting that suggested his motive to shoot Alexus—revenge against William. He also told Bridgette that burning evidence was one of the best ways to get rid of it. When he was being booked into jail, Belcher suggested his involvement in Alexus' killing, asking an officer if the jail would "put [him] in max custody because [he] killed a kid?"

A jury found Belcher guilty of two counts of robbery with the use of a deadly weapon and one count each of burglary while in possession of a firearm, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon causing substantial bodily harm, and third-degree arson. The jury sentenced him to death for the murder. This appeal followed.

DISCUSSION

Admissibility of Belcher's statement to police

Belcher argues that the district court erred in denying his motion to suppress the statements he made during an interview with detectives before his arrest. He asserts that he was in custody at the time and therefore entitled to warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

"*Miranda* establishes procedural safeguards 'to secure and protect the Fifth Amendment privilege against compulsory self-incrimination during the inherently coercive atmosphere of an in-custody interrogation.'" *Stewart v. State*, 133 Nev. 142, 146, 393 P.3d 685, 688 (2017) (quoting *Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007)). If a person is not advised of his or her

Miranda rights, any statements made during a custodial interrogation are inadmissible at trial, *Carroll v. State*, 132 Nev. 269, 282, 371 P.3d 1023, 1032 (2016), except to impeach his or her inconsistent trial testimony, *Lamb v. State*, 127 Nev. 26, 36, 251 P.3d 700, 707 (2011). There is no dispute that Belcher was not given the *Miranda* warnings before he was interviewed, so the only question is whether Belcher was in custody during the interview.

"A defendant is 'in custody' under *Miranda* if he or she has been formally arrested or his or her freedom has been restrained to 'the degree associated with a formal arrest so that a reasonable person would not feel free to leave.'" *Carroll*, 132 Nev. at 282, 371 P.3d at 1032 (quoting *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998)). Whether a defendant is in custody is determined by the totality of the circumstances. *Id*. Those circumstances include the interrogation site, any objective indicia of arrest, "and the length and form of questioning." *Id.* (internal quotation marks omitted). Based on our review of the record and giving deference to the district court's relevant factual findings that are supported by the record, we conclude that Belcher was in custody when detectives interrogated him and therefore the district court erred in denying the motion to suppress and the motion to reconsider that decision. *Id.* at 281, 371 P.3d at 1031 (explaining that the custody determination presents a mixed question of law and fact, so the appellate court will give deference to the district court's findings of historical facts if they are supported by the record but will review de novo the district court's conclusion as to custody).

Site of interrogation

The first factor—the site of the interrogation—indicates that Belcher was in custody during the interview. Detectives transported Belcher to the homicide offices and questioned him in an interview room. Although the location of the interview at the homicide offices does not definitively establish that Belcher was in custody, *see California v. Beheler*, 463 U.S. 1121, 1125 (1983) (holding that an interrogation is not necessarily custodial because it occurred at a police station), it is suggestive of custody considering the other circumstances related to the location, *see Carroll*, 132 Nev. at 282, 371 P.3d at 1032 (recognizing that a suspect who is driven to the interview site could not terminate the interview). The detectives chose to transport Belcher to the homicide offices for the interview when they could have questioned him in a less intimidating location. By transporting Belcher to the homicide offices, the detectives made it more difficult for Belcher to leave without their assistance. The environment in the interview room further conveyed that Belcher was not free to leave. For example, when the detectives spoke with Belcher, they sat in front of the only door to the room, such that Belcher could not terminate the interview or leave the room unless

the detectives moved and allowed him to do so. *Cf. id.* (recognizing a defendant was in custody where two detectives sat between the defendant and the sole door to a very small room). And when detectives left the room, they locked the door behind them. Considering all of the circumstances surrounding the site of the interrogation, we conclude they suggest that Belcher was in custody.

Objective indicia of arrest

The second factor—objective indicia of arrest—also indicates that Belcher was in custody when he made his statements. Objective indicia of arrest include the following:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Taylor, 114 Nev. at 1082 n.1, 968 P.2d at 323 n.1. Not all of these factors need be present to make a determination as to custody. *Id.* With the exception of being placed under formal arrest before the interview, all the objective indicia of arrest are present in this case.

First, the detectives' actions suggested that Belcher was not free to leave. Detectives approached Belcher outside his apartment and handcuffed him. He was detained in handcuffs for approximately 10 to 15 minutes before another set of detectives asked him to come to their office to answer questions. Belcher remained in handcuffs for the 30-minute ride in the police vehicle. The detectives never told him that he was free to decline accompanying them or to leave the interview.

Second, as previously discussed, detectives restricted Belcher's movement during questioning. They questioned Belcher in a room that was approximately the size of the trial court's witness stand. While they questioned him, the two detectives sat between Belcher and the interview room door. He could not leave unless the officers stood, moved aside, and allowed him to do so. Although not handcuffed in the room, he was either flanked by the detectives or locked in the room alone. The State has suggested that Belcher was not precluded from using his cell phone, an apparent effort to distinguish the circumstances from those in *Carroll*. That effort falls flat given evidence in the record that Belcher did not have possession of his cell phone during the interview, as it was found during the search of his apartment. Instead, the record indicates Belcher perceived that his freedom of movement was limited—for example, he sought

permission to reach inside his pockets. The circumstances and the environment in the interview room described above further reflect the interview's police-dominated atmosphere.

Third, Belcher initially declined to discuss certain topics, such as his drug dealing and whether he had been upstairs in William's home. Detectives pressed the second topic and eventually compelled an answer. They also employed a measure of deception by insisting that Belcher had already been identified by a patrol officer when the identification did not occur until after the interview. Thus, it is not clear that all of Belcher's responses were voluntary.

Lastly, Belcher was arrested at the end of the interview. When the interview ceased and Belcher asked to leave, detectives insisted that they would release him in ten minutes. They instead left him sitting in the interview room for approximately an hour, until the patrol officer who pulled over the white Versa on the night of the shooting arrived for a show-up identification. Belcher was arrested after the officer identified him as the driver he pulled over in the white Versa.

In sum, all but one of the seven objective indicia of arrest weigh in favor of concluding that Belcher was in custody. The detectives' subjective motivation for handcuffing Belcher (officer safety) and locking him in the interview room (to prevent him from wandering around the homicide offices) and their subjective intention with respect to the techniques they employed are not relevant because "whether a suspect is 'in custody' is an *objective* inquiry." *J.D.B v. North Carolina*, 564 U.S. 261, 270 (2011) (emphasis added). Here, the *objective* indicia of arrest suggest that Belcher was in custody during the interrogation.

Length and form of questioning

The third factor—length and form of the questioning—also indicates that Belcher was in custody. Although detectives questioned Belcher for a little under an hour, he was in the interview room for three and one-half hours. Detectives did not immediately start questioning him and took breaks during the questioning. While the amount of time spent on questioning might not alone suggest that Belcher was in custody, *cf. Carroll*, 132 Nev. at 285, 371 P.3d at 1034 (concluding that questioning of two and one-half hours, excluding breaks, militated toward finding that suspect was in custody), Belcher was left in the locked interview room for another hour after the interview, even though he had asked to leave at the end of the interview and had been told that he would be able to leave in about ten minutes. Additionally, detectives questioned Belcher as a suspect, not as a witness. The questioning was focused on where Belcher was on the evening of the shooting and his conflict with William. Detectives also pressed him on issues he was initially reluctant to talk about, employed deception during the interview, and repeatedly confronted him with evidence that conflicted with his answers.

Considering the totality of the circumstances, Belcher was in custody when detectives interviewed him. And with no *Miranda* warnings issued, we conclude that the district court erred in denying the motion to suppress and the motion to reconsider its decision.

Harmless-error review

When an appellant demonstrates error of a constitutional nature, as Belcher has done here, we must reverse unless the error was harmless beyond a reasonable doubt. *See* NRS 178.598; *Obermeyer v. State*, 97 Nev. 158, 159, 625 P.2d 95, 96 (1981); *see also Chapman v. California*, 386 U.S. 18, 24 (1967). The State bears the burden of proving that the error was harmless—i.e., that the error did not contribute to the verdict. *See Chapman*, 386 U.S. at 24. It follows that the State forfeits the opportunity to satisfy that burden if it fails to address harmlessness. *See Polk v. State*, 126 Nev. 180, 184-86, 233 P.3d 357, 359-61 (2010); *cf.* NRAP 31(d)(2) ("The failure of respondent to file a brief may be treated by the court as a confession of error . . . ."). Here, the State made no argument as to harmlessness. Accordingly, we may treat that omission as a waiver of the issue or confession that the error was not harmless. Doing so "makes perfect sense in light of the nature of the harmless-error inquiry: it is the [State's] burden to establish harmlessness, and it cannot expect us to shoulder that burden for it." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005).

This court has not addressed, however, whether there are circumstances in which we will consider harmlessness even though the State has not argued it, aside from observations in *Polk* about insignificant issues or excusable neglect. *See Polk*, 126 Nev. at 185, 233 P.3d at 360. A number of federal circuit courts of appeal have recognized they have discretion to consider whether an error was harmless under certain circumstances regardless of whether the government has argued harmlessness. *See, e.g.*, *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018); *United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.10 (11th Cir. 1995); *United States v. Langston*, 970 F.2d 692, 704 n.9 (10th Cir. 1992); *Lufkins v. Leapley*, 965 F.2d 1477, 1481 (8th Cir. 1992); *United States v. Pryce*, 938 F.2d 1343, 1348 (D.C. Cir. 1991); *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991). In doing so, they primarily rely "on the arguably mandatory language" in the federal harmless-error rule providing that error that "does not affect substantial rights *shall be disregarded*." *Rose*, 104 F.3d at 1414 (emphasis added) (internal quotation marks omitted) (referencing former version of rule).[2] Nevada's statutory definition of harmless error includes the same "arguably mandatory language[:]" "Any er-

[2]Currently, Fed. R. Crim. P. 52(a) states, "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

ror, defect, irregularity or variance which does not affect substantial rights *shall be* disregarded." NRS 178.598 (emphasis added). Given that similarity, we agree with the federal courts and thus take this opportunity to hold that Nevada's appellate courts *may* overlook the State's omission and consider harmlessness sua sponte.

But like the federal courts, we will overlook the State's failure to argue harmlessness only in "extraordinary cases" because "there are good policy reasons not to do so" at all. *Rodriguez*, 880 F.3d at 1163-64 (internal quotation marks omitted). Chief among those reasons is fairness. As the United States Court of Appeals for the Ninth Circuit has observed, considering harmless error where the government has not raised it "may unfairly tilt the scales of justice by authorizing courts to construct the government's best arguments for [harmlessness] without providing the defendant with a chance to respond." *Gonzalez-Flores*, 418 F.3d at 1101. Nor do we want "to encourage the government's laxness and failure to follow . . . clear, applicable precedent" assigning it the burden of establishing harmlessness. *Rodriguez*, 880 F.3d at 1163 (internal quotation marks omitted). And not to be overlooked is the impact on the reviewing court, which would be obligated to expend its limited resources "search[ing] through large records without guidance from the parties." *Gonzalez-Flores*, 418 F.3d at 1100.

To help identify the exceptional case in which the court may consider harmlessness when the State has not argued it, we adopt the test employed by the federal circuit courts. Accordingly, we will look to three factors in deciding whether to consider an error's harmlessness sua sponte: "(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation." *Rodriguez*, 880 F.3d at 1164 (internal quotation marks omitted); *see also United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), *abrogated on other grounds by United States v. Fiorelli*, 133 F.3d 218 (3d Cir. 1998); *Giovannetti*, 928 F.2d at 227. *But see Rose*, 104 F.3d at 1415 (rejecting test and considering "the balancing of many elements"). Of those factors, the second one—the court's certainty as to the error's harmlessness—is most sensitive to the concerns of considering an error's harmlessness notwithstanding the State's failure to argue it. *Gonzalez-Flores*, 418 F.3d at 1101. In particular, when the error's harmlessness "is at all close, defense counsel's lack of opportunity to answer potential harmless error arguments may lead the court to miss an angle that would have shown the error to have been prejudicial." *Id.* (quoting *Pryce*, 938 F.2d at 1347). The second factor therefore is the most important. *United States v. Brooks*, 772 F.3d 1161, 1171 (9th Cir. 2014). Thus, "[i]f the harmlessness of the error is at all debatable, prudence and fairness to the defendant counsel against deeming that error harmless without the benefit of the parties' debate." *Gonzalez-Flores*, 418 F.3d at 1101. Applying the fac-

tors here, we conclude sua sponte review is warranted and the error in admitting Belcher's statement was harmless.

The record here is voluminous. The guilt phase of trial lasted nearly three weeks and included testimony from three dozen witnesses. The witnesses provided eyewitness, scientific, financial, and investigative testimony. But whether unbriefed harmlessness review unduly burdens this court does not directly correlate to the overall size of the record. In fact, most of the record is irrelevant to the harmless-error review at issue. In particular, we do not need to consider the lengthy parts of the record devoted to charging proceedings, pretrial motion practice, and discovery to determine whether the admission of Belcher's statement was harmless. Nor do we need to consider the whole of the trial transcript. For example, the transcripts of jury selection and the penalty phase proceedings offer no insight into whether the admission of Belcher's statement was harmless to the guilt phase verdict. When the record is narrowed down to the relevant parts of the guilt phase transcripts, sua sponte review for harmlessness is much less burdensome. And because we are already obligated to afford "extra resources and heightened scrutiny" to death penalty cases, *see Evans v. State*, 117 Nev. 609, 642, 28 P.3d 498, 520 (2001) ("SCR 250 and the internal policies of this court ensure that [death penalty] cases receive extra resources and heightened scrutiny."), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the record's size is not a compelling factor in deciding whether to conduct sua sponte harmless-error review in this capital case.

We are also certain that the error was harmless beyond a reasonable doubt. Belcher did not confess during the custodial interview, nor did his statements lead detectives to evidence implicating him in the crimes. At most, the jury could infer consciousness of guilt when Belcher tried to concoct an alibi and lied about the traffic stop and the fate of his rental car. But there was other, significantly more compelling evidence against Belcher. Nick identified Belcher as the man who shot him. Evidence established the disintegration of William and Belcher's illicit business relationship, including a heated disagreement between the two men regarding a drug debt close in time to the shooting. And Belcher openly contemplated harming William's 15-year-old daughter as revenge. Eyewitness testimony placed a white car at the scene of the shooting, and minutes after the shooting, a patrol officer stopped Belcher for speeding in the white rental car that, two hours later, was set on fire and destroyed. The defense even *admitted* that Belcher committed third-degree arson. And when Belcher was booked into the jail, he made an unsolicited comment to one of the correctional officers that seemingly acknowledged he killed Alexus: "[S]ir, are you . . . going to put me in max custody because I killed a kid?" In this context, Belcher's statement was cumulative and much weaker than other evidence of his guilt.

When the totality of the other evidence of Belcher's guilt is considered against the contrastingly weak and cumulative consciousness of guilt exhibited in Belcher's statement, there can be no debate that a rational jury would have found Belcher guilty with or without his statement to the police. Given this, it would be futile to reverse and remand because another trial would reach the same result. *See Brooks*, 772 F.3d at 1172 (concluding that remand for retrial would be futile where there is overwhelming evidence of guilt). And considering that the original trial lasted about three weeks and involved dozens of witnesses, reversal and remand for another trial would be costly both in terms of the expense and impact on the lower court's docket and imposition on the victims and their families. *See Giovannetti*, 928 F.2d at 227 (recognizing that when considering the impact a lengthy retrial would have on litigants in other cases due to the strain on judicial resources, "reversal may be an excessive sanction for the government's having failed to argue harmless error, at least if the harmlessness of the error is readily discernible without an elaborate search of the record").

Having considered the factors adopted today, we conclude that applying a sua sponte harmlessness review to the relevant portions of the record in this case demonstrates that the error was harmless and that a new trial will undoubtedly end in the same result.

Conflict of interest

Belcher argues that the district court erred in denying his motion to dismiss based on an alleged conflict of interest. He asserts that one of his attorneys, Lance Maningo, defended Nick on unrelated drug charges and declined to cross-examine Nick at the preliminary hearing due to the prior relationship.

A conflict of interest exists where "counsel 'actively represent[s] conflicting interests.'" *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)); *see also Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) ("In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991))). We discern no such conflict here. At the time of the preliminary hearing, Maningo did not recall that he had represented Nick. Because he was unaware of the prior representation, it cannot be said that the prior representation adversely affected his performance at the preliminary hearing. But more importantly, Maningo's co-counsel made the decision not to cross-examine Nick for reasons that were unrelated to and were not influenced by Maningo's former representation of Nick. We therefore conclude that Belcher did not demonstrate that an actual conflict adversely affected his attorney's performance. *Cuyler*, 446 U.S. at 348 n.14. Accordingly, the district court did not err in denying the

motion to dismiss. *See Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (explaining that questions as to counsel's performance "present[ ] a mixed question of law and fact that is subject to independent review").

Apartment search

Belcher argues that the district court erred in denying his motion to suppress evidence seized from his apartment because police entered the apartment before the warrant issued. We disagree.

The facts adduced at the suppression hearing established that officers took Belcher's keys and entered his apartment when they detained him before obtaining a search warrant. Although "[w]arrantless searches and seizures in a home are presumptively unreasonable," *Doleman v. State*, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991); *see also* U.S. Const. amend. IV, a prior unauthorized entry does not necessitate the suppression of evidence where there is an independent source for the information supporting the warrant. *Segura v. United States*, 468 U.S. 796, 813-14 (1984). Here, while the officers initially entered Belcher's apartment before obtaining the warrant, the search and processing of the apartment did not begin until after the warrant issued. The warrant application did not contain any information discovered during the unauthorized entry but instead relied on evidence of the purported debt and animus between Belcher and William, reports of a car similar to Belcher's rental car seen at the home around the time of the shooting, evidence that Belcher was driving his rental car shortly after the shooting, and evidence that Belcher's rental car was later set on fire. Therefore, the district court did not err in denying the motion to suppress.

Out-of-court identifications

Belcher argues that the district court erred in denying his motion to exclude two witnesses' identifications of him because the procedures used were unnecessarily suggestive. Although we agree that the procedures employed were unnecessarily suggestive, we conclude that the district court did not err because the identifications nonetheless were reliable.

The pretrial identification procedures employed with Nick and Officer Cavaricci were unnecessarily suggestive. *See Banks v. State*, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (considering whether identification procedure "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law" (alteration in original) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967))). Nick was presented with a photographic lineup that conspicuously highlighted a comparatively unique trait of Belcher's in contrast with the other subjects. *See Simmons v. United States*, 390 U.S. 377, 383 (1968) (recognizing

that photographic lineup may result in incorrect identification where photograph of individual "is in some way emphasized"). Belcher, an African American with a lighter complexion and light hair, was displayed in a photograph lineup in which he was the only subject without dark hair. And Officer Cavaricci viewed Belcher in the interview room at the homicide office, which was "inherently suggestive because it is apparent that law enforcement officials believe[d] they [had] caught the offender." *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979).

Nevertheless, both identifications were reliable despite the suggestive procedures. *Banks*, 94 Nev. at 94, 575 P.2d at 595 (recognizing that identification made from a suggestive procedure is nevertheless admissible when the identification is reliable). Nick's identification was reliable because he had identified Belcher by name and described his features *before* officers presented him with the photo array. Officer Cavaricci's identification was reliable because he had a significant opportunity to view Belcher during the traffic stop, observing Belcher from a distance of about three feet for approximately ten minutes; he had to verify that Belcher matched the driver's license picture that Belcher provided; he identified Belcher in the show-up identification less than 24 hours after the traffic stop; and he immediately identified Belcher, stating that he was certain Belcher was driving the vehicle he stopped for speeding. *See Gehrke v. State*, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980) (considering witness's opportunity to view the criminal, degree of attention, accuracy of prior description, level of certainty at the identification, and time between crime and identification in determining reliability of identification). Considering these facts, the district court did not err in denying the motion.

Failure to preserve exculpatory evidence

Belcher argues that the district court should have granted his motion to dismiss the charges based on the State's failure to collect William Postorino's cell phone. He alleges that a text message exchange on the phone would have refuted the motive asserted by the State as it would have showed the drug debt had been settled. We conclude that Belcher did not make the required showing to warrant dismissal and therefore the district court did not err.

"[P]olice officers generally have no duty to collect all potential evidence from a crime scene." *Daniels v. State*, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (quoting *State v. Ware*, 881 P.2d 679, 684 (N.M. 1994)). To demonstrate a due process violation based on the failure to gather evidence, a defendant must show "a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." *Id.* at 267, 956 P.2d at 115. If that showing is made, the appropriate sanction depends on "whether the failure to gather evidence was the result

of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." *Id.* There is no indication from the record, beyond Belcher's bare assertion, that the phone contained additional messages other than those the detectives had memorialized. Even assuming such messages existed, Belcher did not demonstrate a reasonable probability that the result of the trial would have been different had the phone been seized, as William testified that he had paid Belcher to settle the dispute. And we further agree with the district court that Belcher also did not show that officers acted in bad faith, a required showing to warrant dismissal. *Id.*

Aiding and abetting theory of guilt

Belcher asserts that the district court erred in declining to strike the State's aiding and abetting theory of guilt and instructing the jury on aiding and abetting liability. We disagree.

As some evidence adduced during the preliminary hearing suggested more than one individual was involved in the burglary and shootings, Belcher did not demonstrate that the district court should have struck the aiding and abetting allegations from the information. *See Sheriff v. Potter*, 99 Nev. 389, 391, 663 P.2d 350, 352 (1983) ("Probable cause to support an information may be based on slight, even 'marginal' evidence." (quoting *Sheriff v. Lyons*, 96 Nev. 298, 299, 607 P.2d 590, 591 (1980) (internal quotation marks omitted))). To the extent that Belcher relies on *Barren v. State*, 99 Nev. 661, 669 P.2d 725 (1983), to suggest that the district court should have struck the aiding and abetting theory because it was not adequately pleaded, that argument lacks merit. Belcher did not ask that the State be required to amend the information to allege specific facts related to the aiding and abetting theory. *See id.* at 669-70, 669 P.2d at 729-30. And even if the information did not include specific factual allegations as to the means of aiding and abetting, Belcher was not prejudiced because the State proceeded at trial based solely on the theory that Belcher acted alone in the burglary, shooting, and robberies. *See Randolph v. State*, 117 Nev. 970, 978, 36 P.3d 424, 429 (2001) ("[O]ur holding in *Barren* was aimed at preserving due process by preventing the prosecution from concealing or vacillating in its theory of the case to gain an unfair advantage over the defendant.").

Prior bad acts

Belcher argues that the district court erred in admitting testimony about a prior burglary accusation against him and that he contemplated harming one of the victims and in excluding evidence of a home invasion committed by another suspect. We disagree.

Belcher did not object to the witnesses' testimony about the prior burglary, which would normally invoke plain-error review. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003) (reviewing unobjected-to error for plain error affecting a defendant's

substantial rights). But here, Belcher waived any argument that the evidence was inadmissible under NRS 48.045(2) when the parties agreed at a pretrial hearing to the admission of evidence about Belcher's history of drug dealing with William and the accusation that Belcher committed the uncharged burglary. As to Belcher's conversation with Bridgette, it was not a bad act inadmissible under NRS 48.045(2). Rather, Belcher's statement to Bridgette was relevant as it reflected his animosity toward William and intent to hurt William by harming his child, *see* NRS 48.015 (defining "relevant evidence"), and was admissible against him even though it was an out-of-court statement, *see* NRS 51.035(3)(a) (recognizing that a party's own statement is not hearsay when it is offered against him). Finally, the district court did not abuse its discretion in excluding the alternative suspect's criminal record. *See Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013) (stating that district court's decision to admit or exclude prior-bad-act evidence is subject to review for an abuse of discretion). That evidence was not admissible to prove that the other suspect committed the burglary and shooting, NRS 48.045(1), and Belcher has not alleged sufficient circumstances indicating that the evidence would have been admissible pursuant to an exception under NRS 48.045(2).

Witness vouching

Belcher argues that the district court erred in allowing Detective Teresa Mogg to vouch for the credibility of Ashley's statement to police. We conclude that this contention lacks merit.

"A witness may not vouch for the testimony of another." *Farmer v. State*, 133 Nev. 693, 705, 405 P.3d 114, 125 (2017) (internal quotation marks omitted). During cross-examination by the State, Detective Mogg arguably vouched for the veracity of Ashley's statement when she testified that she was skeptical about Ashley's statement at first but believed her by the end of the interview. Belcher did not object to this testimony, such that we normally would review for plain error. *See Green*, 119 Nev. at 545, 80 P.3d at 94-95. But here, even plain-error review is not warranted considering defense counsel's direct examination of Detective Mogg. When defense counsel questioned Detective Mogg about Ashley's statement to her, he specifically broached the subject of whether Detective Mogg was skeptical of Ashley's statement that her boyfriend, another suspect considered by police, would not have been upset by her spending time with Nick. Detective Mogg responded that the skepticism she displayed during the interview was intended to coax more information out of Ashley. This line of inquiry by defense counsel provoked the State to cross-examine Detective Mogg about the skepticism she expressed during the interview with Ashley, which led to Detective Mogg's testimony that she believed Ashley by the end of the interview. Belcher thus invited the testimony he now challenges as

error. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (recognizing that invited error occurs when a party appeals an error "which he himself induced or provoked the court or the opposite party to commit" (internal quotation marks omitted)). As such, he cannot complain about it on appeal. *Id*.

Hearsay

Belcher argues that the district court erred in admitting hearsay evidence in violation of the Confrontation Clause. He did not object below, and we discern no plain error. *See Green*, 119 Nev. at 545, 80 P.3d at 94-95. A review of the record reveals that Detective Ken Hardy's testimony that a possible suspect told him that he was home at the time of the shooting was not offered to prove the truth of that statement and thus was not hearsay. Instead, the testimony, which was accompanied by testimony that the investigation did not reveal any connections between that suspect and Alexus, explained why detectives did not investigate the suspect further. Detective Hardy's testimony therefore was not hearsay. NRS 51.035 (providing that hearsay is an out-of-court statement offered "to prove the truth of the matter asserted"); *United States v. Holmes*, 620 F.3d 836, 841 (8th Cir. 2010) (holding course-of-investigation evidence admissible to explain a police investigation "when the propriety of the investigation is at issue in the trial"); *Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) (similar). And because "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004), there was no confrontation violation either.

Sufficiency of the evidence of robbery

Belcher argues that the State produced insufficient evidence to support his conviction for robbing Nick of his laptop and wallet. We agree.

In reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, *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)). The State alleged that Belcher committed robbery by taking Nick's laptop and wallet after shooting him. *See* NRS 200.380(1) (defining robbery as "the 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"). Unlike other valuable property taken from the home, Nick's laptop and wallet remained in the home. While processing the scene, officers found both items in William's room. And there were conflicting accounts

of where Nick's property had been before the shooting. Given that the property was found in the home and the conflicting accounts of where in the home that property was before the shooting, we are not convinced that, even viewing the evidence in the light most favorable to the State, a rational trier of fact could find beyond a reasonable doubt the unlawful taking of the laptop and wallet. *See Litteral v. State*, 97 Nev. 503, 506-08, 634 P.2d 1226, 1227-29 (1981) (discussing the "unlawful taking" element of robbery), *disapproved of on other grounds by Talancon v. State*, 102 Nev. 294, 721 P.2d 764 (1986). Accordingly, we reverse the conviction for robbery related to Nick's laptop and wallet (count 2).

Guilt phase jury instructions

Belcher argues that the district court erred in giving several jury instructions. Specifically, he contends that the implied malice instruction used archaic language, the premeditation instruction was vague and did not differentiate the elements of first- and second-degree murder, the reasonable doubt instruction improperly minimized the State's burden of proof, and the equal and exact justice instruction was confusing. Belcher did not object below and we discern no plain error. *See* NRS 178.602; *Green*, 119 Nev. at 545, 80 P.3d at 94-95. This court has upheld the language used in the implied malice instruction, *Leonard v. State*, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001) (the statutory language of implied malice is well established in Nevada and accurately informs the jury of the distinction between express and implied malice); *Cordova v. State*, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000) (the substitution of the word "may" for "shall" in an implied malice instruction is preferable because it eliminates the mandatory presumption); the premeditation instruction, *see Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000); and the equal and exact justice instruction, *see Thomas v. State*, 120 Nev. 37, 46, 83 P.3d 818, 824-25 (2004); *Daniel v. State*, 119 Nev. 498, 522, 78 P.3d 890, 906 (2003); *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). In addition, the district court gave Nevada's statutory reasonable doubt instruction as set forth in and mandated by NRS 175.211, and we have repeatedly upheld the constitutionality of that instruction. *See Garcia v. State*, 121 Nev. 327, 340 & n.26, 113 P.3d 836, 844 & n.26 (2005) (collecting cases), *modified on other grounds by Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006).

Ineffective assistance of trial counsel

Belcher argues that his trial counsel introduced inappropriate and highly prejudicial expert psychological testimony during the penalty hearing. Relying on *Mazzan v. State*, 100 Nev. 74, 675 P.2d 409 (1984), and *McCoy v. Louisiana*, 138 S. Ct. 1500

(2018), Belcher contends that counsel's ineffectiveness is clear from the record before this court.

"[W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary." *Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) (footnote omitted), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018); *see also United States v. Daychild*, 357 F.3d 1082, 1095 (9th Cir. 2004). Neither exception applies in this case. The district court did not evaluate this claim in an evidentiary hearing. And counsel's decision to introduce expert psychological evidence is not so apparently deficient from a review of the record that we could conclude that an evidentiary hearing is unnecessary or that the record has been sufficiently developed rendering an evidentiary hearing unnecessary. *Cf. Mazzan*, 100 Nev. at 80, 675 P.2d at 413 (concluding based on record on direct appeal that counsel's performance "exceeded the outer parameters of effective advocacy" and that defendant would have been better served without counsel). In addition, Belcher's reliance on *McCoy* is misplaced, as Belcher did not object to the testimony and the testimony itself was not an admission of guilt. *See McCoy*, 138 S. Ct. at 1507, 1509, 1512. Rather, this claim is best raised in a timely postconviction petition for a writ of habeas corpus in the first instance. *See Gibbons v. State*, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981) (declining to consider ineffective-assistance claim even though record suggested ineffective assistance because of possibility that counsel could rationalize his performance at evidentiary hearing). Accordingly, we decline to consider Belcher's ineffective-assistance-of-counsel claim at this time.

Penalty phase jury instructions

Belcher argues that the district court erred in giving several penalty phase instructions. He asserts that the instructions defining mitigation impermissibly limited the consideration of mitigating evidence to only evidence related to the offense. He also asserts that the jury should not have been instructed that it could consider hearsay evidence. Belcher did not object below, and we discern no plain error. *See* NRS 178.602; *Green*, 119 Nev. at 545, 80 P.3d at 94-95.

Neither challenged mitigation instruction misstated or misled the jury about the scope of mitigating circumstances. Reading the whole of the two instructions, neither one states or implies that the scope of mitigating circumstances is limited to offense-specific circumstances. *See Watson v. State*, 130 Nev. 764, 784, 335 P.3d 157, 171 (2014) ("Mitigation evidence includes any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death; ac-

cordingly, mitigation is not limited to evidence which would tend to support a legal excuse from criminal liability." (citations and internal quotation marks omitted)). The penalty phase instructions as a whole provided that "other evidence that bears on the Defendant's character" may be presented at the penalty hearing and that the jury "must consider any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death." This court has described that language as conveying "the breadth of possible mitigation evidence." *Watson*, 130 Nev. at 786, 335 P.3d at 173. As to the hearsay instruction, Belcher acknowledges that the language is a correct statement of the law, as hearsay is generally admissible at a capital penalty hearing under NRS 175.552(3), and that neither the Confrontation Clause nor *Crawford v. Washington*, 541 U.S. 36 (2004), applies to evidence admitted at a capital penalty hearing, *see, e.g.*, *Summers v. State*, 122 Nev. 1326, 1332-33, 148 P.3d 778, 783 (2006). He asks us to overrule this court's prior decisions, but he offers no arguments beyond those considered and rejected in *Summers* and has not cited any controlling authority that is contrary to *Summers*. Nor has he pointed to any specific instances of hearsay being presented during the penalty phase. For these reasons, any possible error in the challenged instructions is not "so unmistakable that it reveals itself by a casual inspection of the record," as required to establish plain error. *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks omitted) (describing when an error is "plain" for purposes of plain-error review).

Constitutionality of the death penalty

Belcher argues that the death penalty is unconstitutional. He asserts that it violates the Eighth Amendment's prohibition against cruel and unusual punishment. We have rejected similar arguments, *see, e.g.*, *Thomas v. State*, 122 Nev. 1361, 1373, 148 P.3d 727, 735-36 (2006) (reaffirming that Nevada's death penalty statutes sufficiently narrow the class of persons eligible for the death penalty); *Colwell v. State*, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996) (rejecting claims that Nevada's death penalty scheme violates the United States or Nevada Constitutions); *Bishop v. State*, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979) (similar); *see also Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) (rejecting claims that extended confinement before execution was cruel and unusual punishment), and see no reason to do otherwise here.

Cumulative error

Belcher argues that the cumulative effect of errors at trial warrant reversal. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless

individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Belcher demonstrated two errors: the district court should have suppressed his statement to police, and one of his robbery convictions was not supported by sufficient evidence. As we have granted discrete relief by reversing the robbery conviction, only one error remains, which, in and of itself, is harmless. Therefore, there is nothing to cumulate. *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("If there are no errors or a single error, there can be no cumulative error.").

Mandatory review of death sentence

NRS 177.055(2)(c)-(e) requires this court to determine whether the evidence supports the aggravating circumstances found; "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor"; and whether, considering the crime and the defendant, "the sentence of death is excessive."

Sufficient evidence supports four of the five aggravating circumstances found by the jury.[3] The evidence showing that Belcher had a prior conviction for voluntary manslaughter and had been convicted of attempted murder in the guilt phase of trial supported the jury's finding of two aggravating circumstances under NRS 200.033(2)(b) (murder committed by a person who had prior conviction for a violent felony). And the evidence presented at the guilt phase that resulted in convictions for burglary while in possession of a deadly weapon and robbery with the use of a deadly weapon—namely, that Belcher kicked in the door to the victims' home, shot two people who lived in the home, and took property from the home—supports the jury's finding of two more aggravating circumstances under NRS 200.033(4)(a) (murder occurred during course of a burglary or robbery).

We also conclude that the jury did not act under an improper influence in imposing death. The finding of a mitigating circumstance evinces a thoughtful and deliberative jury, particularly when Belcher chose not to appear at or participate in the penalty phase of the trial. There is nothing in the record that suggests the jury acted "under the influence of passion, prejudice or any arbitrary factor." NRS 177.055(2)(d).

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[3]As we have concluded that Belcher's conviction for robbing Nick was not supported by sufficient evidence, the aggravating circumstance related to that robbery is invalid. We are convinced beyond a reasonable doubt, however, that the jury would have returned the same sentence absent that aggravating circumstance. *See Archanian v. State*, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006) ("A death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review."); *see also Clemons v. Mississippi*, 494 U.S. 738, 741 (1990) (holding "that the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review").

Finally, the death sentence is not excessive in this case. Belcher broke into a home in the middle of the night and shot two unarmed people, killing a 15-year-old child. There is evidence that Belcher killed Alexus to exact revenge against her father with whom he was angry because of a dispute over a drug transaction. There is no evidence that Belcher was under the influence at the time of the murder or that the murder was rash or impulsive or the result of uncontrollable or delusional impulses. *Cf. Chambers v. State*, 113 Nev. 974, 984-85, 944 P.2d 805, 811-12 (1997) (death sentence excessive where defendant was drunk at the time of the murder, there was no advance planning, and there was an emotional confrontation between the defendant and the victim); *Haynes v. State*, 103 Nev. 309, 318-19, 739 P.2d 497, 503 (1987) (death sentence excessive where murder was the result of uncontrollable, irrational, or delusional impulses). This was not Belcher's first experience with the criminal justice system, nor was it his first time committing a crime of violence that resulted in another person's death. He had at least four prior felony convictions, including one for voluntary manslaughter entered just three years before he killed Alexus. Considering both the circumstances of the murder and Belcher's character and history, death was not an excessive sentence.

CONCLUSION

We conclude that the district court erred in denying Belcher's motion to suppress statements made to police because he was subjected to a custodial interrogation without the benefit of *Miranda* warnings. The State did not argue that the error was harmless. However, after adopting factors to guide this court in deciding whether to consider an error's harmlessness despite the State's failure to argue it and after weighing those factors and concluding that sua sponte harmless-error review is appropriate, we conclude that the complained-of error was harmless. We also conclude that Belcher's conviction for robbing Nick (count 2) was not supported by sufficient evidence. No other claims of error have merit. Accordingly, we affirm the judgment of conviction in part and reverse it in part.

Pickering, C.J., Gibbons, J., and Shirley, D.J., concur.

Stiglich, J., with whom Parraguirre and Silver, JJ., agree, concurring in part and dissenting in part:

I agree that the district court erred in admitting Belcher's statement and with the test that the majority adopts to determine when this court should consider the harmlessness of an error even though the State neglected to argue harmlessness. Generally, this court treated the State's failure to argue harmlessness as a concession that the error was prejudicial. *Polk v. State*, 126 Nev. 180, 183 n.2, 233 P.3d 357, 359 n.2 (2010); *Natko v. State*, 134 Nev. 841, 845-46, 435

P.3d 680, 683-84 (Ct. App. 2018); *see generally Talancon v. State*, 102 Nev. 294, 302 n.4, 721 P.2d 764, 769 n.4 (1986) (recognizing that this court declines to consider arguments not raised in an opening brief). This was a severe measure. To temper the impact of this rule, this court would overlook the State's confession of error where the State "inadvertently failed to respond to an inconsequential issue or had a recognizable excuse." *Polk*, 126 Nev. at 185, 233 P.3d at 360. Those exceptional circumstances included meritless issues raised in pro se briefs or for the first time on appeal. *Id.* While there were exceptions to the stringent application of the rule, there was no rubric employed to ensure consistency in deciding whether to find a confession of error in a particular case. Thus, I welcome the adoption of a test to ensure greater intellectual consistency in this court's decisions when the State neglects to argue an error is harmless. My only disagreement with the majority is in how it has applied the test in this case. In my view, this case does not present the rare exception where we should review for harmlessness sua sponte.

Under the newly adopted test, this court looks to three factors in deciding whether to consider an error's harmlessness sua sponte: "(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation." *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018) (internal quotation marks omitted); *see also United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), *abrogated on other grounds by United States v. Fiorelli*, 133 F.3d 218 (3d Cir. 1998); *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991). In my opinion, all three factors weigh against sua sponte harmless-error review in this case.

As the majority recognizes, the record here is complex and sizable, as it memorializes the proceedings leading up to and including a three-week trial. Three dozen witnesses provided general information about the night of the crimes and details about highly specific evidence attendant to the case. As such, I believe the 44-volume record is large enough to make the harmlessness inquiry a burdensome one absent any guidance from the parties on the issue. *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100-02 (9th Cir. 2005); *see United States v. Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999) (concluding that 25-volume record of two-week trial was too extensive and complex to engage in forfeited harmless-error review).

In concluding otherwise, the majority relies on this court's obligation to conduct heightened review in death penalty cases. It reasons that further review for harmlessness does not unnecessarily burden the court given that obligation. It is true that "SCR 250 and the internal policies of this court ensure that [death penalty] cases receive extra resources and heightened scrutiny." *Evans v. State*, 117 Nev. 609, 642, 28 P.3d 498, 520 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

But this rationale does not take into account the full scope and purpose of SCR 250.

SCR 250 exists to "ensure that capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the occurrence of error in capital cases and to recognize and correct promptly any error that may occur; and to facilitate the just and expeditious final disposition of all capital cases." SCR 250(1). In this vein, the rule sets forth the required qualifications and duties of attorneys who serve as trial, appellate, and postconviction counsel, SCR 250(2), (3); the duties for courts and court personnel, SCR 250(5)(b), (6)(a), (6)(c), (11); and the duties of the State attendant to the notice of intent to seek the death penalty, notice of evidence in aggravation, and the continuing duty to report to this court on the status of death penalty cases, SCR 250(4)(c), (4)(f), (9). This court indeed has a higher standard of diligence in death penalty cases. But every party involved in death penalty cases is held to a higher standard of diligence. The obligations imposed on the State promote "accountability and diligence" in its prosecution of death penalty cases. *Bennett v. Eighth Judicial Dist. Court*, 121 Nev. 802, 810, 121 P.3d 605, 610 (2005).

Considering these burdens and the reasons for them, we should be more reticent to make harmlessness arguments on the State's behalf, particularly when the error is one of constitutional dimension. This court should review the entire record to ensure a capital defendant receives fair process throughout his or her trial, appeal, and postconviction proceedings and minimize the occurrence of error throughout those stages. *See* SCR 250(1). But it should not use that review to instead "construct the government's best arguments for it without providing the defendant with a chance to respond." *Gonzalez-Flores*, 418 F.3d at 1101. "Where a court analyzes the harmless error issue wholly on its own initiative, it assumes burdens normally shouldered by government and defense counsel." *United States v. Pryce*, 938 F.2d 1343, 1347 (D.C. Cir. 1991); *see Gonzalez-Flores*, 418 F.3d at 1100 ("[I]t is the government's burden to establish harmlessness, and it cannot expect [the court] to shoulder that burden for it."). This court's obligations to afford death penalty cases heightened review should not excuse the State from its neglect, as doing so would "encourage the government's laxness and failure to follow . . . clear, applicable precedent." *Rodriguez*, 880 F.3d at 1163 (quoting *United States v. Murguia-Rodriguez*, 815 F.3d 566, 573 (9th Cir. 2016)); *see United States v. Rose*, 104 F.3d 1408, 1414-15 (1st Cir. 1997) (recognizing that harmless-error review sua sponte may incentivize the government's failure to make proper arguments). Encouraging laxness in appellate briefing by the State in death penalty cases would serve neither this court's nor the State's heightened standard of diligence to minimize error and ensure fair trials in those cases. Additionally, given the clear purpose of SCR

250 to protect a capital defendant's due process rights and minimize trial error, sua sponte harmless-error review should not be used to tolerate carelessness on the part of any party involved. Therefore, I conclude that the size of the record militates against unguided harmless-error review in this case.

I would also approach the second prong of the test differently. Under the new test, the reviewing court must conclude that, after an unguided search of the record, the error's harmlessness is not debatable. *See Giovannetti*, 928 F.2d at 227. This court should only overlook the State's failure to argue harmlessness in extraordinary cases, because when we consider harmless error sua sponte, we might unfairly "construct the government's best arguments for [harmlessness] without providing the defendant with a chance to respond." *Gonzalez-Flores*, 418 F.3d at 1101. Thus, "[i]f the harmlessness of the error is at all debatable, prudence and fairness to the defendant counsel against deeming that error harmless without the benefit of the parties' debate." *Id.*

When this court undertakes harmless-error analysis, it evaluates whether and the extent to which the error affected the verdict. *Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999). This analysis involves examining whether the question of guilt is close, the nature of the error, "and the gravity of the crime charged." *Id.* Where there is overwhelming evidence of guilt and the error's effect is insignificant by comparison, an error is generally harmless beyond a reasonable doubt. *Stevens v. State*, 97 Nev. 443, 445, 634 P.2d 662, 664 (1981). But where "guilt is 'woven from circumstantial evidence,'" it may not be clear that an error is harmless beyond a reasonable doubt, particularly an error in the admission of evidence. *Id.* (quoting *Harrington v. California*, 395 U.S. 250, 254 (1969)). Thus, when conducting harmless-error review in a case woven from circumstantial evidence as this one was, this court must get into the weeds to determine whether an error is harmless. That is the analysis that the majority conducted. Essentially, it performed harmless-error review to determine whether it should perform harmless-error review. I feel that this defeats the purpose of the test we adopt today.

In contrast, I believe that when evaluating whether the harmlessness of the error is debatable, this court should take a broader, more casual view of the record. And only if, from this vantage, the court is certain the error had no effect on the jury's verdict, should the court then conclude that it should engage in harmless-error analysis sua sponte. From this broader view, Belcher's statement appears to be a more integral piece of the State's case-in-chief. The State mentioned Belcher's statement, notably his lies to police and attempts to fabricate an alibi for the night of the crime, during its opening statement and closing arguments. It introduced Belcher's statement and testimony from a witness who refuted Belcher's purported alibi with bank records. This was an important tactic, as the evidence

against Belcher was largely circumstantial and not overwhelming. No physical evidence connected Belcher to the scene. No one identified him as the man seen outside the home before the shootings or loading property into the car after the shootings. None of the stolen property was recovered or, despite the size of the property, noted during the traffic stop after the shootings. When questioned by the police, William Postorino initially refuted Belcher's purported motive and pointed to another individual who was dating Ashley Riley, was jealous and abusive, and had access to a white sedan. Nick Brabham's identification was equivocal and Belcher's other inculpatory statements could have been misconstrued by the listener or fabricated by a witness seeking lenient treatment in other criminal proceedings. By framing the trial with Belcher's deception, the State infused doubt over the defense evidence and arguments. Absent physical or forensic evidence, or an unequivocal identification of Belcher at the scene of the shooting, the error's harmlessness is not readily assessed and requires a more thorough search of the record. *See Giovannetti*, 928 F.2d at 227. Based on the difficulty in quantifying the effect that Belcher's statement had on the verdict, I believe the error's harmlessness is debatable.

Finally, the third factor (futility and costliness of reversal and further litigation) does not support harmlessness review in this case. Reversal and further litigation is only futile when the error did not make any difference in the verdict—in other words, when the harmlessness is *not* reasonably debatable. *See id.* at 227 (recognizing that when considering third-party costs, "reversal may be an excessive sanction for the government's having failed to argue harmless error, at least if the harmlessness of the error is readily discernable without an elaborate search of the record"). When harmlessness *is* reasonably debatable, as I believe it is here, reversal and further litigation is not futile precisely because of the uncertainty as to whether the verdict would have been the same absent the error. *See Rodriguez*, 880 F.3d at 1165 (concluding that reversal was not clearly futile because the error's harmlessness was debatable).

In sum, I conclude that the voluminous and complex record makes sua sponte harmless-error review impracticable, the harmlessness of the constitutional error at issue is debatable, and remand is not clearly futile. Thus, we should not relieve the State from the consequences of its waiver. Accordingly, I would reverse the judgment of conviction and remand for a new trial based on the constitutional error in admitting Belcher's un-Mirandized statements during a custodial interrogation.

JOSHUA RAY HONEA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 76621

June 18, 2020 466 P.3d 522

Appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a minor under 16 years of age. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed and remanded.

Jonathan E. MacArthur, P.C., and *Jonathan E. MacArthur*, Las Vegas; *Monique A. McNeill*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander G. Chen*, Chief Deputy District Attorney, and *Stacy L. Kollins*, Deputy District Attorney, Clark County, for Respondent.

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

OPINION

By the Court, Stiglich, J.:

In this opinion, we are asked to examine a previous version of NRS 200.366 (2007),[1] Nevada's sexual assault statute, to determine whether age alone was determinative of nonconsent or of the victim's ability to resist or understand the nature of the sexual conduct. Because NRS 200.366 did not contain an age of consent, the mere fact of a victim's age did not establish a lack of consent or an inability to resist or understand the nature of the conduct. Therefore, the district court's instructions to the jury that 16 was the age of consent to sexual penetration and that consent in fact by a child under 16 years of age was not a defense to the crime of sexual assault of a minor under 16 were incorrect statements of law and given in error. Additionally, the district court erred in failing to give an inverse jury instruction supporting the defendant's theory of defense. Because we cannot say these errors were harmless beyond a reasonable doubt, we reverse and remand for a new trial.

BACKGROUND

The State filed 52 charges against appellant Joshua Honea, all relating to his relationship with the victim, a minor. Honea was in his

[1]Throughout this opinion, we refer to the version of the statute in effect when appellant Joshua Honea was charged. See 2007 Nev. Stat., ch. 528, § 7, at 3255-56.

late teens and early twenties during his relationship with the victim, who was 11 when she met Honea and 15 when their relationship concluded. The victim told investigating officers, and testified at the preliminary hearing, that she and Honea had a sexual relationship for years. However, when the victim was 18 years old, she recanted her story during trial and stated the two were just friends.

Before the district court submitted the case to the jury, Honea requested the following jury instruction:

> Physical force is not necessary in the commission of sexual assault. The crucial question is not whether a person was physically forced to engage in a sexual assault but whether the act was committed without her consent or under conditions in which the defendant knew or should have known, the person was incapable of giving her consent or understanding the nature of the act.
>
> Thus, if the State fails to prove beyond a reasonable doubt that the person did not consent or fails to prove beyond a reasonable doubt that the defendant knew or should have known the person was incapable of giving her consent or fails to prove beyond a reasonable doubt that she did not understand the nature of the act, you must find the defendant not guilty of Sexual Assault.

The State proposed an instruction declaring, "[c]onsent in fact of a minor child under the age of 16 years to sexual activity is not a defense to a charge of Sexual Assault with a Minor Under Sixteen Years of Age." Over Honea's objection, the district court gave the State's instruction and rejected his instruction. The district court also instructed the jury that, "[i]n Nevada, the age of consent to sexual penetration is sixteen." A jury acquitted Honea of all but one of the 52 charges, convicting him of Count 39, sexual assault of a minor under 16 years of age.[2]

DISCUSSION

The victim's age, by itself, was not dispositive of any element of sexual assault

Honea argues the district court erred by instructing the jury that the age of consent to sexual penetration is 16 years old and that consent is not a defense to the crime of sexual assault of a minor under the age of 16. While we review a district court's decision to give a particular instruction for an abuse of discretion or judicial error, we review de novo whether a particular instruction is a correct

[2]Count 39 alleged that Honea and the victim had sexual intercourse sometime between June 30, 2013, and December 31, 2014. The evidence adduced at trial showed that the victim was 15 years old and Honea was 21 or 22 years old at the time of the conduct alleged in this count.

statement of law. *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). We agree with Honea that the challenged jury instructions were incorrect statements of law.

In relevant part, the version of NRS 200.366(1) in effect when Honea was charged defined sexual assault as:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself[,] . . . *against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct*, is guilty of sexual assault.

(Emphasis added.) This language provides two theories of criminal liability for sexual assault. The first theory criminalizes sexual penetration made against the victim's will. The second theory criminalizes sexual penetration made under conditions in which the perpetrator knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of the conduct. Neither theory mentions the victim's age.

We recognized the omission of the victim's age in *Alotaibi v. State*, where we considered the same statutory language and concluded statutory sexual seduction was not a lesser-included offense of sexual assault of a minor. 133 Nev. 650, 404 P.3d 761 (2017), *cert. denied*, 138 S. Ct. 1555 (2018). We clarified that the age of the victim only served to increase the maximum sentence the district court could impose for sexual assault of a minor. *Id.* at 654, 404 P.3d at 766. Specifically, we stated the following:

> [T]he offense of sexual assault, *regardless of whether it was committed against a minor*, has two statutory elements: "(1) subject[ing] another person to sexual penetration . . . (2) against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct."

Id. at 655-56, 404 P.3d at 766 (alteration in original) (emphasis added) (quoting 2007 Nev. Stat., ch. 528, § 7, at 3255 (NRS 200.366(1))). We explained that the victim's age was not an element of sexual assault or "essential to a finding of guilt." *Id*. at 655, 404 P.3d at 765. Thus, the victim's age, alone, does not establish the victim's ability to consent or the capacity to resist or understand the nature of the sexual conduct.

Nevertheless, the State argues that this court previously determined that minors under 16 were incapable of giving consent when we recognized "sixteen as the age of consent for sexual intercourse, anal intercourse, cunnilingus or fellatio." *Manning v. Warden*, 99 Nev. 82, 86 n.6, 659 P.2d 847, 849 n.6 (1983). We reject the State's

argument that the age of consent from a wholly separate statute could be assigned to the sexual assault statute. The *Manning* decision referred to a previous version of statutory sexual seduction that contained an element of consent. *See* 1979 Nev. Stat., ch. 349, § 1(3), at 572 (" 'Statutory sexual seduction' means ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a *consenting* person under the age of 16 years." (emphasis added)). At the time Honea was charged, the statute had been modified to delete the word "consenting" and criminalized sexual acts based solely on the ages of those involved. *See* 2013 Nev. Stat., ch. 426, § 34(6)(a), at 2427. The modification eliminated the element of consent and thus any previously recognized age of consent. Any reliance on this language in *Manning* at Honea's trial for sexual assault was misplaced.

Our sexual assault statute has also undergone modifications, and the legislative history of the most recent amendment supports our conclusion that age was not determinative of any element in the statute at the time Honea was charged. In 2015, the Legislature modified the sexual assault statute to add an additional theory of liability:

> A person is guilty of sexual assault if he or she . . .
>
> (b) Commits a sexual penetration upon a child under the age of 14 years or causes a child under the age of 14 years to make a sexual penetration on himself or herself or another . . . .

2015 Nev. Stat., ch. 399, § 8, at 2235; NRS 200.366(1). The legislative history surrounding this change demonstrates that, prior to 2015, "[t]o prove a sexual assault occurred, the State [had to] show the child could not have consented to the act based on lack of age, life experiences and immaturity." *See* Hearing on A.B. 49 Before the Senate Judiciary Comm., 78th Leg. (Nev., May 8, 2015) (statement of James Sweetin, Chief Deputy District Attorney, Clark County District Attorney's Office). As explained, the amendment would "no longer require[ ] the State to show a child under the age of 14 . . . did not understand the conduct in order to prove a sexual assault." *Id*. The new theory of liability allowed prosecution without a showing of sexual penetration against the victim's will or under conditions in which the defendant knew or should have known the victim was incapable of understanding or resisting but only where the victim was under the age of 14. Prior to this amendment, the State was required to prove lack of consent or an inability to resist or understand the nature of the sexual conduct, no matter the victim's age. And as discussed above, the victim's age, by itself, was not conclusive proof of either theory. Accordingly, the district court's instructions that 16 is the age of consent to sexual penetration and that consent in fact of a victim under 16 is not a defense to sexual assault of a minor under 16 were incorrect statements of law.

Honea was entitled to an inverse jury instruction

Honea also claims the district court erred by rejecting his proposed jury instruction. We have "held that the defense has the right to have the jury instructed on its theory of the case[,] . . . no matter how weak or incredible that evidence may be." *Crawford v. State*, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005) (internal quotation marks omitted). And when a defendant requests "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking," the district court must give those instructions. *Id.* at 753, 121 P.3d at 588. But a defendant is not "entitled to instructions that are misleading, inaccurate, or duplicitous." *Id.* at 754, 121 P.3d at 589.

Honea's proposed instruction stated the jury could not convict him if the State did not prove beyond a reasonable doubt that (1) the victim did not consent, (2) Honea knew or should have known that the victim was incapable of giving her consent, or (3) the victim did not understand the nature of the act. As written, Honea's proposed jury instruction partially misstated the law. It is not only that the victim did not understand the nature of the act but also that Honea knew or should have known the victim did not understand. But even where a defendant's proposed instruction is poorly drafted, "the district court is ultimately responsible for . . . assuring that the substance of the defendant's requested instruction is provided to the jury" and is a correct statement of law. *See id.* at 754-55, 121 P.3d at 589. "[T]he district court may either assist the parties in crafting the required instructions or may complete the instructions sua sponte." *Id*. at 755, 121 P.3d at 589. Regardless of whether Honea's instruction was poorly drafted, Honea was entitled to a correctly worded instruction that reminded the jury it could not find him guilty of sexual assault of a minor under 16 years of age unless the State established beyond a reasonable doubt that sexual penetration occurred either (1) against the victim's will, or (2) under conditions in which Honea knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of her conduct. Therefore, we conclude the district court abused its discretion by not giving an inverse jury instruction that correctly stated the law.

The district court's jury-instruction errors were not harmless

"This court evaluates appellate claims concerning jury instructions using a harmless error standard of review." *Mathews v. State*, 134 Nev. 512, 517, 424 P.3d 634, 639 (2018) (internal quotation marks omitted). The district court's errors pertaining to jury instructions will be harmless only if "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error

and that the error was harmless under the facts and circumstances of this case." *Crawford*, 121 Nev. at 756, 121 P.3d at 590. But "[i]f a defendant has contested the omitted element [of a criminal offense] and there is sufficient evidence to support a contrary finding," the instructional error is not harmless. *Mathews*, 134 Nev. at 517, 424 P.3d at 639 (second alteration in original) (internal quotation marks omitted).

As concluded above, Honea was entitled to a properly worded jury instruction supporting his theory of defense. The district court's failure to give such an instruction, on its own, may have been harmless. But the resulting error was compounded by the instructions misstating the law about an age of consent and the unavailability of consent as a defense. We are not convinced beyond a reasonable doubt that these errors did not contribute, at least in part, to the jury's verdict. Because these errors were not harmless, we reverse and remand this matter for a new trial.[3]

Hardesty and Silver, JJ., concur.

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[3]Because we reverse and remand for a new trial, we do not consider Honea's argument that the district court erred by denying his motion for a new trial based on juror misconduct and his motion for a judgment of acquittal.

Additionally, Honea argues the State presented insufficient evidence to sustain his conviction. After viewing the evidence in the light most favorable to the State, we disagree and conclude a rational trier of fact could have found, beyond a reasonable doubt, the elements of sexual assault of a minor under 16 years of age. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jackson v. State*, 117 Nev. 116, 122, 17 P.3d 998, 1002 (2001); *see also McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("[I]t is the jury's function, not that of the [reviewing] court, to assess the weight of the evidence and determine the credibility of witnesses.").

JAMES H. DROGE, an Individual; and CYNTHIA DROGE, an Individual, Appellants, *v.* AAAA TWO STAR TOWING, INC., a Nevada Corporation; DONALD SHUPP, an Individual; ZANE INVESTIGATIONS, INC., a Nevada Corporation; MARK A. ZANE, an Individual; and KRISTAL M. ROMANS, aka CRYSTAL ROMANS, an Individual, Respondents.

No. 75206-COA

June 18, 2020 468 P.3d 862

Appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed in part, reversed in part, and remanded.

Stovall & Associates and *Ross H. Moynihan* and *Leslie Mark Stovall*, Las Vegas, for Appellants.

Bremer Whyte Brown & O'Meara, LLP, and *Jared G. Christensen* and *Anthony T. Garasi*, Las Vegas, for Respondents Kristal M. Romans, Mark A. Zane, and Zane Investigations, Inc.

Phillips, Spallas & Angstadt, LLC, and *Alyce W. Foshee* and *Robert K. Phillips*, Las Vegas, for Respondents AAAA Two Star Towing, Inc., and Donald Shupp.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

OPINION

By the Court, Bulla, J.:

Under NRS 104.9609—part of Nevada's version of the Uniform Commercial Code (U.C.C.)—when a default occurs, a secured party who "proceeds without breach of the peace" can take possession of collateral "[w]ithout judicial process." In other words, this statute authorizes a creditor to enter onto private property to attempt to retrieve collateral in what is commonly referred to as a self-help repossession.

In this appeal, the court is asked to consider an issue of first impression—the question of what conduct, undertaken in the course of a self-help repossession of a vehicle, constitutes a breach of the peace, such that the privilege to enter real property without judicial process and retake collateral afforded by NRS 104.9609 no longer applies to those engaged in the repossession effort. We also consider whether appellants can properly base their tort claims on allegations

that both a breach of the peace and trespass occurred, even though they did not plead separate claims for such, or indeed a violation of NRS 104.9609. Finally, this court must examine whether summary judgment was warranted with respect to appellants' tort claims in light of our resolution of the above issues.

I.

A.

Russell Droge entered into a loan agreement with JP Morgan Chase Bank, N.A., in connection with his purchase of a Dodge Ram pickup truck. Russell was later incarcerated, and his parents, appellants James and Cynthia Droge (referred to collectively as the Droges where appropriate), agreed to store the truck at their home in Pahrump, Nevada. Thereafter, the Droges had possession of the truck, which they kept in their fenced backyard. Although the Droges had possession of the collateral, they have never asserted during these proceedings that they are debtors or obligors with respect to the truck or that they have any security interest in the truck.

While incarcerated, Russell defaulted on his loan. Chase retained respondent Zane Investigations, Inc. (Zane), to perform an involuntary repossession of the truck.[1] Zane, in turn, assigned the matter to respondent Kristal Romans, who was Zane's sole employee in Pahrump and in charge of its repossessions.[2] In connection with her assignment to repossess Russell's truck, Romans regularly drove by the Droges' property to assess the feasibility of repossessing the vehicle. Romans was not immediately able to repossess the truck because it was parked in the Droges' secured backyard.

Several months later, Romans spotted Russell's truck parked in front of the Droges' home on the driveway, which was not fenced and was therefore accessible. However, because Zane does not have its own tow trucks in Pahrump, Romans could not proceed with the repossession by herself. Instead, Romans parked on a nearby street

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[1]Because a secured party's duty to carry out self-help repossessions is nondelegable, *see* U.C.C. § 9-625 cmt. 3 (Am. Law Inst. & Unif. Law Comm'n 2017), secured parties will be held liable for actions taken on their behalf by agents or independent contractors. Courts have likewise permitted claims to proceed against agents or independent contractors for any breach of the peace and resulting tortious conduct that occurs during self-help repossessions. *See, e.g.*, *Callaway v. Whittenton*, 892 So. 2d 852, 857 (Ala. 2003) (permitting a wrongful repossession claim against a repossession agent to go to the jury on the question of whether the agent breached the peace); *Griffith v. Valley of the Sun Recovery & Adjustment Bureau, Inc.*, 613 P.2d 1283, 1284-86 (Ariz. Ct. App. 1980) (permitting a plaintiff to proceed against a repossession agency with a negligence claim that was based on a breach of the peace theory). Thus, for purposes of this opinion, we do not differentiate between secured parties and their independent contractors.

[2]Zane and Romans are jointly represented in this matter, and they are referred to collectively herein as Romans where appropriate.

and contacted respondent AAAA Two Star Towing, Inc. (Two Star), which provides Zane with towing services when it repossesses vehicles in Pahrump. Two Star, in turn, dispatched one of its tow truck drivers, respondent Donald Shupp,[3] to meet Romans and tow Russell's truck for Zane. Shupp's training was in the area of towing, but with regard to repossessions, Two Star directed him to follow the repossession agent's instructions, avoid confrontations, and retreat upon demand.

On the day of the attempted repossession, Shupp met Romans on the street where she had parked to assess whether they had an opportunity to repossess the truck. She explained to Shupp that the repossession was involuntary and would be of the "grab-and-go," "no-contact" variety. They then drove to the Droges' property. Romans parked on the street in front of the Droges' house and walked to Russell's truck in the driveway while Shupp backed his tow truck onto the driveway behind Russell's truck.

The parties agree, and the record reflects, that upon entering the Droges' property, Romans confirmed that Russell's truck was the vehicle they were there to repossess by checking its vehicle identification number. Shupp then lowered his tow truck's flatbed and began chaining Russell's truck to the winch so that the truck could be pulled onto the flatbed. Meanwhile, Cynthia and James Droge, who were in their house, became aware of what was transpiring and went outside to confront Romans and Shupp. At some point during the proceeding events, either one or both of the Droges objected to Romans and Shupp repossessing Russell's truck, although the parties vigorously dispute when this actually took place. But ultimately, the attempted repossession continued until James retrieved the keys to Russell's truck, started it, and moved it into the fenced backyard. Either Romans or Shupp then called 9-1-1.

B.

The parties do not agree about much else that transpired during the attempted repossession. Indeed, Romans and Shupp maintain that they followed proper procedures during the attempted repossession and that their entry onto the Droges' property was privileged under NRS 104.9609. The Droges, on the other hand, contend that Romans and Shupp breached the peace and thereby forfeited the statute's protections. The parties' positions are based on a number of more specific disputes concerning what happened during the attempted repossession.[4]

[3]Two Star and Shupp are jointly represented in this matter, and they are referred to collectively herein as Shupp where appropriate.

[4]Although the parties disagree about what happened during the attempted repossession, the propriety of the time at which it occurred has never been at issue in this case.

For example, the parties disagree whether Romans and Shupp identified themselves and produced the documentation from Chase that authorized them to repossess Russell's truck. The Droges contend that Romans refused Cynthia's request to see her identification and the documentation and instead stepped toward Cynthia in a confrontational manner, proclaiming that she and Shupp were "taking the truck." Romans and Shupp, on the other hand, maintain that, although they were not asked for identification or the documentation, Romans identified herself and explained that they were repossessing Russell's truck, which prompted Cynthia to threaten to call 9-1-1.

The parties also dispute when the Droges objected to Romans and Shupp being on their property in order to repossess the truck, and how Romans and Shupp responded to any objection. According to the Droges, they objected to the repossession as soon as Romans refused to identify herself and produce the repossession order. The Droges further assert that they objected several more times during the incident and that, although Romans eventually walked off of the property and out to the street in front of the Droges' house, Shupp continued with his efforts to attach a chain to the truck until James moved Russell's truck to the backyard and demanded that Shupp leave the property.

According to Romans and Shupp, Cynthia threatened to call the police, which prompted Romans to tell Shupp to hurry up so they could "hook" the vehicle before the Droges told them to leave the property. But Romans and Shupp do not acknowledge any of the Droges' specific objections to the repossession, arguing instead that the first time the Droges demanded that they leave the property was *after* James finished moving Russell's truck into the backyard. Romans and Shupp further maintain that Shupp responded by promptly joining Romans on the street in front of the Droges' house while leaving his tow truck in the Droges' driveway, presumably to be retrieved in the aftermath of the 9-1-1 call that Romans or Shupp subsequently made.

Lastly, the parties dispute whether Shupp was struck by Russell's truck while James was attempting to move the vehicle. According to the Droges, James saw that Shupp was working under the back of the truck when James began to move it, but they maintain that James first moved the vehicle forward, which prompted Shupp to stand up and get out of the way, and that James then backed the truck up and proceeded to maneuver the vehicle into the backyard without event. But the Droges acknowledge that, once James parked Russell's truck in the backyard, Shupp stated from the other side of the fence, "[y]ou hit me, man," albeit without further explanation. On the other hand, Romans and Shupp maintain that Shupp was still under the vehicle when James began to back it up, which prompted Romans to scream for Shupp to watch out. This prompted Shupp to

look around, but Romans' warning apparently came too late, as Romans and Shupp indicate that Shupp was struck in the chest by the passenger-side rear wheel of Russell's truck. According to Shupp, he would have been crushed if James had backed Russell's truck up another four inches; however, since he was not injured, he was able to scramble out from under the truck while James continued maneuvering the vehicle into the backyard.

C.

In the aftermath of the failed repossession, a sheriff's deputy responded to the Droges' home. James admitted to the sheriff's deputy that he knew Shupp was on the ground behind Russell's truck when he began to move it. As a result, the sheriff's deputy concluded that James committed battery with a deadly weapon and arrested him. For the same reason, a deputy district attorney decided to charge James with that crime, and the justice court concluded that there was probable cause to bind James over for trial before the district court. The case proceeded to trial, and the jury ultimately acquitted James.

II.

The Droges subsequently sued Zane, Romans, Two Star, and Shupp, alleging that Romans and Shupp entered their property and trespassed when they failed to leave when asked, that Shupp indicated to the sheriff's deputy that he wanted to press charges against James, and that Romans and Shupp testified against James at his criminal trial.[5] Based primarily on these allegations, the operative complaint included claims for malicious prosecution (solely on James's behalf); negligent hiring, training, and supervision (against Zane and Two Star); negligent infliction of emotional distress (NIED) (solely on Cynthia's behalf); negligent performance of an undertaking (against Zane and Two Star); nuisance (against Romans and Shupp); aiding and abetting; concert of action; intentional infliction of emotional distress (IIED); unreasonable intrusion upon the seclusion of another; and declaratory relief.[6]

Early in the proceeding, Romans moved for summary judgment, but the district court only granted her motion as to James' claim for malicious prosecution and James' and Cynthia's claim for negligent hiring, summarily concluding that they were unable to establish the required elements of those claims. Following discovery, Romans and Shupp each moved for summary judgment on the Droges' re-

[5]The Droges also sued Zane's owner, Mark A. Zane, but the district court later dismissed their claims against him, and the Droges do not challenge that decision on appeal.

[6]The Droges asserted these claims against each respondent unless otherwise noted.

maining claims, arguing, among other things, that NRS 104.9609 authorized them to enter the Droges' property to repossess Russell's truck; that they did not initiate the prosecution against James; and that they were not the proximate cause of any of the Droges' alleged damages.

The Droges opposed summary judgment, asserting, among other things, that Romans and Shupp failed to leave their property when directed to do so; therefore, Romans and Shupp breached the peace by trespassing and cannot rely on the protections afforded by NRS 104.9609, that Romans and Shupp initiated the criminal proceeding against James, and that they suffered physical and emotional injuries as a result of the attempted repossession and James's subsequent criminal prosecution. Following a hearing, the district court entered a second written order summarily concluding that the Droges could not establish all the required elements of their remaining claims and granted summary judgment against them. The Droges appeal, challenging both summary judgment orders.

III.

This court reviews a district court's orders granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when the pleadings and other evidence in the record establish that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. *Id.* When evaluating a summary judgment motion, the district court must view all evidence, along with any reasonable inferences drawn from it, "in a light most favorable to the nonmoving party." *Id.* The nonmoving party "may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Id.* at 731, 121 P.3d at 1030-31 (internal quotation marks omitted). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

On appeal, the Droges primarily argue that Romans and Shupp forfeited NRS 104.9609's protections by breaching the peace during the attempted repossession of Russell's truck. They contend that Romans' and Shupp's entry on their property was a trespass because the two would not leave when asked, and therefore, the district court erred in granting summary judgment against them. Further, they argue that their various tort claims, which were underpinned by theories of breach of the peace and trespass, were supported by the evidence and that the district court should not have entered summary judgment against them. Romans and Shupp counter that they did not breach the peace during the attempted repossession, and therefore, their entry on the Droges' property to repossess Russell's truck was

privileged under NRS 104.9609.[7] Romans and Shupp further argue that the Droges' amended complaint was deficient in that the Droges failed to prove the requisite elements of their claims, including damages; thus, summary judgment was appropriate.

IV.

Before we can evaluate whether the district court erred in granting summary judgment against the Droges on their various tort claims, we must first determine whether Romans and Shupp forfeited the protections afforded by NRS 104.9609 by breaching the peace in their efforts to repossess Russell's truck. Nevada's statute, like its analogue in the U.C.C., does not define the term breach of the peace. *See* U.C.C. § 9-609 cmt. 3 (Am. Law Inst. & Unif. Law Comm'n 2017) (noting that, rather than defining or explaining what conduct constitutes a breach of the peace, U.C.C. § 9-609 leaves that issue for development by the courts). And although the Nevada Supreme Court has recognized that self-help repossessions are permissible, provided that they are performed without a breach of the peace, *see Nev. Nat'l Bank v. Huff*, 94 Nev. 506, 512, 582 P.2d 364, 369 (1978) (citing NRS 104.9609 as originally numbered), the court has yet to define what constitutes a breach of the peace in the context of the U.C.C.

A.

The term "breach of the peace," however, appears elsewhere in Nevada law. The term is defined in NRS 203.010, a criminal statute that appears under the heading "[b]reach of peace," which makes it a misdemeanor to "maliciously and willfully disturb the peace or quiet of any neighborhood or person or family by loud or unusual noises, or by tumultuous and offensive conduct, threatening, traducing, quarreling, challenging to fight, or fighting." In arguing that they did not breach the peace, Romans and Shupp emphasize that the sheriff's deputy did not cite them for violation of this criminal statute. But while the rules of statutory construction generally per-

[7]Although not raised in the present case, because it is an important issue, we clarify that a successful repossession is not a prerequisite to a secured party being liable for violating NRS 104.9609. *See Williams v. Republic Recovery Serv., Inc.*, No. 09-cv-6554, 2010 WL 3732107, at *3 (N.D. Ill. Sep. 16, 2010) (concluding that a secured party need not successfully repossess collateral to violate Illinois' self-help repossession statute); *Census Fed. Credit Union v. Wann*, 403 N.E.2d 348, 351-52 (Ind. Ct. App. 1980) ("[E]ven in the attempted repossession of a chattel off a street, parking lot or unenclosed space, if the repossession is verbally or otherwise contested at the actual time of and in the immediate vicinity of the attempted repossession by the defaulting party or other person in control of the chattel, the secured party must desist and pursue his remedy in court.").

mit us to construe a statutory term by looking to how that term is defined elsewhere in Nevada law, *see Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 283-84, 449 P.3d 479, 482-83 (Ct. App. 2019) (construing a statutory term by looking to how that term is defined in similar statutes), applying that approach in the present case would be inapposite to how the Legislature has expressly stated Nevada's U.C.C. should be construed. Indeed, NRS 104.1103(1) directs courts to liberally construe and apply Nevada's U.C.C. "[t]o make uniform the law among the various jurisdictions." *See Newmar Corp. v. McCrary*, 129 Nev. 638, 641, 309 P.3d 1021, 1024 (2013) (recognizing that NRS 104.1103 provides courts guidance with respect to how they should construe Nevada's U.C.C.). As a result, we proceed to examine how other jurisdictions have construed and applied the term "breach of the peace" for purposes of applying their self-help repossession statutes.

B.

Not surprisingly, courts struggle to define the term "breach of the peace" in the context of self-help repossession statutes. Indeed, a breach of the peace has been described as "a legal concept with shifting boundaries not unlike the relatively elastic legal concept of 'probable cause.'" *Hopkins v. First Union Bank of Savannah*, 387 S.E.2d 144, 145 (Ga. Ct. App. 1989). As a result, most courts simply resolve breach of the peace cases without adopting a definition for the term itself, instead focusing on the specific factual circumstances of each case. *See, e.g.*, *Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449 (Wis. Ct. App. 1993) (looking to a case's specific factual circumstances without defining the term breach of the peace); *Wade v. Ford Motor Credit Co.*, 668 P.2d 183 (Kan. Ct. App. 1983) (surveying definitions of breach of the peace from extrajurisdictional authorities without adopting them).

Because we agree that breach of the peace is a relatively elastic legal concept, we track the majority approach and decline to adopt an express definition for the term. Instead, we provide workable guidelines to assist courts in determining when a breach of the peace occurs. We initially focus on key general principles that can be gleaned from how other jurisdictions have resolved whether a secured party's conduct rises to the level of a breach of the peace resulting in losing the protections afforded by self-help repossession statutes. We next consider the analytical framework set forth in the Restatement (Second) of Torts, which provides guidance as to when a secured party's conduct will be deemed to constitute a breach of the peace in the self-help repossession context. Finally, we will address the appropriate legal test to be applied in Nevada with respect to this issue.

C.

Because litigation in this area generally involves a narrow set of factual circumstances that routinely arise during self-help repossessions, general principles with respect to what constitutes a breach of the peace are readily discernable from other jurisdictions. For example, courts routinely conclude that a breach of the peace occurs where actual violence or physical resistance is present during a repossession. *See, e.g.*, *Callaway v. Whittenton*, 892 So. 2d 852, 854, 857 (Ala. 2003) (holding that a repossession agent who drove over a debtor's foot and drug him behind a vehicle used physical force to overcome the debtor's resistance and that a jury could therefore find a breach of the peace); *Cottam v. Heppner*, 777 P.2d 468, 472 (Utah 1989) (identifying the potential for violence and the nature of the premises intruded upon as the primary factors for the court's consideration when determining whether a breach of the peace has occurred). However, courts nonetheless widely recognize that violence is not a precondition to a breach of the peace under self-help repossession statutes. *See, e.g.*, *Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171, 1173 (Ill. App. Ct. 1996) (providing that violent conduct is not a necessary element of a breach of the peace and that a probability of violence incident to a repossession is sufficient).

Courts also routinely hold that, even absent physical violence, when a repossession agent crosses physical barriers or destroys personal property in furtherance of a repossession, a breach of the peace occurs. *See, e.g.*, *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29-30 (Tenn. Ct. App. 1991) (concluding that a repossession agent breached the peace by entering a closed garage and cutting a padlock). However, courts also recognize that a mere trespass, standing alone, is not a breach of the peace. As a result, courts have been unwilling to subject creditors to liability for removing collateral from debtors' private driveways, provided that they are open. *See, e.g.*, *Butler v. Ford Motor Credit Co.*, 829 F.2d 568, 569-70 (5th Cir. 1987) (affirming a district court's conclusion that a repossession agent did not breach the peace by entering an open private driveway to repossess a vehicle without the use of force). And courts generally take the same approach where creditors repossess collateral from open areas on the property of third parties. *See, e.g.*, *Reno v. Gen. Motors Acceptance Corp.*, 378 So. 2d 1103, 1103-05 (Ala. 1979) (concluding that a repossession agent did not breach the peace when it removed the debtor's collateral from his employer's parking lot).

Courts further routinely conclude that, under self-help repossession statutes, the peace is breached when a repossession proceeds over the objection of the debtor or certain third parties, such as the debtor's family or a person in control of the collateral. *See, e.g.*, *Hollibush*, 508 N.W.2d at 455 (concluding that a secured party's

agent breached the peace when it repossessed a vehicle over the objection of the debtor or her fiancé). However, courts generally recognize that an objection must be made at the time of the repossession to give rise to a breach of the peace. *See, e.g.*, *Chapa v. Traciers & Assocs.*, 267 S.W.3d 386, 395 (Tex. Ct. App. 2008) (recognizing that the secured party must desist when the debtor or other person in control of the collateral objects contemporaneously with and in close proximity to the repossession).[8]

D.

We next examine the approach set forth in Restatement (Second) of Torts section 198(1) (Am. Law Inst. 1965) in determining what constitutes a breach of the peace. In addition to analyzing the specific circumstances of each case, courts also follow a more structured approach by applying the test from section 198(1) of the Second Restatement, which provides that "[o]ne is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel to the immediate possession of which the actor is entitled, and which has come upon the land otherwise than with the actor's consent or by his tortious conduct or contributory negligence."

The Wyoming Supreme Court's decision in *Salisbury Livestock Co. v. Colorado Central Credit Union* provides the best example of this approach. 793 P.2d 470 (Wyo. 1990). In that case, a debtor defaulted on a loan secured by, as relevant here, two vehicles that he stored on a secluded ranch that was owned by a corporation for which he held a partial ownership interest. *Id.* at 471-72, 475. After the secured party's agents repossessed those vehicles from the ranch without notice to the corporation, the corporation sued the secured party and its agents for trespass, and the trial court entered a directed verdict for the defense, reasoning that the agents' conduct was privileged under Wyoming's self-help repossession statute, which is nearly identical to NRS 104.9609. *Id.* at 471-73, 475.

In the subsequent appeal, the *Salisbury* court considered whether the secured party's agents' conduct rose to the level of a breach of the peace for purposes of Wyoming's self-help repossession statute. The *Salisbury* court initially observed that Wyoming's self-help repossession statute was a codification of U.C.C. section 9-503, which

[8]A few courts have essentially held that a breach of the peace does not occur when a repossession proceeds over a mere objection. *See, e.g.*, *Koontz*, 661 N.E.2d at 1174 (reasoning that a self-help repossession statute would be useless if an oral protest alone were sufficient to constitute a breach of the peace). But as observed in *Hollibush*, an objection is a "precursor to violence and . . . it should not be necessary for a debtor to resort to violence" for a breach of the peace to occur. 508 N.W.2d at 455. Because we agree with the *Hollibush* reasoning, we conclude that a mere objection may be sufficient to require a secured party to terminate its repossession efforts so as not to breach the peace.

has since been renumbered as U.C.C. section 9-609. *Id.* at 473. The *Salisbury* court further explained that U.C.C. section 9-609 itself incorporated a preexisting common law right of extrajudicial repossession, which the court reasoned was expressed in section 198(1) of the Second Restatement.[9] *Id.* In addition, because nothing in Wyoming's self-help repossession statute indicated that the Wyoming Legislature intended to deviate from the common law, the *Salisbury* court adopted the Second Restatement's reasonableness test for purposes of determining when a secured party's conduct during a self-help repossession rises to the level of a breach of the peace. *Id.* at 474. For further support, the Wyoming Supreme Court reasoned that this approach would effectively balance the secured party's right to enforce its security interest through self-help with society's interest in tranquility and the right of those who are not parties to a security agreement to be free from unwanted invasions of their land. *Id.* at 474-76.

Consistent with the general principles discussed above, the *Salisbury* court further explained that, in applying the Restatement's reasonableness test, the primary factors a court should consider are the potential for violence and the nature of the premises intruded upon, since the potential for violence increases as the proximity to a dwelling, particularly a secluded one, decreases. *Id.* at 474-75. Thus, because the underlying repossession took place in a rural setting on a third party's property without notice to the third party, the *Salisbury* court concluded that a jury needed to determine whether there was a real possibility of immediate violence, such that the repossession was not reasonable in time and manner and, therefore, resulted in a breach of the peace. *Id.* at 475. Accordingly, the *Salisbury* court overturned the directed verdict for the secured party and its agents on the corporation's trespass claim and remanded the matter for a jury to evaluate whether a breach of the peace occurred. *Id*. at 471.

V.

With the foregoing in mind, we turn to how Nevada courts should evaluate breach of the peace in the self-help repossession context, including when applying NRS 104.9609. In support of their argument that Romans and Shupp breached the peace during the attempted repossession, the Droges argue that this court should follow the Wyoming Supreme Court's approach in *Salisbury* by adopting the

[9]Given the *Salisbury* court's observation that section 198(1) of the Second Restatement expressed a common law right that predated the U.C.C., it is notable that section 198(1) of the Second Restatement is a substantially unchanged version of Restatement (First) of Torts section 198(1), which the American Law Institute published in 1934, nearly two decades before the Uniform Commercial Code, with its breach of the peace standard, was offered to the states for adoption. *See* U.C.C. § 9-503 (Am. Law Inst. & Unif. Law Comm'n 1951 Final Text Edition).

Restatement's reasonableness standard. While Romans and Shupp disagree with respect to whether a breach of the peace occurred, they follow the Droges' lead in framing their argument in terms of whether they acted reasonably during the attempted repossession.

In considering whether to adopt the Restatement's reasonableness standard, we initially note that self-help repossession is recognized to be an inherently dangerous activity. *See, e.g.*, *Ford Motor Credit Co. v. Ryan*, 939 N.E.2d 891, 927 (Ohio Ct. App. 2010). However, secured parties nevertheless have an interest in enforcing their security interests through self-help when debtors default. As a result, the self-help repossession statutes that derive from U.C.C. section 9-609 authorize secured parties to engage in a repossession if it can be done without a breach of the peace. In this way, self-help repossession statutes protect the interest of not only the secured party, but also the debtor and the general public. *See* U.C.C. § 9-601 cmt. 2 (Am. Law Inst. & Unif. Law Comm'n 2017) (explaining that U.C.C. § 9-609 limits a secured party's ability to enforce its security interest in order to "protect[ ] the defaulting debtor, other creditors, and other affected persons"). Indeed, these authorities strive

> (1) to benefit creditors in permitting them to realize collateral without having to resort to judicial process; (2) to benefit debtors in general by making credit available at lower costs; and (3) to support a public policy discouraging extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.

Clarin v. Minn. Repossessors, Inc., 198 F.3d 661, 664 (8th Cir. 1999) (internal quotation marks omitted); *see also Giles v. First Va. Credit Servs., Inc.*, 560 S.E.2d 557, 565 (N.C. Ct. App. 2002). Consequently, the overriding goal for any test for determining whether conduct constitutes a breach of the peace must be to balance the stated objectives of self-help repossessions while minimizing the potential for violence by providing debtors and creditors with clear guidance as to when a breach of the peace occurs. *Clarin*, 198 F.3d at 664 (reasoning that, because secured parties, debtors, and the public have competing interests in the self-help repossession context, those interests must be balanced when determining what constitutes a breach of the peace); *see also Salisbury*, 793 P.2d at 475-76 (recognizing the importance of balancing the secured party's interest in a self-help remedy with society's interest in tranquility and the right of third parties to be free from unwanted invasions of their land).

We agree with the Wyoming Supreme Court that an effective means of balancing the competing interests that arise in the self-help repossession context is provided by the Second Restatement's requirement that self-help repossessions be conducted at a reasonable time and in a reasonable manner. Moreover, because NRS 104.9609 does not express a legislative intent to deviate from the common

law right to extrajudicial repossession that predated the U.C.C., we agree with the Wyoming Supreme Court that applying the Second Restatement's reasonableness standard to determine when a breach of the peace occurs is particularly appropriate. *See Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015) (providing that Nevada's appellate courts "presume that a statute does not modify common law unless such intent is explicitly stated"); Restatement (First) of Torts Introduction (Am. Law Inst. 1934) (explaining that the Restatement was published "to present an orderly statement of the general common law of the United States"); *see also Salisbury*, 793 P.2d at 473 (reasoning that the Restatement reflects the common law of extrajudicial repossession and adopting the Restatement's reasonableness standard since Wyoming's self-help repossession statute did not include an expression of legislative intent to deviate from the common law). Indeed, the Restatement's reasonableness standard has been adopted, or at least tacitly endorsed, by several other jurisdictions aside from Wyoming. *See, e.g.*, *Giles*, 560 S.E.2d at 565-66 (looking to the reasonableness of the time and manner of a repossession based on the Restatement but also applying a multifactor balancing test to aid the court's analysis).

Based on the reasoning articulated above, we adopt the Restatement's reasonableness standard and conclude that self-help repossessions must be conducted at a reasonable time and in a reasonable manner and that a breach of the peace occurs when a secured party fails to satisfy either or both of these obligations.[10] Moreover, given that the U.C.C. essentially codifies the common law right to extrajudicial repossession reflected in the Restatement, as the *Salisbury* court recognized, 793 P.2d at 473, we hold that a breach of the peace occurs when a self-help repossession or attempted repossession under NRS 104.9609 is undertaken in an unreasonable time or manner or both. And because the Nevada Legislature has directed that NRS 104.9609 be liberally construed "[t]o make uniform the law among the various jurisdictions," NRS 104.1103(1), we also direct Nevada courts to consider the key general principles regarding what consti-

[10]Although we adopt the reasonableness factors articulated in the Second Restatement, we reject the suggestion, in comments h and i to section 198, that breaking and entering and the use of force are acceptable in the self-help repossession context. Allowing such conduct is incompatible with the U.C.C.'s objective of discouraging violence in the course of self-help repossessions. *Clarin*, 198 F.3d at 664. We likewise decline to adopt comment d to section 198, which generally requires a secured party to provide the debtor with notice before it would be reasonable to enter the property to recover collateral. While the provision of notice may be relevant in assessing the reasonableness of a repossession in some circumstances, requiring a secured party to provide notice is unduly restrictive and is likely to undermine the secured parties' ability to carry out self-help repossessions. *See Everett v. U.S. Life Credit Corp.*, 327 S.E.2d 269, 269-70 (N.C. Ct. App. 1985).

tutes a breach of the peace that were discussed above in applying this reasonableness test.[11] *See supra* § IV(C). These general principles, gleaned from cases analyzing specific instances of conduct as discussed above, should not be disregarded merely because we have adopted the Restatement's reasonable time and manner requirements. Indeed, because these principles stem from a common understanding of the factual circumstances that tend to arise in self-help repossessions, courts should be guided by these general principles when evaluating the reasonableness of a secured party's conduct.[12]

VI.

Having determined that a breach of the peace occurs when a secured party acts at a time or in a manner that is not reasonable during a self-help repossession, we now consider whether genuine issues of material fact remain with respect to whether Romans' and Shupp's conduct breached the peace during the attempted self-help repossession. We note that we are not addressing the timing of the attempted repossession in the present case, as the Droges have never argued that it occurred at an unreasonable time. Instead, we focus on the *manner* of the attempted repossession. In this respect, the evidence in the record—particularly the parties' deposition testimony—when taken in the light most favorable to the Droges, reveals that factual disputes remain between the parties concerning almost everything

[11]Although reasonableness is generally a question of fact for the jury, a district court may nevertheless resolve a breach of the peace issue in the self-help repossession context prior to trial when it is clear that a reasonable jury could only reach one possible conclusion. *See Lee v. GNLV Corp.*, 117 Nev. 291, 296-97, 22 P.3d 209, 212-13 (2001) (explaining, in the context of a negligence claim, that reasonableness is usually a factual question for the jury but that summary judgment may nevertheless be warranted if a claim fails as a matter of law (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 37, at 237 (5th ed. 1984) ("It is possible to say, in many cases, that the conduct of the individual clearly has or has not conformed to what the community requires, and that no reasonable jury could reach a contrary conclusion."))). Consistent with this approach and Nevada's summary judgment standard, the existence of disputed issues of material fact is necessarily determinative of whether breach of the peace issues in the self-help repossession context can be resolved by the district court on summary judgment or whether these issues should go to the jury. *Compare Clarin*, 198 F.3d at 664 (affirming the entry of summary judgment against the plaintiff on a wrongful repossession claim that was based on a breach of the peace theory), *with Salisbury*, 793 P.2d at 475 (reversing a directed verdict on a trespass claim for the jury to consider whether the secured party's agent breached the peace).

[12]We recognize that other jurisdictions have used different analytical frameworks to determine when a secured party's conduct rises to the level of a breach of the peace in the self-help repossession context. *See, e.g.*, *Clarin*, 198 F.3d at 664 (balancing five factors in considering whether a breach of the peace occurred). Nevertheless, we conclude that the Restatement's reasonableness test, when applied in conjunction with the key general principles discussed above, provides the best-reasoned approach for resolving breach of the peace issues in the self-help repossession context.

that transpired during the attempted repossession. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (explaining that, in the context of a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party). Indeed, the parties disagree about when the Droges objected to the repossession and how Romans and Shupp responded to their objections, as well as whether the attempted repossession concluded with James striking Shupp with Russell's truck. Moreover, the parties dispute whether Romans behaved aggressively and failed to identify herself during the attempted repossession.

Each of these factual disputes is material to the general principles discussed above and raises the broader question as to whether Romans and Shupp failed to act in a reasonable manner and thereby breached the peace. *See id.* at 731, 121 P.3d at 1031 (stating that the substantive law determines which factual disputes are material, and, therefore, preclude summary judgment). Thus, genuine issues of material fact remain as to whether Romans and Shupp breached the peace, and as a result, the district court erred to the extent that it granted them summary judgment based on a contrary conclusion rather than permitting the trier of fact to evaluate those issues. *Id.* at 729, 121 P.3d at 1029.

VII.

The foregoing does not end our analysis, however, because Romans and Shupp further assert that the Droges failed to plead breach of the peace and trespass as separate claims below, and therefore the issues are not properly before this court. The Droges do not dispute that they did not expressly plead separate claims for breach of the peace and trespass in their amended complaint. Instead, they argue that the issues are properly before us since "breach of the peace" and "trespass" underpin their claims for NIED, negligent training and supervision, negligent performance of an undertaking, IIED, unreasonable intrusion upon the seclusion of another, nuisance, concert of action, aiding and abetting, and punitive damages, as well as Romans' and Shupp's defenses thereto. In particular, the Droges contend that they may establish certain elements of their tort claims by demonstrating that Romans and Shupp breached the peace during the attempted repossession and thereby forfeited NRS 104.9609's protections.

A.

The Droges' argument in this regard raises the issue of whether a plaintiff may seek redress for a breach of the peace by bringing tort claims, as the Droges did here, even though Article 9 of Nevada's U.C.C. provides for a private cause of action arguably encompassing the conduct at issue here. Specifically, NRS 104.9625 makes "a person . . . liable for damages in the amount of any loss caused by

a failure to comply with . . . [A]rticle [9].” When a plaintiff brings a claim under NRS 104.9625 that is premised on a secured party breaching the peace in violation of NRS 104.9609, the plaintiff is essentially asserting a wrongful repossession claim. *See, e.g.*, *Clarin*, 198 F.3d at 663 (referring to a claim arising from a secured party’s alleged breach of the peace as a cause of action for wrongful repossession under the U.C.C.); 42 Am. Jur. 3d *Liability of Creditor and Repossession Agent for Wrongful Repossession and Tortious Acts Committed During Repossession* § 355 (1997) (explaining that a self-help repossession is wrongful if any one of the following elements are missing: “(1) the creditor must have a security interest in the property repossessed; (2) the debtor must be in default; (3) the creditor’s actions must be in conformance with its contract with the debtor; and (4) the repossession must occur without a ‘breach of the peace’” (footnotes omitted)).

But pursuant to NRS 104.9625(3), this statutory wrongful repossession claim is only available to debtors, obligors, and holders of security interests or other liens on collateral.[13] And because the Droges do not contend that they fall within any of these categories, there is no indication that they are eligible claimants under the statute. *See* NRS 104.9102(1)(bb), (fff) (defining the terms “debtor” and “obligor” for purposes of Nevada’s U.C.C.). This is likely why the parties failed to either address or even identify this issue below. But a question remains as to whether the statute’s remedy is nonexclusive, such that the Droges may maintain common law tort claims based on the same type of conduct that would give rise to a claim under NRS 104.9625, such as a violation of NRS 104.9609.

Based on our review of extrajurisdictional authority as well as the comments to U.C.C. section 9-625 and other secondary sources, we conclude that Nevada’s self-help repossession statute is not an exclusive remedy. This conclusion is consistent with other courts, which widely recognize that statutes based on U.C.C. section 9-625 are nonexclusive. *See, e.g.*, *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 31 (Tenn. Ct. App. 1991) (explaining that Tennessee’s equivalent to the predecessor of U.C.C. § 9-625 was not exclusive, but rather, was cumulative to other remedies available under state law); *Gen. Elec. Credit Corp. v. Timbrook*, 291 S.E.2d 383, 385

[13]The comments to U.C.C. section 9-625 (Am. Law Inst. & Unif. Law Comm’n 2017), which corresponds to NRS 104.9625 and provides persuasive authority with respect to the interpretation of Nevada’s U.C.C., *see Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 523, 286 P.3d 249, 261 (2012) (citing the official comments to the U.C.C. as persuasive authority), confirm this interpretation of NRS 104.9625(3). *See* U.C.C. § 9-625 cmt. 3 (providing that subsection (c) of U.C.C. § 9-625, which corresponds to NRS 104.9625(3), identifies who may assert a claim deriving from the provision); NRS 104.9625(3) (setting forth damages that are available under NRS 104.9625(2) to a person who “at the time of [a violation of Article 9] was a debtor, was an obligor or held a security interest in or other lien on the collateral”).

(W. Va. 1982) ("[I]f repossessions result in breaches of the peace, creditors are responsible for any torts they commit."); *Whisenhunt v. Allen Parker Co.*, 168 S.E.2d 827, 831 (Ga. Ct. App. 1969) (explaining that, although a repossession agency had a right to peacefully repossess a vehicle, it was "responsible for any tortious acts committed during the repossession"). And although courts generally do not elaborate on this point, they frequently permit plaintiffs to present individual tort claims premised on alleged breaches of the peace. *See, e.g.*, *Mauro v. Gen. Motors Acceptance Corp.*, 626 N.Y.S.2d 374, 377 (N.Y. Sup. Ct. 1995) (permitting plaintiffs to proceed with assault and battery claims against a secured party based on the conduct of its independent contractor during a repossession); *Smith v. John Deere Co.*, 614 N.E.2d 1148, 1154-55 (Ohio Ct. App. 1993) (permitting plaintiffs to proceed with trespass and negligence claims that were based on a breach of the peace theory).

Further support for our conclusion that NRS 104.9625's private cause of action is nonexclusive can be found in comment 3 to U.C.C. section 9-625. That comment initially clarifies that, although U.C.C. section 9-625(b), like NRS 104.9625(2), states that persons eligible to bring wrongful repossession claims deriving from U.C.C. section 9-625 may recover damages for "any loss" resulting from a secured party's noncompliance with Article 9, the provision only supports the recovery of actual damages since it is intended to create a mechanism to "put an eligible claimant in the position that [the claimant] would have occupied had no violation occurred." U.C.C. § 9-625 cmt. 3. But the comment further provides that U.C.C. section 9-625 is supplemented by "principles of tort law." *Id.* Moreover, the comment indicates that double recoveries are prohibited "to the extent that damages in tort compensate the debtor for the same loss dealt with by . . . [Article 9]," *id.*, which is telling for the present purposes since a double recovery would not be possible unless the underlying tort and wrongful repossession claims were both premised on a breach of the peace.

The clarification provided by this comment has led one legal scholar to observe that the U.C.C. anticipates eligible claimants being able to recover damages in tort for violations of Article 9, with the secured party's potential liability only being limited by the nature and number of tort claims in the relevant jurisdiction. *See* 4 James J. White et al., *Uniform Commercial Code* § 34:44 (6th ed. 2015). The principal significance of this dual claim approach is that debtors may recover punitive damages by way of tort claims that are unavailable through a statutory claim under statutes deriving from U.C.C. section 9-625. *Id.*

Thus, we conclude that U.C.C. section 9-625 as codified in NRS 104.9625 is not an exclusive remedy for debtors to seek recovery of damages for a wrongful repossession. Given that debtors and other eligible claimants are not limited to statutory damages, parties who

are *not* entitled to statutory damages, like the Droges, should also be afforded the opportunity to plead tort claims to seek recovery based on a breach of the peace theory, as the Droges did here. And although Nevada courts have not expressly addressed this issue, other courts have permitted parties similarly situated to the Droges to do exactly that. For example, while the court in *Griffith v. Valley of the Sun Recovery & Adjustment Bureau, Inc.*, concluded that an innocent bystander who was shot during a self-help repossession could not establish negligence per se based on a violation of a self-help repossession statute, the court further explained that the secured party was responsible for any torts committed during the repossession and that a jury question remained as to whether the secured party was liable for negligence based on the "explosive atmosphere" created during the repossession, which is essentially a breach of the peace theory. 613 P.2d 1283, 1284-86 (Ariz. Ct. App. 1980). Likewise, in *Salisbury Livestock Co. v. Colorado Central Credit Union*, 793 P.2d 470, 471, 475 (Wyo. 1990), the court permitted a corporate plaintiff that stored a debtor's vehicle on its property to proceed with a trespass claim against a secured party defendant based on a breach of the peace theory.

Based on the foregoing analysis, we conclude that NRS 104.9625 does not provide an exclusive remedy for injuries stemming from a breach of the peace during a self-help repossession. *See* NRS 104.1103(1) (providing that Nevada's U.C.C. should be liberally construed and applied "[t]o make uniform the law among the various jurisdictions"); *Newmar Corp. v. McCrary*, 129 Nev. 638, 641, 309 P.3d 1021, 1024 (2013) (recognizing that NRS 104.1103 provides guidance for how to construe Nevada's U.C.C.). Thus, regardless of whether a plaintiff is entitled to bring a claim under NRS 104.9625, the plaintiff may seek to recover through tort-based claims arising from an alleged breach of the peace.

B.

A question remains, however, as to whether the Droges alleged sufficient facts to state claims based on their breach of the peace and trespass theories in light of the reasonable time and manner standard that we adopted above as well as Nevada's liberal notice-pleading standard. *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) (explaining that, because Nevada is a notice-pleading state, courts in Nevada "liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party" (internal quotation marks omitted)). This standard "requires plaintiffs to set forth the facts which support a legal theory, but does not require the legal theory relied upon to be correctly identified." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (footnote omitted). "A plaintiff who fails to use the precise legalese in describing his grievance but who

sets forth the facts which support his complaint thus satisfies the requisites of notice pleading." *Id.*

In the instant case, the Droges alleged in their complaint that Romans and Shupp entered their property and refused to leave when told to do so, and they described these actions as a trespass in their pleadings. For purposes of Nevada's notice-pleading standard, such allegations provide sufficient notice that the Droges sought to recover damages for Romans and Shupp breaching the peace and trespassing on their land during the attempted repossession. *See id.* (holding that notice to the defending party is adequate when a complaint "set[s] forth sufficient facts to demonstrate the necessary elements of a claim for relief[,]" such that the "nature of the claim and relief sought" are apparent); NRCP 8(a)[14] (requiring that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

Indeed, the Droges' allegations demonstrated that they would seek to prove that Romans and Shupp acted in an unreasonable manner during the attempted repossession, which as discussed above, is what the Droges must establish to demonstrate that a breach of the peace occurred. *See* Restatement (Second) of Torts § 198(1) ("One is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel . . . ."). Specifically, the Droges' allegations support that they sought to recover for Romans' and Shupp's failure to leave their property when asked, which is what the Droges must establish to demonstrate trespass in the breach of the peace context. *See Lied v. Cty. of Clark*, 94 Nev. 275, 279, 579 P.2d 171, 173-74 (1978) (providing that a trespass claim requires the invasion of a property right). And these allegations were not mere background information in the Droges' amended complaint that could easily be overlooked, but instead, the allegations formed the basis for the vast majority of the claims in their case. This is presumably why Romans and Shupp have defended against the Droges' claims, both below and on appeal, by asserting that their conduct was privileged under NRS 104.9609, and why they conducted discovery relevant to these issues below.[15]

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[14]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). The amendments do not affect the disposition of this appeal, however, because they were enacted after the district court entered the challenged orders. Nonetheless, we note that we cite the prior version of the rules herein.

[15]Romans even retained a repossession expert who opined as to what constitutes a breach of the peace for purposes of NRS 104.9609. Overall, given Romans' and Shupp's topics of inquiry during discovery, it appears that they both recognized that breach of the peace and trespass were at issue in this case.

Thus, given that NRS 104.9625 is nonexclusive and that the facts in the Droges' complaint were sufficient to satisfy Nevada's notice-pleading standard with respect to their breach of the peace and trespass theories, we conclude that the Droges properly stated tort claims based on these theories.[16] In deciding this, we specifically distinguish this case from *Sprouse v. Wentz*, 105 Nev. 597, 602, 781 P.2d 1136, 1139 (1989), where the plaintiff did not plead wrongful repossession and the supreme court concluded that, although he pleaded relevant "scattered facts" in the context of his other claims, those facts were insufficient to give notice of a wrongful repossession cause of action. Here, the facts contained in the Droges' complaint relevant to breach of the peace and trespass were not "scattered," but indeed formed the underpinnings of all of the Droges' tort claims. To be sure, these facts were so engrained in the Droges' complaint that, under Nevada's notice-pleading standard, the Droges' allegations concerning the attempted self-help repossession are sufficient to maintain common law claims for wrongful repossession based on a breach of the peace and for trespass, notwithstanding the fact that the Droges did not label them as separate claims in their complaint. As a result, Romans' and Shupp's assertion that the issues of breach of the peace and trespass are not properly before this court fails.

VIII.

We next turn to the question of whether summary judgment was warranted on the entirety of the Droges' amended complaint, even though, as discussed above, genuine issues of material fact remain regarding whether Romans and Shupp breached the peace during the attempted repossession.

A.

As a preliminary matter, we point out that the district court failed to set forth the undisputed material facts and legal determinations on which it relied in reaching its decision to grant summary judgment. *See* NRCP 56(c) (requiring summary judgment orders to include "the undisputed material facts and legal determinations" on which the district court relied); *see also ASAP Storage, Inc. v. City of*

[16]As an additional basis for our conclusion that NRS 104.9625 did not preclude the Droges from embedding their breach of the peace and trespass theories in these claims, we note that Romans and Shupp have never argued that NRS 104.9625 is an exclusive remedy, and as a result, they waived any such argument. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are waived).

Sparks, 123 Nev. 639, 656-57, 173 P.3d 734, 746 (2007) (reversing and remanding a portion of a district court order granting summary judgment because it did not set forth the undisputed material facts and legal determinations supporting the court's decision). Nevertheless, because one of the Droges' tort claims fails as a matter of law, and since the Droges have waived any challenge to the summary judgment on certain of their other tort claims, we affirm the entry of summary judgment on those claims.

B.

We affirm the summary judgment against the Droges on the negligent hiring portion of their negligent hiring, training, and supervision claim and the portion of James's malicious prosecution claim that was directed at Romans, as the Droges have expressly waived any challenge to those decisions on appeal. We also affirm the summary judgment on the Droges' claim for negligent performance of an undertaking, as the Droges failed to meaningfully address Romans' and Shupp's arguments in support of the district court's decision on this claim in either their opening or reply briefs, and as a result, they waived any challenge thereto. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position").

Finally, with respect to the Droges' claim for NIED, which they asserted on Cynthia's behalf, we affirm the summary judgment in Romans' and Shupp's favor. Where a defendant's negligence causes a third party's death or serious injury, and a plaintiff who is related to the third party perceives the death or serious injury and suffers emotional distress causing physical manifestations as a result, the plaintiff may recover for NIED. *See State, Dep't of Transp. v. Hill*, 114 Nev. 810, 815, 963 P.2d 480, 483 (1998), *overruled on other grounds by Grotts v. Zahner*, 115 Nev. 339, 341, 989 P.2d 415, 416 (1999). In this case, there is no evidence James suffered any injury during the attempted repossession efforts. Therefore, Cynthia could not have suffered any emotional distress as a result, and summary judgment was appropriate on this claim.

C.

With the exception of the foregoing, we reverse summary judgment as to the remainder of the Droges' tort claims. Again, the deficiencies in the district court's summary judgment orders prevent us from fully considering the propriety of the court's decisions with

respect to these remaining claims. *See* NRCP 56(c); *ASAP Storage*, 123 Nev. at 656-57, 173 P.3d at 746. Nonetheless, as discussed above, the record demonstrates that genuine issues of material fact remain with respect to the breach of the peace and trespass theories that underpin the Droges' claims, including questions concerning when the Droges objected to the attempted repossession, how Romans and Shupp responded to the objection, and whether the attempted repossession resulted in a violent incident. And insofar as the district court entered summary judgment based on a determination that no genuine issues of material fact remained on the breach of the peace issue, its decision was erroneous.[17]

D.

Despite our decision to reverse the summary judgment on the Droges' remaining claims, we take this opportunity to provide guidance on three of these claims. Although summary judgment was warranted with respect to the Droges' NIED claim, the same is not true of the Droges' IIED claim, which differs from NIED claims in that a plaintiff need not establish that he or she apprehended a relative's death or serious injury to recover for the emotional distress caused by a defendant's extreme and outrageous conduct.[18] *Compare Hill*, 114 Nev. at 815, 963 P.2d at 483 (discussing the elements of an NIED claim, including the requirement that the plaintiff "apprehend[ ] the death or serious injury of a loved one" (emphasis and internal quotation marks omitted)), *with Olivero v. Lowe*, 116 Nev. 395, 398, 995 P.2d 1023, 1025 (2000) (setting forth the elements of an IIED claim). Under the facts and circumstances of this case, questions of fact remain as to the extremeness and outrageousness

[17]While Romans and Shupp vociferously defend the summary judgment in their favor by asserting that the Droges did not suffer physical injury damages, it is notable that the Droges have tort claims for which physical injury damages are not a requirement. For example, by way of their trespass claim, the Droges can pursue nominal damages or even damages for annoyance and discomfort. *See Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. 686, 700, 356 P.3d 511, 521 (2015) (recognizing that a plaintiff asserting a trespass claim may recover damages for annoyance and discomfort); *Parkinson v. Winniman*, 75 Nev. 405, 408, 344 P.2d 677, 678 (1959) (concluding that a nominal damages award was appropriate in the context of a trespass claim).

[18]Additionally, although a plaintiff must suffer a physical manifestation of his or her emotional distress to prevail on an NIED claim, the supreme court has recognized that a plaintiff is not necessarily required to establish a physical manifestation to state an IIED claim, provided that the defendant's conduct is sufficiently extreme and outrageous. *See Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459, 462 (1993) (comparing and contrasting the physical manifestation requirement of NIED and IIED claims and observing that, in the context of an IIED claim, "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress" (alteration in original) (internal quotation marks omitted)).

of Romans' and Shupp's conduct during their repossession efforts and the Droges suffering extreme emotional distress as a result.

With respect to the Droges' malicious prosecution claim that was asserted on James's behalf against Shupp, a defendant may be liable for malicious prosecution if criminal proceedings were commenced based on the defendant's "direction, request, or pressure," unless the prosecutor made an independent determination to commence the criminal proceeding. *See Lester v. Buchanen*, 112 Nev. 1426, 1429, 929 P.2d 910, 913 (1996) (internal quotation marks omitted). This independent determination rule does not apply, however, if the defendant did *not* believe the information provided to authorities to be true since "an intelligent exercise of the officer's discretion [is] impossible" when a witness knowingly provides false information. Restatement (Second) of Torts § 653 cmt. g (Am. Law Inst. 1977); *see also Lester*, 112 Nev. at 1429, 929 P.2d at 912-13 (applying the Second Restatement's approach to malicious prosecution claims and providing that a defendant is only shielded by the independent determination rule if the defendant provided information that he or she believed to be true). And because the parties dispute whether James hit Shupp with Russell's truck, this raises the possibility that Shupp falsely reported that James did so, when he knew this not to be true. Thus, genuine issues of material fact remain with respect to whether the district attorney could intelligently exercise discretion to prosecute James in a manner that would shield Shupp from liability.

Finally, turning to the Droges' claim for punitive damages, we note that punitive damages is a remedy, not a cause of action. 22 Am. Jur. 2d *Damages* § 567 (2013) ("[A]s a rule, there is no cause of action for punitive damages by itself; a punitive-damage claim is not a separate or independent cause of action." (footnote omitted)). However, if the Droges can establish that Romans and Shupp acted with oppression, fraud, or malice during the attempted repossession, then they may be able to recover punitive damages. *See Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450-51 (2006) (providing that punitive damages may be awarded to a plaintiff who establishes by clear and convincing evidence that the defendant acted with "oppression, fraud or malice, [either] express or implied" (internal quotation marks omitted)); *see also Wolf v. Bonanza Inv. Co.*, 77 Nev. 138, 143, 360 P.2d 360, 362 (1961) (reasoning that, without a judgment for actual damages, a judgment for exemplary damages cannot be valid).

IX.

In sum, pursuant to NRS 104.9609, secured parties may carry out self-help repossessions on private property provided that they do so without breaching the peace. A breach of the peace occurs when a secured party performs a self-help repossession that is not

reasonable in time or manner. To determine whether a repossession is reasonable in time or manner, courts should consider the general principles set forth in this opinion, as they reflect a common understanding among jurisdictions as to what conduct rises to the level of a breach of the peace.

In the present case, genuine issues of material fact remain for the trier of fact with respect to almost everything about the attempted repossession, including whether the Droges objected to the attempted repossession from the outset and whether the attempted repossession resulted in violence. Thus, taking the facts of this case in the light most favorable to the Droges, the district erred to the extent that it concluded that the factual circumstances did not constitute a breach of the peace and trespass as a matter of law when, as reflected in the general principles set forth above, a trier of fact could conclude otherwise based on the disputed facts.

Finally, we affirm the entry of summary judgment against the Droges on their claims for malicious prosecution (against Romans only), negligent hiring, negligent performance of an undertaking, and NIED because these claims have either been waived by the Droges or fail as a matter of law. However, with respect to the Droges' remaining claims, genuine issues of material fact remain. Thus, we reverse the entry of summary judgment on these claims and remand for further proceedings consistent with this opinion.

Gibbons, C.J., and Tao, J., concur.

STATE OF NEVADA EX REL. NICOLE J. CANNIZZARO, IN HER OFFICIAL CAPACITY AS SENATE MAJORITY LEADER OF THE SENATE OF THE STATE OF NEVADA; CLAIRE J. CLIFT, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE SENATE OF THE STATE OF NEVADA; LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION, IN ITS OFFICIAL CAPACITY AS THE LEGAL AGENCY OF THE LEGISLATIVE DEPARTMENT OF THE STATE OF NEVADA; BRENDA J. ERDOES, ESQ., IN HER OFFICIAL CAPACITY AS LEGISLATIVE COUNSEL AND CHIEF OF THE LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION, AND IN HER PROFESSIONAL CAPACITY AS AN ATTORNEY AND LICENSED MEMBER OF THE STATE BAR OF NEVADA; AND KEVIN C. POWERS, ESQ., IN HIS OFFICIAL CAPACITY AS CHIEF LITIGATION COUNSEL OF THE LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION, AND IN HIS PROFESSIONAL CAPACITY AS AN ATTORNEY AND LICENSED MEMBER OF THE STATE BAR OF NEVADA, PETITIONERS, *v.* THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CARSON CITY; AND THE HONORABLE JAMES TODD RUSSELL, DISTRICT JUDGE, RESPONDENTS, AND JAMES A. SETTELMEYER; JOSEPH P. HARDY; HEIDI SEEVERS GANSERT; SCOTT T. HAMMOND; PETE GOICOECHEA; BEN KIECKHEFER; IRA D. HANSEN; AND KEITH F. PICKARD, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE SENATE OF THE STATE OF NEVADA AND INDIVIDUALLY, REAL PARTIES IN INTEREST.

No. 80313

June 26, 2020 466 P.3d 529

Original petition for a writ of mandamus challenging a district court order disqualifying counsel from representing certain defendants in a declaratory relief action concerning the passage of two bills in the state senate.

Petition granted.

SILVER, J., with whom PICKERING, C.J., agreed, dissented.

Legislative Counsel Bureau, Legal Division, and *Brenda J. Erdoes*, Legislative Counsel, and *Kevin C. Powers*, Chief Litigation Counsel, Carson City, for Petitioners.

Allison MacKenzie, Ltd., and *Karen A. Peterson* and *Justin M. Townsend*, Carson City, for Real Parties in Interest.

Before the Supreme Court, EN BANC.

OPINION

By the Court, Cadish, J.:

Nevada Rule of Professional Conduct 1.7 prohibits a lawyer from representing a client if a concurrent conflict of interest exists with another client. The rule applies when "[t]he representation of one client will be directly adverse to another client." In this proceeding, the district court determined that the Legislative Counsel Bureau Legal Division's (LCB Legal) representation of two defendants in the underlying action, Senate Majority Leader Nicole Cannizzaro and Senate Secretary Claire Clift, is directly adverse to another of its clients—the eight Nevada State Senators who are plaintiffs in that action (the senator plaintiffs). The district court therefore granted the senator plaintiffs' motion to disqualify LCB Legal from representing Senator Cannizzaro and Secretary Clift.

Although the district court concluded that LCB Legal has an ongoing attorney-client relationship with the senator plaintiffs, the circumstances here cut against that conclusion. LCB Legal's client is the Legislature, and it represents individual legislators only in their official capacities as constituent members of the Legislature acting on the Legislature's behalf. The senator plaintiffs sued Senator Cannizzaro and Secretary Clift in their official capacities for actions taken on behalf of the Legislature related to the passage of two senate bills, and LCB Legal's defense of Senator Cannizzaro and Secretary Clift as to those legislative acts therefore is ancillary to its defense of the bills themselves. But in challenging the legislation, the senator plaintiffs are not similarly acting on the Legislature's behalf, and thus they are not considered LCB Legal's client in this situation. Accordingly, we agree with petitioners that the senator plaintiffs lack standing to move to disqualify LCB Legal because they do not have an attorney-client relationship with LCB Legal other than in their roles as duly authorized members of the Legislature acting on the Legislature's behalf. We therefore grant the petition for a writ of mandamus.

DISCUSSION

Eight Nevada State Senators and several business entities filed a complaint for declaratory and injunctive relief, naming various executive branch officials and agencies and petitioners, Senate Majority Leader Nicole J. Cannizzaro and Senate Secretary Claire J. Clift (the legislative defendants) in their official capacities. The complaint alleges that Senate Bills 542 and 551 were unconstitutionally approved with a simple majority vote in the Senate instead of a two-thirds' affirmative vote. LCB Legal filed an answer to the complaint on behalf of the legislative defendants. The senator plaintiffs moved to disqualify LCB Legal, and the district court granted the motion.

In concluding that LCB Legal had a disqualifying conflict under RPC 1.7, the district court relied on the fact that LCB Legal provided a legal opinion during the legislative session that addressed the vote requirement issue for the benefit of both Senator Cannizzaro and plaintiff Senator James Settelmeyer.[1] Senator Cannizzaro, Secretary Clift, and LCB Legal and two of its attorneys, Brenda Erdoes and Kevin Powers, have petitioned for a writ of mandamus, challenging the order.[2]

Petitioners seek a writ of mandamus because an order disqualifying counsel is not immediately appealable. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) ("This court has consistently held that mandamus is the appropriate vehicle for challenging orders that disqualify counsel."). Although the district court has broad discretion in attorney disqualification matters, *id.* at 54, 152 P.3d at 743, when the facts are undisputed and the appropriate standard for disqualification is based on interpretation of a disciplinary rule, de novo review applies, *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) ("This court reviews a district court's interpretation of a statute or court rule . . . de novo, even in the context of a writ petition."); *see Dynamic 3D Geosolutions LLC v. Schlumberger Ltd.*, 837 F.3d 1280, 1284 (Fed. Cir. 2016) (observing that the standard of review for an order resolving a motion to disqualify "is for abuse of discretion, with the underlying factual findings reviewed for clear error and the interpretation of the relevant rules of attorney conduct reviewed *de novo*"); *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) (observing that "in the event an appropriate standard for disqualification is based on a state's disciplinary rules, a court of appeals should consider the district court's interpretation of [those] rules as an interpretation of law, subject essentially to *de novo* consideration").

"The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." RPC 1.0A(a). Pursuant to RPC 1.7, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The rule essentially precludes an attorney from taking a position that is adverse to another client's interests. RPC 1.7(a)(1). "The party seeking to disqualify [an attorney]

[1]At the same time, the district court entered an order granting the Legislature's motion to intervene and allowing LCB Legal to represent the Legislature, as a whole, adverse to the senator plaintiffs.

[2]Petitioners' February 6, 2020, motion to supplement the record regarding jurisdictional issues is granted. The clerk of this court shall detach the supplement from the motion and file it separately. As petitioners point out, and the supplement supports, the Legislative Commission authorized this mandamus action at its December 30, 2019, public meeting. We therefore reject the senator plaintiffs' contention that this petition may be defective.

bears the burden of establishing that it has standing to do so." *Liapis v. Second Judicial Dist. Court*, 128 Nev. 414, 420, 282 P.3d 733, 737 (2012). "The general rule is that only a former or current client has standing to bring a motion to disqualify counsel on the basis of a conflict of interest." *Id.* (quoting Model Rules of Prof'l Conduct R. 1.7 annot., which discusses the model rule identical to RPC 1.7).

The Legislature has the right to choose legal counsel with specialized knowledge and experience in protecting the Legislature's official interests in litigation; however, that right "must yield to ethical considerations that affect the fundamental principles of [the] judicial process." *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 377-78 (Cal. 1999) (observing that a motion to disqualify a party's counsel may implicate several important interests, including a client's right to choose legal counsel, the expense of obtaining substitute counsel, and the possibility that such a motion was brought for tactical purposes). LCB Legal represents the Legislature as an organizational client "acting through its duly authorized constituents," RPC 1.13(a), and its attorney-client relationship is with the Legislature, RPC 1.13(f) (providing that "the lawyer's client is the organization rather than the constituent"). Under the facts and circumstances of this case, we conclude that the senator plaintiffs lack standing to seek LCB Legal's disqualification because they do not have an attorney-client relationship with LCB Legal other than as duly authorized constituent members of the Legislature acting on the Legislature's behalf. The senator plaintiffs are suing Senator Cannizzaro and Secretary Clift in their official capacities for acts taken on behalf of the Legislature as a whole. LCB Legal does not have a disqualifying conflict of interest that prevents it from defending such a lawsuit because its only client is the Legislature acting through its duly authorized constituents, and LCB Legal only represents individual senators to the extent they are acting on the Legislature's behalf.

Other courts have concluded similarly. In *Ward v. Superior Court*, a California Court of Appeal concluded that Los Angeles county counsel represented the county as a governmental entity and not its individual officers, and thus counsel did not have a disqualifying attorney-client relationship with the county assessor as an individual officer. 138 Cal. Rptr. 532, 533-38 (Ct. App. 1977). Therefore, the county attorney was not disqualified by a conflict of interest from representing county commissioner board members who were sued in their official capacities by the county assessor in his individual and taxpayer capacities. *Id.*

Similarly, in *Cole v. Ruidoso Municipal Schools*, the Tenth Circuit Court of Appeals held that a public school principal did not have a separate attorney-client relationship with the school district's attorneys, even though she had consulted with those attorneys on

"sensitive personal issues" and acted on the attorneys' advice. 43 F.3d 1373, 1384 (10th Cir. 1994). The court concluded that the principal's belief that she had a separate attorney-client relationship was not reasonable because "she consulted the [school district's attorneys] only for the purpose of carrying out her duties as principal." *Id.* The court thus concluded that the school district's attorney was not disqualified from representing the school district in the principal's lawsuit against it. *Id.* at 1385; *see also Handverger v. City of Winooski*, 38 A.3d 1158, 1160-61 (Vt. 2011) (holding that a city manager did not have an attorney-client relationship with the city attorney individually or in any capacity other than as city manager because "[a]n organization's lawyer, such as a city attorney or corporate counsel, works only for its constituents, including its employees and officials, in order to serve the organization, not to serve those individuals personally"); *Salt Lake Cty. Comm'n v. Salt Lake Cty. Att'y*, 985 P.2d 899, 905 (Utah 1999) (denying disqualification and relying on Utah's counterpart to RPC 1.13 in holding that "[t]he County Attorney has an attorney-client relationship only with the County as an entity, not with the Commission or the individual Commissioners apart from the entity on behalf of which they act").

The senator plaintiffs argue that *Ward* is distinguishable because there the court determined that the county attorney had not obtained confidential information about the assessor through his prior representation of the assessor. *See Ward*, 138 Cal. Rptr. at 535, 537-39. But the record here does not support that any confidential information was disclosed to LCB Legal regarding this litigation challenging the constitutionality of two senate bills,[3] where both the senate majority and minority leaders requested an opinion from LCB Legal addressing that legal issue. Although the senator plaintiffs have a right to be free from inadvertent disclosure of confidential information, nothing in the record supports that such information was provided to LCB Legal such that it could be disclosed.

The senator plaintiffs also argue that *Ward*, *Cole*, and the other cases are distinguishable because the plaintiffs there sued in their individual and taxpayer capacities, whereas here the senator plaintiffs are suing in their official capacities. We are not persuaded that such a distinction matters here. The senator plaintiffs are not acting

[3]In their brief, the senator plaintiffs asserted that LCB Legal "does obtain confidential information about and from individual legislators," but nothing in the record supports that any such information was disclosed here. Senator Settelmeyer's affidavit, which was attached to the senator plaintiffs' reply to the legislative defendants' opposition to the motion to disqualify, states that he had "several conversations with LCB Legal about the LCB Opinion issued on May 8, 2019," but nothing in the affidavit supports that the communications Senator Settelmeyer had with LCB Legal would be deemed confidential or privileged because they concerned a legal opinion regarding legislation, not an issue personal to the Senator.

on behalf of the Legislature as contemplated by RPC 1.13(a) and (g) in challenging legislation that is presumed to be constitutional (the passage of two senate bills), *see Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) ("Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional."), and actions by the legislative defendants that were undertaken in their official roles on behalf of the Legislature. The senator plaintiffs contend that the senate bills' approval by a simple majority improperly nullified their votes against the bills and deprived them of the power to act, but that contention, while relating to their roles as senators, does not assert a claim on behalf of the Legislature as an entity but instead asserts deprivation of each plaintiff senator's alleged rights.

The senator plaintiffs argue that the statute under which LCB Legal may be authorized to provide legal representation to protect the Legislature's official interests, NRS 218F.720,[4] distinguishes this case from cases confirming that a governmental attorney serves as counsel for the governmental organization, not its individual members. That argument falls flat because a government lawyer's role as counsel for the organization holds true even when an enabling statute authorizes counsel to represent the organization's members. RPC 1.13(a), (f); *Handverger*, 38 A.3d at 1160-61; *cf.* NRS 218F.720(1) ("When deemed necessary or advisable *to protect the official interests of the Legislature* in any action or proceeding, the Legislative Commission . . . may direct the Legislative Counsel and the Legal Division to appear in, commence, prosecute, defend or intervene in any action or proceeding before any court . . . ." (emphasis added)). When LCB Legal performs its statutory duties to provide legal services such as bill drafts and legal opinions to legislative members, it does so because the members are constituents of the Legislature as an organizational client and for the benefit of the Legislature as an organization. RPC 1.13(a), (f), (g). It thus advises members solely in their official roles as legislators.

LCB Legal is authorized to represent the legislative defendants sued in their official capacities to defend against claims challenging the constitutionality of legislation and to protect the institutional interests of its organizational client, the Legislature. The district court characterized LCB Legal's representation as "pick[ing] sides," but that characterization is unfair and unsupported, and the senator plaintiffs acknowledged at oral argument that nothing in the record supports that LCB picked sides or chose to represent Senator Cannizzaro and Secretary Clift. LCB Legal serves as nonpartisan legal counsel for the Legislature acting through its duly authorized con-

[4]The senator plaintiffs point to NRS 218F.720(6)(c) in particular, which defines the "Legislature" to include any current or former member or officer of the Legislature.

stituents. But the senator plaintiffs are not acting on behalf of the Legislature when they sue other legislative members in their official capacities in order to challenge the validity of legislation that the law presumes to be constitutional. Furthermore, LCB Legal is not authorized to advocate against such legislation or official legislative acts, and thus it did not "pick sides." As counsel for the senator plaintiffs acknowledged at oral argument, LCB Legal cannot take a position contrary to the Legislature, and thus it could not represent the senator plaintiffs in the underlying litigation even if Senator Cannizzaro and Secretary Clift had not been named as defendants. Its representation of the legislative defendants likewise does not damage its neutrality, as defending a bill's constitutionality is a public, nonpartisan function, and pursuant to NRS 218F.720, LCB Legal would defend such a bill regardless of which political party is in the majority. The basis for LCB Legal's legal opinion was not political, and counsel for the senator plaintiffs acknowledged that there was nothing improper about LCB Legal providing a legal opinion to both the majority and minority leaders during the legislative session. Moreover, nothing in the record, briefs, or arguments suggests that LCB Legal cannot continue to give advice on bill drafts and provide legal opinions to both the minority and majority members of the Legislature in their roles as constituents thereof.

CONCLUSION

Because the senator plaintiffs failed to establish standing to assert a concurrent conflict of interest on which to ground disqualification, we conclude that the district court erred in applying RPC 1.7 to disqualify LCB Legal.[5] The senator plaintiffs are suing Senator Cannizzaro and Secretary Clift in their official capacities for legislative acts taken on behalf of the Legislature as a whole. The Legislative Commission authorized LCB Legal to defend Senator Cannizzaro and Secretary Clift in their official capacities pursuant to NRS 218F.720(1), and we agree with petitioners that the senator plaintiffs do not have an attorney-client relationship with LCB Legal other than as duly authorized constituent members of the Legislature acting on the Legislature's behalf. LCB Legal's representation of Senator Cannizzaro and Secretary Clift is consistent with that attorney-client relationship. We therefore grant the petition and instruct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order disqualifying LCB Legal.[6]

Gibbons, Hardesty, Parraguirre, and Stiglich, JJ., concur.

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[5]Based on this conclusion, we need not address petitioners' other arguments against LCB Legal's disqualification.

[6]In light of this opinion, we vacate the stay imposed by our January 10, 2020, order.

SILVER, J., with whom PICKERING, C.J., agrees, dissenting:

I agree with the majority that a petition for a writ of mandamus is the proper vehicle to challenge the district court's order granting the motion to disqualify LCB Legal. I respectfully dissent, however, because NRS 218F.720 does not mandate that LCB Legal provide legal representation in the underlying case and because the district court did not manifestly abuse its discretion in granting the motion to disqualify. I would therefore deny the writ petition's requested relief.

NRS 218F.720(1) provides that, "[w]hen deemed necessary or advisable to protect the official interests of the Legislature in any action or proceeding, the [LCB] . . . *may* direct [LCB Legal] to appear in, commence, prosecute, defend or intervene in any action or proceeding before any court." (Emphasis added.) The use of the word "may" signifies that the LCB has no duty to direct LCB Legal to act in such cases; instead the statutory language is permissive. *See Dornbach v. Tenth Judicial Dist. Court*, 130 Nev. 305, 310, 324 P.3d 369, 373 (2014) (holding that where NRCP 16.1 provides that a "case may be dismissed," the language was permissive (quoting NRCP 16.1(e)(1), (2)). Because the statute is permissive, the statute is not violated if LCB does not direct LCB Legal to, or LCB Legal does not, "appear in, commence, prosecute, defend or intervene" in an action such as the one underlying this writ petition. *See Washington v. State*, 98 Nev. 601, 603-04, 655 P.2d 531, 532 (1982) (holding that a rule's permissive language gave the district court discretion to act). The cases cited by petitioners, where the underlying statutes are mandatory, are therefore not convincing.

Furthermore, this court should only overturn a district court's order disqualifying counsel when the district court has "manifestly abused its discretion" in doing so. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (internal quotation marks and alteration omitted) (comparing a manifest abuse of discretion to an arbitrary or capricious exercise of discretion). And, as to the factual determination regarding the existence of an attorney-client relationship, *see Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 611, 119 P.3d 1219, 1223 (2005) (recognizing that the existence of an attorney-client relationship is a question of fact), this court defers to the district court and will not intercede except when clear error appears, *see Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (reviewing a district court's factual findings for clear error).

The district court found that a concurrent conflict of interest exists under Nevada Rule of Professional Conduct (NRPC) 1.7 as to LCB Legal's representation of the legislative defendants in direct

opposition to the senator plaintiffs in this case. NRPC 1.7(a) provides "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists if "[t]he representation of one client will be directly adverse to another client." NRPC 1.7(a)(1). "Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." Model Rules Prof'l Conduct r. 1.7 cmt. 6 (Am. Bar Ass'n 2019).

The senator plaintiffs, equally with the legislative defendants, are current clients of LCB Legal. *See* NRS 218D.110; NRS 218F.150; NRS 218F.710(2); NRS 218F.720. LCB Legal acknowledges as much but argues that a "government-lawyer exception" exists that takes its representation of the legislative defendants against the senator plaintiffs outside NRPC 1.7. But this is contrary to NRPC 1.11(d), which states, "[e]xcept as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: (1) Is subject to Rules 1.7 and 1.9." While the statutes just cited authorize LCB Legal to provide legal services to the members of the Nevada Legislature, nowhere do they say LCB Legal can represent one member of the Legislature against another as litigation adversaries.

LCB Legal offers the fallback argument, which the majority accepts, that LCB Legal's client is the Legislature, not its members, except to the extent the members act as "duly authorized constituents" of the Legislature. But whether an organization's attorney is representing the organization, one or more persons within the organization, a person or entity related to the organization, or some combination thereof, "is a question of fact to be determined based on reasonable expectations in the circumstances." Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (2000) (recognizing that while an "organization's structure and organic law determine whether a particular agent has authority to retain and direct the [organization's] lawyer," who the organizational lawyer represents is a question of fact); *see Nev. Yellow Cab*, 123 Nev. at 49, 152 P.3d at 740. And, as NRPC 1.13(f) makes clear, if a lawyer means to represent an organization to the exclusion of its constituents, the "lawyer shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent," and, "[i]n cases of multiple representation . . . , the lawyer shall take reasonable steps to ensure that the constituent understands the fact of multiple representation."

The senator plaintiffs supported their motion to disqualify with the affidavit of Senator Settelmeyer and excerpts from the orientation materials LCB Legal gives new legislators. Nothing in the record

suggests LCB Legal conveyed to Senator Settelmeyer or the other senator plaintiffs that its representation of them was qualified, such that LCB Legal could later represent other senators against them as litigation adversaries. And, in fact, it appears that LCB Legal undertakes to represent the members of the Legislature unqualifiedly. *See Comm'n on Ethics v. Hansen*, 134 Nev. 304, 305, 419 P.3d 140, 141 (2018) (reciting that LCB Legal offered legal and ethical advice to a legislator to assist him in defending citations the Nevada Department of Wildlife issued against him for placing snare traps too close to the roadway in violation of NRS 503.580). Further, as LCB Legal acknowledged at oral argument, it provides confidential advice to legislative members that it does not share with other legislative members, consistent with NRS 218F.150(1)(b).

In its order, the district court made thorough findings of fact that are supported by the record submitted to this court. Those findings establish that LCB Legal concurrently represents both the senator plaintiffs and the legislative defendants. It thus cannot represent the latter against the former in this case because the representation is directly adverse. The district court's conclusions of law demonstrate neither an erroneous interpretation of the relevant law nor an erroneous application of that law. Based on this record, I cannot say that the district court manifestly abused its discretion in granting the motion to disqualify LCB Legal.

For the foregoing reasons, I would deny the petition for a writ of mandamus.

JEFFREY D. SPENCER, an Individual, Appellant, *v*. HELMUT KLEMENTI, an Individual; EGON KLEMENTI, an Individual; ELFRIEDE KLEMENTI, an Individual; MARY ELLEN KINION, an Individual; ROWENA SHAW, an Individual; and PETER SHAW, an Individual, Respondents.

No. 77086

JEFFREY D. SPENCER, an Individual, Appellant, *v*. HELMUT KLEMENTI, an Individual; EGON KLEMENTI, an Individual; ELFRIEDE KLEMENTI, an Individual; MARY ELLEN KINION, an Individual; ROWENA SHAW, an Individual; and PETER SHAW, an Individual, Respondents.

No. 77711

July 9, 2020 466 P.3d 1241

Consolidated appeals from a final judgment and awards of attorney fees in a tort action. Ninth Judicial District Court, Douglas County; Steven R. Kosach, Senior Judge.

Affirmed in part, reversed in part, vacated in part, and remanded.

[Rehearing denied September 30, 2020]

Doyle Law Office, PLLC, and *Kerry St. Clair Doyle*, Reno, for Appellant.

Lemons, Grundy & Eisenberg and *Douglas R. Brown, Sarah M. Molleck*, and *Christian L. Moore*, Reno, for Respondent Helmut Klementi.

McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, and *Michael A. Pintar*, Reno, for Respondents Mary Ellen Kinion, Egon Klementi, and Elfriede Klementi.

Tanika M. Capers, Las Vegas, for Respondents Rowena Shaw and Peter Shaw.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Cadish, J.:

Appellant sued respondents for, among other things, defamation based on statements they made during the public-comment period of planning-commission and improvement-district meetings, and malicious prosecution following his acquittal on battery and elder

abuse charges. As to the defamation claim, the district court separately granted summary judgment to each respondent, relying in part on the judicial-proceedings privilege. Generally, the privilege absolutely protects statements made during judicial proceedings, and therefore those statements cannot form the basis of a defamation claim. This privilege extends to statements made during quasi-judicial proceedings, but the issue here is whether the public-comment periods of planning-commission and improvement-district meetings are quasi-judicial proceedings. We conclude that in this case, the public-comment portions of the meetings were not quasi-judicial because they lacked the basic due-process protections we would normally expect to find in a court of law. We therefore reverse the district court's orders that relied exclusively on this privilege and the corresponding awards of attorney fees, and remand for further proceedings on the defamation counterclaim. We affirm, however, the district court's adverse summary judgments on appellant's defamation claims that relied on statements that were undisputedly true. We likewise affirm the district court's summary judgments on appellant's malicious-prosecution claim because the district court did not erroneously apply the law in resolving that claim.

FACTS

This appeal arises from a dispute between neighbors living in the Kingsbury General Improvement District (KGID) of Douglas County. The dispute began when appellant Jeffrey D. Spencer built a fence around his property. Respondents Helmut, Egon, and Elfriede Klementi, Mary Kinion, and Rowena and Peter Shaw complained about the fence at Douglas County Planning Commission meetings and contacted the Douglas County District Attorney's office. At a later KGID board meeting, respondents alleged that Spencer, who operated a snowplow for KGID during the winter, retaliated by blocking their driveways with snow. They also alleged that he used a snowplow to cover Egon with snow and ice.

The dispute culminated in 2013 when Spencer allegedly battered Helmut. Respondents again complained about Spencer at KGID and Douglas County Planning Commission meetings. Shortly thereafter, the district attorney's office charged Spencer with a misdemeanor battery. Four months later, it enhanced the misdemeanor battery to felony elder abuse and added two more charges of elder abuse—one based on the alleged snowplow incident and the other based on alleged threats. After a jury trial, Spencer was acquitted.

Helmut thereafter filed a civil complaint against Spencer seeking recovery for his personal injuries. Spencer filed a malicious-prosecution counterclaim against Helmut, Egon, Elfriede, and Kinion, alleging that they falsely accused him of criminal activity with the intent to induce criminal prosecution. He soon added Rowena and Peter Shaw as third-party defendants and added a defamation

counterclaim, alleging that respondents made defamatory statements at public meetings.[1]

Kinion first moved for summary judgment on the malicious-prosecution counterclaim. At a hearing on the motion, the district court called the deputy district attorney as a witness. She testified that Kinion did not influence her decision to initially charge and prosecute Spencer or to later enhance the charges. Relying partly on this testimony, the district court found that Kinion was not involved in the initiation or enhancement of Spencer's criminal charges and granted her motion for summary judgment. As the prevailing party, Kinion moved for attorney fees under NRS 18.010(2)(b), which the district court granted.

Next, respondents Kinion, Helmut, Elfriede, and the Shaws separately moved for summary judgment on the remaining counterclaims. The district court granted their motions, finding that Spencer did not present sufficient evidence to survive summary judgment on the remaining malicious-prosecution counterclaims. It also found that respondents' statements were protected under the judicial-proceedings privilege, which precluded liability for defamation. As the prevailing parties, Kinion, Helmut, and Elfriede separately moved for attorney fees under NRS 18.010(2)(b), which Spencer did not oppose. The district court thus granted the motions, construing Spencer's failure to oppose as a concession that his counterclaims lacked a reasonable basis. The remaining claims were also resolved, and Spencer now appeals, challenging the district court's summary judgment orders and awards of attorney fees.

DISCUSSION

The district court's summary judgment in favor of Kinion on the malicious-prosecution counterclaim

Spencer first argues that the district court erroneously granted Kinion's motion for summary judgment on the malicious-prosecution counterclaim because there was a genuine issue of material fact about Kinion's participation in his criminal prosecution.[2]

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[1]In his complaint, Spencer did not identify any potentially defamatory statements. Instead, he merely alleged that respondents "made repeated false and defamatory statements . . . publicly asserting [1] that he failed to properly do his job as a contract snow plower, [2] that he assaulted and battered elderly persons, and [3] that he had committed felonies against elderly persons." The record shows, however, that Spencer was referring to statements made during the public-comment periods of KGID and Douglas County Planning Commission meetings.

[2]Spencer also argues that the district court erred when it sua sponte called the deputy district attorney as a witness because in doing so, it erroneously elicited evidence outside the pleadings and supporting documents. But because Spencer failed to object or raise this issue in district court, we decline to consider it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that we need not consider an issue raised for the first time on appeal).

We review the district court's summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.* The movant bears the burden of production and therefore must either "submit[ ] evidence that negates an essential element of the [non-moving party's] claim" or "point[ ] out . . . that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (internal quotation marks omitted). If the movant does so, then the nonmoving party must "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact" in order to avoid summary judgment. *Id.* at 603, 172 P.3d at 134.

To prevail on a malicious-prosecution claim, a party must establish, among other elements, "that the defendant [1] initiated, [2] procured the institution of, or [3] actively participated in the continuation of a criminal proceeding against the plaintiff." *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879-80 (2002). In her motion for summary judgment, Kinion argued that there was insufficient evidence to establish any of those three requirements. She pointed out that the arresting officer did not contact or communicate with her during the investigation of the alleged battery. Kinion attached to her summary-judgment motion the official report of the incident, which did not list her name as a witness or otherwise mention her. She also attached the arresting officer's deposition, wherein he acknowledged that he did not speak with her before writing his incident report and forwarding it to the district attorney's office. Kinion pointed out that any continued involvement in Spencer's criminal prosecution was at the request of the deputy district attorney, who subpoenaed her to testify at Spencer's criminal trial and requested that she send a letter with information about the neighborhood dispute. Because Kinion successfully pointed out that there was insufficient evidence to support Spencer's counterclaim, she met her burden as the party moving for summary judgment.

In his opposition, Spencer focused solely on the third requirement, arguing that Kinion was actively involved in the continuation of his criminal prosecution.[3] He introduced evidence that Kinion called the police after witnessing the snowplow incident, communicated ex parte with a judge, and sent a letter to the Douglas County District Attorney's Office.

We are not persuaded that these facts create a genuine issue of material fact as to whether Kinion was actively involved in the

[3]Because the three bases for malicious-prosecution liability are joined by the disjunctive *or*, a party need prove only one of them to succeed on a defamation claim.

continuation of Spencer's criminal prosecution. The deputy district attorney testified that she based her decision to amend Spencer's criminal complaint on facts presented at a preliminary hearing, at which Kinion did not testify. The deputy district attorney also testified that Kinion's letter, which was one of many received during the investigation, did not influence her to enhance the charges. In fact, Kinion was not even listed as a witness on the amended complaint. Spencer's opposition to the motion for summary judgment and the documents attached thereto did not refute this evidence, nor were they sufficient to show a genuine issue as to any material fact. That Kinion called the police after witnessing potentially illegal behavior does not, without more, establish that she played an active role in the district attorney's decision to amend the criminal complaint. And Kinion's ex-parte communication with a judge, while improper, concerned the geographical reach of Spencer's restraining order and was therefore not relevant to the dispositive issue here. Spencer thus failed to meet his burden of showing a genuine dispute of material fact, and we therefore affirm the district court's summary judgment.[4]

The district court's summary judgment in favor of the Shaws, Helmut, Kinion, and Elfriede on the defamation counterclaims

Spencer next argues that the district court erred when it granted summary judgment to the Shaws, Helmut, Kinion, and Elfriede on the defamation counterclaim based on the judicial-proceedings privilege. He argues that Nevada has never extended the absolute privilege that attaches to judicial and quasi-judicial proceedings to statements made during the public-comment period of a planning-commission or improvement-district meeting. We review the district court's separate summary judgments de novo, starting first with its summary judgment in favor of the Shaws.

The district court did not err in granting summary judgment in favor of the Shaws

In its order granting summary judgment to the Shaws, the district court found that none of the Shaws' statements were defamatory or untrue, but that the judicial-proceedings privilege nonetheless pro-

[4]Spencer also challenges the district court's summary judgment in favor of Helmut, Elfriede, and the Shaws on the malicious-prosecution counterclaim, arguing that the district court erred when it applied the judicial-proceedings privilege in the context of malicious prosecution. But even if the district court erroneously applied the privilege in this context, it *alternatively* found that Spencer failed to present sufficient evidence to establish a genuine issue of material fact as to whether respondents initiated, procured the institution of, or actively participated in the continuation of his criminal proceeding. Spencer does not challenge this finding, which is independently sufficient to support summary judgment in respondents' favor. We therefore conclude that any alleged error was harmless. *See* NRCP 61 (providing that this court must disregard all errors that do not affect a party's substantial rights).

tected their statements. The only potentially defamatory statements the Shaws made involved snow removal. But in their motion for summary judgment, the Shaws pointed out that there was no evidence that these statements were false, so Spencer could not prove his case. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714-15, 57 P.3d 82, 87-88 (2002) (defining defamation as "a publication of a false statement of fact" and further clarifying that "a statement [is not] defamatory if it is absolutely true, or substantially true"). The Shaws thus met their burden. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 134 (internal quotation marks omitted) (explaining that the party moving for summary judgment can meet its burden by "pointing out . . . an absence of evidence to support the nonmoving party's case[ ]" (internal quotation marks omitted)).

In his opposition, Spencer did not present any evidence that the statements about snow removal were untrue or that the Shaws made additional defamatory statements. Further, he did not attach an affidavit, testimony from the Shaws, or any other evidence that "transcend[ed] the pleadings." *Id.* He merely alleged that the Shaws did not have firsthand knowledge of these accusations. General allegations, however, are insufficient to survive summary judgment. *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 194, 444 P.3d 436, 439 (2019) (reiterating that the nonmoving party must "rely[ ] upon more than general allegations and conclusions set forth in the pleadings" to survive summary judgment). Because Spencer failed to meet his burden, we affirm the district court's summary judgment in favor of the Shaws.

The district court did not err in granting summary judgment to Helmut

In its order granting summary judgment to Helmut, the district court similarly found that none of the statements Helmut made were defamatory or untrue, but it nonetheless applied the judicial-proceedings privilege to his statements. The only potentially defamatory statement Helmut made during public meetings involved his altercation with Spencer. He said he was "confronted by Mr. Spencer" while taking pictures of the snow berms. But in his motion for summary judgment, Helmut presented evidence that this statement was true, thereby negating an essential element of Spencer's defamation claim. *See Pegasus*, 118 Nev. at 715, 57 P.3d at 88. He therefore met his burden as the party moving for summary judgment. *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134 (providing that the movant can meet its burden by "submitting evidence that negates an essential element of the nonmoving party's claim").

In his opposition, Spencer did not present any evidence that the statement about the altercation was untrue or that Helmut made additional defamatory statements. In fact, he admitted that he ap-

proached someone in his driveway the night of the altercation and that they collided. Spencer's primary argument was that he did not know that the person in his driveway was Helmut. Even so, this fact does not render Helmut's statement that he was "confronted by Mr. Spencer" untrue or otherwise defamatory. Spencer therefore failed to demonstrate that a genuine issue of material fact remained as to whether Helmut's statement was true, so we affirm the district court's summary judgment in favor of Helmut.[5]

The district court erred in granting summary judgment to Kinion and Elfriede

Like the Shaws, Kinion and Elfriede discussed snow removal at public meetings. But at a KGID public meeting, Elfriede also said that "Spencer was speeding and put the blade down and splashed the snow over [Egon's] face." At the same meeting, Kinion said that "Spencer had a big grin on his face and turned the blade and that is when [Egon] got splashed with the snow."[6] Unlike the Shaws, in moving for summary judgment, neither Kinion nor Elfriede argued that their statements were true or otherwise not defamatory. They instead argued that the judicial-proceedings privilege, which provides absolute immunity for statements made during judicial and quasi-judicial proceedings, protected their statements because KGID and the Douglas County Planning Commission meetings were quasi-judicial proceedings.[7]

By presenting this affirmative defense, Kinion and Elfriede met their burden as the parties moving for summary judgment, but did so without addressing the elements of and factual basis for Spencer's defamation counterclaim. We must therefore address whether the judicial-proceedings privilege applies in this context, which we review de novo. *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983) (holding that absolute privilege is a question of law); *Clark Cty. Sch. Dist. v. Payo*, 133 Nev. 626, 631,

[5]This basis is independently sufficient to affirm the district court's summary judgment in favor of the Shaws and Helmut. We therefore decline to address the district court's application of the judicial-proceedings privilege to statements made by the Shaws and Helmut.

[6]During KGID and Douglas County Planning Commission meetings, Kinion and Elfriede also said that Spencer's fence violated county code and that Spencer was threatening and aggressive. These statements do not fall within any of the three categories of potentially defamatory statements Spencer listed in his complaint, so we need not analyze these statements here.

[7]The parties do not argue for the application of the judicial-function test we adopted in *State ex rel. Board of Parole Commissioners v. Morrow*, 127 Nev. 265, 273-74, 255 P.3d 224, 229 (2011). Further, we decline to extend that test, which provides a list of factors to consider when determining whether an *entity* is acting in a quasi-judicial manner and is therefore exempt from the Open Meeting Law, here. *See id.* at 274, 255 P.3d at 229-30.

403 P.3d 1270, 1275 (2017) (holding that this court reviews questions of law de novo).

Generally, the judicial-proceedings privilege provides absolute immunity to statements made in the course of a judicial proceeding "so long as [the statements] are in some way pertinent to the subject of controversy." *Circus Circus Hotels*, 99 Nev. at 60, 657 P.2d at 104. We have expressly extended this absolute privilege "to quasi-judicial proceedings before executive officers, boards, and commissions." *Id.* at 61, 657 P.2d at 104 (extending the absolute privilege to a letter sent to the Nevada Employment Security Department regarding unemployment benefits); *see also Knox v. Dick*, 99 Nev. 514, 517-18, 665 P.2d 267, 269-70 (1983) (extending the absolute privilege to witness testimony before the Clark County Personnel Grievance Board). But we have never expressly defined a quasi-judicial proceeding in the context of defamation suits.

We therefore take this opportunity to clarify that a quasi-judicial proceeding in the context of defamation suits is one that provides basic due-process protections similar to those provided in a court of law. Such protections will undoubtedly vary based on the type of proceeding, but we hold that to qualify as a quasi-judicial proceeding for purposes of the absolute privilege, a proceeding must, at a minimum, (1) provide the opportunity to present and rebut evidence and witness testimony, (2) require that such evidence and testimony be presented upon oath or affirmation, and (3) allow opposing parties to cross-examine, impeach, or otherwise confront a witness. *See Knox*, 99 Nev. at 518, 665 P.2d at 270 (concluding that a grievance board hearing was a quasi-judicial proceeding because the guidelines governing it required evidence to be taken upon oath or affirmation, allowed witnesses to testify, provided for impeachment of those witnesses, and allowed for rebuttal). These basic protections provide parties with the opportunity to present arguments with supporting evidence and testimony while also ensuring that such evidence and testimony is credible and reliable. With this definition in mind, we turn to the proceedings at issue here.

During the public-comment period of KGID and Douglas County Planning Commission meetings, the public is invited to speak about relevant community issues. Although both proceedings provided parties the opportunity to present personal testimony during this period, neither required an oath or affirmation. Further, although Kinion and Elfriede were allowed to speak freely during the public-comment periods, neither was subject to cross-examination or impeachment. Because these public-comment periods lacked the basic due-process protections we would expect to find in a court of law, they were not quasi-judicial in nature.

And while we have on rare occasion and in specific contexts applied the judicial-proceedings privilege based solely on public policy, we cannot do so here. *See, e.g.*, *Lewis v. Benson*, 101 Nev. 300,

301, 701 P.2d 751, 752 (1985) (applying the absolute privilege to complaints with an internal-affairs bureau without first determining whether the proceeding was quasi-judicial in nature because doing so "promote[ed] the public's interest by allowing civilian complaints against public officials to be aired in the proper forum"). Statements made during proceedings that lack basic due-process protections generally do not engender fair or reliable outcomes. Extending the judicial-proceedings privilege to such statements thus does not comport with the privilege's policy "to promote the truth finding process in a judicial proceeding." *Jacobs v. Adelson*, 130 Nev. 408, 415, 325 P.3d 1282, 1286 (2014) (internal quotation marks omitted). Based on our conclusion that the public-comment periods here lacked basic due-process protections, we conclude that public policy considerations do not weigh in favor of applying the judicial-proceedings privilege here.

Because we conclude that the absolute privilege that attaches to judicial and quasi-judicial proceedings does not apply here, we reverse the district court's orders granting summary judgment for Kinion and Elfriede and remand for further proceedings consistent with this opinion.[8]

Attorney fees under NRS 18.010(2)(b)

Relying on its authority to award attorney fees to a prevailing party under NRS 18.010(2)(b), the district court awarded Kinion attorney fees after granting her motion for summary judgment on the malicious-prosecution counterclaim. It also awarded Helmut, Elfriede, and Kinion attorney fees after granting their motions for summary judgment on the remaining counterclaims, which included the defamation counterclaim. Spencer challenges both awards of attorney fees, which we review for abuse of discretion. *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014).

The district court did not abuse its discretion when it awarded attorney fees to Kinion on the malicious-prosecution counterclaim

Based on our affirmance of the district court's summary judgment in favor of Kinion on the malicious prosecution counterclaim, we conclude that the district court did not abuse its discretion when it determined that Kinion was the prevailing party on that claim. *See Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev.

[8]In their answering brief, Kinion and Elfriede allude to the possibility that a conditional or qualified privilege might attach to their statements, but because neither presented this argument in district court, we decline to address it for the first time on appeal. *See Jacobs v. Adelson*, 130 Nev. 408, 418, 325 P.3d 1282, 1288 (2014) (vacating after determining that the absolute privilege did not apply in a defamation case and remanding for the district court to determine the applicability of the conditional privilege).

80, 90, 343 P.3d 608, 615 (2015) (defining a prevailing party as one that "succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit" (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)); *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995) (clarifying that the term "prevailing party" includes "plaintiffs, counterclaimants and defendants"). NRS 18.010(2)(b) therefore authorized it to award Kinion attorney fees if it determined that Spencer "brought or maintained [a claim] without reasonable ground or to harass the prevailing party." *See Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580, 427 P.3d 104, 113 (2018) (defining a groundless claim as one unsupported by credible evidence).

The district court found that Spencer's malicious-prosecution counterclaim was groundless because there was probable cause to criminally prosecute him, so he could not prove an essential element of his malicious-prosecution counterclaim. *LaMantia*, 118 Nev. at 30, 38 P.3d at 879 (explaining that "the elements of a malicious prosecution claim are: (1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage" (internal quotation marks omitted)). The deputy district attorney's testimony and respondents' testimony at the preliminary hearing support the district court's finding. *See Frederic & Barbara Rosenberg Living Tr.*, 134 Nev. at 580-81, 427 P.3d at 113 (explaining that "there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass" (internal quotation marks omitted)). We therefore affirm the district court's award of attorney fees to Kinion on the malicious-prosecution counterclaim.

The district court did not abuse its discretion when it awarded attorney fees to Helmut

We also conclude that, based on our affirmance of the district court's summary judgment in favor of Helmut, the district court did not abuse its discretion when it determined that Helmut was the prevailing party. NRS 18.010(2)(b) therefore authorized it to award Helmut attorney fees if it determined that Spencer "brought or maintained [a claim] without reasonable ground or to harass the prevailing party." The district court construed Spencer's failure to oppose Helmut's motion for attorney fees as a concession that his counterclaims lacked any reasonable ground and thus awarded Helmut attorney fees. Nevada law supports the district court's conclusion. *See* DCR 13(3) (expressly authorizing a district court to construe an opposing party's failure to file a written opposition "as an admission that the motion is meritorious and a consent to granting the same"); *see also Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern*

Rentals, Inc., 124 Nev. 272, 278, 182 P.3d 764, 768 (2008) (affirming the district court's treatment of the opposing party's failure to oppose a motion for attorney fees as an admission that the moving party's motion was meritorious). We therefore affirm the district court's award of attorney fees to Helmut.

Because Kinion and Elfriede are no longer prevailing parties on Spencer's defamation claim, we vacate the awards of attorney fees in their favor

Because we reverse the district court's order granting summary judgment to Kinion and Elfriede on the defamation counterclaims, the district court's characterization of these respondents as the prevailing parties under NRS 18.010(2)(b) might change on remand. We therefore vacate both awards of attorney fees.

Consistent with the foregoing, we affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

Parraguirre and Hardesty, JJ., concur.