the evidence. In this case, territorial jurisdiction was proper as the State proved by a preponderance of the evidence that McNamara continued the crime of first-degree kidnapping into Nevada and his prevention of Sharp from receiving medical treatment caused her prolonged physical pain, warranting the substantial bodily harm enhancement to his kidnapping charge. Although the district court committed two errors—the failure to conclude as a matter of law whether it had territorial jurisdiction and the inadvertent use of the incorrect verdict form, we conclude such errors were harmless. McNamara's other claims on appeal are meritless and do not warrant a new trial. Thus, we affirm the judgment of conviction.

HARDESTY and SAITTA, JJ., concur.

LAZARO MARTINEZ-HERNANDEZ, AKA LAZARO MARTINEZHERNANDEZ, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 69169

August 12, 2016 380 P.3d 861

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

As matters of first impression, the supreme court, SAITTA, J., held that: (1) petition challenging validity of conviction did not become moot after defendant, who was in custody at time petition was filed, was released from custody subsequent to the filing of petition, if collateral consequences of conviction existed; and (2) there was a presumption that continuing collateral consequences existed.

Reversed and remanded.

Law Office of Terrence M. Jackson and *Terrence M. Jackson*, Las Vegas, for Appellant.

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

1. ACTION.
   Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.
2. ACTION.
   A moot case is one that seeks to determine an abstract question that does not rest upon existing facts or rights.

3. Habeas Corpus.
   In instances where collateral consequences of a conviction exist, a habeas petition challenging the validity of a judgment of conviction does not become moot when the petitioner, who was in custody at the time the petition was filed, is released from custody subsequent to the filing of the petition. Const. art. 6, § 6; NRS 34.724.
4. Criminal Law.
   Completion of a defendant's sentence may render a challenge to the sentence itself moot.
5. Habeas Corpus.
   There is a presumption that continuing collateral consequences exist whenever there is a criminal conviction, and thus, a postconviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction, filed while the petitioner is imprisoned or under supervision as a probationer or parolee, may not be summarily dismissed as moot after the petitioner is released from custody.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Saitta, J.:

It is settled law that a petitioner must either be imprisoned or under supervision as a probationer or parolee in order to file a postconviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction. In this case, we are asked to decide whether a petition filed under these conditions later becomes moot once the petitioner is released.

We hold that a habeas petition challenging the validity of a judgment of conviction filed while the petitioner is imprisoned or under supervision does not become moot when the petitioner is released if there are continuing collateral consequences stemming from that conviction. We further hold that continuing collateral consequences are presumed to flow from a criminal conviction. Therefore, we hold that the petition is not moot, and we reverse the district court's order and remand this case for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

The original conviction

On February 5, 2008, appellant Lazaro Martinez-Hernandez was found guilty by a jury of one count of assault with a deadly weapon. He was sentenced to 36 months in prison with parole eligibility after 12 months. The district court suspended the sentence and placed Martinez-Hernandez on probation for an indeterminate period of time not to exceed three years. A judgment of conviction was entered, from which Martinez-Hernandez did not appeal.

In 2010, Martinez-Hernandez stipulated to having violated the conditions of his probation. Accordingly, the district court revoked

his probation and imposed the original sentence with a 96-day credit for time served. An amended judgment of conviction was issued, from which Martinez-Hernandez again did not appeal.

The habeas petition

On February 1, 2011, Martinez-Hernandez, while still imprisoned, filed a postconviction petition for a writ of habeas corpus in which he alleged ineffective assistance of counsel and appeal deprivation. On July 19, 2013, the district court granted the petition in part, finding that Martinez-Hernandez was wrongfully deprived of an appeal and, as such, was entitled to file an untimely appeal as provided in NRAP 4(c). The district court did not address the other ineffective-assistance-of-counsel claims. Martinez-Hernandez subsequently filed his direct appeal from the judgment of conviction, and on July 22, 2014, this court affirmed Martinez-Hernandez's conviction and sentence in an unpublished order.

On February 24, 2015, Martinez-Hernandez filed a supplement to the 2011 petition, in which he again alleged ineffective assistance of counsel. After a hearing and additional briefing, the district court dismissed Martinez-Hernandez's petition as moot because he was no longer in custody, on probation, or on parole.

Martinez-Hernandez now appeals. The issue on appeal is whether his postconviction petition for a writ of habeas corpus was rendered moot by his release from physical custody.

DISCUSSION

[Headnotes 1, 2]

> This court has frequently refused to determine questions presented in purely moot cases. Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events. A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights.

Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) (citations omitted). Whether an issue is moot is a question of law that we review de novo. *See Stevenson v. State*, 131 Nev. 598, 602, 354 P.3d 1277, 1280 (2015).

The Nevada Constitution states:

> The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction.

Nev. Const. art. 6, § 6. We have held that a petitioner must either be imprisoned or "under supervision as a probationer or parolee" in

order to file a petition for a writ of habeas corpus. *State v. Baliotis*, 98 Nev. 176, 178, 643 P.2d 1223, 1224 (1982); *see also Coleman v. State*, 130 Nev. 190, 193, 321 P.3d 863, 865-66 (2014); *Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999); NRS 34.724. The issue in this case, however, is whether a postconviction habeas petition that is filed while the petitioner is imprisoned later becomes moot when the petitioner is released from physical custody and supervision. We have never addressed this issue. However, decisions by this court and the United States Supreme Court suggest that a petition that was filed while the petitioner was imprisoned or under supervision does not necessarily become moot after the petitioner's sentence has expired.

Other jurisdictions allow proceedings on habeas petitions to continue where collateral consequences exist stemming from the conviction

In *Carafas v. LaVallee*, the United States Supreme Court considered whether, when a petitioner has timely filed a federal habeas corpus petition while imprisoned, the expiration of a petitioner's sentence and his unconditional release from prison prior to the final adjudication of habeas proceedings renders his petition moot. 391 U.S. 234, 237 (1968). The *Carafas* petitioner had been convicted of burglary and grand larceny in New York state court. *Id.* at 235. Because of his convictions, he could not engage in certain businesses, vote in state elections, or serve as a juror. *Id*. at 237. The Supreme Court concluded that because of these "collateral consequences," the *Carafas* petitioner's habeas claim was not moot. *Id*. at 237-38. The *Carafas* court reasoned that due to the "disabilities or burdens" that may have resulted from the petitioner's conviction, he possessed "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Id*. at 237 (internal quotations omitted). The court further stated that a habeas petitioner "should not be . . . required to bear the consequences of [an] assertedly unlawful conviction simply because the path has been so long that he has served his sentence." *Id*. at 240.

This court has recognized that the collateral consequences stemming from a criminal conviction can prevent mootness, albeit in the context of a direct appeal. *Knight v. State*, 116 Nev. 140, 143-44, 993 P.2d 67, 70 (2000). In *Knight*, this court reconsidered a previous case holding that "an appeal in a misdemeanor or gross misdemeanor case [is] rendered moot by satisfaction of a fine or completion of a defendant's sentence" because "no effective relief would accrue from reversal of the defendant's conviction if the fine had been paid or the sentence served." *Id*. at 143, 993 P.2d at 70. In overruling the previous case, the *Knight* court recognized that "criminal convictions carry with them certain collateral consequences," such as the "impact [they have on] penalty considerations in a subsequent crim-

inal action." *Id*. Therefore, the *Knight* court held that "satisfaction of a fine or completion of a sentence [does not] render[ ] a timely appeal from a criminal conviction moot." *Id*. at 143-44, 993 P.2d at 70.

[Headnotes 3, 4]

We therefore hold, consistent with the *Knight* case and with the Supreme Court's jurisprudence in *Carafas*, that in instances where collateral consequences of a conviction exist, a habeas petition challenging the validity of a judgment of conviction does not become moot when the petitioner, who was in custody at the time the petition was filed, is released from custody subsequent to the filing of the petition.[1]

> *A criminal conviction creates a presumption that collateral consequences exist*
>
> An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction. Once the convict's sentence has expired, however, some concrete and continuing injury other than the now-ended incarceration or parole—some "collateral consequence" of the conviction—must exist if the suit is to be maintained.

Spencer v. Kemna, 523 U.S. 1, 7 (1998). Examples of collateral consequences due to a conviction identified by the United States Supreme Court include being prohibited from: (1) engaging in certain businesses, (2) voting in state elections, and (3) serving as a juror. *Carafas*, 391 U.S. at 237. In *Spencer*, the Supreme Court went even further and held that there is a *presumption* that "a wrongful criminal conviction has continuing collateral consequences [for the purposes of mootness]." 523 U.S. at 8. However, some state courts decide on a case-by-case basis whether the collateral consequences claimed by a petitioner are sufficient to preclude a finding that the case is moot. *See, e.g.*, *Gural v. State*, 251 A.2d 344, 344-45 (Del. 1969); *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981); *E.C. v. Va. Dep't of Juvenile Justice*, 722 S.E.2d 827, 835 (Va. 2012).

[Headnote 5]

Our caselaw supports the adoption of the presumption of collateral consequences articulated by the Supreme Court in *Spencer*. In

[1]However, we note that completion of a defendant's sentence may still render a challenge to the sentence itself moot. *See generally Johnson v. Dir., Dep't of Prisons*, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989) (stating that expiration of a defendant's sentence rendered any question concerning computation of the sentence moot).

Knight, this court identified the impact that a conviction may have on penalty considerations in a subsequent criminal action as a collateral consequence that prevents mootness. 116 Nev. at 143, 993 P.2d at 70. The *Knight* court reasoned that "it is an 'obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.'" *Id*. (quoting *Spencer*, 523 U.S. at 12). By citing to *Spencer* for this proposition, we believe that the *Knight* court was moving toward the adoption of *Spencer*'s presumption of continuing collateral consequences, even if it did not explicitly so state. Therefore, we hold that there is a presumption that continuing collateral consequences exist whenever there is a criminal conviction, and thus, the district court erred in summarily dismissing Martinez-Hernandez's petition as moot.

CONCLUSION

A postconviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction filed while the petitioner is imprisoned or under supervision as a probationer or parolee does not become moot when the petitioner is released if there are continuing collateral consequences stemming from that conviction. Furthermore, a criminal conviction creates a presumption that continuing collateral consequences exist. Given this presumption, the district court erred in summarily dismissing the petition as moot. We therefore reverse and remand this case for further proceedings consistent with this opinion.

HARDESTY and PICKERING, JJ., concur.

TOWER HOMES, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v*. WILLIAM H. HEATON, INDIVIDUALLY; AND NITZ WALTON & HEATON, LTD., A DOMESTIC PROFESSIONAL CORPORATION, RESPONDENTS.

No. 65755

August 12, 2016 377 P.3d 118

Appeal from a district court summary judgment in a legal malpractice action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Creditors, who were authorized by bankruptcy trustee to pursue Chapter 11 debtor's legal malpractice claim, brought legal malpractice action against attorney and law firm, asserting negligence and breach of fiduciary duty claims arising out of the loss of earnest money deposits that creditors gave to debtor to reserve condo-

minium space in buildings that debtor planned to build. The district court entered summary judgment in favor of attorney and law firm. Creditors appealed. The supreme court, HARDESTY, J., held that: (1) creditors did not pursue legal malpractice claim on behalf of debtor's estate, and thus, conditions set forth in bankruptcy statute, permitting estate's representative to pursue debtor's claims, were not satisfied; and (2) bankruptcy trustee's stipulation and the court's order permitting creditors to pursue debtor's legal malpractice claim constituted assignment of the claim in violation of public policy against assignments of legal malpractice claims.

Affirmed.

Eglet Prince and *Dennis M. Prince*, Las Vegas; *Keating Law Group* and *John T. Keating, Ian C. Estrada*, and *Eric N. Tran*, Las Vegas, for Appellant.

Lewis Brisbois Bisgaard & Smith LLP and *Jeffrey D. Olster* and *V. Andrew Cass*, Las Vegas, for Respondents.

1. APPEAL AND ERROR.
   The supreme court reviews a summary judgment order de novo.
2. JUDGMENT.
   Summary judgment is appropriate only when the pleadings and record demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.
3. APPEAL AND ERROR.
   When reviewing a summary judgment motion on appeal, evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.
4. BANKRUPTCY.
   A bankruptcy trustee can pursue a debtor's legal claims. 11 U.S.C. §§ 704(a), 1123(b)(3)(B).
5. ASSIGNMENTS.
   As a matter of public policy, the court cannot permit enforcement of a legal malpractice action that has been transferred by assignment but that was never pursued by the original client.
6. ATTORNEY AND CLIENT.
   The decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client.
7. BANKRUPTCY.
   When a Chapter 11 bankruptcy plan of reorganization grants a creditor the right to pursue a claim belonging to the debtor's estate as a representative of the estate, and when the representative has no independent claim to any proceeds from a successful prosecution, there has been no assignment of the claim. 11 U.S.C. § 1123(b)(3)(B).
8. BANKRUPTCY.
   Although Nevada law prohibits the assignment of legal malpractice claims, a Chapter 11 bankruptcy plan may provide for an estate representative to pursue a legal malpractice claim belonging to the estate without an assignment so long as the representative is prosecuting the claim on behalf of the estate. 11 U.S.C. § 1123(b)(3)(B).

9. Assignments; Bankruptcy.
   Pursuit of a legal malpractice claim by a Chapter 11 bankruptcy estate representative on behalf of the estate is not contrary to the rule prohibiting assignment of a legal malpractice claim because the representative does not own the claim and is entitled only to reimbursement for incurred expenses and a reasonable hourly fee for its services, as permitted by federal bankruptcy law. 11 U.S.C. § 1123(b)(3)(B).
10. Assignments; Bankruptcy.
    If a party seeks to prosecute a legal malpractice action belonging to a Chapter 11 bankruptcy estate on its own behalf, it must do so as an assignee, not as a special representative. 11 U.S.C. § 1123(b)(3)(B).
11. Assignments; Bankruptcy.
    Creditors did not pursue legal malpractice claim belonging to Chapter 11 bankruptcy estate on behalf of the estate, and thus, conditions set forth in bankruptcy statute, permitting estate's representative to pursue debtor's claims, were not satisfied, where bankruptcy court's order transferred control and proceeds of the claim to the creditors. 11 U.S.C. § 1123(b)(3)(B).
12. Assignments; Bankruptcy.
    Bankruptcy trustee's stipulation and the court's order permitting creditors to pursue Chapter 11 debtor's legal malpractice claim, arising out of the loss of earnest money deposits that creditors gave to debtor to reserve condominium space, constituted assignment of the claim in violation of public policy against assignment of legal malpractice claims; although order did not use the term "assigned," the court gave creditors the right to pursue any and all claims on debtor's behalf, no limit was placed on creditors' control of the case, and creditors were entitled to any recovery. 11 U.S.C. § 1123(b)(3)(B).
13. Assignments; Bankruptcy.
    When the conditions set forth in bankruptcy statute, allowing representative of Chapter 11 bankruptcy estate to pursue debtor's claims, are not satisfied, Nevada law prohibits the assignment of legal malpractice claims from a bankruptcy estate to creditors. 11 U.S.C. § 1123(b)(3)(B).
14. Assignments.
    It is the unique quality of legal services, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship that invoke public policy considerations supporting the conclusion that malpractice claims should not be subject to assignment.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Hardesty, J.:

In this case, a bankruptcy court entered an order authorizing the bankruptcy trustee to permit a group of creditors to pursue a debtor's legal malpractice claim in the debtor's name. The order provided that the creditors were entitled to all financial benefit from the claim, and no limit was placed on the creditors' control of the lawsuit. The creditors then pursued that claim in Nevada district court. On the defendant attorney and law firm's motion, the district court entered summary judgment concluding that Nevada law prohibits the assignment of legal malpractice claims. To resolve this appeal,

we are asked to consider whether the trustee's stipulation to permit the creditors to pursue the claim and the bankruptcy court's order authorizing the same resulted in an impermissible assignment of a legal malpractice claim. We conclude that the stipulation and order constituted an assignment, which is prohibited under Nevada law as a matter of public policy. Further, while we recognize that, when certain conditions are met, creditors may bring a debtor's legal malpractice claim pursuant to 11 U.S.C. § 1123(b)(3)(B) (2012), those conditions were not met in this case.

FACTS AND PROCEDURAL HISTORY

Appellant Tower Homes, LLC, and Rodney Yanke, its managing member, began developing a residential common ownership project called Spanish View Towers Project (hereinafter the project). Tower Homes planned to build three 18-story condominium towers as a part of the project. Attorney William Heaton and the law firm Nitz, Walton & Heaton, Ltd. (collectively Heaton), were retained by Tower Homes for legal guidance. A number of individual investors (hereinafter the purchasers) entered into contracts with Tower Homes and made earnest money deposits to reserve condominium space. The project failed, and Tower Homes entered Chapter 11 bankruptcy protection.

The purchasers were among the many creditors during the bankruptcy proceedings. A plan of reorganization was created by the bankruptcy trustee and a confirmation order was entered by the bankruptcy court in 2008. The plan and the confirmation order stated that the trustee and the bankruptcy estate retained all legal claims.

In 2010, the bankruptcy trustee entered into a stipulation with the purchasers recognizing that the trustee did not have sufficient funds to pursue any legal malpractice claims arising out of the loss of the purchasers' earnest money deposits and permitting the purchasers to pursue that claim in the Tower Homes' name. The bankruptcy court then entered an order authorizing the trustee to release to the purchasers all of Tower Homes' claims against any individual or entity that was liable for the loss of the earnest money deposits. Because there is a dispute as to whether the purchasers are pursing the claim individually, on behalf of the estate, or as Tower Homes, LLC, we will refer to the appellant party in this case as the purchasers.

Pursuant to the 2010 order, the purchasers filed a legal malpractice lawsuit in 2012 against Heaton, naming Tower Homes as plaintiff, alleging negligence and breach of fiduciary duty claims. The district court was not satisfied that the purchasers had standing under the 2010 order to pursue the claim, but it allowed the purchasers to ask the bankruptcy court for an amended order to remedy any potential concerns.

In 2013, the trustee and bankruptcy court again attempted to allow the purchasers to pursue the claims. The second stipulation

agreed to by the trustee and the purchasers stated, in relevant part, as follows:

> 1) The Trustee has determined that he does not intend and, in any event, does not have sufficient funds in the Estate to pursue claims on behalf of the Debtor . . . .
>
> . . . .
>
> 5) The Trustee hereby stipulates and *agrees to permit the Tower Homes Purchasers[ ] to pursue* . . . the action currently filed in the Clark County District Court styled as Tower Homes, LLC v. William H. Heaton, et al. . . .

(Emphasis added.)

The relevant portion of the bankruptcy court's corresponding order stated:

> [T]his Order authorizes the *Trustee to permit the Tower Homes Purchasers[ ] to pursue any and all claims on behalf of Tower Homes, LLC* (the "Debtor") . . . which shall specifically include . . . pursuing the action currently filed in the Clark County District Court styled as Tower Homes, LLC v[.] William H. Heaton et al. . . .
>
> . . . [T]his Court hereby authorizes the law firm of Marquis Aurbach Coffing, and/or Prince & Keating LLP . . . to recover any and all earnest money deposits, damages, attorneys fees and costs, and interest thereon on behalf of Debtor and the Tower Homes Purchasers and that any such recoveries *shall be for the benefit of the Tower Homes Purchasers*.

(Emphases added.)

Heaton moved for summary judgment in the district court, arguing that the 2013 bankruptcy stipulation and order constituted an impermissible assignment of a legal malpractice claim to the purchasers. The district court agreed and granted summary judgment in favor of Heaton. This appeal follows.

DISCUSSION

[Headnotes 1-3]

We review a summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate only when the pleadings and record demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When reviewing a summary judgment motion, "evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.*

[Headnote 4]

When a bankruptcy petition is filed, all of the debtor's property, other than certain exceptions, becomes part of the bankruptcy estate.

11 U.S.C. § 541(a) (2012). A bankruptcy trustee is charged with administering the estate and recovering assets for the creditors' benefit. 11 U.S.C. § 704(a) (2012); 11 U.S.C. § 1123(b)(3)(B) (2012). The trustee can pursue a debtor's legal claims. *Office of Statewide Health Planning & Dev. v. Musick, Peeler & Garrett*, 90 Cal. Rptr. 2d 705, 707-08 (Ct. App. 1999); *see also In re J.E. Marion, Inc.*, 199 B.R. 635, 637 (Bankr. S.D. Tex. 1996) (stating that potential legal claims belong to the estate). Therefore, when Tower Homes entered bankruptcy protection, the trustee was allowed to pursue a potential legal malpractice claim against Heaton. However, the issue presented in this case is whether the bankruptcy order impermissibly assigned a legal malpractice claim under Nevada law.

Under Nevada law, the assignment of legal malpractice claims is generally prohibited

[Headnotes 5, 6]

"As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment . . . but which was never pursued by the original client." *Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982). "The decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Id.* at 224, 645 P.2d at 966.

Notwithstanding the rule set forth in *Chaffee*, the purchasers argue that they were named representatives of the estate and under federal law a Chapter 11 bankruptcy plan may permit such representatives to bring a legal malpractice claim on behalf of the estate without an assignment, or, alternatively, that there was no assignment of the legal malpractice claim, only an assignment of proceeds. Heaton argues that the 2013 bankruptcy stipulation and order did not appoint the purchasers to represent the bankruptcy estate in a legal malpractice claim on behalf of the estate as permitted under 11 U.S.C. § 1123(b)(3)(B) (2012), but instead purported to authorize the purchasers to prosecute a legal malpractice action on their own behalf and benefit in Tower Homes' name, thus constituting an unlawful assignment of a legal malpractice claim.

Bankruptcy statutes permit bankruptcy creditors to bring debtor malpractice claims under certain conditions

[Headnote 7]

Courts recognize that creditors can bring a debtor's legal malpractice claim under bankruptcy law when certain conditions are satisfied. *See Musick*, 90 Cal. Rptr. 2d at 708. 11 U.S.C. § 1123(b)(3)(B) (2012) states that "a plan may . . . provide for . . . the retention and enforcement [of a claim of the estate] by the debtor, by the trustee, or *by a representative of the estate* appointed for such purpose, of any such claim or interest." (Emphasis added.) Where a

Chapter 11 bankruptcy plan of reorganization grants a creditor the right to pursue a claim belonging to the debtor's estate pursuant to 11 U.S.C. § 1123(b)(3)(B) (2012) as a representative of the estate, and where the representative "has no independent claim to any proceeds from a successful prosecution, there has been no assignment" of the claim. *Appletree Square I Ltd. P'ship v. O'Connor & Hannan*, 575 N.W.2d 102, 106 (Minn. 1998).

[Headnotes 8-10]

Thus, although Nevada law prohibits the assignment of legal malpractice claims, a bankruptcy plan may provide for an estate representative to pursue a legal malpractice claim belonging to the estate without an assignment so long as the representative is prosecuting the claim "on behalf of the estate." *Musick*, 90 Cal. Rptr. 2d at 708. Pursuit of such a claim by a bankruptcy estate representative is not contrary to the rule prohibiting assignment because the representative "does not own the claim and is entitled only to reimbursement for incurred expenses and a reasonable hourly fee for its services," as permitted by federal bankruptcy law. *Id*. "[I]f a party seeks to prosecute the action on its own behalf, it must do so as an assignee, not as a special representative." *Id.*

[Headnote 11]

Although the purchasers assert that the bankruptcy stipulation and order authorized them to bring the legal malpractice action in Tower Homes' name on behalf of the estate as set forth under section 11 U.S.C. § 1123(b)(3)(B) (2012), the bankruptcy court's order transferred control and proceeds of the claim to the purchasers. We therefore conclude that the purchasers are not pursuing a legal malpractice action on behalf of Tower Homes' estate as provided under 11 U.S.C. § 1123(b)(3)(B) (2012).

The legal malpractice claim against Heaton was improperly assigned to the purchasers

[Headnotes 12, 13]

When the 11 U.S.C. § 1123(b)(3)(B) (2012) conditions are not satisfied, Nevada law prohibits the assignment of legal malpractice claims from a bankruptcy estate to creditors. *See Chaffee*, 98 Nev. at 223-24, 645 P.2d at 966 (generally prohibiting the assignment of legal malpractice claims (citing *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Ct. App. 1976) (detailing policy considerations that underlie the nonassignability of legal malpractice claims))); *see also In re J.E. Marion, Inc*., 199 B.R. at 639 ("[T]he costs to the legal system of assigning legal malpractice claims in the bankruptcy context outweighs the benefits.")

To overcome these concerns, the purchasers contend that they were only assigned proceeds, not the entire malpractice claim

against Heaton.[1] In *Edward J. Achrem, Chartered v. Expressway Plaza Ltd. Partnership*, this court determined that the assignment of personal injury claims was prohibited, but the assignment of personal injury claim proceeds was allowed. 112 Nev. 737, 741, 917 P.2d 447, 449 (1996).

We are not convinced that *Achrem*'s reasoning applies to legal malpractice claims; however, even if an assignment of the claim is distinguished from a right to proceeds in the legal malpractice context, the 2013 bankruptcy stipulation and order constitute an assignment of the entire claim. In *Achrem*, this court determined that the difference between an assignment of an entire case and an assignment of proceeds was the retention of *control*. *Id*. When only the proceeds are assigned, the original party maintains control over the case. *Id.* at 740-41, 917 P.2d at 448-49. When an entire claim is assigned, a new party gains control over the case. *Id*. Here, the bankruptcy court gave the purchasers the right to "pursue any and all claims on behalf of . . . [d]ebtor . . . which shall specifically include . . . pursuing the action currently filed in the Clark County District Court styled as Tower Homes, LLC v[.] William H. Heaton, et al." No limit was placed on the purchasers' control of the case, and the purchasers were entitled to any recovery.[2]

[Headnote 14]

As the court in *Goodley* stated, "[i]t is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment." 133 Cal. Rptr. at 87. Allowing such assignments would "embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* Here, issues regarding the personal nature of the attorney-client privilege are implicated. Also, a number of confidentiality problems

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[1]The purchasers also argue that no assignment occurred because Tower Homes, not the purchasers, is the real party in interest as Tower Homes is the only entity with the requisite attorney-client privilege to bring a legal malpractice action. However, given the clear and express language in the 2013 bankruptcy stipulation and order providing the purchasers with a right to bring the claim and the exclusive interest in proceeds, we conclude that this contention is meritless. *Painter v. Anderson*, 96 Nev. 941, 943, 620 P.2d 1254, 1255-56 (1980) ("The concept 'real party in interest' under NRCP 17(a) means that an action shall be brought by a party who possesses the right to enforce the claim and who has a significant interest in the litigation." (internal quotations omitted)).

[2]The purchasers also contend that even if their claim was impermissibly assigned, the portion of the bankruptcy court order allowing the purchasers to retain any recovery should be ignored and the proceeds should revert back to the estate. However, the purchasers have cited no authority to support a remedy that would result in rewriting the bankruptcy court's order severing the purchasers' rights to proceeds, and we decline to do so.

arise if the purchasers are allowed to bring this claim. For example, the record reflects that plaintiff's counsel attempted to discover confidential files regarding Heaton's representation of Tower Homes. Because the bankruptcy court's order demonstrates that the purchasers are actually pursuing the claim, any disclosure potentially breaches Heaton's duty of confidentiality to Tower Homes. Additionally, Tower Homes can no longer control what confidential information is released, because it cannot decide whether to dismiss the claim in order to avoid disclosure of confidential information. In Nevada, the duty of confidentiality does not extend "to a communication relevant to an issue of breach of duty by the lawyer to his or her client." NRS 49.115(3).

While the 2013 bankruptcy stipulation and order here do not explicitly use "assigned," such formalistic language is not required for a valid assignment. *See Easton Bus. Opportunities, Inc. v. Town Exec. Suites*, 126 Nev. 119, 127, 230 P.3d 827, 832 (2010) ("[T]here are no prescribed formalities that must be observed to make an effective assignment. The assignor must manifest a present intention to transfer its contract right to the assignee." (internal quotations and citations omitted)). The 2013 bankruptcy stipulation and court order express the bankruptcy court's and the bankruptcy trustee's present intention to allow the purchasers to control the legal malpractice case. As a result, we conclude that the district court properly determined that the legal malpractice claim was assigned to the purchasers.

Accordingly, for the reasons set forth above, we affirm the district court's summary judgment.

SAITTA and PICKERING, JJ., concur.

MEHMET SAIT KAR, APPELLANT, *v.*
KATHLEEN A. KAR, RESPONDENT.

No. 65985

August 12, 2016 378 P.3d 1204

Appeal from a district court order denying a motion to modify child custody and support. Eighth Judicial District Court, Family Court Division, Clark County; Sandra L. Pomrenze, Judge.

Father petitioned for modification of child custody agreement. The district court determined that it lacked jurisdiction to modify existing agreement. Father appealed. The supreme court, PICKERING, J., held that: (1) the district court lost exclusive, continuing jurisdiction over matter under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) once child and child's parents moved

away from state; and (2) the district court, while lacking exclusive jurisdiction over matter, retained jurisdiction under UCCJEA to ensure that another more appropriate forum existed to resolve dispute.

Reversed and remanded.

Law Offices of Amberlea Davis and *Amberlea S. Davis*, Las Vegas, for Appellant.

Roberts Stoffel Family Law Group and *Jason P. Stoffel* and *Amanda M. Roberts*, Las Vegas, for Respondent.

1. Child Custody.
   So long as the jurisdictional facts are undisputed, jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act involves questions of law, which are reviewed de novo. NRS 125A.305.
2. Child Custody.
   Under the Uniform Child Custody Jurisdiction and Enforcement Act, the district court that made initial child custody determination lost exclusive, continuing jurisdiction over child custody matter once child and child's parents moved away from state. NRS 125A.305, 125A.315(1)(a), (b).
3. Child Custody.
   Even though, under the Uniform Child Custody Jurisdiction and Enforcement Act, the district court that initially made child custody determination lost exclusive jurisdiction over custody matter when child and child's parents moved out of the state and to other countries, the court retained jurisdiction to ensure that another more appropriate forum existed to resolve dispute. NRS 125A.305(1)(b), (d), 125A.315(1)(a), (1)(b), (2).

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

This is an appeal from an order denying a motion to modify a Nevada child custody decree. Citing the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which Nevada has codified as NRS Chapter 125A, the district court held that it lost jurisdiction to modify its decree when the parents and the child moved away from Nevada. While it is true that the district court lost exclusive jurisdiction over custody upon its determination that "the child, the child's parents and any person acting as a parent do not presently reside in this state," NRS 125A.315(1)(b), the district court erred when it failed to recognize that, under the UCCJEA, it nonetheless retained jurisdiction, which it should have exercised, to ensure that another more appropriate forum existed to resolve the dispute. Because the district court failed to complete the jurisdictional analysis requested by appellant and mandated by the UCCJEA in this setting, we reverse and remand.

I.

Respondent Kathleen A. Kar and appellant Mehmet Sait Kar, divorced while living in Nevada with their minor child. The decree provided for joint legal custody but awarded Kathleen primary physical custody with Mehmet having visitation two weekends per month. After the divorce, Mehmet moved to Turkey, whereupon Kathleen applied for and obtained an order modifying the decree to give her sole legal and physical custody. Kathleen is in the Air Force and had been stationed at Creech Air Force Base in Nevada. After Kathleen obtained sole custody, the Air Force notified her that she had received a Permanent Change of Duty Station (PCS). The PCS required Kathleen to move from Nevada to England, which she did, taking the child with her.

Two months after Kathleen and the child moved to England, Mehmet filed the motion to modify child custody and support that underlies this appeal.[1] Kathleen opposed the motion and filed a countermotion to dismiss for lack of jurisdiction. The district court heard oral argument, but did not conduct an evidentiary hearing on the cross-motions. At the hearing, the district court opined that "UCCJEA jurisdiction ends when neither party is living here . . . . That second that she [the mother and the child] moved [to England], I lost jurisdiction." On this basis, the district court orally denied Mehmet's motion to modify child custody and granted Kathleen's countermotion to dismiss. A written order followed, from which Mehmet has timely appealed.

II.

A.

[Headnote 1]

The primary issue on appeal is whether the district court was correct that it lost subject matter jurisdiction to hear Mehmet's motion when the parties and the child left Nevada. Resolving this question requires us to examine the interconnected rules of the UCCJEA, which Nevada adopted in 2003 as NRS Chapter 125A. *Friedman v. Eighth Judicial Dist. Court*, 127 Nev. 842, 847, 264 P.3d 1161, 1165 (2011) (citing 2003 Nev. Stat., ch. 199, §§ 1-59, at 990-1004). Although the UCCJEA does not contain an express statement of purpose, the official comments to the Act state that it "should be in-

[1]Although Mehmet's motion also sought to modify child support, the district court did not address whether it had jurisdiction to do so under either NRS Chapter 125B or NRS Chapter 130, an issue distinct from its jurisdiction to modify custody under NRS Chapter 125A. Because the parties did not adequately brief the support issue we do not reach it, *see Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006), except to the extent of directing the district court, on remand, to analyze whether it had jurisdiction to modify child support.

terpreted according to its purposes which are to: (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child; (3) Discourage the use of the interstate system for continuing controversies over child custody; (4) Deter abductions of children; (5) Avoid relitigation of custody decision of other States in this State; [and] (6) Facilitate the enforcement of custody decrees of other States." Unif. Child Custody Jurisdiction & Enf't Act § 101 cmt. (Unif. Law Comm'n 1997), 9 ULA, Part 1A, 657 (West 1999). To these ends, the UCCJEA establishes uniform protocols to be followed in entering, enforcing, and modifying child custody decrees across state or, as here, international lines. *See* NRS 125A.225(1) (entitled "International application" and providing, "A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying NRS 125A.005 to NRS 125A.395, inclusive."). So long as the jurisdictional facts are undisputed, jurisdiction under the UCCJEA involves questions of law, which we review de novo. *Friedman*, 127 Nev. at 847, 264 P.3d at 1165.

[Headnotes 2, 3]

At the time the parties divorced, Nevada was the child's "home state," which NRS 125A.085(1) tells us is "[t]he state in which a child lived with a parent . . . for at least 6 consecutive months . . . immediately before the commencement of a child custody proceeding." This gave Nevada jurisdiction to make the initial child custody determination under NRS 125A.305(1)(a) ("[A] court of this State has jurisdiction to make an initial child custody determination . . . if [t]his State is the home state of the child on the date of the commencement of the proceeding . . . ."). Having made the initial custody determination, Nevada acquired "exclusive, continuing jurisdiction" over the Kars' child's custody until, as pertinent here, "[a] court of this state . . . determine[d] that the child, the child's parents and any person acting as a parent do not presently reside in this state." NRS 125A.315(1)(b); *see also* NRS 125A.315(1)(a) (providing that exclusive, continuing jurisdiction may also end if "[a] court of this state determines that the child [and] the child's parents . . . do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships"). Once it determined that the child and the child's parents no longer resided in Nevada, the district court lost *exclusive*, *continuing* jurisdiction under NRS 125A.315(1). But this did not mean, as the district court erroneously held, that it lost *all* jurisdiction in the matter. On the contrary, even

after a district court loses exclusive, continuing jurisdiction, it may still modify its own prior order if the criteria NRS 125A.305(1) establishes for a court to obtain jurisdiction over an initial custody determination are met by the motion to modify custody. *See* NRS 125A.315(2) ("A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction pursuant to this section may modify that determination only if it has jurisdiction to make an initial determination pursuant to NRS 125A.305."); *Friedman*, 127 Nev. at 848-49, 264 P.3d at 1166 (holding that "commencement of the proceedings" in a UCCJEA modification context refers to the filing of a post-divorce decree motion concerning custody, not the original divorce proceedings).

NRS 125A.305 provides four possible means for a Nevada court to obtain jurisdiction over an initial child custody determination:

> 1. Except as otherwise provided in NRS 125A.335 [addressing temporary emergency jurisdiction], a court of this State has jurisdiction to make an initial child custody determination only if:
>
> (a) This State is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (b) A court of another state does not have jurisdiction pursuant to paragraph (a) or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum pursuant to NRS 125A.365 or 125A.375 and:
>
> (1) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> (2) Substantial evidence is available in this State concerning the child's care, protection, training and personal relationships;
>
> (c) All courts having jurisdiction pursuant to paragraph (a) or (b) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child pursuant to NRS 125A.365 or 125A.375; or
>
> (d) No court of any other state would have jurisdiction pursuant to the criteria specified in paragraph (a), (b) or (c).

Mehmet concedes, as he must, that his motion to modify did not meet the jurisdictional criteria stated in NRS 125A.305(1)(a), since

he filed it two months after Kathleen and the child left Nevada, by which time he was living in Turkey. He also recognizes that, since neither he nor Kathleen had commenced a proceeding in England or elsewhere, NRS 125A.305(1)(c) does not apply. But he maintains that the district court erred in refusing to consider whether it had jurisdiction under NRS 125A.305(1)(b) or NRS 125A.305(1)(d). We agree.

Under NRS 125A.305(1)(b), Nevada would have jurisdiction if the following conditions are met: First, no state has "home state" jurisdiction, or, if a state does, it declined jurisdiction based on an inconvenient forum analysis. Second, the child and at least one parent must have "a significant connection with [Nevada] other than mere physical presence." NRS 125A.305(1)(b). Third, substantial evidence must be available in Nevada regarding "the child's care, protection, training and personal relationships." *Id.*

Here, the only potential courts that could exercise jurisdiction are in Nevada and England because these are the only places where the child has lived. As Mehmet concedes, Nevada no longer has home state jurisdiction. Similarly, at the time the motion to modify was filed, neither did England. The child had lived in England for only two months at the time of the commencement of the action, and so was four months short of making England his home state. *See* NRS 125A.085 (defining "home state"). Thus, the first of the conditions specified for jurisdiction under NRS 125A.305(1)(b)—no state has "home state" jurisdiction—was met.

Because the district court deemed its jurisdiction to have expired the moment Kathleen and the child left Nevada, it did not consider the second and third conditions for exercising jurisdiction under NRS 125A.305(1)(b): connection of the child and his parents to Nevada other than mere physical presence; and whether there is substantial evidence in Nevada pertaining to the child's care, protection, training, and personal relationships. Mehmet argues that Kathleen and the child had significant connections with Nevada because they "resided there for several years" and the child "was in school in Nevada for at least one year." While Kathleen did not present directly contrary evidence, her counsel represented to the district court that Kathleen has nothing left in Nevada, as evidenced by the fact her car and all belongings are in England.[2] These representations do not persuade us that a significant connection does not exist in Nevada, but does exist in England. *See* Unif. Child Custody Jurisdiction & Enf't Act § 202 cmt. ("The significant connection to the original decree State must relate to the *child*, the *child* and a parent,

[2]Kathleen's counsel also represented that, when and if she returns to the United States, she plans to make her home in Florida, not Nevada.

or the *child* and a person acting as a parent." (emphases added)). Because NRS 125A.305(1)(b) requires a highly factual analysis, we reverse and remand for the district court to determine whether jurisdiction was warranted under that subsection.

NRS 125A.305(1)(d) provides jurisdiction to Nevada as a last resort when no other court could exercise jurisdiction under the criteria of paragraphs (a) through (c). As noted above, the only potential courts that could exercise jurisdiction are in Nevada and England because these are the only places the child has lived, yet neither Nevada nor England qualified as the child's "home state" or under NRS 125A.305(1)(a) when the motion to modify was filed. Thus, whether Nevada had default jurisdiction depends on whether England could have exercised jurisdiction under NRS 125A.305(1)(b) or (c). The analysis of England's jurisdiction under NRS 125A.305(1)(b) mirrors that just undertaken with respect to Nevada's potential jurisdiction under the same subsection and is equally fact-bound. Because the child and Kathleen lived in England when Mehmet brought his motion, they clearly had some connection with that country. However, the significance of that connection was not fully developed below. Therefore, this court cannot determine whether England would have "significant connection" jurisdiction based on the record before us; whether Kathleen or the child had a significant connection with England and whether there was substantial evidence in England regarding the child's well-being are questions of fact for the district court to resolve in the first instance.

The final question to determine whether Nevada had default jurisdiction is whether NRS 125A.305(1)(c) provided England with jurisdiction. NRS 125A.305(1)(c) permits a court to exercise jurisdiction when other states that would have jurisdiction under paragraphs (a) or (b) have declined to do so "on the ground that a court of this State is the more appropriate forum to determine the custody of the child pursuant to NRS 125A.365 or 125A.375." This does not apply here because no state other than Nevada had the opportunity to decline jurisdiction. Because Nevada did not have jurisdiction under paragraph (a) and it is unclear whether Nevada has jurisdiction under paragraph (b), the district court's erroneous rejection of jurisdiction did not provide England with jurisdiction under NRS 125A.305(1)(c).

Thus, while it appears that no other state had jurisdiction under paragraphs (a) or (c) over the parties' custody matter, it is unclear based on the record before us whether England had "significant connection" jurisdiction under paragraph (b). If, upon remand, evidence demonstrates that England did not have "significant connection" jurisdiction, default jurisdiction under NRS 125A.305(1)(d) would be appropriate. Either way, the district court erred when it determined that it lacked jurisdiction over the case simply because neither the

parents nor the child lived in Nevada without analyzing jurisdiction under NRS 125A.305(1).

B.

NRS 125A.365(1) provides that a court "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." Kathleen argues that the district court properly determined, sua sponte, that Nevada was an inconvenient forum and directed Mehmet to file in England. *See id.* ("The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court."). The problem is that, at the time the district court granted Kathleen's countermotion to dismiss, no child custody proceeding had been commenced in England. NRS 125A.365(3) directs that, "If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, *it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state* . . . ." (Emphasis added.) When a court declines jurisdiction under NRS 125A.365, in other words, it "may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum." Unif. Child Custody Jurisdiction & Enf't Act § 207 cmt.

III.

In sum, the district court's loss of exclusive, continuing jurisdiction did not end the jurisdictional analysis. The district court should have considered Mehmet's arguments that it retained jurisdiction to modify its prior custody order by operation of NRS 125A.315(2) and NRS 125A.305. Finally, if the district court determines that it has jurisdiction but that a more convenient forum exists after evaluating the factors under NRS 125A.365, the district court may not cast the parties loose but must stay the proceedings to allow the parties to file in the appropriate forum. Here, because the district court failed to analyze jurisdiction under NRS 125A.305(1) and dismissed, rather than stayed, the proceeding, we reverse and remand for proceedings consistent with this opinion.

Hardesty and Saitta, JJ., concur.

BANK OF NEVADA, A NEVADA BANKING CORPORATION, APPELLANT, *v.* MURRAY PETERSEN, AN INDIVIDUAL, RESPONDENT.

No. 66568

August 12, 2016 380 P.3d 854

Appeal from district court orders granting and denying cross-motions for summary judgment and denying a post-judgment motion to alter or amend in an action for a deficiency on a commercial guaranty. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Unsecured creditor brought action against commercial guarantor, seeking a deficiency judgment in the principal amount of $1,109,798.29, plus prejudgment interest, attorney fees, and costs. The district court granted summary judgment in favor of guarantor, and creditor appealed. The supreme court, PICKERING, J., held that: (1) creditor's complaint for a deficiency, as augmented by the joint conference report and stipulation and order as to the fair market value of the foreclosed upon property, were sufficient to satisfy the statutory application requirement for a deficiency judgment award to a judgment creditor; and (2) creditor was not required to make a second application after the foreclosure sale occurred in order to satisfy the six-month limitations period for a civil action by a person to whom an obligation secured by a junior mortgage or lien on real property is owed to obtain a money judgment against the debtor after a foreclosure sale.

Reversed and remanded.

[Rehearing denied September 27, 2016]

[En banc reconsideration denied November 23, 2016]

Snell & Wilmer, L.L.P., and *Michael D. Stein* and *Bradley T. Austin*, Las Vegas, for Appellant.

The McKnight Law Firm, PLLC, and *Richard McKnight*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews the district court's summary judgment de novo. NRCP 56.
2. APPEAL AND ERROR.
   Questions of statutory interpretation receive de novo review.
3. MORTGAGES.
   Creditor's complaint for a deficiency, as augmented by the joint conference report and stipulation and order as to the fair market value of the foreclosed upon property, were sufficient to satisfy the statutory application requirement for a deficiency judgment award to a judgment creditor; creditor filed its complaint before, not after, foreclosure sale, satisfying the

requirement that it be filed within six months after the sale. NRS 40.455(1), 40.495(4).

4. Mortgages.

By requiring the lender to proceed first against the property, and limiting the deficiency arising from foreclosure by the fair market value of the property foreclosed, the one-action rule and its associated fair value protections prevent harassment of debtors by creditors attempting double recovery by seeking a full money judgment against the debtor and by seeking to recover the real property securing the debt.

5. Judgment; Mortgages.

While a motion for summary judgment can constitute a sufficient application for purposes of statute governing the application requirements for a deficiency judgment award to a judgment creditor, so, too, can a properly pleaded complaint for a deficiency.

6. Guaranty.

Creditor, a junior lienholder that brought a pre-foreclosure deficiency action against its guarantor, was not required to make a second application after the foreclosure sale occurred in order to satisfy the six-month limitations period for a civil action by a person to whom an obligation secured by a junior mortgage or lien on real property is owed to obtain a money judgment against the debtor after a foreclosure sale; if a lender who brings a pre-foreclosure deficiency action against its guarantor does not have to make a second, separate application after the foreclosure sale occurs, it would produce unreasonable results to require a junior lienholder to file a second civil action or amend its complaint to satisfy the application requirements. NRS 40.4639.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

This appeal requires us to interpret NRS 40.455 and NRS 40.4639 and to decide whether, in the context of a suit by an undersecured creditor on a commercial guaranty, a pre-foreclosure complaint for the deficiency allowed by NRS 40.495(4) satisfies the requirements of NRS Chapter 40. We hold that it does and therefore reverse the district court's summary judgment in favor of the guarantor.

I.

Respondent Murray Petersen defaulted on a commercial guaranty agreement with appellant Bank of Nevada (BON) by failing to repay the more than $2,500,000 loan BON made to Petersen's company, Red Card, LLC. The loan was evidenced by two promissory notes, Note A and Note B, which were secured by first and second deeds of trust on the real property located at 8490 Westcliff Dr., Las Vegas, Nevada, on which Red Card operated its gas station and convenience store business (the Property). Petersen personally guaranteed both Note A and Note B. Further, Petersen agreed to waive

any rights or defenses he may have under NRS 40.430, Nevada's one-action rule.

When Red Card defaulted on the Notes, and Petersen did not make good on his guaranty, BON sued Petersen. BON filed its action against Petersen on April 12, 2013, after sending a notice of default and election to sell but before foreclosing the deeds of trust on the Property. In its complaint, BON did not seek from Petersen the full amount due on the Notes. Instead, paraphrasing the guarantor deficiency provision in NRS 40.495(4), BON's complaint sought damages from Petersen in:

> (a) The amount by which the Indebtedness exceeds the fair market value of the property as of the date of commencement of this action; or
>
> (b) If a foreclosure sale is concluded before a judgment is entered, the amount that is the difference between the amount for which the property was actually sold and the Indebtedness;
>
> whichever is the lesser amount.

BON proceeded to foreclosure sale on the first and second deeds of trust on June 18, 2013, roughly two months after it sued Petersen. BON acquired the Property at foreclosure by means of a $1,400,000 credit bid. Six weeks later, BON and Petersen filed the joint case conference report required by NRCP 16.1. The joint case report identified "[t]he key issue in this case [as] the fair market value of the [P]roperty." After several months of discovery, BON and Petersen resolved the issue, submitting a stipulation and order, which the district court signed and filed on December 13, 2013, declaring that, "The fair market value of the [P]roperty at issue in this action . . . , as of the date of the commencement of this action, is $1,990,000."

On January 16, 2014, BON moved for summary judgment. It supported its motion with evidence establishing that, as of the date of commencement of the action, the amounts owed on Notes A and B were $1,843,726.54 and $1,256,071.75, respectively. The stipulated fair market value of the Property as of that date ($1,990,000) was enough to satisfy the entire indebtedness on Note A ($1,843,726.54), and a portion ($1,990,000 − $1,843,726.54 = $146,273.46) of the indebtedness on Note B ($1,256,071.75), yielding a deficiency due on Note B, after foreclosure of the first and second deeds of trust, of $1,109,798.29 ($1,256,071.75 − $146,273.46 = $1,109,798.29). Applying this math, BON's motion for summary judgment sought a deficiency judgment against Petersen in the principal amount of $1,109,798.29, plus prejudgment interest, attorney fees, and costs.

Petersen opposed BON's motion for summary judgment with a cross-motion for summary judgment of his own. Petersen argued that, because BON let more than six months elapse between the date of the foreclosure sale (June 18, 2013) and the date it filed its motion

for summary judgment (January 16, 2014), BON forfeited its right to obtain a deficiency judgment by operation of NRS 40.455, which requires a foreclosing lender to make "application" for a deficiency judgment "within 6 months after the date of the foreclosure sale." In response, BON argued that its pre-foreclosure complaint satisfied all applicable requirements in NRS Chapter 40, to wit: NRS 40.495(4), which allows a commercial lender whose guarantor has waived NRS 40.430's one-action rule, to bring an action for a deficiency before conducting a foreclosure sale; and NRS 40.4639, which applies to junior lienholders and requires that "a civil action," not a separate "application," be filed "within 6 months after the date of the foreclosure sale." The district court agreed with Petersen and granted summary judgment in his favor and against BON.

II.

A.

[Headnotes 1, 2]

We review the district court's NRCP 56 summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). There are no contested facts, only questions of statutory interpretation, which also receive de novo review. *Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 727, 263 P.3d 231, 234 (2011).

B.

Petersen defends the correctness of the summary judgment in his favor based on NRS 40.455(1), as interpreted in *Lavi v. Eighth Judicial District Court*, 130 Nev. 344, 325 P.3d 1265 (2014). Like this case, *Lavi* grew out of a defaulted commercial real estate loan. The loan was secured by a first deed of trust on the real estate. After the borrower defaulted, the beneficiary of the deed of trust, Branch Banking and Trust (BB&T), "filed a complaint seeking full recovery of the loan's balance from Lavi," who had guaranteed the loan and, in his guaranty, waived the protections of NRS 40.430. *Id.* at 345, 325 P.3d at 1266; *see* NRS 40.495(2) (providing that a guarantor "may waive the provisions of NRS 40.430"). BB&T then foreclosed its deed of trust, which produced a deficiency. Almost a year after the foreclosure sale, BB&T moved for summary judgment against Lavi, who filed a countermotion to dismiss. *Lavi*, 130 Nev. at 345-46, 325 P.3d at 1266. In his countermotion, Lavi argued that BB&T's complaint should be dismissed under NRS 40.455(1) which, by its terms, required BB&T to make "application" for the deficiency "within 6 months after the date of the foreclosure sale," a deadline BB&T missed when it waited a year after the sale to file its motion for summary judgment.

The court sided with Lavi. Applying the pre-2011 version of NRS 40.495,[1] we held that:

> When Lavi waived the one-rule action, BB&T was allowed to bring an action against him prior to completing the foreclosure on the secured property, but that waiver did not terminate the procedural requirements for asserting that separate action. Although BB&T commenced an action on the guaranty first under NRS 40.495(2), once it foreclosed on the property and sought a deficiency judgment, it was required to satisfy NRS 40.455 [and make] timely application for a deficiency judgment . . . .

Lavi, 130 Nev. at 348, 325 P.3d at 1268. BB&T's complaint against Lavi did not constitute the "application" required by NRS 40.455(1) because it sought the full loan amount as opposed to a deficiency, *see id.* at 346, 325 P.3d at 1266, and, under NRS 40.495 as written before its amendment in 2011, BB&T's "right to a deficiency judgment [did] not vest until the secured property [was] sold." *Id.* at 348, 325 P.3d at 1269. Also, while a motion for summary judgment can satisfy NRS 40.455(1)'s "application" requirement, *see Walters*, 127 Nev. at 728, 263 P.3d at 234, BB&T filed its motion for summary judgment almost a year after the foreclosure sale. The *Lavi* majority thus concluded that "BB&T was barred from recovering under the guaranty because it failed to apply for a deficiency judgment under NRS 40.455 within six months after the property's sale." *Lavi*, 130 Nev. at 345, 325 P.3d at 1266.

C.

Lavi was decided under the pre-2011 version of NRS Chapter 40. *See supra* note 1. The 2011 Nevada Legislature made two significant amendments to Chapter 40. First, it amended NRS 40.495, governing pre-foreclosure suits by lenders against guarantors who have waived NRS 40.430's one-action rule, to add subparagraph 4, which specifies the lender's pre-foreclosure right to a deficiency judgment against its guarantor and how to calculate that judgment. 2011 Nev. Stat., ch. 311, § 5.5, at 1743-44; *see* NRS 40.495(4). Second, the 2011 Legislature created a statutory scheme to govern junior lienholder claims. 2011 Nev. Stat., ch. 311, §§ 1.2-3.3, at 1742-43; *see* NRS 40.4636 to 40.4639. In doing so, it added NRS 40.4639, which substitutes the filing of a "civil action" for NRS 40.455(1)'s "application" requirement in the junior lienholder context. BON maintains that, together,

[1]NRS Chapter 40 was substantially amended in 2011 and again in 2015. 2011 Nev. Stat., ch. 311, §§ 1-5.5, at 1742-45; *see* 2015 Nev. Stat., ch. 518, §§ 1-13, at 3336-45. Although the *Lavi* opinion was filed in 2014, the case arose under the pre-2011 version of NRS Chapter 40 because BB&T filed the underlying complaint against Lavi in 2009. *See Lavi*, 130 Nev. at 349, 351-52, 356-57, 325 P.3d at 1269, 1271, 1274 (PICKERING & HARDESTY, JJ., dissenting).

these amendments take this case outside *Lavi* and its reading of NRS 40.455(1). We agree.

1.

[Headnotes 3, 4]

Some background is helpful to place the 2011 amendments to NRS Chapter 40 in context. NRS 40.430 states Nevada's one-action rule. It provides that, in general, "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate," and specifies that such "action must be in accordance with the provisions of NRS 40.426 to 40.459, inclusive." NRS 40.430(1). Included in the range of provisions with which the "action" must comply are NRS 40.451 through NRS 40.459. These provisions establish the procedures a lender must follow to obtain a deficiency judgment, NRS 40.455, 40.457, and cap the deficiency by the amount remaining after subtracting the fair market value of the foreclosed real estate, NRS 40.459, thereby protecting the debtor against an unfairly low credit bid. By requiring the lender to proceed first against the property, and limiting the deficiency arising from foreclosure by the fair market value of the property foreclosed, the one-action rule and its associated fair value protections "prevent harassment of debtors by creditors attempting double recovery by seeking a full money judgment against the debtor and by seeking to recover the real property securing the debt." *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 751 (2005).

NRS 40.495 allows a commercial guarantor to waive the protections of NRS 40.430 so long as the secured debt guaranteed exceeds $500,000. NRS 40.495(2), (5)(a); *see* NRS 40.430(1) ("Except in cases where a person proceeds under subsection 2 of NRS 40.495 . . . there may be but one action for the recovery of any debt . . . ."); NRS 40.453 (providing that "[e]xcept as otherwise provided in NRS 40.495," it is "against public policy for any document relating to the sale of real property to contain any provision" waiving the protections afforded by state statute). Beyond permitting such waivers, NRS 40.495 as written before its amendment in 2011 contained few specifics. Subparagraph 2 provided, as it does today, that an action against a guarantor who has waived the protections of NRS 40.430 "may be maintained separately and independently" from any proceedings against the grantor of the deed of trust or his property. And NRS 40.495(3) provided, much as it does today, "If the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby, the guarantor, surety or other obligor may assert any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to 40.463 [today, 40.4639], inclusive." *See* 2011 Nev. Stat., ch. 311, § 5.5, at 1744. But, until it was amended in 2011,

NRS 40.495 did not include its own fair value provisions to apply when, after bringing suit against its guarantor, the lender foreclosed on the property securing the guaranteed debt. This raised the specter of an unfair double recovery that drove the decision in *Lavi*, where the obligee sought full recovery from the guarantor in its complaint, yet foreclosed on the property after suing the guarantor. 130 Nev. at 347-48, 325 P.3d at 1268 (stating concern that obligees should not receive excess recovery and that guarantors have notice of the actual amount of the deficiency); *but see* NRS 40.475 (addressing the paying guarantor's subrogation rights).

In 2011, the Legislature added subparagraph 4 to NRS 40.495. In NRS 40.495(4), the Legislature provided, for the first time, a method by which a lender intending both to foreclose a secured debt and sue the guarantor for the deficiency could calculate and claim the deficiency from the guarantor, though it had yet to conduct the foreclosure sale. As amended in 2011, NRS 40.495(4) reads:

> If, before a foreclosure sale of real property, the obligee commences an action against a guarantor, surety or other obligor, other than the mortgagor or grantor of a deed of trust, to enforce an obligation to pay, satisfy or purchase all or part of an indebtedness or obligation secured by a mortgage or lien upon the real property:
>
> (a) The court must hold a hearing and take evidence presented by either party concerning the fair market value of the property as of the date of the commencement of the action. Notice of such hearing must be served upon all defendants who have appeared in the action and against whom a judgment is sought, or upon their attorneys of record, at least 15 days before the date set for the hearing.
>
> (b) After the hearing, if the court awards a money judgment against the [guarantor, surety or other obligor[2]] who is personally liable for the debt, the court must not render judgment for more than:
>
> (1) The amount by which the amount of the indebtedness exceeds the fair market value of the property as of the date of the commencement of the action; or
>
> (2) If a foreclosure sale is concluded before a judgment is entered, the amount that is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured,
>
> whichever is the lesser amount.

NRS 40.495(4) incorporates, with changes specific to the waived one-action rule/commercial guaranty setting, much of the language

[2]The 2013 Legislature corrected a technical error in the 2011 version of NRS 40.495(4)(b), substituting "guarantor, surety or other obligor" for "debtor, guarantor or surety." *See* 2013 Nev. Stat., ch. 553, § 10, at 3797, 3810-11.

and many of the fair value protections in NRS 40.451 through NRS 40.459. The deficiency hearing provision in NRS 40.495(4)(a), for example, replicates NRS 40.457(1), except that it limits the deficiency by the fair market value of the property as of the date of the commencement of the action, as opposed to the date of the foreclosure sale.[3] Similarly, NRS 40.495(4)(b)'s alternative fair value/sale price deficiency metric copies that in NRS 40.459(2), again except for the date fair market value is measured, using the date of commencement of the action instead of the date of the foreclosure sale.

In this case, BON sued Petersen in 2013. Unlike the lender in *Lavi*, who in 2009 "filed a complaint seeking full recovery of the loan's balance from Lavi," 130 Nev. at 345, 325 P.3d at 1266, BON never sought more from Petersen than the deficiency allowed by NRS 40.495(4). BON built its complaint on NRS 40.495(4). Both in the body of its complaint and in the complaint's *ad damnum* clause, BON limited its claim to the difference between the indebtedness and either the fair market value as of the date of the commencement of the action or the foreclosure sale price, whichever proved less. Petersen thus had fair notice, from the start, that BON sought a deficiency judgment and, given NRS 40.495(4)(b), knew how to calculate what he owed. Thus, Petersen joined issue with BON on its deficiency claim in his answer and, thereafter, in the joint case conference report and stipulation and order respecting the fair market value of the Property, both of which—the case conference report and the stipulation and order—were filed within six months of the foreclosure sale.

[Headnote 5]

Under these circumstances, BON's complaint for a deficiency, as augmented by the joint case conference report and stipulation and order, satisfied the "application" requirement in NRS 40.455(1). While a motion for summary judgment can constitute a sufficient "application" for purposes of NRS 40.455(1), so, too, can a properly pleaded complaint for a deficiency. *See First Interstate Bank of Nev. v. Shields*, 102 Nev. 616, 618 n.2, 730 P.2d 429, 430 n.2 (1986) (equating complaint with application in analyzing timeliness of application for a deficiency under an earlier version of NRS 40.455); *see also Walters*, 127 Nev. at 727-28, 263 P.3d at 234 (holding that the obligee's motion for summary judgment qualified as a timely "application" for a deficiency, but not addressing whether the obli-

[3]NRS 40.457(1) provides that before awarding a deficiency judgment under NRS 40.455, the court shall "hold a hearing and shall take evidence presented by either party concerning the fair market value of the property *as of the date of foreclosure sale*. Notice of such hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for the hearing." (Emphasis added.) NRS 40.495(4)(a) substitutes "as of the date of commencement of the action" for "as of the date of foreclosure sale."

gee's counterclaim and cross-claim also qualified, and noting that NRS 40.455(1) does not require that the application "be specifically labeled as a deficiency judgment application"); *Application*, *Black's Law Dictionary* (10th ed. 2014) (defining "application" to mean either "[a] request or petition" or a "[m]otion").

To be sure, BON filed its complaint before, not after, the foreclosure sale, and *Lavi* contains broad language suggesting that, because NRS 40.455(1) requires the "application" to be filed "within 6 months *after* the date of the foreclosure sale," a pre-foreclosure complaint against a guarantor will never do. *Lavi*, 130 Nev. at 348, 325 P.3d at 1269 (emphasis added) (quotation omitted) (stating that "BB&T's complaint could not have met NRS 40.455's requirements because BB&T filed it before the trustee's sale"). But this broad pronouncement was not necessary to the holding in *Lavi*, given that the guarantor's complaint in *Lavi* sought the full amount of the debt, not just the deficiency, even after the foreclosure sale, directly offending the public policy *Lavi* sought to defend. *Accord Badger v. Eighth Judicial Dist. Court*, 132 Nev. 396, 402, 373 P.3d 89, 94 (2016) (citing *Lavi* and holding that, where the lender did not sue the guarantor for a deficiency in its original complaint or amend its timely post-foreclosure complaint against the borrower to add the guarantor until more than 6 months after the foreclosure sale, NRS 40.455(1) barred a deficiency action against the guarantor). The 2011 amendments to NRS 40.495(4) changed the rules of the game and gave BON, on Petersen's default, the right to pursue a deficiency, measured as of the date of the commencement of the action, which right it timely and properly exercised.[4] *Lavi* thus does not control.

2.

[Headnote 6]

Even accepting Petersen's argument that, under *Lavi*, BON's pre-foreclosure complaint could not satisfy NRS 40.455(1), we still must reverse the summary judgment in favor of Petersen. In addition to amending NRS 40.495 to add subparagraph 4, the 2011 Legislature also added a new series of statutes specifically to gov-

[4]Our reading of NRS 40.455(1) is confirmed by the 2015 Legislature's amendment of NRS 40.455, 2015 Nev. Stat., ch. 518, § 8, at 3340, which left subparagraph 1's application requirement intact but added new subparagraph 4 to clarify: "For purposes of an action against a guarantor . . . pursuant to NRS 40.495, the term 'application' includes, without limitation, a complaint or other pleading to collect the indebtedness or obligation which is filed before the date and time of the foreclosure sale unless a judgment has been entered in such action as provided in paragraph (b) of subsection 4 of NRS 40.495." NRS 40.455(4). While the 2015 amendments do not carry retroactive effect, *see Badger*, 132 Nev. at 403 n.1, 373 P.3d at 94 n.1 (alternative holding), they nonetheless may be consulted to the extent they clarify unclear statutory text. *See Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157 n.52, 179 P.3d 542, 555 n.52 (2008).

ern junior lienholder claims. 2011 Nev. Stat., ch. 311, §§ 1.2-3.3, at 1742-43; *see* NRS 40.4636 to 40.4639. The Legislature included, as part of its junior lienholder scheme, NRS 40.4639, which provides:

> A civil action not barred by NRS 40.430 or 40.4638 by a person to whom an obligation secured by a junior mortgage or lien on real property is owed to obtain a money judgment against the debtor after a foreclosure sale of the real property or a sale in lieu of a foreclosure sale may only be commenced within 6 months after the date of the foreclosure sale or sale in lieu of a foreclosure.

BON argues that, because it was undersecured only on the second deed of trust, it necessarily filed its action for the deficiency authorized by NRS 40.495(4) in its capacity as a junior lienholder and that, having filed the civil action required by NRS 40.4639, it was not required to do more. *See State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 388, 254 P.3d 601, 605 (2011) ("A specific statute controls over a general statute.").

NRS 40.4639 speaks to an action by a junior lienholder "against the debtor." In extending the fair value and anti-deficiency protections of NRS Chapter 40 to guarantors, NRS 40.495(3) specifically references NRS 40.4639, providing that, in a proper case, a guarantor "may assert any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to 40.4639, inclusive." Petersen objects that, as the holder of both the first and second deed of trusts, who purchased the property by credit bid at the foreclosure sale, BON is not a sold-out junior lienholder, defeating application of NRS 40.4639. While Petersen is correct that BON is not a sold-out junior lienholder, *see* NRS 40.430(6)(j), the junior lienholder statutes, including NRS 40.4639, apply to junior lienholders generally and are not restricted to those who are sold out. And, since Petersen waived the one-action rule, BON's "civil action," though not an action by a sold-out junior lienholder under NRS 40.430(6)(j), was not "barred by NRS 40.430." NRS 40.4639. We therefore reject Petersen's threshold argument that NRS 40.4639 does not apply.

Unlike NRS 40.455, which requires the obligee to file an "application" for a deficiency judgment, NRS 40.4639 requires the junior lienholder to commence a "civil action." While the Legislature has not expressed how a lienholder commences a civil action in the context of NRS 40.4639, the Nevada Rules of Civil Procedure state: "A civil action is commenced by filing a complaint with the court." NRCP 3.

NRS 40.4639 copies NRS 40.455(1) to the extent the "civil action" it requires must be "commenced within 6 months *after* the date of the foreclosure sale." (Emphasis added.) While *Lavi* read "*after* the date of the foreclosure sale" literally in the context of NRS 40.455(1), we decline to extend this literal reading of the word

"after" to NRS 40.4639 for three reasons. First, a junior lienholder who properly commences the pre-foreclosure deficiency action authorized by NRS 40.495(4) against its guarantor should not have to commence a second, post-sale action to satisfy the civil action requirement of NRS 40.4639. *See Allenbach v. Ridenour*, 51 Nev. 437, 462, 279 P. 32, 37 (1929) ("The law does not require idle acts" not necessary to do justice). Second, NRS 40.4639 acts as a statute of limitations, not a limit on when a cause of action for a deficiency accrues under NRS 40.495(4). *See* NRS 11.190 (establishing the statutes of limitations generally applicable to various kinds of Nevada actions "[e]xcept as otherwise provided in NRS 40.4639"). Third, when the Legislature amended NRS 40.455 in 2015, it recognized that lenders can bring pre-foreclosure deficiency actions under NRS 40.495(4) against defaulting guarantors who have waived the one-action rule, and now allows a pre-foreclosure complaint to satisfy the "application" requirement of NRS 40.455 in an action against a guarantor. *See* NRS 40.455(4), reprinted *supra* note 3; Hearing on S.B. 453 Before the Assembly Judiciary Comm., 78th Leg. (Nev., May 1, 2015). Even with this exception to NRS 40.455, the 2015 Legislature did not amend NRS 40.455(1) to remove the language "within 6 months *after* the date of the foreclosure sale." (Emphasis added.) The Legislature has the last word on how it writes its statutes and, if a lender who brings a pre-foreclosure deficiency action against its guarantor does not have to make a second, separate application after the foreclosure sale occurs, it would produce unreasonable results to require a junior lienholder to file a second civil action or amend its complaint to satisfy NRS 40.4639. *See City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722 (2011) ("No part of a statute should be rendered meaningless, and this court will not read statutory language in a manner that produces absurd or unreasonable results." (internal quotation marks omitted)).

III.

As the statutory landscape for deficiency actions against guarantors has changed since this court decided *Lavi*, 130 Nev. 344, 325 P.3d 1265, we hold that BON's complaint against Petersen for the deficiency allowed by NRS 40.495(4) satisfied the requirements of NRS Chapter 40. We therefore reverse the district court's orders and remand for calculation and entry of summary judgment in favor of BON.

HARDESTY and SAITTA, JJ., concur.

MATTHEW WASHINGTON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 65998

August 12, 2016 376 P.3d 802

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, murder with the use of a deadly weapon, three counts of attempted murder with the use of a deadly weapon, two counts of battery with the use of a deadly weapon, ten counts of discharging a firearm at or into a structure, and possession of a firearm by a felon. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

The supreme court, HARDESTY, J., held that: (1) defendant's ten convictions for the crime of discharging a firearm into a structure were not redundant; (2) evidence was sufficient to prove the elements of first-degree murder, such that any rational juror could find defendant guilty beyond a reasonable doubt; (3) evidence was sufficient to prove the elements of attempted murder, such that any rational juror could find defendant guilty beyond a reasonable doubt; (4) the State sufficiently proved the elements of conspiracy to commit murder, such that any reasonable jury could have found defendant guilty beyond a reasonable doubt; (5) the State sufficiently proved the elements of discharging a firearm into an occupied structure, a category B felony, such that any rational juror could have found defendant guilty beyond a reasonable doubt; and (6) the State's failure to identify conspirator in second amended criminal information did not substantially prejudice defendant, and therefore did not warrant reversal.

Affirmed.

[Rehearing denied September 16, 2016]

[En banc reconsideration denied November 23, 2016]

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

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.

The unit of prosecution for the crime of discharging a firearm at or into a structure was the act of the bullet leaving the weapon, and thus, defendant's ten convictions were not redundant, even if the discharges occurred in quick succession; the term "discharges" as used in the statute was not ambiguous, and it was the Legislature's intent to separately punish each time a bullet left the gun. NRS 202.285(1).

2. Criminal Law.
   Determining the unit of prosecution under a criminal statute involves a matter of statutory interpretation, which is subject to de novo review.
3. Statutes.
   When interpreting a statute, the supreme court must attribute the plain meaning to the statute that is not ambiguous; an ambiguity arises when the statutory language lends itself to two or more reasonable interpretations.
4. Criminal Law.
   When reviewing a challenge to the sufficiency of the evidence, the supreme court must determine 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.
5. Criminal Law.
   When there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal.
6. Criminal Law.
   The jury is tasked with assessing the weight of the evidence and determining the credibility of witnesses; and the jury is free to rely on both direct and circumstantial evidence in returning its verdict.
7. Homicide.
   Evidence supported first-degree murder conviction; jury could have inferred that defendant knew or reasonably should have known apartment was occupied, that firing multiple bullets into building demonstrated an intent to kill, and that defendant acted with express malice and that his actions were willful, and with regard to deliberation and premeditation, the State presented circumstantial evidence that defendant drove to apartment complex with a handgun that he discharged multiple times into apartment without provocation. NRS 200.010(1), 200.030(1)(a).
8. Homicide.
   Malice aforethought, as an element of first-degree murder, may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner. NRS 193.0175, 200.010(1).
9. Homicide.
   Willful first-degree murder requires that the killer actually intend to kill; deliberation requires a thought process and a weighing of the consequences, premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing. NRS 200.030(1)(a).
10. Homicide.
    The intention to kill, as an element of first-degree murder, may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of the use, and the attendant circumstances characterizing the act. NRS 193.200, 200.030(1)(a).
11. Homicide.
    Evidence supported conviction for attempted murder; jury could have inferred that defendant knew or reasonably should have known apartment was occupied, that firing multiple bullets into building demonstrated an intent to kill, and that defendant acted with express malice, that his actions were willful, and with regard to deliberation and premeditation, the State presented circumstantial evidence that defendant drove to apartment complex with a handgun that he discharged multiple times into apartment without provocation.
12. Homicide.
    In order to prove attempted murder, the State is required to prove the performance of an act or acts that tend, but fail, to kill a human being, when

such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

13. Conspiracy.
The State sufficiently proved the elements of conspiracy to commit murder; shortly after shooting, police conducted traffic stop, defendant was driver of vehicle and there was a rear seat passenger in the vehicle, witnesses who saw vehicle leaving the scene of shooting were brought to vehicle stop and identified the vehicle, and shell casings found at the crime scene matched two handguns found in the vehicle.

14. Conspiracy.
A conspiracy is an agreement between two or more persons for an unlawful purpose.

15. Conspiracy.
A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator.

16. Conspiracy; Criminal Law.
Even though mere association is insufficient to support a charge of conspiracy, proof of even a single overt act may be sufficient to corroborate a defendant's statement and support a conspiracy conviction.

17. Weapons.
Evidence supported conviction for discharging a firearm into an occupied structure, a category B felony; shell casings and bullet fragments from crime scene matched defendant's handgun, and shots were willfully and maliciously fired into apartment, in which television had been left on, and which was located in a populated apartment complex. NRS 202.285(1)(a), (b).

18. Conspiracy; Criminal Law.
The State's failure to identify coconspirator in second amended criminal information did not substantially prejudice defendant charged with conspiracy to commit murder and to discharge a firearm into an occupied structure, and therefore did not warrant reversal; while two persons were required to constitute a conspiracy, the State was not required to identify other members of the conspiracy, inasmuch as one person could be convicted of conspiring with persons whose names were unknown.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Hardesty, J.:

A jury convicted appellant Matthew Washington of ten counts of discharging a firearm at or into a structure pursuant to NRS 202.285(1). In this appeal, we are asked to determine whether multiple convictions under this statute are permissible based on multiple discharges that occurred in quick succession. Because the word "discharges," as used in NRS 202.285(1), unambiguously allows for a separate conviction for each discrete shot, we conclude that Washington's ten convictions for discharging a firearm are not redundant.

Washington also challenges the sufficiency of the evidence to convict him of first-degree murder, attempted murder, conspiracy

to commit murder, and discharging a firearm into an occupied structure. Having carefully reviewed the evidence in the record before us, we conclude that the State presented sufficient evidence to convict Washington of these charges.[1] Finally, we consider Washington's challenge to the criminal information. Because the State is not required to prove the identity of unknown conspiracy members, we conclude that the State's use of the language "unnamed coconspirator" in the second amended criminal information did not render the document defective. As a result, Washington has failed to demonstrate substantial prejudice, and reversal is therefore not warranted on this basis.

FACTS AND PROCEDURAL HISTORY

In the early morning hours on November 5, 2013, Marque Hill, LaRoy Thomas, Nathan Rawls, and Ashely Scott were asleep in an apartment in Las Vegas when they were awakened by gunshots being fired into the apartment in rapid succession. Scott was shot in the foot, Thomas was shot in the ankle, and Rawls was killed. Darren and Lorraine DeSoto, who resided in a neighboring apartment, were also awakened by the sound of the gunshots. The DeSotos observed a silver Dodge Magnum drive slowly past their window and called 911.

An officer with the Las Vegas Metropolitan Police Department (LVMPD) was on patrol when he received notification of the shooting. Within minutes, the officer observed a vehicle matching the description given by the DeSotos. The officer pulled the vehicle over and conducted a felony vehicle stop. Washington was the driver, and Martell Moten was a passenger in the rear driver-side seat. Washington told the officer that "he was by the Stratosphere and he just picked up his friend and they were going home." An officer testified that the Stratosphere is "fairly close" to the apartment where the shooting occurred.

The DeSotos were brought to the scene and identified the silver Dodge Magnum as the one they observed drive slowly past their window. Washington and Moten were then taken into custody. Because the vehicle doors had been left open, an officer observed a handgun underneath the front passenger seat. The gun was later determined to be a Smith & Wesson 9 millimeter. The vehicle was towed to a crime lab, and a search warrant was obtained. After the vehicle was processed by the crime lab but while it was still in the possession of the crime lab, a detective learned that another handgun was still in the vehicle. The detective searched for and found a handgun concealed in the vehicle's steering column. This gun was later determined to be a .40 caliber Glock.

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[1]Because Washington does not contest the sufficiency of the evidence with regard to his convictions for battery with use of a deadly weapon and possession of a firearm by a felon, we affirm these convictions as well.

An LVMPD crime scene analyst testified that seven .40 caliber and six 9 millimeter cartridge casings were found outside the apartment. The seven .40 caliber cartridge casings were determined to have been fired from the Glock found in the steering column of Washington's vehicle, and the six 9 millimeter cartridge casings were determined to have been fired from the Smith & Wesson found under the front passenger seat of the vehicle.

Washington was charged with conspiracy to commit murder, murder with the use of a deadly weapon, three counts of attempted murder with the use of a deadly weapon, two counts of battery with the use of a deadly weapon, ten counts of discharging a firearm at or into a structure, and possession of a firearm by a felon. A jury found Washington guilty of all counts, and Washington now appeals.

DISCUSSION

On appeal, Washington argues: (1) double jeopardy precludes multiple convictions for discharging a firearm; (2) there was insufficient evidence to support his convictions for first-degree murder, attempted murder, conspiracy to commit murder, and discharging a firearm into an occupied structure; and (3) the criminal information was defective because the identity of an unnamed coconspirator needed to be proven.[2]

Washington's convictions for discharging a firearm at or into a structure

[Headnote 1]

Washington argues that double jeopardy prevents the State from charging one count for each discharge of a firearm because firing a gun multiple times in quick succession amounts to a single violation of NRS 202.285(1). Washington argues that the unit of prosecution is the "firearm." Based on the substance of Washington's ar-

[2]Washington also challenges his conviction on several other grounds: (1) a jury instruction improperly informed the jury that the charges against him were felonies, (2) the district court erred in rejecting his proffered jury instruction on motive, (3) the State committed prosecutorial misconduct during its closing argument by stating that the jury could find that Washington acted with specific intent if it found that he discharged a firearm, (4) the State was required to obtain a new search warrant before conducting a second search of his vehicle, (5) the State's forensic scientist improperly testified that she and three of her colleagues had come to the same conclusion regarding bullets and shell casings found at the scene, (6) the district court erred in allowing evidence of field interview stops to be admitted during the penalty phase without sua sponte conducting an evidentiary hearing to determine whether the stops were constitutional, and (7) he was prejudiced when the State introduced evidence of his tattoos during the penalty hearing.

We decline to consider arguments (1), (5), and (6) because Washington failed to object or preserve these arguments below. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). And after careful consideration, we conclude that the remaining arguments lack merit.

gument, which involves a question about the "unit of prosecution," we conclude that Washington's argument actually raises an issue of redundancy, not double jeopardy. *See Jackson v. State*, 128 Nev. 598, 612, 291 P.3d 1274, 1283 (2012) ("Nevada's redundancy case law has . . . captured 'unit of prosecution' . . . within its sweep."); *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (disagreeing with the defendant's classification of the issue raised on appeal as a double jeopardy concern when the defendant's argument stemmed from his conviction "of three counts of leaving the scene of the accident"). Thus, we analyze Washington's argument in the context of redundancy.

[Headnotes 2, 3]

"[A] claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct." *Wilson v. State*, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005). Determining the unit of prosecution under a criminal statute thus involves a matter of statutory interpretation. *Jackson*, 128 Nev. at 612, 291 P.3d at 1278. "Statutory interpretation is a question of law subject to de novo review." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). "We must attribute the plain meaning to a statute that is not ambiguous." *Id*. "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations." *Id*.

The legislation at issue here is NRS 202.285(1), which provides that "[a] person who willfully and maliciously discharges a firearm at or into any house, room, [or] apartment" is guilty of either a misdemeanor or felony depending on whether the structure is abandoned or occupied. The unit of prosecution in NRS 202.285 does not turn on the word "firearm" but instead on the meaning of the verb "discharges." *See State v. Rasabout*, 356 P.3d 1258, 1263 (Utah 2015) (determining that the unit of prosecution for Utah's statute that prohibits the "*discharge* [of] any kind of dangerous weapon or firearm" is the term "discharge"). NRS Chapter 202 does not define the term discharge. However, the commonly understood meaning, in the context of a firearm, is the act of the bullet leaving the weapon. *See Discharge*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2011) (defining "discharge" as "go off, fire").

Our conclusion that the unit of prosecution is the act of the bullet leaving the weapon is supported by a similar statute, NRS 476.070(1), and by the statutory definition of a "firearm." NRS 476.070(1) provides that "[a]ny person who discharges any bullet, projectile or ammunition of any kind which is tracer or incendiary in nature on any grass, brush, forest or crop-covered land is guilty of a misdemeanor." Similarly, NRS 202.253(2) defines " '[f]irearm' " as "any device designed to be used as a weapon from which a projec-

tile may be expelled through the barrel by the force of any explosion or other form of combustion." The use of single nouns—"bullet," "projectile," and "ammunition" in NRS 476.070(1) and "a projectile" in NRS 202.253(2)—demonstrates the fact that "discharges," as used in NRS 202.285(1), "contemplates a discrete shot or explosion." *Rasabout*, 356 P.3d at 1263-64 (examining Utah's statutory definition of a firearm and a handgun, which are defined, respectively, as "any device . . . from which is expelled *a* projectile by action of *an* explosive" and "a firearm of any description . . . from which any shot, bullet, or other missile can be discharged" (alterations in original) (internal quotation marks omitted)).

Therefore, we conclude that "discharges," as used in NRS 202.285(1), is not ambiguous, *see Catanio*, 120 Nev. at 1033, 102 P.3d at 590, and that it is the Legislature's intent to separately punish each time a bullet leaves the gun under NRS 202.285(1), *see Wilson*, 121 Nev. at 355, 114 P.3d at 292.[3] Accordingly, we further conclude that Washington's ten convictions for discharging a firearm are not redundant.

Sufficiency of the evidence

[Headnotes 4, 5]

When reviewing a challenge to the sufficiency of the evidence, we must determine "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." *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotation marks omitted). "Where . . . there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal." *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

[Headnote 6]

The jury is tasked with "assess[ing] the weight of the evidence and determin[ing] the credibility of witnesses." *Rose*, 123 Nev. at 202-03, 163 P.3d at 414 (internal quotation marks omitted). And a jury is free to rely on both direct and circumstantial evidence in returning its verdict. *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). This court has consistently held that "circumstantial evidence may constitute the sole basis for a conviction." *Canape v. State*, 109 Nev. 864, 869, 859 P.2d 1023, 1026 (1993).

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[3]We are not asked in this case to determine the unit of prosecution under NRS 202.285(1) where a fully automatic firearm is used. *See generally State v. Rasabout*, 356 P.3d 1258, 1264 n.25 (Utah 2015) (describing "fully automatic weapon" based on definition in Utah statute as a firearm that is designed or modified to shoot automatically more than one shot, without manually reloading, by a single function of the trigger and suggesting that for purpose of unlawful-discharge-of-a-firearm statute, it does not matter how many times the trigger is pulled but instead how many "explosion[s]" there are).

First-degree murder

[Headnotes 7, 8]

"Murder is the unlawful killing of a human being . . . [w]ith malice aforethought, either express or implied." NRS 200.010(1); *see also Collman v. State*, 116 Nev. 687, 719-20, 7 P.3d 426, 447 (2000) ("[T]o establish that a killing is [first-degree] murder . . . , the State must prove that the killer acted with malice aforethought, i.e., with the deliberate intention unlawfully to take life or with an abandoned and malignant heart."). Express malice is defined as the "deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." NRS 200.020(1). Whereas "[m]alice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2). "Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." NRS 193.0175. "Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner." *Moser v. State*, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975).

[Headnotes 9, 10]

Based on how Washington was charged, the jury was also required to find that he committed a "willful, deliberate and premeditated killing." NRS 200.030(1)(a). "[W]illful first-degree murder requires that the killer actually intend to kill." *Byford v. State*, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000). "Deliberation requires a thought process and a weighing of the consequences[, and p]remeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing." *Valdez v. State*, 124 Nev. 1172, 1196, 196 P.3d 465, 481 (2008) (internal quotation marks and footnotes omitted). "Evidence of premeditation and deliberation is seldom direct." *Briano v. State*, 94 Nev. 422, 425, 581 P.2d 5, 7 (1978). Intent "is manifested by the circumstances connected with the perpetration of the offense." NRS 193.200; *see also Valdez*, 124 Nev. at 1197, 196 P.3d at 481 ("[I]ntent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime." (internal quotation marks omitted)). "[T]he intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of the use, and the attendant circumstances characterizing the act." *Moser*, 91 Nev. at 812, 544 P.2d at 426.

Based on the theory pursued by the State in this case, it could not rely on implied malice and, instead, had to prove that Washington actually intended to kill someone. Washington argues that the State

failed to prove he acted willfully, deliberately, with malice, or with premeditation because he had no plan to kill or harm the victims, he did not know the victims, and he did not know there were people inside the apartment.[4] We disagree.

Intent to kill can be inferred from the circumstances surrounding the killing. Due to the nature of the structure, a residential building in a populated area of town, and the time of day, 4:35 a.m., the jury could infer that Washington knew or reasonably should have known that the apartment was occupied. We conclude that firing multiple bullets into an occupied structure demonstrates intent to kill such that any rational juror could reasonably infer that Washington acted with express malice and that his actions were willful. With regard to deliberation and premeditation, the State presented circumstantial evidence at trial showing that Washington drove to the apartment complex with a handgun in the vehicle and that the handgun was discharged numerous times into the inhabited apartment without provocation. Based on this evidence, we conclude that the jury could reasonably infer that Washington's actions were deliberate and premeditated. Accordingly, we conclude that the State sufficiently proved the elements of first-degree murder such that any rational juror could have found Washington guilty beyond a reasonable doubt. *See Rose*, 123 Nev. at 202, 163 P.3d at 414.

Attempted murder

[Headnotes 11, 12]

In order to prove attempted murder, the State is required to prove "the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill." *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988) ("An attempt, by nature, is a failure to accomplish what one *intended* to do."). Based on our previous conclusion that the jury could infer that Washington acted with express malice and the fact that Washington fired multiple bullets that failed to kill Hill, Thomas, and Scott, we conclude that the State sufficiently proved the elements of attempted murder such that any rational juror could have found Washington guilty beyond a reasonable doubt. *See Rose*, 123 Nev. at 202, 163 P.3d at 414.

Conspiracy to commit murder

[Headnotes 13-16]

"A conspiracy is an agreement between two or more persons for an unlawful purpose." *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d

[4]Thomas and Hill both testified that during their time at the apartment, they did not fight with anyone and did not observe the others in the apartment having problems with anyone. Additionally, Thomas, Scott, and Hill all testified that they did not know Washington.

901, 911 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). "A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator . . . ." *Id*. Even though "mere association is insufficient to support a charge of conspiracy," *Sanders v. State*, 110 Nev. 434, 436, 874 P.2d 1239, 1240 (1994), "proof of even a single overt act may be sufficient to corroborate a defendant's statement and support a conspiracy conviction," *Doyle*, 112 Nev. at 894, 921 P.2d at 911. "[C]onspiracy is usually established by inference from the conduct of the parties." *Rowland v. State*, 118 Nev. 31, 46, 39 P.3d 114, 123 (2002).

Shortly after the shooting, the police conducted a vehicle stop. Washington was the driver of the vehicle, and Moten was a passenger. The witnesses who saw the vehicle, a silver Dodge Magnum, leaving the scene of the shooting were brought to the vehicle stop and identified the vehicle as the silver Dodge Magnum they observed leaving the area of the shooting. The shell casings found at the crime scene matched the two handguns found in the vehicle. Based on this evidence, we conclude that the State sufficiently proved the existence of a conspiracy.

Because "conspiracy is a specific intent crime," the State was also required to prove that Washington had "the intent to agree or conspire and the intent to commit the offense that is [the] object of the conspiracy." 15A C.J.S. *Conspiracy* § 126 (2012). Accordingly, the State was required to prove that Washington had the intent to kill. Based on our previous conclusion that the jury could infer that Washington acted with intent to kill and the fact that the parties' intent to conspire is demonstrated by the existence of a conspiracy, we conclude that the State sufficiently proved the elements of conspiracy to commit murder such that any rational juror could have found Washington guilty beyond a reasonable doubt. *See Rose*, 123 Nev. at 202, 163 P.3d at 414.

Discharging a firearm

[Headnote 17]

"A person who willfully and maliciously discharges a firearm at or into any [structure] . . . is guilty of a category B felony" if the structure is occupied or a misdemeanor if the structure is abandoned. NRS 202.285(1)(a), (b). Because NRS 202.285(1)'s penalties are based on whether the structure is occupied, Washington argues that the State was required to prove that he knew or had reason to know that the apartment was inhabited. Even assuming that is what the State had to prove, the circumstantial evidence is sufficient to prove that Washington knew or should have known that the structure was occupied. The evidence at trial established that two firearms were willfully and maliciously discharged into the apartment. Moreover,

there was sufficient evidence presented to show that the apartment was not abandoned. Thomas testified that the television was left on, and the apartment was located in a populated complex. This evidence shows that Washington should have known that the apartment may have been occupied. Further, an LVMPD forensic analyst testified that seven shell casings found outside the apartment and seven bullet fragments found inside the apartment matched the Glock handgun found in the steering column of the vehicle, and six shell casings found outside the apartment matched the Smith & Wesson found under the front passenger seat of the vehicle. Based on the evidence adduced at trial, we conclude that the State sufficiently proved the elements of discharging a firearm into a structure such that any rational juror could have found Washington guilty beyond a reasonable doubt. *See Rose*, 123 Nev. at 202, 163 P.3d at 414.

The criminal information

[Headnote 18]

Washington argues that reversal is required because the criminal information was defective in referring to an unnamed coconspirator whose existence the State never proved. Because the sufficiency of the indictment was challenged only after all the evidence was presented at trial, we apply a reduced standard such that Washington must demonstrate that his substantial rights were affected. *See State v. Jones*, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980).

In count 1 of the second amended criminal information, the State alleged as follows: "Defendant MATTHEW WASHINGTON and MARTELL MOTEN along with an *unnamed coconspirator*, did then and there meet with each other and between themselves and each of them with the other, willfully, unlawfully and feloniously conspire and agree to commit a crime." (Emphasis added.) The State alleged the same alternate theories of liability in each of counts 2 through 7 of the second amended information: "(1) by directly committing said act, and/or (2) by Defendant MATTHEW WASHINGTON and MARTELL MOTEN and/or *unnamed coconspirator*, aiding or abetting each other . . . and/or (3) Defendant MATTHEW WASHINGTON and MARTELL MOTEN and an *unnamed coconspirator*, conspiring with each . . . ."[5] (Emphases added.) Similarly, the theories of liability for counts 8 through 17, discharging a firearm, alleged as follows: "(1) by directly committing said act, and/or (2) by Defendant MATTHEW WASHINGTON and MARTELL MOTEN and/or *unnamed coconspirator*, aiding or abetting each other . . . , and/or (3) pursuant to a conspiracy to commit this crime." (Emphasis added.)

[5]Counts 2 through 7 include 1 count of murder with use of a deadly weapon, 3 counts of attempted murder with use of a deadly weapon, and 2 counts of battery with use of a deadly weapon.

The United States Supreme Court has stated that "at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown." *Rogers v. United States*, 340 U.S. 367, 375 (1951). Because *Rogers* does not require the identity of unknown conspiracy members to be proven, we conclude that Washington's second amended criminal information was not defective. As a result, Washington has failed to demonstrate substantial prejudice and reversal is not warranted on this basis.

Accordingly, for the reasons set forth above, we affirm the judgment of conviction.[6]

SAITTA and PICKERING, JJ., concur.

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[6]Washington also argues that cumulative error entitles him to a new trial. However, because Washington has failed to demonstrate any error, we conclude that he was not deprived of a fair trial due to cumulative error.