WILBER ERNESTO MARTINEZ GUZMAN, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE CONNIE J. STEINHEIMER, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 81842

September 30, 2021 496 P.3d 572

Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss counts of an indictment.

Petition granted.

Pickering, J., with whom Parraguirre, J., agreed, dissented.

John L. Arrascada, Public Defender, and *John Reese Petty, Katheryn Hickman, Gianna M. Verness*, and *Joseph W. Goodnight*, Chief Deputy Public Defenders, Washoe County, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Marilee Cate*, Appellate Deputy District Attorney, Washoe County; *Mark Jackson*, District Attorney, Douglas County, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

This is the second time this court has considered the scope of a grand jury's authority to return an indictment for offenses committed by petitioner Wilber Ernesto Martinez Guzman. Last year, we held that a grand jury may inquire into an offense as long as venue is proper for that offense in the district court where the grand jury is impaneled. *Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. 103, 110, 460 P.3d 443, 450 (2020). Today, we consider whether venue is proper.

Martinez Guzman has been charged with committing three burglaries and two murders in Washoe County, and two burglaries and two murders in Douglas County. A Washoe County grand jury indicted him for all these offenses. Upon Martinez Guzman's motion to dismiss the Douglas County charges for lack of territorial jurisdiction, the district court found that venue was proper in Washoe County for each charge. We disagree. The State advanced several theories for why venue was proper in Washoe County, and venue for the Douglas County charges need only be proper under

one justification for the Washoe County grand jury to have authority to indict Martinez Guzman. But the State's theories supporting venue were too speculative and unsupported by the evidence to make venue proper for any of the Douglas County charges. In particular, we conclude there was no act or effect requisite to the consummation of the Douglas County offenses that occurred in Washoe County to justify venue there under NRS 171.030. We also determine there was insufficient evidence that property taken from Douglas County had been brought into Washoe County to justify venue there under NRS 171.060. We therefore hold that the district court manifestly abused its discretion in denying Martinez Guzman's motion to dismiss the Douglas County charges for lack of venue.

BACKGROUND

Crimes and indictment

Martinez Guzman, a Carson City resident, is accused of committing five burglaries and four murders in three households between January 3 and January 16, 2019. First, according to the State, Martinez Guzman burglarized the David home in Reno (Washoe County) on two consecutive nights. There, among numerous other items, he stole the gun and ammunition that he went on to use in the subsequent crimes. Around five days later, the night of January 9, he burglarized the Koontz home and killed Constance Koontz in Gardnerville (Douglas County). That same week, he burglarized the Renken home in Gardnerville, killing Sophia Renken. He then returned to the David home the night of January 15, burglarizing it and killing Gerald and Sharon David. In a police interview following his arrest on January 19, Martinez Guzman confessed to the crimes, told police he had observed the homes while working for a landscaping business, and directed police to a location in Carson City where he had buried other weapons taken from the David home. Martinez Guzman stated he drove the same car to each of the homes. When officers searched his car after his arrest in Carson City, they discovered a .22 caliber revolver and ammunition, a small pendant and an airline document from the Koontz home, and a name tag from the David home.

In March 2019, a grand jury returned an indictment with ten felony counts in the Second Judicial District Court in Washoe County. The evidence consisted mostly of Martinez Guzman's police interview. Counts I, II, and IX charge the burglaries of the David home in Washoe County, and counts VII and VIII charge the murders of the Davids. Counts III, IV, V, and VI (collectively, the Douglas County charges) charge the burglaries and murders at the Koontz and Renken homes in Douglas County. Count X charges possession of the stolen firearms in Washoe County and/or Douglas County and/or Carson

City. The State subsequently filed a notice of intent to seek the death penalty.

Past matter before this court

Martinez Guzman moved to dismiss the Douglas County charges on the ground that the Washoe County grand jury lacked jurisdiction under NRS 172.105, which allows grand juries to "inquire into all public offenses triable in the district court or in a Justice Court, committed within the territorial jurisdiction of the district court for which it is impaneled." The district court denied the motion to dismiss after concluding that the court's territorial jurisdiction extended statewide. *Martinez Guzman*, 136 Nev. at 105, 460 P.3d at 446.

This court reviewed that issue on a writ petition and held that the district court had interpreted NRS 172.105 too expansively, because a grand jury may indict a defendant only "so long as the district court that empaneled the grand jury may appropriately adjudicate the defendant's guilt for that particular offense" under the applicable venue statutes. *Id.* at 110, 460 P.3d at 450. We vacated the district court's order and remanded the matter for reconsideration of the motion to dismiss, providing that

> In doing so, the district court shall review the evidence presented to the Washoe County grand jury to determine whether there is a sufficient connection between the Douglas County offenses and Washoe County. *To do so, the district court must determine whether venue would be proper in Washoe County for the Douglas County offenses*.

Id. at 104, 460 P.3d at 445 (emphasis added). If venue was improper, we explained, "then the Washoe County grand jury does not have the authority to inquire into the Douglas County offenses, and the district court must grant Martinez Guzman's motion to dismiss." *Id.* at 104, 460 P.3d at 446.

Proceedings on remand

The district court reheard the motion to dismiss after supplemental briefing. Martinez Guzman argued that only two venue statutes—NRS 171.030 and NRS 171.060—were applicable, and they did not support venue in Washoe County for the Douglas County charges. The State countered that venue was appropriate in Washoe County under the applicable venue statutes and that the district court could also consider other statutes like NRS 173.115 (concerning joinder of offenses) and NRS 171.020 (concerning Nevada's jurisdiction over offenses committed outside the state). The district court again denied the motion to dismiss, finding that venue was proper in Washoe County for all charges and, thus, the

grand jury had authority to indict Martinez Guzman on the Douglas County charges.

Martinez Guzman again petitioned this court for a writ of mandamus on the ground that the district court manifestly abused its discretion in finding venue proper in Washoe County.

DISCUSSION

We choose to entertain this writ petition

Whether a writ of mandamus will be considered is within this court's sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ of mandamus is available to "compel the performance of an act that the law requires" or "to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). Mandamus may be appropriate "when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). However, the writ will not be issued if the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170.

Here, the petition touches on an important and largely unsettled legal question in Nevada: what nexus between where a crime is committed and where it is charged must exist to make venue proper. If this matter were to proceed to a complex capital trial on all of these charges, only for this court to find on appeal that the Washoe County grand jury lacked authority to indict on the Douglas County charges, much time and judicial resources would be wasted. Thus, the interests of sound judicial administration and clear law favor our consideration of this petition.

Generally, venue is only proper in the county where the crime is committed

In our first *Martinez Guzman* opinion, we tasked the district court to analyze venue "under the applicable statutes." *Martinez Guzman*, 136 Nev. at 110, 460 P.3d at 450. We take this opportunity to note that, in many instances, no specific venue statute applies and the general common law rule that "each county will have independent jurisdiction over a criminal offender for conduct occurring in that county" governs. *Zebe v. State*, 112 Nev. 1482, 1484-85, 929 P.2d 927, 929 (1996). This makes sense—when it is clear where a crime has been committed, community interest weighs towards prosecution in the county where that crime has been committed. However, there are statutory exceptions that allow some crimes to be prosecuted in more than one county. Whether the Washoe County grand jury had authority to indict Martinez Guzman on the

Douglas County charges—burglaries and murders that no one disputes happened in Douglas County homes—depends on whether venue to try those crimes in Washoe County is proper under any of those statutory exceptions.

Venue was not proper in Washoe County under NRS 171.030 for the Douglas County offenses

NRS 171.030 governs venue over criminal offenses committed in more than one county:

> When a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county.

The State argues that Washoe County is a proper venue under NRS 171.030 on two grounds. First, it asserts that venue is proper because intent is an "act or effect" integral to committing the charged Douglas County offenses and Martinez Guzman's intent *could* have been formed in Washoe County. Second, the State contends that venue is proper because preparatory acts (namely, obtaining the gun in Washoe County) are acts "constituting or requisite to the consummation of" the Douglas County offenses. Martinez Guzman counters that there was no evidence that intent was formed in Washoe County or that he obtained the gun in preparation for the Douglas County offenses.

Questions of statutory interpretation are questions of law and are reviewed de novo, even in the context of a writ petition. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009); *see also Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008). "This court will attribute the plain meaning to a statute that is not ambiguous." *Mendoza-Lobos*, 125 Nev. at 642, 218 P.3d at 506. "A statute is ambiguous when its language lends itself to two or more reasonable interpretations." *Id*. (internal quotation marks omitted). Because venue does not involve an element of the crime or relate to guilt or innocence, the State need only prove venue by a preponderance of the evidence. *Cf. McNamara v. State*, 132 Nev. 606, 615-16, 377 P.3d 106, 113 (2016). "[V]enue may be established by circumstantial evidence." *James v. State*, 105 Nev. 873, 875, 784 P.2d 965, 967 (1989).

Neither formation of intent alone nor preparatory acts alone are sufficient to make venue proper in a charging county

The district court's finding of proper venue under this statute depended in part on its finding that intent alone or a preparatory act alone could meet the requirements of that language. We hold that this conclusion was incorrect.

First, the nebulous formation of intent, without acts furthering that intent, does not constitute an "act" under NRS 171.030. The difference between a crime's *actus reus* and *mens rea* is centuries-old. We cannot say that the Legislature—in using the language "*acts* or effects"—meant to include the formation of *intent* alone, despite the fact that intent is certainly requisite to the consummation of many offenses. The State's argument assumes that, since intent is an element of the charges, *see* NRS 200.010; NRS 205.060, it is an act or effect constituting or requisite to the consummation of the burglaries and murders. But NRS 171.030 does not refer to elements of the offense, but rather to "acts or effects," and intent standing alone is neither.

Second, whether acts done in preparation for the relevant offense are "acts . . . requisite to the consummation" of an offense under NRS 171.030 is an issue of first impression for this court, which is not answered by the plain language of the statute. Below, both the district court and the parties were guided by California courts' interpretations of that state's analogous statute, which is almost identical to NRS 171.030. *See City of Las Vegas Downtown Redev. Agency v. Crockett*, 117 Nev. 816, 824, 34 P.3d 553, 559 (2001); *compare* Cal. Penal Code § 781 (West 2020), *with* NRS 171.030.[1] Notably, California has said that the statute "must be given a liberal interpretation to permit trial in a county where only preparatory acts have occurred." *People v. Simon*, 25 P.3d 598, 617 (Cal. 2001). California has, for example, held that where a defendant was part of a conspiracy to commit a murder and traveled to one county to obtain a gun for subsequent use in committing that murder in another county, venue for the murder was proper in the county where he obtained the gun. *People v. Price*, 821 P.2d 610, 640 (Cal. 1991). In California, even a "telephone call for the purpose of planning a crime received within [a] county is an adequate basis for venue, despite the fact the call was originated outside the county," albeit at the outer limits of adequacy. *See People v. Posey*, 82 P.3d 755, 773 (Cal. 2004) (alteration in original) (internal quotation marks omitted). California not only allows venue to be based on preparatory acts, but also "on the *effects* of preparatory acts," such as the person in the charging county *receiving* the defendant's call from another county, as discussed in *Posey*. *People v. Thomas*, 274 P.3d 1170, 1176 (Cal. 2012).

Other states with similar statutes have roundly rejected an interpretation making purely preparatory actions sufficient for venue, however. Florida, for example, has ruled that "preparation is not one of the elemental acts 'constituting' or 'requisite to the commission' of premeditated first degree murder," even if certain acts

[1]"Although [California Penal Code § 781] speaks in terms of jurisdiction, it is actually a venue statute." *People v. Britt*, 87 P.3d 812, 818 (Cal. 2004), *disapproved on other grounds by People v. Correa*, 278 P.3d 809 (Cal. 2012).

of preparation may be necessary to complete a particular murder. *Crittendon v. State*, 338 So. 2d 1088, 1090 (Fla. Dist. Ct. App. 1976). Montana, under its previous statute, held that "[a]cts preparatory to the commission of an offense but which are not essentials of the crime, provided no basis for venue." *State v. Preite*, 564 P.2d 598, 601 (Mont. 1977), *overruled on other grounds by City of Helena v. Frankforter*, 423 P.3d 581 (Mont. 2018). The Montana court held that venue could not rest on acts like buying a pistol or traveling through a county to where the crime was committed, even though the crime could not be committed without these acts. *Id.*

We reject both extremes in our construction of NRS 171.030 with respect to preparatory acts. We hold that in Nevada, venue cannot be based on supposedly preparatory acts unless the evidence shows that those acts were undertaken with the intent to commit the charged crime and in furtherance of that crime. Many crimes involve countless acts which lead to the ultimate criminal act being possible. But it is obvious that not every action undertaken by a defendant which puts them in the particular place, time, and circumstances of an offense was done with the intent to commit that offense.

We therefore conclude that neither intent nor a supposedly preparatory act, standing alone, is sufficient to make venue proper in a charging county. However, when there is evidence of a preparatory act *plus* intent in that county, an act requisite to the consummation of the charged offense has occurred there, and a grand jury may indict a defendant of that offense.

Insufficient evidence was presented to the grand jury that a preparatory act with the intent to commit the Douglas County charges occurred in Washoe County

So, we turn to this matter's facts to determine if the Washoe County grand jury was presented with evidence of a preparatory act plus intent with respect to the Douglas County offenses.

The State argues, and the district court accepted, that Martinez Guzman had an original plan to rob outbuildings and garages on the three properties and then changed his intent after finding the Davids' firearm in Washoe County. The State argues there is a "very clear triggering event for the Douglas County offenses: [Martinez] Guzman's procurement of the revolver and ammunition from Washoe County," after which Martinez Guzman decided to "abandon his earlier plan and, instead, enter the living quarters of the victims in this case." The State acknowledges that Martinez Guzman could have formed the intent after obtaining the revolver, but argues that because intent could have been formed in Washoe County, Carson City, or Douglas County, venue is proper in Washoe County.

This argument relies on this court's decision in *Walker v. State*, 78 Nev. 463, 376 P.2d 137 (1962), one of our only opinions interpreting the "acts or effects" portion of NRS 171.030. In *Walker*, a hitchhiker murdered the driver who picked him up. The killing took place *somewhere* between Elko and Reno, but the State could not pinpoint the county where the murder occurred. *Id.* at 470, 376 P.2d at 140. This court concluded that venue was proper in Washoe County because "[w]ith the uncertainty existing in this case . . . 'the acts or effects thereof constituting or requisite to the consummation of the offense' could have occurred in two or more counties, one of which was Washoe County." *Id.* at 471, 376 P.2d at 141 (quoting NRS 171.030).

That concept from *Walker*—that venue is proper if an act constituting or requisite to the offense *could have* happened in the county claiming venue—was crucial to the district court finding venue proper under the State's change-in-intent theory. But the State's theory is too attenuated from the evidence presented to the grand jury. It was clear that Martinez Guzman had seen the David, Renken, and Koontz homes while working for a landscaping business in 2018 and identified those homes as potential targets for theft. From these bare statements and the fact that Martinez Guzman first went into the Davids' outbuildings, the State paints Martinez Guzman's supposed initial intent as to steal from these properties—but not from their living quarters. But the State places too much weight on the difference between burglarizing a garage or shed, and the rest of a home—a difference that Martinez Guzman never discussed. The evidence shows that Martinez Guzman formed the intent to steal from the Koontz and Renken properties before he ever knew he would acquire a firearm in Washoe County. This belies the State's venue theory, which completely hinges on the finding of the firearm. There is no evidence of any supposed "clear triggering event" that caused Martinez Guzman to commit the offenses in Douglas County.

Likewise, there is no evidence that Martinez Guzman took the firearm in preparation for the burglaries and murder in Douglas County. During his second consecutive burglary of the David property, Martinez Guzman took a bag from a trailer, which contained the revolver and several fishing poles. No evidence was presented that he even was aware the bag contained a firearm when he took it from the property. The fact that Martinez Guzman brought the revolver to the Koontz and Renken homes days later, and then back to the Davids', is insufficient evidence that his act of taking the revolver was done in furtherance of his long-existing intent to burglarize the Douglas County homes, rather than just the consummation of the offense of burglarizing the Davids. We decline to interpret NRS 171.030 so that actions which *may* have been preparatory for another offense are sufficient to make venue lie in

one county for a crime entirely committed within another. In this matter, had there been any nonspeculative evidence that Martinez Guzman obtained the revolver in Washoe County with the goal of committing burglary and murder in Douglas County, our holding may have been different.

Venue was not proper in Washoe County for the Douglas County charges under NRS 171.060

The State also argues that venue was proper under NRS 171.060, which governs offenses in which property is taken from one county and brought to another. NRS 171.060 reads, in part, as follows:

> When property taken in one county by burglary, robbery, larceny or embezzlement has been brought into another, the venue of the offense is in either county.

Thus, to make venue proper under this statute, the State must have shown the grand jury that property taken in Douglas County was at some point brought into Washoe County.

The arguments under this statute hinge on the fact that Martinez Guzman's vehicle was found upon his arrest in Carson City with two items from the Koontz home in it: an airline document and a small piece of jewelry. Of the four charges at issue—the Koontz murder, Koontz burglary, Renken murder, and Renken burglary—we find that the statute only arguably applies to the Koontz burglary and that venue in Washoe County was not proper for even that charge.

Martinez Guzman took property from the Koontz home in Douglas County days before returning to the David home in Washoe County and drove the same car to each of the crime scenes. Thus, the State alleges that the presence of the two items in Martinez Guzman's car in Carson City is circumstantial evidence that the items were in the car from the time of the Koontz burglary on January 9 or 10, through Martinez Guzman's return to Washoe County on January 15 or 16, and until his arrest on January 19, such that he brought stolen property into the venue county, establishing venue under NRS 171.060. The district court agreed and found that *all* the Douglas County charges could be brought in Washoe County under NRS 171.060. We conclude that the district court's determination constitutes a manifest abuse of discretion.

As a threshold matter, NRS 171.060 cannot establish Washoe County as the proper venue for the Koontz or Renken murders or the Renken burglary. NRS 171.060 provides that "burglary, robbery, larceny or embezzlement" may be charged in a county where property taken in the commission of one of those offenses is later brought. The statute does not expand venue for murder, which is not one of the enumerated crimes, even if the murder occurred at the time the property was taken. And there was absolutely no evidence

presented to the grand jury to suggest that Martinez Guzman took property from the Renken home to Washoe County.

Nor does NRS 171.060 support the conclusion that Washoe County was a proper venue for the Koontz burglary, as the grand jury was not presented with evidence that the stolen items were in the vehicle when Martinez Guzman went to Washoe County. The only evidence the State points to in support of this argument is that Martinez Guzman drove the same car to the David home. We conclude that the mere possibility that the property found in Martinez Guzman's car at the time of arrest was transported everywhere inside the car for days after it was stolen is insufficient to show proof by a preponderance of the evidence. Accordingly, the district court manifestly abused its discretion in concluding that venue was proper on this basis.

The district court should not have hinged its decision on NRS 171.020 or NRS 173.115 for this intercounty venue issue

Below, the district court relied on NRS 171.020 and Nevada's joinder statute, NRS 173.115(1), to support its conclusion that venue was proper in Washoe County for the Douglas County charges. NRS 171.020 provides that a person who commits an act in Nevada, which executes an intent to commit a crime and results in the commission of a crime, may be punished for that crime as though the crime were committed entirely in Nevada. NRS 173.115(1)[2] allows the joinder of multiple offenses against a defendant where the offenses are based on "the same act or transaction" or "two or more acts or transactions connected together or constituting parts of a common scheme or plan."

We conclude the district court erred in relying on these statutes. First, NRS 171.020 does not apply here because it deals with interstate jurisdiction, not intercounty venue. Second, NRS 173.115(1) is not a venue statute and finding that the offenses are part of a "common scheme or plan" does not confer venue. The statutes governing these particular intercounty offenses are NRS 171.030 and NRS 171.060, as discussed above. Therefore, the district court abused its discretion in resting its decision on NRS 171.020 and NRS 173.115.

CONCLUSION

Despite many statutory exceptions which expand venue, the common law principle that a person should only be charged in a location with sufficient connections to the crime remains. *See Zebe*, 112 Nev. at 1484-85, 929 P.2d at 929.

[2]This statute was amended by 2021 Nev. Stat., ch. 253, § 1. Any reference to NRS 173.115 throughout this opinion refers to the prior version, put in place by 2017 Nev. Stat., ch. 235, § 1.

Under the statutes governing venue for the offenses Martinez Guzman allegedly committed, it is not enough to present evidence that may have allowed the grand jury to speculate that intent could possibly have been formed in the charging county, or that an action in the charging county may have been preparatory for the disputed charges. NRS 171.030's reference to "acts or effects thereof constituting or requisite to the consummation of the offense" does not refer to intent or potentially preparatory acts standing alone. If, however, intent is coupled with an act in furtherance of that intent, venue may be proper. But there is simply no nonspeculative evidence of that in this matter. Likewise, there is no evidence besides bare speculation that stolen property was taken to the charging county as required by NRS 171.060.

This court has described venue as "a matter so pliant that it would expand under the slight pressure of convenience." *Walker*, 78 Nev. at 472, 376 P.2d at 141 (quoting *State v. Le Blanch*, 31 N.J.L. 82, 85 (1864)). In this case, we come up against the limits of venue's pliancy. We decline to hand-wave, solely for convenience's sake, around the principle that crimes should be tried where they are committed in the absence of a statutory exception. Consequently, we grant Martinez Guzman's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Martinez Guzman's motion to dismiss and to enter an order granting the motion as to Counts III, IV, V, and VI.

Hardesty, C.J., and Cadish, Silver, and Herndon, JJ., concur.

Pickering, J., with whom Parraguirre, J., agrees, dissenting:

Countervailing policy interests are at play when determining criminal venue—on the one hand, the constitutionally founded interests of fairness and convenience to the accused, and on the other, the interests of the local justice system in demonstrating its ability to render justice, as well as the community's interests in witnessing prosecution of the wrong from which they suffered. *See United States v. Reed*, 773 F.2d 477, 480-82 (2d Cir. 1985) (discussing interests involved in determining constitutional venue in criminal prosecutions). Where "witnesses and relevant circumstances surrounding the contested issues" can be gathered with equal ease in competing venues, the interests of one venue may offset those of the other; therefore, "there is no single defined policy or mechanical test" to determine criminal venue in such cases. *Id.* at 480-81 (internal quotation marks omitted). But nearly all courts, including this court, agree that the "site of the defendant's acts" is a proper venue "because the alleged criminal acts provide substantial contact with the district" to satisfy the interests laid out above. *Id.* at 481; *see also Martinez Guzman v. Second Judicial Dist.*

Court (*Martinez Guzman I*), 136 Nev. 103, 109-10, 460 P.3d 443, 449 (2020) (holding that "territorial jurisdiction . . . depends on whether the *necessary connections*, as identified in Nevada's statutes, to the location of the court exist") (emphasis added). Under this standard, "necessary connections" exist under NRS 171.030 sufficient to lay venue in Washoe County for the Douglas County offenses because Martinez Guzman's Washoe acts predicated the Douglas offenses. *Martinez Guzman I*, 136 Nev. at 109-10, 460 P.3d at 449. Accordingly, I dissent.

I.

NRS 171.030 provides that "[w]hen a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county." California's analogous intercounty venue statute is nearly identical to NRS 171.030. *See* Cal. Penal Code § 781 ("[W]hen a public offense is committed in part in one jurisdictional territory and in part in another jurisdictional territory, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction for the offense is in any competent court within either jurisdictional territory."). California caselaw is therefore persuasive when interpreting NRS 171.030. *City of Las Vegas Downtown Redev. Agency v. Crockett*, 117 Nev. 816, 824-25, 34 P.3d 553, 558-59 (2001) (looking to California law as persuasive authority when interpreting an analogous Nevada statute).

In California, venue is governed by statute, and whether venue is proper under a particular statute is a question of law reserved to the court. *People v. Posey*, 82 P.3d 755, 765 (Cal. 2004). As is relevant here, California courts have interpreted Section 781 to "permit trial in a county where only preparatory acts have occurred." *E.g.*, *People v. Simon*, 25 P.3d 598, 617 (Cal. 2001). These preparatory acts need not constitute an element of the offense (e.g., criminal intent) to justify venue under the statute. *People v. Thomas*, 274 P.3d 1170, 1175 (Cal. 2012). Thus, venue was proper under Section 781 where (1) criminal conduct in the forum county was preparatory to later assault of an officer during a police chase in another county, *Simon*, 25 P.3d at 603, 617; (2) loading the victim and her belongings into defendant's car in the forum was preparatory to murder in another county, *People v. Crew*, 74 P.3d 820, 834 (Cal. 2003); and (3) kidnapping in the forum was preparatory to subsequent murder in another county, *People v. Abbott*, 303 P.2d 730, 735-36 (Cal. 1956). Most analogous to this case is *People v. Price*, wherein the defendant burglarized a home in Humboldt County, California, and stole a revolver. 821 P.2d 610, 634-35 (1991). He then

drove to Los Angeles County and used that stolen revolver to shoot and kill the victim, before returning to Humboldt County to commit another burglary, robbery, and murder. *Id.* The court held that venue was proper in Humboldt County for the Los Angeles County murder under Section 781 because "the jury could reasonably infer from the[ ] facts that defendant committed acts in Humboldt County that were preparatory to the murder [in Los Angeles County]." *Id.* at 640.

As the majority notes, most jurisdictions hold otherwise and require that an essential element or "overt act" of the charged offense must have occurred in the forum to lay proper venue there. *Addington v. State*, 431 P.2d 532, 540 (Kan. 1967). But the majority ignores the key distinction between those jurisdictions and California—states following the majority approach have a constitutional guarantee limiting venue in criminal cases, while California does not. *Posey*, 82 P.3d at 765 (reasoning that the California Constitution does not govern venue); *Addington*, 431 P.2d at 542. And, like California, the Nevada Constitution does not limit criminal venue. *Walker v. State*, 78 Nev. 463, 472, 376 P.2d 137, 141 (1962) (noting that Nevada is not tied down by a constitutional venue guarantee). Criminal venue is therefore governed by Nevada's statutes. *Id.* And in the principal case interpreting venue under modern-day NRS 171.030, *Walker v. State*, this court deemed venue proper in Washoe County because police found the victim's body, jewelry, and murder weapon there, even though the murder could have occurred in any one of four counties, including Washoe. 78 Nev. at 470-71, 376 P.2d at 141. This court reasoned that even if it knew where the murder occurred, or if the murder occurred partially in Washoe and partially in another county, venue would *still* be proper in Washoe based on the objective connections to that forum. *Id.* at 471, 376 P.2d at 141 ("Even if [the jury] determined that acts resulting in death were committed . . . in two or more counties, of which Washoe County was one, then, under NRS 171.030, venue was properly laid in Washoe County.").

Side-stepping this court's holding in *Walker* and NRS 171.030's plain language, the majority holds that venue is only proper under NRS 171.030 if the State can conclusively show that the defendant *intended* to further the charged offense when he or she took preparatory acts in the proposed forum. This standard is misguided for several reasons. First, a court may never be able to pinpoint the precise moment a criminal defendant formed the intent to commit the crime at issue; instead, the most concrete measures available are the acts themselves. *People v. Carrington*, 211 P.3d 617, 650 (Cal. 2009) (holding that it did not matter whether the defendant took preparatory acts with intent to commit the target offense for purposes of venue under Section 781). Our contacts analysis can

only practically derive therefrom, without speculating as to the defendant's intent when taking subject acts. *Id.* (holding that "if preparatory acts occur in one county, those acts vest jurisdiction over the crime [under Section 781] 'even though the intent may have arisen in another county'" (quoting *People v. Bismillah*, 256 Cal. Rptr. 25, 28 (Ct. App. 1989))). Accordingly, our existing caselaw on this point remains the most workable and well-reasoned standard, *see Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (noting that stare decisis is "indispensable to the due administration of justice"), and I would follow *Walker* to hold that the court need only conclude that a sufficient connection exists between the offense and the forum county based on the defendant's acts to satisfy NRS 171.030.

Second, any inquiry into the defendant's criminal intent poses a substantive question of guilt, based in fact, that should be asked of the jury at trial, *see Valdez v. State*, 124 Nev. 1172, 1197, 196 P.3d 465, 481 (2008) (noting that the *jury* must find that the defendant had the requisite intent to commit the subject offense); 22 C.J.S. *Criminal Law: Substantive Principles* § 37 (Supp. 2021) (noting that criminal intent is a question of fact and "intent is therefore a question for the jury"), thus rendering the majority's standard in conflict with Nevada law, under which criminal venue is a legal question. *See Martinez Guzman I*, 136 Nev. at 110, 460 P.3d at 450 (holding that venue is a question of law for the court); *Shannon v. State*, 105 Nev. 782, 791, 783 P.2d 942, 948 (1989) (holding that venue under sister-statute NRS 171.020 is a question of law). Posing such an early inquiry into criminal intent also risks an unwarranted acquittal later based solely on improper venue. *Posey*, 82 P.3d at 762. Under the majority's factual standard, if a jury returns a conviction, while also concluding that venue is improper—for example, by finding that the defendant formed intent at a different point in time—then jeopardy has attached and an acquittal is won on a procedural technicality. *Shuman v. Sheriff of Carson City*, 90 Nev. 227, 228, 523 P.2d 841, 842 (1974) (noting that jeopardy attaches when "the accused has been placed upon trial, upon a valid indictment, before a competent court, and a jury duly impaneled, sworn, and charged with the case") (quoting *Ex Parte Maxwell*, 11 Nev. 428, 434 (1876)); *see also Posey*, 82 P.3d at 762 ("[U]nless the jury is instructed to return a separate [finding] on the issue of venue before returning a . . . verdict, a [jury] finding that the proceeding has been brought in an improper venue can result in an unwarranted acquittal, rather than in a new trial in an authorized venue." (second alteration in original) (quoting *Simon*, 25 P.3d at 618 n.18)).

Third, unlike its sister-statute NRS 171.020, NRS 171.030 does not include an intent requirement, *cf.* NRS 171.020 ("Whenever a person, *with intent to commit a crime*, does any act within this State in execution or part execution of such intent, which culminates in

the commission of a crime, either within or without this State, such a person is punishable for such crime in this State . . . .") (emphasis added); well-worn canons of construction establish that the expression of this requirement in a statute that is *in pari materia* necessarily implies the absence of the same in NRS 171.030. Finally, the majority's approach is unworkable with and contrary to the Legislature's purpose in enacting criminal laws with territorial reach ending only at state lines. *See Shannon*, 105 Nev. at 792, 783 P.2d at 948 (interpreting NRS 171.020 to vest Nevada with jurisdiction over crimes "whenever the criminal intent is formed and *any act* is accomplished in this state"). The Legislature enacted NRS 171.030 to enable venue in multiple counties within Nevada because no practical reason exists to conduct multiple trials and risk inconsistent results when an offense(s) is sufficiently connected to a single forum to lay venue there. *See* 1873 Nev. Stat., ch. LIII, § 1714, at 471; *Martinez Guzman I*, 136 Nev. at 109-10, 460 P.3d at 449 (noting that "Nevada's statutes," including NRS 171.030, modified the former common law rule against prosecuting a crime unless it occurred entirely within the forum). This is to say nothing of the level of extreme anguish communities, victims, victims' families, and criminal defendants face at the prospect of the sort of duplicative proceedings the majority's approach would foster. *See People v. Gholston*, 464 N.E.2d 1179, 1191 (Ill. App. Ct. 1984) (noting the "extreme trauma" that a victim must undergo by testifying at multiple court appearances spread over months or years).

There is no legal or practical demand for such a result here because sufficient connections exist between the Douglas offenses and Washoe to lay venue in the latter county under NRS 171.030. Martinez Guzman confessed to committing burglary and murder in Douglas using a revolver that he stole in Washoe. But for obtaining the revolver in Washoe, he could not have committed the Douglas offenses. Then, after perpetrating two residential burglaries in Douglas with the gun that he obtained during his second Washoe burglary—which firearm he stole only after surveying the Davids' property during his first burglary—Martinez Guzman returned to Washoe where he replicated the Douglas offenses by burglarizing the Davids' home a third time and killing both its occupants. All the while, Martinez Guzman drove the same BMW sedan to and from Washoe and Douglas counties to commit this veritable crime spree. Martinez Guzman's preparatory acts to the Douglas offenses occurred almost entirely in Washoe, but the majority demands that the court dice this continuous crime spree into distinct pieces fit for two trials in two separate counties. This is legally unnecessary and an unfair imposition on the victims' families and the court system; Martinez Guzman's Washoe acts suffice to satisfy NRS 171.030's requirements and lay venue in Washoe for the Douglas offenses.

II.

In any case, even under the majority's purported standard, venue in Washoe is appropriate here. As a threshold matter, it is unclear whether the majority fashioned its standard for the court or the jury to apply, because, as noted above, although venue is a question of law, a defendant's alleged criminal intent is a question of fact. *See Valdez*, 124 Nev. at 1197, 196 P.3d at 481; 22 C.J.S. *Criminal Law: Substantive Principles* § 37 (Supp. 2021). But even applying this tenuous standard, the State alleged sufficient facts for a reasonable jury to find that Martinez Guzman had intent to further the Douglas offenses when he acted in Washoe and thus satisfied the majority's interpretation of NRS 171.030's requirements.

The State must prove venue by a preponderance of the evidence, and it may do so with circumstantial evidence. *Dixon v. State*, 83 Nev. 120, 122, 424 P.2d 100, 101 (1967); *cf. Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (holding that criminal intent can be inferred from conduct). The preponderance of the evidence standard requires the trier of fact "to find that the existence of the contested fact is more probable than its nonexistence." *Abbott v. State*, 122 Nev. 715, 734, 138 P.3d 462, 475 (2006) (internal quotation marks omitted). Here, Martinez Guzman identified the David, Renken, and Koontz properties as potential targets for theft while working for his uncle's landscaping company, which operated in both Washoe and Douglas Counties. Later, Martinez Guzman twice burglarized outbuildings on the Davids' property in Washoe—first a shed and then a trailer—without entering the primary residence and without using a weapon. After auditing the Davids' property during his first burglary, Martinez Guzman returned and burglarized the Davids' trailer; he specifically identified and stole fishing poles and a firearm case, which contained the revolver. Upon stealing the revolver, Martinez Guzman took it to the Renken and Koontz properties in Douglas, burglarized the primary residences, and shot and killed the occupants. A reasonable jury could infer from these facts that it is more likely than not that Martinez Guzman stole the firearm with intent to move beyond burglary of trailers and sheds and enable entry into the Renken and Koontz primary residences.

But the majority demands more. Indeed, it appears that nothing short of a confession pinpointing Martinez Guzman's motive for stealing the revolver, at the moment he stole it, will satisfy NRS 171.030's requirements under the majority's reasoning. Such an exacting standard swallows the statute whole, and in its absence, the majority provides the common law rule as its substitute. But this conclusion offends the Legislature's power to define and expand venue with its enactment of NRS 171.030, *see Martinez Guzman I*, 136 Nev. at 109, 460 P.3d at 449 (noting that NRS 171.030 modified the common law rule as to intercounty territorial jurisdiction);

Walker, 78 Nev. at 472, 376 P.2d at 141 (noting that Nevada is not tied down by a constitutional venue guarantee when interpreting NRS 171.030), and increases the potential for inconsistent results in unwarranted separate trials because the State must prosecute the same facts twice. *See In re Rolls Royce Corp.*, 775 F.3d 671, 680 (5th Cir. 2014) (holding that the court must focus on judicial efficiency more when considering a motion to sever claims alongside a motion to transfer partial venue).

Sufficient evidence exists to show that Martinez Guzman acted in Washoe to prepare for the Douglas offenses, and applying either of the above standards, venue is therefore proper in Washoe under NRS 171.030. For these reasons, I respectfully dissent.

HENRY BIDERMAN APARICIO, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 80072

October 7, 2021 496 P.3d 592

Appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of driving under the influence resulting in death and one count of felony reckless driving. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Affirmed in part, vacated in part, and remanded.

Nevada Defense Group and *Kelsey Bernstein* and *Damian Sheets*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander Chen* and *Jonathan E. VanBoskerck*, Chief Deputy District Attorneys, Clark County, for Respondent.

Aaron D. Ford, Attorney General, *Heidi Parry Stern*, Solicitor General, and *Jeffrey M. Conner*, Deputy Solicitor General, Carson City, for Amicus Curiae Office of the Attorney General.

Darin F. Imlay, Public Defender, and *Deborah L. Westbrook*, Chief Deputy Public Defender, Clark County, for Amicus Curiae Clark County Public Defender.

John L. Arrascada, Public Defender, *John Reese Petty*, Chief Deputy Public Defender, and *Kendra G. Bertschy*, Deputy Public Defender, Washoe County, for Amicus Curiae Washoe County Public Defender's Office.

Rene L. Valladares, Federal Public Defender, and *Randolph M. Fiedler*, Assistant Federal Public Defender, Las Vegas; *Las Vegas Defense Group* and *Charles R. Goodwin*, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, C.J.:

Article 1, Section 8A of the Nevada Constitution, also known as Marsy's Law, and NRS 176.015 both afford a victim the right to be heard at sentencing. The provisions differ, however, in their definitions of "victim." Marsy's Law defines "victim" as "any person

directly and proximately harmed by the commission of a criminal offense under any law of this State." Nev. Const. art. 1, § 8A(7) (emphasis added). NRS 176.015(5)(d)(1)-(3) defines "victim" in part as any person or relative of any person "against whom a crime has been committed" or "who has been injured or killed as a direct result of the commission of a crime."

In this opinion, we clarify that the definitions of "victim" under Marsy's Law and NRS 176.015(5)(d) are harmonious, if not identical. Although "victim" under Marsy's Law may include individuals that NRS 176.015 does not, and vice versa, neither definition includes anyone and everyone impacted by a crime, as the district court found here. Accordingly, when presented with an objection to impact statement(s) during sentencing, a district court must first determine if an individual falls under either the constitutional definition or the statutory definition of "victim." If the statement is from a nonvictim, a district court may consider it only if the court first determines that the statement is relevant and reliable. *See* NRS 176.015(6). Because the district court here wrongly concluded that Marsy's Law broadly applies "to anyone who's impacted by the crime" and thus considered statements, over objection, from persons who do not fall under either definition of victim without making the required relevance and reliability findings, we affirm the judgment of conviction, vacate the sentence, and remand for resentencing in front of a different district court judge.

FACTS AND PROCEDURAL HISTORY

After an evening of drinking with his girlfriend, appellant Henry Biderman Aparicio rear-ended Christa and Damaso Puentes's vehicle at the intersection of Sahara Avenue and Hualapai Way in Las Vegas. At the time of impact, the Puentes's vehicle was stopped, while Aparicio's vehicle was traveling roughly 100 miles per hour. Both Christa and Damaso died from their injuries before or near the time first responders arrived.[1]

The State charged Aparicio with two counts of driving under the influence resulting in death, three counts of felony reckless driving, and one count of driving under the influence resulting in substantial bodily harm. Aparicio pleaded guilty to two counts of driving under the influence resulting in death and one count of felony reckless driving, naming Christa and Damaso as the victims. The State agreed to recommend concurrent prison time on the reckless driving charge.

Shortly before sentencing, the State provided the district court and Aparicio with approximately 50 victim impact letters written by family, friends, and coworkers of the deceased victims. Aparicio

[1]Aparicio's girlfriend was a passenger in his vehicle at the time and also sustained injuries. However, the charges related to her were dismissed pursuant to the plea agreement.

filed a written objection to the admission of 46 of the victim impact letters, arguing that the individuals who drafted those letters did not qualify as victims under NRS 176.015(5)(d).[2] Aparicio also voiced multiple objections during the sentencing hearing in response to various in-court witnesses' statements because the testimony exceeded the bounds of victim impact information. Aparicio presented mitigating evidence, including that he had no prior criminal record. The district court overruled the objections and sentenced Aparicio to an aggregate prison term of 15 to 44 years. Aparicio timely appealed, challenging various aspects of his sentencing hearing. A divided court of appeals vacated and remanded for resentencing. We granted review, thereby vacating the decision by the court of appeals.

DISCUSSION

The crux of Aparicio's argument on appeal is that the district court abused its discretion by overruling his objection to the admission of dozens of improper impact letters because they were written almost entirely by nonvictims and relied upon when determining his sentence. Accordingly, Aparicio contends that he is entitled to a new sentencing hearing before a different judge. The State argues that the district court properly considered the impact statements, as their authors were victims under Nevada law, specifically NRS 176.015(5)(d) and Article 1, Section 8A(7) of the Nevada Constitution. The State contends further that even if the district court did err, any such error was harmless. We agree with Aparicio and therefore vacate the sentence and remand for a new sentencing hearing before a different district court judge.[3]

The district court erred when it summarily overruled Aparicio's objection to 46 of the approximately 50 victim impact letters

NRS 176.015(5)(d) defines "victim" as "(1) A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)." Under NRS 176.015(5)(b)(1)-(4), a "relative" includes "[a] spouse, parent, grandparent or stepparent," "[a] natural born child, stepchild or adopted child," "[a] grandchild,

[2]Although an amended version of NRS 176.015 went into effect in July 2020, we cite to the prior version that was in effect at the time of the relevant proceedings in the district court. *See* 2017 Nev. Stat., ch. 484, § 1, at 3018. Additionally, the sections of the statute that were amended are not relevant to this appeal.

[3]Aparicio also argues that the district court improperly permitted witnesses to make in-court statements that were disparaging to him, the criminal justice system, and the Nevada Division of Parole and Probation and that the manner in which the letters were submitted to the district court was improper. In light of our disposition, however, we need not address these claims.

brother, sister, half brother or half sister," and "[a] parent of a spouse."

Under Marsy's Law, "victim" is defined as "any person *directly and proximately* harmed by the commission of a criminal offense under any law of this State." Nev. Const. art. 1, § 8A(7) (emphasis added). The clause states further that "[i]f the victim is . . . deceased, the term [victim also] includes the legal guardian of the victim or a representative of the victim's estate, *member of the victim's family* or any other person who is appointed by the court to act on the victim's behalf." *Id.* (emphasis added).

The constitutional and statutory definitions of "victim" are similar. In particular, they both recognize that a victim is the person (or persons) who is legally injured or harmed as a direct result of the defendant's criminal conduct—i.e., the person who was the target or object of the offense, or one who was directly and proximately harmed as a result of the criminal act—as well as certain close family members. Neither definition for "victim," however, includes anyone and everyone who was affected by the crime. Under either definition, a "victim" must still be injured or directly and proximately harmed.

Here, the prosecutor submitted approximately 50 impact letters to the district court and characterized all of them as "victim" impact statements. The district court accepted all of the letters and relied on them in making its sentencing decision. However, the district court reviewed the letters in their entirety based upon an erroneous interpretation of Marsy's Law—that "the Nevada Constitution broadly defines victim [as] anyone who's impacted by the crime." We conclude that the district court erred in admitting these letters based upon its erroneous interpretation of Marsy's Law. Once an objection had been lodged, the district court was required to determine, on the record, how each author of the impact statements was "directly and proximately harmed." Nev. Const. art. 1, § 8A(7). In the future, upon objection, district courts must determine on the record whether each individual is a "victim" as defined in Marsy's Law or NRS 176.015(5)(d), and why.

This is not to say that only letters written by victims may be considered at sentencing. As the State correctly points out, NRS 176.015(6) specifically states that "[t]his section does not restrict the authority of the court to consider *any reliable and relevant evidence* at the time of sentencing." (Emphasis added.) Therefore, that the district court considered letters from nonvictims was not, in and of itself, a reversible error. *See Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995) (holding that NRS 176.015 "does not limit in any manner a sentencing court's existing discretion to receive other admissible evidence" from a nonvictim so long as the evidence is relevant and reliable). However, based on the record before this court, it is clear that the district court treated the objected-to

nonvictim impact letters the same as victim impact letters and did not determine whether they were relevant and reliable.

Upon objection, a district court is required to examine each statement and determine, in the first instance, whether it is from an individual who is a "victim" under either Marsy's Law or NRS 176.015(5)(d). If the statements are not from "victims," then a district court may still examine the statements, but only after a finding that they are relevant and reliable. The district court here adopted all of the impact statements as "victim" impact statements under an erroneous interpretation of Marsy's Law and did not otherwise determine whether the nonvictim letters were relevant and reliable. We thus conclude that the district court erred.

The district court's error was not harmless

This court will not vacate a judgment of conviction or sentencing decision unless the error affected the defendant's substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Accordingly, the State urges this court to affirm Aparicio's sentence, arguing that "[a]ny error due to the district court considering the victim impact statements . . . would be harmless."

When determining whether a sentencing error is harmless, reviewing courts "look to the record . . . to determine whether the district court would have imposed the same sentence absent the erroneous factor." *United States v. Collins*, 109 F.3d 1413, 1422 (9th Cir. 1997) (internal quotation marks omitted). Generally, a reviewing court will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In this case, the district court erred in a manner that cannot be considered harmless. In misconstruing Marsy's Law as including "anyone who's impacted by the crime," the district court mistakenly believed that it had to consider all of the submitted letters as victim impact statements. The district court made clear that it fully considered each of those impact statements, explaining that "I'm accepting those victim impact statements and I have read each and every one of them that was submitted to me." Additionally, the district court stated that it "accept[ed] everything and considered that in rendering my sentence here today."

In doing so, the district court did not exercise its discretion, believing that all of the statements constituted victim impact statements. *Cf. Clark v. State*, 109 Nev. 426, 429, 851 P.2d 426, 428 (1993) (remanding for resentencing where it appeared the trial court believed it was required to adjudicate a defendant as a

habitual offender, although the adjudication was discretionary). Of the approximately 50 letters submitted, fewer than five came from individuals clearly meeting the statutory or constitutional definition of "victim." The district court's consideration, over Aparicio's objection, of all of the statements without determining whether each one was from an individual directly and proximately impacted, Nev. Const. art. 1, § 8A(7), fell within NRS 176.015(5)(d), or was relevant and reliable, NRS 176.015(6), makes it impracticable for this court to know, with any degree of certitude, whether the district court's sentencing decision was based upon relevant and reliable evidence or on impalpable or highly suspect evidence. *See Silks*, 92 Nev. at 94, 545 P.2d at 1161. This uncertainty precludes us from determining that the error was harmless as the State argues. The fact that the district court based its decision to consider the statements, at least in part, on a mistaken interpretation of the law, requires us to conclude that these errors were not harmless.

CONCLUSION

Critical to our system of criminal justice is the importance of protecting victims' rights during sentencing. The passage of Marsy's Law supports such protection, giving victims a voice during that process. Nothing in this opinion should be read to suggest otherwise.

When a district court is faced with an objected-to impact statement at sentencing, it is required to determine whether that statement is from an individual who is a "victim" under Marsy's Law or NRS 176.015(5)(d). A "victim" under Marsy's Law must be directly and proximately harmed; the term does not include anyone and everyone incidentally impacted by the crime. If the district court determines the statement is from a nonvictim, the district court may nonetheless examine the statement so long as it determines that the statement is relevant and reliable. Here, the district court examined all of the letters under an erroneous belief that they were from "victims" as defined in Marsy's Law. Thus, we are required to vacate the sentence and remand this case, despite the inevitable pain and distress this will cause the surviving family members to again participate in a sentencing hearing, because it is not clear that the district court would have imposed the same sentence absent these errors.

Accordingly, we affirm the judgment of conviction, vacate Aparicio's sentence, and remand to the district court for resentencing before a different district court judge.

Parraguirre, Stiglich, Cadish, Silver, Pickering, and Herndon, JJ., concur.

FLOR MORENCY; KEYSHA NEWELL; BONNIE YBARRA; AAA SCHOLARSHIP FOUNDATION, INC.; SKLAR WILLIAMS PLLC; AND ENVIRONMENTAL DESIGN GROUP, LLC, APPELLANTS, *v.* THE STATE OF NEVADA DEPARTMENT OF EDUCATION; JHONE EBERT, IN HER OFFICIAL CAPACITY AS STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; THE STATE OF NEVADA DEPARTMENT OF TAXATION; JAMES DEVOLLD, SHARON RIGBY, CRAIG WITT, GEORGE P. KELESIS, ANN BERSI, RANDY BROWN, FRANCINE LIPMAN, AND ANTHONY WREN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NEVADA TAX COMMISSION; MELANIE YOUNG, IN HER OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR AND CHIEF ADMINISTRATIVE OFFICER OF THE DEPARTMENT OF TAXATION; AND THE LEGISLATURE OF THE STATE OF NEVADA, RESPONDENTS.

No. 81281

October 7, 2021 496 P.3d 584

Appeal from a district court summary judgment in a case involving a constitutional challenge to legislation. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed.

[Rehearing denied December 23, 2021]

Institute for Justice and *Joshua A. House*, Arlington, Virginia, and *Robert Gall*, Austin, Texas; *Saltzman Mugan Dushoff* and *Matthew T. Dushoff*, Las Vegas, for Appellants.

Aaron D. Ford, Attorney General, and *Craig A. Newby*, Deputy Solicitor General, Carson City, for Respondents the State of Nevada Department of Education; Jhone Ebert, in her official capacity as State Superintendent of Public Instruction; the State of Nevada Department of Taxation; James DeVolld, Sharon Rigby, Craig Witt, George P. Kelesis, Ann Bersi, Randy Brown, Francine Lipman, and Anthony Wren, in their official capacities as members of the Nevada Tax Commission; and Melanie Young, in her official capacity as the Executive Director and Chief Administrative Officer of the Department of Taxation.

Legislative Counsel Bureau Legal Division and *Kevin C. Powers*, General Counsel, Carson City, for Respondent the Legislature of the State of Nevada.

Before the Supreme Court, EN BANC.

OPINION

By the Court, Hardesty, C.J.:

Under the supermajority voting provision set forth in Article 4, Section 18(2) of the Nevada Constitution, at least two-thirds of the members' votes in each house of the Nevada Legislature are required to pass any bill "which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates." Accordingly, a bill that is subject to the supermajority provision and fails to obtain the necessary two-thirds majority vote from each house cannot be constitutionally enacted.

Assembly Bill (A.B.) 458, which eliminates future increases in the amount of tax credits available to businesses that donate to certain scholarship organizations, did not meet the supermajority voting requirement but was nevertheless passed during the 80th session of the Nevada Legislature in 2019. Appellants, parents of scholarship recipients, a scholarship organization, and businesses who benefited from the tax credit, challenged the legislation as unconstitutional. The district court ruled in favor of the legislation's constitutionality, and appellants appealed.

On appeal, we first consider whether appellants have standing to challenge the legislation's constitutionality. Because we conclude that they do, we next determine whether the bill increases public revenue. We conclude that A.B. 458 does not increase public revenue but instead redirects funds from a specific appropriation to the State General Fund. Therefore, the bill was not subject to the supermajority requirement. Because the district court correctly found that A.B. 458 was constitutional, we affirm the district court's order.

FACTS

Nevada's Educational Choice Scholarship Program

In 2015, the 78th Nevada Legislature passed a bill establishing the Nevada Educational Choice Scholarship Program (NECSP). 2015 Nev. Stat., ch. 22, §§ 2-8, at 86-89. Under the NECSP, businesses can receive credits against the modified business payroll tax (MBT)[1] for their donations to NECSP scholarship organizations. 2015 Nev. Stat., ch. 22, §§ 2, 4, at 86-87 (codified at NRS 363A.139, NRS 363B.119, and NRS 388D.250-.280).[2] The scholarship

[1]*See* NRS 363A.130; NRS 363B.110.

[2]Unless indicated otherwise, the statutory references in this opinion are to the 2019 versions of NRS 363A.130, NRS 363A.139, NRS 363B.110, NRS 363B.119, and NRS 388D.250-.280. 2019 Nev. Stat., ch. 366, §§ 1-2, at 2296-99; *see also* NRS 388D.250-.280 (2019). Although NRS 363A.130, NRS 363B.110, and NRS 388D.270 were amended during the 2021 legislative session, *see* A.B.

organizations receiving these donations must provide scholarships to low-income students from the money donated to them under the NECSP. NRS 388D.270(1)(e).

As enacted in 2015, NRS 363A.139 and NRS 363B.119 provided $5,000,000 in tax credits for the 2015-16 fiscal year, $5,500,000 for the 2016-17 fiscal year, and a ten-percent increase per fiscal year thereafter. 2015 Nev. Stat., ch. 22, § 4, at 86-87. Under that formula, the total amount of tax credits available for the 2017-18 fiscal year was $6,655,000 and $7,320,500 for the 2018-19 fiscal year. The NECSP tax credits are available to donors on a first-come, first-served basis. NRS 363A.139(3); NRS 363B.119(3). Consequently, once the allotted tax credit amounts are expended, businesses remain liable for any remaining MBT taxes owed. *See* NRS 363A.139(6) (providing that once the Department of Taxation approves the tax credit amount requested, the donor subject to the MBT tax will receive a tax credit equal to the amount donated to the NECSP scholarship organization, which the Department will apply against the MBT tax amount due); NRS 363B.119(6) (same).

Assembly Bill 458

A.B. 458 was proposed in 2019 during the 80th legislative session. This bill eliminated the ten-percent annual increase in the amount of available NECSP tax credits, indefinitely capping the total available credits at $6,655,000. 2019 Nev. Stat., ch. 366, §§ 1-2, at 2296-99. While the bill was in the Assembly, the Department of Taxation submitted a fiscal note explaining that A.B. 458 "would increase general fund revenue by $665,500 in fiscal year 2019-20 and $1,397,550 in fiscal year 2020-21." A.B. 458, Fiscal Note, 80th Leg. (Nev. 2019). Assemblymembers voted in favor of the bill by at least a two-thirds majority. *See* Journal of the Assemb., 80th Leg., at 723 (Nev., April 16, 2019).

When the bill reached the Senate, legislative leadership presented two questions to the Legislative Counsel Bureau (LCB) relating to whether A.B. 458 was subject to the Nevada Constitution's supermajority provision. In a letter responding to legislative leadership's questions, LCB opined that A.B. 458 was not subject to the supermajority provision because limiting tax exemptions and credits changes neither the existing statutory tax formulas nor the existing computational bases, and ultimately, the Legislature did not subject the bill to a supermajority vote. When voted on in the Senate, A.B. 458 was passed by only a simple majority. The Governor signed it into law. *See* S. Daily Journal, 80th Leg., at 27-28 (Nev., May 23, 2019); 2019 Nev. Stat., ch. 366, § 3, at 2299 (providing the bill's effective date).

495, 81st Leg. (Nev. 2021), the 2019 versions of the statutes govern here and the 2021 legislative amendments do not substantively alter the analysis in this opinion.

Proceedings in the district court

After A.B. 458 was approved, appellants filed a complaint against respondents the State of Nevada Department of Education and Department of Taxation and several state employees in their official capacities (collectively, the State), challenging the constitutionality of the bill.[3] The complaint sought declaratory relief, arguing that A.B. 458 violated the supermajority voting requirement because it increased revenue for the State General Fund and did not pass with the required two-thirds vote in the Senate. After the Legislature, represented by the LCB, intervened in the case pursuant to NRCP 24 and NRS 218F.720, the State moved to dismiss on the ground that appellants lack standing.[4] The district court denied the motion, finding that appellants have standing and, in the alternative, that the public-importance exception to standing applies. The parties then filed cross-motions for summary judgment. After a hearing, the district court found that the supermajority provision does not apply to A.B. 458 because it does not increase public revenue. Accordingly, the district court granted the State's motion for summary judgment. This appeal followed.

DISCUSSION

Appellants have standing

We first address the State's argument that appellants lack standing because they fail to demonstrate that the State caused them harm and they do not meet the requirements under *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016), for the public-importance exception. "Standing is a question of law reviewed de novo." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). "The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation. The primary purpose of this standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894 (citation omitted). Thus, "a requirement of standing is that the litigant personally suffer injury that can be fairly traced to the allegedly unconstitutional statute and which would be redressed by invalidating the statute." *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988). A general interest in the matter is normally insufficient: "a party must show a personal injury." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894.

[3]The appellants in this case are Flor Morency, Keysha Newell, and Bonnie Ybarra, parents of students who had previously received a scholarship under the NECSP; the AAA Scholarship Foundation, Inc., an NECSP scholarship organization; and Sklar Williams PLLC and Environmental Design Group, LLC, two businesses that benefited from the NECSP tax credits.

[4]The Legislature will be addressed collectively with the State in this opinion unless otherwise indicated.

Appellants claim that the State's enactment of A.B. 458 caused them each harm in the form of lost scholarships, scholarship funding, and tax credits and that their injuries are fairly traced to the State because it enforces the bill and is responsible for administering the NECSP. In the alternative, appellants argue that the public-importance exception to standing under *Schwartz* applies. We agree with appellants in part and conclude that they have standing under the *Schwartz* public-importance exception.

Appellants lack personal harm for general standing

We conclude that appellants fail to meet the personalized-injury requirement for general standing.[5] The State argues that appellants cannot demonstrate harm because the Legislature passed another bill during the 2019 session, Senate Bill (S.B.) 551, which provided additional funding for the NECSP, recuperating part of the loss of funding caused by A.B. 458. *See* 2019 Nev. Stat., ch. 537, § 2.5, at 3273-74, § 3.5, at 3276-77. We agree. Sections 2.5 and 3.5 of S.B. 551 provided an additional allotment of $4,745,000 in tax credits per fiscal year for both the 2019-20 and 2020-21 fiscal years. *See id*.; *see also* S.B. 551, 80th Leg. (Nev. 2019). As a result, appellants failed to show actual harm arising from A.B. 458's tax credit cap and consequent decrease in funding for the NECSP.[6]

The Schwartz *public importance exception applies*

In appropriate cases, however, "we may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894; *see also Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 459, 282 P.3d 751, 755 (2012) ("A corporation that is incorporated in Nevada is a Nevada citizen." (citing *Quigley v. Cent. Pac. R.R. Co.*, 11 Nev.

[5]We reject any argument that NRS 30.040(1)—creating a declaratory relief cause of action to challenge a statute's validity for any person whose "rights, status or other legal relations [were] affected by a statute"—provided appellants standing. Appellants must still demonstrate that they suffered actual personal injury. *See Doe v. Bryan*, 102 Nev. 523, 524-25, 728 P.2d 443, 443-44 (1986) (affirming the dismissal of an action brought under NRS 30.040 because the appellants failed to show that their personal injury was actual rather than speculative).

[6]In *Legislature of State of Nevada v. Settelmeyer*, we considered the constitutionality of S.B. 551 and held that sections 2, 3, 37, and 39 of S.B. 551 were unconstitutional and severable. 137 Nev. 231, 236-37, 486 P.3d 1276, 1280, 1282 (2021). Thus, sections 2.5 and 3.5, which provided additional funding to the NECSP, remain enforceable. *See id*. To the extent that appellants argue that the additional funding provided under S.B. 551 was inadequate in light of A.B. 458's elimination of the automatic ten-percent annual increase for future fiscal years, we reject this injury argument as speculative. *See Doe*, 102 Nev. at 524-25, 728 P.2d at 443-44.

350, 357 (1876) ("[A] corporation is a citizen of the state where it is created.")))).[7] For this exception to apply, a plaintiff must demonstrate that (1) "the case . . . involve[s] an issue of significant public importance," (2) "the case . . . involve[s] a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution," and (3) "there is no one else in a better position [than the plaintiff] who will likely bring an action and . . . the plaintiff is capable of fully advocating his or her position in court." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894-95.

We conclude that appellants have demonstrated standing under the public-importance exception. First, this case involves an issue of significant public importance because it requires us to determine the constitutionality of legislation affecting the financial concerns of a significant number of businesses, organizations, and individuals throughout the state, as well as the state's budget. Second, appellants challenge the Legislature's appropriations for the NECSP under A.B. 458 on the basis that the bill did not meet the supermajority vote required under Article 4, Section 18(2) of the Nevada Constitution. *See Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 890, 141 P.3d 1224, 1233 (2006) ("[A]n appropriation is the setting aside of funds . . . ." (quoting *Rogers v. Heller*, 117 Nev. 169, 173, 18 P.3d 1034, 1036 (2001))). Third, there is no one else in a better position to challenge A.B. 458 than appellants because, as parents of NECSP scholarship recipients, a registered NECSP scholarship organization, and businesses that have donated and wish to continue to donate to NECSP scholarship organizations in exchange for tax credits, they benefit from the NECSP and are interested in maintaining those benefits. Further, the record demonstrates that appellants have the "ability to competently and vigorously advocate their interests in court and fully litigate their claims." *Schwartz*, 132 Nev. at 744, 382 P.3d at 895. Thus, we conclude that appellants have satisfied *Schwartz*'s public-importance exception requirements and consequently have standing to challenge the constitutionality of A.B. 458.

A.B. 458 is not subject to the supermajority provision

We now turn to whether A.B. 458 is subject to the supermajority provision, which states as follows:

> Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which

[7]Respondents do not argue that any of the appellants are not Nevada citizens. Further, we will consider an issue of standing moot when at least some of the appellants have standing. *See Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 304-05, 579 P.2d 775, 777-78 (1978) (concluding that standing was not at issue after having determined that at least some of the parties who brought the claim had standing). We therefore do not consider this issue further.

> *creates, generates, or increases any public revenue in any form*, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

Nev. Const. art. 4, § 18(2) (emphasis added). Thus, to determine whether the supermajority provision applies to A.B. 458, we must consider whether A.B. 458 "creates, generates, or increases any public revenue in any form."

This court reviews a district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Id.* (alteration in original) (internal quotation marks omitted). "The constitutionality of a statute is a question of law subject to de novo review. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. . . . [by] mak[ing] a clear showing of invalidity." *Nevadans for Nev. v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006) (footnotes omitted).

We begin by examining the State's contention that A.B. 458 does not increase public revenue but rather reallocates existing tax funds. The State argues that A.B. 458 does not change the MBT tax rate or computation base and, thus, does not increase the total public revenue collected by the MBT tax. The State therefore contends that A.B. 458 does not increase public revenue and instead simply alters the amount of MBT tax revenue that supports the NECSP. Appellants argue that A.B. 458 is subject to the supermajority provision because it increases the State General Fund.[8] However, as discussed below, A.B. 458 is not subject to the supermajority provision because it merely reduces funding for the NECSP program, rather than "creat[ing], generat[ing], or increas[ing]" public revenue as contemplated by the supermajority provision. Nev. Const. art. 4, § 18(2).

The State General Fund is the default account that receives tax revenue; within it exist other designated accounts. *See* NRS 353.323(2) (stating that the State General Fund "must be used to receive all revenues and account for all expenditures *not otherwise provided by law to be accounted for in any other fund*" (emphasis added)); *see also* NRS 353.288(1) ("The Account to Stabilize the Operation of the State Government is hereby created in the State General

[8]Appellants rely heavily on the Department of Taxation's fiscal note concluding that A.B. 458's passing "would increase *general fund* revenue by $665,500 in fiscal year 2019-20 and $1,397,550 in fiscal year 2020-21" to support this argument. A.B. 458, Fiscal Note, 80th Leg. (Nev. 2019) (emphasis added). As explained further in this opinion, the fact that a bill increases the amount of money in the General Fund does not necessarily mean it also increases public revenue overall.

Fund."). The State General Fund may increase for a variety of reasons. For example, an increase in the State's tax-paying population would increase the amount of taxes paid into the State General Fund and thus increase the public revenue the State receives. However, redirecting funds previously designated for a specific use (an appropriation) back to the State General Fund does not increase public revenue, even if it increases the unrestricted revenue available in the General Fund. *See Schwartz*, 132 Nev. at 753, 382 P.3d at 900 (defining an appropriation); *see also, e.g.*, NRS 2.185(2) (providing that this court must revert to the State General Fund any appropriated money that exceeds the amount the Legislature authorizes for expenditure); NRS 413.030 (providing that if the Civil Air Force Patrol's "Nevada Wing 27001" disbands, "any balance remaining of the appropriated money reverts to the State General Fund"). This is because the amount of public revenue—the amount of taxes collected—does not increase as the result of such a reversion.

The NECSP tax credit is clearly an appropriation. "An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." *Schwartz*, 132 Nev. at 753, 382 P.3d at 900 (internal quotation marks omitted). The State funds the NECSP tax credits by setting aside a specified portion of tax money owed pursuant to NRS 363A.130 and NRS 363B.110. NRS 363A.139(4), (5); NRS 363B.119(4), (5).[9]

Under the NECSP, employers subject to MBT payroll taxes under NRS 363A.130 and NRS 363B.110 "may receive a credit against the tax otherwise due" if they make a monetary donation to a scholarship organization operating under the NECSP. NRS 363A.139(1); NRS 363B.119(1). Employers seeking to obtain tax credits under the NECSP must first notify an NECSP scholarship organization that they want to make a donation and seek the tax credits. NRS 363A.139(2); NRS 363B.119(2). Employers may only receive tax credits equal to the amount they donate to NECSP scholarship organizations and are subject to the annual limit on the total tax credits authorized statewide for the NECSP under NRS 363A.139(4), (5) and NRS 363B.119(4), (5). *See* NRS 363A.139(6) (providing that the tax credits approved will not exceed the taxpayer's donation); NRS 363B.119(6) (same). Then, the NECSP scholarship organization must

[9]The amount of the available tax credits under these statutes has fluctuated over the years. *See* 2015 Nev. Stat., ch. 22, § 4, at 86-87 (providing tax credits in the amount of $5,000,000 for the 2015-2016 fiscal year, $5,500,000 for the 2016-2017 fiscal year, and a ten-percent yearly increase for all subsequent fiscal years but no additional tax credits under subsection 5); 2017 Nev. Stat., ch. 600, § 1, at 4366-67 (maintaining the same amount of tax credits as under the prior version of this statute but authorizing up to $20,000,000 for the 2017-2018 fiscal year under subsection 5); *see also* A.B. 495, 81st Leg. (Nev. 2021). However, the general manner of funding those tax credits has not changed under A.B. 458.

seek approval of the tax credit amount sought from the Department of Taxation before accepting the donation. NRS 363A.139(2); NRS 363B.119(2). NRS 363A.139(4), (5) and NRS 363B.119(4), (5) limit the total amount of tax credits that the Department of Taxation can approve statewide per year to the amounts provided in those subsections. The tax credits are distributed on a first-come, first-served basis. NRS 363A.139(3); NRS 363B.119(3). Once the allotted tax credits have been expended, employers who did not receive sufficient tax credits to offset the total amount of MBT tax they owe under NRS 363A.130 and NRS 363B.110 remain liable for the balance of MBT taxes that exceeds the allotted credits. NRS 363A.139(6); NRS 363B.119(6). Because the NECSP tax credits are in effect funded with tax revenue that is set aside, we conclude that these tax credits are an appropriation.

Having determined that the NECSP tax credits are an appropriation, we conclude that A.B. 458's reduction of the total amount of available tax credits is simply a reallocation of a portion of the total MBT revenue available, rather than something that increases the MBT tax that produces new or additional public revenue. A.B. 458 does not change the amount of money that businesses owed under the MBT payroll taxes. *See* 2019 Nev. Stat., ch. 366, § 1, at 2297, § 2, at 2298; *see also* NRS 363A.130(4); NRS 363B.110(4). Instead, the bill reduces future appropriations to the NECSP tax-credit program. *See* 2019 Nev. Stat., ch. 366, § 1, at 2296-97, § 2, at 2297-98. Before A.B. 458, the State had to allocate an increasing amount of the MBT tax revenue collected per fiscal year to credits for donors to NECSP scholarship organizations. *Compare id. with* NRS 363A.139(4) (2017), *and* NRS 363B.119(4) (2017). Now, rather than obtaining a potential ten-percent increase each fiscal year, under A.B. 458, the NECSP receives up to $6,655,000 in funding under the MBT payroll tax credit program. *See* 2019 Nev. Stat., ch. 366, § 1, at 2296-97, § 2, at 2298. Thus, A.B. 458 increases the amount of unrestricted revenue in the State General Fund by redirecting funds that would have previously, under the former versions of NRS 363A.139 and NRS 363B.119, gone to tax credits for donors to NECSP scholarship organizations. But because the total public revenue collected under the MBT has not changed, A.B. 458 does not increase public revenue.

Further, when compared to another 2019 bill, it becomes clear why, unlike other bills that reduce tax credits, A.B. 458 does not "create, generate, or increase" public revenue such that the supermajority provision applies. Nev. Const. art. 4, § 18(2). In 2019, the Legislature also passed S.B. 551, which proposed to repeal NRS 360.203, a statute that reduces the rate of payroll taxes under the MBT if tax revenues exceed fiscal projections by a certain amount. *See* S.B. 551, 80th Leg. (Nev. 2019); 2019 Nev. Stat., ch. 537, § 2, at 3273, § 3, at 3275, § 39, at 3294. In *Legislature of State of Nevada*

v. Settelmeyer, we concluded that S.B. 551 was subject to the supermajority provision because "but for the MBT bill, the State would not receive . . . increased revenue" of $98.2 million. 137 Nev. 231, 236, 486 P.3d 1276, 1281 (2021). Thus S.B. 551 required taxpayers to pay taxes that they would not otherwise owe, but, under A.B. 458, MBT payroll taxpayers' tax liability has not increased—the reduction of the tax credit only changes how much of the MBT payroll tax money is allocated to fund the NECSP credits. *See* NRS 363A.139(6) (providing that MBT taxpayers whose NECSP donations are approved by the Department of Taxation will have their MBT tax liability offset by an amount equal to the donation made); NRS 363B.119(6) (same).

A.B. 458 does not create, generate, or increase public revenue but rather redirects MBT taxes owed to the General Fund except those set aside as tax credits to support the NECSP. Thus, the supermajority provision does not apply, and A.B. 458 is constitutional.[10] While providing different reasoning, the district court came to the same conclusion, and we therefore affirm its grant of summary judgment to the State. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons." (alteration in original) (quoting *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987))).

CONCLUSION

Article 4, Section 18(2) of the Nevada Constitution does not apply to A.B. 458 because it does not generate, create, or increase public revenue. Because the bill is constitutional, the district court properly granted the State's motion for summary judgment. We therefore affirm the judgment of the district court.

Parraguirre, Stiglich, Cadish, Silver, Pickering, and Herndon, JJ., concur.

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[10]In light of our decision, we do not address the parties' remaining arguments.

AHED SAID SENJAB, Appellant, *v.* MOHAMAD ABUL-HAKIM ALHULAIBI, Respondent.

No. 81515

October 21, 2021 497 P.3d 618

Appeal from a district court order dismissing a complaint for divorce. Eighth Judicial District Court, Family Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Reversed and remanded.

Willick Law Group and *Marshal S. Willick*, Las Vegas, for Appellant.

Markman Law and *David A. Markman*, Las Vegas, for Respondent.

Legal Aid Center of Southern Nevada, Inc., and *Barbara E. Buckley* and *April S. Green*, Las Vegas, for Amicus Curiae National Immigrant Women's Advocacy Project, Inc.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

NRS 125.020(2) provides in part that "no court has jurisdiction to grant a divorce unless either the plaintiff or defendant has been resident of the State for a period of not less than 6 weeks preceding the commencement of the action." Although residence and domicile are distinct concepts elsewhere in the law, for divorce jurisdiction, we have long considered residence "synonymous with domicile." *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 269-70, 44 P.3d 506, 511 (2002) (quoting *Aldabe v. Aldabe*, 84 Nev. 392, 396, 441 P.2d 691, 694 (1968)). In this appeal, we revisit that rule and conclude that divorce jurisdiction requires mere residence.

FACTS

Appellant Ahed Said Senjab and respondent Mohamad Abulhakim Alhulaibi are Syrian citizens. They married in Saudi Arabia and have one minor child. In 2018, Alhulaibi obtained an F-1 (student) visa and moved to Las Vegas to attend the University of Nevada, Las Vegas. Senjab and the child later obtained F-2 (dependent) visas and, in January 2020, moved to Las Vegas to live with Alhulaibi.

In March 2020, Senjab filed a complaint for divorce. She also sought spousal support, custody of the child, and child support. Alhulaibi moved to dismiss Senjab's complaint for lack of subject-matter jurisdiction. He argued that Senjab, as a nonimmigrant, cannot establish intent to remain in Nevada (i.e., domicile), so the district court lacked subject-matter jurisdiction under NRS 125.020, Nevada's divorce-jurisdiction statute. He cited caselaw in which we explained that residence is synonymous with domicile under NRS 125.020, so subject-matter jurisdiction under NRS 125.020 requires not only physical presence in Nevada (i.e., residence), but also intent to remain here. He also cited a recent United States Court of Appeals for the Ninth Circuit decision and other caselaw holding that some visas preclude domicile as a matter of law by requiring that the visa holder not intend to abandon his or her foreign residence. Senjab replied that the caselaw does not apply to her F-2 visa, and the district court had subject-matter jurisdiction under NRS 125.020 because she had resided in Nevada for the stated period of not less than six weeks.

The district court heard Alhulaibi's motion and granted it. Citing our long-standing rule that residence is synonymous with domicile under NRS 125.020, it found that both parties had been physically present in Nevada for at least six weeks before Senjab filed her complaint but neither party had established domicile here. Citing a recent Ninth Circuit decision, it concluded that Alhulaibi's F-1 visa and Senjab's F-2 visa precluded them from establishing domicile as a matter of law, so it dismissed Senjab's complaint for lack of subject-matter jurisdiction.

Senjab now appeals, inviting us to reconsider our rule that residence and domicile are synonymous under NRS 125.020. She argues that "reside[nce]" under NRS 125.020 plainly means mere residence—not domicile.[1] We agree, so we reverse and remand to the district court.

DISCUSSION

We review subject-matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). We likewise review statutory-interpretation issues de novo and will interpret a statute by its plain meaning unless some exception applies. *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020). Neither party to this appeal argues that any exception applies. We will not supply an argument on a party's behalf but review only the

[1]National Immigrant Women's Advocacy Project, Inc., argues in its amicus brief that an F-2 visa does not preclude domicile, but we do not reach that issue or the broader question of domicile because neither is necessary to resolve this appeal. Senjab also raises custody and support issues that we decline to consider because, as she admits, the district court did not reach them.

issues the parties present. *Pelkola v. Pelkola*, 137 Nev. 271, 273, 487 P.3d 807, 809 (2021). Senjab simply argues that we should interpret NRS 125.020 by its plain meaning, and Alhulaibi cites our long-standing rule that residence and domicile are synonymous under NRS 125.020.

NRS 125.020(1) provides several bases for subject-matter jurisdiction of a divorce complaint, including either party's "residen[ce]" in the county in which the plaintiff files the complaint. NRS 125.020(2) further provides that,

> [u]nless the cause of action accrued within the county while the plaintiff and defendant were actually domiciled therein, no court has jurisdiction to grant a divorce unless either the plaintiff or defendant has been resident of the State for a period of not less than 6 weeks preceding the commencement of the action.

Although residence and domicile are generally distinct concepts elsewhere in the law, *see, e.g.*, *Black's Law Dictionary* (11th ed. 2019) (defining residence as "[t]he place where one actually lives, as distinguished from a domicile," and domicile as "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere"), we have long considered residence "synonymous with domicile" for divorce jurisdiction, *Vaile*, 118 Nev. at 269-70, 44 P.3d at 511 (quoting *Aldabe*, 84 Nev. at 396, 441 P.2d at 694).

"[W]e recognize the important role that stare decisis plays in our jurisprudence and reiterate that '[l]egal precedents of this Court should be respected until they are shown to be unsound in principle.'" *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007) (second alteration in original) (quoting *Grotts v. Zahner*, 115 Nev. 339, 342, 989 P.2d 415, 417 (1999) (Rose, C.J., dissenting)). Our review of NRS 125.020 reveals that the rule we reiterated most recently in *Vaile* is unsound, and we take this opportunity to retreat from it for several reasons.

First, residence and domicile are distinct concepts not only elsewhere in the law but also in NRS 125.020 itself. NRS 125.020(2) plainly and separately addresses "domicile[ ]" in its first clause and "residen[ce]" in its second clause. Given such a construction, we cannot interpret "residence" and "domicile" to be synonymous in NRS 125.020. *See Berberich v. Bank of Am., N.A.*, 136 Nev. 93, 95, 460 P.3d 440, 442 (2020) (explaining that, under the surplusage canon, no word or provision of a statute "should be ignored [or] given an interpretation that causes it to duplicate another provision or to have no consequence" (internal quotation marks omitted)).

Second, the very Ninth Circuit decision that Alhulaibi and the district court cited expressly and persuasively distinguished residence and domicile as we do here. In *Park v. Barr*, the Ninth Circuit explained that the California Court of Appeals decision on which the lower court relied "conflated 'residence' with 'domicile'" by describing them as "synonymous." 946 F.3d 1096, 1100 (9th Cir. 2020) (quoting *In re Marriage of Dick*, 18 Cal. Rptr. 2d 743, 746 (Ct. App. 1993)).[2]

And, finally, the Legislature has supplied an applicable definition of residence. NRS 10.155 provides that,

> [u]nless otherwise provided by specific statute, the legal residence of a person with reference to the person's right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, is that place where the person has been physically present within the State or county, as the case may be, during all of the period for which residence is claimed by the person.

No relevant statute provides an alternative definition, so NRS 10.155 applies. Under that definition, residence under NRS 125.020 plainly requires only "physical[ ] presen[ce]"—not an extra-textual intent to remain. NRS 10.155; *see also ASAP Storage*, 123 Nev. at 653, 173 P.3d at 744 ("Statutes should be given their plain meaning whenever possible; otherwise, as we have explained, the constitutional separation-of-powers doctrine is implicated." (footnote omitted)).

Here, the district court found that Senjab and Alhulaibi had been physically present in Nevada for at least six weeks before Senjab filed her complaint. Under a plain-meaning interpretation of "reside[nce]," that finding satisfies NRS 125.020(1)(e), which provides that a plaintiff may obtain divorce in "the district court of any county . . . [i]f plaintiff resided 6 weeks in the State before suit was brought." It also satisfies NRS 125.020(2), which likewise requires residence "for a period of not less than 6 weeks preceding the commencement of the action." With that finding and the plain-meaning interpretation of "residen[ce]" that we now acknowledge, the district court did not lack subject-matter jurisdiction under NRS 125.020.

CONCLUSION

Under NRS 125.020, "residen[ce]" means mere residence—not domicile—and NRS 10.155 defines residence as "physical[ ] presen[ce]." Because the district court found that Senjab had been

[2]Like this court, California courts long ago read an additional, extra-textual domicile requirement into a divorce-jurisdiction statute that required only residence. *E.g.*, *Ungemach v. Ungemach*, 142 P.2d 99, 102 (Cal. Ct. App. 1943) ("The residence referred to in the [divorce-jurisdiction] statute is equivalent to domicile.").

physically present in Nevada for at least six weeks before she filed her divorce complaint, we conclude that it had subject-matter jurisdiction under NRS 125.020. Accordingly, we reverse and remand to the district court for further proceedings consistent with this opinion.

HARDESTY, C.J., and STIGLICH, CADISH, SILVER, PICKERING, and HERNDON, JJ., concur.

VIVIA HARRISON, An Individual, Appellant, *v.* RAMPARTS, INC., dba LUXOR HOTEL & CASINO, a Nevada Domestic Corporation, Respondent.

No. 80167-COA

October 28, 2021 500 P.3d 603

Appeal from a post-judgment district court order awarding attorney fees and costs, and directing that the award be paid from settlement funds owed by a codefendant, in a personal injury matter. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Affirmed in part, reversed in part, and remanded.

Gibbons, C.J., dissented in part.

Claggett & Sykes Law Firm and *Micah S. Echols* and *Scott E. Lundy*, Las Vegas; *Moss Berg Injury Lawyers* and *Boyd B. Moss III*, Las Vegas; *H&P Law, PLLC*, and *Matthew G. Pfau*, Las Vegas, for Appellant.

Lincoln Gustafson & Cercos and *Loren S. Young* and *Mark B. Bailus*, Las Vegas, for Respondent.

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

OPINION

By the Court, Bulla, J.:

This appeal arises from a district court's award of attorney fees and costs to respondent Ramparts, Inc., dba Luxor Hotel and Casino, against appellant Vivia Harrison, pursuant to NRCP 68, after Harrison rejected an offer of judgment and was unsuccessful at trial.[1] The district court ordered that the award be satisfied from the settlement funds codefendant Desert Medical Equipment was obligated to pay Harrison based on their high-low settlement agreement. The court's offset assured that Luxor would receive its award of attorney fees and costs before Harrison and her counsel received any of the settlement funds from Desert Medical.

At issue in this appeal is whether the district court erred in offsetting Harrison's settlement funds from a third party in favor of first satisfying Luxor's judgment for attorney fees and costs. We conclude that it did, and consequently, we reverse and remand as to this portion of the judgment. Harrison also challenges the fees award, which we affirm.

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

I.

Harrison was operating a motorized scooter in a deli restaurant located inside the Luxor Hotel and Casino. In order to make her way through the restaurant, members of her party moved tables to create a pathway. While negotiating the path cleared for her, one of the scooter's back tires rolled over the base of a table, causing it to become unbalanced and tip over. Harrison allegedly suffered serious personal injuries as a result, including a fractured hip and stroke.

Subsequently, Harrison filed a complaint against Ramparts, Inc. (Luxor) and Desert Medical, the entity that rented her the scooter. Approximately seven months after Harrison filed her second amended complaint, Luxor served Harrison with a $1,000 offer of judgment, which Harrison rejected, and the matter proceeded to trial.

During trial, but before the jury reached its verdict, Harrison and Desert Medical negotiated a high-low settlement agreement, under which Desert Medical agreed to pay Harrison $150,000, even if the court entered judgment in its favor. After a nine-day trial, the jury returned a defense verdict for both Desert Medical and Luxor, finding that neither was negligent or otherwise liable for Harrison's injuries. Before the district court entered judgment in favor of Luxor and Desert Medical, Harrison's attorneys gave notice to both parties that they had placed an attorney's lien on the file.

After the district court entered judgment on the verdict, Luxor moved for attorney fees and costs pursuant to NRS Chapter 18 and NRCP 68, which the court granted in part, reducing the overall expert costs and attorney fees Luxor requested. Further, the district court offset Luxor's award of fees and costs from the settlement funds Desert Medical owed Harrison. The court concluded "that this total final judgment must first be offset from other settlement funds received by [Harrison] and [Harrison's] attorney as part of the trial judgment before any distribution and this total final judgment in favor of Luxor takes priority over any other lien, including an attorney's lien," citing to *John W. Muije, Ltd. v. A North Las Vegas Cab Co.*, 106 Nev. 664, 799 P.2d 559 (1990). Harrison filed a motion to reconsider, arguing that the issue of offset was never properly before the court because Luxor failed to request offset in its motion for attorney fees and costs, only mentioning the issue in its reply brief, and that neither the court nor the parties addressed offset at the initial hearing. Therefore, Harrison argued, she did not have the opportunity to challenge whether offset was appropriate under the facts and circumstances of this case. The district court denied Harrison's motion to reconsider.[2]

[2]We note that although District Judge Nancy Allf signed the order denying reconsideration, District Judge David M. Jones heard and orally ruled on the matter and presided over the underlying proceedings.

Because both Harrison and Luxor were attempting to collect the settlement funds of $150,000 from Desert Medical, Desert Medical filed a motion to interplead the funds. The district court granted the motion, which was unopposed, and Desert Medical deposited the settlement funds with the court. Ultimately, the district court ordered the interpleaded funds distributed first to the Luxor to satisfy its judgment, with any remaining funds to be distributed to Harrison and her attorneys. This appeal followed.

On appeal, Harrison does not challenge the verdict in favor of Luxor. Rather, Harrison appeals from the order awarding attorney fees and costs to Luxor, including the priority status given to Luxor to obtain payment of its fees and costs from the settlement funds interpleaded by Desert Medical. Specifically, Harrison argues that the district court erred in offsetting the settlement funds in favor of Luxor and abused its discretion in awarding attorney fees as well as the amount of fees it awarded.

With respect to offset, Luxor asserts that it was proper under *Muije*, and therefore, the district court did not err when it ordered Luxor's award of fees and costs to be offset from the Desert Medical settlement funds. Luxor further argues that the court did not abuse its discretion in its attorney fees award.

II.

We first address whether the offset of the settlement funds, in reliance on *Muije*, was proper. "The 'legal operation and effect of a judgment' is a question of law subject to de novo review." *Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 592, 356 P.3d 1085, 1091 (2015) (internal citation omitted) (quoting *Ormachea v. Ormachea*, 67 Nev. 273, 291, 217 P.2d 355, 364 (1950)).

In *Muije*, the plaintiff prevailed at trial, but the jury award in plaintiff's favor was less than the defendant's offer of judgment. 106 Nev. at 665, 799 P.2d at 559-60. Accordingly, the district court awarded the defendant attorney fees and costs, resulting in each party having a judgment against the other. *Id.* The district court determined that it would offset the amount of plaintiff's judgment from the amount she owed the defendant in attorney fees and costs, extinguishing plaintiff's recovery. *Id.* The plaintiff's attorney appealed, claiming that his attorney lien, which predated the award of fees and costs, was superior to that of the defendant's judgment and that the court should not have offset the two. *Id.*

On appeal, the supreme court concluded that an equitable offset "is a means by which a debtor may satisfy in whole or in part a judgment or claim held against him out of a judgment or claim which he has subsequently acquired against his judgment creditor." *Id.* at 666-67, 799 P.2d at 560 (internal quotation omitted); *see also Pennington v. Campanella*, 180 So. 2d 882, 887 (La. Ct. App. 1965) (providing that parties "cannot offset . . . debts which are not mutually owed and

mutually demandable"). Thus, because the parties each had a judgment against the other, the *Muije* court affirmed the equitable offset in favor of the defendant, concluding that the attorney's lien attached to the net judgment, not the gross amount, which, after the offset, was zero. *Muije*, 106 Nev. at 666-67, 799 P.2d at 560-61.

Here, relying on *Muije*, the district court ordered that Luxor's judgment for attorney fees and costs "must first be offset from other settlement funds received by [Harrison] and [Harrison's] attorney" and that Luxor's judgment "takes priority over any other lien, including an attorney's lien." But, unlike in *Muije*, there are not competing judgments between Harrison and Luxor that are mutually owed and mutually demandable. Equitable offsets are only applicable where a debtor obtains a subsequent judgment against one of his or her creditors. *Muije*, 106 Nev. at 666, 799 P.2d at 560. Although Luxor had a collectable judgment against Harrison, Harrison did not have a collectable judgment against Luxor. Thus, there were no mutually owed judgments to offset.

Moreover, the Desert Medical settlement funds were part of a *settlement agreement* between Harrison and Desert Medical, not Luxor, and the district court did not reduce the settlement to judgment in favor of Harrison. Thus, Luxor was not entitled to make a claim against the settlement funds to satisfy its judgment before distribution, as the funds from the high-low settlement were not a judgment subject to offset, but instead were funds owed pursuant to a contract between the signatories, Harrison and Desert Medical. *Cf. Cunha v. Shapiro*, 837 N.Y.S.2d 160, 163 (App. Div. 2007) (collecting cases and noting that "cases are legion wherein courts have treated high-low agreements as settlements"); *see also Power Co. v. Henry*, 130 Nev. 182, 189, 321 P.3d 858, 863 (2014) ("A settlement agreement is a contract governed by general principles of contract law.").

Therefore, we decline to extend *Muije* to include the facts and circumstances presented here and conclude that the district court erred in granting an offset where Luxor and Harrison did not have mutually owed judgments that could be subject to offset. Accordingly, we reverse the district court's order in part as to the offset.[3] As to the Desert Medical settlement funds, we remand this matter to the district court in order to release the interpleaded funds to Harrison and her attorneys.[4]

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[3]In doing so, we recognize that there are competing public policy considerations at issue, such as encouraging settlement versus not rewarding a party for pursuing a frivolous claim. Nevertheless, we cannot agree that a settlement agreement is the same as a judgment for the purposes of offset, even in light of the public policy considerations enunciated in *Muije*. This is particularly so in this case, where Luxor was not a signatory to the settlement agreement.

[4]We need not reach the issue of whether Harrison's attorneys have perfected their liens, as this likely will be considered upon distribution.

Further, we recognize that any future contested distribution may well have to be made through a separately filed interpleader action with all creditors

III.

Next, we address whether the district court abused its discretion in awarding Luxor its fees.[5] Harrison argues that the district court abused its discretion in awarding Luxor its attorney fees as well as the amount it awarded pursuant to NRCP 68, by pointing out inconsistencies between the district court's statements at the hearing and those contained in its order. Luxor, on the other hand, argues that the district court considered each of the required *Beattie*[6] factors in making its determination and therefore did not abuse its discretion in awarding attorney fees or in determining the amount awarded.

An award of attorney fees is generally reviewed for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014). When deciding whether to award attorney fees under NRCP 68, the district court must weigh four factors in determining whether attorney fees are warranted. These factors include the following four things:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. Although it is preferable, express factual findings on each factor are *not necessary* for a court to properly exercise its discretion; rather, "the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). While all of these factors must be considered, not one is outcome determinative, "and thus, each should be given appropriate consideration." *Frazier v. Drake*, 131 Nev. 632, 642, 357 P.3d 365, 372 (Ct. App. 2015).

The district court made express findings pursuant to *Beattie*, including applying the *Brunzell*[7] factors, and determined that overall the *Beattie* factors weighed in favor of awarding attorney fees, although the district court ultimately reduced the total amount of

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properly served. However, we believe that the burden to ensure a fair and ethical distribution of the funds is properly placed on Harrison's counsel, including the filing of a separate interpleader action if necessary. *See* RPC 1.15(d) (providing that "a lawyer shall promptly deliver to the client or *third person* any funds or other property that the client or third person is entitled to receive" (emphasis added)).

[5]We note that Harrison does not challenge Luxor's award of costs.

[6]*Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

[7]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

fees awarded. The record demonstrates that the final amount of fees the district court awarded is supported by substantial evidence. Based on this record, we conclude that the district court did not abuse its discretion in analyzing and considering the *Beattie* factors as required, including in determining the amount of fees to award.[8] Therefore, the attorney fees award is affirmed.[9]

IV.

In conclusion, a party cannot make a claim for attorney fees and costs—and thus the district court cannot offset—against settlement funds from a third party that have not been reduced to a judgment. We reaffirm that for an equitable offset to apply, there must be competing judgments between the parties that are mutually owed and mutually demandable. Thus, while we affirm the award for attorney fees, we reverse the district court's order as to the offset and remand this matter to the district court for the release of the interpleaded funds.

Tao, J., concurs.

Gibbons, C.J., concurring in part and dissenting in part:

This case presents the issue of whether a district court can accurately and fairly enter a large judgment for attorney fees against a losing party when the court makes unsupported or incomplete findings as to the factors identified in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). I conclude that the district court's order is not legally sufficient. Therefore, I would vacate the attorney fees award and remand for the district court to engage in the correct process and follow the well-established procedures. Accordingly, the entirety of the district court order should be vacated because there is not a valid underlying basis to award attorney fees to respondent. Regardless, I agree with the majority as to the remaining issues and concur with the portion of the opinion reversing in part and remanding to correct the offset.

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[8]To the extent that Harrison argues the differences between the district court findings and its order, the order ultimately controls. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (explaining that oral pronouncements from the bench are ineffective and only a written judgment has legal effect). Accordingly, differences between oral findings and the written findings do not render the written order invalid, as only the written order has legal effect. *See id.* Therefore, because the order demonstrates that the court considered each factor and its decision is otherwise supported by substantial evidence, we conclude that the district court did not abuse its discretion in awarding Luxor its attorney fees. *See Logan*, 131 Nev. at 266-67, 350 P.3d at 1143.

[9]Insofar as the parties raise arguments that are not specifically addressed herein, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

Vivia Harrison was injured in the Luxor Hotel & Casino while operating a motorized scooter. In February 2016, Harrison filed a complaint against Ramparts, Inc. (Luxor) and Desert Medical Equipment (Desert Medical) asserting claims, as relevant here, for negligence. In March 2017, Luxor served an offer of judgment for $1,000 on Harrison, which was not accepted, and the case proceeded to trial in December 2018. During trial, Desert Medical offered Harrison a "high low" settlement offer of $150,000 to $750,000, depending on the ultimate verdict, which was accepted. The jury returned verdicts in favor of both defendants; therefore, Desert Medical owed $150,000 under the settlement agreement.

Luxor brought a motion for attorney fees and costs, seeking $255,558 as the prevailing party under NRCP 68. Luxor requested a total of $202,398 in attorney fees and $53,160 in costs. The district court granted the motion for attorney fees and costs in part and awarded $109,285.28, apportioning $39,597.28 for costs and $69,688 for attorney fees.[1]

The district court summarily concluded in the written order that the $1,000 offer was reasonable. The court, however, did not apply or misstated the actual factors from *Beattie*. The court did not address if the case was *brought* in good faith; rather, it stated that the facts and allegations in the complaint were contrary to Harrison's own witnesses' testimony. The court did not specifically address if the offer was reasonable and in good faith as to timing and amount, or if it was grossly unreasonable or in bad faith for Harrison to reject the $1,000 offer. The court did not balance the *Beattie* factors but still determined that a partial award of attorney fees was proper. Further, the court summarily denied Harrison's motion for reconsideration.

On appeal, Harrison argues that the district court abused its discretion by incorrectly applying all four factors set forth in *Beattie*. Additionally, Harrison argues that the district court misapplied the factors in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), and that the amount of the awarded fees was unreasonable. I agree that the district court failed to correctly apply the first, second, and third *Beattie* factors, failed to balance them against each other, and thus misapplied *Beattie*. Further, the court failed to make adequate findings as to all three *Beattie* factors. Therefore, the district court's judgment as to attorney fees should be vacated and the case remanded for the district court to analyze all of the factors and make proper findings. Then it must engage in a balancing of the first three factors against each other, as well as the fourth factor, to determine if attorney fees should be awarded under the facts of this case. While the district court did correctly apply

[1]While Luxor requested attorney fees as a prevailing party pursuant to both NRS 18.010(2)(b) and NRCP 68, the district court made none of the required findings under NRS 18.010(2)(b) and did not use this statute as the basis for its decision. The court instead only awarded attorney fees pursuant to NRCP 68.

the fourth *Beattie* factor using *Brunzell* to determine the reasonable amount of attorney fees, such fact is not relevant when deciding if the first three factors of *Beattie* were satisfied. Therefore, I only address the first three factors.

Under NRCP 68, a party may recover attorney fees and costs if the other party rejects an offer of judgment and fails to obtain a more favorable outcome. In 1983, the Nevada Supreme Court established four factors in *Beattie v. Thomas* that must be considered when determining whether it can award attorney fees under NRCP 68:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

99 Nev. at 588-89, 668 P.2d at 274.

This court considered the application of the *Beattie* factors in *Frazier v. Drake*, 131 Nev. 632, 357 P.3d 365 (Ct. App. 2015), and *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 429 P.3d 664 (Ct. App. 2018). In *Frazier*, we noted that

> the first three factors all relate to the parties' motives in making or rejecting the offer and continuing the litigation, whereas the fourth factor relates to the amount of fees requested. . . . [But] [n]one of these factors are outcome determinative . . . and thus, each should be given appropriate consideration.

131 Nev. at 642, 357 P.3d at 372 (internal citations omitted). Further, as it relates to the first three factors, we pointed out that the supreme court has recognized that, "[i]f the good faith of either party in litigating liability and/or damage issues is not taken into account, offers would have the effect of unfairly forcing litigants to forego legitimate claims." *Id.* at 643, 357 P.3d at 372 (alteration in original) (quoting *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998)). In addition to noting the public policy supporting the consideration of all of the *Beattie* factors, we recognized in *Frazier* that "where . . . the district court determines that the three good-faith *Beattie* factors weigh in favor of the party that rejected the offer of judgment, the reasonableness of the fees requested by the offeror [the fourth *Beattie* factor] becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror." *Id.* at 644, 357 P.3d at 373.

A district court's application of the *Beattie* factors is reviewed for an abuse of discretion. *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000). "Such an abuse occurs when the court's evaluation of the *Beattie* factors is arbitrary or capricious." *Frazier*, 131 Nev. at 642, 357 P.3d at 372. "Claims for

attorney fees under . . . NRCP 68 are fact intensive," and "[i]f the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion." *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001). "[T]he district court's failure to make explicit findings is not a per se abuse of discretion." *Id*. at 13, 16 P.3d at 428.

I conclude that the district court abused its discretion when awarding attorney fees under NRCP 68, as the record does not clearly reflect that the district court properly considered the first three *Beattie* factors. Although the district court enunciated the factors in its order, it only summarily found that an award of attorney fees and costs was appropriate pursuant to the factors articulated in *Beattie* and *Brunzell*. The order itself fails to address the actual elements of the first three factors. Further, despite this being a fact-intensive inquiry, the court made no findings that the case was brought in bad faith, that the $1,000 offer was reasonable and in good faith in both timing and amount, or that it was grossly unreasonable or in bad faith for Harrison to reject the offer. Without specific findings as to the elements of the first three *Beattie* factors, it is impossible on the face of the order to understand how the court could have balanced all of the factors. The record on appeal should provide support to show that the district court properly considered and balanced these factors; here it does not. *See Wynn*, 117 Nev. at 13, 16 P.3d at 428-29 ("If the record clearly reflects that the district court properly considered the *Beattie* factors, we will defer to its discretion."); *cf. Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 471, 469 P.3d 176, 180 (2020) (holding that district courts must issue explicit and detailed findings for NRCP 60(b)(1) determinations).

Specifically, as to the first factor, the court focused on evidence that was provided for the first time in discovery or at trial, not when Harrison filed suit, which is how good faith under this factor is assessed. As to the second factor, the court noted that discovery had not been completed and made no finding that the offer was reasonable and in good faith as to both timing and amount. As to the third factor, the court found that Harrison was aware of substantial defects in the case and still rejected the offer. Yet the court did not conclude that the rejection of a $1,000 offer was grossly unreasonable or made in bad faith. On the contrary, the court recognized at the hearing that $1,000 was not really intended to settle the case because it would not even cover the cost of filing the case. Thus, the findings as to the first factor misapplied and misconstrued the rule, the findings as to the second factor were significantly incomplete and tended to favor Harrison, and the findings as to the third factor omitted the key element of gross unreasonableness or bad faith. Finally, the court did not balance the factors and explain what factor may have been dispositive or outweighed by any other factors.

My conclusion is further supported by the fact that Desert Medical offered to settle for $150,000 to $750,000 during trial. Because this offer was extended during trial, there is an inference that Harrison presented some credible evidence during trial, at least as to Desert Medical's negligence, and Luxor's $1,000 offer made more than 20 months before trial was not reasonable in timing or amount, or was not rejected in bad faith or otherwise grossly unreasonable.

Here, the district court focused its attention on the fourth *Beattie* factor, the reasonableness of the amount of the requested attorney fees. This factor should not have been addressed until the first three factors were fully considered and balanced against each other to establish a legal basis for awarding attorney fees. *See Frazier*, 131 Nev. at 643, 357 P.3d at 372 ("[T]he fourth *Beattie* factor . . . does not have any direct connection with the questions of whether a good-faith attempt at settlement has been made or whether the offer is an attempt to force a plaintiff to forego legitimate claims.").

It is important to note that the first three *Beattie* factors involve a qualitative analysis, not a quantitative analysis. Each factor mandates the district court to evaluate and measure something different, so the ultimate weight attached to each factor is case-specific. Factor one focuses on the good faith of the plaintiff at the moment the complaint is filed. In this case, that was in February 2016. It does not matter under this factor that the complaint was ultimately found to be nonmeritorious as to Luxor. *See Assurance Co. of Am. v. Nat'l Fire & Marine Ins. Co.*, No. 2:09–CV–1182, 2012 WL 6626809, at *3 (D. Nev. Dec. 19, 2012) ("Plaintiffs, incorrectly in hindsight, believed they had a good chance of success on the merits and pursued the claims in good faith."); *Max Baer Prod. Ltd. v. Riverwood Partners, LLC*, No. 3:09–CV–00512, 2012 WL 5944767, at *3 (D. Nev. Nov. 26, 2012) ("Claims may be unmeritorious and still be brought in good faith."). *Cf.* NRS 7.085 (providing that the court shall sanction an attorney that has brought a case not grounded in fact, not warranted by existing law, or without a good faith argument for changing the law).

The second factor has multiple components. The defendant has to act in good faith and must make a reasonable offer, both in its timing *and* in amount. Luxor acknowledges as much in its answering brief. However, was it in good faith to make an offer before discovery was completed? Was it in good faith to offer a token amount? Was Luxor merely attempting to create the foundation to file a motion for attorney fees years later while not really trying to settle the case? *See Frazier*, 131 Nev. at 644, 357 P.3d at 373 (emphasizing the necessity of considering the parties' good faith; otherwise, an offer could merely be an attempt to force a litigant to forgo a legitimate claim).

The district court did not address these good faith threshold questions. The court made no finding that the timing was reasonable. Indeed, the court suggested it might not have been because

only "some discovery was conducted" at that point. Consequently, the district court should have explained why these circumstances satisfied the burden that was on Luxor to show reasonableness as to timing.

Assuming the court could find the timing reasonable, the court would then need to evaluate the amount offered and find that it also was reasonable. However, the court expressed doubt at the February hearing about the reasonableness of the amount, stating that, from the perspective of a former trial attorney, "$1,000 offers of judgment [were viewed as] . . . just ludicrous." Therefore, making findings as to all components of factor two was crucial in light of Luxor's burden to establish good faith and reasonableness as to timing *and* amount. This $1,000 offer of judgment might seem reasonable in hindsight, but an inquiry into good faith and reasonableness as to timing and amount was still necessary and conspicuously lacking from the district court's order.[2] Indeed, findings were especially important in this case, since the facts and comments from the district court as to the second *Beattie* factor seem to point in the opposite direction of the result ultimately reached. We should not now consider unexplained and incomplete findings as decisive. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (providing that we do not defer "to findings so conclusory they may mask legal error").

I now turn to the district court's failure to apply the elements of factor three. While factors one and two require both an objective and a subjective analysis as to good faith, and factor two additionally looks to reasonableness, factor three is different. It requires an objective and subjective analysis of the plaintiff's reaction to the offer during the 10-day period immediately following the communication of the offer, as the offer expires at that point.[3] The district

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[2]In contrast, in *Tutor Perini Building Corp. v. Show Canada Industries US, Inc.*, No. 74299, 2019 WL 2305717 (Nev. May 29, 2019), Show Canada made Tutor Perini an offer of judgment for $950,000; the verdict in favor of Show Canada was for $908,892, plus $601,960 in prejudgment interest. The supreme court upheld the subsequent award of attorney fees to Show Canada under NRCP 68 in part due to the finding of the district court that Tutor Perini engaged in fraudulent activity, and also because while one factor had deficient findings, the record supported the overall conclusion as to that factor. Therefore, the dollar amounts and the unique circumstances of that case justified an affirmance even though the district court did not make explicit findings as to all of the *Beattie* factors.

[3]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). As is pertinent here, the claim, offer of judgment, trial, and motion for attorney fees were all initiated prior to March 1, 2019. Therefore, I use the version of the NRCP in effect at that time.

court must determine whether the decision to reject the offer and proceed to trial was *grossly* unreasonable or in bad faith. Therefore, even if the offer was determined to be reasonable under the second factor, that is not the standard when considering the third factor. Luxor had to show it was grossly unreasonable or in bad faith for Harrison to fail to accept the offer during the 10-day period following March 23, 2017.

As previously discussed, discovery had not been completed. Luxor knew Harrison was seeking a large amount in damages. Luxor was only offering $1,000, and Desert Medical ultimately offered up to $750,000. The circumstances as they existed on March 23, 2017, must be understood when evaluating whether Harrison acted in bad faith in rejecting the offer. Further, the circumstantial setting provides context when judging whether it was grossly unreasonable to reject the offer. *See, e.g.*, *Yamaha*, 114 Nev. at 252, 955 P.2d at 673 (explaining that "offers [should not] have the effect of unfairly forcing litigants to forego legitimate claims" and remanding for the court to reweigh all four *Beattie* factors).

Luxor contends that failing to accept the offer was grossly unreasonable because either the case was brought in bad faith or it had no merit and Harrison knew as much. In essence, failing to accept *any* offer, even prior to the completion of discovery, was grossly unreasonable. However, the district court never made an oral or written finding or legal conclusion as to the elements of this factor. The very brief apparent reference to factor three in the order was that "[Harrison] was aware of the substantial defects in the case and still rejected Luxor's offer of judgment." Such a factual determination supports a conclusion that Harrison acted unreasonably. The supreme court in *Beattie*, however, has stated that a plaintiff must have acted in a grossly unreasonable way, or in bad faith—a much higher level of culpability than unreasonableness. Here, the district court never made a factual finding or a legal conclusion that it was grossly unreasonable or in bad faith for Harrison to reject the $1,000 offer in April 2017.

To show Harrison's decision was grossly unreasonable, Luxor needed to overcome this high hurdle. *See Assurance Co. of Am.*, 2012 WL 6626809, at *3. The amount of damages the plaintiff seeks and the need for discovery are considerations in deciding whether it is grossly unreasonable to reject an offer. *See Sands Expo & Convention Ctr., Inc. v. Bonvouloir*, No. 67091, 2016 WL 5867493 (Nev. Oct. 6, 2016) ("[The] decision to reject the . . . offer in the face of extensive anticipated damages and on-going discovery does not appear grossly unreasonable."). In addition, as Harrison argues, and as stated earlier in this dissent when discussing the *Frazier* case, the policy behind offers of judgment is not to coerce plaintiffs into accepting token or low-ball offers when there is a viable case with

potentially large damages. The district court needed to carefully analyze and explain why it was nonetheless grossly unreasonable or in bad faith to reject such an offer at that stage of the litigation. *See Frazier*, 131 Nev. at 643, 357 P.3d at 373.

Looking at the three factors as a whole, the district court impliedly found factor one favored Luxor but viewed the situation as it existed later in the proceedings, not when the complaint was filed, as required by *Beattie*. As to factor two, the court stated that discovery had not been completed and never concluded that the offer was extended in good faith or that it was reasonable as to timing or amount. As to factor three, the court failed to determine if the rejection of the $1,000 offer was grossly unreasonable or in bad faith.

Finally, it was critically important for the district court to make findings and legal conclusions to explain why a factor may outweigh another factor or is otherwise given more weight, because no single factor is determinative. *See Yamaha*, 114 Nev. at 252 n.16, 955 P.2d at 673 n.16 ("The district court is reminded that no one factor under *Beattie* is determinative, and that it has broad discretion to grant the request *so long as all appropriate factors are considered*." (emphasis added)). Merely "considering" the factors is not enough, as that is only part of the process. *See State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 119 n.18, 127 P.3d 1082, 1088 n.18 (2006) (holding the district court did not properly consider the *Beattie* factors where the record did not reflect "what, if any, analysis was made" and recognizing that the record must reflect this analysis for the decision to be upheld).

Therefore, I conclude that the district court abused its discretion by failing to properly consider and apply the first, second, and third *Beattie* factors, to explain their interplay with each other, which itself was not supported by any findings, or to then determine and balance factor four, if the first three factors supported the discretionary award of attorney fees. A remand to apply the elements of each factor is necessary. Public policy also supports this conclusion, as litigants should not be coerced into settling cases because of the fear of large awards of attorney fees, which the court might determine months or years later, in hindsight, should be awarded because a token offer was reasonable. Further, cautioning the district courts to correctly apply *Beattie* has not been sufficient, as this case illustrates.[4] Allowing a court to impose a large, five-figure judgment

[4]*See Schwartz v. Estate of Greenspun*, wherein the supreme court stated in 1994 that it "caution[ed] the trial bench to provide written support under the *Beattie* factors for awards of attorney's fees made pursuant to offers of judgment even where the award is less than the sum requested," as "[i]t is difficult at best for this court to review claims of error in the award of such fees where the courts have failed to memorialize, in succinct terms, the justification or rationale for the awards." 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994).

against a party for attorney fees in a summary proceeding, when the court itself does not fully follow the correct procedure, is incompatible with justice. Making appropriate findings alleviates any such concern.

Therefore, I concur in part and dissent in part and would vacate the attorney fees award and remand this case to the district court to make findings as to each *Beattie* factor and then balance them to determine if a judgment for attorney fees should be entered.