petition, presents a circumstance where counsel's actions or omissions can constitute cause for the delay under NRS 34.726(1)(a) for filing an untimely postconviction petition. To demonstrate cause for the delay based on such a circumstance, a petitioner must show: (1) a reasonable belief counsel filed a petition on petitioner's behalf; (2) this belief was objectively reasonable; (3) counsel abandoned the petitioner without notice and failed to file the petition; and (4) the petitioner filed a petition within a reasonable time after the petitioner should have known counsel did not file a petition. We conclude Harris demonstrated cause for the delay under this test. Therefore, we reverse the district court's order dismissing Harris' petition. Because the district court did not make any findings regarding whether Harris established undue prejudice, we remand to the district court to determine whether Harris demonstrated undue prejudice under NRS 34.726(1)(b).

Silver, C.J., and Tao, J., concur.

STEVEN DALE FARMER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 65935

November 16, 2017 405 P.3d 114

Appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of sexual assault, eight counts of open or gross lewdness, and one count of indecent exposure. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Affirmed.

[Rehearing denied February 23, 2018]

Stiglich, J., with whom Cherry, C.J., and Hardesty, J., agreed, dissented.

Philip J. Kohn, Public Defender, and *Ryan J. Bashor* and *Deborah L. Westbrook*, Deputy Public Defenders, Clark County, for Appellant.

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

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

Appellant Steven Farmer was charged with numerous sexual offenses based on accusations that he used his position as a certified nursing assistant (CNA) to take advantage of multiple patients in his care. The State of Nevada argued that Farmer should face five of his accusers in one trial, and Farmer argued in favor of separate trials. After a hearing on the matter, the trial court granted the State's motion to join the offenses under the theory that they were committed pursuant to a common scheme or plan according to NRS 173.115(2). In this appeal, Farmer argues that this court has construed the common scheme or plan language to permit joinder only where the defendant had an overarching plan which involved committing each offense as an individual step toward a predetermined goal, and since his offenses were crimes of opportunity, the trial court erred by joining them. We disagree with his arguments and conclude that the court properly joined the offenses in a single trial. Because we further conclude that his remaining claims lack merit, we affirm the judgment of conviction.

I.

Five female patients who were treated at Centennial Hills Hospital over a two-month period in 2008 testified that Farmer, a CNA employed by the hospital, touched them in a sexual manner. The first patient, L.S.,[1] was taken by ambulance to Centennial Hills in April 2008, following a suicide attempt. She was introduced to Farmer the next day. While she sat in her hospital bed waiting to be moved to a mental health facility, Farmer chatted with L.S. and pushed his groin against her foot. L.S. tried to move away but Farmer continued to push his groin into her while smirking. L.S. and her aunts, who were also in the room, discussed the incident afterward but did not report it to the hospital or to law enforcement at the time.

About two weeks later, M.P. was taken by ambulance to Centennial Hills after experiencing a seizure that left her unable to speak or move. While recovering, M.P. awoke to find Farmer pinching and rubbing her nipples. When Farmer realized M.P. was awake, he told her that one of the leads of her electrocardiogram (ECG) machine had come off. Later, he lifted M.P.'s hospital gown and peered at her exposed body. He then informed M.P. that she had fecal matter on her underside, lifted her legs, and stuck his thumb in her rectum. After that, he penetrated her vagina with his fingers, explaining that he was checking her catheter. When she regained the ability to speak,

[1]The parties amended their respective briefs to refer to Farmers' victims by their initials, and we do so as well for the purposes of this opinion.

M.P. told her sons that Farmer had touched her inappropriately, but she did not report the incident to the hospital or to law enforcement at the time.

A few days later, H.S. was taken by ambulance to Centennial Hills following a seizure. Farmer, who was assigned to transport H.S. to her room, told her when they were alone in an elevator that he should remove the ECG leads. As she lay on the gurney, Farmer opened H.S.'s hospital gown and exposed her breasts. He then removed the leads from her chest, grazing her breast, but did not remove the other leads from her body. Feeling uncomfortable about the situation, H.S. closed her gown and Farmer nervously laughed. Later, Farmer told H.S.'s husband that the ECG leads were tangled in her blanket. Without adjusting the blanket, Farmer exposed and began touching H.S.'s breasts. Her husband covered her and asked Farmer why he had not been more modest. Farmer quickly left the room. H.S. and her husband did not discuss the incidents until later and did not report them at the time.

The same day, R.C. was taken by ambulance to Centennial Hills following a seizure. Farmer was assigned to transport her to her room. Once they were alone in an elevator, Farmer reached underneath R.C.'s blanket and rubbed her thigh. Farmer told R.C. that the medications administered by the hospital would take effect and she would fall asleep. After transporting R.C. to her room, Farmer repeatedly told her that she needed to relax. He then penetrated her vagina with his fingers, explaining that it was procedure and would help her rest. He also squeezed R.C.'s breasts and, according to R.C., performed cunnilingus. Afterwards, Farmer told the nurses assigned to R.C. that they did not need to check on her because she was highly medicated and would not know whether they visited. R.C. reported the incident to the hospital and police, leading to an investigation.

The next day, D.H. was transported by ambulance to Centennial Hills after experiencing chest pains and shortness of breath. While her nurse was out of the room, Farmer walked in, announced that he was there to check on her, then opened D.H.'s hospital gown and exposed her breasts. Farmer touched the ECG leads on D.H.'s abdomen and chest, grazing her breast, but did not touch the remaining leads. D.H. felt uncomfortable because there was no apparent need for Farmer to be in the room or to expose her breasts, but she did not report the incident at the time. D.H.'s nurse, who had witnessed the incident, reported Farmer's conduct.

R.C. was the first patient to report that Farmer had touched her sexually. After law enforcement issued a media release, L.S., M.P., H.S., and D.H. came forward. At trial, each woman testified about Farmer's actions,[2] and other witnesses, including a witness offered

[2]M.P. passed away before trial but a previously recorded deposition was played for the jury in lieu of live testimony.

by the defense, testified about Farmer's unusual behavior, corroborating portions of the victims' testimonies. Farmer was convicted by a jury of four counts of sexual assault, eight counts of open or gross lewdness, and one count of indecent exposure, and was sentenced to three consecutive terms of life imprisonment with the possibility of parole after ten years, as well as other concurrent sentences.[3] This appeal followed.

II.

Farmer's main contention on appeal, which is the focus of this opinion, is that the trial court abused its discretion by granting the State's motion to join the offenses alleged by L.S., M.P., H.S., R.C., and D.H., and by denying his motion to sever the charges. He argues that the reasoning behind the trial court's decision—that the offenses were parts of a common scheme or plan—was erroneous because the State did not show that each offense was an integral part of an overarching criminal enterprise. The State counters by pointing to the striking similarities between the offenses, which it argues demonstrate that they were committed pursuant to design as opposed to being crimes of opportunity. Both parties cite authority in support of their positions, revealing some tension in our joinder jurisprudence.

A.

NRS 173.115 provides that separate offenses may be joined if they are (1) "[b]ased on the same act or transaction" or (2) "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[4] An examination of this court's jurisprudence applying NRS 173.115(2) reveals that, historically, this court has focused on whether the offenses shared certain elements in common when determining whether they were properly joined, at least insofar as those similarities were striking enough to suggest that the offenses were committed as part of a scheme or plan. In *Mitchell v. State*, for example, we held that the trial court erred by joining charges arising from two separate incidents, 45 days apart, where the defendant sexually assaulted women after taking them to the same bar. 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989). In doing so, we noted that there were some minor similarities between the two incidents, but not enough to suggest that the incidents were committed pursuant to design: "[T]aking two different women dancing and later attempting intercourse [cannot] be considered part of a

[3]Farmer was found not guilty of an indecent exposure charge regarding H.S. and one sexual assault charge regarding R.C.

[4]The 2017 amendments to NRS 173.115 are not relevant to our discussion. A.B. 412, 79th Leg. (Nev. 2017).

common plan just because the women are taken in part to the same bar." *Id*. But in *Shannon v. State*, we held that the trial court appropriately joined charges arising out of two separate incidents where the defendant met his young victims, both of the same age group, through his role as leader of a canoe club, placed himself in a position of trust over them, then committed sexual acts on them while on canoe trips. 105 Nev. 782, 786, 783 P.2d 942, 944 (1989). In upholding that decision, we stated that "[g]iven the closeness of the acts, the similar circumstances, and the same modus operandi, the criterion of a common scheme or plan was sufficiently satisfied." *Id*. We used the same analysis in other cases, conducting a fact-specific inquiry comparing the offenses to be joined and discussing whether there were sufficient connections to give rise to the inference that the offenses were committed pursuant to a common scheme or plan rather than unrelated crimes of the same ilk. *E.g.*, *Middleton v. State*, 114 Nev. 1089, 1107, 968 P.2d 296, 308-09 (1998); *Tillema v. State*, 112 Nev. 266, 269, 914 P.2d 605, 607 (1996); *Graves v. State*, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996); *Griego v. State*, 111 Nev. 444, 449, 893 P.2d 995, 999 (1995), *abrogated on other grounds by Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000).

Although our analyses focused on whether the joined offenses shared features in common, we were not always clear regarding which portion of NRS 173.115(2) we were relying upon in reaching our decisions. *See, e.g*., *State v. Boueri*, 99 Nev. 790, 796, 672 P.2d 33, 37 (1983). In *Weber v. State*, this court took its first real stab at providing guidance regarding the phrase "connected together or constituting parts of a common scheme or plan." 121 Nev. 554, 571-73, 119 P.3d 107, 119-20 (2005). Looking to our prior cases, we held that offenses were "connected together" when evidence of the offenses would be cross-admissible at separate trials, a consideration that had always floated around in our prior decisions but had not been moored to any particular language in the joinder statute. *Id.* at 573, 119 P.3d at 120. We also defined the words "scheme" and "plan" for the first time. *Id*. at 572, 119 P.3d at 119-20. Looking to *Black's Law Dictionary*, we defined scheme as "a design or plan formed to accomplish some purpose; a system," and plan as "a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. Method of putting into effect an intention or proposal." *Id*. (internal quotation marks omitted). We then considered the facts of that case in the context of those definitions and held that the offenses were connected together but were not adequately shown to have been parts of a common scheme or plan. *Id*. at 573, 119 P.3d at 120.

B.

Farmer argues that *Weber* changed the joinder calculus. Specifically, he argues that *Weber* eliminated any consideration of whether

the offenses to be joined share sufficient similarities and refocused the analysis on whether each offense was a pre-planned step up the ladder toward a specific, predetermined goal. Farmer reads *Weber* too narrowly. Nothing in *Weber* (or the prior-bad-acts line of cases upon which he also relies) indicates an intent to overrule decades of this court's joinder jurisprudence. We recognize, however, that *Weber*'s definitions of "scheme" and "plan" arguably leave little room for the broader similarity analysis that we have historically employed in joinder cases. Nothing about those definitions is facially wrong, and *Weber*'s holding was correct based on the facts of that case. But *Weber* construed the words "scheme" and "plan" as synonyms. Defining different words, separated by the conjunction "or," to mean the same thing is incorrect under the canons of statutory interpretation. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), *overruled in part on other grounds by Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). And interpreting "scheme" and "plan" as having nearly identical meanings ignored the common usage of the words in the evidentiary context. *See generally* David. P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 9.2.2 (2009).

Contrary to our discussion in *Weber*, the words "scheme" and "plan" as used in NRS 173.115(2) have different implications and ground different theories of joinder. Instead of reading NRS 173.115(2)'s "parts of a common scheme or plan" language as one phrase with one meaning, NRS 173.115(2) is properly understood as permitting joinder if the offenses are "parts of a common scheme" *or* "parts of a common plan." And "the terms 'common scheme' and 'common plan' are not synonymous." *Scott v. Commonwealth*, 651 S.E.2d 630, 635 (Va. 2007). In the joinder context, "the term 'common plan' describes crimes that are related to one another for the purpose of accomplishing a particular goal." *Id*. In contrast, "[t]he term 'common scheme' describes crimes that share features idiosyncratic in character." *Id.*

Thus, in addition to rejecting any reading of *Weber* that would suggest a narrowing of our decisions, we clarify that the similarity analysis in our prior decisions derives from NRS 173.115(2)'s language that offenses may be joined when they are committed as parts of a common scheme.[5] While there may be valid reasons to limit

[5]Farmer also points to a line of cases discussing the admission of bad acts pursuant to NRS 48.045(2). While we do not discount the notion that cases interpreting the terms "scheme" and "plan" in the bad-acts context can be considered when interpreting the terms in the joinder context (as we do throughout this opinion), Farmer's reliance on this particular line of cases is misguided. NRS 48.045(2) states that evidence of bad acts may be admissible as proof of "plan"—not "common scheme or plan"—and the bad-acts line of cases tend to direct back to *Nester v. State*, which referred to the common law rule that evidence of bad acts was admissible to establish "a common scheme or

the circumstances in which different offenses may be joined,[6] defining the "common scheme" theory of joinder as we do is not only consistent with its understanding in the evidentiary context, giving independent meaning to the word "scheme" where there otherwise would be none, it is consistent with our well-settled understanding of NRS 173.115(2) and the traditional understanding of joinder generally. *See* Clifford S. Fishman & Ann T. McKenna, *Jones on Evidence: Civil and Criminal* § 17:17 (7th ed. Supp. 2016) ("Separate crimes committed with a similar, unusual modus operandi, or with sufficient similar characteristics, also may be joined for trial.").

C.

We now turn to the question of whether joinder was appropriate in this case. For the purposes of this opinion, we focus on whether the various offenses were shown to have been parts of a common scheme.[7] As our prior decisions demonstrate, the fact that separate offenses share some trivial elements is an insufficient ground to permit joinder as parts of a common scheme. *See, e.g.*, *Mitchell*, 105 Nev. at 738, 782 P.2d at 1342. Instead, when determining whether a common scheme exists, courts ask whether the offenses share such a concurrence of common features as to support the inference that they were committed pursuant to a common design. *State v. Lough*, 889 P.2d 487, 494 (Wash. 1995). Features that this court has deemed relevant to this analysis include (1) degree of similarity of offenses, *Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003); (2) degree of similarity of victims, *id*. at 303, 72 P.3d at 590; (3) temporal proximity, *Mitchell*, 105 Nev. at 738, 782 P.2d at 1342; (4) physical proximity, *Griego*, 111 Nev. at 449, 893 P.2d at 999; (5) number of victims, *id*.; and (6) other context-specific features.[8] No one fact is dispositive, and each may be assessed different weight depending

---

plan *embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others*." 75 Nev. 41, 46, 334 P.2d 524, 527 (1959) (emphasis added), *abrogated on other grounds by Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012). And, like *Weber*, they do not separately discuss common scheme.

[6]The federal joinder rule, which provides that offenses can be joined when they are merely of "the same or similar character," even if those similarities are insufficient to give rise to the inference that they were committed pursuant to a common scheme or plan, has been criticized for allowing the jury to make improper character inferences. Kevin P. Hein, *Joinder and Severance*, 30 Am. Crim. L. Rev. 1139, 1149 (1993) (internal quotation marks omitted); James Farrin, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 Law & Contemp. Probs. 325, 331 (1989).

[7]We also agree with the State's argument that joinder was permissible because the offenses were connected together under *Weber*.

[8]Other courts have looked to similar facts. *See United States v. Ortiz*, 613 F.3d 550, 557 (5th Cir. 2010)*; State v. Elston*, 735 N.W.2d 196, 199 (Iowa 2007); *Commonwealth v. Pillai*, 833 N.E.2d 1160, 1166 (Mass. 2005).

on the circumstances. *Weber*, 121 Nev. at 572, 119 P.3d at 119 ("Determining whether a common scheme or plan existed in this, or any, case requires fact-specific analysis.").

We have little difficulty concluding that Farmer's offenses were adequately shown to have been parts of a common scheme. The incidents all occurred within the span of several weeks, and all at Centennial Hills Hospital. While the record suggests that the victims' physical attributes varied, the victims were markedly similar in that each was in a profoundly vulnerable state having been taken to Centennial Hills by ambulance after a traumatic medical episode. Of particular relevance, the offenses were not based on one or two incidents widely separated in time, but the allegations of five unrelated victims who claimed that Farmer touched them sexually while suggesting, or outright stating, that the touching was a part of their medical care. To be sure, the various incidents were not identical. But they are not required to be. *See State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006) (recognizing that evidence of other offenses admitted as parts of a common scheme or plan need not be identical but must be markedly similar). And while Farmer's argument that many of these facts were obviously going to be present given that the allegations all stemmed from his role as a CNA is well taken, it does not alter our analysis. To hold under these circumstances that Farmer did not have a scheme to use his position as a CNA to access unusually vulnerable victims and exploit them under the guise of providing medical care would unjustifiably narrow the term, leaving it with little practical effect. Simply put, "these counts involve too many similar factors when viewed together, to be anything but clearly linked and part of the same common scheme or plan." *Rushing v. State*, 911 So. 2d 526, 536 (Miss. 2005).

D.

Our joinder analysis is not done yet, because even if offenses are appropriately joined under NRS 173.115 the trial court should order separate trials if it appears that the defendant will be unduly prejudiced. NRS 174.165(1). For separate trials to be required, "'[t]he simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process.'" *Rimer v. State*, 131 Nev. 307, 323-24, 351 P.3d 697, 709 (2015) (quoting *Honeycutt v. State*, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002), *overruled on other grounds by Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005)). In that regard, Farmer argues that joining all of the offenses was fundamentally unfair because it created too great a risk that the jury would improperly infer that he had the propensity to commit sexual acts without considering each charge separately. And he argues that the State exacerbated this problem by repeatedly asking the jury to make this exact inference. We disagree.

The State did not argue or suggest that Farmer was a sexual deviant and therefore had the propensity to commit deviant acts. Instead, the State made the logical and appropriate argument that the number of victims, and similarity of their stories, was evidence that the offenses actually occurred as the victims claimed, which was the primary issue in the case. *See* Leonard, *The New Wigmore: A Treatise on Evidence*, *supra*, § 9.4.2 (noting the "doctrine of chances," which recognizes that sexual molestation charges involving separate victims may be cross-admissible where the defense is the accusations are false or the victims mistaken; cross-admissibility or joinder rests in such cases on the objective "improbability of so many unfounded accusations of sexual molestation being made independently," effectively removing as a plausible explanation the possibility of mistake or accident). The State's argument thus was not an impermissible attack on Farmer's character nor did it unfairly invite the jury to make improper character inferences. *See generally* Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. Davis L. Rev. 355, 407-08 (1996) (discussing evidence involving multiple accusers with similar stories and explaining that "[f]ocusing as it does on the accusers' stories rather than on the accused's conduct, similar accusations evidence is easily distinguished from character").[9] Farmer's defense—that R.C. falsely accused him of rape and the other women mistook innocent medical care as sexual after he was branded as a rapist—was not complicated and we are confident that jurors were capable of carefully considering the elements of each offense under the circumstances.

E.

Even if reasonable minds might differ as to whether joinder was appropriate in this case, we cannot state that the trial court abused its discretion in making its joinder decision under the circumstances described above. *See Rimer*, 131 Nev. at 320, 351 P.3d at 707 (reviewing a trial court's decision regarding a motion to join or sever offenses for an abuse of discretion, viewed at the time the court made its decision). While not central to our decision, we note that the trial court declined to join offenses relating to a sixth vic-

[9]This determination might have been different had Farmer acknowledged that someone committed the offenses but denied he was the suspect or proffered different defenses in his motion to sever. *See generally People v. Ewoldt*, 867 P.2d 757, 772 (Cal. 1994) (observing that in cases where "it is beyond dispute that the charged offense was committed by someone [and] the primary issue to be determined is whether the defendant was the perpetrator of that crime," evidence that the defendant committed offenses that were markedly similar but insufficient to establish identity may be deemed overly prejudicial), *superseded by statute on other grounds as stated in People v. Britt*, 128 Cal. Rptr. 2d 290 (Ct. App. 2002).

tim—F.R.—whom Farmer also met in his role as a CNA, observing that the allegations involving F.R. were further removed in time (they occurred months before the other incidents) and location (they occurred at a psychiatric hospital, not Centennial Hills), and that the circumstances were too dissimilar for other reasons (F.R. dated Farmer thereafter). Our review of the record indicates that the trial judge adequately weighed each party's position after considering the relevant law and facts and reached a decision consistent with this court's authority discussing the common scheme theory of joinder under NRS 173.115(2) and misjoinder under NRS 174.165. We hold that there was no abuse of discretion. *See Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.").

III.

Farmer also alleges that his rights under Nevada and federal law were violated before trial, during trial, and at sentencing. We consider these arguments in turn.

A.

Farmer first asserts that the trial court violated his right to a speedy trial under the Sixth Amendment. Courts engage in a four-part balancing test to determine whether a defendant's speedy-trial rights were violated: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Middleton v. State*, 114 Nev. 1089, 1110, 968 P.2d 296, 310 (1998). While the first factor tends to favor Farmer, the second and third factors overwhelmingly weigh against him as almost all of the delay is attributable to the defense and he personally waived his speedy-trial right. And although he argues he was prejudiced because M.P. committed suicide before trial, he had an adequate opportunity to cross-examine her before trial as explained in more detail below. His claim therefore fails.

B.

Next, Farmer asserts that the trial court so unreasonably restricted his cross-examination of R.C., her husband, and H.S.'s nurse, that it violated his right to confrontation. We review a trial court's evidentiary rulings for an abuse of discretion and the ultimate question of whether a defendant's Confrontation Clause rights were violated de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Importantly, "trial judges retain wide latitude insofar as

the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Regarding R.C. and her husband, Farmer says that he should have been able to question them about several issues. First, he asserts that he should have been able to ask the couple about problems in their marriage because the State argued that their marriage fell apart due to the sexual assault. Our review of the record, however, indicates that Farmer wanted to bring up allegations made in the couple's divorce proceedings to show that one of them had not told the truth in those proceedings, not the basis he proffers on appeal. *Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (recognizing that an appellant generally may not change his theory underlying an assignment of error on appeal). The trial court invited Farmer to raise the matter during trial if the door was opened to specific allegations, but he did not. Second, Farmer asserts that he should have been able to question R.C. about whether her civil attorney had represented her in prior litigation because she stated that he was "just a friend." But R.C. never claimed her attorney was "just" a friend, and it was clear that he had represented her in civil cases. Finally, Farmer asserts that he should have been able to question R.C. about her interactions with nurses after the assault. Farmer had already questioned R.C. about these interactions and she repeatedly stated that she did not recall speaking with the nurses. The trial court acted within its authority to restrict further cross-examination on the subject. We discern no abuse of discretion or violation of Farmer's constitutional rights.

Regarding H.S.'s nurse, Farmer argues that he should have been able to ask her about the fact that she was fired from Centennial Hills to demonstrate her bias against the hospital and rebut her testimony that he did not follow proper hospital procedure. However, Farmer was not prohibited from asking the nurse about her firing and the trial court did not abuse its discretion by determining that the reason why she was fired was irrelevant. We discern no abuse of discretion or violation of Farmer's constitutional rights.

Regarding M.P., Farmer argues that the trial court unreasonably restricted his cross-examination during her deposition and violated his right to confrontation by allowing her deposition testimony to be introduced at trial. *See Chavez*, 125 Nev. at 337, 213 P.3d at 483 ("[T]he Confrontation Clause bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'") (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). We discern no abuse of discretion with the trial

court's rulings regarding the questions during M.P.'s deposition. As to Farmer's assertion that the introduction of the deposition testimony was improper because he subsequently obtained information about which he was unable to cross-examine M.P., he only identifies two areas that he was unable to fully explore. First, he claims he was unable to question M.P. regarding her subsequent suicide. We reject this argument, as it would mean the prior testimony of an unavailable witness could never be given at trial unless the defendant had cross-examined the witness regarding the reasons for her unavailability. Second, he claims he was unable to question M.P. regarding a statement her son made at trial that she avoided male medical professionals after the incident. M.P.'s testimony at the deposition provided an adequate opportunity to explore this area even if it did not directly relate to her son's comment. *See id.* at 338, 213 P.3d at 483 ("the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish") (internal quotation marks omitted).

C.

Farmer also asserts that the trial court abused its discretion in making several evidentiary decisions. *See Vega v. State*, 126 Nev. 332, 341, 236 P.3d 632, 638 (2010) (recognizing that trial courts have "broad discretion to determine the admissibility of evidence"). First, he asserts that the trial court should have excluded testimony about the psychological effect of his attacks on R.C. and H.S. because it was irrelevant and overly prejudicial. The State argues that this evidence was admissible because it tended to show that the victims were being truthful in their allegations. Regarding R.C., we agree with the State. *See id.* at 342, 236 P.3d at 639 (holding that evidence of the victim's suicide attempt was relevant and not overly prejudicial because "it had a tendency to establish that it is more probable than not that [the defendant] had sexually assaulted the victim"); *see also Dickerson v. Commonwealth*, 174 S.W.3d 451, 472 (Ky. 2005) (permitting introduction of "evidence of a victim's emotional state following a sexual assault as proof that the assault, in fact, occurred" and collecting similar cases).[10] Regarding H.S., we agree with Farmer. Unlike R.C., whose credibility was a key issue, the relevant issue with H.S. and her husband was whether

[10]We conclude that the trial court did not err by denying Farmer's proposed instruction advising the jury not to consider this evidence. Although Farmer argues on appeal that the testimony went beyond the narrow time parameters established by the trial court, he did not contemporaneously object on this ground or otherwise seek to clarify the time frame, which precludes appellate review of the issue. *See Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986) ("We have consistently held that this Court will not speculate as to the nature and substance of excluded testimony.").

they had mistaken innocent medical care as inappropriate sexual conduct. Thus, this evidence had less probative value than it did for R.C. and was ultimately unfairly prejudicial. However, we conclude that the introduction of this evidence regarding H.S. was harmless under the circumstances.

Second, Farmer argues that the trial court abused its discretion by refusing to admit a portion of a redacted copy of M.P.'s diary, which suggested that personal issues may have led to her suicide, not issues relating to the assault. Farmer fails to demonstrate that the portion of the diary was admissible; his reliance on NRS 47.120 is misplaced because the diary was never introduced and he does not establish a sufficient evidentiary basis to admit it on other grounds.

Third, Farmer argues that the trial court abused its discretion by permitting evidence of two uncharged bad acts without a limiting instruction. *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001), *modified by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). He first takes issue with a nurse's testimony that he violated federal rules by discussing R.C.'s condition in front of another patient. We are not convinced that this constitutes a bad act as contemplated by NRS 48.045(2), but in any event, no relief is warranted because Farmer objected to the comment and the State moved on. Next, Farmer challenges admission of a photograph of R.C. that listed Phenobarbital as the "date rape drug." This inadvertently included notation in no way suggested that Farmer had administered the drug to R.C. and does not constitute a bad act. We conclude that no relief is warranted on these claims.

Next, Farmer claims that the State's witnesses inappropriately vouched for one another by making statements regarding the victims' demeanor, describing other witnesses as cooperative or uncooperative, and restating each other's testimony. "A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness." *Perez v. State*, 129 Nev. 850, 861, 313 P.3d 862, 870 (2013). Upon review, we conclude that the challenged testimony does not constitute improper vouching so as to warrant relief.

D.

Farmer also asserts that the prosecutor committed numerous instances of misconduct. However, he only fairly and contemporaneously objected to one: the prosecutor's argument that a normal person in Farmer's position would have denied committing sexual assault when confronted with the accusation. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (explaining that harmless error review only applies when prosecutorial misconduct is preserved). The prosecutor's argument was a fair comment on the testimony concerning Farmer's response when a hospital employee called him and relayed the allegation of sexual abuse. Regard-

ing the unpreserved misconduct, we conclude that Farmer fails to demonstrate plain error that affected his substantial rights. *See id.* (explaining that a defendant must demonstrate plain error regarding unpreserved allegations of prosecutorial misconduct).

E.

Finally, Farmer contends that his sentence constitutes cruel and unusual punishment. *See* U.S. Const. amend. VIII; Nev. Const. art. 1, § 6. He claims that his sentence shocks the conscience because it essentially condemns him to a life-sentence for actions that did not cause substantial physical harm. We disagree. We also reject Farmer's claim that cumulative error warrants relief. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 ("When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.") (internal quotation marks omitted).

As Farmer received the fair trial to which he was entitled, we affirm.

Douglas, Gibbons, and Parraguirre, JJ., concur.

Stiglich, J., with whom Cherry, C.J., and Hardesty, J., agree, dissenting:

The district court denied appellant Steven Farmer's challenge to improper joinder pursuant to NRS 173.115 and denied Farmer's motion to sever for prejudicial joinder pursuant to NRS 174.165. The majority concludes that the charges involving five different victims and involving largely different acts on different days were properly joined as parts of a common scheme and that joinder was not unfairly prejudicial. Respectfully, I dissent from these decisions.

Improper joinder

NRS 173.115 allows for the joinder of offenses against a single defendant only when the offenses charged 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." If these conditions are not met, the district court must order separate trials.[1]

[1]It should be noted that the majority of the federal circuits have held that the issue of joinder should be based on a review of the charging documents alone. *See, e.g.*, *United States v. Butler*, 429 F.3d 140, 146 (5th Cir. 2005); *United States v. Chavis*, 296 F.3d 450, 456 (6th Cir. 2002); *United States v. Wadena*, 152 F.3d 831, 848 (8th Cir. 1998); *United States v. Coleman*, 22 F.3d 126, 134 (7th Cir. 1994); *United States v. Natanel*, 938 F.2d 302, 306 (1st Cir. 1991); *United States v. Terry*, 911 F.2d 272, 277 (9th Cir. 1990). Here, looking solely at the charging documents, joinder was improper because the State's basis for joinder was not apparent from the charging documents. This issue has not been addressed by the parties, nor has it been clearly addressed in our caselaw. Thus, like the majority, I have examined the totality of the record before us.

Judicial economy and prejudice have no part of the district court's analysis of improper joinder.[2] Although our prior caselaw has suggested that this court will review an improper joinder decision for an abuse of discretion, *see Zana v. State*, 125 Nev. 541, 548, 216 P.3d 244, 249 (2009), the issue of improper joinder is a question of law that should be reviewed de novo, *see Coleman*, 22 F.3d at 134; *Terry*, 911 F.2d at 276. On appeal, the issue of improper joinder is subject to harmless error analysis and the State must demonstrate that the improper joinder did not have a substantial and injurious effect or influence in determining the jury's verdict. *See Mitchell v. State*, 105 Nev. 735, 738-39, 782 P.2d 1340, 1343 (1989); *see also United States v. Lane*, 474 U.S. 438, 449 (1986).

The district court found that the State had demonstrated a common scheme or plan: Farmer used his position as a certified nursing assistant at Centennial Hills Hospital to access and sexually abuse female patients. The majority has affirmed that finding, concluding that the charges involving the five different victims were properly joined as part of a common scheme.[3] However, rather than using the definition for common scheme set forth in *Weber v. State*, "a 'design or plan formed to accomplish some purpose; a system,'" 121 Nev. 554, 572, 119 P.3d 107, 119-20 (2005) (quoting *Black's Law Dictionary* 936 (abr. 6th ed. 1991)), the majority has redefined common scheme to mean similarity, a test implicitly rejected in *Weber*.

In *Weber*, using the definitions of plan and scheme in *Black's Law Dictionary*, this court determined that a "purposeful design is central to a scheme or plan." 121 Nev. at 572, 119 P.3d at 120. This meaning of common plan or scheme is likewise employed by other jurisdictions that allow joinder based upon two or more acts being part of a common scheme or plan. For instance, the Ninth Circuit has rejected "mere thematic similarity" as a basis for joinder under common plan or scheme, instead requiring the offenses to have a "concrete connection" and to "grow out of related transactions." *United States v. Jawara*, 474 F.3d 565, 574 (9th Cir. 2007) (quoting *United States v. Randazzo*, 80 F.3d 623, 627 (1st Cir. 1996)). Similarly, Arizona has determined that for offenses to be joined as part of a common scheme or plan "the state must demonstrate that the other act is part of 'a particular plan of which the charged crime is a part.'" *State v. Ives*, 927 P.2d 762, 766, 768 (Ariz. 1996).

---

[2]Rather, these concerns are only properly considered by the district court in the context of prejudicial joinder under NRS 174.165, which assumes that the charges are properly joined.

[3]The majority has further concluded that the offenses were properly joined as "connected together" but provided no analysis for how any of the offenses would be cross-admissible in separate trials. This conclusion appears inappropriate where the district court did not reach this issue and the State inadequately addressed it on appeal.

In addition to allowing joinder when offenses are part of a common scheme or plan, Arizona and the federal courts allow offenses to be joined when they are of the same or similar character. *See* Fed. R. Crim. P. 8(a); Ariz. R. Crim. P. 13.3(a)(1). However, unlike the rules in Arizona and in the federal courts, Nevada's joinder statute does not contain a provision for joining offenses of "similar" character. The majority overlooks this limitation and reads similarity into "common scheme." In fact, the factors that the majority has set forth for evaluating whether there is a common scheme are nearly identical to the factors federal courts will consider in evaluating whether offenses are of the same or similar character under Fed. R. Crim. P. 8(a). *See Jawara*, 474 F.3d at 578; *United States v. Edgar*, 82 F.3d 499, 503 (1st Cir. 1996). If our Legislature had intended to allow for joinder based on the similarity of offenses, the Legislature could have expressly done so as provided for in the federal rules. It did not. And we should not expand the types of offenses that may be joined by caselaw or by a strained reading of "common scheme."

We should be cautious about any expansion of our joinder statute to include similarity of offenses. Joinder based on similarity of offenses has been routinely questioned by courts and commentators. *See Jawara*, 474 F.3d at 575. A number of studies have demonstrated that joinder of offenses against a single defendant in a single trial results in a "bias against the defendant." Kenneth S. Bordens & Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 L. & Hum. Behav., No. 4, 339 (1985). This bias may be due to confusion of evidence, accumulation of evidence across the multiple offenses, or inferences of defendant's criminality. *Id*. at 344-49. Although studies disagree about the nature of the bias, the research indicates an increased likelihood that a defendant will be found guilty in a joined trial. *Id*. The joinder of similar crimes appears to have an even more prejudicial effect than the joinder of dissimilar crimes. Sarah Tanford et al., *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 L. & Hum. Behav., No. 4, 335 (1985). The findings of the Tanford study further indicated that "joinder effects are stronger with weaker cases." *Id*. at 333. This latter risk is particularly weighty in this case.

Even without the risks of joinder found in cases involving similar offenses, I find problematic that the offenses in this case were quite dissimilar. Although these offenses occurred in a relatively short period of time at Centennial Hills Hospital, the allegations of misconduct are not similar across all of the cases.[4] For instance, in the charges involving D.H., H.S., and M.P., the alleged misconduct occurred under the guise of patient or medical care, while there is no argument that the alleged offenses against R.C. and L.S. occurred

[4]Farmer concedes that the offenses involving D.H. and H.S. could be tried together.

under the guise of medical care. The nature of the contact in the charges involving D.H. and H.S. was different from the contact in the charge involving L.S., and different yet again from the contact in the charges involving R.C. Although all of the victims were patients, there was little consistency between the victims themselves. Only three of the five victims had suffered seizures while one had attempted suicide and the last had an asthma attack. The levels of incapacity varied among the victims from not incapacitated to completely incapacitated. Some of the alleged offenses occurred in front of others while other offenses were alleged to have occurred when Farmer was alone with the victim. The victims varied in age and ethnicity. To the extent that the district court implied sexual gratification could be a common link in these offenses, that could connect a great many crimes and is alone insufficient to warrant joinder. *Cf. Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 590 (2003) (holding that money and greed could connect too many potential crimes to warrant joinder). The flawed focus on similarity to establish a common scheme as well as the actual dissimilarities amongst the charges in this case compel a finding of improper joinder.

I also cannot say that there was not a substantial and injurious effect or influence on the jury's verdict in this case based on the improper joinder. The evidence in this case could hardly be termed overwhelming given the discrepancies in testimony. For instance, R.C.'s testimony was contradicted by the testimony of other witnesses. Although a limiting jury instruction was provided in this case to consider each offense separately, such limiting jury instructions have not been found to be effective at eliminating bias against the defendant. Tanford, *supra*, at 321.[5] Further, the State's closing argument linking the victims and stating, "This is what he does," asked the jury to do exactly what the jury should not have done, to accumulate the evidence against Farmer across the multiple charges and infer criminality in his character. The State has not demonstrated that error relating to the improper joinder was harmless and I would vacate the convictions and remand for separate trials.[6]

---

[5]In this case, the jury was instructed: "Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other [ ] offense charged."

The Tanford study indicated that only a robust jury instruction that hits upon the potential sources of prejudice to a defendant in a joint trial (inference of defendant's criminality, confusion, and accumulation of evidence) had an effect on guilt findings. Tanford, *supra*, 324, 326. The jury in this case was not provided a robust instruction as the instruction did not develop caution against accumulation of evidence or inference of criminality.

[6]It is important to note here that if charges are improperly joined, the district court must order separate trials and the issue of prejudicial joinder need not be reached. I have nevertheless discussed prejudicial joinder in the next section because the majority concludes that Farmer has not demonstrated that he is entitled to relief on the basis of prejudicial joinder.

Prejudicial joinder

Even if the joinder were not improper, I believe that the district court should have ordered separate trials based upon prejudicial joinder. NRS 174.165 provides that the district court may order separate trials when the defendant is prejudiced by a joinder of offenses. NRS 174.165 assumes that the charges are properly joined under NRS 173.115, but tasks the district court with considering whether joinder prejudices the defendant. In assessing a defense request to sever based upon prejudicial joinder, this court has held that the trial court should order separate trials if it would be unfairly prejudicial to the defendant to conduct a joint trial. *See Weber*, 121 Nev. at 571, 119 P.3d at 119. While judicial economy is a consideration weighing in favor of joint trials, the district court should consider among other things whether prejudice will arise from the jury accumulating the evidence against the defendant or lessening the presumption of innocence, whether evidence will spillover that would otherwise be inadmissible if the charges had been tried separately, and whether the defendant may wish to testify as to some charges but not all charges. *Rimer v. State*, 131 Nev. 307, 323-24, 351 P.3d 697, 709-10 (2015). This court reviews the district court's decision to deny a motion to sever based upon prejudicial joinder for an abuse of discretion, and the defendant must demonstrate that a trial on joined offenses rendered the trial fundamentally unfair in violation of due process. *Id*.

After reviewing the record before us, I believe the district court abused its discretion in denying the motion to sever based upon prejudicial joinder. The majority suggests that review of the denial of a motion to sever based upon prejudicial joinder is viewed only at the time that the trial court made its decision. However, the Supreme Court has recognized that the district court has an ongoing duty to consider the prejudice of joined charges and grant a severance if prejudice appears. *See Schaffer v. United States*, 362 U.S. 511, 516 (1960); *see also Coleman*, 22 F.3d at 134. Unfair prejudice abounds in the record before this court. The evidence for the charges involving each of the victims was weak and presented a close call of guilt, which increased the danger that it would be unfairly accumulated by the jury. This danger was especially increased when the State argued for this very thing in closing arguments. Finally, the interests of judicial economy were only marginally served as there was not much overlapping testimony. *See United States v. Richardson*, 161 F.3d 728, 734 (D.C. Cir. 1998).

Prejudicial joinder requiring reversal is more likely to occur in a close case because it prevents the jury from making a "reliable judgment about guilt." *Weber*, 121 Nev. at 575, 119 P.3d at 122. This is one such case. As previously stated, the evidence in this case was weak. The State argued for accumulation of evidence and inference

of criminality. No cross-admissibility analysis was performed by the district court, which allowed evidence inadmissible at separate trials (because there was no determination of cross-admissibility) to be presented in this case. I conclude that under the facts in this case Farmer has demonstrated that joinder of the offenses rendered his trial fundamentally unfair and this warrants reversal and remand for separate trials.

IN THE MATTER OF DISCIPLINE OF
R. CHRISTOPHER READE, BAR NO. 6791.

No. 70989

November 16, 2017 405 P.3d 105

Automatic review of a disciplinary board hearing panel's recommendation for attorney discipline.

Suspension issued.

[Rehearing denied March 5, 2018]

Premier Legal Group and *Jay A. Shafer*, Las Vegas; *Wright Stanish & Winckler* and *Richard A. Wright*, Las Vegas, for R. Christopher Reade.

C. Stanley Hunterton, Bar Counsel, and *David W. Mincavage*, Las Vegas, for State Bar of Nevada.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this opinion, we conduct an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney R. Christopher Reade be suspended from the practice of law in Nevada for 30 months and be required to pay a $25,000 fine to the Clients' Security Fund, based on violating RPC 8.4(b) (misconduct). This court previously considered, and rejected, the panel's approval of a conditional guilty plea agreement between Reade and the State Bar under which Reade would be suspended from the practice of law for 2 years. Considering the serious nature of the misconduct and similar discipline cases, we again conclude that the panel's rec-

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision of this matter.

ommended suspension is insufficient and impose a suspension of 4 years. However, as a matter of first impression, we further conclude that the imposition of a fine exceeds the scope of sanctions permissible under SCR 102(2) for a suspension.

FACTS AND PROCEDURAL HISTORY

R. Christopher Reade was admitted to practice law in Nevada in 1998. Reade began representing Global One and its owner, Richard Young, in February 2007. Global One purported to train people in trading FOREX, a term associated with trading foreign currency. Such contracts were traded by merchants referred to as FOREX brokers. From 2006 to 2008, Young organized a fraudulent scheme through which he obtained approximately $16 million in loans from members of Global One by falsely promising them a return of future profits. Young directed Reade to establish a holding corporation, and Reade was listed as the corporation's director, secretary, and president. Young transferred the fraudulently obtained proceeds to the holding corporation's account to purchase a FOREX brokerage business while concealing the source of payment. These transactions were the basis of Young's conviction for money laundering under 18 U.S.C. § 1956(a)(1)(B)(i). Global One issued a $75,000 check to Reade's law firm for the services Reade provided, including those related to the holding corporation and purchase of the FOREX brokerage.

The National Futures Association (NFA) regulates trading practices in FOREX. The NFA must review and approve all FOREX broker purchases in the United States. When the NFA interviewed Reade, he falsely stated that (1) "he was unaware who owned Global One," (2) "Global One's assets were not used to purchase [the FOREX brokerage]," (3) "he was unaware of how Global One raised money," and (4) "the funds in the [holding corporation's] accounts came from his personal contributions and assets."

Thus, Reade knowingly made false representations to the NFA, and knew that his false representations would hinder the investigation and were intended to prevent Young from being prosecuted for money laundering. These actions resulted in Reade's felony conviction under 18 U.S.C. § 3 for one count of accessory after the fact to money laundering. The United States District Court for the District of Nevada sentenced him to 366 days in prison, ordered him to pay a $40,000 fine, and imposed a term of supervised release of up to 3 years. Reade agreed to abandon the $75,000 payment he received from Global One to the Internal Revenue Service.

Reade and the State Bar initially entered into a conditional guilty plea agreement under which Reade stipulated to violating RPC 8.4(b) (misconduct) and a suspension for 2 years. A Southern Nevada Disciplinary Board hearing panel approved the agreement. However, we rejected the conditional guilty plea because the 2-year

suspension was insufficient. On remand, Reade again stipulated to violating RPC 8.4(b) (misconduct), and the hearing panel recommended that Reade be suspended from the practice of law in Nevada for 30 months and be required to pay a $25,000 fine to the Clients' Security Fund. This automatic review followed.

DISCUSSION

The State Bar has the burden of showing by clear and convincing evidence that Reade committed the violation charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). Here, Reade admitted to committing the violation. Thus, we conclude that the record establishes by clear and convincing evidence that Reade violated RPC 8.4(b) when he knew that Young had committed the crime of money laundering and he assisted Young in avoiding punishment for that crime.

Reade's serious criminal conduct warrants a 4-year suspension

Turning to the appropriate discipline, we review the hearing panel's recommendation de novo. SCR 105(3)(b). In determining the appropriate discipline, this court weighs four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008). Reade's criminal conduct is serious. It involves dishonesty and the practice of law, and it violates a duty Reade owes to the legal profession pursuant to RPC 8.4(b). Further, Reade's conduct was knowing and intentional. Finally, the parties stipulated to the following aggravating circumstances at the disciplinary hearing: (1) substantial experience in the practice of law, and (2) the illegal conduct. *See* SCR 102.5(1). The hearing panel also considered the following mitigating circumstances: (1) absence of dishonest or selfish motive; (2) timely good faith effort to rectify the consequences of the misconduct; (3) full and free disclosure to disciplinary authority and cooperative attitude toward the disciplinary proceeding; (4) character and reputation; (5) imposition of other penalties or sanctions; (6) remorse; (7) community service, especially related to pro bono projects; (8) lack of a victim; and (9) no prior disciplinary action. *See* SCR 102.5(2).

Considering all of these factors, we agree with the panel's recommendation that Reade be suspended. However, we do not agree that a 30-month suspension is commensurate with the criminal conduct that resulted in Reade's conviction. In fact, this court has imposed longer suspensions in similar cases involving attorneys convicted of felonies and violations of RPC 8.4(b). For example, in *Whittemore*, an attorney was convicted of three felonies under federal law when he made excessive campaign contributions, gave campaign contributions in another person's name, and made false state-

ments to a federal agency. *In re Discipline of Whittemore*, Docket No. 64154 (Order of Temporary Suspension and Referral to Disciplinary Board, Oct. 8, 2013). The attorney was also incarcerated for his crimes, and we imposed a 4-year suspension despite the disciplinary panel's recommended 18-month suspension. *In re Discipline of Whittemore*, Docket No. 66350 (Order of Suspension, March 20, 2015). In *Gage*, we approved a conditional guilty plea that required a 4-year suspension for an attorney who was convicted of a felony under federal law for obstruction of justice. *In re Discipline of Gage*, Docket Nos. 58640, 64988 (Order Approving Conditional Guilty Plea Agreement, May 28, 2014); *In re Discipline of Gage*, Docket No. 56251 (Order of Temporary Suspension and Referral to Disciplinary Board, July 30, 2010). In light of these similar cases, we conclude that a 4-year suspension is warranted, given Reade's serious criminal conduct that resulted in his felony conviction and imprisonment.

SCR 102 does not provide for the imposition of fines when the discipline is suspension or disbarment

Reade argues that SCR 102 does not provide the court the authority to suspend attorneys *and* impose fines because subsection 2 expressly allows for suspensions but does not reference fines, and subsections 5-7 specifically provide for fines only in cases of public reprimand or letters of reprimand. Reade also argues that the $25,000 fine serves as a punitive measure and is inconsistent with the purpose of attorney discipline.[2] The State Bar argues that SCR 39, which states that "[a]uthority to admit to practice and to discipline is inherent and exclusive to the courts," allows the court to impose fines payable to the Clients' Security Fund. The State Bar also asserts that SCR 76(1), which provides that "[t]he State Bar of Nevada . . . shall govern the legal profession in this state, subject to the approval of the supreme court," further demonstrates the court's inherent authority to impose fines with suspensions.[3] Additionally,

[2]Reade cites *In re Cochrane*, 92 Nev. 253, 549 P.2d 328 (1976), for the notion that additional discipline measures beyond those necessary to protect the public only serve as further punishment, which does not align with the purpose of attorney discipline. We agree with Reade on this principle, *see Cochrane*, 92 Nev. at 255, 549 P.2d at 329-30, but we note that in *Cochrane*, we imposed fines as a disciplinary measure in lieu of a suspension. *Cochrane* was decided in 1976, which was before the ABA standards were adopted and when the rules of professional conduct were different from those currently in effect.

[3]We acknowledge the State Bar's argument that Reade waived his right to appeal the imposition of a fine because he did not object during the hearing when the panel pronounced its decision. However, the panel did not notify Reade that it was recommending a fine until the end of the hearing after arguments concluded. Therefore, it does not appear that Reade had the opportunity to argue the issue, and we do not find the State Bar's contention persuasive.

the State Bar contends that, as a public corporation, it can impose fines as discipline in its regulation of the legal profession. We agree with Reade that SCR 102 does not provide authority to impose a fine in conjunction with suspension or disbarment.

When interpreting a statute or court rule, we begin with the plain language. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 272, 236 P.3d 10, 16 (2010). SCR 102(5)-(7) expressly allow fines in the context of public reprimands or letters of reprimand. On the other hand, neither SCR 102(1) (irrevocable disbarment), nor SCR 102(2) (suspension), provides that the court can impose a fine along with disbarment or suspension. Further, while SCR 39 stands for the general proposition that this court governs attorney discipline, and SCR 76(1) empowers the State Bar to govern the legal profession, this court and the State Bar must operate within the specific rules under SCR 102 that provide authority to impose attorney discipline. To conclude otherwise would expose attorneys disciplined by disbarment and suspension to fines that are arbitrary and standardless.

We recognize that our prior attorney discipline orders have allowed the imposition of fines in conjunction with suspensions or disbarments. However, in those cases, the attorneys did not contest the imposed fine. In fact, in several cases, the attorneys expressly agreed to pay the fines outright or by way of conditional guilty plea agreements. *See, e.g.*, *In re Discipline of Goldberg*, Docket No. 71070 (Order of Suspension, Dec. 21, 2016) (4-year, 9-month suspension and $5,000 fine); *In re Discipline of Michaelides*, Docket No. 70339 (Order Approving Conditional Guilty Plea Agreement, Sept. 12, 2016) (90-day suspension and $5,000 fine); *In re Discipline of Francis*, Docket No. 70020 (Order Approving Conditional Guilty Plea Agreement, June 14, 2016) (9-year, 11-month suspension and $150,000 fine); *In re Discipline of Carrico*, Docket No. 68879 (Order Approving Conditional Guilty Plea Agreement, Dec. 23, 2015) (6-month suspension and $1,000 fine); *In re Discipline of Kennedy*, Docket No. 65742 (Order Approving Conditional Guilty Plea, Oct. 24, 2014) (90-day suspension and $7,500 fine); *In re Discipline of Gage*, Docket Nos. 58640, 64988 (Order Approving Conditional Guilty Plea Agreement, May 28, 2014) (4-year suspension and $25,000 fine).

In other cases, the attorneys failed to challenge the imposed fines. *See, e.g.*, *In re Discipline of Graham*, Docket No. 72693 (Order of Disbarment, Sept. 11, 2017) (disbarment and $1 million fine); *In re Discipline of Harris*, Docket No. 71636 (Order of Disbarment, June 13, 2017) (disbarment and $50,000 fine); *In re Discipline of Groesbeck*, Docket No. 65036 (Order of Suspension, Aug. 1, 2014) (6-year suspension, $1,000 restitution and $10,000 fine); *In re Discipline of Rojas*, Docket No. 69787 (Order of Suspension,

June 14, 2016) (18-month suspension and $25,000 fine). Accordingly, Reade's challenge to our authority to impose fines in addition to suspension or disbarment pursuant to SCR 102 is a matter of first impression. Based on the plain language of SCR 102, we conclude that this court can only impose a fine in conjunction with a public reprimand or a letter of reprimand.

Our interpretation of SCR 102 is consistent with the purpose of attorney discipline and is supported by the ABA and other jurisdictions. The policy underlying attorney discipline guides us in determining the appropriate discipline for attorney misconduct. *See State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988). "The purpose of a disciplinary proceeding is not to punish the attorney but to inquire into the moral fitness of an officer of the court to continue in that capacity and to afford protection to the public, the courts and the legal profession." *Id.* (quoting *In re Kristovich*, 556 P.2d 771, 773 (Cal. 1976)). The American Bar Association Standards for Imposing Lawyer Sanctions does not include fines on the list of appropriate sanctions and remedies, though costs and restitution are included. *See Compendium of Professional Responsibility Rules and Standards: Standards for Imposing Lawyer Sanctions*, (standards 2.2 (Disbarment), 2.3 (Suspension), 2.8 (Other Sanctions and Remedies) (Am. Bar Ass'n 2016)).

Moreover, "[f]ines have traditionally not been authorized as a disciplinary sanction for lawyers." Ted Schneyer, *Professional Discipline for Law Firms?*, 77 Cornell L. Rev. 1, 32 (1991). Courts in other states with statutes or rules that do not authorize fines have likewise determined that they cannot impose fines in conjunction with the attorney's discipline. For example, the Supreme Court of Florida has determined that it has no authority "in a disciplinary proceeding to require a payment that is not for restitution or the payment of costs." *Florida Bar v. Frederick*, 756 So. 2d 79, 89 (Fla. 2000) (internal quotation marks omitted). The Supreme Court of Wisconsin concluded similarly that it did not have authority to impose a fine as a sanction for attorney discipline because the rules governing attorney misconduct did "not authorize the imposition of a fine as a sanction for attorney misconduct." *Matter of Disciplinary Proceedings Against Laubenheimer*, 335 N.W.2d 624, 626 (Wis. 1983). In doing so, the court noted that the purpose of attorney discipline is not to punish the attorney, but to protect the public. *Id.*

Thus, our decision is in accord with the policy underlying attorney discipline, the ABA standards for imposing sanctions, and caselaw from other states. Reade's case demonstrates that the panel's recommended $25,000 fine is an additional punishment that is contrary to the policy underlying attorney discipline. Reade faces a lengthy suspension and concomitant loss of income and reputation that serves as a deterrent to him and other attorneys and protects the public and public confidence in the integrity of the profession and

its ability to regulate itself. He has a criminal conviction, served a custodial sentence, paid a $40,000 criminal fine, and disgorged the entirety of his $75,000 fee, earned in the related representation, to the IRS. Those additional criminal penalties also serve to deter Reade and other attorneys. Reade's violation of RPC 8.4(b) did not result in financial injury to any clients or any claims paid by the Clients' Security Fund. Thus, the fine imposed appears punitive in nature and is contrary to the express language of SCR 102 and the purpose of attorney discipline. Imposing a fine in addition to Reade's suspension "would serve no proper purpose and could only be construed as additional punishment." *Claiborne*, 104 Nev. at 230, 756 P.2d at 539.

CONCLUSION

Based on the foregoing, we suspend R. Christopher Reade from the practice of law for 4 years, retroactive to June 25, 2014, the date of Reade's temporary suspension. Furthermore, we conclude that no fine should be imposed. Reade shall pay the costs of the disciplinary proceedings within 30 days of receipt of the State Bar's bill of costs. SCR 120. Because the imposed suspension is longer than six months, Reade must petition the State Bar for reinstatement to the practice of law. SCR 116. The parties shall comply with SCR 121.1.

Cherry, C.J., and Douglas, Gibbons, Pickering, and Stiglich, JJ., concur.

LESEAN TARUS COLLINS, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 69269

November 22, 2017 405 P.3d 657

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count of murder and one count of robbery. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Affirmed.

David M. Schieck, Special Public Defender, and *JoNell Thomas*, Chief Deputy Special Public Defender, Clark County, for Appellant.

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

Before Douglas, Gibbons and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

A jury convicted Lesean Collins of robbery and first-degree murder, for which he was sentenced to life in prison without the possibility of parole. On appeal, Collins argues that his constitutional rights were violated on the first day of trial when the district court barred him from the courtroom for disruptive conduct for a two-hour period, during which it excused individual jurors for hardship, statutory ineligibility, and language barrier reasons. Collins also raises claims of evidentiary and instructional error and challenges the sufficiency of the evidence to sustain his convictions. Because none of these issues requires reversal, we affirm.

I.

Four days after Brandi Payton went missing, two ATV riders discovered her decomposed body in a ravine. Drag marks led through the dirt and brush to the body. No purse, wallet, cell phone, or means of identification or transportation were found. Brandi's shirt was pulled up over her head, and she was shoeless. Three of her acrylic fingernails had broken off—two were found at the scene—and one of her pockets was inside out. Some nearby rocks had blood on them.

Brandi's sister identified her body. Although identifiable, the body had decomposed too much for the coroner to definitively state the cause of death. The autopsy established that before she died Brandi sustained three blows to her head from a rod-like instrument. While the blows did not fracture Brandi's skull, they were strong enough to render her unconscious. The coroner deemed Brandi's death consistent with asphyxiation or being locked in the trunk of a car in southern Nevada's late summer heat.

Circumstantial evidence tied Collins to Brandi and to her robbery and death. Collins and Brandi knew one another. Brandi occasionally dealt drugs and used cell phones and rental cars to conduct business. Cell phone records showed that Collins and Brandi exchanged numerous calls and texts the day she disappeared. Brandi's phone received its last call at 3:38 p.m., then shut off. Earlier, both Collins's and Brandi's phones sent signals through a cell phone tower close to Collins's girlfriend's house, where Collins often stayed during the day. That night, Collins's cell phone signals placed him in the remote area where Brandi's body was found.

Collins's girlfriend testified that Collins picked her up from work the day Brandi disappeared. He had jewelry with him he didn't have before, including a necklace he later asked his girlfriend to pawn and a Rolex bracelet (at trial the State proved both pieces of jew-

elry had been Brandi's). When they got home, the girlfriend found a gold Hyundai parked in the garage. The carpet in the house was soiled and something had spattered on the laundry room walls. Collins told his girlfriend that Brandi rented the car for him and that he had spilled oil on the carpet, which he tried to clean with bleach. That night, Collins left in the Hyundai, returned, washed the Hyundai, and fell asleep outside in the car. At some point, the North Las Vegas police came by to check on the car and its occupant. Rather than get out as asked, Collins sped off, eluding the police. Collins's girlfriend found a long acrylic fingernail in her home, which Collins admitted to her was Brandi's.

As part of their investigation, the police interviewed Brandi's boyfriend, Rufus. They ruled him out as a suspect and focused on Collins. Several weeks after finding Brandi's body, the police found the gold Hyundai, minus its tires. Tests showed traces of blood belonging to Brandi on the Hyundai's trunk mat. The police also tested the spatter on the walls of Collins's girlfriend's home and confirmed it was Brandi's blood.

Collins was arrested for, charged with, and convicted of robbery and first-degree murder. He appeals.

II.

A criminal defendant has the right under the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to be present at every stage of the trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *see* Nev. Const. art. I, § 8. Collins complains that the district court deprived him of this right when it excused him from the courtroom for the last two hours of the first day of trial.

A.

While a defendant has the right to be present at every stage of trial, that right is not absolute. *Allen*, 397 U.S. at 342-43. A defendant may lose the right to attend trial if, after being warned, he persists in disrupting the proceedings by engaging in conduct inimical to the dignity and decorum required in a court of law. *Id.* at 343; *see* NRS 175.387(1)(c). A district court's decision to remove a defendant from the courtroom for disruptive behavior is reviewed under an abuse-of-discretion standard. *United States v. Hellems*, 866 F.3d 856, 863-64 (8th Cir. 2017); *cf. Tanksley v. State*, 113 Nev. 997, 1001-02, 946 P.2d 148, 150 (1997) (holding in an analogous context that "[a] defendant may be denied his right of self-representation if he or she is unable or unwilling to abide by rules of courtroom procedure" and that, because the trial court judge has "the opportu-

nity to observe" the defendant's "demeanor and conduct" first-hand, "[t]his court will not substitute its evaluation for that of the district court judge's own personal observations and impressions").

"[C]ourts must indulge every reasonable presumption against the loss of constitutional rights." *Allen*, 397 U.S. at 343 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). But district court judges "confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Id.*

A defendant who is removed for courtroom misconduct impliedly waives the right to be present. *See United States v. Benabe*, 654 F.3d 753, 768 (7th Cir. 2011). The waiver is implied, not explicit. *Id*. Though not amenable to a one-size-fits-all approach, the record supporting waiver should demonstrate, at minimum, that the defendant understands the right he is waiving and that the need to maintain the dignity of and control over the proceedings justifies the defendant's removal. *See Allen*, 397 U.S. at 345-46. A district court faced with a disruptive defendant should: (1) advise the defendant that his or her conduct is not acceptable; (2) warn the defendant that persisting in the disruptive conduct will lead to removal; (3) if the conduct persists, determine whether it warrants the defendant's removal or a lesser measure will suffice; and (4) bring the defendant back to court periodically to advise that he or she may return if the defendant credibly promises to desist from the disruptive conduct. Federal Judicial Ctr., *Benchbook for U.S. Dist. Ct. Judges* § 5.01 (2013) (interpreting Fed. R. Crim. P. 43(c)); *see* NRS 175.387. Prejudice to the defendant also factors into the removal decision and its review on appeal. *E.g.*, *Foster v. Wainwright*, 686 F.2d 1382, 1388 (11th Cir. 1982) ("Although *Illinois v. Allen* does not expressly identify prejudice to the defendant as a determinant of whether his removal from the courtroom is proper . . . the potential prejudice to the defense of the accused from his absence from the proceeding is, along with the degree of his misconduct and the adequacy of the warnings previously given, a part of the context in which the trial judge acts, and is therefore a factor to be considered in determining whether the judge commits constitutional error when he orders a disruptive defendant removed from the courtroom.").

B.

Collins had a history of difficulties in district court. Trial was delayed several times due to Collins's dissatisfaction with his lawyers. At one pretrial hearing, he repeatedly interrupted the district judge and said, referring to the prosecutor, that he was going to "knock this bitch-ass out of the trial." At another pretrial conference, Collins, who was in prison for another offense, indicated that he did not

"want to dress out for trial but [would] wear his regular prisoner clothing." At the final pretrial conference, Collins objected to being in court at all and had his lawyer state on the record that Collins "was not going to come to the trial."

Rather than excuse Collins, the district court ordered the correction officers to bring Collins back to court on the first day of trial for canvassing on his announced intention not to attend trial. That morning, the officers reported that Collins refused to change out of jail clothes or to allow them to remove his shackles and belly chains. While the jury pool waited in the jury assembly room, the judge had the officers bring Collins into court shackled and in jail clothes so she could address him directly outside the presence of the jury. *See Chandler v. State*, 92 Nev. 299, 300, 550 P.2d 159, 159-60 (1976) (finding constitutional but harmless error in the defendant having been brought into court in handcuffs in front of the jury).

"Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck v. Missouri*, 544 U.S. 622, 630 (2005); *see Grooms v. State*, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980) ("The presumption of innocence is incompatible with the garb of guilt.") (citing *Estelle v. Williams*, 425 U.S. 501, 504 (1976)). The district judge explained to Collins that appearing in front of the jury in shackles and jail clothes undermined the dignity of the proceeding and created an unacceptable risk of juror prejudice. *See Deck*, 544 U.S. at 631 (noting that "judges must seek to maintain a judicial process that is a dignified process . . . , which includes respectful treatment of defendants" and that "the use of shackles at trial affronts the dignity and decorum of judicial proceedings that the judge is seeking to uphold") (quoting *Allen*, 397 U.S. at 344) (internal editing marks omitted); *State v. McKay*, 63 Nev. 118, 163, 165 P.2d 389, 409 (1946) ("we regard a trial with the prisoner in irons as obnoxious to the spirit of our laws and all ideas of justice . . . .") (quotation omitted). The judge advised Collins that, while "[y]ou certainly have the right not to be compelled to be present for [ ] trial," she would not "go down the road . . . where we set a trial up before we even begin for appeal because you are desiring to be present wearing a certain set of clothing and wearing your chains." The judge noted on the record that Collins refused to look at or acknowledge her. Pressed to explain why he insisted on wearing his jail clothes and chains, Collins stated that they were "comfortable," that "I don't wear other people's clothes," and that "[t]here is no such thing as appropriate clothes."

With input from the lawyers, the court offered Collins three options: remove the chains and change into civilian clothes, remove the chains and remain in jail clothes but turn the shirt inside out so the jury would not see "Clark County Detention Center" printed on it, or be deemed to have waived his right to be present at trial. The

court declared a recess so defense counsel, who advised Collins on the record against appearing in jail clothes and chains, could speak with Collins privately. After the recess, Collins declared, "Your Honor, I decline all the options that you put forth. If you have to force me to do something then you have to force me to do it."

The court then ordered the officer to take Collins out of court, remove the chains, and turn his shirt inside out. While the court and the lawyers waited, they discussed voir dire logistics. Sometime later, the officer returned to say he'd called his supervisor for help because Collins was resisting removal of his chains and the officer "didn't want to escalate the situation by forcing his chains off." The court again delayed the proceedings for the supervisor, Sergeant Trotter, to arrive and speak with Collins. Collins then returned to court with Sergeant Trotter, who removed his chains in the court's presence. But, Collins refused to turn his shirt inside out. The court questioned Collins about his understanding of the options he had been given. The record shows no audible response from Collins beyond him repeating that he was "comfortable." The district judge then made the following record:

> At this point in time it is a quarter to three on Monday. It is very clear to me that we are going to likely get no further in the course of jury selection than identifying those who have hardships and are unable to serve and that we are very unlikely to get to any specific actual discussion/inquiry with these individuals that would impact Mr. Collins' opinion or [defense counsels'] ability to elicit Mr. Collins' opinion in the event you should return tomorrow appropriately dressed.
>
> However, for today, I am not going to concede the point that [the defendant has a right to appear in jail clothes] that supersedes the concern that this court has over the prejudice that would be created. . . . I am not going to have a problem with this trial before we even bring the first juror in this courtroom and I am not going [to] allow the defendant to decide how this courtroom and how this trial proceeds.
>
> * * *
>
> So I will have you removed from the courtroom at this time. It's your choice because you do not wish to select one of the three options that the Court gave you, two of which would allow you to remain in the courtroom, that you are volitionally choosing to not remain in the courtroom and I am going to remove you.
>
> Tomorrow you will be given the same choice.

The officers escorted Collins out, and the court and counsel turned to administrative voir dire. Individual jury pool members whose

questionnaire answers suggested hardship, exposure to pretrial publicity, or language barriers were called in individually and excused if appropriate. The remaining pool was brought in and sworn. The court admonished them that Collins had the right not to attend, which he had exercised "for today's purposes," and that they should not consider his absence "in any way." *Cf. Thomas v. State*, 94 Nev. 605, 609, 584 P.2d 674, 677 (1978) (discussing the "sound practice" of admonishing the jury in cases where a defendant appears before the jury in restraints). The court and the lawyers then introduced themselves, read the witnesses' names to the prospective jurors to flag acquaintances, and excused pool members for whom serving presented a family, medical, or employment hardship or who were ineligible to serve because of a felony conviction.

The next day, Collins returned, again in jail clothes and chains. The district court canvassed Collins about the prejudice his appearance would cause and his right to appear shackle-free, in civilian clothes. *See Estelle v. Williams*, 425 U.S. at 520-21. After consulting with defense counsel, the district court allowed Collins to stay despite his renewed refusal to allow his chains to be removed or to change clothes. *See id.* at 521 ("To be sure, an accused may knowingly, voluntarily, and intelligently consent to be tried in prison garb."). On the third day and thereafter, Collins appeared without incident wearing civilian clothes and no chains.

The district court did not abuse its discretion in removing Collins from the courtroom for two hours on the first day of trial. While an accused may waive the right not to be compelled to appear before the jury in jail clothes, *id.*, that does not give a defendant who does not present a serious security threat the right to appear in court before the jury in belly chains and shackles, *see Deck*, 544 U.S. at 631, or to waste court and jurors' time by defying direct court orders calculated to preserve the dignity and effectiveness of the proceedings. *See United States v. Perkins*, 787 F.3d 1329, 1339 (11th Cir. 2015) (upholding order excluding defendant from trial who, "[d]isplaying disregard for the members of the venire who sat waiting for jury selection to begin . . . refused to get dressed for trial and refused to leave the holding cell").

With the prospective jurors waiting in the jury assembly room, the district court devoted most of the first day of trial to counseling Collins on his right to be present in civilian clothes—without shackles and cloaked in the presumption of innocence—and warning Collins that he would lose the right to be present if he did not follow the court's orders. Even though Collins finally allowed Sergeant Trotter to approach and remove his chains, Collins's removal was justified because he stubbornly refused to abide by the court's other instructions. *See United States v. Daniels*, 803 F.3d 335, 349 (7th Cir. 2015) (upholding exclusion of defendant with history of disruptive behav-

ior who, "after being warned that he would forfeit his right to attend trial . . . refused outright to be sworn in and assure the court that his conduct would not continue during trial"); *LaGon v. State*, 778 S.E.2d 32, 41 (Ga. Ct. App. 2015) (upholding exclusion of defendant who "after being made aware of his right to be present and that the trial will proceed forward in his absence" refused to change out of jail clothes and resisted being brought into court). Also, the district court limited Collins's removal to the end of the first day of trial, *see Foster*, 686 F.2d at 1389 n.3, during which it conducted administrative and preliminary voir dire, to which Collins had little to contribute. *See Gagnon*, 470 U.S. at 526 (declining to find a due process violation in the defendant's exclusion from a brief in-chambers voir dire and noting, in a situation in which "the defendant is not actually confronting witnesses or evidence against him," the "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964)); *see also United States v. Greer*, 285 F.3d 158, 167-68 (2d Cir. 2002) (holding that "routine administrative procedures," including hardship questioning, are not part of the true jury impanelment process that forms a "critical stage of the trial"). With one exception not relevant here, Collins attended the remainder of the trial, including substantive voir dire, the exercise of peremptory challenges, and trial. On this record, we do not find error amounting to an abuse of discretion, much less the structural error Collins complains occurred. *See United States v. Riddle*, 249 F.3d 529, 534-35 (6th Cir. 2001) (rejecting argument that ineffective waiver of a defendant's right to attend in-chambers portion of voir dire constituted structural error); *Manning v. State*, 131 Nev. 206, 211-12, 348 P.3d 1015, 1019 (2015) (reviewing district court's error in communicating with the jury outside the presence of the defendant and his counsel for harmlessness).

III.

A.

A witness may not give a direct opinion on the defendant's guilt or innocence in a criminal case. *See Cordova v. State*, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000). The lead investigator in this case was Detective Mogg, who testified that his investigation into Brandi's death led him to arrest Collins for her murder. On appeal, Collins argues that this testimony violated the rule against a witness giving an opinion on the defendant's guilt. A district court's decision to admit or exclude evidence is reviewed on appeal under an abuse-of-discretion standard. *Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009).

The district court did not abuse its discretion in allowing Mogg to testify that his investigation led to Collins's arrest. As suggested by the extra-jurisdictional case law Collins cites, the rule is that a witness "may not give a *direct* opinion on the defendant's guilt." *United States v. Kinsey*, 843 F.2d 383, 388 (9th Cir. 1988) (emphasis added), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000). This does not mean that a witness may not give testimony from which an inference of guilt—even, an inference that the witness is of the opinion the defendant is guilty—may be drawn. *See Ogden v. State*, 34 P.3d 271, 277 (Wyo. 2001) ("Testimony that is otherwise admissible will not be excluded unless it constitutes an actual conclusion about the guilt or innocence of the accused party. An interpretation of the evidence by a witness, even though that interpretation may be important in establishing an element of the crime and thus leading to the inference of guilt, is not in the same category as an actual conclusional statement on the guilt or innocence of the accused party.") (quoting *Saldana v. State*, 846 P.2d 604, 616 (Wyo. 1993)).

In one of the cases on which Collins relies, *State v. Steadman*, 855 P.2d 919, 922 (Kan. 1993), for example, the detective testified point-blank: "In my opinion [the defendant] killed [the victim]." Similarly, in *State v. Quaale*, 340 P.3d 213, 215 (Wash. 2014), another case on which Collins relies, the police officer was asked in a DUI case if he had an opinion based on the eye-movement test he administered and his "training and experience [as to] whether or not [the defendant's] ability to operate a motor vehicle was impaired?" to which the officer answered, "Absolutely. There was no doubt he was impaired." And in *Bennett v. State*, 794 P.2d 879, 882-83 (Wyo. 1990), another of Collins's cases, the detective "told the jury that in his opinion [the defendant] was a drug dealer because [the defendant] committed the three charged drug transactions."

The problem in each of these cases was not that the police officers testified to what they learned through investigation or what they did based on what they learned. It lay in the officer directly declaring to the jury that "in [his] opinion, the defendant was guilty of the crime." *Steadman*, 855 P.2d at 924. *See Bennett*, 794 P.2d at 883 ("It is difficult to see how jurors could have believed [the detective's direct statement] was anything but an opinion concerning the defendant's guilt."); *Quaale*, 340 P.3d at 217 ("Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury."). While modern law permits opinion testimony on ultimate issues, NRS 50.295; *see* Fed. R. Evid. 704, it deems a *direct* opinion on guilt in a criminal case inadmissible because it is "of no assistance to the trier of fact . . . [who is] as competent

as the witness to weigh the evidence and draw a conclusion on the issue of guilt." *People v. Vang*, 262 P.3d 581, 587 (Cal. 2011) (internal quotations omitted); *Ogden*, 34 P.3d at 277 ("Testimony that is otherwise admissible will not be excluded unless it constitutes an actual conclusion about the guilt or innocence of the accused party."); *cf. Townsend v. State*, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987) (upholding admission of expert testimony that a child had suffered sexual abuse but finding an abuse of discretion in allowing the expert to give an opinion as to the identity of the abuser, which went beyond the witness's expertise and into an area committed to jury determination).

Mogg's testimony that he arrested Collins based on the facts he learned as the lead investigator into Brandi's death stopped there. He did not offer or state a direct opinion on Collins's guilt. Doubtless, a juror might infer from Collins's arrest that Mogg believed he had enough evidence for Collins to be charged. *See Gonzales v. Thaler*, 643 F.3d 425, 431 (5th Cir. 2011) ("That the arresting officer thought he had his man is implicit in the prosecution."). But that did not amount to an opinion, direct or implied, that the jury should find Collins guilty—a determination that, as the jury was instructed, requires proof beyond a reasonable doubt. *See Commonwealth v. Luciano*, 944 N.E.2d 196, 202 (Mass. App. Ct. 2011) (rejecting argument for reversal based on investigating officer's testimony that he determined he had probable cause to arrest the defendant: "in view of the judge's thorough instructions as to the jury's function, the presumption of innocence, and the Commonwealth's obligation to prove the defendants' guilt beyond a reasonable doubt, we are confident that the jury would not have understood the officer's testimony that, at the time, he believed that the lesser probable cause standard [to arrest] had been met, as supplanting their responsibility as fact finders").

Course-of-investigation testimony does not give carte blanche to the introduction of unconfronted hearsay, *see United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004), or evidence concerning matters irrelevant to guilt or innocence, *see Leonard v. State*, 117 Nev. 53, 74 n.14, 17 P.3d 397, 410 n.14 (2001). Detective Mogg's testimony did not cross either line. For the most part, Mogg's course-of-investigation testimony came after that of the witnesses whose interviews he described; to the extent he alluded to facts not yet in evidence, such evidence later came in. *See also Clark County Sheriff v. Blasko*, 98 Nev. 327, 330 n.2, 647 P.2d 371, 373 n.2 (1982) (testimony explaining the reasons for police surveillance is not hearsay, because not offered for the truth of the matter asserted). Finally, the course-of-investigation testimony had relevance, since it rebutted Collins's assertion that the police did not adequately investigate the crime or other potential suspects, including Brandi's boyfriend,

Rufus. *Luciano*, 944 N.E.2d at 202 (rejecting argument that the arresting officer's course-of-investigation testimony "was an impermissible comment on the defendants' guilt; it was an explanation of the officer's actions, elicited to counteract the defendants' claim from the inception of the trial that the police investigation was inadequate and misdirected"); *see United States v. Holmes*, 620 F.3d 836, 841 (8th Cir. 2010) (holding course-of-investigation evidence admissible to explain a police investigation "when the propriety of the investigation is at issue in the trial").

B.

Collins next argues that the district court abused its discretion by refusing to instruct the jury on voluntary manslaughter. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error."). The district court refused to instruct the jury on voluntary manslaughter because it determined that no evidence supported the charge. The district court did not abuse its discretion in making this determination.

Our case law deems voluntary manslaughter a lesser-included offense of murder. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).[1] For voluntary manslaughter "there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing," NRS 200.050. "The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible." NRS 200.060; *see* NRS 200.040 (manslaughter is a voluntary killing "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible").

A defendant "is entitled to a jury instruction on a lesser-included offense as long as there is some evidence reasonably supporting it." *Rosas v. State*, 122 Nev. 1258, 1265, 147 P.3d 1101, 1106 (2006), *abrogated on other grounds by Alotaibi v. State*, 133 Nev. 650, 655, 404 P.3d 761, 765 (2017). But " 'if the prosecution has met its burden of proof on the greater offense and there is no evidence at trial tend-

[1]We apply the "elements test" from *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether an uncharged offense is a lesser-included offense of a charged offense. *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). It may be questioned whether voluntary manslaughter qualifies under the elements test as a lesser-included offense of murder, given that murder does not have as one of its elements the provocation and passion voluntary manslaughter requires. But, since neither the State nor Collins raise this issue, we analyze Collins's instructional error claim under existing case law, which treats voluntary manslaughter as a lesser-included offense of murder.

ing to reduce the greater offense, an instruction on a lesser-included offense may properly be refused.'" *Id.* (quoting *Lisby v. State*, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966)); *see Crawford*, 121 Nev. at 754, 121 P.3d at 589 (holding that, for the duty to instruct the jury on the State's burden to prove the absence of heat of passion upon sufficient provocation to arise, at least "some evidence" in the murder prosecution must "implicate[ ] the crime of voluntary manslaughter"). The judicially imposed condition that there be at least some evidentiary basis for the lesser-included instruction "serves a useful purpose: preventing lesser-included instructions from being misused as invitations to juries to return compromise verdicts without evidentiary support." *Rosas*, 122 Nev. at 1265, 147 P.3d at 1106.

The district court did not abuse its discretion when it determined that the record did not contain evidence to support a voluntary manslaughter charge. The autopsy and other forensic evidence, the location and condition of Brandi's body, Collins's possession of her jewelry and car, the cell phone tower evidence, and Collins's statements and conduct after the killing justified submitting the murder charges against Collins to the jury. *See* § III.C., *infra*. But the record is devoid of evidence suggesting the irresistible heat of passion or extreme provocation required for voluntary manslaughter. While the serious and highly provoking injury (or attempt) required by NRS 200.050 need not be a direct physical assault on the accused, *Roberts v. State*, 102 Nev. 170, 174, 717 P.2d 1115, 1117 (1986), neither "slight provocation nor an assault of a trivial nature will reduce a homicide from murder to manslaughter." *State v. Fisko*, 58 Nev. 65, 75, 70 P.2d 1113, 1116 (1937), *overruled on other grounds by Fox v. State*, 73 Nev. 241, 247, 316 P.2d 924, 927 (1957). Here, the only evidence of provocation and passion Collins identifies consists of his remark to a third party that Collins thought he should delete some text messages between him and Brandi from his phone because the police might think, based on the messages, that "he had something to do with" Brandi's disappearance. The cryptic reference to a text-message exchange between a victim and her killer does not reasonably suggest serious-enough provocation by the victim or sufficient heat of passion in her killer for voluntary manslaughter.

The district court properly instructed the jury on first- and second-degree murder; the willfulness, premeditation and deliberation required by the former (absent a finding of felony murder); and the State's burden of proof. Based on those instructions, the jury returned a verdict of first-degree murder. In doing so, the jury found Collins guilty of felony murder and/or that the State proved willfulness, premeditation, and deliberation beyond a reasonable doubt. Without some evidence to support a voluntary manslaughter charge, the district court did not abuse its discretion in refusing to instruct

on it and, even if it did, on this record, the error was harmless. As neither an abuse of discretion nor harmful error appears, we reject Collins's challenge to the district court's refusal to instruct on voluntary manslaughter.

C.

Last, Collins challenges the sufficiency of the evidence to support his conviction of first-degree murder and robbery.[2] The critical inquiry in deciding a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

The State charged Collins with first-degree murder on two theories: (1) that Collins's killing of Brandi was willful, deliberate, and premeditated; and/or (2) that Collins killed Brandi during the commission or attempted commission of a robbery. To prove murder, the State had to demonstrate: "(1) the fact of death, and (2) that the death occurred by criminal agency of another." *West v. State*, 119 Nev. 410, 415-16, 75 P.3d 808, 812 (2003). A specific cause of death is not required to show that the death occurred by criminal agency. *Id.* at 418, 75 P.3d at 813; *accord Middleton v. State*, 114 Nev. 1089, 1103, 968 P.2d 296, 306 (1998). And, "[c]ircumstantial evidence alone may support a judgment of conviction." *Collman v. State*, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

Collins's argument that the evidence does not establish death due to the criminal agency of another fails. In assessing the sufficiency of corpus delicti evidence, "the court must consider and weigh all the evidence offered which bears on the question of death by criminal agency." *Middleton*, 114 Nev. at 1103, 968 P.2d at 306; *see West*, 119 Nev. at 418, 75 P.3d at 814. Here, similar to *Middleton* and *West*, the state of decomposition of Brandi's body was too far advanced to determine the exact cause of death. Even so, the ante-mortem head injuries Brandi sustained, the condition of her body and its state of partial undress, the apparent good health she enjoyed before she died, the remote location where her body was left, the theft of her jewelry, and the blood found on her car's trunk mat and in Collins's girlfriend's home provide proof sufficient to support a finding beyond a reasonable doubt that her death occurred by criminal agency.

Nor are we persuaded that the evidence was insufficient to support that Collins was the perpetrator, that the killing was willful, deliberate, and premeditated or committed in the course of—not as

[2]Collins raised a disqualification issue in his opening brief but later withdrew it. We have considered and rejected all other claims of error presented by him on this appeal.

an afterthought to—a robbery, and that Collins robbed Brandi. A court reviewing the sufficiency of the evidence to support a criminal conviction does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318-19 (quotation omitted). Rather, it asks whether "*any* rational trier of fact" could have so found. That standard was satisfied by the evidence in this case.

We therefore affirm.

Douglas and Gibbons, JJ., concur.

PETER GARDNER; CHRISTIAN GARDNER, on Behalf of Minor Child, L.G., Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE JERRY A. WIESE, District Judge, Respondents, and HENDERSON WATER PARK, LLC, dba COWABUNGA BAY WATER PARK; WEST COAST WATER PARKS, LLC; and DOUBLE OTT WATER HOLDINGS, LLC, Real Parties in Interest.

No. 70823

November 22, 2017 405 P.3d 651

Original petition for a writ of mandamus challenging a district court order denying a motion to amend a complaint.

Petition granted.

Campbell & Williams and *J. Colby Williams, Donald J. Campbell, Philip R. Erwin*, and *Samuel R. Mirkovich*, Las Vegas, for Petitioners.

Thorndal, Armstrong, Delk, Balkenbush & Eisinger and *Alexandra B. McLeod* and *Paul E. Eisinger*, Las Vegas, for Real Parties in Interest.

Before Douglas, Gibbons and Pickering, JJ.

OPINION

By the Court, Gibbons, J.:

In this original proceeding, we are asked to consider whether seven managers of a limited liability company (LLC) are subject to suit for personal negligence as individual tortfeasors or under an alter ego theory of liability. We conclude that NRS 86.371 is not

intended to shield members or managers from liability for personal negligence. We further conclude that the corporate alter ego doctrine applies to LLCs. Accordingly, we grant the petition and direct the district court to allow petitioners to amend their complaint.

FACTS AND PROCEDURAL HISTORY

Petitioners Peter and Christian Gardner, on behalf of their child L.G. (the Gardners), filed suit after L.G. suffered injuries resulting from a near-drowning at Cowabunga Bay Water Park in Henderson. The Gardners brought suit for negligence against Henderson Water Park, LLC, which does business as Cowabunga Bay Water Park (the Water Park), and its two managing members, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC (the member-LLCs). In turn, Orluff Opheikens, Slade Opheikens, Chet Opheikens, Shane Huish, Scott Huish, Craig Huish, and Tom Welch (the Managers) have an ownership interest in, or manage, the member-LLCs, and they also served on a management committee governing the Water Park.

Among other allegations in their initial complaint, the Gardners alleged the negligence of the Water Park and member-LLCs contributed to L.G.'s injuries because of the Water Park's inadequate staffing of lifeguards. After taking depositions, the Gardners moved for leave to amend their complaint to add the Managers of the Water Park as individual defendants. Specifically, the Gardners sought to assert direct claims for negligence against the Managers in their individual capacities, and they sought to plead allegations supporting an alter ego theory of liability in order to pierce the corporate veil of the Water Park and the member-LLCs to reach the assets of the Managers. In support of their motion to amend their complaint, the Gardners quoted deposition testimony of one of the Managers stating the Water Park did not operate with 17 lifeguards at the wave pool as required by the Southern Nevada Health District.

The district court denied the Gardners' motion, concluding that amendment would be futile because the Managers were improper defendants. Specifically, the district court found that NRS 86.371 protected the Managers from any liabilities incurred by the various LLCs and Nevada's LLC statutes contained no alter ego exception to the protection offered by NRS 86.371.[1] This original writ petition followed.

[1]After the district court denied the Gardners' motion for leave to amend the complaint, the district court granted summary judgment in favor of the member-LLCs, dismissing the member-LLCs as improper defendants pursuant to NRS 86.381. The district court certified this order under NRCP 54(b), and the Gardners appealed that order. We affirmed the order granting summary judgment in *Gardner v. Henderson Water Park, LLC*, because the initial complaint did not allege any conduct by the member-LLCs aside from being members of the Water Park. 133 Nev. 391, 394, 399 P.3d 350, 352 (2017). As the amended

DISCUSSION

Writ relief

"This court has original jurisdiction to issue writs of mandamus . . . ." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Extraordinary relief may be available "[w]here there is no 'plain, speedy and adequate remedy in the ordinary course of law.'" *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 912, 362 P.3d 91, 94 (2015) (quoting NRS 34.170). Whether to consider a writ petition is solely within this court's discretion, and the petitioner bears the burden of demonstrating why extraordinary relief is warranted. *See We the People Nev. v. Miller*, 124 Nev. 874, 880, 192 P.3d 1166, 1170 (2008). In this matter, we exercise our discretion to consider this petition because it raises important and novel issues of law in need of clarification, "and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559.

The district court abused its discretion by denying the Gardners' motion to amend their complaint

In this petition, the Gardners challenge the district court's denial of leave to amend their complaint. NRCP 15(a) provides that leave to amend a complaint should "be freely given when justice so requires." *See also Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 292, 357 P.3d 966, 975 (Ct. App. 2015) ("The liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had."). Leave to amend, however, "should not be granted if the proposed amendment would be futile." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013). This court reviews the denial of a motion for leave to amend a complaint for an abuse of

---

complaint is written, however, it would appear to seek to bring the member-LLCs back into the litigation under alter ego theories. While we acknowledge that the timing of the orders in this matter may create procedural difficulties, we decline to consider them because these considerations are beyond the scope of this writ petition. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 229, 88 P.3d 840, 844 (2004) ("Our review in a writ proceeding is limited to the argument and documents provided by the parties."); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (stating that granting writ relief "is purely discretionary with this court").

discretion. *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013).

Here, the district court determined amendment would be futile because the Managers were improper defendants under NRS 86.371 and the alter ego doctrine does not apply to LLCs. The Gardners argue the district court erred in relying on NRS 86.371 because the Gardners sought to assert tort claims against the Managers in their individual capacities. Additionally, the Gardners argue the district court erred in concluding the alter ego doctrine does not apply to LLCs. Thus, the Gardners seek a writ of mandamus compelling the district court to grant their motion to amend their complaint. For context, we review the nature of LLCs before reaching the parties' arguments.

The limited liability company

The LLC is a form of business organization in Nevada. *See* NRS Title 7, Chapter 86. The persons who own an LLC are its "members." *See* NRS 86.081-.091. The members can manage the LLC themselves or they can appoint a manager or group of managers to manage the company. *See* NRS 86.071; NRS 86.291. Accordingly, the statutes distinguish between member-managed and manager-managed LLCs, and managers of a manager-managed LLC may, but need not, be members of the LLC. *See* NRS 86.291.

An LLC is typically "created to provide a corporate-styled liability shield with pass-through tax benefits of a partnership." *Weddell v. H2O, Inc.*, 128 Nev. 94, 102, 271 P.3d 743, 748 (2012) (internal quotation marks omitted). An LLC "combines the flexibility of a contract-based form such as a partnership and the limited liability of a state-created form such as a corporation." H. Justin Pace, *Contracting Out of Fiduciary Duties in LLCs: Delaware Will Lead, but Will Anyone Follow?*, 16 Nev. L.J. 1085, 1086 (2016). However, "[u]nlike limited partners, LLC members do not lose their limited liability for participating in control of the business." 1 Robert R. Keatinge & Larry E. Ribstein, *Ribstein and Keatinge on Limited Liability Companies* § 1.6 (2016 ed.); *see also* NRS 88.430.

Pursuant to the statutes governing LLCs, "[u]nless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company." NRS 86.371. Furthermore, NRS 86.381 provides that "[a] member of a limited-liability company is not a proper party to proceedings by or against the company, except where the object is to enforce the member's right against or liability to the company." Accordingly, "no member or manager is vicariously liable for the obligations of the LLC solely by reason of being a member or manager." Keatinge &

Ribstein, *supra*, § 1.5; *see also Gardner*, 133 Nev. at 392, 399 P.3d at 350 (holding "that, pursuant to NRS 86.371 and NRS 86.381, a member cannot be personally responsible for the LLC's liabilities solely by virtue of being a member"). Nevada's statutes governing LLCs provide no exception for an alter ego theory of liability, unlike the statutes governing corporations. *See* NRS 78.747(1) ("[N]o stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation."). With this background in mind, we turn to the parties' arguments.

Direct claims against the Managers

The Gardners argue the district court erred in relying on NRS 86.371 because the Gardners sought to assert direct tort claims against the Managers. We agree.

Pursuant to NRS 86.371, a manager cannot be personally responsible in a negligence-based tort action against the LLC solely by virtue of being a manager. As we noted in *Gardner*, however, the statutes limiting personal liability of members and managers of an LLC for debts and obligations of the LLC are not intended to shield members or managers from liability for personal negligence. 133 Nev. at 393, 399 P.3d at 351. A plain reading of NRS 86.371 protects members and managers only from individual liability resulting from the debts or liabilities of the LLC, not liabilities incurred as a result of individual acts. Thus, the act of managing an LLC in and of itself cannot result in personal culpability because this notion would be in conflict with the manager's limited liability.

However, the Gardners' proposed amended complaint contained multiple allegations of individual negligence by the Managers concerning their direct knowledge and actions that threatened physical injury to patrons, including L.G. Specifically, the proposed amended complaint alleges that the Managers, who had authority and control over the Water Park, owed personal duties to their patrons that they intentionally and willfully breached. Thus, the Gardners' proposed amended complaint alleges that the Managers breached a duty owed to L.G. arising out of their individual capacities. *See Cortez v. Nacco Material Handling Grp., Inc.*, 337 P.3d 111, 119 (Or. 2014) (indicating that a member "remains responsible for his or her acts or omissions to the extent those acts or omissions would be actionable against the member . . . if that person were acting in an individual capacity"). Therefore, we conclude that NRS 86.371 is not applicable, the amended complaint adequately states a negligence claim against the Managers in their individual capacities, and the district court abused its discretion by denying the Gardners' motion for leave to amend.

The alter ego doctrine

The Gardners also argue the alter ego doctrine should apply to LLCs so that the Gardners can pierce the veil of the Water Park and its member-LLCs to reach assets belonging to the Managers. We agree that the alter ego doctrine applies to LLCs.

States across the nation have consistently applied the alter ego doctrine to LLCs. *Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1181 (D. Nev. 2008) (recognizing that federal and state courts have regularly applied corporate laws for piercing the corporate veil under the alter ego doctrine to LLCs). Many states have enacted LLC statutes that expressly apply the alter ego doctrine to LLCs. Cal. Corp. Code § 17703.04(b) (West 2014) ("A member of a limited liability company shall be subject to liability under the common law governing alter ego liability . . . ."); Colo. Rev. Stat. § 7-80-107(1) (2017) (applying caselaw that interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law to LLCs).

Other courts, however, have found the alter ego doctrine applies to LLCs absent an express statutory provision. *BLD Prods., Ltd. v. Tech. Plastics of Or., LLC*, No. 05-556-KI, 2006 WL 3628062, at *3 (D. Or. Dec. 11, 2006) (applying Oregon law and finding the veil-piercing doctrine may be applied to LLCs under the same circumstances in which it is applied to corporations); *Westmeyer v. Flynn*, 889 N.E.2d 671, 678 (III. App. Ct. 2008) (holding piercing the corporate veil applies to an LLC and the Illinois LLC Act "does not bar the other bases for corporate veil piercing, such as alter ego, fraud or undercapitalization"); *Howell Contractors, Inc. v. Berling*, 383 S.W.3d 465, 467-69 (Ky. Ct. App. 2012) (recognizing piercing of veil for an LLC in cases of fraud, illegality, or other unlawfulness); *Bottom Line Equip., LLC v. BZ Equip., LLC*, 60 So. 3d 632, 636 (La. Ct. App. 2011) ("The theory of piercing the corporate veil applies to limited liability companies and is not limited to corporations.").

This court has "assume[d], without deciding, that the [alter ego] statute applies [to LLCs]." *See Webb v. Shull*, 128 Nev. 85, 92 n.3, 270 P.3d 1266, 1271 n.3 (2012). Several other courts have made the same assumption. *See, e.g.*, *Volvo Constr. Equip. Rents, Inc. v. NRL Rentals, LLC*, 614 F. App'x 876, 878 n.1, 880 (9th Cir. 2015) ("assum[ing], without deciding, that § 78.747 governs the scope of LLC member liability in Nevada," but ultimately holding the LLC members were not personally liable under the alter ego theory); *Pharmaplast S.A.E. v. Zeus Med. Holdings, LLC*, No. 2:15-cv-002432-JAD-PAL, 2017 WL 985646, at *3 (D. Nev. Mar. 14, 2017) (assuming, without deciding, "that the alter-ego principles that permit courts to pierce corporate veils also permit them to pierce LLC veils in

Nevada," but ultimately dismissing the claims brought under the alter ego theory); *but see In re Giampietro*, 317 B.R. 841, 846 (Bankr. D. Nev. 2004) (recognizing that whether the alter ego doctrine applies to LLCs in Nevada is a question of first impression and predicting "it highly likely that Nevada courts would recognize the extension of the alter ego doctrine to members of limited liability companies").

The alter ego doctrine is a judicially created doctrine that the Nevada Legislature codified for corporations in 2001. *See* NRS 78.747. Before it was codified, this court recognized that "the essence of the alter ego doctrine is to do justice whenever it appears that the protections provided by the corporate form are being abused." *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 903, 8 P.3d 841, 845-46 (2000) (internal quotation marks omitted). Nevada's LLC statutes were enacted in 1991, prior to the Legislature's codification of the corporate alter ego doctrine. *See* 1991 Nev. Stat., ch. 442, at 1184. The Legislature contemplated that LLCs would be subject to the same then judicially applied doctrine of alter ego as corporations. *See* Hearing on A.B. 655 Before the Assembly Judiciary Comm., 66th Leg. (Nev., May 21, 1991). Nothing in the Legislature's codification of the alter ego doctrine for corporations indicates that the Legislature was considering the LLC statutes or that it intended, by negative-implication, to apply the alter ego doctrine to corporations, but not LLCs. *See* 2001 Nev. Stat., ch. 601, at 3170; *see also* Hearing on S.B. 577 Before the Senate Judiciary Comm., 71st Leg. (Nev., May 22, 2001); Hearing on S.B. 577 Before the Senate Judiciary Comm., 71st Leg. (Nev., May 25, 2001); Hearing on S.B. 577 Before the Assembly Judiciary Comm., 71st Leg. (Nev., May 30, 2001). Therefore, we decline to interpret the Legislature's enactment of NRS 78.747 as, by omission, precluding the application of the alter ego doctrine to LLCs.

As recognized by courts across the country, LLCs provide the same sort of possibilities for abuse as corporations, and creditors of LLCs need the same ability to pierce the LLCs' veil when such abuse exists. *See Giampietro*, 317 B.R. at 846 ("The varieties of fraud and injustice that the alter ego doctrine was designed to redress can be equally exploited through limited liability companies."). Thus, we hold the alter ego doctrine applies to LLCs and the district court erred in denying the Gardners' motion to amend their complaint to allege that the Managers were subject to liability through the alter ego doctrine.

CONCLUSION

Accordingly, for the reasons set forth above, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order denying the Gardners' mo-

tion to amend their complaint and to allow the Gardners to amend their complaint.

Douglas and Pickering, JJ., concur.

BRIAN YU, Appellant, *v.* ROURONG YU, Respondent.

No. 70348

November 22, 2017 405 P.3d 639

Jurisdictional prescreening of an appeal from a district court order entered after a decree of divorce. Eighth Judicial District Court, Family Court Division, Clark County; Bill Henderson, Judge.

Appeal may proceed.

Brian Yu, Las Vegas, in Pro Se.

Rourong Yu, Las Vegas, in Pro Se.

Before Hardesty, Parraguirre and Stiglich, JJ.

OPINION

Per Curiam:

This is an appeal from a district court order ruling on several post-judgment issues and declaring the parties to be vexatious litigants. We consider whether the post-judgment vexatious litigant determination, which is not independently appealable, *Peck v. Crouser*, 129 Nev. 120, 124, 295 P.3d 586, 588 (2013), may be considered in this appeal or must be challenged via an original writ petition. We conclude that a post-judgment vexatious litigant determination may be considered in an appeal from an otherwise appealable order, and thus allow this appeal to proceed.

FACTS AND PROCEDURAL HISTORY

Appellant Brian Yu and respondent Rourong Yu were divorced via a decree entered in 2015. Thereafter, Brian filed several motions to reopen the decree and alter its terms. The district court entered an order that, among other things, denied Brian's requests, granted Rourong an additional $88,000 from certain accounts, and declared both Brian and Rourong to be vexatious litigants. Brian timely appealed.

This court entered an order directing Brian to show cause why this appeal should not be dismissed for lack of jurisdiction. We ques-

tioned whether the portion of the order declaring Brian to be a vexatious litigant was appealable where no statute or court rule appeared to authorize an appeal from such an order.[1] *See* NRAP 3A(b) (listing appealable orders); *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (stating that this court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule); *see also Jones v. Eighth Judicial Dist. Court*, 130 Nev. 493, 497, 330 P.3d 475, 478 (2014) (noting that a petition for a writ of mandamus is the proper means to challenge an order restricting a litigant's access to the courts). Brian filed a response arguing that orders resolving a "mixed bag" of issues, some of which are reviewable through an appeal and some through a writ petition, should be reviewable in their entirety via an appeal.[2] He asserts that requiring litigants to file both an appeal and a writ petition from the same order is contrary to Nevada's public policy of promoting judicial economy by avoiding piecemeal review. He also suggests that such a requirement could result in confusion. Finally, Brian points to *Lewis v. Lewis*, 132 Nev. 453, 373 P.3d 878 (2016), in support of his assertion that an appeal is the proper method to challenge an order containing a "mixed bag" of issues.

DISCUSSION

A post-judgment order declaring a party to be a vexatious litigant is not appealable and may only be challenged via an original writ petition.[3] *Peck*, 129 Nev. at 124, 295 P.3d at 588. The question here is whether litigants who seek to challenge a post-judgment vexatious litigant determination contained within an otherwise appealable order must file an original writ petition to challenge the vexatious litigant determination. We conclude they need not.

We agree with Brian that requiring litigants to file both a notice of appeal and an original writ petition to challenge different portions of the same order is inconsistent with Nevada's "interest in promoting judicial economy by avoiding the specter of piecemeal appellate review." *Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 590, 356

[1]We also questioned whether the remainder of the order was appealable. Having considered Brian's response and the documents before this court, it appears that the order is otherwise appealable as a special order after final judgment or an order denying a motion pursuant to NRCP 60(b). NRAP 3A(b)(8); *Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 63, 732 P.2d 1376, 1379 (1987).

[2]The response was filed by Brian's counsel, who has since withdrawn.

[3]Brian's alternative assertion that the vexatious litigant determination is appealable under *Jordan v. State ex rel. Department of Motor Vehicles & Public Safety*, 121 Nev. 44, 110 P.3d 30 (2005), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008), lacks merit because the determination here was made in a post-judgment order rather than in an order interlocutory to a final judgment. *Peck*, 129 Nev. at 123-24, 295 P.3d at 587-88.

P.3d 1085, 1090 (2015) (internal quotation marks omitted). Such a requirement could also cause unnecessary confusion for attorneys and pro se litigants seeking this court's review. Thus, allowing consideration of a post-judgment vexatious litigant determination in an appeal from an otherwise appealable order both promotes judicial efficiency and simplifies the review process. *Cf. Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 526, 134 P.3d 726, 732 (2006) (interpreting NRAP 4(a)(4) in such a manner as to avoid piecemeal litigation and confusion regarding the time for filing a notice of appeal).

Allowing review of a post-judgment vexatious litigant determination on appeal from an otherwise independently appealable order is also consistent with our recent decision in *Vaile v. Vaile*, 133 Nev. 213, 396 P.3d 791 (2017). In that case, the appellant challenged a post-judgment order concerning both child support and contempt. *Id.* at 794-95. Although a contempt order is not independently appealable, *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000), we concluded that we had jurisdiction to consider a contempt finding or sanction on appeal, so long as it "is included in an order that is otherwise independently appealable." *Vaile*, 133 Nev. at 217, 396 P.3d at 794-95; *see also Lewis*, 132 Nev. at 457-58, 373 P.3d at 881 (considering a challenge to contempt findings in an appeal from a post-judgment order modifying custody of a minor child and child support obligation). Similar treatment of non-appealable contempt orders and non-appealable post-judgment vexatious litigant orders will further serve to lessen confusion for those seeking review.

CONCLUSION

A post-judgment vexatious litigant determination may be challenged on appeal if it is contained within an otherwise independently appealable order. Accordingly, we may consider the vexatious litigant determination in the context of this appeal, and this appeal may proceed.

Brian shall have 30 days from the date of this opinion to file either 1) a brief that complies with the requirements of NRAP 28(a) and NRAP 32, or 2) an "Informal Brief Form for Pro Se Parties" provided by the clerk of this court. NRAP 28(k). Rourong need not file a response unless directed to do so by this court. NRAP 46A(c). We caution Brian that failure to timely comply may result in the imposition of sanctions, including dismissal of this appeal.