that Cruse took action against Angel in retaliation for Angel's exercise of his First Amendment right to file a grievance, such action was in violation of clearly established law, and Cruse was not entitled to qualified immunity. *See id.* We therefore conclude that granting summary judgment to Cruse on qualified immunity grounds was inappropriate. *See id.*

CONCLUSION

As detailed above, there were genuine issues of material fact remaining with regard to each of the disputed elements of the retaliation claim and with regard to Cruse's entitlement to qualified immunity. Accordingly, we reverse the district court's order granting summary judgment to Cruse and remand this matter to the district court for further proceedings consistent with this opinion.

HARDESTY and PARRAGUIRRE, JJ., concur.

RAYSHAUN COLEMAN, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 60181

April 3, 2014 321 P.3d 901

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The supreme court, CHERRY, J., held that: (1) the evidence was sufficient to support conviction for first-degree murder by child abuse, (2) the statute defining the statement-against-interest exception to the hearsay rule was not unconstitutional, (3) the district court abused its discretion when it excluded from evidence statements against interest made by defendant's girlfriend, and (4) the district court's error in excluding from evidence statements against interest made by defendant's girlfriend was not harmless.

Reversed and remanded.

[Rehearing denied September 24, 2014]

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

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Giancarlo Pesci*, Deputy District Attorney, Clark County, for Respondent.

1. Homicide.
   Evidence was sufficient to support conviction for first-degree murder by child abuse; defendant was the only adult in the house when infant victim died, evidence established that the victim had been abused since his birth as he was malnourished, suffered from head and rib fractures, and had been burned, defendant admitted he bathed the victim before he stopped breathing, and a medical examiner stated the victim's burns could have come from the abnormally hot water found in the house.
2. Criminal Law.
   The statute defining the statement-against-interest exception to the hearsay rule was not unconstitutional, even though it subjected certain exculpatory hearsay statements to a trustworthiness determination; when applying the rule, courts balance fabrication concerns with the defendant's constitutional right to have a meaningful opportunity to present a complete defense. U.S. Const. amend. 6; NRS 51.345.
3. Criminal Law.
   The supreme court reviews a challenge to the constitutionality of a statute de novo.
4. Constitutional Law.
   Because statutes are presumed to be valid, the challenger bears the heavy burden of demonstrating that the statute is unconstitutional.
5. Criminal Law.
   Hearsay evidence has traditionally been excluded because it is not subject to the usual method to test the declarant's credibility since cross-examination to ascertain a declarant's perception, memory, and truthfulness is not available.
6. Criminal Law.
   The district court abused its discretion when it excluded from evidence, during prosecution for first-degree murder, statements against interest made by defendant's girlfriend, the mother of victim, that the burns on child victim were caused by being splashed by cooking methamphetamine; the statements made by girlfriend were self-incriminating, as they would expose her to criminal liability for child abuse or child neglect, and circumstances corroborated the statements. NRS 51.345, 200.508(1), (2).
7. Criminal Law.
   The district court's error in excluding from evidence, during prosecution for first-degree murder, statements against interest made by defendant's girlfriend, the mother of victim, that the burns on child victim were caused by being splashed by cooking methamphetamine, was not harmless; the exclusion of the evidence affected defendant's constitutional right to present a complete defense. U.S. Const. amend. 6; NRS 51.345.
8. Criminal Law.
   Any hearsay errors are evaluated for harmless error.
9. Homicide.
   The district court's jury instructions on the felony-murder rule and child abuse did not mislead or confuse the jury, as argued by defendant; the instructions informed the jury that while the killing could be accidental, the child abuse must be nonaccidental.

Before Hardesty, Parraguirre and Cherry, JJ.

OPINION

By the Court, CHERRY, J.:

Appellant Rayshaun Coleman was convicted of first-degree murder by child abuse following the death of an infant, Tristen Hilburn. Tristen was the victim of multiple injuries, many of which occurred days and weeks prior to the day of his death. Coleman insists that he is innocent and that the injuries were inflicted by his girlfriend, Tristen's mother Crystal Hilburn Gaynor, or others associated with her, including her methamphetamine-addicted brother. In this appeal, Coleman challenges the constitutionality of NRS 51.345, the statement-against-interest exception to the hearsay bar, the district court's exclusion of defense witnesses, and jury instructions on the felony-murder rule and child abuse.

In resolving Coleman's appeal, we conclude that NRS 51.345 is constitutional but clarify that the standard for admissibility of a statement against penal interest offered to exculpate an accused—"corroborating circumstances [that] clearly indicate the trustworthiness of the statement"—must not be so rigorously applied that it ignores the purpose for the rule and instead infringes the defendant's constitutional right to a meaningful opportunity to present a complete defense. We conclude that the district court, in applying this provision, abused its discretion by refusing to permit two defense witnesses to testify about admissions made by Gaynor concerning a methamphetamine explosion and resulting burns to Tristen's body. In reversing this portion of the decision, we take the opportunity to clarify the relevant considerations for identifying the corroboration necessary to support the admission of a hearsay statement under NRS 51.345. We also conclude that the instructions were not in error.

FACTS

This case stems from the death of Tristen on Sunday, March 8, 2009, when he was just six weeks old. While Tristen was healthy and alert at birth, Gaynor indicated that Tristen had breathing issues to the point where he had stopped breathing and turned blue. Despite this and the fact that he was small and had a weak cry, he was never taken to a doctor because of a lack of health insurance. At the time of Tristen's death, Gaynor lived in a house with her brother Brian Harris, her five-year-old son Devin, and her then-boyfriend Coleman. During this time period, Brian was using methamphetamine on a daily basis. To support his addiction, Brian would often act as a middleman, procuring drugs for acquaintances and receiving either money or drugs in return.

It was not uncommon for these acquaintances to stop by the house to either purchase drugs from, or do drugs with, Brian. Brian sometimes took care of Devin, but he was not entrusted with the care of Tristen. On the day of Tristen's death, Brian spent much of the day in and out of the house with friends, pursuing and using methamphetamine.

In Tristen's six weeks of life, Gaynor left him with Coleman on three weekends, including the final weekend of Tristen's life. Tristen was in Coleman's care that weekend because Gaynor was incarcerated for an unrelated misdemeanor domestic violence conviction. Gaynor was home that Friday and early Saturday morning, but turned herself in at the jail around 8 a.m. on Saturday, March 7, 2009. When Coleman watched Tristen, he would keep Tristen in the master bedroom with the door closed and locked. Although a crib was available, Tristen slept between the couch cushions.

Coleman called 911 on the night of Tristen's death. He met the responding officers at the door and directed them to the back bedroom. Besides the emergency personnel, the only individuals in the house were Tristen, Coleman, and Devin. Upon entering the master bedroom, the responding officers found Tristen lying on the floor, unconscious, and not breathing. Tristen was cold to the touch but was not stiff. A number of responders testified to observing red blotches or burns on Tristen's face and body. Many also noted that the burns appeared to be recent. Responders performed CPR, but it was unsuccessful and Tristen was pronounced dead. Officers on the scene found Tristen's blood and pieces of sloughed skin around the house.

Examination of Tristen's body revealed that he suffered from many health issues and injuries at the time of his death that indicated that he had been abused and neglected. He was extremely small and malnourished, weighing only five and a half pounds (less than he weighed at birth). His brain was small and swollen and some of the brain tissue was dead. Due to the damage to his brain, Tristen may have had problems crying and feeding. Although no tests were conducted to determine bone density, the medical examiner indicated that Tristen likely did not get enough calcium in his diet, which would have affected the density of his bones. Tristan also suffered numerous physical injuries. There were debrided first- to second-degree burns across approximately 36 percent of his body, two skull fractures as the result of blunt force trauma, fresh bleeding in the muscles of his back, and multiple fractured ribs consistent with blunt force trauma. The cause of death was determined to be inflicted head injuries and burns with starvation contributing to the death, and the manner of death to be homicide.

The investigation focused on Coleman. According to the medical examiner, it was not possible for the lethal burns or skull fractures

to have been inflicted before 10 a.m. on Saturday, March 7, 2009, because there was no evidence of healing. This evidence suggested that the injuries were inflicted while Tristen was in Coleman's care; however, the healing process used to determine the time of injury can be affected by a person's strength and the injuries, and in this case, Tristen's immune system appeared to be inactive at the time of his death due to stress and inadequate nutrition. When he was questioned on the day that Tristen died, Coleman initially gave officers a false name. When asked what had happened, Coleman said that he had bathed Tristen and put him down to sleep. He indicated that he then also fell asleep and when he woke he found Tristen unresponsive and with skin peeling from his burns. There was some evidence that the burns could have happened when Coleman bathed Tristen: the temperature of the hot water in the house reached 131 degrees and a crime scene analyst observed that the hot and cold faucets in the bathtub were reversed.

The State charged Coleman with one count of murder by child abuse and two counts of child abuse and neglect with substantial bodily harm. It also charged Gaynor with one count of child neglect with substantial bodily harm. Both pleaded not guilty. The trials were severed, and the State filed a notice of intent to seek the death penalty against Coleman. The State subsequently filed an amended information in which it solely charged Coleman with murder by child abuse.

Before trial, Coleman's counsel informed the court that he intended to call three female witnesses who had been incarcerated with Gaynor. These witnesses would testify about statements allegedly made by Gaynor about burns that both she and Tristen suffered after being splashed by cooking methamphetamine. The State objected to the testimony on hearsay grounds, and Coleman argued that the statements were admissible as statements against interest and pointed out that the statements were exculpatory and relevant as to bias and a lack of investigation. The district court held an evidentiary hearing and ultimately found that the statements were exculpatory as to both Gaynor and Coleman, but were so lacking in any indicia of trustworthiness that they could not be admitted as statements against penal interest under NRS 51.345. Coleman's attorney later lodged a complaint on the record alleging potential due process issues with NRS 51.345.

After Coleman's trial began, instructions were proposed on the felony-murder rule and child abuse. Coleman's counsel objected to the use of the term "accidental" as being confusing given the nonaccidental statutory definition of child abuse under the felony-murder rule in NRS 200.030. The State argued that the instruction was accurate given that the killing can be accidental while the physical injury must be nonaccidental. The district court allowed the instruction unaltered.

During the culpability phase of the trial, the jury ultimately found Coleman guilty of first-degree murder by child abuse. In the penalty phase of the trial, one or more of the jurors found several mitigating circumstances, including an "[a]bsence of intent to cause death" and "[i]nvolvement of others in injuries to Tristen." The jury did not find the aggravating circumstance of mutilation of the victim. It found that the mitigating circumstances outweighed the single aggravating circumstance (the victim's age), and imposed a sentence of life with the possibility of parole after 20 years. Coleman now appeals from the judgment of conviction.

DISCUSSION

Sufficiency of the evidence

[Headnote 1]

Coleman argues that there is insufficient evidence to support the conviction of first-degree murder by child abuse. Coleman argues that his constitutional rights to due process of law, equal protection, a fair trial, and conviction based upon only evidence establishing guilt beyond a reasonable doubt were violated. Coleman points out that the State failed to prove that he inflicted the fatal injuries and that the death was not accidental. In response, the State argues that the evidence presented, viewed in a light most favorable to it, clearly established each element of first-degree murder by child abuse beyond a reasonable doubt.

Because "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotations omitted), we conclude that sufficient evidence supported the verdict. While others were in the house the weekend of Tristen's death, Coleman was the only adult present when Tristen died. Additionally, while testimony provided that Coleman did a good job of caring for Tristen, Tristen was seriously abused from the time of his birth. The abuse was so severe that Tristen's brain was not developing normally, parts of it were dead, and it had shrunk since his birth. Tristen was malnourished, suffered from head and rib fractures, had been burned, and his immune system was not functioning. While the cause of the burns was unknown, Coleman indicated that he had bathed Tristen and put him to bed before he stopped breathing. The medical examiner acknowledged that the burns could have been caused by abnormally hot water found in the house and evidence established that the faucets on the tub were reversed. There was no testimony establishing how the fractures were inflicted, but Coleman was alone with Tristen all weekend. The medical testimony, while inconsistent, supported that the burns and fractures occurred while Coleman was alone with Tristen. And the medical examiner

concluded that Tristen died of the burns and fractures. Viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence presented could lead a rational trier of fact to conclude that Coleman abused Tristen and that abuse led to his death. *See Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (noting that "circumstantial evidence alone may sustain a conviction").

The exclusion of testimony from three defense witnesses

Coleman next attacks the constitutionality of NRS 51.345 and argues that even if the statute is constitutional, reversal is still warranted because the exclusion of the defense witnesses' testimony about Gaynor's statements was an abuse of discretion. Coleman contends that Gaynor's statements would subject her to criminal liability for child neglect and were trustworthy based on corroborating circumstances, and that their exclusion was highly prejudicial.

Constitutionality of NRS 51.345

[Headnote 2]

Coleman argues that NRS 51.345 is unconstitutional because it subjects certain exculpatory hearsay statements to a trustworthiness determination based on corroborating circumstances that does not apply to similar inculpating statements offered by the State.[1] Coleman also avers that the statute arbitrarily allows the district court to preclude defense evidence based upon a trustworthiness determination that should be decided by a jury rather than a judge.[2]

[Headnotes 3, 4]

We review a challenge to the constitutionality of a statute de novo. *Aguilar-Raygoza v. State*, 127 Nev. 349, 352, 255 P.3d 262, 264 (2011). "Because statutes are presumed to be valid, [the challenger] bears the heavy burden of demonstrating that [the statute] is unconstitutional." *Id.*

[Headnote 5]

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted," NRS 51.035, and is inadmissible unless within an exemption or exception. NRS 51.065. Hearsay evidence has traditionally been excluded because it is not subject

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[1]The federal counterpart to NRS 51.345, Federal Rule of Evidence 804(b)(3), was amended in 2010 to make the requirement of corroborating circumstances apply to all declarations against penal interest in criminal cases.

[2]The State argues that this issue was not preserved for appeal. We disagree and conclude that the issue was preserved by the argument below that the statute is unconstitutional and fundamentally unfair in violation of due process because the defendant is held to a different standard for the admission of hearsay evidence.

to the usual method to test the declarant's credibility, since cross-examination to ascertain a declarant's perception, memory, and truthfulness is not available. *Deutscher v. State*, 95 Nev. 669, 684, 601 P.2d 407, 417 (1979). Based on these concerns, additional requirements have been placed on hearsay statements before they may be admitted. *Chambers v. Mississippi*, 410 U.S. 284, 298-99 (1973) ("The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. . . . A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."). A statement against interest is excepted from the hearsay bar and is admissible, provided that the statement, at the time it is made:

> (a) Was so far contrary to the pecuniary or proprietary interest of the declarant;
>
> (b) So far tended to subject the declarant to civil or criminal liability;
>
> (c) So far tended to render invalid a claim by the declarant against another; or
>
> (d) So far tended to make the declarant an object of hatred, ridicule or social disapproval,
>
> that a reasonable person in the position of the declarant would not have made the statement unless the declarant believed it to be true.

NRS 51.345(1). An additional requirement is imposed when a statement "tending to expose the declarant to criminal liability [is] offered to exculpate the accused in a criminal case." *Id.* Such a statement "is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.*

Coleman asserts that *Holmes v. South Carolina*, 547 U.S. 319 (2006), controls the constitutionality assessment of NRS 51.345. In *Holmes*, the United States Supreme Court addressed the constitutionality of "an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." 547 U.S. at 321. The United States Supreme Court began by noting that while the Constitution provides state and federal rulemakers with broad latitude to establish exclusionary rules for evidence in criminal trials, that latitude is limited by the Constitution's guarantee that a criminal defendant must have "a meaningful opportunity to present a complete defense." *Id.* at 324 (internal quotations omitted). The Court stated that "[t]his right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (internal quotations omitted).

However, the Court clarified that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* at 326. The Court then critiqued the evidentiary rule at issue based on its focus on the strength of the prosecution's case regardless of the credibility of the prosecution's witnesses or the reliability of its evidence and without considering the probative value of the proffered defense evidence. *Id.* at 329. The Supreme Court concluded that the evidentiary rule did not "rationally serve the end that . . . [it was] designed to promote, *i.e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Id.* at 330. As a result, the Court held that the rule was arbitrary and violated the defendant's right to a meaningful opportunity to present a complete defense. *Id.* at 331.

We conclude that *Holmes* is not dispositive, as the exclusion of the hearsay statements was not predicated on evidence of Coleman's guilt but was based on NRS 51.345(1)'s requirement that "[a hearsay] statement tending to expose the declarant to criminal liability and offered to exculpate the accused in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Moreover, in critiquing the evidentiary rule at issue in *Holmes*, the Court indicated that rules based on the credibility of the witnesses or the reliability of the evidence would be proper. *Cf.* 547 U.S. at 329. Thus, *Holmes* actually supports the constitutionality of NRS 51.345(1).

Another court has addressed a similar challenge to an evidentiary rule that is identical to NRS 51.345(1). In *Summers v. State*, 231 P.3d 125, 141 (Okla. Crim. App. 2010), the defendant argued that his right to a fair trial was violated when the trial court refused to let him present a witness's testimony that the witness ordered a third party to kill the victims and that the third party made incriminating statements to the witness that exculpated the defendant. The trial court determined that the testimony could not be admitted as it was hearsay and the defense failed to provide clear, corroborating circumstances that would indicate the trustworthiness of the statement. *Id.* at 144-45. The appellate court expressed concern that the evidentiary rule, which required corroborating circumstances establishing the trustworthiness of a statement against penal interest offered to exculpate a defendant, could violate a defendant's constitutional rights. *Id.* at 148. In particular, if a court holds the defense evidence to too high of a standard under the rule, "application of this seemingly reasonable standard could, in fact, violate the defendant's right to a meaningful opportunity to present his defense." *Id.* The court explained that while courts have traditionally treated out-of-court statements that tend to exonerate the defendant and implicate the declarant with great suspicion, that concern does not "fully comport with the later-developed, but now well-established doctrine regard-

ing the defendant's right to a meaningful opportunity to present his defense." *Id.* "Such a rule, at least when too rigorously applied, would appear to be 'disproportionate' to the (reliability) end that it is intended to promote, since it subjects the defendant's evidence to a more demanding admissibility evaluation than it does the State's." *Id.* at 148-49. Despite its concerns, the court did not "question the validity, in general, of this well-established evidentiary rule." *Id.* at 148.

We find the observations in *Summers* to be persuasive and agree with the Oklahoma court's concerns about the constitutional implications of the standard for admissibility of statements against penal interest that are offered to exculpate a defendant. In applying the evidentiary rule, the court must balance fabrication concerns with the constitutional right to have a meaningful opportunity to present a complete defense. *See Holmes*, 547 U.S. at 324 (stating that a defendant is constitutionally guaranteed "a meaningful opportunity to present a complete defense" (internal quotations omitted)); *Woods v. State*, 101 Nev. 128, 132, 696 P.2d 464, 467 (1985) (explaining that the drafters of the federal rule analogous to NRS 51.345 expressed concern about fabrication). Our prior decisions applying NRS 51.345 reflect that careful balance. We have explained that "the statutory test for determining the admissibility of statements against penal interest under NRS 51.345 is whether the totality of the circumstances indicates the trustworthiness of the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant." *Walker v. State*, 116 Nev. 670, 676, 6 P.3d 477, 480 (2000). Our caselaw does not apply NRS 51.345 so rigorously as to hold the defendant to a standard that is disproportionate to the statute's intended goal of providing reliability or unfairly burdens the defendant's constitutional rights. It also balances the principle that the reliability of relevant testimony typically falls within the province of the jury, *Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009), with the need to "compensate for the absence of the oath and opportunity for cross-examination," *Chambers*, 410 U.S. at 299, that is at the heart of exceptions to the hearsay rule such as NRS 51.345(1). Accordingly, based on the balanced approach required to assess whether the statements against penal interest should be admitted, NRS 51.345 is not unconstitutional.

Application of NRS 51.345 to this case

[Headnote 6]

Coleman contends that reversal is warranted because the prohibition of the witnesses' testimony was an abuse of discretion as Gaynor's statements would subject her to child neglect charges, were corroborated and trustworthy, and the exclusion of the evidence was

not harmless. We agree. The district court abused its discretion in failing to allow the testimony from two of the three witnesses.

While the application of NRS 51.345 is within the district court's discretion, we will reverse the decision if it is an abuse of discretion, meaning that the "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001); *Sparks v. State*, 104 Nev. 316, 320-21, 759 P.2d 180, 183 (1988).

The statements

The content of the proffered testimony is critical to our review of the district court's evidentiary decision. Two of the proposed defense witnesses (Erica Antolick and Dawn Makaroplos) testified in an offer of proof outside the presence of the jury. Erica Antolick testified regarding two statements made by Gaynor that the defense offered to exculpate Coleman with respect to the burns suffered by Tristen. First, sometime in 2009, she overheard Gaynor say that while cooking methamphetamine with her brother the mixture exploded and Tristen was splashed. Erica asked what happened when the mixture exploded and Gaynor became defensive, yelled, and very quickly lifted up her shirt to the extent that she could with her shackles. Erica stated that Gaynor's skin appeared red. Erica never heard Gaynor say that the baby suffered any burns, nor did she hear Gaynor discuss how or why Tristen died. Erica also admitted that she had no idea when the burning incident supposedly took place. Second, during a transport ride to court, Erica overheard Gaynor talking with Coleman and indicating that she knew that Coleman did not murder Tristen and that her brother did it. Erica also mentioned the fact that Tristen slept between the couch cushions. Erica admitted that she disliked Gaynor and had even requested a transfer to a separate unit because they did not get along. At the time of the hearing, Erica was on probation after having been convicted of felony forgery.

Dawn Makaroplos, who was Gaynor's friend, also testified about similar statements made by Gaynor that the defense offered to exculpate Coleman with respect to the burns. Dawn indicated that she saw scabs on Gaynor's chest in jail. When she asked Gaynor what happened, Gaynor stated that she and her infant were burned and that her infant had died as a result. Eventually, Gaynor opened up to Dawn and, while crying, said that "her brother was batching meth and she was feeding the baby and the pot exploded over the stove." After Gaynor admitted to having burn marks, Dawn said, "[w]ell, if you're feeding, then the baby got burn marks. . . . So how bad was the baby?" Gaynor would not acknowledge the question. Dawn admitted that Gaynor started crying every time she asked if the baby got burned, so she never obtained a direct answer from

Gaynor. She nevertheless maintained that Gaynor stated that she had been holding the baby. Dawn stated that Gaynor told her that the burn happened the Friday before the baby's death and that Coleman was wrongly in jail for killing Tristen. According to Dawn, Gaynor indicated that it was her brother's fault. Dawn testified that Gaynor talked to and confided in her because everyone else in jail called Gaynor a baby killer. Dawn expressed some resentment toward Gaynor, as Dawn was fighting for custody of her daughter at the time and Gaynor was crying about her five-year-old when she had "killed a newborn." Upon learning that Coleman had been living in Gaynor's house, Dawn admitted that those were not the facts Gaynor told her. Gaynor had told her that Coleman came from California to watch Tristen. Dawn also referenced the fact that Gaynor said Tristen slept on the couch.

The district court excluded this testimony after concluding that Gaynor's statements were not against penal interest and were so lacking in any indicia of trustworthiness that they could not be admitted under the NRS 51.345 hearsay exception. We address each of these determinations in turn.

Potential for criminal liability

The district court emphasized that Gaynor's statements were not self-incriminating. We disagree. Gaynor's alleged statements that she was holding her baby next to where her brother was cooking methamphetamine, resulting in splatter burns, tended to subject her to additional criminal liability for child abuse or child neglect as she admitted to holding a newborn next to highly explosive toxic substances. *See* NRS 200.508(1) (a person is guilty of child abuse if he or she "willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect"); NRS 200.508(2) (a person is guilty of child neglect if he or she "permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect"); NRS 200.508(4)(a) ("'Abuse or neglect' means physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years, . . . under circumstances which indicate that the child's health or welfare is harmed or threatened with harm."); *see also In re A.K.*, 696 N.W.2d 160, 161 (N.D. Ct. App. 2005) (noting the mother's conviction for methamphetamine-related offenses and child abuse and neglect, following a fire that resulted in severe burning of the child). Accordingly, the district court erred in determining that the statement did not tend to subject Gaynor to criminal liability.

Corroborating circumstances and trustworthiness

In determining that there were not sufficient corroborating circumstances to indicate the trustworthiness of Gaynor's statements, the district court noted that the statements were not made to a friend in the comfort of a private residence, but were made in jail and in a transportation van. Also, Gaynor was already implicated in the underlying crime at the time the statements were made, rendering them less trustworthy. Although these are relevant considerations, Coleman presented evidence sufficient to warrant a finding of trustworthiness regarding Gaynor's statements presented by Erica and Dawn.

Discussing the difficulties in precisely identifying the corroboration necessary to support the admission of a hearsay statement, the Fourth Circuit Court of Appeals has recognized several factors that are relevant to the inquiry. Specifically,

> (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question.

United States v. Kivanc, 714 F.3d 782, 792 (4th Cir. 2013) (quoting *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)). Other courts have included for consideration (7) whether the statement was made voluntarily after *Miranda* warnings, *United States v. Nagib*, 56 F.3d 798, 805 (7th Cir. 1995); *United States v. Price*, 134 F.3d 340, 348 (6th Cir. 1998), (8) "whether there is any evidence that the statement was made in order to curry favor with authorities," *Nagib*, 56 F.3d at 805, and (9) the spontaneity of the statement, *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978).

At the time that the statements were made by Gaynor to Erica and Dawn, Gaynor was exposed to prosecution for child abuse and presumably had been given her *Miranda* warnings. She became very upset after mentioning the splashing methamphetamine and reacted emotionally by starting to cry or becoming angry. Gaynor also spontaneously made, and repeated, these statements to both witnesses.

Gaynor was in a relationship with Coleman, giving her a reason to lie to protect him. However, due to the emotionally charged nature of her utterances and their inculpatory nature, the motive behind making the statements is unclear.

Taking into consideration the parties to whom the statement was made, it is apparent that neither Erica nor Dawn had a clear motive to fabricate the statements. *See Woods v. State*, 101 Nev.

128, 133, 696 P.2d 464, 467 (1985) ("In determining whether the declarant in fact made the proffered statement, the trial court may consider the credibility of the witness."). They were not promised any deals or benefits for their testimony such as a plea bargain or reduction in sentence. *See Walker*, 116 Nev. at 676, 6 P.3d at 481 (pointing out that the lack of an advantage accrued in exchange for the testimony supported a trustworthiness finding); *Woods*, 101 Nev. at 135, 696 P.2d at 469 (same). Although Dawn harbored some resentment toward Gaynor concerning child custody issues, she considered Gaynor a friend, providing an indicia of trustworthiness. *See Walker*, 116 Nev. at 676, 6 P.3d at 481 ("[I]t is well-settled that a statement against interest made to a close friend or relative is considered to be more reliable than a statement made to a stranger."). We acknowledge, however, that Erica admitted to not liking Gaynor, which may have given her some incentive to fabricate the statements. But considering the other corroborating circumstances that indicate the trustworthiness of the statements, we are not convinced that this possibility warrants excluding the testimony.

We conclude that the nature and strength of independent evidence relevant to the conduct in question support the admission of Gaynor's statements. The statements were focused on Brian's undisputed involvement with methamphetamine. Although the statements were contradicted by Coleman's statements that Tristen was fine before his death, Coleman's statements were less than trustworthy as, at the time, he was attempting to protect himself, as evidenced by the use of a false name. Erica and Dawn both saw burns on Gaynor's torso, corroborating Gaynor's statements.[3] Erica and Dawn also both knew of the obscure fact that Tristen slept on the couch, indicating that Gaynor must have told them of this detail, corroborating the fact that conversations occurred between them about Tristen. These circumstances corroborate the hearsay statements and were not sufficiently considered by the district court.

In evaluating the corroborating circumstances, the district court also observed that the medical evidence showed that Tristen's burns could not have occurred before Gaynor reported to jail on the morning of Saturday, March 7, 2009. But the evidence concerning Tristen's burns conflicted with the evidence of his lack of a functioning immune system and inability to heal. The inconsistency of these findings would allow for a jury to determine that the burns could have taken place on the Friday before Tristen's death.

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[3]While no other testimony directly corroborated the burns, the detective did not see Gaynor's chest and did not make any attempt to see the area even after having discussed the burns with Dawn. The detective also failed to report his conversation with Dawn and failed to follow up on Dawn's statements to the police.

Considering the corroborating circumstances, we conclude that the district court abused its discretion in excluding the testimony from Erica and Dawn concerning Gaynor's statements about the burns. Any discrepancies with other evidence should be left to the jury to assess. *Woods*, 101 Nev. at 136, 696 P.2d at 469-70 (stating that it is "for the jury to evaluate [the] story and to decide how much credence it should be given"). Accordingly, the district court abused its discretion in excluding the testimony of Dawn and Erica on this ground.

However, we conclude that the district court did not abuse its discretion in refusing to admit the testimony of the third defense witness. Coleman's counsel proffered that the third witness's testimony would be similar to Erica's testimony concerning the batching of methamphetamine and the explosion. However, the third witness was unable to attend the evidentiary hearing. Thus, the record is insufficient to assess the trustworthiness of the statements Gaynor made to her as she did not testify at the hearing. The district court therefore did not abuse its discretion in excluding the third witness's testimony.

The error was not harmless

[Headnotes 7, 8]

Any hearsay errors are evaluated for harmless error. *Walker*, 116 Nev. at 677, 6 P.3d at 481. Coleman contends that the exclusion of this evidence was not harmless. We agree. Because the exclusion of the defense evidence affected Coleman's constitutional right to a meaningful opportunity to present a complete defense, the error is only considered harmless if the court can determine "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). We cannot make this determination. This evidence was very important to Coleman's defense as it showed that he may not have been responsible for Tristen's burns, which were one of the two potential causes of Tristen's death. Considering the mitigating circumstance found by the jury of "[i]nvolvement of others in injuries to Tristen," we cannot conclude beyond a reasonable doubt that the jury would have found Coleman guilty of murder had they heard this testimony. Accordingly, this error was not harmless and warrants a new trial.

Instructions on the felony-murder rule and child abuse

[Headnote 9]

Coleman argues that two instructions misled and confused the jury as they represented that a killing committed in the perpetration of child abuse is deemed to be murder of the first degree, even if

the killing was accidental. The State asserts, and we agree, that the instructions accurately informed the jury that, while the killing can be accidental, the physical injury to the child (the child abuse) must be nonaccidental. Here, the jury was instructed that:

> There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of child abuse. Therefore, a killing which is committed in the perpetration of child abuse is deemed to be murder of the first degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder Rule.
>
> The intent to perpetrate or attempt to perpetrate child abuse must be proven beyond a reasonable doubt.

Moreover, the jury was instructed that "[a] person commits child abuse if he willfully causes physical injury of a nonaccidental nature to a child under the age of 18 years."

These instructions comply with our statutory scheme concerning first-degree murder and child abuse. The instructions properly indicate that the child abuse must be nonaccidental and, to find murder in the first degree, the State must prove beyond a reasonable doubt that the murder was committed in the perpetration of child abuse. The death could have been intentional, unintentional, or accidental, but the child abuse must have been nonaccidental. As the State pointed out, the rationale behind the felony-murder rule is "to deter felons from killing negligently or accidentally by holding them strictly responsible for the killings that are the result of a felony or an attempted one." *Payne v. State*, 81 Nev. 503, 506, 406 P.2d 922, 924 (1965). The instructions comport with our statutory scheme and the purpose behind the felony-murder rule.[4]

CONCLUSION

We conclude that the district court's decision not to allow the testimony from two defense witnesses was an abuse of discretion and prejudiced Coleman. Accordingly, we reverse the judgment of conviction and remand for a new trial.

HARDESTY and PARRAGUIRRE, JJ., concur.

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[4]Because of our resolution of this appeal, we decline to reach Coleman's remaining contentions concerning the jury instructions.

OBTEEN NASSIRI, D.C.; AND EDWARD JOHNSON, D.C., APPELLANTS, *v.* CHIROPRACTIC PHYSICIANS' BOARD OF NEVADA, RESPONDENT.

No. 60490

April 3, 2014 327 P.3d 487

Appeal from a district court order granting in part and denying in part a petition for judicial review in a professional licensing matter. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Chiropractic physicians petitioned for judicial review of decisions of Chiropractic Physicians' Board in disciplinary proceedings. Following an adverse judgment, physicians appealed. The supreme court, CHERRY, J., held that: (1) standard of judicial review of administrative agency finding to determine whether such finding was supported by substantial evidence was not standard of proof for Board to determine whether alleged violations were established, disapproving *Gilman v. State Board of Veterinary Medical Examiners*, 120 Nev. 263, 89 P.3d 1000 (2004), and *Minton v. Board of Medical Examiners*, 110 Nev. 1060, 881 P.2d 1339 (1994); (2) in disciplinary proceedings before Board, allegations of misconduct had to be proven by preponderance of evidence; and (3) Board's characterization of evidence of physicians' misconduct as "substantial, credible, reliable, and probative" did not indicate that Board utilized standard of proof lower than preponderance of evidence.

Affirmed.

Agwara & Associates and *Liborius I. Agwara* and *George A. Maglares*, Las Vegas, for Appellants.

Louis A. Ling, Reno, for Respondent.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   On appeal from orders deciding petitions for judicial review, the supreme court reviews the administrative decision in the same manner as the district court: factual findings will only be overturned if they are not supported by substantial evidence, which is evidence that a reasonable mind could accept as adequately supporting the agency's conclusions, and a de novo standard of review is applied when the court addresses a question of law, including the administrative construction of statutes. NRS 233B.135(3)(e), (f).
2. ADMINISTRATIVE LAW AND PROCEDURE.
   When reviewing an administrative agency's decision, the supreme court will decide purely legal issues without deference to the agency's conclusions of law. NRS 233B.135(3).
3. EVIDENCE.
   "Burden of proof" and "standard of proof" are distinct concepts. The burden of proof refers broadly to a party's duty to present evidence and

argument to prove his or her allegations; whereas, the standard of proof refers to the degree or level of proof demanded to prove specific allegations.

4. Evidence.
   A standard of proof functions to instruct the fact-finder concerning the degree of confidence society thinks the fact-finder should have in the correctness of factual conclusions for a particular type of adjudication.
5. Administrative Law and Procedure.
   In determining whether an administrative agency's determination is supported by substantial evidence, a reviewing court, whether the district court or the supreme court, must inquire whether the agency's factual determinations are reasonably supported by evidence of sufficient quality and quantity. NRS 233B.135(3)(e).
6. Administrative Law and Procedure.
   The "substantial evidence" standard of review of an administrative agency finding refers to the quality and quantity of the evidence necessary to support factual determinations; it contemplates deference to those determinations on review, asking only whether the facts found by the administrative fact-finder are reasonably supported by sufficient, worthy evidence in the record. NRS 233B.135(3).
7. Administrative Law and Procedure.
   Provision of Administrative Procedures Act setting forth standard of judicial review of administrative agency finding to determine whether such finding was supported by substantial evidence was not standard of proof; rather, standard of proof was determined by agency's governing statutes, and then, on judicial review, reviewing court would consider whether substantial evidence supported agency's findings, disapproving *Gilman v. State Board of Veterinary Medical Examiners*, 120 Nev. 263, 89 P.3d 1000 (2004), and *Minton v. Board of Medical Examiners*, 110 Nev. 1060, 881 P.2d 1339 (1994). NRS 233B.135(3)(e).
8. Health.
   In disciplinary proceedings against chiropractic physicians before Chiropractic Physicians' Board, allegations of misconduct had to be proven by a preponderance of the evidence.
9. Evidence.
   The preponderance of the evidence standard is the minimum civil standard of proof.
10. Health.
    Statements by Chiropractic Physicians' Board that evidence of physicians' misconduct was substantial, credible, reliable, and probative did not indicate that Board utilized standard of proof lower than preponderance of evidence applicable in disciplinary proceedings before Board; rather, comments spoke to qualification of evidence rather than to whether evidence satisfied standard of proof used to evaluate whether alleged violations occurred.

Before Hardesty, Parraguirre and Cherry, JJ.

OPINION

By the Court, Cherry, J.:

Appellants assert that the Chiropractic Physicians' Board of Nevada violated their statutory and constitutional rights by ap-

plying a lower standard of proof in disciplinary proceedings than due process allows. They further argue that applying a different standard of proof in chiropractic physician disciplinary proceedings than is applied in medical physician disciplinary proceedings violates the Equal Protection Clause of the United States Constitution. We hold that, in the absence of a specific statutory mandate, agencies generally must utilize, at a minimum, the preponderance-of-the-evidence standard in their adjudicative hearings as it is the general civil standard of proof. Because the preponderance-of-the-evidence standard of proof was ostensibly applied and met here, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Dr. Obteen Nassiri owned and operated a Las Vegas-based chiropractic practice that specialized in treating patients who had been injured in motor vehicle accidents. The practice employed appellant Dr. Edward Johnson as a chiropractic physician, who later purchased the practice from Dr. Nassiri. At the time, both appellants were licensed chiropractic physicians in Nevada.

After an insurance company reported that appellants may have engaged in unprofessional conduct, respondent Chiropractic Physicians' Board of Nevada[1] filed complaints for disciplinary action against appellants, charging them with, among other things, unlawfully referring patients to other physicians, unlawful fee splitting, inaccurate record-keeping, fraud, and employing unregistered assistants. The Board heard testimony from four witnesses and considered numerous exhibits. It subsequently found, based on the "substantial, credible, reliable, and probative evidence," that appellants had violated multiple provisions of NRS Chapter 634 and NAC Chapter 634. As a result, the Board revoked Dr. Nassiri's license, ordered him to pay 80 percent of the Board's fees and costs and a fine of $5,000 for each of the six violations that he was found to have made, and further mandated that Dr. Nassiri could not own, directly or indirectly, any interest in a chiropractic practice through any person related to him within two degrees of consanguinity or affinity until his license was restored. As for Dr. Johnson, the Board suspended his license for one year with conditions, ordered him to pay 20 percent of the Board's fees and costs and a fine of $1,000 for each of the five provisions that he was found to have violated, and imposed probation with conditions for three years to commence once the suspension was lifted.

Appellants petitioned for judicial review in the district court. They asserted, in part, that the Board's order must be set aside be-

[1]The Board consists of seven members appointed by the Governor who are authorized to take disciplinary action against chiropractic licensees. NRS 634.020; NRS 634.190.

cause the Board (1) used the wrong standard of proof—substantial evidence—and in so doing violated their constitutional equal protection and due process rights and (2) did not have the authority to prohibit Dr. Nassiri from owning a chiropractic practice. The district court granted in part and denied in part appellants' petition for judicial review. The court's order granted the petition for judicial review on the portion of the Board's order that prohibited Dr. Nassiri from owning any interest in a chiropractic practice through any person related to him within two degrees of consanguinity or affinity until his license is restored.[2] With respect to the remainder of the Board's order, the district court adopted the Board's findings of fact and affirmed all of the substantive issues now on appeal, thus denying judicial review. Citing NRS 233B.135(3)(e) and *Minton v. Board of Medical Examiners*, 110 Nev. 1060, 1078, 881 P.2d 1339, 1352 (1994), the district court concluded that the Board's determinations must be supported by substantial evidence because NRS Chapter 634 does not set forth a specific standard of proof. The district court entered judgment against appellants, who thereafter filed a timely notice of appeal.

DISCUSSION

Standard of review

[Headnotes 1, 2]

On appeal from orders deciding petitions for judicial review, this court reviews the administrative decision in the same manner as the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (citing *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011)). We review the factual determinations of administrative agencies for clear error "in view of the reliable, probative and substantial evidence on the whole record" or for an "abuse of discretion." NRS 233B.135(3)(e), (f). Thus, factual findings will only be overturned if they are not supported by substantial evidence, which, we have explained, is evidence that a reasonable mind could accept as adequately supporting the agency's conclusions. *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. "A de novo standard of review is applied when this court addresses a question of law, 'including the administrative construction of statutes.'" *Id.* (quoting *Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 153, 274 P.3d 759, 761 (2012)). We will decide purely legal issues without deference to the agency's conclusions of law. *Id.*

Standard of proof at administrative agency proceedings

Appellants argue that the Board improperly used the "substantial evidence" standard set forth in NRS 233B.135 to determine that

[2]This portion of the district court's order is not before this court on appeal.

appellants committed professional misconduct. They assert that this standard is lower than that utilized to discipline medical doctors and that this incongruity is unconstitutional.

[Headnotes 3, 4]

Appellants' argument displays a simple misunderstanding regarding the concept of standard of proof. Foremost, appellants mistakenly use "burden of proof" synonymously with "standard of proof." The two concepts are actually distinct. "Burden of proof" refers broadly to a party's duty to present evidence and argument to prove his or her allegations, whereas "standard of proof" refers to the "degree or level of proof demanded" to prove a specific allegation. *Black's Law Dictionary* 223, 1535 (9th ed. 2009). A standard of proof's function, as the United States Supreme Court has expressed, "is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). In this case, the issue is what *standard* of proof applies in chiropractor disciplinary adjudications, as all parties agree that the Board carried the initial *burden* to prove that appellants committed misconduct.

[Headnotes 5, 6]

Next, appellants appear to confuse "standard of proof" with "standard of review." As noted above, the "substantial evidence" standard set forth in NRS 233B.135 is a standard of review: "[t]he court may remand or affirm the final decision or set it aside in whole or in part . . . because the final decision of the agency is: . . . [c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." NRS 233B.135(3)(e). Under that statute, a reviewing court, whether the district court or this court, must inquire whether the agency's factual determinations are reasonably supported by evidence of sufficient quality and quantity. *Id.*; *see Elizondo*, 129 Nev. at 784, 312 P.3d at 482. Although administrative proceedings typically need not strictly follow the rules of evidence, *see* NRS 233B.123(1) (allowing the admittance of evidence during administrative proceedings "except where precluded by statute, if it is of a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs"), the fact-finder is charged with making a decision based only on evidence of a type and amount that will ensure a fair and impartial hearing. *See* NRS 233B.125; *State, Dep't of Motor Vehicles & Pub. Safety v. Evans*, 114 Nev. 41, 44-45, 952 P.2d 958, 961 (1998); *Garson v. Steamboat Canal Co.*, 43 Nev. 298, 308-09, 185 P. 801, 804 (1919). The substantial evidence standard of review thus refers to the quality and quantity of the evidence necessary to support factual determinations. It contemplates deference to those determinations on review, asking only whether the facts found by

the administrative fact-finder are reasonably supported by sufficient, worthy evidence in the record. *See U.S. Steel Mining Co. v. Dir., Office of Workers' Comp. Programs*, 187 F.3d 384, 389 (4th Cir. 1999) (explaining that, under analogous federal Administrative Procedure Act provisions, an agency fact-finder has a "duty to qualify evidence as reliable, probative, and substantial before relying upon it to grant or deny a claim," so to avoid a decision based on speculation and conjecture (internal quotations omitted)); 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9:24[1] (3d ed. 2010) (explaining that "substantial evidence" language most often conveys a reasonableness standard of review, leaving the decision-making power with the agency). We do not reweigh the fact-finder's conclusions as to the persuasiveness of its factual determinations. NRS 233B.135(3) ("The [reviewing] court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact."). Not only does the language of NRS 233B.135 indicate its application to courts' secondary review and not to the determinations of administrative agencies, but here there is also no lower tribunal to which the Board would give deference. Thus, NRS 233B.135's standard of review does not set forth a standard of proof that administrative agencies apply in their adjudicative hearings.

Appellants' confusion is understandable given that both standards refer to conclusions concerning the evidence and the district court also confused NRS 233B.135's standard of review with a standard of proof. The district court's order states that NRS 233B.135 governs the Board's proceedings in the absence of a statutorily mandated standard of proof in the Board's governing statutes. This court has also contributed to the confusion. *See Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 274, 89 P.3d 1000, 1008 (2004) ("When a higher standard of proof is set forth in a statute involving license revocation proceedings, that statute supersedes the substantial evidence standard of review set forth at NRS 233B.135(3)(e)."); *Minton v. Bd. of Med. Exam'rs*, 110 Nev. 1060, 1078, 881 P.2d 1339, 1352 (1994) (construing the statute providing the standard of proof in medical license revocation proceedings "to supersede" the standard in NRS 233B.135(3)(e)).

[Headnote 7]

We take this opportunity to clarify that NRS 233B.135 sets out a standard of judicial review, not a standard of proof. Agency adjudication should use the standard of proof set out in the agency's governing statutes. *See Gilman*, 120 Nev. at 274, 89 P.3d at 1008; *cf. J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 379-80, 240 P.3d 1033, 1042-43 (2010) (reasoning that "this court must look to reason and public policy" to determine the applicable standard of proof only after analyzing whether "[t]he statute . . . clearly state[s] what

standard of proof the district court should use"). On appeal, the reviewing court should then determine whether substantial evidence supports the agency's factual determinations. *See Gilman*, 120 Nev. at 275, 89 P.3d at 1008 (holding that this court should review the agency decision to determine whether substantial evidence exists to have convinced the agency that violations had been shown in accord with the standard of proof set out in the statute(s) being enforced). To the extent that the language in *Minton* and *Gilman* could be read to conflict with our clarification here, we disapprove of the language used in the reasoning in those cases.

[Headnotes 8, 9]

This raises the question of what standard of proof applies in an agency's occupational license revocation proceedings in the absence of a specific governing statute. This court has held that "the preponderance-of-the-evidence standard is the general civil standard." *J.D. Constr.*, 126 Nev. at 380, 240 P.3d at 1043. The preponderance-of-the-evidence standard is the minimum civil standard of proof. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010) ("Generally, a preponderance of the evidence is all that is needed to resolve a civil matter . . . ."). We have held that the preponderance-of-the-evidence standard is appropriate to protect the procedural due process rights of those confronted with possible revocation of emission-station and inspector licenses. *Nellis Motors v. State, Dep't of Motor Vehicles*, 124 Nev. 1263, 1268, 197 P.3d 1061, 1065 (2008). Here, the license at issue can be no less deserving of due process than the one at issue in *Nellis Motors* because, in that case, we approved of the use of the *minimum* civil standard of proof. *See id*. There is no lower standard.[3] Thus, we hold that the Board was required to find that the allegations were proven by at least a preponderance of the evidence.[4]

[Headnote 10]

The Board found, by at least a preponderance of the evidence, that appellants committed professional misconduct based on the evidence presented. *See Brown v. State*, 107 Nev. 164, 166, 807 P.2d 1379, 1381 (1991) (stating that a preponderance of the evidence amounts to whether the existence of the contested fact is found to be more probable than not). There is no evidence in the record showing that the Board used any sort of standard lower than a preponderance of the evidence, such as that the violations, however unlikely, might

[3]If there were a lower standard, it would be nonsensical; it would allow a tribunal to reach a conclusion even after reasoning that the conclusion is more likely to be *incorrect* than it is to be correct.

[4]Appellants do not argue, and thus we do not address, that a higher standard than preponderance of the evidence might apply.

have occurred. Although the Board refers to the evidence being "substantial, credible, reliable, and probative," these factors speak to the qualification of the evidence, rather than to whether the evidence satisfies the standard of proof used to evaluate whether a violation occurred. *See U.S. Steel Mining Co.*, 187 F.3d at 389 (clarifying that, "to prove by a preponderance of the evidence each element of a claim before an administrative agency, the claimant must present reliable, probative, and substantial evidence of such sufficient quality and quantity that a reasonable [administrative fact-finder] could conclude that the existence of the facts supporting the claim are more probable than their nonexistence"). Thus, we hold that the Board did not err in finding that appellants committed violations warranting professional discipline.

Regarding appellants' argument that due process requires a higher level of review, their argument supposes that the Board used a substantial evidence standard, which we repudiate. We also note that, in light of our conclusion that the Board was convinced by at least a preponderance of the evidence, appellants' equal protection argument is rendered moot because the disciplinary proceedings for medical physicians also use a preponderance-of-the-evidence standard of proof. *See* NRS 630.346(2).

Accordingly, because the Board applied at least the preponderance-of-the-evidence standard and there was no equal protection violation here, we affirm the district court's order denying, in part, judicial review of the Board's order.

HARDESTY and PARRAGUIRRE, JJ., concur.

HIROKO ALCANTARA, AS PARENT AND GUARDIAN ON BEHALF OF SARAH ALCANTARA, APPELLANT, *v.* WAL-MART STORES, INC., A FOREIGN CORPORATION, RESPONDENT.

No. 60566

April 3, 2014 321 P.3d 912

Appeal from a district court order, certified as final under NRCP 54(b), dismissing Wal-Mart Stores, Inc., from a tort action on claim preclusion grounds. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Decedent's heir brought wrongful death action against retail store. The district court dismissed, and heir appealed. The supreme court, CHERRY, J., held that: (1) claim preclusion did not bar heir's wrongful death action against retail store; but (2) heir's attempt to plead nondelegable duty against retail store in a second wrongful death action was insufficient to preclude application of issue pre-

clusion; (3) heir was adequately represented in prior action, which rendered her in privity with estate and subject to issue preclusion on the issue of store's negligence; (4) Restatement (Second) of Judgments, providing that a person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though the person were a party, would be adopted; and (5) the issue of store's negligence was actually and necessarily litigated in the prior action and subject to issue preclusion.

Affirmed.

Law Offices of Mont E. Tanner and *Mont E. Tanner*, Las Vegas, for Appellant.

Phillips, Spallas & Angstadt, LLC, and *Brenda H. Entzminger*, Las Vegas, for Respondent.

1. Appeal and Error.
   The supreme court rigorously reviews a district court order granting a motion to dismiss for failure to state a claim, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. NRCP 12(b)(5).
2. Pretrial Procedure.
   A complaint should be dismissed for failure to state a claim only if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief. NRCP 12(b)(5).
3. Appeal and Error.
   The supreme court reviews a district court's conclusions of law, including whether claim or issue preclusion applies, de novo.
4. Judgment.
   Claim preclusion did not bar heir's wrongful death action against retail store, even though wrongful death claim brought in another action by the personal representative of decedent's estate and heir's claim all arose from the death of the decedent; the statute governing who could bring wrongful death actions created separate wrongful death claims, one belonging to the decedent's heirs and the other belonging to the decedent's personal representative, and thus, the personal representative could not include heir in the prior action. NRS 41.085(4), (5).
5. Judgment.
   Broadly speaking, claim preclusion bars parties and their privies from litigating claims that were or could have been brought in a prior action concerning the same controversy; this doctrine is designed to preserve scarce judicial resources and to prevent vexation and undue expense to parties.
6. Judgment.
   Claim preclusion applies if (1) the same parties or their privies are involved in both cases, (2) a valid final judgment has been entered, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.
7. Judgment.
   All claims based on the same facts and alleged wrongful conduct that were or could have been brought in the first proceeding are generally subject to claim preclusion.

8. Appeal and Error.
   A respondent may, without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument.
9. Judgment.
   A corollary to claim preclusion, issue preclusion is applied to conserve judicial resources, maintain consistency, and avoid harassment or oppression of the adverse party.
10. Judgment.
    For issue preclusion to apply, the following four elements must be met: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action, (2) the initial ruling must have been on the merits and have become final, (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation, and (4) the issue was actually and necessarily litigated.
11. Judgment.
    Decedent's heir's attempt to plead nondelegable duty against retail store in a second wrongful death action was insufficient to preclude application of issue preclusion, as the issue of retail store's liability with regard to death of decedent who was killed in store's parking lot based on store's purported negligence remained the same in both the prior case and the current case. NRS 41.085.
12. Judgment.
    For issue preclusion to attach, the issue decided in the prior proceeding must be identical to the issue presented in the current proceeding.
13. Negligence.
    A nondelegable duty imposes upon the principal not merely an obligation to exercise care in the principal's own activities, but to answer for the well-being of those persons to whom the duty runs.
14. Judgment.
    Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case.
15. Judgment.
    Heir, as beneficiary of decedent's estate, was adequately represented in estate's wrongful death litigation of retail store's alleged negligence in a prior action, which rendered heir in privity with the estate and subject to issue preclusion on that issue; while heir was not a party to the prior action, the estate was representing heir's interests in the wrongful death action. NRS 41.085(4), (5); Restatement (Second) of Judgments § 41.
16. Judgment.
    Issue preclusion can only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation. U.S. Const. amend. 14.
17. Judgment.
    Restatement (Second) of Judgments, providing that a person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though the person were a party, would be adopted. Restatement (Second) of Judgments § 41.
18. Judgment.
    Resolving whether retail store was negligent was necessary to determine whether store was liable for decedent's death in a previous case, and as the previous case was determined on the merits, the issue of store's negligence was actually and necessarily litigated in the prior action and subject

to issue preclusion on that issue in heir's current wrongful death action against store. NRS 41.085(4), (5).

19. JUDGMENT.

When an issue is properly raised and is submitted for determination, the issue is "actually litigated" for purposes of applying issue preclusion; whether the issue was necessarily litigated turns on whether the common issue was necessary to the judgment in the earlier suit.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

This appeal concerns the application of claim and issue preclusion to actions brought under different subsections of Nevada's wrongful death statute, NRS 41.085. In the underlying action, an heir asserted a wrongful-death claim against respondent Wal-Mart Stores, Inc., under NRS 41.085(4), even though the decedent's estate had previously attempted, but failed, to succeed on a wrongful death claim against Wal-Mart under NRS 41.085(5). Wal-Mart moved to dismiss the heir's action on claim and issue preclusion grounds, and the district court granted the motion based on claim preclusion. On appeal, we affirm this dismissal, albeit on issue preclusion grounds. We follow the reasoning in *Evans v. Celotex Corp.*, 238 Cal. Rptr. 259, 260 (Ct. App. 1987), and conclude that the heir is barred from relitigating the issue of Wal-Mart's negligence because it has already been established, in the case brought by the estate on her behalf, that Wal-Mart was not negligent and, thus, not liable. In resolving this appeal, we adopt the Restatement (Second) of Judgments' explanation of what constitutes adequate representation for privity purposes.

FACTS AND PROCEDURAL HISTORY

Appellant Hiroko Alcantara, on behalf of her daughter Sarah, filed a wrongful death action under NRS 41.085 against Wal-Mart and other defendants after Sarah's father was fatally assaulted in a Wal-Mart parking lot. Wal-Mart moved to dismiss the action on claim and issue preclusion grounds, asserting that the decedent's estate, along with three of the decedent's heirs (Sarah's half-brothers), had already filed a wrongful death lawsuit against Wal-Mart and lost. In particular, Wal-Mart pointed out that, in the prior action, the jury had returned a special verdict finding that Wal-Mart was not negligent. The district court granted the motion to dismiss Alcantara's action against Wal-Mart with prejudice, determining that claim preclusion barred the case. Although claims against other defendants remained pending, the court certified

the dismissal order as final under NRCP 54(b), and this appeal followed.

DISCUSSION

[Headnotes 1-3]

We rigorously review a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. We review a district court's conclusions of law, including whether claim or issue preclusion applies, de novo. *Id.*; *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011).

Statutory framework

[Headnote 4]

The NRS 41.085 statutory scheme creates two separate wrongful death claims, one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent, with neither being able to pursue the other's separate claim.[1] *See Alsenz v. Clark Cnty. Sch. Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993). NRS 41.085(2) and (3), respectively, provide that "the heirs of the decedent and the personal representatives of the decedent may *each* maintain an action for damages" and that the causes of action "which arose out of the same wrongful act or neglect *may be joined*." (Emphases added.) *See Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 451 n.20, 25 P.3d 175, 180 n.20 (2001) (explaining that, generally, in statutes, "may" is permissive, while "shall" is mandatory). NRS 41.085(4) further explains that the heirs may recover damages for grief and sorrow, loss of probable support, companionship, and the pain and suffering of the decedent, which may not be used to pay the decedent's debt, while NRS 41.085(5)

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[1]NRS 41.085 provides, in relevant part, that

> 2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against the wrongdoer's personal representatives, whether the wrongdoer died before or after the death of the person injured by the wrongdoer. . . .
>
> 3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by the decedent's personal representatives which arose out of the same wrongful act or neglect may be joined.

explains that the estate may recover special damages, including those for medical and funeral expenses, and any penalties that the decedent would have been able to recover, which are liable to pay the decedent's debt.

Whether claim preclusion bars Alcantara's claims

[Headnote 5]

Alcantara contends that, because NRS 41.085 provides for separate claims, the district court erroneously applied claim preclusion to this case. Broadly speaking, claim preclusion bars parties and their privies from litigating claims that were or could have been brought in a prior action concerning the same controversy. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 712-13 (2008). This doctrine is designed to preserve scarce judicial resources and to prevent vexation and undue expense to parties. *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994). It is premised on fairness to the defendant and sound judicial administration by acknowledging that litigation over a specific controversy must come to an end, even " 'if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding.' " *Five Star*, 124 Nev. at 1058, 194 P.3d at 715 (quoting Restatement (Second) of Judgments § 19 cmt. a (1982)).

[Headnote 6]

Claim preclusion applies if (1) the same parties or their privies are involved in both cases, (2) a valid final judgment has been entered, and (3) "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star*, 124 Nev. at 1054, 194 P.3d at 713. Because it resolves the issue, we start with the third prong.

[Headnote 7]

Generally, "all claims 'based on the same facts and alleged wrongful conduct' that were or could have been brought in the first proceeding are subject to claim preclusion." *G.C. Wallace*, 127 Nev. at 707, 262 P.3d at 1139 (quoting *Five Star*, 124 Nev. at 1058, 194 P.3d at 715). Here, however, the NRS 41.085 statutory scheme clearly creates separate wrongful death claims, one belonging to the decedent's heirs and the other belonging to the decedent's personal representative. As the claim of the personal representative, or the estate, under NRS 41.085(5) could not include Alcantara's claim under NRS 41.085(4), the two claims are separate and thus fail to meet the requirement that the claims in the second case be the same as those that were or could have been brought in the first case. *See* Restatement (Second) of Judgments § 24 cmt. a (1982) ("[I]f more than one party has a right to relief arising out of a single transaction, each such party has a separate claim for purposes of merger and bar."). Accordingly, while

the claims made by the estate and its heirs, Alcantara included, all arose from the death of the decedent, claim preclusion does not apply.[2] *See S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. 276, 286 n.5, 255 P.3d 231, 237 n.5 (2011) ("[C]laim preclusion could not be used to contravene the Legislature's policy decision."). This does not end our inquiry, however, as Wal-Mart alternatively asserts that issue preclusion applies to preclude this action.

Whether issue preclusion bars Alcantara's claims

[Headnote 8]

Wal-Mart argues that issue preclusion provides this court with an independent basis for affirming the dismissal. Because "[a] respondent may, . . . without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument," we address this issue. *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994).

[Headnotes 9, 10]

A corollary to claim preclusion, issue preclusion is applied to conserve judicial resources, maintain consistency, and avoid harassment or oppression of the adverse party. *Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010). For this doctrine to apply, the following four elements must be met:

> "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation"; and (4) the issue was actually and necessarily litigated.

Five Star, 124 Nev. at 1055, 194 P.3d at 713 (alteration in original) (quoting *Tarkanian*, 110 Nev. at 598, 879 P.2d at 1191). As previously explained, the prior case was finally resolved on the merits. We thus turn to the remaining issue preclusion factors: same issues, same parties, and actually and necessarily litigated.

The same issues

[Headnotes 11, 12]

"For 'issue preclusion to attach, the issue decided in the prior [proceeding] must be identical to the issue presented in the current [proceeding].'" *Holt v. Regional Tr. Servs. Corp.*, 127 Nev. 886,

[2]Wal-Mart does not raise an argument that preclusion can be based on the relationship between Alcantara and the heirs who were involved in the prior action; therefore, we do not address this issue.

891, 266 P.3d 602, 605 (2011) (alterations in original) (quoting *Redrock Valley Ranch v. Washoe Cnty.*, 127 Nev. 451, 458, 254 P.3d 641, 646 (2011)). In challenging whether the issues are the same, Alcantara asserts that there are significant differences between the legal theories asserted in the two actions based on her argument that Wal-Mart had a nondelegable duty to provide safe premises, an argument that, she asserts, was not made in the prior case by the estate.

[Headnote 13]

"[A] nondelegable duty imposes upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well-being of those persons to whom the duty runs." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 395 (1982) (citing Restatement (Second) of Agency § 214 (1958)) (finding no nondelegable duty under 42 U.S.C. § 1981). Even the use of utmost care in hiring and delegating the duty to an independent contractor, such as a security company, will not discharge the duty. *Id.*; *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) ("[W]here a property owner hires security personnel to protect his or her premises and patrons, that property owner has a personal and nondelegable duty to provide responsible security personnel. . . . even if the property owner engaged a third party to hire the security personnel.").

[Headnote 14]

Although Alcantara's complaint attempted to plead nondelegable duty as a separate cause of action, it is not an independent cause of action, but instead one way to establish the duty requirement for proving negligence. *See Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 869 (Fla. Dist. Ct. App. 2010) ("[A] claim based on the breach of a nondelegable duty is [not] a separate and distinct cause of action from a cause of action based on what [a party] termed 'active' or 'direct' negligence."). Thus, her attempt at asserting a nondelegable duty does not preclude application of issue preclusion, as the issue of Wal-Mart's liability based on negligence remains the same. Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case. *See LaForge v. State, Univ. and Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000) ("Issue preclusion may apply 'even though the causes of action are substantially different, if the same fact issue is presented.' " (quoting *Clark v. Clark*, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964))); *Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) (stating that "[i]f a party could avoid issue preclusion by finding some argument it failed to raise in the previous litigation, the bar on successive litigation would be seriously undermined"); Restatement (Second) of Judgments § 27 cmt. c (1982). The issue here of

Wal-Mart's negligence for the decedent's death is the same in both cases. The nondelegable duty is not separate and distinct from the negligence determination—it is based on the same facts. Because the issues are the same, we conclude that this element is met.

The same parties or their privies

[Headnotes 15, 16]

"Issue preclusion can only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009). The district court addressed the privity requirement in the context of its claim preclusion analysis and determined that privity existed between the estate and Alcantara because the estate adequately represented Alcantara's interest in the prior lawsuit, as provided in Restatement (Second) of Judgments section 41. The Restatement (Second) of Judgments section 41, provides that

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:
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> (a) The trustee of an estate or interest of which the person is a beneficiary; or
>
> (b) Invested by the person with authority to represent him in an action; or
>
> (c) *The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary*; or
>
> (d) An official or agency invested by law with authority to represent the person's interests; or
>
> (e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.
>
> (2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.
>
> Exceptions to this general rule are stated in § 42.

(Emphasis added.)

Alcantara argues that she is not in privity with the estate and that the district court's reliance on the Restatement (Second) of Judgments section 41 for an example of privity is in error, as that section has not been adopted by this court. Wal-Mart counters that Alcantara, as a beneficiary of the estate, was adequately represented

in the estate's litigation of Wal-Mart's alleged negligence in the prior action, rendering her in privity with the estate and subject to preclusion on that issue. Wal-Mart points out that Alcantara fails to explain why her parallel interests with the estate would alter the outcome, as regardless of who brought the issue before the court, the estate on her behalf failed to demonstrate negligence on Wal-Mart's part.

[Headnote 17]

This court has not previously specifically addressed whether privity can be established through adequate representation as outlined in the Restatement (Second) of Judgments section 41. We take this opportunity to adopt the Restatement (Second) of Judgments section 41's examples of privity that arises when a plaintiff's interests are being represented by someone else. We do so because of our long-standing reliance on the Restatement (Second) of Judgments in the issue and claim preclusion context[3] and because it provides a clear framework for determining whether privity exists under an adequate representation analysis.

In applying the Restatement section 41(1)(c) to this case, we conclude that Alcantara is in privity with the estate. While Alcantara was not a party to the prior action, the estate was representing Alcantara's beneficiary interests in the wrongful death recovery. There is no dispute here as to Alcantara's beneficiary status—she was listed as a beneficiary under the petition for administration. Alcantara was bound to the judgment because the estate represented her as an heir of the estate in the estate's action. This representation is sufficient for privity. *See Young v. Shore*, 588 F. Supp. 2d 544, 548-49 (D. Del. 2008) (relying on Restatement (Second) of Judgments § 41 (2008), to determine that because plaintiff is a beneficiary of the estate, she was in privity with the estate for purposes of the prior action and issue preclusion barred the subsequent action). Moreover, since the issue for determining relief under NRS 41.085(4) and NRS 41.085(5) is the same—Wal-Mart's negligence—the estate fully represented Alcantara's interests as to the issue of negligence.

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[3]*See, i.e.*, *Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013) (relying on Restatement (Second) of Judgments § 27 cmt. d (1982)); *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 706-07, 262 P.3d 1135, 1138-39 (2011) (relying on Restatement (Second) of Judgments § 24 cmt. g (1982) and on Restatement (Second) of Judgments § 26(1)(d) (1982)); *Personhood Nev. v. Bristol*, 126 Nev. 599, 605, 245 P.3d 572, 576 (2010) (relying on Restatement (Second) of Judgments § 28(1) (1982)); *In re Sandoval*, 126 Nev. 136, 140, 232 P.3d 422, 424 (2010) (relying on Restatement (Second) of Judgments § 27 (1982)); *Bower*, 125 Nev. at 481-82, 215 P.3d at 718 (citing to Restatement (Second) of Judgments § 41 (1982)); *Five Star*, 124 Nev. at 1054 n.27, 1058 & n.46, 194 P.3d at 713 n.27, 715 & n.46 (relying on Restatement (Second) of Judgments § 19 (1982)).

Although a beneficiary can assert an independent cause of action from the decedent's estate's claim pursuant to NRS 41.085, as was the case here, the issue of liability is interrelated because both claims are based on the same wrong. The estate already represented its beneficiaries, including Alcantara, as to the determination of liability. Restatement (Second) of Judgments § 41 (1982). As a result, the privity requirement is met and, if the other factors are met, issue preclusion may apply to prevent relitigation of the issue concerning Wal-Mart's liability. This outcome is further supported by Restatement (Second) of Judgments section 46(3) and section 47. While these sections involve procedural scenarios different than this case, as section 46 deals with a situation in which a decedent brings a claim prior to his or her death and the beneficiaries then bring a separate claim after the decedent's death and section 47 involves a situation where after death two separate cases are brought under a survival statute and a death statute, the circumstances are sufficiently similar to the present case in regard to determining whether preclusion should apply. Both section 46(3) and section 47 state that preclusion will apply to a second case brought by a beneficiary of the decedent if the prior case brought by the decedent or the decedent's estate is unsuccessful. *See also* comment c to both section 46 and section 47. Accordingly, we determine that the privity element is satisfied here because the estate already represented Alcantara in the NRS 41.085(5) suit, of which she was a beneficiary.

Actually and necessarily litigated

[Headnotes 18, 19]

The fourth factor concerns whether the issue was actually and necessarily litigated. " 'When an issue is properly raised . . . and is submitted for determination, . . . the issue is actually litigated.' " *Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013) (quoting Restatement (Second) of Judgments § 27 cmt. d (1982)). Whether the issue was necessarily litigated turns on whether " 'the common issue was . . . *necessary to the judgment in the earlier suit*.' " *Id.* (quoting *Tarkanian*, 110 Nev. at 599, 879 P.2d at 1191). Resolving whether Wal-Mart was negligent was necessary to determine whether Wal-Mart was liable for the decedent's death in the previous case. As the previous case was determined on the merits, it is clear that the issue of Wal-Mart's negligence was actually and necessarily litigated in the prior action.

Based on the foregoing, we conclude that issue preclusion can apply to prevent Alcantara's lawsuit against Wal-Mart, as each of the necessary factors are met. This conclusion is supported by the analysis set forth in *Evans v. Celotex Corp.*, 238 Cal. Rptr. 259, 260 (Ct. App. 1987). In *Evans*, the decedent's heirs commenced a wrongful death action against a defendant who had already successfully defended a prior suit related to asbestosis brought when the

decedent was alive. *Id.* The heirs argued that the emergence of new facts from, *inter alia*, the autopsy barred the application of collateral estoppel, that is, issue preclusion. *Id.* at 262. The court determined that because the new evidence "did not establish a previously undiscovered theory of liability nor did it denote a change in the parties' legal rights," it did not prevent the application of issue preclusion. *Id.* at 263. It explained that "[a]n exception to collateral estoppel cannot be grounded on the alleged discovery of more persuasive evidence. Otherwise, there would be no end to litigation." *Id.* The court also rejected the heirs' argument that the issues in their lawsuit were not the same as those in the prior case, explaining that in both cases recovery depended on whether the defendant was liable for the injuries. *Id.* at 261. Further, the *Evans* court held that the heirs were in privity with the decedent, as their claims arose based on the same allegations against the defendant as the decedent's did, and the decedent adequately represented the heirs' interest in the prior action. *Id.* As a result, the court concluded that issue preclusion applied to bar relitigating the issue of the defendant's liability.

We follow the reasoning in *Evans* and determine that the finding of nonliability in the action brought by the estate bars relitigation of Wal-Mart's liability here. While the statute allows for the NRS 41.085(4) claims to be brought independently, the issue of negligence on the part of Wal-Mart was already litigated and a jury determined that Wal-Mart was not negligent. No new facts or issues arose after the estate litigated the issue of Wal-Mart's liability. Because the issue of Wal-Mart's negligence was properly raised in the case brought by the estate, we conclude that issue preclusion applies to prevent Alcantara from relitigating the issue of Wal-Mart's negligence. Therefore, we affirm the decision of the district court to dismiss this case.

HARDESTY and PARRAGUIRRE, JJ., concur.

DARREN GABRIEL LaCHANCE, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 62129

April 3, 2014 321 P.3d 919

Appeal from a judgment of conviction, pursuant to a jury verdict, of domestic battery by strangulation, domestic battery causing substantial bodily harm, possession of a controlled substance for the purpose of sale, possession of a controlled substance, false imprisonment, and unlawful taking of a motor vehicle. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

The supreme court, CHERRY, J., held that: (1) evidence was sufficient to support conviction for felony domestic battery by strangulation; (2) evidence was sufficient to establish that victim experienced prolonged physical pain, so as to support conviction for domestic battery causing substantial bodily harm; (3) separate convictions for possession of a controlled substance for the purpose of sale and possession of a controlled substance violated prohibition against double jeopardy; (4) to remedy double jeopardy violation, vacatur of conviction for lesser-included offense of possession of a controlled substance was required; (5) any error by the district court in permitting State to file a notice of its intent to seek habitual criminal adjudication, rather than requiring State to file separate count or amend its information, did not constitute plain error; (6) the district court acted within its discretion in adjudicating defendant as a habitual criminal; and (7) the supreme court would decline to adopt rule requiring that multiple punishments entered during the same time period be considered a single prior felony conviction, for purposes of habitual criminal sentencing enhancement.

Affirmed in part and reversed in part.

Richard F. Cornell, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Respondent.

1. DOUBLE JEOPARDY.
   Under the Double Jeopardy Clause, a criminal defendant may not be punished multiple times for the same offense unless the legislature has clearly authorized the punishments. U.S. CONST. amend. 5.
2. CRIMINAL LAW.
   Under a challenge to the sufficiency of the evidence, the supreme court reviews the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. CRIMINAL LAW.
   The jury is tasked with assessing the weight of the evidence and the witnesses' credibility and may rely on both direct and circumstantial evidence in returning its verdict.
4. ASSAULT AND BATTERY.
   Evidence was sufficient to support conviction for felony domestic battery by strangulation; evidence established that defendant placed his knee on victim's chest and his hands on her clavicle and the lower part of her neck and then put pressure on the area, impeding her breathing to the point that her vision was impaired, in a manner that created a risk of death or substantial bodily harm. NRS 200.481(1)(h), 200.485(2).
5. ASSAULT AND BATTERY.
   Evidence was sufficient to establish that victim experienced physical suffering or injury lasting longer than the pain immediately resulting from the defendant's wrongful act of battery, so as to constitute prolonged phys-

ical pain, thus supporting conviction for domestic battery causing substantial bodily harm; as a result of defendant's battery, victim was treated at the hospital for hemorrhaging of the ear and multiple contusions and welts, and victim testified that she was immobile for a few days after the battery, that her injuries resulted in permanent shin splints that prevented her from running, and that she had hearing loss as a result of her injuries. NRS 0.060, 200.481(1)(a), (2)(b), 200.485(2).

6. Criminal Law.

An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record; to constitute plain error, the error must also be clear under current Nevada law.

7. Criminal Law.

The district court's definition of prolonged physical pain element of offense of domestic battery causing substantial bodily harm in accordance with the controlling state supreme court opinion, as opposed to adopting alternate standard for prolonged physical pain element announced in dissenting opinion from another jurisdiction's intermediate appellate court, did not constitute plain error in prosecution for domestic battery causing substantial bodily harm; the district court's definition of prolonged physical pain element of offense was consistent with controlling Nevada authority. NRS 200.481(1)(a), (2)(b), 200.485(2).

8. Double Jeopardy.

Separate convictions for possession of a controlled substance for the purpose of sale and possession of a controlled substance violated prohibition against double jeopardy; elements of offense of simple possession were included in offense of possession for sale, such that if a person were guilty of committing greater offense of possession for sale, he or she would necessarily be guilty of lesser-included offense simple possession. U.S. Const. amend. 5; NRS 453.336(1), 453.337(1).

9. Criminal Law.

Evidence failed to establish that defendant, charged with possession of a controlled substance for the purpose of sale and possession of a controlled substance, intentionally relinquished his right to invoke constitutional protections against double jeopardy, and thus, defendant's double jeopardy argument was not waived for appellate review, even though defendant failed to raise double jeopardy argument before the district court. U.S. Const. amend. 5.

10. Double Jeopardy.

While double jeopardy challenges may be waived under certain conditions, waiver of a fundamental constitutional right must be knowing and intentional. U.S. Const. amend. 5.

11. Criminal Law.

Although failure to object at trial generally precludes appellate review, the supreme court has the discretion to review constitutional or plain error.

12. Criminal Law.

Plain error exists when the error was clear and it affects a defendant's substantial rights.

13. Double Jeopardy.

If legislative intent to authorize multiple punishments for the same offense is unclear, for double jeopardy purposes, Nevada Supreme Court utilizes the test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), to determine the permissibility of multiple punishments for the same offense, examining whether each statutory provision under which the defendant is charged requires proof of an additional fact that the other does not. U.S. Const. amend. 5.

14. Double Jeopardy.

Under the *Blockburger v. United States*, 284 U.S. 299, 304 (1932), test to determine whether separate offenses exist for double jeopardy purposes, a person cannot be convicted of both a greater-included and a lesser-included offense. U.S. Const. amend. 5.

15. Double Jeopardy.

To remedy double jeopardy violation resulting from defendant's convictions for greater-included offense possession of a controlled substance for the purpose of sale, and lesser-included offense of possession of a controlled substance, vacatur of conviction for lesser-included offense of possession of a controlled substance was required, even though the district court had adjudicated defendant as a habitual criminal for that offense, which had the effect of increasing the category and range of punishment for that offense so as to make it more severely punishable than greater-included offense; conviction of offense with more lenient sentence was required to be vacated, and issue of which conviction carried more lenient sentence was determined solely by reference to principal offenses, rather than by reference to habitual criminal adjudication. U.S. Const. amend. 5; NRS 453.336(1), 453.337(1).

16. Double Jeopardy.

Courts ordinarily look to the range of punishment to determine which offense is the lesser-included offense, for double jeopardy purposes. U.S. Const. amend. 5.

17. Double Jeopardy.

Because the double-jeopardy analysis is based solely on the elements of the principal offenses, the district court should look to the range of punishment for the principal offenses in deciding which conviction to vacate. U.S. Const. amend. 5.

18. Criminal Law.

Even if the district court erred by permitting State to file a notice of its intent to seek habitual criminal adjudication, rather than requiring State to file a separate count against defendant or amend its information to include the habitual criminal allegation, any such error did not affect defendant's substantial rights, and therefore did not constitute plain error; defendant agreed to the procedure used to notify him of State's intent to seek habitual criminal adjudication, defendant had adequate actual notice of State's intent to seek habitual criminal adjudication, and habitual criminal adjudication was a status determination rather than an offense, such that defendant had no right to jury determination, preliminary hearing, or arraignment.

19. Criminal Law.

Plain error review requires the supreme court to examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights.

20. Criminal Law; Jury; Sentencing and Punishment.

Habitual criminal adjudication is not an offense, it is a status determination that is not subject to jury determination; thus, there is no need for a preliminary hearing or arraignment.

21. Sentencing and Punishment.

Adjudication of a defendant as a habitual criminal is subject to the broadest kind of judicial discretion.

22. Criminal Law.

In determining if a finding of habitual criminal status is proper, the supreme court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion.

23. Sentencing and Punishment.
A sentencing court meets its obligations in determining whether a habitual criminal adjudication is proper so long as it was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication.

24. Sentencing and Punishment.
In considering whether to impose habitual criminal sentencing enhancement, the sentencing court may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the like. NRS 207.010.

25. Sentencing and Punishment.
The sentencing court may dismiss a habitual criminal count when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice. NRS 207.010.

26. Sentencing and Punishment.
Habitual criminality statute exists to enable the criminal justice system to deal determinedly with career criminals who pose a serious threat to public safety. NRS 207.010.

27. Sentencing and Punishment.
The district court acted within its discretion in adjudicating defendant convicted of offenses including domestic battery by strangulation and possession of a controlled substance for the purpose of sale as a habitual criminal, for sentencing purposes, even though defendant's prior felony convictions had resulted in only two terms of imprisonment, where defendant had been convicted of five prior felonies. NRS 207.010.

28. Sentencing and Punishment.
The supreme court would decline to adopt rule requiring that multiple punishments entered during the same time period be considered a single prior felony conviction, for purposes of habitual criminal sentencing enhancement, since existing precedent already permitted sentencing courts to consider convictions growing out of the same act, transaction, or occurrence that were prosecuted in same indictment or information as single prior conviction, and imposing additional time-period constraints upon habitual criminal statutory scheme would interfere with the discretion of sentencing courts to impose the most appropriate sentences upon career criminals posing a serious threat to public safety. NRS 207.010.

29. Criminal Law.
The supreme court would not consider defendant's argument that habitual criminality statute was ambiguous, as argument was raised for the first time in defendant's appellate reply brief. NRAP 28(c).

Before Hardesty, Parraguirre and Cherry, JJ.

OPINION

By the Court, Cherry, J.:

[Headnote 1]

In this opinion, we address whether the charge of possession of a controlled substance is a lesser-included offense of possession of a controlled substance for the purpose of sale. Under the Double

Jeopardy Clause, a criminal defendant may not be punished multiple times for the same offense unless the legislature has clearly authorized the punishments. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Because we conclude that possession of a controlled substance is a lesser-included offense of possession of a controlled substance for the purpose of sale, we conclude that appellant may not be punished for both crimes. To remedy the double-jeopardy violation, we look to the range of punishment for the principal offenses and reverse the conviction with the lesser penalty. Based on appellant's criminal history, we conclude that simple possession was the less severely punishable offense, and we, accordingly, reverse that conviction. However, we affirm the remainder of the judgment of conviction, including the adjudication of appellant as a habitual criminal.

FACTS

After Darren LaChance returned home from a three-day gambling binge, he and his girlfriend, Starleen Lane, got into an argument in the early hours of the morning. Their roommate, Conrad Coultre (CJ), also became involved in the argument later that morning. Lane testified that after LaChance and CJ started arguing, LaChance hit her on the right side of her forehead with a flashlight. Then, after CJ left for work, LaChance grabbed her by the arm and flung her into the bedroom while yelling, belittling, and threatening to kill and maim her. He began to punch and slap her face and ear, threw her on the bed, and got on top of her with his knee on her chest and his hand around the lower part of her neck. LaChance used his body weight to put pressure on her chest and lower neck. Lane had difficulty breathing and saw stars because of the pressure and because of her fear and anxiety. After Lane started to scream, LaChance covered her mouth with his hand.

Lane further stated that LaChance repeatedly slapped her ear, and it "just went blank." She could no longer hear and became immediately nauseous. Lane was able to roll into a fetal position while he kicked her in the shins and tailbone and hit her with the flashlight. When she tried to get up, LaChance stomped on her feet.

According to Lane, LaChance eventually left the room, and Lane opened the patio door, jumped off the balcony, and fled with LaChance chasing her. LaChance caught up to her but, after a neighbor yelled that she was calling the cops, LaChance fled to Lane's car and drove off without her permission. The neighbor testified that she saw LaChance beating Lane, and after she yelled at him, he ran off. The neighbor then called the police. Lane waited for the police to arrive, and she made a report before going to the hospital.

At the hospital, Lane was treated for multiple contusions on her face, back, legs, feet, and ear. She suffered pain in that ear and ten-

derness in her neck, abdomen, pelvis, and extremities. Lane stated that she was immobile for a few days afterward. She has permanent shin splints and can no longer run. Due to her tailbone injuries, she is unable to sit for long periods of time. Lane testified that she suffers from hearing loss and ongoing pain. But, due to a lack of medical insurance, she does not go to the doctor for these problems.

Lane testified that following the assault, she received a number of intimidating text messages from LaChance, indicating that she needed to make the case go away. Lane decided not to press charges out of fear.

About a week after the incident, Lane met with LaChance at a Motel 6. She indicated that the detectives knew of their meeting as her phones were tapped. Lane stayed with LaChance at the motel for two nights.

On the second morning, Lane stated that she left the motel room to smoke a cigarette, rounded the corner, and ran into a group of police officers looking for LaChance. They had established a perimeter when Lane happened upon them. Lane granted consent to the police to enter and search the motel room. Detective Curtis English testified that LaChance did not immediately exit the motel room and was alone in the room for approximately 10 minutes.

When police finally searched the room, they found marijuana floating in the toilet and plastic bags. Police obtained a warrant to search LaChance's duffel bags for controlled substances as the result of a canine alert. Detective English testified that they found approximately 4.6 pounds of marijuana and several scales.

LaChance was subsequently charged by way of information with domestic battery by strangulation, domestic battery causing substantial bodily harm, felony possession of a controlled substance for the purpose of sale (NRS 453.337), felony possession of a controlled substance (NRS 453.336), false imprisonment, and unlawful taking of a motor vehicle. He pleaded not guilty to all counts.

The jury ultimately found LaChance guilty on all counts. The State subsequently gave notice on the record of its intent to pursue habitual criminal enhancements due to LaChance's five prior felony convictions. When asked what the State needed to do to meet the statutory requirements to provide notice, defense counsel and the district court agreed that written notice would be sufficient. A notice of habitual criminal enhancement was filed.

In discussing the sentence, the district court noted LaChance's young age, the victim impact statements, the severity of the beating, and the five prior felony convictions. The district court determined that the habitual criminal enhancement applied and adjudicated LaChance as a habitual criminal on two of the principal offenses: domestic battery causing substantial bodily harm and possession of

a controlled substance. The district court then sentenced LaChance to 24 to 60 months for domestic battery by strangulation, 10 years to life for domestic battery causing substantial bodily harm, 72 to 180 months for felony possession of a controlled substance for the purpose of sale, 10 years to life for felony possession of a controlled substance, 12 months for false imprisonment, and 12 months for unlawful taking of a motor vehicle. A judgment of conviction was entered. LaChance appealed.

DISCUSSION

Sufficiency of the evidence

[Headnotes 2, 3]

We first address LaChance's challenge to the sufficiency of the evidence to support the convictions for domestic battery by strangulation and domestic battery causing substantial bodily harm. Under a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the prosecution and determines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (emphasis and internal quotation marks omitted). The jury is tasked with assessing the weight of the evidence and the witnesses' credibility, *id.*; *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007), and may rely on both direct and circumstantial evidence in returning its verdict, *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

Domestic battery by strangulation

[Headnote 4]

LaChance contends that there was insufficient evidence of strangulation, and therefore, he could not be convicted of felony battery under NRS 200.485(2). He argues that the strangulation element was only supported by speculation and ambiguous statements and that any difficulty in breathing resulted from Lane's anxiety.

NRS 200.481(1)(a) defines battery as "any willful and unlawful use of force or violence upon the person of another." *See also* NRS 33.018 (defining acts of domestic violence). When the battery is committed by strangulation, the perpetrator is guilty of a felony rather than a misdemeanor. NRS 200.485(2). The Legislature defined strangulation as "intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person in a manner that creates a risk of death or substantial bodily harm." NRS 200.481(1)(h).

In reviewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that LaChance strangled Lane. The State

presented evidence that LaChance placed his knee on Lane's chest and his hands on her clavicle/lower part of her neck and then put pressure on the area, impeding her breathing to the point that her vision was impaired. Depriving Lane of oxygen to the point where she lost vision supports a finding that LaChance applied pressure to Lane's throat or neck in a manner that created a risk of death or substantial bodily harm. Accordingly, we affirm the conviction for domestic battery by strangulation.

Domestic battery causing substantial bodily harm

[Headnotes 5-7]

LaChance also challenges the sufficiency of the evidence supporting the substantial-bodily-harm element of the domestic-battery-causing-substantial-bodily-harm conviction. He also contends that where the substantial-bodily-harm element is based on prolonged pain, the pain must also be substantial, and here it was not.[1]

Where a battery results in substantial bodily harm, the battery becomes a felony. *See* NRS 200.485(2); NRS 200.481(2)(b). NRS 0.060 defines substantial bodily harm as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or . . . [p]rolonged physical pain." We have stated that "the phrase 'prolonged physical pain' must necessarily encompass some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." *Collins v. State*, 125 Nev. 60, 64, 203 P.3d 90, 92-93 (2009). "In a battery, for example, the wrongdoer would not be liable for 'prolonged physical pain' for the touching itself. However, the wrongdoer would be liable for any lasting physical pain resulting from the touching." *Id.* at 64 n.3, 203 P.3d at 93 n.3.

Reviewing the evidence in the light most favorable to the prosecution, we conclude that the State presented sufficient evidence

[1]LaChance also avers that the *Collins v. State*, 125 Nev. 60, 203 P.3d 90 (2009), definition of "prolonged physical pain" is inadequate and that this court should adopt the "prolonged . . . pain" standard elucidated in the dissent of *State v. King*, 827 N.E.2d 398, 402 (Ohio Ct. App. 2005) (Rocco, J., dissenting). Because LaChance's counsel acquiesced to the use of the definition found in *Collins* during trial, appellate consideration of this issue is limited to constitutional or plain error. *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (noting that failure to object during trial generally precludes appellate consideration of an issue); *Somee v. State*, 124 Nev. 434, 443, 187 P.3d 152, 159 (2008) ("[T]his court has the discretion to review constitutional or plain error."). Because there is no alleged constitutional component to this argument, the error here must be plain. "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record." *Saletta*, 127 Nev. at 421, 254 P.3d at 114 (internal quotation omitted). The error must also be clear under current Nevada law. *Id.* Accordingly, plain error cannot exist here because such a finding would be inconsistent with *Collins*, the controlling Nevada authority.

to establish that Lane suffered prolonged physical pain. Lane was treated at the hospital for hemorrhaging of the ear and multiple contusions and welts. She testified that she was immobile for a few days afterward and that her injuries have resulted in permanent shin splints, which prevent her from running. The injuries to her tailbone hinder her ability to sit for long periods. She also has hearing loss as a result of the injuries suffered from the assault. We conclude that Lane's testimony and the medical records support a finding that Lane suffered "some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." *Collins*, 125 Nev. at 64, 203 P.3d at 92-93. Accordingly, LaChance's conviction for domestic battery causing substantial bodily harm is supported by sufficient evidence.

Lesser-included offenses

[Headnotes 8-10]

LaChance argues that the convictions and sentences for possession of a controlled substance for the purpose of sale (NRS 453.337) and the lesser-included offense of simple possession (NRS 453.336) based on the same controlled substance violates the Double Jeopardy Clause.[2] The State argues that because NRS 453.336 includes a weight element and NRS 453.337 includes an intent element, simple possession under NRS 453.336 is not a lesser-included offense of possession for sale under NRS 453.337.[3]

[Headnotes 11, 12]

"Although failure to object at trial generally precludes appellate review, this court has the discretion to review constitutional or

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[2]LaChance cites to *Fairman v. State*, for the proposition that possession of a controlled substance is a lesser-included offense of possession of a controlled substance for the purpose of sale. 83 Nev. 137, 141, 425 P.2d 342, 344-45 (1967), *abrogated on other grounds by Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012). However, the *Fairman* court dealt with a situation where the defendant was found guilty of two crimes under the same statute and determined that only one conviction may arise out of a single statute. 83 Nev. at 141, 425 P.2d at 344-45. The statutory scheme has since changed, with possession for sale and simple possession separated into different statutes.

[3]The State asserts that because LaChance never gave the district court the opportunity to address the double jeopardy issue and because double jeopardy protections are waivable, this court should decline to consider the challenge. While double jeopardy challenges may be waived under certain conditions, *United States v. Broce*, 488 U.S. 563, 568 (1989), waiver of a fundamental constitutional right must be knowing and intentional. *Raquepaw v. State*, 108 Nev. 1020, 1023, 843 P.2d 364, 366-67 (1992), *overruled on other grounds by DeRosa v. First Judicial Dist. Court*, 115 Nev. 225, 234, 985 P.2d 157, 163 (1999), *overruled on other grounds by City of Las Vegas v. Walsh*, 121 Nev. 899, 906, 124 P.3d 203, 208 (2005), *overruled on other grounds by City of Reno v. Howard*, 130 Nev. 110, 112, 318 P.3d 1063, 1067 (2014). An intentional relinquishment has not been demonstrated here.

plain error." *Somee v. State*, 124 Nev. 434, 443, 187 P.3d 152, 159 (2008); *see also United States v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008) (reviewing unobjected-to double jeopardy claims under a plain error standard). Plain error exists when the error was clear and it affects a defendant's substantial rights. *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

[Headnotes 13, 14]

"The Double Jeopardy Clause protects against . . . multiple punishments for the same offense." *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012). The Supreme Court of the United States has clarified that the Double Jeopardy Clause does not prohibit multiple punishments if the legislature clearly authorizes them. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). If legislative intent is unclear, this court utilizes the *Blockburger v. United States*, 284 U.S. 299, 304 (1932), test to determine the permissibility of multiple punishments for the same offense. *Jackson*, 128 Nev. at 604, 291 P.3d at 1278. There, the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a[n additional] fact which the other does not." *Blockburger*, 284 U.S. at 304. The *Blockburger* test asks "whether the offense in question cannot be committed without committing the lesser offense." *Estes v. State*, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) (internal quotation omitted). A person cannot be convicted of both a greater- and lesser-included offense. *Id.*

The statute proscribing possession with an intent to sell provides that "it is unlawful for a person to possess for the purpose of sale . . . any controlled substance classified in schedule I or II." NRS 453.337(1).[4] The possession statute simply provides that "[a] person shall not knowingly or intentionally possess a controlled substance." NRS 453.336(1).[5]

The elements of simple possession are included in possession for sale—if one is guilty of possession for sale, he or she will necessarily be guilty of simple possession. *See* NRS 453.337(1); NRS 453.336(1); *see also Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594-95 (1966) (" 'No sale of narcotics is possible without possession, actual or constructive.' " (quoting *People v. Rosales*, 38 Cal. Rptr. 329, 331 (Ct. App. 1964)). The State relies on the additional

[4]NRS 453.337(1), unlawful possession for sale, provides that "[e]xcept as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to possess for the purpose of sale . . . any controlled substance classified in schedule I or II."

[5]NRS 453.336(1), unlawful possession not for purpose of sale, provides that "a person shall not knowingly or intentionally possess a controlled substance."

weight element under NRS 453.336(4)[6] to distinguish the offenses. However, the weight element under NRS 453.336 is a factor to be considered in sentencing and is not an element of the offense for purposes of *Blockburger*. The weight does not affect guilt; it only determines the sentence for simple possession of marijuana. And because all of the elements of simple possession under NRS 453.336 are subsumed within the elements of possession for the purpose of sale under NRS 453.337, it is irrelevant for purposes of the double-jeopardy analysis that possession for the purpose of sale has an additional intent element that is not an element of simple possession. *See Rosas v. State*, 122 Nev. 1258, 1263, 147 P.3d 1101, 1105 (2006) ("A lesser offense is included in a greater offense when all of the elements of the lesser offense are included in the elements of the greater offense." (internal quotation omitted)). Accordingly, the convictions for both violate double jeopardy.

[Headnote 15]

The parties disagree as to which conviction should be vacated to remedy the double-jeopardy violation. The State argues that *Meador v. State*, 101 Nev. 765, 771, 711 P.2d 852, 856 (1985), *disapproved of on other grounds by Talancon v. State*, 102 Nev. 294, 301 & n.3, 721 P.2d 764, 768 n.3, 769 (1986), makes it clear that the crime with the more lenient sentence should be vacated. Applying that rule to this case, the State argues that the possession-for-sale conviction should be vacated because it carries the lesser sentence as a result of the district court adjudicating LaChance as a habitual criminal on simple possession and increasing the sentence for that offense accordingly. LaChance contends that we should look at the maximum punishment for the principal offense, ignoring any habitual criminal adjudication, to determine which is the lesser offense.

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[6]NRS 453.336 provides, in pertinent part, that:

> 4. Unless a greater penalty is provided pursuant to NRS 212.160, a person who is convicted of the possession of 1 ounce or less of marijuana:
>
> (a) For the first offense, is guilty of a misdemeanor and shall be:
>
> (1) Punished by a fine of not more than $600; or
>
> (2) Examined by an approved facility for the treatment of abuse of drugs to determine whether the person is a drug addict and is likely to be rehabilitated through treatment and, if the examination reveals that the person is a drug addict and is likely to be rehabilitated through treatment, assigned to a program of treatment and rehabilitation pursuant to NRS 453.580.
>
> (b) For the second offense, is guilty of a misdemeanor and shall be:
>
> (1) Punished by a fine of not more than $1,000; or
>
> (2) Assigned to a program of treatment and rehabilitation pursuant to NRS 453.580.
>
> (c) For the third offense, is guilty of a gross misdemeanor and shall be punished as provided in NRS 193.140.
>
> (d) For a fourth or subsequent offense, is guilty of a category E felony and shall be punished as provided in NRS 193.130.

[Headnote 16]

We ordinarily look to the range of punishment to determine which offense is the lesser-included offense. *See Brown v. State*, 113 Nev. 275, 287, 934 P.2d 235, 243 (1997) (vacating the conviction for child abuse and maintaining the convictions for sexual assault based on the conclusion that "while the child abuse count required proof of an extra element, i.e., that the sexual assault caused physical pain and mental suffering, the extra element did not transform the child abuse charge into the greater crime at issue"); *Meador*, 101 Nev. at 771, 711 P.2d at 856 (relying on a California case for the proposition that if a defendant is "convicted of two offenses which are actually one, [the] conviction of [the] less severely punishable offense should be set aside" (citation omitted)). Under that approach, simple possession would be the lesser offense. *Compare* NRS 453.336(2)-(4) (penalties for simple possession of controlled substance), *with* NRS 453.337(2) (penalties for possession for sale of schedule I and II controlled substance), *and* NRS 453.338(2) (penalties for possession for sale of schedule III, IV, or V controlled substance).

[Headnote 17]

The issue is only complicated in this case because the district court adjudicated LaChance as a habitual criminal on the simple-possession offense but not the possession-for-sale offense. This had the effect of increasing both the category and range of punishment for the simple-possession offense, *see* NRS 207.010, making the possession-for-sale offense the less severely punishable offense. Because the double-jeopardy analysis is based solely on the elements of the principal offenses, we conclude that the district court should look to the range of punishment for the principal offenses in deciding which conviction to vacate.

Based on LaChance's criminal history, the charge for possession of a controlled substance is a category D felony, NRS 453.336(2)(b), with a sentencing range of 1 to 4 years, NRS 193.130(2)(d). However, his charge for possession of a controlled substance for the purpose of sale is a category B felony, with a sentencing range of 3 to 15 years. NRS 453.337(2)(c). Looking solely at the principal offenses, simple possession is the less severely punishable offense. Accordingly, we reverse the conviction for felony possession of a controlled substance (count II), the lesser-included offense in this instance.

Notice of intent to seek habitual criminal adjudication

[Headnotes 18, 19]

LaChance argues that the district court committed plain error and violated his constitutional rights to a fair trial and due process in allowing habitual offender adjudication without an information or an

arraignment indicating that the State was seeking habitual offender treatment. He avers that while his counsel did not object to a notice being filed, this notice could not have replaced the required charging document. The State points out that adequate actual notice of the habitual criminal enhancement was provided and that no arraignment was necessary as being a habitual criminal is an allegation of a status, not a criminal charge.

LaChance's failure to object to this issue below results in this court conducting plain error review of this issue. *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (noting that failure to object during trial generally precludes appellate consideration of an issue). Plain error review requires this court to "examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Id*. (internal quotation omitted).

Even if it was error to file a notice rather than filing a separate count or amending the information to include the habitual criminal allegation, NRS 207.016(2), LaChance cannot demonstrate that his substantial rights were affected for two reasons. First, he agreed to the procedure used in this case. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (holding plain error does not exist when the complaining party contributed to the error because a defendant "will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit" (citation and internal quotation omitted)).

[Headnote 20]

Second, the clear purpose of NRS 207.010(2) is to ensure that the defendant has notice that the State will request habitual criminal adjudication. *See* NRS 207.016(2) (allowing the habitual criminal to be added right before trial or at any time before sentence is imposed, so long as there is sufficient time between addition and sentence). Here, he had written notice. Moreover, habitual criminal adjudication is not an offense, it is a status determination, *Schneider v. State*, 97 Nev. 573, 575, 635 P.2d 304, 305 (1981), that is not subject to jury determination, *O'Neill v. State*, 123 Nev. 9, 15, 153 P.3d 38, 42 (2007). So, there is no need for a preliminary hearing or arraignment. *See* NRS 174.015; *Hanley v. Zenoff*, 81 Nev. 9, 12, 398 P.2d 241, 242 (1965) (requiring a new arraignment for material changes to the charges). Since LaChance does not have those rights as to habitual criminal allegation, the error could not have substantially affected those rights. Accordingly, plain error was not demonstrated.

Adjudicating LaChance as a habitual criminal

[Headnotes 21-24]

Adjudication of a defendant as a habitual criminal is "subject *to the broadest kind of judicial discretion*." *Tanksley v. State*, 113 Nev.

997, 1004, 946 P.2d 148, 152 (1997) (internal quotation omitted). In determining if a finding of habitual criminal is proper, "this court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion." *O'Neill*, 123 Nev. at 16, 153 P.3d at 43 (internal citation omitted). A sentencing court meets its obligations so long as it "was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication." *Id.* (internal citation omitted). Moreover, in considering the enhancement, the "court may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the like." *Id.*

[Headnotes 25, 26]

The court may "dismiss a count under NRS 207.010 when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice." *French v. State*, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982). The "habitual criminality statute exists to enable the criminal justice system to deal determinedly with career criminals who pose a serious threat to public safety." *Sessions v. State*, 106 Nev. 186, 191, 789 P.2d 1242, 1245 (1990).

[Headnotes 27, 28]

LaChance asserts that he has a constitutionally protected liberty interest under the due process clause of the Fourteenth Amendment to have the State adhere to NRS 207.010. *See Walker v. Deeds*, 50 F.3d 670, 673 (9th Cir. 1995) ("Nevada's law requiring a court to review and make particularized findings that it is 'just and proper' for a defendant to be adjudged a habitual offender also creates a constitutionally protected liberty interest in a sentencing procedure."). Concerning the requisite number of previous felonies for the habitual criminal enhancement, LaChance argues that this court should adopt the majority rule that multiple punishments entered during the same time period are considered only one felony. He then points out that because of the time periods for the felonies, he only was imprisoned twice.

[Headnote 29]

The State argues that the habitual criminal enhancement is not concerned with the number of times the individual passes through the prison system but is concerned with the number of convictions. The State avers that this court should recognize the statute as written by the Legislature, which makes no reference to the number of prison sentences, and decline to usurp the legislative function.[7]

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[7]LaChance argues for the first time in the reply brief that NRS 207.010(1) is ambiguous. Because the Nevada Rules of Appellate Procedure do not allow litigants to raise new issues for the first time in a reply brief, we decline to consider this argument. NRAP 28(c).

The governing statute, NRS 207.010(1)(b), states that a person who has been convicted of at least three felonies is a habitual criminal and shall be punished for a category A felony.[8] However, "[t]he trial judge may, at his or her discretion, dismiss a [habitual criminal] count[,] . . . which is included in any indictment or information." NRS 207.010(2).

The determination of the number of prior felonies for the habitual criminal enhancement is based on the statutory scheme created by the legislature, not on extrajurisdictional caselaw. *See* Cynthia L. Sletto, Annotation, *Chronological or Procedural Sequence of Former Convictions as Affecting Enhancement of Penalty Under Habitual Offender Statutes*, 7 A.L.R. 5th 263 (1992) (revealing a split of authority on the subject of whether "prior offenses and convictions must have occurred in chronological sequence, with each subsequent offense having been committed after conviction of the immediately preceding offense . . . the resolution of which often depends on the language of the particular statute under consideration and the court's opinion of what purpose such a statute is intended to serve"); 24 C.J.S. *Criminal Law* § 2316 (2006) (stating that the circumstantial application of enhancements is statutorily based).

Based on the language and intent of NRS 207.010, we have held "that where two or more convictions grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information, those several convictions may be utilized only as a single 'prior conviction' for purposes of applying the habitual criminal statute." *Rezin v. State*, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979); *see also Halbower v. State*, 96 Nev. 210, 211-12, 606 P.2d 536, 537 (1980) (same). This rule "is consistent with the policy and purpose of the recidivist statute. By enacting the habitual criminal statute, the legislature sought to discourage repeat offenders and to afford them an opportunity to reform." *Rezin*, 95 Nev. at 462-63, 596 P.2d at 227.

LaChance has given us no reason to depart from our prior interpretation of the statutory scheme and impose additional time-period constraints on prior convictions that are not provided for in the statute. NRS 207.010 allows for reform between felonious acts. This time for reform does not hinge on arrests and to so limit reform to time periods between prison terms would hobble the district court's discretion "to deal determinedly with career criminals who pose a

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[8]NRS 207.010(1)(a) provides that a person convicted of

> [a]ny felony, who has previously been two times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.

serious threat to public safety." *Sessions*, 106 Nev. at 191, 789 P.2d at 1245. Accordingly, we decline to impose additional constraints on the district court's discretionary determination of whether habitual criminal adjudication is warranted.

LaChance had been convicted of five prior felonies—(1) a November 14, 2002, conviction for felony battery causing substantial bodily harm for an event that took place on May 13, 2001; (2) a November 14, 2002, felony conviction for possession of 4 grams or more but less than 14 grams of a schedule I controlled substance for an event that took place on May 29, 2002; (3) a February 27, 2003, felony conviction for possession of a stolen motor vehicle for an event that took place on October 9, 2002; (4) an April 3, 2007, felony conviction for trafficking in a controlled substance for an event that took place on October 3, 2006; and (5) an August 23, 2012, felony conviction for possession of a controlled substance for an event that took place on July 12, 2007. The record thus establishes that LaChance has at least three separate and distinct prior felony convictions for purposes of applying the habitual criminal statute. Our analysis of Nevada's law on habitual offender enhancement leads us to conclude that the district court was well within its discretion in sentencing LaChance as a habitual offender.

Accordingly, we reverse the conviction for felony possession of a controlled substance (count II), the lesser-included offense in this instance, and otherwise affirm the judgment of conviction.

HARDESTY and PARRAGUIRRE, JJ., concur.

MICHAEL CHARLES MEISLER, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 63034

April 3, 2014 321 P.3d 930

Appeal from a judgment of conviction, pursuant to a jury verdict, of aggravated stalking. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

The supreme court, CHERRY, J., held that: (1) police officers were authorized to obtain cellular telephone's global positioning system (GPS) coordinates from defendant's cellular telephone service provider for purposes of locating and arresting defendant pursuant to arrest warrant, and (2) defendant could not revoke his previous decision to represent himself on eve of trial.

Affirmed.

Kristine L. Brown, Gardnerville, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Mark B. Jackson*, District Attorney, and *Thomas W. Gregory*, Chief Deputy District Attorney, Douglas County, for Respondent.

1. Arrest; Telecommunications.
   Police officers were authorized to obtain cellular telephone's global positioning system (GPS) coordinates from defendant's cellular telephone service provider for purposes of locating and arresting defendant pursuant to arrest warrant; police had procured a valid arrest warrant before requesting defendant's cellular telephone's GPS coordinates, and because an arrest warrant would have justified an entry into defendant's home, an arrest warrant likewise justified a digital entry into his cellular telephone to retrieve GPS coordinates for the purpose of locating him. U.S. Const. amend. 4.
2. Arrest.
   For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within the dwelling. U.S. Const. amend. 4.
3. Arrest.
   Any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind; hence, under federal law, a search warrant may permit officers the authority to arrest a suspect if probable cause forms during the lawful search, and, likewise, an arrest warrant may permit officers to seize evidence discovered as a result of a lawful arrest. U.S. Const. amend. 4.
4. Arrest; Telecommunications.
   An arrest warrant that justifies the physical invasion of the home also justifies a digital invasion into a defendant's cellular telephone for the purpose of locating the defendant. U.S. Const. amend. 4.
5. Searches and Seizures; Telecommunications.
   The Fourth Amendment cannot accord protection to geolocation data associated with a defendant's cellular telephone while denying such protection against a physical invasion of the defendant's home, as the latter is entitled to the highest order of defense. U.S. Const. amend. 4.
6. Criminal Law.
   Defendant could not revoke his previous decision to represent himself at trial on the eve of trial, when it was apparent that the purpose of his request for counsel was to delay the proceedings, in prosecution for aggravated stalking; defendant made no mention of his request to withdraw at the pretrial conference, which occurred just hours before his motion was filed, and standby counsel was not prepared for trial and would have needed time to become prepared, further delaying the proceedings. U.S. Const. amend. 6.
7. Criminal Law.
   A defendant may not manipulate the right to counsel for purposes of delaying and disrupting the trial. U.S. Const. amend. 6.
8. Criminal Law.
   A district court may deny a request to withdraw from self-representation when the request is made with an intent to delay or obstruct proceedings. U.S. Const. amend. 6.

Before Hardesty, Parraguirre and Cherry, JJ.

OPINION

By the Court, CHERRY, J.:

In this case, we are asked to decide whether law enforcement's efforts to locate appellant Michael Meisler by retrieving his cell phone's Global Positioning System (GPS) coordinates from his cell phone service provider constituted an illegal search. We conclude that Meisler's Fourth Amendment rights were not violated because law enforcement procured a valid arrest warrant before requesting his phone's GPS coordinates. In addition, we hold that the district court did not abuse its discretion in denying Meisler's request to withdraw from self-representation where his request was made with an intent to delay proceedings.

FACTS

Meisler was in a romantic relationship with Janice Tebo. After the relationship ended, Meisler repeatedly sent Tebo emails, text messages, and letters. The communications from Meisler included references to the movie *Fatal Attraction*, statements that she had made a "fatal decision," allusions to the ancient Greek legend of the Sword of Damocles,[1] and threats to sue her for lying to him. One of the communications stated: "JFK died on this day 48 years ago. Today is also a day u will also not eva forget befitting an Irishpolak lying SLUT. Have a nice day :)." After investigating various reports made by Tebo, the Douglas County Sheriff obtained a warrant for Meisler's arrest. Seeking Meisler's location in order to make the arrest, a sheriff's investigator requested that Meisler's cell phone service provider retrieve his GPS coordinates. The service provider complied, and Meisler was arrested in a public parking lot.

During the arrest, Meisler's cell phone was retrieved from his vehicle at his request. The cell phone was kept with his belongings while he was in custody. A valid search warrant was procured before the contents of the cell phone were searched. The search of the cell phone revealed numerous text messages, some of which were eventually used to support Meisler's conviction.

Meisler was charged by information with aggravated stalking, a felony under NRS 200.575(2). On his request, Meisler was canvassed and found competent to represent himself. The court appointed standby counsel. The district court further denied Meisler's request to suppress text messages retrieved from his cell phone as a

[1]The legend recounts a king hanging a sword above Damocles, held to the ceiling by a single horse hair. *See* Marcus Tullius Cicero, *Tusculan Disputations* bk. V, § 21, at 185 (C.D. Yonge trans., New York, Harper & Brothers 1877) (c. 45 B.C.), *available at* http://goo.gl/9cVN57. The king intended that Damocles understand the "constant apprehension[ ]" under which a wealthy ruler must live. *Id.* at 185-86.

result of his arrest. The court held that law enforcement did not need to obtain a warrant before using Meisler's phone GPS coordinates to locate him.

On the day before trial, at 4:23 p.m., Meisler filed a motion to withdraw from self-representation. The court denied the motion after argument on the morning of trial because the motion was untimely and filed with the intent to delay the trial.

Following trial, Meisler was convicted by jury verdict of aggravated stalking. Standby counsel was appointed as counsel of record for sentencing. Meisler was sentenced to prison for a maximum of 12 years with parole eligibility after 2 years. The court also issued an extended protective order of 20 years. Meisler appealed.

DISCUSSION

Fourth Amendment and GPS data

[Headnote 1]

Meisler argues that his Fourth Amendment rights were violated when officers asked his cell phone service provider to use his cell phone's GPS coordinates to locate him. Specifically, he argues that the arrest was illegal because the officers did not obtain a search warrant before retrieving his GPS coordinates. He also claims that the evidence retrieved as a result of his arrest should have been excluded as fruit of the poisonous tree. Meisler admits, however, that the officers did possess a valid arrest warrant at the time of arrest.

[Headnotes 2, 3]

The Supreme Court has stated that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980). In *Payton*, the Court noted that "any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind." *Id.* at 589. Hence, under federal law, a search warrant may permit officers the authority to arrest a suspect if probable cause forms during the lawful search. *See Mahlberg v. Mentzer*, 968 F.2d 772, 775 (8th Cir. 1992). Likewise, an arrest warrant may permit officers to seize evidence discovered as a result of a lawful arrest. *See United States v. Pruitt*, 458 F.3d 477, 480-82 (6th Cir. 2006) (concluding that execution of arrest warrant justified seizure of evidence found in third party's home during protective sweep).

Following *Payton* and its progeny, a federal court recently held that "the issuance of the arrest warrant . . . undermines any privacy interest in prospective geolocation data." *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129, 147, (E.D.N.Y. 2013). The court reasoned that searching for a suspect in his home

is far more intrusive than seeking geolocation data from a suspect's cell phone, and if the United States Supreme Court has found the more intrusive home search to be reasonable, then a less intrusive cell phone data search is surely reasonable. *Id*. at 147; *see also Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981) ("Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home.").

[Headnotes 4, 5]

Thus, an arrest warrant that justifies the physical invasion of the home also justifies a digital invasion into a defendant's cell phone for the purpose of locating the defendant. "The Fourth Amendment cannot accord protection to geolocation data associated with a defendant's cell phone while denying such protection against a physical invasion of his home, as the latter is entitled to the highest order of defense." *In re Smartphone*, 977 F. Supp. 2d at 147. In this case, officers obtained a valid warrant for Meisler's arrest. Because an arrest warrant would have justified an entry into Meisler's home, an arrest warrant likewise justifies a digital entry into his cell phone to retrieve GPS coordinates for the purpose of locating him.[2] We hold that Meisler's Fourth Amendment rights were not violated and, therefore, that the text messages were not fruit of the poisonous tree.[3]

Meisler's request to withdraw from self-representation

[Headnote 6]

Meisler argues that the district court erred by not permitting him to revoke his previous decision to represent himself at trial. We disagree.

[Headnotes 7, 8]

"It is well established that a defendant may not manipulate the right to counsel for purposes of delaying and disrupting the trial." *People v. Howell*, 615 N.Y.S.2d 728, 729 (App. Div. 1994); *see also Moody v. State*, 888 So. 2d 532, 558-59 (Ala. Crim. App. 2003) (compiling court decisions supporting the proposition that "obstructionist and dilatory conduct . . . may constitute a waiver" of a defendant's right to counsel). We have held that a district court

[2]The record is not clear whether Meisler was voluntarily turning his GPS data over to his service provider, but the existence of a valid arrest warrant alleviates any need to discuss Meisler's expectation of privacy.

[3]Even had the government violated Meisler's Fourth Amendment rights in locating him for arrest, the retrieval of text messages from his cell phone might have been so attenuated from the arrest that the fruit-of-the-poisonous-tree doctrine would not be applicable at all. As it is not necessary to our disposition, we merely note the issue and do not opine upon it.

may deny a request for self-representation if the request was made with the intent to delay proceedings. *Vanisi v. State*, 117 Nev. 330, 339, 22 P.3d 1164, 1170 (2001). It follows that a request to withdraw from self-representation may be denied on similar grounds. Other courts have precisely so held: "A district court may refuse a defendant's request to withdraw from self-representation after a valid waiver 'if a defendant seeks counsel in an apparent effort to delay or disrupt proceedings on the eve of trial, or once trial is well underway.'" *United States v. Woodard*, 291 F.3d 95, 111 (1st Cir. 2002) (quoting *United States v. Proctor*, 166 F.3d 396, 402 (1st Cir. 1999)). We agree with the soundness of this rule and hold that a district court may deny a request to withdraw from self-representation when said request is made with an intent to delay or obstruct proceedings.

Here, Meisler's request was made on the eve of trial. He made no mention of his request to withdraw at the pretrial conference, which occurred just hours before his motion was filed. Standby counsel was not prepared for trial and would have needed time to become prepared, further delaying the proceedings. These facts support the district court's conclusion that the motion was made with an intent to delay proceedings. We defer to that conclusion. Thus, the district court did not abuse its discretion in denying Meisler's request to withdraw from self-representation because his motion was made with an intent to delay the proceedings. We have considered Meisler's other arguments and conclude that they lack merit.[4]

Because Meisler's Fourth Amendment rights were not violated and because his other claims lack merit, we affirm the judgment of conviction.

HARDESTY and PARRAGUIRRE, JJ., concur.

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[4]Meisler's contention that the evidence was insufficient to convict him of aggravated stalking lacks merit because a rational juror could have interpreted his numerous references to death as death threats. Meisler's argument about the district court's decision to exclude his proposed expert witnesses lacks merit because those witnesses admitted that their testimony would not be relevant. *See* NRS 50.275 (permitting expert testimony when it "will assist the trier of fact to understand the evidence or to determine a fact in issue"); *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 529, 262 P.3d 360, 368 (2011) ("[I]t will assist the trier of fact if it is relevant and supported by competent . . . research.").