Here, the State Engineer made factual findings regarding the Green Acres properties' use of water from Spring A. First, the State Engineer found that the natural channel of Spring A water flowed directly to the Green Acres properties. The State Engineer also found that water flowed through the six-inch pipe to the Green Acres properties. The State Engineer concluded that the water which flows through the pipe and reaches the Green Acres properties was diverted and put to beneficial use, irrigating the Green Acres properties; therefore, the Green Acres properties had a vested right.

In its answering brief on appeal, the State Engineer argues that he and the district court relied upon expert testimony and culture maps showing homogenous vegetation to reach the conclusion that although water from Spring A had been diverted towards Jackson's property by his predecessors in interest, some was allowed to continue along its more natural path to the Green Acres properties. The district court, after visiting the site with the parties and holding a hearing with expert testimony, affirmed the State Engineer's conclusions.

Jackson seeks to have us reweigh the facts and conclude in his favor; however, the record supports that the district court's findings are not clearly erroneous and are based on substantial evidence, even if Jackson disagrees with the ultimate findings. We will not substitute our judgment for that of the district court unless the district court's findings were clearly erroneous, which they were not.

CONCLUSION

Accordingly, for the reasons set forth above, we order the judgment and decree of the district court affirmed.

DOUGLAS and GIBBONS, JJ., concur.

MICHAEL J. SCHOFIELD, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 65193

April 21, 2016 372 P.3d 488

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping and child abuse, neglect, or endangerment. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

The supreme court, HARDESTY, J., held that: (1) the phrase "to keep," as used in statute defining kidnapping, was ambiguous; (2) the supreme court would invoke rule of lenity in interpreting

meaning of "keep," as used in kidnapping statute; (3) the phrase "intent to keep," as used in kidnapping statute, required intent to keep minor permanently or for protracted period of time; and (4) the evidence was insufficient to establish that defendant kidnapped the child.

Reversed.

Karen K. Wong, Las Vegas, for Appellant.

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

1. Criminal Law.
   Statutory interpretation is a question of law subject to de novo review.
2. Statutes.
   The supreme court must attribute the plain meaning to a statute that is not ambiguous.
3. Statutes.
   An ambiguity arises when the statutory language lends itself to two or more reasonable interpretations.
4. Kidnapping.
   The phrase "to keep," as used in statute defining kidnapping as when accused intended "to keep the minor from his or her parents, guardians, or any other person having lawful custody," was ambiguous, such that the court could look beyond statute's language, since it could reasonably be interpreted in at least two different ways, in that first-degree kidnapping required intent to possess minor permanently or for protracted period, or it required intent to possess minor for any period of time against the child's legal guardian's wishes. NRS 200.310(1).
5. Statutes.
   If a statute is ambiguous, then the supreme court will look beyond the statutory language itself to determine the statute's legislative intent.
6. Criminal Law.
   The rule of lenity, which demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor, only applies when other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, have failed to resolve a penal statute's ambiguity.
7. Criminal Law.
   The supreme court would invoke rule of lenity in interpreting meaning of "keep," as used in statute defining kidnapping as when accused intended "to keep the minor from his or her parents, guardians, or any other person having lawful custody," since legislative history of kidnapping statute shed no light on intended meaning of "keep," and legislative history did not provide meaningful guidance about how "keep" should be interpreted in light of underlying rationale and public policy that induced Legislature to adopt kidnapping statute. NRS 200.310(1).
8. Kidnapping.
   The phrase "intent to keep," as used in statute defining kidnapping as when accused intended "to keep the minor from his or her parents, guardians, or any other person having lawful custody," required intent to keep minor permanently or for protracted period of time; rule of lenity required

interpretation using narrow definition compared to broader definition of "keep" to mean "possess for any amount of time against a legal guardian's wishes." NRS 200.310(1).

9. CONSTITUTIONAL LAW.
When determining whether a jury verdict was based on sufficient evidence to meet due process requirements, the supreme court will inquire whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. U.S. CONST. amend. 14.

10. KIDNAPPING.
Evidence was insufficient to establish that defendant kidnapped child, within meaning of statute allowing kidnapping charge to be supported by intent "to keep, imprison, or confine," where arguments at trial, including closing arguments, and on appeal focused solely on whether defendant intended "to keep" child, State never meaningfully argued that defendant intended to confine or imprison child, and overwhelming evidence at trial showed defendant intended to take child to a store and then return him to his legal guardians, and thus did not "keep" him. NRS 200.310(1).

Before HARDESTY, SAITTA and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

Nevada's first-degree kidnapping statute makes it a category A felony to "lead[ ], take[ ], entice[ ], or carr[y] away or detain[ ] any minor *with the intent to keep*, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor . . . ." NRS 200.310(1) (emphasis added). Appellant argues NRS 200.310(1)'s "intent to keep" language is ambiguous, and there was insufficient evidence to convict him using the proper interpretation of "intent to keep." In addressing appellant's contention, we conclude that (1) NRS 200.310(1)'s "intent to keep" language is ambiguous; (2) pursuant to the canons of statutory interpretation, NRS 200.310(1) requires proof that the accused intended to keep the minor for a protracted period of time or permanently; and (3) reversal is warranted because there is insufficient evidence to support appellant's first-degree kidnapping conviction under the proper legal standard.

FACTS

Appellant Michael John Schofield (Schofield) is the father of Michael Joshua Schofield (Michael). At the time of the incident, and for more than a decade prior, Schofield's mother and stepfather (Patricia and Norman, respectively) had legal custody of Michael.[1]

[1]The record is silent as to the precise extent of Schofield's parental rights; however, the parties agree Patricia and Norman had legal custody of Michael and acted as his primary caregivers. There is no indication in the record that

As was typical, Schofield came to visit Michael at Patricia and Norman's house on a Sunday. During the visit, Schofield realized he left something behind at the grocery store and asked Michael to go with him to get it. Michael said no. Schofield insisted that Michael go, and when Michael continued to say no, the argument became physical. Michael tried to walk, then run, away from Schofield inside the house. Eventually, Schofield caught up with Michael and put him in either a chokehold or a headlock. Schofield then dragged Michael outside and threw Michael into his van, which was parked in the driveway. During these events, Patricia called 911 for help, and Norman repeatedly told Schofield to stop. Two off-duty police officers who lived next door tackled Schofield before he could get in the van and leave with Michael.

Schofield was arrested and charged with child abuse, neglect or endangerment; domestic violence (strangulation); burglary; and first-degree kidnapping. Schofield initially had counsel, but he opted to represent himself toward the end of trial. A jury convicted him of child abuse and first-degree kidnapping but acquitted him of domestic violence (strangulation) and burglary. Schofield now appeals from the judgment of conviction, challenging his first-degree kidnapping (NRS 200.310(1)) conviction.[2]

DISCUSSION

Schofield argues NRS 200.310(1)'s "intent to keep" requirement is ambiguous, and, under the proper interpretation of that requirement, there is insufficient evidence to support his first-degree kidnapping conviction.[3] NRS 200.310(1) states:

> [A] person who leads, takes, entices, or carries away or detains any minor *with the intent to keep*, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor . . . is guilty of kidnapping in the first degree which is a category A felony.

(Emphasis added.)[4] Schofield argues that the "intent to keep" language in NRS 200.310(1) requires an intent to keep a minor perma-

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Schofield was seeking, or had ever sought, a change to the custody rights for Michael. Indeed, the record shows that Schofield typically visited Michael a couple times a week, and that arrangement worked well for all parties.

[2]Schofield has not challenged his child abuse conviction on appeal.

[3]Schofield also argues that the child-kidnapping provisions of NRS 200.310(1) do not apply to the minor's parents, guardians, or other person who has lawful custody. For a general discussion, see William B. Johnson, *Kidnapping or Related Offense by Taking or Removing of Child By or Under Authority of Parent or One in Loco Parentis*, 20 A.L.R.4th 823 (1983 & Supp. 2016) (collecting cases). We do not reach this issue, as it is unnecessary to our disposition of this appeal, and it was neither raised nor developed in the district court.

[4]The material jury instruction here mirrored NRS 200.310(1)'s language.

nently or indefinitely. Based on this argument, we must determine (1) whether NRS 200.310(1)'s "intent to keep" language is ambiguous; (2) if so, what "intent to keep" means; and (3) whether there was sufficient evidence to convict Schofield of first-degree kidnapping under the appropriate legal standard.

NRS 200.310(1)'s "intent to keep" language is ambiguous

[Headnotes 1-3]

"Statutory interpretation is a question of law subject to de novo review." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). "We must attribute the plain meaning to a statute that is not ambiguous." *Id.* "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations." *Id.*

[Headnote 4]

In material part, NRS 200.310(1) requires proof that the accused intended "to keep . . . the minor from his or her parents, guardians, or any other person having lawful custody" before criminal liability attaches for first-degree kidnapping. Schofield argues that the word "keep" unambiguously means "keep permanently or indefinitely," or, alternatively, that the term is ambiguous and should be narrowly defined. We conclude the verb "to keep," as employed in NRS 200.310(1), is ambiguous and therefore not susceptible to a plain meaning analysis. *See id*.

The verb "to keep," as used in NRS 200.310(1), is ambiguous because it can reasonably be interpreted in at least two different ways. *See id.* First, "keep" can mean "[preserve, maintain]: as . . . to continue to maintain," or similarly, "to retain or continue to have in one's possession or power." *Keep*, *Webster's Third New International Dictionary* (2002). Such definitions of the word "keep" focus on dominion or possession for a period of time, either permanently or for a protracted period. Second, "keep" can mean "to restrain from departure or removal," which envisions possession against some countervailing force, rather than possession for a period of time. *Id.* Therefore, a person attempting to interpret NRS 200.310(1) could reasonably conclude that first-degree kidnapping requires an intent (1) to possess a minor permanently or for a protracted period, or (2) to possess a minor for *any* period of time against his legal guardian's wishes. Thus, we conclude that NRS 200.310(1)'s "intent to keep" language is ambiguous.

The word "keep" in NRS 200.310(1) must mean "keep permanently or for a protracted period of time"

[Headnotes 5, 6]

"If the statute is ambiguous, then this court will look beyond the statutory language itself to determine the legislative intent of the statute." *Haney v. State*, 124 Nev. 408, 412, 185 P.3d 350, 353 (2008). The rule of lenity, which "demands that ambiguities in crim-

inal statutes be liberally interpreted in the accused's favor . . . only applies when other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, have failed to resolve a penal statute's ambiguity." *State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011) (internal quotation marks omitted).

[Headnote 7]

NRS 200.310(1)'s legislative history sheds no light on the Legislature's intended meaning for the word "keep." Similarly, NRS 200.310(1)'s legislative history does not provide meaningful guidance about how the word "keep" should be interpreted in light of the underlying rationale and public policy that induced the Legislature to adopt NRS 200.310(1). Therefore, we must invoke the rule of lenity to resolve this ambiguity and interpret NRS 200.310(1) in Schofield's favor.

[Headnote 8]

Interpreting "keep" to mean "possess for any amount of time against a legal guardian's wishes" is exceptionally broad. Indeed, that interpretation would require a jury to convict Schofield of first-degree kidnapping—a category A felony with a five-year mandatory minimum sentence—even if it believed he merely intended to take Michael to the store and immediately return him to Patricia and Norman's custody. Alternatively, "keep" could be read more narrowly to mean "exercise continuous and enduring possession or dominion." Such a definition of "keep" would require a first-degree kidnapping charge to be supported by proof that, at the moment the defendant took possession of the minor, the defendant either intended to keep the minor permanently or for a protracted period of time. Based on the foregoing, we now conclude that the rule of lenity requires that we interpret NRS 200.310(1)'s "intent to keep" requirement as requiring an intent to keep a minor permanently or for a protracted period of time.

Schofield's first-degree kidnapping conviction must be reversed

[Headnotes 9, 10]

"When determining whether a jury verdict was based on sufficient evidence to meet due process requirements, we will inquire whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotation marks omitted)). Using the proper definition of "intent to keep," there is insufficient evidence to support Schofield's first-degree kidnapping conviction because there was no evidence that he intended to keep Michael permanently or for a protracted period. In fact, the

overwhelming evidence at trial showed Schofield intended to take Michael to the store and then return him to Patricia and Norman.

Although NRS 200.310(1) allows a first-degree kidnapping charge to be supported by an intent "to keep, imprison, *or* confine," the arguments at trial—including closing arguments—and on appeal have focused solely on whether Schofield intended "to keep" Michael. (Emphasis added.) The State has never meaningfully argued that Schofield intended to confine or imprison Michael. Indeed, the State's closing argument argued that (1) it only needed to show Schofield intended to *take* Michael; and (2) "[t]here's nothing in that statute . . . that says he has to permanently keep the child, [or] have the intention of permanently keeping the child."

Thus, Schofield was convicted of first-degree kidnapping when no rational juror could have found, beyond a reasonable doubt, that he intended to keep Michael permanently or for a protracted period. Accordingly, Schofield's first-degree kidnapping conviction is reversed as unsupported by the evidence against him.[5] *See Vega v. State*, 126 Nev. 332, 345, 236 P.3d 632, 641 (2010); *accord Rose*, 123 Nev. at 202, 163 P.3d at 414.

SAITTA and PICKERING, JJ., concur.

DONALD TAYLOR, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 65388

April 21, 2016 371 P.3d 1036

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a firearm, conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

The supreme court, SAITTA, J., held that: (1) "specific and articulable facts" standard set forth in Stored Communications Act, rather than probable cause, applied to obtaining of defendant's historical cell phone information, including cell site location data, from cell phone service provider; (2) exigent circumstances justified show-up identification procedure; (3) show-up identification procedure was impermissibly suggestive and unreliable; (4) witness's in-court identification of defendant was admissible as independently reliable; and (5) prosecution's display, at end of closing argument, of

[5]We decline to address Schofield's remaining arguments as our reversal renders them moot.

defendant's image with the word "GUILTY" superimposed on it, as part of computerized slideshow, did not violate defendant's right to fair trial.

Affirmed.

[Rehearing denied June 10, 2016]

[En banc reconsideration denied July 14, 2016]

Drummond Law Firm and *Craig W. Drummond*, Las Vegas, for Appellant.

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

1. Searches and Seizures; Telecommunications.
   "Specific and articulable facts" standard set forth in Stored Communications Act, rather than probable cause standard governing searches under Fourth Amendment, applied to obtaining of defendant's historical cell phone information, including cell site location data, from cell phone service provider; defendant had no reasonable expectation of privacy in business records made, kept, and owned by cell phone providers. U.S. Const. amend. 4; 18 U.S.C. § 2703(d).
2. Constitutional Law.
   In deciding whether a pretrial identification is constitutionally sound, the test is whether, considering the totality of the circumstances, the identification procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process of law. U.S. Const. amend. 14.
3. Constitutional Law.
   When determining whether a pretrial identification procedure is so unnecessarily suggestive and conducive to irreparable mistaken identification as to deprive a defendant of due process, the procedure must be shown to be suggestive and unnecessary due to lack of emergency or exigent circumstances; if the procedure is suggestive and unnecessary, the second inquiry is whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure. U.S. Const. amend. 14.
4. Criminal Law.
   Reliability is the paramount concern of a pretrial identification procedure.
5. Criminal Law.
   As long as a pretrial identification is sufficiently reliable, it is for the jury to weigh the evidence and assess the credibility of the eyewitnesses.
6. Criminal Law.
   A show-up identification is inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender.
7. Criminal Law.
   Countervailing policy considerations, i.e., exigent circumstances that necessitate prompt identification, may justify the use of a show-up identification procedure.

8. Criminal Law.
   Examples of exigencies sufficient to justify a show-up identification include ensuring fresher memory, exonerating innocent people by making prompt identifications, and ensuring that those committing serious or dangerous felonies are swiftly apprehended; where exigencies such as these are absent, show-ups are not justified.
9. Criminal Law.
   Exigent circumstances justified show-up identification procedure to identify murder suspect; two suspects who had just committed murder during course of armed robbery were at large after fleeing victim's apartment, such that anyone near suspects was a potential victim, and suspects took marijuana from apartment, such that it was likely suspects would commit further illegal acts by either selling the marijuana or committing additional robberies.
10. Criminal Law.
    In deciding whether a show-up identification procedure is reliable, the supreme court considers factors including (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the degree of attention paid by the witness, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated at the show-up by the witness, and (5) the length of time between the crime and the show-up.
11. Criminal Law.
    Show-up identification procedure used to identify murder and armed robbery suspect was impermissibly suggestive and, therefore, unreliable; while witness may have had ample opportunity to view suspect while he looked around her apartment prior to committing crimes at issue, witness appeared uncertain during show-up, providing inaccurate description of suspect, and show-up occurred nearly eight hours after crimes occurred.
12. Criminal Law.
    Witness's in-court identification of defendant as perpetrator of murder and armed robbery was independently reliable, and thus was admissible despite unnecessarily suggestive pretrial show-up identification procedure that produced an unreliable identification; witness had observed suspect in her apartment prior to commission of crimes and got at least one good look at suspect she identified as being defendant when they stood face-to-face.
13. Criminal Law.
    When an error is preserved and is of a constitutional nature, the prosecution must show, beyond a reasonable doubt, that the error did not contribute to the verdict.
14. Criminal Law.
    The district court's error in allowing witness's unreliable out-of-court identification into evidence was harmless in prosecution for murder and armed robbery; error was cured by witness's later in-court identification, in that such identification had independent basis.
15. Criminal Law.
    Counsel, during closing argument, must make it clear that the conclusions that he or she urges the jury to reach are to be drawn from the evidence.
16. Criminal Law.
    A prosecutor may not declare to a jury that a defendant is guilty.
17. Criminal Law.
    A computerized slideshow presentation may not be used to make an argument visually that would be improper if made orally.

18. Criminal Law.
Prosecution's display, at end of closing argument, of defendant's image with the word "GUILTY" superimposed on it, as part of computerized slideshow, did not violate murder defendant's right to fair trial; slide was displayed only briefly, and defense did not object to it. U.S. Const. amend. 6.

19. Criminal Law.
The injection of personal beliefs into the argument detracts from the unprejudiced, impartial, and nonpartisan role that a prosecuting attorney assumes in the courtroom; therefore, prosecutors are prohibited from expressing their personal beliefs on the defendant's guilt.

20. Criminal Law.
Statements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable.

21. Criminal Law.
Prosecutor's statement, during closing argument, that the reason the defense suggested the phone used in part to tie defendant to murder was not defendant's was "because the person using that phone is guilty of the crimes charged in this case," but that the evidence was overwhelming, and "he can't," was a reasonable conclusion based on the evidence presented, and was not an improper personal opinion of defendant's guilt; statement was preceded by review of text messages between cell phone recovered from defendant and victim's cell phone, after evidence tied defendant to the phone number used to text victim.

22. Criminal Law.
The Fifth Amendment requires that the state refrain from directly commenting on the defendant's decision not to testify. U.S. Const. amend. 5.

23. Criminal Law.
A direct comment on a defendant's failure to testify is a per se violation of the Fifth Amendment. U.S. Const. amend. 5.

24. Criminal Law.
An indirect comment on a defendant's decision not to testify violates the defendant's Fifth Amendment right against self-incrimination only if the comment was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify. U.S. Const. amend. 5.

25. Criminal Law.
Murder defendant's Fifth Amendment right against self-incrimination was not violated by prosecutor's comments challenging jury to come up with a reasonable explanation of the truth that did not involve defendant's guilt and submitting that there was "at least one person in this room who knows beyond a shadow of a doubt who killed" the victim; although comments indirectly referenced defendant's failure to testify, they were not manifestly intended to be of such a character that jury would naturally and necessarily taken them to be comments on defendant's failure to testify. U.S. Const. amend. 5.

26. Criminal Law.
In reviewing the evidence supporting a jury's verdict, the question is not whether the supreme court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to consider.

27. Criminal Law.
A jury may reasonably rely upon circumstantial evidence; to conclude otherwise would mean that a criminal could commit a secret murder, de-

stroy the body of the victim, and escape punishment despite convincing circumstantial evidence against him or her.

28. HOMICIDE.

Evidence was sufficient to support conviction of murder with the use of a deadly weapon; witness's identification of defendant placed defendant at scene of crime with a gun, witness testified that defendant said he and other suspect were taking marijuana after victim demanded payment for bag of drugs, and witness further testified that, while turned away from suspects and victim, she heard gun shots and then turned to see victim lying in pool of blood.

29. ROBBERY.

Evidence was sufficient to support conviction of robbery with the use of a deadly weapon; witness's identification of defendant placed defendant at scene of crime with a gun, witness testified that defendant said he and other suspect were taking marijuana after victim demanded payment for bag of drugs, and witness further testified that she saw defendant and other suspect take what she believed to be marijuana before fleeing after having shot victim.

Before HARDESTY, SAITTA and PICKERING, JJ.[1]

OPINION

By the Court, SAITTA, J.:

This opinion addresses whether the State's warrantless access of historical cell site location data obtained from a cell phone service provider pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d), violates the Fourth Amendment. We hold that it does not because a defendant does not have a reasonable expectation of privacy in this data, as it is a part of business records made, kept, and owned by cell phone providers. Thus, the "specific and articulable facts" standard set forth at 18 U.S.C. § 2703(d) is sufficient to permit the access of historical cell phone information, and probable cause is not required.

This opinion also addresses the alleged violations of appellant Donald Taylor's right to due process of law and his right against self-incrimination, as well as alleged insufficiency of the evidence and cumulative error.

FACTUAL AND PROCEDURAL HISTORY

The robbery-murder

On November 18, 2010, at approximately 2 p.m., Michael Pearson and his girlfriend's three-year-old son arrived at Angela Chenault's

[1]Subsequent to the oral arguments held in this matter, THE HONORABLE JAMES W. HARDESTY, Justice, was administratively assigned to participate in the disposition of this matter in the place and stead of THE HONORABLE MARK GIBBONS, Justice. THE HONORABLE JAMES W. HARDESTY, Justice, has considered all arguments and briefs in this matter.

apartment. Chenault is the mother of Pearson's girlfriend, Tyniah Haddon. After taking her grandson to the bedroom, Chenault went to the kitchen, where she cooked while she talked with Pearson. Pearson told Chenault that he was meeting his friends at her apartment. Pearson brought a black bag containing marijuana with him into the apartment and placed it on top of the refrigerator. Chenault saw Pearson sit on the couch and talk to someone on his phone.

At some point, Pearson left the apartment and returned with two men. Chenault never met either of these men before and neither introduced themselves to her. One of the men walked around the apartment and went toward the bedroom. To prevent the man from going inside the bedroom where her grandson was watching television, Chenault stood in front of the bedroom door. She momentarily stood face-to-face with the man. He asked who was in the bedroom, and Chenault replied that her grandson was in there. Chenault noticed that the man was holding a gun. During the trial, Chenault identified that man as Taylor.

Chenault returned to the kitchen stove and resumed cooking. Pearson removed the black bag from the top of the refrigerator and placed it on the kitchen table. He asked for money from the two men in exchange for the black bag, but the men responded, "No, we taking this." Pearson then said, "Take it." Chenault saw the men begin going through Pearson's pockets and saw Pearson attempt to grab a gun on his waistband. During this time, Chenault turned back to the stove. Shots were fired, and when Chenault turned around, she found Pearson lying in a pool of blood and saw that the men had fled with the black bag. Chenault did not observe the actual shooting.

Incidents leading to Taylor's arrest

Las Vegas Metropolitan Police Detectives Christopher Bunn and Marty Wildemann responded to the scene of the shooting. After interviewing Chenault, Detective Wildemann interviewed Haddon. Haddon told Detective Wildemann that Pearson was going to sell marijuana to someone that she knew as "D." She also informed Detective Wildemann that she had met "D" at one of Pearson's coworker's houses. Detective Wildemann gave Pearson's cell phone number to the FBI and asked for their assistance regarding possible contacts that Pearson made just before the murder occurred.

The FBI provided Detective Wildemann with a phone number to which Pearson placed a call shortly before the murder. Homicide detectives then processed the phone number through government records and were able to link it to an individual named Jennifer Archer.

While conducting surveillance on Archer, Detective Wildemann observed Archer exit her vehicle and enter a bar. When Archer returned to her vehicle, she was accompanied by an unknown male. After initiating a traffic stop of Archer's vehicle, Detective Wilde-

mann arrested the male passenger, who identified himself as Taylor. Taylor gave Detective Wildemann his cell phone and cell phone number. Detective Wildemann dialed the phone number given to him by the FBI. Taylor's cell phone rang. Detective Wildemann then contacted Chenault to come and identify Taylor.

The out-of-court identification procedure

Detective Wildemann arranged to meet with Chenault and bring her to the parking lot where Taylor was being held to "conduct a one-on-one."[2] The time was 11:45 p.m., and it was "[p]itch black." The lighting conditions were such that Detective Wildemann had to "superimpose a bunch of lighting on [Taylor]" by pulling vehicles around Taylor and lighting up the spot where Taylor was standing with a patrol car spotlight. After explaining the process to Chenault, Detective Wildemann drove her about 15 to 20 yards from where Taylor was standing. Detective Wildemann then drove closer so Chenault could see Taylor more clearly.

Chenault told Detective Wildemann that "she [did not] think that that's him; she just [did not] recognize that to be him." Detective Wildemann pulled the vehicle around and asked Chenault again for her thoughts. Chenault told Detective Wildemann that Taylor looked like the man from the apartment, but believed that Taylor was thicker than the man who was at the apartment. Chenault said that Taylor was "just a bigger guy." Detective Wildemann asked Chenault to focus on Taylor's face, and at that point Chenault said, "[I]t looks like him."

After driving Chenault home, Detective Wildemann texted a photograph of Taylor to Haddon. He asked Haddon to tell him if it was a photograph of "D." Haddon immediately responded, "That's D, that's him." Haddon then showed the photograph to Chenault, who told Haddon that the man in the picture was the person who shot Pearson.

Taylor's indictment and conviction

On January 14, 2011, a Clark County grand jury indicted Taylor on the following charges: burglary while in possession of a firearm, conspiracy to commit robbery, robbery with the use of a deadly weapon, and murder with the use of a deadly weapon. After a six-day jury trial, the jury returned a verdict of guilty on all four counts. Taylor filed a motion for a new trial, which was denied by the district court. The judgment of conviction was filed on March 7, 2014. This appeal followed.

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[2]A one-on-one, or show-up, is a procedure where the police officer brings the witness to the location where the suspect is being held in order to determine whether the witness can make a positive identification of the suspect.

DISCUSSION

The warrantless access and use of Taylor's historical cell phone location data did not violate Taylor's Fourth Amendment rights

Taylor contends that a person has an objectively reasonable expectation of privacy in the access to and the use of his or her historical cell phone location data. He further contends that his Fourth Amendment rights were violated because the State did not have a warrant for his historical cell phone location data.

A search warrant is not required to obtain historical cell site location information

Pursuant to a subpoena under the Stored Communications Act, Sprint-Nextel provided the State with a call-detail record with cell site information for Taylor's phone.[3] The records covered November 11, 2010, through November 18, 2010. Although they do not provide the content of calls or text messages, the records do provide certain information about those communications. For example, the records show various incoming and outgoing calls. They also demonstrate the times and dates of the calls or text messages, along with the duration for each, as well as the location of the cell towers routing the calls.

Generally, the phone seeks the cell tower emitting the strongest signal, not necessarily the closest tower. This was relevant at trial because the cell phone tower records indicated that a phone call was made using Taylor's phone close to the time of the murder and the Sprint-Nextel cell tower closest to the location of the murder routed the call.

There are two types of cell site location information (CSLI) that law enforcement can acquire from cell phone companies. Kyle Malone, *The Fourth Amendment and the Stored Communications Act: Why the Warrantless Gathering of Historical Cell Site Location Information Poses No Threat to Privacy*, 39 Pepp. L. Rev. 701, 710 (2013). Law enforcement can either obtain records that a company has kept containing CSLI, known as "historical CSLI," or it "can request to view incoming CSLI as it is received from a user's cell phone in 'real time,'" known as "prospective CSLI." *Id.* Generally,

[3]"The [Stored Communications Act] was passed in 1986 as part of the Electronic Communications Privacy Act of 1986" and is contained in 18 U.S.C. §§ 2701-2710. Kyle Malone, *The Fourth Amendment and the Stored Communications Act: Why the Warrantless Gathering of Historical Cell Site Location Information Poses No Threat to Privacy*, 39 Pepp. L. Rev. 701, 716 & n.103 (2013). Section 2703(d) of the Stored Communications Act allows for disclosure of private communications data via court order "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (2012).

courts have held that prospective CSLI requires a warrant before disclosure may be granted. *Id.* However, only a few courts have addressed the issue of whether historical CSLI requires a warrant. *Id.*

A warrant is not required under the Fourth Amendment to obtain historical CSLI

The phone records received by the State were obtained based on the "specific and articulable facts" standard set forth in 18 U.S.C. § 2703(d).[4] Federal appellate courts that have reached this issue appear to agree that this "specific and articulable facts" standard is sufficient for obtaining phone records. *See In re Application of U.S. for an Order Directing Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 313 (3d Cir. 2010) (holding that "CSLI from cell phone calls is obtainable under a § 2703(d) order and that such an order does not require the traditional probable cause determination"); *see also United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (holding that CSLI data may be constitutionally obtained without a warrant); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 612-13 (5th Cir. 2013) (holding the same). However, the circuit courts are not consistent when defining the types of phone records that are obtainable under the "specific and articulable facts" standard.

For example, the United States Court of Appeals for the Third Circuit in *In re Application of United States for an Order Directing Provider of Electronic Communication Service to Disclose Records to Government* held that magistrate judges have discretion to require a warrant for historical CSLI if they determine that the location information sought will implicate the suspect's Fourth Amendment privacy rights. 620 F.3d at 319. In reaching this conclusion, the court rejected the argument that a cell phone user's expectation of privacy is eliminated by the service provider's ability to access that information:

> A cell phone customer has not "voluntarily" shared his location information with a cellular provider in any meaningful way. . . . [I]t is unlikely that cell phone customers are aware that their cell phone providers *collect* and store historical location information. Therefore, [w]hen a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed and there is no indication to the user that making that call will also locate the caller; when a cell phone user receives a call, he hasn't voluntarily exposed anything at all.

[4]Taylor does not dispute whether the State had "specific and articulable facts" to obtain a subpoena under the Stored Communications Act but, rather, argues that the standard for obtaining historical CSLI should be probable cause.

Id. at 317-18 (alteration in original) (internal quotations omitted). However, the court also held that "CSLI from cell phone calls is obtainable under a § 2703(d) order and that such an order does not require the traditional probable cause determination." *Id.* at 313. Judge Tashima's concurrence notes that "the majority . . . appears to contradict its own holding." *Id.* at 320 (Tashima, J., concurring). Therefore, while the court held that a cell phone user does not lose their expectation of privacy simply by making or receiving a call, it is unclear whether the Third Circuit's decision requires the specific-and-articulable-facts standard or the more stringent probable cause standard, which would require a warrant, before historical CSLI can be obtained.

In *In re Application of United States for Historical Cell Site Data*, the United States Court of Appeals for the Fifth Circuit determined that cell phone users, by and large, do not have an expectation of privacy with regard to CSLI, as they are aware that their phones must emit CSLI to cell phone providers in order to receive cell phone service but continue to use their cell phones to place calls and, thus, voluntarily convey CSLI to cell phone providers. 724 F.3d at 612-13. The Fifth Circuit stressed that the telephone company, not the government, collects the cell tower information for a variety of legitimate business purposes. *Id.* at 611-14. The court explained that a cell phone user has no subjective expectation of privacy because: (1) the cell phone user has knowledge that his or her cell phone must send a signal to a nearby cell tower in order to wirelessly connect the call; (2) the signal only happens when a user makes or receives a call; (3) the cell phone user has knowledge that when he or she places or receives a call, there are signals transmitted through the cell phone to the nearest cell tower and thus to the service provider; and (4) as such, the cell phone user is aware that he or she is conveying cell tower location information to the service provider and voluntarily does so when using a cell phone for calls. *Id.* at 613-14.

In spite of this, the court's holding is limited. *Id.* at 615. The court only decided the narrow issue of whether § 2703(d) "orders to obtain historical cell site information for specified cell phones at the points at which the user places and terminates a call [were] . . . unconstitutional." *Id.* (emphasis omitted). The court held that § 2703(d) orders are not unconstitutional, thereby allowing for the lesser standard of "specific and articulable facts" in such cases. *Id.* The court did not address

> orders requesting data from all phones that use a tower during a particular interval, orders requesting cell site information for the recipient of a call from the cell phone specified in the order, or orders requesting location information for the duration of the calls or when the phone is idle (assuming the data are available for these periods). Nor do we address situations

> where the Government surreptitiously installs spyware on a target's phone or otherwise hijacks the phone's GPS, with or without the service provider's help.

Id. Therefore, the court's decision implies that the specific-and-articulable-facts standard is sufficient for historical CSLI, to the extent that the information obtained relates to phone calls that were made and/or terminated by the cell phone user specified in the order.[5]

In *United States v. Davis*, the Eleventh Circuit Court of Appeals held that a defendant "ha[s] no reasonable expectation of privacy in business records made, kept, and owned by [his or her cell phone provider]." 785 F.3d 498, 517 (11th Cir. 2015). These records included telephone numbers of calls made by and to the defendant's phone; whether the calls were incoming or outgoing; the date, time, and duration of the calls; as well as historical cell site location information. *Id.* at 503. The court noted that historical cell site location information reveals the precise location of the cell phone towers that route the calls made by a person but do not reveal the precise location of the cell phone or the cell phone user. *Id.* at 504. The court rejected the argument that cell phone users retain an expectation of privacy in the data because they do not voluntarily convey their location information to the service provider. *Id*. at 517. The court also held that "[t]he stored telephone records produced in this case, and in many other criminal cases, serve compelling governmental interests." *Id.* at 518.

[Headnote 1]

Thus, while federal courts generally agree that probable cause is not necessary for obtaining a cell phone user's historical CSLI, the information that can be obtained without probable cause does vary from circuit to circuit. The position taken by the Eleventh Circuit Court of Appeals is persuasive, and we hold that the "specific and articulable facts" standard under § 2703(d) is sufficient to obtain historical cell phone information because a defendant has no reasonable expectation of privacy in business records made, kept, and owned by his or her cell phone provider.

Taylor's Fourth Amendment rights were not violated

Here, the police obtained a § 2703(d) order by meeting the "specific and articulable facts" standard. The order allowed them to obtain

[5]The United States Court of Appeals for the Sixth Circuit has also ruled on whether a person has a reasonable expectation of privacy in the data transmitted from a cell phone, thereby requiring a probable cause standard. *United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012). The court's holding implies that the probable cause standard is not required for a cell phone user's CSLI, at least where the cell phone user is on a public thoroughfare. *Id*. at 781.

Taylor's historical CSLI, including his location—within 2.5 miles of the murder scene—at the time he placed a call, shortly before the murder occurred, and the call and text message records between his and Pearson's cell phones leading up to the robbery-murder. Because Taylor does not have a reasonable expectation of privacy in business records made, kept, and owned by his provider, Sprint-Nextel, a warrant requiring probable cause was not required before obtaining that information. Thus, we hold that Taylor's Fourth Amendment rights were not violated.

The out-of-court and in-court identifications did not violate Taylor's constitutional right to due process of law

Taylor challenges Chenault's identification of him during the show-up as the person in her apartment during the crime, as well as her positive identification of Taylor during trial.[6]

[Headnotes 2-5]

In deciding whether a pretrial identification is constitutionally sound, the test is whether, considering the totality of the circumstances, the identification procedure " 'was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'" *Banks v. State*, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (alteration in original) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). "First, the procedure must be shown to be suggestive[ ] and unnecessary [due to] lack of emergency or exigent circumstances." *Id.* If the procedure is suggestive and unnecessary, "the second inquiry is whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure." *Id.* "Reliability is the paramount concern." *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). As long as the identification is sufficiently reliable, "it is for the jury to weigh the evidence and assess the credibility of the eyewitnesses." *Gehrke v. State*, 96 Nev. 581, 584, 613 P.2d 1028, 1029 (1980).

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[6]Although Taylor alludes to the impropriety of the photograph that was sent to Haddon, he fails to argue in his appellate briefing that the single photograph was unnecessarily suggestive and unreliable. Although an argument can be made that the photograph was unnecessarily suggestive and unreliable because Chenault was shown a single photograph by her daughter that had been sent via text by Detective Wildemann, *see In re Anthony T.*, 169 Cal. Rptr. 120, 123 (Ct. App. 1980) ("[I]f appellant was wrongfully identified and convicted it matters not to him whether the injustice was due to the actions of the private citizens or the police."), Taylor does not cogently argue this claim or provide relevant authority in support of it. Therefore, we need not reach the merits of this issue. *Browning v. State*, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004) (stating that "an appellant must present relevant authority and cogent argument; issues not so presented need not be addressed by this court" (internal quotations omitted)).

Exigent circumstances justified the show-up identification procedure

[Headnotes 6-8]

A show-up "is inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender." *Jones*, 95 Nev. at 617, 600 P.2d at 250. However, countervailing policy considerations may justify the use of a show-up. *Id.* Countervailing policy considerations are related to the presence of exigent circumstances that necessitate prompt identification. *See Gehrke*, 96 Nev. at 584 n.2, 613 P.2d at 1030 n.2. Examples of exigencies sufficient to justify a show-up include: (1) ensuring fresher memory, *Jones*, 95 Nev. at 617, 600 P.2d at 250; (2) exonerating innocent people by making prompt identifications, *id.*; and (3) ensuring that those committing serious or dangerous felonies are swiftly apprehended, *Banks*, 94 Nev. at 95, 575 P.2d at 595. Where exigencies such as these are absent, however, show-ups are not justified. *See Gehrke*, 96 Nev. at 584, 613 P.2d at 1030.

[Headnote 9]

In this case, exigent circumstances justified the show-up identification procedure. Specifically, the show-up was necessary to quickly apprehend a dangerous felon. *See Banks*, 94 Nev. at 95, 575 P.2d at 595-96. In *Banks*, the victim picked up hitchhikers who proceeded to rob him at gunpoint. *Id.* at 92, 575 P.2d at 594. The court stated that "[i]t was imperative for the police to have a prompt determination of whether the robbery suspects had been apprehended or were still at large." *Id*. at 95, 575 P.2d at 596.

This case is similar to *Banks*. Here, two suspects who had just committed a murder during the course of an armed robbery were at large after fleeing Chenault's apartment. Like *Banks*, anyone near the suspects was a potential victim. *See id.* at 95, 575 P.2d at 595-96. Furthermore, the suspects took the marijuana from Chenault's apartment and thus could have likely committed further illegal acts by either selling the marijuana in their possession or committing additional robberies. Therefore, it was essential for the suspects to be swiftly apprehended. Since exigent circumstances existed in the present case, we hold that the show-up identification procedure was justified.

The show-up identification was unreliable

[Headnote 10]

Nevertheless, when dealing with pretrial identification procedures, "[r]eliability is the paramount concern." *Jones*, 95 Nev. at 617, 600 P.2d at 250. In deciding whether a show-up identification procedure is reliable, we consider factors including: (1) the opportu-

nity of the witness "to view the [suspect] at the time of the crime," (2) the degree of attention paid by the witness, (3) "the accuracy of [the witness's] prior description of the [suspect]," (4) "the level of certainty demonstrated at the [show-up]" by the witness, and (5) the length of time between the crime and the show-up. *Gehrke*, 96 Nev. at 584, 613 P.2d at 1030.

[Headnote 11]

Here, although the record suggests that Chenault may have had ample opportunity to view the suspects while they looked around her apartment and conducted the drug deal, the record also suggests that she may not have been paying sufficient attention to them. The record suggests that Chenault appeared uncertain during the show-up, as her description of the suspect was inaccurate with regard to Taylor. Furthermore, the circumstances of the show-up—which occurred nearly eight hours after the crime occurred—were highly suspect. Therefore, we hold that the identification of Taylor was unreliable for purposes of a show-up.

The in-court identification by Chenault was independently reliable

The United States Supreme Court has held that even where an unnecessarily suggestive pretrial procedure occurs that produces an unreliable identification, subsequent in-court identification by the same witness is not necessarily excluded where the in-court identification itself is found to be independently reliable. *Manson v. Brathwaite*, 432 U.S. 98, 112-14 (1977). The factors to be considered are identical to those enunciated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Id.* This court has adopted the same standard. *Browning v. State*, 104 Nev. 269, 273-74, 757 P.2d 351, 353-54 (1988).

[Headnote 12]

Here, Chenault's observation of the suspects in her apartment likely constituted a sufficient independent basis for her in-court identification of Taylor. The suspects were in her apartment for some time, and she got at least one good look at the suspect she identified as being Taylor when they stood face-to-face. Indeed, we have held that similar opportunities for observations constitute a sufficient independent basis for an in-court identification. *Banks*, 94 Nev. at 96, 575 P.2d at 596. In *Banks*, "a good look" at the suspects was enough to allow the in-court identification. *Id.*; *Boone v. State*, 85 Nev. 450, 453, 456 P.2d 418, 420 (1969) (holding that "one good look" during a car chase was sufficiently reliable). Similarly, in *Riley v. State*, 86 Nev. 244, 468 P.2d 11 (1970), an observation of seven seconds or less of the suspects was sufficiently reliable for the in-court identification.

The error was harmless

[Headnote 13]

Where an error is preserved and is of a constitutional nature, the prosecution must show, "beyond a reasonable doubt, that the error did not contribute to the verdict." *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008).

[Headnote 14]

Here, although the district court erred by allowing the out-of-court identification into evidence, the error was cured by the later in-court identification because it had a sufficient independent basis. Thus, it is clear beyond a reasonable doubt that the error did not contribute to the verdict.

The prosecutorial conduct during closing arguments did not violate Taylor's Sixth Amendment right to a fair trial or Fifth Amendment right against self-incrimination

The PowerPoint slide with "GUILTY" superimposed on it did not violate Taylor's right to a fair trial

[Headnotes 15-17]

The purpose of closing arguments is to "enlighten the jury, and to assist . . . in analyzing, evaluating, and applying the evidence, so that the jury may reach a just and reasonable conclusion." 23A C.J.S. *Criminal Law* § 1708 (2006) (citations omitted). However, "counsel must make it clear that the conclusions that he or she urges the jury to reach are to be drawn from the evidence." *Id.* Importantly, a prosecutor may not declare to a jury that a defendant is guilty. *See Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985). In the context of PowerPoints used during trial, "a PowerPoint may not be used to make an argument visually that would be improper if made orally." *Watters v. State*, 129 Nev. 886, 890, 313 P.3d 243, 247 (2013) (reversing where PowerPoint slide with "Guilty" superimposed over defendant's image was displayed extensively during opening statement). However, this court has held that a photograph with the word "guilty" across the front shown during closing arguments is not, on its own, sufficient for a finding of error. *Artiga-Morales v. State*, 130 Nev. 795, 799, 335 P.3d 179, 182 (2014).

[Headnote 18]

The State used the PowerPoint presentation to make an improper oral argument visually—namely, to declare to the jury that Taylor was guilty by superimposing "GUILTY" on a PowerPoint slide. However, the slide was displayed briefly only at the very end of the prosecutor's closing arguments, and the defense did not object to the slide. Accordingly, the PowerPoint slide, on its own, was not sufficient for a finding of error.

The comments made during closing arguments did not violate Taylor's Sixth Amendment right to a fair trial or Fifth Amendment right against self-incrimination

Taylor argues that the prosecutor made comments during closing arguments that could only be construed as the prosecutor's improper personal opinion that Taylor was guilty. Taylor also argues that the prosecutor impermissibly commented on his decision not to testify during trial.

The prosecutor's comments during closing arguments were permissible

[Headnotes 19, 20]

The "injection of personal beliefs into the argument detracts from the unprejudiced, impartial, and nonpartisan role that a prosecuting attorney assumes in the courtroom." *Collier*, 101 Nev. at 480, 705 P.2d at 1130 (internal quotations omitted). Therefore, prosecutors are prohibited from expressing their personal beliefs on the defendant's guilt. *Id.* However, "[s]tatements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable." *Domingues v. State*, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996).

[Headnote 21]

Here, one of the prosecutors stated, "The defense suggests that it's not [Taylor's] phone . . . , [and] I would submit to you [that the defense suggests this] because the person using that phone is guilty of the crimes charged in this case. So he's got to distance himself from that phone. But the evidence is overwhelming. He can't."

This statement was preceded by a review of the text messages between the cell phone recovered from Taylor and Pearson's cell phone. This was after the evidence tied Taylor to the phone number used to text Pearson. Therefore, in this instance, the prosecutor's comments were reasonable conclusions based on the evidence presented and were not improper. *Id.* Furthermore, the record substantiates the prosecutor's statement that the phone was Taylor's and that Taylor texted Pearson prior to the robbery-murder.

On rebuttal, the prosecutor said, "I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed . . . Pearson."[7] Like the statement addressed above, this statement followed a summation of evidence. The statement reflects

[7]The first prosecutor handled the State's closing argument, and the second prosecutor handled the State's rebuttal to the defense's closing argument.

the prosecutor's conclusions based on the evidence regarding the cell phone records and Archer's testimony regarding Taylor's behavior that day. Therefore, we hold that the prosecutor's statement was not improper. *Id.*

The prosecutor did not comment on Taylor's decision not to testify

[Headnotes 22-24]

The Fifth Amendment requires that the State refrain from directly commenting on the defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965); *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). A direct comment on a defendant's failure to testify is a per se violation of the Fifth Amendment. *Harkness*, 107 Nev. at 803, 820 P.2d at 761. However, an indirect comment violates the defendant's Fifth Amendment right against self-incrimination only if the comment "was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Id.* (internal quotations omitted).

Taylor contends that the prosecutor's statements were similar to those made in *Harkness* and thus deprived him of his Fifth Amendment rights. In *Harkness*, the defendant chose not to testify in his defense, and the prosecution commented on gaps in the evidence, intimating that the defendant was the only one who could resolve those gaps: "If we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts in this case?" *Id.* at 802, 820 P.2d at 760 (internal quotations omitted). This court held those comments to be indirect references to the defendant's failure to testify. *Id.* at 804, 820 P.2d at 761. We also held that these comments violated the defendant's Fifth Amendment rights because, when taken in full context, there was a likelihood that the jury took those statements to be a comment on the defendant's failure to testify. *Id.*

In the present case, the prosecutor made the following comments:

> There has to be a rational explanation for the evidence. . . . I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor. . . .
>
> . . . I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed . . . Pearson. And I submit to you if you're doing your duty and you're doing your job, you'll go back in that room and you'll come back here and you'll tell that person you know, too.

[Headnote 25]

Although the comments by the prosecutor indirectly referenced Taylor's failure to testify, unlike the comments in *Harkness* that

blamed the defendant for the lack of information about what had happened in that case, neither comment here "was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Id.* (internal quotations omitted). Therefore, there was no error and Taylor's Fifth Amendment right against self-incrimination was not violated.

There was sufficient evidence at trial to support the jury's finding of guilt

[Headnotes 26, 27]

In reviewing the evidence supporting a jury's verdict, the question is not "whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to [consider]." *Edwards v. State*, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). "Moreover, a jury may reasonably rely upon circumstantial evidence; to conclude otherwise would mean that a criminal could commit a secret murder, destroy the body of the victim, and escape punishment despite convincing circumstantial evidence against him or her." *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

[Headnotes 28, 29]

The evidence here indicated that, prior to the murder, Taylor and Pearson had discussed and planned a sale of marijuana. Chenault's identification of Taylor placed him at the scene of the crime with a gun. She also testified that Taylor stated that he and the other suspect were "taking [the marijuana]" after Pearson demanded payment. Chenault further testified that she heard gun shots and saw Pearson lying in a pool of blood. Finally, Chenault testified that she saw the men take what she believed to be the marijuana before fleeing the scene.

In addition to this evidence, cell phone records connected Taylor and Pearson with calls and text messages prior to the offense and placed Taylor near the crime scene around the time of the murder. Evidence also showed that Taylor subsequently engaged in furtive behavior after the offense, telling Archer to delete text messages, that "it's all bad," and that he had to get out of the state.

We conclude that the evidence was sufficient to establish that Taylor entered Chenault's apartment with the intent to commit a felony, that he conspired to commit a robbery, that he unlawfully took property from Pearson by use of a deadly weapon, and that he committed the unlawful killing of a human being during the commission of a robbery. When viewed in the light most favorable to the State,

there was sufficient evidence for the jury, acting reasonably, to have been convinced beyond a reasonable doubt that Taylor was guilty of these crimes. *Edwards*, 90 Nev. at 258-59, 524 P.2d at 331.[8]

CONCLUSION

The district court did not err by allowing access to historical cell phone information obtained without a warrant because a defendant does not have a reasonable expectation of privacy in business records made, kept, and owned by his provider. Thus, the "specific and articulable facts" standard set forth in 18 U.S.C. § 2703(d) is sufficient to obtain historical cell phone information. Although the district court erred by admitting the out-of-court identification, the error was harmless beyond a reasonable doubt and the subsequent in-court identification of Taylor had a sufficient independent basis. Additionally, there was no prosecutorial misconduct during closing arguments because the PowerPoint slide, on its own, was not sufficient for a finding of error, and the prosecutors' statements were reasonable conclusions based on the evidence presented at trial. Furthermore, neither comment by the prosecutors was of such character that the jury would naturally and necessarily take them to be comments on Taylor's failure to testify. Lastly, there was sufficient evidence at trial to support the jury's finding of guilt. Accordingly, we affirm the judgment of conviction.

HARDESTY and PICKERING, JJ., concur.

JA CYNTA MCCLENDON, APPELLANT, *v.*
DIANE COLLINS, RESPONDENT.

No. 66473

April 21, 2016 372 P.3d 492

Appeal from a district court judgment on a jury verdict following a short trial in a tort action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

In action arising from automobile collision, the district court entered judgment on jury verdict for trailing motorist. Leading motorist appealed. The supreme court, SAITTA, J., held that: (1) after an expert report has been disclosed, a party cannot regain the confidentiality protections granted to nontestifying experts by de-designating

[8]Because we hold that only one error was committed by the district court, we do not reach the issue of whether there was cumulative error.

that witness to the status of a nontestifying expert, but (2) the district court's error in refusing to permit leading motorist to depose expert or to call him to testify was harmless.

Affirmed.

Cram Valdez Brigman & Nelson and *Adam E. Brigman*, Las Vegas, for Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, and *Wade M. Hansard* and *Daniel I. Aquino*, Las Vegas, for Respondent.

1. Appeal and Error.
   The supreme court reviews de novo the district court's legal conclusions regarding court rules.
2. Courts.
   Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.
3. Pretrial Procedure.
   After an expert report has been disclosed, a party cannot regain the confidentiality protections granted to nontestifying experts by de-designating that witness to the status of a nontestifying expert. NRCP 26(b)(4)(B).
4. Pretrial Procedure.
   After an expert witness has lost the confidentiality protections given to nontestifying experts, it is at the district court's discretion whether to allow the witness to be further deposed or called to testify at trial by an opposing party; the district court's discretion should be guided by a balancing of probative value against unfair prejudice—for instance, excluding the expert's testimony where it would be duplicative or cumulative or where the opposing party is attempting to use the testimony to piggyback on the designating party's trial preparation. NRS 48.035; NRCP 26(b)(4)(B).
5. Pretrial Procedure.
   In instances in which an expert is allowed to be deposed or testify after initially being designated as a testifying expert but then subsequently being de-designated, evidence of that expert's original retention by the opposing party is inadmissible. NRCP 26(b)(4)(B).
6. Appeal and Error.
   The supreme court reviews a district court's decision to allow expert testimony for an abuse of discretion.
7. Pretrial Procedure.
   The point at which an expert witness loses confidentiality protections given to nontestifying experts is when an expert witness report is filed, not when a deposition is performed. NRCP 26(b)(4)(B).
8. Appeal and Error.
   When a moving party shows that an error is prejudicial, the error is not harmless and reversal may be appropriate.
9. Appeal and Error.
   To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached.

10. Appeal and Error.
Appellant is responsible for making an adequate appellate record, and when appellant fails to include necessary documentation in the record, the supreme court necessarily presumes that the missing portion supports the district court's decision.

11. Appeal and Error.
Appellant failed to show that she was prejudiced by district court's order refusing to allow appellant to depose other party's expert or to call him to testify, when appellant failed to include trial transcript and failed to provide insight in her brief indicating that she was prejudiced by decision.

12. Pretrial Procedure.
The party who designated the testifying expert witness may de-designate that witness to the status of a nontestifying expert witness and regain the confidentiality protections given to nontestifying experts prior to the disclosure of an expert witness report. NRCP 26(b)(4)(B).

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Saitta, J.:

A party may depose any person who has been identified as an expert whose opinions may be presented at trial but may not depose or otherwise discover facts or opinions held by an expert who is not expected to be called as a witness at trial outside of certain exceptional circumstances. This opinion addresses whether a witness who was originally designated as a testifying expert by a party but was later de-designated may be deposed or called to testify at trial by an opposing party. We hold that after an expert report has been disclosed, a testifying expert witness cannot regain the confidentiality protections of NRCP 26(b)(4)(B) by de-designating that witness to the status of a nontestifying expert. After the expert witness has lost NRCP 26(b)(4)(B)'s protections, it is at the district court's discretion whether to allow the witness to be further deposed or called to testify at trial by an opposing party.

FACTUAL AND PROCEDURAL HISTORY

This case arises from a motor vehicle accident in which respondent Diane Collins rear-ended appellant Ja Cynta McClendon's car. Collins designated a testifying expert medical witness, Dr. Eugene Appel, and filed an expert witness report and two supplemental witness reports. Before McClendon was able to depose Appel, Collins de-designated him as a testifying expert witness and filed a motion for a protective order to prevent McClendon from deposing Appel or calling him to testify at trial. McClendon then filed a motion to designate Appel as her own expert witness, take his deposition, and

use his written opinions and deposition at trial. The district court granted Collins' motion for a protective order and denied McClendon's motion. After a trial in the short trial program, the jury entered a judgment in favor of Collins.

McClendon raises the following issue on appeal: Whether the district court abused its discretion by refusing to allow McClendon to depose Appel or call him to testify.

DISCUSSION

De-designated expert witnesses can be deposed or called to testify at trial by an opposing party in limited circumstances

Under NRCP 26(b)(4)(A), "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial." A party may not depose or otherwise discover facts or opinions held by an expert who is not expected to be called as a witness at trial unless there are "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." NRCP 26(b)(4)(B). However, the rules of civil procedure are silent as to whether an opposing party may depose or call as a witness an expert who had been designated as one who will testify at trial but was then later de-designated.

[Headnotes 1, 2]

"This court reviews de novo [the] district court's legal conclusions" regarding court rules. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). Although this court has not yet ruled on this issue, some federal courts have held that a de-designated expert may lose the confidentiality protections provided under rules similar to that of NRCP 26(b)(4)(B) and be deposed or called as a witness by an opposing party. *See Sec. & Exch. Comm'n v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009); *Peterson v. Willie*, 81 F.3d 1033, 1037-38 (11th Cir. 1996); *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408, 409 (D. Minn. 1999); *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236, 245-46 (N.D. Iowa 1996). "Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)). NRCP 26(b)(4)(A)-(B) are nearly identical to their federal counterparts, FRCP 26(b)(4)(A) and FRCP 26(b)(4)(D).

The Seventh Circuit Court of Appeals has held that an expert who has been designated as a testifying expert witness and produced an expert report cannot later be de-designated as a nontestifying expert

and thus avoid having the expert called to testify at trial or deposed. *See Koenig*, 557 F.3d at 744 ("A witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report has been disclosed, and a deposition conducted, to the status of a trial-preparation expert whose identity and views may be concealed."); *see also Hartford Fire Ins. Co. v. Transgroup Express, Inc.*, 264 F.R.D. 382, 384 (N.D. Ill. 2009) ("The Seventh Circuit Court of Appeals has flatly rejected the idea that an expert who has been designated as a testifying expert witness and has produced an expert report can later be re-designated as a non-testifying expert to avoid having the expert deposed."). The *Koenig* court identified the disclosure of the expert report as the time when "the opportunity to invoke confidentiality" ends, suggesting that before that point, an expert witness may be de-designated. 557 F.3d at 744.

Similarly, the Eleventh Circuit Court of Appeals has ruled that a designated testifying expert witness may not be de-designated and regain the confidentiality protections of the federal counterpart to NRCP 26(b)(4)(B). *Peterson*, 81 F.3d at 1037-38 (citing *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 460-61 (S.D.N.Y. 1995)). However, the Eleventh Circuit qualified its holding by stating that once an expert is de-designated, it is at the discretion of the district court as to whether an opposing party may depose or call the expert to testify. *Id*. at 1038 n.4.

Thus, even after an expert witness has lost the NRCP 26(b)(4)(B) confidentiality protections, this nonetheless does not create "an 'entitlement' of the opposing party to depose or use another party's expert at trial." *House*, 168 F.R.D. at 246. Rather, "the proper standard in these circumstances is a 'discretionary' standard, where the trial court's discretion is guided by a balancing of probative value against prejudice under [Federal Rule of Evidence] 403, [the federal counterpart to NRS 48.035]." *Id*.

> Such a standard takes into account the interests [FRCP] 26 was designed to protect and those of the party who originally hired the expert, to the extent that party has not waived such an interest, *Rubel*, 160 F.R.D. at 460 (party who hired expert waived "free consultation" privilege by allowing deposition of the expert), as well as taking into account the peculiar prejudice that could arise if the jury is informed that an expert presented by one party was hired, then dropped, by the other party.

Id.

In applying this balancing test, courts have considered such factors as whether the testimony would be duplicative or cumulative of other witnesses' testimony, thus limiting the probative value of that testimony. *See, e.g.*, *Peterson*, 81 F.3d at 1037; *Rubel*, 160 F.R.D. at 460-61. Additionally, courts have considered whether the opposing

party failed to designate its own witness before a court-mandated deadline and appeared to be attempting to "piggyback[ ] on another party's trial preparation," thus undermining the principle objective of FRCP 26. *Ferguson*, 189 F.R.D. at 409 (internal quotation omitted); *see also FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1048 (E.D. Cal. 2002) ("There is a strong policy against permitting a non-diligent party from free-riding off the opponent's industry and diligence.").

[Headnotes 3, 4]

We agree with the federal courts and therefore hold that after an expert report has been disclosed, a testifying expert witness cannot regain the confidentiality protections of NRCP 26(b)(4)(B) by de-designating that witness to the status of a nontestifying expert. After the expert witness has lost NRCP 26(b)(4)(B)'s protections, it is at the district court's discretion whether to allow the witness to be further deposed or called to testify at trial by an opposing party. The trial court's discretion should be guided by a balancing of probative value against unfair prejudice under NRS 48.035—for instance, excluding the expert's testimony where it would be duplicative or cumulative or where the opposing party is attempting to use the testimony to piggyback on the designating party's trial preparation.

Evidence of opposing party's original retention is not admissible

[Headnote 5]

An additional issue surrounding the admission of testimony by a de-designated expert is whether evidence of the opposing party's original retention of the expert is admissible. Such evidence could "destroy counsel's credibility in the eyes of the jury" because "[j]urors unfamiliar with the role of counsel in adversary proceedings might well assume that plaintiff's counsel had suppressed evidence which he had an obligation to offer." *Peterson*, 81 F.3d at 1037 (internal quotations omitted). Some federal courts that have faced this issue have indicated that such evidence is not admissible because it is unfairly prejudicial to the party that retained the expert. *See id.* at 1038 (holding that trial court's admission of evidence regarding an expert's original retention was error, but harmless); *see also Agron v. Trs. of Columbia Univ.*, 176 F.R.D. 445, 452-53 (S.D.N.Y. 1997) (holding that a de-designated expert witness may be called to testify as long as evidence of how he became involved in the case is excluded); *House*, 168 F.R.D. at 249 (holding the same). We agree with the federal courts and hold that in instances where a de-designated expert is allowed to be deposed or testify, evidence of that expert's original retention by the opposing party is inadmissible.

The district court abused its discretion

[Headnote 6]

This court "review[s] a district court's decision to [allow] expert testimony for an abuse of discretion." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014).

[Headnote 7]

In the interlocutory order, the district court stated that its decision was "based significantly on the fact that . . . Appel, prior to [Collins] de-designating him as an expert witness, had not performed [an NRCP] 35 examination on [McClendon]." (Emphasis omitted.) However, as we have stated above, the point at which an expert witness loses NRCP 26(b)(4)(B) confidentiality protections is when an expert witness report is filed, not when a deposition is performed. Here, Collins had already filed Appel's expert report as well as two supplements before he attempted to de-designate Appel as an expert witness. Therefore, we hold that the district court abused its discretion by basing its decision on the fact that Appel had not yet been deposed.

The error is harmless

[Headnotes 8-10]

When a moving party shows that an error is prejudicial, the error is not harmless and reversal may be appropriate. *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). "To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Id*. "[A]ppellant[is] responsible for making an adequate appellate record," and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev*., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

[Headnote 11]

McClendon failed to include a trial transcript. Therefore, it is impossible to know to what extent, if any, McClendon was prejudiced by the district court's order. Nor does McClendon provide insight in her brief indicating that she was prejudiced by the decision. Therefore, we hold that the district court's error was harmless.

CONCLUSION

[Headnote 12]

The party who designated the testifying expert witness may de-designate that witness to the status of a nontestifying expert witness and regain the confidentiality protections of NRCP 26(b)(4)(B)

prior to the disclosure of an expert witness report. After an expert witness report has been disclosed, however, the expert witness may not regain NRCP 26(b)(4)(B)'s protections, and the district court has the discretion to allow the witness to be deposed or called to testify at trial by an opposing party. Furthermore, in instances where a de-designated expert is allowed to be deposed or testify, evidence of that expert's original retention by the opposing party is inadmissible.

Because the district court appears to have improperly based its decision on the fact that Appel had not yet been deposed, it abused its discretion. However, because McClendon has not provided a sufficient record for us to determine whether the district court's error was prejudicial, we hold that it was harmless. Therefore, we affirm the district court's order and the final judgment.

HARDESTY and PICKERING, JJ., concur.

GRUPO FAMSA, S.A. DE C.V., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ROB BARE, DISTRICT JUDGE, RESPONDENTS, AND B.E. UNO, LLC, REAL PARTY IN INTEREST.

No. 68626

April 21, 2016 371 P.3d 1048

Original petition for a writ of prohibition challenging a district court order denying a motion to quash service of process.

Lessor brought action against lessee and foreign guarantor following default on lease. Guarantor filed motion to quash service of process. The district court denied motion. Guarantor petitioned for a writ of prohibition. The supreme court, HARDESTY, J., held that service of process on foreign entity in compliance with the Hague Convention did not necessarily comply with due process.

Petition granted in part.

Fennemore Craig, P.C., and *Christopher H. Byrd* and *Daniel Nubel*, Las Vegas; *Levinson Arshonsky & Kurtz, LLP*, and *Richard I. Arshonsky*, Sherman Oaks, California, for Petitioner.

Goold Patterson and *Kelly J. Brinkman*, Las Vegas, for Real Party in Interest.

1. CONSTITUTIONAL LAW; PROCESS.

Certificate of compliance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters issued by foreign nation's central authority did not necessarily guarantee compliance with constitutional due process in action by lessor

against lessee and foreign guarantor in which service of process on guarantor complied with the Hague Convention but was not made on agent, officer, or representative of guarantor. U.S. Const. amend. 14.

2. Prohibition.
A writ of prohibition is the appropriate remedy for a district court's erroneous refusal to quash service of process.

3. Appeal and Error.
The supreme court applies a de novo standard of review to constitutional challenges.

4. Constitutional Law.
An elementary and fundamental requirement of due process in any proceeding that is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. U.S. Const. amend. 14.

5. Constitutional Law.
Whether a particular method of notice is reasonable, so as to comply with due process, depends on the particular factual circumstances. U.S. Const. amend. 14.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Hardesty, J.:

In this petition, we consider whether constitutional due process is satisfied when service of process on a foreign company pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention) depends solely upon a certificate of compliance issued by the foreign nation's central authority. We hold that it is not and that the district court failed to conduct the necessary fact-finding to determine whether service was constitutionally sufficient in this case. Therefore, we grant the petition in part.

FACTS AND PROCEDURAL HISTORY

Real party in interest B.E. Uno, LLC (Uno) owns a shopping center in Las Vegas, Nevada. Famsa, Inc. (Famsa) entered into a lease agreement for commercial retail space at the shopping center. Petitioner Grupo Famsa, S.A. de C.V. (Grupo), a publicly traded Mexican company, agreed to guaranty the Famsa lease. Famsa failed to comply with the terms of the lease, and Uno filed a complaint in district court against Famsa and Grupo for breach of the commercial lease and guaranty.

As Grupo is a Mexican company, and as the United States and Mexico are both signatories to the Hague Convention, Uno served Grupo through the procedures outlined in the Hague Convention. The parties do not dispute that serving Grupo through the procedures outlined in the Hague Convention was appropriate.

The Hague Convention requires all signatories to "designate a 'Central Authority' whose responsibility it is to accept requests of service from any other signatory nation." 4B Charles Alan Wright et al., *Federal Practice and Procedure* § 1134 (4th ed. 2015). The documents to be served must be attached to a formal request form and sent to "the Central Authority of the nation where service is to be carried out." *Id.* "If there is no error in the documents, the Central Authority in the country of service will then . . . serve the defendant named in the documents according to its own local laws . . . ." *Id.* "[O]nce service has been performed[,] the Central Authority . . . complete[s] an official form, . . . certifying the time, place, and method of service, as well as indicating on whom the documents were served." *Id.*

In this case, the Mexican Central Authority issued a certificate of proof of international service of process upon Grupo. The certificate states that a woman named Claudia Palomo Martinez was served with process and that she was an "employee in [Grupo's] legal department." Grupo subsequently filed a motion to quash service of process, arguing that Martinez was not an "employee in [Grupo's] legal department," but rather, she was a hostess employed to greet individuals coming into the store. Grupo submitted a declaration from its legal director stating this was Martinez's role. Grupo argued that because Martinez was not an agent, officer, or representative of Grupo, she had no authority to accept legal documents on Grupo's behalf, and therefore, service of process was constitutionally deficient. Uno argued that, even if Martinez was a hostess, service of process nonetheless complied with Mexican law and the Hague Convention. Uno submitted a declaration from an attorney licensed to practice in Mexico stating he believed the service complied with Mexican law.

During the hearing on the motion to quash, the district court stated multiple times that it did not know whether Martinez was merely a hostess or someone more involved with the company. Nonetheless, the district court denied Grupo's motion to quash service of process, stating that Grupo was properly served "under the laws of Mexico as well as the Hague Convention and that such service efforts satisfied constitutional standards of Due Process." Grupo now petitions this court for a writ of prohibition, seeking to prohibit the district court from exercising jurisdiction over Grupo due to insufficient service of process.

DISCUSSION

[Headnotes 1, 2]

"It is well established that [a] writ of prohibition is the appropriate remedy for a district court's erroneous refusal to quash service of process." *Casentini v. Ninth Judicial Dist. Court*, 110 Nev. 721,

724, 877 P.2d 535, 537-38 (1994) (alteration in original) (internal quotation marks omitted). Furthermore, given the "early stage of the proceedings and the need for efficient judicial administration, an appeal would not be a speedy and adequate legal remedy in this case." *Loeb v. First Judicial Dist. Court*, 129 Nev. 595, 599, 309 P.3d 47, 50 (2013). Therefore, we will exercise our discretion to entertain the merits of the petition.

[Headnote 3]

"This court applies a de novo standard of review to constitutional challenges." *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). Grupo argues that service of process was not constitutionally effective because Martinez was not an agent, officer, or representative so integrated with the company that she knew what to do with the papers. Uno argues that our nation's concept of due process was incorporated into the Hague Convention, and thus, by satisfying the requirements of the Hague Convention, service of process necessarily satisfied constitutional due process. We reject Uno's argument; however, we also reject Grupo's standard for what constitutes constitutional service of process on a foreign corporation.

[Headnotes 4, 5]

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also Lidas, Inc. v. United States*, 238 F.3d 1076, 1084 (9th Cir. 2001) ("Due process merely requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." (internal quotation marks omitted)). "[W]hether a particular method of notice is reasonable depends on the particular [factual] circumstances." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988).

Grupo cites a number of cases for the proposition that due process requires service on an agent, officer, or representative. The cited cases, however, do not provide a standard for what method of service comports with constitutional due process. Rather, they discuss the requirements of federal or state rules. *See Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988); *Tara Minerals Corp. v. Carnegie Mining & Expl., Inc.*, No. 2:11-CV-01816-KJD-GWF, 2012 WL 760653, at *1 (D. Nev. Mar. 7, 2012); *R. Griggs Grp. Ltd. v. Filanto Spa*, 920 F. Supp. 1100, 1102-03 (D. Nev. 1996); *Cont'l Convention & Show Mgmt. v. Am. Broad. Co.*, 41 N.W.2d 263, 265 (Minn. 1950). Although it is certainly relevant whether the person receiving process on a foreign corporation's behalf is an agent, officer, or representative of that corporation, that information is only useful insofar as

it helps demonstrate that notice was "reasonably calculated . . . to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314. Therefore, the fact that Martinez may not have been an agent, officer, or representative of Grupo does not end the analysis because service may still have been performed in a manner reasonably calculated to apprise Grupo of the action.

Furthermore, constitutional due process is not necessarily satisfied merely because the foreign nation's central authority has issued a certificate of compliance. We recognize the Hague Convention, like our nation's concept of due process, works to ensure judicial documents are brought to the attention of the defendant within a reasonable time. Hague Convention pmbl., Nov. 15, 1965, 20 U.S.T. 361, 362. However, we are not convinced that a constitutional inquiry is inappropriate or unnecessary where the Hague Convention applies. Indeed, a due process inquiry is necessary to ensure the veracity of the certificate when the underlying facts are contested.

We also acknowledge that many jurisdictions have either explicitly or implicitly held that whether service complies with the Constitution is a separate, albeit related, question from whether service complies with the Hague Convention. *See Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005) ("[I]n addition to the Hague Convention, service of process must also satisfy constitutional due process."); *Lidas, Inc.*, 238 F.3d at 1084 (suggesting that, although the Hague Convention did not require actual receipt of notice of an IRS summons, a constitutional due process inquiry was still necessary); *Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986) ("Service of process must satisfy both the statute under which service is effectuated and constitutional due process. The statutory prong is governed principally by the Hague Convention . . . ."); *Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158, 162 (S.D.N.Y. 2000) ("In addition to the Hague Convention, service of process must also satisfy constitutional due process."); *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 474 (D.N.J. 1998) ("Service of process must satisfy both the statute under which service is effectuated [in this case, the Hague Convention] and constitutional due process." (internal quotation marks omitted)); *R. Griggs Grp. Ltd.*, 920 F. Supp. at 1103 ("Service of process must comply with both constitutional and statutory requirements," where the statutory requirement referred to the Hague Convention).

As such, where the Hague Convention applies, we hold that service of process must comply with both the Constitution and the Hague Convention. Having so held, we further hold that the district court erred in concluding that "such service efforts [which supposedly complied with Mexican law] satisfied constitutional standards of Due Process" without conducting the necessary fact-finding. Although Uno may have followed the procedures outlined in the

Hague Convention, the Mexican Central Authority's service efforts may have amounted to no more than handing off judicial documents to the equivalent of "a greeter at Wal-Mart"—service efforts that, if true, would be unlikely to satisfy constitutional due process absent extenuating circumstances.[1] Therefore, we conclude an evidentiary hearing on the matter is appropriate to determine whether service here was "reasonably calculated, under all the circumstances, to apprise [Grupo] of the pendency of the action."[2] *Mullane*, 339 U.S. at 314.

CONCLUSION

Given the early stage of the proceedings and the nature of the issue raised, we conclude our intervention is warranted. We hold that the issuance of a certificate of compliance from a foreign nation's central authority does not necessarily guarantee compliance with constitutional due process. We further hold that the district court failed to conduct the necessary fact-finding in determining whether service of process complied with constitutional due process. Accordingly, we grant the petition in part and direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate its order denying Grupo's motion to quash service of process so that an evidentiary hearing may be held on the matter.

SAITTA and PICKERING, JJ., concur.

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[1]We note that the Hague Convention provides multiple means through which a party may effectuate service of documents abroad; therefore, one need not necessarily employ a foreign nation's central authority to comply with the Hague Convention.

[2]Although the district court has the discretion to allow the plaintiff to make a prima facie showing of personal jurisdiction prior to trial, in doing so, the plaintiff would continue to carry the burden to prove jurisdiction by a preponderance of the evidence at trial. *See Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692-93, 857 P.2d 740, 743-44 (1993). However, we note that the better practice with issues concerning service of process is to resolve the matter pretrial through an evidentiary hearing, especially where the issue is not particularly complicated.