mental and emotional needs of a child, *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007), the district court cannot focus on potential future circumstances at the expense of the situation currently before it when making a custody decision.

Additionally, under the order the parties remain free to agree to E.D.'s international visitation and travel, which seems likely to occur as the district court concluded that the parties had a low level of conflict and Ewalefo testified that as E.D. gets older, it may become more appropriate for him to spend extended periods of time with Davis. Moreover, the order does not prevent either party from seeking a modification as the child ages and the circumstances change. *See Ellis*, 123 Nev. at 150, 161 P.3d at 242 (explaining that a modification of a primary physical custody arrangement is appropriate when there is a substantial change in the circumstances and the modification serves the child's best interest).

Because the panel's decision was correct and reversing and remanding this matter will only serve to unnecessarily delay the custody dispute, I would deny Davis's petition for en banc reconsideration. *See* NRAP 40A(a) (describing the grounds for en banc reconsideration). Thus, I respectfully dissent.

SANDRA BISCAY, Appellant, *v.* MGM RESORTS INTERNATIONAL, a Delaware Corporation; JEAN DEVELOPMENT, LLC, a Nevada Limited Liability Corporation dba GOLD STRIKE HOTEL & GAMBLING HALL, Respondents.

No. 63492

July 2, 2015 352 P.3d 1148

Appeal from a district court order of dismissal in a tort action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Hotel patron brought negligence action against hotel owner, which filed demand for security of costs based on patron's status as nonresident plaintiff. Patron filed security more than six months after owner's demand, and owner subsequently filed motion to dismiss. The district court granted owner's motion to dismiss based on length of patron's delay in filing security. Patron appealed. The supreme court, Gibbons, J., held that statute governing filing of security of costs by nonresident plaintiffs did not provide mandatory time frame for filing but permitted filing of security any time before action was dismissed, overruling *Borders Electronic Co., Inc. v. Quirk*, 97 Nev. 205, 626 P.2d 266 (1981).

Reversed and remanded.

Kang & Associates, PLLC, and *Patrick W. Kang* and *Erica D. Loyd*, Las Vegas, for Appellant.

Troy E. Peyton, Las Vegas, for Respondents.

1. Appeal and Error.
   The supreme court reviews for abuse of discretion a dismissal under statute governing filing of security of costs by nonresident plaintiffs. NRS 18.130(4).
2. Appeal and Error.
   The supreme court reviews issues of statutory interpretation de novo.
3. Statutes.
   When the language of a statute is plain and unambiguous, such that it is capable of only one meaning, the supreme court should not construe the statute otherwise.
4. Costs.
   Statute governing filing of security of costs by nonresident plaintiffs does not provide a mandatory time frame in which the security must be paid but, instead, gives a defendant the right to seek dismissal of the case after lapse of 30 days from date of notice requesting that plaintiff file a security; until the case is dismissed, plaintiff is free to file the security, overruling *Borders Electronic Co., Inc. v. Quirk*, 97 Nev. 205, 626 P.2d 266 (1981). NRS 18.130(1), (4).
5. Costs.
   The district court abused its discretion in dismissing negligence action filed by nonresident hotel patron based on patron's delay in filing security of costs for more than six months after receiving a demand for security from hotel owner, when patron's security was filed before her action was dismissed. NRS 18.130(1), (4).

Before Hardesty, C.J., Saitta and Gibbons, JJ.

OPINION

By the Court, Gibbons, J.:

In this opinion, we consider whether dismissal is appropriate under NRS 18.130(4) when a nonresident plaintiff files security with the court clerk for the defendant's costs more than 30 days after receiving notice that security is required, but before the district court has dismissed the case. We conclude that dismissal under NRS 18.130(4) is inappropriate if the plaintiff files the required security with the court clerk at any time prior to dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Sandra Biscay slipped and fell at a hotel owned by respondent MGM Resorts International (MGM). Biscay filed a complaint against MGM for various torts relating to her fall. On September 26, 2012, MGM filed a demand for security of costs pursuant to NRS 18.130. Over six months later, Biscay filed a notice stating that

she had filed the required security with the court clerk. Nine days after Biscay filed her bond, MGM moved the court to dismiss the case pursuant to NRS 18.130(4), which the district court ultimately did.

The district court concluded that NRS 18.130(4) requires that plaintiffs file security with the court clerk within 30 days of receiving notice that security is required. Thus, the district court concluded that even though Biscay filed the required bond *before* MGM moved the court to dismiss the case, dismissal was appropriate because Biscay filed her bond well outside of 30 days from receiving notice that security was required.

In this appeal, Biscay argues that pursuant to NRS 18.130(4), dismissal is inappropriate as long as the plaintiff files the required security with the court clerk before the case is dismissed.

DISCUSSION

Standard of review

[Headnotes 1-3]

This court reviews a dismissal under NRS 18.130 for an abuse of discretion. *Brion v. Union Plaza Corp.*, 104 Nev. 553, 555, 763 P.2d 64, 64 (1988). This case also raises issues of statutory interpretation, which we review de novo. *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 226, 209 P.3d 766, 768 (2009). "This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *Id.* at 228, 209 P.3d at 769. "Thus, when the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not construe that statute otherwise." *Id.* at 228-29, 209 P.3d at 769.

The district court abused its discretion in dismissing the case

NRS 18.130 allows defendants to protect themselves from the dangers of litigating against nonresident plaintiffs. NRS 18.130(1) states, in relevant part:

> When a plaintiff in an action resides out of the State, . . . security for the costs and charges which may be awarded against such plaintiff may be required by the defendant, by the filing and service on plaintiff of a written demand therefor within the time limited for answering the complaint.

In cases where security is required by the defendant, "all proceedings in the action [are] stayed until" the plaintiff files the security. NRS 18.130(1). NRS 18.130(4) states that "[a]fter the lapse of 30 days from the service of notice that security is required, . . . upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed."

[Headnote 4]

Based on a plain reading, we conclude that neither NRS 18.130(1) nor 18.130(4) gives a mandatory time frame in which the security must be filed. Instead, upon providing proof that 30 days has passed and no security has been filed, the defendant *may* move to dismiss the case or the district court *may* dismiss the case on its own. Thus, the 30-day requirement is a prerequisite for dismissal, not filing the security.[1] In other words, once 30 days has passed, the defendant has the right to ask the district court to dismiss the case, or the district court has the authority to dismiss the case on its own. Until the case is dismissed, however, the plaintiff is still free to file the security. *See Carter v. Superior Court of Kern Cnty.*, 169 P. 667, 669 (1917) (interpreting an identical California statute and stating that "[i]t seems clear . . . that the required undertaking may be filed at any time prior to dismissal").

[Headnote 5]

Deciding whether or not to dismiss a case pursuant to NRS 18.130(4) is within the sound discretion of the district court. *Borders Elec. Co., Inc. v. Quirk*, 97 Nev. 205, 206, 626 P.2d 266, 267 (1981). However, we conclude that it is an abuse of discretion for the district court to dismiss the case if the plaintiff has filed the required security with the court clerk at any time before the court dismisses the case. Accordingly, because Biscay filed her bond before the case was dismissed, the district court abused its discretion in granting MGM's motion to dismiss. We therefore reverse the district court's order of dismissal and remand the case to the district court for further proceedings.

HARDESTY, C.J., and SAITTA, J., concur.

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[1]To the extent that *Borders Electronic Co., Inc. v. Quirk*, 97 Nev. 205, 626 P.2d 266 (1981), holds that NRS 18.130(4) creates a time limit for plaintiffs to file the security with the court clerk, such a holding is overruled by the present case.

D & D TIRE, INC., A NEVADA CORPORATION DBA PURCELL TIRE & RUBBER COMPANY, A FOREIGN CORPORATION; PURCELL TIRE COMPANY, INC., A FOREIGN CORPORATION; AND RYAN WINTLE, APPELLANTS, *v.* JACK R. OUELLETTE, RESPONDENT.

No. 63810

July 2, 2015 352 P.3d 32

Appeal from a district court judgment following a jury verdict and a post-judgment order denying judgment as a matter of law and a new trial in a personal injury action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Injured worker brought personal injury action against employer's independent contractor, after its employee pinned worker against a dumpster with truck he was driving after making repairs to it. Following jury verdict in favor of worker, the district court denied independent contractor's motion for judgment as a matter of law, or alternatively a new trial. Independent contractor appealed. The supreme court, SAITTA, J., held that: (1) independent contractor did not have immunity from civil liability as a statutory employer or coemployee under Nevada Industrial Insurance Act (NIIA), and (2) the district court did not abuse its discretion by refusing to give proffered "mere happening" jury instruction.

Affirmed.

Holland & Hart LLP and *J. Stephen Peek* and *J. Robert Smith*, Reno; *Thorndal, Armstrong, Delk, Balkenbush & Eisinger* and *Charles L. Burcham* and *Kevin A. Pick*, Reno, for Appellants.

Bradley, Drendel & Jeanney and *William C. Jeanney*, Reno, for Respondent.

1. TRIAL.
   In deciding a motion for judgment as a matter of law, the district court must view all evidence and inferences in favor of the nonmoving party; thus, a nonmoving party can defeat a motion for judgment as a matter of law if it presents sufficient evidence such that the jury could grant relief to that party. NRCP 50(a)(1).
2. APPEAL AND ERROR.
   The supreme court reviews a district court's order granting or denying judgment as a matter of law and its interpretation of a statute de novo.
3. WORKERS' COMPENSATION.
   The "normal work" test for determining whether a subcontractor or independent contractor is considered to be in the same trade, business, profession, or occupation as the employer of an injured worker, so as to be considered a statutory employee entitled to immunity under Nevada Industrial Insurance Act (NIIA), is not whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, but rather whether that indispensable activity is, in that

business, normally carried on through employees rather than independent contractors. NRS 616A.210, 616B.603(1)(b).

4. Workers' Compensation.
   With regard to subcontracted maintenance activities, the general rule is that major repairs, or specialized repairs of the sort that the employer of an injured worker is not equipped to handle with the employer's own force, are held to be outside the employer's regular business, such that the subcontractor would not be considered a statutory employee entitled to immunity under Nevada Industrial Insurance Act (NIIA). NRS 616A.210, 616B.603(1)(b).
5. Workers' Compensation.
   Presence of independent contractor's employee at mine for purpose of a specialized repair to boom truck's power take off unit was sufficient to establish that he was not acting as statutory employee of employer of injured worker at the time of the injury, and thus, independent contractor was not immune from liability for worker's injury under Nevada Industrial Insurance Act (NIIA); even though injury occurred while truck was being driven and filled with hydraulic oil, work that employer's workers would typically do, in context of independent contractor's employee's other actions, he was acting in furtherance of the overall specialized repair at time of the worker's injury. NRS 616A.210, 616B.603, 616B.612.
6. Workers' Compensation.
   To determine whether a subcontractor or independent contractor was engaged in a specialized repair under the "normal work" test, and therefore whether that subcontractor or independent contractor was not a statutory employee entitled to immunity under Nevada Industrial Insurance Act (NIIA) and was instead liable for any injuries caused to workers during the course of that specialized repair, the court must consider the subcontractor or independent contractor's activity leading to the worker's injury within the context of the subcontractor or independent contractor's other actions, both before and after the injury, and not in isolation. NRS 616B.603(1)(b), 616B.612.
7. Appeal and Error.
   The supreme court reviews a decision to admit or refuse jury instructions for an abuse of discretion or judicial error.
8. Appeal and Error.
   The supreme court reviews de novo whether a jury instruction accurately states Nevada law.
9. Workers' Compensation.
   The district court did not abuse its discretion, in injured worker's personal injury action against independent contractor, by refusing to give independent contractor's proffered incomplete "mere happening" jury instruction, stating the mere fact that there was an accident or other event where someone was injured was not in and of itself a sufficient basis for negligence, where the jury had been instructed on negligence, proximate cause, and the essentiality of a finding of the independent contractor's negligence, such that a "mere happening" instruction would have been duplicative and/or confusing.
10. Negligence.
    Negligence is never presumed but must be established by substantial evidence.
11. Trial.
    In civil cases, if an instruction is not technically correct, the instruction should be examined in the context of all instructions given to the jury in deciding whether the jury was sufficiently and fairly instructed.

12. TRIAL.
    The number of instructions to be given to the jury is discretionary with the court; if one instruction adequately covers a given theory of liability or defense, it is preferable that the court refuse additional instructions relating to the same theory, though couched in different language.
13. TRIAL.
    Where other jury instructions adequately cover negligence, proximate cause, and the essentiality of a finding of defendants' negligence to permit a verdict for the plaintiff, a "mere happening" instruction is duplicative or confusing.

Before SAITTA, GIBBONS and PICKERING, JJ.

OPINION

By the Court, SAITTA, J.:

In Nevada, employers and coemployees of a person injured in the course of employment are immune from liability for the injury under the exclusive remedy provision of the workers' compensation statutes. Additionally, some subcontractors and independent contractors are accorded the same status as employers or coemployees of the injured employee and are thus immune from liability. However, a subcontractor or independent contractor is not considered to be a statutory employee when it is performing a major or specialized repair that the injured worker's employer is not equipped to handle with its own work force. This opinion addresses when an independent contractor's actions are within the scope of a major or specialized repair so as to prevent it from claiming immunity as a statutory employer or coemployee.

We hold that when evaluating whether an independent contractor's actions are within the scope of a major or specialized repair, a district court must consider the act giving rise to the injury within the entire context of the overall specialized repair and not in isolation. Thus, factors such as whether the presence of the contractor at the job site was for the purpose of the specialized repair or whether the activity was in furtherance of the specialized repair can help guide the court's analysis. We further hold that where, as in this case, the jury is instructed on negligence, proximate cause, and the essentiality of a finding of the defendant's negligence, an incomplete "mere happening" jury instruction may be duplicative and/or confusing, and thus, the district court's failure to give such an instruction was not an abuse of discretion.

FACTUAL AND PROCEDURAL HISTORY

Respondent Jack R. Ouellette was employed by Allied Nevada Gold Corporation (Allied) to perform tire service work, including

the installation, removal, repair, and replacement of tires on various pieces of mining equipment. Appellant Purcell Tire & Rubber Company is a commercial tire retailer.[1] Among other things, it provides tire changing and repair services to mining companies.

As part of his job, Ouellette drove and operated a tire changing boom truck owned by Purcell and leased to Allied. When a problem developed with the boom truck's power take off unit (PTO), Purcell contacted an independent repair company, Dakota Diesel, who sent repairman Scott Durick to make specialized repairs to the PTO. Purcell, as owner of the truck, also sent Ryan Wintle, a tire technician for Purcell with responsibilities similar to those of Ouellette, to assist with the repairs.

After the initial repairs were completed, Wintle and Durick filled the truck with hydraulic oil. Wintle then got into the truck to move it to another area before testing the PTO. While backing up the truck, Wintle struck and pinned Ouellette against a dumpster, causing Ouellette to suffer a shoulder injury.

Ouellette filed a personal injury claim against Purcell. At trial, Purcell moved for a judgment as a matter of law on the grounds that it was a statutory employee of Allied and was thus immune from liability under the Nevada Industrial Insurance Act (NIIA). The district court denied Purcell's motion. Purcell also requested a mere happening jury instruction, which the district court declined to give.

The jury returned a verdict in favor of Ouellette. Purcell then renewed its motion for judgment as a matter of law on the ground that it was a statutory employee of Allied. Alternatively, it moved for a new trial, arguing that the district court's error in refusing to give Purcell's mere happening jury instruction materially affected its substantial rights. The district court denied Purcell's motion. Purcell now appeals.

DISCUSSION

Purcell argues that the district court erred in denying its motion for judgment as a matter of law because Purcell was a statutory employee of Allied at the time of Ouellette's injury and would thus be immune from liability for the injury under the NIIA. Purcell also argues that the district court abused its discretion by refusing to give a mere happening jury instruction.

Ouellette argues that the district court did not err in denying Purcell's motion for judgment as a matter of law because Purcell was performing a specialized repair at the time of Ouellette's injury and thus was not a statutory employee of Allied. Ouellette also argues that the district court did not err in refusing to give Purcell's prof-

[1]Appellants D & D Tire, Inc., and Purcell Tire Company, Inc., are subsidiaries of Purcell Tire & Rubber Company (collectively, Purcell).

fered jury instruction because it misstated Nevada law and was adequately covered by other instructions given to the jury.

The district court did not err by denying Purcell's motion for judgment as a matter of law

[Headnote 1]

NRCP 50(a)(1) provides that a district court may grant judgment as a matter of law "with respect to a claim or defense that cannot under the controlling law be maintained or defeated." In deciding a motion for judgment as a matter of law, "[t]he [district] court must view all evidence and inferences in favor of the nonmoving party." *FGA, Inc. v. Giglio*, 128 Nev. 271, 288, 278 P.3d 490, 500 (2012). Thus, a nonmoving party can defeat a motion for judgment as a matter of law if it "present[s] sufficient evidence such that the jury could grant relief to that party." *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 471, 306 P.3d 360, 368 (2013) (internal quotations omitted).

[Headnote 2]

We review a district court's order granting or denying judgment as a matter of law and its interpretation of a statute de novo. *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) (reviewing judgment as a matter of law de novo); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) (reviewing statutory interpretation de novo).

An independent contractor is not immune from liability when performing specialized repairs

In Nevada, employers and coemployees of a person injured in the course of employment are immune from liability under the NIIA. NRS 616B.612; *Lipps v. S. Nev. Paving*, 116 Nev. 497, 501, 998 P.2d 1183, 1186 (2000) (noting that coemployees are immune from liability for injuries incurred by other employees during the course of employment under NRS 616B.612(3), NRS 616A.020(1), and NRS 616C.215(2)(a)). Additionally, the NIIA is "uniquely different from industrial insurance acts of some states in that sub-contractors and independent contractors are accorded the same status as employees" and are immune from liability. *Meers v. Haughton Elevator*, 101 Nev. 283, 285, 701 P.2d 1006, 1007 (1985) (internal quotations omitted) (interpreting a prior version of NRS 616C.215); *see also* NRS 616A.210(1) ("[S]ubcontractors, independent contractors and the employees of either [are] deemed to be employees of the principal contractor for the purposes of [the NIIA].").

However, not all types of subcontractors and independent contractors are considered to be statutory employees under NRS 616A.210. *Id*. A subcontractor or independent contractor is not a statutory employee if it "is not in the same trade, business, profes-

sion or occupation as the [employer of the injured worker]." *See* NRS 616B.603(1)(b); *Hays Home Delivery, Inc. v. Emp'rs Ins. Co. of Nev.*, 117 Nev. 678, 682, 31 P.3d 367, 369-70 (2001) (noting that NRS 616B.603 codifies the *Meers* test, discussed below, which is used to "determine[ ] whether independent contractors are 'employees' under the NIIA").

[Headnotes 3, 4]

The "normal work" test, first articulated in *Meers*, guides courts as to whether a subcontractor or independent contractor is considered to be in the same trade, business, profession, or occupation as the employer of an injured worker. *See Hays Home Delivery, Inc.*, 117 Nev. at 682-83, 31 P.3d at 369-70 (2001). The *Meers* normal work test is

> not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction or transportation service. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether that indispensable activity is, in that business, *normally* carried on through employees rather than independent contractors.

101 Nev. at 286, 701 P.2d at 1007 (internal quotations omitted); *see also Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1349, 905 P.2d 168, 175 (1995) (holding that the "same trade" language in NRS 616.262, replaced by NRS 616B.603, refers to the *Meers* test). With regard to subcontracted maintenance activities, "[t]he general rule is that major repairs, or specialized repairs of the sort which the employer is not equipped to handle with his own force, are held to be outside his regular business." *Meers*, 101 Nev. at 286, 701 P.2d at 1007-08 (internal quotations omitted).

Purcell's interpretation of the Meers normal work test is incorrect

Purcell concedes that the job of repairing the truck's PTO would be considered a specialized repair under *Meers*. However, it argues that Dakota Diesel performed the specialized repair, while Wintle was merely there to "monitor the repair process." Purcell further argues that even if Wintle was performing a specialized repair on the day of Ouellette's injury, Wintle was not performing a specialized repair at the time Ouellette was actually injured.

In making its argument, Purcell contends that the focus of the normal work test is on the work being performed at the time the injury occurred. Therefore, because Wintle was moving the tire changing boom truck at the time of Ouellette's injury, which was work normally performed by employees of Allied, Purcell argues that Wintle was not performing a specialized repair at the time of Ouellette's

injury. In support of its argument, Purcell relies on *State Industrial Insurance System v. Ortega Concrete Pumping, Inc.*, which held that under the normal work test, "the relevant factual inquiry . . . is whether [the contractor who caused the accident] was in the 'same trade, business, profession or occupation' as [the injured employee] *at the time of the accident*." 113 Nev. 1359, 1363-64, 951 P.2d 1033, 1036 (1997) (emphasis added). Purcell also relies on *Employers Insurance Company of Nevada v. United States*, which held that a principal contractor was immune under the NIIA as the statutory employee of the subcontractor because the work that the subcontractor "was performing *at the time of his injury*" was normally carried out by the principal contractor. 322 F. Supp. 2d 1116, 1118 (D. Nev. 2004) (emphasis added).

We reject Purcell's narrow interpretation of the *Meers* normal work test. Purcell effectively argues that the relevant inquiry under *Meers* is whether, at the *exact moment* of an employee's injury, the activity being performed by the subcontractor or independent contractor was normally performed by the injured worker's employer. Purcell misstates the holdings of *Ortega* and *Employers Insurance Company*. In *Ortega*, this court found the district court's failure to apply the *Meers* test was error, and we reversed and remanded so that it could apply the proper analysis. 113 Nev. at 1364, 951 P.2d at 1036. Because the *Ortega* court did not actually apply the *Meers* normal work test, its holding is inapposite to the current case. *Id*. And in *Employers Insurance Company*, the district court examined whether the defendant was the statutory employer "at the time of the accident" by examining the circumstances surrounding the employment, not the acts at the exact moment of the injury. 322 F. Supp. 2d at 1118. Thus, nothing in the reasoning of either case supports Purcell's contention.

Furthermore, Purcell's narrow interpretation could readily create absurd results. Under Purcell's reasoning, the status of a worker performing specialized repairs would change from moment-to-moment depending on whether that particular task is normally performed by employees of the primary contractor. For instance, repairing an engine valve on a vehicle might be considered a specialized repair, but checking the oil level afterwards would not be if the primary contractor's employees normally check the oil level of the vehicles they are driving. Thus, the status of the work that an independent contractor is performing could repeatedly alternate between a specialized repair and something else during the same overall repair.

Wintle was performing a specialized repair at the time of Ouellette's injury

[Headnotes 5, 6]

In rejecting Purcell's narrow interpretation of *Meers*, we hold that in order to determine whether a subcontractor or independent con-

tractor was engaged in a specialized repair under the *Meers* test, and therefore whether that subcontractor or independent contractor is liable for any injuries caused to workers during the course of that specialized repair, the court must consider the subcontractor or independent contractor's activity leading to a worker's injury within the context of their other actions, both before and after the injury, and not in isolation. In this case, we hold that Wintle's presence at the mine for the purpose of a specialized repair was sufficient to establish that he was not acting as an employee of Allied at the time of the injury.

Wintle was at the mine on the day of Ouellette's injury because the truck's PTO required specialized repair. Purcell sent Wintle to the site specifically to accompany Durick, who was hired to make those specialized repairs.[2] Even if Wintle's only purpose at the mine that day was to "monitor the repair process" of the truck, as Purcell claims, Wintle was nonetheless there for the sole purpose of the specialized repair. To put it another way, Wintle would not have been at the mine that day *but for* the specialized repair. Because Wintle was at the mine on the day of Ouellette's injury for the purpose of a specialized repair, we hold that there was sufficient evidence for the jury to find that Wintle and Purcell were performing a specialized repair under *Meers* at the time of Ouellette's injury, and were therefore not statutory employees of Allied under NRS 616B.603 and NRS 616A.210.

Even under Purcell's narrow interpretation of *Meers*, we hold that, when looked at in context, Wintle would still have been acting in furtherance of the specialized repair at the time of Ouellette's injury and thus be considered to be performing a specialized repair under *Meers*. Wintle arrived at the mine with Durick, the Dakota Diesel repairman Purcell had engaged to perform the specialized repair work. Both Durick and Wintle testified that Wintle actively assisted Durick in the specialized repair. Wintle testified that "[he] was going out to assist and facilitate . . . Durick in repairs to the 508 boom truck." Durick testified that Wintle assisted him in his work on the truck, stating that

> [Wintle and I] had to drain all of the hydraulic oil. We drained the transmission fluid out, removed the hydraulic pump, and the power takeoff unit, mounted the new one on, had to do some setup procedure on it, got that all mounted, filled the tranny back full of oil, and remounted the hydraulic pump.

After Durick and Wintle performed the initial repairs, they "got to a point where [they] needed hydraulic oil" and drove the truck from the tire pad to the shop where the hydraulic oil was kept. After fill-

[2]When asked why he was at the mine on the day of the accident, Wintle testified that he went there "to assist and facilitate Mr. Durick in repairs to the 508 boom truck."

ing the truck with hydraulic oil, Durick testified that he and Wintle were next going to "take pressure checks and . . . were going to operate the crane to make sure it was operating and functioning properly." Ouellette testified that this was to see if the repairs were successful. Wintle then asked Durick if he "wanted to do the pressure checks and the function checks right there," but Durick wanted to first move the truck to the tire pad because the shop area was congested. Wintle then got into the truck to move it to the tire pad, a move that led to Ouellette's injury.

Thus, while employees of Allied may usually drive the truck and fill it with hydraulic oil, in the context of Wintle's other actions, it is clear that in this case he was acting in furtherance of the overall specialized repair at the time of Ouellette's injury. Therefore, even had evidence not been presented that Wintle was at the mine solely for the purpose of the specialized repair, there was sufficient evidence demonstrating that Wintle was still in the process of performing a specialized repair at the time of Ouellette's accident. Accordingly, Purcell was not a statutory employee of Allied under NRS 616B.603 and NRS 616A.210, and we hold that the district court did not err in denying Purcell's motion for judgment as a matter of law regarding NRS 616B.612's application.

The district court did not improperly reject Purcell's jury instruction

[Headnotes 7, 8]

We review a decision to admit or refuse jury instructions for an abuse of discretion or judicial error. *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 463, 134 P.3d 698, 702-03 (2006). We review de novo whether a jury instruction accurately states Nevada law. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008). Although "a party is entitled to jury instructions on every theory of [its] case that is supported by the evidence," *Johnson v. Egtedar*, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996), the offering party must demonstrate that the proffered jury instruction is warranted by Nevada law. NRCP 51(a)(1).

[Headnotes 9, 10]

At trial, the district court rejected the following jury instruction offered by Purcell:

> The mere fact that there was an accident or other event where someone was injured is not in and of itself a sufficient basis for negligence.

The instruction was based on *Gunlock v. New Frontier Hotel Corp.*, which held, in relevant part, that "[t]he mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Negligence is never presumed but must be established by substantial evidence." 78 Nev. 182, 185, 370 P.2d

682, 684 (1962), *abrogated on other grounds by Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 782, 291 P.3d 150, 156 (2012).

The omitted portions of Purcell's jury instruction were adequately covered by other instructions

[Headnote 11]

While Purcell's proffered jury instruction accurately reflects the first part of the *Gunlock* mere happening instruction, it omits the second part, stating that "[n]egligence is never presumed but must be established by substantial evidence." 78 Nev. at 185, 370 P.2d at 684. Therefore, Purcell's proffered jury instruction, by itself, is an inaccurate statement of Nevada law. However, in civil cases, "if an instruction is not technically correct, the instruction should be examined in the context of all instructions given to the jury" in deciding whether "the jury was sufficiently and fairly instructed." *Gordon v. Hurtado*, 96 Nev. 375, 380, 609 P.2d 327, 330 (1980).

Here, the statement that "[n]egligence is never presumed" is merely a restatement of the first part of the *Gunlock* reasoning presented above, 78 Nev. at 185, 370 P.2d at 684 ("The mere fact that there was an accident . . . is not of itself sufficient to predicate liability."), and the concept that negligence "must be established by substantial evidence" was adequately covered by other jury instructions stating the burden of proof for a claim of negligence; *see, e.g.*, Jury Instruction No. 20 (stating the elements that Ouellette must prove to prevail on a negligence theory and that those elements must be proven by a preponderance of the evidence). Thus, when taken as a whole with the other jury instructions given by the court, we find that Purcell's proposed jury instruction would have sufficiently and fairly instructed the jury on *Gunlock*'s holding. *See Gordon*, 96 Nev. at 380, 609 P.2d at 330.

Purcell's proposed jury instruction was adequately covered by other instructions

[Headnote 12]

"[T]he number of instructions to be given is discretionary with the court." *Duran v. Mueller*, 79 Nev. 453, 460, 386 P.2d 733, 737 (1963). "If one instruction adequately covers a given theory of liability or defense, it is preferable that the court refuse additional instructions relating to the same theory, though couched in different language." *Id*.

[Headnote 13]

Where other jury instructions "adequately cover[ ] negligence, proximate cause, and the essentiality of a finding of defendants' negligence to permit a verdict for [the] plaintiff," a mere happening instruction is duplicative or confusing. *Gagosian v. Burdick's Television & Appliances*, 62 Cal. Rptr. 70, 73 (Ct. App. 1967); *see also*

Kennelly v. Burgess, 654 A.2d 1335, 1341 (Md. 1995) ("Even the use of a proper 'mere happening' instruction can lead to confusion in the minds of jurors . . . ."); *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318, 324 (Mass. 1992) (holding that a mere happening instruction was redundant to an instruction which stated that "if the defendant acted with reasonable care under the circumstances, then it is not negligent and not liable to the plaintiff even though the plaintiff might have been injured"), *abrogated on other grounds by Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 910 (Mass. 1998).

Here, the district court's jury instructions covered the issues of negligence, proximate cause, and the essentiality of a finding of Purcell's negligence. *See* Jury Instruction No. 18 (stating that Ouellette had the burden to prove that his injury was caused by Purcell's negligence); Jury Instruction No. 20 (stating the elements that Ouellette must prove to prevail on a negligence theory and that those elements must be proven by a preponderance of the evidence); Jury Instructions Nos. 21-26 (defining negligence, contributory negligence, proximate cause, and duty of care). Therefore, the district court did not abuse its discretion by refusing to give Purcell's incomplete mere happening jury instruction. *See Gagosian*, 62 Cal. Rptr. at 73.

CONCLUSION

Because there was sufficient evidence demonstrating that Wintle was present at the mine for the purpose of a specialized repair and acting in furtherance of the specialized repair when he caused Ouellette's injury, Purcell was not immune from liability for Ouellette's injury under NRS 616B.612. Thus, the district court did not err in denying Purcell's motion for judgment as a matter of law. Furthermore, the district court did not abuse its discretion in refusing to give an incomplete mere happening jury instruction because to do so would have been duplicative and/or confusing.

GIBBONS and PICKERING, JJ., concur.

THE STATE OF NEVADA, APPELLANT, *v.*
EARL WAYNE BEAUDION, RESPONDENT.

No. 65429

July 2, 2015 352 P.3d 39

Appeal from an order dismissing an indictment. Eighth Judicial District Court, Clark County; Joe Hardy, Judge.[1]

Defendant was indicted by a grand jury for battery causing substantial bodily harm. The district court dismissed. State appealed. The supreme court, PICKERING, J., held that: (1) judge assigned to defendant's criminal case had authority to determine whether judge, who granted application for permission to withhold target notice from defendant, deviated from statute; (2) court is not required to conduct an adversarial hearing on application to withhold target notice of grand jury proceeding; and (3) oral hearing is not required on district attorney's application for permission to withhold target notice.

Reversed and remanded.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens* and *Jonathan VanBoskerck*, Chief Deputy District Attorneys, and *Jeffrey S. Rogan*, Deputy District Attorney, Clark County, for Appellant.

Philip Kohn, Public Defender, and *Jeffrey M. Banks* and *Howard Brooks*, Deputy Public Defenders, Clark County, for Respondent.

1. JUDGES.
   The district judge assigned to defendant's criminal case had authority to determine whether judge, who granted district attorney's application for permission to withhold target notice from defendant, deviated in such a way as to require dismissal of the indictment from statute requiring a court withholding target notice from subject of grand jury investigation to hold a closed hearing, where questions were neither tendered to, nor decided by, the district judge charged with supervising the grand jury's preindictment activities. NRS 174.105.
2. JUDGES.
   While one district judge may not directly overrule the decision of another district judge on the same matter in the same case, this rule does not prohibit a second district judge who is assigned to a matter by operation of administrative court rules from deciding a matter related, but not identical, to another regularly assigned judge's earlier rulings.
3. GRAND JURY.
   Court is not required, by statute requiring a court withholding target notice from subject of grand jury investigation to hold a closed hearing before granting an application to withhold notice of a grand jury proceeding, to conduct an adversarial hearing with the target present so the target can

[1]District Judge Hardy took office after the proceedings in the district court concluded.

challenge the factual and legal bases for withholding notice; the right to notice is statute-based, not constitutional in origin, and, thus, defendant has no right to participate in the closed hearing beyond that conferred by statute, which does not confer the right to notice of the closed hearing on the target, as the point of the hearing is to determine whether adequate cause exists to withhold notice of the grand jury proceeding from target. NRS 172.241(4).

4. Criminal Law.
   Statutory interpretation involves a question of law; the supreme court reviews statutes under scrutiny de novo, without deference to the district court's conclusions.
5. Criminal Law.
   A statutory hearing requirement may be satisfied by providing the parties the opportunity to present arguments and evidence through written submissions.
6. Grand Jury.
   Oral hearing is not required on district attorney's application for permission to withhold target notice from target of grand jury proceedings; if the district court has determined that the State's written submissions provide sufficient grounds to support withholding notice, nothing further would be accomplished by requiring the prosecuting attorney to appear before the district court to orally argue what is already provided in the written materials, and target can later challenge basis upon which notice was withheld on the basis of the State's written submissions and the district court's order memorializing the reasons underlying the district court's decision. NRS 172.241.

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

NRS 172.241 affords the target of a grand jury investigation the opportunity to testify before them unless, after holding "a closed hearing on the matter," the district court determines that adequate cause exists to withhold target notice. In this case, the district judge supervising the grand jury entered an order authorizing the State to withhold target notice based on the district attorney's written request and supporting affidavit, without conducting a face-to-face oral hearing. We must decide whether this procedure satisfies NRS 172.241's "closed hearing" requirement. We hold that it does and therefore reverse the order dismissing the indictment that was entered by the district judge to whom the criminal case was assigned after the indictment was returned.

I.

A.

[Headnotes 1, 2]

NRS 172.241(1) provides: "A person whose indictment the district attorney intends to seek . . . may testify before the grand

jury if the person requests to do so and executes a valid waiver in writing of the person's constitutional privilege against self-incrimination." To facilitate exercise of this right, NRS 172.241(2) requires the district attorney to give the target reasonable notice, sometimes called *Marcum* notice,[2] of the grand jury proceeding, "unless the court determines that adequate cause exists to withhold notice." Addressing the circumstances in which target notice may be withheld, NRS 172.241(3) specifies that "[t]he district attorney may apply to the court for a determination that adequate cause exists to withhold notice, if the district attorney . . . [d]etermines" that the target poses a flight risk, cannot be located or, as relevant here, "that the notice may endanger the life or property of other persons."

> If a district attorney applies to the court for a determination that adequate cause exists to withhold notice, *the court shall hold a closed hearing on the matter*. Upon a finding of adequate cause, the court may order that no notice be given.

NRS 172.241(4) (emphasis added).

B.

[Headnotes 3, 4]

The State alleges that respondent Earl Wayne Beaudion committed battery causing substantial bodily harm constituting domestic violence against his then-girlfriend when he tied her to their bed and poured boiling water over her exposed torso, burning her so severely that she required skin grafts. The State further alleges that Beaudion intimidated or threatened the victim with additional harm if she cooperated in his prosecution.

Initially, the State attempted to proceed against Beaudion by information, rather than indictment. Each time the date scheduled for the preliminary hearing arrived, the victim failed to appear and, eventually, she vanished. After three failed attempts at conducting the preliminary hearing, the State dismissed its criminal complaint against Beaudion without prejudice.

Several years later, detectives located the victim. The district attorney's office renewed its efforts to charge Beaudion, this time utilizing the grand jury, which conducts its proceedings largely in secret. *See* NRS 172.245. Before presenting its case against Beaudion to the grand jury, the district attorney's office submitted a written application to the court supervising the grand jury for permission to withhold target notice from Beaudion. As grounds for withholding target notice, the application asserted that Beaudion would threaten or harm the victim and/or her family to prevent the victim from testifying if Beaudion knew the grand jury was considering his in-

[2]*Sheriff v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989), *amended* 790 P.2d 497 (1990).

dictment. The ex parte application was supported by an affidavit from the prosecutor relating that "previously the Defendant intimidated the Victim to the point where she would not appear for court"; that, when the victim had to be hospitalized for her burns, Beaudion had driven her from Nevada to California "to avoid being caught for committing the crimes in this case"; and that "[t]here is a good faith basis to believe that if the Defendant learns of the State's intentions of indicting him . . . he will again intimidate or harm the Victim . . . to prevent her from testifying." After considering the written application and supporting affidavit, but without holding an oral hearing, the court entered a written order finding cause for and authorizing the State to proceed without notice to Beaudion.

The victim testified before the grand jury, which returned a true bill, and the State filed an indictment against Beaudion in district court. Under local court rules, *see* EDCR 1.31, the case was administratively assigned to a different department of the district court than had impaneled the grand jury and so had issued the order dispensing with target notice. Beaudion filed a motion to dismiss in the department of the district court to which his criminal case was assigned. He argued that the order authorizing the district attorney's office to withhold *Marcum* notice was deficient because it had not been preceded by the "closed hearing" required by NRS 172.241(4) and that this deficiency invalidated the indictment.

The district court granted Beaudion's motion to dismiss. It accepted that, on the merits, the application and supporting affidavit established more than adequate cause to withhold *Marcum* notice from Beaudion under NRS 172.241(3)(b) (permitting target notice to be withheld if giving notice "may endanger the life or property of other persons"). And, it rejected Beaudion's argument that the "closed hearing" needed to include him and his lawyer as participants. Nonetheless, the district court deemed it a violation of NRS 172.241(4)'s "closed hearing" requirement for the court to have dispensed with target notice based on the prosecutor's written submissions, without conducting an oral, face-to-face hearing. In the district court's view, the failure to hold the hearing required by NRS 172.241(4) invalidated the order authorizing the State to withhold target notice from Beaudion and rendered the indictment procedurally defective, requiring dismissal. The dismissal was effectively with prejudice since by then the statute of limitations had run. The State appeals, and we reverse.

II.

A.

[Headnotes 1, 2]

The State makes a threshold argument that it did not make in the district court challenging the district court's jurisdiction over Beaudion's motion to dismiss. It contends that the district judge assigned

to Beaudion's criminal case lacked authority to "overrule" the grand jury judge's decision to waive target notice, and that instead of asking the former to "overrule" the latter, Beaudion should have challenged the grand jury judge's decision by way of an extraordinary writ from this court. We disagree. NRS 174.105 allows a defendant to challenge procedural defects in the indictment by pretrial motion, and the State offers no authority that makes an original action in this court the exclusive means for a criminal defendant to contest compliance with NRS 172.241. Nor are we persuaded that the district judge assigned to Beaudion's criminal case improperly reexamined or second-guessed the grand jury judge's substantive determination that adequate cause existed to withhold target notice. On the contrary, the district judge examined the procedure followed, specifically, whether it deviated from NRS 172.241(4) in such a way as to require dismissal of the indictment—questions neither tendered to nor decided by the district judge charged with supervising the grand jury's preindictment activities. While one district judge may not directly overrule the decision of another district judge on the same matter in the same case, *see State v. Babayan*, 106 Nev. 155, 165, 787 P.2d 805, 812-13 (1990), this rule does not prohibit a second district judge who is assigned to a matter by operation of administrative court rules from deciding a matter related but not identical to another regularly assigned judge's earlier rulings. *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906-07, 803 P.2d 659, 662-63 (1990) (while invalidating a third district judge's order reinstating a case a second district judge had dismissed on double jeopardy grounds, this court found no infirmity in the second judge's order of dismissal, even though the order of dismissal implicitly conflicted with the yet-earlier order of the first district judge, who tried the case and had granted a mistrial over defense objection that manifest necessity for a mistrial had not been shown); *see Major v. State*, 130 Nev. 657, 659-60, 333 P.3d 235, 237-38 (2014).

B.

[Headnotes 3, 4]

Although we normally "review a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion," *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008), this appeal concerns the proper interpretation of NRS 172.241(4), specifically, its "closed hearing" requirement. "Statutory [interpretation] involves a question of law, and this court reviews the statute under scrutiny de novo, without deference to the district court's conclusions." *Schuster v. Eighth Judicial Dist. Court*, 123 Nev. 187, 190-91, 160 P.3d 873, 875 (2007) (interpreting NRS 172.145(2)).

The question we must decide is what NRS 172.241(4) means by its "closed hearing" requirement. The statute does not define the term "closed hearing." Beaudion argued in the district court that the

"closed hearing" excludes the public but includes the target—in other words, that before granting an application to withhold notice, the court must conduct an adversarial hearing, with the target present, so the target can challenge the factual and legal bases for withholding *Marcum* notice. The district court rejected this reading of NRS 172.241(4), and so do we. A defendant's rights to *Marcum* notice and to testify before the grand jury are statute-based, not constitutional in origin. *See Gordon v. Ponticello*, 110 Nev. 1015, 1020-21, 879 P.2d 741, 745 (1994) ("[T]he Nevada Legislature has chosen to extend the right to testify to grand jury targets [through NRS 172.241], a grant of grace that it was not constitutionally required to make."); *Gier v. Ninth Judicial Dist. Court*, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990) ("Although *Marcum* announced a new rule, the rule was not of constitutional dimensions. *Marcum* did not address a constitutional right because the creation of grand juries is not constitutionally required."). This being so, the defendant has no right to participate in the "closed hearing" beyond that conferred by statute and here, the statute does not confer the right to notice of the "closed hearing" on the defendant. After all, the point of the hearing is to determine whether "adequate cause" exists to withhold notice of the grand jury proceeding from its target because, under NRS 172.241(3), giving such notice might cause the target to flee or endanger the lives or property of others. We do not read statutes to produce absurd or unreasonable results, *see Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001), and it would indeed be absurd to read NRS 172.241(4) to require that the target be given notice and opportunity to be heard on whether notice should be withheld because he or she presents a flight risk or threat to others if given notice. The district court correctly rejected this argument.

The harder question is whether the reference in NRS 172.241(4) to a "closed hearing" requires an oral presentation to the court by the prosecutor or permits the court to decide whether to approve withholding target notice based on the prosecutor's written submission if the written submission is adequate to the task. That the hearing must be "closed" does not affect the analysis; the adjective "closed" signifies only that the hearing, whatever it may entail, be "conducted in secrecy," *Black's Law Dictionary* 310 (10th ed. 2014), which is consistent with the obligations of secrecy stated in NRS 172.245. The difficulty lies in the term "hearing."

The word "hearing" derives from the word "hear" and thus seems to carry an "auditory component." *Lewis v. Superior Court*, 970 P.2d 872, 883 (Cal. 1999). This suggestion of an oral or auditory component also inheres in general dictionary definitions of "hearing," for example, *Black's Law Dictionary*, which defines "hearing" as "A judicial session, usu. open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses tes-

tifying." *Id.* at 886. But this does not answer the question whether, invariably, a hearing must be oral or can be achieved by written submissions. On this point, "[t]he term 'hearing' in its legal context undoubtedly has a host of meanings," *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 239 (1973); *see also U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994) (observing "the fluidity in the meaning of the term 'hearing'"), *superseded by statute on other grounds as stated in U.S. ex rel. Black v. Health & Hosp. Corp. of Marion Cnty.*, 494 Fed. App'x 285 (4th Cir. 2012) (unpublished decision), making etymology and dictionary definitions less helpful than other indicia of statutory meaning, including the context in which the hearing requirement arises and the object of the review process involved.[3] *See Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 241, 181 P.3d 675, 681 (2008) (noting multiple, competing dictionary definitions of "hearing" and deeming the hearing requirement in former NRS 360.247 ambiguous, requiring resort to legislative history to determine its meaning in context).

[Headnote 5]

The majority of courts to have considered the question "have concluded that the use of the term 'hearing' in a statute does not confer a [mandatory] right to oral argument [or oral presentation] unless additional statutory language or the context indicates otherwise." *Lewis*, 970 P.2d at 884 (collecting cases); *Chan v. Gantner*, 464 F.3d 289, 296 (2d Cir. 2006) ("Absent some otherwise expressed Congressional intent, the mere use of the word 'hearing' in a statute does not mandate an evidentiary hearing be held."). And as one commentator has recognized,

> Determination whether or not an oral hearing is required should depend on the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs.

Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1281 (1975), *cited with approval in Mathews v. Eldridge*, 424 U.S. 319, 343, 348 (1976), and *Lewis*, 970 P.2d at 884. Thus, depending on context, a statutory hearing requirement may be satisfied by providing the parties the opportunity to present arguments and evidence through written submissions. *See, e.g.*, *Florida E. Coast*

[3]Article 6, Section 2(2)(a) of the Nevada Constitution, for example, authorizes the Legislature to provide for the "hearing and decision of cases by panels of no fewer than three justices." Neither in its rules nor its practice has this court allowed oral argument in all panel cases, yet that would be the effect of interpreting "hearing" to invariably require an oral presentation or exchange.

Ry. Co., 410 U.S. at 241-42 (holding that a hearing requirement contained in the Administrative Procedure Act could be satisfied by allowing interested parties to file written submission of argument and evidence and did not require oral testimony or argument); *Anchorage Assocs. v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 176-77 (3d Cir. 1990) ("While [former Federal Rule of Civil Procedure] Rule 56 speaks of a 'hearing,' we do not read it to require that an oral hearing be held before judgment is entered. An opportunity to submit written evidence and argument satisfies the requirements of the rule."); *Hower v. Wal-Mart Stores, Inc.*, Civil Action No. 08-1736, 2009 WL 2047892, at *3 (E.D. Pa. July 10, 2009) (unpublished disposition) (collecting cases). *Cf. Ou-Young v. Roberts*, No. C-13-4442 EMC, 2013 WL 6732118, at *8 (N.D. Cal. Dec. 20, 2013) (unpublished disposition) (a "notice and opportunity to be heard" in the vexatious litigation context requires only "that the litigant be given an opportunity to oppose the order before it is entered," and does not require an in-person hearing).

[Headnote 6]

Given the ex parte nature of the procedure here, if the district court has determined that the State's written submissions provide sufficient grounds to support withholding notice, nothing further would be accomplished by requiring the prosecuting attorney to appear before the district court to orally argue what is already provided in the written materials. And as long as the State's written submissions and the district court's order memorialize the reasons underlying the district court's decision, the target, if later indicted, would be able to challenge the basis upon which the notice was withheld, serving another purpose of the notice withholding procedure. Hearing on S.B. 82 Before the Assembly Comm. on Judiciary, 66th Leg. (Nev., May 30, 1991) (testimony discussing the addition of the "closed hearing" language and other amendments to NRS 172.241, and confirming that if "the district attorney's office abused the process the defense had the remedy of filing a motion to dismiss the indictment").

Thus, the more reasonable interpretation of "closed hearing," as used in NRS 172.241, does not mandate an oral hearing in all instances, as that would require use of court resources and time for essentially no reason in cases such as this, *see Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007) ("[T]his court will resolve any doubt as to [a statute's fair meaning] in favor of what is reasonable."), but instead requires in camera review by the court of the State's submission, with or without the prosecutor present. Indeed, this is consistent with ABA Model Grand Jury Act of 1982, section 102(3), which, like NRS 172.241, affords a target notice and the opportunity to

testify unless "the prosecutor demonstrates to the court *in camera* that there are reasonable grounds to believe that giving such notice would create an undue risk of danger to other persons, flight of the target or other obstruction of justice," requiring judicial review but not an in-person meeting between the prosecutor and the judge. And we see no reason to impose a blanket oral hearing requirement when NRS 172.241's purposes can be met without the prosecuting attorney meeting in-person ex parte with the district court judge. *See Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013) ("When a party accomplishes such actual compliance as to matters of substance, technical deviations from form requirements do not rise to the level of noncompliance."); *see also Citizens for Allegan Cnty., Inc. v. Fed. Power Comm'n*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) ("[T]he right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing."). Thus, NRS 172.241's procedure for withholding notice is met if the State presents sufficient evidence to the district court, through written application and/or at oral argument, should the court require it, to allow the court to conclude by written order that adequate cause to withhold notice of the grand jury proceedings exists. As the State did so here, we reverse the order dismissing the indictment and remand.

SAITTA and GIBBONS, JJ., concur.

NOEL LIRIO GONZALES, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64539

July 2, 2015 354 P.3d 654

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with the use of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The court of appeals, TAO, J., held that: (1) incriminatory statements given by defendant during custodial interrogation were voluntary, and thus, admissible; (2) any error in admitting incriminating statements made by defendant during custodial interrogation was harmless; (3) in a matter of first impression, photographs of a rental car agreement and a receipt bearing defendant's name that police found in car parked in victim's driveway were admissible as nonhearsay; and (4) evidence was sufficient to support defendant's conviction for both robbery and first-degree kidnapping.

Affirmed.

Wright Stanish & Winckler and *Monti Levy*, Las Vegas, for Appellant.

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

1. Criminal Law.
   When a confession is challenged and a hearing is requested under *Jackson v. Denno*, 378 U.S. 368 (1964), the State must prove by a preponderance of the evidence that defendant's incriminatory statements are admissible.
2. Criminal Law.
   When a defendant has been subjected to custodial interrogation, the State must first demonstrate the police administered *Miranda* warnings prior to initiating any questioning; if the warnings were properly given, the State must then prove defendant voluntarily, knowingly, and intelligently understood his constitutional right to remain silent and/or to have an attorney present during any questioning and agreed to waive those rights. U.S. Const. amend. 5.
3. Criminal Law.
   Even where *Miranda* warnings were properly administered and waived, the State must show that defendant's incriminatory statements were voluntary under the totality of the circumstances.
4. Criminal Law.
   A confession is admissible as evidence only if it is made freely, voluntarily, and without compulsion or inducement.
5. Criminal Law.
   Voluntariness of a confession, as required for its admissibility, must be determined by reviewing the totality of the circumstances, including such factors as defendant's age, education, and intelligence; defendant's knowledge of his or her rights; the length of defendant's detention; the nature of the questioning; and the physical conditions under which the interrogation was conducted.
6. Criminal Law.
   A confession is involuntary if it was coerced by physical intimidation or psychological pressure; the ultimate inquiry is whether defendant's will was overborne by the government's actions.
7. Criminal Law.
   As a general proposition, intoxication is a factor the district court must consider in determining whether a confession was truly voluntary; however, intoxication is not, by itself, sufficient to render a confession involuntary when the totality of the circumstances otherwise indicate that the statements were voluntary.
8. Criminal Law.
   Constitutionally, admissibility of a confession must be assessed in view of the totality of the circumstances. Const. art. 1, § 8(5); U.S. Const. amend. 14.

9. Criminal Law.
   Incriminatory statements given by defendant during custodial interrogation, after being given *Miranda* warnings and acknowledging that he understood his rights, were voluntary, and thus, admissible, even though defendant was not provided with a Tagalog interpreter while being questioned and was purportedly intoxicated during the interrogation; detective took the time to explain individual portions of the *Miranda* warnings in plain English several times, and each time defendant stated he understood them, defendant had prior experience with the criminal justice system and had been administered *Miranda* warnings on at least one prior occasion, and the interrogation occurred approximately nine hours after defendant purportedly ingested methamphetamine.
10. Criminal Law.
    The supreme court reviews the district court's factual findings for clear error and its legal conclusions de novo.
11. Criminal Law.
    On appeal, if substantial evidence supports the district court's finding that a confession was voluntary, then the district court did not err in admitting the confession.
12. Criminal Law.
    Even if the admission of a confession is deemed to have been erroneous, reversal is not required if the error was harmless.
13. Criminal Law.
    Any error by the district court in admitting incriminating statements made by defendant during custodial interrogation was harmless; the collective evidence against defendant was overwhelming in that police found defendant near the scene moments after the crime with some of the victim's stolen property in his pocket, and he immediately confessed to the crime before even being identified as a suspect or arrested.
14. Criminal Law.
    In criminal prosecution for conspiracy to commit robbery, burglary while in possession of a firearm, robbery with the use of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon, photographs of a rental car agreement and a receipt bearing defendant's name that police found in car parked in victim's driveway were admissible as nonhearsay; the documents were not introduced to prove that defendant rented a car or borrowed money, but rather were introduced to link defendant to a vehicle found at the crime scene under circumstances in which it was unlikely that documents bearing his name would be left in the car by anyone other than the defendant. NRS 51.035, 200.310(1), 200.380.
15. Criminal Law.
    Alleged hearsay errors are subject to harmless-error analysis. NRS 51.035.
16. Criminal Law.
    The district court is vested with broad discretion in determining the admissibility of evidence, and a decision to admit or exclude particular evidence will not be reversed absent a clear abuse of discretion.
17. Kidnapping.
    Evidence that victim was moved from an open garage into her house and then from room to room while defendant and his accomplices ransacked the entire home was sufficient to support defendant's conviction for both robbery with use of deadly weapon and first-degree kidnapping with use of a deadly weapon; even after realizing victim could provide little as-

sistance in locating guns and money, defendant and other accomplices continued moving victim to different rooms for no ascertainable purpose, and by concealing victim, defendant and his accomplices increased the danger to victim and allowed the crime to continue unabated for much longer than it otherwise might have. NRS 200.310(1), 200.380.

18. Criminal Law.
The test for sufficiency of the evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

19. Criminal Law.
It is the jury's function to assess the weight of the evidence and credibility of witnesses.

20. Kidnapping.
A conviction for first-degree kidnapping requires proof that a victim was seized or detained for one of certain specifically enumerated purposes, including, among other things, for the purpose of committing one of the listed predicate felonies such as sexual assault, extortion, robbery, or homicide. NRS 200.310(1).

21. Kidnapping.
In general, whether the movement of kidnapping victims is incidental to the associated offense and whether the risk of harm is substantially increased thereby are questions of fact to be determined by the trier of fact in all but the clearest cases. NRS 200.310(1).

22. Robbery.
A robbery can take place over extended distance and time, including efforts to escape the scene after property has been taken. NRS 200.380.

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

By the Court, Tao, J.:

Appellant Noel Gonzales was convicted of multiple felonies following a jury trial, and part of the evidence introduced against him was his tape-recorded confession to the crimes during a custodial police interrogation. Because Gonzales claims to be a nonnative English speaker, he asks us in this appeal to adopt the test set forth by the United States Court of Appeals for the Ninth Circuit in *United States v. Garibay*, 143 F.3d 534, 538 (9th Cir. 1998), to find that his confession should not have been admitted at trial because he was not provided with the assistance of an interpreter and therefore his confession was obtained illegally.

We conclude that the test set forth in *Garibay* provides a helpful guide in identifying and weighing some of the circumstances that may be relevant to the admissibility of confessions rendered by nonnative English speakers. However, we decline to adopt the *Garibay* test as an overarching inquiry that must always be applied by district courts whenever an interrogated suspect is a nonnative English speaker. After reviewing the totality of the circumstances

in this case, we conclude that the district court did not err in ruling that appellant's confession was admissible even though English is not his native language and he was not provided with the assistance of an interpreter during his police interrogation. We also conclude that the district court did not err in admitting documents proffered to tie Gonzales to the scene that Gonzales characterizes as hearsay. In addition, we conclude the evidence presented to the jury in this case was sufficient to sustain convictions for the crimes of kidnapping and robbery arising from the same course of conduct.

FACTS

Michelle Damaya was in the garage of her home vacuuming her car while her 22-month-old daughter Abigail napped inside the house. Three people, a woman and two men, entered through the open garage door and accosted Michelle. The shorter of the two men, later identified as Gonzales, was wearing a mask and had the hood of his sweatshirt pulled over his head so that Michelle could not immediately see his face. Gonzales pointed a gun at Michelle and told her, "we want your guns, we want your money." The woman motioned for Michelle to go inside the house, and she complied.

At gunpoint, Michelle led the trio to the master bedroom, where they ransacked the room in search of valuables. The trio asked Michelle where any guns and money were kept, but Michelle answered that she did not know because her husband had recently moved his guns in order to prevent Abigail from accidentally finding them. The woman responded by calling Michelle stupid for not knowing where anything was. Eventually, after searching the entire room, the perpetrators found a safe and forced Michelle to open it. The perpetrators then forced Michelle to hold laundry baskets for them to fill with items from the safe.

Michelle asked if she could go get Abigail, but the perpetrators refused. Following repeated and increasingly insistent requests by Michelle, Gonzales eventually gave permission and Michelle retrieved her daughter. At some point Gonzales and the female perpetrator split up to search other rooms of the house while the taller man stayed in the master bedroom with Michelle and Abigail. The taller man continued searching the master bedroom and eventually discovered a hidden firearm owned by Michelle's husband.

After a few minutes, the woman called Michelle to another room where Michelle watched her go through the drawers of a desk. Michelle asked the taller man why they were there, and he replied that they had been hired to "come get your guns and money." The trio then scattered throughout the house in search of more valuables, leaving Michelle and Abigail alone. Michelle ran to a side door that she had previously left unlocked, but apparently had been locked by the perpetrators during the crime, unlocked it, and fled the house with Abigail to a neighbor's residence where she called 9-1-1. Po-

lice officers arrived moments later and quickly located the woman and the taller man who had accompanied Gonzales. They also found a car parked in Michelle's driveway in which documents bearing Gonzales' name were later discovered.

While police officers worked to establish a perimeter around the house, Gonzales voluntarily approached a police detective parked on the street and spontaneously uttered, in English, "I was involved. It was me. I was involved." He was immediately arrested and searched, and property belonging to Michelle and her husband was found on his person. After the search, Gonzales asked, again in English, to be placed into the police car rather than be left standing in the street, and officers complied. Gonzales remained seated in the police car for approximately one hour with one back door open and the air conditioner turned on while the police continued to investigate the scene.

Gonzales was then transported to police headquarters and interrogated by Detective Patrick Flynn. Prior to the interrogation, Detective Flynn administered warnings, in English, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). In English, Gonzales stated that he understood his rights and agreed to be questioned. Flynn repeated the warnings again, in slightly different and less formal language, later during the questioning. Gonzales, whose native language is Tagalog, never requested the assistance of an interpreter, and none was provided. The entire interrogation was conducted in English and tape-recorded. Gonzales subsequently confessed to the offenses in detail in English.

Gonzales and his two codefendants were each charged with the crimes of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, and first-degree kidnapping with use of a deadly weapon.

Prior to trial, Gonzales filed a motion with the district court seeking to suppress incriminatory statements made during his recorded interrogation, asserting that he was under the influence of methamphetamine during the interrogation, and furthermore that he had not been provided with the assistance of a Tagalog interpreter even though English was not his native language. Following a two-day evidentiary hearing, the district court denied the motion. The recorded interrogation was played to the jury during Gonzales' trial, and he was convicted of all counts. This appeal followed.

ANALYSIS

In this appeal, we focus upon three contentions of error asserted by Gonzales.[1] First, Gonzales contends the district court erred by

[1]Gonzales also contends that the multiple alleged errors constituted cumulative error depriving him of a fair trial. Because we conclude that the district court did not commit any of the individual errors ascribed to it, we also

admitting statements made during his recorded interrogation because those statements were not made freely or voluntarily. Second, he asserts the district court erred in admitting hearsay in the form of a rental car agreement and a Money Tree receipt bearing Gonzales' name found in a car parked in the driveway of the home. Third, Gonzales avers the evidence was insufficient to support convictions for both kidnapping and robbery, because those counts legally "merged" under the facts of this case.

Admission of Gonzales' incriminatory statements

Gonzales first contends that incriminatory statements made by him during his recorded interrogation should not have been admitted at trial because his grasp of the English language was insufficient for him to knowingly and intelligently waive his *Miranda* rights, and because the circumstances demonstrate that the interrogation was coercive as he was not provided with the assistance of an interpreter. Therefore, Gonzales contends his confession should have been deemed inadmissible under the standard set forth in *United States v. Garibay*, 143 F.3d 534, 538 (9th Cir. 1998).

[Headnotes 1-3]

When a confession is challenged and a hearing is requested under *Jackson v. Denno*, 378 U.S. 368, 380 (1964), the State must prove by a preponderance of the evidence that the defendant's incriminatory statements are admissible. *Dewey v. State*, 123 Nev. 483, 492, 169 P.3d 1149, 1154 (2007). When a defendant has been subjected to "custodial interrogation," the State must first demonstrate the police administered *Miranda* warnings prior to initiating any questioning. *See State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). If the warnings were properly given, the State must then prove the defendant voluntarily, knowingly, and intelligently understood his constitutional right to remain silent and/or to have an attorney present during any questioning, and agreed to waive those rights. *See Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 181-82 (2006); *see also Miranda v. Arizona*, 384 U.S. 436 (1966). Even where such warnings were properly administered and waived, the State must also separately show that the defendant's incriminatory statements were voluntary under the totality of the circumstances. *See Falcon v. State*, 110 Nev. 530, 534, 874 P.2d 772, 775 (1994).

[Headnotes 4-6]

" 'A confession is admissible as evidence only if it is made freely, voluntarily, and without compulsion or inducement.' " *Echavarria v. State*, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992) (quoting *Franklin v. State*, 96 Nev. 417, 421, 610 P.2d 732, 734 (1980)); *see also*

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conclude that no cumulative error has occurred. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).

Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) ("In order to be voluntary, a confession must be the product of a rational intellect and a free will." (internal quotation marks omitted)). Voluntariness must be determined by reviewing the totality of the circumstances, including such factors as the defendant's age, education, and intelligence; his knowledge of his rights; the length of his detention; the nature of the questioning; and the physical conditions under which the interrogation was conducted. *Passama*, 103 Nev. at 214, 735 P.2d at 323. A "confession is involuntary if it was coerced by physical intimidation or psychological pressure." *Brust v. State*, 108 Nev. 872, 874, 839 P.2d 1300, 1301 (1992). The ultimate inquiry is whether the defendant's will was overborne by the government's actions. *Chambers v. State*, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

In this case, the parties do not dispute that Gonzales was in custody at all times while being questioned, that the police questioning constituted an "interrogation" triggering the administering of *Miranda* warnings, or that detectives administered the proper warnings prior to commencing the interrogation. Indeed, all of this is confirmed by the recording and transcript of the questioning. The parties also do not appear to dispute that Gonzales verbally acknowledged he understood his rights once they were read by saying "yes," and waived those rights to participate in the police interrogation by answering questions without invoking his right to remain silent or asking for an attorney.

[Headnote 7]

Gonzales contends, however, that his statements were inadmissible because he was not provided with the assistance of a Tagalog interpreter while being questioned, and also because he was intoxicated during the interrogation.[2] Consequently, Gonzales con-

[2]As a general proposition, intoxication is a factor the district court must consider in determining whether a confession was truly voluntary. However, intoxication is not, by itself, sufficient to render a confession involuntary when the totality of the circumstances otherwise indicate that the statements were voluntary. *E.g.*, *Chambers v. State*, 113 Nev. 974, 981-82, 944 P.2d 805, 809-10 (1997) (confession voluntary even when given with blood alcohol content (BAC) of .27 and other drugs were present in defendant's system, and defendant was in pain from an open stab wound in arm); *Kirksey v. State*, 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996) (to render confession involuntary, defendant must have been so intoxicated that "he was unable to understand the meaning of his comments" (internal quotation marks omitted)); *Falcon v. State*, 110 Nev. 530, 533-35, 874 P.2d 772, 774-75 (1994) (confession admitted even though defendant was under influence of illegal narcotics at time of questioning); *Tucker v. State*, 92 Nev. 486, 487-88, 553 P.2d 951, 952 (1976) (confession admissible even though defendant's BAC was .20 at the time he signed the confession); *Wallace v. State*, 84 Nev. 603, 605, 447 P.2d 30, 31 (1968) (confession voluntary even when given in emergency room after being shot).

tends his *Miranda* waiver was inadequate and the entire interrogation was unconstitutionally conducted.

The test of United States v. Garibay

Questions relating to the admissibility of a confession rendered by a nonnative English speaker during a custodial police interrogation are ones that the courts of this state are encountering with increasing frequency. During a single shift, a police officer in Nevada may encounter a variety of different languages and dialects, and court-certified interpreters may not always be readily available to assist the officer whenever an interrogation is necessary. At the same time, there appears to be a dearth of published precedent from the Nevada Supreme Court to guide trial courts and police officers in handling such interrogations.

To fill that void, Gonzales asks this court to require district courts to apply the six-prong test set forth in *United States v. Garibay*, 143 F.3d 534, 538 (9th Cir. 1998), whenever the admissibility of a custodial police interrogation of a nonnative English speaker is challenged. In *Garibay*, the Ninth Circuit canvassed existing case law and identified six factors that federal courts generally consider relevant to the voluntariness of a confession rendered by a nonnative English speaking defendant. Specifically, the court stated:

> In applying the "totality of circumstances" test, we further examine whether other circumstances surrounding Garibay's interrogation indicate that he knowingly and intelligently waived his constitutional rights, despite his English-language difficulties, borderline retarded IQ, and poor verbal comprehension skills. The following considerations guide our inquiry: (1) whether the defendant signed a written waiver; (2) whether the defendant was advised of his rights in his native tongue; (3) whether the defendant appeared to understand his rights; (4) whether a defendant had the assistance of a translator; (5) whether the defendant's rights were individually and repeatedly explained to him; and (6) whether the defendant had prior experience with the criminal justice system.

Id. at 538. Factually, the Ninth Circuit held that Garibay's confession was involuntary because he possessed a low IQ, had some history of mental illness, and spoke English very poorly, yet was not provided with the assistance of an interpreter during a custodial interrogation. *Id*. at 538-39. Because the interrogation of Garibay failed to meet even a single one of the six factors identified by the Ninth Circuit, the confession was deemed inadmissible. *Id.*

Gonzales asks this court to follow the guidance of *Garibay* in determining the voluntariness of his confession in this case. As a

general proposition, Nevada's Due Process Clause is textually identical to the federal Due Process Clause in relevant respects. *Compare* Nev. Const. art. 1, § 8(5), *with* U.S. Const. amend. XIV, § 1. The Nevada Supreme Court reads the state clause as coextensive with the federal clause. *See, e.g.*, *Wyman v. State*, 125 Nev. 592, 600, 217 P.3d 572, 578 (2009). Furthermore, "Nevada has historically followed the United States Supreme Court on most, if not all, of its interpretations and applications of the law governing searches and seizures." *State v. Lloyd*, 129 Nev. 739, 745, 312 P.3d 467, 471 (2013) (internal quotation marks omitted). Thus, *Garibay* represents persuasive authority that can be considered by this court.

[Headnote 8]

Contrary to Gonzales' characterization, however, *Garibay* did not articulate a comprehensive legal test that, by itself, determines the admissibility of any confession made by a nonnative English speaker. Constitutionally, admissibility must be assessed in view of the "totality of the circumstances." *Passama*, 103 Nev. at 214, 735 P.2d 323. *Garibay* identifies some of the myriad circumstances generally relevant to the admissibility of any confession within the existing constitutional framework that might have special relevance when the defendant is a nonnative speaker, but the factors listed therein are nonexclusive. 143 F.3d at 538 (stating that the factors listed were "considerations [to] guide our inquiry"). Thus, the framework of *Garibay* may provide helpful guidance to district courts grappling with the question of admissibility of such confessions, and the *Garibay* factors may be considered by district courts when reviewing those confessions. However, the mere fact that a particular confession fails to satisfy the six factors identified in *Garibay* does not, by itself, render the confession inadmissible any more than an otherwise involuntary confession becomes admissible merely because it meets those six factors.

Questions relating to the admissibility of confessions by nonnative English speakers are far too complex and fact-specific to pigeonhole into any single legal test, even one with six elements. Indeed, no single legal litmus test can possibly capture all of the relevant variations and iterations that could help determine the voluntariness of an interrogated suspect who speaks English as a second language, because nonnative speakers who are somewhat familiar with English may possess different degrees of fluency that are not always easy to label or categorize. For example, some nonnative English speakers may speak English conversationally yet not understand arcane or complex legal terms; some may speak English well but cannot read it; some may read and write English extremely well yet speak with accents that render their spoken words difficult for others to understand; some may understand the meaning of English words when they hear them without

being able to generate those same words quickly during conversation; some may speak and understand English well when conversing with some people but have difficulty understanding others who speak with a strong regional accent such as a southern drawl or northeastern inflection; and some may understand extremely complex English words and concepts when formally phrased yet not understand street jargon, slang, aphorisms, pop-culture references, or other colloquialisms that, to native speakers, might be far more conceptually simple. It is even possible that some nonnative speakers may, based upon their education, understand the legal system extremely well yet not understand other words or concepts that might be conceptually simpler to others.

All of these subtleties are relevant to the voluntariness of a confession, but nonetheless are not captured well in the *Garibay* test. Consequently, while *Garibay* provides useful guidance for district courts grappling with the admissibility of confessions rendered by nonnative English speakers, we decline the invitation to adopt the *Garibay* test as a comprehensive test of voluntariness in Nevada. The constitutional test for admissibility remains whether the confession was voluntary under the totality of all circumstances relevant to the confession, whether the circumstances are delineated in *Garibay* or not. *See Passama*, 103 Nev. at 214, 735 P.2d at 323.

Consequently, we cannot conclude that the district court erred in this case merely because it failed to set forth its findings within the context of the *Garibay* analysis.

Admissibility of Gonzales' confession

[Headnotes 9-12]

The district court conducted a two-day evidentiary hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 380 (1964), and concluded that Gonzales' statements were admissible. We review the district court's factual findings for "clear error" and its legal conclusions de novo. *Lamb v. State*, 127 Nev. 26, 31, 251 P.3d 700, 703 (2011). "On appeal, if substantial evidence supports the district court's finding that the confession was voluntary, then the district court did not err in admitting the confession." *Brust v. State*, 108 Nev. 872, 874, 839 P.2d 1300, 1301 (1992). "Substantial evidence" has been defined as evidence that "a reasonable mind might consider adequate to support a conclusion." *Steese v. State*, 114 Nev. 479, 488, 960 P.2d 321, 328 (1998). Additionally, even if the admission of a confession is deemed to have been erroneous, reversal is not required if the error was harmless. *Mendoza v. State*, 122 Nev. 267, 277 n.28, 130 P.3d 176, 182 n.28 (2006).

In this case, the district court concluded that Gonzales' ability to speak and understand English was sufficiently high that he was fully capable of understanding and waiving his *Miranda* rights and

making free and voluntary admissions. During the two-day evidentiary hearing, certified court interpreter Josefina Dooley testified that Tagalog speakers who can appear to speak English well may have trouble understanding complicated legal principles such as *Miranda* warnings, and there are words contained within the standard *Miranda* warnings (such as "waiver") that cannot be easily translated directly into Tagalog. Ms. Dooley also testified that she had interpreted for Gonzales on approximately ten occasions and had witnessed him respond to questions inappropriately or incorrectly on a number of occasions. However, Ms. Dooley admitted she had also witnessed Gonzales begin to correctly answer questions posed to him in English before they were translated to him by her.

Two psychologists, Dr. John Paglini and Dr. Gary Lenkeit, were asked to conduct competency evaluations of Gonzales, and testified that Gonzales needed translation assistance during their evaluations. Dr. Paglini testified that Gonzales appeared to have good English comprehension skills, was "pretty fluent" in English, and had a higher-than-average IQ. Dr. Paglini described Gonzales as being able to respond in English approximately 30 to 50 percent of the time during the evaluation and that approximately 50 to 70 percent of the time Gonzales could respond in English but would depend upon the interpreter to translate the questions for him before answering. Dr. Lenkeit testified that during his evaluation Gonzales relied upon the interpreter approximately 40 percent of the time, and appeared to particularly need translation assistance when asked questions relating to the legal system or to legal principles. Both Dr. Paglini and Dr. Lenkeit testified they could not have completed Gonzales' assessment without the assistance of a Tagalog interpreter. Dr. Lenkeit also opined that, had Gonzales ingested methamphetamine hours before the interview, the drugs would have further impaired his already limited understanding of the interview in English.

A police detective testified that he interacted with Gonzales at the scene of the crime and, based upon his training and experience, Gonzales did not appear to be intoxicated or under the influence of narcotics. He also testified that while Gonzales spoke with an accent, he conversed freely in English and spontaneously admitted his involvement in the crime in English before being arrested. Two other police detectives testified that although Gonzales spoke with a pronounced accent, he was able to speak and understand most or all of what was said to him in English. They testified that Gonzales claimed during the interview to have ingested methamphetamine at approximately 10 o'clock the morning of the crime. The interrogation occurred at 7:32 that evening, some nine hours later.

Another police officer testified that he had previously arrested Gonzales for an unrelated offense and had administered *Miranda* warnings in English that Gonzales acknowledged understanding. He

also testified that Gonzales spoke with a heavy accent and occasionally gave answers that were difficult to understand or unintelligible, but Gonzales was able to answer most questions posed to him in proper English.

After hearing this testimony, the district court concluded that Gonzales "presented insufficient evidence that he was under the influence of a narcotic that would render his statement involuntary." Our review of the record reveals the only evidence presented by Gonzales of any drug use was his own claim to have ingested methamphetamine more than nine hours prior to the interrogation. No witness testified that Gonzales appeared to be intoxicated during the interrogation, and no medical evidence of drug usage was presented to the district court. Under these circumstances, the district court's conclusion was not clearly erroneous.

The district court also concluded that Gonzales understood and spoke English sufficiently well that his incriminatory statements were free and voluntary and he could understand and thereby waive his *Miranda* rights even without the assistance of an interpreter. In reviewing the record, we note the district court was presented with evidence suggesting that Gonzales' grasp of the English language was limited and he had difficulty understanding legal concepts in English. The transcript of his interrogation includes certain confused descriptions, such as describing criminals as "the felonies people."

On the other hand, the evidence before the district court also suggested that Gonzales understood most of what was said to him during the interrogation. Indeed, Gonzales concedes in his appeal briefing that he "appears [to observers] to be fluent in conversational English." The transcript of the interrogation further indicates Gonzales understood virtually every question asked of him, his answers were on the whole clear, appropriate, and responsive to the questions asked, and he even occasionally corrected erroneous information presented to him. Some of his answers consisted of lengthy narratives in English that included complex words and concepts such as "diversified," "camouflage," "informant," "prescription," and "discharging firearms." Additionally, Gonzales was described as having a higher-than-average IQ and was familiar with the *Miranda* warnings from at least one previous police interrogation. At one point during the interrogation, the following colloquy occurred:

> Gonzales: Man it's in my heart to help, you know, but the problem is the English the problem—that's my problem.
>
> Detective Flynn: Yeah I think your English is pretty good. There's only been a couple—couple times when I had a hard time understanding you but you just explained it a different way. I understand everything you are saying.
>
> Gonzales: But . . .

Detective Flynn: Do you understand everything I'm saying?

Gonzales: Yes sir.

Detective Flynn: Okay. You've never had a problem understanding what I'm saying?

Gonzales: No you're clear.

The district court also indicated it had listened to audio recordings of the interrogation and two phone calls made by Gonzales while incarcerated. Importantly, the court noted that witnesses Josefina Dooley, Dr. Paglini, and Dr. Lenkeit had not been provided with either the videotape of Gonzales' interrogation or audio recordings of Gonzales' phone calls that the court reviewed. After considering all of the evidence, the district court concluded Gonzales "has sufficient skills in English to not only understand the *Miranda* warnings, but to waive his rights and make a statement against interest."

In this case, the district court was presented with conflicting evidence. While reasonable minds could perhaps reach different conclusions based upon that evidence, the district court heard the witnesses and saw the evidence firsthand while this court has only the written record. Based upon the evidence in the record, we cannot fairly say the district court's factual findings constituted clear error, and we conclude the district court did not err as a matter of law by admitting Gonzales' confession.[3]

[Headnote 13]

Finally, we note that even if Gonzales' custodial confession was improperly admitted, the collective evidence against him was overwhelming. Police found Gonzales near the scene moments after the crime with some of the victim's stolen property in his pocket, and he immediately confessed to the crime (in a statement not challenged on appeal) before even being identified as a suspect or arrested. Thus, any error in admitting Gonzales' statement, even if such error occurred, would have been harmless.

Admission of alleged hearsay evidence

[Headnote 14]

Gonzales also contends the district court erred in admitting evidence in the form of photographs of documents found at the scene of the crime that, according to Gonzales, constituted hearsay.

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[3]We also note Gonzales' confession in this case met three of the six factors set forth in *Garibay*. While Gonzales did not sign a written waiver and was not provided with the assistance of an interpreter, the detective took the time to explain the individual portions of the *Miranda* warnings in plain English several times during the interrogation, and each time Gonzales stated that he understood them. Furthermore, Gonzales had prior experience with the criminal justice system and had been administered *Miranda* warnings on at least one prior occasion. *See Garibay*, 132 F.3d at 538.

[Headnotes 15, 16]

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. NRS 51.035. Hearsay is generally inadmissible unless it meets a recognized exception. NRS 51.065(1). Alleged hearsay errors are subject to harmless-error analysis. *Franco v. State*, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993). The trial court is vested with broad discretion in determining the admissibility of evidence, and a decision to admit or exclude particular evidence will not be reversed absent a clear abuse of discretion. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

In this case, the evidence in question consisted of photographs of a rental car agreement and a Money Tree receipt bearing Gonzales' name that police found in a car parked in Michelle's driveway. Michelle testified the car did not belong to her. The photographs were proffered by the State in order to connect the vehicle to Gonzales. The district court admitted the photographs of the documents over a timely objection by Gonzales, reasoning that they tied Gonzales to the car. Gonzales argues that this was error because the presence of his name on the documents constituted a hearsay statement "asserting" that Gonzales rented or drove the car, yet no witnesses were able to testify that the papers fell within the "business records" exception to the hearsay rule.

The question of whether the hearsay statute encompasses documents offered as circumstantial evidence linking a defendant to a particular person, place, or thing has not been specifically addressed by the Nevada Supreme Court. It has, however, been addressed by numerous federal courts, and the decisions of those courts constitute persuasive authority for this court. *Cf. Terry v. Sapphire Gentleman's Club*, 130 Nev. 879, 886, 336 P.3d 951, 957 (2014) ("having no substantive reason to break with the federal courts on this issue, judicial efficiency implores us to use the same test as the federal courts under the [Fair Labor Standards Act]." (internal quotation omitted)); *State v. Lloyd*, 129 Nev. 739, 745, 312 P.3d 467, 471 (2013) ("Nevada has historically followed the United States Supreme Court on most, if not all, of its interpretations and applications of the law governing searches and seizures." (internal quotations omitted)); *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) ("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." (internal quotations omitted)). This is especially so because Nevada's hearsay statute is virtually identical to the federal hearsay rule. *Compare* NRS 51.035, *with* Fed. R. Evid. 801(c).

"Many [federal] courts . . . have held that merchandise receipts, utility bills, and similar documents are not hearsay when they are offered as circumstantial evidence to link a defendant to a particu-

lar place, to other defendants, or to an illegal item." *United States v. Serrano*, 434 F.3d 1003, 1005 (7th Cir. 2006); *United States v. Thornton*, 197 F.3d 241, 251 (7th Cir. 1999) (receipts, utility bills, and business cards were admissible to show the relationship of co-conspirators to each other); *United States v. McIntyre*, 997 F.2d 687, 702-04 (10th Cir. 1993) (testimony regarding rental, money order, and credit card receipts was admissible to link defendants together and to certain locations); *United States v. Patrick*, 959 F.2d 991, 999-1000 (D.C. Cir. 1992) (television sales receipt bearing defendant's name was admissible to link defendant to cocaine and a weapon found in the same bedroom, but it was not admissible to prove the defendant resided at the address listed on the receipt), *abrogated on other grounds by United States v. Webb*, 255 F.3d 890, 894-95 (D.C. Cir. 2001); *see also United States v. Richardson*, 208 F.3d 626, 632 (7th Cir. 2000) (finding the defendant "had a substantial connection to the house: in his bedroom were multiple medicine bottles labeled with his name as well as his clothes; he received his mail at [the house]; and he admitted that he was the caretaker and landlord of the address"); *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995) ("The search revealed, in addition to the firearms, a number of Kitchen's possessions—his El Rukn bracelet, bills and papers bearing his name and various articles of men's clothing.").

> In such cases, the documents are not introduced for the truth of the matters they assert—for example, that the defendant rented a car, bought a television, or used 500 kilowatt hours of electricity. Rather, the documents are introduced for the inferences that may be drawn circumstantially from their existence or from where they are found, regardless of whether the assertions contained therein are true or not . . . *See also* Fed. R. Evid. 801 Advisory Committee Notes to 1972 Proposed Rules (noting that the rule excludes from the definition of hearsay "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted").

Serrano, 434 F.3d at 1005 (internal quotations omitted).

Thus, the weight of federal authority holds the admission of documents bearing a defendant's name in order to establish a circumstantial link to the defendant does not necessarily violate the hearsay rule. We find this authority persuasive. Had the State sought to introduce the documents found in the car to prove that Gonzales actually rented a car or borrowed money from Money Tree, the documents may have constituted hearsay. But in this case, the State introduced the documents to link Gonzales to a vehicle found at the crime scene under circumstances in which it was unlikely that documents bearing his name would be left in the car by anyone other than Gonzales, regardless of whether it was true or not that he rented the car or

ever patronized the Money Tree. What mattered was not the truth asserted within the documents, but rather the circumstances of their discovery. Thus, the photographs of those documents were not hearsay and the district court did not err in admitting them.

Sufficiency of the evidence sustaining the convictions for kidnapping and robbery

[Headnote 17]

Gonzales contends the evidence in this case was insufficient to sustain convictions for both first-degree kidnapping with the use of a deadly weapon and robbery with use of a deadly weapon.

[Headnotes 18, 19]

The test for sufficiency of the evidence in a criminal case is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[I]t is the jury's function . . . to assess the weight of the evidence and . . . credibility of witnesses." *Id*.

In this appeal, Gonzales does not challenge the sufficiency of the evidence supporting his individual convictions for robbery, burglary, or conspiracy. Instead, he challenges only the evidence underlying the first-degree kidnapping conviction, contending that the facts sustaining the kidnapping conviction were intertwined with those proving the robbery conviction and therefore he cannot be convicted of both crimes.

[Headnotes 20, 21]

The crime of robbery is articulated in NRS 200.380, while the crime of first-degree kidnapping is described in NRS 200.310(1). A conviction for first-degree kidnapping requires proof that a victim was seized or detained for one of certain specifically enumerated purposes, including (among other things) for the purpose of committing one of the listed predicate felonies such as sexual assault, extortion, robbery, or homicide. Dual convictions under both statutes are permitted based upon the same conduct. However, in such cases, the Nevada Supreme Court has held:

> to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006). In general, "[w]hether the movement of the victims is incidental to the associated offense and whether the risk of harm is substantially increased thereby are questions of fact to be determined by the trier of fact in all but the clearest cases." *Curtis D. v. State*, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982).

The Nevada Supreme Court has held that moving a victim from one room inside a house to another room in search of valuables during the commission of a robbery is insufficient, by itself, to sustain convictions for both kidnapping and robbery. *See Wright v. State*, 94 Nev. 415, 417-18, 581 P.2d 443-44 (1978) (reversing kidnapping conviction as incidental to robbery when movement from room to room occurred "only for the short period of time necessary to consummate the robbery" for purposes of locating valuables). *Wright* is the principal authority relied upon by Gonzales in challenging his kidnapping conviction.

In this case, Michelle was accosted at gunpoint while in her garage with the door open and the interior visible to her neighbors, and then forced into the residence and moved from room to room. The jury could have found that, by moving Michelle from a public place into a private one, Gonzales substantially increased the risk of harm to Michelle, because had Michelle been detained in the open garage while her residence was ransacked, she might have been seen by passersby who could have called police, she might have had a chance to cry out to her neighbors for help, and she might even have found an easier opportunity to escape while her house was being searched room by room. But these opportunities were diminished once she was removed from public view. Furthermore, moving Michelle from the open garage into the secluded interior of the locked house, and then throughout the house, may have psychologically emboldened the defendant to escalate the violence of the crime, as well as to extend the length of time over which it took place, once Michelle's fate was less likely to be witnessed by her neighbors.

Gonzales nonetheless argues that he cannot be convicted of both kidnapping and robbery because Michelle was only moved into the house to help search for valuables during the robbery. Gonzales' argument touches upon one of the curiosities of the *Mendoza* doctrine, which fundamentally asks the jury to define the level of violence acceptably necessary to commit the crime of robbery. Gonzales contends that Michelle's detention was inherent in, and necessary to, the robbery because she was only detained for as long as it took to ransack the house and was only moved within the house for the purpose of aiding in the search for valuables. In essence, he avers that Michelle's movement cannot constitute a kidnapping because it was closely related, spatially and temporally, to the facts required to prove the elements of the crime of robbery.

[Headnote 22]

Some cases contain language supporting Gonzales' argument. *See Wright*, 94 Nev. at 417-18, 581 P.2d at 443-44 (referring to the "short period of time" during which robbery occurred). However, casting the *Mendoza* test solely or primarily in relation to overlapping space and time raises logical problems. A robbery can take place over extended distance and time, including efforts to escape the scene after property has been taken. *See Fouquette v. State*, 67 Nev. 505, 527-28, 221 P.2d 404, 416-17 (1950). In this case, Michelle was detained for somewhat less than an hour while the criminals ransacked the house. But Gonzales' argument suggests that a victim could be detained for much longer, many hours or perhaps even days, without converting a robbery into a kidnapping so long as the criminals continue to leisurely search for valuables during the entire period. It also suggests that a victim could be physically transported over vast distances without being kidnapped, so long as the purpose of the transportation is to collect the victim's far-flung possessions. Thus, under Gonzales' theory, had Michelle owned a vacation home in Miami, transporting her thousands of miles from Las Vegas to Florida over a period of many days could conceivably be argued to have been necessary to effectuate the taking of all of her possessions; but that argument is clearly not what *Mendoza* envisioned.[4]

In this case, Michelle was moved from the open garage into the house, and then from room to room, while the criminals ransacked the entire home. Gonzales argues that the movement was intended to assist him in locating valuables, but as it turned out, Michelle provided almost no help because she did not know where her husband had stored his weapons. Indeed, her assistance turned out to be so inconsequential that the criminals berated her for her ignorance. Yet, even after realizing she could provide little guidance to them, the perpetrators nonetheless continued moving her to different rooms for no ascertainable purpose. Under these facts, the jury could have found that the robbery could have been successfully completed by simply detaining Michelle in the garage while other accomplices searched through the residence for valuables without her, and Michelle was therefore unnecessarily forced at gunpoint into the house when she did not need to be for the robbery to occur and her concealment increased the danger to her and allowed the crime to continue unabated for much longer than it otherwise might have.

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[4]Conversely, it is also true that multiple crimes can occur within a very small window of time and space; here, Gonzales does not challenge the validity of his convictions for burglary and conspiracy based upon facts occurring in rapid succession and in close physical proximity to the facts underlying the robbery conviction. *See Garcia v. State*, 121 Nev. 327, 344, 113 P.3d 836, 847 (2005) (affirming convictions for kidnapping, robbery, and conspiracy based on events occurring close together in time and within the same room).

Under the circumstances of this case, the jury could reasonably have found that Michelle's movement substantially exceeded that necessary to complete the robbery and/or substantially increased the harm to her. Whether Michelle's movement was incidental to the robbery, and whether the risk of harm to her was substantially increased, are questions of fact to be determined by the jury in "all but the clearest of cases." *Curtis D.*, 98 Nev. at 274, 646 P.2d at 548. We conclude that this is not one of the "clearest" of cases in which the jury's verdict must be deemed unreasonable. We therefore conclude that the evidence presented to the jury was sufficient to convict Gonzales of both robbery and first-degree kidnapping.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not commit reversible error, and therefore affirm the judgment of conviction.

GIBBONS, C.J., and SILVER, J., concur.

TONI SANDERS; AND ROBERT SANDERS, AS HUSBAND AND WIFE, APPELLANTS, *v.* RISA SEARS-PAGE, RESPONDENT.

No. 62792

July 16, 2015 354 P.3d 201

Appeal from a jury verdict finding for defendant in a personal injury action arising from a vehicular accident. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

The court of appeals, SILVER, J., held that: (1) removal of juror for cause was warranted; (2) the district court committed plain error by asking, in front of juror, whether either party wished to challenge juror for cause; (3) portion of plaintiff's purported medical record was not properly authenticated; and (4) undisclosed expert testimony regarding purported medical record of plaintiff was inadmissible.

Reversed and remanded.

Seegmiller & Associates and *Clark Seegmiller* and *Robert L. English*, Las Vegas, for Appellants.

Atkin Winner & Sherrod and *Thomas E. Winner* and *Andrew D. Smith*, Las Vegas, for Respondent.

1. JURY.

Whether a juror must be stricken for cause is a question of fact to be determined by the district court judge. NRS 16.060.

2. Appeal and Error.
The appellate court reviews a district court's denial of a challenge for cause to either a venireperson or a sworn juror for an abuse of discretion. NRS 16.060.

3. Jury.
If a juror's statements suggest actual bias, the district court must properly question the juror to determine if the juror will be impartial despite the bias; actual bias arises where the juror's statements evince a biased state of mind that will prevent the juror from acting impartially.

4. Jury.
A juror's opinions or views for or against a party do not, without more, establish bias; rather, bias exists when the juror's views either prevent or substantially impair the juror's ability to apply the law and the instructions of the court in deciding the verdict.

5. Appeal and Error.
If the district court sufficiently questions the juror and determines the juror can set aside any bias and be impartial, the appellate court will generally defer to the trial court's decision.

6. Appeal and Error.
Deference does not mandate affirmance when failure to strike the juror was erroneous.

7. Jury.
If the juror's statements, taken as a whole, indicate bias, the juror must be struck.

8. Jury.
If a juror's background is replete with circumstances that would call into question his or her ability to be fair, the district court should remove the juror for cause, even if the juror has stated that he or she can be impartial.

9. Jury.
In determining whether to strike a juror for cause, the district court should assess the actual facts of the juror's experience rather than rely solely upon the juror's assertion of impartiality.

10. Jury.
Removal for cause was warranted in personal injury action for the juror who asserted that he could be impartial but who had been a patient at same spine clinic that had evaluated and treated plaintiff motorist; the juror's recent experiences with spine clinic were similar to patient's, the juror expressly admitted that he knew which way he was "personally going to be leaning," the juror's statements claiming impartiality were not wholly unequivocal, and credibility of plaintiff's case rested almost entirely on evidence presented by clinic.

11. Appeal and Error.
Under the state constitution's guarantee of a right to a jury trial, when a failure to remove a biased juror results in an unfair empaneled jury, the error is reversible; this is true even if the error is harmless. Const. art. 1, § 3.

12. Appeal and Error.
The district court's failure to remove a biased juror for cause was reversible error in motorist's personal injury action; the juror's preconceptions could have infected the jury panel or affected the jury's verdict.

13. Appeal and Error.
The district court committed plain error in motorist's personal injury action by asking parties, in front of empaneled juror, whether either party wished to challenge the juror for cause; the district court's actions placed motorist in difficult position of arguing before the juror that he should be removed.

14. Evidence.
When an expert authenticating a document has no personal knowledge as to how, when, and in what manner the document was made, the expert's testimony as to the document's authenticity, standing alone, is insufficient to authenticate the records. NRS 52.025.

15. Evidence.
Defense's medical expert in personal injury action was not a proper witness who could authenticate plaintiff motorist's purported medical record; expert did not author the document, was not the custodian of the record, and testified only that the document looked like a typical medical record. NRS 52.015, 52.025.

16. Evidence.
Plaintiff motorist's purported medical record was not properly authenticated in plaintiff's personal injury action; defense counsel admitted that he did not know identity or representative capacity of person who "dropped off" documents to his paralegal during trial, and there was no verification by custodian that document was made at or near time of event when it was purportedly recorded by physician or his staff during medical treatment of plaintiff. NRS 52.325.

17. Pretrial Procedure.
Defense was not entitled to present undisclosed opinion from medical expert in personal injury action regarding unauthenticated document that was purportedly plaintiff motorist's medical record; expert's undisclosed opinion supported his position that plaintiff motorist had experienced chronic neck pain for years prior to accident, expert's testimony unfairly surprised plaintiff and damaged her case, and defense had ample opportunity to obtain complete medical records prior to trial and failed to do so. NRCP 16.1(a)(2).

18. Pretrial Procedure.
Retained medical experts are subject to the requirements that each party provide a written disclosure of their experts and the contents of their testimonies well in advance of trial. NRCP 16.1(a)(2).

19. Appeal and Error.
The district court's errors in admitting unauthenticated document that was purportedly plaintiff motorist's medical record and in allowing undisclosed expert testimony based on that document were not harmless in plaintiff motorist's personal injury action; document and testimony significantly bolstered defense claim that plaintiff had ongoing history of neck pain prior to accident and simultaneously impeached credibility of plaintiff's testimony that she had not sought treatment for neck pain before accident. NRCP 16.1(a)(2).

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

By the Court, Silver, J.:

When a juror is biased against a party, that juror must be struck from the jury. In this appeal, we consider whether the district court erred in declining to strike an empaneled juror whose background experience implied bias but who asserted he could be impartial. We

also consider the district court's decisions to invite challenges for cause with the juror present and to allow a newly discovered document to be entered into evidence and testified to on the final day of trial. We hold the district court erred in these respects and, accordingly, we reverse and remand for a new trial.

FACTS AND PROCEDURE

This appeal arises from a jury trial on a personal injury claim for damages following a 2009 car accident. Respondent Risa Sears-Page made a right turn from a left-hand lane and hit appellant Toni Sanders' car. Initially, the accident appeared minor as neither party claimed injuries at the scene. A few days later, Sanders purportedly began experiencing neck pain that worsened over time. Sanders and her husband, appellant Robert Sanders, sued Sears-Page for negligence to recover damages, including medical expenses. Sears-Page admitted liability but denied causation and damages.

Sanders' injuries

The central issues at trial involved whether the accident had caused or contributed to Sanders' injury and, if so, whether Sanders' claimed medical expenses were reasonable. Sanders, who had chronic back pain, had previously experienced neck pain in 2004 from a bone spur. But she denied having neck pain in the years immediately preceding the accident, and two of her treating physicians testified the accident with Sears-Page caused Sanders' 2009 neck pain. Both doctors also testified Sanders' medical procedures and surgeries following the accident to alleviate pain were reasonably necessary.

To support her claimed damages, Sanders presented medical records and bills from Nevada Spine Clinic. Those records were generated primarily by treatment from Doctors Jaswinder Grover, Babuk Ghuman, and Jorg Rosler, but many records were generated by other doctors and medical professionals at Nevada Spine Clinic. Of the people who treated Sanders at Nevada Spine Clinic, only Dr. Grover testified at trial. Dr. Grover was one of several doctors at that clinic who treated Sanders for chronic back pain before the 2009 accident and also treated her for neck pain after the accident, and testified all of Sanders' medical bills from Nevada Spine Clinic were reasonable.

Sears-Page denied Sanders' injuries occurred as a result of the automobile accident. Instead, Sears-Page asserted Sanders' symptoms arose from a preexisting degenerative medical condition. In opening statements, Sears-Page emphasized that Dr. Grover "sold [Sanders] spine surgery" and the doctors at Nevada Spine Clinic encouraged unnecessary surgery and medical procedures for their own financial

gain. Sears-Page argued she should not have to pay for Sanders' unnecessary medical expenses, which were purposely inflated by Nevada Spine Clinic.

During trial, Sears-Page's retained medical experts, Dr. Joseph Schifini and Dr. Derek Duke, both testified Sanders' medical records showed a preexisting degenerative condition that developed over the course of several years, and her post-accident medical records were devoid of trauma to her neck. Both experts opined the accident did not cause Sanders' medical condition or contribute to her current neck pain. Dr. Duke further noted Sanders' medical history prior to the accident included treatment for neck pain in 2004 and 2009, which supported his opinion that Sanders' degenerative condition alone caused her current neck pain.

Both experts testified Sanders' surgery and medical procedures performed by Nevada Spine Clinic doctors were unnecessary and unreasonable. Further, they emphasized the clinic doctors' fees were significantly higher than average doctor's fees. Sears-Page argued Nevada Spine Clinic's physicians' practice of referring patients (like Sanders) to medical facilities owned by the physicians not only benefited the physicians financially, but also inflated Sanders' medical bills.

Juror 9

After opening statements and the testimony of Robert Sanders, Juror 9 notified the district court he previously had been a patient of Dr. Ghuman's at Nevada Spine Clinic. Because neither party mentioned Nevada Spine Clinic or Dr. Ghuman by name during voir dire, and the attorneys did not question Juror 9 regarding the names of his treating physicians for the back pain he disclosed during voir dire, Juror 9 was unaware of the connection until after opening statements.

Outside the presence of the other jurors, the district court and the attorneys questioned Juror 9. Juror 9 acknowledged several doctors at Nevada Spine Clinic treated him for a herniated disc. After an initial consultation with Dr. Ghuman, he was ultimately treated by other doctors at Nevada Spine Clinic who did not treat Sanders. When one of those doctors advised Juror 9 that back surgery was "inevitable" and encouraged him to schedule surgery, Juror 9 sought a second opinion from a doctor at a different facility regarding back surgery. Juror 9 followed the advice of the second doctor and opted for nonsurgical treatments.

Juror 9 stated he could be impartial "without a doubt," would "base [his] decision on facts," and would not "be inclined to give more credibility" to the conclusions of the doctors at Nevada Spine Clinic. When specifically questioned whether his experience might

bias him *against* the doctors at Nevada Spine Clinic, however, Juror 9 told the court, "I don't—I don't think so" and "I think I can keep an open mind." When Juror 9 was questioned regarding his ability to be impartial when viewing Nevada Spine Clinic's billing records, Juror 9 stated he had no problem with the billing from the clinic because he "didn't pay the bills anyway," referring to his insurance. Juror 9 advised the court he viewed "surgery as a last resort" and had "never been real enamored with having surgery." Additionally, Juror 9 stated he conducted "some research on fusion versus disc replacement" when deciding whether to have back surgery, and stated, "I kind of know which way I'm personally going to be leaning . . . [a]s far as my case." Neither the judge nor the attorneys asked Juror 9 about the nature or extent of his independent research.

With Juror 9 still present, the district court asked the parties if either wished to challenge Juror 9 for cause. Sears-Page stated she did not, but Sanders challenged Juror 9 for cause. The district court then asked Juror 9 to leave the courtroom, and Sanders argued for striking Juror 9. Although Sears-Page told the court the juror appeared to be impartial, Sears-Page also acknowledged there was an issue of bias. Additionally, Sears-Page characterized Sanders' arguments for striking Juror 9 as "good" and suggested the district court make Juror 9 an alternate instead of removing him for cause. The court denied Sanders' motion to strike Juror 9 for cause, stating Juror 9's answers demonstrated his ability to be impartial. Juror 9 later became the foreman of the jury.

Exhibit 62

Prior to trial, both parties sought medical records from Dr. Pollard, who was unaffiliated with Nevada Spine Clinic and treated Sanders between 2004 and the accident, but Dr. Pollard only provided incomplete medical records in response. Both sides demanded Dr. Pollard produce additional records prior to the close of discovery, but he failed to comply with those requests. Neither party sought an order to show cause for contempt from the discovery commissioner regarding this issue. Instead, the parties proceeded to trial with the incomplete records.

During the week of trial, however, Sears-Page threatened Dr. Pollard with contempt if the complete records were not produced. Then, on the morning of the last day of trial, an unidentified person dropped off a box of documents at the courthouse to a member of Sears-Page's legal team. One of the documents was allegedly a portion of a medical record from a visit Sanders made to Dr. Pollard in 2005. That document stated Sanders suffered from "spinal degenerative joint disease and upper cervical area with bone spur." Yet, Sanders testified in her case-in-chief that she had not sought treatment for neck pain in 2005.

Sears-Page sought to introduce this document into evidence and proposed to the district court that Dr. Duke, one of Sears-Page's retained medical experts, authenticate the document. Sanders objected to the document's admission, but the district court admitted the document as exhibit 62 because the court felt this result was fair given Sears-Page's aggressive tactics to obtain the records during the trial proceedings.

Dr. Duke viewed exhibit 62 for the first time on the witness stand. He testified the document looked like a typical medical record. He then reviewed the document and opined that it supported his theory that Sanders had a chronic, degenerative disease that predated the 2009 automobile accident and was the sole cause of her neck pain.

The jury unanimously found for Sears-Page. Sanders appeals.

ANALYSIS

The issues we consider on appeal are whether the district court erred in (1) failing to strike Juror 9 for cause, (2) inviting challenges for cause while Juror 9 was present, (3) admitting exhibit 62, and (4) allowing Dr. Duke to give undisclosed opinions based on exhibit 62.[1] We agree that in all four instances the district court erred and its errors are reversible.[2]

Sanders' challenge to Juror 9 for cause

Sanders argues the district court erred in failing to remove Juror 9 for cause because Juror 9's statements suggested bias and he did not unequivocally state he could be impartial. We agree.

The Nevada Constitution, like the U.S. Constitution, guarantees litigants the right to a jury trial. Nev. Const. art. 1, § 3; *see* U.S. Const. amend. VII. "The right to trial by jury, if it is to mean anything, must mean the right to a fair and impartial jury." *McNally v. Walkowski*, 85 Nev. 696, 700, 462 P.2d 1016, 1018 (1969). "The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country." *Whitlock v. Salmon*, 104 Nev. 24, 27, 752 P.2d 210, 212 (1988). Under Nevada's Constitution, civil litigants are entitled to impartial jurors who will fairly

[1]We do not address the remaining issues on appeal, including Sanders' arguments regarding attorney misconduct, the proposed jury instructions, and the eggshell plaintiff instruction. Insofar as the proposed jury instruction on apportionment of damages raises a purely legal question, we note the district court instructed the jury on aggravation of damages and appellants cite no Nevada law requiring the district court to also instruct the jury on apportionment of damages where there is only one alleged tortfeasor.

[2]Without commenting on the merits of Sanders' arguments, we caution the parties to be mindful of the potential grounds for attorney misconduct.

and honestly deliberate the case without interference from personal bias or prejudice.[3] *McNally*, 85 Nev. at 700-01, 462 P.2d at 1018-19.

[Headnotes 1, 2]

Nevada law is well-settled that whether a juror must be stricken for cause is a question of fact to be determined by the trial judge. *Jitnan v. Oliver*, 127 Nev. 424, 431, 254 P.3d 623, 628 (2011); *see also* NRS 16.060 (providing that the district court tries all challenges to jurors for cause). Accordingly, we review a district court's denial of a challenge for cause to either a venireperson or a sworn juror for an abuse of discretion. *See Jitnan*, 127 Nev. at 431-32, 254 P.3d at 628-29; *Blake v. State*, 121 Nev. 779, 795-96, 121 P.3d 567, 578 (2005); *see also Nelson v. Commonwealth*, 589 S.E. 2d 23, 30-31 (Va. Ct. App. 2003) (applying the abuse of discretion standard to decisions regarding challenges for cause to both seated jurors and venirepersons).

[Headnote 3]

If a juror's statements suggest actual bias, the trial court must properly question the juror to determine if the juror will be impartial despite the bias. *See Thompson v. Altheimer & Gray*, 248 F.3d 621, 627 (7th Cir. 2001) ("When a prospective juror manifests a prior belief that is both material and contestable . . . , it is the judge's duty to determine whether the juror is capable of suspending that belief for the duration of the trial." (emphasis omitted)). Actual bias arises where the juror's statements evince a biased state of mind that will prevent the juror from acting impartially. *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997); *see State v. Squaires*, 2 Nev. 226, 230-31 (1866) (defining actual bias).

[Headnote 4]

A juror's opinions or views for or against a party do not, without more, establish bias. *See Kaplan v. State*, 96 Nev. 798, 800, 618 P.2d 354, 355-56 (1980) (quoting *Irvin v. Dowd*, 366 U.S. 717 (1961)); *see also Thompson*, 248 F.3d at 625 (noting that a juror's stated tendency to believe prison guards over inmates, without more, is not a sign of bias). Rather, bias exists when the juror's views either prevent or substantially impair the juror's ability to apply the law and the instructions of the court in deciding the verdict. *See*

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[3]Although the right to an impartial jury has largely been addressed by our supreme court in a criminal context rather than in civil law, we note California's constitutional provision regarding the right to a jury trial is similar to ours, and California law has consistently extended the right of an impartial jury to civil litigants. *See Weathers v. Kaiser Found. Hosps.*, 485 P.2d 1132, 1140 (Cal. 1971); *Grobeson v. City of Los Angeles*, 118 Cal. Rptr. 3d 798, 809-10 (Ct. App. 2010); *Tapia v. Barker*, 206 Cal. Rptr. 803, 805 (Ct. App. 1984); *Clemens v. Regents of Univ. of Cal.*, 97 Cal. Rptr. 589, 591-92 (Ct. App. 1971).

Preciado v. State, 130 Nev. 40, 44, 318 P.3d 176, 178 (2014); *see also Thompson*, 248 F.3d at 625 (holding that a prior belief becomes "bias only if it were irrational or unshakable, so that the prospective juror would be unable to faithfully and impartially apply the law" (internal quotation marks and emphasis omitted)).

[Headnote 5]

If the trial court *sufficiently* questions the juror and determines the juror can set aside any bias and be impartial, we will generally defer to the trial court's decision. *See Preciado*, 130 Nev. at 43, 318 P.3d at 178 (discussing the standard of review in challenges for cause); *Thompson*, 248 F.3d at 626-27 (finding the district court's failure to sufficiently question a juror after the juror revealed potential bias constituted reversible error); *see also United States v. Maloney*, 699 F.3d 1130, 1137-38 (9th Cir. 2012) (discussing several cases where the jurors in question had experiences similar to the facts of this case and the district courts' questioning of those jurors was sufficient to show their impartiality), *overruled on other grounds by United States v. Maloney*, 755 F.3d 1044 (2014).

[Headnotes 6, 7]

Deference does not, however, mandate affirmance where failure to strike the juror was erroneous. *See Jitnan*, 127 Nev. at 433, 254 P.3d at 629 (holding the district court abused its discretion in failing to strike a juror for cause). The Nevada Supreme Court has clarified that the district court should err in favor of seating an impartial jury whenever doubts remain as to the juror's impartiality. *Bryant v. State*, 72 Nev. 330, 333, 305 P.2d 360, 361 (1956). Recently, the court reaffirmed that a "prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause." *Preciado*, 130 Nev. at 42, 318 P.3d at 177; *see Whitlock*, 104 Nev. at 27, 752 P.2d at 212 ("The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country."). Thus, if the juror's statements, taken as a whole, indicate bias, the juror must be struck. *See Jitnan*, 127 Nev. at 432, 254 P.3d at 629.

Our supreme court has never addressed a situation where a juror asserts impartiality despite having an experience so similar to the case being tried that the juror's impartiality is improbable. Other jurisdictions considering this question have determined that a juror's experience may directly impact the juror's ability to fairly judge the case, leading to bias. *See, e.g.*, *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 156 (3d Cir. 1995); *Dyer v. Calderon*, 151 F.3d 970, 975-76 (9th Cir. 1998). In such cases, reliance on the juror's promise of impartiality is insufficient when the record as a whole demonstrates

lingering bias. *See Kirk*, 61 F.3d at 156; *Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000).

In *Kirk*, the United States Court of Appeals for the Third Circuit held that a juror who had inhaled asbestos, knew people who were suffering from asbestos poisoning, and feared succumbing to an asbestos-induced disease, should not have been empaneled in an asbestos damages case. 61 F.3d at 156. The court held the juror's background gave rise to an inference of impermissible bias in favor of the plaintiffs, and the juror would be more likely to return a large award of damages because of his own experiences. *Id.* Accordingly, the juror's statement of impartiality was insufficient to support the district court's denial of the challenge for cause. *Id*.

Likewise, in *Wolfe*, the Sixth Circuit determined a district court erred by accepting a juror's assertion of impartiality where the juror had a close relationship with the victim's family and had spoken to them about the crime. 232 F.3d at 502. The Second Circuit in *Torres* upheld a district court's finding of bias where a prospective juror in a criminal trial engaged in similar conduct as the conduct with which the defendant was criminally charged. 128 F.3d at 44-45. And in *Dyer*, the Ninth Circuit held a trial judge erred in accepting a juror could be impartial in a murder trial where the juror's brother died under circumstances similar to those suffered by the victims. 151 F.3d at 975-76.

[Headnotes 8, 9]

We agree with these jurisdictions and hold that if a juror's "background is replete with circumstances which would call into question his ability to be fair," the district court should remove the juror for cause, even if the juror has stated he or she can be impartial. *Kirk*, 61 F.3d at 156. In determining whether to strike a juror for cause, the trial court should assess the actual facts of the juror's experience rather than rely solely upon the juror's assertion of impartiality.

[Headnote 10]

In opening statements, Sears-Page told the jury "Nevada Spine Clinic sold Sanders surgery" and further suggested Sanders wanted to make Sears-Page pay hundreds of thousands of dollars for this unnecessary surgery. After opening statements, Juror 9 admitted to the district court and parties he, too, was a patient at Nevada Spine Clinic. The district court questioned Juror 9 and elicited Juror 9's promise he would try to be impartial. The trial judge accepted those assurances as reliable.

It is well-established that trial judges are in the best position to view the prospective juror's demeanor and judge the veracity of the juror's assertion of impartiality, *see Jitnan*, 127 Nev. at 431, 254 P.3d at 628, and therefore, in many cases, our inquiry would normal-

ly end here. Under the particular facts of this case, however, we conclude the district court nevertheless abused its discretion in failing to strike Juror 9 for cause. Despite Juror 9's assertion of impartiality, his experience was "replete with circumstances which would call into question his ability to be fair," *Kirk*, 61 F.3d at 156, and the record, read as a whole, suggests bias against the clinic's doctors and, by extension, Sanders' case.

Juror 9's recent experiences with Nevada Spine Clinic bore striking similarity to Sanders', with the critical difference being Juror 9 chose not to follow the clinic's advice. Juror 9 also expressly admitted he already determined "I kind of know which way I'm *personally going to be leaning*" under his own, and very similar, circumstances. Although Juror 9 stated he would not discredit the opinions of the clinic's doctors, his decision to discredit the clinic's advice in his own case creates a strong inference Juror 9 would be unable to set aside bias in judging the facts of Sanders' case. This inference is critical because the crux of this case turned on competing expert opinions. The credibility of Sanders' case rested almost entirely on the evidence provided by the clinic. Neither the court nor the parties asked any probing questions about Juror 9's opinions regarding the doctors or the clinic. The court simply denied Sanders' challenge based on Juror 9's superficial statement that he would try to be impartial.

Moreover, Sears-Page's arguments during opening and closing statements emphasized the theory that the clinic's doctors "sold" Sanders unnecessary and overpriced surgery, along with other medical procedures. Because Juror 9 remained empaneled, Sears-Page benefited from making this argument to a juror who had been to the *same* clinic, seen one of the *same* doctors,[4] and been given the *same* advice to have surgery, but who instead researched alternatives to surgery and chose to disregard the clinic's opinion in favor of alternative, and inferably less expensive, nonsurgical treatments. In other words, this clinic *failed* to sell surgery to Juror 9. Juror 9's experience with this clinic significantly advantaged Sears-Page's ability to undermine the credibility of Sanders' experts and contest causation and damages.

Additionally, Juror 9's statements claiming impartiality were not wholly unequivocal, supporting the implication of bias. *Cf. Jitnan*, 127 Nev. at 432, 254 P.3d at 629 (detached language does not establish impartiality where the record otherwise indicates the juror could not unequivocally assure the court of his or her impartiality);

[4]Although neither Dr. Hoffman nor Dr. Khavkin treated Sanders or were involved in the trial, the defense focused on the records generated by multiple doctors at Nevada Spine Clinic in arguing that Sanders' requested damages were unreasonable and inflated, effectively putting the medical opinions and billing practices of Nevada Spine Clinic as a whole at issue.

see also Preciado, 130 Nev. at 42, 318 P.3d at 177 (holding that "a prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause"). Although Juror 9 did not state he doubted his ability to be impartial or he harbored bias, when directly questioned by the parties about whether his experience with the clinic would interfere with his ability to equally credit the evidence proffered by the clinic doctors, he qualified his statements regarding his ability to be impartial by responding, "I don't *think* so," and "I *think* I can keep an open mind." (Emphases added.) Further, Juror 9's statements that he did not have a problem with the clinic's billing practices because he did not have to pay the clinic's bills becomes particularly troublesome in light of defense counsel's continued arguments throughout trial that Sanders wanted Sears-Page to "pay for [her] surgery."

Despite these facts, the district court refused to strike Juror 9 for cause. This refusal is more disconcerting because the court later struck a juror who had dozed off for one to four minutes during the fifth day of trial. There, the juror was questioned separately and the juror assured the court she had been paying close attention and dozed for only a minute or two. Although neither party moved to strike that juror, the court sua sponte dismissed her. While we do not disparage the district court's determination to ensure the parties presented the case to an alert jury, we question why the court would remove a drowsy juror and not remove a juror whose background experiences unquestionably raised an inference of bias, to which both parties conceded. The court's sua sponte action of removing a drowsy juror while refusing to strike a juror whose background evinces bias is puzzling, particularly since there were sufficient alternates to replace both jurors.

Because a review of the record as a whole casts serious doubt on Juror 9's ability to be fair and impartial, we hold the district court abused its discretion by failing to strike Juror 9 for cause.

[Headnote 11]

This error is reversible because Juror 9's presence on the jury resulted in an unfair empaneled jury. *See Jitnan*, 127 Nev. at 434, 254 P.3d at 630 (noting the party's constitutional right is violated when a seated juror is partial or unfair); *Aftercare of Clark Cnty. v. Justice Court of Las Vegas Twp.*, 120 Nev. 1, 5, 82 P.3d 931, 933 (2004) (explaining Nevada's right to a jury trial in civil cases). Under Nevada law, when a failure to remove a biased juror results in an unfair empaneled jury, the error is reversible. *See Jitnan*, 127 Nev. at 434, 254 P.3d at 630 (holding that "a party's state constitutional rights [are not violated] unless he or she demonstrates actual prejudice; in other words, he or she must show that a member of the jury was unfair or partial"); *McNally*, 85 Nev. at 700, 462 P.2d at 1018. This is true even if the error is harmless, as the biased juror's pres-

ence on the jury violates the parties' right to an impartial jury under the Nevada Constitution. *See Preciado*, 130 Nev. at 44, 318 P.3d at 179 (a court's error in failing to strike a biased juror is harmless if the juror is not ultimately empaneled); *Aftercare of Clark Cnty.*, 120 Nev. at 5, 82 P.3d at 933 (recognizing the right to jury trial in civil cases under the Nevada Constitution); *McNally*, 85 Nev. at 700, 462 P.2d at 1018 ("The right to trial by jury, if it is to mean anything, must mean the right to a fair and impartial jury."); *see also Thompson*, 248 F.3d at 622 (holding the presence of a biased juror on a jury panel in a Title VII case warrants reversal regardless of whether the error was harmless).

[Headnote 12]

Here, unlike *Jitnan* and *Preciado*, in which the Nevada Supreme Court held the district courts' failure to remove biased venirepersons was harmless because they were not ultimately empaneled, 127 Nev. at 434-35, 254 P.3d at 630-31; 130 Nev. at 44, 318 P.3d at 179, the biased juror was empaneled, and Sanders had no ability to exercise a peremptory strike to remove him from the jury. Under these particular facts, this court cannot state with certainty that Juror 9's preconceptions did not infect the jury panel or affect the jury's verdict in addition to biasing the juror's views. *See Preciado*, 130 Nev. at 44, 318 P.3d at 179.

A party's challenge for cause while an empaneled juror is present

[Headnote 13]

In conjunction with the district court's error in failing to strike Juror 9, we also consider the ramifications of the district court's conduct in asking the parties, in front of Juror 9, whether either wished to challenge Juror 9 for cause. On appeal, Sanders argues these actions constitute error. The parties did not object to the court's conduct at trial, and we generally do not review unpreserved issues on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Oade v. State*, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998). However, we may review unobjected-to judicial conduct to prevent plain error. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (recognizing the appellate court's inherent ability to consider relevant issues to prevent plain error).

Our supreme court has recognized that a district court's conduct may influence jurors, prejudicing them against a party. *See Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 417-18, 470 P.2d 135, 140 (1970) (" '[T]he words and utterances of a trial judge, sitting with a jury in attendance, is liable . . . to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.' " (quoting *Peterson v. Pittsburgh Silver Peak Gold Mining Co.*, 37 Nev. 117, 122, 140 P. 519, 521

(1914))); *see also Oade*, 114 Nev. at 624, 960 P.2d at 339 (noting that a judge's repeated statements regarding decorum to the defendant's lawyer may have prejudiced the jury against the admonished party). While jurisdictions differ regarding whether a district court abuses its discretion by refusing to conduct challenges for cause outside the presence of the prospective jurors during voir dire, *see People v. Flockhart*, 304 P.3d 227, 236 n.8 (Colo. 2013) (discussing this jurisdictional split), several have noted this refusal may amount to error if it results in the seating of a prejudiced juror.[5] The American Bar Association recommends trial courts entertain challenges for cause outside the juror's presence, in part so the juror is not prejudiced against the party making the challenge. *See ABA Standards for Criminal Justice: Discovery and Trial by Jury* 15-2.7(a) (3d ed. 1996).

After questioning Juror 9, and with Juror 9 still seated in the courtroom, the trial judge asked whether either party wished to challenge Juror 9 for cause. Sears-Page stated she had no challenge, but Sanders stated she wished to challenge Juror 9 for cause. The trial judge then asked Juror 9 to leave the courtroom.

Although Nevada law does not mandate judges entertain challenges for cause outside of the prospective juror's presence, a critical difference exists between the challenge of a prospective juror during voir dire and a challenge for cause in front of an empaneled juror, particularly where the challenge occurs immediately after the empaneled juror admits facts establishing an inference of bias against the party making the challenge, as occurred here. Had this exchange occurred during voir dire, the trial judge's conduct may not have prejudiced Sanders, as she would have had the ability to use a peremptory strike if she feared Juror 9 would be biased by the failed challenge.

Yet, "'[w]hat may be innocuous conduct in some circumstances may constitute prejudicial conduct in a trial setting,'" *Oade*, 114 Nev. at 621, 960 P.2d at 338 (quoting *Parodi v. Washoe Med. Ctr.*, 111 Nev. 365, 367, 892 P.2d 588, 589 (1995)), and we hold such was the case under these facts. The district court's actions here placed Sanders in the difficult position of arguing before a juror that he

[5]*See Flockhart*, 304 P.3d at 237 (noting that although a trial court retains discretion to determine whether to conduct challenges for cause in front of a juror, such action may be an abuse of discretion depending on the facts surrounding the challenge and the juror); *State v. Hardin*, 498 N.W.2d 677, 681-82 (Iowa 1993) (recognizing that if a juror becomes biased by hearing the challenge, the district court may have abused its discretion in requiring the parties to issue challenges in front of that juror); *Brooks v. Commonwealth*, 484 S.E.2d 127, 129-30 (Va. Ct. App. 1997) (holding that the trial judge committed reversible error under settled Virginia law by requiring a party to challenge a juror in front of the juror); *see also State v. Love*, 309 P.3d 1209, 1213 (Wash. Ct. App. 2013) (noting most parties would prefer to issue challenges outside the juror's presence to avoid possibly prejudicing the juror against the party).

should be removed, and that juror knew Sanders did not want him on the jury. *See Brooks v. Commonwealth*, 484 S.E.2d 127, 130 (Va. Ct. App. 1997) (noting the "untenable position" parties are put in when considering challenging a juror for cause due to the potential to create bias, especially when the challenge is argued in front of the juror). Under these facts, the district court's process of requiring the parties to issue their challenges for cause in front of Juror 9 amounted to plain error. *See Gaxiola v. State*, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) (holding plain error arises where the error prejudicially impacts the verdict or seriously affects the judicial proceedings' integrity or public reputation) (internal citations omitted); *see also Brooks*, 484 S.E.2d at 130 (finding error where the district court's actions likely led to a juror becoming biased against the party challenging the juror). Accordingly, this error is reversible.

Exhibit 62

We next consider whether the district court erred by admitting exhibit 62 into evidence and allowing Dr. Duke to testify to that document. We will not overturn a district court's decision regarding the admission of evidence absent a palpable abuse of discretion, as district courts have broad discretion in determining whether to admit evidence. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005). A district court abuses its discretion by admitting medical expert testimony that fails to comply with Nevada's rules governing the admission of evidence. *See FCH1, LLC v. Rodriguez*, 130 Nev. 425, 434, 335 P.3d 183, 190 (2014).

We conclude the district court abused its discretion in admitting exhibit 62 because it was not properly authenticated. We likewise conclude the district court further abused its discretion in allowing Dr. Duke to testify to an undisclosed opinion regarding exhibit 62. Finally, we conclude these errors were not harmless under these facts.

Authentication

Sanders argues exhibit 62 was improperly admitted because it was not authenticated. Sears-Page counters that exhibit 62 was properly admitted because both parties had attempted to obtain it prior to trial, two hearsay exemptions applied, and this court should defer to the district court's decision. We disagree.

Authentication is a basic prerequisite to the admission of evidence. *See* NRS 52.015. Under NRS 52.015(1), authentication of a document requires evidence or some other showing "that the matter in question is what its proponent claims." Authentication relates to

relevancy because "evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." *Rodriguez v. State*, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012) (internal quotations omitted).

NRS 52.325 sets forth the procedure for authenticating medical records. This statute requires the custodian of the medical records to deliver a "true and exact" copy of the subpoenaed medical records to the clerk of the issuing court on or before the subpoena's deadline. NRS 52.325(1). The record "must be authenticated by an affidavit" in accordance with NRS 52.260(3), and signed by the custodian of the medical records, verifying the documents are accurate reproductions of the original medical records. NRS 52.325(2), (4). Additionally, the custodian must certify those original records were "made at or near the time of the act, event, condition, opinion or diagnosis by or from information transmitted by a person with knowledge in the course of a regularly conducted activity." NRS 52.325(2). Medical records delivered pursuant to a subpoena must "be kept in the custody of the clerk of the court issuing the subpoena, in a sealed container supplied by the custodian of the medical record." NRS 52.335(1).

In addition, NRS 52.025 through NRS 52.105 provide a nonexhaustive list of methods by which a document may be authenticated. NRS 52.015(2). As relevant here, NRS 52.025 permits a witness to authenticate a document through testimony "if the witness has *personal knowledge* that a matter is what it is claimed to be." (Emphasis added.)

[Headnote 14]

Where an expert authenticating a document has "[n]o . . . personal knowledge . . . as to how, when and in what manner" the document was made, the expert's testimony as to the document's authenticity, standing alone, is insufficient to authenticate the records. *Frias v. Valle*, 101 Nev. 219, 221-22, 698 P.2d 875, 877 (1985); *see also* NRS 52.025. In *Frias*, our supreme court considered an issue nearly identical to the one here. There, the district court allowed the admission of medical records after a doctor, who had treated the patient but who had not generated the records in question, testified the records belonged to the patient because they were labeled with the patient's name. *Frias*, 101 Nev. at 221-22, 698 P.2d at 877. The doctor viewed the records for the first time while waiting to take the witness stand, and he therefore had no personal knowledge regarding those records. *Id*. at 221, 698 P.2d at 877. The Nevada Supreme Court reversed, holding the records were not properly authenticated because the specialist had no personal knowledge of the records' authenticity: he neither ordered the records nor used them in treating

the patient, and he did not even view them until immediately prior to giving testimony. *Id*.

[Headnote 15]

Analogous to *Frias*, the document here, exhibit 62, merely contained Sanders' name on it. Dr. Duke did not author the document, was not the custodian of the record, and testified the document looked like a typical medical record. Dr. Duke, therefore, was not a proper witness who could authenticate the document under NRS 52.025 and NRS 52.015. Because no other evidence corroborated exhibit 62, since Sanders testified she had not sought medical care for neck pain in 2005, and the exhibit was not properly authenticated, the district court abused its discretion in admitting exhibit 62.

[Headnote 16]

The district court admitted exhibit 62, over Sanders' objection, despite Sears-Page's failure to comply with *any* of NRS 52.325's requirements. Sears-Page's counsel admitted he did not know the identity or representative capacity of the person who literally "dropped off" documents to his paralegal that morning. *See* NRS 52.325(1) (requiring the custodian of the records to deliver or mail the records). Here, the custodian of records did not deliver them to the clerk of the court as is required by NRS 52.325(1). *See* NRS 52.320(1) (defining "[c]ustodian of medical records"). And these medical records were not accompanied by a properly authenticated affidavit formatted according to NRS 52.260, signed by the custodian, or verified by the custodian to be "a true and complete reproduction of the original medical record." NRS 52.325(2). Nor was there any verification by the custodian that exhibit 62 was "made at or near the time of the . . . event" when it was purportedly recorded by Dr. Pollard or his staff during medical treatment of Sanders. *Id*. The fact that Sears-Page threatened to compel production of the medical records, and thereafter documents were dropped off during the trial, does not establish Dr. Pollard or his staff actually generated the documents or that the records were unaltered when the district court admitted exhibit 62 into evidence. As in *Frias*, the district court committed error by admitting exhibit 62, and the error was not harmless.

Undisclosed expert opinion

[Headnote 17]

Sanders next argues the district court compounded its error by allowing Dr. Duke, the retained defense expert, to thereafter testify to an undisclosed opinion regarding exhibit 62. Sears-Page claims the district court did not err by admitting Dr. Duke's testimony regarding exhibit 62, which is particularly disconcerting because Sears-Page filed a motion in limine prior to trial to prohibit Sanders' experts from testifying to any undisclosed opinion. The district

court granted Sears-Page's motion preventing Sanders' experts from offering any undisclosed opinions. Yet, the district court allowed Sears-Page's expert to testify to an undisclosed opinion on the final day of trial and after Sanders rested her case-in-chief. We agree this is error.

[Headnote 18]

Nevada Rule of Civil Procedure (NRCP) 16.1(a)(2) requires each party to provide a written disclosure of their experts *and* the contents of those experts' testimonies, including the information each expert considered in forming an opinion, well in advance of trial. Retained medical experts are subject to the requirements of this provision. *See FCH1*, 130 Nev. at 433, 335 P.3d at 189 (holding that where a treating physician's testimony exceeds the scope of opinions "formed during the course of treatment" (internal quotations omitted), the physician "testifies as an expert and is subject to the relevant requirements"). This rule serves to place all parties on an even playing field and to prevent trial by ambush or unfair surprise. *See id*. at 434, 335 P.3d at 190. The history behind the amendment of NRCP 16.1 reveals that one concern behind this rule was to prevent physicians from offering undisclosed opinions based upon evidence that had not been duly admitted or disclosed. *See In re Proposed Amendments to NRCP 16.1(a)(2)*, ADKT 472 (Exhibit A to Order Scheduling Public Hearing and Requesting Public Comment, November 9, 2011) (Memorandum from Discovery Commissioners Bonnie A. Bulla, Chris A. Beecroft, Jr., and Wesley M. Ayres); *id*. (Letter from J.R. Crockett, January 25, 2012, and Letter from Martin Kravitz, April 13, 2012).

In *FCH1*, the Nevada Supreme Court held a district court erred by allowing the plaintiff's treating doctors to offer opinions based, in part, on documents not disclosed during discovery. 130 Nev. at 434-35, 335 P.3d at 190. One doctor read thousands of pages of records to form his opinion, yet disclosed only 21 pages during discovery, while other doctors' testimonies exceeded the bounds of their NRCP 16.1(a)(2)(B) disclosures and addressed topics not previously disclosed. *Id*. at 435, 335 P.3d at 189-90. Ultimately, the district court abused its discretion in admitting this testimony. *Id*. at 435, 335 P.3d at 190. Although the facts of *FCH1* are somewhat different than the facts here, the supreme court's rationale is particularly instructive in this case as the court was ultimately concerned with basic fairness, while disfavoring trial by ambush. *See id.*

Sanders testified in her case-in-chief that she had not experienced neck pain nor had she received treatment for neck pain after 2004 and prior to the accident. Dr. Duke, Sears-Page's retained medical expert, testified Sanders had a chronic condition causing her neck pain. Further, he opined Sanders' neck pain predated the accident, citing to a Nevada Spine Clinic intake form, which was created

shortly before the accident, noting Sanders was experiencing neck pain during that time. After exhibit 62 was admitted into evidence, the district court allowed Dr. Duke to make additional opinions based on its contents supporting his previous opinion that Sanders experienced chronic neck pain for years prior to the accident and that the accident did not contribute to her pain.

The district court's decision allowing Dr. Duke to make an undisclosed opinion that exhibit 62 supported his position that Sanders experienced chronic neck pain for years prior to the accident directly violated NRCP 16.1.

Although NRCP 16.1(a)(2)(B) allows the trial court to relieve a party of its duty to comply with the written report requirement for good cause, no facts support the district court's decision that good cause existed in this case. *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 668 n.66, 188 P.3d 1136, 1146 n.66 (2008) (providing that "[g]ood cause generally is established when it is shown that the circumstances causing the failure to act are beyond the individual's control"). Here, Sears-Page had ample opportunity to obtain complete medical records from Dr. Pollard's office prior to trial and failed to do so. Rather, she proceeded to trial and defended with documents and testimony previously obtained and disclosed during discovery. Sears-Page's actions threatening Dr. Pollard with contempt and obtaining records during trial do not constitute good cause, as nothing prevented Sears-Page from taking such actions prior to the discovery deadline.

Moreover, although this is not a traditional trial-by-ambush situation because Sears-Page did not intentionally withhold information, the trial court's admission of exhibit 62 and allowing Dr. Duke to testify regarding its contents nevertheless unfairly surprised Sanders and damaged her case. *Cf. Sheehan & Sheehan*, 121 Nev. at 485, 492-93, 117 P.3d at 222, 226-27 (noting that though a party intentionally withheld information, it was not a trial-by-ambush situation because that information was later disclosed). The district court not only violated the express requirements of Rule 16.1, but also its purpose and policy.[6] *See FCH1*, 130 Nev. at 434-35, 335 P.3d at 190 (noting the purpose of NRCP 16.1's document disclosure requirements). Accordingly, under these facts, the district court erred in allowing Dr. Duke to testify to an undisclosed expert opinion.

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[6]We further note that NRCP 16.1 parallels Federal Rule of Civil Procedure 26, which was enacted to prevent ambush at trial. *See Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutauo y Beneficiencia de Puerto Rico*, 248 F.3d 29, 35 (1st Cir. 2001); *see also Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 602, 608, 309 P.3d 1017, 1020 (2013) (noting that "federal cases interpreting [analogous federal rules] are strong persuasive authority" (internal quotations omitted)).

Harmless error

[Headnote 19]

Sears-Page argues any error regarding exhibit 62 is harmless because Dr. Duke formed his opinion on other evidence previously disclosed to Sanders. We disagree.

Although we do not reverse a decision where error is harmless, "if the moving party shows that the error is prejudicial, reversal may be appropriate." *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). An error is prejudicial where the moving party shows "that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached. The inquiry is fact-dependent and requires us to evaluate the error in light of the entire record." *Id*. (internal citations omitted).

The district court's errors in admitting exhibit 62, although the document was not properly authenticated, and in allowing Dr. Duke to testify as to an undisclosed opinion regarding that document, were not harmless in light of the record as a whole. Importantly, Dr. Duke's pretrial disclosures focused on records noting Sanders' history of pain in her legs and back, yet Dr. Duke utilized exhibit 62 at trial to specifically recognize Sanders had an ongoing recorded history of chronic neck pain. And, exhibit 62 substantiated Dr. Duke's trial opinion of Sanders' ongoing history of neck pain, which significantly bolstered Sears-Page's defense while simultaneously impeaching the credibility of Sanders' testimony that she had not sought treatment for neck pain after 2004 and before the accident.

This created both unfair surprise to Sanders and prejudice to her case. Sanders was unaware of exhibit 62 or Dr. Duke's opinion as to that document until the final hours of the trial. And, as exhibit 62 and Dr. Duke's opinion regarding that document significantly helped Sears-Page's defense and damaged the credibility of Sanders' testimony regarding the onset of her pain, but for this document and Dr. Duke's undisclosed opinion, the jury may have reached a different result. The unfair surprise under these facts is further apparent considering the district court allowed Dr. Duke's undisclosed opinion despite granting Sears-Page's pretrial motion preventing Sanders' experts from presenting undisclosed opinions.

Because the district court allowed Dr. Duke, a retained defense expert, to testify to an undisclosed opinion after Sanders rested her case-in-chief, and because the district court previously granted Sears-Page's motion preventing Sanders' experts from presenting undisclosed opinions, the district court abused its discretion. And, because these errors resulted in prejudice to Sanders' case, the error was palpable and is reversible. *See Wyeth*, 126 Nev. at 465, 244 P.3d at 778 (holding such error is reversible where the result may have been different but for the error).

CONCLUSION

The district court erred in failing to strike Juror 9 for cause as Juror 9's statements in their totality evinced bias against Sanders' case. This error resulted in an unfair empaneled jury, requiring reversal. The district court's process in allowing Juror 9 to be present while Sanders' challenged Juror 9 for cause likewise constitutes plain error under these facts. Further, the district court erred by admitting into evidence exhibit 62 over Sanders' objection as this document was not properly authenticated. Finally, the district court erred when it allowed a retained defense expert to testify to an undisclosed opinion by utilizing exhibit 62. Accordingly, we reverse and remand for a new trial.

GIBBONS, C.J., and TAO, J., concur.