JOSEPH JAMIL STEVENSON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 62965

August 13, 2015 354 P.3d 1277

Appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of attempted sexual assault. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

The supreme court, PICKERING, J., held that: (1) determination of whether defendant presented a fair and just reason sufficient to permit withdrawal of his guilty plea was not limited to consideration of whether plea was knowingly, voluntarily, and intelligently entered, but instead required consideration of totality of circumstances, abrogating *Crawford v. State*, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001); (2) defendant's contention that members of his defense team lied about time it would take to recover surveillance video of parking lot where one of victims was sexually assaulted, in order to induce him to plead guilty, was not fair and just reason sufficient to permit withdrawal of plea; (3) defendant's contention that he was coerced into pleading guilty based on compounded pressures did not establish fair and just reason sufficient to permit plea withdrawal; and (4) defendant's contention that he made impulsive decision to plead guilty without knowing definitively whether surveillance video could be viewed did not establish fair and just reason sufficient to permit plea withdrawal.

Affirmed.

Casey A. Landis, Las Vegas, for Appellant.

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

1. CRIMINAL LAW.
   Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which the supreme court reviews de novo.
2. CRIMINAL LAW.
   Determination of whether defendant presented a fair and just reason sufficient to permit withdrawal of his guilty plea was not limited to whether plea was knowingly, voluntarily, and intelligently entered, but instead required consideration of the totality of the circumstances, abrogating *Crawford v. State*, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001). NRS 176.165.
3. CRIMINAL LAW.
   Defendant's contention that members of his defense team lied, in order to induce him to plead guilty, about the time it would take to recover surveillance video of parking lot where one victim was sexually assaulted was not a fair and just reason sufficient to permit withdrawal of de-

fendant's guilty plea to crime of attempted sexual assault; defendant was given considerable leeway to demonstrate how he was lied to or misled, and defendant struggled to articulate a cohesive response, pointing instead to circumstances which, viewed in context, were neither inconsistent nor suspicious. NRS 176.165.

4. Criminal Law.

Defendant's contention that he was coerced into pleading guilty based on compounded pressures of trial court's allegedly erroneous evidentiary ruling regarding his motion to suppress surveillance video of parking lot where one victim was sexually assaulted, standby counsel's pressure to negotiate a plea, and time constraints did not establish fair and just reason sufficient to permit withdrawal of defendant's guilty plea to crime of attempted sexual assault; even if the district court's ruling regarding video was incorrect, such mistake did not amount to undue coercion, and there was no indication that time constraints and pressure from interested parties, which were factors present in every case, prevented defendant from making a voluntary and intelligent choice among available options. NRS 176.165.

5. Criminal Law.

Undue coercion in entering a guilty plea occurs when a defendant is induced by promises or threats that deprive the plea of the nature of a voluntary act, not where a court makes a ruling later determined to be incorrect.

6. Criminal Law.

Defendant's contention that he made impulsive decision to plead guilty without knowing definitively whether surveillance video of parking lot where one victim was sexually assaulted could be viewed did not establish fair and just reason sufficient to permit withdrawal of defendant's guilty plea to crime of attempted sexual assault; defendant did not move to withdraw plea for several months, contradicting any suggestion that he entered plea in a state of temporary confusion while in throes of discovering that video was not easily accessible, and defendant relied upon uncertainty surrounding video as leverage to negotiate extremely favorable plea, despite apparently strong evidence against him. NRS 176.165.

Before Saitta, Gibbons and Pickering, JJ.

OPINION[1]

By the Court, Pickering, J.:

NRS 176.165 allows a defendant who has pleaded guilty, but not been sentenced, to petition the district court to withdraw his plea. When this court first examined NRS 176.165, we held that a court may grant such motions for any substantial reason that is "fair and just." *See State v. Second Judicial Dist. Court* (*Bernardelli*), 85 Nev. 381, 385, 455 P.2d 923, 926 (1969). Many years later, we significantly narrowed that holding, stating that the only relevant question when determining whether a defendant presented a fair and just rea-

[1]This opinion has been circulated among all justices of this court, any two of whom, under IOP 13(b), may request en banc review of a case. The two votes needed to require en banc review in the first instance of the question of disavowing in part *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), were not cast.

son sufficient to permit withdrawal of his plea is whether the plea was knowingly, voluntarily, and intelligently entered. *Crawford v. State*, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001). In this appeal, we consider whether *Crawford*'s exclusive focus on the validity of the plea is supported by NRS 176.165. We hold that it is not. We also hold that appellant failed to present a fair and just reason favoring withdrawal of his plea and therefore affirm his judgment of conviction.

I.

Appellant Joseph Stevenson was charged with numerous offenses relating to his sexual attacks of three women between 2007 and 2009. The evidence against him appeared to be strong, consisting of identifications by the women and a DNA match. The cases were consolidated, and Stevenson chose to represent himself. As trial approached, he attempted to obtain a surveillance video of the Cheetahs gentlemen's club parking lot where one of the women was sexually assaulted. When it became clear that the State had lost the video, Stevenson moved to dismiss the charges. The district court denied his motion on March 9, 2011. On November 9, shortly before trial was set to begin, Stevenson informed the district court that Cheetahs still had the actual machine that the club had used to record surveillance footage. According to Stevenson, the manager had unplugged the machine when the video had been requested, but it required a password that she did not know and therefore she could not retrieve the recording. Stevenson argued that the video should exist on the machine's hard drive and he would not be ready for trial until he saw it. The parties decided that a computer technician would attempt to "break into" the machine and access the video overnight. The next day, without any explanation, Stevenson pleaded guilty to two counts of attempted sexual assault.

On February 21, 2012, before sentencing, Stevenson moved to withdraw his plea on the ground that he had been misled about the existence of the video. According to Stevenson, he had only pleaded guilty because his court-appointed standby counsel told him that the video could not be viewed unless the machine was sent back to the company that made it, which would take several months and could erase the video. But after he pleaded guilty, Stevenson allegedly learned that the video could be extracted in mere days and there was no risk of damaging it in the process. The district court conducted an evidentiary hearing regarding this claim where Stevenson's investigator, the computer technician, and Cheetahs' manager testified. After their testimony, the district court denied Stevenson's motion pursuant to *Crawford*, 117 Nev. at 721-22, 30 P.3d at 1125-

26, finding that his plea was entered into knowingly, voluntarily, and intelligently.

II.

Stevenson argues that *Crawford*'s exclusive focus on whether the plea was knowing, voluntary, and intelligent lacks foundation in NRS 176.165. He points out that, before *Crawford*, this court had interpreted NRS 176.165 to permit the withdrawal of a guilty plea before sentencing for any "fair and just" reason, which included reasons beyond just whether the plea was validly entered. *See Bernardelli*, 85 Nev. at 385, 455 P.2d at 926 ("The granting of the motion to withdraw one's plea before sentencing is proper where for any substantial reason the granting of the privilege seems fair and just." (internal quotation marks omitted)); *see also Mitchell v. State*, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993) (holding that the appellant presented a fair and just reason to withdraw her plea where she had a credible claim of innocence, the State would not be prejudiced, and only a minor amount of money was involved).

A.

In order to resolve Stevenson's contention, it is necessary to understand how this court's interpretation of NRS 176.165 has evolved over time. In relevant part, NRS 176.165 provides that a defendant who has pleaded guilty may petition the court to withdraw his plea "before sentence is imposed or imposition of sentence is suspended." Although the statute makes clear that a defendant *can* move to withdraw his plea, it says nothing about the *circumstances* in which his motion should be granted. This court first outlined these circumstances shortly after NRS 176.165 was enacted. In *Bernardelli*, the defendant argued that the district court abused its discretion by denying his motion to withdraw his plea. 85 Nev. at 385, 455 P.2d at 926. Because the statute was silent regarding the issue, we looked to federal courts for guidance, recognizing that NRS 176.165 was modeled after an almost identical federal rule, Fed. R. Crim. P. 32(d).[2] *Id*. Relying on *Gearhart v. United States*, 272 F.2d 499

[2]In 1965, the Nevada Legislature directed a commission to "prepare a new code of substantive law" after determining that the criminal code in existence at the time was outdated. Assemb. Concurrent Res. 9, 53d Leg., 1965 Nev. Stat. 1507. The commission recommended that the Legislature adopt certain Federal Rules of Criminal Procedure which were not already covered by state rules, including the rule permitting withdrawal of guilty pleas, Rule 32(d). *Report of the Subcomm. for Revision of the Criminal Law to the Legis. Comm'n*, 3. The Legislature agreed and adopted NRS 176.165 almost verbatim from Rule 32(d). 1967 Nev. Stat., ch. 523, § 245, at 1434. Rule 32(d) has undergone several revisions and now exists as Fed. R. Crim. P. 11(d).

(D.C. Cir. 1959), we held that a district court may grant a motion to withdraw a guilty plea before sentencing "where for any substantial reason the granting of the privilege seems 'fair and just.'" *Bernardelli*, 85 Nev. at 385, 455 P.2d at 926.[3]

In cases subsequent to *Bernardelli*, we did not explain what constituted a fair and just reason sufficient to permit withdrawal of a plea. Instead, we acted on a case-by-case basis and considered the totality of the circumstances to determine whether allowing withdrawal would be fair to the defendant and the State. But we were not always careful to explain the test we were applying, *see Jezierski v. State*, 107 Nev. 395, 396, 812 P.2d 355, 356 (1991) (reversing based upon "public policy" considerations); *Mitchell*, 109 Nev. at 141, 848 P.2d at 1062 (reversing without mentioning the "fair and just" language), and a discussion of whether the plea was validly entered began to creep into our analysis, *Mitchell*, 109 Nev. at 140, 848 P.2d at 1061 (explaining that the defendant bore the burden of demonstrating that her plea "was not entered knowingly and intelligently" (quoting *Bryant v. State*, 102 Nev. 268, 721 P.2d 364 (1986))). This confusion came to a head in *Crawford*, when, for the first time, we focused the "fair and just" analysis *solely* upon whether the plea was valid, holding that "[t]o determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must . . . determine whether the defendant entered the plea voluntarily, knowingly, and intelligently." 117 Nev. at 721-22, 30 P.3d at 1125-26. Since *Crawford*, we have repeatedly observed that the only relevant question when considering whether a defendant should be permitted to withdraw his plea before sentencing is whether the plea was entered into knowingly, voluntarily, and intelligently. In applying this standard, we have refused to permit withdrawal of pleas that were valid even if the defendant presented an otherwise fair and just reason for withdrawing his plea.

B.

[Headnote 1]

We now turn to the question of whether the withdrawal standard announced in *Crawford* is supported by NRS 176.165. "[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). "When Nevada legislation is patterned after a federal statute or the law of another state, it is understood that the courts of the adopting state usually follow the construction placed on the statute

[3]The requirement that a proffered reason be "substantial" appears to have been our own.

in the jurisdiction of its inception." *Advanced Sports Info., Inc. v. Novotnak*, 114 Nev. 336, 340, 956 P.2d 806, 809 (1998) (internal quotation marks omitted).

[Headnote 2]

As we observed in *Bernardelli*, NRS 176.165 was modeled after Fed. R. Crim. P. 32(d). Around the time that the statute was enacted, federal courts interpreting Rule 32(d) allowed a defendant to withdraw his guilty plea " 'if for any reason the granting of the privilege seems fair and just.' " *Gearhart*, 272 F.2d at 502 (quoting *Kercheval v. United States*, 274 U.S. 220, 224 (1927)); *see also United States v. Stayton*, 408 F.2d 559, 561 (3d Cir. 1969) ("In weighing motions for withdrawal of a guilty plea before sentencing, the test to be applied by the trial courts is fairness and justice."). What constituted a fair and just reason was unsettled, and a conflict eventually emerged between courts who held that withdrawal should be permitted in almost every circumstance and courts who held that the defendant must first present a plausible ground for withdrawal. Fed. R. Crim. P. 32(d) advisory committee's note (1983).[4] But under either view, withdrawal was permitted for reasons other than merely whether a plea was knowing, voluntary, and intelligent. *See, e.g.*, *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963) ("Rule 32(d) imposes no limitation upon the withdrawal of a guilty plea before sentence is imposed, and such leave should be freely allowed" (internal quotation marks omitted)); *United States v. Sambro*, 454 F.2d 918, 924 (D.C. Cir. 1971) ("For example, a judge may but need not allow presentence withdrawal when the defendant establishes that there are circumstances which might lead a jury to refuse to convict notwithstanding his technical guilt of the charge. Or, a judge *might* allow withdrawal because the defendant has become aware of some collateral consequences of conviction which he wants to avoid." (internal citation omitted)). More recently, federal courts have expressly rejected the notion that the "fair and just" analysis turns upon the validity of the plea. *United States v. Ortega-Ascanio*, 376 F.3d 879, 884 (9th Cir. 2004). Thus, the statement in *Crawford* which focuses the "fair and just" analysis solely upon whether the plea was knowing, voluntary, and intelligent is more narrow than contemplated by NRS 176.165. We therefore disavow *Crawford*'s exclusive focus on the validity of the plea and affirm that the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.

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[4]Congress eventually adopted the latter position. Fed. R. Crim. P. 32(d) advisory committee's note (1983); *United States v. Martinez*, 785 F.2d 111, 115-16 (3d Cir. 1986).

III.

[Headnote 3]

Having determined that a district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just, we turn now to the reasons Stevenson has given as to why withdrawal was warranted. The crux of Stevenson's argument below as to why he should be allowed to withdraw his plea was that the members of his defense team lied about the existence of the video in order to induce him to plead guilty. The district court considered this contention and gave Stevenson considerable leeway to demonstrate how he was lied to or misled. Stevenson struggled to articulate a cohesive response, pointing instead to circumstances which, viewed in context, were neither inconsistent nor suspicious. After considering Stevenson's arguments, as well as the testimony presented at the multiple evidentiary hearings, the district court found that no one lied to Stevenson about the time it would take to determine whether the video could be extracted or otherwise misled him in any way. The district court also found that Stevenson's testimony in this regard was not credible. We must give deference to these findings so long as they are supported by the record, *see Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001) (giving deference to factual findings made by the district court in the course of a motion to withdraw a guilty plea), which they are. Based on these findings, withdrawal was not warranted on this ground.

[Headnotes 4, 5]

Similarly unconvincing is Stevenson's contention that he was coerced into pleading guilty based on the compounded pressures of the district court's "erroneous" evidentiary ruling regarding his motion to suppress the video, standby counsel's pressure to negotiate a plea, and time constraints. We need not consider whether the lower court's ruling regarding the video was correct, because even assuming it was not, undue coercion occurs when "a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act," *Doe v. Woodford*, 508 F.3d 563, 570 (9th Cir. 2007) (internal quotation marks omitted), not where a court makes a ruling later determined to be incorrect, *see generally Brady v. United States*, 397 U.S. 742, 757 (1970) ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."). Moreover, time constraints and pressure from interested parties exist in every criminal case, and there is no indication in the record that their presence here prevented Stevenson from making a voluntary and intelligent choice among the options available. *See Doe*, 508 F.3d at 570 ("The test for determining whether a plea is valid is whether the plea represents a

voluntary and intelligent choice among the alternative courses of action open to the defendant." (internal quotation marks omitted)); *Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995) ("Although deadlines, mental anguish, depression, and stress are inevitable hallmarks of pretrial plea discussions, such factors considered individually or in aggregate do not establish that [a defendant's] plea was involuntary.").

[Headnote 6]

Finally, we reject Stevenson's implied contention that withdrawal was warranted because he made an impulsive decision to plead guilty without knowing, definitively, whether the video could be viewed. Stevenson did not move to withdraw his plea for several months, which contradicts his suggestion that he entered his plea in a state of temporary confusion while in the throes of discovering that the video was not easily accessible. *See United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991) (explaining that one of the goals of the fair and just analysis "is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty" (internal quotation marks omitted)); *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir. 1975) ("A swift change of heart is itself strong indication that the plea was entered in haste and confusion[.]"). Most importantly, Stevenson relied upon the uncertainty surrounding the video as leverage to negotiate an extremely favorable plea despite the apparently strong evidence against him. *See United States v. Ensminger*, 567 F.3d 587, 593 (9th Cir. 2009) ("The guilty plea is not a placeholder that reserves [a defendant's] right to our criminal system's incentives for acceptance of responsibility unless or until a preferable alternative later arises. Rather, it is a grave and solemn act, which is accepted only with care and discernment." (internal quotation marks omitted)).

Considering the totality of the circumstances, we have no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. Permitting him to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to "become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *Barker*, 514 F.2d at 221. This we cannot allow.[5]

For these reasons, we affirm.

SAITTA and GIBBONS, JJ., concur.

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[5]Stevenson urges us to consider his "colorable claim of innocence" when evaluating whether he presented a fair and just reason for withdrawing his plea. *See Woods v. State*, 114 Nev. 468, 475, 958 P.2d 91, 95-96 (1998). Stevenson fails to support his contention that he has a colorable claim of innocence.

DOMINIC SANTINO CASSINELLI, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64881

August 27, 2015 357 P.3d 349

Appeal from a judgment of conviction, entered pursuant to an *Alford* plea,[1] of coercion and preventing or dissuading a person from testifying. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

The court of appeals, SILVER, J., held that: (1) defendant was eligible for treatment for alcohol abuse, even though actions underlying coercion conviction involved acts of domestic violence; (2) in considering eligibility for treatment, sentencing judge was limited to considering only the delineated crime to which defendant pleaded guilty; (3) determination that defendant was not likely to be rehabilitated was not an abuse of discretion; (4) declining to assign defendant to treatment was not an abuse of discretion; (5) prosecutor's statements during sentencing did not amount to misconduct or breach plea agreement; and (6) sentence was illegal.

Affirmed in part, vacated in part, and remanded.

Law Offices of John E. Oakes and *John E. Oakes*, Reno; *Richard F. Cornell*, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *R. Bryce Shields*, District Attorney, Pershing County, for Respondent.

1. SENTENCING AND PUNISHMENT.
   Defendant convicted of coercion, the actions underlying which involved acts of domestic violence, who was otherwise eligible for treatment for alcohol abuse, was not disqualified by statute removing domestic violence defendants from eligibility for treatment; prosecutor plea bargained charges to coercion without specifically delineating coercion as constituting domestic violence, the State did not allege in the information that coercion constituted domestic violence, and defendant pleaded guilty to coercion rather than coercion constituting domestic violence. NRS 33.018(1)(c), 458.300(1)(d).
2. CRIMINAL LAW.
   The court of appeals reviews questions of statutory interpretation de novo.
3. STATUTES.
   In interpreting a statute, the court of appeals gives the statute its plain meaning and considers the statute as a whole, awarding meaning to each word, phrase, and provision.
4. STATUTES.
   In interpreting a statute, the court of appeals strives to avoid rendering any words or phrases superfluous or nugatory.

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

5. Statutes.
   Only if the statute is ambiguous does the court of appeals look beyond the statute's language to legislative history or other sources to determine the intent of the statute.
6. Statutes.
   Ambiguity in a statute arises where the statute's language lends itself to two or more reasonable interpretations.
7. Criminal Law.
   When a criminal statute is ambiguous, the court of appeals construes the statute in favor of the accused. NRS 169.035.
8. Sentencing and Punishment.
   In considering a defendant's eligibility for treatment for drug and alcohol abuse, under statute disqualifying defendants convicted of a crime constituting domestic violence, the sentencing judge is limited to considering only the delineated crime that the defendant pleaded guilty to or was found guilty of, rather than considering whether the underlying acts involved in the crime constitute domestic violence. NRS 33.018(1)(c), 458.300(1)(d).
9. Sentencing and Punishment.
   Determination that defendant, who was convicted of coercion, was not likely to be rehabilitated by treatment for alcohol addiction was not an abuse of discretion; presentence investigation report noted that defendant did not believe alcohol was a problem for him, defendant's lack of humility during sentencing hearing indicated he was not willing to take accountability for his alcoholism, and his criminal acts went far beyond issue of alcohol abuse. NRS 458.300, 458.310(1), 458.320(2).
10. Sentencing and Punishment.
    Declining to assign defendant, who was convicted of coercion, to an alcohol treatment program was not an abuse of discretion; victim impact statement reflected multiple instances of severe physical, sexual, and verbal abuse, graphic photographs and an event journal corroborated victim's testimony, and defendant appeared to be unaffected by the harm his violent acts caused the couple's children, who were present during some of the crimes. NRS 176.015(3)(b), 458.300, 458.310(1), 458.320(2).
11. Criminal Law.
    Prosecutor's statements during sentencing did not amount to misconduct or breach plea agreement, which provided that the State would not oppose alcohol treatment program for coercion conviction in first count and allowed parties to argue their position regarding conviction for preventing or dissuading a person from testifying in second count, where prosecutor recommended a treatment program on first count and argued for maximum sentence on second count, and prosecutor clarified that statements regarding gruesomeness of crimes applied to second count and limited his argument to facts relating to second count. NRS 458.300.
12. Criminal Law.
    The court of appeals reviews unpreserved claims of prosecutorial misconduct for plain error.
13. Criminal Law.
    Reversal is required if the State has violated either the terms or the spirit of the plea agreement in exercising its right to argue at sentencing.
14. Sentencing and Punishment.
    Cross-examination of victim after her impact statement at sentencing for convictions for felony coercion and gross misdemeanor preventing or dissuading a person from testifying was not required; statement was provided to court and defendant well in advance of sentencing, statement related to facts of crimes and addressed impact of crimes on victim and her chil-

dren, defendant failed to object to information in statement, and defendant did not argue that statements went beyond crimes involved in instant case. NRS 176.015(3).

15. Criminal Law.
The court of appeals reviews unobjected-to conduct for plain error.

16. Sentencing and Punishment.
When a victim impact statement refers only to the facts of the crime, the impact on the victim, and the need for restitution, a victim testifying as a witness must be sworn in, but cross-examination and prior notice of the contents of the impact statement normally are not required. NRS 176.015(3)(b).

17. Constitutional Law.
When a victim impact statement includes references to specific prior acts of the defendant that are not related to the instant crime, due process requires that the accuser be under oath, and an opportunity for cross-examination and reasonable notice of the prior acts that the impact statement will contain must be provided. U.S. Const. amend. 14; NRS 176.015(3).

18. Sentencing and Punishment.
Suspension of 364-day jail sentence to place defendant on probation for three years on his gross misdemeanor conviction for dissuading a person from testifying was illegal, when sentencing court ran sentence consecutive to a prison term of 14-48 months for felony coercion conviction, and it was possible that defendant would have begun probation after serving maximum four-year sentence in prison. NRS 176A.500(1)(a).

19. Sentencing and Punishment.
If any portion of a defendant's criminal sentence is illegal at the time of the pronouncement of sentencing, whether it is the minimum sentence or the maximum sentence, the entire sentence is illegal. NRS 176A.500(1).

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

OPINION

By the Court, Silver, J.:

Appellant Dominic Cassinelli pleaded guilty to coercion and preventing or dissuading a person from testifying. The guilty plea resulted from allegations made by Cassinelli's long-time girlfriend that he had sexually abused her. Cassinelli requested the district court to defer sentencing and assign him to a treatment program for alcohol abuse under NRS Chapter 458 rather than impose a term of incarceration.

The primary legal issue before this court is whether NRS 458.300(1)(d) precludes eligibility for a drug or alcohol treatment program for the crime of coercion, where the acts underlying the crime fall within the definition of domestic violence, but the defendant had not pleaded guilty to a charged felony "which constitutes domestic violence as set forth in NRS 33.018." We hold that when determining eligibility to elect a program of treatment, the district court may only consider the actual crime the defendant pleaded guilty to or was found guilty of by a jury.

We further determine whether, in this case, the district court erred by finding Cassinelli ineligible for a treatment program, whether the district court abused its discretion by denying Cassinelli's motion to elect a program of treatment under NRS Chapter 458 on alternate grounds, whether there was prosecutorial misconduct, whether error arises from Cassinelli's inability to cross-examine the victim during her victim-impact statement, and whether the sentence imposed is illegal.

We conclude the district court erred by determining that the acts underlying the crime involved domestic violence and, thereafter, concluding that Cassinelli was ineligible for a treatment program under NRS Chapter 458. We nevertheless affirm the district court's decision not to assign Cassinelli to a treatment program, as ultimately sentencing is left to the sound discretion of the district court. We also affirm the district court on the remaining issues, with the exception of the sentence imposed on Count II (preventing or dissuading a person from testifying), which we hold is illegal. We vacate Cassinelli's sentence on Count II and remand this case only for the district court to resentence him on the gross misdemeanor.

FACTUAL AND PROCEDURAL HISTORY

Appellant Dominic Cassinelli and the victim were involved in a romantic relationship from 2006 to 2012. They had two children together. During that time, Cassinelli was employed as a police officer in Winnemucca.

At the preliminary hearing, testimony established that the pair engaged in sadomasochistic sex acts. The victim testified that she consented in the beginning of the relationship, but over time, the violence escalated to the point where she no longer wished to participate in sadomasochistic sex acts. Eventually the victim took the couple's children and moved away. After the victim discovered that Cassinelli began seeing another woman, the victim reported to the Winnemucca Chief of Police that Cassinelli had sexually assaulted her. Although the victim had accused him of domestic violence in the past, Cassinelli had no convictions on his record.

The case was referred to the Nevada Division of Investigation. The victim reported specific incidents of sexual assault, involving handcuffing, binding, blindfolding with duct tape, and suspension from the ceiling with harnesses and straps. The victim also reported that Cassinelli threatened to kill her and pointed a loaded assault rifle and handgun at her while their children were present. Further, the victim advised investigators that the children witnessed Cassinelli sexually assaulting her. The victim provided investigators with photographs and an event journal to substantiate her claims.

Prosecutors charged Cassinelli with four counts of sexual assault; five counts of battery with intent to commit sexual assault or,

in the alternative, domestic battery with strangulation; two counts of abuse, neglect, or endangerment of a child; two counts of misdemeanor domestic battery; and two counts of unlawful capture/distribution/display of image of private area of another.

The parties reached a plea agreement, wherein Cassinelli entered an *Alford* plea to coercion, a felony (Count I), and preventing or dissuading a person from testifying, a gross misdemeanor (Count II). The parties agreed Count I would not be treated as "sexually motivated." Further, Count I contained no language in the information reflecting that the coercion constituted domestic violence. The State agreed it would not oppose treatment if Cassinelli was eligible for a program of treatment under NRS Chapter 458. The parties were free to argue during sentencing regarding punishment with regard to Count II.

At sentencing, Cassinelli requested and the State recommended to the district court, a program involving treatment under NRS 458.300 for Count I because it believed Cassinelli was eligible based upon his evaluation recommending alcohol treatment. The State then argued for the maximum sentence of 364 days in jail for Count II. Cassinelli had already spent 279 days in custody. As the final component of the combined hearing on the motion to elect treatment and sentencing, the victim addressed the court with her impact statement.

The district court acknowledged that Cassinelli was eligible for alcohol treatment under NRS 458.300 but stated "whether that's to be given is another issue. That's up to me as the judge." The district court, however, did not subsequently specifically address Cassinelli's request for a program of treatment under NRS Chapter 458. Instead, the court sentenced Cassinelli to a prison term of 14-48 months for Count I, and a consecutive jail term of 364 days for Count II. The court suspended the sentence on Count II and imposed a three-year term of probation, to run consecutive to Count I.

Cassinelli appealed, claiming that his sentence was illegally imposed because the district court failed to adjudicate his motion for treatment pursuant to NRS 458.290 *et seq.*, prior to imposing sentence. The parties filed a "Stipulation for Order of Remand," in which the parties agreed that the record did not reveal that the district court had expressly adjudicated the motion for election of treatment prior to sentencing Cassinelli. Because the record revealed the district court had determined that Cassinelli was eligible for treatment and implicitly denied the motion, but the record was silent on the basis for the denial, the Nevada Supreme Court approved the parties' stipulation and remanded the appeal to the district court for the limited purpose of entering an order explaining its ruling. *Cassinelli v. State*, Docket No. 64881 (Order of Limited Remand, June 11, 2014).

On remand, the district court entered a written "Order Adjudicating Motion for Election of Treatment." The district court reconsidered its original position that Cassinelli was eligible for assignment to a program for alcohol treatment under NRS 458.300. The district court ruled that the acts underlying Cassinelli's guilty plea constituted domestic violence as defined in NRS 33.018. Therefore, despite the fact Cassinelli pleaded guilty to coercion pursuant to NRS 207.190, the court found that Cassinelli was not eligible to elect a program of treatment pursuant to NRS 458.300(1)(d). The court further ruled that even if Cassinelli were eligible for treatment, Cassinelli was not likely to be rehabilitated through alcohol treatment and was not otherwise a good candidate for treatment, therefore his motion was denied. We now consider Cassinelli's direct appeal from his judgment of conviction and sentence.

ANALYSIS

On appeal, Cassinelli argues that (1) the district court incorrectly determined that he was not eligible for assignment to a program of treatment for alcohol abuse under NRS Chapter 458; (2) assuming he was eligible to elect a program of treatment under NRS Chapter 458, the district court abused its discretion by denying his motion to elect treatment; (3) the prosecutor engaged in misconduct during sentencing; (4) the district court erred by not allowing cross-examination of the victim after her impact statement to the court; and (5) the sentence the district court imposed was illegal. For the following reasons, we affirm in part.

The district court erred by ruling that Cassinelli was not eligible for alcohol treatment under NRS Chapter 458

[Headnote 1]

NRS 458.300(1)(d) provides that a person who is convicted of a crime that is "[a]n act which constitutes domestic violence as set forth in NRS 33.018" is not eligible for assignment to a program of treatment for the abuse of alcohol or drugs. Cassinelli argues that nothing in NRS 458.300(1) makes a person ineligible for treatment if convicted of the crime of coercion pursuant to NRS 207.190. The State counters that Cassinelli was ineligible under NRS 458.300(1)(d) because the underlying facts in this case constitute acts of domestic violence as defined by NRS 33.018(1)(c).

[Headnotes 2-4]

We review questions of statutory interpretation de novo. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). In interpreting a statute, we give the statute its plain meaning and consider the statute as a whole, awarding meaning to each word, phrase, and provision. *Haney v. State*, 124 Nev. 408, 411-12, 185 P.3d 350, 353 (2008). We

strive to avoid rendering any words or phrases superfluous or nugatory. *Id*. Nevada's criminal statutes should be interpreted to provide both fairness and simplicity. NRS 169.035 (also referring to "the elimination of unjustifiable expense and delay").

[Headnotes 5-7]

Only if the statute is ambiguous do we look beyond the statute's language to legislative history or other sources to determine the intent of the statute. *Attaguile v. State*, 122 Nev. 504, 507, 134 P.3d 715, 717 (2006). Ambiguity arises where the statute's "language lends itself to two or more reasonable interpretations." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). When a criminal statute is ambiguous, we construe the statute in favor of the accused. *Haney*, 124 Nev. at 412, 185 P.3d at 353.

The portion of NRS 458.300 at issue here provides:

> [A]n alcoholic . . . who has been convicted of a crime is eligible to elect to be assigned by the court to a program of treatment for the abuse of alcohol or drugs . . . unless:
>
> 1. The crime is:
>
> . . .
>
> (d) An act which constitutes domestic violence as set forth in NRS 33.018.

The statute plainly removes from eligibility a person who is convicted of a crime constituting domestic violence. Less clear is what the sentencing judge may consider when determining whether the crime is "an act which constitutes domestic violence."

Cassinelli argues that a district court should only consider the crime for which the defendant is convicted of in determining eligibility. The State argues that when determining eligibility, the court may look at the underlying facts in each case.[2]

Both interpretations are reasonable. The language stating "[t]he *crime* is . . . [a]n act which constitutes domestic violence" may be construed as requiring that the actual crime the defendant is convicted of be delineated in the charging document as "constituting domestic violence" before a court may preclude eligibility under the statute. NRS 458.300(1)(d) (emphasis added). Yet, because subsection (d) uses the broader term "act," while the remaining subsections provide that the disqualifying crime must itself be a "crime" or "offense," an inference is raised that, in situations where the facts of the crime may fall within the definition of domestic violence, the sentencing judge may look at the acts underlying the crime in determining eligibility. Because the language of the statute supports

[2]We note the State conceded below and at oral argument that, prior to the district court's ruling on remand, the State believed Cassinelli was eligible for a treatment program.

two reasonable interpretations, we turn to the legislative history in determining the legislative intent. *See Catanio*, 120 Nev. at 1033, 102 P.3d at 590 ("Legislative intent is the controlling factor in statutory construction.").

NRS 458.300 was amended in 1975, *see* 1975 Nev. Stat., ch. 553, § 1, at 971, although the language now found in subsection (1)(d) was not added until 1995 through Assembly Bill 84. *See* 1995 Nev. Stat., ch. 157, § 1(1), at 235; Hearing on A.B. 84 Before the Assembly Judiciary Comm., 68th Leg. (Nev., April 19, 1995); Hearing on A.B. 84 Before the Senate Judiciary Comm., 68th Leg. (Nev., May 15, 1995). A.B. 84 proposed several amendments to the statute, and the legislative history makes clear this bill was meant to expand, as opposed to limit, eligibility for drug and alcohol treatment programs. Hearings on A.B. 84 Before the Assembly Judiciary Comm., 68th Leg. (Nev., February 6 and 24, 1995). At several points, legislators referred to A.B. 84 as encompassing persons who had been charged with or convicted of domestic violence.[3] Hearings on A.B. 84 Before the Assembly Judiciary Comm., 68th Leg. (Nev., February 24 and April 19, 1995); Hearings on A.B. 84 Before the Senate Judiciary Comm., 68th Leg. (Nev., May 15, 1995). However, it appears the Legislature wished to exclude defendants who pleaded guilty or were found guilty of "battery constituting domestic violence" because these defendants had access to other programs tailored to stop recidivism. Hearing on A.B. 84 Before the Assembly Judiciary Comm., 68th Leg. (Nev., April 19, 1995); Hearings on A.B. 84 Before the Senate Judiciary Comm., 68th Leg. (Nev., May 15, 1995).

Nothing in the legislative history indicates the Legislature intended for the sentencing judge to consider whether the underlying acts of a crime constitute domestic violence for the purpose of determining eligibility. In fact, it appears quite the opposite is true and the Legislature intended the eligibility determination to be based solely on the crime with which the defendant was charged with or found guilty of. The primary focus of A.B. 84 was increasing eligibility for drug and alcohol treatment programs. The Legislature recognized that plea bargaining within the criminal justice system is very common and some defendants would be able to plead down their charges and be eligible for a program of treatment. Hearings on A.B. 84 Before the Assembly Judiciary Comm., 68th Leg. (Nev., February 6 and 24, 1995).

Prosecutors are granted the authority to consider each case individually and charge or negotiate pleas in most criminal cases.

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[3]For example, it was specifically noted that the amendment would exclude "misdemeanor domestic violence convictions[.]" Hearing on A.B. 84 Before the Senate Judiciary Comm., 68th Leg. (Nev., February 24, 1995).

Further, prosecutors consider both the underlying facts of a crime and punishment sought in negotiating a charge when prosecuting a case within the system. The Legislature could have precluded plea bargains that would make an otherwise ineligible defendant eligible for a program of treatment under NRS Chapter 458, however it did not do so.

Here, the prosecutor plea bargained charges in this case to coercion without specifically delineating the coercion as constituting domestic violence. In the guilty plea agreement, the prosecutor affirmatively agreed not to oppose a program for alcohol treatment if an evaluation confirmed that Cassinelli was a good candidate for alcohol treatment pursuant to NRS Chapter 458. At sentencing, based on the evaluation, the prosecutor affirmatively recommended an alcohol treatment program with probation on the coercion charge. Even the district court believed that Cassinelli was eligible for treatment under this statute. Thus, the prosecutor, the district court, and Cassinelli all believed he was eligible for alcohol treatment despite the fact that the underlying acts involved domestic violence in this case. Moreover, Cassinelli pleaded guilty to felony coercion. The information and the guilty plea agreement did not specifically delineate Cassinelli's coercion as constituting domestic violence, which would have placed all parties on notice that Cassinelli was ineligible for alcohol treatment under NRS Chapter 458.

[Headnote 8]

We hold that in considering eligibility under NRS 458.300(1)(d), the sentencing judge is limited to considering only the delineated crime that the defendant pleaded guilty to or was found guilty of, rather than considering whether the underlying acts involved in the crime constitute domestic violence. Fairness and due process ensure that defendants know at the time they plead guilty whether they may be eligible for a treatment program pursuant to NRS Chapter 458. The prosecutor has discretion to resolve a criminal charge, including whether to add language to an information or indictment alleging that the crime itself constitutes domestic violence. This effectively gives all criminal defendants notice at the time of pleading guilty whether they may be eligible for drug and alcohol treatment under NRS 458.300 and removes any ambiguity otherwise arising from requiring the district court to determine whether the underlying facts constitute or do not constitute domestic violence.

Cassinelli pleaded guilty to felony coercion. Cassinelli did not plead guilty to coercion constituting domestic violence. The State did not allege in the information that this coercion constituted domestic violence.[4] During negotiations, and at sentencing, it is clear

[4]We note that the prosecutor purposefully negotiated Cassinelli's charges to coercion without sexual motivation. The prosecutor negotiated this despite

that Cassinelli, the State, and the district court, all believed Cassinelli's crime did not preclude him from eligibility for alcohol treatment under NRS Chapter 458. Accordingly, the district court's conclusion upon remand that NRS 458.300(1)(d) excluded Cassinelli from eligibility for alcohol treatment was error.

[Headnote 9]

This conclusion does not end our inquiry, however, because in this case the district court alternatively denied Cassinelli's request to be placed in a treatment program pursuant to NRS Chapter 458 because the court found that he was not likely to be rehabilitated through treatment or was not otherwise a good candidate for treatment. We note that either basis, standing alone, is sufficient to deny treatment. We therefore consider whether the district court abused its discretion by denying Cassinelli's request below. For the following reasons, we conclude that the district court did not abuse its discretion by denying Cassinelli's requests on these bases.

The district court did not abuse its discretion by denying Cassinelli's request for assignment to a program of treatment

Cassinelli claims that the district court abused its discretion by denying his request for assignment to a program of treatment on the basis that he was not likely to be rehabilitated through treatment or was not otherwise a good candidate for treatment. Cassinelli further asserts that the district court improperly distinguished between benefiting from a treatment program and being likely to be rehabilitated through a treatment program. Cassinelli also argues that the court denied him entry into a treatment program because he entered an *Alford* plea and never admitted guilt. Therefore, the court's decision to sentence him to prison was based on prejudice and preference. We disagree.

NRS 458.320(2) provides: "If the court, acting on the report or other relevant information, determines that the person is not an alcoholic or drug addict, is not likely to be rehabilitated through treatment or is otherwise not a good candidate for treatment, the person may be sentenced and the sentence executed."[5] Although the district court determined that Cassinelli was an alcoholic, it failed to clearly make separate findings regarding whether Cassinelli was likely to

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the fact that Cassinelli was originally charged with the crime of sexual assault. By not alleging that Cassinelli's crime involved a sexually motivated coercion, this prosecutor used his discretion to effectively change the penalty involved at sentencing, and Cassinelli, too, was cognizant of the difference in the penalty at the time he pleaded guilty.

[5]The legislative history of NRS 458.320 indicates a district court has discretion when determining whether to grant or deny a motion for notice of election under this statute. *See* Minutes, Hearing on A.B. 413 Before the Assembly Judiciary Comm., 64th Leg. (Nev., April 1, 1987).

be rehabilitated or was not otherwise a good candidate. Nevertheless, we consider in turn the three aspects of the statute in light of the district court's findings.

The district court reluctantly determined that Cassinelli was an alcoholic

In making its determination under the statute, the district court may consider evaluations regarding whether the individual is an alcoholic or drug addict and is likely to be rehabilitated through treatment, as well as any other relevant information. NRS 458.310(1); NRS 458.320(2); *see also Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976) (noting the trial court, at sentencing, "is privileged to consider facts and circumstances which clearly would not be admissible at trial").

Here, the district court conducted a hearing regarding eligibility for treatment under NRS 458.300 simultaneously with Cassinelli's sentencing. In determining whether Cassinelli was an alcoholic, the district court considered a facility evaluation recommending placement into an alcohol treatment program.

The district court found, albeit reluctantly, that Cassinelli was an alcoholic, based upon the testimony at the hearing and the evaluations. The district court voiced concerns with this designation, citing "some reservations" arising from the fact that the evaluator was picked by defense counsel, and the evaluation contained language indicating to defense counsel that the evaluation could be revised in the manner defense counsel requested. Despite these concerns, the district court found Cassinelli to be an alcoholic. Based on the factual findings in the record, the district court did not abuse its discretion by determining Cassinelli was an alcoholic.

The district court found that Cassinelli would not likely be rehabilitated through an alcohol treatment program

The district court conducted a hearing regarding eligibility for treatment under NRS 458.300 simultaneously with Cassinelli's sentencing.[6] During that hearing, the district court first correctly distinguished between benefiting and being likely to be rehabilitated. *See* NRS 458.320(1) ("If the court . . . determines that the person . . . is not likely to be *rehabilitated* through treatment . . . the person may be sentenced and the sentence executed." (emphasis added)). The

[6]We take this opportunity to caution district courts against failing to make specific findings, separate and apart from the sentencing record, regarding a determination of whether to assign a defendant to a treatment program pursuant to NRS Chapter 458. Making separate and specific findings on the record alleviates potential issues and confusion that may otherwise arise upon appellate review. This is especially true where, as here, the hearing for assignment to a treatment program was heard along with Cassinelli's sentencing hearing.

district court concluded, although Cassinelli may benefit from a program of treatment, that he would not likely be rehabilitated through such treatment. Most importantly, the district court noted:

> Defendant demonstrated little ability to be rehabilitated. Throughout the sentencing, it appeared that the Defendant believed he should have special consideration because he is a "3rd generation Nevadan" and that his father had a good reputation as a long-time Reno police officer. *At no time did the Defendant demonstrate any humility necessary for treatment*.

(Emphasis added.) Thus, the district court specifically made findings that in this case Cassinelli would not likely be rehabilitated from alcohol abuse if the court assigned Cassinelli to an alcohol treatment program.

The facts and evidence support these findings. Successful rehabilitation hinges largely on the defendant's state of mind, particularly the defendant's humility and willingness to take accountability for alcoholism. However, the presentence investigation report prepared by the Division of Parole and Probation noted that Cassinelli "does not believe alcoholic beverages are problematic for him." This was contrary to what Cassinelli otherwise explained to evaluators for the program. Further, Cassinelli's lack of humility during the hearing and sentencing strongly indicated that he was not willing to take accountability for his alcoholism, driving the conclusion that an alcohol treatment program would be ineffectual. And, as discussed below, Cassinelli's criminal acts went far beyond the issue of alcohol abuse. We conclude that the district court did not abuse its discretion by determining that Cassinelli was not likely to be rehabilitated from the abuse of alcohol and refusing to assign him to an alcohol treatment program on this basis.

> *The district court determined that Cassinelli was not otherwise a good candidate for alcohol treatment in this case*

[Headnote 10]

In addition to finding that Cassinelli was not likely to be rehabilitated by treatment, the district court determined that Cassinelli was not otherwise a good candidate for a program of treatment. Importantly, during the hearing, the district court found Cassinelli's testimony unbelievable and the victim's testimony credible. The court's order concluded that Cassinelli's criminal acts with firearms involving sexual, verbal, physical, and child abuse were "of the worst kind" and, rather than stemming from alcoholism, were grounded in "a man establishing improper control over a woman by the sexual and mental abuse that was prevalent in this case." Rather than granting Cassinelli's request to elect a program of treatment, which would result in the dismissal of the coercion charge and ultimately

seal his record, the district court, instead, opted to hold Cassinelli accountable for his crime by sentencing Cassinelli to prison.

This was not an abuse of discretion.[7] The record supports the district court's conclusion that Cassinelli was not otherwise a good candidate for a dismissal with assignment to an alcohol treatment program. The victim's impact statement reflected multiple instances of Cassinelli's severe physical, sexual, and verbal abuse. Graphic photographs and an event journal corroborated the victim's testimony. Cassinelli appeared to be unaffected by the harm his violent acts caused the couple's children, who were also present during some of his crimes. And, because the facility report only concluded that Cassinelli was likely to benefit from such a program, the district court may have concluded that Cassinelli was not even eligible because NRS 458.320(1) requires that the facility determine that the person is likely to be rehabilitated.

We further note that NRS 458.300 does not bar Cassinelli from a treatment program based on what he pleaded guilty to and because the district court found that he was an alcoholic. The statute and the legislative history make clear that the Nevada Legislature recognized that defendants who engage in domestic violence are not necessarily good candidates for alcohol treatment programs because other programs are available for these offenders. *See* NRS 458.300(1)(d); Hearing on A.B. 84 Before the Assembly Judiciary Comm., 68th Leg. (Nev., April 19, 1995); Hearing on A.B. 84 Before the Senate Judiciary Comm., 68th Leg. (Nev., May 15, 1995). Thus, although Cassinelli was not charged with or convicted of a crime constituting domestic violence and was technically eligible for an alcohol treatment program, the actions underlying his crime involved acts of domestic violence, and thus, the district court did not abuse its discretion in determining that these facts weighed against assignment to a treatment program designed to rehabilitate alcoholism as Cassinelli was not otherwise a good candidate.

In sum, we conclude that the district court properly distinguished between benefiting from an alcohol treatment program and being

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[7]We note that if refusing to permit a person to participate in a treatment program and sending that person to prison instead constitutes a more severe sentence, then, because Cassinelli pleaded guilty pursuant to *Alford* and maintained his innocence, the district court would have abused its discretion by considering Cassinelli's lack of remorse in making its determination that Cassinelli was not otherwise a good candidate for assignment to an alcohol treatment program. *See Brown v. State*, 113 Nev. 275, 291, 934 P.2d 234, 245 (1997) ("The district court violated [the defendant's] Fifth Amendment rights by considering his 'lack of remorse' when he still had a constitutional right to maintain his innocence and by threatening to impose a harsher sentence if [the defendant] refused to admit his guilt."). Because we find that the district court's reliance on other factors supports the district court's determination that Cassinelli was not likely to be rehabilitated or was not otherwise a good candidate for a program of treatment, we need not address this issue.

likely to be rehabilitated through an alcohol treatment program. Further, the district court's findings that Cassinelli was not likely to be rehabilitated because he lacked humility and did not take accountability for his alcoholism, and that he was not an otherwise good candidate for an alcohol treatment program because of his propensity for violence and disregard for his children's well-being, are supported by the record. Accordingly, we conclude that the district court did not abuse its discretion in declining to assign Cassinelli to an alcohol treatment program.

The plea agreement was not breached and the prosecutor did not engage in misconduct at sentencing

[Headnote 11]

We next turn to whether the prosecutor breached the plea agreement at sentencing and whether the prosecutor's actions amounted to misconduct. Cassinelli claims that the prosecutor committed misconduct during sentencing by advocating for a jail sentence for his conviction on Count II, thereby indirectly recommending a sentence harsher than that agreed upon in the plea agreement. Cassinelli did not object to the prosecutor's argument. We disagree with Cassinelli's claim.

[Headnotes 12, 13]

We review unpreserved claims of prosecutorial misconduct for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Reversal is required if the State has violated either the terms or the spirit of the plea agreement in exercising its right to argue at sentencing. *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986).

The plea agreement in this case provided that the State would not oppose an alcohol treatment program if Cassinelli was eligible for admission into an alcohol treatment program for Count I. The plea agreement allowed the parties to argue their position at sentencing regarding Count II. At sentencing, the prosecutor recommended a program of treatment for Count I and argued for the maximum sentence on Count II, asking the court for 364 days' jail time. The guilty plea agreement expressly allowed for this argument.

Nor did the prosecutor breach the plea agreement with regard to Count I. Although the prosecutor initially made statements regarding the gruesomeness of the crimes involved, the judge interrupted the prosecutor, who proceeded to clarify that his arguments applied to Count II, preventing or dissuading a person from testifying. The prosecutor thereafter limited his argument to the facts relating to that crime. Cassinelli did not object to the prosecutor's argument, and we conclude that he has failed to demonstrate any error, let alone plain error, because the prosecutor's argument did "not explicitly or implicitly undercut the sentencing recommendation." *Sullivan v.*

State, 115 Nev. 383, 389, 990 P.2d 1258, 1262 (1999); *see also Valdez*, 124 Nev. at 1190, 196 P.3d at 477.

Accordingly, we conclude that the State did not breach the spirit of the plea agreement and did not commit misconduct in the manner alleged.

The district court did not err by refusing Cassinelli an opportunity to cross-examine the victim during her impact statement at sentencing

[Headnote 14]

Cassinelli next claims that the district court erred by preventing him an opportunity to cross-examine the victim after her impact statement at sentencing. Specifically, Cassinelli claims error stemming from the district court's actions in explaining the procedure involved in the sentencing. We disagree with Cassinelli's interpretation of the district court's comments, as the record demonstrates that Cassinelli was never expressly prohibited from cross-examining the victim.

[Headnotes 15-17]

We review unobjected-to conduct for plain error. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. NRS 176.015(3)(b) allows a victim to present, at sentencing, a statement that "[r]easonably expresses any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." Where a victim impact statement refers only to "the facts of the crime, the impact on the victim, and the need for restitution," a victim testifying as a witness must be sworn in, "but . . . cross-examination and prior notice of the contents of the impact statement normally are not required." *Buschauer v. State*, 106 Nev. 890, 893-94, 804 P.2d 1046, 1048 (1990). Generally, a defendant will already be aware of the information in the statement and will be able to rebut that information. *Id*. at 894, 804 P.2d at 1048. However, when an impact statement includes references to specific prior acts of the defendant that fall outside the scope of NRS 176.015(3), "due process requires that the accuser be under oath, [and have] an opportunity for cross-examination and . . . reasonable notice of the prior acts which the impact statement will contain" must be provided. *Id*.

Here, the victim prepared an impact statement that was attached to the presentence investigation report. This statement was provided to Cassinelli prior to sentencing. At sentencing, after being sworn in, the victim read aloud to the court the same impact statement that was attached to the presentence investigation report. The impact statement was provided to both the court and Cassinelli well in advance of sentencing, and the statement related the facts of the crimes, addressed the impact of those crimes on the victim and her children, and concluded that five years of probation was not enough time to account for Cassinelli's actions.

Cassinelli did not assert below, nor does he assert on appeal, that cross-examination of the victim was required because the impact statement included allegations of prior acts that were not related to the instant crimes. And, despite receiving an exact copy of the victim impact statement in advance of sentencing, Cassinelli never objected to the statement's contents. Cassinelli also never requested to cross-examine the victim and did not object to her testimony at sentencing.

We conclude, under the circumstances presented, that cross-examination of the victim regarding her impact statement was not required. The statement was limited in accordance with NRS 176.015(3), Cassinelli failed to object to the information in the statement, and Cassinelli never argued that the victim's statements went beyond the crimes involved in this case. We also note that Cassinelli has not shown any prejudice arising from an inability to cross-examine the victim.[8] Therefore, the district court did not err.[9]

The sentence was illegal

[Headnote 18]

Finally, we turn to the question of whether Cassinelli's sentence was illegal. Here, the district court sentenced Cassinelli to serve a prison term of 14-48 months on Count I. On Count II, the gross misdemeanor, the district court sentenced Cassinelli to 364 days of jail, and then the court suspended that sentence and placed Cassinelli on probation for three years. Because the district court ordered the sentence for Count II to run consecutive to Count I, Cassinelli's suspended jail sentence with probation could not occur until after his release from prison on Count I.

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[8]Cassinelli implies, had he been able to cross-examine the victim, he could have undermined the credibility of her statements. However, we note that during sentencing, Cassinelli argued to the district court that the victim only asserted allegations of abuse after she had discovered Cassinelli was involved with another woman, and Cassinelli presented witness testimony that the victim had threatened to "bury [Cassinelli] and take everything he's ever had in his life." Cassinelli was, therefore, able to attack the victim's credibility. Cassinelli has not shown why, under these facts, cross-examination would have yielded a different sentence.

[9]To the extent Cassinelli claims that the district court abused its discretion by denying his motion to continue the sentencing hearing, we reject this claim. Initially, we note that Cassinelli made no formal motion to continue the sentencing. Moreover, to the extent he informally asked for a continuance, the request did not arise in the context of obtaining the transcripts to cross-examine the victim. Further, Cassinelli was given reasonable notice of the contents of the impact statement, and he failed to demonstrate that he did not have an opportunity to obtain the transcripts prior to the sentencing hearing. *See Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010) (stating that a court's decision on a motion for a continuance is reviewed for an abuse of discretion); *see also Buschauer*, 106 Nev. at 894, 804 P.2d at 1048 (indicating that a continuance may be necessary if the impact statement "presents significant facts not previously raised").

Cassinelli argues that his sentence is illegal pursuant to NRS 176A.500(1) because the probationary period exceeds the three-year time period prescribed by the statute for probation on a gross misdemeanor. The State concedes error, and we agree.

NRS 176A.500(1), governing probation and suspension of sentences, provides, "[t]he period of probation or suspension of sentence . . . including any extensions thereof, must not be more than: (a) Three years for a: (1) Gross misdemeanor." Here, the district court sentenced Cassinelli to 14-48 months (or maximum of four years) on Count I. Because Cassinelli's maximum prison sentence is four years on Count I, and the district court sentenced Count II consecutive to Count I, Cassinelli may not be able to begin probation until after he has served four years in prison. This clearly exceeds the three-year limit for a probationary period imposed by NRS 176A.500(1)(a) on a gross misdemeanor.

The Nevada Supreme Court addressed a similar situation in *Wicker v. State*, 111 Nev. 43, 888 P.2d 918 (1995). There, Wicker was convicted of two counts of robbery, rape, and three counts of infamous crime against nature. *Id*. at 44, 888 P.2d at 918. The district court sentenced Wicker to 15 years in prison for robbery and to a consecutive life sentence for rape, as well as to another 15-year term for a second robbery count and three consecutive life sentences for three counts of infamous crime against nature. *Id*. at 44-45, 888 P.2d at 918. The district court suspended the last four sentences and placed Wicker on a five-year probationary period running after parole from prison on the first two sentences. *Id*. at 45, 888 P.2d at 918. Years later, after serving his prison sentence and while on probation, Wicker violated the terms of his probation. Appearing before a different district court judge at his probation revocation hearing, Wicker contested the legality of his original sentence. *Id*. at 45, 888 P.2d at 919. That district court held that Wicker's sentence was illegal pursuant to NRS 176A.500(1). The district court then removed the period of probation and amended Wicker's judgment of conviction and sentence. On appeal, the Nevada Supreme Court affirmed. *Id*.

The court held that former NRS 176.215(1), now codified as NRS 176A.500, prohibited a period of probation or suspension of felony sentences from exceeding five years. *Wicker*, 111 Nev. at 46, 888 P.2d at 919. The court further reasoned that the statute's limitation period prevented district courts from having perpetual jurisdiction over a defendant:

> Moreover, the purpose behind the limitation period in NRS 176.215(1) is to set some sort of time limit on a district court's power over a particular defendant. Under a sentencing scheme such as that imposed . . . the district court could exercise control over a defendant indefinitely, depending upon the number

> and length of sentences the defendant serves before he is granted probation.

Id. at 47, 888 P.2d at 920.

Although Wicker's period of probation on the last four sentences did not exceed five years, the period of suspension did. *Id*. at 45, 888 P.2d at 919. The court held that Wicker's original sentence conflicted with the statute and was illegal because "*at the time Wicker was sentenced*, the last four sentences were inevitably suspended for more than five years." *Id*. at 47, 888 P.2d at 920 (emphasis added).

Since the court decided *Wicker*, our Legislature has changed the criminal sentencing structure. Now, NRS 193.130(1) requires district courts to pronounce both a minimum and maximum term for most felony convictions and forbids the courts from imposing a minimum sentence which exceeds 40 percent of the maximum sentence. *Wicker*, however, is still good law and stands for the proposition that a sentence is illegal at its inception if the sentence's probationary period inevitably exceeds the statutory maximum.[10] *Wicker*, 111 Nev. at 47, 888 P.2d at 920; *see also Edwards v. State*, 112 Nev. 704, 707-08, 918 P.2d 321, 324 (1996) (holding that sentences that exceed the statutory maximum are illegal); *State v. Deal*, 186 P.3d 735, 736 (Kan. 2008); 21 Am. Jur. 2d *Criminal Law* § 764 (Supp. 2015). Therefore, although the structure of sentencing criminal defendants has changed since *Wicker*, the court's rationale still extends to Cassinelli's case.

[Headnote 19]

We hold that if any portion of a defendant's criminal sentence is illegal *at the time of the pronouncement of sentencing*, whether the minimum sentence or the maximum sentence, the entire sentence is illegal. To hold otherwise would force district and appellate courts to engage in speculation regarding whether a facially illegal sentence might become legal at some later time depending on whether or not a defendant is granted parole, and if granted, when that parole may occur in the future. Our holding also prevents district courts from exercising perpetual jurisdiction over a defendant, contrary to the rationale expressed in *Wicker*.[11]

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[10]A majority of jurisdictions further hold that illegal sentences are void. *See, e.g.*, *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995) ("[I]llegal sentences are not subject to the usual requirements of error preservation and waiver. An illegal sentence is one not authorized by statute; it is void." (citations omitted)); *Summers v. State*, 212 S.W.3d 251, 256 (Tenn. 2007) ("A sentence imposed in direct contravention of a statute is void and illegal."); *Rodriguez v. State*, 939 S.W.2d 211, 222 (Tex. Ct. App. 1997) ("If the punishment is not authorized by law, the order imposing punishment is void.").

[11]For this reason, we would caution judges against imposing a consecutive probationary period for one crime after a prison sentence on a different count because the period of suspension of probation may violate the statutory limits.

Here, the district court sentenced Cassinelli to a prison term of 14-48 months for Count I. The district court then imposed a consecutive 364-day jail sentence for Count II, a gross misdemeanor. The district court suspended the jail sentence on Count II, placing Cassinelli on probation for a term of 36 months (or three years). Because the district court ran Count II consecutive to Count I, Cassinelli may not be placed on probation until after his maximum four-year prison sentence runs on Count I. Because NRS 176A.500(1)(a) limits probation for gross misdemeanors to three years, there is a possibility Cassinelli would begin probation after serving his maximum four-year sentence in prison.[12] Therefore the district court violated the statute's limits regarding the term of probation periods, and thus, Cassinelli's sentence on Count II is illegal.

Accordingly, we remand this case for the district court to impose a sentence on Count II that does not violate NRS 176A.500(1)(a). We vacate Cassinelli's sentence on Count II and remand this case for resentencing on Count II only.[13]

CONCLUSION

Cassinelli has failed to show reversible error on the majority of his claims. However, we agree with the parties that Cassinelli's gross misdemeanor sentence for Count II, dissuading a person from testifying, is illegal under NRS 176A.500(1). We therefore vacate that sentence and remand this case for proceedings consistent with this opinion.

GIBBONS, C.J., concurs.

TAO, J., concurring:

Two aspects of the majority opinion warrant further explanation. First, the district court concluded (in its "Order Adjudicating Motion for Election of Treatment," filed June 20, 2014), that, while Cassinelli might have been an alcoholic, he was "not likely to be

[12]We recognize that, in very limited circumstances, the suspension of probation may not exceed the statutory limitation on either the minimum or maximum sentence imposed as a defendant may, for a multitude of reasons, actually receive probation within the time limit set by statute. However, we do not consider those possibilities when determining whether the sentence, as pronounced, violates the statute because to do so would be speculative, rendering any analysis under *Wicker* difficult if not impossible, and would run contrary to Nevada law and policy.

[13]In so doing, we caution the district court to be mindful of the Nevada Supreme Court's language in *Miranda v. State*, wherein the court held that to comply with the Double Jeopardy Clause of the Nevada Constitution, "a district court may correct an illegal sentence by increasing its severity only when necessary to bring the sentence into compliance with the pertinent statute, and a correction that increases sentence severity is 'necessary' only when there is no other, less severe means of correcting the illegality." 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998).

rehabilitated through treatment" under NRS 458.300 because his underlying problem was not alcoholism but rather a propensity for violence. Among other things, the district court found the following:

> While alcohol played a role in the crimes committed by Defendant, more significant is the propensity of the Defendant to commit acts of domestic violence, acts of sexual perversion on an unwilling partner, violent acts with the use of firearms and little regard for his own children witnessing such acts. Such behavior is not likely to be corrected by alcohol rehabilitation.

I am inclined to agree with the sentencing court's characterization of Cassinelli's personality based upon the sentencing transcript and the abhorrent acts Cassinelli committed against the mother of his children. But I am not sure that the district court's analysis represents a precisely correct application of NRS 458.320. NRS 458.320 permits a sentencing court to deny participation in a treatment program if the court finds that the defendant is not likely to be "rehabilitated" through the program. But the way I read the plain text of NRS 458.320, "rehabilitation" refers to rehabilitation from alcoholism, not rehabilitation from crime, because the treatment program established by NRS 458.300 is one for the "treatment for the abuse of alcohol or drugs," not treatment for general criminal behavior or violent tendencies.

In this case, this distinction makes no difference to the outcome of this appeal because the statute gives the sentencing court wide latitude to deny participation to anyone who "is otherwise not a good candidate" for the program. NRS 458.320(2). Thus, the district court properly concluded that, even if a defendant is a good candidate for rehabilitation from alcoholism, the criminal sentence imposed upon him need not include participation in a treatment program if his alcoholism was not the driving force behind his criminal behavior.[1] Consequently, the district court did not err in its ultimate conclusion. As a matter of better practice, however, had the district court found that Cassinelli could potentially be rehabilitated from his alcoholism but that he was not otherwise a good candidate for treatment because alcohol was not the driving force behind the violent crime he committed, its findings would have more closely mirrored the words of the statute and the intention of the Legislature.

My second concern arises from the district court's conclusion that Cassinelli failed to "demonstrate any humility necessary for treat-

[1]In fact, the "otherwise not a good candidate" language was specifically inserted into NRS 458.320(2), *see* A.B. 413, 64th Leg. (Nev. 1987), in response to concerns that, as previously written without this language, the statute could be read to require sentencing judges to allow participation in alcohol treatment so long as the defendant was an alcoholic even if alcohol had nothing to do with the crime.

ment." The problem here is that Cassinelli pleaded guilty by way of *North Carolina v. Alford*, 400 U.S. 25 (1970). The defining characteristic of an *Alford* plea is that, by entering one, a defendant waives his right to proceed to trial and contest the charges against him, but exercises his Fifth Amendment privilege not to incriminate himself by admitting factual guilt. *Id*. at 35-39. Both the United States Supreme Court and the Nevada Supreme Court have made clear that a district court cannot impose a "harsher sentence" based upon a defendant's refusal to either admit guilt or show remorse when the defendant's plea was by way of *Alford* because doing so violates the defendant's Fifth Amendment privilege against self-incrimination and constitutes an abuse of the sentencing court's discretion. *See Brown v. State*, 113 Nev. 275, 291, 934 P.2d 235, 245 (1997); *see also Mitchell v. United States*, 526 U.S. 314, 327-28 (1999) (sentencing court cannot draw any adverse inference from a defendant's choice to stand silently at sentencing).

Yet, as the majority correctly notes, within the field of psychology generally, and within the field of substance abuse treatment specifically, expressions of humility and overt admissions of guilt are frequently considered prerequisites for admission into treatment programs. Thus, in the absence of a more detailed explanation than that provided in footnote 7 of the majority opinion, the district court's findings could potentially be construed by anyone not familiar with this area of the law to have improperly denied Cassinelli access to such a program because he chose to plead guilty by way of *Alford*, thereby receiving a more severe punishment based upon the exercise of a constitutional right. Therefore, I write to supply additional clarification as well as future guidance to district courts tasked with making sentencing determinations involving NRS 458.300.

As I noted, a court cannot impose a harsher or more severe sentence upon a defendant for exercising a valid constitutional right, including rights specifically reserved when the defendant pleads guilty by way of *Alford*. *See Thomas v. State*, 99 Nev. 757, 758, 670 P.2d 111, 112 (1983) (holding that imposing harsher sentence after trial on defendant who refused to admit guilt was an abuse of discretion because defendant retained Fifth Amendment right to refuse to incriminate himself while appeal was pending and new trial was still a possibility). Whether the district court did that in this case depends upon whether refusing to permit Cassinelli to participate in a treatment program and sending him to prison instead constitutes a more severe sentence, or merely a refusal to grant leniency to which Cassinelli was not otherwise entitled.

The Nevada Supreme Court has held that the denial of probation based upon a defendant's exercise of his right to refuse to admit guilt was not an abuse of discretion because "[p]robation is a benefit provided by the Legislature in certain sex offense cases only if defendants demonstrate they are not a menace to the health, safety, or morals of others." *Dzul v. State*, 118 Nev. 681, 692, 56 P.3d 875,

882 (2002). In reaching that conclusion, the court distinguished between, on the one hand, a mere denial of benefits or refusal to grant an act of leniency, and on the other hand, the imposition of a penalty such as a longer sentence of years. Citing a series of federal cases, the court noted that while a sentencing court is constitutionally entitled to refuse to grant leniency in response to a defendant's exercise of a constitutional right, it could not impose a harsher penalty for doing so. *Id*. at 692-93, 56 P.3d at 882-83. Because criminal defendants are not entitled to receive probation, but may be granted it as an act of leniency by the sentencing court, no constitutional error occurs if a court decides not to grant probation to a defendant who refuses to admit guilt. *Id*. at 693, 56 P.3d at 883 ("[W]e conclude that probation is a form of leniency.").

In this case, whether the district court erred in refusing to allow Cassinelli to participate in an alcohol treatment program due to his lack of remorse depends upon whether such refusal represented imposition of a penalty or a mere denial of leniency or a benefit. This, in turn, depends upon whether the consequences for a constitutional invocation operate to deprive a defendant of something to which he is entitled or rather to simply refuse to give him something to which he is not otherwise independently entitled. Two contrasting cases are illustrative. In *Minnesota v. Murphy*, 465 U.S. 420, 422-23 (1984), the Supreme Court held that a probation officer could not revoke a defendant from probation for refusing to confess to a crime where the defendant was statutorily entitled to remain on probation absent proof of a violation. In *Doe v. Sauer*, 186 F.3d 903, 906 (8th Cir. 1999), another court held that an inmate's privilege against self-incrimination was not violated when his parole was denied because he refused to participate in a rehabilitation program that required him to admit guilt because parole is a benefit that involves relief from a penalty that has already been imposed.

In *Dzul*, the Nevada Supreme Court adopted this benefit/penalty analysis. 118 Nev. at 692, 56 P.3d at 882 ("We find the benefit/penalty analysis persuasive."). Applying this test to the facts of the instant case, it appears clear that participation in an alcohol treatment program under NRS 458.300 is a benefit, and refusal to allow participation is not a penalty. The reasons for this are fairly obvious from the plain text of the statute. As an initial observation, under NRS 458.350, the State is not even required to establish any facility for treatment. NRS 458.350 ("The provisions of NRS 458.290 to 458.350, inclusive, do not require the State or any of its political subdivisions to establish or finance any facility for the treatment of abuse of alcohol or drugs."). It should be self-evident that if the State is not required to establish a treatment program, a defendant is not entitled to enroll in one. Furthermore, even if one has been established, the statute provides that even if the sentencing court deems a defendant worthy of treatment, he must still be separately accepted by the facility. NRS 458.320(6) ("No person

may be placed under the supervision of a facility under this section unless the facility accepts the person for treatment."). Thus, no right to participate in a program is guaranteed because participation can be denied by people or entities other than the sentencing judge. Consequently, it appears clear to me that refusing to permit a defendant to participate in such a program constitutes the denial of a benefit to which he is not independently entitled, rather than the imposition of a penalty. Accordingly, I agree with the majority that the district court did not abuse its discretion by refusing to allow Cassinelli to enter such a program in part because he would not confess his guilt or display humility in this case.

THE STATE OF NEVADA, Appellant, *v.*
TERRANCE REED SMITH, Respondent.

No. 66117

September 3, 2015 356 P.3d 1092

Appeal from a district court order granting a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Petitioner sought post-conviction habeas corpus relief, alleging that his no-contest plea to one count of child abuse resulting in substantial bodily harm was coerced by Department of Social Services (DSS). The district court partially granted the petition. The State appealed. The supreme court held that the district court did not abuse its discretion in finding that DSS's action of conditioning its consent to return of child to both physical and legal custody of petitioner's wife on petitioner's incarceration amounted to coercion that rendered no-contest plea involuntary.

Affirmed.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Jennifer P. Noble*, Deputy District Attorney, Washoe County, for Appellant.

Richard F. Cornell, Reno, for Respondent.

1. Criminal Law.
   A no-contest plea is presumed valid, and defendant bears the burden of demonstrating that such a plea was not entered into knowingly, voluntarily, and intelligently.
2. Criminal Law.
   The supreme court presumes that the lower court correctly assessed the validity of a challenged plea and will not reverse the lower court's determination absent a clear showing of an abuse of discretion.

3. Criminal Law.
   An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.
4. Criminal Law.
   The district court did not abuse its discretion in finding that Department of Social Services' action of conditioning its consent to return of child to both physical and legal custody of defendant's wife, who was child's mother, on defendant's incarceration amounted to coercion that rendered involuntary defendant's no-contest plea to child abuse resulting in substantial bodily harm.
5. Criminal Law.
   In a post-conviction proceeding, it is the province of the district court to weigh the evidence and state the facts as it found them.
6. Criminal Law.
   The supreme court defers to factual findings of the district court.

Before Saitta, Gibbons and Pickering, JJ.

OPINION[1]

Per Curiam:

Terrance Smith pleaded no contest to one count of child abuse resulting in substantial bodily harm. The State argues that the district court abused its discretion when it found that the actions of the Washoe County Department of Social Services (DSS) coerced Smith into pleading no contest. We conclude that the district court did not abuse its discretion in concluding that those actions amounted to coercion and that Smith's no-contest plea was therefore involuntary.

FACTS AND PROCEDURAL HISTORY

Smith's two-month-old daughter suffered a spiral fracture of her femur on November 30, 2010, purportedly while in Smith's care. Smith has always maintained his innocence of child abuse, but DSS concluded that Smith broke the leg in an act of child abuse and sought and obtained legal custody over the infant. Smith's wife often had physical custody of their daughter, but at times DSS sought and/or obtained physical custody of the infant and placed her in foster care. As noted in the district court order partially granting Smith's habeas petition, DSS indicated that it would consent to returning both physical and legal custody to Smith's wife but that doing so "was solely dependent upon [Smith's] incarceration." Indeed, after Smith was sentenced to prison in May 2012, DSS closed the case and returned legal and physical custody of the infant to Smith's wife.

[1]We originally affirmed the judgment of the district court in an unpublished order filed on April 15, 2015. Smith subsequently moved for publication of our disposition as an opinion. *See* NRAP 36(f). Cause appearing, we grant the motion and issue this opinion in place of our prior unpublished order.

Smith filed a timely post-conviction petition for a writ of habeas corpus in which he argued that he should be allowed to withdraw his no-contest plea because it was coerced and thus not voluntary. Based on the facts above, the district court concluded that Smith was coerced into pleading no contest and issued an order partially granting the petition, directing the judgment of conviction and sentence be set aside, and concluding that he be allowed to withdraw his no-contest plea. The State appeals.

DISCUSSION

[Headnotes 1-3]

The State argues on appeal that the district court abused its discretion when it found that DSS's legal, constitutional actions amounted to coercion and concluded that Smith was entitled to withdraw his plea. A no-contest plea is presumed valid, and Smith bore the burden below of demonstrating that it was not entered into knowingly, voluntarily, and intelligently. *See Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), *limited on other grounds by Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994); *see also State v. Lewis*, 124 Nev. 132, 133 n.1, 178 P.3d 146, 147 n.1 (2008) (noting that a no-contest plea is equivalent to a guilty plea insofar as how the court treats a defendant). We "presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion." *Bryant*, 102 Nev. at 272, 721 P.2d at 368. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[Headnotes 4-6]

The State first argues that the district court ignored important facts regarding Smith's behavior and compliance with DSS and regarding DSS's intent to protect the child. In a post-conviction proceeding, it is the province of the district court to weigh the evidence and state the facts as it found them. *See Bryant*, 102 Nev. at 272, 721 P.2d at 367-68 (noting the factual nature of an invalid-plea claim and that it is "the duty of the trial court to review the entire record to determine whether the plea was valid"). And this court defers to factual findings of the district court. *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). The district court received the evidence to which the State refers yet still came to the findings to which the State objects. The State points to nothing to suggest that the district court ignored the evidence and has thus not demonstrated that the decision constituted an abuse of discretion.

The State next argues that the plea was not coerced just because it was motivated by a desire to avoid a more serious consequence.

The district court specifically found, however, that there was no evidence to support the theory that Smith entered the no-contest plea to avoid a greater charge or to get a lesser penalty. Rather, the district court found that Smith's plea was motivated by the "unique" circumstances of DSS's "inflexible," "unyielding," and "uncompromising" position in his family court case. The district court's findings are supported by the record, and accordingly, were not an abuse of discretion.

The State finally argues that nothing about DSS's actions were unconstitutional and implies that constitutional, lawful actions of an agency cannot amount to coercion. In support, the State cites only to *Iaea v. Sunn*, 800 F.2d 861 (9th Cir. 1986), but that case tends to support the opposite conclusion. The defendant in *Iaea* argued that his guilty plea was coerced by a threat from his brother to withdraw bail and a threat from his counsel to withdraw from the case if he took it to trial. *Id.* at 866-67. The United States Court of Appeals for the Ninth Circuit observed that voluntariness is determined based on an examination of the totality of the circumstances and, therefore, "[w]hen a guilty plea is challenged as being the product of coercion, [the court's] concern is not solely with the subjective state of mind of the defendant, but also with the constitutional acceptability of the external forces inducing the guilty plea." *Id.* at 866. The reference to the "constitutional acceptability of the external forces inducing the guilty plea" does not relate to the constitutionality of the external forces in isolation but instead relates to whether the external forces, such as promises or threats, deprived the plea of the nature of a voluntary act, making the plea involuntary. *See id.* at 866-67. This is reflected in the Ninth Circuit's decision to remand in *Iaea* for the federal district court to determine whether the threats were made and, if so, to consider their coercive impact on the voluntariness of the plea, without finding that either challenged action was unconstitutional. *Id.* at 867-68. *Iaea* thus suggests that actions that may be lawful and constitutional can nevertheless be unduly coercive and thereby render a plea involuntary. The State has therefore failed to demonstrate that the district court abused its discretion in partially granting the petition. We therefore affirm.[2]

[2]The State takes issue with Smith's argument below that his plea was similar to package plea deals where a defendant pleads guilty in order to benefit a third party. The State argues that the two situations are not analogous. As the district court did not base its decision on Smith's analogy, the State's argument need not be addressed.

ANIKA FRAZIER, Individually; and RANDY KEYS, Individually, Appellants, *v.* PATRICK DRAKE, Individually; and MS CONCRETE COMPANY, INC., Respondents.

No. 61775

September 3, 2015 357 P.3d 365

Appeal from a district court judgment on a jury verdict in a personal injury action. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Automobile driver and passenger brought personal injury action against driver of truck that rear-ended their automobile and against driver's employer. The district court entered judgment on jury verdict for defendants and awarded attorney fees and costs to defendants. Plaintiffs appealed. The court of appeals held that: (1) sudden-emergency instruction was warranted by evidence that bee flew into truck's cabin and landed on driver's eye, (2) evidence supported finding that truck driver acted as a reasonably prudent person, (3) defendants were not entitled to award of attorney fees based on plaintiffs' rejection of offer of judgment, and (4) the district court was required to justify amount of expert fees awarded to defendants.

Affirmed in part, reversed in part, and remanded.

Greenman Goldberg Raby & Martinez and *Aubrey Goldberg*, Las Vegas; *Walsh & Friedman, Ltd.*, and *Robert J. Walsh*, Las Vegas, for Appellants.

Hall Jaffe & Clayton, LLP, and *Steven T. Jaffe* and *Ashlie L. Surur*, Las Vegas, for Respondents.

1. Negligence.

   One defense to a negligence claim is the sudden emergency doctrine, which allows a defendant to argue nonnegligence insofar as being confronted with a sudden emergency that did not arise due to defendant's own negligence and that defendant acted as a reasonably prudent person would upon being confronted with that emergency.

2. Negligence.

   For a sudden emergency instruction to be warranted, sufficient evidence must be presented demonstrating that a party was suddenly placed in a position of peril through no fault of his or her own and that the party responded to that emergency as a reasonably prudent person would; additionally, the emergency must have directly affected the party seeking the instruction, rather than another party involved in the incident, even if the emergency resulted in indirect consequences for the party seeking the instruction.

3. Automobiles.

   When a sudden emergency instruction is sought in the context of a motor vehicle accident case, evidence must be presented demonstrating that the asserted emergency involved something more than the typical hazards drivers should expect to encounter in the regular course of operating

a vehicle, such as the sudden appearance of obstacles or people, crowded intersections, or sudden stops.

4. Automobiles; Evidence.
   A sudden emergency instruction was warranted by evidence that bees flew into truck's cabin and that one bee landed on driver's eye; there was expert testimony that driver was unable to focus on stopping or avoiding a collision until bee was no longer in his eye, driver did nothing to cause appearance of bees in cabin, and bees flying into vehicle with one bee landing on driver's eye constituted more than an ordinary driving hazard.
5. Automobiles; Evidence.
   Evidence was sufficient to permit jury to find that truck driver acted as a reasonably prudent person would have acted by failing to apply brakes during emergency occurring when bees flew into cabin of truck with one bee landing on driver's eye; there was expert testimony that driver's brain would have focused all of its attention on dealing with bee, such that driver could not focus on stopping or avoiding a collision until bee was no longer in his eye.
6. Costs.
   When determining whether to award attorney fees based on a rejected offer of judgment, the district court must evaluate the *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. NRS 17.115(4)(d)(3); NRCP 68(f)(2).
7. Costs.
   When determining whether to award attorney fees based on a rejected offer of judgment, the district court should give appropriate consideration to the *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), factors, as none are outcome determinative. NRS 17.115(4)(d)(3); NRCP 68(f)(2).
8. Appeal and Error.
   When a district court properly evaluates the factors to be used in determining whether to award attorney fees based on a rejected offer of judgment, its decision will not be disturbed absent a clear abuse of discretion; such an abuse occurs when the district court's evaluation of the relevant factors is arbitrary or capricious. NRS 17.115(4)(d)(3); NRCP 68(f)(2).
9. Costs.
   Defendants were not entitled to award of attorney fees based on plaintiffs' rejection of offer of judgment, even though defendants prevailed at trial and even though amount of fees requested by defendants was reasonable, where the district court had determined that plaintiffs' decisions to reject defendants' offers were neither unreasonable nor made in bad faith. NRS 17.115(4)(d)(3); NRCP 68(f)(2).
10. Costs.
    When the district court determines that the three good-faith factors weigh in favor of the party that rejected the offer of judgment, the reasonableness of the fees requested by the offeror becomes irrelevant and cannot, by itself, support a decision to award attorney fees to the offeror. NRS 17.115(4)(d)(3); NRCP 68(f)(2).
11. Appeal and Error.
    A district court's decision to award more than $1,500 in expert witness fees to a prevailing party is reviewed for an abuse of discretion. NRS 18.005(5).

12. Costs.
    For expert fees to be recoverable by a prevailing party, any requested costs must have been actually incurred. NRS 18.005(5).
13. Costs.
    Any award of expert witness fees to a prevailing party in excess of $1,500 per expert must be supported by an express, careful, and preferably written explanation of the district court's analysis of factors pertinent to determining the reasonableness of the requested fees and whether the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee. NRS 18.005(5).
14. Costs.
    In evaluating requests for an award of expert fees over $1,500 to a prevailing party, district courts should consider: the importance of the expert's testimony to the party's case; the degree to which the expert's opinion aided the trier of fact in deciding the case; whether the expert's reports or testimony were repetitive of other expert witnesses; the extent and nature of the work performed by the expert; whether the expert had to conduct independent investigations or testing; the amount of time the expert spent in court, preparing a report, and preparing for trial; the expert's area of expertise; the expert's education and training; the fee actually charged to the party who retained the expert; the fees traditionally charged by the expert on related matters; comparable experts' fees charged in similar cases; and, if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held. NRS 18.005(5).
15. Costs.
    The resolution of requests for expert fees in excess of $1,500 to a prevailing party will necessarily require a case-by-case examination of appropriate factors. NRS 18.005(5).
16. Costs.
    In awarding expert fees of over $1,500 to prevailing party, the district court was required to explain how it determined that $10,000 constituted a reasonable fee for four of the five experts, why it deemed the $7,400 fee requested for the fifth expert reasonable, and how it determined that circumstances surrounding experts' testimony were of such necessity as to require larger fees. NRS 18.005(5).

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

OPINION

Per Curiam:

This matter arises from a personal injury action initiated by appellants following a motor vehicle accident in which their vehicle was rear-ended by a semitrailer truck driven and owned by respondents. A jury trial of appellants' claims resulted in a verdict in respondents' favor, and the district court later denied appellants' motion for a new trial. The district court further awarded respondents attorney fees and costs, the latter of which included an award of expert witness fees.

In this appeal, we are presented with two novel issues. First, we must determine whether a district court abuses its discretion in awarding attorney fees when parties fail to improve upon rejected offers of judgment at trial, but the district court concludes that all of the *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), factors other than the reasonableness of the requested fees favor the parties who rejected the offers of judgment. Second, we address the considerations that a district court must weigh in deciding whether to award expert witness fees as costs in excess of NRS 18.005(5)'s $1,500 per-expert presumed maximum and, if such an award is to be made, in determining what amount constitutes a reasonable award beyond this statutory ceiling.

Before reaching these issues, however, we must first evaluate whether the district court properly instructed the jury on sudden emergencies. The three sudden emergency instructions at issue here all stated that the jury could find that respondents were not negligent if they were suddenly placed in a position of peril through no fault of their own and acted as reasonably prudent people would upon being confronted with that emergency. We must also determine if a new trial was warranted because the jury disregarded instructions regarding the applicable standard of care. Because evidence was presented indicating that bees flew into the cabin of respondents' truck, and one bee landed on the eye of the driver, these facts could allow the jury to infer that a sudden emergency occurred and that respondents were not negligent. Thus, the district court did not abuse its discretion by giving the sudden emergency jury instructions. We further conclude that the jury's verdict does not demonstrate that the jury disregarded the given instructions. We therefore affirm the judgment on the jury verdict and the denial of appellants' motion for a new trial.

Turning to the award of attorney fees, the reasonableness of the fees requested cannot, by itself, outweigh the other three *Beattie* factors. As a result, we conclude the court abused its discretion by awarding attorney fees to respondents based on the rejected offers of judgment, and we reverse that award. Finally, with regard to the expert witness fees award, we note that the Nevada Supreme Court has provided only limited guidance on this issue. Thus, we adopt factors to guide the district courts in assessing the reasonableness of such requests and whether the circumstances surrounding the expert's testimony require an award in excess of NRS 18.005(5)'s per-expert presumptive maximum. Here, the district court provided only limited justification for its decision to award expert witness fees in excess of $1,500 per expert and offered no explanation for how it arrived at the amount of expert witness fees awarded. We therefore reverse the award of expert witness fees as costs and remand this

matter to the district court for further proceedings consistent with this opinion.

BACKGROUND

Respondent Patrick Drake was an employee of respondent MS Concrete Company, Inc. On the day of the incident, Drake was driving an MS Concrete semitrailer truck on a major road in North Las Vegas. As he was driving, bees flew into the truck's cabin,[1] and one bee purportedly landed on his eye. While Drake attempted to remove the bee from his eye, he failed to observe a stoplight and rear-ended appellants Anika Frazier and Randy Keys, whose vehicle was stopped at the light. Frazier and Keys (collectively referred to as Frazier, except where the context requires otherwise) suffered injuries in the accident and subsequently initiated the underlying personal injury action against Drake and MS Concrete (collectively referred to as Drake).

Approximately one month before trial, and nearly three years after the complaint was filed, Drake made an offer of judgment to each appellant pursuant to NRCP 68 and NRS 17.115. Frazier and Keys each rejected the offers, which were for $50,001 and $70,001, respectively.

During the trial, Drake presented his defense that the bee landing on his eye constituted a sudden emergency rendering him unable to avoid the accident. Based on this defense, Drake sought to have the jury instructed that, if it found that the bee landing on his eye constituted a sudden emergency, he only had a duty of care equal to that of a reasonable person faced with the same situation. Over Frazier's objections, the court instructed the jury on sudden emergencies,[2] and the jury ultimately found in favor of Drake. Frazier then moved for a new trial, arguing that the sudden emergency instructions should not have been given and that the jury ignored the court's instruction regarding Drake's standard of care in reaching its verdict. Drake opposed this motion, which the district court ultimately denied.

In addition, Drake moved for attorney fees and costs, citing Frazier's and Keys' failure to improve upon the offers of judgment at trial and Drake's status as a prevailing party. Drake's motion sought both general costs and $107,635.73 in fees for five expert witnesses. Frazier opposed the motion, arguing that awarding attorney fees was not proper under the *Beattie* factors and that the requested costs, particularly the expert witness fees, were excessive. Ultimately, the district court granted Drake's motion in part. Despite finding that

[1]According to Drake, numerous bees flew into the cabin of the truck. After the accident, a responding police officer noted a few dead bees on the truck's front grill as well as one live bee inside the cabin.

[2]Frazier does not challenge the substance of these instructions on appeal, and thus, they are not reproduced within this opinion.

three of the four *Beattie* factors weighed in favor of Frazier, the district court nonetheless awarded Drake all of his requested attorney fees. The court also awarded Drake his general costs but reduced the award for expert witness fees as costs to $47,400, as it found some of the fees to be unreasonable and excessive. In total, the court awarded Drake $144,808.59 in attorney fees, general costs, and expert witness fees. Following the entry of judgment on the jury verdict, this appeal followed.[3]

ANALYSIS

Our examination of the issues presented in this appeal begins with Frazier's challenges to the judgment on the jury verdict and the denial of her new trial motion, which focus on the district court's decision to give the three sudden emergency jury instructions, and her argument that the jury disregarded the standard of care instructions. We then turn to Frazier's challenge to the award of attorney fees to Drake, based on Frazier's and Keys' rejections of the offers of judgment. Lastly, we conclude by addressing the award of expert witness fees to Drake.

District court decisions regarding whether to give a particular jury instruction, grant a new trial motion, and award attorney fees and costs are reviewed for an abuse of discretion. *Wyeth v. Rowatt*, 126 Nev. 446, 464, 244 P.3d 765, 778 (2010) (jury instructions); *Ringle v. Bruton*, 120 Nev. 82, 94, 86 P.3d 1032, 1040 (2004) (new trial motions); *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000) (attorney fees); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) (costs). While the abuse of discretion standard is generally deferential, the reviewing court will not defer to a district court decision that is based on legal error. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

Sudden emergency instructions

Frazier first challenges the district court's decision to give the jury three sudden emergency instructions. In particular, she contends the sudden emergency doctrine should not have been applied because Drake created or contributed to the emergency by failing to apply his brakes when the bees flew in his cab window. In response, Drake argues the sudden emergency instructions were proper because the bees flying in his window, and particularly one bee landing on his eye, created a sudden emergency that prevented him from avoiding the collision.

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[3]The orders denying Frazier's new trial motion and awarding Drake attorney fees and costs were entered before the judgment on the jury verdict and are thus before us as interlocutory orders challenged in the context of Frazier's appeal from the district court judgment. *See Consol. Generator–Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

[Headnote 1]

In an ordinary negligence action, a plaintiff must demonstrate, among other things, that the defendant breached a duty of care owed to the plaintiff. *DeBoer v. Senior Bridges of Sparks Family Hosp., Inc.*, 128 Nev. 406, 412, 282 P.3d 727, 732 (2012). Under a general negligence standard, a party who owed a duty of care must "exercise reasonable care to avoid foreseeable harm" to the party to whom that duty is owed. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 464, 168 P.3d 1055, 1065 (2007). One defense to a negligence claim is the sudden emergency doctrine, which allows a defendant to argue he was not negligent insofar as he was confronted with a sudden emergency that did not arise due to his own negligence and he acted as a reasonably prudent person would upon being confronted with that emergency. *See generally Posas v. Horton*, 126 Nev. 112, 228 P.3d 457 (2010).

In *Posas*, the Nevada Supreme Court discussed the circumstances under which the sudden emergency doctrine may be applied. *See id.* In addressing this issue, the *Posas* court recognized that "a sudden emergency occurs when an unexpected condition confronts a party exercising reasonable care." *Id.* at 115, 228 P.3d at 459 (citing 57A Am. Jur. 2d *Negligence* § 198 (2004)). Thus, when a party's negligence is what caused the emergency, that party's exercise of reasonable care after the emergency arose will not preclude his liability for the negligent conduct that created the emergency. *Id.* (citing Restatement (Second) of Torts § 296 (1965)).

[Headnotes 2, 3]

For a sudden emergency instruction to be warranted, sufficient evidence must be presented demonstrating that a party was suddenly placed in a position of peril through no fault of his own and that he responded to that emergency as a reasonably prudent person would. *Id*. Additionally, the emergency must have directly affected the party seeking the instruction, rather than another party involved in the incident, even if the emergency resulted in indirect consequences for the party seeking the instruction. *See id*. at 118, 228 P.3d at 461 (concluding that a pedestrian walking into the street in front of a car was not a sudden emergency for the driver of a second car who was following too closely and hit the first car when it stopped short to avoid hitting the pedestrian). Finally, when a sudden emergency instruction is sought in the context of a motor vehicle accident case, evidence must be presented demonstrating that the asserted emergency involved something more than the typical hazards drivers should expect to encounter in the regular course of operating a vehicle, such as the sudden appearance of obstacles or people, crowded intersections, or sudden stops. *Id.* at 117, 228 P.3d at 460.

[Headnote 4]

In challenging both the judgment on the jury verdict and the denial of her new trial motion, Frazier asserts the sudden emergency

doctrine did not apply in this case because Drake caused the emergency situation by failing to apply the brakes while removing the bee from his eye. Frazier's argument suggests the failure to brake and the resulting collision constituted the sudden emergency. The emergency asserted by Drake, and recognized by the district court in its jury instructions, however, was not Drake's failure to apply the brakes, but instead, was the entrance of the bees into the truck cabin and, particularly, the proximity of one of those bees to Drake's eye.

To that end, during trial, Drake presented evidence indicating that bees flew into the cabin of his truck shortly before the accident occurred and that one of the bees landed on his eye. He further presented expert testimony indicating that, when people are confronted with an emergency, their brain focuses all of its attention on dealing with the emergency until it is resolved, such that Drake's brain would respond to a bee landing on his eye as an emergency and would "lock[ ] into dealing just with that trauma." The expert concluded that, under these circumstances, Drake was unable to focus on stopping or avoiding a collision with Frazier's car until the bee was no longer in his eye.

Moreover, Frazier does not contend that Drake did anything to cause the appearance of the bees in the cabin or that he otherwise acted negligently prior to their entry into the cabin. And to the extent Frazier's arguments can be read as suggesting that bees flying into a vehicle, with one bee landing on the driver's eye, constitute the sort of typical driving hazard that would preclude application of the sudden emergency doctrine, relevant authority supports the conclusion that these circumstances would constitute more than an ordinary driving hazard. *See id.* at 115 n.5, 228 P.3d at 459 n.5 (noting that other courts have given sudden emergency instructions based on, among other things, dust clouds, dense patches of fog, an unexpected brake failure, and a stopped vehicle without hazard lights activated at night).

Based on the foregoing, we conclude Drake presented sufficient evidence to allow the jury to determine that, through no fault of his own, Drake was directly placed in a position of peril beyond the ordinary hazards of driving and responded to that situation as a reasonably prudent person would. *See id.* at 115, 228 P.3d at 459. Under these circumstances, we will not disturb the jury verdict based on the district court's decision to instruct the jury regarding the law on sudden emergencies.[4] *Id.*; *Wyeth*, 126 Nev. at 464, 244 P.3d at 778 (stating that a party is entitled to have the jury instructed on its

[4]Frazier also contends that giving three separate sudden emergency instructions was improper because doing so had the effect of directing the jury to find that a sudden emergency occurred. As Frazier provides no authority to support this position, however, we decline to consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that the court need not address issues not cogently argued or supported by relevant authority).

theory of the case so long as that theory is supported by the evidence and that the district court's decision to give a particular jury instruction will not be overturned absent an abuse of discretion or judicial error). For the same reasons, we determine the district court did not abuse its discretion in refusing to grant a new trial on these grounds. *See Ringle*, 120 Nev. at 94, 86 P.3d at 1040 (reviewing a district court's resolution of a new trial motion for an abuse of discretion).

Disregard of jury instructions

Frazier next argues the district court abused its discretion by not granting a new trial based on the jury's alleged disregard of the court's instructions regarding the applicable standard of care. The Nevada Supreme Court has held that, when a party seeking a new trial argues that the jury manifestly disregarded its instructions under NRCP 59(a)(5),[5] the district court is obligated to grant the new trial motion "if the jury could not have reached the verdict that it reached if it had properly applied the district court's instructions." *Paul v. Imperial Palace, Inc.*, 111 Nev. 1544, 1550, 908 P.2d 226, 230 (1995); *see also Carlson v. Locatelli*, 109 Nev. 257, 261, 849 P.2d 313, 315 (1993) (concluding that " '[t]his basis for granting a new trial may only be used if the jury, as a matter of law, could not have reached the conclusion that it reached' " (quoting *Brascia v. Johnson*, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989))).

[Headnote 5]

Regarding Drake's duty of care, the jury was instructed that a driver has a duty to decrease his speed as necessary to avoid colliding with another vehicle and that, if the jury found Drake violated this duty, it "should then consider the issue of whether that was negligence and was a proximate and legal cause of injury or damage to the plaintiff." The sudden emergency instructions, however, allowed the jury to find Drake was not negligent if it concluded that he was confronted with a sudden emergency not caused by his own negligence and that he acted as any reasonably prudent person would when faced with a similar emergency.

Taking the sudden emergency instructions into account, Frazier contends a reasonably prudent person would have applied the brakes under the circumstances faced by Drake. In this regard, Frazier points to testimony by three witnesses asserting that they experienced having bees in their cars and that they either rolled down the window, allowing the bees to escape, or applied their brakes and pulled the car over until the bees flew out of the car. But as Drake points out, none of these witnesses testified that a bee had landed

[5]NRCP 59(a)(5) provides that the district court may grant a new trial if there was a "[m]anifest disregard by the jury of the instructions of the court" that materially affected a party's substantial rights.

on their face or on their eye. Moreover, Drake presented expert testimony indicating that, when the bee landed on his eye, his brain would have focused all of its attention on dealing with the bee, such that he could not focus on stopping or avoiding a collision with Frazier's car until the bee was no longer in his eye.

Based on this evidence, the jury could have found that, when faced with the sudden emergency of a bee in his eye, Drake acted as a reasonably prudent person would act under the same circumstances. *See Posas*, 126 Nev. at 115, 228 P.3d at 459. Thus, it cannot be said that the jurors did not follow the district court's instructions when they found for Drake. *See id.*; *see also Krause Inc. v. Little*, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001) (holding that jurors are presumed to follow the district court's instructions). Accordingly, because Frazier cannot demonstrate that, as a matter of law, the jury could not have reached a verdict in Drake's favor without manifestly disregarding its instructions, the district court properly denied Frazier's request for a new trial on this basis. *See Paul*, 111 Nev. at 1550, 908 P.2d at 230; *Carlson*, 109 Nev. at 261, 849 P.2d at 315. Having determined that the jury instructions and the denial of the motion for a new trial were proper, we now turn our attention to Frazier's arguments regarding the district court's awards of attorney fees and expert witness fees as costs to Drake.

Attorney fees

Under NRCP 68 and NRS 17.115,[6] either party may make an offer of judgment and serve it on another party to the case at least ten days before trial. If the party to whom the offer is made rejects it and then fails to obtain a more favorable judgment at trial, the district court may order that party to pay the offeror "reasonable attorney fees." NRCP 68(f)(2); NRS 17.115(4)(d)(3). Although the decision to award such fees lies within the district court's discretion, the Nevada Supreme Court has emphasized that, while Nevada's offer of judgment provisions are designed to encourage settlement, they should not be used as a mechanism to unfairly force plaintiffs to forego legitimate claims. *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

[Headnotes 6, 7]

To that end, in *Beattie*, the Nevada Supreme Court held that, when determining whether to award attorney fees based on a rejected offer of judgment, the district court is to evaluate

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[6]NRS 17.115 has been repealed by the 78th Nevada Legislature effective October 1, 2015. A.B. 69, 78th Leg. (Nev. 2015). Because the statute was in effect at the time the award of attorney fees and costs was made, however, we nonetheless consider the parties' NRS 17.115-based arguments to the extent that they are properly before us.

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

Id. Notably, the first three factors all relate to the parties' motives in making or rejecting the offer and continuing the litigation, whereas the fourth factor relates to the amount of fees requested. *See id.* None of these factors are outcome determinative, however, and thus, each should be given appropriate consideration. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998).

[Headnote 8]

When a district court properly evaluates the *Beattie* factors, its decision to grant or deny attorney fees will not be disturbed absent a clear abuse of discretion. *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000). Such an abuse occurs when the court's evaluation of the *Beattie* factors is arbitrary or capricious. *Yamaha Motor Co.*, 114 Nev. at 251, 955 P.2d at 672.

[Headnote 9]

In challenging the award of attorney fees to Drake, Frazier does not challenge the district court's findings with regard to the individual *Beattie* factors. Her lack of argument in this regard is not surprising, as the district court found that the first three factors weighed in her favor, while only concluding that the factor regarding the reasonableness of the amount of fees weighed in favor of Drake. Under these circumstances, Frazier essentially argues that, when the district court's individual findings regarding these factors are combined, they do not support the decision to award the requested fees. Drake, on the other hand, argues the district court properly considered each of the *Beattie* factors and maintains that the fact that the district court determined that certain of those factors weighed in Frazier's "favor is irrelevant and does not establish [an] abuse of discretion."[7]

Because offers of judgment are designed to encourage settlement and are not intended to unfairly force plaintiffs to forego legitimate claims, three of the four *Beattie* factors require an assessment of whether the parties' actions were undertaken in good faith. Specifically, the district court must determine whether the plaintiff's claims

[7]Like Frazier, Drake does not argue that the district court's determinations regarding any of the individual *Beattie* factors were incorrect.

were brought in good faith,[8] whether the defendant's offer was reasonable and in good faith in both timing and amount, and whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith. *Id.* The connection between the emphases that these three factors place on the parties' good-faith participation in this process and the underlying purposes of NRCP 68 and NRS 17.115 is clear. As the Nevada Supreme Court recognized, "[i]f the good faith of either party in litigating liability and/or damage issues is not taken into account, offers would have the effect of unfairly forcing litigants to forego legitimate claims." *Yamaha Motor Co*., 114 Nev. at 252, 955 P.2d at 673. In contrast, the fourth *Beattie* factor—the reasonableness of the amount of fees requested—does not have any direct connection with the questions of whether a good-faith attempt at settlement has been made or whether the offer is an attempt to force a plaintiff to forego legitimate claims.

As Frazier points out, the district court found that Frazier's and Keys' claims were brought in good faith, that Drake's offers of judgment were not reasonable or made in good faith in either timing or amount, and that Frazier's and Keys' decisions to reject Drake's offers were not grossly unreasonable or in bad faith. Despite finding that each of the three good-faith-participation factors favored Frazier and Keys, and that only the reasonableness of the amount of attorney fees requested favored Drake, the district court nonetheless awarded Drake the entirety of his requested attorney fees. In reaching this conclusion, the district court penalized Frazier and Keys for rejecting offers of judgment the court deemed unreasonable and not made in good faith and opting to pursue claims the court found to have been brought in good faith, while simultaneously determining that Frazier's and Keys' decisions to reject Drake's offers were neither unreasonable nor made in bad faith.

The district court's award of attorney fees to Drake under these circumstances effectively deemed the respective good faith of the parties to be of no import. Such an approach elevates the reasonableness of the attorney fees sought to a position of higher importance than the other *Beattie* factors in direct contravention of well-established Nevada authority. *See Yamaha Motor Co.*, 114 Nev. at 252 n.16, 955 P.2d at 673 n.16 (cautioning the district courts that no one *Beattie* factor is outcome determinative). Further, this

[8]After the *Beattie* factors were adopted, the Nevada Supreme Court held that, where the defendant is the offeree, the factor regarding whether the plaintiff's claims were brought in good faith drops out and is replaced by an examination of whether the defendant's defenses were litigated in good faith. *Yamaha Motor Co.*, 114 Nev. at 252, 955 P.2d at 673.

approach transforms offers of judgment into a vehicle to pressure offerees into foregoing legitimate claims in exchange for unreasonably low offers of judgment, which is the exact result that the Nevada Supreme Court sought to avoid by requiring that the parties' good faith be considered when awarding attorney fees under Nevada's offer of judgment provisions. *Id.* at 252, 955 P.2d at 673 (emphasizing that the parties' good faith must be taken into account, lest offers "have the effect of unfairly forcing litigants to forego legitimate claims").

[Headnote 10]

We conclude that where, as here, the district court determines that the three good-faith *Beattie* factors weigh in favor of the party that rejected the offer of judgment, the reasonableness of the fees requested by the offeror becomes irrelevant, and cannot, by itself, support a decision to award attorney fees to the offeror. Thus, because the district court found that the fees' reasonableness alone supported an award of attorney fees, we conclude that the district court's weighing of the *Beattie* factors was arbitrary and capricious, *id.* at 251, 955 P.2d at 672, and constituted legal error, rendering its decision to award attorney fees to Drake a clear abuse of discretion. *See LaForge*, 116 Nev. at 423, 997 P.2d at 136; *see also AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) ("While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error."). Accordingly, we reverse the district court's award of attorney fees.

Expert witness fees

[Headnote 11]

Turning to the district court's award of expert witness fees as costs to Drake pursuant to NRS 18.020(3) and NRS 18.005(5), the parties do not dispute that Drake is a prevailing party entitled to recover costs under NRS 18.020(3). Instead, the parties' arguments focus on whether the amount of expert witness fees awarded was excessive.[9] In this regard, NRS 18.005(5) provides for the recovery of "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." A district court's decision to award more than $1,500 in expert witness fees is reviewed for an abuse of discretion. *See Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 272-

[9]While Frazier also addresses the district court's award of $50,741.09 in general costs to Drake, her arguments provide no explanation as to why she believes this award was unreasonable. We therefore decline to consider these arguments and necessarily affirm this award. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that an appellate court need not consider issues that are not cogently argued).

73, 89 P.3d 1000, 1006-07 (2004), *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249-50, 327 P.3d 487, 490-91 (2014).

Drake sought fees for five expert witnesses in amounts of $32,657.52, $10,804.00, $20,325.00, $36,449.21, and $7,400.00 respectively. Although the district court awarded fees for each expert, it reduced the award to $10,000 per expert for the first four experts while awarding the full $7,400 for the fifth expert. In making this determination, the court found that, while Drake had hired the top experts in the country, the amounts sought were nonetheless excessive and unreasonable. The district court did not, however, explain why the fees requested for the first four experts were excessive or unreasonable or how it arrived at the flat $10,000 awards for each expert. The court similarly did not explain why it found the $7,400 fee to be reasonable. Further, despite concluding that $1,500 was not a reasonable sum to cover the cost of retaining an expert, the court did not address NRS 18.005(5)'s requirement that fees over $1,500 per expert should only be awarded if the court determines that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fees.

On appeal, Frazier argues the award of expert witness fees was excessive because the awards for each expert greatly exceeded $1,500. Drake disagrees,[10] arguing the district court properly assessed the reasonableness of the requested fees before making its award.[11] In

[10]Frazier and Drake both reference the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), to support their respective arguments as to the propriety of the expert witness fees award. The *Beattie* factors, however, "merely guide[ ] the district court's discretion to award attorney fees" following a rejected offer of judgment, *see Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 420 n.17, 132 P.3d 1022, 1030 n.17 (2006), and are thus not relevant to an award of expert witness fees under NRS 18.005(5).

[11]In awarding expert witness fees, the district court referenced the reasonableness requirements in both NRS 18.005(5) and NRS 17.115(4)(d)(1) (providing for an award of "[a] reasonable sum to cover any costs incurred" for certain expert witnesses to a party whose offer of judgment was rejected). But in responding to Frazier's assertion that the expert witness fees award was not reasonable, Drake's answering brief addresses only NRS 18.005(5), even though Drake made extensive arguments regarding why such fees should be awarded under both NRS 17.115(4)(d)(1) and NRCP 68 in the district court. Drake's answering brief does, however, discuss the offer of judgment provisions in NRS 17.115 and NRCP 68 in arguing that the awards of attorney fees and general costs should be affirmed. At oral argument, Drake sought to resurrect his NRS 17.115- and NRCP 68-based arguments in support of the expert witness fees award, contending that, under these provisions, the district court could have awarded dollar-for-dollar costs for any amounts incurred after the offers were made. But given his failure to incorporate these arguments into his answering brief despite making extensive arguments based on these provisions in the district court, we decline to consider Drake's NRS 17.115- and NRCP 68-based arguments in resolving Frazier's challenge to the expert witness fees award.

this regard, Drake points to the court's determination that he hired the top experts in the country and that $1,500 is "not a reasonable amount to hire a competent expert."

For an award of expert witness fees in excess of $1,500 per expert to be proper, the fees awarded must not only be reasonable, but "the circumstances surrounding [each] expert's testimony [must be] of such necessity as to require the larger fee." NRS 18.005(5); *see also Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015) (stating that "NRS 18.005(5) allows the district court to award more than $1,500 for an expert's witness fees if the larger fee was necessary"). In line with these requirements, in *Gilman*, the Nevada Supreme Court affirmed an award of $7,145 in expert witness fees on the basis that the expert's testimony constituted most of the party's evidence in the underlying case. 120 Nev. at 272-73, 89 P.3d at 1006-07. Aside from *Gilman*, however, the Nevada Supreme Court has not provided further guidance as to when an award of expert witness fees of more than $1,500 per expert under NRS 18.005(5) is warranted.[12] As a result, we look to other jurisdictions for additional guidance regarding what should be considered in determining whether expert witness fees requested in excess of $1,500 per expert are reasonable and whether the circumstances surrounding the expert's testimony are of such necessity as to require a larger fee.

[12]The Nevada Supreme Court recently addressed the award of expert witness fees in excess of $1,500 per expert as costs in *Logan v. Abe*, 131 Nev. 260, 350 P.3d 1139 (2015). In that case, the expert witness had been retained to rebut the testimony of the opposing party's expert witness, but the opposing party decided on the eve of trial not to call their expert. *Id.* at 267, 350 P.3d at 1144. Under those circumstances, the Nevada Supreme Court concluded the district court did not abuse its discretion by awarding expert witness fees greater than $1,500 as costs. *Id.* In setting up the discussion, the *Logan* court contrasted the case before it with a situation in which a party seeks to recover less than $1,500, which the *Logan* court noted "does not require an expert witness to testify." *Id*. at 268, 350 P.3d at 1144. In light of this contrasting language, and the *Logan* court's emphasis on the particular circumstances of that case leading to the expert not testifying, *Logan* suggests that, ordinarily, an expert must testify in order for a party to recover more than $1,500 in costs for that expert's fees under NRS 18.005(5). This conclusion is consistent with an earlier Nevada Supreme Court case, *Mays v. Todaro*, 97 Nev. 195, 199, 626 P.2d 260, 263 (1981), in which the court noted that expert witness fees could be awarded "if the witness had been sworn and testified." *Id*. The *Mays* court, however, did not limit this language only to situations in which the fees sought exceeded $1,500. *See id*. Conversely, in *Bergmann v. Boyce*, 109 Nev. 670, 679-80, 856 P.2d 560, 566 (1993), the court affirmed an award of expert fees below the statutory cap, holding that an expert need not be called as a witness as a predicate for awarding fees without overtly limiting the court's conclusion to fees that do not exceed the statutory cap or discussing *Mays*. *Id*. Because Frazier does not assert that any of the fees at issue here should be excluded due to the expert not being called to testify at trial, however, we need not resolve the apparent inconsistency between these decisions.

Extrajurisdictional authority

Our survey of extrajurisdictional authority addressing the recovery of expert witness fees reveals that only Idaho has a statute or court rule similar to NRS 18.005(5).[13] Specifically, Idaho Rule of Civil Procedure 54(d)(1)(C)(8) provides for the recovery of "[r]easonable expert witness fees for an expert who testifies at a deposition or at a trial of an action not to exceed the sum of $2,000 for each expert witness for all appearances." This cap may be exceeded, however, if it can be demonstrated "that [the] costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party." Idaho R. Civ. P. 54(d)(1)(D). Applying this rule to an award of approximately $24,000 in expert witness fees arising from an eminent domain action, the Idaho Supreme Court upheld the award, concluding the expert aided the court in understanding the incomprehensible issues presented, the testimony was helpful due to the exceptional nature of the case, and the expert's testimony was necessary due to the complexity of the issues presented. *See State, Dep't of Transp. v. HJ Grathol*, 343 P.3d 480, 494-95 (Idaho 2015).

Despite not having statutes or court rules directly analogous to NRS 18.005(5), other jurisdictions nonetheless permit such fees in certain circumstances. To the extent that such fees are permitted, those jurisdictions generally require trial courts to consider factors related to the reasonableness and necessity of an expert's testimony in determining whether to make an award of expert witness fees. For example, Louisiana appellate courts have adopted two separate sets of somewhat related factors for use in determining whether expert witness fees should be awarded as part of a general costs award,[14] with both courts noting that such awards turn on the particular facts and circumstances of each case. *See Bd. of Supervisors of La. State*

[13]Indeed, many jurisdictions do not allow the recovery of any expert witness fees as costs, *see, e.g.*, *Wood v. Tyler*, 877 S.W.2d 582, 583 (Ark. 1994); *TruServ Corp. v. Ernst & Young LLP*, 876 N.E.2d 77, 85 (Ill. App. Ct. 2007), while other jurisdictions limit the recoverable fees to the nominal amount generally provided for witnesses, *see, e.g.*, *Calhoun v. Hammond*, 345 N.E.2d 859, 862 (Ind. Ct. App. 1976); *Grant v. Chappell*, 916 P.2d 723, 725 (Kan. Ct. App. 1996), or limit the award to encompass only fees covering time the expert actually spent testifying or in attendance at trial, thereby precluding any award for preparation time. *See, e.g.*, *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 238 (Del. Ch. 1997) (but also recognizing that extraordinary circumstances may allow for an additional award of costs, without explaining what those circumstances might be); *Springs v. City of Charlotte*, 704 S.E.2d 319, 327 (N.C. Ct. App. 2011); *Chaffin v. Ellis*, 211 S.W.3d 264, 293 (Tenn. Ct. App. 2006).

[14]Because Louisiana has multiple intermediate appellate courts, within the state, appellate court holdings are precedential only in the district in which the court sits. *See Bernard v. Ellis*, 111 So. 3d 995, 1000 (La. 2012) (addressing an issue because of a split among the appellate courts).

Univ. & Agric. & Mech. Coll. v. 1732 Canal St., LLC, 133 So. 3d 109, 118 n.6, 119-20 (La. Ct. App. 2014) (addressing an award of costs under Louisiana Code of Civil Procedure art. 1920, which provides that "the court may render judgment for costs . . . as it may consider equitable"); *Randolph v. Gen. Motors Corp.*, 646 So. 2d 1019, 1029 (La. Ct. App. 1994) (reviewing an award of expert witness fees as costs but failing to specify under what rule the award was made).

In *Board of Supervisors*, the Louisiana Court of Appeals held that, in deciding whether to award expert witness fees as costs, courts should consider the amount of time the expert spent in court, preparing a report, and preparing for trial; the amount charged to the hiring party; the expert's expertise and the difficulty of the expert's work; the amount of the award; and "[t]he degree to which the expert['s] . . . opinion aided the court in its decision." 133 So. 3d at 120. The court further provided that this list of factors was nonexhaustive and that each case would require a case-specific examination of appropriate factors. *Id*. Applying some of these factors to the approximately $250,000 award before it on appeal, the *Board of Supervisors* court affirmed the award in light of the complexity of the case, the length and scope of the testimony given, the nature and helpfulness of the testimony, and the deductions already made from the requested fees by the district court. *See generally id.* at 120-28.

In *Randolph*, another Louisiana Court of Appeals considered a slightly different set of factors covering essentially the same general considerations identified in *Board of Supervisors*. 646 So. 2d at 1029. The *Randolph* court indicated that trial courts should consider the time spent testifying, preparing for trial, and waiting to testify; the extent and nature of the work performed; the knowledge, attainments, and skill of the expert; the helpfulness of the expert's testimony; the amount in controversy; the complexity of the issues addressed by the expert; and awards to other experts in similar cases. *Id*. The court then went on to affirm an award of approximately $3,000 in expert witness fees for three experts, albeit by simply concluding that, "[c]onsidering these factors in light of the discretion accorded the trial court," it could not be said that the trial court abused its discretion in making the award. *Id.* at 1029-30.

Connecticut courts have considered a similar set of factors when evaluating the reasonableness of expert witness fees sought for time the expert spent responding to discovery from an opposing party under a former court rule that required parties seeking discovery to "pay the expert a reasonable fee" for this time. *See Rose v. Jolly*, 854 A.2d 824, 825 (Conn. Super. Ct. 2004) (providing that courts should evaluate the expert's area of expertise, education, and training; the prevailing rates earned by "comparably respected available experts"; "the nature, quality, and complexity" of the discovery re-

sponses provided; the fee incurred to retain the expert; the "fees traditionally charged by the expert on related matters"; and any additional factors that would assist the court "in balancing the interest implicated" by the rule in determining the amount of expert witness fees to award (quoting former Connecticut Superior Court Rule § 13-4(3))). These same factors are also utilized by Maryland courts and several federal district courts in evaluating requests for expert witness fees under similar rules providing for the recovery of expert fees incurred in responding to the opposing party's discovery. *See, e.g.*, *Kilsheimer v. Dewberry & Davis*, 665 A.2d 723, 736 (Md. Ct. Spec. App. 1995); *Fisher-Price, Inc. v. Safety 1st, Inc.*, 217 F.R.D. 329, 333 (D. Del. 2003); *Goldwater v. Postmaster Gen.*, 136 F.R.D. 337, 339-40 (D. Conn. 1991).

The Massachusetts Supreme Judicial Court has likewise adopted similar factors for consideration in awarding reasonable expert witness fees pursuant to a consumer protections statute providing for an award of " 'costs incurred in connection with said action.' " *Linthicum v. Archambault*, 398 N.E.2d 482, 488 (Mass. 1979) (quoting Mass. Gen. Laws ch. 93A, § 9(4)) (giving trial courts discretion to award reasonable costs under a statute providing that "the petitioner shall . . . be awarded reasonable . . . costs incurred"), *abrogated on other grounds by Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 640 N.E.2d 1101, 1105 n.7 (Mass. 1994). Specifically, the *Linthicum* court held that, in evaluating a request for expert witness fees, courts should consider "factors such as the time spent by the expert in testimony, the number of appearances, preparation time, the degree of learning and skill possessed by that witness, as well as the assistance such testimony gave to the trier of fact." *Id*. Finally, the South Dakota Supreme Court has held that an examination of the reasonableness of an expert witness fees award turns on whether the fees are in excess of the customary rate for the services of a similar expert where the trial was held. *See State v. Guthrie*, 631 N.W.2d 190, 195-96 (S.D. 2001) (making this determination in reviewing an order requiring payment of an expert witness fee as a discovery sanction under a statute authorizing the imposition of any discovery sanctions that a court deems warranted).

As our examination of these cases illustrates, in those jurisdictions that do not bar or strictly limit the recovery of expert witness fees, the factors utilized to determine the amount of fees that should be awarded are largely similar. With these extrajurisdictional authorities in mind, we now determine what factors Nevada courts should consider in assessing the reasonableness of expert witness fees requested as costs in excess of $1,500 per expert and whether "the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee" under NRS 18.005(5).

Factors for consideration in awarding expert witness fees as costs in excess of $1,500 per expert under NRS 18.005(5)

[Headnote 12]

While the Nevada Supreme Court has provided only limited guidance regarding what district courts must consider in awarding expert fees in excess of $1,500 per expert, the court has made clear that the importance of the expert's testimony to the party's case plays a key role in assessing the propriety of such an award. *See Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 273, 89 P.3d 1000, 1006-07 (2004), (affirming an award of $7,145 in fees made under NRS 18.005(5) because the expert's testimony constituted most of the party's evidence), *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249-50, 327 P.3d 487, 490-91 (2014). In addition, to be recoverable, any requested costs must have been actually incurred. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Similar to these requirements, many of the extrajurisdictional authorities discussed above also require that trial courts consider the impact the expert's testimony had on the case and the amount of fees actually incurred in determining the amounts that should be awarded. *E.g.*, *Bd. of Supervisors*, 133 So. 3d at 120; *Randolph*, 646 So. 2d at 1029; *Kilsheimer*, 665 A.2d at 736; *Linthicum*, 398 N.E.2d at 488.

[Headnotes 13, 14]

In light of these pronouncements from our supreme court and our review of extrajurisdictional authority, we conclude that any award of expert witness fees in excess of $1,500 per expert under NRS 18.005(5) must be supported by an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining the reasonableness of the requested fees and whether "the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." *See* NRS 18.005(5); *cf. Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (requiring an "express, careful and preferably written explanation" of the district court's analysis of factors pertinent to determining whether a dismissal with prejudice is an appropriate discovery sanction). In evaluating requests for such awards, district courts should consider the importance of the expert's testimony to the party's case; the degree to which the expert's opinion aided the trier of fact in deciding the case; whether the expert's reports or testimony were repetitive of other expert witnesses; the extent and nature of the work performed by the expert; whether the expert had to conduct independent investigations or testing; the amount of time the expert spent in court,[15] preparing a report, and preparing for tri-

[15]This may include, for example, consideration of whether it was necessary for the expert to be in court to listen to other witnesses' testimony for the purpose of offering rebuttal testimony.

al; the expert's area of expertise; the expert's education and training; the fee actually charged to the party who retained the expert; the fees traditionally charged by the expert on related matters; comparable experts' fees charged in similar cases; and, if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.[16]

[Headnote 15]

We emphasize that not all of these factors may be pertinent to every request for expert witness fees in excess of $1,500 per expert under NRS 18.050(5), and thus, the resolution of such requests will necessarily require a case-by-case examination of appropriate factors. *See Bd. of Supervisors*, 133 So. 3d at 120. Moreover, the factors set forth in this opinion are nonexhaustive and other factors may therefore be appropriate for consideration depending on the circumstances of a case. *See id*.; *see also Rose*, 854 A.2d at 825. Finally, before any award of expert witness fees as costs may be made under NRS Chapter 18, the district court must have evidence before it demonstrating "that the costs were reasonable, necessary, and actually incurred" that goes beyond a mere memorandum of costs. *See Cadle Co.*, 131 Nev. at 121, 345 P.3d at 1054; *see also Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (stating that costs awarded under NRS 18.005 must be reasonable, and that "reasonable costs must be actual and reasonable," rather than an estimate, even if the estimate itself is reasonable (internal quotation marks omitted)).

The district court's award of expert witness fees as costs

[Headnote 16]

In making the award of expert witness fees at issue here, the district court failed to explain why it found the fees for four of Drake's experts to be unreasonable or how it determined that $10,000 constituted a reasonable fee for each of these experts. Indeed, Drake conceded at oral argument that the amounts awarded for the experts appeared to simply be "guesstimates." The district court similarly provided no explanation for why it deemed the $7,400 fee requested for the fifth expert reasonable. And while the court did note that Drake had hired the top experts in the country and that $1,500 was not a reasonable sum to cover the cost of an expert, it did not address NRS 18.005(5)'s requirement that fees over $1,500 per expert should be awarded only if the court determines that the circumstanc-

[16]The relevance of comparing the costs and fees incurred by hiring an expert from outside the area in which the trial is held to those that would be incurred to retain a comparable local expert will necessarily turn on the availability of comparable experts where the trial is held.

es surrounding the experts' testimony were of such necessity as to require the larger fees.

Given the district court's failure to adequately set forth the basis for its decision or address why the circumstances surrounding the expert's testimony necessitated the larger fee, we conclude the district court abused its discretion in awarding Drake his expert witness fees. Thus, we reverse that award and remand this matter to the district court for reconsideration of Drake's request for expert witness fees as costs under NRS 18.005(5) in light of the principles set forth in this opinion.

CONCLUSION

Based on the foregoing analysis, we affirm the judgment on the jury verdict and the denial of the new trial motion in the underlying case. We further conclude the district court's decision to award attorney fees based on Frazier's rejection of the offers of judgment was an abuse of discretion, and we therefore reverse that award. Finally, we reverse the award of expert witness fees as costs and remand this issue to the district court for further proceedings consistent with this opinion.

CARRIE SUZANNE MERLINO, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 65273

September 10, 2015 357 P.3d 379

Appeal from a judgment of conviction for burglary entered following a jury trial. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

The court of appeals, TAO, J., held that: (1) appellate court would apply reasonable belief test, rather than common law "airspace" test, when determining outer boundary of pawnshop for purpose of establishing whether requisite "entry" for burglary conviction was satisfied; and (2) under reasonable belief test, defendant did not "enter" outer boundary of pawnshop building by placing stolen items onto, and removing money from, retractable sliding tray of pawnshop's drive-through window while tray was open during transaction with cashier, as required to support burglary conviction.

Vacated in part.

Philip J. Kohn, Public Defender, *Howard S. Brooks*, Chief Deputy Public Defender, and *Jasmin D. Spells*, Deputy Public Defender, Clark County, for Appellant.

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

1. COMMON LAW.
   When the Legislature has not stepped in to address a particular question, the court of appeals may look to the common law for an answer.
2. BURGLARY.
   The crime of burglary only requires an entry with the proper intent to commit an enumerated crime. NRS 205.060.
3. BURGLARY.
   Consent to an entry is not a defense to burglary if the person acquired the entry with felonious intent. NRS 205.060.
4. BURGLARY.
   The court of appeals applies reasonable belief test, rather than common law "airspace" test when determining outer boundary of pawnshop for purpose of establishing whether requisite "entry" for burglary conviction was satisfied, where building at issue had retractable sliding tray as part of drive-through feature. NRS 205.060.
5. BURGLARY.
   When determining whether there has been an "entry" required for a burglary conviction, whenever the outer boundary of a building is not self-evident from the shape and contours of the structure itself, the outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization, while if the outer boundary of the structure is self-evident because the shape and features of the structure are traditional, then the common-law airspace test may be satisfactory. NRS 205.060.
6. BURGLARY.
   Under reasonable belief test, defendant did not "enter" outer boundary of pawnshop building by placing stolen items onto, and removing money from, retractable sliding tray of pawnshop's drive-through window while tray was open during transaction with cashier, as required to support burglary conviction; in absence of customer, tray was normally retracted into closed position in which it rested entirely inside perimeter of pawnshop's wall, so that when retracted, no reasonable person would believe that member of general public could force or pry tray open without authorization in order to gain access, but when open, and absent force, no reasonable person would believe that violation of area temporarily enclosed within tray threatened owner's permanent possessory rights in building. NRS 193.0145, 205.060(1), (5).

Before GIBBONS, C.J., TAO and SILVER, JJ.

OPINION

By the Court, TAO, J.:

Under Nevada law, a defendant commits the crime of burglary when he or she enters a building with the intent to commit a predicate crime inside the building. The question raised in this appeal is whether NRS 193.0145, NRS 205.060(1), and NRS 205.060(5),

which define the acts that can constitute an entry into a building for purposes of the burglary statute, encompass selling stolen property through the retractable sliding tray of a pawn shop's drive-through window.

A jury convicted appellant Carrie Suzanne Merlino of burglary for doing exactly that. On appeal, we conclude that no reasonable person could conclude that the sliding tray fell within the outer boundary of the building that housed the pawn shop, and therefore the evidence introduced at trial was insufficient to demonstrate that Merlino committed an unlawful entry of the building as defined in the burglary statutes. Accordingly, we vacate the conviction on count five.

FACTS

Merlino and her boyfriend, Dennis Byrd, befriended neighbor Teresa Wilson and would occasionally visit her in her apartment. During their visits, Merlino would sometimes bring Wilson food, clean her apartment, and run errands for her. Wilson eventually noticed that some jewelry was missing from her apartment and reported the theft, informing detectives with the Las Vegas Metropolitan Police Department that Merlino and Byrd might be responsible for the missing items. During their investigation, the detectives learned that Merlino had pawned items matching the descriptions of Wilson's missing jewelry. Wilson identified the pawned items as belonging to her and indicated that Merlino did not have permission to possess those items. Merlino was subsequently charged by way of indictment with conspiracy to commit a crime, grand larceny, and three counts of burglary. She was convicted on all counts but on appeal challenges only her conviction on count five, one of the three counts of burglary.

Count five of the indictment charged Merlino with entering an EZ-Pawn store on October 24, 2011, with the intent to obtain money under false pretenses by pawning items stolen from Wilson. The evidence introduced at trial in support of this count demonstrated that, on that date, Merlino pawned five items of jewelry through the drive-through window of the EZ-Pawn by placing them onto a metal tray that slid in and out of the building.

EZ-Pawn employee Leonard Yazzie described the drive-through window and its tray. Yazzie could not recall the particular transaction involving Merlino but testified that, in general, pawn transactions through the drive-through window required a customer outside the store to place items onto a sliding tray, which the cashier would extend out to the customer and then pull back into the interior of the store. The cashier would retrieve the items from the tray and place documents and money onto the tray before sliding it back outside the store to where the customer could access the tray. Only when extended could the customer access the tray; when retracted, the

tray was enclosed entirely within the walls of the building and could not be accessed from outside.

After the close of evidence, the district court instructed the jury. Among the instructions given was Instruction No. 23, which stated that "[a]n entry is deemed complete when, however slight, any portion of the intruder's body penetrates the space within the building." Based upon this definition, the State argued that the sliding tray constituted part of the structure of the building and, therefore, Merlino entered the building by using the tray to pawn Wilson's property. Merlino maintained that no part of her body entered the interior of the building and, consequently, no entry occurred.

ANALYSIS

In this appeal, Merlino challenges only one of her three burglary convictions, namely, count five, which charged her with entering the EZ-Pawn store on October 24, 2011, with the intent to commit the crime of obtaining money under false pretenses. Merlino concedes that substantial evidence was introduced at trial to support her convictions on the remaining counts.

As to count five, however, Merlino contends that insufficient evidence exists to support her conviction. 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, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Id*. (citing *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975)).

Merlino argues that the crime of burglary requires "entry" into the premises, and no such "entry" occurred when she merely placed items onto, and removed money from, the sliding tray of the drive-through window. The principal authority cited by Merlino is *Smith v. First Judicial District Court*, 75 Nev. 526, 347 P.2d 526 (1959), in which the Nevada Supreme Court held that removing items from the open bed of a pickup truck was not a burglarious "entry" of the truck itself. In response, the State argues that the sliding tray was part of the building, and therefore when Merlino's hand entered the tray, the hand necessarily entered the building itself. For the reasons set forth below, we agree with Merlino.

Nevada's burglary scheme

In Nevada, the offense of burglary is defined by NRS 205.060, which states, in pertinent part, as follows:

> 1. Except as otherwise provided in subsection 5, a person who, by day or night, enters any house, room, apartment, ten-

> ement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary.

An essential element of the offense of burglary is that the offender "entered" a "building." NRS 193.0145 defines "enter" for purposes of the burglary statute as follows:

> "Enter," when constituting an element or part of a crime, includes the entrance of the offender, or the insertion of any part of the body of the offender, or of any instrument or weapon held in the offender's hand and used or intended to be used to threaten or intimidate a person, or to detach or remove property.

NRS 193.0125 defines a "building" as including "every house, shed, boat, watercraft, railway car, tent or booth, whether completed or not, suitable for affording shelter for any human being, or as a place where any property is or will be kept for use, sale or deposit."[1]

The question before us is whether the evidence at trial, construed in the light most favorable to the State, was sufficient to demonstrate that Merlino entered the EZ-Pawn within the meaning of NRS 193.0125, NRS 193.0145, and NRS 205.060, by pawning items through the sliding tray of the drive-through window. In this case, there is no evidence that Merlino used a weapon or otherwise "threaten[ed] or intimidate[d]" any person during the commission of the charged crime. Therefore, for Merlino's conviction to stand, the evidence adduced at trial must demonstrate that some part of Merlino's body, or something held in her hand, entered the building in question within the meaning of Nevada's burglary statutes.

Determining whether such an entry occurred in this case reveals a gap in Nevada's statutory burglary scheme. NRS 193.0125 defines the term "building" with reference to the functionality of a structure; specifically, a structure is a "building" that can be burglarized if it is functionally suitable to afford shelter or to keep property for use, sale, or deposit. NRS 193.0145 defines "entry" with respect to the offender's body or any tools that he or she uses. But the burglary statutes do not define the terms "enter" or "building" with reference to the size, shape, dimensions, or physical appearance of a particular structure. Consequently, the statutes do not delineate where the outer boundary of a structure begins and ends for purposes of determining when a particular structure has, or has not, been entered within the meaning of NRS 193.0145. Yet this is precisely the question

[1]This definition is broader than the common-law definition, which defined "building" as a "structure with four walls and a roof, esp. a permanent structure." *Black's Law Dictionary* 234 (10th ed. 2014).

before us in this appeal. Thus, resolving this appeal requires us to look outside of the statutes for guidance.

[Headnote 1]

When the Legislature has not stepped in to address a particular question, we may look to the common law for an answer. *See Vansickle v. Haines*, 7 Nev. 249, 285 (1872) (stating that the common law, "so far as it is not repugnant to or inconsistent with, the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory. . . . [The common law] should remain in force until repealed by the legislature" (internal quotations omitted)).

Burglary at common law

The crime of burglary was originally a creature of the common law, but "[o]f all common law crimes, burglary today perhaps least resembles the prototype from which it sprang." Minturn T. Wright III, Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. Pa. L. Rev. 411, 411 (1951). At common law, burglary was the breaking and entering of a dwelling in the nighttime, and the law was intended to protect the sanctity of residences when its inhabitants were likely to be asleep and vulnerable. *Id.* at 411-12. Thus defined, burglary was not an offense against real or personal property, but rather one against the habitation. *See People v. Davis*, 958 P.2d 1083, 1088 (Cal. 1998). Consequently, burglary was originally "a crime of the most precise definition, under which only certain restricted acts were criminal." Wright, *supra*, at 411. Most states, however, have replaced the common-law crime with broader statutory definitions under which burglary "has become one of the most generalized forms of crime," encompassing not only personal abodes but also myriad other structures and even vehicles and commercial businesses in which people are unlikely to reside. *Id*.

[Headnotes 2, 3]

Nevada adopted and applied the common-law definition of the crime of burglary until 1911, when it enacted the original statutes that, over time, evolved into NRS 193.0125, NRS 193.0145, and NRS 205.060. The statutory definition of burglary originally created in 1911, and whose core has survived until today, is significantly broader than the common-law definition in important ways.[2] But,

[2]For example, under the current statute, breaking is no longer an essential element of the crime. *State v. Adams*, 94 Nev. 503, 505, 581 P.2d 868, 869 (1978); *see also* NRS 205.060(1). Rather, the crime only requires an entry with the proper intent to commit an enumerated crime. *Id*. Further, the entry no longer needs to be forcible, nor does the crime need to occur at night. *See Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1113 (2002); *see also* NRS 205.060(1). Also, consent to the entry is not a defense to burglary if the person "acquired the entry with felonious intent." *Barrett v. State*, 105 Nev. 361, 364, 775 P.2d 1276,

as noted, Nevada never legislatively defined the term "building" in a way that objectively explains where one begins and ends or, put another way, whether and when one has been "entered" or not under NRS 193.0145. In reviewing the common law for guidance, the problem we encounter is that many of the terms historically used to describe the crime of burglary were somewhat ill-defined. For example, an "entry" was traditionally deemed to occur "when any part of the defendant's person passes the line of the threshold." 3 *Wharton's Criminal Law* § 322 (15th ed. 1995); *see also* 12A C.J.S. *Burglary* § 28 ("For purposes of a burglary conviction, a person must penetrate whatever forms a structure's outer boundary . . . ."). Consequently, the traditional definition of an "entry" and the traditional definition of a "building" were defined primarily in relation to each other; a building was entered when its threshold or outer boundary was penetrated.

At common law, the most widely used legal test for defining the outer boundary of a building, and when a building has been "entered," was to inquire whether the "airspace" contained within it has been penetrated.[3] *See Davis*, 958 P.2d at 1094 (Baxter, J., dissenting); *Gant v. State*, 640 So. 2d 1180, 1182 (Fla. Dist. Ct. App. 1994), *receded from on other grounds by Norman v. State*, 676 So. 2d 7 (Fla. Dist. Ct. App. 1996). As some courts have noted, "[i]t is the nature of the enclosure that creates [prohibited space]." *State v. Holt*, 352 P.3d 702, 706 (N.M. Ct. App.) (citation omitted); *see People v. Valencia*, 46 P.3d 920, 925 (Cal. 2002) ("The airspace of a building is not independent of the outer boundary of a building; rather, the airspace of a building simply is that which is surrounded by the building's outer boundary."), *overruled in part on other grounds by People v. Yarborough*, 281 P.3d 68 (Cal. 2012).

When analyzing conventional buildings that were most commonly constructed decades ago, courts developed an understanding over time regarding where the boundaries of most such buildings were located. In most states, a structure's outer boundary was generally understood to include its roof, walls, doors, and windows.[4] The case

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1277 (1989). Finally, like many other states, Nevada has expanded the types of structures that can be burglarized to include houses, boats, watercraft, railway cars, tents, or booths, and the like. NRS 193.0125; NRS 205.060(1).

[3]The instruction given to the jury in this case (Instruction No. 23) appeared to have been modeled after the common-law test.

[4]*See Holt*, 352 P.3d at 706 (" '[I]n general, the roof, walls, doors, and windows constitute parts of a building's outer boundary, the penetration of which is sufficient for entry.' " (quoting *Valencia*, 46 P.3d at 925)); *State v. Kindred*, 307 P.3d 1038, 1041 (Ariz. Ct. App. 2013) ("a person must penetrate whatever forms a structure's outer boundary—a door, window, or wall, for example—but need not go further to have entered the structure"). Other courts have held that such things as the door jamb, window screen, and screen door also fall within the building's outer boundary. *See People v. Garcia*, 16 Cal. Rptr. 3d 833, 840 (Ct. App. 2004) (jamming crowbar into door jamb penetrated outer boundary

at hand, however, involves a feature constructed onto a building that was not as common a few decades ago as it is today, and here we see the common-law test fall short. A century ago, most abodes and businesses were conventionally constructed of a primarily rectangular shape with four walls, a roof, and clearly defined doors and windows; defining the boundaries of such simple structures was a relatively straightforward endeavor and the "airspace" test could be easily applied in most instances. But in an era in which buildings are no longer exclusively rectangular and may have such features as retractable roofs, sliding partitions, moveable awnings, or rolling shutters, and in which the outer boundaries of a building are no longer necessarily either fixed in place or easily recognizable, any test focused upon a building's "airspace" becomes increasingly subjective and arbitrary. As in this case, many commercial businesses today conduct at least some of their business through deposit windows, drop boxes, sliding trays, chutes, portals, tubes, slides, ramps, canisters, and slots of various configurations which may move in various ways, and which may, or may not, have lids, doors, covers, walls, tops, raised edges, or other features. Inquiring whether these features fall within the "outer boundary" of a building and serve to define "airspace" verges on an exercise in empty rhetoric rather than a search for a rigorous and meaningful definition of an essential element of a felony crime.

Indeed, courts applying the "airspace" test frequently find themselves wrestling over such minutiae as the distinction between an inner window and an outer window, *Commonwealth v. Burke*, 467 N.E.2d 846, 849 (Mass. 1984); whether the interior of a home begins at the exterior surface or interior surface of a door, *State v. Kindred*, 307 P.3d 1038, 1040-41 (Ariz. Ct. App. 2013); where the last barrier to the interior of the house was located, *State v. Pigques*, 310 S.W.2d 942, 944 (Mo. 1958); and whether the distance between a roof and a ceiling falls within the "airspace" of a home, *Miller v. State*, 187 So. 2d 51, 52 (Fla. Dist. Ct. App. 1966).

Consequently, California (whose burglary statute substantially mirrors Nevada's)[5] expressly rejected the "airspace" test as a

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of building); *People v. Moore*, 37 Cal. Rptr. 2d 104, 106 (Ct. App. 1994) (penetrating area between screen door and door sufficient for entry into outer boundary); *Commonwealth v. Burke*, 467 N.E.2d 846, 848-49 (Mass. 1984) (breaking outer storm window constituted entry even if inner window intact); *Williams v. State*, 997 S.W.2d 415, 417 (Tex. Crim. App. 1999) (breaking a door frame was burglarious entry); *Ortega v. State*, 626 S.W.2d 746, 747 (Tex. Crim. App. 1981) (a failed attempt to open a wooden door after removing its screen door constituted entry into outer boundary); *but see Stamps v. Commonwealth*, 602 S.W.2d 172, 173 (Ky. 1980) (breaking exterior surface of cinder block wall not entry; interior of the blocks themselves was "not a protected space").

[5]*See State v. White*, 130 Nev. 533, 537 n.1, 330 P.3d 482, 485 n.1 (2014) ("California's burglary statute is nearly identical to Nevada's . . . ."). Cal. Penal Code § 459 (West 2010) provides, in relevant part, that "[e]very person who

comprehensive test for determining the boundary of a building or inquiring whether it has been entered. *See Valencia*, 46 P.3d at 925 ("[W]e have misgivings about the general usefulness of an airspace test to define the outer boundary of a building for purposes of burglary."); *People v. Nible*, 247 Cal. Rptr. 396, 399 (Ct. App. 1988) ("in our view, the 'air space' test, although useful in some situations, is inadequate as a comprehensive test for determining when a burglarious entry occurs"). Some other states have also limited the "airspace" test. *See Holt*, 352 P.3d at 707 (reviewing cases from several states).

Instead, recognizing that modern burglary statutes exist to protect a property owner's "possessory interest in a building" and the safety of its occupants, California has supplemented the "airspace" test with a "reasonable belief" test, articulated as follows: whenever the outer boundary of a building is not self-evident under the common-law "airspace" test, the outer boundary legally includes "any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." *Valencia*, 46 P.3d at 926. This test was designed to more closely mirror the normal expectations of privacy and safety that attach to property ownership and habitation. *Id*. at 924-25 (quoting *Nible*, 247 Cal. Rptr. at 399) ("The proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions . . . [and whether the feature was] a permanent part of the dwelling . . . on which the occupants rely for protection and that to open such a door . . . is a violation of the security of the dwelling house which is the peculiar gravamen of a burglarious breaking." (internal quotations omitted)).

The Supreme Court of Nevada recently explored the purpose of Nevada's burglary statute in some detail and concluded that Nevada follows California burglary law in important respects. *State v. White*, 130 Nev. 533, 538, 330 P.3d 482, 485 (2014) ("We agree with the analysis of the California Supreme Court in [*People v. Gauze*, 542 P.2d 1365 (Cal. 1975)], which relied upon these policies to reach the conclusion that a person with an absolute right to enter a structure cannot commit burglary of that structure."). The court concluded that Nevada's burglary scheme was designed to protect the same interests as California's, namely, to protect the owner's possessory right in his property or premises and to prevent the danger associated with a felonious entry of the structure. *Id.*

Because the scope and purpose of Nevada's statutory scheme fundamentally mirrors that of California, it follows that we may consider California jurisprudence in defining the "outer boundary" of

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enters any . . . tenement, shop, warehouse, store . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary."

a building and analyzing when it has been "entered" under NRS 193.0145 and NRS 205.060. *See generally City of Las Vegas v. Cliff Shadows Prof. Plaza, LLC*, 129 Nev. 1, 9 n.4, 293 P.3d 860, 865 n.4 (2013) ("This court has often relied on the decisions of other jurisdictions when, as here, it is faced with issues of first impression.").

[Headnotes 4, 5]

We conclude that, when dealing with unorthodox contours or features such as the sliding tray in this case, the "reasonable belief" test represents a superior method for identifying the protected outer boundary of a structure than the common-law "airspace" test. Thus, whenever the outer boundary of a building is not self-evident from the shape and contours of the structure itself, the outer boundary is legally defined to include "any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." *Valencia*, 46 P.3d at 926. On the other hand, if the outer boundary of the structure is self-evident because the shape and features of the structure are traditional, then the common-law "airspace" test may be satisfactory.[6]

Under this test, stepping onto an unenclosed front porch has been held not to constitute a burglarious entry because a reasonable person would not believe that he or she would need permission to merely step onto the porch. *Id*. (citing *People v. Brown*, 8 Cal. Rptr. 2d 513, 517 (Ct. App. 1992). On the other hand, opening and walking through a screen door to an enclosed porch, or a locked gate covered with iron mesh in front of an enclosed and roofed stairway, has been held to constitute a burglarious entry because a reasonable person would believe that he or she needed permission to do so. *Id.* (citing *People v. Wise*, 30 Cal. Rptr. 2d 413, 415-18 (Ct. App. 1994)); *Bowers v. State*, 297 S.E.2d 359 (Ga. Ct. App. 1982). Similarly, climbing over the railing of a second-floor balcony bounded by a railing has also been held to constitute a burglarious entry. *See Yarborough*, 281 P.3d at 698.

The evidence in this case

[Headnote 6]

At trial, the State argued that Merlino entered the EZ-Pawn store by placing items onto—and removing money from—the sliding tray connected to the building while the tray was open. The dispositive question, however, is not whether she entered the tray, but rather whether she crossed the outer boundary of the building. Accordingly, the inquiry is whether the tray falls inside, or outside, the outer

[6]Although we apply the "reasonable belief" test as a legal test to the facts of this case, in future cases, the district courts of this state should consider utilizing this test as a jury instruction whenever the jury is tasked with defining the "outer boundary" of a building or structure having unusual features and when such a building has been "entered."

boundary of the building. Applying the "reasonable belief" test, the question becomes whether the tray, when open, constitutes an element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. We conclude that it does not.

Our conclusion arises from the natural operation of the tray, which is worth describing in detail. The tray in this case is retractable and can be manually opened and closed by the pawn shop cashier. When no customer is present, the tray is normally retracted into its closed position in which it rests entirely inside the perimeter of the wall of the pawn shop and its outer edge is flush with the wall. While closed, nothing can be placed into the tray from outside the building. When a customer wishes to do business through the drive-through window, the pawn shop cashier can manually push the tray outwards toward the customer so that it temporarily extends beyond the perimeter of the wall, giving the customer access to the tray for a few seconds during the transaction. After items have been placed inside the tray, the cashier may withdraw the tray into the perimeter of the wall into its closed position. A customer may place items into the tray while it is open, but the tray cannot be fully retracted into the store until the customer lets go of it.

When the tray is retracted entirely within the perimeter of the wall in its closed position, no reasonable person would believe that a member of the general public could force or pry the tray open without authorization in order to gain access to the interior of the building. While retracted into the building, the outer edge of the tray encloses an area that can reasonably be considered to fall within the permanent possessory rights of the building's owner. Thus, forcing open a tray that has been closed would clearly constitute a violation of the building's outer boundary.

However, the analysis is very different when the tray is extended outward in its open position. When open, the tray temporarily (for only as long as it takes to complete the transaction) extends some distance outside of the perimeter of the wall and occupies an area outside of the wall, a few feet above the ground. No reasonable person would believe that violation of the area temporarily enclosed within the tray while extended threatened the owner's permanent possessory rights in the building. *See People v. Davis*, 958 P.2d 1083, 1089 (Cal. 1998) (holding that passing a forged check through the window chute of a business's walk-up window did not constitute a burglarious entry, because doing so did not violate the owner's possessory interest in the building). A building owner may construct a tray or box that attaches to the building in some way and moves around, but that does not mean that the owner necessarily "owns" the space within the box whenever it goes outside of the building as

an incident of owning the building itself.[7] In this case, the sliding tray fails the "reasonable belief" test, and an item placed within the sliding tray cannot in any realistic sense be considered to be inside the boundary of the building until, and unless, the cashier manually draws it inside by retracting the tray.

In this case, the retractable tray is far more akin to a tool or instrument that can be manipulated to move objects into and out of the outer boundary of the building than it is a part of the boundary itself. At common law, the use of an instrument to breach a building could constitute a burglarious entry. *See id*. at 1086 ("[A] burglary may be committed by using an instrument to enter a building—whether that instrument is used solely to effect entry, or to accomplish the intended larceny or felony as well."). But under NRS 193.0145, the instrument must be held in the offender's hand, or at least operated by the defendant, to constitute an "entry." NRS 193.0145 (entry can be through an "instrument or weapon held in the offender's hand and used . . . to detach or remove property").

Here, the tray was operated not by Merlino, but rather by the cashier, whose independent actions caused the tray to enter the building but who could have refused to do so. Thus, fairly described, Merlino placed stolen items into an instrument operated by someone else to cause something to enter the building after it left her hands. Her actions initiated a chain of events that ultimately caused the building to be entered, but the success of that chain of events depended upon the cooperation of the cashier. Merely setting in motion a chain of events involving other people that culminates in stolen property entering the building does not equate to a criminal entry of the building by Merlino herself. Were it otherwise, then Merlino could conceivably have been convicted of burglary for hiring a courier to carry stolen property into the building, or even for mailing stolen items to the pawn shop through the U.S. mail. NRS 193.0145 was not intended to encompass these circumstances.[8] *See Davis*, 958 P.2d at 1087-88 (noting that mailing a forged check into a bank through the mail, sliding a ransom note under a door, or accessing a bank's computer via the Internet from a home computer, "cannot reasonably be argued" to constitute burglaries).

Moreover, placing objects into the tray while standing outside does not implicate the same kinds of security and safety concerns

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[7]He may own the box, but it is not because he owns the building.

[8]The State argues that similar acts have been considered burglarious in various federal cases. *See United States v. Goudy*, 792 F.2d 664 (7th Cir. 1986) (walk-up window of bank's drive-up facility); *United States v. Phillips*, 609 F.2d 1271 (8th Cir. 1979) (taking money from bank's drive-up window); *United States v. Lankford*, 573 F.2d 1051 (8th Cir. 1978) (bank's night depository chute). But those cases were decided pursuant to federal bank robbery statutes that are substantially dissimilar to Nevada burglary law.

as would arise had Merlino physically entered the pawn shop and potentially initiated a confrontation. *See White*, 130 Nev. at 538, 330 P.3d at 485 (noting that "[b]urglary statutes 'are based primarily upon a recognition of the dangers to personal safety . . . that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion'" (quoting *People v. Gauze*, 542 P.2d 1365, 1368 (Cal. 1975)). Her conviction for burglary cannot stand and must therefore be vacated.[9]

In closing, in response to various arguments raised by the State, we note in passing that our disposition of this appeal does not depend upon whether Merlino was considered to have entered the store with her entire body, or merely a small portion of it such as her hand; either would suffice to constitute a burglarious entry had the actual boundary of the store been penetrated. Even the slightest penetration into a building (had the building been penetrated) would suffice to support a burglary conviction.[10]

CONCLUSION

For the foregoing reasons, we vacate Merlino's conviction on count five.

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

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[9]Our conclusion may be different had Merlino pried the tray open from its closed position in order to insert items into, or remove items from, the pawn shop. It might even be different had Merlino placed something into the tray while it was open and then forcefully pushed it into the building against the resistance of the cashier. In either of these cases, a reasonable person could believe that the tray was being used to breach the building in a way that violated the owner's property rights in the building. But no evidence was presented that Merlino did either of these things.

[10]NRS 193.0145; *see Sears v. State*, 713 P.2d 1218, 1220 (Alaska Ct. App. 1986) ("[An] intruder enters by entry of his whole body, part of his body, or by insertion of any instrument that is intended to be used in the commission of a crime."); *Valencia*, 46 P.3d at 928 ("Entry that is *just barely* inside the premises, even if the area penetrated is small, is sufficient."); *State v. Faria*, 60 P.3d 333, 339-40 (Haw. 2002) (even slight penetration by hand, foot, or instrument is sufficient to constitute burglary); *Hebron v. State*, 627 A.2d 1029, 1038 (Md. 1993) ("the term 'entering' . . . requires that some part of the body of the intruder or an instrument used by the intruder crosses the threshold, even momentarily, of the house"); *see also Edelen v. United States*, 560 A.2d 527, 530 (D.C. 1989); *State v. Nichols*, 572 N.W.2d 163, 164 (Iowa Ct. App. 1997); *State v. Ervin*, 573 P.2d 600, 601-02 (Kan. 1977); *State v. Sneed*, 247 S.E.2d 658, 659 (N.C. Ct. App. 1978); *Griffin v. State*, 815 S.W.2d 576, 578 (Tex. Crim. App. 1991).