pliance exception in addressing the viability of an unlicensed contractor's equitable causes of action in a contract claim. Although DTJ may have attempted to register in 1998, there is nothing in the record to suggest that the application was ever received or approved, nor does the record show that DTJ ever attempted to remediate the situation. Rather, DTJ has been involved with at least four similar development projects over the past 15 years, despite its noncompliance with NRS 623.349. Accordingly, we conclude that the district court's dismissal was proper. *Id.*; *see also Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 23 F. Supp. 2d 1166, 1175 (D. Nev. 1998) (discussing the substantial compliance exception for an unlicensed contractor's equitable claims); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.").

GIBBONS, C.J., and PICKERING, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

EDWARD PRECIADO, AKA EDWARD A. PRECIADO-NUNO, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 58000

February 13, 2014 318 P.3d 176

Appeal from a judgment of conviction, pursuant to a jury verdict, of voluntary manslaughter with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

The supreme court, DOUGLAS, J., held that: (1) due process required memorializing bench and in-chambers conferences, (2) erroneous failure to memorialize bench and in-chambers conferences did not prejudice defendant, (3) two prospective jurors' relationships with police officer and State's witnesses did not warrant exclusion for cause, (4) a prospective juror's statement regarding graphic photos warranted exclusion for cause, but (5) the district court's failure to exclude juror for cause was harmless error.

Affirmed.

[Rehearing denied April 30, 2014]

[En banc reconsideration denied July 31, 2014]

Law Office of Lisa Rasmussen and *Lisa A. Rasmussen*, Las Vegas, for Appellant.

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

1. Constitutional Law; Criminal Law.
   Due process required memorializing bench and in-chambers conferences during noncapital prosecution for voluntary manslaughter; meaningful appellate review was inextricably linked to the availability of an accurate record of the lower court proceedings, such that, regardless of the type of case, it was crucial for the district court to memorialize all bench conferences, either contemporaneously or by allowing attorneys to make a record afterward. U.S. Const. amend. 14.
2. Criminal Law.
   Meaningful appellate review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues on appeal; therefore, a defendant is entitled to have the most accurate record of his or her district court proceedings possible.
3. Criminal Law.
   The district court's erroneous failure to memorialize bench and in-chambers conferences did not prejudice defendant in voluntary manslaughter prosecution, where defendant failed to allege any specific prejudice caused by the error, and the district court record was sufficient to allow the supreme court to adequately consider all issues raised by defendant.
4. Criminal Law.
   A district court's failure to make a record of an unrecorded sidebar warrants reversal only if the appellant shows that the record's missing portions are so significant that their absence precludes the supreme court from conducting a meaningful review of the alleged errors that the appellant identified and the prejudicial effect of any error.
5. Jury.
   Prospective jurors' relationships with police officer and State's witnesses did not warrant exclusion of jurors for cause in voluntary manslaughter prosecution, where both jurors unequivocally stated that they could be impartial when examining evidence and rendering a verdict.
6. Jury.
   Prospective juror's statement that graphic photos would have made her think that the defendant was a little bit guilty warranted exclusion of juror for cause in voluntary manslaughter prosecution, where, although juror stated that she could be impartial, she was equivocal, and statement that graphic photo would have made her think defendant was guilty (without proof defendant caused damage in photo) cast doubt on her impartiality.
7. Jury.
   A prospective juror should be removed for cause only if the prospective juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath.
8. Jury.
   If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied the right to an impartial jury.
9. Criminal Law.
   A district court's erroneous denial of a challenge for cause is reversible error only if it results in an unfair empaneled jury.
10. Jury.
    The district court has broad discretion in ruling on challenges to prospective jurors for cause.

11. Criminal Law.

The district court's erroneous failure to exclude prospective juror for cause, after juror stated that graphic photo would have made her think defendant was guilty, was harmless error in voluntary manslaughter prosecution, where prospective juror was not empaneled on the jury, and juror's preconceptions did not infect the jury panel.

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

OPINION

By the Court, Douglas, J.:

We take this opportunity to stress that bench and in-chambers conferences should be memorialized either contemporaneously or by allowing counsel to make a record afterward; and that a prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause.

Appellant Edward Preciado engaged in a physical altercation with Kim Long. During the altercation, Preciado repeatedly struck Long in the head with a hammer, killing her. Preciado claimed self-defense, but a jury convicted Preciado of voluntary manslaughter with the use of a deadly weapon. The district court sentenced Preciado to the maximum of 4 to 10 years in prison, with a consecutive 4 to 10 years for the weapon enhancement.

On appeal, Preciado raises eight issues for this court's review: (1) whether the district court's failure to record numerous bench and in-chambers conferences was a constitutional violation, (2) whether the district court erred in declining to give Preciado's jury questionnaire and denying his challenges for cause, (3) whether the State committed prosecutorial misconduct, (4) whether the State mishandled critical evidence, (5) whether the district court erred in limiting Preciado's examination of three witnesses, (6) whether the trial judge improperly sentenced Preciado, (7) whether the trial judge was biased against the defense, and (8) whether cumulative error requires a new trial.[1]

After full consideration, we determine that only two of Preciado's issues have some merit: that the district court erred in failing to record numerous bench and in-chambers conferences and in failing to excuse for cause a prospective juror who was equivocal about her impartiality. However, these errors were harmless; thus, we affirm Preciado's judgment of conviction.

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[1]Preciado also asks this court to review alleged errors in his presentence investigation report, but we decline to do so because he failed to object to any perceived inaccuracies in the report at the time of his sentencing, thereby waiving the argument on appeal. *See* NRS 176.156(1); *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 250-51, 255 P.3d 209, 214 (2011).

Unrecorded bench conferences and in-chambers discussions

[Headnote 1]

The district court conducted numerous unrecorded bench and in-chambers conferences during Preciado's trial. The court memorialized some of the conferences, but not all. The court also denied Preciado's motion to settle the trial record and reconstruct the unrecorded conferences. Preciado argues that the court's failure to make a record of all of the conferences effectively denied him his right to appeal.

[Headnote 2]

Meaningful appellate review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues on appeal; therefore, a defendant is entitled to have the most accurate record of his or her district court proceedings possible. *See Daniel v. State*, 119 Nev. 498, 507-08, 78 P.3d 890, 897 (2003). In *Daniel*, we determined that SCR 250(5)(a) and due process require a district court to record all sidebar proceedings in a capital case either contemporaneously with the matter's resolution, or the sidebar's contents must be placed on the record at the next break in trial. *Id.*

Due process requires us to extend our reasoning in *Daniel* to defendants in noncapital cases, because regardless of the type of case, it is crucial for a district court to memorialize all bench conferences, either contemporaneously or by allowing the attorneys to make a record afterward.

[Headnotes 3, 4]

Here, the district erred by failing to make a record of the unrecorded conferences, but this misstep does not warrant reversal. A district court's failure to make a record of an unrecorded sidebar warrants reversal only if the appellant shows that the record's missing portions are so significant that their absence precludes this court from conducting a meaningful review of the alleged errors that the appellant identified and the prejudicial effect of any error. *Id*. at 508, 78 P.3d at 897. Preciado did not demonstrate that the district court's failure to record all conferences prejudiced his appeal. The district court record is sufficient to allow this court to adequately consider all issues that Preciado preserved for appeal. Thus, the unrecorded conferences did not prejudice Preciado, and reversal is not warranted.

Challenges for cause

[Headnotes 5, 6]

During the jury selection process, Preciado asserted challenges for cause against prospective jurors #304, #318, and #496, in an attempt to exclude the jurors from the jury pool. Preciado asserted

that: (1) prospective juror #304's statement that graphic photos would make her think Preciado was a little bit guilty demonstrated that she could not be impartial when reviewing the evidence and rendering a verdict, (2) the district court should have excluded prospective juror #318 because he knew two of the State's witnesses, and (3) prospective juror #496's relationship with a Las Vegas police officer effectively prohibited her from being objective when evaluating the evidence.

The district court denied all of Preciado's challenges for cause after each of the three prospective jurors stated that he or she could be impartial. The court determined that the jurors' statements alleviated any doubt as to their impartiality. In response, Preciado used peremptory challenges to eliminate prospective jurors #304 and #496, but he did not have any remaining peremptory challenges to eliminate prospective juror #318, who sat on the empaneled jury.

[Headnotes 7-10]

A prospective juror should be removed for cause only if the "prospective juror's views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Weber v. State*, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (quoting *Leonard v. State*, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001)). "If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury." *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). A district court's erroneous denial of a challenge for cause is reversible error only if it results in an unfair empaneled jury. *See id.* The district court has broad discretion in ruling on challenges for cause. *Id*. at 795, 119 P.3d at 577.

[Headnote 11]

The district court did not abuse its discretion in denying Preciado's challenges for cause against prospective jurors #318 and #496, but the court did abuse its discretion in denying Preciado's challenge against prospective juror #304. Prospective jurors #318 and #496 unequivocally stated that they could be impartial when examining the evidence and rendering a verdict; thus, they were suitable jurors. But, while prospective juror #304 stated that she could be impartial, she was equivocal. Prospective juror #304's statement that a graphic photo would make her believe the defendant was guilty (without proof that the defendant caused the damage depicted in the photo) cast doubt on her impartiality. Therefore, the court should have granted Preciado's challenge for cause against prospective juror #304. However, the court's error was harmless and does not require reversal because prospective juror #304 was not on the empaneled jury and her preconceptions did not infect the jury panel. Further,

though Preciado did not have a peremptory challenge left to remove juror #318, we conclude that juror #318 demonstrated the ability to set aside any preconceived prejudices. Therefore, juror #318's presence on the empaneled jury did not prejudice Preciado. Consequently, this issue is not grounds for reversal.

Accordingly, we affirm Preciado's conviction.

GIBBONS, C.J., and SAITTA, J., concur.

SERGIO AMEZCUA, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ROB BARE, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 63724

February 13, 2014 319 P.3d 602

Original petition for a writ of mandamus or habeas corpus challenging a district court order affirming a judgment of conviction and denial of a motion for new trial.

After defendant was charged with first-offense battery constituting domestic violence, defendant filed timely notice for jury trial. The justice court denied the motion. Defendant petitioned for writ of mandamus. The district court denied petition. After defendant was convicted in the justice court and conviction was affirmed by the district court, defendant petitioned for extraordinary relief. The supreme court held that first-offense domestic battery was petty offense to which constitutional right to jury trial did not attach.

Petition denied.

The Pariente Law Firm, P.C., and *Michael D. Pariente*, Las Vegas, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

1. MANDAMUS.
   A writ of mandamus may issue to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   As a general rule, the supreme court will not entertain a petition for a writ of mandamus that requests review of a district court decision when that court is acting in its appellate capacity unless the petitioner demonstrates

that the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner. NRS 34.160.

3. JURY.

The constitutional right to a jury trial does not extend to every criminal proceeding, but rather only applies to "serious" offenses. Const. art. 1, § 3; U.S. CONST. amend. 6.

4. JURY.

To determine whether the constitutional right to a jury trial attaches to a particular offense, the court must examine objective indications of the seriousness with which society regards the offense. Const. art. 1, § 3; U.S. CONST. amend. 6.

5. JURY.

The best objective indicator of the seriousness with which society regards an offense, for purposes of determining whether the offense is a "serious" offense to which the constitutional right to a jury trial attaches, is the maximum penalty that the legislature has set for it. Const. art. 1, § 3; U.S. CONST. amend. 6.

6. JURY.

The presumption that an offense for which the period of incarceration was six months or less was a "petty" offense to which the constitutional right to a jury trial did not attach may be overcome only by showing that the additional penalties, viewed together with the maximum prison term, are so severe that the legislature clearly determined that the offense is a "serious" one. Const. art. 1, § 3; U.S. CONST. amend. 6.

7. JURY.

First-offense domestic battery did not constitute a "serious" offense, but rather a "petty" offense, and therefore, defendant was not entitled to a jury trial pursuant to the federal constitution, where, although conviction of offense resulted in collateral consequences of an evidentiary presumption in child custody and dependency actions, limitations on the right to possess a firearm, and possible deportation, statutory penalties for offense were maximum term of imprisonment of six months, community-service requirement of not more than 120 hours, and fine of not more than $1,000. Const. art. 1, § 3; U.S. CONST. amend. 6; NRS 200.485(1)(a)(1).

Before GIBBONS, C.J., DOUGLAS and SAITTA, JJ.

OPINION

Per Curiam:

The right to a jury trial under the Sixth Amendment to the United States Constitution depends on whether an offense is "petty" or "serious." In this original proceeding, we consider whether certain collateral consequences of a conviction for first-offense domestic battery, such as an evidentiary presumption in child custody and dependency actions, limitations on the right to possess a firearm, and possible deportation, make it a serious offense for which a defendant is entitled to a jury trial. We conclude that petitioner Sergio Amezcua has not demonstrated that first-offense domestic battery is a serious offense. He therefore was

not entitled to a jury trial on the misdemeanor charge of domestic battery.

FACTS AND PROCEDURAL HISTORY

Amezcua was charged with first-offense battery constituting domestic violence in justice court. He filed a timely notice for jury trial pursuant to NRS 175.011(2). The justice court denied the motion. Amezcua subsequently filed a petition for a writ of mandamus in the district court, which was denied. He unsuccessfully challenged the district court's denial of that writ petition in a petition for a writ of mandamus or habeas corpus filed in this court. *See Amezcua v. Eighth Judicial Dist. Court*, Docket No. 59868 (Order Denying Petition, February 9, 2012). Thereafter, Amezcua was convicted of the charged offense in the justice court. On appeal, the district court affirmed the judgment of conviction. This petition for extraordinary relief followed.

DISCUSSION

[Headnotes 1, 2]

A writ of mandamus may issue to compel the performance of an act which the law requires "as a duty resulting from an office, trust or station," NRS 34.160, or to control an arbitrary or capricious exercise of discretion, *see Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). The writ will not issue, however, if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170. Here, Amezcua had a plain, speedy, and adequate remedy at law to address his claim. He appealed his conviction to the district court, which enjoys final appellate jurisdiction in cases arising from justice court, Nev. Const. art. 6, § 1, and raised the claim that the justice court erred in denying his request for a jury trial. He may not seek writ relief merely because he disagrees with the district court's determination. *See Hosier v. State*, 121 Nev. 409, 412, 117 P.3d 212, 213 (2005) (declining to exercise original jurisdiction over petition for extraordinary relief challenging the validity of a judgment of conviction); *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (noting that the purpose of the writ is not to correct lower-court decisions that may be error). As a general rule, we will not entertain a writ petition that requests review of a district court decision when that court is acting in its appellate capacity unless the petitioner demonstrates that "the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner." *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 696 (2000). The petition filed in this

case fits none of those exceptions. In similar circumstances we nevertheless have exercised our constitutional prerogative to entertain a writ petition where the petition presented a significant issue of statewide concern that would otherwise escape our review. *Cf. id.* at 134, 994 P.2d at 697 (exercising discretion to entertain petition where lower courts had reached different conclusions on significant issues of statewide concern). This petition presents such a situation.[1]

[Headnote 3]

The Sixth Amendment of the United States Constitution guarantees an individual the right to a jury trial.[2] U.S. Const. amend. VI; *see also Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968) (providing the Sixth Amendment right to a jury trial applies to the States through the Fourteenth Amendment). However, that right "does not extend to every criminal proceeding." *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 629, 748 P.2d 494, 497 (1987), *aff'd sub nom. Blanton v. N. Las Vegas*, 489 U.S. 538 (1989). The critical distinction is between "petty" and "serious" offenses: the right to a jury trial attaches only to "serious" offenses. *Id.*

[Headnotes 4-6]

"[T]o determine whether the . . . right to a jury trial attaches to a particular offense, the court must examine 'objective indications of the seriousness with which society regards the offense.' " *United States v. Nachtigal*, 507 U.S. 1, 3 (1993) (quoting *Blanton v. N. Las Vegas*, 489 U.S. 538, 541 (1989)). The best objective indicator of the seriousness with which society regards an offense is the maximum penalty that the legislature has set for it. *Id.* Although a "penalty" may include things other than imprisonment, the focus for purposes of the right to a jury trial has been " 'on the maximum authorized period of incarceration.' " *Id.* (quoting *Blanton*, 489 U.S. at 542). Taking this approach, the Supreme Court has held that an offense for which the period of incarceration is six months or less is presumptively a "petty" offense and a jury trial is not constitutionally required. *Id.* We have reached the same conclusion. *Blanton*, 103 Nev. at 633-34, 748 P.2d at 500-01. The presumption may be overcome "only by showing that the additional penalties, viewed together with the maximum prison term, are so severe that the legis-

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[1]To the extent that Amezcua seeks relief from this court in habeas corpus, we deny his petition as we will not exercise our original jurisdiction to consider a petition for a writ of habeas corpus challenging the validity of a judgment of conviction. *Hosier v. State*, 121 Nev. 409, 412, 117 P.3d 212, 213 (2005).

[2]The right to a jury trial is also guaranteed by Article 1, Section 3 of the Nevada Constitution. In the context of criminal proceedings, we have held that the right under the state constitution "is coextensive with that guaranteed by the federal constitution." *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 628-29, 748 P.2d 494, 497 (1987), *aff'd sub nom. Blanton v. N. Las Vegas*, 489 U.S. 538 (1989).

lature clearly determined that the offense is a 'serious' one." *Nachtigal*, 507 U.S. at 3-4 (quoting *Blanton*, 489 U.S. at 543).

[Headnote 7]

Under Nevada law, first-offense domestic battery is a misdemeanor that has a maximum term of imprisonment of six months. NRS 200.485(1)(a)(1). First-offense domestic battery therefore is presumptively a petty offense to which no jury-trial right attaches. Amezcua bears the burden of proving that additional penalties, when considered with the maximum term of imprisonment, are so severe that they clearly reflect a legislative determination that first-offense domestic battery is a "serious" offense. *Blanton*, 489 U.S. at 543.

Amezcua claims that various consequences of a conviction for domestic battery reflect a legislative determination that the offense is serious: (1) NRS 432B.157 and NRS 125C.230 create a rebuttable presumption that he, as a perpetrator of domestic violence, is unfit for sole or joint custody of his children; (2) he could lose the right to possess a firearm under 18 U.S.C. § 922(g)(9) (2012); and (3) a conviction would render a noncitizen deportable under federal immigration law.[3] Amezcua contends that his interest in raising his child and his right to bear arms are important fundamental rights that are significantly affected by his conviction, and therefore, this court should consider the conviction's impact on these rights in determining whether the offense is "serious." He asserts that these additional penalties are more severe than penalties that other courts have determined are enough to clearly demonstrate a legislative determination that an offense is serious, such as a 15-year driver's license revocation.

The additional penalties that Amezcua cites do not demonstrate a clear determination by the Nevada Legislature that first-offense domestic battery is a serious offense to which the jury-trial right attaches. The rebuttable presumptions set forth in NRS 432B.157 and NRS 125C.230 are concerned with the best interest of a child who is the subject of child protection or custody proceedings.[4] As such, they reflect only that concern for the best interest of the child rather than a clear legislative determination that first-offense domestic battery is a serious offense. And whether those rebuttable presumptions will ever be used against a defendant is speculative at best since they would arise only in separate civil proceedings. The fact that they are not conclusive or automatic indicates that

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[3]Amezcua concedes that he is a United States citizen.

[4]We note that the presumptions in these statutes do not arise only when there has been a conviction. They require a finding after an evidentiary hearing that there is clear and convincing evidence that a parent or other person seeking custody of a child engaged in one or more acts of domestic violence against the child, a parent of the child, or any other person residing with the child. Therefore, neither statute depends on a conviction.

they do not reflect a legislative determination sufficient to rebut the presumption that the offense is "petty" based on the maximum term of imprisonment. *See Foote v. United States*, 670 A.2d 366, 372 (D.C. 1996) ("*Blanton*'s presumption that offenses carrying no more than six months incarceration are petty cannot, in our view, be effectively rebutted by reference to the potential remedies in hypothetical civil or administrative proceedings which have not been instituted . . . ."). The other two "penalties" that Amezcua mentions—restrictions on possession of a firearm and deportation—are collateral consequences of a conviction: they arise out of federal law, not the Nevada statute that proscribes first-offense domestic battery. *See Palmer v. State*, 118 Nev. 823, 826, 59 P.3d 1192, 1194 (2002) ("Direct consequences have an automatic and immediate effect on the nature or length of a defendant's punishment; collateral consequences do not."); *Nollette v. State*, 118 Nev. 341, 344, 46 P.3d 87, 89 (2002) ("Collateral consequences . . . do not affect the length or nature of the punishment and are generally dependent on either the court's discretion, the defendant's future conduct, or the discretion of a government agency."). Such collateral consequences of a conviction are not relevant because they do not reflect a determination by the Nevada Legislature that first-offense domestic battery is a serious offense. *See Blanton*, 103 Nev. at 633-34, 748 P.2d at 500-01; *see also Nachtigal*, 507 U.S. at 4 ("[W]e expressly stated [in *Blanton*] that the statutory penalties in other States are irrelevant to the question whether a particular legislature deemed a particular offense 'serious.' " (quoting *Blanton*, 489 U.S. at 545 n.11)); *Blanton*, 489 U.S. at 543 n.8 ("In performing this analysis, only penalties resulting from state action, *e.g.*, those mandated by statute or regulation, should be considered."). In this respect, Amezcua's analogy to the 15-year driver's license revocation in *Richter v. Fairbanks*, 903 F.2d 1202, 1205 (8th Cir. 1990), fails. Unlike the additional penalties identified by Amezcua, the driver's license revocation considered in *Richter* was included in the Nebraska DWI ordinance. *See id.* at 1203.

The only penalties that NRS 200.485(1) imposes, in addition to imprisonment, are a community-service requirement of not more than 120 hours and a fine of not more than $1,000. There is nothing so severe in those penalties, considered together, as to clearly indicate a determination by the Nevada Legislature that this is a serious offense to which the right to a jury trial attaches. *Cf. Nachtigal*, 507 U.S. at 5-6 (concluding that federal DUI offense was not serious where maximum imprisonment was six months and statute included additional penalties such as $5,000 fine); *Blanton*, 489 U.S. at 544-45 & n.9 (concluding that DUI was petty offense under Nevada law where maximum imprisonment was six months and statute included

additional penalties such as 90-day driver's license revocation, alcohol abuse education, and $1,000 fine or 48 hours of community service). That the Nevada Legislature did not view this as a "serious" offense is further reflected in its decision to afford the trial judge discretion to allow the defendant to serve the term of imprisonment intermittently. *See* NRS 200.485(1)(a).

We conclude that first-offense domestic battery is a "petty" offense to which the right to a jury trial does not attach. The petition therefore is denied.

GEORGE "EDDIE" LORTON, PETITIONER, *v.* LYNNETTE JONES, IN HER OFFICIAL CAPACITY AS RENO CITY CLERK; AND DAN BURK, IN HIS OFFICIAL CAPACITY AS THE WASHOE COUNTY REGISTRAR AND CHIEF ELECTIONS OFFICER OF WASHOE COUNTY, RESPONDENTS, AND JESSICA SFERRAZZA AND DWIGHT DORTCH, IN THEIR CAPACITIES AS CANDIDATES FOR CERTAIN OFFICES, REAL PARTIES IN INTEREST.

No. 64194

February 20, 2014 322 P.3d 1051

Original petition for a writ of mandamus or prohibition challenging the eligibility of real parties in interest to run in the 2014 Reno, Nevada, mayoral election.

Mayoral candidate petitioned for a writ of mandamus or prohibition challenging the eligibility of former city council members in mayoral election. The supreme court, HARDESTY, J., held that in a matter of first impression, Nevada constitutional provision on term limits precluded council members who had served 12 years from being elected mayor.

Petition granted.

[Rehearing denied March 5, 2014]

SAITTA, J., with whom PARRAGUIRRE, J., agreed, dissented.

Hardy Law Group and *Stephanie R. Rice*, Reno, for Petitioner.

John J. Kadlic, City Attorney, and *Tracy L. Chase*, Chief Deputy City Attorney, Reno, for Respondent Lynette Jones.

Richard A. Gammick, District Attorney, and *Herbert B. Kaplan*, Deputy District Attorney, Washoe County, for Respondent Dan Burk.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Daniel Bravo*, Las Vegas, for Real Party in Interest Jessica Sferrazza.

Gordon Silver and *John P. Desmond, Brett J. Scolari*, and *Anjali D. Webster*, Reno, for Real Party in Interest Dwight Dortch.

1. MANDAMUS.
   Writ relief is generally not available when the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170, 34.330.
2. MANDAMUS.
   Even when a legal remedy is available, the supreme court may exercise its discretion to consider a writ petition when the petition presents a legal issue of statewide importance that needs clarification, and principles of judicial economy and public policy weigh in favor of considering the petition.
3. MANDAMUS; PROHIBITION.
   Mayoral candidate's petition for a writ of mandamus or prohibition challenging the eligibility of former city council members in mayoral election presented an issue of statewide importance for which judicial economy and public policy warranted consideration of the writ by the supreme court; petition presented a purely legal question of constitutional interpretation with regard to whether years of service as a council member counted against the number of years that a council member could serve as mayor, and resolution of the petition would create an established interpretation of the provision to aid any city where the government was structured such that the mayor was a member of the city council. Const. art. 15, § 3(2).
4. CONSTITUTIONAL LAW.
   The rules of statutory construction apply to the interpretation of a constitutional provision.
5. CONSTITUTIONAL LAW.
   If a constitutional provision is clear and unambiguous, the supreme court will not look beyond the language of the provision, but will instead apply its plain meaning.
6. CONSTITUTIONAL LAW.
   A constitutional provision is ambiguous if it is susceptible to two or more reasonable but inconsistent interpretations.
7. CONSTITUTIONAL LAW.
   If a constitutional provision is ambiguous, the supreme court may look to the provision's history, public policy, and reason to determine what the voters intended.
8. MUNICIPAL CORPORATIONS; STATES.
   The drafters of Nevada constitutional provision that prohibits an individual from being elected to any state office or local governing body if he or she has served in that office, or at the expiration of his or her current term he or she will have served, 12 years or more intended to preclude reelection to the local governing body as a whole when a member has served on that body for 12 years or more in any capacity. Const. art. 15, § 3(2).
9. CONSTITUTIONAL LAW.
   In construing constitutional provisions, supreme court must read those provisions in harmony with each other whenever possible.
10. MUNICIPAL CORPORATIONS.
    Nevada constitutional provision prohibiting an individual from being elected to any state office or local governing body if he or she had served in that office, or at the expiration of his or her current term he or she would

have served, 12 years or more prevented city council members who had served for 12 years from being elected mayor; under the city charter, city council was the city's governing body, and the mayor was a member of the city council for all purposes. Const. art. 15, §§ 3(2), 11.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Article 15, Section 3(2) of the Nevada Constitution prohibits an individual from being "elected to any state office or local governing body [if he or she] has served in that office, or at the expiration of his [or her] current term [he or she] will have served, 12 years or more." The parties do not dispute that the "local governing body" of the City of Reno, Nevada, is the city council, which is made up of six council members and the mayor of Reno. The issue we must decide is whether an individual who has served for 12 years or more as a council member is thereafter prohibited, by the limitations imposed under Article 15, Section 3(2), from running for mayor of Reno. Because the Reno City Charter makes the mayor a member of the city's "local governing body" for all purposes, we conclude that Article 15, Section 3(2) bars a term-limited council member from thereafter being elected mayor of Reno. We therefore grant the petition for a writ of mandamus.

BACKGROUND

The City of Reno is a municipal corporation, organized and existing under the laws of the State of Nevada through a charter approved by the Legislature. Under the Reno City Charter, the legislative power of the city is vested in the city council, which consists of six city council members and the mayor. Reno City Charter, Art. II, § 2.010(1). The mayor and one of the city council members represent the city at large, while the remaining city council members each represent one of Reno's five wards. *See id.* § 2.010(3).

In this matter, real party in interest Jessica Sferrazza served on the Reno city council as the representative for Ward 3 for 12 years, ending in 2012. Real party in interest Dwight Dortch is currently serving on the Reno city council as the representative for Ward 4. When his term ends in 2014, he will also have served on the city council for 12 years. Both Sferrazza and Dortch have publicly expressed an intention to run for mayor of Reno in the 2014 election.

Petitioner George "Eddie" Lorton, a citizen of Reno who also intends to run for mayor, filed this writ petition seeking extraordinary relief preventing respondents Reno City Clerk Lynette Jones and Washoe County Registrar and Chief Elections Officer Dan Burk

from taking the steps necessary to include either Sferrazza or Dortch on the 2014 ballot for the mayoral race. Lorton asserts that both Sferrazza and Dortch are ineligible to run for mayor under Article 15, Section 3(2) of the Nevada Constitution by virtue of their 12 years of service as city council members.

DISCUSSION

Article 15, Section 3(2) of the Nevada Constitution provides, in full, that

> [n]o person may be elected to any state office or local governing body who has served in that office, or at the expiration of his [or her] current term if he [or she] is so serving will have served, 12 years or more, unless the permissible number of terms or duration of service is otherwise specified in this Constitution.

It is undisputed that, under this provision, an individual may not serve in the same state office or position on a local governing body for more than 12 years. *See Miller v. Burk*, 124 Nev. 579, 599, 188 P.3d 1112, 1125 (2008). The question here is, when a local governing body includes multiple positions, such as when a city council is made up of both city council members and the city's mayor, does Article 15, Section 3(2) also prevent an individual who has served for 12 years in one position on that local governing body from then serving additional terms in a different position on the same body?[1]

Before reaching that question, however, we must first determine whether a writ proceeding is an appropriate avenue for obtaining the relief that petitioner seeks.

Writ relief

[Headnotes 1, 2]

It is well established that writ relief is generally not available when the petitioner has a plain, speedy, and adequate remedy at law. *See* NRS 34.170; NRS 34.330; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). But even when a legal remedy is available, this court may exercise its discretion to consider a writ petition when the petition presents a legal issue of statewide importance that needs clarification, and principles of judicial economy and public policy weigh in favor of considering the petition. *See Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 901-02, 34 P.3d 509, 515-16 (2001) (indicating that, even when a legal remedy is available, this court may exercise its discretion to consider a writ petition that presents an issue

[1]This court invited the Nevada League of Cities and Municipalities to participate in this original proceeding as amicus curiae, but the League of Cities declined our invitation.

of statewide importance when principles of sound judicial economy weigh in favor of consideration of the petition); *see also Walker v. Eighth Judicial Dist. Court*, 120 Nev. 815, 819, 101 P.3d 787, 790 (2004) (recognizing that this court may consider a writ petition when "an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction" (internal quotation marks omitted)).

[Headnote 3]

In city elections, NRS 293C.186 allows a citizen to assert a challenge to a declared candidate on the ground that the candidate does not meet one of the qualifications for office, such as an age or residency requirement. NRS 293C.186(1). Here, Lorton contends that this statutory scheme is insufficient to allow a constitutional challenge to a declared candidate to be timely resolved and argues that Sferrazza and Dortch do not meet the constitutional requirements for the office of mayor because they have each served the maximum permissible number of years on the Reno city council.[2] Unlike a fact-based challenge to a candidate's age or residency, the facts in this matter are not in dispute, as there is no question that Sferrazza and Dortch will each have served for 12 years as council members. Instead, this petition presents a purely legal question of constitutional interpretation with regard to whether years of service as a council member counts against the number of years that a council member could serve as mayor.

Beyond determining whether Sferrazza and Dortch are eligible for the position of Reno mayor, resolution of this petition will also help define the parameters of Article 15, Section 3(2), so that future potential candidates and challengers will be able to understand the provision's effect and the district courts will be able to apply an established interpretation of the provision to any factual disputes that may arise with regard to a specific candidate's eligibility, not only in Reno, but in any city where the government is structured such that the mayor is a member of the city council. *See, e.g.*, Henderson City Charter, Art. II, § 2.010(1) (providing that the Henderson city council is made up of four council members and the mayor); Las Vegas City Charter, Art. II, § 2.010(1) (providing that the Las Vegas city council is made up of one council member from each of six wards and the mayor); North Las Vegas City Charter, Art. II, § 2.010(1) (providing that the North Las Vegas city council is made up of four council members and the mayor).

We conclude that this petition presents an issue of statewide importance for which judicial economy and public policy warrant

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[2]Dortch, in his answer, agrees with Lorton that this issue should be addressed by way of this writ petition. Sferrazza does not address the propriety of writ relief in her answer.

consideration of the writ.[3] *See Walker*, 120 Nev. at 819, 101 P.3d at 790; *Salaiscooper*, 117 Nev. at 901-02, 34 P.3d at 515-16; *see also Child v. Lomax*, 124 Nev. 600, 605-06, 188 P.3d 1103, 1107 (2008) (recognizing that a writ petition relating to the term-limits provisions applicable to members of the Nevada State Assembly presented a question of statewide significance). Additionally, as the issue presented by this petition concerns whether, as a matter of law, respondents are required to exclude Sferrazza and Dortch from the 2014 ballot materials and does not involve any question regarding the exercise of judicial functions, we conclude that mandamus, rather than prohibition, is the appropriate vehicle for seeking the relief requested by Lorton. *Compare* NRS 34.160 (providing that a writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station), *with* NRS 34.320 (explaining that the purpose of a writ of prohibition is to arrest "the proceedings of any tribunal . . . when such proceedings are without or in excess of the jurisdiction of such tribunal"). Having determined that this writ petition is appropriate for review, we now turn to the substantive issue presented by the petition.

Standard of review

This court has not previously addressed the specific parameters of Article 15, Section 3(2) with regard to the members of a local governing body.[4] In the absence of any precedential authority, we must interpret the language of Article 15, Section 3(2) in order to determine whether that provision precludes a term-limited city council member from running for mayor.

[Headnotes 4-7]

"The rules of statutory construction apply to the interpretation of a constitutional provision." *We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). If a provision is clear and unambiguous, this court will not look beyond the language of the provision, *Miller*, 124 Nev. at 590, 188 P.3d at 1119-20, but will instead apply its plain meaning. *Kay v. Nunez*, 122

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[3]As we conclude that the nature of the issue presented warrants consideration by way of this writ petition, we need not address Lorton's argument that the statutory scheme for challenging candidates provides an insufficient amount of time for resolution of this matter.

[4]The parties do not dispute that the Reno city council is a local governing body within the meaning of Article 15, Section 3(2), or that the mayor, as a member of the city council, is generally subject to the limitations imposed by that provision. Consequently, we do not address these issues in this opinion. *See In re Contested Election of Mallory*, 128 Nev. 436, 438-39 n.4, 282 P.3d 739, 742 n.4 (2012) (declining to consider whether a district attorney was subject to term limits based on the "local governing body" portion of Article 15, Section 3(2) because the parties had not raised arguments related to that portion of the term-limits provision).

Nev. 1100, 1104, 146 P.3d 801, 804-05 (2006). A constitutional provision is ambiguous if "it is susceptible to two or more reasonable but inconsistent interpretations." *Miller*, 124 Nev. at 590, 188 P.3d at 1120 (internal quotation marks omitted). If a provision is ambiguous, this court "may look to the provision's history, public policy, and reason to determine what the voters intended." *Id.*

Article 15, Section 3(2)

Article 15, Section 3(2) states that "[n]o person may be elected to any state office or local governing body who has served in *that office*" for 12 years or more. Nev. Const. art. 15, § 3(2) (emphasis added). In this context, the word "*that*" is used to modify the general term "*office*" in order to refer to a particular office. William A. Sabin, *The Gregg Reference Manual* ¶ 308 (Elizabeth Haefele et al. eds., 11th ed. 2011). Specifically, "that office" appears to refer to both the term "state office" and the phrase "local governing body." *See* Nev. Const. art. 15, § 3(2). Put differently, the sentence may properly be read as saying that "[n]o person may be elected to any state office . . . who has served in that office" for 12 years or more, and that "[n]o person may be elected to any . . . local governing body who has served in that office" for 12 years or more. *See id.*

As to a state office, the effect of Article 15, Section 3(2) is clear insofar as the word "office" is used in both parts of the phrase. *See id.* So if a person has served in a particular state office for 12 years or more, that person may not serve any additional terms in that specific state office. *See id.*; *see also Miller*, 124 Nev. at 599, 188 P.3d at 1125. The effect of the portion of the provision referring to a "local governing body" is less clear because the words "office" and "local governing body" have different meanings, as an "office" is "[a] position of duty, trust, or authority, esp[ecially] one conferred by a governmental authority for a public purpose," *Black's Law Dictionary* 1190 (9th ed. 2009), while a "governing body" refers to "[a] group of . . . officers or persons having ultimate control." *Id.* at 764.

Lorton's interpretation

In his petition, Lorton argues that Article 15, Section 3(2) precludes an individual from serving for more than 12 years in any position or combination of positions on a single local governing body. Thus, he contends that because Sferrazza and Dortch will have served for 12 years on the Reno city council, as council members representing their respective wards, they cannot now serve additional terms on the council as mayor. Lorton asserts that this interpretation of Article 15, Section 3(2) is consistent with the purposes of the limitations provision—preventing individuals from becoming career politicians and restricting the power of lobbyists and special interest groups—because it prevents a person from being elected to

different positions within the same local governing body after he or she has served the maximum number of years.

The interpretation of the "local governing body" portion of the provision set forth by Lorton seems to require the phrase "that office" to be read as meaning the entire "local governing body," such that the provision would be understood to mean that "[n]o person may be elected to any . . . local governing body who has served [on] that [local governing body]" for 12 years or more. *See* Nev. Const. art. 15, § 3(2). Under this interpretation, when an individual has been a member of a local governing body for 12 years or more, that individual would no longer be eligible for election to that body in any capacity. *See id.*

The problem with this approach, however, is that interpreting the phrase "that office" to refer to an entire governing body assigns a meaning to the term "office" that is somewhat different from its usual and customary meaning. *See State v. Stu's Bail Bonds*, 115 Nev. 436, 439, 991 P.2d 469, 471 (1999) (explaining that this court should presume that words have "their usual and natural meaning"). In particular, as noted above, the term "office" generally refers to a single position, *Black's Law Dictionary* 1190, whereas a "governing body" is made up of a group of people. *Id.* at 764.

A different way to consider Lorton's approach would be to construe "that office" to refer to a particular office or position within a local governing body, but to separate "that office" from the antecedent "local governing body" language, and to then interpret "local governing body" itself to refer to the body as a whole. The effect of this view of Article 15, Section 3(2) would be that "[n]o person may be elected to any . . . local governing body who has served in [any] office [within that local governing body]" for 12 years or more. But this approach is also problematic, as it would effectively require us to replace the phrase "that office" with "any office within that local governing body." Thus, taking either of these approaches, Lorton's interpretation does not fit squarely within the plain language of Article 15, Section 3(2).

Sferrazza's and Dortch's interpretation

In their answers to the petition, Sferrazza and Dortch each argue that Article 15, Section 3(2) only prevents an individual from serving in a particular "office" or "position" within a local governing body for more than 12 years.[5] Sferrazza and Dortch contend that

[5]In his answer, Dortch points to this court's statement in *Miller*, 124 Nev. at 599, 188 P.3d at 1125, that "Article 15, Section 3(2) plainly states that if a person has served, or at the conclusion of his or her current term will have served, 12 years or more in an office *or a position on* a local governing body, that person may not be reelected to that office *or position*" (emphases added), for the proposition that this court has already determined that the term limits apply only to individual positions within a local governing body. In *Miller*, however,

interpreting the constitution to mean that a person cannot serve for more than 12 years in distinct offices within a local governing body renders the phrase "in that office" meaningless within the provision. Sferrazza and Dortch therefore assert that because the Reno city council members and the Reno mayor serve in different capacities, one who has served for 12 years as a city council member is not precluded from serving additional terms as mayor. Such an interpretation would cause Article 15, Section 3(2) to be understood to mean that "[n]o person may be elected to any . . . [office within a] local governing body who has served in that office" for 12 years or more.

This approach interprets "that office" to refer to a single, specific office, rather than to a group of offices. Nevertheless, as Article 15, Section 3(2) refers to a "local governing body," and not to an "office" on a local governing body, taking this approach would require us to read words into Article 15, Section 3(2) that are not expressly there. *See State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997) (providing that this court should not add to or alter language in a provision "to accomplish a purpose not on the face of the [provision] or apparent from permissible extrinsic aids such as legislative history or committee reports" (internal quotation marks omitted)).

In short, neither reading of Article 15, Section 3(2) set forth by the parties appears to be plainly correct based on the specific language of that provision. Thus, because these inconsistent interpretations are both reasonable, we conclude that Article 15, Section 3(2) is ambiguous. *See Miller*, 124 Nev. at 590, 188 P.3d at 1120 (explaining that a constitutional provision is ambiguous if "it is susceptible to two or more reasonable but inconsistent interpretations" (internal quotation marks omitted)). As a result, we look to the history of Article 15, Section 3(2), public policy, and reason to determine the meaning of the provision. *See Miller*, 124 Nev. at 590, 188 P.3d at 1120.

Context within Article 15, Section 3(2)

Before looking outside the language of the provision, we note that, although the text is ambiguous, the drafters' word choice may still provide some indications as to the proper interpretation of the provision. On this point, it is significant that the drafters chose to use different terms in addressing how term limits apply in state and

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this court did not specifically address the scope of the limitations provision with regard to whether the same limits apply to different positions within a single local governing body. Instead, the language cited by Dortch was contained in a general statement that term limits apply to state offices and local governing bodies. Moreover, the words "position on" were added before "a local governing body" without any express discussion as to the impact of that addition. As a result, we conclude that the language cited from *Miller* is not determinative of this writ petition.

local elections by saying that a person may not be elected to a "state office or local governing body." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). To illustrate, the drafters could have used "state governing body" and "local governing body" to indicate the bodies as a whole. Or they could have used "state office" and "local office" to refer to individual positions. Instead, they chose the distinct terms "state office" and "local governing body," which indicates that, at the state level, the drafters intended to prevent election to a specific office, but at the local level, the intent was to preclude continuing service on the governing body generally.[6] *See id.*

Purpose and public policy

Outside of the text, the purpose of the provision and public policy are relevant to our interpretation of Article 15, Section 3(2), and these considerations further support the conclusion that the limitations apply to the local governing body as a whole. Article 15, Section 3(2)'s limitations provision was enacted by the voters through the ballot initiative process following its approval at the 1994 and 1996 elections. When the question was presented to voters, the proponents stated that its purpose was to "stop career politicians" by preventing them from holding office for an excessive number of terms. Nevada Ballot Questions 1994, 1996, Nevada Secretary of State, Question No. 9. The objective of limiting career politicians in order to promote a government of citizen representatives has been recognized as a legitimate state interest validating the imposition of term limits. *See Nev. Judges Ass'n v. Lau*, 112 Nev. 51, 56, 910 P.2d 898, 901-02 (1996) (citing *Legislature of Cal. v. Eu*, 816 P.2d 1309, 1325 (Cal. 1991)).

With regard to city council members, prohibiting reelection to the "local governing body" as a whole is in line with this goal, given that a local governing body may be made up of members who represent different wards, and thus arguably hold different offices, but whose roles are essentially the same. *See Mason's Manual of Legislative Procedure* § 52 (Nat'l Conference of State Legislatures 2010) ("In public bodies the equality of members is presumed."); *id.* § 120 ("The rights and duties of members of a legislative body are

[6]We are cognizant that the ballot questions used the terms "local public officer" and "local governing body members" to describe to whom Article 15, Section 3(2) would apply. Nevada Ballot Questions 1994, 1996, Nevada Secretary of State, Question No. 9. While this language arguably weighs in favor of the conclusion that the provision was intended to apply to individual positions within a local governing body, when viewed on balance with the remaining considerations discussed in this opinion, this language is not sufficient to support a conclusion different than the one we reach herein.

derived from and founded upon the absolute equality of the members."). In light of this structure, prohibiting a city council member who is term limited in one ward from being elected to what is essentially the same position in a different ward serves the purpose of preventing one person from holding the same political position for excessive years.

Sferrazza and Dortch argue that this purpose would not be undermined under their interpretation of Article 15, Section 3(2) because their interpretation would not allow a council member to serve for more than 12 years by representing multiple wards. They say that this is so because the council members collectively serve in one office within the city council, while the mayor serves in a separate office on that body. Building on this foundation, Sferrazza's counsel asserted at oral argument that Article 15, Section 3(2) is "office based," in that it precludes reelection to the same office, as opposed to being "body based" and precluding reelection to the body as a whole. But as discussed above, Article 15, Section 3(2) does not say that a term-limited individual is precluded from reelection to "an office on a local governing body." Instead, it says that the person may not be reelected to the "local governing body."

In further evaluating the "office based" versus "body based" distinction, the term-limits provisions related to the Nevada Legislature provide helpful context. In particular, Article 4, Section 3(2) of the Nevada Constitution provides that "[n]o person may be elected or appointed as a member of the Assembly who has served in that Office . . . 12 years or more, *from any district of this State.*" (Emphasis added.) Similarly, Article 4, Section 4(2) states that "[n]o person may be elected or appointed as a Senator who has served in that Office . . . 12 years or more, *from any district of this State.*" (Emphasis added.) In these two provisions, "that office" refers to the office of "member of the Assembly" and the office of "Senator," respectively. In the absence of clarifying language, these provisions could have been interpreted to mean that a Senator representing a specific district could not serve for more than 12 years as the representative of that district. But the drafters included the phrase "from any district of this state" to preclude any question as to whether the provisions prevented reelection only to the specific seat or to the Assembly or Senate respectively. While Article 15, Section 3(2) does not include the same language as Article 4, Section 3(2) and Article 4, Section 4(2), it does provide that the person may not be elected to the "local governing body," again indicating an intent to preclude election to the body as a whole, which is consistent with the term-limit provisions governing elections to the Legislature.

[Headnote 8]

Based on these considerations, we conclude that the drafters intended to preclude reelection to the local governing body as a whole when a member has served on that body for 12 years or more in any

capacity.[7] Thus, the question that remains is whether the mayor of Reno is sufficiently distinct from the city council to preclude application of Article 15, Section 3(2) to council members who may seek to run for mayor.

Article 15, Section 11 and the Reno City Charter

[Headnotes 9, 10]

In construing constitutional provisions, we must read those provisions in harmony with each other whenever possible. *See Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 543 (2002) (recognizing this court's obligation to construe statutory provisions in harmony with each other when possible). Under Article 15, Section 11 of the Nevada Constitution, the provisions of a legally adopted charter control with regard to "the tenure of office or the dismissal from office" of any municipal officer or employee. Reading that provision in conjunction with Article 15, Section 3(2), this court must give effect to any charter provisions that shed light on the extent to which the mayor is part of the local governing body, and thus, is subject to Article 15, Section 3(2)'s limitations. As a result, we must look to the Reno City Charter in order to determine whether, in Reno, a council member who has served for 12 years or more is precluded from being elected as the mayor of Reno.

Notably, the Reno City Charter states that the city council is Reno's governing body. *See* Reno City Charter, Art. I, § 1.014. And the charter expressly provides that the mayor is a member of the city council, *id.*, Art. II, § 2.010(1); *id.*, Art. III, § 3.010(1)(a), which in turn means that the mayor is a member of the local governing body. *See also id.*, Art. I, § 1.014. We recognize that the mayor is identified in the charter as a separate elective officer from the other six council members, *see id.* § 1.060(1)(a) and (b), and that the mayor has additional duties that do not fall on the other council members. *See, e.g.*, *id.*, Art. II, § 2.040(2) (explaining that the mayor is the only council member who may call special meetings of the city council); *id.*, Art. III, § 3.010(1)(a) and (d) (providing that the mayor determines the order of business for and presides over city council meetings); *id.* § 3.010(1)(f) (requiring the mayor to take measures to preserve the public peace and suppress riots and other public disturbances). But these additional responsibilities do not divest the mayor of his or her full and equal membership on the city council. *See* 4 Eugene

[7]Although not binding authority, we note that our decision herein is consistent with that issued by the Legislative Counsel Bureau in its December 15, 2011, opinion. Letter from Brenda J. Erdoes, Legislative Counsel, to Senator Ben Kieckhefer (December 15, 2011) (discussing the limitations provision of Article 15, Section 3 of the Nevada Constitution).

McQuillin, *The Law of Municipal Corporations* § 13:29 (3d ed. Rev. 2011) (noting that when a city charter designates a mayor as a member of a city council, the mayor for all intents and purposes serves as a member of that governing body); *see also Harrison v. Campbell*, 254 S.W. 438, 439 (Ark. 1923); *Griffin v. Messenger*, 86 N.W. 219, 219 (Iowa 1901); *Dafoe v. Harshaw*, 26 N.W. 879, 880 (Mich. 1886).

Furthermore, a review of the charter demonstrates that the mayor's primary function relates to his or her service on the city council. *Compare* Reno City Charter, Art. III, § 3.010(1)(a) (providing that the mayor presides over city council meetings and serves as a member of the council), *with* Sparks City Charter, Art. III, § 3.010(1)(a) (explaining that the mayor presides over the meetings of the city council but may not vote on any matter). The mayor of Reno is not the chief executive and administrative officer, as that role is filled by the city manager, *see* Reno City Charter, Art. III, § 3.020(1), and the mayor has no administrative duties. *See id.*, Art. III, § 3.010(1)(b). The mayor is the head of the city government for ceremonial purposes only. *Compare* Reno City Charter, Art. III, § 3.010(1)(c) (recognizing the mayor as the head of the Reno government for ceremonial purposes), *with* Sparks City Charter, Art. III, § 3.010(1)(b) (requiring the mayor to act as the head of the Sparks government for all purposes). While the Reno City Charter may assign additional duties to the Reno mayor, none of those added duties change the equality of all of the members of the city council or provide a basis for the unequal application of the limitations provision to all members of the "local governing body."

Thus, based on the provisions of the Reno City Charter, we conclude that the Reno mayor is a member of the "local governing body," subject to the same limitations that apply to the other city council members. Accordingly, because Sferrazza and Dortch each will have served on the Reno city council for 12 years by the end of the current term, they are ineligible to be elected as Reno's mayor. *See* Nev. Const. art. 15, § 3(2). We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus requiring respondents to exclude Sferrazza and Dortch from the ballot materials for the 2014 Reno mayoral election.[8]

GIBBONS, C.J., and DOUGLAS and CHERRY, JJ., concur.

PICKERING, J., concurring:

I join the majority but write separately to respond to the dissent, which focuses on dictionary definitions of "office" and "local

[8]In light of our decision herein, we deny Sferrazza's request for attorney fees pursuant to NRS 293C.186(6) without considering whether such a request may properly be presented in a writ petition.

governing body" but does not adequately consider the meaning these words have in the context of Article 15, Section 3 of the Nevada Constitution. *See United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (Posner, J.) ("Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings.").

The Nevada Constitution relies on municipal charters to establish standards for the tenure and dismissal of municipal officers and employees. Nev. Const. art. 15, § 11. Here, the Reno City Charter vests all of "[t]he legislative power of the City . . . in a City Council consisting of six Council Members and a Mayor." Reno City Charter, Art. II, § 2.010(1). To be mayor, a person must also be a member of the city council. *Id*., Art. III, § 3.010(1)(a). The mayor has a legislative vote, equally with any other member of the city council. *Id*. § 3.010(1)(e). And the City Charter specifies that the mayor of Reno, unlike some other Nevada mayors, "[s]hall not have any administrative duties." *Id.* § 3.010(1)(b).

The dissent argues that there is a difference between the mayor and other city council members and, to be sure, there is: The mayor has all the duties, powers, and prerogatives of a city council member *plus* acts as the City's "ceremonial" leader, *id*. § 3.010(1)(c), and is charged with preserving public peace and "suppression of riots," *id*. § 3.010(1)(f). But does this turn the mayor into a separate officer for purposes of exercising powers of governance ceded by Reno's citizens to their city council? The dissent argues that it does because a city council member who becomes a mayor takes on additional duties, making the mayor job a new office. What if the order of things was reversed and the person served first as mayor and then city council member? In that event, the mayor would continue doing the exact same legislative job, just minus his or her ceremonial and riot-suppression duties. Yet, as an equal holder of the substantive vote, the mayor→city council member could perpetuate his or her legislative policies for 24 years.

The dissent accepts that a person could not serve 72 years on the city council by moving from ward to ward and finally taking the at-large position. Why should this be different for someone who, judged by the power ceded to him or her, is a city council member with some ceremonial duties?

Whether we agree or disagree with the policies underlying term limits, the voters amended the Nevada Constitution to impose them. Nev. Const. art. 4, §§ 3(2) & 4(2); *id.*, art. 15, § 3(2). The contemporaneous understanding of the voters who passed the amendment is evident in the question they voted on: "Shall the Nevada Constitution be amended to establish term limits for state and local public officers in the executive and legislative branches of government?" Nevada Ballot Questions 1996, Nevada Secretary of State, Question 9(a). It is further evident in the explanation of the

amendment that appeared on the ballot—the voters who passed the measure were told that it would limit the terms of "state officials and local governing body members" to set terms, mostly of 12 years. *Id.* The measure passed decisively, twice. As enacted, the amendments specifically address the two houses of the state Legislature: A person cannot evade the term limits provision by moving from district to district. Nev. Const. art. 4, §§ 3(2) & 4(2). And they make no exception for the legislator who serves as speaker or in another legislative leadership role.

The point is to put time limits on the exercise of legislative or executive authority by elected politicians. This explains the reference to "local *governing* body." Nev. Const. art. 15, § 3(2) (emphasis added). Reno voters only ceded the power to *govern* the City—that is to say, exercise legislative authority over them—for a maximum of 12 years. Just as at the state level a member of the senate or assembly cannot perpetuate his or her tenure beyond 12 years by moving from district to district, a Reno city council member's authority is limited to 12 years. To me, the fact that the mayor exercises the exact legislative authority a city council member does—and has no administrative duties, Reno City Charter, Art. III, § 3.010(1)(b)—answers the term-limits question. The addition of ceremonial and riot-suppression duties doesn't change the time limits on that exercise of ceded powers of civic governance.

SAITTA, J., with whom PARRAGUIRRE, J., agrees, dissenting:

I would deny the petition for a writ of mandamus or prohibition. Although the majority frames the issue in terms of whether Article 15, Section 3(2) of the Nevada Constitution prohibits reelection to a local governing body as a whole, the effect of the court's conclusion is to find that the Reno mayor is essentially just a seventh city council member with a few minor additional responsibilities thrown in to his or her job description. This conclusion gives short shrift to both the language of the constitutional provision and the role of the Reno mayor. To reach its result, the court focuses on the "local governing body" language and discounts the phrase "that office." To me, it is the "that office" language that determines the provision's operation here.

The majority recognizes that its governing body-based interpretation necessitates construing "that office" to mean either "that local governing body" or "any office within that local governing body." Such a construction, however, is contrary to our well-established rules of construction, which charge this court with giving words their usual and natural meaning. *See State v. Stu's Bail Bonds*, 115 Nev. 436, 439, 991 P.2d 469, 471 (1999). *Black's Law Dictionary* defines "office" as "[*a*] *position* of duty, trust, or authority." 1190 (9th ed. 2009) (emphasis added). A "governing body," on the other hand, encompasses a group of officers. *See Black's Law*

Dictionary 764 (defining "governing body" as "[a] group of . . . officers or persons having ultimate control"). Thus, an office cannot be equated to a governing body. Moreover, the drafters used the word "that" to modify the word "office," which demonstrates that the phrase "that office" refers to a specific office, not to any particular governing body as a whole. *See* William A. Sabin, *The Gregg Reference Manual* ¶ 308 (Elizabeth Haefele et al. eds., 11th ed. 2011). Undeniably, the words "that office," as used in Article 15, Section 3(2), cannot be read as meaning "that local governing body" or "any office within that local governing body."

As used in Article 15, Section 3(2), "that office" identifies the specific position that the person at issue has held for 12 or more years. And for the phrase to have any significance within the term-limits provision, "that office" must be the office to which the person is ineligible for election. *See* Nev. Const. art. 15, § 3(2).

Here, the Reno City Charter explains that the Reno city council is made up of two separate elective offices: mayor and city council member. Reno City Charter, Art. I, § 1.060(1)(a), (b) (identifying the mayor as one elective office and the six city council members as a separate elective office); *see also id.*, Art. II, § 2.010(1) ("The legislative power of the City is vested in a City Council consisting of six Council Members *and* a Mayor." (Emphasis added.)). In this context, no one disputes that the six city council members all hold the same office, that of city councilman or city councilwoman.[1] Indeed, the charter does not distinguish them from one another and they are all granted the same duties and powers. *See generally id.*, Art. II. And, as discussed by the majority, the council members are all of equal rank. *See Mason's Manual of Legislative Procedure* § 52 (Nat'l Conference of State Legislatures 2010) ("In public bodies the equality of members is presumed."); *id.* § 120 ("The rights and duties of members of a legislative body are derived from and founded upon the absolute equality of the members.").

But the mayor is different. The mayor is elected to the office of mayor, not to the office of city council member. Bob Cashell is formally recognized as Mayor Cashell, not Councilman Cashell. Further, the mayor's responsibilities are set out distinctly in the part of the charter governing the executive department, Reno City Charter, Art. III, § 3.010(1), while the city council members' duties are included in the article governing the legislative department. *See generally id.*, Art. II. And unlike the council members, the mayor is

[1]Thus, while the city council members each represent a separate ward or the city at large, they are nonetheless all subject to the same term limits. *See* Reno City Charter, Art. I, § 1.060(1)(b). As a result, any concerns that my interpretation of Article 15, Section 3(2) of the Nevada Constitution would allow council members to avoid the application of term limits by shifting positions on the city council are unfounded.

the public figurehead of the Reno city government. *See id.*, Art. III, § 3.010(1)(c).

Quite significantly, the mayor alone is charged with protecting the public peace and suppressing riots, and section 3.010(1)(f) authorizes him or her to declare emergencies and empowers the mayor to take immediate protective actions such as establishing a curfew, barricading streets and roads, and redirecting funds for emergency use. *See* Reno Municipal Code §§ 8.34.050(a), 8.34.060. And finally, the mayor is responsible for appointing certain commission and committee members. *See* Reno City Charter, Art. IX, § 9.030(1) (providing that the mayor appoints the members of the Reno Civil Service Commission). These duties are among those that set the mayor apart from the six city council members, establishing the office of mayor as a separate and distinct office. As a result, a person who has served for 12 years as a city council member has not served in the office of mayor, and thus, is not precluded by Article 15, Section 3(2) from holding "that office."

ROBERT GUNDERSON; PHYLLIS GUNDERSON; SHARRON LIBBY; ROSARIO LAYTON; TOMI DUREN; LINDA WATERS; JESSICA GRANT; CLIFFORD COUSER; CHARINA COUSER; DEANNA DAVIS; RICHARD T. JONES; MESSINA KLEIN; MELANIE MOORE; JOHN MENICHELLI; BERNADETTE MENICHELLI; SUZANNE ALLEN; ROBERT WEBER; KAREN KELLISON; JUAN LOPEZ; HELEN SCUNGIO; SHONNA MAYFIELD; GUNTHER R. PAUL; SHARON EPSTEIN; STEPHEN GREGORY; WENDY MURATA; VANESSA CASTER; WANDA BERKHOLTZ; DENNIS WERRA; AMANUAL ASFAHA; EDIT MOLNAR; FRANK SUTTON; GAGANATH M. PYARA; JESSE SAUNDERS; JODI MARTIN; JOSHUA DAVIS; KRISTI RODRIGUEZ; LYNN NOWAKOWSKI-BACON; JOHN NOWAKOWSKI-BACON; MARGARET DUDLEY; MICHELLE JOHNSON; MIGUEL SANTANA; DESIREE SANTANA; PATRICIA BARRETT; RANDY FERREN; PATRICK MCGOUGH; NANCY JANSEN; AND BARBARA WERRA, APPELLANTS/CROSS-RESPONDENTS, *v.* D.R. HORTON, INC., A DELAWARE CORPORATION, RESPONDENT/CROSS-APPELLANT.

No. 56614

February 27, 2014 319 P.3d 606

Appeal and cross-appeal from a district court judgment on a jury verdict in a construction defect action and an appeal from an order

denying a new trial. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Homeowners brought construction defect action against contractor. After homeowners rejected contractor's offers of judgment, the district court entered judgment on jury verdicts in favor of homeowners, awarded contractor post-offer costs, and denied homeowners' motion for a new trial. Homeowner appealed and contractor cross-appealed. The supreme court, DOUGLAS, J., held that: (1) homeowners failed to demonstrate that attorney misconduct warranted grant of new trial; (2) attorney's statement in closing argument stating belief that defects had been fixed was not impermissible personal opinion; (3) attorney's statement that he knew what opposing counsel was thinking constituted impermissible personal opinion; (4) attorney did not impermissibly encourage jury nullification; (5) after determining that offers of judgment were valid, the district court was required to award sanctions to contractor; (6) on issue of first impression, it was within the district court's discretion to apportion sanctions or impose joint and several liability; but (7) in construction defect action involving multiple offerees, apportionment was required.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied April 23, 2014]

James R. Christensen, Las Vegas, for Appellants/Cross-Respondents Robert Gunderson, Phyllis Gunderson, Linda Waters, Jessica Grant, Clifford Couser, John Menichelli, Bernadette Menichelli, Robert Weber, Juan Lopez, Helen Scungio, Shonna Mayfield, Gunther R. Paul, Wendy Murata, Wanda Berkholtz, Lynn Nowakowski-Bacon, Margaret Dudley, Michelle Johnson, Patricia Barrett, Patrick McGough, Nancy Jansen, and Barbara Werra.

Sharron Libby, Rosario Layton, Tomi Duren, Charina Couser, Deanna Davis, Richard T. Jones, Messina Klein, Melanie Moore, Suzanne Allen, Karen Kellison, Sharon Epstein, Stephen Gregory, Vanessa Caster, Dennis Werra, Amanual Asfaha, Edit Molnar, Frank Sutton, Gaganath M. Pyara, Jesse Saunders, Jodi Martin, Joshua Davis, Kristi Rodriguez, John Nowakowski-Bacon, Miguel Santana, Desiree Santana, and *Randy Ferren*, in Proper Person.

Wolfenzon Rolle and *Bruno Wolfenzon* and *Jonathan P. Rolle*, Las Vegas; *Marquis Aurbach Coffing* and *Jack Chen Min Juan* and *Micah S. Echols*, Las Vegas, for Respondent/Cross-Appellant.

1. APPEAL AND ERROR.

The supreme court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion.

2. Appeal and Error.
   Whether an attorney's comments, for purposes of granting a new trial, are misconduct is a question of law, which the supreme court reviews de novo; however, the supreme court will give deference to the district court's factual findings and application of the standards to the facts. NRCP 59(a)(2).
3. New Trial.
   A district court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party's substantial rights. NRCP 59(a)(2).
4. Appeal and Error.
   When reviewing a district court's grant or denial of a motion for a new trial based on attorney misconduct, the supreme court decides whether there was attorney misconduct, identifies the applicable legal standard for determining whether a new trial was warranted, and assesses whether the district court abused its discretion in applying that standard. NRCP 59(a)(2).
5. Trial.
   When an attorney commits misconduct, and an opposing party objects, the district court should sustain the objection and admonish the jury and counsel, respectively, by advising the jury about the impropriety of counsel's conduct and reprimanding or cautioning counsel against such misconduct.
6. New Trial.
   In the event of a proper objection and admonition following attorney misconduct during trial, a party moving for a new trial bears the burden of demonstrating that the misconduct was so extreme that the objection and admonishment could not remove the misconduct's effect. NRCP 59(a)(2).
7. New Trial.
   If the district court overrules a party's objection to alleged attorney misconduct, the party moving for a new trial must show that the district court erred in its ruling and that an admonition to the jury would likely have affected the verdict in favor of the moving party. NRCP 59(a)(2).
8. Appeal and Error.
   An attorney's failure to object constitutes waiver of an issue, unless the failure to correct the misconduct would constitute plain error.
9. Appeal and Error.
   Establishing plain error from attorney misconduct requires a party to show that the attorney misconduct amounted to irreparable and fundamental error, resulting in a substantial impairment of justice or denial of fundamental rights.
10. Appeal and Error.
    Plain error exists only when it is plain and clear that no other reasonable explanation for the verdict exists.
11. New Trial.
    If attorney misconduct is persistent or repeated, when considering a motion for a new trial, the district court must take into account that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by the attorney's misconduct. NRCP 59(a)(2).
12. New Trial.
    When considering a motion for a new trial based on attorney misconduct, the district court must acknowledge that although specific instances of misconduct alone might have been curable by objection and admonishment, the effect of persistent or repeated misconduct might be incurable. NRCP 59(a)(2).

13. New Trial.

Homeowners failed to demonstrate that misconduct was so extreme that objection and sustainment of request for admonishment could not have removed misconduct's effect, and therefore, misconduct by counsel for contractor during construction defect action by homeowners, in violating rule of professional conduct prohibiting attorneys from stating personal opinion as to the justness of cause, the credibility of a witness, or the culpability of a civil litigant, did not warrant granting a new trial; although attorney implicitly asserted a personal opinion as to the justness of the homeowners' case by implying that the homeowners' attorneys unilaterally initiated the action and fabricated its foundations, homeowners failed to demonstrate that there was no other reasonable basis to support the verdict. NRCP 59(a)(2); RPC 3.4(e).

14. Attorney and Client.

Attorney's statement in closing argument of construction defect action that he believed subcontractor fixed any plumbing defects in homes did not violate rule of professional conduct prohibiting attorneys from alluding to any matter that the lawyer did not reasonably believe was relevant or that would not be supported by admissible evidence, asserting personal knowledge of facts in issue except when testifying as a witness, or stating a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant. RPC 3.4(e).

15. Attorney and Client.

Statement by attorney for contractor in construction defect action by homeowners claiming to know what counsel for homeowners was thinking constituted violation of rule of professional conduct prohibiting attorneys from stating a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant, where statement implicitly asserted a personal opinion as to the justness of the homeowners' case based on the statement's implication that the homeowners' attorneys unilaterally initiated the action and fabricated its foundations. RPC 3.4(e).

16. New Trial.

When a district court sustains an objection to attorney misconduct but fails to admonish counsel or the jury, if objecting counsel does not promptly request the omitted admonishments, he or she must, in seeking a new trial based on the improper conduct, demonstrate that the misconduct was so extreme that the objection and sustainment could not have removed the misconduct's effect. NRCP 59(a)(2).

17. New Trial; Trial.

If the district court fails to admonish counsel or the jury after objecting counsel requests such admonishment promptly following his or her sustained objection to attorney misconduct, a party moving for a new trial must only demonstrate that an admonition to the jury would likely have affected the verdict in favor of the moving party. NRCP 59(a)(2).

18. Attorney and Client.

Counsel for contractor did not encourage jury nullification in construction defect action by homeowners in violation of rule of professional conduct prohibiting attorneys stating a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant, where counsel did not urge the jury to reject the evidence or the law when making this statement; instead, counsel asked the jury to find that contractor was not liable based on the evidence presented. RPC 3.4(e).

19. Attorney and Client.

An attorney making an attempt at jury nullification violates the rule of professional conduct prohibiting attorneys stating a personal opinion as to

the justness of a cause, the credibility of a witness, or the culpability of a civil litigant in two ways: (1) the attorney is either alluding to a matter that is irrelevant given the law or unsupported by admissible evidence given the facts; and (2) whether explicit or implicit, the attorney is inherently asserting his or her opinion as to the justness of a cause. RPC 3.4(e).

20. New Trial.

To obtain a new trial based on the cumulative effect of attorney misconduct, the moving party must demonstrate that no other reasonable explanation for the verdict exists. NRCP 59(a)(2).

21. New Trial.

In evaluating whether a party seeking a new trial based on the cumulative effect of attorney misconduct at trial has demonstrated that no other reasonable explanation for the verdict exists, the supreme court looks at the scope, nature, and quantity of misconduct as indicators of the verdict's reliability. NRCP 59(a)(2).

22. Appeal and Error.

Grounds for reversing a district court's decision denying a new trial based on attorney misconduct under the plain error standard will generally require multiple severe instances of attorney misconduct as determined by their context. NRCP 59(a)(2).

23. Appeal and Error.

The supreme court generally reviews a district court's decision awarding or denying costs or attorney fees for an abuse of discretion.

24. Appeal and Error.

When a district court exercises its discretion in clear disregard of the guiding legal principles, it may constitute an abuse of discretion.

25. Costs.

Statute governing awards of attorney fees in construction defect actions does not preclude application of the penalty provisions of statute and rule of civil procedure governing offers of judgment. NRS 17.115, 40.655; NRCP 68.

26. Costs.

In determining whether to award attorney fees in the offer of judgment context, a district court must consider and weigh the following factors: (1) whether the plaintiff's claim was brought in good faith, (2) whether the defendant's 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; NRCP 68.

27. Costs.

After determining that contractor's offers of judgment to homeowners were valid in construction defect action, the district court was statutorily required to issue sanctions to contractor after jury verdicts in favor of homeowners in amounts less than offers of judgment. NRS 17.115; NRCP 68.

28. Costs.

When sanctions are issued against multiple offerees pursuant to penalty provisions of statute and rule of civil procedure governing rejections of offers of judgment, the decision of whether to apportion the sanctions among the offerees or to impose joint and several liability falls within the purview of the district court's discretion based on the circumstances before it, including whether different offerees raised distinct issues justifying segregating the costs and attorney fees associated with the litigation, and in the case of a prevailing party, whether the party entitled to costs and/or attorney

fees would otherwise not likely be able to recover a substantial portion of his or her judgment. NRS 17.115; NRCP 68.

29. Appeal and Error.

A district court's discretion includes the power to determine questions to which no strict rule of law is applicable but which, from their nature and the circumstances of the case, are controlled by the personal judgment of the court.

30. Costs.

In construction defect action, when sanctions were issued against multiple offeree homeowners pursuant to penalty provisions of statute and rule of civil procedure governing rejection of offers of judgment, the district court was required to apportion sanctions among homeowners, rather than impose joint and several liability; by requiring the apportionment of sanctions in this context, it was ensured that group homeowner construction defect actions would not be chilled by the threat of crippling joint and several sanctions, and apportionment was logical and feasible in these circumstances because each home had distinctive defects and juries issued individual homeowner verdicts. NRS 17.115; NRCP 68.

Before the Court En Banc.[1]

OPINION

By the Court, Douglas, J.:

In this opinion, we address whether the district court abused its discretion by: (1) denying a motion for a new trial based on allegations of attorney misconduct; (2) not granting sanctions under NRS 17.115 and NRCP 68; and/or (3) refusing to consider apportioning sanctions. We conclude that the district court did not abuse its discretion in denying appellants/cross-respondents' motion for a new trial, but did abuse its discretion regarding the issuance and apportionment of sanctions. We hold that: (1) the district court was statutorily required to issue sanctions under NRS 17.115 and NRCP 68; (2) when a district court issues sanctions against multiple offerees pursuant to NRS 17.115 and NRCP 68, it has and must exercise its discretion to determine whether to apportion those sanctions among the multiple offerees or to impose those sanctions with joint and several liability; and (3) when sanctions are issued against multiple homeowner offerees pursuant to NRS 17.115 and NRCP 68 in a construction defect action, a district court abuses its discretion by imposing those sanctions jointly and severally against the homeowners. Accordingly, we affirm the district court's decision in part, reverse in part, and remand the matter to the district court for further proceedings consistent with this opinion.

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[1]The Honorable Michael A. Cherry, Justice, and The Honorable Ron D. Parraguirre, Justice, voluntarily recused themselves from participation in this matter.

FACTS AND PROCEDURAL HISTORY

Appellants/cross-respondents, homeowners in the High Noon at Boulder Ranch community (the homeowners), retained experts to inspect their homes for construction defects. Based on their experts' findings, the homeowners sent respondent/cross-appellant contractor D.R. Horton, Inc., a written notice detailing alleged architectural, insulation, waterproofing, and other defects. In response, D.R. Horton notified the homeowners of its intent to inspect the alleged defects to determine how to respond to the homeowners' notice. The homeowners then filed a complaint, seeking relief primarily under theories of negligence and breach of warranty.

After receiving the homeowners' complaint, D.R. Horton elected to repair the identified defects. Subsequently, the district court stayed proceedings on the homeowners' complaint to allow D.R. Horton to make repairs. After completing its work, D.R. Horton provided the homeowners with a formal statement of repairs. The district court then lifted the stay, and the homeowners filed an amended complaint. In response, D.R. Horton filed an answer and a third-party complaint against several subcontractors.

Before trial, D.R. Horton served individual offers of judgment on each of the homeowners based on the extent of their respective property's defects; 39 of the 40 homeowners rejected these offers and proceeded to trial.

During closing arguments, counsel for D.R. Horton and counsel for third-party defendant RCR Plumbing made multiple statements that the homeowners' counsel objected to as attorney misconduct. The district court sustained several of these objections without admonishing counsel or the jury. At the conclusion of the trial, the jury awarded verdicts for each homeowner, totaling $66,300 in damages. No individual homeowner's award exceeded his or her offer of judgment from D.R. Horton.

Following the jury's verdicts, the homeowners and D.R. Horton filed motions for costs and attorney fees. The district court determined that D.R. Horton made valid offers of judgment and that no homeowner's award exceeded his or her respective offer. Accordingly, the district court awarded D.R. Horton post-offer costs, but declined to award it attorney fees. Despite awarding D.R. Horton post-offer costs, the district court denied both motions, stating that it was impossible to award apportioned costs and fees under the circumstances. The homeowners then filed a motion for a new trial, or, in the alternative, additur. D.R. Horton opposed the homeowners' motion and filed a countermotion for remittitur, requesting that the district court reduce the verdicts to zero. Again, the district court denied both motions. This appeal and cross-appeal followed.

In their appeal and cross-appeal, the homeowners and D.R. Horton assert a number of arguments. While we conclude that most of these arguments do not warrant specific discussion,[2] we take this opportunity to address the homeowners' argument that the district court abused its discretion in denying their motion for a new trial based on attorney misconduct and both parties' contentions that they were entitled to costs and attorney fees.

DISCUSSION

I. *The district court did not abuse its discretion in denying a new trial for attorney misconduct*

The homeowners argue that the district court should have granted their motion for a new trial because D.R. Horton's counsel repeatedly committed misconduct throughout the trial. Specifically, the homeowners claim that D.R. Horton's counsel violated RPC 3.4(e) and our decision in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), by urging the jurors to "send a message" because this case was driven by attorneys and experts, the homeowners were liars, and the trial was a waste of the jury's time. The homeowners also assert that, even if the specific instances of misconduct were not independently sufficient to warrant a new trial, the cumulative effect of D.R. Horton's counsel's misconduct required the district court to grant the homeowners' motion for a new trial. We disagree.

[Headnotes 1, 2]

This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Lioce*, 124 Nev. at 20, 174 P.3d at 982. "Whether an attorney's comments are misconduct is a question of law, which we review de novo; however, we will give deference to the district court's factual findings and application of the standards to the facts." *Id.*

[Headnotes 3, 4]

Under NRCP 59(a)(2), the district court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party's substantial rights. In *Lioce*, this court discussed the applicable legal standards for reviewing a district court's denial of a motion for a new trial based on attorney misconduct. *See Lioce*, 124 Nev. at 14-26, 174 P.3d at 978-86. Under *Lioce*, this court decides

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[2]In particular, we have considered the homeowners' arguments regarding alleged improper ex parte communications, reliance on facts not in evidence, introduction of excluded evidence, changes to the trial protocol, acceptance of late-deposited documents, the jury instructions, the motion to strike a defense expert's testimony, exclusion of certain evidence, and the denial of additur. With regard to each of these claims, we have determined that either the homeowners failed to preserve the argument or the argument lacks merit. We also conclude that by failing to make an offer of proof, D.R. Horton failed to preserve its argument that the district court abused its discretion in denying testimony from a defense witness.

whether there was attorney misconduct, identifies the applicable legal standard for determining whether a new trial was warranted, and assesses whether the district court abused its discretion in applying that standard. *See id.* at 14-26, 174 P.3d at 978-86.

[Headnotes 5-7]

When an attorney commits misconduct, and an opposing party objects, the district court should sustain the objection and admonish the jury and counsel, respectively, by advising the jury about the impropriety of counsel's conduct and reprimanding or cautioning counsel against such misconduct. *Id.* at 17, 174 P.3d at 980; *see also Black's Law Dictionary* 55 (9th ed. 2009) (defining "admonition" as "[a]ny authoritative advice or caution from the court to the jury regarding their duty as jurors or the admissibility of evidence for consideration," or "[a] reprimand or cautionary statement addressed to counsel by a judge"). In the event of a proper objection and admonition, "a party moving for a new trial bears the burden of demonstrating that the misconduct [was] so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce*, 124 Nev. at 17, 174 P.3d at 981. If the district court overrules the objection, the party moving for a new trial must show that the district court erred in its ruling and that "an admonition to the jury would likely have affected the verdict in favor of the moving party." *Id.* at 18, 174 P.3d at 981.

[Headnotes 8-10]

An attorney's failure to object constitutes waiver of an issue, unless the failure to correct the misconduct would constitute plain error. *Id.* at 19, 174 P.3d at 982. Establishing plain error requires a party to show that "the attorney misconduct amounted to irreparable and fundamental error," resulting "in a substantial impairment of justice or denial of fundamental rights." *Id.* In other words, plain error exists only "when it is plain and clear that no other reasonable explanation for the verdict exists." *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004).

[Headnotes 11, 12]

Finally, if misconduct is persistent or repeated, the district court must take into account "that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct." *Lioce*, 124 Nev. at 18-19, 174 P.3d at 981. As a result, the district court must acknowledge that although specific instances of misconduct alone might have been curable by objection and admonishment, the effect of persistent or repeated misconduct might be incurable. *See id.* at 19, 174 P.3d at 981.

[Headnote 13]

The homeowners argue that D.R. Horton's counsel violated RPC 3.4(e) by pursuing the theme that the case was driven by the home-

owners' lawyers and experts. Specifically, the homeowners contend that D.R. Horton's counsel instructed the jury to disregard the evidence, that the homeowners were liars, and that the alleged defects did not exist. D.R. Horton claims that it did not violate RPC 3.4(e) and that the homeowners are precluded from making this argument now because they failed to object on these grounds at trial.

RPC 3.4(e) prohibits attorneys from:

> allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert[ing] personal knowledge of facts in issue except when testifying as a witness, or stat[ing] a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant . . . .

[Headnote 14]

The homeowners objected to the following comment made by third-party defendant RCR's counsel during closing arguments:[3]

> There's a Special Interrogatory I'm going to ask you to find whether you still believe if there are any plumbing repairs out there. I don't believe there is. I think we repaired anything that was there.

Applying *Lioce*'s framework, we must first determine whether RCR's counsel committed attorney misconduct. In this instance, our review of the record indicates that RCR's counsel did not violate RPC 3.4(e) or commit any other attorney misconduct. Accordingly, this statement provides no basis for a new trial.

[Headnote 15]

The homeowners also objected to the following statement by D.R. Horton's counsel:

> What did every homeowner say they wanted? They wanted a safe house; right? That's what they all wanted. They learned that from their expert that their house was somehow unsafe? No. None of them ever talked to their experts. They learned it from their attorneys. For what purpose? For the purpose of litigation. And now the homeowner is in the middle because Mr. Gunther is sitting here, and he's listening to our side of the story, and he's saying, "Oh, gosh. They tell me my house is unsafe."

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[3]D.R. Horton argues that because the jury was instructed to decide the case only as between D.R. Horton and the homeowners, the argument of RCR's counsel is irrelevant in this appeal. We disagree. Regardless of the limitations imposed on the scope of the jury's decision, RCR's counsel made its remarks before the jury deliberated about the issues in this appeal, and thus, counsel's comments could have influenced that verdict.

The basis for the homeowners' objection was that D.R. Horton's attorney improperly claimed to know what Mr. Gunther was thinking. Applying the *Lioce* framework again, we first determine whether D.R. Horton's counsel's statement was attorney misconduct. D.R. Horton's counsel's statement violates RPC 3.4(e) by implicitly asserting a personal opinion as to the justness of the homeowners' case based on the statement's implication that the homeowners' attorneys unilaterally initiated this action and fabricated its foundations.

[Headnotes 16, 17]

Next, we must identify the applicable legal standard. As the homeowners note, after sustaining their objection to this statement, the district court failed to admonish counsel or the jury. *Lioce* does not directly address this situation. Accordingly, we now clarify that when a district court sustains an objection to attorney misconduct but fails to admonish counsel or the jury, if objecting counsel does not promptly request the omitted admonishments, he or she must, in seeking a new trial based on the improper conduct, demonstrate that the misconduct was so extreme that the objection and sustainment could not have removed the misconduct's effect. *Cf. Lioce*, 124 Nev. at 17, 174 P.3d at 981. If the district court fails to admonish counsel or the jury after objecting counsel requests such admonishment promptly following his or her sustained objection, a party moving for a new trial must only demonstrate that "an admonition to the jury would likely have affected the verdict in favor of the moving party." *Cf. id.* at 18, 174 P.3d at 981.

Here, the homeowners must show that D.R. Horton's counsel's misconduct was so extreme that its effect could not have been removed by their objection and the district court's sustainment because their counsel failed to request admonishments where they were mistakenly omitted by the district court. We conclude that the homeowners have not shown that the misconduct's effect could not have been removed by the objection and its sustainment. Accordingly, applying the last step in the *Lioce* analysis, we determine that the district court did not abuse its discretion in denying the homeowners' motion for a new trial.

[Headnotes 18, 19]

The homeowners separately claim that D.R. Horton's counsel committed attorney misconduct by encouraging jury nullification. An attorney's arguments in favor of jury nullification constitute misconduct in part because they violate RPC 3.4(e). Jury nullification is defined as

> [a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case

> itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

Lioce, 124 Nev. at 20, 174 P.3d at 982-83 (alteration in original) (quoting *Black's Law Dictionary* 875 (8th ed. 2004)). An attorney making an attempt at jury nullification violates RPC 3.4(e) in two ways: (1) the attorney is either alluding to a matter that is irrelevant given the law or unsupported by admissible evidence given the facts; and (2) whether explicit or implicit, the attorney is inherently asserting his or her opinion as to the justness of a cause.

In support of their jury nullification argument, the homeowners rely in part on D.R. Horton's counsel's statement during closing arguments that, "[i]f you want to send a message to the homeowners that their houses are safe, tell them, 'I sat for 12 weeks; I listened to everything; your house is safe.' " In *Lioce*, this court concluded that the attorney made a jury nullification argument when he encouraged the jury to find in the defendants' favor regardless of the evidence to send the message that lawsuits like the case at issue are a waste of taxpayers' money and jurors' time. *Lioce*, 124 Nev. at 21, 174 P.3d at 983. In other words, the attorney encouraged the jurors to make their decision based on something other than the law and the evidence. *See id.* In contrast to *Lioce*, D.R. Horton's counsel did not urge the jury to reject the evidence or the law when making this statement. Instead, D.R. Horton's counsel asked the jury to find that D.R. Horton was not liable based on the evidence presented. Thus, regardless of D.R. Horton's counsel's use of the phrase "send a message," counsel was not improperly encouraging jury nullification, and this argument does not provide a basis for reversing the district court's decision denying the homeowners' motion for a new trial.

[Headnotes 20-22]

Finally, the homeowners argue that the cumulative effect of D.R. Horton's counsel's misconduct justifies a new trial. To obtain a new trial based on the cumulative effect of attorney misconduct, the appealing party "must demonstrate that no other reasonable explanation for the verdict exists." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365, 212 P.3d 1068, 1079 (2009). In evaluating whether this has been demonstrated, we "look at the scope, nature, and quantity of misconduct as indicators of the verdict's reliability." *Id.* Grounds for reversing a district court's decision denying a new trial under the plain error standard will generally require multiple severe instances of attorney misconduct as determined by their context. *See, e.g.*, *Lioce*, 124 Nev. at 8, 24, 174 P.3d at 974-75, 985 (upholding a district court's granting of a motion for a new trial where the attorney's misconduct included multiple improper attempts at jury nullification and repeated egregious and inappropriate com-

ments during closing arguments).[4] Considering the homeowners' arguments as a whole, we conclude that they fail to meet Nevada's standards for reversing a district court's denial of a motion for a new trial. Accordingly, we affirm the district court's denial of the homeowners' motion for a new trial.

II. *The district court abused its discretion in refusing to issue sanctions pursuant to NRS 17.115 and NRCP 68 and in failing to apportion those sanctions among the homeowners*

In its order on the issue of costs and attorney fees, the district court determined that D.R. Horton's individual offers of judgment were valid pursuant to NRS 17.115 and NRCP 68. The district court also found that the valid offers of judgment were rejected by the 39 homeowners involved and that none of them obtained a jury verdict higher than his or her respective offer of judgment. Based on these findings, the district court awarded D.R. Horton post-offer costs.

Immediately following this award, the district court stated that neither the homeowners nor D.R. Horton did or could allocate any costs or attorney fees, seemingly disposing of the issues once and for all. After making this statement, the district court revived the issue of D.R. Horton's attorney fees by conducting a *Beattie* analysis and concluding that D.R. Horton was not entitled to attorney fees under NRS 17.115 and NRCP 68. *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). The district court also determined that D.R. Horton was not entitled to attorney fees pursuant to NRS 18.010. Finally, for the second time, the district court stated that neither the homeowners nor D.R. Horton allocated or could allocate costs or attorney fees among the homeowners in this case, making it impossible for it to award any costs or attorney fees.

The homeowners claim that D.R. Horton's individual offers of judgment were invalid, preventing D.R. Horton from receiving costs under NRS 17.115 and NRCP 68. Conversely, the homeowners contend that they are entitled to costs pursuant to NRS 40.650. In response, D.R. Horton argues that it is entitled to costs and attorney fees under NRCP 68 and NRS 17.115 because the offers of judgment were valid, and that for the same reason, the homeowners are precluded from recovering either costs or attorney fees after they rejected the valid offers. Additionally, D.R. Horton asserts that the homeowners cannot recover costs because they failed to file the

[4]*See also Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 266, 269-76 (D. N.J. 1991) *aff'd*, 980 F.2d 171 (3d Cir. 1992) (granting a new trial where attorney misconduct included (1) pervasive and flagrant appeals to speculation, sympathy, outrage, and revenge from the jury; (2) repeated expressions of opinion as to the merits, credibility of witnesses, and culpability of defendant; and (3) repeated disparaging attacks on opposing counsel).

required memorandum of costs under NRS 18.110(1). D.R. Horton alternatively maintains that it is the prevailing party entitled to costs and attorney fees under NRS 18.020. The homeowners reply that D.R. Horton was not a prevailing party and therefore cannot recover under NRS 18.020.

A. *Sanctions*

[Headnotes 23, 24]

This court generally reviews a district court's decision awarding or denying costs or attorney fees for an abuse of discretion. *See Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998). "[W]here a trial court exercises its discretion in clear disregard of the guiding legal principles," it "may constitute an abuse of discretion." *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

Because we determine that the district court's order was unclear and erroneous, we offer the following guidance. In a construction defect action, the claimant generally may only recover attorney fees and specified costs that are proximately caused by a construction defect. *See* NRS 40.655(1). Alternatively, "the court may make an allowance of [attorney] fees to a prevailing party." NRS 18.010(2). And "[c]osts must be allowed . . . to the prevailing party against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." NRS 18.020(3).

[Headnote 25]

However, "NRS 40.655 does not preclude application of the penalty provisions of NRCP 68 and NRS 17.115." *Albois v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). Similarly, NRS 18.010 and 18.020 do not preclude the application of the penalty provisions of NRCP 68 and NRS 17.115. *See id.* Thus, when an offeree rejects a valid offer and does not obtain a more favorable judgment, NRS 17.115(4)(a) and (b) and NRCP 68(f)(1) preclude the offeree from recovering any costs, attorney fees, or interest for the period after the service of the offer and before the judgment. In such a situation, the district court must order the offeree to pay the post-offer costs incurred by the party who made the offer.[5] *See* NRS 17.115(4)(c); NRCP 68(f)(2). Additionally, the

[5]Although NRCP 68(f)(2) requires an award of "post-offer costs" and NRS 17.115(4)(c) requires an award of "taxable costs," we follow our precedent and harmonize these seemingly conflicting provisions to mean "post-offer costs." *See McCrary v. Bianco*, 122 Nev. 102, 106-07, 131 P.3d 573, 576 (2006) (stating that regarding NRCP 68 and NRS 17.115, "the court construes the rules in harmony with the statute"); *In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) (determining that "where a general statutory provision and a specific one cover the same subject matter, the specific provision controls").

district court may order the offeree to pay the offeror's reasonable attorney fees pursuant to NRS 17.115(4)(d)(3) and NRCP 68(f)(2).

[Headnote 26]

In determining whether to award attorney fees in the offer of judgment context, a district court must consider and weigh the following factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant[']s] 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.

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. In considering the fourth *Beattie* factor, whether the fees sought by the offeror are reasonable and justified in amount, the district court must consider the *Brunzell* factors. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005). The *Brunzell* factors include:

> (1) *the qualities of the advocate*: his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done*: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) *the work actually performed by the lawyer*: the skill, time and attention given to the work; (4) *the result*: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

As a threshold matter for our analysis, we determine that the district court properly concluded that D.R. Horton's offers of judgment were valid. Although the homeowners sought costs and attorney fees under NRS 18.010, 18.020, and 40.655, each of them failed to obtain a judgment greater than his or her rejected valid offer of judgment. Accordingly, NRS 17.115 and NRCP 68 preclude those homeowners from recovering any costs or attorney fees, and we affirm the district court's denial of costs or attorney fees to the homeowners.[6] *See Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (affirming a district court's correct result reached for the wrong reason).

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[6]Even if the homeowners were not precluded from recovering costs by NRS 17.115 and NRCP 68, they would be for their failure to file a memorandum of costs pursuant to NRS 18.110(1).

[Headnote 27]

We now consider the district court's order as it relates to D.R. Horton's motion for costs and attorney fees. At the outset, we note that the district court was required to award D.R. Horton post-offer costs under NRS 17.115(4)(c) and NRCP 68(f)(2). Additionally, in considering whether to award D.R. Horton reasonable attorney fees pursuant to NRS 17.115(4)(d)(3) and NRCP 68(f)(2), the district court properly identified the *Beattie* factors. The district court's analysis did not, however, consider the required *Brunzell* factors in its *Beattie* analysis. To the extent that the district court failed to apply the full, applicable legal analysis, it abused its discretion. *See Beattie*, 99 Nev. at 589, 668 P.2d at 274. On remand, the district court must award D.R. Horton post-offer costs and reconsider its attorney fees analysis as to D.R. Horton by properly applying the *Beattie* and *Brunzell* factors.[7] Additionally, the district court must follow our guidance below in determining whether to apportion issued sanctions among the homeowners or impose the sanctions with joint and several liability.

B. *Apportionment of sanctions issued under NRS 17.115 and NRCP 68*

[Headnotes 28, 29]

Although a district court's decision regarding an award of attorney fees is generally reviewed for an abuse of discretion, where, as here, the decision implicates a question of law, the appropriate standard of review is de novo. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). Whether a district court can apportion sanctions awarded under NRS 17.115 and NRCP 68 is a question of law that this court has not addressed. In considering this question, we preliminarily acknowledge that a district court's discretion includes "[t]he power . . . to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." *Goodman v. Goodman*, 68 Nev. 484, 487, 236 P.2d 305, 306 (1951) (internal quotation omitted). With this in mind, we hold that when a district court issues sanctions against multiple offerees pursuant to NRS 17.115 and NRCP 68, it has and must exercise its discretion to determine whether to apportion those sanctions among the multiple offerees or impose those sanctions with joint and several liability.

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[7]The district court correctly ruled that D.R. Horton had no right to attorney fees under NRS 18.010 because D.R. Horton failed to obtain a monetary judgment. *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995) (holding "that the recovery of a money judgment is a prerequisite to an award of attorney fees pursuant to NRS 18.010(2)(a)").

The Arizona Court of Appeals recently addressed the issue of whether a trial court was required to consider apportioning sanctions among multiple offerees in the offer of judgment context. *See Flood Control Dist. of Maricopa Cnty. v. Paloma Inv. Ltd. P'ship*, 279 P.3d 1191, 1209-10 (Ariz. Ct. App. 2012). In *Maricopa County*, the offeror made offers of judgment to two offerees in the amount of 46 percent and 8 percent of its total offer to a larger group of offerees. *Id.* at 1209. Because the two offerees failed to obtain a judgment greater than their respective offers, Arizona's offer of judgment rule permitted sanctions. *Id.* at 1208-10. The two offerees argued that their share of any sanction should be proportional to their percentage of the allocated offer of judgment. *Id.* at 1209. The trial court disagreed. *Id.* In reviewing the issue, the appellate court in *Maricopa County* recognized that Arizona's offer of judgment rule did not require or prohibit the apportionment of sanctions between offerees. *See id.* Based on this finding, the court reversed and remanded the case so that the trial court could exercise its discretion to determine whether sanctions should be apportioned based on the individual allocated offers of judgment. *Id.* at 1210.

We note that similar to Arizona's rule, our offer of judgment rule does not speak to apportionment based on allocated offers of judgment among multiple offerees. *See* NRS 17.115; NRCP 68. Like the *Maricopa County* court, we conclude that the decision of whether to apportion sanctions under NRS 17.115 and NRCP 68 among multiple offerees or to impose joint and several liability falls within the purview of the district court's discretion based on the circumstances before it. In exercising this discretion, the district court should consider factors, including but not limited to: (1) whether different offerees raise distinct issues justifying segregating the costs and attorney fees associated with the litigation; and (2) in the case of a prevailing party, whether the party entitled to costs and/or attorney fees would otherwise not likely be able to recover a substantial portion of his or her judgment. *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497 (8th Cir. 2002).[8] We emphasize that these two factors are not exhaustive and that the district court can and should consider other relevant factors where appropriate. Having established that the district court must exercise its discretion to determine whether to apportion sanctions or impose

[8]*See also White v. Sundstrand Corp.*, 256 F.3d 580, 585-86 (7th Cir. 2001) (holding eight class representatives jointly and severally liable for costs where the other class members were not given notice and opportunity to opt out of the case); *Walker v. U.S. Dep't of Housing and Urban Dev.*, 99 F.3d 761 (5th Cir. 1996) (upholding a district court's imposition of joint and several liability of attorney fees where the parties had a joint legal team and shared witnesses).

them jointly and severally, we conclude that the district court abused its discretion by failing to make such a determination in this case.

[Headnote 30]

Additionally, we take this opportunity to hold that when sanctions are issued against multiple homeowner offerees pursuant to NRS 17.115 and NRCP 68 in a construction defect action, a district court abuses its discretion by imposing those sanctions jointly and severally against the homeowners. When an individual brings a construction defect action, litigation costs will often exceed the recoverable amount for the defects in that individual's home. While NRS 40.655 permits an award of reasonable attorney fees proximately caused by a construction defect, it does not guarantee it. *See* NRS 40.655(1)(a). Thus, absent egregiously costly defects, a homeowner will be chilled from bringing an individual lawsuit to exercise his or her right to be compensated for less costly defects. Based on this kind of cost-benefit analysis, construction defect actions tend to be brought in groups by multiple homeowners from the same community.

One of the primary purposes of our construction defect statutory scheme is "to protect the rights of homebuyers by providing a process to hold contractors liable for defective original construction or alterations." *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 359, 167 P.3d 421, 428 (2007). Our analysis has shown that homeowners already face much uncertainty in bringing individual construction defect actions, placing great importance on preserving the reasonableness of bringing a group lawsuit for construction defects. By requiring the apportionment of sanctions under NRS 17.115 and NRCP 68 in this context, we are seeking to ensure that group homeowner construction defect actions will not be chilled by the threat of crippling joint and several sanctions. We also note that apportionment is logical and feasible in these circumstances because each home has distinctive defects and juries issue individual homeowner verdicts. Accordingly, we determine that on remand the district court must apportion sanctions issued against the homeowners based on their individual offers of judgment.

Based on the foregoing analysis, we affirm the district court's order denying the homeowners' motion for a new trial, but we reverse the district court's order regarding the issuance of sanctions and remand the matter to the district court for further proceedings consistent with this opinion.

GIBBONS, C.J., and PICKERING, HARDESTY, and SAITTA, JJ., concur.

DAVID SANCHEZ-DOMINGUEZ, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 58345

February 27, 2014 318 P.3d 1068

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, aggravated stalking, and burglary. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

The supreme court, PICKERING, J., held that: (1) the killing that resulted from the burglary fell within the purview of the first-degree felony-murder statute, and (2) the district court did not commit plain error in instructing the jury on the felony-murder rule.

Affirmed.

CHERRY and SAITTA, JJ., dissented.

Richard F. Cornell, Reno, for Appellant.

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

1. CRIMINAL LAW.
   The supreme court reviews the district court's rejection of proposed instructions for an abuse of discretion, keeping in mind that a defendant is not entitled to misleading, inaccurate, or duplicative jury instructions.
2. HOMICIDE.
   Duration of felony-murder liability can extend beyond the termination of the felony.
3. CRIMINAL LAW.
   The district court had no obligation to give defendant's proposed instructions that misstated the law regarding felony murder.
4. CRIMINAL LAW.
   Although defendant's proposed instruction was an accurate statement of the law of burglary, the district court did not err by omitting this instruction because the instruction duplicated, and was less accurate than, the burglary instruction the court actually gave. NRS 205.060.
5. CRIMINAL LAW.
   A party's failure to object to or request an instruction generally precludes appellate review, but there is an exception to this rule, namely if a plain and obvious error occurred that is so serious it affected the defendant's substantial rights.
6. CRIMINAL LAW.
   In conducting plain error review, the supreme court must examine whether there was error, whether the error was plain or clear, and whether

the error affected the defendant's substantial rights, and to demonstrate plain error, appellant has the burden of demonstrating actual prejudice.

7. CRIMINAL LAW.
   Necessary antecedent to invoking the plain-error doctrine is to determine whether error occurred at all.
8. HOMICIDE.
   Purpose of felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for the killings that are the result of a felony or an attempted one.
9. HOMICIDE.
   Because the felony-murder rule seeks to make punishment more certain, it is not intended to relieve the wrong-doer from any consequences of the perpetrator's act.
10. HOMICIDE.
    Perpetration of a felony does not end the moment all of the statutory elements of the felony are complete, and instead, the duration of felony-murder liability can extend beyond the termination of the felony itself if the killing and the felony are part of one continuous transaction. NRS 200.030(1)(b).
11. HOMICIDE.
    For purposes of felony-murder rule, crimes of arson, burglary, and rape may be considered to continue while the building burns, while the burglars search the building, and while the sexual connection is maintained. NRS 200.030(1)(b).
12. HOMICIDE.
    Phrase "in the perpetration of," as used in the felony-murder rule, encompasses acts beyond the predicate felony's statutory elements to include all acts connected to the predicate felony. NRS 200.030(1)(b).
13. HOMICIDE.
    Even if defendant had completed the statutory elements of burglary by the time he killed victim, the felony-murder rule still applied because the killing occurred moments later while defendant remained in the family home uninvited. NRS 200.030(1)(b).
14. CRIMINAL LAW.
    "Cause" is something that precedes an effect or result, whereas "perpetration" is a specific type of causation where an actor commits or carries out a crime.
15. HOMICIDE.
    If a person commits a homicide "in the perpetration" of a felony, the person commits the homicide while causing a felonious event; in other words, the only nexus required is that the felony and the killing be part of a continuous transaction. NRS 200.030(1)(b).
16. HOMICIDE.
    Felony-murder rule holds felons strictly accountable for the consequences of perpetrating a felony, and it is immaterial whether a killing is intentional or accidental. NRS 200.030(1)(b).
17. HOMICIDE.
    Even if a perpetrator did not intend to cause a death, causation is assumed where a killing would not have occurred but for the perpetrator's purposeful decision to cause a felony.
18. HOMICIDE.
    Phrase "in the perpetration of," as used in felony-murder rule, captures the nominal causation that felony murder requires. NRS 200.030(1)(b).

19. HOMICIDE.

Felony-murder rule does not apply where a bank customer unaware that a robbery is taking place suffers a fatal heart attack from natural causes, and in this situation, what has absolved the defendant of felony-murder liability is not a lack of causation, but rather that the death did not occur "in the perpetration of" the felony. NRS 200.030(1)(b).

20. HOMICIDE.

The killing that resulted from the burglary fell within the purview of the first-degree felony-murder statute; victim's death would not have occurred but for defendant's burglary of the home, and there was no doubt that defendant shot victim at point-blank range as victim stood between defendant and victim's mother, and even though defendant completed the statutory elements of burglary once he crossed the threshold of the house, victim's efforts to defend his family and home were natural consequences of defendant's unlawful entry. NRS 200.030(1)(b).

21. CRIMINAL LAW; HOMICIDE.

The district court did not commit plain error in instructing the jury on the felony-murder rule, and the district court did not err by not sua sponte including more in the instruction than it did; the district court's instruction informed jurors that felony murder required a finding that, during the perpetration or attempted perpetration of a burglary, a killing resulted, and this language closely mirrored felony-murder statute.

Before the Court EN BANC.[1]

OPINION

By the Court, PICKERING, J.:

First-degree felony murder occurs when a murder is "[c]ommitted in the perpetration or attempted perpetration of" certain felonies, including burglary. NRS 200.030(1)(b). In this appeal, we address the meaning of "in the perpetration or attempted perpetration of" a burglary, specifically, whether a killing must be caused by, and occur at the exact moment of, a burglar's entry into a protected structure. Because NRS 200.030(1)(b) holds felons strictly responsible for killings that result from their felonious actions, we affirm the judgment of conviction, even though the killing here occurred after the offense of burglary was complete.

I.

David Sanchez-Dominguez married Maria Angustias Corona in 2002. Over the course of their seven-year marriage, Sanchez-Dominguez subjected Maria to physical and mental abuse. Maria attempted to leave Sanchez-Dominguez several times, but always returned. In September 2009, Maria again left Sanchez-Dominguez and moved into her mother's home.

[1]Following oral argument, this matter was transferred from a panel to the en banc court pursuant to IOP Rule 13(b).

She also obtained a temporary protective order that forbade Sanchez-Dominguez from coming within 100 yards of Maria, her mother's home, or her place of work. Despite the protective order, Sanchez-Dominguez continued to pursue Maria.

On November 13, 2009, Sanchez-Dominguez drove to Maria's mother's home. He entered the home, uninvited, through the unlocked front door. Inside, he encountered several of Maria's relatives, including her mother, two cousins, and two brothers. Repeatedly, Sanchez-Dominguez asked for Maria and was told that she was not home. Maria's relatives told Sanchez-Dominguez to leave, but he refused. When Maria's cousin Jose moved toward the phone to call 911, Sanchez-Dominguez pulled a gun from the waist of his pants and told Jose not to move. He then pointed the gun at Maria's mother. Hearing the commotion, Roberto Corona, Maria's brother, came downstairs. Upon realizing what was happening and seeing that Sanchez-Dominguez had the gun drawn, Roberto stepped between his mother and Sanchez-Dominguez and said, "if you're going to shoot, shoot." Immediately, Sanchez-Dominguez held the gun to Roberto's chest and fired a single shot, killing him.

The State charged Sanchez-Dominguez with burglary, aggravated stalking, and murder. The murder count was charged as willful, deliberate, and premeditated murder and, alternatively, as felony murder in the perpetration of burglary. After a seven-day trial, the jury found Sanchez-Dominguez guilty on all three counts. The jury then chose a sentence of life imprisonment without parole for the murder, and the district court sentenced Sanchez-Dominguez on the remaining counts.

Sanchez-Dominguez raises two issues on appeal, only one of which warrants extended discussion: Did the district court err by issuing an incomplete jury instruction regarding felony murder and rejecting the alternative instructions Sanchez-Dominguez proffered, thereby allowing the jury to base a first-degree murder conviction on the felony-murder theory predicated on a completed felony?[2]

II.

In the district court, Sanchez-Dominguez's theory of defense was that the felony-murder rule did not apply because the underlying

[2]Sanchez-Dominguez also argues that the aggravated stalking charge should have been severed and tried separately because it was unrelated to the other offenses and highly prejudicial. The district court did not abuse its discretion in refusing severance. The record shows that Sanchez-Dominguez had an overarching plan to terrorize and control Maria that ultimately resulted in the burglary and murder. *See* NRS 173.115(2). Also, the evidence that Sanchez-Dominguez burglarized the home and killed Roberto was overwhelming, leaving little reason to believe the jurors convicted him of murder based on emotional outrage over the stalking, rather than admissible evidence regarding the murder.

felony, burglary, was complete before the killing happened, and thus, the death did not occur "during the perpetration or attempted perpetration" of a felony. He offered three jury instructions consistent with his theory of the case:

> (1) Burglary is confined to a fixed locus in time. The crime of Burglary is complete at entry into a house where the necessary specific intent is also determined to exist at that same fixed locus in time. All matters following the burglary are not a part of the Burglary. Thus, any act of violence following the actual entry into a house cannot be an act done during the perpetration or attempted perpetration of a Burglary.
>
> Because the evidence in this case demonstrates that ROBERTO CORONA was killed after the defendant's entry into the house . . . , you may not consider the alternative theory of felony murder as a basis for conviction of First Degree Murder. That theory is therefore removed from your consideration.
>
> The only theory of First Degree Murder that you may consider is premeditated and deliberate murder as defined in these instructions.
>
> (2) In order to find that the defendant willfully and unlawfully killed ROBERTO CORONA in the perpetration or attempted perpetration of a Burglary . . . , you must find beyond a reasonable doubt that the killing occurred while the defendant was entering the house.
>
> (3) The offense of Burglary is complete upon entry of a house only when at the time the house is entered, the defendant has the specific intent to commit assault or battery or coercion or kidnapping therein.

The district court rejected the proffered instructions on the grounds they did not accurately state the law.

Citing *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005), Sanchez-Dominguez argues that defendants are entitled to have the jury instructed on their theory of the case. He urges that even if his proposed instructions were poorly worded, the district court had an obligation to provide the substance of the requested instructions to the jury. And because the district court refused to instruct the jury on the substance of his theory that the burglary ended before the murder, Sanchez-Dominguez maintains that the court violated his constitutional rights.

[Headnote 1]

We review the district court's rejection of the proposed instructions for an abuse of discretion, keeping in mind that a defendant is

not entitled to misleading, inaccurate, or duplicative jury instructions. *Crawford v. State*, 121 Nev. 744, 748, 754, 121 P.3d 582, 585, 589 (2005).

[Headnotes 2-4]

The first and second proposed instructions misstate the law regarding felony murder because the duration of felony-murder liability can extend beyond the termination of the felony. *See infra* § III(B). Thus, the district court had no obligation to give either instruction. *See Barron v. State*, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) ("if a proffered instruction misstates the law or is adequately covered by other instructions, it need not be given"); *see also Eddy v. State*, 496 N.E.2d 24, 27-28 (Ind. 1986) (affirming district court's rejection of defendant's completed-felony instruction). The third instruction is an accurate statement of the law of burglary enumerated in NRS 205.060. Nonetheless, the court did not err by omitting this instruction because the instruction duplicates, and is less accurate than, the burglary instruction the court gave as instruction 31.[3] *See Crawford*, 121 Nev. at 754, 121 P.3d at 589. Thus, the district court did not abuse its discretion by rejecting the three instructions that Sanchez-Dominguez proffered.

III.

Sanchez-Dominguez also argues that jury instruction number 24 did not include all the elements of felony murder. The instruction read:

> The elements of the second category of First Degree Murder are:
>
> 1. During the defendant's perpetration or attempted perpetration of a Burglary;
>
> 2. a killing resulted.
>
> Whenever death occurs during the perpetration or attempt to perpetrate certain felonies, including Burglary, the killing constitutes First Degree Murder. This second category of First Degree Murder is the "Felony Murder" rule.

While the district court was settling jury instructions, Sanchez-Dominguez objected that the phrase "a killing resulted" did not have the same meaning as "a murder committed in the perpetration." He did not tender an alternative instruction to capture this concept or expand on this objection.

Now, for the first time on appeal, Sanchez-Dominguez argues that instruction 24 erroneously omitted the principle of causation from

[3]Instruction 31 read: "The elements of the crime of Burglary are: (1) the defendant willfully and unlawfully; (2) entered any house, room apartment, tenement, shop or other building; (3) with the intent to commit: (a) assault, or (b) battery, or (c) any felony crime; including coercion and/or kidnapping."

its definition of felony murder, thereby relieving the State of its burden of proving "that the killing [was] linked to or part of the series of incidents so as to be one continuous transaction," as required by *Payne v. State*, 81 Nev. 503, 506-07, 406 P.2d 922, 924-25 (1965). At oral argument, Sanchez-Dominguez admitted that he did not request a causation instruction or use causation as a theory of his defense. And so, Sanchez-Dominguez essentially argues that the district court had a sua sponte obligation to instruct the jury on the required connection between the burglary and the killing.

[Headnotes 5, 6]

Generally, a party's failure to object to or request an instruction precludes appellate review. *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (failure to clearly object to a jury instruction generally precludes review). There is an exception to this rule, however, if a plain and obvious error occurred that is so serious, it affected the defendant's substantial rights. *Green*, 119 Nev. at 545, 80 P.3d at 95. "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Id.* To demonstrate plain error, the appellant has the burden of demonstrating actual prejudice. *Id.*

A.

[Headnote 7]

"A necessary antecedent to invoking the plain-error doctrine is to determine whether error occurred at all." *People v. Walker*, 982 N.E.2d 269, 273 (Ill. App. Ct. 2012); *see also Archanian v. State*, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006) (the first step in conducting plain-error analysis is to consider whether an error exists).

NRS 200.030(1)(b) defines first-degree felony murder as a killing that is "[c]ommitted in the perpetration or attempted perpetration of" certain felonies, including burglary. The phrase "[c]ommitted in the perpetration or attempted perpetration" of a felony does not give clear answers as to the time, place, and causal connection required. 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.5(f) (2d ed. 2003). And, as noted in *Payne*, 81 Nev. at 506, 406 P.2d at 924, "[t]he point at which the crime was 'perpetrated' . . . has been subject to varying degrees and wide latitude."

Sanchez-Dominguez construes the phrase "committed in the perpetration of" temporally—as requiring that the killing occur *before* all the statutory elements of burglary have been completed. Citing *Carr v. Sheriff*, 95 Nev. 688, 689-70, 601 P.2d 422, 423-24 (1979),

he maintains that he was no longer engaged "in the perpetration" of a burglary when he shot Roberto; the burglary, he argues, was complete once he had entered the family home with the specific intent to commit a felony against Maria. Because the burglary was completed before Roberto was killed, Sanchez-Dominguez maintains that the felony-murder rule does not apply.

B.

1.

The phrase "in the perpetration of" has common-law roots. In most states, "felony murder statutes are premised upon the 1794 felony-murder statute of Pennsylvania." *People v. Gillis*, 712 N.W.2d 419, 427 (Mich. 2006) (comparing the Pennsylvania statute with Michigan's identical felony-murder statute); *see also* 2 *Wharton's Criminal Law* § 147 (15th ed. 1994) ("In most states, the felony-murder statutory pattern continues to this day to be grounded conceptually on the 1794 felony-murder statute of Pennsylvania"). Pennsylvania defined felony murder as "[a]ll murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary . . . ." *Rodriguez v. State*, 953 S.W.2d 342, 346 (Tex. App. 1997) (citing Edwin Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 759 (1949)).

Nevada's original first-degree murder statute dates back to territorial days and used the same "in the perpetration of" language to describe a killing committed during the course of an enumerated felony. *See* 1861 Laws of the Territory of Nevada, ch. 28, § 17, at 58 (murder includes a killing "which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary . . ."); *see also State v. Millain*, 3 Nev. 409, 440 (1867) ("Let us here, however, repeat the parent statute, being the Pennsylvania one of 1791.").[4] The Nevada Legislature has continued to use this language, with small changes, for over 153 years. Much like the current statute, the original version did not define "in the perpetration of." But because this language was widely used, the contemporaneous understanding of "in the perpetration of" among the states in the mid-to-late 1800s is useful in understanding what Nevada's statute meant in 1861 and still means today.

Indiana was one of the first states to address the meaning of "perpetration." In an 1876 decision, the Indiana Supreme Court upheld a felony-murder conviction where the defendant killed a marshal who confronted him after he broke into a drug store. *Bissot v. State*, 53 Ind. 408, 411-12 (1876); *see also State v. Pratt*,

[4]The 1791 statute that Nevada adopted is identical to the 1794 version that most states followed.

873 P.2d 800, 811-12 (Idaho 1993). Rejecting the suggestion the burglary was already "complete" before the killing occurred, the court explained that "where the homicide is committed within the *res gestae* of the felony charged, it is committed in the perpetration of, or attempt to perpetrate, the felony within the true intent and fair meaning of the statute," and affirmed the conviction. *Bissot*, 53 Ind. at 413-14.

In another early case, Ohio similarly rejected a defendant's argument that a killing was not "in the perpetration of" a burglary because the burglary was complete before he killed the victim. *Conrad v. State*, 78 N.E. 957, 958-59 (Ohio 1906). Citing the well-established rule that statutory construction must not defeat the purpose of a statute, the court explained that a killing within the res gestae of burglary is committed in the "perpetration of" the burglary, as the term is used in the felony-murder statute. *Id.* at 959; *see also Dolan v. People*, 64 N.Y. 485, 497 (1876) (even if the offense of burglary is "doubtless complete," an accused "may be said to be engaged in the commission of the crime until he leaves the building").

And in 1905, this court used a similar analysis when it interpreted the time requirement of the felony-murder rule. *See State v. Williams*, 28 Nev. 395, 82 P. 353 (1905). There, the defendant claimed he finished robbing a victim two minutes before shooting the victim and he therefore could not be found guilty of first-degree murder. *Id.* at 407, 82 P. at 353. This court disagreed and affirmed Williams's conviction because the shooting was part of a continuous assault that began with the robbery and did not end until after the shooting. *Id.*

2.

[Headnotes 8-10]

The felony-murder rule has not substantially changed over time. Its "purpose [is] to deter felons from killing negligently or accidentally by holding them strictly responsible for the killings that are the result of a felony or an attempted one." *Payne*, 81 Nev. at 506, 406 P.2d at 924. *See also People v. Wilkens*, 295 P.3d 903, 911 (Cal. 2013) ("Once a person perpetrates . . . one of the enumerated felonies [in the felony-murder statute], then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder . . . ."). Because the felony-murder rule seeks to make punishment more certain, "[i]t was not intended to relieve the wrong-doer from any . . . consequences of his act." *People v. Boss*, 290 P. 881, 884 (Cal. 1930). Consistent with this purpose, under NRS 200.030(1)(b), the perpetration of a felony does not end the moment all of the statutory elements of the felony are complete. Instead, the duration of

felony-murder liability can extend beyond the termination of the felony itself if the killing and the felony are part of one continuous transaction. *See, e.g.*, *State v. Hardy*, 283 P.3d 12, 18-19 (Ariz. 2012) (en banc) (upholding felony-murder conviction where a felony occurred before a fatal shooting); *Yates v. State*, 55 A.3d 25, 34 (Md. 2012) (holding that "the felony murder doctrine applies when the felony and the homicide are parts of one continuous transaction").

[Headnote 11]

While the phrase "in the perpetration of" suggests a temporal component, it is not absolute; "the crimes of arson, burglary and rape may be considered to continue while the building burns, while the burglars search the building and while the sexual connection is maintained." LaFave, *supra*, § 14.5(f); *see also* 2 Charles E. Torcia, *Wharton's Criminal Law* § 150 (15th ed. 1994 & Supp. 2012) ("the period during which a burglary is deemed to be in progress has ordinarily been extended"). If the opposite were true and a technical construction was given to the statute, as advanced by Sanchez-Dominguez, it would make it "quite impracticable to ever convict for a murder committed in the perpetration of any of the felonies mentioned" in the felony-murder statute. *Bissot*, 53 Ind. at 412; *see also Pratt*, 873 P.2d at 811-12 (to say felony murder predicated upon burglary cannot obtain once the burglary is complete would restrict the felony-murder rule to cases where "the burglar had one leg over the windowsill or one foot across the threshold" and defeat the purpose of the felony-murder statute (internal quotations omitted)).

3.

[Headnotes 12, 13]

Thus, both historical and modern interpretations of the phrase "in the perpetration of" as used in the felony-murder rule lead to the same conclusion: the phrase encompasses acts beyond the predicate felony's statutory elements to include all acts connected to the predicate felony. So, even granting that Sanchez-Dominguez had completed the statutory elements of burglary by the time he killed Roberto, the felony-murder rule still applies because the killing occurred moments later while Sanchez-Dominguez remained in the family home uninvited.

C.

But Sanchez-Dominguez argues that NRS 200.030 additionally requires, as a separate element, direct and immediate causation between the underlying felony and the victim's death. He asserts that if a felony is already complete, there can be no direct causal connection between the felony and the killing, such that the district court's failure to instruct on causation beyond the reference to "a

killing resulted" in instruction number 24 constitutes plain error. We disagree.

[Headnotes 14, 15]

A cause is "something that precedes an effect or result," whereas perpetration is a specific type of causation where an actor "commit[s] or carr[ies] out" a crime. *Black's Law Dictionary* 250, 1256 (9th ed. 2009). So, if a person commits a homicide "in the perpetration" of a felony, he commits the homicide while "causing" a felonious event. In other words, "[t]he only nexus required is that the felony and the killing be part of a continuous transaction." *People v. Thompson*, 785 P.2d 857, 877 (Cal. 1990). And with regard to Sanchez-Dominguez's actions, that nexus is established.

[Headnotes 16-18]

After all, the felony-murder rule holds felons strictly accountable for the consequences of perpetrating a felony, and it is immaterial whether a killing is intentional or accidental. *State v. Fouquette*, 67 Nev. 505, 529-30, 221 P.2d 404, 417 (1950); *Walker*, 982 N.E.2d at 275) (discussing pattern jury instructions); *People v. Huynh*, 151 Cal. Rptr. 3d 170, 191 (Ct. App. 2012) ("the felony-murder rule imposes a type of strict liability on the perpetrator . . ."). So, even if a perpetrator did not intend to cause a death, causation is assumed where a killing would not have occurred but for the perpetrator's purposeful decision to cause a felony. *See, e.g.*, *Walker*, 982 N.E.2d at 270 (upholding a felony-murder conviction where a Jehovah's Witness's decision to refuse a blood transfusion actually caused death because the victim would not have needed a life-saving transfusion but for perpetrator's actions); *Gillis*, 712 N.W.2d at 422-23 (holding felony-murder rule applied where a burglar killed two people during a high-speed police chase). Accordingly, "in the perpetration of" captures the nominal causation that felony murder requires.

[Headnote 19]

This is not to say that a felon is responsible for "mere coincidence[s] of time and place." 2 LaFave, *supra*, § 14.5(f). For example, the felony-murder rule would not apply where a bank customer unaware that a robbery is taking place suffers a fatal heart attack from natural causes. *Id. See also, e.g.*, *Huynh*, 151 Cal. Rptr. 3d at 190-91 (explaining that "causation principles" are only pertinent where other acts allegedly caused the death). But in these situations what has absolved the defendant of felony-murder liability is not a lack of causation, but rather that the death did not occur "in the perpetration of" the felony.

[Headnote 20]

Here, Roberto's death would not have occurred but for Sanchez-Dominguez's burglary of the home, and there is no doubt

that Sanchez-Dominguez shot Roberto at point-blank range as Roberto stood between Sanchez-Dominguez and Roberto's and Maria's mother, the matriarch of their family. Even though Sanchez-Dominguez completed the statutory elements of burglary once he crossed the threshold of the house, Roberto's efforts to defend his family and home were natural consequences of Sanchez-Dominguez's unlawful entry. *See State v. Contreras*, 118 Nev. 332, 336, 46 P.3d 661, 663 (2002) ("'It should be apparent that the Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent . . . .'" (quoting *People v. Miller*, 297 N.E.2d 85, 87 (N.Y. 1973))). Accordingly, as we have indicated above, the killing that resulted falls within the purview of the first-degree felony-murder statute. *See, e.g.*, *Contreras*, 118 Nev. 337, 46 P.3d at 664 (reversing a district court's dismissal of a felony-murder charge predicated upon burglary because the legislative language in NRS 200.030(1)(b) is clear); *State v. Burzette*, 222 N.W. 394, 399 (Iowa 1928) (upholding felony murder predicated upon burglary even though the killing happened after the perpetrator's illegal entry); *Dolan*, 64 N.Y. at 498-99 (same); *Conrad*, 78 N.E. at 958 (same); *Hardy*, 283 P.3d at 18-19 (same).

[Headnote 21]

In light of this analysis, we conclude that the district court did not commit plain error in instructing the jury on the felony-murder rule. Its instruction informed jurors that felony murder requires a finding that, during the perpetration or attempted perpetration of a burglary, a killing resulted. This language closely mirrors NRS 200.030(1)(b), as interpreted in *Payne*, 81 Nev. at 506-07, 406 P.2d at 924-25. The district court did not err by not sua sponte including more in the instruction than it did.

Thus, we conclude that the assignments of error are without merit and affirm the judgment of conviction.

GIBBONS, C.J., and HARDESTY, PARRAGUIRRE, and DOUGLAS, JJ., concur.

CHERRY and SAITTA, JJ., dissenting:

We respectfully dissent. We would reverse the judgment of conviction on the grounds that the district court plainly erred in failing to instruct the jury that it could not convict appellant of felony murder if it concluded that the crime of burglary was completed at the time of the killing.

The felony-murder rule exists "'to deter dangerous conduct by punishing as a first degree murder a homicide resulting from dangerous conduct in the perpetration of a felony, even if the defendant did

not intend to kill.' " *Nay v. State*, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007) (quoting *State v. Allen*, 875 A.2d 724, 729 (Md. 2005)). It aims to deter a person from committing the felony itself, or, at the very least, to avoid committing it in a violent manner. *Id.* It cannot apply where the perpetrator does not have the " 'intent to commit the underlying felony at the time of the killing,' " *id.* (quoting *State v. Buggs*, 995 S.W.2d 102, 107 (Tenn. 1999)), because "the intent to commit the felony supplies the malice" which elevates the killing to a murder, *id.* This rule alleviates the State's burden of proving the malice required for murder if it shows that the murder occurred during the course of certain felonies. *See Rose v. State*, 127 Nev. 494, 500, 255 P.3d 291, 295 (2011) ("The felony-murder rule makes a killing committed in the course of certain felonies murder, without requiring the State to present additional evidence as to the defendant's mental state."). Accordingly, this court should be cautious with any ruling that could expand this doctrine.

In holding that the district court did not err in denying the requested instructions that burglary could not support felony murder if it ended prior to the killing, the majority adopts the premise that the killing occurred within the res gestae of the burglary and, therefore, "in the perpetration of" the burglary. It relies on *State v. Pratt*, 873 P.2d 800, 811-12 (Idaho 1993); *Bissot v. State*, 53 Ind. 408, 411-12 (1876); *Dolan v. People*, 64 N.Y. 485, 497 (1876); and *Conrad v. State*, 78 N.E. 957, 958-59 (Ohio 1906). These cases, while similar to each other, are too dissimilar to the facts before us. In each of the cited cases, the defendants entered a structure with the intent to steal property. *See Pratt*, 873 P.2d at 811-12 (entering home with intent to steal); *Bissot*, 53 Ind. at 408 (entering drug store for purpose of robbing it); *Dolan*, 64 N.Y. at 487 (entering dwelling with intent to steal); *Conrad*, 78 N.E. at 958 (entering home with intent to remove property). During the burglary, or their escape from the premises, a killing occurs. The cases concluded that the burglary continued until the defendants left the building with the property they intended to steal. *See Pratt*, 873 P.2d at 811-12 (holding that killing occurring after entry but before belongings were removed occurred in the perpetration of the burglary); *Bissot*, 53 Ind. at 408 (holding that killing occurring during burglary at drug store was committed in the perpetration of the burglary); *Dolan*, 64 N.Y. at 497 (holding that a burglar "may be said to be engaged in the commission of the crime until he leaves the building with his plunder"); *Conrad*, 78 N.E. at 959 (holding that killing occurring during escape from burglary of dwelling occurred in the res gestae of the burglary). Inherent in the intent to steal is the desire to carry that property from the structure in order to enjoy the possession of it. *See State v. Fouquette*, 67 Nev. 505, 528, 221 P.2d 404, 416 (1950) ("The escape of the robber with his ill-gotten gains by means of arms is as important to the execution

of the robbery as gaining possession of the property."). Therefore, the felonious intent with which these defendants crossed the threshold informed their actions during the crime and accompanied them in their flight. *See id.* at 527, 221 P.2d at 416 ("Robbery, unlike burglary, is not confined to a fixed locus, but is frequently spread over considerable distance and varying periods of time."). This case, conversely, lacks such unifying intent.

The evidence produced at trial showed that Sanchez-Dominguez entered the home of his estranged wife's family with the intent to commit assault, battery, coercion, or kidnapping against his estranged wife. The charged burglary was complete when he entered the home. *See Carr v. Sheriff, Clark Cnty.*, 95 Nev. 688, 689-90, 601 P.2d 422, 423 (1979) ("The offense of burglary is complete when the house or other building is entered with the specific intent designated in the statute."). Upon learning that his wife was not at home and, therefore, the crimes he intended to inflict upon her became impossible to complete, the intent that accompanied Sanchez-Dominguez across the threshold of the residence waned. He did not attempt to escape, which may have demonstrated the logical continuation of the intent, but instead abandoned it. Thereafter, Sanchez-Dominguez's actions became informed by an intent that arose after entry into the home and could not support a burglary conviction, *see State v. Adams*, 94 Nev. 503, 505, 581 P.2d 868, 869 (1978) ("A criminal intent formulated after a lawful entry will not satisfy the statute."), and was separate and distinct from the earlier intent which accompanied him into the home.

This discontinuity in the intent distinguishes the instant case from those relied upon by the majority. Unlike the defendants in those cases, Sanchez-Dominguez's actions after the completion of the burglary were not the logical continuation of the intent that accompanied him through the door. *See Payne v. State*, 81 Nev. 503, 507, 406 P.2d 922, 924 (1965) ("The res gestae of the crime begins at the point where an indictable attempt is reached and ends where the chain of events between the attempted crime or completed felony is broken, with that question usually being a fact determination for the jury."). Therefore, there was a factual issue as to whether the killing occurred in the course of the burglary that turned on an obscure legal theory and the district court plainly erred in failing to provide sufficient instruction for the jury to evaluate the facts before it. *See Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005) ("Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the fact and circumstances of the case.").

We further conclude that the failure to give the instruction affected Sanchez-Dominguez's substantial rights. *See* NRS 178.602; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Although the evidence unquestionably shows that Sanchez-Dominguez killed the victim, it is a close question regarding whether that killing occurred in the perpetration of the earlier burglary. Further, as there was evidence that Sanchez-Dominguez was extremely intoxicated, the evidence supporting the premeditation theory of liability was not so convincing that the failure to give the instruction did not have a prejudicial impact on the verdict.

Accordingly, we would reverse the judgment of conviction and remand for a new trial.