CONCLUSION

Searches and seizures conducted by a private individual only implicate the Fourth Amendment when a private individual acts as an agent or instrument for the government. Because there is no bright line or defined set of features for distinguishing purely private conduct from governmental action, turning to federal caselaw, we adopt a two-factor approach for analyzing whether a private party should be deemed an agent of the government. To determine whether the requisite agency relationship exists, two factors should be considered: (1) whether the government knew of and acquiesced in the private individual's intrusive conduct, and (2) whether the private individual performing the search or seizure intended to assist law enforcement or had some other independent motivation. Applying this test to the facts in this case, we conclude Mooney did not meet his burden and demonstrate Aline was acting as an agent or instrument of the government. We conclude that Deputy Shoaf did not violate Mooney's Fourth Amendment rights by peering into and entering his room to secure it and protect others from the potential harms that may have resulted from the explosives Deputy Shoaf perceived in plain view. We therefore affirm the district court's order denying Mooney's motion to suppress evidence and affirm his judgment of conviction.

Silver, C.J., and Tao, J., concur.

ANDREW ROBERT ALLEN LASTINE, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 73239-COA

August 30, 2018 429 P.3d 942

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count of leaving the scene of an accident involving personal injury. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Reversed and remanded.

Jeremy T. Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Joseph R. Plater*, Appellate Deputy District Attorney, Washoe County, for Respondent.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, Gibbons, J.:

The Fourth Amendment to the United States Constitution and Article I, Section 18 of the Nevada Constitution provide that the people possess an inviolable right against unreasonable searches and seizures. Under both provisions, warrantless searches are per se unreasonable subject to a few specific exceptions. One such exception is the consent of a third party who has authority over the premises or effects to be searched.

Though Nevada's jurisprudence has delineated the basic principles governing consent as an exception to the warrant requirement, this case presents a question concerning that exception that our caselaw does not fully address: how does a person's living arrangement within a third party's residence affect that third party's legal authority to consent to a search of the other person's living space? Additionally, can law enforcement officers rely upon the consent of a third party to search a room within a residence without asking about the living arrangements within that residence?

Looking to federal caselaw, we conclude that law enforcement officers cannot justify a warrantless search of a bedroom inside a home by pointing to the consent of a third party when the third party did not have authority to consent and officers have little or no information about that third party's authority over the bedroom. Accordingly, we instruct law enforcement officers to make sufficient inquiries about the parties' living arrangements and the third party's authority over them before conducting a warrantless search.

FACTS AND PROCEDURAL HISTORY

On Wednesday, January 7, 2016, Gertrude Green's vehicle was rear-ended by a truck while waiting at a traffic light on her drive home from work, and she suffered a whiplash injury. The driver of the truck drove away after striking Green's car. Green and one witness told first responders they believed the driver was a man.

In the debris field on the road, a Nevada Highway Patrol trooper found a license plate that did not belong to Green's car. The trooper ran the plate through dispatch and discovered the plate belonged to a truck registered to Andrew Lastine. Due to concurrent jurisdiction in the area, Washoe County Sheriff's Deputy Francisco Gamboa headed to the address listed on the truck's registration.

When he arrived at the address at about 6 p.m., Deputy Gamboa observed a small truck in the driveway with front-end damage and smoke or steam coming from the engine compartment. The license plate matched the one found at the scene of the Green accident. He also saw footprints in the snow leading from the truck to the house

located at the address. Based on these observations, Deputy Gamboa initiated a "knock and talk" investigation.[1]

Robert Lastine (Robert) answered the door. Deputy Gamboa identified himself after Robert stepped outside. He then informed Robert about the Green accident and that the license plate found at the scene of the Green accident matched the license plate on the truck. Deputy Gamboa asked Robert who owned the truck, and Robert told him that his nephew, Andrew Lastine, owned the truck. Robert also told Deputy Gamboa that Lastine was probably in "the back bedroom" of the house. At some point later, Deputy Gamboa asked for permission to enter Robert's house to "find the owner of the truck." Robert apparently said, "go get him."

As a safety precaution, Deputy Gamboa waited for a back-up deputy, Deputy Martin Obos, to arrive at the residence before entering the house. He did not attempt to secure a telephonic search warrant or ascertain Lastine's physical condition while he waited. When Deputy Obos arrived, both he and Deputy Gamboa walked into the house, and Robert guided them to a hallway and pointed to a door indicating it led into the back bedroom where he suggested they might find Lastine.

According to Deputy Gamboa, he and Deputy Obos stood at the bedroom door, did not knock, but announced "police, sheriff's office." After no response, the deputies pushed the door open. The bedroom was dark, but Deputy Gamboa testified he could make out a bed directly in front of the doorway with a person, later identified as Lastine, on it under a blanket. They ordered Lastine to show his hands, but he refused. The deputies entered the bedroom, removed the blanket covering Lastine, and placed him in handcuffs. Inside the bedroom, the deputies saw a pair of tennis shoes with snow and mud on them and snowy, muddy footprints. The deputies removed Lastine from the bedroom and placed him on a couch in the living room.

Later, Nevada Highway Patrol Trooper Alyssa Howald arrived at the residence from the scene of the Green accident. She met with Deputy Gamboa outside the house, and he told her that he and Deputy Obos had a suspect in custody inside the house. Deputy Gamboa explained that the footprints that led in the snow from near the driver's side door of the truck to a door at that residence matched the tread on a pair of shoes he found in Lastine's room, where Lastine was located.

Trooper Howald entered the house and placed Lastine under arrest. She performed a search of Lastine's person incident to that

[1]In a "knock and talk" investigation, police officers "approach the front door of a residence," knock on the door, and seek "to speak to an occupant for the purpose of gathering evidence." *Florida v. Jardines*, 569 U.S. 1, 21 (2013) (Alito, J., dissenting).

arrest and found a set of keys in his pants pocket. Without more, Trooper Howald used a key from the set to open the locked truck and started the truck's engine.

Trooper Howald transported Lastine to the Washoe County jail. Though Trooper Howald did not ask him any questions, Lastine made several spontaneous remarks, including stating he was an "idiot and that's all that matters."

Lastine was charged with one count of leaving the scene of an accident involving personal injury. He moved to suppress the evidence gathered as a result of the deputies' warrantless entry into his bedroom and the trooper's warrantless entry into his vehicle. The district court denied most of Lastine's motion, granting only his request to suppress the fact that the keys Trooper Howald found in his pocket opened and started the truck.

Lastine's case proceeded to a jury trial. The jury found him guilty of leaving the scene of an accident involving personal injury. He was sentenced to serve three to ten years in prison. This appeal follows.

ANALYSIS

Lastine argues that the district court erred by denying in part his motion to suppress. In particular, he argues that Robert did not have actual or apparent authority to consent to a search of Lastine's bedroom because that bedroom "was not a commonly shared area." Further, he argues that, given the totality of the circumstances, no exigency existed to justify the deputies' warrantless entry into his bedroom.

The Fourth Amendment generally prohibits the warrantless entry of a person's home. *See Payton v. New York*, 445 U.S. 573, 585-86 (1980). Warrantless searches are per se unreasonable, unless an "established and well-delineated exception[ ]" applies. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). One exception to the warrant requirement "is the valid consent of a third party who possesses actual authority over or other sufficient relationship to the premises or effects sought to be inspected." *State v. Taylor*, 114 Nev. 1071, 1079, 968 P.2d 315, 321 (1998) (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974)). Even if it later turns out that the third party did not have actual authority over the area searched, the search may still be valid under the apparent authority doctrine if the law enforcement officers reasonably believed, based upon the facts available to them at the moment of the warrantless search, the consenting party had actual authority. *See id.* at 1080, 968 P.2d at 322.

The burden of establishing actual or apparent authority rests with the State. *See Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *see also United States v. Arreguin*, 735 F.3d 1168, 1174 (9th Cir. 2013) ("[T]he government has the burden of establishing the effectiveness

of a third party's consent to a search of a defendant's property."). Because review of a district court's determinations concerning "authority to consent to a search requires consideration of both factual" and legal issues, "we review de novo the district court's decisions regarding authority to consent." *Taylor*, 114 Nev. at 1078, 968 P.2d at 321. In so doing, "this court treats the district court's findings of fact deferentially . . . ." *McMorran v. State*, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002).

Did Robert have authority to consent to a search of Lastine's bedroom?

In the proceedings below, the district court concluded that Robert was "the actual and apparent owner of the home and his authority to consent to a search included [Lastine's] bedroom." The court did not expressly parse out the legal distinctions between actual and apparent authority and the elements of each in its analysis. *See Rodriguez*, 497 U.S. at 181-83. We do so now, turning first to actual authority.

Actual authority

We first address whether Robert had actual authority to consent to a search of Lastine's bedroom. Actual authority to consent to a search is a legal condition that is wholly separate from and independent of what a particular law enforcement officer believes about a third party's authority over a premises or object to be searched. *See id.* at 181-82; *Matlock*, 415 U.S. at 171 n.7 (noting that common authority is based "on mutual use of the property by persons generally having joint access or control for most purposes"). "Actual authority is proved (1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property." *Taylor*, 114 Nev. at 1079, 968 P.2d at 321. "Actual authority does not require an ownership interest in the property by the third party and does not require the actual owner's presence at the time of the search." *Id.* (citations omitted).

Lastine argues that his bedroom was not a commonly shared area. He asserts that while Robert had actual authority to consent to the deputies' search of the common areas inside the house, Robert lacked actual authority to consent to a search inside Lastine's bedroom, which was a separate room of the house.

The State counters that because Robert owned and lived in the house, he had actual authority to consent to a search of any room within that house, including Lastine's bedroom. We disagree with the State.

The Nevada Supreme Court addressed a third-party cohabitant's consent to a search within a residence in *Casteel v. State.* There, Casteel appealed from the district court's denial of his motion to

suppress evidence the police discovered when they searched his apartment based on his live-in girlfriend's consent. 122 Nev. at 360, 131 P.3d at 3.

The supreme court considered, in relevant part, whether Casteel's live-in girlfriend had authority to consent to a search of their shared apartment and Casteel's gym bag, which was inside a closet in the apartment. *Id.* at 359-61, 131 P.3d at 2-4. It observed that "[a] warrantless search is valid if the police acquire consent from *a cohabitant* who possesses *common authority* over *the property* to be searched." *Id.* at 360, 131 P.3d at 3 (emphasis added) (citing *Rodriguez*, 497 U.S. at 181). The court concluded that Casteel's live-in girlfriend "clearly consented to the search and had equal control over the apartment." *Id.*

In this case, Robert and Lastine both lived in the residence. However, unlike in *Casteel*, they did not cohabit, "share," or possess "equal control over" Lastine's bedroom. Instead, Robert ceded most of his control of the bedroom to Lastine, and Lastine paid rent for the use of the bedroom. Consequently, Robert was in effect Lastine's landlord.

If we view Robert as Lastine's landlord, instead of or in addition to being a cohabitant of the house, his access to Lastine's room would be further limited. *See United States v. Warner*, 843 F.2d 401, 403 (9th Cir. 1988) (recognizing landlords' lack of authority to consent to a search of a tenant's apartment). Third parties such as landlords with access to an area only have actual authority to consent to a search of that area when they reserve a right of access "for most purposes," instead of a limited right of access to conduct repairs or maintenance, or engage in any other "narrowly prescribed" set of activities. *See id.*; *see also United States v. Kim*, 105 F.3d 1579, 1582 (9th Cir. 1997).

Here, Robert did not reserve a broad right of access "for most purposes" to Lastine's bedroom. Robert testified at the suppression hearing that he built the back bedroom as an addition to the modular home for the purpose of permitting others to live there. The room was attached to the home and shared a common roofline, but it was built on a separate foundation for all four of its walls. Robert also testified that he did not spend any time in the back bedroom and he did not enter the bedroom freely as the door was always closed and he knocked before entering. Consequently, Robert had only limited access to Lastine's bedroom and did not have actual authority to consent to the search of that room.

Still, if a defendant assumes the risk that some third party, such as a landlord, with limited access to the searched property, "will at times exceed the scope of authorized access," *United States v. Sledge*, 650 F.2d 1075, 1080 n.10 (9th Cir. 1981), then that third party will have "[actual] authority to consent to [a] search." *Kim*, 105 F.3d at 1582. A defendant generally assumes the risk when he cedes

control of his property to another. *See Taylor*, 114 Nev. at 1079, 968 P.2d at 321 (concluding that Taylor gave control of his suitcase to a third party and assumed the risk she might allow law enforcement to search it when the suitcase was checked in the third party's name, she kept the baggage claim ticket, and Taylor did not remain with the third party while they were in the airport together).

The State avers on appeal that Robert also possessed actual authority because Lastine assumed the risk that Robert would "consent to a search of his own house." The State did not argue this alternative below, and therefore it waived this argument. *See Emmons v. State*, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991). But even if the court considered it on the merits, it fails. The State contends that Lastine failed to show he had exclusive control over the room or the details about the living arrangements, yet the evidence reveals that Lastine had a lock on the interior door and had closed the door—so Lastine took steps to protect his privacy interest. *Cf. Taylor*, 114 Nev. at 1079, 968 P.2d at 321. Moreover, the State's assumption-of-the-risk argument attempts to shift the burden onto Lastine to prove he possessed constitutionally protected privacy interests in the bedroom. At the outset, we reiterate that the burden of proving that a third party had authority to consent to a warrantless search rests with the State. *See Rodriguez*, 497 U.S. at 181. The defendant does not have the burden to disprove the third party's authority. *See id.*

Here, the State did not provide any proof that Robert entered Lastine's bedroom unannounced or otherwise exceeded his limited access to the bedroom such that Lastine assumed the risk that Robert would exceed his authorized access to Lastine's bedroom. Robert's testimony at the suppression hearing suggested the opposite—Lastine assumed no such risk, as Robert characterized the bedroom as Lastine's space that he rented, and the door was always closed. Additionally, the district court did not make any findings that Lastine assumed the risk. We conclude the State failed to meet its burden to prove that Robert possessed actual authority to consent to a search of Lastine's bedroom. We turn now to apparent authority.

Apparent authority

The State argues that even if Robert did not have actual authority to consent to a search of Lastine's bedroom, Robert had apparent authority to authorize the search. Lastine counters that the deputies did not have sufficient facts available to them to justify the search based on the doctrine of apparent authority. We agree with Lastine.

Apparent authority is a misnomer of sorts. A third party does not possess apparent authority; rather, apparent authority exists when the law enforcement officers who conducted a warrantless search or seizure based on a third party's consent reasonably believed that the third party had actual authority to give consent. *See id.* at 183. In this way, apparent authority goes to the key assurance of the Fourth

Amendment—that no search will occur that is "*unreasonable*," not that no imperfect searches will occur. *See id.* (emphasis added). Thus, the apparent authority doctrine permits warrantless searches and seizures based upon the consent of a third party who lacks actual authority to consent so long as the law enforcement officers who relied upon the third party's consent acted reasonably given the circumstances available at the time of the search or seizure. *See id.* at 187-89.

To determine whether law enforcement officers possessed an objectively reasonable belief that a third party had authority to consent to a search of a certain area, we assess the reasonableness of their belief by considering "the facts available to [them] *at the moment*." *Arreguin*, 735 F.3d at 1175 (quoting *Rodriguez*, 497 U.S. at 188). Again, the State has the burden to show the officers' belief concerning the third party's authority to consent to a search was reasonable concerning "each specific area searched." *Id.* (brackets omitted). When law enforcement officers proceed to search an area based on the consent of a third party "in a state of near-ignorance" without obtaining sufficient information about the third party's authority, we cannot conclude they possessed an objectively reasonable belief that the third party had authority to consent to a search. *Id.* at 1176.

For example, consider the facts of *Arreguin* as they are similar to the present case. There, nine law enforcement officers knocked on the door of a house they suspected had been used for illegal drug-related activity. *Id.* at 1171-72. A man answered the door. *Id.* at 1172. The officers knew little about this man, the various rooms or areas inside the house, or the "nature and extent of [the man's] connection to those separate areas." *Id.* at 1175. Yet, despite their "near-ignorance," *id.* at 1176, the officers relied upon that man's consent to conduct a thorough search of a number of rooms inside the house, including the garage. *Id.* at 1172-73. Ultimately, they learned that the man was a visitor at the home and another occupant, whom they saw but did not question, owned the house. *Id.* at 1173.

The United States Court of Appeals for the Ninth Circuit concluded that the officers acted unreasonably by presuming the man who answered the door had authority to consent to their request to search without further inquiry. *Id.* at 1177. The court held that "[t]he failure to inquire properly weighs against the government, not [the defendant], because the police are simply 'not allowed to proceed on the theory that ignorance is bliss.'" *Id.* (quoting *United States v. Dearing*, 9 F.3d 1428, 1430 (9th Cir. 1993)).

We agree with the Ninth Circuit's approach. Law enforcement officers cannot use the apparent authority doctrine to justify a warrantless search when they fail to make a sufficient inquiry into the consenting party's "use, access, or control over" the area to be searched. *Id.* We carefully scrutinize searches that occur in private areas such as bedrooms as "[t]he Fourth Amendment's protection

is at its zenith within the home . . . .” *Thompson v. Rahr*, 885 F.3d 582, 589 (9th Cir. 2018) (citing *Payton*, 445 U.S. at 589-90). Law enforcement officers may not “always accept a person’s invitation to enter [the] premises.” *Rodriguez*, 497 U.S. at 188 (alteration to the original). When the facts available to and known by the officers are insufficient to establish a reasonable belief that the third party inviting the officers into the home to conduct a search has the authority to do so, “then warrantless entry without further inquiry is unlawful unless authority actually exists.” *Id.* at 188-89.

In this case, the district court did not squarely address whether either Deputy Gamboa or Deputy Obos (or both) possessed an objectively reasonable belief based upon the totality of the circumstances available to them that Robert had authority to consent to a search of Lastine’s bedroom. The court only stated that Robert was the apparent owner of the home.

Neither Deputy Gamboa nor Deputy Obos sufficiently inquired into Lastine’s living arrangement. Deputy Gamboa knew that Robert lived in the house, Robert was Lastine’s uncle, Lastine owned the truck outside the house, and Lastine may have been in the back bedroom of the house. Deputy Gamboa did not ask Robert about the ownership of the house or any rental arrangements regarding the rooms in the house. And Deputy Gamboa had time to ask Robert additional questions to gather relevant information about Lastine’s living arrangement as he waited for Deputy Obos to arrive, but did not do so.

When faced with a situation like this in which the suspect in a crime is located within a private area of a home such as a bedroom—not in a common area—and law enforcement officers choose to enter the private area without the consent of the person occupying the private area, but with the consent of a third party, they need to ensure the third party has the authority to allow the intrusion. The objective is to determine if the third party has the actual authority to consent to the search as discussed earlier in this opinion. Asking the third party about his control over the private area is the first step. Does the third party have primary control over or mutual use of the private area to be searched? Or is the area controlled and used primarily by the person suspected of the crime? If it is used primarily by the suspect, then further inquiries are needed to determine if it is a near exclusive use such as by a renter or tenant. Conducting such inquires is an indication that officers are acting in good faith in attempting to comply with the law when they do not choose to seek a search warrant. *See United States v. Leon*, 468 U.S. 897, 907-08, 919-20 (1984) (recognizing policy of limiting the extent of the exclusionary rule when police act in “objective good faith”).[2] Such efforts could

[2]We note that the better practice is to obtain a search warrant when practical, and here, Deputy Gamboa had an opportunity to seek a telephonic search

justify the application of the apparent authority doctrine if actual authority did not in fact exist.

Based on what the deputies knew about Lastine's living arrangement inside Robert's house, it appears they presumed that, because Robert answered the door, lived in the house, and was Lastine's older relative, Robert had authority to consent to the search of Lastine's bedroom. As in *Arreguin*, the deputies' presumption about Robert's authority based on the information they gathered was unreasonable. Had the deputies conducted even a brief fact-finding inquiry, they would have learned Robert was the owner, but he did not have actual authority as: (1) Robert built the back bedroom in which Lastine lived as an addition to provide a separate living space; (2) although Lastine was an adult relative, he was also a paying tenant and could come and go as he pleased and have guests over without Robert's knowledge or authorization; and (3) the room had its own doors leading in and out of the house, there was a lock on the interior door, that door was normally kept closed, and Robert did not enter without knocking.[3] However, because the deputies failed to make any inquiries about the use and control of the bedroom, they did not have a sufficient basis to believe Robert had primary or even mutual use, access, or control over the bedroom. Neither Robert's occupancy of the house, nor his status as Lastine's older relative, without more, was enough to support the deputies' belief Robert had authority to consent to a search of Lastine's bedroom. Thus, under the totality of the circumstances in this case, we conclude the deputies did not gather sufficient information to form an objectively reasonable belief that Robert had authority to consent to a search of Lastine's separate bedroom.

Did emergency circumstances justify entry into Lastine's bedroom?

Lastine argues that no exigency existed to justify the deputies' warrantless entry into his bedroom. The State argued below in its brief that probable cause to arrest and officer safety justified the warrantless entry into the bedroom. The State, however, has abandoned these arguments on appeal and now only argues that the emergency doctrine justified entry into Lastine's bedroom as Deputy Gamboa was concerned for Lastine's physical well-being. The district court made no findings as to whether an officer safety exigency or an emergency existed. *See Hannon v. State*, 125 Nev. 142, 145-46, 207 P.3d 344, 346 (2009) ("Emergencies . . . are analytically distinct from other exigent circumstances.").

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warrant while he waited for Deputy Obos to arrive. *See Leon*, 468 U.S. at 920-21 (stating that generally there is no illegal police action "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope").

[3]Robert testified to these facts during the suppression hearing.

Although the State did not clearly present the emergency doctrine as an argument below,[4] we will review the argument de novo and determine whether an emergency justified the deputies' entry into Lastine's bedroom. *See id.* at 145, 207 P.3d at 346. The subjective intent of the deputies is not relevant as we look to see if they possessed "an objectively reasonable basis to believe that there was an immediate need to protect the lives or safety of themselves or others." *Id.* at 147, 207 P.3d at 347.

The State argues Deputy Gamboa was concerned for Lastine's well-being because there had been a major car accident with damage to Lastine's truck. The State cites to *Koza v. State*, which describes the emergency doctrine as an urgent need to enter the private premises not to arrest or search, but to protect life or property or investigate a "substantial threat of imminent danger." 100 Nev. 245, 252-53, 681 P.2d 44, 48 (1984) (quoting *Banks v. State*, 94 Nev. 90, 97, 575 P.2d 592, 596 (1978)).

When viewed objectively, the facts do not demonstrate a reasonable basis to believe Lastine was in imminent danger. Air bags were not activated at the time of the collision, and Lastine immediately drove from the scene of the accident to his home. Damage was observed to the exterior of his vehicle but not to the interior. There was no blood in or on his truck, and no blood was found in or on the home. Also, the deputies' actions were consistent with a criminal investigation and not the duty to protect life. Deputy Gamboa did not immediately enter the home or the bedroom to check on the welfare of Lastine. Instead, he waited for Deputy Obos to arrive and assist with the search.[5] Also, he did not ask Robert to check on Lastine's well-being at any time. Deputy Gamboa could not recall if paramedics later responded to the scene. He recalled that the fire department was dispatched, but only to check on the smoking vehicle.

Moreover, when the deputies attempted to initiate communication with Lastine at his bedroom door, they did not ask if he was injured. And, when they finally entered the room, it was a direct

[4]Although Deputy Gamboa answered affirmatively when prompted at the suppression hearing whether he was *potentially* concerned for Lastine's well-being, there was no other evidence presented that this potential concern led to the warrantless entry into Lastine's bedroom or that the entry was objectively reasonable. Furthermore, in its argument below, the State characterized the situation as a potential hypothetical (as no evidence or legal authority was presented) that the delay that would be caused by the telephonic search warrant process might have adversely affected the well-being of Lastine. But on appeal, the State recites in its brief the factual reason for the entry into the bedroom as, "Andrew refused to show his hands, so deputies entered the room. Robert Lastine [later] thought Andrew needed medical treatment."

[5]We note this fact undermines the argument raised in the hypothetical posed by the State during the suppression hearing because Deputy Gamboa had adequate time during this interval to seek a telephonic search warrant. *See* NRS 179.045.

reaction to *both* Lastine's verbal and nonverbal refusal to show his hands, not because Lastine had been nonresponsive. The deputies then immediately searched, handcuffed, and took Lastine into their physical custody. It was only later when *Robert* expressed concern over Lastine's well-being that paramedics were summoned. In fact, Robert testified that Deputy Gamboa did not ask for consent to enter the home to check on the well-being of Lastine. Therefore, the totality of the circumstances does not suggest an objectively reasonable basis to believe an immediate entry was needed to protect Lastine. *See id*.

Having concluded that Robert did not possess actual authority to consent to the deputies' entry into Lastine's bedroom, the deputies did not have an objectively reasonable belief that Robert had such authority, and no exigent or emergency circumstances existed, we further conclude the deputies' warrantless search was constitutionally unreasonable. Therefore, the district court erred by denying the motion to suppress all evidence obtained from the deputies' warrantless entry into Lastine's bedroom. *See United States v. Pulliam*, 405 F.3d 782, 785 (9th Cir. 2005) ("[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree." (internal quotation marks omitted)).

Was the district court's error in denying in part Lastine's motion to suppress harmless beyond a reasonable doubt?

The State argues that if the district court erred by denying in part Lastine's motion to suppress, the error was harmless beyond a reasonable doubt, as overwhelming evidence supports the conviction. We disagree.

Where the issue has been preserved for appeal, we can only affirm a ruling containing constitutional errors if we are "able to declare a belief that [the errors were] harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 476-77 (2006). "Under this standard, reversal is not required if the State [can] show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Medina*, 122 Nev. at 355, 143 P.3d at 477 (internal quotation marks and citations omitted). The State does not meet this burden.

Important evidence the State presented at trial to prove that Lastine was the person who committed the crime came from the deputies' illegal entry into Lastine's bedroom. We cannot say beyond a reasonable doubt that admission of this evidence did not contribute to the verdict. Therefore, we conclude the State has not demonstrated that the district court's erroneous decision to deny the suppression of this evidence was harmless beyond a reasonable doubt.

CONCLUSION

Law enforcement officers may conduct a warrantless search if a third party with common authority over an area consents to that search. A warrantless search based upon third-party consent is lawful so long as the third party has actual authority to consent *or* the law enforcement officers formed an objectively reasonable belief, based upon the facts available to them, that the third party had authority to consent.

Law enforcement officers cannot justify a warrantless search of a bedroom inside a home by pointing to the consent of a third party when the officers have little to no information about that third party's authority in the home. Rather, law enforcement officers should gather sufficient information about the living arrangements inside the home to establish an objectively reasonable belief that the third party has authority to consent to a search therein before proceeding with that search without a warrant, lest they risk the search being deemed unconstitutional. To this end, we encourage law enforcement officers to seek a warrant before conducting a search if practical, even when an exception to the warrant requirement seems to exist.

Because the district court erred in denying in part Lastine's motion to suppress evidence and the error was not harmless, we reverse the judgment of conviction and remand with instructions to grant Lastine's motion and suppress all evidence obtained as a result of the illegal entry.

Silver, C.J., and Tao, J., concur.

YVONNE O'CONNELL, an Individual, Appellant, *v.* WYNN LAS VEGAS, LLC, dba WYNN LAS VEGAS, Respondent.

No. 71798-COA

August 30, 2018 429 P.3d 664

Appeal from a post-judgment order denying appellant's motion for attorney fees and costs. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Reversed and remanded.

Nettles Law Firm and *Brian D. Nettles, Christian M. Morris, Jon J. Carlston*, and *Edward J. Wynder*, Henderson, for Appellant.

Semenza Kircher Rickard and *Lawrence J. Semenza, III, Christopher D. Kircher*, and *Jarrod L. Rickard*, Las Vegas, for Respondent.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, Gibbons, J.:

Yvonne O'Connell sued Wynn Las Vegas, LLC, for negligence after she was injured when she slipped and fell on the resort's property.[1] Before the jury trial on O'Connell's claims, O'Connell made a $49,999 offer of judgment to Wynn, which it rejected. A jury awarded O'Connell $400,000 for past and future pain and suffering, with the final judgment of $240,000 reflecting that the jury deemed Wynn 60 percent at fault and O'Connell 40 percent at fault.

O'Connell subsequently sought an attorney fees award under NRCP 68, which allows a party to seek attorney fees when the final judgment is more favorable than her rejected offer of judgment. She requested $96,000 in attorney fees, which she calculated as 40 percent of the reduced judgment amount based on the 40-percent contingency fee agreement with her attorneys. The district court denied her request. The court did not award O'Connell any attorney fees because, in part, O'Connell did not submit hourly billing records of the work performed by her counsel to show the requested fee was reasonable. The court further found that the other factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), likewise supported denying attorney fees. O'Connell appealed, arguing that she should not be required to submit hourly billing records to support an attorney fees award when her attorneys represented her on a contingency fee basis and that the court otherwise abused its discretion in weighing the *Beattie* factors to deny her fees request.

This case asks us to examine if a lawyer, who represents a client on a contingency fee basis, must provide proof of hourly billing records before he or she can be awarded attorney fees that are otherwise allowed by agreement, rule, or statute. We conclude that district courts cannot deny attorney fees because an attorney, who represents a client on a contingency fee basis, does not submit hourly billing records. The district court here relied primarily on the lack of hourly billing records in evaluating the reasonableness of O'Connell's application for attorney fees, without recognizing that attorney fees can be awarded when they are based upon contingency fee agreements. And because we further determine that the district court improperly analyzed certain of the remaining *Beattie* factors,

[1]This appeal was consolidated with the appeal in Docket No. 70583 prior to briefing. We now deconsolidate these appeals for the purposes of disposition. Judgment was affirmed in Docket No. 70583.

we conclude the court abused its discretion in denying her request. Consequently, we reverse the district court's denial of O'Connell's request for attorney fees and remand for a full hearing on O'Connell's request.[2]

FACTS AND PROCEDURAL HISTORY

On February 8, 2010, O'Connell slipped and fell on a liquid substance as she was walking through the front atrium of the Wynn resort. Two days later, she went to an urgent care facility seeking treatment for her pain from the fall. She continued to see a series of doctors for pain and injuries related to the incident. Two years after her fall, O'Connell sued Wynn for negligence. Discovery progressed over the following three years, and the case was tried before a jury, over a seven-day period, in November 2015.

Before the jury trial, Wynn and O'Connell attempted to settle the case by exchanging offers of judgment. Wynn's top offer was for $3,000. O'Connell's last offer was for $49,999, which included interest, costs, and attorney fees. Four months before O'Connell's last offer, and before the discovery deadline, she disclosed approximately $33,000 in medical damages. She later disclosed an amended amount of nearly $38,000 in damages approximately a month after the discovery deadline, but still before she presented her offer of judgment. The case proceeded to a jury trial, and the jury awarded O'Connell $400,000 for pain and suffering, apportioned as $150,000 for past pain and suffering and $250,000 for future pain and suffering. The jury assigned 60 percent of the fault to Wynn and 40 percent to O'Connell, and the judgment amount of $240,000 reflected the verdict minus 40 percent.

Post-trial, in her initial application for attorney fees, costs, and pre-judgment interest, O'Connell argued that her requested attorney fees were reasonable and justified because the State Bar of Nevada approves of contingency fee arrangements and "the industry standard" is 40 percent, or more, if the case goes to a jury trial. Within her application, O'Connell noted generally "the work done in this case" and argued that her "counsel expended substantial time and incurred costs to try this matter through a full jury trial." O'Connell further argued that, if the court did not award fees, it would undermine the purpose of NRCP 68 and its goal to settle cases. O'Connell contended that to decide "the amount of fees to award, the court may

[2]The district court partially awarded O'Connell her requested expert witness fees. O'Connell argues on appeal that the district court should have awarded her the entirety of those fees. O'Connell did not raise this argument until her reply brief in her appeal. Therefore, we decline to consider it now. *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) ("As this argument was raised only in [appellant's] reply brief, we need not consider it."). All other points raised on appeal not discussed herein are unpersuasive.

calculate a reasonable amount to be that of the contingency fee," citing to *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005). She claimed, without elaborating, that under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), which sets out factors to help courts assess a reasonable amount of attorney fees, it was evident that her request for $96,000 in attorney fees was "reasonable." To support this request, O'Connell attached her contingency fee agreement, which stated, in part, that the fee would be 40 percent of any recovery and 50 percent of any recovery if there was an appeal.

In her later-filed amended application for fees, costs, and prejudgment interest, O'Connell addressed the *Brunzell* factors and argued that her counsel satisfied all four factors. As to the second factor, the type of work done, O'Connell noted that contingency fees are common in personal injury cases because clients usually have fewer resources to pay legal fees upfront or as the fees accrue. She argued that personal injury cases are difficult because the burden of proof rests on the plaintiff and the "[c]ases require considerable skill and effort in written discovery and trial work." Additionally, she explained the risk attorneys take by accepting cases on a contingency fee basis because "attorneys will not be entitled to fees if they lose." Regarding the third factor about the "work actually performed," O'Connell summarily argued that her counsel "spent hundreds of hours preparing and litigating this case."

The district court conducted a brief hearing on the motion for attorney fees, and no additional evidence was presented. The court allowed only limited argument by O'Connell and then denied the request for attorney fees. In its order, the district court rejected O'Connell's request for attorney fees in its entirety. It applied the *Beattie* factors, 99 Nev. at 588-89, 668 P.2d at 274, as required when evaluating an NRCP 68 offer to decide whether the prevailing party is entitled to attorney fees. The district court concluded that the first three *Beattie* factors favored Wynn, signaling that O'Connell was not entitled to attorney fees despite prevailing. For the fourth *Beattie* factor regarding the reasonableness of the fees, the court applied the factors from *Brunzell* to decide what, if any, amount of attorney fees it could award. It acknowledged that O'Connell provided the qualities of her counsel and that it was apparent she received a favorable result. The court did not distinctly address the remaining two *Brunzell* factors. Instead it only addressed the tasks performed and hours associated with them. It decided that it could not determine if the fees were reasonable without any bills describing the tasks completed and the hours expended, and found in favor of Wynn on the fourth *Beattie* factor.

In her appeal from the district court's decision regarding attorney fees, O'Connell does not argue that she provided any billing

statements to the court in addressing the determination that the reasonableness of the award could not be determined absent any bills. Rather, she argues that the district court is holding contingency fee agreements to "a double standard" by requiring hourly billing records. We agree that declining to assess the reasonableness of a request for attorney fees, based upon a contingency fee agreement, because the motion was not supported by hourly billing statements, is improper when analyzing whether to award fees under *Beattie* and how much to award under *Brunzell*.

ANALYSIS

A party may seek attorney fees when allowed by an agreement, rule, or statute. *See* NRS 18.010 (governing awards of attorney fees); *RTTC Commc'ns, LLC v. The Saratoga Flier, Inc.*, 121 Nev. 34, 40, 110 P.3d 24, 28 (2005) (noting that "a court may not award attorney fees absent authority under a specific rule or statute"). NRCP 68 establishes the rules regarding offers of judgment. A party may serve an offer of judgment "[a]t any time more than 10 days before trial." NRCP 68(a). If a party "rejects an offer and fails to obtain a more favorable judgment," that party is responsible for "the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer." NRCP 68(f)(2); *see also RTTC*, 121 Nev. at 40-41, 110 P.3d at 28.

The district court must evaluate the *Beattie* factors when deciding whether to award attorney fees pursuant to NRCP 68. *Frazier v. Drake*, 131 Nev. 632, 641-42, 357 P.3d 365, 372 (Ct. App. 2015). Ultimately, the decision to award attorney fees rests within the district court's discretion, and we review such decisions for an abuse of discretion. *Id.* at 642, 357 P.3d at 372. The district court abuses its discretion when "the court's evaluation of the *Beattie* factors is arbitrary or capricious." *Id.*

The *Beattie* factors require the district court to evaluate:

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

Beattie, 99 Nev. at 588-89, 668 P.2d at 274. *Beattie* applies to plaintiffs and defendants. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998) (deciding that when the defendant is the offeree, the court should consider if the defendant's defense was brought in good faith under the first factor and remanding for the district court to reconsider liability issues when evaluat-

ing whether the defendant's rejection of the offer was unreasonable or in bad faith under the third factor). When it is determined that the first three *Beattie* factors weigh in favor of the party who rejected the offer of judgment, the reasonableness of the requested fees becomes irrelevant as the reasonableness of the fees alone cannot support an attorney fees award. *Frazier*, 131 Nev. at 644, 357 P.3d at 373.

When considering the amount of attorney fees to award, the analysis turns on the factors set forth in *Brunzell*. Of particular significance to this case, *Brunzell* provides that "[w]hile hourly time schedules are helpful in establishing the value of counsel services, other factors may be equally significant." 85 Nev. at 349, 455 P.2d at 33. *Brunzell* directs lower courts to consider the following when determining a reasonable amount of attorney fees to award:

> (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.

Id. (internal quotation marks omitted). With these standards in mind, we turn to the matter before us.

The offer of judgment was reasonable and in good faith[3]

The district court concluded that the second *Beattie* factor weighed in Wynn's favor because the court precluded O'Connell from submitting "special medical damages at the time of trial," which made it difficult for Wynn to determine the value of the case. The court also concluded that the offer was unreasonable because O'Connell made it when she did not have a proper damages calculation. O'Connell argues that she had disclosed approximately $38,000 in medical damages at the time of her offer. Wynn contends that O'Connell's damages should have been excluded because of discovery issues,

[3]We address only *Beattie* factors two and four in this opinion. On appeal, O'Connell does not challenge the district court's ruling on the first *Beattie* factor, and so we need not consider it. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). Additionally, Wynn did not respond to O'Connell's argument regarding the third *Beattie* factor. Therefore, Wynn conceded this point, and thus, the district court will need to reweigh this factor upon remand. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating respondent's failure to address one of appellant's arguments "as a confession of error").

while O'Connell points to the significant amount of discovery her attorneys completed before making the $49,999 offer.

The second *Beattie* factor requires district courts to evaluate "whether the . . . offer of judgment was reasonable and in good faith in both its timing and amount." *Beattie*, 99 Nev. at 588, 668 P.2d at 274. "[T]here is no bright-line rule that qualifies an offer of judgment as per se reasonable in amount; instead, the district court is vested with discretion to consider the adequacy of the offer and the propriety of granting attorney fees." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012).

Here, the district court justified its decision to weigh the second factor in Wynn's favor based on its conclusion that it had excluded evidence of O'Connell's medical damages. This reasoning has two significant flaws. First, as to timing, apart from its decision in its order denying O'Connell's request for attorney fees, it is not apparent from the record that the district court did in fact exclude O'Connell's medical damages. After it heard Wynn's motion in limine seeking to exclude the medical damages before trial, the court denied Wynn's motion without prejudice and deferred its decision until trial, which was almost two months after O'Connell's offer of judgment expired. Furthermore, on the first day of trial, O'Connell chose not to seek medical damages, so it is unclear if an order was ever needed, or entered, as one does not appear in the record. If the district court ever did exclude the evidence, any exclusion occurred after O'Connell's offer of judgment had expired. Therefore, Wynn did not know at the time it rejected the offer of judgment that it would not face potential liability for medical damages.

Second, as to the amount, whether O'Connell's medical damages were excluded did not control her request for general damages, which would include pain and suffering. Wynn had all of the necessary information to evaluate O'Connell's claim as discovery had closed before she made her offer. *See Certified*, 128 Nev. at 383, 283 P.3d at 258. Indeed, Wynn risked the possibility of a large, six-figure verdict by rejecting O'Connell's offer, regardless of the admissibility of her medical damages—and that is exactly what happened. During closing arguments, O'Connell asked the jury for a damages award in the six figures. She ultimately was awarded $400,000, and still received a $240,000 judgment after fault was apportioned—well above her $49,999 offer of judgment that Wynn rejected. *See generally RTTC*, 121 Nev. at 37, 43, 110 P.3d at 26, 29 (concluding that there was "ample support in the record to support the district court's findings that both [respondent's] claim and offer of judgment were brought in good faith" in a case in which respondent made a $45,000 offer of judgment that was rejected, yet the respondent was ultimately awarded "$53,333, plus interest").

Based on the foregoing, the district court abused its discretion by mistakenly concluding that, because medical damages were pre-

cluded, O'Connell did not have a basis for her offer or that Wynn could not properly evaluate her offer.[4] *See Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999) (highlighting that "[t]he purpose of . . . NRCP 68 is to save time and money" and to "reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer"). Thus, the determination regarding the reasonableness of the offer as to timing and amount was an abuse of discretion and must be reweighed on remand in consideration of all of the factors when deciding whether fees are warranted.

The district court abused its discretion by limiting its review of the reasonableness of O'Connell's fees to whether hourly billing records were submitted

We now turn to the fourth *Beattie* factor to determine "whether the fees sought by the offeror are reasonable and justified in amount." *Beattie*, 99 Nev. at 589, 668 P.2d at 274. As discussed above, courts apply the *Brunzell* factors within their analysis of the fourth *Beattie* factor to determine a reasonable amount of attorney fees. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Here, the district court concluded that, because O'Connell did not provide bills detailing the tasks executed and hours expended to complete those tasks, it could not determine if the requested fee was reasonable based on the work performed.

We first address whether an attorney, who litigated a matter based on a contingency fee agreement, is required to produce hourly billing records to receive an attorney fees award. We conclude that such records are not required. We then provide guidance as to how trial courts can evaluate a fee request based on a contingency fee agreement that does not include hourly billing statements.

Hourly billing records are not required to support an award of attorney fees based on a contingency fee agreement

Nevada law does not require billing records with every attorney fees request. The law only requires the trial court to calculate "a reasonable fee." *Shuette*, 121 Nev. at 864, 124 P.3d at 548 (internal quotation marks omitted); NRCP 68(f)(2) (allowing an offeror reasonable attorney fees); *see also* NRCP 54(d)(2)(B) (requiring "a fair estimate of" the reasonable attorney fees). "[I]n determining the

[4]Wynn argued below that O'Connell's various offers resulted in "gamesmanship" and was one reason why Wynn could not give due weight to her $49,999 offer of judgment. But this argument is unpersuasive as the record suggests that Wynn did not give due weight to any of O'Connell's offers. O'Connell's $49,999 offer was close to her two most recently disclosed medical damages at the time ($33,000 in medical damages followed by a later disclosed $38,000 in medical damages). In comparison, Wynn only made a $3,000 offer of judgment when O'Connell disclosed an estimated $29,000 in medical expenses.

amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, including those based on a 'lodestar' amount or a *contingency fee*." *Shuette*, 121 Nev. at 864, 124 P.3d at 549 (emphasis added) (citation omitted).[5] The district court must properly weigh the *Brunzell* factors in deciding what amount to award. *Id.* at 864-65, 124 P.3d at 549. "In this manner, whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination." *Id.* at 865, 124 P.3d at 549.

In *Cooke v. Gove*, the Nevada Supreme Court upheld an attorney fees award based on "the reasonable value" of the attorney's services, even though the case was taken on a contingency fee basis with no formal agreement. 61 Nev. 55, 61, 114 P.2d 87, 89 (1941). The "evidence" to support the fee was the case file from the successful matter, some of the letters between the client and attorney, and two depositions from other attorneys about the value of the appellant's services. *Id*. at 57, 114 P.2d at 88. The court noted that the reasonable fee was based on the trial court's evaluation of "the reasonable value of plaintiff's services from all the facts and circumstances" after the court considered how the plaintiff 's "work, thought and skill contributed" to the successful outcome. *Id.* at 61, 114 P.2d at 89 (internal quotation marks omitted).

Thus, the district court is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements. *See Shuette*, 121 Nev. at 864-65, 124 P.3d at 548-49; *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Rather, limiting the source for the calculation primarily to billing records is too restrictive. *See generally Shuette*, 121 Nev. at 864, 124 P.3d at 549 (stating that there is no one approach to determining the amount of attorney fees). Accordingly, a trial court can award attorney fees to the prevailing party who was represented under a contingency fee agreement, even if there are no hourly billing records to support the request.

We note that our conclusion is in line with other jurisdictions that squarely address awarding attorney fees based on a contingency fee agreement. For example, in *McNeel v. Farm Bureau General Insurance Co.*, the Michigan Court of Appeals reversed a trial court's decision to reduce an award of fees to an attorney who represented a client on a contingency fee basis because the "court gave only mild consideration to the complexity of the case" and did not factor in the required attorney preparation. 795 N.W.2d 205, 221 (Mich. Ct. App. 2010). The *McNeel* court outlined what the trial court could do when reviewing a fee without billable hour statements: "The trial

[5]The lodestar method "involves multiplying the number of hours *reasonably* spent on the case by a *reasonable* hourly rate." *Shuette*, 121 Nev. at 864 n.98, 124 P.3d at 549 n.98 (emphasis added) (internal quotation marks omitted).

court can certainly consider the type of case, the length of the trial, the difficulty of the case, the numbers and types of witnesses, as well as other relevant factors . . . ." *Id.* at 220 (internal quotation marks omitted). Similarly, in California, billing records are not always required. *See Mardirossian & Assocs., Inc. v. Ersoff*, 62 Cal. Rptr. 3d 665, 676 (Ct. App. 2007) (concluding that the trial court did not abuse its discretion in an attorney fees award case, in part, because, despite a lack of billing records, the Mardirossian attorneys had personal knowledge of the legal work they performed and "each testified at length concerning the work he or she performed, the complexity of the issues and the extent of the work that was required").

Courts have recognized an additional reason that supports awarding attorney fees—the risks attorneys take by offering or accepting contingency fee agreements. *See King v. Fox*, 851 N.E.2d 1184, 1191-92 (N.Y. 2006) ("In entering into contingent fee agreements, attorneys risk their time and resources in endeavors that may ultimately be fruitless. Moreover, it is well settled that the client may terminate [the contingency fee agreement] at any time, leaving the lawyer no cause of action for breach of contract[,] only quantum meruit." (first alteration in original) (citation and internal quotation marks omitted)); *see also Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 96-97 (Haw. 2001) (concluding that fee awards can be justified based on the risks associated with accepting a case on a contingency fee basis). Courts should also account for the greater risk of nonpayment for attorneys who take contingency fee cases, in comparison to attorneys who bill and are paid on an hourly basis, as they normally obtain assurances they will receive payment. *See Rendine v. Pantzer*, 661 A.2d 1202, 1228 (N.J. 1995) (recognizing that rewarding a lawyer for taking a case for which compensation is contingent on the outcome is based in part on providing a monetary incentive for taking such cases because an hourly fee is more attractive unless such an extra incentive exists).

Additionally, contingency fees allow those who cannot afford an attorney who bills at an hourly rate to secure legal representation. *See King*, 851 N.E.2d at 1191 ("Contingent fee agreements between attorneys and their clients . . . generally allow a client without financial means to obtain legal access to the civil justice system."). Relatedly, attorney fees are permissible in pro bono cases, where there are likewise no billing statements. *See Miller v. Wilfong*, 121 Nev. 619, 622-23, 119 P.3d 727, 729-30 (2005) (discussing the public policy rationale in support of awarding attorney fees to pro bono counsel and concluding that such awards are proper); *Black v. Brooks*, 827 N.W.2d 256, 265 (Neb. 2013) (concluding that if organizations are not awarded for recovery of statutory fees, they may decline to represent pro bono cases); *see, e.g.*, *New Jerseyans for a*

Death Penalty Moratorium v. N.J. Dep't of Corr., 850 A.2d 530, 532 (N.J. Super. Ct. App. Div. 2004) (explaining that when determining a reasonable fee to award in a pro bono case, courts should consider whether to increase the "fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome") (internal quotation marks omitted), *aff'd as modified by* 883 A.2d 329 (N.J. 2005).

Considerations when assessing an attorney fees award based on a contingency fee agreement

Here, the district court determined that it could not award fees without hourly billing records despite citing no legal authority for that proposition. As discussed above, however, district courts may take almost any sensible approach or apply any logical method to calculate "a reasonable fee" to award as long as the court weighs the *Brunzell* factors. *See Shuette*, 121 Nev. at 864-65, 124 P.3d at 548-49 (internal quotation marks omitted).

As to the methods or approaches a district court may use to determine a reasonable amount, there are certainly more considerations than just hourly billing records. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 637, 173 P.3d 724, 733 (2007) (remanding the issue of attorney fees to the district court to determine a starting point and adjust the fee accordingly based on several factors, including the "time taken away from other work," case-imposed deadlines, how long the attorney worked with the client, the usual fee and awards in similar cases, if the fee was contingent or hourly, the amount of money at stake, and how desirable the case was to the attorneys involved); *see also* RPC 1.5(a)(1)-(8) (listing factors to consider in deciding if a fee is reasonable). Additionally, district courts can look at the facts before them, such as what occurred at trial and the record a party produced in litigating a matter. *See Herbst v. Humana Health Ins. of Nev., Inc.*, 105 Nev. 586, 591, 781 P.2d 762, 765 (1989) (reviewing an attorney's affidavit of the number of hours of work performed and concluding that this document, "combined with the fact that Herbst's attorney worked for two years on the case, established 12 volumes of records on appeal, and engaged in a five day trial should enable the court to make a reasonable determination of attorney's fees").

In comparison here, the district court could consider the length of time counsel represented O'Connell and the length of the trial. We note that the appellate record was large and most of it pertained to the trial. Also, based on the lower court record, there is evidence that O'Connell's attorneys worked on the case in the form of motions they filed and at pretrial hearings held after O'Connell's offer of judgment expired, as well as at trial, which lasted seven days. Further, O'Connell's application indicated that counsel had per-

formed a considerable amount of work—"hundreds of hours" on the case—and she included the contingency fee agreement as part of her request for fees.[6] *See generally* RPC 3.3(a)(1) (prohibiting an attorney from making "a false statement of fact or law to a tribunal"); NRCP 11(b)(3) (indicating that, by submitting pleadings to the court, parties are certifying that the facts contained within the document "are likely to have evidentiary support"); *compare* NRS 18.110(1) (requiring a verified memorandum of costs) *with* NRS 18.010 (awarding attorney fees based on an agreement or statute, not a verified memorandum); *see also Mardirossian*, 62 Cal. Rptr. 3d at 676 (accepting testimony from attorneys about the level of work required); *Weber v. Langholz*, 46 Cal. Rptr. 2d 677, 683 (Ct. App. 1995) (noting that the trial court did not lack substantial evidence for an attorney fees award even though there were no time records or billing statements).

Furthermore, although NRS 18.010(3) dictates that a district court may award attorney fees with or without additional evidence, the district court's decision to require hourly billing records as a prerequisite to determine if the fee request was reasonable and justified was itself unreasonable as the court had presided over protracted litigation and witnessed a lengthy trial in which O'Connell overcame numerous challenges to prevail. *See Cooke*, 61 Nev. at 61, 114 P.2d at 89 (looking at "the reasonable value of plaintiff's services from all the facts and circumstances"). Importantly, where, as here, a district court observes an attorney successfully litigating in court, rarely should the court decide to award no attorney fees when evaluating if fees based on a contingency fee agreement are reasonable and justified in amount under the fourth *Beattie* factor, assuming the factors as a whole weigh in favor of an award. *See Frazier*, 131 Nev. at 644, 357 P.3d at 373.

Therefore, we conclude that, in this case, there were alternative sources of information for the district court to rely upon to determine whether the requested award was reasonable, even though hourly

[6]Although O'Connell did not provide a verified application or affidavits to the district court to support her request for attorney fees, the district court is not limited to considering affidavits in determining a reasonable amount of attorney fees. Further, despite the lack of an affidavit and based on O'Connell's representations in her application for fees, the district court could have sworn in counsel at the hearing to accept testimony supporting the fee request or possibly have taken judicial notice of certain facts. *See* NRS 47.130; NRCP 43(c) (indicating that when a motion is based on facts that are not in the record, the district court may decide the motion based on the affidavits presented or oral testimony); *Mardirossian*, 62 Cal. Rptr. 3d at 676 (accepting testimony from attorneys about the level of work required). We note, however, that in addition to any other potential evidence the district court may consider, O'Connell and other parties should provide district courts with affidavits or verified pleadings when seeking attorney fees awards.

billing records were not provided. Thus, the district court should not have concluded that no attorney fees were warranted based on the absence of hourly billing records alone and without holding an evidentiary hearing or making a determination based upon all the information before it. Accordingly, the denial of attorney fees must be reversed and the matter remanded to the district court for further proceedings consistent with this opinion.

We note that the cases and methods used within this opinion to determine the amount of an attorney fees award are instructive and not exhaustive. Trial courts should also keep in mind that their awards of attorney fees should be made on a case-by-case basis by applying the considerations described herein to the evidence provided, and that an adequate record will be critical to facilitate appellate review. *Cf. Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (noting that while the district court has discretion, "the award must be supported by substantial evidence").

Ultimately a party seeking attorney fees based on a contingency fee agreement must provide or point to substantial evidence of counsel's efforts to satisfy the *Beattie* and *Brunzell* factors.[7] On remand, if O'Connell cannot provide substantial evidence of the time reasonably spent on this case, the district court can exercise its discretion to adjust the fee accordingly, while also being mindful of all applicable considerations. *See Hsu*, 123 Nev. at 637, 173 P.3d at 733; *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (explaining, in using the lodestar method, that the district court may reduce an attorney fees award if the documentation of the hours reasonably expended on the litigation is inadequate). Counsel must show how their work helped accomplish the result achieved. Additionally, O'Connell's claim for attorney fees is limited to those fees earned post-offer.[8] *See* NRCP 68(f)(2).

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[7]We note that the better—but not required—practice in a contingency fee case is for an attorney to keep hourly statements or timely billing records to later justify the requested fees. *See, e.g.*, *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1094 (5th Cir. 1982) (cautioning that representing a client on a contingency fee basis is not a valid excuse for failure to keep time records), *overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174, 1180-81 (5th Cir. 1986).

[8]On appeal, O'Connell concedes that her award should be limited to her post-offer fees. She estimates her request should accordingly be reduced to $71,111.11. Her contingency fee agreement, however, also provided for a 50-percent fee if she was successful on appeal. Additionally, we note that O'Connell did not retain the same counsel from the beginning of the case until the end, and thus her current counsel is not automatically entitled to fees based on the entire litigation. *Cf. Van Cleave v. Osborne, Jenkins & Gamboa, Chtd.*, 108 Nev. 885, 888, 840 P.2d 589, 592 (1992) (awarding attorney fees to the firm that more efficiently resolved a matter, regardless of the length of time of its representation, in comparison to the prior firm that litigated the same case for six years without resolution). We leave the consideration of these circumstances to the district court.

On remand, the district court should consider the proposed amount of the attorney fees award based on the judgment and the contingency fee agreement and evaluate the requested award based on the work performed. The evidence does not need to be limited to documents and may include what the trial court readily observed.

CONCLUSION

Attorneys who represent a client on a contingency fee basis are not required to submit hourly billing records to support an award of attorney fees that are allowed by a valid agreement, rule, or statute. Because the district court incorrectly based its decision to deny fees, in part, on the second *Beattie* factor and on the failure to provide hourly billing records with regard to the fourth *Beattie* factor, we conclude that the district court abused its discretion in denying O'Connell's request. Accordingly, we reverse the district court's order as to its complete denial of O'Connell's request for attorney fees. We remand this matter for the district court to allow O'Connell a new hearing related to her attorney fees request, and then to address and reweigh the second, third, and fourth *Beattie* factors in light of this opinion. If the *Beattie* factors favor O'Connell, we direct the district court to determine a reasonable amount of attorney fees to award.

Silver, C.J., and Tao, J., concur.

JOHN FRANCIS DUNHAM, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 73143

September 6, 2018 426 P.3d 11

Appeal from a judgment of conviction, pursuant to a jury verdict, of home invasion. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

Affirmed.

Kristine L. Brown, Gardnerville, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Mark B. Jackson*, District Attorney, and *Richard B. Casper*, Deputy District Attorney, Minden, for Respondent.

Before the Supreme Court, Pickering, Gibbons and Hardesty, JJ.

OPINION

By the Court, Hardesty, J.:

Appellant John Dunham was convicted of home invasion under NRS 205.067 when he entered his wife's second home. In this appeal, we must determine whether the word "resides" as used in the definition of "inhabited dwelling" in Nevada's home invasion statute, NRS 205.067(5)(b), requires the "owner or other lawful occupant" to dwell permanently or continuously. We conclude that the district court did not abuse its discretion in refusing Dunham's proffered instruction defining "resides" because an owner need not permanently or continuously dwell in a house for the house to be an inhabited dwelling. Finally, we conclude that the district court's sentence in this case does not constitute cruel and unusual punishment, and we affirm the conviction.

FACTS AND PROCEDURAL HISTORY

Dunham and his wife Patricia Scripko lived in a rented home in Monterey, California. In October 2015, Scripko purchased in her name only a condominium in Stateline, Nevada. Scripko testified that she originally planned to move to Stateline, but after the purchase, she lived in both the condominium and the Monterey home. Specifically, Scripko explained that she lived and worked in Monterey but spent occasional weekends at the condominium and, at one point, spent half her time in Monterey and half her time at the condominium. Dunham and Scripko began living separately in June 2016, and Dunham moved into the condominium while Scripko remained in Monterey.

In August 2016, Scripko obtained a domestic violence protective order against Dunham prohibiting him from contacting her and requiring that he stay at least 100 yards away from her, her Monterey residence, and the condominium. Scripko testified that because she did not want to have a confrontation with Dunham, she did not visit the condominium from the time she obtained the protective order until October 21, 2016. During that time period, Dunham violated the protective order multiple times by contacting Scripko and entering the condominium. Scripko went to the condominium on October 21, 2016, to meet with her contractor to change the locks and have him perform repairs because she decided to list the condominium as a vacation rental. On October 21, 2016, shortly before Scripko arrived at the condominium, police found and arrested Dunham in the condominium. After arriving at the condominium, Scripko stayed in the condominium until October 23, 2016.

On October 26, 2016, the day after Dunham was released from jail for his second violation of the protective order, Scripko's contractor went to the condominium to perform repair work. The contractor

noticed that the kitchen window adjacent to the front door was broken, and after entering the house, saw Dunham sleeping upstairs and called the police. Deputies responded to the call, and when they entered the condominium, they observed Dunham walking down the stairs, apparently intoxicated. Dunham was arrested and charged with home invasion and burglary. Following a three-day jury trial, the jury found Dunham guilty of home invasion but not guilty of burglary. The district court sentenced Dunham to a maximum term of 96 months in prison, with parole eligibility after 38 months. This appeal followed.

DISCUSSION

On appeal, Dunham argues that the district court abused its discretion in refusing his proposed jury instruction that defined the word "resides" as used in the "inhabited dwelling" definition in Nevada's home invasion statute to require the dwelling be permanently or continuously occupied. Dunham further appeals his sentence as constituting cruel and unusual punishment. We disagree with both contentions.

The district court did not abuse its discretion in instructing the jury

Dunham asks us to vacate his sentence and order a new trial because under *Crawford v. State*, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005), he was entitled to instruct the jury on his theory of the case, and therefore, the district court abused its discretion in refusing to instruct the jury on the definition of "resides." The defense theory of the case was that Scripko did not "reside" in the condominium for purposes of Nevada's home invasion statute. Dunham offered a jury instruction that defined the term "reside," using a definition from a Wisconsin case: "Reside means to dwell permanently or continuously. It expresses an idea that a person keeps or returns to a particular dwelling place as his fixed, settled, or legal abode. The plain meaning of reside implies a continuous arrangement."

The State objected to the proffered jury instruction, arguing that the Wisconsin definition was based on a distinguishable statute that involved domestic violence rather than the property-based offense of home invasion. The State did not offer a competing jury instruction but argued that the meaning of "resides" does not require an intent to remain permanently. The district court concluded that the jury did not need to be instructed on the meaning because the word "resides" is not defined in the statute, and the jury could use common sense to determine the meaning.

"We generally review a district court's refusal to give a jury instruction for an abuse of discretion or judicial error." *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). "This court has consistently held that the defense has the right to have the jury instructed

on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Crawford*, 121 Nev. at 751, 121 P.3d at 586 (internal quotation marks omitted). But the defense is not "entitled to instructions that are misleading, inaccurate, or duplicitous." *Id*. at 754, 121 P.3d at 589. "[W]hether a proffered instruction is a correct statement of the law presents a legal question which we review de novo." *Nay*, 123 Nev. at 330, 167 P.3d at 433.

When interpreting a statute, this court begins with a statute's plain language. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). Nevada's invasion of the home offense is codified at NRS 205.067(1) and provides:

> A person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home.

NRS 205.067(5)(b) defines "[i]nhabited dwelling" as "any structure, building, house, room, apartment, tenement, tent, conveyance, vessel, boat, vehicle, house trailer, travel trailer, motor home or railroad car in which the owner or other lawful occupant *resides*." (Emphasis added.)

The crime of home invasion requires that the unlawful and forcible entry be into a dwelling, and that the dwelling be inhabited. A "dwelling" is "a structure or part thereof that is designed or intended for occupancy as a residence or sleeping place," NRS 205.081 (defining "dwelling" for unlawful entry or occupancy statutes), and can include a variety of structures, *see* NRS 205.067(5)(b). NRS 205.067(5)(b) clarifies that a dwelling is inhabited when "the owner or other lawful occupant resides" in it. We disagree with Dunham's assertion that an owner or lawful occupant only "resides" in a dwelling under NRS 205.067 if the owner or other lawful occupant permanently or continuously lives in it.

A vacation condominium, like the one in this case, is an inhabited dwelling, even when not presently occupied, so long as the owner or lawful occupant intends to return and continue to use it as a residence or a sleeping place in the future. *Cf.* NRS 205.081 (defining "dwelling" as a structure used as "a residence or sleeping place"); *see also People v. DeRouen*, 44 Cal. Rptr. 2d 842, 845 (Ct. App. 1995) (concluding that "the occupant of a vacation home reasonably expects the same protection from unauthorized intrusions as the occupant of any other residence"), *disapproved of on other grounds by People v. Allen*, 984 P.2d 486, 499-500 (Cal. 1999).

Scripko, while not present at the time of Dunham's entry, was using the condominium for dwelling purposes. *Cf.* Cal. Penal Code § 459 (West 2010) (" '[I]nhabited' means currently being used for dwelling purposes, whether occupied or not."). Even though Scrip-

ko decided to rent out the condominium in the future, she continued to use the condominium for sleeping purposes while preparing it for rent. Scripko liked to visit the condominium for a few days at a time, and her extended absences from the condominium reflected a desire to avoid conflict with Dunham, not an intent to stop using the condominium as a dwelling place. Further, she stayed at the condominium the weekend before Dunham was arrested for breaking into it, and the condominium was not ready to list as a rental property until December 2016, two months after this incident. *Cf. People v. Burkett*, 163 Cal. Rptr. 3d 259, 267 (Cal. Ct. App. 2013) (interpreting Cal. Penal Code § 459's definition of "inhabited" and concluding there was no evidence that the burglarized home "was currently being used by someone for dwelling purposes" when the tenant had removed all personal items from the house and the new lawful occupant had not yet moved in).

Although Dunham's argument suggests that the definition of "inhabited dwelling" is ambiguous because of the use of the term "resides," and the proper interpretation of "resides" is to require permanent or continuous occupancy, we disagree. Dunham's proffered jury instruction was taken from a Wisconsin case involving a domestic abuse statute that "applies to certain acts engaged in by 'an adult family member or adult household member against another adult family member or adult household member.'" *Petrowsky v. Krause*, 588 N.W.2d 318, 319 (Wis. Ct. App. 1998) (quoting Wis. Stat. Ann. § 813.12). The issue in *Petrowsky* was "who constitutes a 'household member' under the domestic abuse statute." *Id*. The relevant statute defined a "household member" as "a person currently or formerly residing in a place of abode with another person." *Id*. (quoting Wis. Stat. Ann. § 813.12(1)(c)).

Dunham's reliance on *Petrowsky*'s definition of "reside" is misplaced because the instruction is based on a domestic violence statute that defines when a person resides with another person enough such that he or she can be considered a "household member." But "resides," as used in NRS 205.067(5)(b), relates to whether the property is an "inhabited dwelling" and whether the nature of the use of a dwelling is such that it deserves more protection than if it were uninhabited. *See* Hearing on A.B. 593 Before the Senate Judiciary Comm., 65th Leg. (Nev., June 13, 1989) (indicating that the Legislature enacted Nevada's home invasion statute intending to hold individuals accountable in scenarios where someone entered a home but retreated before committing a felony, because in those situations, it was difficult to convict someone for burglary since oftentimes the prosecutor could not prove that the individual had the intent to commit a felony); 1989 Nev. Stat., ch. 631, § 3, at 1452; Hearing on A.B. 593 Before the Assembly Judiciary Comm., 65th Leg. (Nev., April 25, 1989) (indicating the home invasion bill was

intended to protect the "sanctity of the home"); *cf. DeRouen*, 44 Cal. Rptr. 2d at 844 ("[A] burglary of an inhabited dwelling involves an invasion of perhaps the most secret zone of privacy, the place where trinkets, mementos, heirlooms, and other stuff of personal history are kept." (internal quotation marks omitted)). While defining what constitutes a household member would necessarily include determining the permanency and continuity of a living arrangement between two people, inhabiting a dwelling does not require permanent or continuous use, and an individual is not limited to inhabiting one dwelling at a time.

We reject the notion that the word "resides" compels interpreting "inhabited dwelling" as requiring permanent or continuous use. Our interpretation is consistent with other jurisdictions that have considered whether a structure is an inhabited dwelling in the context of property crimes. For example, in *Hess v. State*, 207 S.E.2d 580, 581 (Ga. Ct. App. 1974), the owner of a house "sporadically" stayed there during the ten years she owned it. In assessing whether the house was a dwelling in the context of a burglary charge, the court determined that "[t]here is no requirement in the law that a house be continuously occupied in order to be a 'dwelling.' It is sufficient that it is occasionally occupied for residential purposes . . . ." *Id*. at 582 (internal quotation marks omitted). Additionally, the Oregon court of appeals determined that under Oregon's burglary statute, a home that "had been occupied regularly for years but had been vacant and unfurnished for six months before [the] defendant's entry [and] was to be sold as a residence and was ready for occupancy" was a dwelling. *State v. Kautz*, 39 P.3d 937, 939-40 (Or. Ct. App. 2002).

In *Burkett*, the court interpreted "inhabited," which under the California burglary statute means that the structure is "currently being used for dwelling purposes, whether occupied or not." 163 Cal. Rptr. 3d at 264 (quoting Cal. Penal Code § 459). The court explained that the relevant inquiry in determining whether the structure is inhabited is focused on "the nature of the current use of the building, which is to say the use at the time of the entry rather than the design of the building, its customary use, or its current occupancy." *Id*. (citation omitted). Although the court determined that the dwelling was not inhabited in *Burkett*, the court identified various factors that give rise to finding that a structure is inhabited although not occupied at the time of the entry, including whether the owner or occupant (1) intends to return to the structure, (2) has belongings in the structure, or (3) has recently moved into the structure. *Id*. at 266. Finally, in *State v. Steadman*, the South Carolina supreme court determined that the trial court was correct in instructing the jury that a dwelling need not be "constantly inhabited every day or night of the year." 186 S.E.2d 712, 716 (S.C. 1972).

Though we acknowledge that these jurisdictions may have statutes that define "inhabited dwelling" differently than NRS 205.067(5)(b), *see, e.g.*, Or. Rev. Stat. § 164.205(2) (2017) ("'Dwelling' means a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present."), we agree with these jurisdictions that a dwelling need not be continuously or permanently occupied to be inhabited, as nothing in NRS 205.067(5)(b) compels such an interpretation.

Dunham's proffered jury instruction requiring the jury to find permanent or continuous occupancy of the property as an element of the crime was therefore a misstatement of Nevada's home invasion statute. Accordingly, we conclude that the district court did not abuse its discretion in refusing Dunham's proffered instruction because it was not an accurate statement of the law. *See Crawford*, 121 Nev. at 754, 121 P.3d at 589.

Dunham's sentence is not cruel and unusual punishment

Dunham argues that his sentence constitutes cruel and unusual punishment because it is excessive when compared to the severity of the crime. Dunham further emphasizes that the district court's sentence was lengthier than both the Department of Parole and Probation's recommendation of 48 months' imprisonment with parole eligibility after 12 months, and the State's recommendation of 72 months' imprisonment with parole eligibility after 14 months. Additionally, Dunham argues that there were several mitigating factors, including that prior to this case, he had only one misdemeanor, he had substance abuse problems, he had familial support, and he was a good father.

"This court has consistently afforded the district court wide discretion in its sentencing decision." *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). "A sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted). Additionally, "[a] recommendation of the Department of Prisons or the Department of Parole and Probation has no binding effect on the courts." *Etcheverry v. State*, 107 Nev. 782, 786, 821 P.2d 350, 352 (1991). Similarly, a district court does not abuse its discretion by imposing a sentence in excess of the State's recommendation. *Goodson v. State*, 98 Nev. 493, 495, 654 P.2d 1006, 1007 (1982).

Dunham does not challenge the constitutionality of the statute. Further, NRS 205.067(2) provides that a person convicted of home invasion can be sentenced to a minimum term of 1 year in prison and to a maximum term of 10 years. Here, Dunham was sentenced with-

in that guideline. Therefore, Dunham's sentence does not constitute cruel and unusual punishment.

CONCLUSION

We conclude that the district court did not abuse its discretion in refusing Dunham's proffered jury instruction because it was an inaccurate statement of the law taken from a distinguishable Wisconsin case involving that state's domestic violence statute. We further conclude that Dunham's sentence does not constitute cruel and unusual punishment. Accordingly, we affirm the judgment of conviction.

Pickering and Gibbons, JJ., concur.

FREDERIC AND BARBARA ROSENBERG LIVING TRUST, Appellant/Cross-Respondent, *v.* MACDONALD HIGHLANDS REALTY, LLC, a Nevada Limited Liability Company; MICHAEL DOIRON, an Individual; and FHP VENTURES, a Nevada Limited Partnership, Respondents/Cross-Appellants.

No. 69399

THE FREDERIC AND BARBARA ROSENBERG LIVING TRUST, Appellant, *v.* SHAHIN SHANE MALEK, Respondent.

No. 70478

September 13, 2018 427 P.3d 104

Consolidated appeals and cross-appeal from a judgment certified as final and a final judgment in an action arising from the purchase of real property and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Affirmed in part, reversed in part, and remanded.

Kim Gilbert Ebron and *Karen L. Hanks* and *Jacqueline A. Gilbert*, Las Vegas, for Appellant/Cross-Respondent Frederic and Barbara Rosenberg Living Trust.

Kemp, Jones & Coulthard, LLP, and *J. Randall Jones, Spencer H. Gunnerson*, and *Matthew S. Carter*, Las Vegas, for Respondents/Cross-Appellants MacDonald Highlands Realty, Michael Doiron, and FHP Ventures.

Smith & Shapiro, PLLC, and *James E. Shapiro* and *Sheldon A. Herbert*, Henderson, for Respondent Shahin Shane Malek.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

Appellant/cross-respondent Frederic and Barbara Rosenberg Living Trust (the Trust) purchased a residential lot that adjoins respondent Shahin Malek's residential lot (the Lot), and which also adjoins a golf course. The Lot also includes a small parcel of land (the out-of-bounds parcel), which had previously been an out-of-bounds area between the golf course and the Lot. In this appeal, we must determine whether the Trust can maintain an implied restrictive covenant upon the out-of-bounds parcel. Because we decline to recognize implied restrictive covenants, we affirm the district court as to this issue.

Next, we consider whether the Trust waived any claims it may have had against respondents/cross-appellants MacDonald Highlands Realty, LLC, real estate agent Michael Doiron, and the developer of MacDonald Highlands, FHP Ventures (the MacDonald parties) for misrepresentations or failing to disclose information in the purchase process of the Trust property. We conclude that the Trust waived its common law claims but did not waive its statutory claims under NRS Chapter 645. Because we reverse this claim, we necessarily reverse the MacDonald parties' award of attorney fees and costs. Finally, we determine that the district court abused its discretion in awarding attorney fees and costs to Malek pursuant to NRS 18.010(2)(b) because the Trust had reasonable grounds to maintain this litigation.

FACTS AND PROCEDURAL HISTORY

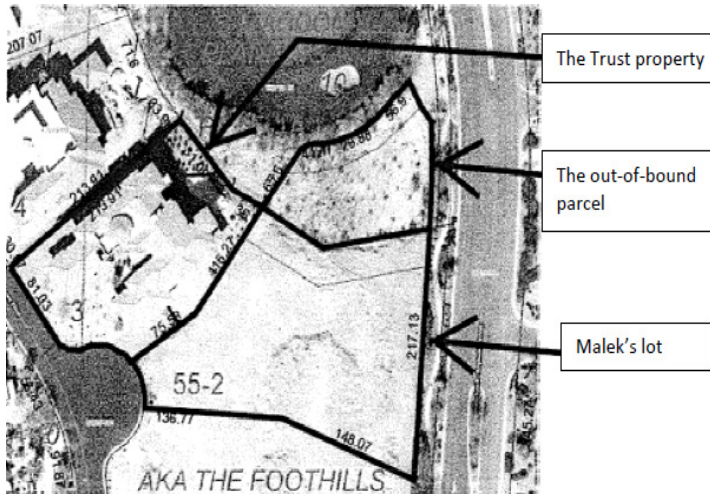
The MacDonald Highlands master planned community is situated around the Dragon Ridge Golf Course in Henderson, Nevada. In the summer of 2012, Malek expressed interest in purchasing the Lot, which was undeveloped and located at 594 Lairmont Place within the MacDonald Highlands master planned community, in order to build a new home. The Lot is located to the south of the ninth hole of the golf course.

Malek also insisted on purchasing the out-of-bounds parcel,[2] which was situated to the north of the Lot, in between the Lot and

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision of this matter.

[2]The record demonstrates that the out-of-bounds parcel is a 0.34-acre dirt area, covered in rocks and shrubs. While it appears to be within the golf course, it is not an in-play area.

the ninth hole of the golf course. Below is a map depicting Malek's lot, the out-of-bounds parcel, and the Trust's lot.[3]



In order for Malek to purchase the out-of-bounds parcel, it had to be rezoned from its public/semi-public designation to residential. Relying on MacDonald Highlands' real estate agent Doiron's commitment to rezone and sell the out-of-bounds parcel, Malek purchased the Lot in August 2012. With the help of MacDonald Highlands, he sought and obtained the City of Henderson's approval to rezone the out-of-bounds parcel. In December 2012, while the rezoning was pending, Malek hired surveyors to stake the Lot and out-of-bounds parcel to show where he intended to build.

The rezoning process involved several steps, which the MacDonald parties were familiar with because they had rezoned at least two other parcels of land prior to rezoning the out-of-bounds parcel. First, the MacDonald parties and a third-party company gave notice of and held a homeowners' association community meeting to discuss the rezoning. Next, the City of Henderson held a planning commission meeting. The Henderson City Council eventually passed a resolution approving the rezoning and held a public meeting where they again approved it. The City's resolution rezoning the out-of-bounds parcel to residential use was adopted on December 8, 2012, and recorded on January 7, 2013. On January 24, 2013, the City of Henderson adopted a new map reflecting the zoning change, and the final map was recorded on June 26, 2013. There were no objections to the rezoning request throughout this process.

At the time Malek inquired about purchasing the Lot and initiated the rezoning process, Bank of America owned the neighboring Trust

[3]This map was included in Malek's answering brief, and its accuracy was not disputed in the Trust's reply brief.

property to the northwest of the Lot. The Trust property also abuts the ninth hole of the golf course and shares one point of contact with the out-of-bounds property on the southeast corner of the Trust property. Bank of America received notice of the rezoning but did not object.

In February 2013, Barbara Rosenberg sent a letter of intent to Bank of America expressing intent to purchase the Trust property "As-Is," "Where-is," and "With All Faults." In March 2013, the Trust signed a written purchase offer and attached a proposed residential purchase agreement that included those terms. The residential purchase agreement contained several waivers and obligations to be undertaken on the part of the Trust, the sellers, and the sellers' agents, including the Trust's waiver of its right to perform a survey and determine the boundary lines surrounding the Trust property. The purchase agreement also provided the Trust with a 12-day due diligence period to inspect the Trust property, and included a waiver of claims against all brokers and their agents. The MacDonald parties are listed as the agent and broker for Bank of America in the purchase agreement. The Trust took title in May 2013.

Malek's deed for the out-of-bounds parcel was recorded on June 26, 2013. When the Trust learned about Malek's purchase of the out-of-bounds parcel, it filed a complaint seeking, among other things, to establish an easement against the MacDonald parties and Malek. The Trust filed an amended complaint, reasserting the easement claim against the MacDonald parties and Malek, and also including a separate claim for an implied restrictive covenant against Malek alone to enjoin him from constructing anything on the out-of-bounds parcel. The Trust further sought monetary damages against the MacDonald parties for negligent and intentional misrepresentations, for real estate broker violations under NRS Chapter 645, and for failure to make various disclosures, including failing to disclose the zoning change of the out-of-bounds parcel.

Both Malek and the MacDonald parties brought motions for summary judgment on all of the Trust's claims. The MacDonald parties argued that the purchase agreement placed the burden on the Trust to investigate boundary and zoning issues, the proper disclosures were made, and the Trust waived any claims by signing the purchase agreement. Malek and the MacDonald parties argued that there is no easement or implied restrictive covenant for light, air, view, or privacy in Nevada.[4]

The district court granted both Malek and the MacDonald parties' motions for summary judgment, determining that (1) the Trust had sought, and then agreed, to purchase the Trust property as-is from

[4]Malek also moved for summary judgment on his counterclaim for slander of title, which the district court denied. However, Malek and the Trust stipulated to dismissing that counterclaim.

the seller; (2) the Trust's claims failed as a matter of law because Nevada law does not recognize the types of easements and covenants the Trust sought; and (3) the Trust voluntarily and knowingly waived any claims it may have had against the MacDonald parties. The district court subsequently awarded the MacDonald parties and Malek attorney fees and costs.

DISCUSSION

On appeal, the Trust argues that the district court erred in granting summary judgment for both the MacDonald parties and Malek, and, further, abused its discretion in granting them attorney fees and costs. We first discuss the Trust's claim for an implied restrictive covenant against Malek to determine whether Nevada law has previously recognized such a doctrine and, if so, whether the Trust has established an implied restrictive covenant in this case.[5] We then consider whether the Trust waived all of its other claims against the MacDonald parties, and, in doing so, we consider whether reversal of the MacDonald parties' award of attorney fees and costs is warranted. Finally, we address whether the district court abused its discretion in awarding attorney fees and costs to Malek.

The district court did not err in concluding that Nevada law has not recognized an implied restrictive covenant for use

The Trust sought an implied restrictive covenant over the out-of-bounds parcel, under the terms of which the out-of-bounds parcel must perpetually be used as part of the golf course. The district court rejected this claim, concluding that under Nevada law, "there is not an implied easement or implied restrictive covenant requiring property formerly owned by a golf course to remain part of the golf course indefinitely, especially where that property was not a part of the playable grass area of the golf course." The district court also concluded that the Trust did not provide evidence demonstrating that an implied restrictive covenant would preserve anything other than its view, light, or privacy. The Trust argues that this was error because Nevada law has recognized implied restrictive covenants and implied easements.

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[5]In its first amended complaint, the Trust asserted a claim for easement against both the MacDonald parties and Malek. The district court concluded that the Trust was truly seeking an implied negative easement for light, air, and view, which Nevada law prohibits. We affirm the district court's grant of summary judgment on this issue as the Trust concedes that Nevada law does not recognize such an easement, the Trust offers no argument on appeal as to the easement claim, and Nevada law clearly precludes an easement for view. *See Probasco v. City of Reno*, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969) ("Nevada has expressly repudiated the doctrine of implied negative easement of light, air and view for the purpose of a private suit by one landowner against a neighbor.").

We review orders granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is only appropriate "when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Id*. (alteration in original) (internal quotation marks omitted). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031. "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id*. at 729, 121 P.3d at 1029.

The Trust points us to our decision in *Shearer v. City of Reno*, 36 Nev. 443, 136 P. 705 (1913), to demonstrate that we have previously recognized implied restrictive covenants. In *Shearer*, a landowner sold several lots, expressly agreeing that he would not improve or sell the surrounding lots. *Id*. at 447, 136 P. at 707. The landowner dedicated the surrounding lots "to the public for all time," and filed a plat identifying so. *Id*. We acknowledged that "[t]he filing of the original plat and the selling of lots was with the representation and assurance that purchasers would have the benefit of streets and avenues as represented on the map." *Id*. at 448, 136 P. at 707. We further explained that "[t]he purchaser took not merely the interest of the grantor in the land described in the deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an implied covenant that subsequent purchasers should be entitled to the same rights." *Id*. at 450, 136 P. at 708.

While we recognized an implied covenant in *Shearer*, it was in the context of an express agreement and a public land dedication. Here, the out-of-bounds parcel was part of a common development, where, as counsel for the Trust conceded during oral argument, there was no express agreement that the out-of-bounds parcel would remain part of the golf course, or even that the golf course itself would remain a golf course in perpetuity. Further, there was no public dedication for the golf course. As the parties acknowledge, the golf course was not public land; rather, those wanting to use the golf course had to have memberships or pay to play. Thus, the Trust is not seeking the type of implied covenant that we discussed in *Shearer*. Further, it is clear that we did not adopt in *Shearer* the type of covenant sought by the Trust—an implied restrictive covenant based on the existence of a common development scheme.

The Trust also points to our decision in *Boyd v. McDonald*, in which we recognized implied easements for ingress and egress across another's property. 81 Nev. 642, 647, 408 P.2d 717, 720 (1965). The Trust uses the term "implied easement" interchangeably with "implied restrictive covenant"; however, the two property interests are distinct. As we explained in *Boyd*, an implied easement is

> an easement created by law. It is grounded in the court's decision that as to a particular transaction in land, the owner of two parcels had so used one to the benefit of his other that, on selling the benefited parcel, a purchaser could reasonably have expected, without further inquiry, that these benefits were included in the sale.

Id. at 649, 408 P.2d at 721. An implied easement gives a person the right "to use in some way the land of another." *Id.* at 647, 408 P.2d at 720 (internal quotation marks omitted). In this case, however, it is undisputed that the Trust did not seek a *right to use* the property of another, as the plaintiffs did in *Boyd*. Rather, the Trust sought to *restrict the use* by another of his or her own property. The Trust claimed that a restrictive covenant should be implied from the existence of the common development plan, requiring the out-of-bounds parcel to remain part of the golf course in perpetuity.[6]

While we outlined the requirements for the creation of an implied easement for use of another's land in *Boyd*, we did not address the doctrine of implied restrictive covenants that involves restrictions imposed upon an owner relating to the use of his or her own land. *See Boyd*, 81 Nev. at 647, 408 P.2d at 720 (explaining that "the three essential characteristics of an easement by implication are (1) unity of title and subsequent separation by a grant of the dominant tenement; (2) apparent and continuous user; and (3) the easement must be necessary to the proper or reasonable enjoyment of the dominant tenement"). Thus, although the Trust correctly points out that we recognized implied easements, it conflates the relief sought in *Boyd* with the relief it seeks here.

As the district court stated, we have not previously acknowledged implied restrictive covenants in the context of a common development scheme, nor have we stated that one exists under Nevada law. While other courts have recognized them, implied restrictive covenants are generally disfavored. 20 Am. Jur. 2d *Covenants, Etc.* § 155 (2015); *see also* 9 Richard R. Powell, *Powell on Real Property* § 60.03[1] (2000) (explaining that because implied covenants "involve[ ] a relaxation of the writing requirement," many courts are cautious to infer a restrictive covenant only when it is "obvious and clearly intended"). Other jurisdictions have acknowledged that implied restrictive covenants "should be applied with extreme caution because in effect it lodges discretionary power in a court to deprive a [person] of his [or her] property by imposing a servitude through implication." *Walters v. Colford*, 900 N.W.2d 183, 191 (Neb. 2017)

[6]Situations, as here, where a property owner seeks to enforce a restrictive covenant based on a common development are also generally referred to a "implied reciprocal covenants," as well as "reciprocal negative easement[s]" or "implied servitude[s]." 20 Am. Jur. 2d *Covenants, Etc.* § 156 (2017).

(alterations in original) (quoting *Galbreath v. Miller*, 426 S.W.2d 126, 128 (Ky. 1968)). We are not persuaded to recognize an implied restrictive covenant in this case based on the facts before us.[7] Moreover, even assuming implied restrictive covenants exist under Nevada law, the Trust has not proved that an implied restrictive covenant existed in this case. *See* 20 Am. Jur. 2d *Covenants, Etc.* § 155 (2015) (explaining that the party attempting to establish the implied restrictive covenant bears the burden of proving it exists).

In arguing in favor of an implied restrictive covenant, the Trust relies upon and applies the elements of an implied easement from *Boyd*. But those elements do not apply where a party seeks to establish an implied restrictive covenant. Though the Trust has failed to argue the specific elements of an implied restrictive covenant, we nevertheless discern from the evidence presented that the requirements have not been met here. A restrictive covenant by implication may arise when the following elements are established: (1) there is a common grantor, (2) there is "a designation of the property subject to the restrictions," (3) there exists "a general plan or scheme of restriction for such property," and (4) the restrictions run with the land. 20 Am. Jur. 2d *Covenants, Etc.* § 156 (2015). Thus, there must be a restriction "evidencing a scheme or intent that the entire tract should be similarly treated, so that once the plan is effectively put into operation, the burden placed upon the land conveyed is by operation of law reciprocally placed upon the land retained." *Id*. Implied restrictive covenants are "enforceable against the grantor or a subsequent purchaser of the lot from the grantor with notice, either actual or constructive." *Id*.

The Trust established the first element for an implied restrictive covenant as MacDonald Highlands was the common grantor of the residential lots as the developer of the master planned community. *See id*. However, the Trust failed to establish the remaining elements. Primarily, the Trust did not demonstrate that MacDonald Highlands intended to restrict the use of the out-of-bounds parcel. *See id*. (explaining that it must be shown that the common grantor, "in the various grants of the lots [in the common development scheme], . . . included some restriction, either affirmative or negative, for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated"). In the district court, the Trust characterized the scope of the implied restrictive covenant as one for view. On appeal, the Trust states that characterization was not its contention, but that it instead seeks to ensure

[7]The Trust argues that under *Jackson v. Nash*, 109 Nev. 1202, 866 P.2d 262 (1993), whether an implied restrictive covenant exists is a question of fact. We note that *Jackson* involved an implied easement, not an implied restrictive covenant. 109 Nev. at 1208, 866 P.2d at 267. Moreover, we can conclude from the undisputed facts that no implied restrictive covenant existed here.

the out-of-bounds parcel remains part of the golf course. However, the Trust does not point to any evidence in the record demonstrating that the out-of-bounds parcel was used as part of the golf course or that the sale of the out-of-bounds parcel diminishes the ability to use the golf course. Notably, it is undisputed that the actual golf course remains a golf course. Additionally, there is no evidence in the record before us that the MacDonald parties ever expressed, implied, or intended that the out-of-bounds parcel would perpetually be part of the golf course or that Malek or his predecessors in interest were on either actual or constructive notice of such a restriction. *See id*. (noting that "[a] court's primary interest in [determining whether an implied restrictive covenant exists] is to give effect to the actual intent of the grantor" and clarifying that a subsequent purchaser will only be bound by an implied restrictive covenant when on actual or constructive notice).

Therefore, the Trust has failed to demonstrate that the elements of an implied restrictive covenant were met in this case. *See* 20 Am. Jur. 2d *Covenants, Etc.* § 155 (2015) (explaining that "in order for a restriction to be thus created, the implication must be plain and unmistakable, or necessary" (footnote omitted)). Accordingly, we conclude that no genuine issue of material fact remains, and the district court correctly granted summary judgment on this claim. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

The Trust waived its common law, but not statutory, claims against the MacDonald parties

The district court determined that the Trust's claims against the MacDonald parties for unjust enrichment, fraudulent or intentional misrepresentation, negligent misrepresentation, real estate broker violations of NRS Chapter 645, and declaratory relief failed because the Trust insisted and agreed upon taking the Trust property as-is and thus knowingly, intentionally, and voluntarily waived these claims. The Trust argues that the district court erred in determining that it waived its claims against the MacDonald parties because the MacDonald parties had a common law and statutory duty to disclose that the out-of-bounds parcel had been rezoned and that the lot lines had been changed in a way that reduced the Trust property's value.

Generally, "[n]ondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.'" *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). Moreover, "[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). The general rule foreclosing liability for nondisclosure when property is purchased as-is does not apply when

> the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to [the seller] and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer.

Mackintosh, 109 Nev. at 633, 855 P.2d at 552 (alteration in original) (internal quotation marks omitted).

We agree with the district court that the Trust waived its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and unjust enrichment. The record demonstrates that the Trust expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information regarding the lot lines was reasonably accessible to the Trust. Accordingly, we conclude that the Trust's agreement to purchase the property as-is foreclosed its common law claims against the MacDonald parties, and thus, the district court did not err in granting summary judgment on the Trust's common law claims. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

However, we agree with the Trust that it did not waive its statutory claims of real estate broker violations. In its complaint, the Trust alleged that the MacDonald parties violated the duties and obligations required under NRS 645.252. NRS 645.252 provides, in pertinent part, as follows:

> A licensee who acts as an agent in a real estate transaction:
>
> 1. Shall disclose to each party to the real estate transaction as soon as is practicable:
>
> (a) Any material and relevant facts, data or information which the licensee knows, or which by the exercise of reasonable care and diligence should have known, relating to the property which is the subject of the transaction.

Under NRS 645.255, except for the duty to present all offers to the client, "no duty of a licensee set forth in NRS 645.252 or 645.254 may be waived." Thus, the Trust could not waive its statutory claims against the MacDonald parties. Accordingly, we conclude that the district court erred in granting summary judgment on the basis that the Trust waived the duty of disclosure pursuant to NRS 645.252. Because we reverse the district court's order granting summary judgment in favor of the MacDonald parties on the Trust's statutory claims, we necessarily reverse the attorney fees and costs awarded to the MacDonald parties.[8] *See Bower v. Harrah's Laughlin, Inc.*,

[8]We reverse the attorney fees and costs awarded to FHP Ventures on the separate ground that it was not included in the offer of judgment. Further, because we reverse the award of attorney fees and costs to the MacDonald parties, we do not reach their argument on cross-appeal that the district court erred in not granting post-judgment interest on their award.

125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) ("[I]f we reverse the underlying decision of the district court that made the recipient of the costs the prevailing party, we will also reverse the costs award.").

The district court abused its discretion in awarding attorney fees and costs to Malek

The district court granted Malek's motion for attorney fees and costs pursuant to NRS 18.010(2)(b), which states that attorney fees may be awarded to a prevailing party if "the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." During the hearing on Malek's motion for attorney fees and costs, the district court concluded that the Trust's claims were not frivolous when initially filed. However, the district court concluded that after the Trust received Malek's motion for summary judgment, the Trust lacked reasonable grounds to maintain the litigation, even if it initially had reasonable grounds to file suit, because of the facts and law in Malek's motion. Therefore, the district court awarded Malek the attorney fees he incurred from the time he filed his motion for summary judgment until the date he filed his motion for attorney fees, which totaled $18,417.50. The district court also awarded Malek $7,568.50 in costs.

The Trust argues that the district court abused its discretion in determining that its claims were frivolously maintained.[9] We agree. We review a district court's attorney fees decision for an abuse of discretion. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 967, 194 P.3d 96, 106 (2008). A district court may award attorney fees to a prevailing party when it finds that the opposing party brought or maintained a claim without reasonable grounds. NRS 18.010(2)(b). For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995). "Although a district court has discretion to award attorney fees under NRS 18.010(2)(b), there must be evidence supporting the district court's finding that the claim or defense

[9]The Trust makes additional arguments as to how the attorney fees award was an abuse of discretion, including that the district court did not conduct the required analysis under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). While we agree that the district court was required to conduct a *Brunzell* analysis, *see Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864-65, 124 P.3d 530, 548-49 (2005), we do not further address these arguments as they are not necessary to the resolution of this issue. *See First Nat'l Bank of Nev. v. Ron Rudin Realty Co.*, 97 Nev. 20, 24, 623 P.2d 558, 560 (1981) ("In that our determination of the first issue is dispositive of this case, we do not reach the second issue . . . .").

was unreasonable or brought to harass." *Bower*, 125 Nev. at 493, 215 P.3d at 726.

The district court's order pointed to the facts and law included in Malek's motion for summary judgment to support its finding that the Trust lacked reasonable grounds to maintain this suit. Though we agree that the evidence produced and Nevada's current jurisprudence does not fully support the Trust's suit, we disagree that the Trust lacked reasonable grounds to maintain the suit, as it presented a novel issue in state law, which, if successful, could have resulted in the expansion of Nevada's caselaw regarding restrictive covenants. *See Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 801 (2009) (affirming the district court's denial of attorney fees under NRS 18.010(2)(b) where the claim "presented a novel issue in Nevada law concerning the potential expansion of common law liability"). Though we understand the Legislature's desire to deter frivolous lawsuits, this must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law. *See, e.g.*, *Stubbs v. Strickland*, 129 Nev. 146, 153-54, 297 P.3d 326, 330-31 (2013) (determining that a party did not file suit for an improper purpose because he argued for a change or clarification in existing law). Accordingly, we reverse the district court's award of attorney fees and costs to Malek.

CONCLUSION

We determine that Nevada law has not recognized implied restrictive covenants based on a common development scheme, and we are not persuaded to adopt the doctrine based on the record before us. We further hold that the Trust could not waive its statutory claims under NRS Chapter 645 against the MacDonald parties, and, therefore, we reverse the district court's grant of summary judgment on this issue and reverse the district court's award of attorney fees and costs to the MacDonald parties. Finally, we conclude that the district court abused its discretion in awarding attorney fees and costs to Malek pursuant to NRS 18.010(2)(b) as the Trust presented a novel legal issue, and attorneys should not be prohibited from pursuing novel legal issues or arguing for modification or expansion of existing law. As such, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Douglas, C.J., and Cherry, Gibbons, Pickering, and Stiglich, JJ., concur.

GABRIEL IBARRA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 69617

September 13, 2018 426 P.3d 16

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count of larceny from the person. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Affirmed.

Stiglich, J., with whom Cherry, J., agreed, dissented.

Philip J. Kohn, Public Defender, and *Jeremy B. Wood* and *Howard Brooks*, Deputy Public Defenders, Clark County, for Appellant.

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

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

A jury convicted Gabriel Ibarra of larceny from the person. To convict a defendant of this crime the State must prove that, "under circumstances not amounting to robbery, with the intent to steal or appropriate to his or her own use, [the defendant took] property from the person of another, without the other person's consent." NRS 205.270. Ibarra stole a cell phone from a woman sitting next to him at a bus stop. He asked to use her phone to make a call, then, as she handed it to him, he grabbed the phone and ran. Because the woman voluntarily handed him her phone, Ibarra maintains he did not take the phone "from the person of another, without [her] consent," so the State failed to prove its case. We hold that the evidence supports Ibarra's conviction and affirm.

I.

Ibarra approached his victim, E.M., at a Las Vegas bus stop around 3 a.m. E.M. was seated on a bench, texting on her iPhone, when Ibarra sat down next to her. E.M. did not know Ibarra but she responded when he spoke to her, asking her where she was from and what kind of phone she had. After a few minutes, Ibarra asked E.M. if he could use her phone to make a call. Ibarra's request made E.M. "a little nervous," so she asked Ibarra for the number he wanted to

call and typed it into her phone before extending her arm to hand him the phone. E.M. testified that Ibarra "grabbed" the phone from her hand, then stood to walk away. When E.M. stood to stay close to her phone, Ibarra ran. E.M. gave chase but soon lost Ibarra. She returned to the bus stop, where she borrowed another person's phone and called the police. Using an iPhone tracking application, the police found E.M.'s phone—and Ibarra, whom they arrested—outside a nearby apartment complex.

E.M. valued her iPhone at $500. Stealing property worth less than $650 constitutes petit larceny, a misdemeanor. *See* NRS 205.240. Stealing property worth less than $3,500 under circumstances amounting to larceny from the person, by contrast, is a category C felony. *See* NRS 205.270(1)(a).

The State charged Ibarra with larceny from the person. At trial, Ibarra defended the charge on the ground that, while he might have committed petit larceny, he did not commit the more serious crime of larceny from the person. His reasoning was this: Because E.M. voluntarily handed Ibarra her phone, he did not take it from E.M.'s person, without her consent, or invade her privacy, as the jury was told larceny from the person requires. At Ibarra's request, the judge instructed the jury that petit larceny is a lesser included offense of larceny from the person. The verdict form gave the jury its choice of finding Ibarra not guilty, guilty of petit larceny, or guilty of larceny from the person. After deliberation, the jury found Ibarra guilty of larceny from the person.

Ibarra timely appealed. In a split decision, the court of appeals vacated Ibarra's conviction for the reason the evidence did not establish the elements required for the crime of larceny from the person. The State petitioned for review under NRAP 40B, which we granted.

II.

A.

Larceny from the person has been a crime in Nevada since 1911. *See* 1911 Nev. Crimes & Punishments § 557, codified in 2 Nev. Rev. Laws § 6822 (1912). Except for its penalty provisions, the statute has changed little over the past 100 years. NRS 205.270 defines the crime of larceny from the person as follows:

> 1. A person who, under circumstances not amounting to robbery, with the intent to steal or appropriate to his or her own use, takes property from the person of another, without the other person's consent, is guilty of:
>
> (a) If the value of the property taken is less than $3,500, a category C felony and shall be punished as provided in NRS 193.130[.]

Ibarra's sole issue on appeal is the sufficiency of the evidence to sustain his conviction. He accepts that sufficient evidence established he intended to steal the phone. But he argues that, since E.M. gave him permission to use her phone and handed it to him, Ibarra did not take the phone "without [her] consent," as NRS 205.270(1) requires. He also maintains that he did not "take[ ]" the cell phone "from [E.M.'s] person," as this court interpreted those elements of the crime in *Terral v. State*, 84 Nev. 412, 442 P.2d 465 (1968).

A sufficiency-of-the-evidence challenge asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Middleton v. State*, 114 Nev. 1089, 1103, 968 P.2d 296, 306 (1998) (internal quotation marks omitted; emphasis in original). An appellate court will not second-guess a jury's determination of the facts. Deciding what constitutes "the essential elements of the crime" presents a question of law and statutory interpretation that we decide de novo. *See Coleman v. State*, 134 Nev. 218, 219, 416 P.3d 238, 240 (2018).

B.

NRS 205.270 does not define what it means to take property "without the other person's consent." Larceny was a crime at common law and included lack of consent as an element of the crime. *See* 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.1(a), at 69 (3d ed. 2017) (at common law, larceny occurred "when one person misappropriated another's property by means of taking it from his possession without his consent"). To define "without the other person's consent" in NRS 205.270, we therefore look to how the common law approached lack of consent in the context of larceny. *See* NRS 193.050 ("No conduct constitutes a crime unless prohibited by some statute of this state," but the "provisions of the common law relating to the definition of public offenses apply to any public offense which is so prohibited but is not defined, or which is so prohibited but is incompletely defined."); 3 Charles E. Torcia, *Wharton's Criminal Law* § 342, at 350 (15th ed. 1995) ("to understand the language and concepts of modern larceny statutes, an understanding of the pertinent common law is essential [since] if a term known to the common law has not otherwise been defined by statute, it is assumed that the common-law meaning was intended").

Judged by the common law, Ibarra took E.M.'s phone without her consent. At common law, "larceny is committed only when the aim of the thief is to divest the owner of his ownership, in distinction from the mere use or temporary possession; so that a consent which comes short of this necessary intent does not cover the whole ground of the taking, and avails nothing." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 813, at 451 (6th ed. 1877)

(footnote omitted); *id*. § 809, at 448 ("if one consents to part with merely the possession, and another, who takes the goods, intends a theft, the latter, without reference to the question of fraud, goes beyond the consent, and commits the offence"); *see Jarvis v. State*, 74 So. 796, 796 (Fla. 1917) ("The consent of the owner in surrendering possession of property must be as broad as the taking."). "A watch might be handed by the owner to a friend to be used only for a moment in timing a race, and to be kept right in the presence of the owner." Rollin M. Perkins, *Criminal Law* § 1, at 197 (1957). The friend would "have custody only" and if, at the time he accepted the watch, he intended to and did steal it, permanently dispossessing the owner of his watch, the friend committed the crime of larceny. *Id.*; *see* Charles Hughes, *Hughes' Criminal Law: The Law of Crimes, Prosecutions, Defenses and Procedure as Determined by Decisions of the Courts of Last Resort in the United States and England* § 398, at 105 (1901) (larceny from the person was properly found where the "defendant entered a store and asked that he be permitted to look at some watches [then, while] the owner was showing the watches to him, the defendant stole two of them"). E.M. agreed to let Ibarra use her phone to make a call; she did not agree to him taking her phone permanently. The mismatch between the limited permission E.M. gave and the permanent dispossession Ibarra intended rendered the taking without E.M.'s consent.

Ibarra's fraud in telling E.M. he only wanted to use the phone briefly to make a call when in fact he intended to steal the phone permanently is another reason the common law would deem the taking to be without E.M.'s consent. Common law larceny required "a trespass in the taking." *See* 3 LaFave, *supra* § 19.1(a), at 69. In 1779, an English court recognized "larceny by trick" as a form of trespassory taking. *Rex v. Pear*, 168 Eng. Rep. 208, 209 (1779). Larceny by trick, a form of larceny, occurs "when a defendant, with the intent permanently to deprive, obtained the personal property of another by fraudulently inducing such other person to part with its possession." 3 *Wharton's Criminal Law*, *supra* § 343, at 350.

Fraudulently representing that you want to hire another's horse temporarily when, in fact, you intend to steal the horse represents a classic case of larceny by trick. *State v. Humphrey*, 32 Vt. 569, 571-72 (1860); *see Rex*, 168 Eng. Rep. at 209. The taking is "*without the consent and against the will of the owner*" because of "the absence of all *free* and *voluntary* consent upon the part of the owner to the party taking his goods and appropriating them to his own use." *Humphrey*, 32 Vt. at 571 (emphasis in original).

> Where the consent of the owner to the taking has been obtained by fraud and deception by inducing him to believe that the taker wishes to obtain the property for an honest and temporary purpose, when in fact the design is to wholly deprive him of

> it, and where no consent would have been given if the real purpose had been disclosed, this is not regarded as any assent by the owner, and the taking for the purpose and design of the taker is against the will of the owner. A consent thus obtained is wholly nugatory . . . .

Id. at 571-72. By 1860, the principle that fraudulently obtained permission-to-use does not equal consent-to-take for purposes of larceny was "fully established . . . in England, and . . . in every State in the Union except Tennessee [and was] so laid down by every elementary book on criminal law." *Id.* at 572; *see* Bishop, *supra* § 814, at 452 (also noting Tennessee as the lone exception to the rule that fraud defeats consent for larceny).

Such reasoning continues today. *See People v. Williams*, 305 P.3d 1241, 1245 (Cal. 2013) ("a property owner who is fraudulently induced to transfer possession of the property to another does not do so with free and genuine consent, so 'the one who thus fraudulently obtains possession commits a trespass'") (quoting 2 Burdick, *Law of Crime* § 535, at 301 (1946)); *Reid v. Commonwealth*, 781 S.E.2d 373, 375 n.1 (Va. Ct. App. 2016) ("Larceny by trick is not a separate and distinct statutory offense . . . but rather is a common law species of larceny where the element of trick substitutes for the wrongful taking element required by larceny."); *see also State v. Barbour*, 570 S.E.2d 126, 128 (N.C. Ct. App. 2002) ("an actual trespass is not a necessary element of larceny when possession of the property is fraudulently obtained by some trick or artifice"). Because Nevada law similarly does not distinguish between larceny by trespassory taking or larceny by trick, the larceny offenses it recognizes encompass both forms of larceny. *See* NRS 205.0833 (titled "Theft constitutes single offense embracing certain separate offenses . . ."); NRS 205.220 (grand larceny); NRS 205.240 (petit larceny); *see also People v. Gonzales*, 392 P.3d 437, 441 n.6 (Cal. 2017) ("Larceny includes larceny by trick, which involves fraudulently acquiring possession, but not title, of property.").[1]

While larceny from the person is a distinct offense, it stems from the crime of ordinary larceny. *See Terral*, 84 Nev. at 413, 442 P.2d at 465 ("Larceny from the person was first recognized as a crime distinct from simple larceny by the Statute of 8 Elizabeth in the 16th century."); 3 LaFave, *supra* § 20.3(d)(1), at 235 n.48 ("such a snatching [of property from the owner's grasp] constitutes larceny from the person, a crime less serious than robbery but more serious than ordinary larceny"). At the heart of both larceny from the per-

[1]Although Nevada enacted general theft statutes in 1989, codified at NRS 205.0821 through NRS 205.0835, it did not repeal its older larceny statutes and, in fact, recognized that the penalties specified in a "specific statute" may apply if those penalties are greater than those specified in the theft statutes. *See* NRS 205.0835(1).

son and the other larceny crimes is the same offense: taking property of another without consent. 4 *Wharton's Criminal Law*, *supra* § 464, at 40 (" 'larceny from the person' . . . is usually a higher grade or degree of larceny permitting severer punishment irrespective of the value of the property"). Because larceny from the person is the crime of larceny with the additional element of taking from the victim's person, it follows that what negates consent for ordinary larceny also negates consent for larceny from the person. We therefore hold, consistent with the common law, that a defendant who through fraud persuades a person to let him use her property, asking to borrow the property temporarily while intending to steal it permanently, takes the property "without the other person's consent" for purposes of NRS 205.270(1).

The dissent dismisses our reading of NRS 205.270(1) as "deeply flawed" because only this particular larceny statute uses the phrase "without the other person's consent." That NRS 205.270(1) explicitly includes the common law requirement that the taking be "without the other person's consent" while Nevada's other larceny statutes do not speak to consent does not turn fraudulently obtained permission-to-use into consent-to-take for purposes of larceny from the person. To so hold would produce the anomalous result that in the one statute in which "without the other person's consent" is stated as an element of the crime, mere permission will defeat the offense, whereas in every other instance lack of actual consent must be shown. This not only does not make sense, it would also defy the mandate in NRS 193.050(3) that the common law apply to any statutory offense that was also a crime at common law and is not defined or incompletely defined.

Also unpersuasive is the dissent's reliance on the distinction some out-of-state cases have drawn between fraud in fact and fraud in the inducement in assessing consent in the sex-crime context. Wholly apart from fraud, the limited permission E.M. gave Ibarra to use the phone did not establish consent to him taking it permanently because, as discussed above, the permission given did not match the taking intended. (This also suggests Ibarra's fraud was fraud in fact, not fraud in the inducement, because Ibarra said he wanted to use the phone, not take it.) More fundamentally, this case does not involve sexual assault but larceny. That every jurisdiction except 19th century Tennessee recognized that fraud defeats consent for purposes of common law larceny properly controls our reading of the phrase "without the other person's consent" in NRS 205.270.

C.

Ibarra also denies that the State's proof satisfied the "takes property from the person of another" requirement in NRS 205.270. He argues that, because E.M. handed him her phone, the "taking" did

not occur until he ran off with the phone, so he did not "take[ ]" the phone "from the person of another." Ibarra's argument misses the mark. A "taking" (or "caption") at common law "occurs when the offender secures dominion over the property." 3 LaFave, *supra* § 19.3, at 90. Ibarra secured dominion over the phone when he grabbed it from E.M.'s hand, intending to steal it, not later, when he ran off with it.

The seminal Nevada case interpreting the "takes property from the person of another" requirement is *Terral v. State*, 84 Nev. 412, 442 P.2d 465 (1968). In *Terral*, the victim was playing craps at the Dunes, with his gaming tokens in front of him on a rack. *Id.* at 413, 442 P.2d at 465. The defendant snatched the tokens from the rack, for which a jury convicted him of larceny from the person under NRS 205.270 (1967). *Id.* We reversed. *Id*. at 413-14, 442 P.2d at 465-66. The tokens were in the victim's presence but not on his person. Unlike the robbery statute, which defines that crime in terms of taking property by violence, force, or fear "from the person of another, *or in the person's presence*," NRS 200.380 (emphasis added); *see* 1911 Nev. Crimes & Punishments § 162, codified in 2 Nev. Rev. Laws § 6427 (1912) (similar), larceny from the person does not require violence, force, or fear but does require that the taking be "from the person of another." Citing *People v. McElroy*, 116 Cal. 583, 48 Pac. 718 (1897), which interpreted comparable California statutes, we held that larceny from the person "is not committed if the property is taken from the immediate presence, or constructive control or possession of the owner." *Terral*, 84 Nev. at 414, 442 P.2d at 466. Rather, the property must be taken "from the person" of the victim. "The statutory words 'from the person' mean precisely that." *Id.*

After construing NRS 205.270 as limited to takings "from the person" and not from the person's mere presence, *Terral* explained its reasons for reading the statute so literally: "It is important to restrict the coverage of NRS 205.270 to pickpockets, purse snatchers, jewel abstracters and the like, since larceny from the person is a felony, and the value of the property taken is immaterial so long as it has some value." *Id.* The court of appeals majority mistook *Terral*'s stated rationale as the judicial creation of new limitations on the crime of larceny from the person—limitations they assume without citing authority (what is a jewel abstracter, anyway?) require larceny from the person to occur through stealth, not fraud. But "pickpockets, purse snatchers, jewel abstracters, and the like" resemble one another in a more obvious way: They all (except possibly jewel abstracters) take property "from the person" of their victim. *McElroy* confirms that this is all *Terral* meant by the above-quoted language, for it explains its rationale in terms *Terral* paraphrased, making explicitly clear that the taking required for larceny from the person can occur openly or through either stealth *or fraud*:

> In view of these authorities and the origin of the statute, we think its obvious purpose was to protect persons and property against the approach of the pick-pocket, the purse-snatcher, the jewel abstracter, *and other thieves of like character who obtain property by similar means of stealth* ***or fraud***, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession—such as clothing, apparel, or ornaments, or things contained therein, or attached thereto, *or property held or carried in the hands, or by other means, upon the person*; that it was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control of the owner while so laid away from his person and out of his hands. . . . Had the legislature intended that the offense should include instances of property merely in the immediate presence, but not in the manual possession about the person, it would doubtless have so provided, as it has in defining robbery.

McElroy, 116 Cal. at 586 (emphasis added).

Larceny from the person carries a heightened penalty over other forms of larceny because, with larceny from the person, "the person of another has been violated and his privacy directly invaded." *Terral*, 84 Nev. at 414, 442 P.2d at 466. But this is not the sole reason for the heightened penalty. A taking from the person, as opposed to other, more remote forms of theft, places the victim at risk of confrontation, physical injury, and alarm. *See United States v. McVicar*, 907 F.2d 1, 2 (1st Cir. 1990), *abrogated on other grounds by Descamps v. United States*, 570 U.S. 254 (2013). While larceny from the person does not require the taking to be accomplished by force, violence, or fear of injury as robbery does, *see* NRS 200.380—remember, larceny from the person can only occur "under circumstances not amounting to robbery," NRS 205.270—a taking "from the person of another" carries risks of physical and emotional harm that thefts that do not occur in close proximity to the victim do not. Interpreting NRS 205.270 to include all types of taking from a victim's physical person supports the statute's objective: penalizing as a felony and therefore discouraging theft that carries an unacceptable risk of violating the victim's person or privacy or causing confrontation, physical injury, or alarm.

Terral and *McElroy* represent a minority view in that they require the taking to be from the victim's physical person; a taking from the victim's immediate presence will not do. *See* 3 LaFave, *supra* § 19.3(b), at 94 ("While the traditional view of larceny 'from the person' is that the taking must be directly from the body of the person, the current majority view is that 'from the person' includes the area within a victim's immediate presence.") (footnotes omitted)

(citing *Terral* and *McElroy* as the minority view). The rationale for extending larceny from the person to include takings from the victim's immediate presence is that, in a taking from the victim's immediate presence, "the rights of the person to inviolability [are] encroached upon and his personal security endangered quite as much as if his watch or purse had been taken from his pocket." *Id.* (internal quotation and footnote omitted). Whatever the merits of the current majority view extending larceny from the person to including taking from the victim's immediate presence as well as from his or her physical person, this case does not require us to revisit *Terral*.

Ibarra took the phone from E.M.'s hand, not merely from her presence, so the taking was from her physical person. Unlike *Terral*, where the victim elected to set his tokens on the craps table instead of keeping them on his person, Ibarra separated E.M.'s phone from her person wrongfully, approaching her at the bus stop at 3 a.m., asking to use her phone, then in E.M.'s words "grabb[ing]" the phone and running off with it. These facts pose a threat of violent confrontation and injury to the victim just as surely as—and perhaps more than—other cases sustaining a larceny from the person charge. *See Odom v. Sheriff, Clark County*, 88 Nev. 315, 316, 497 P.2d 906, 906-07 (1972) (affirming the sufficiency of the evidence to charge a defendant with larceny from the person for taking money in a sting operation involving a police officer pretending to be drunk); In re George B., 279 Cal. Rptr. 388, 390-91 (Ct. App. 1991) (upholding charge of grand theft "from the person" where the juvenile stole groceries from a shopping cart the victim was pushing toward her car in the parking lot); *see also In re Jesus O.*, 152 P.3d 1100, 1101 (Cal. 2007) (upholding charge requiring theft to be "from the person of another" where, intending to steal something from the victim, the juvenile assaulted him, causing the victim to drop his cell phone, which the juvenile picked up and kept: "When someone, intending to steal, causes property to become separated from the victim's person, then gains possession of the property, the theft is from the person.").[2]

D.

Last, Ibarra argues that *Terral* interpreted NRS 205.270 as requiring an additional element not articulated in the statute's plain language: invasion of privacy. He claims that implicit in the rule that

[2]The dissent cites three cases it claims reject larceny from the person under circumstances our interpretation of NRS 205.270 would support: *Willis v. State*, 480 So. 2d 56 (Ala. Crim. App. 1985); *People v. Warner*, 801 P.2d 1187 (Colo. 1990); and *People v. Washington*, 548 N.Y.S.2d 48 (Sup. Ct. App. Div. 1989). From a common law perspective, these cases appear to involve false-pretenses crimes, where a defendant uses fraud to obtain *both title and possession* of money or property, not larceny, and so are inapposite. *See Wharton's Criminal Law*, *supra* § 343. They also involve statutes that differ from ours.

the theft occur from the person of another is the requirement that the theft invade the victim's privacy, and that he did not invade E.M.'s privacy when he tricked E.M. into relinquishing her cell phone. Whether *Terral* added the element of invasion of privacy to NRS 205.270 is a question of law reviewed de novo. *See Paige v. State*, 116 Nev. 206, 208, 995 P.2d 1020, 1021 (2000).

As discussed above, *Terral* limited NRS 205.270 to situations where the defendant takes the property from the victim's physical person, not the "immediate presence, or constructive control or possession of the [victim]." 84 Nev. at 413-14, 442 P.2d at 465-66. *Terral* explained that the Legislature specifically limited the statute's application so as not to confuse larceny from the person, a felony, with petit larceny, a misdemeanor, resulting in inconsistent applications of the law.

> The gravam[e]n of [larceny from the person] is that the person of another has been violated and his privacy directly invaded . . . If we were to confuse the statutory language and rule that "from the person of another" also means "from the presence of another," an accused in some instances could be charged with either a felony or a misdemeanor—a possibility which the legislature did not intend and has carefully precluded by clear language.

Id. at 414, 442 P.2d at 466.

Terral did not impose an additional element of invasion of privacy to the crime of larceny from the person; it simply interpreted larceny from the person by relating it to similar criminal statutes. *See* 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 51:1 (7th ed. 2012) (discussing the interpretive relevance of related statutes). The term gravamen is used to identify "[t]he substantial point or essence of a claim." *Gravamen*, *Black's Law Dictionary* 817 (10th ed. 2014). That *Terral* notes that the "gravam[e]n of [larceny from the person]" is invasion of privacy does not impose an invasion of privacy requirement for NRS 205.270. *Terral* identified that what distinguishes larceny from the person from ordinary larceny and justifies its felony treatment is that the act of "taking from the person of another" violates and directly invades the victim's privacy. *See Terral*, 84 Nev. at 414, 442 P.2d at 466. This observation in *Terral* did not impose an additional element of invasion of privacy for the crime of larceny from the person.

IV.

With NRS 205.270's application and meaning clarified, we now determine whether there was sufficient evidence to convict Ibarra of larceny from the person. Under NRS 205.270(1), the State needed to show that Ibarra took property from E.M.'s person, with the intent to steal or appropriate to his own use, without E.M.'s consent, under

circumstances not amounting to robbery. At trial, the State provided evidence that Ibarra asked to borrow E.M.'s cell phone with the ulterior motive of stealing it; that when E.M. extended her arm to hand Ibarra the phone, Ibarra grabbed it from her; and that after E.M. stood to follow Ibarra, he ran.

The judge instructed the jury it could find Ibarra not guilty, guilty of petit larceny, or guilty of larceny from the person. The jury found Ibarra guilty of larceny from the person. From the evidence the State presented, a rational juror could so find. There was sufficient evidence to support Ibarra's conviction, and we therefore affirm the judgment of conviction.

Douglas, C.J., and Gibbons, Hardesty, and Parraguirre, JJ., concur.

Stiglich, J., with whom Cherry, J., agrees, dissenting:

We can affirm a conviction pursuant to NRS 205.270 only if a taking occurred "without the other person's consent." In affirming Ibarra's conviction, the majority removes a material element from NRS 205.270, misapplies this court's precedent, and blurs the distinction between a crime the Legislature deemed a felony and others that it deemed misdemeanors. Therefore, I dissent.

NRS 205.270 contains five elements. It occurs when, (1) "under circumstances not amounting to robbery," (2) "with the intent to steal or appropriate," a person (3) "takes property" (4) "from the person of another" (5) "without the other person's consent." I agree with the majority that substantial evidence in this case satisfies the first four elements.

Unlike the majority, however, I do not believe these facts support a finding that Ibarra took the phone "without the other person's consent." NRS 205.270(1). The uncontested fact is that E.M. willingly handed her phone to Ibarra.[1] Therefore, as the majority notes, she consented to him taking the phone. If the language of NRS 205.270 is unambiguous—as the majority contends it to be—then we must reverse because Ibarra did not take property "without [E.M.]'s consent." Instead, the majority affirms Ibarra's conviction on the ground that fraud vitiates consent as a matter of law. This holding is flawed in several respects.

I.

First, the majority's holding contravenes the Legislature's purpose in elevating larceny from the person to a felony. NRS 205.270

[1]The majority uses the word "grabbed" from the victim's testimony in a manner that suggests the taking was forceful or aggressive. What is clear from the *entirety* of the victim's testimony is that E.M. voluntarily handed Ibarra her phone.

criminalizes a particular *method* of taking: taking in a way that "violate[s]" the person of the victim and "directly invade[s]" her privacy. *Terral v. State*, 84 Nev. 412, 414, 442 P.2d 465, 466 (1968) (defining "the gravaman" of NRS 205.270). That is why "[i]t is important to restrict the coverage of NRS 205.270 to pickpockets, purse snatchers, jewel abstracters and the like, since larceny from the person is a felony, and the value of the property taken is immaterial." *Id*. What "pickpockets, purse snatchers, jewel abstracters and the like" have in common is that they use stealth to take property *without the person's consent*. *See People v. Warner*, 801 P.2d 1187, 1191 (Colo. 1990) ("[T]heft from the person of another involves circumstances, such as pickpocketing, where something of value is taken from one who is unconscious or unaware of the theft."). They "snatch[ ]" property from an unaware victim. 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3(d)(1), at 235 & n.48 (3d ed. 2017).

The reason that the Legislature chose to inflict a greater punishment on theft from the person is because—as the majority notes—such conduct carries an unacceptable risk of "violating the victim's person or privacy or causing confrontation, physical injury, or alarm." Majority opinion *ante* at 589. Just as robbery is punished more severely because taking "by means of force" often leads to violence, *see* NRS 200.380(1), larceny from the person is heightened above ordinary larceny because "such a theft involves special potentialities for physical violence or alarm associated with the taking." *Commonwealth v. Williams*, 567 A.2d 709, 713 (Pa. Super. Ct. 1989) (internal quotation marks omitted). When, for example, a would-be victim discovers a pickpocket's hand in her pocket, she immediately feels that her privacy has been violated and is likely to defend herself using physical force.

But the "victim's person or privacy" is not violated when, as here, the victim willingly hands over property to a fraudster. And the risk of violence is lower when, as here, the victim hands property to a thief and *subsequently* discovers the thief's criminal intent. That is because the thief's criminal intent is not revealed until the thief is some distance from the victim and therefore beyond striking distance. To engage in a physical altercation, a victim must first chase and catch the thief—as E.M. tried to do here. Such chases are equally likely to occur when a thief steals property from the "immediate presence" of the victim. *Terral*, 84 Nev. at 414, 442 P.2d at 466. In sum, the Legislature believed that violence was *more likely* to occur when a thief employs a particular method of taking: "from the person" of the owner "without [that] person's consent." NRS 205.270. That is not how Ibarra took E.M's phone.

In applying larceny from the person to this scenario, the majority radically expands what the *Terral* court thought "important to restrict." 84 Nev. at 414, 442 P.2d at 466. The majority's interpretation expands the scope of NRS 205.270 to apply to any situation in which

a defendant fraudulently obtains property from a victim's hands. Examples include passing an invalid check,[2] deliberately shortchanging a cashier,[3] and any other scenario in which a defendant tricks a victim into handing over property.[4] Such situations—like Ibarra's—involve fraud and deceit, as opposed to stealth and trespass inherent in conduct that NRS 205.270 was intended to cover. *See Terral*, 84 Nev. at 414, 442 P.2d at 466. We should adhere to *Terral* and follow our sister states that declined to expand larceny from the person in the manner espoused by the majority today. *See, e.g.*, *Willis*, 480 So. 2d at 57-58 (Alabama); *Warner*, 801 P.2d at 1188 (Colorado); *Washington*, 548 N.Y.S.2d at 49 (New York). Unlike the majority, I find those well-reasoned opinions more persuasive than two words of dicta from a nineteenth-century California case. *See People v. McElroy*, 48 P. 718, 719 (Cal. 1897).

II.

The majority's consent analysis is deeply flawed. As an initial matter, the majority confuses E.M.'s consent for Ibarra to *take* her phone—which she provided—with consent for him to *steal* it—which she did not. Unlike every other theft or larceny statute within the Nevada Revised Statutes, NRS 205.270 is exclusively concerned with the act of *taking*. Under an NRS 205.270 conviction, therefore, it is irrelevant that E.M. did not consent for Ibarra to appropriate her property. By contrast, E.M.'s lack of consent to Ibarra's running away with her phone would be relevant to a conviction for petit larceny, which criminalizes the acts of "steal[ing]" or "tak[ing] and carr[ying] away," NRS 205.240(1)(a), a misdemeanor when the value of the stolen property is less than $650. NRS 205.240(2). Ibarra could also be guilty of "[o]btaining money, property, rent or labor by false pretenses," a misdemeanor when the property obtained is worth less than $650. NRS 205.380(1). Alternatively, he could be convicted of NRS 205.0832(1)(c) for obtaining E.M.'s property by making a "representation or statement . . . which is fraudulent and which, when used or made, is instrumental in causing the wrongful control or transfer of property"—also a misdemeanor when the value of the property is below $650. NRS 205.0835(2). The fact that the Legislature crafted three *misdemeanors* to perfectly cover Ibarra's conduct further indicates that the *felony* of larceny from the person criminalizes something else. *See* Antonin Scalia & Bryan A.

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[2]*See Willis v. State*, 480 So. 2d 56, 57-58 (Ala. Crim. App. 1985) (holding that such conduct is not a taking from the person).

[3]*See People v. Warner*, 801 P.2d 1187, 1188, 1191-92 (Colo. 1990) (holding that such conduct is not "theft from the person").

[4]*See People v. Washington*, 548 N.Y.S.2d 48, 49 (App. Div. 1989) (holding that a defendant who tricks a victim into voluntarily handing over money has not committed a taking from the person).

Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) ("[L]aws dealing with the same subject—being *in pari materia* (translated as 'in a like matter')—should if possible be interpreted harmoniously.").

"Because larceny from the person is the crime of larceny with the additional element of taking from the victim's person," the majority tells us, "it follows that what negates consent for ordinary larceny also negates consent for larceny from the person." The problem with this reasoning is that "ordinary larceny" does not contain an explicit element regarding the victim's consent. The crime of ordinary larceny is complete when the defendant "[i]ntentionally steals, takes and carries away, leads away or drives away" property. *See* NRS 205.220 (grand larceny); NRS 205.240 (petit larceny). Therefore, "larceny from the person" is not simply "the crime of larceny with the additional element of taking from the victim's person." Rather, it is larceny with *two* additional explicit elements: "from the person of another" *and* "without the other person's consent." NRS 205.270(1). We should pause before applying a common law principle from "ordinary larceny" (which does not have an explicit "without the other person's consent" element) to "larceny from the person" (which does). The majority's conclusion to the contrary renders superfluous "without the other person's consent" within NRS 205.270(1). We should not interpret a provision in a way "that causes it to duplicate another provision or to have no consequence." Scalia & Garner, *supra*, at 174 (defining the "Surplusage Canon").

Assuming *arguendo* that the legal concept of fraud negating consent applies to NRS 205.270, the majority misapplies that legal concept. "[T]he basic common law rule [is] that, unless there is statutory language to the contrary, whenever lack of consent is a necessary element of a crime, the fact that consent is obtained through misrepresentation will not supply the essential element of nonconsent." *People v. Cook*, 39 Cal. Rptr. 802, 804 (Dist. Ct. App. 1964). In determining whether or not fraud vitiates consent, courts draw a distinction between "fraud in fact" and "fraud in the inducement." Fraud in fact occurs when "an act is done that is different from the act the defendant said he would perform." *State v. Bolsinger*, 709 N.W.2d 560, 564 (Iowa 2006). Fraud in fact vitiates consent because "where there is fraud in the fact, there was no consent to begin with." *People v. Harris*, 155 Cal. Rptr. 472, 478 (Ct. App. 1979). By contrast, fraud in the inducement occurs when "the act is done as the defendant stated it would be, but it is for some collateral or ulterior purpose." *Bolsinger*, 709 N.W.2d at 564. Such fraud does not vitiate consent. *People v. Stuedemann*, 67 Cal. Rptr. 3d 13, 16 (Ct. App. 2007) ("When lack of consent is a necessary element of a crime, the fact the defendant employed fraudulent misrepresentations to induce the victim to consent to the proscribed act ordinarily does not vitiate the consent . . . .").

In the instant case, Ibarra obtained E.M.'s consent for him to take the phone from her hand by misrepresenting his motives. Ibarra's act of taking E.M.'s phone was "done as [Ibarra] stated it would be," but for the "ulterior purpose" of appropriating it. *Bolsinger*, 709 N.W.2d at 564. Therefore, his misrepresentation constitutes fraud in the inducement, which does not negate E.M.'s consent for him to take the phone. *See id.* By contrast, fraud in fact would occur, for example, if Ibarra had obtained E.M.'s consent to merely *touch* her phone. In such a scenario, Ibarra's taking of the phone would be "different from the act [he] said he would perform." *Id.* But that is not what occurred here—E.M. consented to Ibarra taking her phone, and that is precisely what he did. Thus, even if we assume that fraud *can* negate consent within the context of NRS 205.270, Ibarra's misrepresentation as to his purpose did not negate E.M.'s consent for him to take her phone.

III.

Finally, the majority's holding leads to bizarre and irrational results. If E.M. had consented to Ibarra taking her property that lay on the bench beside her, Ibarra could not be guilty of felony larceny from the person, NRS 205.270, because he would have taken the property from the bench rather than E.M.'s person. He would instead be guilty of a misdemeanor, assuming the phone was worth less than $650. *See* NRS 205.0832(1)(c) (theft); NRS 205.240 (petit larceny); NRS 205.380 (obtaining property "by false pretenses"). But, the majority tells us, because E.M. *handed* Ibarra her phone, that misdemeanor is elevated to a category C felony. *See* NRS 205.270(1)(a). In both scenarios, Ibarra would have used the same means (a lie) to achieve the same result (Ibarra taking the phone with consent). Designating the former scenario a misdemeanor and the latter a felony is not "consistent with reason and public policy." *State v. White*, 130 Nev. 533, 536, 330 P.3d 482, 484 (2014) (internal quotation marks omitted).

In sum, I believe that the majority's decision departs from the plain meaning and purpose of NRS 205.270, it expands what the *Terral* court deemed "important to restrict," 84 Nev. at 414, 442 P.2d at 466, and it broadens a narrowly defined felony such that it is now practically indistinguishable from misdemeanors. Accordingly, I dissent.