

KIM A. JUDD, APPELLANT, v. THE STATE OF NEVADA,
RESPONDENT.

No. 85734-COA

March 28, 2024

547 P.3d 138

Appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of felony injuring or tampering with a motor vehicle and one count of felony coercion. Seventh Judicial District Court, Lincoln County; Gary Fairman, Judge.

Affirmed in part, reversed in part, and remanded.

Katschke Law, LLC, and *Franklin J. Katschke*, Panaca, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Dylan V. Frehner*, District Attorney, Lincoln County, for Respondent.

Before the Court of Appeals, GIBBONS, C.J., and BULLA and WESTBROOK, JJ.

OPINION

By the Court, BULLA, J.:

The consequences of criminal convictions vary widely between misdemeanors and felonies, including the potential terms of incarceration. And sometimes crimes—such as coercion—can be punished as either. Under NRS 207.190(2), criminal coercion is punishable as a felony if carried out using physical force or the immediate threat of physical force. However, absent the use or immediate threat of physical force, coercion is punishable as a misdemeanor. In this opinion, we consider whether NRS 207.190(2)'s use of the phrase “physical force” to distinguish between coercion being punished as a felony versus as a misdemeanor should be limited to physical force against a person, and not merely against property—in this case, a 1957 Chevrolet truck. Because we conclude that the Nevada Legislature intended for the distinguishing statutory element of “physical force” to be limited to force against a person, the jury should have been so instructed.

In reaching our decision, we emphasize the importance of giving proper jury instructions for the essential elements of a crime. Doing so is particularly important where, as here, the jury's consideration of the essential element of physical force, without proper instruction, resulted in a felony conviction. As the district court failed to properly instruct the jury on the definition of physical force as being limited to force against a person—the essential element required

for a felony conviction—we necessarily reverse this conviction. However, we affirm the felony conviction for injuring or tampering with a motor vehicle, as the district court correctly instructed the jury as to the proper measure of damages for the partial destruction of property.

FACTS AND PROCEDURAL HISTORY

In 2020, Scott Reber purchased a 1957 Chevrolet truck. After having mechanical work completed on the truck to render it drivable, Reber dropped his truck off at the residence of a longtime acquaintance, appellant Kim A. Judd, for restoration and repair work to the truck's exterior. Reber initially paid Judd about \$1,000 for the repairs, but the two did not sign a formal agreement.

When the work was not completed several months later, Reber decided to retrieve his truck and have the work finished elsewhere. In a phone call, Judd refused to return the truck unless Reber paid Judd an additional sum for the repairs he had already made. Reber declined to pay more and told Judd he was coming to retrieve his truck. At this point, Judd retorted that if Reber came on to Judd's property, Judd would kill him. Thereafter, Judd continued to threaten Reber, stating in text messages that if Reber came to retrieve the truck, he would burn or damage the truck. Judd then struck the truck several times with a sledgehammer and sent Reber pictures of the damage. The following day, the sheriff accompanied Reber to Judd's residence to retrieve the truck.

The State charged Judd with one count of felony coercion and one count of felony injuring or tampering with a motor vehicle, and the case proceeded to trial. During the settling of jury instructions, Judd raised two objections. First, Judd objected to a proposed jury instruction setting forth the elements of felony coercion without defining "physical force." Specifically, as an alternative to the standard coercion instruction, Judd offered an instruction adopting the definition of physical force as set forth in NRS 193.303, which defines physical force as force used against "another person." In connection with Judd's request for this instruction, Judd orally requested dismissal of the felony coercion count because the State had failed to present evidence that either physical force or the immediate threat of physical force had been used against Reber.¹ Second, Judd objected to the State's proposed jury instruc-

¹To the extent that Judd contends the district court erred in denying his oral motion to dismiss at the close of the State's case, we note that no statutory authority permits a motion to dismiss during a criminal trial for insufficient evidence, and therefore the district court did not err in denying Judd's motion. *Cf.* NRS 175.381(1) ("If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.").

tion regarding the proper measure of damages. The State argued that because the truck was only partially damaged the proper measure of damages was the cost to repair or replace the damaged parts. Conversely, Judd argued for an instruction that the proper measure of damages was the fair market value of each individual part at the time of the damage, the total of which he asserted had to be less than the value of the truck when Reber dropped it off, or less than \$5,000. The district court denied Judd's motion to dismiss, refused Judd's proposed instructions, and specifically declined to give an instruction defining "physical force." The jury found Judd guilty on both felony counts, and Judd was sentenced to a maximum of 48 months in prison on each count, to run concurrently. This appeal followed.

Judd challenges his convictions on several grounds, and we address two in this opinion. First, we agree with Judd's argument that, with respect to the felony coercion charge, the district court erred in failing to give a jury instruction defining "physical force" as being limited to force against a person, and therefore we necessarily reverse the felony coercion conviction. But second, as to the charge of injuring or tampering with a motor vehicle, we conclude that the district court correctly instructed the jury on the proper measure of damages applicable to the partial destruction of property. Thus, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

ANALYSIS

The district court committed reversible error when it failed to instruct the jury that NRS 207.190(2)'s use of the phrase "physical force" is limited to force against a person

NRS 207.190 sets forth the crime of coercion and provides that

1. It is unlawful for a person, with the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing, to:

(a) Use violence or inflict injury upon the other person or any of the other person's family, or upon the other person's property, or threaten such violence or injury;

. . . ; or

(c) Attempt to intimidate the person by threats or force.

2. A person who violates the provisions of subsection 1 shall be punished:

(a) Where physical force or the immediate threat of physical force is used, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than \$5,000.

(b) Where no physical force or immediate threat of physical force is used, for a misdemeanor.

Although Judd does not challenge the elements of coercion set forth in NRS 207.190(1), he contests his felony conviction under the statute. To convict Judd of felony coercion under NRS 207.190, the State was required to prove an additional element as set forth in subsection 2: the use of “physical force or the immediate threat of physical force.” Judd contends that the district court erred when it failed to instruct the jury that “physical force,” as used in NRS 207.190(2), is limited to force against a person.

Specifically, Judd argues that the district court should have adopted his proposed jury instruction that applied the definition of “physical force” from NRS 193.303. That provision, located within the general section of criminal statutes governing the use of force by peace officers, states that “[p]hysical force” means the application of physical techniques, chemical agents or weapons to *another person*.” (Emphasis added.) Alternatively, Judd proposes that the district court should have given an instruction that physical force or threat of physical force must be used against a person. And since the evidence at trial did not establish the requisite physical force against a person, Judd contends the district court should have dismissed that felony charge. The State counters that Judd’s proposed jury instruction would have misstated the law, asserting that NRS 207.190(2)’s plain language and legislative history support the conclusion that “physical force” includes the use of force against both persons and property.²

We review a district court’s refusal to issue a jury instruction for an abuse of discretion or judicial error, but we review whether a proffered instruction correctly states the law de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). In this case, we must first determine whether “physical force” as used in NRS 207.190(2), which distinguishes felony coercion from misdemeanor coercion, requires force or the immediate threat of force to be used against a person. Thus, to resolve whether the district court abused its discretion or erred in failing to give an instruction that “physical force” must be against a person, we necessarily consider whether such an instruction encompasses a correct statement of the law based on legislative intent.

Our “starting point for determining legislative intent is the statute’s plain meaning.” *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d

²We do not necessarily agree that Judd’s proposed instruction incorporating language from NRS 193.303 should have been the exact instruction given in this case, but we recognize that Judd’s primary argument is that an instruction should have been given to define physical force or threat of physical force as being against a person and not merely property. We note that the district court has the ultimate responsibility of ensuring that the jury is properly instructed. See *Crawford v. State*, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (“And in the final analysis, the district court is ultimately responsible for not only assuring that the substance of the defendant’s requested instruction is provided to the jury, but that the jury is otherwise fully and correctly instructed.”).

1226, 1228 (2011). However, “when ‘the statutory language lends itself to two or more reasonable interpretations,’ the statute is ambiguous,” and this court will “look to the legislative history [to] construe the statute in a manner that is consistent with reason and public policy.” *Id.* (quoting *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004)); see also *Jones v. Nev., State Bd. of Med. Exam’rs*, 131 Nev. 24, 28, 342 P.3d 50, 52 (2015) (“Because the statute does not define [the disputed term] and the parties each advance a different definition, we may look beyond the plain meaning of the statute . . .”). Further, “[p]enal statutes should be narrowly construed where they are ambiguous.”³ *Romero v. State*, 116 Nev. 344, 348, 996 P.2d 894, 897 (2000).

NRS 207.190 does not define “physical force.” And in this case, the parties each ascribe different reasonable meanings to the phrase. Under the State’s reading, NRS 207.190(2)’s inclusion of “physical force” pertains to all conceivable types of physical force against persons or property based on the elements of coercion set forth in NRS 207.190(1)(a). While the State acknowledges that the phrase “physical force” is not included in NRS 207.190(1)(a), the State interprets NRS 207.190(2) to mean that if a defendant uses *any* physical force to accomplish the actions set forth in NRS 207.190(1)(a) (e.g., violence against persons or property), then the crime is punishable as a felony. Judd conversely interprets NRS 207.190(2)’s use of “physical force” to be a separate element required for felony coercion and asserts it should be interpreted as physical force *only* against a person. With this interpretation, Judd seeks to distinguish felony coercion from misdemeanor coercion, as both felony and misdemeanor coercion encompass the same elements set forth in NRS 207.190(1). Judd relies on the narrower definition of “physical force” in NRS 193.303 to support his argument that physical force must be against a person. See *Jones*, 131 Nev. at 28, 342 P.3d at 52 (explaining that reasonable interpretations may draw from “analogous statutory provisions”). Because “physical force” bears two reasonable interpretations in the context of the statute, the phrase is ambiguous. See *id.* Thus, we next turn to the statute’s legislative history for additional insight.

In 1967, the Legislature added “physical force” as a required element of felony coercion under NRS 207.190. See A.B. 71, 54th Leg. (Nev. 1967). The Legislature amended NRS 207.190 again in 1995

³We note that the phrase “physical force” is considered a legal term of art that has different meanings in different statutory contexts. Compare *Johnson v. United States*, 559 U.S. 133, 141 (2010) (holding that the phrase “physical force” as used in the Armed Career Criminal Act refers to “force capable of causing physical pain or injury to another person”), with *United States v. Castleman*, 572 U.S. 157, 163 (2014) (holding that a federal statute’s use of the phrase “physical force” when setting out a “misdemeanor crime of domestic violence” includes “even the slightest offensive touching”).

under S.B. 416, 68th Leg. (Nev. 1995), which classified all felony crimes under a letter-coded felony scheme—category A felonies being the most serious and carrying the longest potential sentences. The bill classified felony coercion as a category B felony—the category containing the second-most serious felonies—which is how the crime remains classified today. *See id.*; NRS 207.190(2).

In classifying felonies, the Legislature relied, in part, on a report produced by the Nevada Department of Prisons detailing the average sentence imposed and average time served for crimes separated by the putative letter-coded tiers. *See* Hearing on S.B. 416 Before the Assemb. Comm. on Judiciary, 68th Leg., at 757, 775 (Nev., May 17, 1995). That report delineated felony coercion as a “serious crime” and category B felony based on prior putative lists, as well as on the department’s own categorization of the crimes based on their elements. *Id.* at 773, 775. Within this list, the only other “serious crime” listed as a category B felony that also required physical force as a necessary element was felony battery, which limited the use of physical force to force against another *person*.⁴ *See id.* at 775; *Hobbs v. State*, 127 Nev. 234, 238-39, 251 P.3d 177, 180 (2011) (explaining that the physical force required for battery includes “the intentional and unwanted exertion of force *upon another*” (emphasis added)). Because the Legislature viewed felony coercion and felony battery as similarly serious crimes when designating them as category B felonies, we conclude that it intended for the crimes’ shared elements to carry the same meaning and, therefore, for felony coercion’s requirement of “physical force” to only include force against a person. *See Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007) (“[W]hen the same word is used in different statutes that are similar with respect to purpose and content, the word will be used in the same sense, unless the statutes’ context indicates otherwise”). Thus, although “physical force” in NRS 207.190(2) is not defined as force against a person, we conclude that the legislative history supports Judd’s position that it was intended to be, contrary to the State’s position. We also note that the only reference to “force” in NRS 207.190(1) involves coercion by “[a]ttempt[ing] to intimidate the *person* by threats or force.” *See* NRS 207.190(1)(c) (emphasis added).

Interpreting felony coercion to require the use of physical force (or the immediate threat of physical force) against a person, and not merely against property, is both reasonable and avoids absurd results. *See State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120

⁴During oral argument, the State suggested that extortion under NRS 205.320(2) punishes threats to injure property with the intent to gain money as a category B felony. But unlike extortion, coercion requires the use of physical force or the immediate threat of physical force as a necessary element of the felony crime. Moreover, as the State duly noted, it did not charge Judd with extortion.

(2001) (explaining that a reviewing court’s interpretation of an ambiguous statute “should be in line with what reason and public policy would indicate the [L]egislature intended, and should avoid absurd results” (quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998))). For example, under the State’s proposed reading of the coercion statute, a defendant would be guilty of *felony* coercion if they used physical force or immediately threatened physical force against *any* personal property, even if the resulting damage would be less than \$1.

The State, in its supplemental authorities on appeal, points to *Guerrina v. State*, where the Nevada Supreme Court observed in dicta, paraphrasing subsection 1 of the coercion statute, that “felony coercion consists of the use or immediate threat of violence or injury against a person or property, with ‘the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing.’” 134 Nev. 338, 346, 419 P.3d 705, 712 (2018) (quoting NRS 207.190(1)). In *Guerrina*, however, the supreme court affirmed the defendant’s felony coercion conviction because the defendant’s immediate proximity to the victim, accompanied with a command to disconnect the phone, arose to “an immediate—albeit unspoken—threat of physical force” against the victim. *Id.* at 347, 419 P.3d at 713 (internal quotation marks omitted). In contrast to the facts in *Guerrina*, Judd and Reber were miles apart when Judd threatened him over the phone, and that threat carried no immediate threat of physical force against Reber’s person, as Reber acknowledged at trial. Thus, the holding of *Guerrina* is unpersuasive in resolving the matter before us.

The State otherwise points to no controlling legal authority in this jurisdiction, nor do we find any, where a felony coercion conviction was affirmed based solely on the use of physical force or immediate threat of physical force against property with no accompanying use or immediate threat of force against the victim’s person.⁵ Further, to

⁵At oral argument, the State discussed *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018), where the United States Court of Appeals for the Ninth Circuit, in deciding whether a conviction for felony coercion was a “crime of violence” for federal sentencing purposes, looked to three unpublished orders by the Nevada Supreme Court affirming felony coercion convictions. Although those unpublished decisions involved defendants forcefully depriving victims of phones they were using to call law enforcement, the Ninth Circuit speculated that there was a “‘realistic probability’ that a defendant could be convicted of felony coercion without using or threatening to use violent physical force against the person of another” and therefore felony coercion under NRS 207.190 was not a “crime of violence” under federal sentencing guidelines. *Id.* at 1159 (quoting U.S. Sent’g Guidelines Manual § 4B1.2). We are not persuaded by the Ninth Circuit’s conjecture. Of course, the use of such force could be directed to both property and a person, such as the use of physical force to grab a phone from a person’s hand and destroy the phone to prevent a call to law enforcement. *See, e.g., Gramm v. State*, No. 72459, 2018 WL 679548, at *1 (Nev. Feb. 1, 2018) (Order of Affirmance) (affirming a conviction of felony

the extent any lingering ambiguity as to the statutory requirement of “physical force” remains, the rule of lenity weighs in favor of Judd. Under the rule of lenity, if a penal statute remains ambiguous after exhausting all other methods of statutory interpretation, then the statute should be “interpreted in the accused’s favor.” *Lucero*, 127 Nev. at 99, 249 P.3d at 1230 (quoting *Moore v. State*, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006)). Thus, the rule of lenity further supports our interpretation that the requirement of “physical force” under NRS 207.190(2) is limited to force against a person because this resolves any remaining ambiguity in Judd’s favor.⁶

We therefore conclude that the district court erred in refusing to instruct the jury that “physical force” must be against a person, which is necessary to support the charge of felony coercion in accordance with NRS 207.190(2). Having concluded that the district court erred in failing to properly instruct the jury, we now determine whether that error was harmless. *See Nay*, 123 Nev. at 333-34, 167 P.3d at 435 (recognizing that harmless-error review applies to jury instruction errors). “[A]n error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Id.* at 334, 167 P.3d at 435 (quoting *Wegner v. State*, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1267-68, 147 P.3d 1101, 1108 (2006) (further internal quotation marks omitted)).

At trial, Reber explicitly testified that Judd never used any physical force against him and that he did not feel he faced any

coercion where the defendant hit a phone out of the victim’s hand while the victim was trying to call the police). Thus, to establish felony coercion, there must be some temporal proximity between the intent to damage property and the victim such that a reasonable person under the same circumstances would feel immediately threatened by the use of physical force against their person. *See Santana v. State*, 122 Nev. 1458, 1462-63, 148 P.3d 741, 744-45 (2006). We also note that in *Abner v. State*, No. 77650, 2020 WL 3570435, at *1 (Nev. June 30, 2020) (Order of Affirmance), the supreme court expressly declined to address whether physical force requires force against a person for felony coercion because the issue was not preserved for appellate review and, therefore, affirmed a felony coercion conviction in an unpublished order based on the sufficiency of evidence where the defendant’s actions of “cut[ting] the lines to the land line” and removing the battery from the victim’s cell phone prevented the victim from calling for help.

⁶Indeed, when faced with a similar question—determining whether the language “threat of physical injury” in a criminal statute included threats to both property or a person, or solely to a person—the United States Court of Appeals for the Tenth Circuit relied, in part, on the rule of lenity to hold that the phrase only applied to threats of physical injury to a person. *United States v. O’Connor*, 874 F.3d 1147, 1157-58 (10th Cir. 2017) (“[T]he rule of lenity counsels courts to interpret [ambiguous criminal statutes] to ‘avoid an increase in the penalty prescribed for the offense.’” (quoting *United States v. Manatau*, 647 F.3d 1048, 1055 (10th Cir. 2011))).

“immediate threat of danger” when Judd, over the phone, threatened him and his property if he attempted to retrieve the truck because they were more than ten miles apart.⁷ Under these facts, we cannot conclude beyond a reasonable doubt that a rational jury would have found Judd guilty of felony coercion for partially damaging Reber’s truck had the district court properly instructed the jury on the definition of “physical force” as being against a person. Under these same facts, absent the district court’s error in failing to properly instruct the jury, a rational jury could have found a reasonable person in Reber’s position would not have felt immediately threatened. *See Santana v. State*, 122 Nev. 1458, 1462-63, 148 P.3d 741, 744-45 (2006) (holding that, when determining whether a threat of physical force was immediate for the purposes of NRS 207.190(2), the factfinder must determine whether a reasonable person under the same circumstances would have felt immediately threatened). As we cannot conclude beyond a reasonable doubt that Judd would have been convicted of felony coercion had a proper instruction regarding physical force been given, we agree that the error was not harmless and necessarily reverse Judd’s conviction of felony coercion.

The district court properly instructed the jury on the appropriate measure of damages

Generally, the criminal charge of injuring or tampering with a motor vehicle is punishable according to the extent of the property damage caused.⁸ At trial, the State offered expert testimony to support a felony conviction for the damage Judd caused to Reber’s truck. Ronald Lourenco, the owner of an autobody shop that provided Reber with an estimate of the cost to repair the exterior damage to the truck Judd caused, testified that the damaged exterior parts were not repairable and required replacement. Lourenco also testified that he could not find original parts for the 1957 Chevrolet truck for sale—new or used—and therefore had to order replica parts. The shop’s estimate costs for these replica parts totaled \$17,594.80. Judd offered no evidence of the parts’ replacement value to the contrary. Rather, Judd argued that each damaged part should be treated as its own loss and, therefore, the proper measure of damages would be the combined fair market value for each individual

⁷At oral argument, both parties agreed that, at the time Judd threatened Reber, they were approximately 10 to 15 miles away from each other.

⁸Under NRS 205.274(1), it is unlawful to damage the motor vehicle of another. If the cost of the damage to the motor vehicle is \$5,000 or more, then the defendant is guilty of a category C felony. NRS 193.155(1) (setting forth the level of culpability for public offenses “proportionate to the value of property affected”). If the cost of that damage is more than \$250 but less than \$5,000, the defendant is guilty of a gross misdemeanor. NRS 193.155(2).

part at the time the damage occurred. Judd asserts that this total had to be less than \$5,000 because Reber testified that the total value of the truck was less than \$5,000 when he purchased it. The jury ultimately found that the measure of damages was \$5,000 or more, and Judd was therefore convicted of a felony for the damage he caused.

On appeal, Judd essentially reargues his position below, that the district court should not have instructed the jury that the proper measure of damages was the cost to repair or replace its damaged parts, but rather, the fair market value of each part at the time it was damaged. Judd contends that the damaged exterior parts were not permanently affixed to the truck and, therefore, each individual part should be considered its own loss, thereby making the proper measure of damages the total fair market value of the individual parts. The State counters that the district court properly found that the truck, as a whole, was partially damaged and not a total loss. Therefore, the district court correctly instructed the jury that the measure of damages was the cost to repair or replace the parts necessary to restore the truck. We agree with the State.

In *Romero v. State*, the Nevada Supreme Court set forth two standards for calculating property damage when determining a criminal defendant's culpability based on the extent of the damage. 116 Nev. at 346-49, 996 P.2d at 896-98. When property is "completely destroyed," the appropriate standard is the fair market value of the property at the time it was destroyed. *Id.* at 348, 996 P.2d at 897. "However, when property is only partially destroyed," "the appropriate measure of damages is the cost related to repair or restore the property." *Id.* Under the latter method, the damage must be directly tied to the offense. *Id.* at 349, 996 P.2d at 897 (holding that the costs of hiring security following an incident were not directly tied to property damage at a store).

In this case, Judd partially destroyed Reber's 1957 Chevrolet truck by damaging individual exterior parts. Even though these parts were not permanently affixed to the truck's frame, they had to be replaced—as they could not be repaired—to restore the truck to its condition before Judd partially damaged it. Thus, the proper measure of damages was the cost to repair or replace the damaged parts. *See Romero*, 116 Nev. at 348, 996 P.2d at 897. Based on the uncontroverted expert testimony at trial, we conclude that the invoice of \$17,594.80 for the replica replacement parts was directly tied to the offense charged and represented the amount necessary to restore the partially damaged truck.

Therefore, the district court correctly instructed the jury on the proper measure of damages for the partial damage Judd caused to Reber's 1957 Chevrolet truck. And, based on the replacement value of the replica parts necessary to restore the truck, we affirm Judd's

felony conviction of injuring or tampering with a motor vehicle causing damage of \$5,000 or more.⁹

CONCLUSION

We affirm Judd's felony conviction for injuring or tampering with a motor vehicle because the district court correctly instructed the jury on the proper measure of damages. However, we conclude that to affirm a conviction of felony coercion, physical force or the immediate threat of physical force must have been used against a person, not merely against property. Therefore, the district court erred in rejecting a jury instruction defining physical force or immediate threat of physical force as being against a person. We further conclude that this error was not harmless. Accordingly, we reverse Judd's conviction of felony coercion and remand for further proceedings consistent with this opinion.

GIBBONS, C.J., and WESTBROOK, J., concur.

⁹We have considered other arguments raised by Judd on appeal, including that the district court improperly allowed the State to amend the information after the start of trial; abused its discretion in denying his request to remove a juror for misconduct; and erred in denying his motions to set aside the conviction and conduct a competency evaluation and to remove his attorney and conclude that they do not present a basis for further relief.

LANCE POSNER; AND EVA POSNER, APPELLANTS, v. U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR MASTR ASSET BACKED SECURITIES TRUST 2006-HE1, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-HE1; AND QUALITY LOAN SERVICE CORPORATION, A FOREIGN CORPORATION, RESPONDENTS.

No. 85860

April 4, 2024

545 P.3d 1150

Appeal from a district court order denying a motion for a preliminary injunction in an action to quiet title. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Senior Judge.

Affirmed.

[Rehearing denied May 7, 2024]

Robert W. Lueck, Ltd., and *Robert W. Lueck*, Las Vegas, for Appellants.

Wright, Finlay & Zak, LLP, and *Christina V. Miller* and *Robert A. Riether*, Las Vegas, for Respondent U.S. Bank National Association.

Before the Supreme Court, STIGLICH, LEE, and BELL, JJ.

OPINION

By the Court, LEE, J.:

NRS 106.240 provides that certain liens on real property are automatically cleared from the public records after a specified period of time. More precisely, the statute provides that a lien that is created by a mortgage or deed of trust on real property is conclusively presumed to be discharged “10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due.”

We recently held in *LV Debt Collect, LLC v. Bank of New York Mellon*, 139 Nev. 232, 534 P.3d 693 (2023), that recording a notice of default to institute nonjudicial foreclosure proceedings does not trigger NRS 106.240’s 10-year time frame. In this opinion, and for reasons similar to those in *LV Debt Collect*, we clarify that instituting judicial foreclosure proceedings likewise does not trigger the 10-year time frame. We therefore affirm the district court’s order denying appellants’ motion for a preliminary injunction.

FACTS AND PROCEDURAL HISTORY

In 2005, appellants Lance and Eva Posner purchased the subject property. The sellers had an outstanding loan that was secured by

a deed of trust on the property. The Posners assumed responsibility for the loan, and the deed of trust was eventually assigned to respondent U.S. Bank. In September 2012, U.S. Bank filed a judicial foreclosure action against the Posners. U.S. Bank's complaint alleged that "[t]he amount owing under the Note has become accelerated in accordance with the terms of the Note and Deed of Trust" and that "there remains due and owing under the Note the approximate principal amount of \$937,000.00." U.S. Bank did not pursue the judicial foreclosure, and in July 2013, it voluntarily dismissed its lawsuit without prejudice.¹

The Posners remained in default on the loan through 2019, at which point they filed an action in federal district court. In that case, the Posners alleged that a fraudulent deed of trust assignment from 2012 deprived U.S. Bank of the right to foreclose on their property. The federal district court granted U.S. Bank's motion to dismiss that action with prejudice in 2020.

Thereafter, the Posners filed the underlying state-court action in 2022. Their complaint asserted a claim for quiet title, alleging that the 10-year period in NRS 106.240 was triggered in 2012 when U.S. Bank filed its judicial foreclosure action, such that by 2022, the deed of trust had been extinguished as a matter of law.² The Posners sought a preliminary injunction to prevent U.S. Bank's scheduled nonjudicial foreclosure sale. The district court denied the request for an injunction, finding the Posners' claims had no likelihood of success. The Posners now appeal.

DISCUSSION

We typically review a district court's denial of a preliminary injunction for an abuse of discretion. *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015). But where, as here, the denial of injunctive relief presents a purely legal issue, our review is de novo. *Sowers v. Forest Hills Subdiv.*, 129 Nev. 99, 108, 294 P.3d 427, 433 (2013). "A preliminary injunction is proper where the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary

¹The record reflects that respondent Quality Loan Service Corporation is U.S. Bank's foreclosure trustee. Although named as a defendant in the underlying matter and a respondent in this appeal, Quality Loan Service has not filed a brief in this matter.

²The Posners also asserted a claim for fraud, alleging that the 2012 deed of trust assignment to U.S. Bank was either fraudulent or improperly notarized. The district court found that this claim was barred by issue and claim preclusion based on the Posners' 2019 federal lawsuit. To the extent the Posners challenge this finding on appeal, we are not persuaded that any exception to issue preclusion applies. *Cf.* Restatement (Second) of Judgments § 28 (Am. L. Inst. 1982) (listing scenarios when issue preclusion should not apply even though an issue was actually and necessarily litigated).

injunction, it will suffer irreparable harm for which compensatory damages would not suffice.” *Excellence Cmty. Mgmt.*, 131 Nev. at 350-51, 351 P.3d at 722. Here, we focus solely on the Posners’ likelihood of success on the merits of their quiet title claim because that was the primary basis for the district court’s decision.³

In denying the preliminary injunction, the district court relied on NRS 107.550(3), which provides that if a deed of trust beneficiary’s judicial foreclosure claim is dismissed without prejudice, the “beneficiary of the deed of trust is thereupon restored to its former position and has the same rights as though an action for a judicial foreclosure had not been commenced.” The Posners contend that the district court erred in relying on NRS 107.550 because that statute only applies to judicial foreclosure actions commenced on or after October 1, 2013. *See* 2013 Nev. Stat., ch. 403, § 30, at 2202. We agree that the district court’s reliance on that statute is questionable, as U.S. Bank commenced its judicial foreclosure action in September 2012. Nevertheless, we conclude that the district court reached the correct result in concluding that the Posners had no likelihood of success on their quiet title claim. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (recognizing that this court will affirm the district court’s ruling if it reached the right result for the wrong reason).

The quiet title claim is premised on the idea that the 10-year period in NRS 106.240 had been triggered in 2012, and thus the lien on the subject property was discharged as a matter of law in 2022. That premise is wrong. In its entirety, NRS 106.240 provides,

The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, *shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due*, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

(Emphasis added.) As we recognized in *LV Debt Collect*, the statute plainly states that a debt “‘become[s] wholly due’ only ‘according to’ either of two things: (1) the ‘terms thereof,’ referring to the mortgage or deed of trust, or (2) ‘any recorded written extension thereof.’” 139 Nev. at 236, 534 P.3d at 697 (quoting NRS 106.240). Thus, when there is no recorded extension of the due date, the terms of the mortgage or deed of trust dictate when the debt becomes wholly due. *Id.* (“[W]hen a statute’s language is plain and

³To the extent that any of the other preliminary-injunction factors may weigh in favor of the Posners, we conclude that the district court was within its discretion in finding that those factors did not outweigh the district court’s finding that the Posners had no likelihood of success on the merits of their quiet title claim.

its meaning clear, the court will apply that plain language.” (quoting *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007))). Here, the deed of trust does not mention judicial foreclosure actions, much less state that the institution of such an action makes the loan “wholly due” for purposes of NRS 106.240. Thus, despite the language in U.S. Bank’s judicial foreclosure complaint that could be construed as accelerating the Posners’ loan, U.S. Bank’s judicial foreclosure action was insufficient to trigger NRS 106.240’s 10-year time frame. This conclusion is consistent with the policy considerations set forth in *LV Debt Collect*, in that applying NRS 106.240 to security interests that are the subject of pending litigation would be “incongruous with the statute’s purpose” and would encourage property owners to “engage in run-out-the-clock gamesmanship” by prolonging a judicial foreclosure action until NRS 106.240’s 10-year period expires. 139 Nev. at 237, 534 P.3d at 698-99.

CONCLUSION

Because the judicial foreclosure action did not trigger the 10-year time frame in NRS 106.240, the district court reached the correct result when it determined that the Posners’ quiet title claim had no likelihood of success on the merits. We therefore affirm the district court’s order denying the Posners’ motion for a preliminary injunction.

STIGLICH and BELL, JJ., concur.

RAMEL W. ORTIZ, APPELLANT, v. THE STATE OF NEVADA,
RESPONDENT.

No. 85887

April 4, 2024

545 P.3d 1142

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

Steven S. Owens, LLC, and *Steven S. Owens*, Henderson, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, STIGLICH, LEE, and BELL, JJ.

OPINION

By the Court, BELL, J.:

Appellant Ramel Ortiz was convicted of six counts of sexual assault and other felonies after he broke into victim M.P.'s house and forced M.P. to engage in multiple sexual acts. Four of the sexual assault counts arose from an incident during which Ortiz subjected M.P. to intercourse in different sexual positions. In this opinion, we consider whether appellate counsel provided ineffective assistance by failing to challenge the sufficiency of the evidence to support multiple sexual assault convictions.

Nevada precedent provides that a change in sexual position alone is insufficient to show that the resulting sexual acts constitute more than one sexual assault offense. Appellate counsel applied that precedent to unsuccessfully challenge jury instructions but failed to challenge the multiple convictions for the same incident. We conclude that appellate counsel's omission of a sufficiency challenge to the multiple convictions fell below an objective standard of reasonableness. Because the sufficiency challenge stood a reasonable probability of success had it been raised on appeal from the judgment of conviction, we further conclude that Ortiz was prejudiced by appellate counsel's omission of that challenge. The district court erred in denying Ortiz's postconviction petition for a writ of habeas corpus with respect to this ineffective-assistance claim. We reverse in part and remand for the district court to vacate three of Ortiz's

sexual assault convictions. Because Ortiz's remaining claims lack merit, we affirm the district court's decision as to those claims.

FACTS AND PROCEDURAL HISTORY

During the early morning hours of March 9, 2017, Ortiz entered M.P.'s home. When Ortiz encountered M.P. in a hallway, Ortiz pointed a gun at M.P.'s back and began leading her through the house. Ortiz claimed to be searching for a phone. Ortiz then demanded that M.P. engage in various sexual acts with him. M.P. informed Ortiz that her adult daughter, E.C., would be returning home from work soon. Ortiz reassured M.P. that E.C. would not be harmed if M.P. complied with Ortiz's demands. Ortiz led M.P. into her bedroom and forced her to engage in vaginal intercourse with him, moving into multiple sexual positions during the encounter. Ortiz eventually allowed M.P. to leave the bedroom but perpetrated additional offenses in other locations in the home. When E.C. returned from work, M.P. offered Ortiz the keys to E.C.'s car. M.P. encouraged Ortiz to take the car and leave. Ortiz declined, stating that all three of them would be leaving together. Ortiz asked E.C. for a pair of socks, which E.C. retrieved from her room and gave to him.

Ultimately, M.P. and E.C. escaped by running outside and driving to safety. When police arrived, Ortiz was no longer present. Police discovered items had been taken from the home, including jewelry and E.C.'s socks. In the home, police recovered two pairs of orange boxer shorts and a pair of orange socks. These items bore the initials of the Clark County Detention Center (CCDC). DNA testing linked one of the pairs of boxer shorts to Ortiz, who had been released from CCDC the night before after an unrelated arrest.

A jury found Ortiz guilty of burglary, first- and second-degree kidnapping, robbery, assault, six counts of sexual assault, and three counts of open or gross lewdness. The district court sentenced Ortiz to an aggregate prison term of twenty-five years to life. Ortiz appealed, and this court affirmed the convictions. *Ortiz v. State*, No. 78996, 2021 WL 1085375 (Nev. Mar. 19, 2021) (Order of Affirmance). Ortiz subsequently filed a timely postconviction petition for a writ of habeas corpus alleging multiple instances of ineffective assistance of counsel. Postconviction counsel filed a supplemental brief and waived an evidentiary hearing. Following argument, the district court denied the petition.

DISCUSSION

Ineffective assistance of counsel

Ortiz argues that the district court erred in denying multiple claims of ineffective assistance of trial and appellate counsel. To demonstrate ineffective assistance of counsel, a petitioner must

show that counsel's performance fell below an objective standard of reasonableness and that the prejudice from the deficient performance creates a reasonable probability that there would have been a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); see also *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the *Strickland* test); *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) (applying the *Strickland* test to claims of ineffective assistance of appellate counsel). For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690. "With respect to the prejudice prong, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Johnson v. State*, 133 Nev. 571, 576, 402 P.3d 1266, 1273 (2017) (alteration in original) (quoting *Strickland*, 466 U.S. at 694). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts of his or her claims by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We defer to the district court's factual findings that are supported by substantial evidence and not clearly wrong but review its application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Appellate counsel provided ineffective assistance by failing to challenge the sufficiency of the evidence to support multiple counts of sexual assault arising from a single encounter

Ortiz argues that appellate counsel should have challenged the sufficiency of the evidence to support the sexual assault convictions in counts 4-7.¹ Specifically, Ortiz asserts that the sexual acts charged in these counts, all of which pertained to the conduct in M.P.'s bedroom, occurred during a single sexual encounter, and M.P.'s testimony was insufficient to support a finding of guilt as to more than one count of sexual assault. According to Ortiz, had appellate counsel raised this issue on direct appeal, three of the sexual assault convictions would have been reversed.

Nevada law provides that a person commits sexual assault when the person "[s]ubjects another person to sexual penetration . . . against the will of the victim." NRS 200.366(1)(a). "[S]eparate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions 'even though the acts were the result of a single encounter and all occurred within a

¹Ortiz was convicted of two other counts of sexual assault (counts 9 and 10) occurring in a separate area of M.P.'s home but does not argue that appellate counsel should have challenged the sufficiency of the evidence to support these convictions.

relatively short time.’” *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) (quoting *Wright v. State*, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990)). For example, where acts of sexual assault occurring during a single encounter involve different types of penetration, this court has held that each different type of penetration necessarily constitutes a separate and distinct sexual offense. *See, e.g., Peck v. State*, 116 Nev. 840, 848-49, 7 P.3d 470, 475 (2000) (affirming two counts of sexual assault where the defendant digitally penetrated the victim, then forcibly engaged her in sexual intercourse), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1266, 147 P.3d 1101, 1107 (2006), *abrogated on other grounds by Alotaibi v. State*, 133 Nev. 650, 404 P.3d 761 (2017); *Hutchins v. State*, 110 Nev. 103, 113, 867 P.2d 1136, 1143 (1994) (upholding four counts of sexual assault for four methods of penetration occurring during a single attack), *holding modified on other grounds by Mendoza v. State*, 122 Nev. 267, 275-76, 130 P.3d 176, 181 (2006); *Deeds v. State*, 97 Nev. 216, 216-17, 626 P.2d 271, 272 (1981) (upholding two sexual assault convictions for forced oral and vaginal penetration during a single encounter); *Wicker v. State*, 95 Nev. 804, 806, 603 P.2d 265, 266-67 (1979) (holding that vaginal, oral, and anal penetration constituted separate offenses, despite the acts occurring close in time to each other).

By contrast, when the acts of sexual assault occurring during a single encounter involve the same type of penetration, the acts support only one sexual assault conviction absent an interruption and subsequent reinitiation of activity. The decision in *Townsend v. State*, 103 Nev. 113, 734 P.2d 705 (1987), is illustrative. There, this court reviewed the propriety of two sexual assault convictions where the defendant lubricated the victim’s vaginal area, removed his hand to add more lubricant, then returned and penetrated her vagina with his finger. *See id.* at 120, 734 P.2d at 709-10. This court concluded that subjecting the defendant to two sexual assault convictions under these circumstances was “not sustainable,” as it would result in “a hypertechnical division of what was essentially a single act.” *Id.* at 121, 734 P.2d at 710. As this court later explained, “only one sexual assault occurred [because the defendant’s] actions were continuous and did not stop between the different acts.” *Peck*, 116 Nev. at 848, 7 P.3d at 475; *cf. Wright*, 106 Nev. at 650, 799 P.2d at 549-50 (holding that separate convictions for attempted and completed sexual assault were warranted because, before the completed offense, appellant briefly “stopped and waited while a car passed”). Thus, our precedent makes clear that multiple acts of the same type of penetration, even when performed in multiple sexual positions, are not separate and distinct sexual assaults when the encounter is continuous and there is no break or interruption between the acts. This court has not relied on instances of penetration alone to

determine how many distinct acts have been proven. *See Townsend*, 103 Nev. at 121, 734 P.2d at 710.

On direct appeal, Ortiz's appellate counsel identified the multiple sexual assault counts arising from the encounter in M.P.'s bedroom as a potential source of error. Specifically, appellate counsel unsuccessfully argued that the trial court erred by providing incorrect instructions and refusing to proffer Ortiz's requested instructions regarding conditions warranting multiple sexual assault convictions. As support for that instructional-error argument, appellate counsel relied on *Townsend*. After considering the instructional-error argument, this court concluded that the trial court did not abuse its discretion because the given instructions accurately reflected the law and generally encompassed Ortiz's requested instructions. *See Ortiz*, 2021 WL 1085375, at *2.

Despite focusing on *Townsend* and observing in the opening brief that "[s]eparate convictions for one continuous course of conduct cannot stand," appellate counsel failed to raise a sufficiency-of-the-evidence challenge. And notably, the fact that appellate counsel identified the relevant authority but failed to make the argument that most logically flowed from it cannot be explained by the size limit placed on appellate briefs given that the opening brief fell approximately 2,000 words short of that limit. *See* NRAP 32(a)(7)(A)(ii) (setting forth type-volume limitation for opening brief in a noncapital case). In these circumstances, we conclude that appellate counsel's omission of the sufficiency challenge based on *Townsend* and other similar cases fell below an objective standard of reasonableness.

Whether appellate counsel's deficient performance in this respect prejudiced Ortiz depends on the likelihood that the omitted sufficiency challenge would have succeeded on appeal. In that context, this court's inquiry on direct appeal would have been "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." *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Here, M.P. testified that Ortiz penetrated her vagina with his penis in four sexual positions, all occurring on or next to her bed. M.P. thought Ortiz removed and then reinserted his penis when moving from one position to another, but she could not be sure and was unable to recall any details. A victim in a sexual assault case must testify with some particularity about the incident and there must be some reliable indicia that the number of acts charged actually occurred. *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). M.P.'s testimony did not reveal the amount of time that passed between positions, if any, or how the transitions occurred.

She could not remember any specific events, actions, or statements that would tend to show interruption in Ortiz's conduct. Even viewing the evidence in the light most favorable to the State, our review of the record reveals that no rational trier of fact could have found beyond a reasonable doubt that each sexual position amounted to a separate and distinct sexual act. We therefore conclude that Ortiz has demonstrated that but for appellate counsel's omission, there is a reasonable probability that the result on direct appeal would have been different. *See Kirksey*, 112 Nev. at 998, 923 P.2d at 1114; *see also LaPierre*, 108 Nev. at 531, 836 P.2d at 58 (vacating five counts of sexual assault on appeal where there was insufficient evidence to support a finding that the number of acts charged actually occurred). Accordingly, Ortiz has established that the district court erred in denying this claim of ineffective assistance of appellate counsel.

The district court also erred in determining that Ortiz waived this claim by failing to raise it on direct appeal. The appellate-counsel claim could not have been raised on direct appeal, and the sufficiency challenge is properly considered in the context of that ineffective-assistance claim even if an independent claim based on the sufficiency challenge would be subject to procedural bars. *Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 535 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

The remaining claims of ineffective assistance of counsel lack merit

We have carefully considered the remaining ineffective-assistance-of-counsel claims raised in this appeal and conclude each lacks merit.

Ortiz argues that trial counsel provided ineffective assistance by failing to challenge the same sexual assault convictions. While it is possible trial counsel was also ineffective, Ortiz's reply brief specifically disavows any ineffectiveness claim for failure of trial counsel to challenge the charging document. Ortiz did not articulate what trial counsel should have done. As a result, we conclude that Ortiz failed to establish either deficient performance or prejudice, and the district court properly denied this claim with respect to trial counsel.

Ortiz also argues that trial counsel was ineffective for reserving an opening statement at the beginning of trial and then not giving the statement after the State rested its case. According to Ortiz, the lack of an opening statement prevented jurors from adequately considering the defense theory of the case. Even assuming trial counsel should have given an opening statement, Ortiz has failed to demonstrate prejudice. Ortiz testified at trial, stating that the encounter with M.P. was consensual. Furthermore, trial counsel presented a clear and organized closing argument, explaining Ortiz's defense

and highlighting inconsistencies that could undermine the victims' credibility. Ortiz has not shown a reasonable probability of a different outcome at trial had counsel made an opening statement to outline Ortiz's case. *See Watters v. State*, 129 Nev. 886, 890-91, 313 P.3d 243, 247 (2013) (explaining that opening statements merely outline what evidence counsel expects to present); *State v. Olivieri*, 49 Nev. 75, 77-78, 236 P. 1100, 1101 (1925) (explaining that opening statements "are not evidence . . . and cannot be so considered by the jury"). Thus, we conclude that the district court did not err in denying this ineffective-assistance claim.

Next, Ortiz asserts that trial counsel should not have stipulated that the orange jail-issued clothing found in M.P.'s home was Ortiz's because doing so exposed jurors to evidence of uncharged bad acts stemming from an unrelated arrest. Ortiz has failed to demonstrate deficient performance. Trial counsel's stipulation was not objectively unreasonable given Ortiz's DNA on the clothing. Additionally, the stipulation prevented the State from offering additional evidence about Ortiz's previous arrest and time in custody to link Ortiz to the clothing.

Likewise, Ortiz has failed to show prejudice for two reasons. First, any reference to the clothing having come from the Clark County Detention Center was redacted, and Ortiz failed to allege sufficient facts demonstrating that the jurors would infer the clothing was jail-issued based solely on its color. Second, Ortiz took the stand and testified about the unrelated arrest. Ortiz further contends that by stipulating to ownership of both pairs of boxer shorts, rather than only the one containing Ortiz's DNA, trial counsel could not argue that the second pair of shorts pointed to an alternate suspect. Ortiz fails to demonstrate a reasonable probability that this argument would have changed the outcome of the trial given the implausibility of this theory and lack of evidence corroborating the presence of another unidentified person in M.P.'s home. Therefore, we conclude that the district court did not err in denying this ineffective-assistance claim.

To the extent that Ortiz contends trial counsel was deficient for failing to prepare him to testify, this argument is belied by the record. Ortiz testified during cross-examination to meeting with counsel three to four times to prepare the testimony.

Additionally, Ortiz contends that trial and appellate counsel should have challenged the testimony of M.P.'s ex-husband as improper victim-impact testimony. Ortiz has not shown deficient performance given that trial counsel objected to the ex-husband's testimony about the breakdown of his marriage to M.P., which the district court overruled. Given the overruling of the objection, Ortiz has not shown counsel could have successfully challenged the testimony with a pretrial motion or additional objection. *See Donovan*

v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (holding that counsel is not deficient for failing to make futile motions). Ortiz's contention that counsel should have objected to the ex-husband's testimony as improperly vouching for M.P.'s credibility was also without merit. The ex-husband's explanation that the marriage ended due to his inability to work through M.P. being sexually assaulted did not directly state any opinion about the truth of M.P.'s testimony. See *Farmer v. State*, 133 Nev. 693, 705, 405 P.3d 114, 125 (2017) (explaining that impermissible vouching occurs when a witness "testif[ies] as to the truthfulness of another witness" (quoting *Perez v. State*, 129 Nev. 850, 861, 313 P.3d 862, 870 (2013))). Therefore, neither trial nor appellate counsel failed to raise a meritorious issue. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("[C]ounsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Further, Ortiz has failed to demonstrate prejudice arising from the jury's knowledge of M.P.'s divorce, particularly given the nature of the offenses and overwhelming evidence of guilt presented at trial. Therefore, we conclude that the district court did not err in denying this ineffective-assistance claim.

Finally, Ortiz asserts that trial and appellate counsel should have challenged the conviction for second-degree kidnapping of E.C. as incidental to the robbery conviction. At trial, the evidence showed that M.P. encouraged Ortiz to take E.C.'s car, but he declined. According to M.P., Ortiz stated, "no, the three of us are going to go." Ortiz's statement that M.P. and E.C. would be leaving with him, after having shown both victims that he had a gun, caused M.P. and E.C. to reasonably believe they could not freely leave their home. A short time later, Ortiz asked E.C. for a pair of socks, which she retrieved from her room and gave to him. The detention of E.C., so that Ortiz could take her with him when he left the residence, was not inherent to the robbery. See *Mendoza*, 122 Nev. at 275, 130 P.3d at 181 (holding that convictions for both robbery and kidnapping arising from the same course of conduct may be sustained where "any movement or restraint [stands] alone with independent significance from the act of robbery itself"). Thus, the evidence supported the dual convictions, and Ortiz has not shown that trial or appellate counsel omitted a meritorious issue. Accordingly, we conclude that the district court did not err in denying this ineffective-assistance claim.

CONCLUSION

By only eliciting testimony that established one type of sexual penetration on and near the victim's bed, without additional detail, the State failed to present evidence from which a rational juror could have found four separate and distinct acts of sexual assault. Because appellate counsel identified the possibility of error relating to these multiple convictions but failed to challenge the sufficiency of the

evidence supporting them on direct appeal, we conclude that counsel's performance fell below an objective standard of reasonableness and prejudiced Ortiz. We conclude that Ortiz's other claims lack merit. Accordingly, we affirm in part, reverse in part, and remand with instructions to grant the petition in part and to vacate the convictions of sexual assault imposed in counts 5-7.

STIGLICH and LEE, JJ., concur.

KWAME DE-MARKQUISE MORRISON, APPELLANT, v. THE
STATE OF NEVADA, RESPONDENT.

No. 85868-COA

April 4, 2024

548 P.3d 431

Appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of sexual assault upon a minor under 14 years of age and one count of use of a minor under the age of 14 in producing pornography. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Affirmed.

Law Office of Amanda Pellizzari, LLC, and *Amanda Pellizzari*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander G. Chen* and *Karen L. Mishler*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Court of Appeals, GIBBONS, C.J., and BULLA and WESTBROOK, JJ.

OPINION

By the Court, WESTBROOK, J.:

A jury convicted appellant Kwame De-Markquise Morrison of three counts of sexual assault upon a minor under 14 years of age and one count of use of a minor under the age of 14 in producing pornography. Morrison contends that the district court committed reversible error by instructing the jury that a lack of knowledge or a mistake as to the victim’s age is not a defense to a charge of using a minor in producing pornography. We agree that the instruction was inaccurate because the State is required to prove that the defendant “knowingly” used “a minor” in producing pornography. *See* NRS 200.710(1). Nevertheless, for purposes of determining the appropriate penalty for the offense, the State is not required to prove that the defendant knew or should have known that the victim was under the age of 14. *See* NRS 200.750(2). Here, because Morrison admitted that he believed A.M. was 16 years old—and therefore a minor—during their sexual relationship, the district court’s instructional error was harmless beyond a reasonable doubt. We also reject Morrison’s remaining claims on appeal, and accordingly, we affirm Morrison’s judgment of conviction.

FACTUAL AND PROCEDURAL HISTORY

In 2016, 21-year-old Morrison initiated a sexual relationship with A.M., who was only 12 years old at the time. In June 2017, A.M. discovered that she was pregnant and disclosed the relationship to her mother, who filed a police report that identified Morrison as A.M.'s sexual partner. In October 2017, shortly after turning 13 years old, A.M. gave birth to a boy who was later adopted.

Thereafter, A.M. participated in a forensic interview with Las Vegas Metropolitan Police Department (LVMPD) Detective Becky Salkoff. During her interview, A.M. identified Morrison as her sexual partner. Detective Salkoff then conducted two recorded forensic interviews with Morrison in July and August 2018. During the interviews, Morrison admitted he had sex with A.M. two to three times but stated that he believed A.M. was 16 years old.¹ Subsequently, Detective Salkoff subpoenaed Morrison's Facebook records, which included sexually explicit pictures that A.M. had taken of herself and sent to him at his request. Detective Salkoff also collected DNA from Morrison, A.M., and A.M.'s child, which confirmed that Morrison was the child's father.

The State ultimately charged Morrison by indictment with six counts of sexual assault upon a minor under 14 years of age and one count of use of a minor under the age of 14 in producing pornography. Morrison's jury trial was scheduled for early June 2022, with calendar call one week prior to trial. Three days before calendar call, Morrison filed a motion to dismiss his appointed counsel in which he requested the appointment of new counsel. At calendar call, the district court denied Morrison's request to appoint new counsel. Although Morrison initially indicated that he might be interested in representing himself at trial, he subsequently told the court that he did not want to be canvassed to represent himself. Though his jury trial was continued, at no point thereafter did Morrison ever raise any additional concerns about counsel, nor did he ever renew his request to represent himself.

Morrison's three-day jury trial commenced in October 2022. A.M. testified that Morrison lived in the house next door to her and knew some of her other siblings. She first met Morrison in August 2016, on her first day of sixth grade when she and her siblings walked past his house on their way to school. A.M. was 11 years old at the time.²

¹Although the parties did not include the interview transcripts in the record on appeal, the closing arguments reflect that Morrison made these admissions during the interviews.

²The State introduced into evidence A.M.'s birth certificate, establishing that she was born in October 2004.

According to A.M., her first sexual interaction with Morrison occurred when she was playing with her younger siblings in front of her house. Morrison asked her to come over to him, gave her a candy bar, and then propositioned her for sex. Although A.M. could not recall whether they had sex on that occasion, A.M. testified in detail about five other incidents that occurred while she was between the ages of 12 and 13. A.M. stated that on each occasion, Morrison inserted his fingers into her vagina and then had sexual intercourse with her. A.M. testified that the first incident occurred on a bathroom floor at Morrison's house, the second incident occurred in Morrison's bedroom, the third incident occurred behind a McDonald's dumpster, and the fourth incident occurred at her house. The fifth incident occurred in November or December 2017 in her backyard, after the birth of her son.³

Next, the State published an exhibit containing Morrison's Facebook communications with A.M. and asked her about several of the messages. A.M. testified that, at Morrison's request, she sent him sexually explicit pictures of herself over Facebook, which included nude photos of her breasts and vagina. A.M. testified that in January 2017, when she was 12 years old, Morrison sent her a message directing her to "[t]urn on the light," and she sent him a photo in response. A.M. also testified about a message she received after she sent Morrison a photo, where Morrison told her, "Open your legs more. You don't have a flash." Finally, A.M. testified about a message she received from Morrison in December 2017, when she was 13 years old, requesting another photo of her vagina.

The State presented testimony from two LVMPD forensic scientists establishing that Morrison was the father of A.M.'s son. Finally, Detective Salkoff testified about her investigation into Morrison's case. She testified about her forensic interview with A.M.; her collection of DNA from A.M., A.M.'s son, and Morrison; and her two recorded interviews with Morrison. During her testimony, the State published the transcripts of Detective Salkoff's interviews with Morrison and played the recordings of those interviews for the jury. Although neither party included those transcripts in the record on appeal, the State's closing argument indicates that Morrison told Detective Salkoff that he had sex with A.M. two or three times, and Morrison did not object to that representation of the evidence. Likewise, Morrison argued in closing that, in his statement to Detective Salkoff, "he told you he believed she was 16. And I'm sure that he believed that a 16 year old can consent to sex, as that is the law." Finally, the State's rebuttal closing argument reflects that Morrison told Detective Salkoff he had sex with A.M. by a dumpster

³The State also introduced into evidence A.M.'s son's birth certificate, establishing that he was born in October 2017 when A.M. was 13 years old.

at McDonald's and on his bathroom floor, corroborating two of the incidents to which A.M. testified. Morrison did not object to this description of the evidence either.

While settling jury instructions, the State proposed an instruction providing that a defendant's lack of knowledge or mistake as to the victim's age is not a defense to *either* of the charged crimes—sexual assault upon a minor under the age of 14 *or* use of a minor under the age of 14 in the production of pornography. Although Morrison agreed that the instruction was correct as applied to the sexual assault charges, he objected to its application to the pornography charge. Over Morrison's objection, the district court included the State's proposed jury instruction for all charges.

Ultimately, the jury found Morrison guilty of three counts of sexual assault upon a minor under 14 years of age and one count of use of a minor under the age of 14 to produce pornography. The jury acquitted Morrison of the remaining three sexual assault charges. The district court sentenced Morrison to imprisonment for life with the possibility of parole after 35 years for each sexual assault conviction and life with the possibility of parole after 10 years for using a minor under 14 to produce pornography, with all sentences to run concurrently. Morrison timely appealed.

ANALYSIS

Morrison contends that the district court incorrectly instructed the jury that a lack of knowledge or mistake of fact as to the victim's age is not a defense to the charge of use of a minor in producing pornography. In addition, he argues that the district court abused its discretion by denying his motion to dismiss counsel and by failing to conduct a *Faretta*⁴ canvass, and that the State committed prosecutorial misconduct by knowingly allowing A.M. to testify falsely and by improperly commenting on the evidence. We address each argument in turn.

Although the district court provided an inaccurate jury instruction, the error was harmless beyond a reasonable doubt

Morrison argues that the district court committed reversible error when it gave the following instruction to the jury:

The lack of knowledge of the age, or a reasonable mistake as to the age, of a child victim of sexual assault of a minor under the age of fourteen and use of a minor under the age of fourteen in producing pornography is not a defense to the crimes of sexual assault of a minor under the age of fourteen and use of a minor under the age of fourteen in producing pornography.

⁴*Faretta v. California*, 422 U.S. 806 (1975).

Morrison contends that this instruction misstated NRS 200.710(1), which criminalizes “knowingly” using “a minor” to produce pornography.

District courts have “broad discretion” in settling jury instructions; therefore, this court generally reviews a district court’s decision regarding jury instructions for abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). However, whether a jury instruction is an accurate statement of the law is reviewed de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). Additionally, when interpreting a statute, this court will “interpret clear and unambiguous statutory language by its plain meaning unless doing so would lead to an unreasonable or absurd result.” *Moore v. State*, 136 Nev. 620, 622-23, 475 P.3d 33, 36 (2020).

Morrison was charged under NRS 200.710(1) with using a minor in producing pornography. NRS 200.710(1) provides that “[a] person who *knowingly* uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750.” (Emphasis added.) For purposes of this statute, the term “minor” means an individual under the age of 18. *State v. Hughes*, 127 Nev. 626, 628-29, 261 P.3d 1067, 1069 (2011). Morrison argues that the use of the word “knowingly” in NRS 200.710(1) means that the State must prove that Morrison knew or had reason to know that A.M. was a minor at the time of the crime. We agree.

As the Nevada Supreme Court explained in *Garcia v. Sixth Judicial District Court*, “[w]hen an intent requirement is supplied in the statute, in order to sustain a conviction, that intent must be proven as to each element of the crime.” 117 Nev. 697, 701, 30 P.3d 1110, 1112 (2001). In *Garcia*, the supreme court addressed NRS 202.055, which criminalizes the sale of alcohol to persons under 21 years of age. Because NRS 202.055 made it unlawful to “knowingly . . . [s]ell[] . . . an alcoholic beverage to any person under 21 years of age,” the court concluded that the statute required proof of “either actual or constructive knowledge of the purchaser’s age.” *Id.* at 698, 30 P.3d at 1111. In reaching this conclusion, the supreme court distinguished NRS 202.055 from “other age-specific statutes” that did not contain a knowledge element, including NRS 202.2493(2) (sale of tobacco to persons under 18), NRS 200.366-.368 (sexual assault and statutory sexual seduction), and NRS 463.350 (presence of persons under 21 years in gaming institutions). *Id.* at 701 n.9, 30 P.3d at 1113 n.9. The supreme court pointed out that, unlike the other statutes, “a defendant’s state of mind (‘knowingly’) has expressly been included in NRS 202.055, thus requiring

a defendant's knowledge of each element to be proven." *Id.* at 701-02, 30 P.3d at 1113.

The United States Supreme Court reached a similar conclusion in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). There, the Court analyzed a statute that imposes a criminal penalty if the defendant "*knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.*" *Id.* at 647 (quoting 18 U.S.C. § 1028A(a)(1) (emphases in original)). The Supreme Court concluded that the knowledge requirement applied to each element of the statute and, as a result, the government was required to prove that the defendant knew that the means of identification belonged to someone else. *Id.* at 657.

The Court explained that in ordinary English usage, "whe[n] a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Id.* at 650. For example, if someone says that "a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy *and* that the toy belongs to his sibling." *Id.* at 651 (emphasis in original). Because courts interpret criminal statutes in accordance with this ordinary English usage, courts "ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 652. Therefore, the Supreme Court determined that the modifying adverb "knowingly" in § 1028A(a)(1) applied to the statute's transitive verbs ("transfers, possesses, or uses") *and* the verbs' object ("a means of identification of another person"). *See id.* at 650.

Applying this reasoning to the plain language of NRS 200.710(1), we conclude that the word "knowingly" applies to each element of the crime of use of a minor in the production of pornography, including the transitive verbs ("uses, encourages, entices or permits") *and* the verbs' object ("a minor"). Therefore, to obtain a conviction under NRS 200.710(1), the State must prove, beyond a reasonable doubt, that the defendant knew or had reason to know that the victim was a minor—under the age of 18—at the time of the crime.

The State posits that because NRS 200.710(1) is intended to protect children from sexual abuse, the term "knowingly" should be interpreted like the term "willfully" to require only general intent. To support this argument, the State relies on *Jenkins v. State*, 110 Nev. 865, 877 P.2d 1063 (1994), which held that a reasonable mistake of fact as to the age of a victim is not a defense to the crime of statutory sexual seduction, and *Moore v. State*, 136 Nev. 620, 475 P.3d 33 (2020), which held that a mistaken belief as to the victim's

age is not a defense to the crime of lewdness with a child under the age of 16.

However, both *Jenkins* and *Moore*—and the statutes cited therein—are distinguishable. Unlike the crime of use of a minor in the production of pornography, the crimes of statutory sexual seduction and lewdness do not contain an express knowledge requirement. Statutory sexual seduction is a general intent crime,⁵ which requires only “an intent to do the act, rather than any intent to violate the law or injure another.” *Jenkins*, 110 Nev. at 870, 877 P.2d at 1066. And while the crime of lewdness with a child under 16 is a specific intent crime,⁶ the structure of that statute differs from NRS 200.710(1). In NRS 201.230, the age element *precedes* the specific intent element, and the “plain language [does not] otherwise require the State to prove that the defendant knew or should have known that the child was under the age of 16.” *Moore*, 136 Nev. at 623-24, 475 P.3d at 36.

Furthermore, unlike the term “willfully,” which can be interpreted to refer to a general intent crime in the context of child abuse statutes, *see Jenkins*, 110 Nev. at 870, 877 P.2d at 1066, the term “knowingly” requires actual or constructive knowledge, *see* NRS 193.017 (“‘Knowingly’ imports a knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness. Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry.”). To interpret the word “knowingly” as imposing only a general intent requirement would conflict with the term’s statutory definition. *See Williams v. State, Dep’t of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (“This court ‘avoid[s] statutory interpretation that renders language meaningless or superfluous.’” (quoting *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011))).

Nevertheless, while the State was required to prove beyond a reasonable doubt that Morrison knew or should have known that A.M. was a minor under the age of 18 to impose criminal liability under NRS 200.710(1), the State was *not* required to prove that Morrison knew or should have known that A.M. was, in fact, under the age of

⁵NRS 200.364(10) (“‘Statutory sexual seduction’ means ordinary sexual intercourse, anal intercourse or sexual penetration committed by a person 18 years of age or older with a person who is 14 or 15 years of age and who is at least 4 years younger than the perpetrator.”).

⁶NRS 201.230(1)(a) (defining the crime of lewdness with a child under 16 as occurring when a person “18 years of age or older . . . willfully and lewdly commits any lewd or lascivious act . . . upon or with the body . . . of a child under the age of 16 years, *with the intent of* arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child” (emphasis added)).

14 for purposes of determining the appropriate penalty at sentencing. NRS 200.710(1) provides that a defendant who is guilty of using a minor in the production of pornography shall be “punished as provided in NRS 200.750.” NRS 200.750 sets forth the two possible penalties for a violation of NRS 200.710(1), depending on whether the minor is “14 years of age or older” or “less than 14 years of age.”

Here, the State charged Morrison under NRS 200.750(2), on the basis that A.M. was “less than 14 years of age” when the crime was committed. Yet, unlike NRS 200.710(1), NRS 200.750 does not contain the word “knowingly.” And where the plain language of NRS 200.750 does not include the element of knowledge, we agree with the State that requiring it to prove the defendant knew or should have known that the victim was under the age of 14 would contravene Nevada’s strong public policy of protecting minors from sex crimes. *See Moore*, 136 Nev. at 623-24, 475 P.3d at 36-37 (holding that the State need not prove that the defendant knew or should have known that a minor was under the age of 16 to obtain a conviction for lewdness where the statute’s plain language did not include the element of knowledge).

Although the State was not required to prove that Morrison knew or had reason to know that A.M. was under the age of 14 to impose the sentence set forth in NRS 200.750(2), we conclude that the jury instruction given in this case was inaccurate insofar as it instructed that the State did not need to prove that Morrison knew or had reason to know that A.M. was a minor under the age of 18 to establish criminal liability under NRS 200.710(1). As a result, we must determine whether the instructional error in this case requires reversal.

When a jury instruction is inaccurate, we review for harmless error. *Honea v. State*, 136 Nev. 285, 289, 466 P.3d 522, 526 (2020). An erroneous jury instruction is harmless only if this court is “convinced beyond a reasonable doubt that the jury’s verdict was not attributable to the error and that the error was harmless under the facts and circumstances of [the] case.” *Id.* at 289-90, 466 P.3d at 526 (quoting *Crawford*, 121 Nev. at 756, 121 P.3d at 590). In this case, we are convinced beyond a reasonable doubt that the instructional error was harmless.

Initially, we note that the jury was properly instructed on the statutory elements of the crime of use of a minor in producing pornography in a separate instruction.⁷ More importantly, however,

⁷Specifically, Jury Instruction 16 provided, in relevant part, that

[a] person who knowingly either (1) uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance, or (2) uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance regardless of whether the minor is aware that the sexual portrayal is part of a performance, has committed the crime of Use of Minor in Producing Pornography.

Morrison stated in his recorded interview—that was admitted by stipulation and relied on by his attorney in closing argument—that he believed A.M. was 16 years old at the time of their sexual relationship. That Morrison knew A.M. was a minor is further supported by overwhelming evidence, including A.M.’s testimony that Morrison was her neighbor, she first met him while walking to middle school at the age of 11, and he subsequently propositioned her by offering her a candy bar while she was outside playing with her siblings. Although Morrison argues that A.M. “looked like a grown woman,” he does not point to any evidence in the record to support that assertion. *Cf. Garcia*, 117 Nev. at 703, 30 P.3d at 1113 (reversing a conviction under NRS 202.055 where the State failed to establish that the defendant had actual or constructive knowledge that the purchaser of alcohol was under the age of 21 where “[t]he record reveals that [the minor] looked substantially older than twenty-one years of age, had a full beard, wore a hat and perhaps even sunglasses when he bought the alcohol” and “all of the petitioners testified that he looked twenty-four to twenty-seven years old”). And, because Morrison conceded his awareness that A.M. was under the age of 18, and therefore a minor, we conclude that the jury’s verdict was not due to the inaccurate instruction; thus, the error was harmless beyond a reasonable doubt.

The district court did not abuse its discretion by denying Morrison’s motion to dismiss counsel

Morrison argues that the district court abused its discretion when it denied his motion to dismiss appointed counsel because the court failed to adequately inquire about his ineffective assistance claim as required by *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004).

We review a district court’s denial of a motion to dismiss or substitute counsel for an abuse of discretion. *Garcia v. State*, 121 Nev. 327, 337, 113 P.3d 836, 842-43 (2005) (applying the *Young* factors to a motion to dismiss counsel), *modified on other grounds by Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006). When reviewing the district court’s decision, we consider three factors: “(1) the extent of the conflict between the defendant and counsel, (2) the adequacy of the [district] court’s inquiry into the defendant’s complaint, and (3) the timeliness of the motion and the extent of any inconvenience or delay.” *Young*, 120 Nev. at 965, 102 P.3d at 574.

As to the first factor, Morrison fails to establish an irreconcilable conflict with his appointed counsel. Morrison filed a single motion to substitute counsel shortly before his scheduled trial. When given the opportunity to describe the alleged conflict, Morrison claimed that counsel failed to communicate with him, but then acknowledged that they had recently attended two settlement conferences together. Morrison’s allegations do not demonstrate a significant

breakdown in his relationship with appointed counsel that would warrant substitution. *Cf. id.* at 969, 102 P.3d at 576 (finding a “significant breakdown” in the attorney-client relationship that warranted substitution of counsel where defendant complained about counsel to the court on five separate occasions and counsel violated a court directive to visit the defendant in jail).

Morrison also fails to demonstrate that the district court’s inquiry was inadequate. Morrison accepted his counsel’s assurance of future communication as a resolution to the communication issue and never renewed his request to dismiss counsel. *See Garcia*, 121 Nev. at 339, 113 P.3d at 844 (concluding that the district court’s inquiry, albeit limited, was adequate where “[the defendant’s] attorney addressed the court on the motion [to substitute counsel] and agreed to resolve the issues in due course”).⁸ Therefore, although the district court’s inquiry was limited, it was adequate.

As to the third factor, the district court noted that Morrison’s request was made approximately one week prior to trial, and Morrison concedes on appeal that his motion was “admittedly quite untimely.” *See id.* at 338-39, 113 P.3d at 843 (finding a request for substitution of counsel untimely when it was made at calendar call, just days before trial was set to begin). Therefore, we conclude that the district court did not abuse its discretion by denying Morrison’s motion to dismiss counsel.

The district court did not err by failing to conduct a Faretta canvass

Morrison next asserts that the district court abused its discretion when it failed to perform a *Faretta*⁹ canvass after he requested to represent himself at calendar call. Though Morrison initially asked to be canvassed, following his counsel’s assurance of future communication, he withdrew his request. Because Morrison withdrew his request for self-representation, he invited any alleged error in this regard. *See LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014) (holding that “a party will not be heard to complain on appeal of errors which he himself has induced or provoked”). Therefore, Morrison is not entitled to relief on this claim.

The State did not commit prosecutorial misconduct

Citing *Hanley v. Sheriff*, 85 Nev. 615, 460 P.2d 162 (1969), Morrison argues that the State committed prosecutorial misconduct

⁸We also note that Morrison blanketly asserts that the district court’s inquiry was deficient but fails to provide any legal authorities or record citations in support of his claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant’s argument that is not cogently argued or lacks the support of relevant authority); NRAP 28(a)(10).

⁹*Faretta*, 422 U.S. 806.

by knowingly allowing A.M. to provide false testimony. Morrison contends that A.M. falsely testified that she did not initiate sex or sexual conversations with Morrison and that Morrison forced her to have sex. Morrison further contends that the State had a duty “to correct” this testimony, which was elicited during his cross-examination of A.M.

Morrison did not object at trial, so we review his claim for plain error. *See Rose v. State*, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007) (providing that plain error review applies when the appellant failed to object to alleged prosecutorial misconduct). Prosecutorial misconduct is considered plain error if the error either “(1) had a prejudicial impact on the verdict when viewed in the context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.” *Id.* (citation and internal quotation marks omitted).

In *Hanley*, the Nevada Supreme Court addressed a claim of prosecutorial misconduct, noting that “[i]f the state knows that its witness has testified falsely on a point relevant to the credibility of that witness, and fails to correct that falsehood, the conviction is constitutionally infirm.” 85 Nev. at 617, 460 P.2d at 163 (citing *Napue v. Illinois*, 360 U.S. 264 (1969)). There, the defendant argued that prosecutorial misconduct required his release from custody because a key witness for the State subsequently recanted his preliminary hearing testimony that implicated the defendant in a murder. *See id.* However, the supreme court disagreed, finding nothing in the record to establish that the State “knowingly offered false testimony.” *Id.*

In this case, Morrison cannot establish prosecutorial misconduct, let alone a plain error requiring reversal. At the outset, we note that Morrison does not cite any evidence in the record demonstrating that A.M. testified falsely, that the State *knew* of any alleged falsehoods, or that the State knowingly elicited false testimony from A.M. *Cf.* NRAP 28(e)(1) (“[E]very assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.”).

To establish that the State “knew” A.M. testified falsely, Morrison summarily asserts that the State “had all these records, including Facebook and text messages,” which contradicted A.M.’s trial testimony. Morrison failed, however, to provide this court with any of the relevant messages to support this claim.¹⁰ The trial transcript

¹⁰Although the parties stipulated to admit two exhibits containing A.M.’s Facebook communications with Morrison, Morrison did not include any of those communications in the record on appeal. *See* NRAP 10(a) (stating that “[t]he trial court record consists of the papers and exhibits filed in the district court”); NRAP 10(b)(1) (providing that the parties shall include in an appendix “the portions of the trial court record to be used on appeal”); *see also*

reflects that Morrison referenced A.M.'s Facebook communications while cross-examining A.M. in an effort to impeach her credibility;¹¹ however, the State did not conduct any redirect thereafter. To the extent Morrison implies that *Hanley* required the State to conduct redirect and highlight the alleged inconsistencies identified by Morrison on cross-examination, we disagree. Even if some of the Facebook messages appeared to be inconsistent with A.M.'s testimony during cross-examination, Morrison has not established that the State engaged in misconduct by subsequently failing to "correct" her testimony.

Likewise, Morrison has not established a prejudicial impact on the verdict. In his closing argument, Morrison took full advantage of the alleged contradictions between the Facebook messages and A.M.'s testimony on cross-examination to argue that "everything [A.M.] said to you yesterday was a lie" and ask the jury to disregard her testimony. Arguably, Morrison benefited from his impeachment of A.M., with the jury acquitting him of the three counts of sexual assault that were not independently corroborated by his own admissions. Furthermore, even if A.M. did testify falsely on matters of force or consent, the State was not required to prove that Morrison forced A.M. to have intercourse or that A.M. did not consent to intercourse. *See* NRS 200.366(1)(b) ("A person is guilty of sexual assault if the person . . . [c]ommits a sexual penetration upon a child under the age of 14 years . . ."). We therefore conclude that Morrison has not established plain error.

The State did not improperly comment on the evidence during closing argument

Morrison argues that the district court erred in overruling his objection to the State's comment during closing argument that Morrison attended high school with A.M.'s older brother and therefore would have known that A.M. was not age 16 or older at the time of the offenses. Morrison contends on appeal, as he did below,

NRAP 10(b)(2) (stating that "[i]f exhibits cannot be copied to be included in the appendix the parties may request transmittal of the original exhibits"). Likewise, Morrison did not include in the record on appeal any text messages between himself and A.M. As a result, we cannot determine whether A.M.'s trial testimony was inconsistent with her Facebook or text messages, let alone that her trial testimony was "false." And because it is the appellant's burden to ensure that a proper appellate record is prepared, we necessarily presume that the missing documents support the challenged decisions, including the jury's verdict. *Cf. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

¹¹On cross-examination, Morrison sought to portray his sexual relationship with A.M. as consensual and to depict A.M. as a liar. Initially, A.M. testified that Morrison forced her to have sex. After confronting A.M. with Facebook messages that purportedly indicated otherwise, at the end of her cross-examination, A.M. conceded that she "agree[d]" to have sex with Morrison.

that the prosecutor's comment was based on inadmissible hearsay because Detective Salkoff made that statement during a recorded interview that Morrison stipulated to admit into evidence. The district court overruled the objection, finding that the statement was admissible since Morrison's "acquiescence" in response to Detective Salkoff's statement effectively adopted it.¹²

A district court's evidentiary rulings, and its rulings regarding the latitude allowed to counsel in closing argument, are reviewed for an abuse of discretion. *Glover v. Eighth Jud. Dist. Ct.*, 125 Nev. 691, 704, 220 P.3d 684, 693 (2009). Here, because Morrison stipulated to admit the video recording of the interview and did not object when it was played for the jury, Morrison forfeited any claim that Detective Salkoff's statements during that interview were inadmissible hearsay. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) ("The failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal.").

While Morrison challenges the State's reference to the interview during its closing argument, "[t]he State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence." *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001). Because the video recording was admitted by stipulation, the State's reference was a permissible comment on the evidence presented at trial. Therefore, Morrison is not entitled to relief.

CONCLUSION

The district court erred when it instructed the jury that a lack of knowledge or a reasonable mistake as to the age of a child victim is not a defense to the crime of use of a minor under the age of 14 in producing pornography. Although the State did not need to prove that Morrison knew or had reason to know that A.M. was under the age of 14 to impose a sentence under NRS 200.750(2), the State *did* need to prove beyond a reasonable doubt that Morrison knew or had reason to know that A.M. was a minor under the age of 18 for the jury to convict him under NRS 200.710(1). Because Morrison admitted to police that he believed A.M. was 16 years old during their sexual relationship, however, the district court's instructional

¹²Morrison argues that the court's ruling violated his Fifth Amendment right to remain silent in response to Detective Salkoff's comment; however, Morrison has not provided this court with the video recording or a transcript of the recorded interview, so we necessarily presume that he waived his right to remain silent at the outset of the interview. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 135; *see also Anderson v. Charles*, 447 U.S. 404, 408 (1980) (holding that "a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent" and may be questioned about why they did not correct an officer's factual statement during an interview).

error was harmless beyond a reasonable doubt. Finding no other errors, we affirm the judgment of conviction.¹³

GIBBONS, C.J., and BULLA, J., concur.

¹³We reject Morrison’s argument that his convictions and sentence are unconstitutional under the Eighth Amendment because the underlying statutes were “meant to punish pedophiles” and Morrison “doesn’t have an attraction to small children.” And Morrison does not cogently argue why the punishment imposed in this case violates the Equal Protection Clause. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6. Insofar as Morrison has raised any other arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they do not present a basis for relief.

IN THE MATTER OF D.C., JR., DATE OF BIRTH 01/19/2007, A MINOR
15 YEARS OF AGE.

D.C., JR., APPELLANT, v. THE STATE OF NEVADA,
RESPONDENT.

No. 84563

April 18, 2024

546 P.3d 810

Appeal from a district court order certifying a juvenile for criminal proceedings as an adult. Eighth Judicial District Court, Family Division, Clark County; William O. Voy, Judge.

Vacated and remanded with instructions.

Darin Imlay, Public Defender, *P. David Westbrook*, Chief Deputy Public Defender, and *Haylee M. Kolkoski*, Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen* and *Jonathan E. VanBoskerck*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PICKERING, J.:

The juvenile court certified D.C., Jr., for prosecution as an adult on charges of murder, attempted murder, and robbery. D.C. has an IQ of 66 and was 14 years old when the events giving rise to the charges occurred. Through counsel, D.C. requested a competency determination before proceeding to the certification hearing. After an initial finding of incompetency followed by competency-restoration sessions, the juvenile court declared D.C. competent to proceed. In declaring D.C. competent, the juvenile court did not expressly address the conflicting and equivocal expert testimony as to D.C.'s understanding of the proceedings and ability to assist counsel. It also appears to have applied juvenile-court-specific competency standards, emphasizing, for example, that there is no right to a jury trial in a juvenile delinquency adjudication.

This was error. A juvenile who faces the possibility of prosecution as an adult on serious criminal charges as a result of a certification proceeding must meet the adult criminal court standard for competence. Because the juvenile court appears to have applied an incorrect standard and did not support its determination with adequate findings, we vacate the certification order and

the competency determination and remand for the juvenile court to reassess D.C.'s competency.

I.

This case grows out of a Las Vegas Metropolitan Police Department investigation into three separate incidents during which an assailant or assailants robbed victims at gunpoint, fatally shooting two of them and wounding the third. Detectives determined that bullets used in each of those three incidents were fired from the same handgun. All three incidents occurred within a quarter mile of each other and within the timespan of just over a week. The third victim had messaged an unknown individual to set up a meeting about three minutes before the shooting. Detectives traced the IP address of the person on the other end of that conversation to the address of the apartment where D.C. lived with his father. Eyewitness descriptions of the assailant(s) varied, but in serving a search warrant for that address, detectives saw D.C. and concluded that he matched at least one witness's description. In D.C.'s bedroom, detectives found a watch matching the watch stolen from a victim, as well as a hoodie resembling one seen in a surveillance video near the time of the first incident. Following the search, detectives arrested D.C.

The State filed a delinquency petition against D.C. and, on the same day, petitioned the juvenile court to certify D.C. for criminal proceedings as an adult. D.C.'s attorney requested a competency evaluation. The next month, Dr. Lisa Foerster determined that D.C. did not meet all of the competency criteria but opined that competency restoration sessions likely would restore him to competence. D.C. attended three competency restoration sessions with Dr. Bonnie Brown, who reported at the conclusion of the sessions that D.C. had "demonstrated significant improvement related to competence and would be considered appropriate to proceed with adjudication at this time." But Dr. Brown also noted that D.C.'s comprehension level was consistent with his cognitive abilities—he had a documented comprehension level of second to third grade—and was "not [] expected to significantly improve." She also cautioned that without "frequent rehearsal, [D.C. was] at risk to again become not competent." Dr. Brown therefore recommended periodic reassessment and, if needed, additional restoration sessions.

Following the restoration sessions with Dr. Brown, Dr. Foerster again evaluated D.C. Her report was inconclusive about whether D.C. was competent, as she suspected that D.C. had "put forth less than optimal effort." She agreed with Dr. Brown that D.C. might benefit from educational classes to maintain his knowledge. At D.C.'s counsel's request, Dr. Sharon Jones-Forrester conducted a neuropsychological evaluation. She concluded that D.C. was not

competent to proceed and that he was unlikely to become competent because of his intellectual disability and neurocognitive deficits.

All three experts testified at the competency hearing. Dr. Jones-Forrester testified that D.C. had an intellectual disability, as well as unspecified neurocognitive disorder—possibly consistent with fetal alcohol syndrome—“over and above what would be expected from his intellectual disability.” In Dr. Jones-Forrester’s opinion, D.C. was incompetent to proceed. Dr. Foerster did not dispute that D.C. had an IQ of 66, and both Dr. Foerster and Dr. Brown agreed that D.C. had “cognitive deficits.” As with her second evaluation, Dr. Foerster’s testimony was inconclusive about D.C.’s competence; she suspected he was malingering and left it to the juvenile court to determine whether D.C. was competent. Dr. Brown concluded that D.C. was still competent to proceed, stating that she stood by her report’s conclusion that D.C. should have frequent rehearsal. She criticized Dr. Jones-Forrester for measuring D.C.’s competence by an adult standard, instead of a more relaxed juvenile court standard. Addressing D.C.’s poor test results, Dr. Brown suggested that D.C. may have realized that it was “to his benefit to not be competent.” Dr. Jones-Forrester disagreed that D.C. was trying to appear lower functioning than he was, noting that she based her opinion on recognized validity measures. Unlike Dr. Jones-Forrester, Dr. Foerster chose not to use validity measures, concluding that because of D.C.’s IQ of 66, “the validity of the results would be difficult to stand by.”

The juvenile court deemed D.C. competent. It did so orally, not in writing. Before announcing its ruling, the juvenile court described the differences between juvenile court and adult criminal court. In part, the juvenile court focused on plea deals, stating that “the plea bargain really is a nomenclature that comes from the adult criminal side” and suggested that plea bargaining was often something that children in juvenile court struggle to understand. As part of that discussion, the court noted that in juvenile court, whether the alleged offense was a misdemeanor or a felony was usually “not that important” to the outcome. And because juvenile court does not have jury trials, the court was unsure why a competency evaluator would even ask a child about jury trials. The court’s discussion suggests that the court doubted whether D.C. understood jury trials—it stated that “if we were in a criminal proceeding, you would really want to make sure the individual understands what the role of the jury is and how that works But we don’t have juries down here.”

Following this discussion, the juvenile court considered NRS 62D.140’s three competency prongs and orally pronounced D.C. “competent to proceed at the present time.” As noted, it did not memorialize its competency determination in writing. The

certification hearing took place the next month. At the certification hearing, the juvenile court considered the factors established for discretionary certification in *In re Seven Minors*, 99 Nev. 427, 664 P.2d 947 (1983), *disapproved on other grounds by In re William S.*, 122 Nev. 432, 442 n.23, 132 P.3d 1015, 1021 n.23 (2006). It found prosecutive merit on all counts and certified D.C. for criminal proceedings as an adult.

II.

D.C. appeals both the certification order and the competency determination. An order certifying a juvenile for proceedings in adult criminal court is a final appealable judgment under NRAP 3A(b)(1). *Castillo v. State*, 106 Nev. 349, 351, 792 P.2d 1133, 1134 (1990). In this case, the appeal of the certification order brings with it the antecedent competency determination since, if D.C. was incompetent, the juvenile court could not proceed to the certification hearing. *In re Two Minor Children*, 95 Nev. 225, 231, 592 P.2d 166, 169 (1979) (holding that if a minor was not competent, the court “could go no further with the proceedings”); *see* NRS 62D.190.

A.

On appeal, D.C. argues that a finding of competency in juvenile court requires competency to stand trial. And because the juvenile court did not assess his competency to stand trial but instead only found him competent to participate in juvenile court proceedings, D.C. continues, the juvenile court improperly created a lower competency standard. The State responds that the juvenile court appropriately found D.C. competent using the standard from *Dusky v. United States* and that the competency finding was supported by substantial evidence. D.C. replies that the juvenile court’s competency determination was not based on substantial evidence. This court reviews a district court’s competency determination for abuse of discretion. *See Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006). But we owe no deference to legal error, to a determination that is unsupported by substantial evidence, *cf. id.* (explaining that the determination will stand if supported by substantial evidence), or “to findings so conclusory they may mask legal error,” *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

1.

Under *Dusky*, the test for determining competence is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402,

402 (1960) (internal quotation marks omitted). Nevada's adult competency statute, NRS 178.400(2), conforms to the *Dusky* standard and satisfies constitutional due process requirements. See *Calvin*, 122 Nev. at 1182-83, 147 P.3d at 1100 (interpreting NRS 178.400 (1995)). Nevada's juvenile competency statute, NRS 62D.140, largely tracks NRS 178.400(2), incorporating its three-pronged test. Both statutes require that individuals understand the nature of the delinquency allegations or criminal charges. NRS 62D.140(1); NRS 178.400(2)(a). Both require individuals to "[u]nderstand the nature and purpose of the court proceedings." NRS 62D.140(2); NRS 178.400(2)(b). And both require individuals to be able to "[a]id and assist . . . counsel . . . with a reasonable degree of rational understanding." NRS 62D.140(3); NRS 178.400(2)(c). Proceedings may not go forward while the child in delinquency proceedings or the defendant in criminal court is incompetent. NRS 62D.190(1) ("[D]uring the period that the child remains incompetent, the child may not be . . . [a]djudicated a delinquent child[,] . . . [p]laced under the supervision of the juvenile court[, or c]ommitted to the custody of a correctional facility."); NRS 178.400(1) ("A person may not be tried or adjudged to punishment for a public offense while incompetent.").

Although *Dusky* addresses competency in the context of standing trial, the standard of competency that it announced has broader application. See *Dusky*, 362 U.S. at 402; *In re Two Minor Children*, 95 Nev. at 230-31, 592 P.2d at 169. And NRS 62D.140 references "court proceedings" rather than trial specifically. Under NRS 62D.140, a child is incompetent when the child does not have the "present ability" to meet the three competency prongs. We read NRS 62D.140 to require the juvenile court to assess the child's competency to proceed under the circumstances of the particular case, rather than to always require the juvenile court to assess the child's competency to stand trial in adult court, as D.C. argues.

A question remains, however, as to the level of ability or comprehension the child must have to be found competent to proceed. Some courts evaluate a child's competency using "juvenile norms." E.g., *In re Carey*, 615 N.W.2d 742, 747-48 (Mich. Ct. App. 2000); *In re J.M.*, 769 A.2d 656, 662 (Vt. 2001). These courts emphasize that juvenile proceedings treat juveniles "more gently" than criminal proceedings treat adults, *In re SWM v. State*, 299 P.3d 673, 683 (Wyo. 2013) (internal quotation marks omitted), and that children's "limited life experience" may prevent them from understanding proceedings with an adult level of comprehension, *In re J.M.*, 769 A.2d at 662; see also *In re Carey*, 615 N.W.2d at 748. Other courts have determined that "the level of competence required to permit a child's participation in juvenile court proceedings can be no less than the competence demanded for trial or sentencing of an adult."

In re Welfare of D.D.N., 582 N.W.2d 278, 281 (Minn. Ct. App. 1998); *Commonwealth v. B.H.*, 548 S.W.3d 238, 248 (Ky. 2018) (holding that the level of competence required by due process to permit a child's participation in juvenile transfer proceedings is no less than that required of an adult to proceed in criminal court).

Rather than categorically hold that juvenile norms or an adult level of competence applies to a competency determination made by a juvenile court, in our view, the application of the *Dusky* standard is context-specific. The facts and circumstances of a case affect the level of ability that a child must have to be competent under *Dusky* and NRS 62D.140. On one hand, if a case in juvenile court "raises no complex legal or evidentiary issues and if the possible dispositions and consequences of adjudication are not similar to those of a criminal conviction," then "a juvenile with more limited decision-making capacity than would be required in a criminal proceeding" could be competent to proceed in juvenile court. Restatement of Children and the Law § 15.30 cmts. c & d (Am. L. Inst., Tentative Draft No. 2, 2019). So, in some cases, what other courts refer to as evaluating competency according to juvenile norms may be appropriate. On the other hand, "[t]he rationale for applying *Dusky* according to juvenile norms does not apply if the charges are serious, or if potentially serious consequences can follow adjudication." Restatement of Children and the Law § 15.30 cmt. c (Am. L. Inst., Tentative Draft No. 2, 2019). Where the punishment stakes are equal to those facing adult criminal defendants and the objective is punitive, a finding that the juvenile is competent at the level of an adult criminal defendant is required. See Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 798 (2005) ("The adoption of a less demanding competence standard can be constitutionally justified only if the punishment stakes in delinquency proceedings are lower than those facing criminal defendants and the objectives of juvenile justice policy are broader than punishment.").

To be competent, a child facing a certification proceeding must understand the right to a jury trial in adult criminal court and be able to make trial-related decisions, such as whether to accept a plea deal. Cf. *Godinez v. Moran*, 509 U.S. 389, 398-99 (1993) (stating that an adult defendant must meet the *Dusky* standard of competency before pleading guilty). If the consequences of a child accepting a plea deal involve "presumed placement in a correctional facility," then the child "must demonstrate the same level of decisionmaking capacity as an adult making a similar decision in a criminal proceeding." Restatement of Children and the Law § 15.30 cmt. d (Am. L. Inst., Tentative Draft No. 2, 2019). This is because the child must understand the long-term consequences of accepting the plea deal to be able to rationally choose between the available options. *Id.*

And in adult criminal court, “plea bargains have become so central to the administration of the criminal justice system” that plea bargaining “*is* the criminal justice system.” *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (second passage quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

Along with potential trial-related decisions that a juvenile would need to make if certified for criminal proceedings as an adult, the certification hearing itself is a critical part of the process. *See Anthony Lee R. v. State*, 113 Nev. 1406, 1410 n.1, 952 P.2d 1, 4 n.1 (1997) (“The juvenile court’s decision to retain jurisdiction or certify for criminal proceedings is a much more momentous and life-changing event for a juvenile than is an adjudication of delinquency . . .”). When considering whether to certify a juvenile for criminal proceedings as an adult, the juvenile court must consider a number of complex and nuanced factors. *See Seven Minors*, 99 Nev. at 434-35, 664 P.2d at 952; Restatement of Children and the Law § 13.10 (Am. L. Inst., Tentative Draft No. 6, calendared for discussion before the ALI membership in May 2024). To comply with the Due Process Clause of the Fourteenth Amendment, a certification proceeding must be fair to the juvenile. *See id.* cmt. c. One aspect of fairness is that the juvenile be competent at the certification hearing.

The *Dusky* standard applies in both juvenile court and adult criminal court under each court’s respective competency statutes, but the application of the *Dusky* standard will vary depending on the facts and circumstances of each case in juvenile court. *Cf. Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007) (addressing competency in the capital habeas context and noting that “[t]he test is unitary but its application will depend on the circumstances. They include not only the litigant’s particular mental condition but also the nature of the decision that he must be competent to make”). Here, on the same day that the State filed the petition of juvenile delinquency against D.C. in juvenile court, it also filed a petition to certify him for criminal proceedings as an adult. The delinquency petition included counts for multiple offenses that would be felonies if tried in adult criminal court, including murder, attempted murder, and robbery, each with a deadly weapon. In defending the proceedings to certify him to adult court, D.C. faced a high-stakes criminal prosecution with the possibility of severe punishment. No rationale exists for assessing D.C.’s competency by considering only what he would face in juvenile court rather than considering the consequences that he would face and the decisions that he would need to make if certified to proceed in adult criminal court. *See* Restatement of Children and the Law § 15.30 cmt. c (Am. L. Inst., Tentative Draft No. 2, 2019) (“A juvenile who faces the possibility of criminal prosecution as a result of a transfer proceeding is competent only if he or she satisfies the criminal-court standard.”). Given the seriousness of the charges in

the delinquency petition and the possibility of life-altering consequences should D.C. be certified to adult criminal court, D.C. was only competent to proceed to the certification hearing if he met the NRS 62D.140 prongs at the level of a competent adult defendant.

2.

We next turn to whether the juvenile court correctly considered the facts and circumstances of the case when it found D.C. competent, and, if so, whether substantial evidence supported that finding. In the absence of a clear statement from the juvenile court about the level of ability that it was using to consider whether D.C. was competent to proceed, it is difficult to discern whether the juvenile court found that D.C. was competent according to juvenile norms or if it determined that he was competent at the level of ability and understanding required to proceed in adult criminal court. In its ruling, the juvenile court emphasized the differences between juvenile court and criminal court, seemingly acknowledging that competency to be adjudicated in criminal court would require a higher ability or comprehension level. Focusing on NRS 62D.140(2), which requires understanding of “the nature and purpose of the court proceedings,” the court “found [the second prong] to be a problem” and explained that arguments on this prong often stem from the fact that there are different procedures and consequences in criminal court than in juvenile court. The court distinguished competency requirements in juvenile court from criminal court by stating that “[o]bviously if we were in a criminal proceeding, you would really want to make sure the individual understands what the role of the jury is and how that works.”

Of note, the juvenile court made no finding on whether D.C. understood the concept of plea bargaining—it asked, “[D]oes he really understand the plea bargain?” But instead of reaching a definitive conclusion, the court stated that “the plea bargain really is a nomenclature that comes from the adult criminal side.” To be competent to proceed to a certification hearing in this case, D.C. must understand what the stakes are should the juvenile court certify him for proceedings in adult criminal court. *See Frye*, 566 U.S. at 143 (explaining that the adult criminal justice system “is for the most part a system of pleas, not a system of trials”) (quoting *Laffler v. Cooper*, 566 U.S. 156, 170 (2012)). This suggests that the court viewed competency through the lens of juvenile proceedings without considering the full context of D.C.’s case.

The expert testimony sheds additional light. First, although Dr. Brown educated D.C. on certain concepts that are only present in adult criminal court, such as a jury trial, she concluded that D.C. “could assist his attorney at the level expected from a minor child.” And at the competency hearing, Dr. Brown stated that she felt that

Dr. Jones-Forrester was evaluating D.C.'s competency at a level that was "more consistent with an adult in criminal court than with a juvenile" and opined that the degree of ability required for competency is lower in juvenile court. Next, Dr. Foerster, in evaluating D.C.'s competency, noted Dr. Jones-Forrester's conclusion that D.C. struggled with the concept of a jury trial. Dr. Foerster included in her report some of D.C.'s comments regarding jury trials, which are a component of adult criminal trials. She also included D.C.'s statements recognizing the possible consequences of a conviction, including a life sentence, again something that would only occur in criminal court. But her testimony indicated that she used the "juvenile adjudicated competency instrument," which is used for juvenile competency assessments. And regarding Dr. Jones-Forrester's evaluation, Dr. Foerster posited that Dr. Jones-Forrester's "bar for acceptable competence is pretty high." That the juvenile court sided with the experts who testified in favor of determining competency under a lower ability level further suggests that the juvenile court measured D.C.'s competency against juvenile norms rather than against the adult criminal context D.C. would face if certified. From this record, it appears that the district court applied an incorrect juvenile court standard to determine D.C.'s competence.

Even had the juvenile court appropriately considered the context of this case and found that D.C.'s competency was commensurate with that of a competent adult criminal defendant, such a finding is not supported by substantial evidence. No expert established that D.C. was competent to proceed in adult criminal court as to the second and third of NRS 62D.140's three prongs. Compounding this problem, the juvenile court failed to make findings on the conflicting evidence of competency. When experts give conflicting psychiatric testimony as to competency, the factfinder resolves that conflict, and those findings will be sustained so long as they are supported by substantial evidence. *Ogden v. State*, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980). Here, the experts disagreed as to D.C.'s competency and, seemingly, as to whether a more relaxed juvenile court level of ability applied. The experts who determined that he was or could be competent did so based on suspicions that D.C. was malingering. In contrast, Dr. Jones-Forrester, who concluded that D.C. was not competent, also concluded after performing validity tests that he was not malingering. Dr. Foerster was uncertain about D.C.'s competency but did not use validity measures when concluding that D.C. was malingering. Instead, she stated that she "believed that [D.C.] put forth less than optimal effort" and concluded that the court could find him competent if it believed that D.C. had "greater knowledge than what he demonstrated during [the] evaluation." And the record does not indicate that Dr. Brown, who also concluded that D.C. was malingering, did any testing for validity. As

the State conceded during oral argument, the juvenile court did not make written or oral findings on D.C.'s effort or malingering during the competency evaluations. Nor did the court state that it was relying on the testimony or conclusions of a particular expert or experts or resolve the conflicts between the experts' opinions. The court's failure to make findings resolving these uncertainties and conflicts prevents us from engaging in meaningful review or from concluding that its decision was based on substantial evidence. *Cf. Somee v. State*, 124 Nev. 434, 443, 187 P.3d 152, 158 (2008) (holding that a district court's failure to make findings prevented appellate review).

We are also concerned that the juvenile court failed to address or follow the conditions of frequent rehearsal, periodic reevaluation, and if necessary, additional restoration sessions set by those experts to sustain a competency determination. The only expert—Dr. Brown—to conclude that D.C. was competent under all three prongs testified that for individuals such as D.C. “who have cognitive deficits . . . competency is a fluid state” and can be lost. She recommended that D.C.'s competency be periodically reassessed so that additional competency restoration sessions could be scheduled if he needed them to maintain competency. And Dr. Foerster—who was unsure whether D.C. was competent—agreed that continued education “might be beneficial for [D.C.] . . . to, at minimum, maintain his present knowledge base until the charges are resolved.” In concluding that D.C. was competent, the juvenile court neglected to address these experts' recommendation for additional education to ensure continued competency, further mandating vacatur and remand here. *See In re J.M.*, 769 A.2d at 663-64 (remanding for a new competency determination because the family court failed to address the needs established by the expert for the child to be competent).

B.

The State argues that even if the juvenile court erred by finding D.C. competent, that error is harmless because D.C. was properly certified to adult court and may raise competency again in adult criminal court. We disagree. The juvenile court did not properly resolve D.C.'s competency challenge before proceeding to the certification hearing. If D.C. was incompetent, the court “could go no further with the proceedings.” *In re Two Minor Children*, 95 Nev. at 231, 592 P.2d at 169. Without a proper competency determination, it was error to proceed to certification.

III.

For these reasons, we vacate the juvenile court's competency determination and remand for a new competency determination, supported by appropriate findings. The stakes here are high, and

the record does not show the juvenile court correctly assessed D.C.'s competency to proceed. And because we vacate the competency determination, we necessarily vacate the order certifying D.C. for criminal proceedings as an adult that followed the competency determination. On remand, the juvenile court should order further evaluations as necessary to appropriately weigh D.C.'s competency and take care to make sufficient findings on the evidence.

CADISH, C.J., and STIGLICH, HERNDON, LEE, PARRAGUIRRE, and BELL, JJ., concur.
