KIRK ROSS HARRISON, APPELLANT, *v.*
VIVIAN MARIE LEE HARRISON, RESPONDENT.

No. 66157

July 28, 2016 376 P.3d 173

Appeal from a divorce decree and post-decree orders concerning child custody. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Husband brought divorce action. The district court adopted parties' written stipulation as to custody, which included a teenage discretion provision, granted joint legal and physical custody of parties' two minor children and appointed a parenting coordinator to make recommendations regarding ancillary matters such as scheduling. Husband appealed. The supreme court, DOUGLAS, J., held that: (1) as a matter of first impression, teenage discretion provision did not violate joint physical custody agreement; (2) teenage discretion provision did not make a child's request for a custody schedule change subject to either parent's veto; (3) as a matter of first impression, parenting coordinator provision contained in parties' custody agreement was not disadvantageous to children's best interests; and (4) parenting coordinator provision did not violate husband's right to due process by extending judicial decision-making authority to a third party.

Affirmed.

HARDESTY, J., with whom CHERRY and GIBBONS, JJ., agreed, dissented.

Kirk Ross Harrison, Boulder City; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno, for Appellant.

Radford J. Smith, Chtd., and *Radford J. Smith*, Henderson; *Silverman, Decaria & Kattelman, Chtd.*, and *Gary R. Silverman* and *Mary Anne Decaria*, Reno, for Respondent.

1. CHILD CUSTODY.
   Absent a clear abuse of discretion, the supreme court will not disturb a district court's custody determinations.
2. CHILD CUSTODY.
   A teenage discretion provision in a child custody stipulation, which provided that when a child reached the age of 14, it was within the child's teenage discretion to determine time spent with either parent so long as joint physical custody agreement remained intact and did not violate joint physical custody agreement or public policy; clause provided only limited discretion to adjust weekly schedules without modifying joint physical custody agreement, a right which parents had right to confer, and because it provided for flexibility without deviating from joint custody agreement, best interests of children remained intact. NRS 125C.0045(1)(b); NRS 125.480(1) (Repealed).

3. Constitutional Law; Parent and Child.
   Parents have a fundamental liberty interest in the care, custody, and control of their children, although that right is not absolute.
4. Parent and Child.
   It is not the judiciary's role to limit parental authority where the fundamental rights of a child are not at stake.
5. Child Custody.
   Teenage discretion provision in custody agreement did not make a child's request for a custody schedule change subject to either parent's veto; as written, each child "shall have" the discretion to choose time spent with either parent to the extent it does not interfere with the joint custody agreement, and the use of the word "shall" made plain parents' intent to extend such teenage discretion to the children.
6. Contracts.
   The supreme court will not rewrite parties' contracts, in part, because the parties' failure to agree to a judicially blue-penciled term's inclusion risks trampling the parties' intent.
7. Child Custody.
   Parenting coordinator provision contained in the parties' custody agreement was not disadvantageous to the children's best interests in violation of public policy, even if it increased the intrusion of third parties into their lives; in the environment of a highly contentious custody dispute, the coordinator was an outlet for conflict resolution of nonsubstantive issues, and thereby minimized any adverse impact of the persistent conflict on the children. NRS 125.480(1) (Repealed).
8. Child Custody; Constitutional Law.
   Parenting coordinator provision contained in parties' child custody agreement did not violate husband's right to due process by extending judicial decision-making authority to a third party; in addition to the parties' consent, the parenting coordinator's authority was limited to resolving nonsubstantive issues, such as scheduling and travel issues, and did not extend to modifying the underlying custody agreement. U.S. Const. amend. 14; NRS 125.005(1); NRCP 53(a)(1).
9. Alternative Dispute Resolution.
   The supreme court does not impose judicial review where private parties have voluntarily entered into an agreement, especially as it concerns matters ancillary to the district court's jurisdiction.
10. Constitutional Law.
    Due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right. U.S. Const. amend. 14.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

This appeal raises two issues of first impression concerning the balance between contractual obligations and public policy concerns. The parties to this appeal share joint legal and physical custody of their two minor children as stated in a stipulated order. One provision of the parties' agreement provides that when a child reaches the

age of 14, it is within the child's "teenage discretion" to determine time spent with either parent, so long as the joint physical custody agreement remains intact. A second provision provides for a "parenting coordinator" to resolve disputes and authorizes the district court to issue an order defining the coordinator's role. Appellant argues that both contractual provisions should be invalidated because they are against public policy. We conclude that neither provision violates the paramount public policy concern in child custody matters—the best interest of the child, nor does the parenting coordinator provision improperly delegate decision-making authority. Therefore, we affirm.

BACKGROUND

Appellant Kirk Harrison filed for divorce from respondent Vivian Harrison in 2011. After extensive proceedings and settlement negotiations in the district court, Kirk and Vivian entered into a written stipulation as to the custody arrangement for their two minor children, which was adopted by the district court. The district court's stipulated order granted Vivian and Kirk joint legal and physical custody of their two minor children. One provision of the order provides for "teenage discretion" in determining time spent with either parent when a child reaches the age of 14. Another provision confers authority to resolve disputes to a "parenting coordinator" and consents to allow the district court to issue an order that defines the coordinator's role if the parties do not agree.

After the district court entered the stipulated order, conflict regarding its interpretation arose. Vivian argued that the teenage discretion provision allowed the children to make a request to spend time with either parent that the parents must honor. Kirk argued that the provision merely empowered the children to make a request that he or Vivian could deny.

The teenage discretion provision's meaning became important when the Harrisons' oldest daughter reached the age of 14. She then informed Kirk that she planned to exercise her discretion and live with Vivian full-time. According to Kirk, he was deprived of seeing his 14-year-old daughter for two weeks based on Vivian's misinterpretation of the teenage discretion provision. Kirk filed a motion for judicial determination of the teenage discretion provision, but the district court denied Kirk's motion.

Amid the conflict over the teenage discretion provision, Kirk and Vivian never identified a parenting coordinator. Vivian filed a motion for an order appointing a parenting coordinator, wherein she included a proposed order. Kirk opposed the motion, arguing that Vivian's proposed order granted the parenting coordinator too much authority without due process.

Ultimately, the district court issued an order appointing a parenting coordinator and ruling that the purpose of the parenting coordinator was "to resolve disputes," not merely to provide mediation services. The district court's order also provided that the parenting coordinator's authority was limited to making nonsubstantive recommendations regarding ancillary matters, such as scheduling, and that the recommendations were not final and not immediately effective. Thus, if either party objected to the parenting coordinator's recommendation, the order provided a procedure to seek review by the court.

After the district court issued the order appointing a parenting coordinator, Kirk filed a motion to modify the original stipulated child custody order. He argued that the teenage discretion provision should be rendered void as against public policy, or in the alternative, construed as merely empowering the Harrisons' 14-year-old daughter to make a request that could be denied. He further argued that the parenting coordinator provision should be rendered void because it was not the result of a meeting of the minds.

At the subsequent hearing, the district court explained that an interpretation that merely empowered the children to make a request rendered the provision meaningless, but that the provision was not an instrument whereby the joint custody arrangement could be altered. In addition, the district court noted that the parties had agreed to the parenting coordinator provision and concluded that there was no basis to modify it. The district court denied Kirk's motion in its written decision. Kirk now appeals.

DISCUSSION

[Headnote 1]

We have held that "[p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009). We also recognize broad discretionary powers for district courts when deciding child custody matters. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). Absent a clear abuse of discretion, we will not disturb a district court's custody determinations. *Id.* Thus, the stipulated order in this case must only yield to violations of public policy. *See Miller v. A & R Joint Venture*, 97 Nev. 580, 582, 636 P.2d 277, 278 (1981) (discussing public policy as a limitation on the enforceability of a contract).

Teenage discretion provision

Kirk argues that this court should modify the stipulated order by invalidating the teenage discretion provision because it is against public policy. Alternatively, Kirk requests that this court construe

the provision to provide teenage discretion to make a schedule change request that the parents can deny.[1]

The teenage discretion provision states:

> 6. Notwithstanding the foregoing time-share arrangement, the parents agreed that, once each child reaches the age of fourteen (14) years, such child shall have "teenage discretion" with respect to the time the child desires to spend with each parent. Thus, while the parents acknowledge the foregoing time-share arrangement, the parents further acknowledge and agree that it is in the best interest of each of their minor children to allow each child the right to exercise such "teenage discretion" in determining the time the child desires to spend with each parent once that child reaches 14 years of age.
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> 6.1. The parties do not intend by this section to give the children the absolute ability to determine their custodial schedule with the other parent. Rather, the parties intend to allow the children to feel comfortable in requesting and/or making adjustments to their weekly schedule, from time to time, to spend additional time with either parent or at either parent's home.

Modification by invalidation

[Headnote 2]

In any action for determining physical custody of a minor child, "the sole consideration of the court is the best interest of the child." NRS 125.480(1) (2009); *see Ellis*, 123 Nev. at 149, 161 P.3d at 242. If the parents agree to joint physical custody, there is a presumption "that joint custody would be in the best interest of a minor child." *See* NRS 125.490(1) (1981).[2] The Harrisons agreed that joint physical custody was in the best interests of their children. Thus, our particular policy concern is preserving the agreed-upon joint physical custody arrangement.

The teenage discretion provision does not violate the joint physical custody arrangement. The agreement permits the children to adjust "their weekly schedule, from time to time." But that flexibility is necessarily limited. Section 6.1 provides: "The parties do not intend . . . to give the children the absolute ability to determine their custodial schedule with the other parent." Thus, section 6.1 reinforces that child-initiated schedule changes may not take so much liberty that they violate the joint custody arrangement set forth by the district court. And if the custody arrangement is in jeopardy,

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[1]We note that Kirk's opposition to the agreed-upon terms did not arise until more than a year after the stipulated order was issued—when his oldest daughter turned 14.

[2]On October 1, 2015, the statute was NRS 125.510(1)(b) (2013).

then the Harrisons may seek resolution through the agreed-upon parenting coordinator, followed by review from the district court. Therefore, rather than detracting from the district court's authority, as the dissent claims, the terms of the agreement reinforce that the district court will have the ultimate say over matters that concern it. Hence, the dissent's claim of judicial intrusion fails to acknowledge the clear black letter of the agreement providing only limited discretion to adjust weekly schedules without modifying the joint physical custody arrangement. The limited discretion is the key factor for maintaining joint custody.

[Headnotes 3, 4]

We conclude that the Harrisons have the right to confer that discretion on their teenage children.[3] Parents have a fundamental liberty interest in the care, custody, and control of their children, although that right is not absolute. *Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 71, 64 P.3d 1056, 1059 (2003). States may limit parental authority, but those limitations are generally only necessary where the opposing interest is the fundamental right of a child, *see id.* (balancing a parent's interest in consenting to a child's marriage against the child's constitutional right to marry), or the safety of a child, *see* NRS Chapter 432B (providing for the protection of children from abuse and neglect). It is not the judiciary's role to limit parental authority where similarly severe concerns are not at stake. *Parham v. J. R.*, 442 U.S. 584, 603 (1979) ("Simply because the decision of a parent is not agreeable . . . or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."). Weekly schedule changes do not carry the magnitude of concern that we deem sufficiently comparable to enter "the private realm of family life." *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing that the state must "respect[ ] the private realm of family life").

Nevada statutory law does not require families to petition the district court for minor schedule changes, *see generally* NRS 125C.0045(1)(b), and we will not either.[4] Even if we disagree with the Harrisons' decision to grant their teenage children discretion to initiate weekly schedule changes, the power to make that decision does not rest with this court. The Harrisons agreed that joint custody and teenage discretion were in the best interests of their children. Because the teenage discretion provision provides for flexibility

[3]The Legislature has also provided a path for mature children to have a voice in determining what is in their best interests. *See* NRS 125.480(4)(a) (2009) ("In determining the best interest of the child, the court shall consider . . . [t]he wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.").

[4]On October 1, 2015, the statute was NRS 125.510(1)(b) (2013).

without deviating from the joint custody agreement, the best interests of the children remain intact under it. Thus, we decline to invalidate the provision.

Modification by rewriting

[Headnote 5]

As to Kirk's alternative request that this court construe the teenage discretion provision to limit the children's discretion even further, making a schedule change request subject to either parent's veto, we also decline. Reaching Kirk's interpretation would require that this court rewrite the parties' custody agreement. As written, each child "shall have" the discretion to choose time spent with either parent to the extent it does not interfere with the joint custody arrangement. The definiteness represented by the Harrisons' use of the word "shall" makes plain their intent to extend teenage discretion. *See State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) (" '[S]hall' is presumptively mandatory."). And no words in the provision's language make the children's discretion contingent upon either parent's concurrence. Thus, Kirk's requested interpretation seeks the addition of a contingency term to which he and Vivian did not agree.

[Headnote 6]

We do not rewrite parties' contracts, *see Rivero*, 125 Nev. at 429, 216 P.3d at 226 (recognizing that parties' contracts will be enforced as long as "they are not unconscionable, illegal, or in violation of public policy"), in part, because the parties' failure to agree to a judicially blue-penciled term's inclusion risks trampling the parties' intent, *see Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947) ("This would be virtually creating a new contract for the parties, which they have not created or intended themsel[ve]s, and which, under well-settled rules of construction, the court has no power to do."). It is the contracting parties' duty to agree to what they intend. *See id.* As we are not advocates, it is not our role to partake in drafting. Thus, Kirk's request for the judiciary's advocacy is denied.[5]

Parenting coordinator provision

Kirk contends that the parenting coordinator provision that he and Vivian agreed to should be invalidated because it is against the best interests of his children and because the judiciary may not delegate its authority. Again, we disagree.

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[5]Although we conclude that the parents do not have absolute veto power over the schedule changes permitted by the teenage discretion provision, the parents nonetheless retain the power to enforce the provision as written, allowing "from time to time" modest adjustments to the weekly custodial schedule that do not interfere with the underlying joint physical custody arrangement.

Defining a parenting coordinator

The use of parenting coordinators in the family law arena has become a common practice across the country. *See Bower v. Bournay-Bower*, 15 N.E.3d 745, 748-49 (Mass. 2014) (referencing several jurisdictions that allow for the use of parenting coordinators by statute, court rule, or caselaw). In general, parenting coordinators are neutral third-party intermediaries who facilitate resolution of conflicts related to custody and visitation between divorced or separated parents. *Id.* at 748. Thus, parenting coordinators can be described as providing a hybrid of mediation and arbitration services. *Id.* at 748-49.

A parenting coordinator's particular role may vary significantly across jurisdictions. *See, e.g.*, Fla. Stat. Ann. § 61.125(1) (West 2016) (providing that a parenting coordinator's purpose is to facilitate resolution of disputes by providing education, making recommendations, and if the parents have agreed, making limited decisions within the scope of a court order); La. Stat. Ann. § 9:358.4(C) (2008) (providing that a parenting coordinator's role is to assist in resolving disputes and the coordinator is permitted to make recommendations "in a report to the court for resolution of the dispute"); N.D. Cent. Code § 14-09.2-01 (2009) (providing that a parenting coordinator's duty is to use the dispute resolution process "to resolve parenting time disputes by interpreting, clarifying, and addressing circumstances not specifically addressed by an existing court order"); Or. Rev. Stat. Ann. § 107.425(3)(a) (2015) (providing that an individual may be appointed by the court to "creat[e] parenting plans or resolv[e] disputes regarding parenting time"). In Nevada, parenting coordinators are not authorized by statute. Thus, their role is defined by agreement between the parties, a court order, or both.

Best interests of the children

[Headnote 7]

Kirk argues that the parenting coordinator provision is against the best interests of his children because it increases the intrusion of third parties into their lives. We agree that third-party interaction is increased under the term, but we conclude that in this case, such an intrusion, which was agreed to by both Kirk and Vivian, is in the best interests of the children.

Courts in other jurisdictions have acknowledged the benefit of assigning parenting coordinators in particularly contentious cases. *See, e.g.*, *Bower*, 15 N.E.3d at 749. The Harrisons' custody dispute has been highly contentious, marked by frequent accusations and extensive district court proceedings that have been ongoing since 2011. In such an environment, a parenting coordinator could be an outlet for conflict resolution of nonsubstantive issues, thereby minimizing any adverse impact of the persistent conflict on the children.

Id. at 752; *see Yates v. Yates*, 963 A.2d 535, 539 (Pa. Super. Ct. 2008). For example, the parenting coordinator is authorized to facilitate resolution of scheduling conflicts that may arise from an unexpected cancellation of school or a child becoming ill. *See Bower*, 15 N.E.3d at 752 (recognizing the benefits of a parenting coordinator for these same purposes). The parenting coordinator could also help organize the parents' attendance at special events and parent-teacher conferences. *See id.* Furthermore, access to a parenting coordinator offers dispute resolution sooner than the Harrisons would be able to appear before a judge, which may reduce the likelihood of contempt complaints or other formal proceedings between the parents. *See id.*

Thus, we cannot conclude, as Kirk claims, that the introduction of a third-party parenting coordinator would further disrupt the children's lives and be disadvantageous to their best interests. In consideration of this case's contentious history, a parenting coordinator's facilitation in resolving time-sensitive, everyday disputes serves the children's best interests, and the district court did not abuse its discretion by refusing to remove the parenting coordinator provision from the custody order on this ground.

Delegation of judicial authority

[Headnote 8]

Kirk next argues that the parenting coordinator provision, as interpreted by the district court, violates his right to due process because it extends judicial decision-making authority to a third party. We conclude that the district court did not improperly delegate its decision-making authority.

To be sure, a district court does not improperly delegate its authority merely by appointing a third party to perform quasi-judicial duties. *See* NRCP 53(a)(1) (providing that a court may appoint a special master in a pending action); NRS 125.005(1) (permitting the district court to appoint a referee in a custody action); *In re Fine*, 116 Nev. 1001, 1015, 13 P.3d 400, 409 (2000) ("Experts appointed pursuant to an order of a court for the purpose of providing information that a court may utilize in rendering a decision are an arm of the court."). And in this case, the parties voluntarily agreed to the district court's appointment of a parenting coordinator to resolve disputes.

In addition to the parties' consent, we find support in the limitations placed on the parenting coordinator, which our sister states have said preserve judicial authority. The parenting coordinator's authority was limited to resolving nonsubstantive issues, such as scheduling and travel issues, and did not extend to modifying the underlying custody arrangement. *Compare Yates*, 963 A.2d at 540 (upholding the district court's appointment of a parenting coordi-

nator to resolve issues "such as determining temporary variances in the custody schedule, exchanging information and communication, and coordinating [the child's] recreational and extracurricular activities"), *with Dilbeck v. Dilbeck*, 245 P.3d 630, 638 (Okla. Civ. App. 2010) (determining that the parenting coordinator could not be authorized to change a custody order or to make recommendations with regard to whom should have custody), *and* Charles P. Kindregan et al., 2 *Massachusetts Practice Series, Family Law and Practice* § 37:3 (4th ed. 2013) ("It is never appropriate for a parenting coordinator to perform judicial functions (beyond his or her limited delegated authority), such as deciding legal or physical custody arrangements."). In addition, the parenting coordinator's authority was limited by the final decision-making authority maintained by the district court. If either of the Harrisons was dissatisfied with the parenting coordinator's recommendation, the district court's order provided for a procedure to object and seek the district court's review. *See Dieterle v. Dieterle*, 830 N.W.2d 571, 579 (N.D. 2013) (noting that the parties were able to seek review in determining that judicial power was not improperly delegated); *see also Bender v. Bender*, 304 N.Y.S.2d 482, 483 (App. Div. 1969) (noting the same). Because the parenting coordinator's authority was limited in scope and was subject to judicial review, there is no question that judicial integrity was preserved.

[Headnotes 9, 10]

And in this light, the dissent's argument that the district court improperly delegated its authority lacks traction. The dissent bases its argument on the fact that judicial review was not required if the parties agreed or if a disagreeing party failed to make an objection. However, we do not impose judicial review where private parties have voluntarily entered into an agreement, especially as it concerns matters ancillary to the district court's jurisdiction. *Cf. In re A.B.*, 128 Nev. 764, 771, 291 P.3d 122, 127 (2012) (providing a two-step approach for review of a master's recommendation regarding the merits of an abuse and neglect petition where there is no mention of any consent from the parties). Moreover, "due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right." *SFR Invs. Pool 1, LLC v. U.S. Bank*, 130 Nev. 742, 757, 334 P.3d 408, 418 (2014) (quoting *In re Medaglia*, 52 F.3d 451, 455 (2d Cir. 1995)); *see also Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 118 Nev. 124, 130, 41 P.3d 327, 330 (2002) (observing that "[a] party who wishes to object to the appointment of a special master must do so at the time of appointment, or within a reasonable time thereafter, or else

its objection is waived"). Therefore, we conclude that the dissent's concern for a lack of judicial review is misplaced. We are satisfied that the district court did not improperly delegate its authority and that due process has been preserved.

NRS 125.005

As a final matter, we address the applicability of NRS 125.005, which allows a district court to appoint a referee in divorce and child custody cases to "hear all disputed factual issues and make written findings of fact and recommendations to the district judge." NRS 125.005(2). The dissent argues that "[b]y allowing the court or the parties to dictate the parenting coordinator's role, including the granting of binding authority, the majority is engaging in legislation and impermissibly expanding NRS 125.005(2)." Dissent opinion *post.* at 578. First, we note that NRS 125.005 is inapplicable here because it "appl[ies] only in judicial districts that do not include a county whose population is 700,000 or more," and the Eighth Judicial District Court includes Clark County, which has a population of over two million. *See* NRS 125.005(6); United States Census Bureau, *Clark County, Nevada* (2015), *available at* http://www.census.gov/quickfacts/table/PST045215/32003.

But even if NRS 125.005 were applicable, the dissent's quarrel with allowing the district court to dictate the parenting coordinator's role is contradictory to its argument analogizing the parenting coordinator's role here to a referee under NRS 125.005. Dissent opinion *post.* at 578 n.3 ("Nevada's use of the term 'referee' instead of 'parenting coordinator' is immaterial . . . ."). The dissent rejects the very same grant of authority for a parenting coordinator that it deems appropriate to delegate to a referee. *Id.* at 578 ("By allowing the court . . . to dictate the parenting coordinator's role, . . . the majority is engaging in legislation . . . ."). In particular, the contradiction arises when the dissent claims that a referee and parenting coordinator are the same for purposes of the analysis, and then in the analysis, indicates that a district court may dictate a referee's role, *see* NRS 125.005(2), but not a parenting coordinator's.

As implied, the district court's order appointing a parenting coordinator provides for some of the same authority as delegated to a referee pursuant to NRS 125.005. Under both the order and NRS 125.005, the court generally accepts the professional's recommendation, unless the parties object, at which time the court fully reviews the matter. NRS 125.005(4). This process of review is hardly the "binding authority" the dissent proclaims. Dissent opinion *post.* at 578-79. And even if the review process were labeled "binding," it was legislatively implemented, an approach the dissent deems necessary to resolve the parenting coordinator issue. *Id.* at 578 ("[I]t is the Legislature's duty to frame the parenting coordinator's function.").

Lastly, although a referee under NRS 125.005 and the parenting coordinator here are given similar authority in some respects, the overall authority granted to the parenting coordinator is considerably more limited than the parameters set forth for a referee under NRS 125.005. Pursuant to NRS 125.005(3), a referee may (1) conduct proceedings "in the same manner as the district court," (2) "rule upon the admissibility of evidence," and (3) examine parties and witnesses under oath. The parenting coordinator does not have that same authority. Therefore, we reject the dissent's assertion that in reaching our holding we have taken legislative action and expanded NRS 125.005. Instead, the parties' mutually agreed-upon provision allowing a parenting coordinator to assist in resolving nonsubstantive conflicts, subject to court review upon the objection of either party, is permissible and will be upheld.[6]

Based on the foregoing, we affirm the district court's decision denying modification of its stipulated custody order and the order appointing a parenting coordinator.

PARRAGUIRRE, C.J., and SAITTA and PICKERING, JJ., concur.

HARDESTY, J., with whom CHERRY and GIBBONS, JJ., agree, dissenting:

I dissent because the "teenage discretion" provision encroaches on the district court's jurisdiction, and the parenting coordinator provision is an inappropriate delegation of the district court's responsibility, and, as such, both provisions should be invalidated.

"Teenage discretion" provision

In this case, the parties stipulated to giving their minor children, once they reach 14 years of age, " 'teenage discretion' with respect to the time the child desires to spend with each parent." The majority determined that this provision does not change the custody agreement because it provides only limited deviation from the parties' set schedule. However, the majority should not be concerned about the amount of discretion given to the minor children; it should be concerned that the minor children are given any discretion. The district court "ha[s] original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." Nev. Const. art. 6, § 6(1); *see also Landreth v. Malik*, 127 Nev. 175, 177, 251 P.3d 163, 164 (2011) ("Article 6, Section 6(1) of the Nevada Constitution grants original and appellate jurisdiction to the district courts in the judicial districts of the state."). And the district court "mak[es]

[6]We note that, although Kirk voluntarily agreed to the appointment of a parenting coordinator, he does not actually dispute any decision of the parenting coordinator. Kirk's only opposition is an after-the-fact recantation of a parenting coordinator whose expertise he has not utilized.

a determination regarding the physical custody of a child." NRS 125C.0025(1). Therefore, the district court must determine a minor child's custody arrangement, so the teenage discretion provision improperly intrudes on what should be the district court's sole determination.

Additionally, although the district court is required to consider a mature child's wishes when determining the child's best interest, there are also many other considerations that must be taken into account. *See* NRS 125C.0035(4). The teenage discretion provision improperly endorses one consideration over the others.[1] Thus, I believe the teenage discretion provision should be invalidated.[2]

Parenting coordinator provision

NRCP 53(a)(1) provides that a district court may appoint a special master in a pending action. The master is required to prepare a report, and, in nonjury actions, the district court "may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." NRCP 53(e)(1), (2). Likewise, NRS 125.005(1) permits the district court to appoint a referee in a custody action. NRS 125.005(2) provides that "the referee shall hear all disputed factual issues and make written findings of fact and *recommendations* to the district judge." (Emphasis added.) Notwithstanding NRCP 53 and NRS 125.005(1), "[t]he constitutional power of decision vested in a trial court in child custody cases can be exercised only by the duly constituted judge, and that power may not be delegated to a master or other subordi-

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[1]This determination aligns with other jurisdictions that have considered whether discretion should be given to a minor child. *See, e.g.*, *In re Julie M.*, 81 Cal. Rptr. 2d 354, 358 (Ct. App. 1999) ("The juvenile court did abuse its discretion in giving the children absolute discretion to decide whether [their mother] could visit with them. The order essentially delegated judicial power to the children—an abdication of governmental responsibility . . . ."); *McFadden v. McFadden*, 509 S.W.2d 795, 800 (Mo. Ct. App. 1974) ("We believe it is unwise to accord children the authority and power to determine when they are to be placed in the temporary custody of the other parent who does not have their permanent custody."); *Miosky v. Miosky*, 823 N.Y.S.2d 269, 272 (App. Div. 2006) ("[V]isitation between the mother and [the] daughter—who is now 15 years of age—should not . . . have been left to the child's wishes."); *Morgan v. Morgan*, 202 S.E.2d 356, 358 (N.C. Ct. App. 1974) ("While we realize that the preferences of a 14 year old are entitled to some weight in determining custody and visitation rights, it is error to allow the minor to dictate, at will from time to time, whether the judgment of the court is to be honored.").

[2]The majority explains that this court does not rewrite contracts. Majority opinion *ante* at 570. However, because parties are not allowed to contract unlawfully, *see NAD, Inc. v. Eighth Judicial Dist. Court*, 115 Nev. 71, 77, 976 P.2d 994, 997 (1999), I would invalidate—not rewrite—the unlawful teenage discretion provision.

nate official of the court." *Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962).

This court recently addressed a master's role in *In re A.B.*, 128 Nev. 764, 291 P.3d 122 (2012). In *In re A.B.*, the juvenile court reviewed a dependency master's findings in an abuse and neglect matter. *Id*. at 765, 291 P.3d at 124. This court explained that "a master's findings and recommendations are only advisory" and that "[t]he juvenile court ultimately must exercise its own independent judgment when deciding how to resolve a case." *Id*. at 766, 291 P.3d at 124. Although this court has not addressed the issue of improper delegation in the context of parenting coordinators, many states require "the court to review and approve a [parenting coordinator]'s recommendations." Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 Fam. Ct. Rev. 246, 249-50 (2004) ("[T]he opportunity for judicial review [is] a touchstone in what may constitute a lawful delegation of authority versus what is an unlawful delegation of authority."). *See, e.g.*, *In re Marriage of Rozzi*, 190 P.3d 815, 823 (Colo. App. 2008) (remanding the case to the trial court to "clarify that the parenting coordinator may make recommendations to the parties to assist them in resolving disputes, but may not make decisions for them"); *In re Paternity of C.H.*, 936 N.E.2d 1270, 1274 (Ind. Ct. App. 2010) ("[A] parent coordinator serves a role akin to that of an expert witness who reviews information relevant to the case and develops an opinion to be accepted or rejected by the trial court."); *Silbowitz v. Silbowitz*, 930 N.Y.S.2d 270, 271 (App. Div. 2011) (explaining that the parenting coordinator's "resolutions [must] remain subject to court oversight"). Additionally, it is also an improper delegation of authority if the parenting coordinator is granted binding authority. *See Bower v. Bournay-Bower*, 15 N.E.3d 745, 748 (Mass. 2014) (vacating an order giving "the parent coordinator the authority to make binding decisions on matters of custody and visitation" because it "exceeded the bounds of the judge's inherent authority and was so broad in scope that it constitutes an unlawful delegation of judicial authority"); *Kilpatrick v. Kilpatrick*, 198 P.3d 406, 410 (Okla. Civ. App. 2008) (holding that an order mandating that "the parenting coordinator's recommendations should be observed as orders of the Court" "constitutes an improper delegation of judicial power" (internal quotation marks omitted)).

The majority reasons that contrary to parenting coordinators in other jurisdictions whose role is defined by statute, parenting coordinators in Nevada are defined by the court and/or the parties. Majority opinion *ante* at 571. Interestingly, two of the statutes relied upon by the majority are substantially similar to NRS 125.005(2) with regard to the parenting coordinator's role in the decision-

making process, so the majority's statement that "parenting coordinators are not authorized by statute" in Nevada is confounding.[3] *Id*. *Compare* NRS 125.005(2) ("[T]he referee shall hear all disputed factual issues and make written findings of fact and recommendations to the district judge."), *with* La. Stat. Ann. § 9:358.4(C) (2008) ("When the parties are unable to reach an agreement, the parenting coordinator may make a recommendation in a report to the court for resolution of the dispute."), *and* Or. Rev. Stat. Ann. § 107.425(3)(a)(C) (2015) (listing the parenting coordinators' services as including "[p]roviding the parents, their attorneys, if any, and the court with recommendations for new or modified parenting time provisions").

More importantly, the Nevada Constitution provides that it is the Legislature's duty to frame the parenting coordinator's function. Nev. Const. art. 6, § 6(2)(a) ("The [L]egislature may provide by law for . . . [r]eferees in district courts."). By allowing the court or the parties to dictate the parenting coordinator's role, including the granting of binding authority, the majority is engaging in legislation and impermissibly expanding NRS 125.005(2).[4] Ironically, this expansion likens NRS 125.005(2) to Florida's and North Dakota's parenting coordinator statutes. *See* Fla. Stat. Ann. § 61.125(1) (West 2016) (granting the parenting coordinator the authority to "mak[e] limited decisions"); N.D. Cent. Code § 14-09.2-04 (2009) ("An agreement of the parties or a decision of the parenting coordinator is binding on the parties until further order of the court."). However, as pointed out by the majority, these statutes were authorized by the respective legislatures—not the judiciary.

In this case, the parties stipulated that a parenting coordinator would be hired "*to resolve disputes*." (Emphasis added.) Thereafter, the district court entered an order clarifying that the parenting coordinator could only resolve disputes "not involv[ing] a substantive change to the shared parenting plan," but allowed the parenting coordinator to consider issues involving exchanges, holidays, school breaks, health care, education, religious observances, extracurricular activities, travel, and communication. As far as procedure, the

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[3]Nevada's use of the term "referee" instead of "parenting coordinator" is immaterial to our analysis here. *See* Eve Orlow, *Working with Parenting Coordinators*, 30-SUM Fam. Advoc. 24 (2007) (explaining that "a 'parenting coordinator'" is "a nonjudicial officer, sometimes called special master, mediator, custody commissioner, or referee").

[4]As the majority notes, the use of referees under NRS 125.005 is limited to judicial districts that do not include Clark County. *See* majority opinion *ante* at 574. The majority's comment on this exclusion misses the point. Nevada's Legislature has only authorized the use of referees in judicial districts outside of Clark County and has not approved of the use of parenting coordinators anywhere in Nevada. Without addressing *Cosner v. Cosner*, 78 Nev. 242, 371 P.2d 278 (1962), the majority fails to explain the basis for the power of the district court judge, whether agreed to by the parties or not, to delegate child custody decisions to a subordinate official, such as a parenting coordinator.

district court clarified that if the "mediation result[s] in an agreement, the [p]arenting [c]oordinator shall prepare a simple '[a]greement' on the subject for signature by each party and the [p]arenting [c]oordinator." However, if "the mediation [does] not result in an [a]greement, the [p]arenting [c]oordinator shall prepare and send to the parties a written decision in the form of a '[r]ecommendation,' . . . resolving the dispute." If neither party files an objection to the recommendation, "the [r]ecommendation shall be deemed approved by the [c]ourt and shall become an [o]rder of the [c]ourt." If a party files an objection, the matter "can be reviewed by the [c]ourt."

The district court's order gives the parenting coordinator binding authority, without judicial review, when the parties are in agreement or, in the case of a disagreement, when the disagreeing party fails to file an objection. Furthermore, use of the word "can" provides only for discretionary review by the district court when an objection is filed. Thus, I conclude that the district court is not "exercis[ing] its own independent judgment," *In re A.B.*, 128 Nev. at 766, 291 P.3d at 124, and is improperly delegating its authority to the parenting coordinator, *Cosner*, 78 Nev. at 245, 371 P.2d at 279, by failing to provide for the proper review of the parenting coordinator's decisions.[5]

Conclusion

Accordingly, because the teenage discretion provision encroaches on a district court's jurisdiction, and the parenting coordinator's authority was not limited to making recommendations, I believe that the district court erred in failing to modify the terms of the parenting plan regarding teenage discretion and the order appointing the parenting coordinator. Therefore, I would reverse the judgment of the district court.

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[5]I note that it may be inefficient for the district court to review minor or emergency decisions by the parenting coordinator, such as which parent is picking up the minor child on a single occasion. However, because the order allows the parenting coordinator to address more complex issues, such as religion and education, the parenting coordinator's decisions impede on the district court's jurisdiction over child custody proceedings. *See Custody*, *Black's Law Dictionary* (10th ed. 2014) (defining "custody" in family law matters as "[t]he care, control, and maintenance of a child").

JOHN FRITZ; AND MELISSA FRITZ, APPELLANTS, *v.*
WASHOE COUNTY, RESPONDENT.

No. 67660

August 4, 2016 376 P.3d 794

Appeal from a district court summary judgment in an inverse condemnation action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Property owners brought inverse condemnation claim against county after development of drainage system resulted in downstream flooding. The district court granted summary judgment in favor of County, and property owners appealed. The supreme court, DOUGLAS, J., held that: (1) a genuine issue of material fact as to whether downstream property owners had standing to assert claims against County based on plat maps it approved before property owners acquired their property precluded summary judgment; and (2) in a matter of first impression, a genuine issue of material fact as to the level of County's involvement in private drainage system sufficient to deem it a public use precluded summary judgment.

Reversed and remanded.

[Rehearing denied October 27, 2016]

[En banc reconsideration denied December 21, 2016]

Luke A. Busby, Reno, for Appellants.

Christopher J. Hicks, District Attorney, and *Stephan J. Hollandsworth*, Deputy District Attorney, Washoe County, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.
2. JUDGMENT.
   Summary judgment is proper if the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law.
3. JUDGMENT.
   When reviewing a summary judgment motion, all evidence and reasonable inferences must be viewed in a light most favorable to the nonmoving party.
4. JUDGMENT.
   A genuine issue of material fact as to whether downstream property owners had standing to assert claims against County based on plat maps it approved before property owners acquired their property precluded summary judgment on property owner's inverse condemnation action.
5. EMINENT DOMAIN.
   Takings claims lie with the party who owned the property at the time the taking occurred.

6. JUDGMENT.
   A genuine issue of material fact as to the level of County's involvement in private drainage system sufficient to deem it a public use precluded summary judgment on downstream property owners' inverse condemnation claim based on the takings clauses of the United States and Nevada Constitutions. Const. art. 1, § 8(6); U.S. CONST. amend. 5.
7. EMINENT DOMAIN.
   When a governmental entity takes property without just compensation, or initiating an eminent domain action, an aggrieved party may file a complaint for inverse condemnation.
8. EMINENT DOMAIN.
   As the counterpart of eminent domain, inverse condemnation requires a party to demonstrate the following: (1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not instituted formal proceedings.
9. EMINENT DOMAIN.
   A private party cannot recover in inverse condemnation for property taken by another private party; however, when a private party and a government entity act in concert, government responsibility for any resulting damage to other private property may be established by demonstrating that the government entity was substantially involved in the development of private lands for public use that unreasonably injured the property of others.
10. EMINENT DOMAIN.
    A county's mere approval of subdivision maps, without more, does not convert private development into a public use that gives rise to inverse condemnation liability.

Before DOUGLAS, CHERRY and GIBBONS, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we are asked to consider whether, when a county approved subdivision maps, directed the flow of water, and accepted street dedications during the building process of two upstream developments, its actions constituted substantial involvement to support inverse condemnation in the flooding of a downstream property. We conclude that inverse condemnation is a viable theory of liability and genuine issues of material fact remain as to the County's substantial involvement in the development of the drainage system at issue. We therefore reverse the district court's grant of summary judgment.

BACKGROUND

In 2001, appellants John and Melissa Fritz purchased property adjacent to Whites Creek. Before the Fritzes purchased their property, Washoe County approved plat maps for the upstream development, Lancer Estates. After the Fritzes purchased their property,

Washoe County approved plat maps for another upstream development, Monte Rosa. Washoe County subsequently accepted various street dedications that were incorporated into the upstream developments' drainage system, which diverts water to Whites Creek.[1] Since the construction of the developments, the Fritzes' property floods during heavy rainstorms.

In 2013, the Fritzes filed an inverse condemnation complaint against Washoe County. The Fritzes alleged that Washoe County approved plat maps, managed and directed development of the water drainage system, approved final maps, and ultimately accepted dedication of the water drainage system that increased the flow of water to Whites Creek and caused flooding to their property. According to the Fritzes, Washoe County's conduct constituted substantial involvement in activities that caused the taking of their property.

Washoe County answered and then filed a motion for summary judgment, arguing that the Fritzes did not have standing to assert claims against it for plat maps it approved before the Fritzes owned their property. As to the maps approved after the Fritzes came into ownership, and its acceptance of dedications, Washoe County argued that its conduct was not substantial and did not give rise to the Fritzes' inverse condemnation claim.

The Fritzes opposed Washoe County's motion for summary judgment and attached documents detailing Washoe County's involvement in the developments' draining scheme. One such document was a 1996 letter from the Nevada Department of Transportation (NDOT) to Washoe County. In the letter, NDOT refers to a previous agreement with Washoe County wherein Washoe County would direct the developers to convey water north through Lancer Estates. NDOT then requested that Washoe County follow through with that agreement. In addition to the letter, the Fritzes submitted the Lancer Estates Hydrology Report, wherein the developers stated that they were in compliance with the NDOT and Washoe County agreement to convey water north.

Ultimately, the district court granted summary judgment in favor of Washoe County. The court reasoned that Washoe County's approval of subdivision maps and acceptance of dedications did not amount to substantial involvement sufficient to support a claim for inverse condemnation. The Fritzes appealed.

DISCUSSION

[Headnotes 1-3]

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood*

[1]It is clear from the record that Washoe County accepted certain street dedications. However, it is not clear whether Washoe County accepted dedication of other improvements incorporated into the drainage system, formally or informally.

v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Id.* (alteration in original) (internal quotation omitted). When reviewing a summary judgment motion, all evidence and reasonable inferences "must be viewed in a light most favorable to the nonmoving party." *Id.*

Standing

[Headnote 4]

On appeal, Washoe County contends that the Fritzes do not have standing to assert their inverse condemnation claim because Washoe County approved the majority of subdivision maps before the Fritzes owned the land. Construing the facts in a light most favorable to the Fritzes, we disagree.

[Headnote 5]

Takings claims lie with the party who owned the property at the time the taking occurred. *Argier v. Nev. Power Co.*, 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). The Fritzes alleged that their property was taken by flooding as a result of heavy rainstorms occurring during the course of their ownership. The district court made no findings with regard to when the taking occurred. Thus, a genuine issue of material fact remains as to the issue of standing, and we cannot uphold summary judgment on this ground.

Substantial involvement

[Headnote 6]

The district court found that Washoe County approved maps and accepted certain dedications. The Fritzes presented evidence that Washoe County also directed the developer to divert water north from Mount Rose Highway into Whites Creek. According to the Fritzes, these actions constitute substantial government involvement in private activities that led to an increased quantity and flow of water in Whites Creek and flooding on their property. Washoe County contends that approval of maps and acceptance of dedications are insufficient to constitute substantial involvement giving rise to a claim for inverse condemnation.

[Headnote 7]

The Takings Clause of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, the Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been first made." Nev. Const. art. 1, § 8(6). When a governmental entity takes property

without just compensation, or initiating an eminent domain action, an aggrieved party may file a complaint for inverse condemnation. *State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004).

[Headnote 8]

Nevada caselaw has not clearly and comprehensively set forth the elements of inverse condemnation, but we do so now. As the counterpart of eminent domain, inverse condemnation requires a party to demonstrate the following: (1) a taking (2) of real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not instituted formal proceedings. *See Dickgieser v. State*, 105 P.3d 26, 29 (Wash. 2005); *see also ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645-47, 173 P.3d 734, 738-39 (2007) (providing that an interest in real or personal property satisfies the private property requirement); *Gutierrez v. Cty. of San Bernardino*, 130 Cal. Rptr. 3d 482, 485 (Ct. App. 2011) (providing that the taking must be proximately caused by a government entity).

[Headnote 9]

A private party cannot recover in inverse condemnation for property taken by another private party. However, when a private party and a government entity act in concert, government responsibility for any resulting damage to other private property may be established by demonstrating that the government entity was substantially involved "in the development of private lands [for public use] which unreasonably injure[d] the property of others." *Cty. of Clark v. Powers*, 96 Nev. 497, 505, 611 P.2d 1072, 1077 (1980); *see Gutierrez*, 130 Cal. Rptr. 3d at 485 ("To be a proximate cause, the design, construction, or maintenance of the improvement must be a substantial cause of the damages.").

The district court reached its conclusion that Washoe County was not substantially involved, in part, by distinguishing the government involvement here from the government involvement in *Powers*. We affirmed a district court's judgment that held the County liable in inverse condemnation for acting in conjunction with various private parties to cause large amounts of water to be cast upon the property of the plaintiff landowners. 96 Nev. at 499-500, 611 P.2d at 1073-74. We held the County liable because it "participated actively in the development of these lands, both by its own planning, design, engineering, and construction activities and by its adoption of the similar activities of various private developers as part of the County's master plan for the drainage and flood control of the area." *Id.* at 500, 611 P.2d at 1074.

We agree with the district court that *Powers* is distinguishable. The government conduct in *Powers* can be described as physical

involvement directly attributable to the government entity. Here, however, the Fritzes did not provide any evidence that Washoe County participated in the engineering and construction of the developments. Thus, the district court correctly concluded that the significance of Washoe County's involvement here is distinguishable from that in *Powers*.

However, drawing this distinction is not dispositive of the issues raised in this appeal. *Powers* indicates that an act, such as construction, which by any measure reaches the height of substantial involvement, is sufficient to establish a claim. We have not limited the range of actions that constitute substantial involvement to physical engagement in private activities. We have, nonetheless, provided that claims based on mere planning are outside the scope of substantial involvement. *Sproul Homes of Nev. v. State, Dep't of Highways*, 96 Nev. 441, 443, 611 P.2d 620, 621 (1980) ("It is well-established that the mere planning of a project is insufficient to constitute a taking for which an inverse condemnation action will lie."). Hence, this case presents a novel question: whether government activities short of physical labor, but with more engagement than mere planning, can constitute substantial involvement in a private development sufficient to constitute public use in support of inverse condemnation. While we have not previously addressed this question, the California courts have addressed similar factual situations.

The district court relied in part on *Ullery v. Contra Costa County* to reach its determination that the Fritzes' inverse condemnation claim was not actionable. 248 Cal. Rptr. 727 (Ct. App. 1988). In *Ullery*, the developer of property located at the bottom of a hill made an offer of dedication of a water drainage easement in a natural stream running parallel to the bottom of the hillside, but the County expressly rejected the dedication. *Id.* at 728-29. Thereafter, neither the County nor City performed maintenance on the drainage easement. *Id.* at 729. A landslide later injured two hillside neighboring properties, and the landowners brought suit against the County, City, and Sanitary District, arguing that the County's approval of tentative and final subdivision maps resulted in an "environment conducive to landslide damage" caused by erosion from water drainage. *Id.* at 731 (internal quotation omitted).

[Headnote 10]

In this case, apparently analogizing it to *Ullery*,[2] the district court concluded that Washoe County's approval of subdivision maps and acceptance of dedications was insufficient to support the Fritzes'

[2]Although the district court's order does not directly state that the instant case is analogous to *Ullery*, this conclusion can be drawn from its use of the case to reach its conclusion that approving subdivision maps and dedications is insufficient to constitute inverse condemnation liability.

inverse condemnation claim. However, the district court misapplied *Ullery*. The *Ullery* court recognized that a public use or improvement cannot be demonstrated by mere subdivision map approval, finding that, without the County's acceptance of the dedication, its "sole participation in the development process was approval of the tentative and final subdivision maps. This alone [was] not enough to give rise to establish inverse condemnation liability." *Id.* at 731-32. Thus, *Ullery* draws a distinction between merely approving subdivision maps and taking other actions, including accepting dedications. The former, on its own, does not convert the private development into a public use that gives rise to inverse condemnation liability. We adopt this rule from *Ullery*.

However, the case at bar is distinguishable from *Ullery*. The Fritzes alleged that Washoe County did more than approve subdivision maps. The Fritzes provided evidence that, among other activities, Washoe County formally accepted dedications of the streets in the developments and entered into an agreement with NDOT to direct water from the developments north into Whites Creek, rather than to allow the water to follow its natural path down Mount Rose Highway. Therefore, unlike the county in *Ullery*, Washoe County has taken actions beyond merely approving the subdivision maps, and the Fritzes' inverse condemnation claim here is actionable.

After applying *Ullery*, we conclude that genuine issues of material fact exist as to whether Washoe County's actions constituted substantial involvement in the drainage system sufficient to deem it a public use. In particular, when resolving a summary judgment motion, the district court has the obligation to "set forth the undisputed material facts and legal determinations on which the court granted summary judgment." NRCP 56(c). In this case, however, the district court's order summarized the basic facts, but ignored certain evidence provided by the parties and did not explicitly state which facts were undisputed. On appeal, while the parties periodically alleged in their briefs that the facts are undisputed, they differ as to the import and effect of these facts on the substantial involvement considerations.

Therefore, because genuine issues of material fact remain, we reverse the district court's grant of summary judgment and remand this matter to the district court for proceedings consistent with this opinion.[3]

CHERRY and GIBBONS, JJ., concur.

[3]Washoe County also contends that the injuries caused by flooding were not substantial. However, the district court did not make findings on this issue sufficient for this court to review. Therefore, we decline to consider this question.

MARY LOU CORNELLA, PETITIONER, *v.* CHURCHILL COUNTY, STATE OF NEVADA, JUSTICE COURT OF NEW RIVER TOWNSHIP; THE HONORABLE MICHAEL D. RICHARDS; THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CHURCHILL; AND THE HONORABLE DAVID A. HUFF, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 56329

August 12, 2016 377 P.3d 97

Original petition for a writ of certiorari challenging an order of the district court affirming on appeal a judgment of conviction entered in justice court.

Defendant, who was charged with vehicular manslaughter, moved to dismiss the charge, arguing that the vehicular manslaughter statute was unconstitutionally vague. The justice court denied motion and found defendant guilty following bench trial. Defendant appealed. The district court affirmed. Defendant filed petition for writ of certiorari. The supreme court, HARDESTY, J., held that: (1) phrase "an act or omission," as used in vehicular manslaughter statute, denoted violation of traffic law, and thus, evidence that defendant committed an unlawful act or omission, which would warrant traffic violation, was required to support conviction; (2) "simple negligence," as used in vehicular manslaughter statute, denoted ordinary negligence; (3) vehicular manslaughter statute, as interpreted to require unlawful act or omission and ordinary negligence, was not unconstitutionally vague; and (4) vehicular manslaughter was public welfare offense, and thus, simple or ordinary negligence standard required for vehicular manslaughter conviction was sufficient to meet due process requirements for imposing criminal liability.

Petition granted.

The Digesti Law Firm, Ltd., and *Matthew P. Digesti* and *Laurence P. Digesti*, Reno, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Arthur E. Mallory*, District Attorney, and *Benjamin D. Shawcroft*, Chief Deputy District Attorney, Churchill County, for Real Party in Interest.

1. CRIMINAL LAW.
   The constitutionality of a statute is a question of law that the supreme court reviews de novo.
2. CONSTITUTIONAL LAW.
   Statutes are presumed to be valid, and the burden is on the challenging party to demonstrate that a statute is unconstitutional.

3. Constitutional Law.
   The supreme court construes statutes, if reasonably possible, so as to be in harmony with the constitution.
4. Constitutional Law.
   The vagueness doctrine is an outgrowth of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. 5, 14.
5. Constitutional Law.
   A criminal law may be vague for one of two reasons: (1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.
6. Constitutional Law.
   In applying the two-prong test for vagueness to a criminal penalty, the supreme court looks to whether vagueness permeates the text, which means a statute will be invalid if the conduct prohibited by the statute is void in most circumstances.
7. Constitutional Law.
   Under the first prong of the vagueness test, a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute; but a statute is not unconstitutionally vague simply because there are some marginal cases where it is difficult to ascertain whether the facts violate the statute.
8. Constitutional Law.
   Mathematical precision is not required in drafting statutory language; thus, when statutory language has ordinarily understood meanings, the supreme court applies those meanings to define the limits of the statute when a statute is challenged as being unconstitutionally vague.
9. Constitutional Law.
   Under the second prong of the vagueness test, in order to avoid discriminatory enforcement of a criminal statute, the Legislature must establish minimal guidelines to govern law enforcement; the second prong is more important than the first prong because otherwise a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to pursue their personal predilections.
10. Automobiles.
    Phrase "an act or omission," as used in vehicular manslaughter statute, denoted violation of traffic law, and thus, evidence that defendant committed an unlawful act or omission, which would warrant traffic violation, was required to support conviction for vehicular manslaughter; spotlight on traffic violations when statute was enacted demonstrated Legislature's intent that statute required unlawful act, Nevada was one of only a few states to criminalize simple negligence without requiring underlying unlawful act, and it would be difficult for people to abide by statute that punished simple negligence without an unlawful act. NRS 484B.657(1).
11. Automobiles.
    "Simple negligence," as used in vehicular manslaughter statute, denoted ordinary negligence; dictionary noted that ordinary negligence and simple negligence were coextensive terms with the same meaning, and Legislature chose the term "simple negligence" to distinguish it from the heightened criminal negligence standard. NRS 484B.657(1).
12. Criminal Law.
    "Gross negligence" is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care.

13. Statutes.
When the Legislature does not specifically define a term in a statute, the supreme court presumes that the Legislature intended to use words in their usual and natural meaning.

14. Automobiles; Constitutional Law.
Vehicular manslaughter statute, as interpreted to require unlawful act or omission and ordinary negligence, was not unconstitutionally vague in violation of due process; unlawful act or omission requirement delineated type of activity prohibited and provided objective standard, and ordinary negligence standard provided fair notice of conduct that statute proscribed. U.S. Const. amend. 14; NRS 484B.657(1).

15. Automobiles; Constitutional Law.
Vehicular manslaughter was public welfare offense, and thus, simple or ordinary negligence standard required for vehicular manslaughter conviction was sufficient to meet due process requirements for imposing criminal liability; negligent vehicular manslaughter was not crime at common law, was punishable only as misdemeanor, and although serving six months in jail could slightly harm character of offender, nature of conviction did not encompass evil conduct. U.S. Const. amend. 14; NRS 484B.657(1).

16. Criminal Law.
A general principle of criminal law is that some level of intent or culpability is required to punish someone for a crime.

17. Criminal Law.
The purpose of public welfare offenses, which require only ordinary negligence for a criminal conviction, is to require a degree of diligence for the protection of the public which shall render violation impossible.

18. Criminal Law.
A crime may be treated as a public welfare offense requiring only ordinary negligence when it: (1) is not rooted in the common law, (2) involves a small penalty, (3) does not tarnish the character of the offender, and (4) is of a type by which a person could reasonably be expected to abide.

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

OPINION

By the Court, Hardesty, J.:

In this writ proceeding, we consider constitutional challenges to NRS 484B.657(1),[1] which provides that a person is guilty of misdemeanor vehicular manslaughter if, "while driving or in actual physical control of any vehicle, [the person] proximately causes the death of another person through an act or omission that constitutes simple negligence."

Petitioner Mary Lou Cornella maintains that the phrases "act or omission" and "simple negligence" render the statute unconstitutionally void for vagueness. She also maintains that a showing of

[1]In 2009, the Legislature substituted NRS 484B.657 for NRS 484.3775. Although the title of the chapter governing this statute has been modified, the statute's language remains unchanged. We refer to the current codification in this opinion.

"simple negligence" rather than criminal intent violates her right to due process.

We conclude that NRS 484B.657(1) is not unconstitutionally vague if (1) "an act or omission," as used in NRS 484B.657(1), is read to require an unlawful act or omission; and (2) "simple negligence," as used in NRS 484B.657(1), is read as ordinary negligence. We further conclude that vehicular manslaughter closely resembles a traditional public welfare offense. Therefore, a conviction pursuant to NRS 484B.657(1), without a criminal intent requirement, does not violate due process. Because the district court erroneously upheld the constitutionality of NRS 484B.657(1) without interpreting the phrase "act or omission," we grant the petition and direct the clerk of the court to issue a writ of certiorari upholding the constitutionality of NRS 484B.657(1) consistent with this opinion.

FACTS

While driving through an intersection controlled by a four-way stop sign in Fallon, Cornella ran over and killed 12-year-old Brittany Cardella, who was riding her bicycle. After the accident, the State charged Cornella with two misdemeanor counts: (1) failure to yield the right of way in violation of NRS 484B.257,[2] and (2) vehicular manslaughter in violation of NRS 484B.657(1).

A bench trial was held in justice court in Churchill County, and on the second day, Cornella filed two motions to dismiss the charges against her. In her first motion, Cornella argued that the State failed to meet its burden as to count one because NRS 484B.257 requires a motorist to yield to another vehicle, and a bicycle is not a vehicle pursuant to NRS 484A.320.[3] She further argued that, without count one, count two also failed because her alleged failure to yield was the predicate "act or omission" for the vehicular-manslaughter charge. The justice court granted the motion as to count one but denied it as to count two. Cornella then filed a second motion, arguing that the vehicular-manslaughter statute is unconstitutionally vague because simple negligence is not sufficiently defined to warn people of the acts that will result in a violation. After hearing arguments on the second motion, the justice court denied it.

The trial then proceeded with the State presenting multiple theories to demonstrate Cornella's negligence that resulted in Brittany's death. After Cornella presented her defense, she renewed her motion to dismiss count two, but the court again denied it and found Cornella guilty of vehicular manslaughter in violation of NRS 484B.657(1). The justice court sentenced her to 150 hours of community service.

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[2]In 2009, the Legislature substituted NRS 484B.257 for NRS 484.319; however, the statute's language remains unchanged, and we thus refer to the current codification in this opinion.

[3]In 2009, the Legislature also substituted NRS 484A.320 for NRS 484.217, and the statute's language remains unchanged.

Following the trial, Cornella appealed to the district court. *See* Nev. Const. art. 6, § 6(1); NRS 177.015(1)(a). Before the district court, she argued that NRS 484B.657(1) was unconstitutionally vague and that there was not substantial evidence to support her conviction. Without addressing Cornella's arguments concerning the vagueness of the phrases in NRS 484B.657(1), the district court found that NRS 484B.657(1) "clearly proscribes causing death of a person by the negligent operation of a vehicle" and upheld Cornella's conviction. Cornella thereafter filed this petition for a writ of certiorari, challenging the constitutionality of NRS 484B.657(1).

DISCUSSION

Initially, we note that pursuant to Nevada Constitution Article 6, Section 4(1), this court has the power to issue a writ of certiorari. NRS 34.020(3) authorizes our review of a certiorari petition when a district court has examined the constitutionality or validity of a statute on appeal from a conviction in justice or municipal court for a violation of that statute. Because that is the case here, we exercise our discretion to consider this writ petition to the extent that it asks us to review the constitutionality or validity of the vehicular-manslaughter statute and the statute's alleged infringement of Cornella's right to due process.

[Headnotes 1-3]

"The constitutionality of a statute is a question of law that we review de novo." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). "Statutes are presumed to be valid," and the burden is on the challenging party to demonstrate that a statute is unconstitutional. *Id*. This court "construe[s] statutes, if reasonably possible, so as to be in harmony with the constitution." *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014) (internal quotations omitted).

I.

[Headnotes 4-6]

Cornella argues that NRS 484B.657(1) is unconstitutional because any "act or omission" and "simple negligence" are highly malleable concepts, and, therefore, the conduct prohibited by the statute is imprecise and void for vagueness. The " '[v]agueness doctrine is an outgrowth . . . of the Due Process Clause[s] of the Fifth' and Fourteenth Amendments to the United States Constitution." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010) (third alteration in original) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). A criminal law may be vague for one of two reasons: "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.' "

Id. at 481-82, 245 P.3d at 553 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). In applying this two-prong test to a criminal penalty, such as the one involved here, we look to whether "vagueness permeates the text," which means a statute will be invalid if the conduct prohibited by the statute is "void in most circumstances." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 512-13, 217 P.3d 546, 553-54 (2009) (internal quotation omitted).

[Headnotes 7, 8]

Under the first prong of the vagueness test, "a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute." *Nelson v. State*, 123 Nev. 534, 540-41, 170 P.3d 517, 522 (2007) (quoting *Williams v. State*, 118 Nev. 536, 546, 50 P.3d 1116, 1122 (2002)). But a statute is not unconstitutionally vague simply because there are some marginal cases where it is difficult to ascertain whether the facts violate the statute. *Id*. at 541, 170 P.3d at 522. Moreover, "[m]athematical precision is not [required] in drafting statutory language." *Castaneda*, 126 Nev. at 482, 245 P.3d at 553 (quoting *City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 864, 59 P.3d 477, 481 (2002)). Thus, when statutory language has ordinarily understood meanings, this court applies those meanings to define the limits of the statute.

[Headnote 9]

Under the second prong of the vagueness test, in order to avoid discriminatory enforcement of a criminal statute, the Legislature must "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). This prong is more important than the first prong because otherwise "a criminal statute may permit a standardless sweep, which would allow the police, 'prosecutors, and juries to pursue their personal predilections.'" *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (quoting *Kolender*, 461 U.S. at 358).

We must now determine whether the phrases "an act or omission" and "simple negligence" make NRS 484B.657(1) void for vagueness. We address each of these phrases in turn.

"An act or omission" denotes an unlawful act or omission

[Headnote 10]

Because Nevada has not specified the type of "act or omission" that is required pursuant to NRS 484B.657(1), we look to other jurisdictions for guidance. In *State v. Russo*, the Superior Court of Connecticut held that a negligent-vehicular-homicide statute was not void for vagueness. 450 A.2d 857, 862 (Conn. Super. Ct. 1982).

Essential to the court's reasoning, however, was the need to show a violation of a separate traffic law to provide the required degree of care by which to establish the negligent act that formed the basis of the negligent-vehicular-homicide conviction. *Id*.; *see also State v. Tabigne*, 966 P.2d 608, 616 (Haw. 1998) (holding that "the jury may, consistent with the requirements of due process and other rules peculiar to the criminal process, be allowed to consider relevant statutes or ordinances in criminal negligent homicide cases"). Employing this reasoning that the degree of care is determined by traffic laws for a negligent-vehicular-homicide conviction, we conclude that "an act or omission," as used in NRS 484B.657(1), denotes a violation of a traffic law. Thus, there must be evidence that a defendant committed an unlawful act or omission, which would warrant a traffic violation, in order to support a conviction pursuant to NRS 484B.657(1).

We note that this unlawful act requirement is supported by NRS 484B.657's legislative history,[4] by the fact that Nevada is one of only a few states to criminalize simple negligence without requiring an underlying unlawful act,[5] and because it would be difficult for people to abide by a statute that punished simple negligence without an unlawful act or omission.

"Simple negligence" denotes "ordinary negligence"

[Headnote 11]

Because Nevada has also not specifically defined "simple negligence," we start with the different degrees of negligence recognized in the law and by this court. This court has recognized a difference between "ordinary," "gross," and "criminal" negligence. *See Hart v. Kline*, 61 Nev. 96, 100-01, 116 P.2d 672, 673-74 (1941). Ordinary negligence and gross negligence are degrees of the same conduct, and we have held that "[o]rdinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency

[4]In support of the bill that enacted what was then NRS 484.3775, Assemblywoman Sheila Leslie, Assemblywoman Debbie Smith, and a private citizen lamented on the fact that negligent drivers who are responsible for the death of another only receive traffic violations. Hearing on A.B. 295 Before the Assembly Judiciary Comm., 73d Leg. (Nev., March 29, 2005). Similarly, Ben Graham, the legislative representative at the time for the Clark County District Attorney's Office and the Nevada District Attorneys Association, noted that someone could be charged under the statute "[i]f you are guilty of simple negligence of a traffic violation where a death occurs." *Id*. We conclude that this spotlight on traffic violations demonstrates the Legislature's intent that NRS 484B.657(1) require an unlawful act.

[5]For example, both the Idaho and Pennsylvania statutes require ordinary negligence *and* an unlawful act. *See Haxforth v. State*, 786 P.2d 580, 581-82 (Idaho Ct. App. 1990); *Commonwealth v. Heck*, 491 A.2d 212, 215 (Pa. Super. Ct. 1985).

to injure." *Id*. at 101, 116 P.2d at 674 (quoting *Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932)).

[Headnote 12]

In the civil context, "ordinary" negligence has been described as the "failure to exercise that degree of care in a given situation which a reasonable man under similar circumstances would exercise." *Driscoll v. Erreguible*, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971); *see also* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 3 (Am. Law Inst. 2010) (defining negligence as failure to "exercise reasonable care under all the circumstances"). Gross negligence "is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care." *Hart*, 61 Nev. at 100, 116 P.2d at 674 (quoting *Shaw*, 162 A. at 374). Similar to our definition of gross negligence, criminal negligence has been described as "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Model Penal Code § 2.02(2)(d) (Am. Law Inst., Official Draft & Revised Comments 1980).

[Headnote 13]

When the Legislature does not specifically define a term, this court "presume[s] that the Legislature intended to use words in their usual and natural meaning." *Wyman v. State*, 125 Nev. 592, 607, 217 P.3d 572, 583 (2009) (alteration in original) (quoting *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007)). *Black's Law Dictionary* defines "negligence" as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation," and notes that "*ordinary negligence*" and "*simple negligence*" are coextensive terms with the same meaning. *Negligence*, *Black's Law Dictionary* (10th ed. 2014). We note that other jurisdictions also expressly equate simple negligence with ordinary negligence[6] and that the Legislature chose the term "simple negligence" to distinguish it from the heightened criminal negligence standard.[7] Thus, based on the ordi-

[6]*See, e.g.*, *State v. Hazelwood*, 946 P.2d 875, 885 (Alaska 1997) (noting that the term " 'negligence' always denotes ordinary, civil negligence"); *Heck*, 491 A.2d at 217 (noting that, in Pennsylvania, "vehicular homicide is a crime predicated on 'civil,' 'simple,' or 'ordinary' negligence" and citing a definition of "[o]rdinary [n]egligence"); *State v. Jenkins*, 294 S.E.2d 44, 45 (S.C. 1982) (holding that unlawful neglect of a child required "simple negligence, rather than criminal negligence"); *see also* Haw. Rev. Stat. § 707-704(2)(d) (2014) (defining "[s]imple negligence" as it applies to negligent homicide, which includes "a deviation from the standard of care that a law-abiding person would observe in the same situation").

[7]Ben Graham, the legislative representative at the time for the Nevada District Attorneys Association, testified that simple negligence "is not a high degree of negligence" and punishes conduct less than criminal negligence. Hearing on A.B. 295 Before the Senate Judiciary Comm., 73d Leg. (Nev., April 21, 2005).

narily understood meaning of simple negligence as reflected in the dictionary definitions, caselaw and statutes from other jurisdictions, and the legislative history for the vehicular-manslaughter statute, we conclude that "simple negligence," as used in NRS 484B.657(1), denotes ordinary negligence. Accordingly, because the unlawful act or omission requirement clearly delineates the type of activity prohibited and ordinary negligence is a reasonableness person standard, "a person of ordinary intelligence [is provided] fair notice of" the conduct that NRS 484B.657(1) proscribes. *Castaneda*, 126 Nev. at 481, 245 P.3d at 553 (quoting *Holder*, 561 U.S. at 18).

[Headnote 14]

Having concluded that "an act or omission" denotes an unlawful act or omission and "simple negligence" denotes ordinary negligence, we consider the second prong of the vagueness test under *Castaneda*. To recall, the second prong looks to whether the statute "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id*. at 481-82, 245 P.3d at 553 (quoting *Williams*, 553 U.S. at 304). The unlawful act or omission requirement provides an objective standard so "seriously discriminatory enforcement" is not implicated. *Id*.; *cf. Silvar*, 122 Nev. at 296, 129 P.3d at 687 (noting that prostitution-loitering ordinance was unconstitutionally vague because, in part, it lacked objective standards by which to evaluate enforcement). Accordingly, we conclude that NRS 484B.657(1), as interpreted in this opinion, is not unconstitutionally vague.

II.

[Headnotes 15-17]

Cornella also argues that NRS 484B.657(1)'s simple negligence standard violated her right to due process. We acknowledge that the use of simple negligence, rather than criminal negligence, is not without some controversy in terms of whether it meets due process criteria for imposing criminal liability. A general principle of criminal law is that some level of intent or culpability is required to punish someone for a crime. *Morissette v. United States*, 342 U.S. 246, 250 (1952). In *Morissette*, the United States Supreme Court held:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Similarly, Assemblywoman Sheila Leslie noted that the purpose of the bill was to punish "inattentive" driving resulting in a fatality. *Id*. As stated previously, inattentiveness is a characteristic of ordinary negligence. *See Hart*, 61 Nev. at 101, 116 P.2d at 674.

Id. Nevada has codified this concept in NRS 193.190, which requires that "[i]n every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence." Despite this requirement, some crimes are punished in the absence of criminal intent or culpability. *See Morissette*, 342 U.S. at 252-57. The most common offenses that fall into this category are "public welfare offenses," which "are in the nature of police regulations." *Id*. at 255, 257 (internal quotations omitted). These offenses did not arise out of the common law as they have "different antecedents and origins." *Id*. at 252. Instead, public welfare offenses generally arose out of the Industrial Revolution and involve "neglect where the law requires care, or inaction where it imposes a duty." *Id*. at 253-55. The purpose of public welfare offenses is "to require a degree of diligence for the protection of the public which shall render violation impossible." *Id*. at 257 (quoting *People v. Roby*, 18 N.W. 365, 366 (Mich. 1884)). Thus, the Supreme Court has recognized a state's authority to dispense with criminal intent or culpability, noting that "[t]here is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." *Lambert v. California*, 355 U.S. 225, 228 (1957). However, this power has limits. *See Heck*, 491 A.2d at 219 ("[T]he legislature's power to eliminate mens rea is not without limitation . . . .").

[Headnote 18]

A crime may be treated as a public welfare offense requiring only ordinary negligence when it: (1) is not rooted in the common law, (2) involves a small penalty, (3) does not tarnish the character of the offender, and (4) is of a type that a person could reasonably be expected to abide by. *See Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960); *Haxforth*, 786 P.2d at 582; *Heck*, 491 A.2d at 220-21. Nevada is not alone in punishing vehicular manslaughter/homicide based on ordinary negligence.[8] Other jurisdictions that do so include Connecticut, the District of Columbia, Hawaii, Idaho, Massachusetts, Michigan, South Dakota, and Virginia.[9] *See United*

[8]We note that Nevada also criminalizes ordinary negligence in other statutes, including NRS 202.280(1) (making it a misdemeanor to "maliciously, wantonly or negligently discharge[ ] . . . any . . . firearm" in certain places), NRS 475.010 (making it a misdemeanor to "willfully or negligently set[ ] or fail[ ] to guard carefully or extinguish any fire"), NRS 475.020 (making it a misdemeanor to "willfully or negligently leave[ ] [a] fire or fires burning or unexhausted, or fail[ ] to extinguish them thoroughly"), and NRS 476.030 (making it a misdemeanor to "injure[ ] or cause[ ] injury to the person or property of another" "by careless, negligent or unauthorized use or management of any explosive or combustible substance").

[9]Conn. Gen. Stat. § 14-222a(a) (2011); D.C. Code § 50-2203.01 (2001) ("Any person who, by the operation of any vehicle in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of

States v. Gomez-Leon, 545 F.3d 777, 792-93 (9th Cir. 2008) (comparing California's vehicular-manslaughter statute to statutes in other states and noting that several states punish involuntary manslaughter or negligent homicide on a showing of ordinary negligence). Courts and legal commentators considering whether vehicular manslaughter/homicide is a public offense requiring only ordinary negligence have reached differing conclusions. We are persuaded, however, that vehicular manslaughter under NRS 484B.657(1) is a public welfare offense, and, therefore, simple or ordinary negligence is sufficient to meet due process requirements.

In *Haxforth*, the Court of Appeals of Idaho concluded that Idaho's vehicular-manslaughter statute[10] did not violate due process even though it required only ordinary negligence. 786 P.2d at 582. The court reasoned that traffic laws such as the vehicular-manslaughter statute had no roots in the common law. *Id*. The *Haxforth* court also observed that the Idaho statute carries a light penalty (it is a misdemeanor) and that "[t]he punishment is directed not at evil conduct but at negligent acts or omissions tragically resulting in loss of life" such that a conviction under the statute "does not gravely besmirch the defendant's character." *Id*. Based on this analysis, the court held that vehicular manslaughter "resembles more closely a public welfare offense, and as such need not contain a criminal negligence requirement." *Id*.; *accord Russo*, 450 A.2d at 862 (reject-

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another, . . . shall be guilty of a felony . . . ."); Haw. Rev. Stat. § 707-704(1) (2014) ("A person is guilty of the offense of negligent homicide in the third degree if that person causes the death of another person by the operation of a vehicle in a manner which is simple negligence."); Haw. Rev. Stat. §§ 707-704(2) (defining simple negligence); Idaho Code § 18-4006(3)(c) (2016); Mass. Ann. Laws ch. 90, § 24G(b) (LexisNexis 2012) (A person who, while under the influence of alcohol or drugs, "operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, [is] guilty of homicide by a motor vehicle."); Mich. Comp. Laws Ann. § 257.601d(1) (West 2016) ("A person who commits a moving violation . . . that causes the death of another person is guilty of a misdemeanor . . . ."); S.D. Codified Laws § 22-16-41 (2009) ("Any person who, while under the influence of alcohol, drugs, or substances . . . without design to effect death, operates or drives a vehicle of any kind in a negligent manner and thereby causes the death of another person, including an unborn child, is guilty of vehicular homicide."); *State v. Two Bulls*, 547 N.W.2d 764, 766 (S.D. 1996) (South Dakota's statute requires that the person was driving under the influence and a showing of ordinary negligence); Va. Code Ann. § 18.2-36.1(A) (2014) (providing in part that a driver who "unintentionally causes the death of another person" while the driver is under the influence is guilty of involuntary manslaughter); *Keech v. Commonwealth*, 386 S.E.2d 813, 816 (Va. Ct. App. 1989) (providing that when a driver is not under the influence, "a higher degree of negligence" is required).

[10]Idaho defines vehicular manslaughter as "the operation of a motor vehicle . . . [that] cause[s] . . . death because of . . . [t]he commission of an unlawful act, not amounting to a felony, without gross negligence." Idaho Code § 18-4006(3)(c) (2016).

ing argument that Connecticut's negligent-homicide statute[11] was unconstitutional because it lacked an element of intent where statute regulates conduct under police power, and a violation, therefore, can support criminal conviction, regardless of intent). As Stanford University law professor Herbert L. Packer has noted, "negligence has a very strong foothold in the criminal law. It finds its most explicit formulation in the statutes penalizing negligent homicide in the driving of an automobile." *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 143-44 (1962); *see also* C.P. Jhong, Annotation, *What Amounts to Negligence Within Meaning of Statutes Penalizing Negligent Homicide by Operation of a Motor Vehicle*, 20 A.L.R. 3d 473 § 3 (1968) ("Many cases have held or recognized that a showing of ordinary negligence is sufficient to convict an accused under a vehicular negligent homicide statute describing the punishable misconduct in terms of 'negligence' without any modification or qualification being attached to such word.").

The conflicting position is reflected in *Heck*, wherein the Superior Court of Pennsylvania concluded that Pennsylvania's negligent-vehicular-homicide statute[12] was unconstitutionally vague because it criminalized negligent conduct. 491 A.2d at 214-15. In reaching its conclusion, the court observed that the statute imposed a stiff penalty (up to five years in prison plus revocation of the defendant's driver's license), a conviction under the statute damages the defendant's reputation by branding him a "criminal killer," and it "carries with it the stamp of criminality and the kind of opprobrium that under the common law was reserved for true crimes of moral turpitude." *Id*. at 222-23. The *Heck* court further explained that it was unreasonable to penalize someone for inadvertent conduct because "it can serve no rational purpose of the criminal law to subject the merely negligent actor to the additional punitive sanctions of the criminal law." *Id*. at 224. Specifically, punishing negligent conduct does not serve the purposes of deterrence, rehabilitation, or remov-

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[11]Conn. Gen. Stat. § 14-222a(a) (2011) ("[A]ny person who, in consequence of the negligent operation of a motor vehicle, causes the death of another person shall be fined not more than one thousand dollars or imprisoned not more than six months or both.").

[12]The Pennsylvania statute in effect at the time provided:

> Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic . . . is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.

75 Pa. Stat. and Cons. Stat. Ann. § 3732 (West 1982). This statute required an unlawful act, whereas Nevada's statute is silent on this matter. The current version of Pennsylvania's homicide-by-vehicle statute requires recklessness or gross negligence. 75 Pa. Stat. and Cons. Stat. Ann. § 3732(a) (West 2010).

ing dangerous people from society. *Id*. at 224-25 ("One who is not aware of the criminality of his conduct cannot be deterred from performing it. And one who is morally blameless need not be isolated from society or rehabilitated." (internal quotations omitted)); *see also* Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Colum. L. Rev. 632, 634 (1963) (noting that "today it is well established in the common law of most [modern legal systems] that conviction for manslaughter, including homicide by automobile, requires at least recklessness").

Applying the relevant criteria, we agree with the *Haxforth* court and conclude that our vehicular-manslaughter statute closely resembles a public welfare offense, and, therefore, a violation thereof does not require criminal intent, but rather may be based on simple or ordinary negligence. First, negligent vehicular manslaughter was not a crime at common law. *Haxforth*, 786 P.2d at 582. Second, unlike the more severe penalty under the Pennsylvania statute considered in *Heck*, vehicular manslaughter in Nevada is punishable only as a misdemeanor, NRS 484B.657(1), and carries a relatively light sentence served in a county jail for not more than six months, a fine of $1,000, or both the fine and imprisonment.[13] NRS 193.150(1). In contrast, the Nevada offense that carries a penalty similar to the Pennsylvania statute—reckless driving causing death or substantial bodily harm—includes a criminal intent more akin to criminal or gross negligence. *See* NRS 484B.653(6) ("[A] person who does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle in willful or wanton disregard of the safety of persons or property, if the act or neglect of duty proximately causes the death of or substantial bodily harm to another person, is guilty of a category B felony and shall be punished 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 by a fine of not less than $2,000 but not more than $5,000."). Third, although serving six months in a county jail may slightly harm the character of the offender, we look to the nature of a vehicular-manslaughter conviction and the fact that it does not encompass evil conduct. *Haxforth*, 786 P.2d at 582. As to the fourth factor, that the statute must embody a rule of conduct that a person could reasonably be expected to abide by, we conclude that simple negligence meets this requirement based on our previous conclusion that NRS 484B.657(1) requires an unlawful act. We so hold because traffic laws are akin to public welfare offenses, and people should be reasonably able to comply with their terms. *See id*. The Nevada Legis-

[13]An additional penalty is available under certain circumstances set forth in NRS 484B.130. *See* NRS 484B.657(2).

lature exercised its authority to exclude from NRS 484B.657(1) the traditional requirement of criminal intent or culpability and instead required simple negligence. We see no reason to circumvent that authority here. *See Lambert*, 355 U.S. at 228 ("There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.").

CONCLUSION

Because the district court failed to correctly interpret the phrase "an act or omission" as requiring an unlawful act or omission, we grant the petition and direct the clerk of this court to issue a writ of certiorari instructing the district court to reconsider Cornella's direct appeal for the sole purpose of applying NRS 484B.657(1) consistent with the interpretation of the statute in this opinion.[14]

PARRAGUIRRE, C.J., and SAITTA, J., concur.

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

No. 68545

August 12, 2016 376 P.3d 798

Original petition for a writ of mandamus or prohibition challenging a district court order vacating a misdemeanor conviction and remanding for a new trial.

The supreme court, HARDESTY, J., held that: (1) the district court did not arbitrarily or capriciously exercise its discretion when it found that the justice court's comments at sentencing indicated bias against defendant, but (2) the district court arbitrarily and capriciously exercised its discretion to reverse defendant's conviction as remedy for the justice court's bias against defendant.

Petition denied in part and granted in part.

[Rehearing denied September 30, 2016]

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[14]Because Cornella did not challenge the district court's order by way of a writ of mandamus, we do not address whether there was sufficient evidence presented to support Cornella's conviction. *See State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 696-97 (2000) (discussing limited circumstances in which this court will entertain review on mandamus of a district court's decision under its appellate jurisdiction).

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Bruce W. Nelson*, Chief Deputy District Attorney, Clark County, for Petitioner.

Mueller, Hinds & Associates, Chtd., and *Craig A. Mueller* and *Kelsey Bernstein*, Las Vegas, for Real Party in Interest.

1. MANDAMUS.
   The decision to consider a writ of mandamus is within the supreme court's complete discretion.
2. MANDAMUS.
   A writ of mandamus will generally not issue if the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170.
3. COURTS.
   District courts are granted exclusive final appellate jurisdiction in cases arising in justice courts.
4. MANDAMUS.
   As a general rule, the supreme court will not consider a petition for a writ of mandamus that requests review of a decision of the district court acting in its appellate capacity unless the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction or has exercised its discretion in an arbitrary or capricious manner, or where there is a split of authority among lower courts that can only be resolved through the supreme court's exercise of its original jurisdiction.
5. MANDAMUS.
   An arbitrary or capricious exercise of discretion, for which mandamus relief is available, is one founded on prejudice or preference rather than on reason or contrary to the evidence or established rules of law.
6. MANDAMUS; SENTENCING AND PUNISHMENT.
   The district court did not arbitrarily or capriciously exercise its discretion when it found that the justice court's comments at sentencing, concerning the court's sentencing policies, indicated bias against defendant convicted of misdemeanor driving under the influence, and thus, mandamus relief was unavailable; before any argument could be heard regarding aggravation or mitigation, the justice court stated that defendant would be remanded into custody to serve additional day in jail because she only had one day of credit for time served, and when counsel tried to address the sentence, the justice court commented that it was following policies of department's sitting judge. NRS 484C.400(1)(a)(2).
7. JUDGES.
   A judge's remarks made in the context of a court proceeding may be indicative of prejudice or improper bias if they demonstrate the judge has closed his or her mind to the presentation of all the evidence.
8. MANDAMUS.
   The district court arbitrarily and capriciously exercised its discretion to reverse defendant's misdemeanor driving under the influence conviction as a remedy for the justice court's bias against defendant at sentencing, warranting mandamus relief; the district court found that there was no problem with the merits of the case at trial, did not account for the state of evidence of defendant's guilt, and there was no showing that bias toward defendant at sentencing interfered with her fair trial right.

Before HARDESTY, SAITTA and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

The district court reversed real party in interest Jennifer Schneider's misdemeanor driving under the influence conviction when it found that the justice court's comments at sentencing showed bias that undermined both the sentence and the fairness of the trial. We conclude that the district court did not abuse its discretion when it found the justice court's comments at sentencing indicated a bias against Schneider. However, in fashioning a remedy, the district court did not account for the state of the evidence of Schneider's guilt. We conclude the district court arbitrarily and capriciously exercised its discretion when it reversed Schneider's conviction and therefore grant the petition in part.

FACTS AND PROCEDURAL HISTORY

Schneider was charged with misdemeanor driving under the influence and exercised her right to a trial in justice court. Although the case proceeded in Department 13 of the Las Vegas Township Justice Court, another justice of the peace presided over the trial in place of the justice of the peace who sits in Department 13. *See* NRS 4.340(1) (allowing a justice of the peace to invite another justice of the peace to temporarily assist in the justice's department in certain circumstances). As is typical in misdemeanor cases, the trial proceeded as a bench trial with the judge acting as the fact-finder. At the conclusion of the evidence, the trial judge found Schneider guilty. Before any argument could be made as to sentencing, the judge ordered that Schneider be remanded into custody to serve 24 hours in jail because she only had one day of credit for time served. Schneider argued that an immediate remand to serve jail time constituted a "trial tax" or that the automatic remand was a penalty for exercising her right to a trial. The judge responded, "I understand your argument. Like I said, my theory is . . . that I am sitting for [Department 13]. I do have sentencing discretion. I do follow what [Department 13's] policies and procedures are." Ultimately, the judge allowed Schneider the opportunity to post $500 in cash as bail for a 24-hour incarceration and ordered that she perform community service if she posted bail.[1]

Schneider appealed the conviction to the district court, claiming that there was insufficient evidence to support her conviction and that her sentencing was unconstitutional as it was based upon a policy to discourage defendants from exercising their right to a

[1]The record does not clearly demonstrate whether the bail was in lieu of any imposed incarceration or whether Schneider was released on bail pending appeal.

trial. The policy, she alleged, was to punish only those defendants who went to trial for driving under the influence by ordering an automatic and immediate remand to complete a minimum of two days in custody, despite the sentencing discretion outlined in NRS 484C.400(1)(a)(2), which authorizes the court to impose a term of imprisonment of not less than two days or community service for not less than 48 hours, and NRS 484C.400(3), which allows a term of confinement for misdemeanor driving under the influence to be served intermittently.

Relying upon the trial judge's comment that she was following the policies of the justice of the peace who sits in Department 13 and upon the sentence imposed, the district court found there was a policy at the time of Schneider's trial to impose a predetermined sentence of jail time on those defendants who exercised their right to a trial. The district court concluded that there was no error in the trial or issue with the merits of the case but determined that the policy violated Schneider's due process right to a fair trial. Consequently, the district court ordered Schneider's sentence and conviction reversed and remanded the matter for a new trial in a different department. The State filed this original writ petition challenging that decision.

DISCUSSION

[Headnotes 1-4]

The decision to consider a writ of mandamus is within this court's complete discretion.[2] *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). Generally, a writ of mandamus will not issue if the petitioner has a plain, speedy, and adequate remedy at law. *See* NRS 34.170. Here, the State does not have a plain, speedy, and adequate remedy in the ordinary course of law as "district courts are granted exclusive final appellate jurisdiction in cases arising in Justices Courts." *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005) (internal quotation marks omitted). We have been reluctant, however, to entertain petitions like this one "that request review of a decision of the district court acting in its appellate capacity" because doing so "would undermine the finality of the district court's appellate jurisdiction." *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 696 (2000). As a general rule, we will not consider such petitions "unless the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction or

[2]The State alternatively seeks a writ of prohibition. A writ of prohibition is inapplicable here because the district court had jurisdiction to hear and determine Schneider's appeal. *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (holding that a writ of prohibition "will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration"); *see also* NRS 34.320.

has exercised its discretion in an arbitrary or capricious manner," or where there is a split of authority among lower courts that can only be resolved through this court's exercise of its original jurisdiction. *Id.* at 134, 994 P.2d at 696-97.

[Headnote 5]

The State asserts that the district court arbitrarily and capriciously determined that the trial court was biased against Schneider at sentencing and reversed and remanded for a new trial as a result. We elect to exercise our discretion and consider whether the district court exercised its discretion in an arbitrary or capricious manner. "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason or contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citations and internal quotation marks omitted).

[Headnotes 6, 7]

The State first contends the district court arbitrarily and capriciously concluded that the justice court was biased against Schneider at sentencing. The district court acknowledged that the justice court had wide sentencing discretion but found that the justice court was biased against Schneider because it sentenced her to additional jail time based solely on a predetermined policy to order jail time when a defendant exercises the right to a trial for misdemeanor driving under the influence. We are not convinced the district court's decision—that a judge who imposes a sentence based solely on the defendant's exercise of the right to a trial is biased—is contrary to established law. The district court's concern, and ours as well, goes beyond the well-established proscription that an individual "may not be punished for exercising a protected statutory or constitutional right," *United States v. Goodwin*, 457 U.S. 368, 372 (1982), to the appearance of prejudice or bias. As we have recognized, a judge's remarks made in the context of a court proceeding may be indicative of prejudice or improper bias if they demonstrate "the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

Before any argument could be heard regarding aggravation or mitigation, the justice court stated that because Schneider only had one day of credit for time served, she would be remanded into custody to serve 24 hours in jail. When defense counsel tried to address the sentence, the justice court commented that it was following the policies of the department's sitting judge. These circumstances indicate that the justice court had closed its mind to the issue of an appropriate sentence and predetermined a sentence of two days in custody. That conclusion does not change even assuming that the policy referenced by the justice court was not intended to punish

defendants for exercising their right to a trial.[3] The district court's decision was based on the law and the record before it, not prejudice or preference. As such, we cannot say the district court arbitrarily or capriciously exercised its discretion by determining that the justice court was biased against Schneider at sentencing.

[Headnote 8]

The State next contends the district court arbitrarily and capriciously reversed Schneider's conviction and remanded for a new trial. The State argues that, even assuming the justice court was biased at sentencing, the appropriate remedy was to vacate the sentence, not the conviction, and that bias at sentencing does not affect the validity of the verdict.

We have "held that the amount of misconduct necessary to reverse [a conviction] depends on how strong and convincing is the evidence of guilt," but that "misconduct may so interfere with the right to a fair trial" that reversal is warranted. *Kinna v. State*, 84 Nev. 642, 647, 447 P.2d 32, 35 (1968). While the district court found that the justice court was biased against Schneider at sentencing, it also found that there was "no problem with the merits of the case as [the trial judge] handled it." Despite finding no error with the justice court's conduct of the trial or its determination of guilt, the district court ordered that Schneider's conviction be reversed. But the district court's order did not account for the state of the evidence of Schneider's guilt as required by *Kinna*. Schneider did not show, the district court did not find, and the record does not reveal any error in the determination of her guilt from the trial evidence. As a result, there was no showing that the bias toward Schneider at sentencing interfered with her fair trial right.

The district court commented on the lack of controlling authority concerning an appropriate remedy. While noting the State's reliance on *United States v. Medina-Cervantes*, 690 F.2d 715, 716-17 (9th Cir. 1982) (concluding that where a defendant "was punished more severely because of his assertion of the right to trial," the appropriate remedy was to vacate the defendant's sentence), in arguing for merely a new sentencing hearing, the district court nonetheless ordered Schneider's conviction reversed without identifying any instance of possible bias or appearance of partiality during the trial that affected Schneider's right to a fair trial. *See Wesley v. State*, 112 Nev. 503, 509, 916 P.2d 793, 798 (1996) ("The right to a fair trial incorporates the right to have a trial presided over by a judge who is free from bias or prejudice."). We conclude the district court ar-

[3]While the State argues that Schneider was ultimately allowed to post cash bail to avoid remand and jail time and that therefore the justice court clearly did not follow any purported sentencing policy of the sitting judge, the predetermined sentence of two days in custody was nevertheless imposed.

bitrarily and capriciously exercised its discretion to reverse Schneider's conviction and therefore grant the petition in part.

For the reasons stated above, we order the petition denied in part and granted in part and direct the clerk of this court to issue a writ of mandamus instructing the district court to strike the portion of its May 4, 2015, order that reverses Schneider's conviction.

SAITTA and PICKERING, JJ., concur.

JAMES MCNAMARA, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64403

August 12, 2016 377 P.3d 106

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping with substantial bodily harm and possession of a controlled substance. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

The supreme court, PICKERING, J., held that: (1) defendant's act of forcing victim to remain with him against her will in state was in furtherance of first-degree kidnapping sufficient to establish State's territorial jurisdiction over crime; (2) defendant's prevention of victim from seeking medical treatment to address infections in her legs from repeated beatings in another state constituted substantial bodily harm sufficient to give State territorial jurisdiction over substantial bodily harm enhancement to kidnapping crime; (3) State needed to prove territorial jurisdiction only by preponderance of evidence; and (4) the district court's error in failing to include, on verdict form, second-degree kidnapping as lesser-included offense of first-degree kidnapping was harmless error.

Affirmed.

[Rehearing denied September 16, 2016]

[En banc reconsideration denied November 23, 2016]

Philip J. Kohn, Public Defender, and *Sharon G. Dickinson*, Deputy Public Defender, Clark County, for Appellant.

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

1. CRIMINAL LAW.

The language of the statute addressing territorial jurisdiction with respect to interstate crimes gives jurisdiction to state courts whenever the

criminal intent is formed and any act is accomplished in the state in pursuance or partial pursuance of the intent. NRS 171.020.

2. Criminal Law.

Defendant's act of forcing victim to remain with him against her will in state was in furtherance of first-degree kidnapping sufficient to establish State's territorial jurisdiction to prosecute defendant for such crime, even though defendant did not form intent to commit kidnapping, which began in another state, in the state. NRS 171.020.

3. Criminal Law.

State courts obtain territorial jurisdiction to prosecute a crime whenever (1) a defendant has criminal intent, irrespective of where it was formed; and (2) he or she performs any act in this state in furtherance of that criminal intent. NRS 171.020.

4. Criminal Law.

Defendant's prevention of victim from seeking medical treatment to address infections in her legs from repeated beatings in another state constituted substantial bodily harm sufficient to give State territorial jurisdiction over substantial bodily harm enhancement to crime of first-degree kidnapping, even though defendant never hit victim or forced her to have sex with him while in the state; forced delay in obtaining medical attention caused infections in victim's legs to worsen, creating excruciating pain and hindering victim's ability to put weight on her legs, with untreated injuries requiring victim to undergo extensive surgery that necessitated several weeks of painful follow-up at hospital. NRS 0.060, 171.020, 200.320.

5. Sentencing and Punishment.

Delayed medical treatment can cause prolonged physical pain, thereby falling within the definition of substantial bodily harm that will warrant an enhancement to crime of first-degree kidnapping. NRS 0.060, 200.320.

6. Criminal Law.

Territorial jurisdiction with respect to interstate crimes is a question of law reserved for the court. NRS 171.020.

7. Criminal Law.

The State need only prove territorial jurisdiction with respect to interstate crimes by a preponderance of the evidence, as jurisdiction does not involve an element of the crime charged or relate to the defendant's guilt or innocence. NRS 171.020.

8. Jury.

Territorial jurisdiction with respect to interstate crime was a procedural matter relating to State's authority to adjudicate case and not to defendant's guilt or limit of authorized punishment, and thus, jury trial on factual questions establishing jurisdiction were not required by Sixth Amendment. U.S. Const. amend. 6; NRS 171.020.

9. Criminal Law.

When instructing on territorial jurisdiction, the district court's failure to acknowledge to jury, as matter of law, that territorial jurisdiction over crime of first-degree kidnapping with substantial bodily harm that originated in another state was proper was harmless error; State proffered extensive testimony that kidnapping continued into the state, and while defendant did not physically abuse victim in the state, he impeded her from seeking medical treatment, which exacerbated her injuries and caused her excruciating and prolonged pain. NRS 171.020.

10. Grand Jury.

Facsimile notice of intent to seek indictment by grand jury satisfied statutory notice requirement, even though notice did not include date, time, and place of grand jury hearing; notice gave defendant over five judicial

days to submit written request, and State provided defense counsel with date, time, and place for scheduled grand jury proceedings two days later, on day following receipt of defendant's request for such information. NRS 172.241(2).

11. Criminal Law.
The district court's error in failing to include, on verdict form, second-degree kidnapping as lesser-included offense of first-degree kidnapping was harmless error; jury was properly instructed on lesser-included offense, evidence supporting first-degree kidnapping conviction was overwhelming, and the district court individually polled jurors.

12. Criminal Law.
If a district court properly instructs the jury on lesser-included offenses, it is not reversible error if the lesser-included offenses are omitted from the verdict form.

13. Criminal Law.
Jurors are presumed to follow the instructions they are given.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

NRS 171.020 governs Nevada's jurisdiction over crimes that straddle state lines. Here, we are asked to address whether Nevada had territorial jurisdiction over the crime of kidnapping with substantial bodily harm when the kidnapping and bodily harm originated in Illinois. We hold that Nevada had territorial jurisdiction over both the kidnapping charge and the substantial bodily harm enhancement. While the kidnapping began in Illinois, it continued into Nevada, where the kidnapper impeded the victim from seeking medical treatment for her injuries. Appellant's other assignments of error either lack merit or amount to harmless error.[1] We therefore affirm.

FACTS

From December 2010 to February 2011, in the suburbs outside of Chicago, Kathryn Sharp resided with appellant James McNamara. The once-friendly and platonic relationship turned into an abusive one as McNamara began physically beating Sharp, isolating her

[1]McNamara raises several other issues on appeal, challenging the sufficiency of the evidence, the admission of prior bad act evidence, denials of his motions for mistrial, the failure to gather evidence, refusal of his proposed jury instructions, the admission of Sharp's driver's license photo and McNamara's mug shot photo, the exclusion from evidence of Sharp's prior domestic abuse relationship, prosecutorial misconduct, violation of his speedy trial rights, the admission of bad act testimony during sentencing, and any cumulative error. We conclude McNamara's arguments are without merit and do not warrant discussion.

from her friends and family, and threatening to torture and kill her family if she tried to leave. Beyond punches and kicks, McNamara beat Sharp with a metal baseball bat, a hammer, and other tools and household items—he even stabbed her with knives. The beatings with the metal baseball bat left open wounds on Sharp's legs, which became badly infected. McNamara would not let Sharp go to the hospital, nor did he allow her to freely shower. When she stated that she needed medical treatment, he grew angry and beat her. Without medical treatment, Sharp wrapped her legs with paper towels and duct-taped them to prevent the pus from the infections from leaking. The denial of medical treatment and the inability to shower exacerbated the infection in Sharp's legs—she testified, "my legs were so bad. I couldn't even put any weight on them the pain was so excruciating."

On February 13, 2011, Sharp and McNamara flew from Chicago to Las Vegas, where McNamara planned to visit his father. Sharp and McNamara stayed at the Circus Circus Hotel and Casino. Sharp was alone part of the time in Las Vegas—she went to the gift shop and buffet, and spent time in the room by herself. She testified, however, that she felt she could not safely escape without endangering herself and her family, whose lives McNamara had threatened. Although Sharp acknowledged at trial that McNamara was not physically violent with her in Las Vegas, McNamara continued to threaten her. While in Las Vegas, Sharp told McNamara she was in an enormous amount of pain because she did not have her normal painkillers with her and asked him if she could get medical treatment. McNamara became visibly upset when Sharp asked to go to the hospital and threatened to hurt her. Sharp retreated, saying that she was fine with Ibuprofen and did not need medical attention. However, McNamara told Sharp that he was going to beat her when he woke up from his nap. Knowing she needed medical treatment and in fear of another beating, Sharp escaped the hotel room and solicited help from hotel security who summoned an ambulance to take her to the hospital.

Once at the hospital, Sharp underwent extensive surgery on her legs. The surgeon at University Medical Center testified that her lower extremities evidenced repeated assaults over a long period of time and that the failure to seek medical treatment greatly exacerbated the injuries and infection, which had to have caused "excruciating" pain. Sharp's infection was so extreme that she was lucky to be alive, much less save her legs from amputation. After surgery, Sharp had to get her dressings changed every day, which was a very painful experience.

While Sharp was at the hospital, the police arrested McNamara. On April 15, 2011, the State charged McNamara by way of information with kidnapping with substantial bodily harm, coercion, and possession of a controlled substance. After McNamara filed a pretrial petition for a writ of habeas corpus challenging the substantial

bodily harm enhancement, the district court dismissed the enhancement, concluding that Nevada did not have territorial jurisdiction as all the physical violence occurred outside Nevada. Thereafter, the State obtained a grand jury indictment using different wording to support the substantial bodily harm enhancement. The grand jury indicted McNamara on one count each of first-degree kidnapping with substantial bodily harm and possession of a controlled substance. On May 31, 2013, the jury returned a guilty verdict on both counts. McNamara was sentenced to life without the possibility of parole.

DISCUSSION

Territorial jurisdiction

McNamara argues that Nevada lacked territorial jurisdiction to prosecute him for first-degree kidnapping with substantial bodily harm. McNamara's argument is three-fold. First, McNamara claims that he did not form any intent to kidnap in Nevada, which he contends NRS 171.020 requires. "By arguing the kidnapping was an on-going event beginning in Illinois," McNamara posits, the "State admitted [McNamara] did not form intent in Nevada." Second, McNamara argues that the aggravated charge of first-degree kidnapping with substantial bodily harm cannot be sustained because Sharp conceded that McNamara never physically hurt her in Las Vegas, only in Illinois, which he claims vitiates the substantial bodily harm enhancement. Third, McNamara argues that the district court erred in failing to submit the issue of territorial jurisdiction to the jury.

Proving territorial jurisdiction under NRS 171.020

Territorial jurisdiction has long been required in criminal cases. First, territorial jurisdiction was a creature of common law and the prosecution had the burden to affirmatively prove that the crime "was committed within the territorial jurisdiction of the court and grand jury where the indictment was found." *People v. Gleason*, 1 Nev. 173, 178 (1865); *see also People v. Betts*, 103 P.3d 883, 886-86 (Cal. 2005) ("At common law, courts applied a narrow principle of territorial jurisdiction in criminal cases and, with some exceptions, a particular crime was viewed as occurring for purposes of jurisdiction in only one location, conferring jurisdiction over the offense upon only a single state. . . . Like most other states, California has addressed the problem of criminal activity that spans more than one state by adopting statutes that provide our state with broader jurisdiction over interstate crimes than existed at common law."). However, the Nevada Legislature modified the common-law rule by enacting NRS 171.020 to address territorial jurisdiction in the context of interstate crimes.

[Headnote 1]

NRS 171.020 provides:

> Whenever a person, with intent to commit a crime, does any act within this State in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this State, such person is punishable for such crime in this State in the same manner as if the same had been committed entirely within this State.

"The language of the statute gives jurisdiction to Nevada courts whenever the criminal intent is formed and *any act* is accomplished in this state in pursuance or partial pursuance *of the intent*." *Shannon v. State*, 105 Nev. 782, 792, 783 P.2d 942, 948 (1989). Prior to *Shannon*, this court had interpreted NRS 171.020 narrowly because it worried that a broad interpretation would impose "upon the sovereignty of a sister state." *Id.* at 791, 783 P.2d at 947. However, after "the United States Supreme Court ha[d] ruled, under the dual sovereignty doctrine, that successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause of the Fifth Amendment," this court reversed course and held "that NRS 171.020 should be given the full interpretation intended by the Nevada Legislature." *Id.* at 791, 783 P.2d at 948. Thus, this court interpreted NRS 171.020 "not [to] require that there be partial execution of the actual crime" within Nevada, but rather that NRS 171.020 "only requires some carrying out of the criminal intent" within Nevada. *Id.* at 792, 783 P.2d at 948.

[Headnotes 2, 3]

McNamara interprets NRS 171.020 and *Shannon* to require that a defendant *form* his or her criminal intent in Nevada *plus* accomplish any act in furtherance of that intent in Nevada. Nothing in the plain language of NRS 171.020 or the holding in *Shannon* requires that the intent be formed in Nevada. Rather, Nevada courts obtain territorial jurisdiction whenever (1) a defendant has criminal intent (irrespective of where it was formed) and (2) he or she performs any act in this state in furtherance of that criminal intent. The broad language of NRS 171.020 demonstrates a legislative objective to confer territorial jurisdiction over crimes having a sufficient connection to Nevada. *Cf. People v. Renteria*, 82 Cal. Rptr. 3d 11, 17 (Ct. App. 2008) (discussing Cal. Penal Code § 778a(a) (West 2008), which is similar to NRS 171.020, and concluding that "[t]he ultimate question is whether given the crime charged there is a *sufficient connection* between that crime and the interests of the State of California such that it is reasonable and appropriate for California to prosecute the offense" (emphasis added)); *State v. Legg*, 9 S.W.3d 111, 112 (Tenn. 1999) (holding that Tennessee had territorial jurisdiction

over an aggravated kidnapping charge even though the kidnapping and physical violence took place in Alabama).

As kidnapping is a continuing crime, *see* 51 C.J.S. *Kidnapping* § 3 (2010) ("Kidnapping, which involves the detention of another, is, by its nature, a continuing crime. . . . The span of the kidnapping or confinement begins when the unlawful detention is initiated and ends only when the victim both feels and is, in fact, free from detention."); *see also Smith v. State*, 101 Nev. 167, 169, 697 P.2d 113, 115 (1985) (holding that "when a defendant commits criminal acts in Nevada which are a substantial and integral part of an overall continuing crime plan," Nevada courts have jurisdiction under NRS 171.020), jurisdiction over McNamara was proper for the charge of kidnapping because, when McNamara forced Sharp to remain with him against her will, the kidnapping continued into Nevada's territorial jurisdiction until such time that Sharp felt and was, in fact, free from detention.[2]

Substantial bodily harm enhancement

[Headnote 4]

McNamara argues that Sharp's concession that McNamara "never hit her and never forced her to have sex while in Nevada" demonstrates that Nevada lacked territorial jurisdiction over the substantial bodily harm enhancement. The substantial bodily harm enhancement rendered McNamara eligible for life without the possibility of parole, whereas first-degree kidnapping without substantial bodily harm carries the possibility of parole. NRS 200.320. The State counters that McNamara prevented Sharp from receiving medical treatment while in Las Vegas, which constitutes substantial bodily harm because it made her endure prolonged physical pain.

[Headnote 5]

"Substantial bodily harm" is defined as "(1) Bodily injury which creates a substantial risk of death or which causes serious, perma-

[2]McNamara's reliance on *Fortner v. Superior Court*, 159 Cal. Rptr. 3d 128 (Ct. App. 2013), is misplaced. *Fortner* involved a domestic battery that took place while a couple was on vacation in Hawaii—specifically a "single punch to [the victim]'s face." *Id.* at 131-32. Once home in California, the prosecution charged the defendant for said offense. *Id.* at 131. The California Court of Appeal granted the defendant's motion to dismiss the Hawaii-related offense for lack of territorial jurisdiction because the prosecution failed to present any evidence that tied the offense to California. *Id.* at 134. We are presented with a different situation here. Not only is the continuing nature of kidnapping distinct from a single punch to one's face, but our statutes provide different jurisdictional rules for kidnapping than battery or domestic violence. *Compare* NRS 200.350(1) ("Any proceedings for kidnapping may be instituted either in the county where the offense was committed or in any county through or in which the person kidnapped or confined was taken or kept while under confinement or restraint."), *with* NRS 200.485, *and* NRS 200.481(1).

nent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or (2) Prolonged physical pain." NRS 0.060. Delayed medical treatment can cause "prolonged physical pain, thereby falling within the definition of substantial bodily harm." *Rice v. State*, 113 Nev. 1300, 1310, 949 P.2d 262, 268 (1997), *abrogated on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006); *see Collins v. State*, 125 Nev. 60, 64, 203 P.3d 90, 92-93 (2009) (defining "prolonged physical pain" in broad terms to "encompass some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act," but noting that "by its very nature, the term 'pain' is necessarily subjective and cannot be defined further"); *see also LaChance v. State*, 130 Nev. 263, 271-72, 321 P.3d 919, 925 (2014) (upholding substantial bodily harm enhancement for battery charge "based on prolonged physical pain" where the victim "testified that she was immobile for a few days afterward and that her injuries have resulted in permanent shin splints, which prevent her from running . . . [and her] injuries to her tailbone hinder her ability to sit for long periods").

In this case, McNamara restricted Sharp from seeking medical treatment, both before and after they came to Las Vegas. The forced delay in obtaining medical attention caused the infections in Sharp's legs to worsen, creating excruciating pain and hindering her ability to put weight on her legs. These untreated injuries required Sharp to undergo extensive surgery, necessitating several weeks of painful follow-up at the hospital. Because McNamara's prevention of Sharp seeking medical treatment in Nevada caused prolonged physical pain, Nevada had jurisdiction over the substantial bodily harm enhancement.

Procedure for establishing territorial jurisdiction

Citing *Gleason*, 1 Nev. 173, McNamara argues that the district court was required to instruct the jury on territorial jurisdiction and the State needed to prove jurisdiction beyond a reasonable doubt. McNamara points out that "*Shannon* did not overrule *Gleason*," rendering *Gleason*'s reasonable doubt standard of proof for territorial jurisdiction controlling. We disagree. While McNamara is correct that *Shannon* did not overrule *Gleason*, *Gleason* is inapplicable because it interpreted the common law, which the Legislature abrogated with the passage of NRS 171.020 in 1911 and subsequent amendment in 1927. *See* 1927 Nev. Stat., ch. 64, § 59a, at 87.

[Headnote 6]

Our prior decisions make clear that territorial jurisdiction is a question of law reserved for the court. *See Shannon*, 105 Nev. at 791, 783 P.2d at 948 (concluding that territorial jurisdiction involves "a question of law to be decided by the court, not to be submitted

to a jury"). Yet, this court has not expressly articulated the burden of proof to establish territorial jurisdiction and there is a split of authority on this issue.

Some jurisdictions require proof beyond a reasonable doubt when determining territorial jurisdiction. Typically, these courts reason that territorial jurisdiction is an essential element of the crime charged, invoking the State's burden to prove each element beyond a reasonable doubt. *See, e.g.*, *Ortiz v. State*, 766 N.E.2d 370, 374 (Ind. 2002) ("Territorial jurisdiction . . . is not necessarily thought of as an element of the offense. Nonetheless, we have determined that the State is required to prove territorial jurisdiction beyond a reasonable doubt. This is so because where the law has established the necessity of a certain fact for an accused to be guilty of an offense, the existence of that fact is treated much like an element of the offense." (citation and internal quotation marks omitted)); *State v. Rimmer*, 877 N.W.2d 652, 661 (Iowa 2016) (stating that "territorial jurisdiction is an essential element of the crime" (internal quotation marks omitted)). Other courts that have required proof beyond a reasonable doubt to prove territorial jurisdiction have reasoned that the question of jurisdiction involves factual disputes best suited for the jury. *See, e.g.*, *Khalifa v. State*, 855 A.2d 1175, 1185 (Md. 2004) ("Territorial jurisdiction is a factual issue for the trier of fact. When the issue is in dispute, the State has the burden to prove 'beyond a reasonable doubt' that the crime was committed within the geographic limits of Maryland." (citation omitted)); *State v. Batdorf*, 238 S.E.2d 497, 502-03 (N.C. 1977) ("[W]hen jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused.").

Nevertheless, albeit in a roundabout way, our prior decisions indicate that the preponderance of the evidence standard applies when pleading and proving territorial jurisdiction in criminal cases. The analysis begins with *Walstrom v. State*, where this court held that the State's burden of proof for an exception to the statutes of limitation was the preponderance of the evidence standard and reasoned:

> The lesser standard is appropriate because proving the application of the exception to the statute is not the same as proving an element of the crime. Proving the exception to the statute of limitations addresses the issue of the court's jurisdiction; proving an element of the crime concerns the issue of a defendant's guilt or innocence. *The considerations that require proof beyond a reasonable doubt do not apply when the State is merely attempting to prove jurisdiction*. Given the difficulty of proving the secret manner exception long after the commission of an offense, we see no sound reason to compound the difficulty by imposing a higher standard upon the State.

104 Nev. 51, 54-55, 752 P.2d 225, 227-28 (1988) (emphasis added), *overruled in part by Hubbard v. State*, 112 Nev. 946, 920 P.2d 991 (1996). *Hubbard* retreated from *Walstrom*, concluding that *Walstrom*'s holding "that statutes of limitation are jurisdictional and that they may be raised as a bar to prosecution at any time" went against the weight of authority of other jurisdictions and, thus, because "statutes of limitation in criminal cases are non-jurisdictional, affirmative defenses[, they] must be raised in the trial court or they are waived." 112 Nev. at 948, 920 P.2d at 992. In *Dozier v. State*, though, this court recognized that *Hubbard* focused on the issue of waiver, but did not discuss *Walstrom*'s holding that the State's burden of proof for statutes of limitation is preponderance of the evidence and was confronted with addressing the appropriate burden of proof. 124 Nev. 125, 129, 178 P.3d 149, 152 (2008). This court held:

> We now clarify that despite our holding in *Hubbard II* that the statute of limitations is an affirmative, non-jurisdictional defense, the State's burden of proof is still governed by the preponderance of the evidence standard . . . . In addressing the State's burden to disprove an affirmative defense that negates an element of a criminal offense, this court has held that the State has the burden to disprove the defense beyond a reasonable doubt. As we explained in *Walstrom*, however, an affirmative defense asserting that the prosecution is barred by the statute of limitations does not involve an element of the offense implicating the defendant's guilt or innocence.

Id. at 129-30, 178 P.3d at 152-53 (footnote omitted). After reviewing jurisdictions that apply proof beyond a reasonable doubt to statutes of limitation, this court rejected that reasoning because "[t]he statute of limitations is not an element of the offense that the State should be required to prove beyond a reasonable doubt." *Id.* at 131, 178 P.3d at 154. Thus, *Dozier* revived the reasoning in *Walstrom* that a preponderance of the evidence standard applies to issues not involving the defendant's guilt or innocence or an element of the criminal offense. *Id.*

[Headnote 7]

After reviewing these cases in light of *Shannon*, we hold that the State need only prove territorial jurisdiction by a preponderance of the evidence. *Shannon* made clear, "whether NRS 171.020 allows Nevada jurisdiction over crimes occurring in another state is a question of jurisdiction, *not an element of the crime charged*." 105 Nev. at 791, 783 P.2d at 948 (emphasis added). As such, because jurisdiction does not involve an element of the crime charged or relate to the defendant's guilt or innocence, under the reasoning in *Walstrom* and *Dozier*, territorial jurisdiction need not be proven beyond a reason-

able doubt. *See, e.g.*, *United States v. White*, 611 F.2d 531, 535 (5th Cir. 1980) ("If the Government shows by a preponderance of the evidence that the crime was committed in the trial district, both territorial jurisdiction and proper venue are established."); *Betts*, 103 P.3d at 893 ("The prosecution has the burden of proving the facts necessary to establish territorial jurisdiction by a preponderance of the evidence."); *State v. Holm*, 137 P.3d 726, 749-50 (Utah 2006) (discussing Utah Code Ann. § 76-1-501(3) (LexisNexis 2012) and concluding that "[t]he jurisdiction determination is a matter for the trial court, not the jury, and the court itself must resolve any associated factual disputes by a preponderance of the evidence").

For much the same reason, we also reject McNamara's argument that the failure to submit the question of territorial jurisdiction to the jury violated his Sixth Amendment rights as articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Supreme Court invalidated a hate-crime sentence enhancement because the statute allowed the trial judge to effectively increase a defendant's sentence if, by a preponderance of the evidence, the trial judge found that the defendant's possession of a firearm was "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* at 469 (quoting former N.J. Stat. Ann. § 2C:44-3(e) (West 1999)). Recognizing the "with a purpose" requirement inherently involved a determination of the defendant's mens rea, the Court stated that "[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" *Id.* at 493. This led the Court to ask, "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. Answering that question in the affirmative, the Court observed that a trial judge's finding of a hate crime by a preponderance of the evidence had the potential to increase the defendant's sentence from 10 to 20 years. *Id.* at 495. Thus, the Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Notably, the Supreme Court did not discuss procedural issues, such as jurisdiction. And courts deciding issues of territorial jurisdiction post-*Apprendi* have found *Apprendi* inapplicable to territorial jurisdiction challenges. *See, e.g.*, *Betts*, 103 P.3d at 892 (distinguishing *Apprendi* and noting that "territorial jurisdiction is a procedural matter that relates to the authority of California courts to adjudicate the case and not to the guilt of the accused or the limit

of authorized punishment, [and thus] a jury trial on the factual questions that establish jurisdiction is not required by the federal Constitution"); *see also United States v. Miguel*, 338 F.3d 995, 1004 (9th Cir. 2003) ("*Apprendi* does not require a jury find the facts that allow the transfer to district court. The transfer proceeding establishes the district court's jurisdiction over a defendant."); *United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001) ("*Apprendi* claims are not jurisdictional."). Thus, the district court is not required to submit territorial jurisdiction to the jury and it may decide any factual disputes concerning jurisdiction by a preponderance of the evidence.

[Headnotes 8, 9]

In this case, the parties disputed factually whether territorial jurisdiction was proper. McNamara argues that the issue of territorial jurisdiction should have been submitted to the jury under the reasonable doubt standard. However, the issue of territorial jurisdiction in this case *was* submitted to the jury to determine beyond a reasonable doubt. The district court instructed the jury on territorial jurisdiction using the language of NRS 171.020:

> Whenever a person, with intent to commit a crime, does any act within this State in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this State, such person is punishable for such crime in this State in the same manner as if the same had been committed entirely within this State. Nevada has jurisdiction over such a continuing offense only when the criminal intent is formed and any act is accomplished in this state in pursuance or partial pursuance of the intent. It is not required that there be partial execution of the actual crime; it only requires some carrying out of the criminal intent.

The jury was not told that it need only find territorial jurisdiction proper by a preponderance of the evidence. Instead, the jury was instructed solely on the reasonable doubt standard. Thus, in finding McNamara guilty of first-degree kidnapping with substantial bodily harm, the jury resolved the factual disputes regarding territorial jurisdiction by a standard higher than this court requires today. And although the district court failed to formally acknowledge, as a matter of law, that territorial jurisdiction was proper, any such error was harmless because the State proffered extensive testimony that the kidnapping continued into Nevada and, while McNamara did not physically abuse Sharp in Nevada, he impeded her from seeking medical treatment, which exacerbated her injuries and caused her excruciating and prolonged pain. Therefore, Nevada had territorial jurisdiction over McNamara with regard to the charge of first-degree kidnapping with substantial bodily harm.

Notice of grand jury proceedings

[Headnote 10]

McNamara argues that the State failed to give him proper notice of the grand jury proceedings because the amount of time was not reasonable as he had less than one-day's notice of the actual time, date, and place of the grand jury proceedings. The dates of the notice are as follow:

- *Nov. 8, 2011*: State sent defense counsel notice of intent to seek indictment via fax to the public defender's office.
- *Nov. 14, 2011*: Defense counsel sent letter to State, indicating he received notice and requesting notification of date, time, and place of the proceedings.
- *Nov. 16, 2011*: Unaware of defense counsel's letter, State sent defense counsel an email following up to ask whether McNamara planned to testify or defense counsel had any exculpatory evidence for it to present.
- *Nov. 16, 2011*: Defense counsel responded via email, explaining that he already sent a letter requesting the date, time, and place of the grand jury proceedings.
- *Nov. 16, 2011, 3:49 p.m.*: State faxed defense counsel a letter with the date, time, and place of the proceedings, and requested any exculpatory evidence.
- *Nov. 17, 2011*: Grand jury proceedings were scheduled to be held, in which the State allotted a testify-time for McNamara at 4:30 p.m.
- *Nov. 17, 2011, 3:57 p.m.*: After receiving no response after State's notice of date, time, and place, State emailed defense counsel, asking whether he planned to come to grand jury proceedings.
- *Nov. 17, 2011, 5:07 p.m.*: After the grand jury proceedings, State emailed defense counsel stating, "You and your client did not appear. The grand jury deliberated and returned a true bill. The indictment will be returned tomorrow at 11:45 in DC 7."

NRS 172.241 provides in part that a district attorney need only provide notice of its intent to seek indictment at least five judicial days before the grand jury:

> 1. A person whose indictment the district attorney intends to seek or the grand jury on its own motion intends to return, but who has not been subpoenaed to appear before the grand jury, may testify before the grand jury if the person requests

> to do so and executes a valid waiver in writing of the person's constitutional privilege against self-incrimination.
>
> 2. A district attorney or a peace officer shall serve reasonable notice upon a person whose indictment is being considered by a grand jury unless the court determines that adequate cause exists to withhold notice. *The notice is adequate if it*:
>
> (a) Is given to the person, the person's attorney of record or an attorney who claims to represent the person and *gives the person not less than 5 judicial days to submit a request to testify to the district attorney*; and
>
> (b) Advises the person that the person may testify before the grand jury *only if the person submits a written request to the district attorney* and includes an address where the district attorney may send a notice of the date, time and place of the scheduled proceeding of the grand jury.

(Emphases added.)

Here, the district attorney complied with NRS 172.241(2) because it faxed its grand jury notice to the public defender's office on November 8, which gave McNamara over five judicial days to submit a written request. *See Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 120, 294 P.3d 415, 418 (2013) (holding that fax notice of intent to seek indictment was sufficient and such notice need not include the date, time, and place of the grand jury hearing). Though defense counsel sent a letter to the State, it was not received until the next day. The following day, the State provided defense counsel with the statutorily required information, including date, time, and place of the scheduled grand jury proceedings.

McNamara argues that a one-day notice of the date, time, and place of the grand jury proceedings is unreasonable, citing *Sheriff v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989). However, *Marcum* held that a one-day notice was unreasonable regarding notice of whether the State intended to seek an indictment, not necessarily notice of the date, time, and place of the grand jury proceedings. *Id.* at 827, 783 P.2d at 1391. *Marcum* analyzed then-NRS 172.241, which did not include the five-day notice provision as exists today. *Id.* at 826, 783 P.2d at 1390 ("We note that although both NRS 172.095(1)(d) and NRS 172.241 give a defendant the right to testify before a grand jury, both statutes are silent regarding a defendant's right to have notice of the grand jury proceedings at which he may be indicted." (footnotes omitted)). In response to *Marcum*, the Legislature amended NRS 172.241 to include a five-day notice provision of the State's intent to seek an indictment, requiring the defense to submit a written request for the date, time, and place. *See* Hearing on S.B. 82 Before the Assembly Judiciary Comm., 66th

Leg. (Nev., May 30, 1991); *see also* 1997 Nev. Stat., ch. 99, § 1, at 188. Thus, the State complied with NRS 172.241 and McNamara failed to show how the State's notice was unreasonable.

Verdict form did not include second-degree kidnapping

[Headnote 11]

McNamara argues that his conviction must be reversed because the district court failed to include the lesser offense of second-degree kidnapping on the verdict form. Both parties and the district court agreed to include second-degree kidnapping on the verdict form. The district court instructed the jury on second-degree kidnapping:

> INSTRUCTION NO. 11
>
> You are instructed that if you find that the State has established that the defendant has committed first degree kidnapping you shall select first degree kidnapping as your verdict. The crime of first degree kidnapping may include the crimes of second degree kidnapping. You shall find the defendant guilty of second degree kidnapping if:
>
> (1) You have not found, beyond a reasonable doubt, that the defendant is guilty of first degree kidnapping, and
>
> (2) All twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of second degree kidnapping.
>
> If you are convinced beyond a reasonable doubt that the crime of kidnapping has been committed by the defendant, but you have a reasonable doubt whether such kidnapping was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of kidnapping of the second degree.
>
> INSTRUCTION NO. 12
>
> A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree.

Despite the agreement to include second-degree kidnapping on the verdict form and the instructions allowing the jury to consider second-degree kidnapping as a lesser offense, the district court mistakenly gave the jury a verdict form that did not include second-degree kidnapping. McNamara did not review the verdict form before it was given to the jury because he claims that the district court "is the last person handling jury instructions and verdict forms."

Neither party disputes that McNamara was entitled to an instruction on second-degree kidnapping. Rather, the issue is whether the district court's mistake in failing to include second-degree kidnapping on the verdict form is reversible error. We conclude that it is not reversible error.

[Headnote 12]

If a district court properly instructs the jury on the lesser-included offenses, it is not reversible error if the lesser-included offenses are omitted from the verdict form. *See State v. St. Clair*, 16 Nev. 207, 212 (1881); *People v. Osband*, 919 P.2d 640, 683-84 (Cal. 1996). In *St. Clair*, the district court gave the jury a verdict form that included only first- and second-degree murder but omitted the lesser-included offenses of manslaughter and justifiable homicide. 16 Nev. at 212. As here, the district court did instruct the jury on all of the lesser-included offenses. *Id.* The court found no reversible error occurred:

> Upon these facts it is clear, to our minds, that the jurors were not misled, as claimed by appellant's counsel, into the belief that if they found defendant guilty they were confined in their deliberations, as to the degree of guilt, to the two degrees of murder. It was their duty, if they believed, from the evidence, that the defendant was guilty of any offense (and they were so instructed), to determine the degree of guilt from the evidence adduced at trial. The forms were merely given as a guide to the jury in framing their verdict, and were not intended, and could not have been considered, to limit the right of the jury to a consideration of the defendant's guilt to the two degrees of murder.

Id. The California Supreme Court came to the same conclusion: "any failure to provide a form, if error it is, results in no prejudice when the jury has been properly instructed on the legal issue the trial presented." *Osband*, 919 P.2d at 683-84. The court in *Osband* relied on *People v. Hill*, 48 P. 711, 713 (Cal. 1897), for the following statement:

> Where, therefore, the jury has been properly instructed as to the different degrees of the offense, it must be presumed that, if their conclusion called for a form of verdict with which they were not furnished, they would either ask for it, or write one for themselves. It certainly could have no necessary tendency to preclude them from finding such verdict.

Thus, the court in *Hill* concluded that there was "no reversible error in the record." *Id. But see Wilson v. State*, 566 So. 2d 36, 37 (Fla. Dist. Ct. App. 1990) (concluding that "[a] verdict that is not in conformance with the jury instructions is clearly defective," and reversing the conviction because the district court did not include

the lesser charge of "robbery" and only included "robbery with a firearm" on the verdict form, even though both offenses were in the jury instructions). While we recognize McNamara's citation to *Wilson*, which is equally as analogous to this case as *St. Clair*, we are not bound by the Florida District Court of Appeal. Thus, under Nevada precedent, the district court did not commit reversible error.

Here, like *St. Clair*, the district court properly instructed the jury on first- and second-degree kidnapping but failed to include second-degree kidnapping in the verdict form. Although this omission was an error, it does not constitute a reversible error as per the reasoning in *St. Clair*, but is rather a harmless error, to which McNamara did not object.

[Headnote 13]

Jurors are presumed to follow the instructions they are given. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Here, the jury was instructed that they must find the defendant guilty of each element of first-degree kidnapping to convict him of this offense. The jury made an affirmative finding that the defendant was guilty of first-degree kidnapping when they signed and returned their verdict to that effect. Had they not found McNamara guilty of first-degree kidnapping, their choice was to sign and return the not guilty form, to question the verdict form, or to amend it to find him guilty of second-degree kidnapping. Finally, the evidence supporting the first-degree kidnapping conviction was overwhelming and the district court individually polled the jurors. *See People v. Jimenez*, 217 P.3d 841, 869-70 (Colo. App. 2008) (rejecting defendant's claim that error on verdict form, which did not include a "not guilty" box for the lesser-included offense of second-degree murder, required reversal, observing "that the court polled the jurors after they returned their verdicts, and all of them affirmatively indicated that they had found defendant guilty of second-degree murder. Thus, we need not guess whether the jury's verdict accurately reflected its collective conclusion concerning defendant's guilt or innocence of second-degree murder."). *Cf. Bohrer v. DeHart*, 961 P.2d 472, 477 (Colo. 1998) ("We defer to jury verdicts when jurors have been properly instructed and the record contains evidence to support the jury's findings."). Therefore, while the omission of the lesser-included offense of second-degree kidnapping was in error, it did not constitute reversible error.

CONCLUSION

We hold that territorial jurisdiction is proper when a defendant has criminal intent and he or she performs any act in this state in furtherance of that criminal intent. Territorial jurisdiction is a question of law for the court to decide, not the jury. The State bears the burden of proving territorial jurisdiction by a preponderance of

the evidence. In this case, territorial jurisdiction was proper as the State proved by a preponderance of the evidence that McNamara continued the crime of first-degree kidnapping into Nevada and his prevention of Sharp from receiving medical treatment caused her prolonged physical pain, warranting the substantial bodily harm enhancement to his kidnapping charge. Although the district court committed two errors—the failure to conclude as a matter of law whether it had territorial jurisdiction and the inadvertent use of the incorrect verdict form, we conclude such errors were harmless. McNamara's other claims on appeal are meritless and do not warrant a new trial. Thus, we affirm the judgment of conviction.

HARDESTY and SAITTA, JJ., concur.