ABEBAW TESFAYE KASSA, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 76870

April 29, 2021 485 P.3d 750

Appeal from a judgment of conviction, pursuant to a jury verdict, finding appellant guilty but mentally ill on charges of first-degree murder and first-degree arson. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Affirmed.

Silver, J., with whom Hardesty, C.J., and Stiglich, J., agreed, dissented.

Marchese Law Office and *Jess R. Marchese*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *David L. Stanton* and *Charles W. Thoman*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

A jury found appellant Abebaw Tesfaye Kassa guilty but mentally ill on charges of first-degree felony murder and first-degree arson. Kassa contests the validity of his convictions on the basis that the district court misinstructed the jury on voluntary intoxication, and otherwise erred by denying his motion to vacate the jury's guilty verdict and find him not guilty by reason of insanity. But there is sufficient evidence in the record to support Kassa's convictions, and we disagree that the district court abused its discretion in giving the challenged instruction. Accordingly, we affirm.

I.

Early one morning in 2016, Kassa set fire to the transitional home for persons with mental illness where he had been living without incident for just over a month. Kassa's fellow residents escaped, but the housekeeper, Lolita Budiao, was badly burned and died several days later. Kassa had delayed Budiao's escape by deliberately trapping her in a bathroom while the fire engulfed the home. Kassa himself fled, without injury, through a window as law enforcement arrived at the scene. He tried to run from the officers and resisted arrest when they ultimately caught and restrained him.

The State charged Kassa with first-degree felony murder and first-degree arson. At trial, Kassa admitted setting the fire and causing Budiao's death. But he raised, as an affirmative defense, his alleged legal insanity at the time. Specifically, Kassa alleged that he was suffering from schizophrenic auditory hallucinations when he set the fire—voices were telling him that he had died in a car accident five years prior, that his body was being kept breathing and used by others for nefarious purposes, and that he needed to set and burn in the fire to end his exploitation. Kassa introduced expert testimony by two psychiatrists who had examined him in the years since the fire to support this defense.

The State countered the defense experts by introducing medical records of Kassa, noting statements he made to the medical care providers attending him shortly after the fire. These records reflect that at that time—notably, prior to Budiao's death, when the prospect of murder charges arose—Kassa reported that before the fire he had been snorting "Spice," a synthetic version of marijuana with wide-ranging and potentially hallucinogenic effects. He also reported on the intoxicating mental effects from his use of the Spice, stating that this drug use left him "feeling disturbed and unable to sleep." Based in part on this evidence, the State proposed jury instruction no. 20 regarding voluntary intoxication, which advised jurors that voluntary intoxication—in contrast to a mental disease or defect—did not render any resulting conduct "less criminal." The instruction further advised that this was so even where "the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity." The district court provided this instruction over Kassa's objection.

The jury found Kassa guilty but mentally ill (GBMI) on both counts. NRS 175.533 allows a jury to find a defendant GBMI when the jury finds the defendant guilty beyond a reasonable doubt of the offense, and that "due to a disease or defect of the mind, the defendant was mentally ill at the time of the commission of the offense," though falling short of the demanding legal insanity standard that would support a verdict of not guilty by reason of insanity (NGRI). With such a finding, the jury determines that a defendant's mental illness does not excuse his or her criminal conduct; accordingly, the result is not an acquittal, but a guilty verdict that signals certain allowances in sentencing. *See Finger v. State*, 117 Nev. 548, 554, 27 P.3d 66, 70 (2001) (noting that with a GBMI verdict, "the district court may suggest that the prison system provide certain types of treatment to the convicted individual").

Kassa moved the district court to vacate the GBMI verdicts and find him not guilty by reason of insanity. Following a hearing, the district court denied the motion. The district court sentenced Kassa to serve concurrent prison terms totaling 20 years to life in the aggregate. This appeal followed.

II.

At trial, Kassa conceded that he intentionally started a fire; that he intended that fire to cause death; that he started that fire with knowledge that others were in the home; that he held Budiao captive in a bathroom to prevent her from escaping or extinguishing the fire; and that Budiao died as a result. And even beyond Kassa's admissions, the State presented testimony from multiple eyewitnesses supporting the State's factual account. From this testimony, the jury could have reasonably inferred Kassa's intent to commit the crimes as charged. The crux of the case below was therefore not whether Kassa committed the acts the State alleged, with the intent to cause harm, but whether his conduct was excused from criminal liability based on an NGRI defense. *See Finger v. State*, 117 Nev. at 568, 27 P.3d at 80 (stating that " 'legal insanity' simply means that a person has a complete defense to a criminal act").

For Kassa's alleged insanity to give him a complete defense to the charged crimes, his condition must satisfy the specific and demanding *M'Naghten* test—that is, "[d]ue to a disease or defect of the mind," he suffered from delusions such that he did not "(1) [k]now or understand the nature and capacity of his . . . act; or (2) [a]ppreciate that his or her conduct was wrong." NRS 174.035(6)(b); *see Finger*, 117 Nev. at 556-57, 27 P.3d at 72-73 (discussing *M'Naghten's Case*, 8 Eng. Rep. 718, 722, 10 Cl. & Fin. 200, 209-10 (1843), and describing the resulting test). Following his conviction, Kassa moved the district court for a judgment of acquittal pursuant to NRS 175.381(2), based on his supposed satisfaction of *M'Naghten*. But NRS 175.381(2) sets a high bar—if the record contains evidence on which any rational juror might convict, then its demanding standard is not met, *State v. Purcell*, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)—that the district court found Kassa failed to clear.

De novo review applies to an appeal from an order denying a motion for a judgment of acquittal, insofar as the appellate court must determine whether the district court applied the correct legal standard in deciding the motion. *Evans v. State*, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996); *see United States v. Gagarin*, 950 F.3d 596, 602 (9th Cir. 2020) (noting that the court reviews de novo a denial of a motion for acquittal under analogous Fed. R. Crim. P. 29). However, the Seventh Circuit Court of Appeals has rightly assessed that, phrased in these terms, "this standard of review is slightly deceiving." *United States v. Johns*, 686 F.3d 438, 446 (7th Cir. 2012). Because the district court decides a motion for a judgment of acquittal under NRS 175.381(2) based on a sufficiency of the evidence standard, *Purcell*, 110 Nev. at 1394, 887 P.2d at 279; *see Evans*, 112 Nev. at 1193, 926 P.2d at 279, appellate review of an order denying such a motion "is in essence the same as a review of the sufficiency of the evidence." *Johns*, 686 F.3d at 446. Accordingly, Kassa's path to reversal is onerous.

A.

The record supports the district court's decision: A reasonable juror could have looked at the evidence and concluded that Kassa did not satisfy *M'Naghten*. Foremost, as the jury instructions emphasized, whether or not Kassa suffers from a mental illness, the State's case still benefits from an initial presumption of his *legal sanity*—it was Kassa's burden to rebut this by a preponderance of the evidence. NRS 174.035(6); *see Clark v. State*, 95 Nev. 24, 26, 588 P.2d 1027, 1028 (1979). And "[t]he presumption of [legal] sanity operates most critically, of course, at the time the offense is committed." *Ford v. State*, 102 Nev. 126, 135, 717 P.2d 27, 33 (1986). Accordingly, while the State did not deny the proffered evidence of Kassa's history of delusions and hallucination, neither this nor his psychiatric diagnosis established his legal insanity for the purposes of his NGRI defense—the *M'Naghten* test hinges on the temporal and causal connection between Kassa's mental illness and the crime. *Id.* at 136, 717 P.2d at 33.

Had the jury credited the testimony of Kassa's two psychiatrists, an NGRI verdict might have been reached.[1] But as Kassa conceded at oral argument before this court, the jury was under no obligation to accept the experts' testimony. And circumstances here likely led the jury to be somewhat skeptical. As a foundational matter, two years after the fire—and long after he was charged with arson and murder—Kassa denied to the testifying psychiatric experts that he had used drugs before committing the crime. But in opening and closing arguments, the State noted that medical records made two days after the fire—records that Kassa stipulated to admitting at trial, which his experts confirmed the existence and contents of during their testimony, and which he did not include in his appellate record[2]—reflect that while in the hospital after the fire Kassa "gives a . . . detailed account of using . . . Spice, via snorting it." It appears that those nearly contemporaneous records additionally stated that, "Patient reports he had recently been snorting Spice. Reports it was a powder-like substance and that he had a history of using this in the past as well. . . . [H]e reports feeling disturbed and unable to sleep after snorting it . . . ."

A reasonable juror could have elevated these medical records—made shortly after the fire, before Budiao died, without any ulterior investigative purpose, and before serious criminal charges were brought—over the testifying expert opinions, based as they were on self-serving information Kassa supplied two years after the event.

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[1]Though, for the reasons discussed below, a reasonable juror could have accepted the expert testimony in whole and still rejected Kassa's NGRI defense.

[2]Where records are missing from the appellate record, we presume the materials support the district court's decision. *See Sasser v. State*, 130 Nev. 387, 393 & n.8, 324 P.3d 1221, 1225 & n.8 (2014).

See Clark, 95 Nev. at 28, 588 P.2d at 1029-30 (finding that the jury reasonably rejected an NGRI defense where "[t]he expert opinions were largely based on information supplied to the psychiatrists by appellant over a year subsequent to the commission of the crime, which information was markedly sharp in contrast to statements given police more proximate to [the crime]"). This is especially so given that Kassa's own expert agreed that, based on his review of the records noted above, he "could not rule out the use of Spice at the time" Kassa set the fire. And to the extent the jury reasonably believed that Kassa's ingestion of Spice created his alleged delusion or otherwise led to his admitted arson, they likewise correctly rejected his NGRI defense—*M'Naghten*'s causal requirement, that the operative delusion result from a "mental disease or defect," would not be satisfied under such conditions. *State v. Fisko*, 58 Nev. 65, 79, 70 P.2d 1113, 1118 (1937) (stating that "voluntary intoxication furnishes no excuse for crime committed under its influence") (quoting 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 400 (7th ed. 1882)), *overruled in part on other grounds by Fox v. State*, 73 Nev. 241, 316 P.2d 924 (1957); *see* NRS 174.035(10)(a) (stating that an exonerating "[d]isease or defect of the mind" for purposes of Nevada's *M'Naghten* test "does not include a disease or defect which is caused solely by voluntary intoxication").

B.

All this said, there is no need to rely on the record evidence of Kassa's Spice use to support the jury's verdict. Sufficient evidence alternatively supports that Kassa fell short of *M'Naghten* in any case. *Cf. Rhyne v. State*, 118 Nev. 1, 10, 38 P.3d 163, 169 (2002) (noting "that a jury may return a general guilty verdict on an indictment charging several acts in the alternative even if one of the possible bases of conviction is unsupported by sufficient evidence"). *M'Naghten* sets "a very narrow standard." *Finger*, 117 Nev. at 577, 27 P.3d at 85. Under *M'Naghten*, "[d]elusional beliefs can only be the grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act." *Id.* And, even accepting at face value that Kassa suffered under the delusions he claimed, and that they were caused by a defect of the mind rather than substance abuse, a reasonable juror could have determined that they did not meet this exacting requirement.

Of note, Kassa presented somewhat conflicting testimony as to the content of his delusions. One psychiatrist reported that Kassa said he lit the fire "to die fully" and end outside control of his reanimated body, while the other suggested that those same outside forces had directed him to set the fire. But in either case, with regard to the first part of the *M'Naghten* test, there is substantial record support for the inference that Kassa understood "the nature and capacity of his . . . act," NRS 174.035(6)(b)(1). Kassa knew that

he was setting a fire, adding "clothing and furniture, a chair and possibly something from the sofa" as kindling, and that this would cause the home he and others lived in to burn. Indeed, his purpose in setting the fire was that it be deadly. It is therefore unsurprising that one of Kassa's own psychiatric experts testified that Kassa failed to "show impairment in this sub element" because he "knew that fires burned" and believed that he "required a fire that would burn his body." This alone would justify the jury in rejecting Kassa's NGRI defense under the first *M'Naghten* pathway. *See Buford v. State*, 793 S.E.2d 91, 94 (Ga. 2016) (holding that evidence was sufficient to support rejection of defendant's NGRI defense where one of two testifying experts was uncertain as to whether the defendant met the test's requirements).

As to the second part of the *M'Naghten* test, a jury could have also inferred that Kassa appreciated that his conduct was wrongful. Most notably, Kassa trapped Budiao in the bathroom, despite her screaming pleas to be released, specifically because he knew she would stop him and extinguish the fire. Beyond this, as Kassa's own testifying expert noted, Kassa escaped from the burning house through a window, then resisted arrest. Though one of Kassa's experts suggested that he escaped the fire when the smell of smoke triggered some sort of survival reflex in him, a reasonable jury still could infer Kassa's appreciation of wrongfulness from these facts. *See Edwards v. State*, 90 Nev. 255, 260, 524 P.2d 328, 332 (1974) (noting that an attempt to flee the scene of a crime "is a circumstance supportive of an inference of guilt").

Accordingly, even if the jury believed that Kassa had the delusions either of his psychiatrists described, and even if they believed those delusions were caused by a "defect of the mind," NRS 174.035(10)(a), and not Spice use, the evidence demonstrates that Kassa knew that he was setting a house on fire, the house was occupied by others, and the occupants would want to stop him. He likewise knew enough to escape from the fire and to attempt to evade arrest. And more fundamentally, neither his delusional need "to die fully" nor his need to satisfy certain unnamed external forces controlling him amount to a *legal defense* for his intentionally starting a deadly fire, in the early morning, in a dwelling occupied by sleeping individuals who were, even in the context of his delusion, completely innocent. *See Finger*, 117 Nev. at 576, 27 P.3d at 85 (explaining that defendant is entitled to acquittal under the *M'Naghten* test only "if the facts as he believed them to be in his delusional state would justify his actions"). Accordingly, any suggestion that the testimony by Kassa's experts necessitated his acquittal is misdirected: "Even when experts are unanimous in their opinion," which was not the case here, "the factfinder may discredit their testimony—or disregard it altogether—and rely instead on other probative evidence from which to infer the defendant's sanity." 2 Catherine Palo,

Criminal Law Defenses § 173 (Supp. 2020); *see also Clark*, 95 Nev. at 28, 588 P.2d at 1029 (noting that expert "testimony is not binding on the trier of fact, and the jury was entitled to believe or disbelieve the expert witnesses"). The district court did not err by denying Kassa's motion for acquittal.

III.

Kassa's second argument in favor of reversal centers on jury instruction no. 20, and specifically the insertion of the second sentence therein:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. *This is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity.* But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

(Emphasis added.) This instruction is based in large part on NRS 193.220; the additional language regarding the interplay between voluntary intoxication and NGRI defenses is from *Fisko*, 58 Nev. at 79, 70 P.2d at 1118.

Generally, "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Newson v. State*, 136 Nev. 181, 185, 462 P.3d 246, 249-50 (2020) (internal quotation marks omitted). That said, "we review de novo whether a particular instruction . . . comprises a correct statement of the law." *Hager v. State*, 135 Nev. 246, 257, 447 P.3d 1063, 1072 (2019) (alterations and internal quotation marks omitted). And even if an instruction is given in error, reversal is not required unless a different result would be likely, absent the contested instruction. *See Allred v. State*, 120 Nev. 410, 416, 92 P.3d 1246, 1251 (2004).

The substance of Kassa's objection is somewhat unclear. To the extent he suggests that a court may never allow jury instructions that vary from the applicable statutory language, this is untenable. *See Runion v. State*, 116 Nev. 1041, 1050-51, 13 P.3d 52, 58-59 (2000) (admonishing district courts to tailor instructions to the case, rather than merely quote applicable statutes). Kassa also seems to argue that the district court should not have permitted any instruction regarding voluntary intoxication and its impact on an NGRI defense. But this ignores that he raised no objection—even on appeal—to instructions no. 14 (instructing that in the NGRI context, "[v]oluntary use of drugs or alcohol do not constitute a severe

mental disease or defect. The voluntary use of drugs or alcohol must be disregarded.") and 17 (instructing that a "'[d]isease or defect of the mind' does not include a disease or defect which is caused solely by voluntary intoxication"). These cover the same subject matter as instruction no. 20.

In any case, Kassa could not demonstrate any prejudice from the district court's inclusion of these instructions, such that reversal would be justified. *See Allred v. State*, 120 Nev. 410, 416, 92 P.3d 1246, 1251 (2004). Indeed, these instructions actually opened an additional avenue by which the jury might have acquitted him, had his attorney so argued the alleged facts. Arson, which also served as the basis for the State's felony murder charge, is a specific intent crime, *see Ewish v. State*, 110 Nev. 221, 228, 871 P.2d 306, 311 (1994), *on reh'g*, 111 Nev. 1365, 904 P.2d 1038 (1995), and voluntary intoxication can defeat specific intent, *see* NRS 193.220.

Kassa may also have intended to object to instruction no. 20 on the grounds that its use of the phrase "temporary insanity" was prejudicially confusing. It is true that NGRI defenses only require that the defendant be legally insane at the moment of the offense; that is, it has no bearing whether the alleged insanity was temporary or long-running. But instruction no. 20 only integrates related and correct statements of law. *See* NRS 193.220; *Fisko*, 58 Nev. at 79, 70 P.2d at 1118. And in any case, reading the instructions as a whole, *Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997), it is clear that the concepts instruction no. 20 distinguishes are that of a causal mental disease or defect and voluntary intoxication, of which only the former will suffice for an acquittal under *M'Naghten*.

Indeed, in its closing argument to the jury, the State clearly made correct use of the language of instruction no. 20 (in conjunction with instructions no. 14 and 17):

> Now, what's the importance of the Spice . . . . In order to be [legally] insane, your delusional mental state must be derived from the mental defect, here schizophrenia. It cannot be derived from the ingestion of alcohol and narcotics. Now, you could be absolutely insane and use drugs and alcohol, and that still is a legal defense for legal insanity, but the cause, where the conduct and the delusional state comes from must come from the mental illness and not from the Spice.

Accordingly, to the extent there was anything potentially confusing in instruction no. 20, the context of the related unobjected-to instructions and the State's explanation of the same offered sufficient clarification. *See Nunnery v. State*, 127 Nev. 749, 786, 263 P.3d 235, 259 (2011) (finding district court did not abuse its discretion in issuing particular jury instruction "[b]ecause three other instructions informed the jury that the State bore the burden of proof and the same need not be stated in every instruction").

Finally, Kassa argues that our statement in *Nevius v. State*—that "for a defendant to obtain an instruction on voluntary intoxication as negating specific intent, the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings," 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985)—in fairness should apply equally to the State. But whether or not Kassa is correct that *Nevius* can be logically extended to require a burden of production on the State in the odd instance that the State raises a theory of intoxication is beside the point. Here, the State satisfied this burden. As discussed above, Kassa stipulated to the admission of medical records reporting his statements to health care providers two days after the fire, in which Kassa admitted his Spice use and spoke of the unsettling, intoxicating effect that such use had on his mental state. Although Kassa did not include the medical records as part of the record on appeal—an omission that weighs against his claim of evidentiary insufficiency, *see* note 2, *supra*—his expert also spoke to the intoxicating effects that Spice can have on a person's mental state, including causing a person to feel paranoid, hear voices, and have delusions and/or hallucinations. Kassa's experts further admitted they could not exclude Spice as a potential cause of his alleged delusions and noted the contents of his medical records stating the same. And in any case, as indicated above, Kassa raised no objection to instructions no. 14 and 17 on this basis, neither here nor in the district court. This would likewise operate to defeat this claim. *Cf. Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (noting that "[g]enerally, the failure to clearly object on the record to a jury instruction precludes appellate review" (internal quotation marks omitted)).

For these reasons, we affirm the judgment of the district court.

Parraguirre, Cadish, and Herndon, JJ., concur.

Silver, J., with whom Hardesty, C.J., and Stiglich, J., agree, dissenting:

I would reverse the judgment of conviction adjudicating appellant Abebaw Kassa guilty but mentally ill of first-degree murder and first-degree arson and remand the matter for a new trial. In my view, the district court abused its discretion by instructing the jury on voluntary intoxication because the State did not present sufficient evidence to warrant a voluntary intoxication instruction under *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985). And the district court compounded that error by giving a confusing and legally inaccurate form of the instruction (no. 20), as proposed by the State. Contrary to Nevada law, the challenged instruction implied that the jury could determine that Kassa was insane at the time of the offense but nevertheless find him criminally liable.

Cf. NRS 194.010(4) (excepting from criminal liability "[p]ersons who committed the act charged or made the omission charged in a state of insanity"). Moreover, instruction no. 20 contradicted and conflicted with other instructions that addressed the relationship between intoxication and insanity (nos. 14 and 17). The majority correctly notes that our test for legal insanity is "specific and demanding," Majority Opinion at 152, which is exactly why this court has described insanity as "a term of art" and "stress[ed] the need for experts and juries to be correctly advised on the M'Naghten standard." *Finger v. State*, 117 Nev. 548, 577, 27 P.3d 66, 85 (2001). I believe the instructional error was not harmless, as these contradictory instructions likely confused the jury about a highly technical area of criminal law. Because the jury's deliberative process was inexorably tainted by the error, I respectfully dissent.

In 2016, Kassa lived in a community-based group home for individuals suffering from mental illness. The home specialized in assisting semi-independent individuals with their basic life skills, e.g., hygiene, nutrition, and compliance with medication needs. Kassa resided in the home for approximately one month without incident. During the early morning hours of July 27, 2016, Kassa started a fire in the home that claimed the life of the live-in caretaker. The State charged Kassa with first-degree arson and felony murder. Kassa entered a plea of not guilty by reason of insanity (NGRI). To meet the standard of legal insanity, Kassa bore the burden of proving that, due to a mental defect or disease, he "was in a delusional state at the time of the alleged offense," NRS 174.035(6)(a), that resulted in his inability to "(1) [k]now or understand the nature and capacity of his . . . act; or (2) [a]ppreciate that his . . . conduct was wrong, meaning not authorized by law," NRS 174.035(6)(b).

Before trial, mental health evaluators assessed Kassa and determined he was psychotic and incompetent to stand trial. After approximately six months of treatment and antipsychotic medication in a maximum security forensic hospital, Kassa regained competence and proceeded to trial. The defense retained Dr. Gregory Brown to evaluate Kassa and provide expert psychiatric testimony at trial. Dr. Brown diagnosed Kassa as schizophrenic and concluded he was legally insane when he started the fire. After Kassa filed notice of his entry of an NGRI plea, the State requested and obtained an independent psychological evaluation of Kassa from Dr. Steven Zuchowski. After evaluating Kassa, Dr. Zuchowski likewise diagnosed Kassa with schizophrenia, concluded that he was legally insane when he set the fire, and testified for the defense at trial.

In discussing his conclusions, Dr. Brown explained that individuals with schizophrenia typically develop symptoms during their mid-to-late 20s, including disorganized thinking, sensory hallucinations that seem real, and delusions related to fixed-false beliefs. Mental health professionals first diagnosed Kassa as schizophrenic

in 2011, and he reported experiencing auditory hallucinations since 2008. Dr. Brown detailed multiple schizophrenic episodes in Kassa's mental health history. In one incident, Kassa called 9-1-1 on himself because voices were telling him to hurt someone. Emergency responders found him lying in his bedroom closet and took him for a mental health evaluation. During another incident, emergency responders found Kassa screaming incoherently after voices told him that his mother died, though his mother was still alive. At one point, authorities involuntarily admitted Kassa to a mental health facility. During the inpatient admission, Kassa described other instances of hearing voices coming from a radio and hearing "heavenly things." Authorities determined Kassa was psychotic and treated him with antipsychotic medication. Dr. Brown found that Kassa's psychiatric history conformed to the diagnosis of schizophrenia and ruled out potential malingering.

Regarding Kassa's legal sanity at the time of the fire, Dr. Brown explained that Kassa suffered from two distinct delusions. First, Kassa believed that he died in a 2013 car accident because voices told him he had died and because he could not locate his pulse. Further, Kassa believed that he was unable to control his body because external forces were animating his dead body and making him breathe artificially. Kassa understood the concept of fire and believed it necessary to destroy his already dead body. Dr. Brown opined that this delusion prevented Kassa from understanding that his actions were wrong. Ultimately, Dr. Brown concluded that Kassa's schizophrenia and delusional state when he started the fire met the NGRI standard.

Dr. Zuchowski, the State's handpicked psychiatrist, testified similarly, explaining that Kassa's mental health history conformed to a diagnosis of schizophrenia. And he concluded that Kassa suffered under a fixed-false belief that he was already dead and experienced "command-oriented hallucinations." Dr. Zuchowski described Kassa's belief that he was already dead and in heaven. While Dr. Zuchowski found that Kassa understood he was starting a fire, he concluded that Kassa did not understand that other people could be harmed or that the fire would have serious consequences. Accordingly, Dr. Zuchowski concluded that Kassa, in the depths of his psychotic delusion, did not appreciate the wrongfulness of his actions.

In the face of this overwhelming presentation of evidence that Kassa was legally insane when he started the fire—including from the State's chosen expert—the prosecution did not present any contrary expert testimony. Instead, the State focused on the idea that Kassa was intoxicated, not insane, at the time of the fire, pointing to a notation in the medical records about Kassa's use of Spice. However, Dr. Brown testified that nothing about the admitted medical records, including the notation about Spice usage, would change

his conclusions. And Dr. Zuchowski did not see any evidence that drug use caused Kassa's psychotic episodes, concluding that the description of the event was consistent with the diagnosis of schizophrenia. But the State persisted in arguing that

> [Kassa is] claiming that he's insane, anything to rebut that, including extreme intoxication, including temporary insanity[,] . . . the State should be allowed to argue that if [Kassa is] intoxicated to the point where he's even temporarily insane he's[,] . . . and I hate to use a double negative, but he's not not guilty by reason of insanity.

This argument highlights the confusion created by the State commingling temporary insanity and voluntary intoxication with instruction no. 20. Kassa objected generally to giving any voluntary intoxication instruction. After the district court found the instruction proper, he further objected to the State's proposed injection of language that discussed voluntary intoxication causing a "temporary insanity," as it would confuse the jury.

This court has explained that, to warrant giving a voluntary intoxication instruction, "the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings." *Nevius*, 101 Nev. at 249, 699 P.2d at 1060. In *Nevius*, the defendant presented evidence that "showed only that he consumed intoxicants." *Id*. Specifically, "Nevius testified that the four men had a bottle of wine with them . . . and that [he] had smoked marijuana." *Id*. Because the defendant did not establish the intoxicating effect of the wine and marijuana, or the effect on his mental state as it related to the criminal charge, this court concluded the district court properly rejected the defendant's voluntary intoxication instruction. *Id*. While the majority does not conclude one way or the other, in my view, the law—and specifically the *Nevius* standard in this case—should apply equally to the State when it requests an instruction like the one given in this case. I also disagree with the majority that the State nevertheless "satisfied this burden." Maj. Op. at 158.

Here, the State did not even establish that Kassa consumed Spice. The State relied solely on a notation in Kassa's medical records and paraphrased it during closing arguments. Specifically, the State commented that "[Kassa] gives a pretty detailed account of using *some type of substance*, Spice, via snorting it. . . . Reports it was a powder-like substance and that he had a history of using this in the past as well. Then he reports feeling disturbed and unable to sleep after snorting it, *the substance he refers to as Spice*." (Emphases added.) Accordingly, Kassa admitted to using "some type of substance" that he called "Spice" and felt agitated and had trouble sleeping afterwards.

But this account of Kassa's alleged intoxication is problematic. First, the description "of using some type of substance" fails to show what substance, if any, Kassa actually ingested. Additionally, although the medical records referred to "Spice," Dr. Zuchowski posited that Kassa described being "anointed with some kind of an incense or perfume the day prior to the fire at church . . . and that may have been misinterpreted as Spice use."[1] Second, even assuming Kassa ingested Spice, the State presented no compelling evidence that established the intoxicating effects. Because Kassa suffered under a delusion that he was already dead and his body was animated by external forces, his description of "feeling disturbed and unable to sleep" sheds little light on his "mental state pertinent to the proceedings." *Nevius*, 101 Nev. at 249, 699 P.2d at 1060. Further, Dr. Brown explained that the substance can cause "widely differing effects on individuals" depending on the chemical makeup.[2] The effects range from feeling "mellow and relaxed" to causing paranoia and hallucinations. Thus, the State did not establish what, if any, substance Kassa consumed, the amount ingested, or how the effects he described related to the offense. Accordingly, I conclude that the district court abused its discretion by instructing the jury on voluntary intoxication.

Although I do not believe that a voluntary intoxication instruction should have been given at all, because one was given it should have, at the very least, correctly instructed the jury, particularly given that the instruction requested by the State referred to the highly technical NGRI defense. *See Finger*, 117 Nev. at 576-77, 27 P.3d at 85 (explaining that "[l]egal insanity has a precise and extremely narrow definition in Nevada law"). In my view, instruction no. 20 misstated the law, *see Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) ("[W]hether a proffered instruction is a correct statement of the law presents a legal question which we review de novo."), and confused the "very narrow standard" that we apply to the insanity defense, *Finger*, 117 Nev. at 577, 27 P.3d at 85. Jury instruction no. 20 states the following:

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[1]Kassa utilized a translator at trial. Dr. Brown testified that during his interview with Kassa—whose native language was Amharic, "a Semitic language that is an official language of Ethiopia," *Merriam-Webster's Collegiate Dictionary* 40 (11th ed. 2014)—he spoke "good English overall" but needed certain words repeated.

[2]*See* Major Catherine L. Brantley, *Spice, Bath Salts, Salvia Divinorum, and Huffing: A Judge Advocate's Guide to Disposing of Designer Drug Cases in the Military*, 2012-Apr. Army Law. 15, 16 (2012) (explaining that "[Spice] produces euphoria, psychosis, respiratory problems, and low blood pressure; however, lower doses usually result in calming sensations"). Moreover, Kassa's description of ingesting Spice by snorting a powdered substance is dubious because "Spice is a green leafy substance that resembles marijuana. . . . [It] is comprised of a combination of different plant materials." *Id*. (defining "Spice").

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. *This is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity.* But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

(Emphasis added.) I disagree with the majority that "instruction no. 20 only integrates related and correct statements of law." Maj. Op. at 157. Although the instruction largely tracks NRS 193.220,[3] the second sentence does not appear in that statute. The first and second sentence in the instruction, read together, imply that temporary insanity is not a defense. That is incorrect, as Nevada law allows the insanity defense to be based on insanity during a temporary interval of time, i.e., temporary insanity. NRS 174.035(6)(a) (requiring the defendant to prove he "was in a delusional state *at the time of the alleged offense*" (emphasis added)); *see also Miller v. State*, 112 Nev. 168, 174, 911 P.2d 1183, 1186-87 (1996) ("[A] person can benefit from the M'Naghten insanity defense if he shows he was insane during the temporal period that coincides with the time of the crime. Technically and semantically, such a finding is temporary insanity." (citation omitted)). The defense of temporary insanity reflects the fluid state of mental health. Put another way, a defendant can be legally sane before or after a criminal act and also legally insane at the time of the offense. *See Insanity, Black's Law Dictionary* (11th ed. 2019) (defining "temporary insanity" as "[i]nsanity that exists only at the time of a criminal act").

The record reflects that the State and the district court relied on *State v. Fisko*, 58 Nev. 65, 70 P.2d 1113 (1937), *overruled on other grounds by Fox v. State*, 73 Nev. 241, 247, 316 P.2d 924, 927 (1957), for the second sentence in the instruction. But that case conflated the defenses of temporary insanity and diminished capacity. *See id.* at 78-79, 70 P.2d at 1118 (describing defendant's diminished capacity defense based on voluntary intoxication as "temporary insanity" that "furnishes no excuse for [the] crime committed" (quoting 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law*

[3]NRS 193.220 explains the circumstances in which a jury may consider voluntary intoxication and the limits on its relevance:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

§ 400 (7th ed. 1882))). As this court explained in *Miller*, 112 Nev. at 173-74, 911 P.2d at 1186-87, those defenses are mutually exclusive because diminished capacity can be present only in the absence of insanity whereas temporary insanity requires proof of insanity. *See Diminished Capacity*, *Black's Law Dictionary* (11th ed. 2019) (defining "diminished capacity" as "[a]n impaired mental condition—short of insanity—that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime"). The language that the State appropriated from *Fisko* also implies that intoxication alone can "create a temporary insanity." 58 Nev. at 79, 70 P.2d at 1118 (quoting Bishop, *supra*, § 400). But under Nevada law, voluntary intoxication cannot alone result in legal insanity, temporary or not. *See* NRS 174.035(10)(a) (" 'Disease or defect of the mind' [for purposes of the insanity defense] does not include a disease or defect which is caused solely by voluntary intoxication."). Accordingly, I believe the State's inclusion of language from an archaic treatise, published over 120 years before Nevada's codification of the *M'Naghten* standard, was contrary to Nevada law as it no longer comports with our contemporary insanity jurisprudence. I would therefore overrule *Fisko* to the extent it implies that voluntary intoxication alone can cause temporary insanity. Thus, I conclude that instructing the jury that "voluntary intoxication" can "create a temporary insanity" is an incorrect statement of the law and an abuse of discretion by the district court.

The question then is whether the instructional error was harmless. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *Nay*, 123 Nev. at 333-34, 167 P.3d at 435 (explaining that instructional errors generally are subject to harmless-error review). Here, the relationship between the insanity defense and voluntary intoxication was of critical importance because Kassa presented expert testimony that he was legally insane at the time of the crimes and the State contends that it presented evidence that Kassa ingested an intoxicating substance before the crimes. That relationship was concisely and clearly addressed in jury instruction no. 17, which followed an instruction explaining that the insanity defense requires proof of a disease or defect of the mind and quoted NRS 174.035(10)(a): " 'Disease or defect of the mind' does not include a disease or defect which is caused solely by voluntary intoxication." But jury instruction no. 20 then muddied the waters, suggesting that voluntary intoxication on its own *could* give rise to temporary insanity while implying that temporary insanity is not a defense. Unfortunately, none of the other instructions clarified the matter. In fact, another instruction (no. 14) compounded the potential for confusion by telling the jury that "[t]he voluntary use of drugs or alcohol must be disregarded in determining whether the defendant could appreciate

the nature and quality of his acts or the moral wrongfulness of his acts." That instruction misstates the law and conflicts with the correct statement of the law set forth in jury instruction no. 17.[4] Under Nevada law, voluntary intoxication cannot be the *sole* cause of a mental disease or defect to support an insanity defense, but it may be a contributing factor for the jury to consider.

The jury thus was faced with internally inconsistent and confusing instructions. Indeed, one need only look to the State's comments in support of instruction no. 20 to see the problem: "the insanity—this case is confusing in and of itself." Or as the State told the jury, "You have the instructions. They're a little bit complicated . . . ." Yet the State chose to compound that confusion and further complicate the proceedings with its proffered instruction. We should not expect jurors "to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005). This is particularly true where even the State found the case confusing.

Further, the majority isolates comments in the State's rebuttal argument that noted "[Kassa's] delusional mental state must be derived from the mental defect, here schizophrenia. It cannot be derived from the ingestion of alcohol and narcotics." Maj. Op. at 157.[5] But I believe the majority overrates the clarifying effect of this statement, as the State negated that principle by first telling the jury in closing argument, "You have an instruction [no. 20] that tells you that no act committed by a person while in a state of voluntary intoxication shall be deemed less . . . criminal by reason of his condition, and that's so, *even when the intoxication is so extreme as to cause temporary insanity*." (Emphasis added.) This statement encapsulates the flaw in instruction no. 20 and the resulting prejudice, i.e., that the jury could conclude that Kassa was both temporarily insane and criminally liable. *Cf. Finger*, 117 Nev. at 568, 27 P.3d at 80 (providing that " 'legal insanity' simply means that a person has a complete

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[4]The majority correctly notes that Kassa did not object to instruction no. 14. But in my view, reading the instructions as a whole only clarifies the error in instruction no. 20, instead of curing it. *See Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997) (providing that "[t]aken as a whole, the jury instructions d[id] not cure" an erroneous instruction).

[5]In full, the State made the following comment:

> Now, what's the importance of the Spice? . . . In order to be [legally] insane, your delusional mental state must be derived from the mental defect, here schizophrenia. It cannot be derived from the ingestion of alcohol and narcotics. Now, you could be absolutely insane and use drugs and alcohol, and that still is a legal defense for legal insanity, but the cause, where the conduct and the delusional state comes from must come from the mental illness and not from the Spice.

defense to a criminal act based upon the person's inability to form the requisite criminal intent").

Finally, regarding the majority's position that the voluntary intoxication instruction actually benefited Kassa, I again disagree.[6] While "[i]t is true that voluntary intoxication may negate specific intent," *Nevius*, 101 Nev. at 249, 699 P.2d at 1060, it also opened up an avenue for the State to confuse the jury and persuade them to disregard the overwhelming, and one-sided, evidence of Kassa's legal insanity by instead focusing attention on the specter of Spice. This is reflected in the State's use of the term "Spice" 14 times during its closing and rebuttal arguments. Ultimately, under the circumstances presented here, I do not believe the error in giving jury instruction no. 20 was harmless beyond a reasonable doubt, as the erroneous emphasis on the alleged use of Spice certainly affected the jury's verdict. *See Miller*, 112 Nev. at 175, 911 P.2d at 1187 (reversing a conviction where the prosecution and district court misinterpreted the insanity defense and hopelessly confused the jury).

In sum, I conclude that the district court erred in giving a voluntary intoxication instruction and compounded that error by giving an instruction that misstated and confused the intricate and precise standard for legal insanity, thus making jury instruction no. 20 more injurious than instructive. Further, I conclude the error likely affected the jury's verdict and therefore was not harmless beyond a reasonable doubt. Accordingly, I would reverse the judgment of conviction and remand for a new trial based on the instructional error.

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[6]To the extent the majority suggests Kassa could have argued a specific-intent defense to arson, the district court appeared to preclude such an argument. While discussing jury instruction no. 20, Kassa commented that if the State proves voluntary intoxication, "that vitiates the specific intent. There's no arson. There's no felony murder." In response, the district court stated, "No. . . . See you put his sanity at issue. . . . [S]o intoxication would negate the sanity issue, and since you put his sanity at issue, I think [the instruction is] appropriate . . . ."

RALPH EDMOND GOAD, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 79977-COA

April 29, 2021 488 P.3d 646

Appeal from a judgment of conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Vacated and remanded.

Tao, J., dissented in part.

John L. Arrascada, Public Defender, and *Kathryn Reynolds*, Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Kevin Naughton*, Appellate Deputy District Attorney, Washoe County, for Respondent.

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

OPINION

By the Court, Gibbons, C.J.:

The United States and Nevada Constitutions prohibit trying a criminal defendant while he is mentally incompetent. An incompetent defendant lacks the requisite mental cognizance to receive a fair trial and appreciate the rights associated therewith. A defendant cannot, among other things, effectively assist counsel, confront witnesses, or intelligently decide whether to testify or remain silent. Thus, both the United States and Nevada Supreme Courts have recognized that conviction of an incompetent criminal defendant violates due process.

The right to stand trial while competent being paramount, the United States Supreme Court has recognized a procedural due process right to a hearing to determine whether a defendant is competent if sufficient doubt of competency arises at any time. The Nevada Supreme Court has embraced this right by requiring a trial court to order a competency hearing sua sponte when any evidence before the court—in isolation or in light of other evidence—gives rise to reasonable doubt as to the defendant's competency. Nevada prescribes statutory procedures that trial courts must follow when determining whether doubt is reasonable. If there is such doubt, the court must conduct a competency hearing; neither the defendant nor defense counsel can waive the right to a hearing. The Nevada Supreme Court has consistently remedied violations of a defendant's

right to a competency hearing with reversal of the conviction and remand for a new trial but has not mandated that a new trial is the only permissible remedy.

This case presents three questions that Nevada competency jurisprudence has yet to answer or clarify. First, does reasonable doubt exist where a defendant has a history of mental health issues and use of psychoactive medications, been deprived of an unknown medication during trial, and becomes debilitated during trial? Second, is a trial court required to consider evidence of incompetence adduced during pretrial proceedings in its reasonable doubt determination if a different judge adjudicated pretrial matters? Third, is it permissible to remedy a violation of a defendant's right to a competency hearing by remanding the case to the trial court to determine whether the defendant was incompetent during trial?

We now extend Nevada's procedural due process requirement of a hearing to determine competency to novel factual circumstances and apply a new remedy. Accordingly, we conclude that (1) reasonable doubt exists as to a defendant's competency where the defendant has a history of mental health issues and psychoactive medication use, is deprived of medication during trial, and becomes debilitated thereafter; (2) a trial court must consider any evidence of incompetence in the record when determining whether reasonable doubt exists notwithstanding whether the case is transferred from another judge; and (3) we may remedy a violation of a defendant's right to a competency hearing by remanding the case to the trial court to determine whether the defendant was incompetent during trial, but the trial court must first determine if the competency hearing is feasible before holding it.

FACTS AND PROCEDURAL HISTORY

Appellant Ralph Edmond Goad and Theodore Gibson lived in apartments located in the same hallway of an apartment building in Reno. Goad and Gibson were apparently close friends and frequently spent time together. Both Goad and Gibson were in their seventies and received Social Security benefits through a payee counseling service that managed income from Social Security on behalf of beneficiaries who were unable to manage their own finances. Near the end of 2018, the payee service closed. Goad received his last payment from the payee service in November 2018. On January 11, 2019, Goad received a notice of eviction for nonpayment of rent. He was locked out of his apartment on January 30.

On February 13, employees of the apartment building found Gibson's dead body in his apartment. According to the autopsy report, Gibson suffered a total of 250 stab wounds to the face, head, neck, and other parts of his body. Inside the apartment, police found Gibson's wallet on the floor with its contents strewn about and containing no cash. Police recovered scissors and a knife from

inside Gibson's apartment with Gibson's blood on them. Police found Goad's DNA on the handle of the scissors. Police later recovered Goad's clothes from his apartment, on which police detected Gibson's blood. Police obtained video surveillance footage of the hallway in which Gibson's and Goad's apartments were located. The footage shows Gibson entering his apartment on January 18, which was the last time Gibson was seen alive, and Goad entering and exiting Gibson's apartment multiple times between January 18 and January 22. Goad was arrested in Sacramento on March 7.

The State charged Goad with murder with the use of a deadly weapon. The State moved to admit evidence of Goad's finances, including documents regarding his eviction. Goad opposed the motion. In its reply, the State included a transcript of the police interrogation of Goad following his arrest. During the interrogation, Goad discussed his finances and recounted his mental health history, including mental health hospitalizations, doctors struggling to diagnose his mental conditions, and psychoactive medications that he had been prescribed to stabilize his conditions. Among other things, Goad stated,

> they said [I was in the mental hospital] because depression. . . . But, um, the nurses would tell ya you got something else. They'd tell the doctor to write that down. . . . Some years they'd say it was this and give me these pills. . . . And some years they'd say it was that and give me those pills. The only thing that really worked was Amitriptyline for sleep. And, uh, 1 milligram of Ativan three times a day to stop the shakes[, which are from] this and that. See, I've been a nervous wreck all my life.
>
> . . .
>
> No, I'm definitely not fine. . . . I don't know [what's wrong,] I just don't get along like, um, I'm different. . . . [I just don't get along with people] because I can't sleep right and I'm nervous all the time.
>
> . . .
>
> [I take] Amitriptyline and the Ativan. The Amitriptyline is for depression and sleep. And the Ativan is for bad nervous, anxiety. It's much better than Valium. Valium just makes you sleepy. Ativan calms you down like that.
>
> . . .
>
> [The last time I took my medications was] 7 years ago, 'cause when they took me out of the mental hospital and gave me that payee, she was independent, so I wasn't allowed to go back and see a doctor or get medicine anymore. So it was good in a way. But I wasn't able to get any medication anymore. So 7 years, I went without medicine.
>
> . . .

> [When I'm not on medication, I] get angry [and] have to drink beer to calm down. . . . [When] the beer wears off, it makes you angry 'cause now I gotta walk to the store and buy more beer to calm down again.

In this case, one judge presided over all pretrial matters, and the case was transferred to another judge for trial. The trial judge acknowledged during trial that he was not entirely familiar with what occurred pretrial by stating, "I did not conduct the pretrial hearings," and "I reflected on the fact that I don't know everything that was argued in front of" the pretrial judge.

On the first day of trial, during jury selection but outside the presence of the prospective jurors, the court, defense counsel, and the State briefly discussed Goad's mental health and whether the State would seek admission of the transcript of the police interrogation of Goad. The State informed the court that it would not seek to introduce the transcript at trial. The parties discussed the interrogation transcript again after opening statements because defense counsel quoted a line from the transcript in his opening statement but could not provide a viable theory for admission of the transcript at trial.

At around 2 p.m. on the third day of Goad's trial, the district court and counsel discussed Goad's condition and demeanor outside the presence of the jury. The court explained that "there had been some inquiries about Mr. Goad's health." Court staff informed the court that, according to medical staff at the jail, Goad had not received his medication that morning and that it was "the type that cannot wait [to be administered] until the end of" the day. Therefore, Goad needed to be transported immediately to the sheriff's office in order to receive the medication. The district court and the parties did not discuss the name or effects of the medication Goad was deprived of on the third day of trial.

After staff came forward, the court solicited comments from the State and defense counsel on the matter. Both informed the court that Goad appeared infirm that morning and that his condition worsened as the day progressed. Defense counsel reported that Goad had been "degrading in his physical [condition]." The State reported that, when Goad came into the courtroom on the morning of the third day of trial, "he did not sit down, he stood there with a look that I think was objectively concerning to the [S]tate."

The district court expressed that it had also observed a change in Goad's demeanor. The court stated, "I've watched Mr. Goad a little bit more today, hoping that he doesn't fall out. I do not believe there is any gamesmanship, legal strategy, being pursued at all." The court added, "Mr. Goad is entitled to be present and well as he both observes trial and participates with his attorneys privately." The court then recessed for the day in order for Goad to be transported to receive his medication.

On the morning of the fourth day of trial, defense counsel asked the district court to canvass Goad because Goad refused to interact with or even acknowledge defense counsel that morning. The court replied that it was "not going to conduct some form of informal mini[-]mental examination from the bench" and that the trial would "proceed with or without Mr. Goad's presence or participation." Nevertheless, the court began asking Goad questions, and Goad gestured to inform the court that he was unable to speak. The court thereafter reported Goad's gestures for the record, including Goad's nods affirming that he was aware of what the judge does, who his attorneys were, and that he desired to proceed with trial. The court's questions did not specifically address the factors for determining incompetence set forth in NRS 178.400(2).[1] Court staff informed the court that the infirmary at the jail had medically cleared Goad for trial. The district court then resumed trial.

Later, the court asked Goad's counsel to comment on his condition. Defense counsel stated, "it's as if the medication that he was given yesterday has a time frame in which it actually has its effect. Because I have noticed a marked difference now with respect to Mr. Goad and his ability to communicate with me." Counsel continued, "[i]t's as if . . . this morning [the medication] hadn't fully activated."

The jury ultimately found Goad guilty of murder with the use of a deadly weapon. The district court later sentenced Goad to life in prison without the possibility of parole and a consecutive sentence of 36 to 240 months for the use of a deadly weapon.[2] This appeal followed.

On appeal, Goad argues that the district court (1) violated his federal due process and Nevada constitutional rights by failing to order a competency hearing, (2) abused its discretion by admitting evidence of his financial situation,[3] and (3) abused its discretion by

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[1]*See* NRS 178.400(2) ("'[I]ncompetent' means that the person does not have present ability to (a) [u]nderstand the nature of the criminal charges against the person; (b) [u]nderstand the nature and purpose of the court proceedings; or (c) [a]id and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.").

[2]This court only reviews the record that was before the district court on the third and fourth days of trial, when Goad endured the effects of missing his medication. However, the dissent asserts "Goad has never been found legally incompetent" based on comments from Goad's sentencing hearing and oral argument before this court, which were not in the record before the district court on the third and fourth days of trial. Even so, at sentencing, the court commented Goad was the subject of "five separate proceedings in which somebody sought to have him involuntarily committed because of mental health concerns that he may be a harm to himself or others."

[3]The district court admitted the evidence of Goad's finances and eviction as res gestae evidence under NRS 48.035(3), but denied the State's motion as to its alternative theory that the evidence consisted of prior bad acts that qualified under the motive exception in NRS 48.045(2). However, on appeal, Goad argues that the district court admitted this evidence under the motive exception

admitting photos of Gibson's clothing that he was wearing when he was killed.[4] We conclude the district denied Goad due process by failing to conduct a competency hearing when reasonable doubt arose about Goad's competency. Accordingly, we vacate Goad's judgment of conviction and remand for appropriate hearings.[5]

ANALYSIS

Goad argues that the district court denied him due process under the United States and Nevada Constitutions when it failed to order a competency hearing. He contends reasonable doubt about his competency arose because he was deprived of a necessary medication, refused to interact with defense counsel, and was unable to speak. Goad emphasizes that defense counsel, the State, and the district court agreed that he was unable to be present on the afternoon of the third day of trial due to his declining condition. Goad further argues that the court's canvass of Goad on the fourth day of trial did not dispel the reasonable doubt, especially because the court failed to ask Goad why he could not speak or why he refused to interact with his counsel.

The State argues that a competency hearing was unnecessary. The State claims that the canvass the district court performed at the request of defense counsel, Goad's comprehension of the canvass, Goad's desire to proceed with the trial, that the infirmary medically cleared Goad on the morning of the fourth day of trial, and Goad's ability to write in lieu of speaking all dispelled any doubt. The State further argues that the Nevada Supreme Court rejected a due process claim analogous to Goad's in *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (2019). We disagree with the State.

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to the rule prohibiting prior bad act evidence; that is, Goad does not challenge the admission of the evidence under NRS 48.035(3). Thus, Goad waived any alleged error. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that, by failing to raise an argument on appeal, a party thereby waives the argument); *see also Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

[4]Goad moved to preclude admission of photographs of Gibson's blood-soaked clothes with holes corresponding to his stab wounds, arguing the photos were substantially more unfairly prejudicial than probative because they were gruesome. The district court ruled the photographs were admissible because they assisted the State's forensic pathologist with her testimony and were not unfairly prejudicial. We conclude that there was no abuse of discretion because the photographs of the blood-soaked clothes were not substantially more unfairly prejudicial than probative, and they assisted the State's pathologist to testify as to the stab wounds. *See Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997); *cf. Harris v. State*, 134 Nev. 877, 880, 432 P.3d 207, 211 (2018) (holding photographs of a crash scene were prejudicial because they showed mutilated bodies in the aftermath of a crash scene), *cert. denied*, 139 S. Ct. 2671 (2019).

[5]We do not reach Goad's claim of cumulative error in light of our disposition.

We first address the due process requirement for a competency hearing, its relationship to Nevada's competency statutes, and evaluate the district court's compliance with each. We then conclude that a retrospective competency hearing is an acceptable remedy for denial of a defendant's right to a competency hearing, and further adopt a test for determining whether a retrospective competency hearing is feasible and may proceed in lieu of reversal and a new trial.

Due process

Federal due process jurisprudence and Nevada law govern Goad's claim that the district court violated his right to procedural due process by failing to order a competency hearing. *See Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983); Nev. Const. art. 1, § 8. A district court's determination of whether a competency hearing is required is reviewed for abuse of discretion. *Olivares v. State*, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008). A district court abuses its discretion and denies due process when reasonable doubt as to the defendant's competency arises and it fails to order a competency hearing. *Id*.

"The Due Process Clause of the Fourteenth Amendment provides that a criminal defendant may not be prosecuted if he or she lacks competence to stand trial." *Lipsitz*, 135 Nev. at 135, 442 P.3d at 142. A defendant is competent if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and [if] he has a rational as well as factual understanding of the proceedings against him." *Melchor-Gloria*, 99 Nev. at 179-80, 660 P.2d at 113 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (internal quotations omitted)); *see also* NRS 178.400(2); *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) ("[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear[,] and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense."). There are two "due process rights related to competency to stand trial. The first is the traditional right not to be tried or convicted while legally incompetent. The second . . . is the right to be accorded a competency hearing when sufficient evidence of incompetency is adduced before the trial court." *Doggett v. Warden*, 93 Nev. 591, 595, 572 P.2d 207, 210 (1977) (citations omitted). This appeal primarily concerns the latter.

Nevada statutory law prescribes a procedure that trial courts must follow in order to determine whether doubt as to a defendant's competency amounts to reasonable doubt necessitating a competency hearing. *See* NRS 178.405(1) (providing that a court must suspend the proceedings when doubt arises until the question of competency is determined); NRS 178.415 (prescribing the procedures a

court must follow in conducting a competency hearing). "Under Nevada's competency procedure, if *any* 'doubt arises as to the competence of the defendant, the court shall suspend the . . . [trial] until the question of competence is determined.'" *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121-22, 206 P.3d 975, 977 (2009) (quoting NRS 178.405(1)) (emphasis added). During the suspension, the court must "hold a hearing to fully consider [such] doubts and to determine whether further competency proceedings under NRS 178.415 are warranted." *Olivares*, 124 Nev. at 1149, 195 P.3d at 869. "Further competency proceedings under NRS 178.415 are warranted when there is reasonable doubt regarding a defendant's competency." *Scarbo*, 125 Nev. at 121-22, 206 P.3d at 977 (internal quotations omitted).

Nevada's competency statutes

It is unclear whether the district court was attempting to comply with NRS 178.405(1) on the third day when it paused the proceedings, solicited comments about Goad's behavior, and ultimately recessed for the day. However, due process requires us to find error where a defendant did not receive a competency hearing if reasonable doubt existed as to his competency, regardless of whether the district court complied with NRS 178.405(1). Nevertheless, we note that NRS 178.405 and NRS 178.415 prescribe a framework for compliance with the due process reasonable doubt standard that trial courts are required to follow.[6] Unequivocal and diligent adherence to these statutes will naturally guide district courts to a reliable determination of whether a formal competency hearing is necessary and, ultimately, whether the defendant is incompetent.[7] *See*

[6]*See, e.g.*, *Humphreys v. State*, Docket No. 52525, at *4 (Order of Affirmance, Nov. 25, 2009) ("Nevada's governing statutes, as interpreted by this court, set up a two-stage procedure that the district court must follow whenever the question of a defendant's competency has been raised: First, the district court must evaluate if there is any doubt as to the defendant's competency. If there is, the court must suspend the proceedings and hold a hearing to consider fully the doubts. Second, if as a result of considering fully those doubts, the district court finds there is reasonable doubt regarding a defendant's competency, the district court must order a full competency evaluation pursuant to the provisions of NRS 178.415." (citations omitted)).

[7]The dissent does not discuss NRS 178.405 or NRS 178.415, but asserts our decision encourages "fishing expeditions" in which we "imagine" evidence will surface. The dissent's comments belie the prescriptions of NRS 178.415, which specifically invite new evidence for the purpose of determining competency. NRS 178.415 requires a district court to appoint two psychologists or psychiatrists, or one of each, to "examine" the defendant, and the court must receive their "report of the examination." NRS 178.415(1), (2). Both the prosecution and the defendant may "introduce other evidence including, without limitation, evidence related to treatment to competency and the possibility of ordering the involuntary administration of medication . . . ." NRS 178.415(3).

Olivares, 124 Nev. at 1149, 195 P.3d at 869 ("In addition to the doubts that have been raised, the district court may consider all available information, including any prior competency reports and any new information calling the defendant's competency into question.").

Procedural due process

We now turn to whether Goad was entitled to a competency hearing as a matter of procedural due process.[8] In Nevada, "[a] formal competency hearing is constitutionally compelled any time there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. In this context, evidence is 'substantial' if it 'raises a reasonable doubt about the defendant's competency to stand trial.'" *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (quoting *Moore v. United States*, 464 F.2d 663, 666 (9th Cir. 1972)). "The trial court's sole function in such circumstances is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency."[9] *Id.* A court must consider evidence of incompetence in the aggregate, rather than separately or in isolation. *Drope v. Missouri*, 420 U.S. 162, 179-80 (1975). "Once there is such evidence from any source, there is a doubt that

[8]The State correctly acknowledged during oral argument before this court that if Goad was incompetent at any point during trial, he was denied substantive due process. However, Goad argues on appeal that he was denied procedural due process insofar as he did not receive a hearing to determine his competency, not that he was incompetent in fact and denied his substantive due process right not to stand trial while incompetent. As Goad stated during oral argument, the procedural due process right to a hearing to determine competency—which protects and ensures the substantive right not to stand trial while incompetent—has been treated *like* it is structural. The Nevada Supreme Court has historically remedied a district court's failure to provide a competency hearing when reasonable doubt arose by reversing and remanding for a new trial, but it has not ruled that such error is structural. *See, e.g.*, *Olivares*, 124 Nev. at 1149, 195 P.3d at 869; *Fergusen v. State*, 124 Nev. 795, 806, 192 P.3d 712, 720 (2008); *Williams v. Warden*, 91 Nev. 16, 17, 530 P.2d 761, 761-62 (1975); *Krause v. Fogliani*, 82 Nev. 459, 463, 421 P.2d 949, 951 (1966).

[9]The dissent missapplies *Melchor-Gloria* to argue reasonable doubt about competency is solely a question of fact that is entirely "within the discretion of the trial court." The very next line in *Melchor-Gloria* states, "[t]he court's discretion in this area, however, is not unbridled." 99 Nev. at 180, 660 P.2d at 113. Indeed, in the ensuing paragraph, *Melchor-Gloria* sets forth two jointly sufficient criteria for finding abuse of discretion and violation of due process: evidence giving rise to a reasonable doubt about competency, and failure to order a competency hearing. Reasonable doubt is *not evaluated* for abuse of discretion; rather, it is a criterion for *finding* an abuse of discretion. The dissent thus inverts the abuse of discretion standard as it pertains to the reasonable doubt (puts the cart before the horse). We do not evaluate whether reasonable doubt existed for abuse of discretion; according to *Melchor-Gloria*, we find abuse of discretion where reasonable doubt existed and the district court failed to order a competency hearing. Since both criterion are present here, we must find an abuse of discretion in this case.

cannot be dispelled by resort to conflicting evidence," *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (quoting *Moore*, 464 F.2d at 666), and the court must, "sua sponte, . . . order a competency hearing," *Krause*, 82 Nev. at 463, 421 P.2d at 951. "If [evidence raising a reasonable doubt] exists, the failure of the court to order a formal competency hearing is an abuse of discretion and a denial of due process."[10] *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). A defendant cannot waive his right to a competency hearing and, accordingly, does not waive his right to a competency hearing by failing to request one. *Krause*, 82 Nev. at 463, 421 P.2d at 951; *see also Pate*, 383 U.S. at 384.

Moore, the United States Court of Appeals for the Ninth Circuit opinion from which *Melchor-Gloria* adopted its language regarding reasonable doubt, dictates that an appellate court reviews a district court's reasonable doubt determination (or lack thereof) based on the evidence "before the court" at the time when reasonable doubt purportedly arose. 464 F.2d at 666. Federal precedent further indicates that any evidence in the record is properly "before the [trial] court" at any given time. *See United States v. Brugnara*, 856 F.3d 1198, 1215 (9th Cir. 2017) ("Such reasonable [doubt] exists when there is substantial evidence in the record . . . ." (internal quotations omitted)); *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991) (finding that a court's pretrial determination of doubt properly excluded a psychological report that was not in the record at the time the determination was made); *United States v. Veatch*, 674 F.2d 1217, 1223 (9th Cir. 1981) (stating that the court reviewed "the entire record that was before the district court" to determine whether reasonable doubt existed). Thus, when read in light of *Moore*, *Melchor-Gloria*'s broad requirement that a district court must consider "whether there is any evidence" "from any source" in its reasonable doubt determination extends to evidence of incompetence in the record corresponding to the defendant's case, including evidence adduced pretrial or before a different judge. 99 Nev. at 180, 660 P.2d at 113; *Moore*, 464 F.2d at 666.

[10]The dissent asserts *Melchor-Gloria* states "three things courts must weigh to determine whether a full competency hearing is required—the defendant's history of irrational behavior, his demeanor at trial, and [any] prior medical opinion of his competence to stand trial . . . ." *Melchor-Gloria* states this information in a parenthetical citing to *Drope*, 420 U.S. at 180. However, *Drope* states that these factors "are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some cases, be sufficient." *Id. Drope* also notes that there are no "fixed or immutable" factors for the trial court to address because "the inquiry is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* Thus, the dissent mischaracterizes *Melchor-Gloria* as positing an exclusive list of sources from which a district court may infer reasonable doubt. *Drope* shows that these are potential sources used to assess doubt as to competency, not exclusive factors.

Reasonable doubt

The foregoing authority compels us to conclude that the district court denied Goad due process because reasonable doubt existed on the third and fourth days of trial and the court did not hold a competency hearing. Pursuant to *Moore* and *Melchor-Gloria*, the district court was required to consider any evidence of incompetence in the record to conclude there was no reasonable doubt.[11] *Moore*, 464 F.2d at 666; *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. For example, the interrogation transcript was among the evidence before the district court; i.e., in the record, on the third and fourth days of trial. Thus, the court was required to consider any information in the transcript pertinent to Goad's competency in its reasonable doubt determination, including Goad's possible history of mental health hospitalizations, the fact that doctors struggled to diagnose him, and his past use of various psychoactive medications.

We understand that, as a practical matter, district courts do not typically scrutinize every item in the record of every case. However, the Nevada Supreme Court has not limited the scope of the evidence that *Melchor-Gloria* requires a district court to consider. At a minimum, *Melchor-Gloria* requires a district court to consider evidence in the record, given that *Moore*, the case from which the supreme court adopted the standard announced in *Melchor-Gloria*, specifies that the record is among the sources of evidence a district court must consider. Yet, the district court must also consider the defendant's behavior at trial, which may not be reflected in the record. *See Drope*, 420 U.S. at 180 ("[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required . . . ."). Thus, the burden of holding district courts to account for evidence of incompetence in the record is neither novel nor exhaustive of a district court's duty to ensure a defendant is competent during trial.

Additionally, the burden established by the Nevada Supreme Court in *Melchor-Gloria* is apt given that it ultimately serves to protect the right to be competent while one stands trial. The right to a hearing to determine competency safeguards the substantive due process right not to stand trial while incompetent, which is

[11]The district court never stated on the record that a reasonable doubt did or did not exist as to Goad's competency; however, a trial court impliedly determines there is no reasonable doubt as to a defendant's competency if it fails to exercise its sua sponte duty to order a competency hearing. *See Drope*, 420 U.S. at 181 ("[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standard of competence to stand trial."); *Moore*, 464 F.2d at 666 ("At any time . . . evidence [raising a reasonable doubt as to defendant's competency] appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue."); *Fergusen*, 124 Nev. at 802, 192 P.3d at 717; *Krause*, 82 Nev. at 463, 421 P.2d at 951.

> rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, confront, and to cross-examine witnesses, and the right to testify on one's own behalf or remain silent without penalty for doing so.

Riggins v. Nevada, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring). If we allow a district court to overlook portions of the record, we risk curtailing the evidence of incompetence that will come to the court's attention. *See Fergusen*, 124 Nev. at 802, 192 P.3d at 718 (stating that a district court may not assign the determination of whether a defendant is competent to a different judge during trial because doing so would interrupt the trial judge's ongoing assessment of the defendant's competence). This would decrease the likelihood that a court will find reasonable doubt exists as to the defendant's competency, and the right to a competency hearing would become dependent upon the trial court's diligence in reviewing the record. This is particularly so in cases where the defendant's behavior during trial could seem negligible in isolation, but when considered in light of evidence in the record that was submitted pretrial, the doubtfulness as to competency may become palpable.

The evidence of Goad's incompetence that was properly before the district court gave rise to a reasonable doubt in the aggregate. As stated, the district court was required to consider any evidence of incompetence in the record and its own observations in light of other evidence or observations bearing on Goad's competence in reaching its reasonable doubt determination. *See Drope*, 420 U.S. at 179-80. In the aggregate, the crime of which Goad was accused—stabbing his elderly friend 250 times and repeatedly visiting the victim's apartment following the victim's death;[12] Goad's apparent history of mental health issues and psychoactive medication use; the fact that Goad was deprived of medication on the third day of trial; and the fact that Goad became debilitated on the third day of trial—which was corroborated by defense counsel, the State, and the district court—collectively suggested that Goad was deprived

[12]Although the extreme nature of the stabbings of which Goad was accused and his returns to the crime scene do not prove that he was incompetent at trial, the fact that he apparently engaged in such irrational behavior is a factor a district court must weigh in determining whether reasonable doubt exists. *See Drope*, 420 U.S. at 179 (stating that the trial court failed to give proper weight to record evidence, including the victim's testimony that the defendant allegedly attempted to choke her to death on the Sunday prior to trial); *id.* (stating that the trial court may not ignore "the uncontradicted testimony of a history of pronounced irrational behavior"); *Doggett*, 93 Nev. at 595, 572 P.2d at 209 (citing *Pate*, 383 U.S. 375) (stating that the Supreme Court held in *Pate v. Robinson* that there was a reasonable doubt about Pate's competency in part due to "uncontradicted testimony of defendant's long history of disturbed and violent episodes, including the slaying of his infant son and an attempted suicide").

of a medication that stabilized his mental health, was suffering from withdrawals, or was somehow adversely affected by not having taken the medication. Thus, the evidence of Goad's incompetence gave rise to a reasonable doubt as to whether Goad was competent on the third day of trial.[13] *See Melchor-Gloria*, 99 Nev. at 179-80, 660 P.2d at 113; *see also* NRS 178.400(2); *People v. Moore*, 946 N.E.2d 442, 448 (Ill. App. Ct. 2011) (providing that a "bona fide doubt" arose when the "chemically-dependent" defendant, who needed antidepressants to be fit for trial, was "suddenly made to go off his medication," and that the trial court could not shirk its sua sponte duty to order a competency hearing by placing the burden on defense counsel to inquire into the matter).

Goad's competency only became more doubtful on the fourth day of trial when he inexplicably lost his ability to speak and refused to acknowledge his counsel despite never refusing to do so before. Thus, the evidence of Goad's potential incompetence in the record, in the aggregate, raised a reasonable doubt as to Goad's competence on the third and fourth days of trial.

The evidence the State cites to contradict the reasonable doubt that arose during trial did not dispose of the court's duty to order a competency hearing. A reasonable doubt cannot be dispelled by resorting to conflicting evidence once there is evidence of incompetence sufficient to give rise to a reasonable doubt. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. Therefore, the evidence that the State cites to suggest that Goad was competent, including that Goad was apparently medically cleared on the fourth day of trial by an unknown person from the jail staff and Goad's comprehension and nonverbal responsiveness during the court's canvass, did not obviate

[13]The dissent states that, by "aggregating," we mean that a district court must "conduct a full-blown hearing and investigation." Indeed, "that's not how the legal test works[.]" However, this is not how we applied the aggregating principle. The aggregating principle requires a trial court to consider evidence of potential incompetence in light of other such evidence rather than in isolation when determining reasonable doubt. *See Chavez v. United States*, 656 F.2d 512, 517-18 (9th Cir. 1981). In isolation, being deprived of medication does not imply that the medication could affect Goad's competency; the medication conceivably could have treated a purely physical ailment that does not impact competency. Applying the aggregating principle, it becomes more likely that the deprivation of medication affected his competency because the district court must consider the deprivation in light of other evidence, including Goad's behavior, the court's worry that Goad "might fall out," that Goad has historically relied on psychoactive medication to stabilize his mental health, and the urgency with which staff had to administer Goad's medication. *See* 40 Am. Jur. 2d *Proof of Facts* 171, § 10 cmt. (2021 Update) ("It would seem prudent to require a competency hearing any time a defendant is taking medication or drugs which may have an effect on his mental capabilities. This would protect the defendant's interests and also save the state considerable time and expense by obviating the situation in which a lengthy trial would be nullified due to a subsequent determination that the defendant was legally incompetent to stand trial.").

the need for a competency hearing.[14] *See Pate*, 383 U.S. at 385 (rejecting the argument that "the mental alertness and understanding displayed in [the defendant's] colloquies with the trial judge" dispensed with the need for a competency hearing (internal quotations omitted)).

Neither Goad's expressed desire to proceed nor defense counsel's request for a canvass waived Goad's right to a competency hearing. A defendant cannot waive his right to a competency hearing. *Krause*, 82 Nev. at 463, 421 P.2d at 951 (citing *Pate*, 383 U.S. at 384). Goad did not waive his right to a competency hearing by not specifically requesting one either. *See Pate*, 383 U.S. at 384 (rejecting the prosecution's argument that the defendant waived his right to a competency hearing because his counsel failed to demand a hearing). Thus, the State's argument that the district court satisfied due process by obliging defense counsel's request for a canvass and by confirming that Goad desired to proceed is unpersuasive.[15]

The State's analogy to *Lipsitz* overlooks that there are stronger indicia of incompetence in Goad's case. In *Lipsitz*, the Nevada Supreme Court held that a trial court did not err when it "relied on defense counsel's assurances, its own interactions with [the defendant], and his responses to the court's canvass in arriving at its determination that a competency hearing was not warranted." 135 Nev. at 135, 442 P.3d at 142. The supreme court concluded that the defendant's obstinacy was not sufficient to raise a reasonable doubt as to the defendant's competence. *Id.* at 135, 442 P.3d at 142-43.

The State is correct that, like the district court in *Lipsitz*, the district court here performed a canvass—albeit a brief one—and relied in part on assurances from counsel that Goad desired to proceed with trial. Similarly, Goad appeared to behave "obstinately" on the morning of the fourth day of trial when he refused to acknowledge his counsel. However, unlike Goad, who was deprived of medication

[14]Additionally, the district court's canvass did not cover the criteria for incompetency as provided by NRS 178.400(2).

[15]The dissent cites no authority for its conclusion that, "[i]f Goad can't quite bring himself to say that he was incompetent in truth and in fact, then I would conclude that there exists no 'reasonable doubt[.]'" This is a classic "red herring" because Goad was not required at trial, or now on appeal, to assert he was incompetent. The quantum of proof for a defendant to be entitled to a competency hearing is reasonable doubt. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. Due process required he receive a hearing when there was reasonable doubt as to his competency, and the hearing was not conditioned upon Goad or his counsel asserting that he was incompetent in fact. Thus, even if he ultimately would have been found competent at trial, he was still entitled to a hearing under NRS 178.415 to *confirm* he was competent because there was a reasonable doubt. Additionally, NRS 178.415 shows competency in fact is a question requiring medical expertise: a court may determine competency in fact only after receiving reports from experts. We cannot expect Goad to declare in good faith that he was incompetent when we would not allow a district court to reach the same conclusion without the assistance of experts.

and whose psychiatric and medical history suggested that the deprivation of the medication affected his competency, there was no reason to believe that Lipsitz had been deprived of medication that affected his competency.

Furthermore, Lipsitz's obstinacy was preceded by a pattern of attempts to obstruct trial proceedings. *Id.* at 132-34, 442 P.3d at 141-42. Comparatively, there is no indication in the record that Goad behaved inappropriately, previously refused to acknowledge defense counsel, or otherwise obstructed the proceedings prior to the fourth day of trial. On the contrary, Goad's obstinacy on the fourth day of trial weighs in favor of finding that reasonable doubt existed because, according to the district court, he was well-behaved throughout trial. Based on the record, Goad's temperament changed only after he was deprived of medication. *See Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); *see generally Hawai'i v. Soares*, 916 P.2d 1233, 1250 (Haw. Ct. App. 1996), *overruled on other grounds by State v. Janto*, 986 P.2d 306 (Haw. 1999).[16]

In sum, federal due process jurisprudence and the Nevada Constitution required the district court to order a competency hearing sua sponte because reasonable doubt arose as to Goad's competency on the third day of trial in light of the nature of the charged crime, Goad's history of mental health conditions and use of psychoactive medications, Goad being deprived of medication, and Goad's abnormal behavior thereafter. The reasonable doubt that accrued on the third day of trial continued into the fourth day of trial, where Goad's competency became even more doubtful in light of his inability to speak and his refusal to acknowledge his counsel. We emphasize that the record does not suggest that Goad was feigning his behavior or attempting to manipulate the court at any time.

Although we conclude there was sufficient evidence to give rise to a reasonable doubt, our conclusion should not be interpreted as

[16]Although Nevada competency jurisprudence has not previously addressed the significance of deprivation of medication with regard to a court's reasonable doubt determination, Goad's case is very similar to *Soares*. 916 P.2d at 1250. In *Soares*, the Intermediate Court of Appeals of Hawai'i held that "a good faith doubt"—Hawai'i's rendition of the "reasonable doubt" standard—arose based upon the defendant's assertion that he had not received his medication that morning and his trial counsel's representation that he "was acting completely differently from the first day of trial." *Id.* The court explained that it was "not clear from the record whether [d]efendant required the medication in order to be mentally competent to proceed to trial. However, in view of [d]efendant's assertion, as well as his trial counsel's representations that [d]efendant was acting completely differently from the first day of trial[,] . . . a good faith doubt was clearly raised as to whether [d]efendant's failure to take his medication was directly affecting his legal competence to stand trial." *Id.*

endorsing or opposing an inference that Goad was in fact incompetent during trial. We reiterate that the district court was required to "decide whether there is any evidence which, *assuming its truth*, raise[d] a reasonable doubt" about Goad's competency. *See Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (emphasis added) (quoting *Moore*, 464 F.2d at 666). We thus do not resolve whether Goad was telling the truth when he made the statements documented in the interrogation transcript, whether the medication did in fact impact his competency, or any other matter bearing on Goad's competency except to the extent that it gave rise to a reasonable doubt necessitating a competency hearing.

Remedy

In every case where the Nevada Supreme Court has found on direct review that a trial court failed to order a competency hearing when reasonable doubt existed, it has reversed the judgment of conviction and ordered a new trial.[17] When the case entailed review of a petition for a writ of habeas corpus, the court discharged the petitioner from confinement unless the State elected to retry the petitioner within a reasonable time.[18] Despite this uniformity, the Nevada Supreme Court has not ruled that reversal and remand for a new trial is *always* required when a trial court fails to order a competency hearing. *See Krause*, 82 Nev. at 463, 421 P.2d at 951 (stating that the court "prefer[s]" the United States Supreme Court's remedy in *Pate* of reversal and remand due to the difficulty of holding a limited retrospective hearing). Nor has the United States Supreme Court ruled that reversal and remand is the exclusive remedy when a court violates *Pate*. *See Pate*, 383 U.S. at 386; *Drope*, 420 U.S. at 183.

In lieu of reversal and remand, appellate courts have at times remedied trial courts' failures to order a competency hearing with a retrospective, or *nunc pro tunc*, competency hearing. *See Odle*, 238 F.3d at 1089-90 ("The state court can nonetheless cure its failure to hold a competency hearing at the time of trial by conducting one retroactively."). A *nunc pro tunc* hearing is a hearing that takes the place of a contemporaneous hearing, as if it had been held at an earlier time. *See Iouri v. Ashcroft*, 464 F.3d 172, 181-82 (2d Cir.

[17]*See Olivares*, 124 Nev. at 1149, 195 P.3d at 869 (reversing defendant's conviction and remanding the case to district court to conduct a new trial); *Fergusen*, 124 Nev. at 806, 192 P.3d at 720 (reversing the defendant's conviction and remanding the case for a new trial).

[18]*See Williams*, 91 Nev. at 17, 530 P.2d at 761-62 (reversing a habeas petitioner's conviction because the trial court failed to order a competency hearing and "discharg[ing] [petitioner] from confinement unless the State within a reasonable time elects to retry him"); *Krause*, 82 Nev. at 463, 421 P.2d at 951 (discharging a habeas petitioner from confinement due to a trial court's failure to sua sponte order a competency hearing "unless the State, within a reasonable time, elects to retry him").

2006), *opinion modified and superseded on denial of rehearing*, 487 F.3d 76 (2d Cir. 2007).

The utility of a retrospective competency hearing is clear: "[a]n automatic full reversal with a remand for a new trial . . . would impose severe costs on the justice system in remedying a violation that, while considered a miscarriage of justice in the context of competency proceedings, might not have affected the guilt and penalty verdicts." *People v. Lightsey*, 279 P.3d 1072, 1102 (Cal. 2012). "[I]f placing [the] defendant in a position comparable to the one he would have been in had the violation not occurred is possible," and the district court finds that the defendant was competent to stand trial on remand, then "we would have no reason to question the fundamental fairness and reliability of the remainder of the judgment against him." *Id.*

However, before a *nunc pro tunc* competency hearing can occur, the district court must determine on remand that a meaningful retrospective hearing to determine competency is feasible.[19] *See Odle*, 238 F.3d at 1089-90; *see also McGregor v. Gibson*, 248 F.3d 946, 962 (10th Cir. 2001) ("Retrospective competency hearings are generally disfavored but are permissible whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant." (internal quotations omitted)). A retrospective competency hearing is "feasible" if there is sufficient evidence available to reliably determine a defendant's competence at or around the time reasonable doubt arose. *Lightsey*, 279 P.3d at 1104-05. To determine whether a retrospective competency hearing is feasible, a trial court must consider the following factors:

> (1) [t]he passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with [the] defendant before and during trial as well as any other facts the court deems relevant.

Id. at 1105 (alterations in original) (citation and internal quotations omitted). The trial court's focus in making "the feasibility determination must be on whether a retrospective competency hearing will provide [a] defendant a fair opportunity to prove incompetence,

[19]The dissent states, "there is nothing for the district court to aggregate on remand." The dissent again confuses reasonable doubt with determining competency in fact. The aggregating principle applies when a court is considering whether there is reasonable doubt such that a hearing is necessary, not *during* a competency hearing when a court determines if a defendant is incompetent in fact under NRS 178.415. Similarly, the dissent's comments regarding the scope of a competency hearing, which are not supported by authority, completely overlook NRS 178.415, the controlling statute.

not merely whether some evidence exists by which the trier of fact might reach a decision on the subject." *Id.* (emphasis omitted). "Because of the inherent difficulties in attempting to look back at the defendant's past mental state, the burden of persuasion" is on the prosecution to convince the trial court "by a preponderance of the evidence that a retrospective competency hearing is feasible in this case."[20] *Id.* (citation omitted).

We conclude that vacating the judgment of conviction and ordering a retrospective, or *nunc pro tunc*, competency hearing is the appropriate remedy for the district court's violation. If, on remand,[21] the district court determines that a hearing to retrospectively determine Goad's competence is not feasible in accordance with the forgoing prescripts, then the judgment of conviction remains vacated and the district court is ordered to conduct a new trial.[22] *See id.* at 1120. If the district court determines that a hearing is feasible, then it shall conduct the hearing in accordance with NRS 178.415.[23] If, at the conclusion of the hearing, the district court finds that Goad was competent throughout his 2019 trial, then the court shall

[20]During oral argument, we asked the parties if it would be feasible at this time to conduct a hearing to determine Goad's competence during his trial. Neither party conceded that it would be feasible, but neither argued that it would be impracticable or impossible. Notably, neither party suggested that there are any impediments in determining the effect of being deprived of the medication Goad was receiving, which would likely be the focus of the feasibility determination and, if feasible, the subsequent *nunc pro tunc* competency hearing.

[21]Remanding a case for the district court to make a determination on a specific issue is not a novel practice for a Nevada reviewing court. *See Harvey v. State*, 136 Nev. 539, 473 P.3d 1015 (2020) (reversing a judge's rulings on post-trial motions who sat in for the trial judge and remanding the case for the trial judge to consider the motions). *Lightsey* further explains that "a limited remand for the purpose of conducting, if feasible, a retrospective competency hearing is akin to a limited remand to remedy a sentencing error that has not affected the judgment of guilt." 279 P.3d at 1103.

[22]Pursuant to *Lightsey*, a reviewing court reverses the judgment of conviction and remands the case for a *nunc pro tunc* hearing with instructions to conduct a new trial if the hearing is not feasible or the result of the hearing is that the defendant is found to have been incompetent. *See Lightsey*, 279 P.3d at 1120. We choose to vacate because the judgment of conviction may be reinstated depending on the outcome of the hearing.

[23]In *Doggett v. Warden*, the Nevada Supreme Court, in reviewing a petition for postconviction relief, commented that the burden of proof in a retrospective hearing to determine competency is sometimes allocated to the State. 93 Nev. 591, 595, 572 P.2d 207, 210 (1977) ("It is only when the trial court has failed to follow the procedural requirements of *Pate* that the State is required to forgo its usual requirement that the defendant establish his incompetence as of the date of the original trial."). Because the *Doggett* court reviewed an order denying a petition for a writ of habeas corpus that did not allege a *Pate* violation, and because the decision predates the enactment of Nevada's current competency hearing statute, NRS 178.415, we need not decide its possible application here.

reinstate its judgment of conviction. *See* NRS 178.420; *Lightsey*, 279 P.3d at 1120. Alternatively, if the court finds that Goad was incompetent, then the district court must conduct a new trial.[24] *Id.*

CONCLUSION

Trial courts have a duty to ensure that criminal defendants are competent while standing trial. Thus, a trial court must order a hearing sua sponte to determine whether a defendant is competent when there is reasonable doubt about his or her competency. To fulfill its duty to order a competency hearing, a trial court must follow Nevada's statutory competency procedures and consider any evidence of incompetence in the record regardless of whether that evidence was adduced pretrial or during trial. In reaching its reasonable doubt determination, the trial court must consider evidence of incompetence in the aggregate; that is, evidence of incompetence should be considered in light of other evidence of incompetence as well as the court's own observations of the defendant. If a trial court fails to order a competency hearing when reasonable doubt arises, an appellate court may remedy the failure by remanding the case to the trial court to hold a retrospective hearing to determine whether the defendant was incompetent during trial, provided the trial court first determines on remand that it is feasible to retrospectively determine the defendant's competence.

Accordingly, we order the judgment of conviction vacated and remand this case for a retrospective competency hearing, if feasible, and any such other proceedings consistent with this opinion.

Bulla, J., concurs.

Tao, J., concurring in part and dissenting in part:

The majority resolves this appeal by vacating a murder conviction in favor of a remedy—a retrospective competency hearing to be held more than 21 months after the original trial—that Goad himself never requested; that the Nevada Supreme Court has already announced that district courts cannot order; and that doesn't even apply to the facts of this case. The majority ends up vacating a murder conviction for the district court to "aggregate" additional

[24]The dissent cites an unpublished case, *State v. Fifth Judicial Dist. Court*, to argue that the Nevada Supreme Court has ruled against the remedy we order here. Docket No. 53926 (Order Granting Petition, Sept. 25, 2009) ("Nevada law does not permit a trial court to vacate prior proceedings based upon present doubt as to past competency."). Even if this decision bound us, which it does not, *see* NRAP 36(c)(3), our remedy does not vest the district court with power to "vacate prior proceedings." *This court* is vacating the district court's judgment, and the district court will reinstate the judgment of conviction if a competency hearing is feasible and the district court determines that Goad was competent during his trial after the hearing. Otherwise, the district court must conduct a new trial pursuant to *our order*.

evidence that Goad himself doesn't claim to exist, for the purposes of assessing the truth of something that Goad himself doesn't claim to be true. "There's no there there" to aggregate. Gertrude Stein, *Everybody's Autobiography* (1937). Respectfully, I dissent.

I.

Goad stabbed his victim a total of 250 times in one of the most brutal and bloody murders in recent memory. Goad has been diagnosed with a mental illness, and it's pretty clear that he has one of some sort; the excessive and wanton violence of the crime alone seems to suggest that. But what we don't know is whether his mental illness either did, or did not, render him incompetent on one particular day several months after the murder, day four (August 8, 2019) of his trial. As the majority notes, the record is devoid of sufficient information. For example, as the majority specifically notes (and greatly emphasizes), we don't know much about his precise diagnosis, as he was apparently never examined by a psychologist or psychiatrist during the litigation of this case, and we don't know what medications he was administered during his trial and how they may, or may not, have affected him.

This lack of information matters, because mental illness and legal incompetence are two very different things. Many people who suffer from various mental illnesses are fully competent to stand trial for the crimes they commit. The test for legal incompetence is altogether different, and considerably harder to meet, than the test for whether someone suffers from one of the many mental illnesses listed in the *DSM* (*Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association). A court measures competence not by whether the defendant has a mental illness, but rather something very different: by the defendant's ability to understand the nature of the criminal charges, the nature and purpose of the court proceedings, and by his or her ability to aid and assist his or her counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding. *Calvin v. State*, 122 Nev. 1178, 1182-83, 147 P.3d 1097, 1100 (2006); *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see* NRS 178.400(2)(a)-(c).

"[D]iagnosis of a mental illness or defect, without more, does not reasonably raise a doubt about the defendant's competence" to stand trial. *Robinson v. State*, 301 So. 3d 577, 582 (Miss. 2020); *see People v. Lara*, No. B186598, 2006 WL 3734924, at *2 (Cal. Ct. App. Dec. 20, 2006) (noting psychologist's evaluation that defendant was mentally ill but not incompetent); *Commonwealth v. Zook*, 887 A.2d 1218, 1225 (Pa. 2005) (affirming trial judge's conclusion that defendant was "mentally ill and not incompetent to proceed"); *Bishop v. Caudill*, 118 S.W.3d 159, 167 (Ky. 2003) (Keller, J., concurring)

(noting entire class of cases "where the defendant is mentally ill, but not incompetent"). The Nevada Supreme Court agrees: "[a defendant's] history of drug abuse, possible PTSD, and mental health history, without more, did not indicate that he was unable to consult with his attorney or understand the proceedings against him." *Eubanks v. Baker*, Docket No. 68628, at *1 (Order of Affirmance, May 9, 2016) (citing *Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983), and *Dusky*, 362 U.S. at 402).

Quite the opposite can often be true: people with mental illnesses can function at such a high level that several have won Pulitzer Prizes and Nobel Prizes for their work. *See* James C. Kaufman, *Genius, Lunatics, and Poets: Mental Illness in Prize-Winning Authors*, SAGE J., Vol. 20, Issue 4, pp. 305-14 (Yale Univ. June 1, 2001); A. Rothenberg, *Creativity and Mental Illness*, Am. J. of Psychiatry, 152:5, pp. 815-16 (1995). Meeting the basic test of legal competency is many orders of magnitude less complex than the kind of sustained genius that wins those kinds of awards. Genius aside, millions of other people diagnosed with mental illnesses are nonetheless fully competent to sign contracts, raise children, be licensed to drive, open bank accounts, write valid wills, hold important jobs, grant or refuse consent to medical treatment, make important life choices without being overruled by a court-appointed guardian, and be put on trial for the crimes they commit. *See Munsey v. State*, No. E2002-02929-CCA-R3-PC, 2004 WL 587642 (Tenn. Crim. App. 2004) (finding that a mentally ill defendant was fully competent to waive right to counsel); *In re Yetter*, No. 533, 1973 WL 15229 (Pa. Ct. Comm. Pleas 1973) (refusing to appoint a guardian to oversee medical decisions for a person who had mental illness but was fully competent to make her own medical decisions). *See generally* Claudine Walker Ausness, Note: *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat From Those Who Are Fit*, 66 Ky. L. J. 666, 679 (1977-78).

On the other hand, people can be incompetent for reasons entirely unrelated to mental illness. Intoxicated defendants, for example, may be incompetent (albeit temporarily). In Nevada, children under six years of age are presumptively incompetent to testify in judicial proceedings. People suffering from Alzheimer's disease or dementia, or who have suffered certain types of head injuries, may be incompetent despite having no diagnosed mental illness whatsoever. Competence can sometimes come and go; someone can be incompetent to testify at one period in time but fully competent at another. *See Felix v. State*, 109 Nev. 151, 173, 849 P.2d 220, 235-36 (1993), *superseded by statute on other grounds as stated in Springman v. State*, Docket No. 50325 (Order of Affirmance, February 10, 2009).

Of course, it goes without saying that for many people mental illness and competency can be related. Some people suffer from mental illnesses so severe that they render that person legally

incompetent, sometimes permanently. But the larger point is that the link between the two things is at best imperfect. The presence of one does not necessarily suggest the other. In fact, the link is so tenuous that mental illness cannot even be said to usually or commonly suggest legal incompetence. *See Robinson*, 301 So. 3d at 582; *Bishop*, 118 S.W.3d at 167 (noting entire class of cases "where the defendant is mentally ill, but not incompetent"). If we're going to get the analysis right, then as the saying goes, we need to make sure apples are sorted with apples and oranges with oranges.

II.

The answer to our lack of knowledge isn't to vacate the conviction and remand for a retrospective hearing, because that approach turns such a hearing into something it isn't supposed to be: rather than a focused judicial weighing of existing evidence, it becomes a tool of open-ended investigation and discovery requiring the district court to conduct a free-floating fishing expedition for new information totally outside of the record and beyond the evidence that the parties decided to present on their behalf, regardless of whether the parties want the new evidence or think it helps them or not. Worse, it directs the district court to do this even though Goad did not request such an investigation either before or during trial.

Fundamentally, it reverses not because the district court committed any legal error in evaluating what the parties actually presented, but rather because the majority imagines that there might be some evidence outside the record that the parties overlooked that the court was never asked to consider but that someone ought to now go look for, 21 months after the fact. Mind you, the majority tacitly admits that we don't know what that evidence might be, because it isn't enough for this court to actually conclude that Goad was so clearly incompetent that the district court must conduct a new trial. Rather, the majority expressly leaves open the possibility that the district court is free on remand to conclude that any additional evidence it finds might not be enough to warrant a full competency adjudication, much less demand the conclusion that Goad was incompetent to stand trial on day four. So whatever additional evidence might be out there (whatever it is) could go either way. But let's vacate Goad's murder conviction and require the district court to look anyway.

This isn't how such hearings are supposed to work. They're not supposed to be open-ended discovery searches. Rather,

> [t]his court "disfavor[s] retrospective determinations of incompetence," *see Williams v. Woodford*, 384 F.3d 567, 608 (9th Cir. 2004), and they are reserved for those cases where it is possible to "conduct a meaningful hearing to evaluate retrospectively the competency of the defendant." *Moran v. Godinez*, 57 F.3d 690, 696 (9th Cir. 1995), *overruled on other*

> *grounds by Lockyer v. Andrade*, 538 U.S. 63, 75-76, . . . (2003); *see Drope* [*v. Missouri*], 420 U.S. [162,] 183 . . . [(1975)] (holding that "[g]iven the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances," a retrospective competency hearing six years after the trial was not possible). In determining whether such a hearing is warranted, we evaluate such factors as the passage of time and the availability of contemporaneous medical reports. *Moran*, 57 F.3d at 696; *see also McMurtrey* [*v. Ryan*], 539 F.3d [1112,] 1131-32 [(2008)].

Maxwell v. Roe, 606 F.3d 561, 576 (9th Cir. 2010). Requiring one when we have no idea if any concrete evidence even exists risks morphing Goad's trial from an adversarial proceeding into something more like an inquisitorial one (familiar to Europeans) in which the judge, not the parties, directs the investigation, decides where to look, and decides what should matter to the parties whether they like it or not. That might be how things work in Europe, but it's not how we're supposed to handle things. In our adversarial system of justice, when the record lacks information necessary to warrant reversal, the solution is to conclude that the appellant failed to meet his or her burden of demonstrating that he or she is entitled to relief. In Nevada, the burden falls on the appellant trying to overturn a jury verdict to provide us with a complete enough record to make a case for reversal, and if he or she fails to do so we "necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). This premise is sometimes phrased in an alternative: we "cannot properly consider matters not appearing in th[e] record." *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997).

Here, the record contains ample evidence of mental illness, but none whatsoever that Goad has ever been legally incompetent at any time in his long 74-year life. Indeed, he never claimed to be incompetent at any time during the litigation of his murder case: he did not assert a defense of insanity or diminished capacity in response to the charges, and his trial counsel never argued to the district court that he believed his client was incompetent to stand trial or assist in his defense. Goad and his counsel presented no evidence at all that he has ever been legally incompetent for even a single minute of his life, and Nevada law holds that lack of information against the party bearing the burden of proof on appeal, which is Goad. Yet by reversing anyway, the majority assumes something it doesn't want to say: that by failing to challenge competency more vigorously, Goad's counsel was basically ineffective and two judges of this court are going to give him a second chance to come up with more evidence than he presented the first time. But unlike my

colleagues, I'm not willing to jump to the conclusion that counsel failed at his job. Rather, I would think that if anyone knows Goad's mental competence, it would be counsel in close contact with him during the litigation of a murder trial over the course of several months, rather than appellate judges viewing nothing but a written transcript almost two years later.

Quite to the contrary, one fact stands out: Goad doesn't even claim himself that he was incompetent during his trial. In determining whether a full competency hearing is required, courts focus on three factors: the defendant's history of irrational behavior, the defendant's demeanor at trial, and prior medical opinion of the defendant's competence to stand trial. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Drope*, 420 U.S. at 180). Two of the three are nonexistent by Goad's own admission, and the third supports the district court.

As a starting point, Goad admits that he goes long periods of his life without taking any medication for his mental illness; in fact, he told the police during a recorded and transcribed interrogation that he was medication-free for seven years before his arrest, and he never disavows the truth of that statement, not even now. *See* Transcript of March 2019 Police Interview, 1 JA 124: "Q: When was the last time you took, you took your medications? A: 7 years ago . . . . So 7 years I went without medicine." Yet he never claimed to be legally incompetent. In district court, Goad never argued that he was incompetent either before or during trial, and indeed while the district court conducted the canvass that gives rise to this appeal, neither Goad nor his counsel suggested that there existed any past history of incompetency. On appeal, his counsel expressly admitted that there is no evidence that Goad has ever been diagnosed or adjudicated incompetent by any physician or court at any time during his 74-year life, not even during the years when he was medication-free.

> [Court:] [B]ut mental illness and incompetence are two different things, so my question to you is, has he ever in his seventy-four years been adjudicated incompetent by any other court, because it doesn't appear anywhere during the lifespan of this case before trial that anyone raised any questions of his competency despite the fact that he clearly has a mental illness. Has anyone ever, other than this one day in time, had questions about his competency as opposed to his overall mental health?
>
> [Goad:] . . . In the record, before the district court or anything that was currently in the appellant record there is no other indication that Mr. Goad has been formally adjudicated incompetent by a court.

Notably, the question asked during argument wasn't just whether he's ever been formally adjudicated legally incompetent, but whether anyone has ever "had questions" about his competency, to

which the answer was negative. If any such evidence existed, this was certainly the prime moment for counsel to mention it.

Conclusion: there is simply is no evidence that Goad was ever legally incompetent to stand trial for murder, either with or without medication.

Indeed, if you look closely and carefully at both the record and Goad's briefing, Goad himself never actually asserted that he was ever incompetent, either to the district court or, notably, even in his briefing on appeal to this court even after having had almost two years to think about it. The best argument that Goad makes is the cleverly worded one that "due process clearly required that Mr. Goad be evaluated for his competence to stand trial." (Appellant's Opening Brief, page 15.) His "Summary of Argument" elaborates:

> In this case, Mr. Goad was found to be seriously ill on the afternoon of August 7. When he returned to court on August 8, he refused to engage with or acknowledge counsel, and appeared unable to assist counsel in his own defense. Given these circumstances, the district court abused its discretion in failing to initiate formal competency proceedings.

(Appellant's Opening Brief, p. 10.) We all know that Goad was mentally "ill," but notice what's cleverly missing from even Goad's own carefully parsed argument: the factual assertion that he has ever been incompetent, either before August 8, on August 8, or at any time after August 8 through today. His argument is all about day four of the trial, August 8. He concedes (and the majority accepts) that he was fully competent on days one and two of the trial, and then fully competent on every day after day four. But even as to day four itself, nowhere does he go so far as to allege that he actually was, as a medical truth, incompetent. So it appears to me that Goad just wants a reversal of his murder conviction for the purely rhetorical reason that the evidence might suggest victory based upon grounds that he himself does not personally say were factually true. Unlike the majority, I don't assume that counsel must have done a bad job. Rather, I see this as good and clever lawyering, the kind of quality representation that every defendant facing murder charges deserves to have but relatively few ever get. But good lawyering by itself doesn't mean that reversal is warranted. If Goad can't quite bring himself to say that he was incompetent in truth and in fact, then I would conclude that there exists no "reasonable doubt" about it: it's just not true. At the very least, we must conclude that the existing record supports no other conclusion.

The majority thus remands this matter back to the district court for supposedly failing to "aggregate" evidence that Goad's trial and appellate counsel do not claim to actually exist anywhere in the world. The district court can hardly be faulted for failing to "aggregate" evidence that Goad did not bother to present to the district

court when given the opportunity, and even now does not quite say actually exists. If any hearing would be meaningless, this one will be, and during oral argument Goad's counsel quite sensibly agreed:

> [Court:] Is it possible in this situation to send this case back for a competency hearing at this point in time as opposed to a new trial?
>
> [Goad:] Your honor, I don't believe a competency examination at this point in time could establish whether Mr. Goad was competent during that morning of trial, though it may provide more information if we knew what the medication was.
>
> [Court:] Couldn't a hearing determine the answer to the questions [the court] posed?
>
> [Goad:] A hearing could determine the answer to those questions, though it would be difficult to determine Mr. Goad's mental state on that morning.
>
> [Court:] It would be difficult, but would it be impossible?
>
> [Goad:] I think it would be next to impossible.

There is nothing for the district court to aggregate on remand. The aggregate of zero is zero, and we should affirm.

III.

The scope and purpose of a retrospective hearing is considerably more limited and narrow than the majority opinion suggests. Its purpose is to answer the narrow question of legal competence, not to conduct a free-wheeling investigation into a defendant's overall mental health just to see what might be lurking there. Thus, the remedy is far from sweeping; to the contrary, it is actually quite narrow. First, it triggers only when there exists "reasonable doubt" regarding competency; it is not supposed to be held for every defendant who happens to suffer from some kind of mental illness unrelated to competency.

Second, the remedy is only an appellate remedy, not one that can be granted by a district court in connection with a post-verdict motion for new trial no matter how much doubt exists regarding competence. The Nevada Supreme Court has already announced that "Nevada law does not permit a trial court to vacate prior proceedings based upon present doubt as to past competency" and a district court that vacates a jury verdict and grants a new trial on this basis "exceeds its authority." *State v. Fifth Judicial Dist. Court*, Docket No. 53926 (Order Granting Petition, Sept. 25, 2009). In that case, the defendant was convicted at trial but behaved erratically during sentencing. The district court ordered and conducted its own retrospective hearing and determined that the defendant had been incompetent during trial, and vacated the conviction. The State filed

a petition for writ of mandamus, and the Nevada Supreme Court intervened and ordered the district court to restore the guilty verdict, concluding:

> The State challenges the district court's order setting aside the verdict on two grounds: (1) the district court exceeded its authority under NRS 175.381(2) when it set aside the verdict on a ground other than sufficiency of the evidence, and (2) the district court exceeded its authority and abused its discretion when it made a determination as to Yowell's past competency that was not supported by substantial evidence. We agree.
>
> First, a trial court may set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. NRS 175.381(2). In the instant case, the district court set aside the verdict because it believed that Yowell was not competent during his trial. There was no allegation, let alone a finding by the district court, that the evidence presented by the State was insufficient to sustain a conviction. Therefore, we conclude that the district court exceeded its authority under NRS 175.381(2) by setting aside the verdict.
>
> NRS 176.515(1) provides that "the court may grant a new trial to a defendant if required as a matter of law on the ground of newly discovered evidence." However, Nevada law does not permit a trial court to vacate prior proceedings based upon present doubt as to past competency.

Id. at *2. Thus, a district court's power to vacate a jury verdict and grant a new trial in a criminal case is governed by statute, and the statutes do not authorize courts to grant new trials on grounds other than insufficiency of the evidence. *Id.* Consequently, district courts may not vacate jury verdicts and order such hearings themselves after trial. Only appellate courts may order such hearings; district courts have no authority to do so.

Accordingly, the scope of what the majority does today is extremely limited: it applies only to the judges of this court, not to any district courts and not to the Nevada Supreme Court either, which remains free to ignore opinions from lower courts. It is precedent only to us, not any other court either above or below. Because this is only an appellate remedy not available to the district court, the inquiry must be filtered through the appellate standard of review. Whether there exists "reasonable doubt" regarding competency is a question of fact "within the discretion of the trial court" to answer. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. Appellate courts are required to defer to the district court on questions of fact.

> An appellate court is not particularly well-suited to make factual determinations in the first instance. *Zugel* [*by Zugel v. Miller*], 99 Nev. [100,] 101, 659 P.2d [296,] 297 [(1983)]; 16

> Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3937.1 (2d ed. 1996) ("Appellate procedure is not geared to factfinding."); *see also Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact); *Alburquerque v. Bara*, 628 F.2d 767, 775 (2d Cir. 1980) (remanding habeas petition to district court for additional fact findings because Court of Appeals was not well-suited to make factual findings). An appellate court's ability to make factual determinations is hampered by the rules of appellate procedure, the limited ability to take oral testimony, and its panel or en banc nature.

Ryan's Express v. Amador Stage Lines, 128 Nev. 289, 299, 279 P.3d 166, 172-73 (2012).

So, properly framed, the issue before us isn't whether we think there existed "reasonable doubt" regarding Goad's competency; we have no ability to engage in fact-finding when we can't see Goad and all we have before us is a typed transcript of events that happened over 21 months ago. Rather, the issue is whether there exists "substantial evidence" in the record to support the district court's conclusion that no such doubt existed based upon its firsthand personal interaction with Goad at the precise moment in time when his competency was supposedly under suspicion.

IV.

This court reviews the district court's decision to hold or not to hold a more in-depth competency proceeding for an abuse of discretion. *Olivares v. State*, 124 Nev. 1142, 1149, 195 P.3d 864, 869 (2008). Here, Goad is mentally ill, but that tells us little about whether he was incompetent on any particular day of his trial. Even at the ripe old age of 74, Goad admits that there exists precisely zero evidence that he has ever been previously suspected, diagnosed, or adjudicated as legally incompetent at any time in his life by any physician or any court, despite suffering from a mental illness continuously. *See Eubanks v. Baker*, Docket No. 68628, at *1 (Order of Affirmance, May 9, 2016) (a defendant's "history of drug abuse, possible PTSD, and mental health history, without more, did not indicate that he was unable to consult with his attorney or understand the proceedings against him"). Did the district court "abuse its discretion" in finding that a formal competency hearing was unnecessary? Here's what the trial record says.

During six months of pretrial litigation between Goad's arrest and trial (from March to August 2019), neither he nor his counsel ever placed his competency into question. I would think that counsel in close quarters with Goad while preparing for a murder trial would

know plenty that we do not, and would raise the matter on even the slightest sniff of a problem. Nothing. The district court was asked to resolve a series of pretrial motions, none of which raised any question about Goad's competency (motion to admit/exclude evidence of Goad's eviction/financial issues, motion to exclude prior bad acts, motion to exclude prejudicial photos and videos).

If anything, the pretrial record cuts the opposite way. The only pretrial motion relating in any way to Goad's mental health was a motion to admit/exclude a recording/transcript of police interrogation in which Goad describes his mental health history in some detail but never claimed any prior diagnosis of incompetency. During it, Goad claimed (all unverified) that he spent time in various mental health facilities (at UC Davis, in Glendale, and in Galletti) and suffers from what he described as "depression" and at one time took the medications Amitriptyline to help him sleep and Ativan for "shakes." However, he asserted that the last time he took those medications was seven years before the interrogation. Therefore, by his own admission, he does not need medication to be legally incompetent. Perhaps the medication reduces the severity of the symptoms of his mental illness. But when he admits that he has not received medication for seven years, and then counsel adds that he has never been diagnosed or adjudicated incompetent, the last step of the syllogism becomes obvious: the district court correctly concluded that there is simply no evidence that Goad needs medication to be legally competent to stand trial for the crime of murder.

So Goad's competency was never questioned before trial and has apparently not been questioned in the 21 months that have elapsed since trial until now. What about the trial itself? In evaluating whether a full competency hearing is required, trial courts must consider their own observations of the defendant's behavior. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113; *Drope*, 420 U.S. at 180. Goad concedes that he was fully competent on days one and two of the trial, and then fully competent on every day of the trial that took place after day four. Even on day four, he concedes (as will soon become apparent) that he was competent by the early afternoon.

The only issue is what happened during part of the morning of day four, as he was fully competent after lunch. Here's what the trial transcript says about Goad's behavior during the events of that day.

On day three of Goad's trial, the district court stated shortly after the lunch break:

> I've observed a difference in Mr. Goad's physical appearance today. And during the lunch hour, just in the last five minutes, Deputy Cross came to me and said that there had been some inquires about Mr. Goad's health. I asked him if Mr. Goad's attorneys were aware of it, and he said that they had been here for the entire break.

A deputy court marshal then stated on the record that he was "advised of the change of behavior" and was in contact with medical staff, which revealed that Goad did not receive a medicine that day. The deputy further noted the medication was the "type that cannot wait until the end of our normal business day." The deputy recommended stopping proceedings for the day and taking care of Goad.

The district court then asked defense counsel for his impressions, to which counsel responded that Goad was "worse than he was this morning" and was degrading physically. Notably, counsel did not question Goad's ability to communicate with him or assist in defending the trial, despite the judge's express invitation. The district court then said, "I think it's appropriate that we recess for the day. And if that means that it pushes the trial back, that's what it means. Mr. Goad is entitled to be present and well as he both observes trial and participates with his attorneys privately." The district court then sent the jury home, after which Goad received his medication.

Trial reconvened the next day at 9 a.m. Defense counsel started by notifying the district court that Goad was unresponsive and failed to acknowledge his attorneys. The record indicates, however, that Goad was responsive with the marshals and courtroom deputies. Defense counsel next said, "So what I would be interested in this morning is just the Court to ask Mr. Goad if he understands why we're here and what we're doing. And if he could acknowledge that to the Court I would feel comfortable going forward." Notably, counsel did not express the belief that Goad was incompetent, and did not request the full competency hearing that the majority now says was necessary. The district court responded:

> I'm not going to conduct some form of informal mini mental examination from the bench. This trial is going to proceed with or without Mr. Goad's presence or participation. I want Mr. Goad to be present. But if Mr. Goad, for example, chose not to accept the transport I'd quickly do some legal research but I—I have a sense that without any competent jury this trial proceeds.
>
> So I'm going to ask Mr. Goad about being here, I'm going to acknowledge him, express my gratitude that he's here, my hope that he remains, but I'm not going to make findings about his cog nature.

The following is the interaction the district court had with Goad.

> [Court:] Mr. Goad, good morning. And you've just raised your hand to say hello to me in gesture. Are you having a hard time speaking?
>
> [Goad:] (Nods head.)

> [Court:] Yes, you're nodding your head yes. The record will reflect that I'm looking directly at Mr. Goad and he is looking at me as I speak to him. Our eyes are communicating with each other, and he's nodding his head yes. But you're not able to speak this morning; is that correct?
>
> [Goad:] (No audible response.)
>
> [Court:] So Mr. Goad has attempted to make noise with his throat and he's held his hand up to his throat indicating there may be some problem with his ability to use words this morning.
>
> Mr. Goad, do you know who I am? Not my name, but do you know what I do? Yeah, you're nodding your head yes. And these are your two attorneys. And you're nodding your head and saying yes and waving to them.
>
> Are you able to write at all? Yes? So what I'll do is at defense counsel's request, if at any time you want to communicate with your attorneys, just let Ms. Mayhew know, she'll stand and let me know, and . . . we'll let you write a note to them. I'm not sure what's going on.
>
> Has Mr. Goad been medically cleared from the infirmary? The deputies are answering yes, he has, and he is nodding his head yes.
>
> Mr. Goad, is it—will you just raise your hand if you want this trial to proceed? Yes. He's raising his hand immediately.
>
> All right. That's enough of a canvass for me.

The district court then called the jury in and the trial proceeded. By early that afternoon, Goad's counsel entered the following observation into the record:

> What I want to let the court know is it's as if the medication that he was given yesterday has a time frame in which it actually has its effect. Because I have noticed a marked difference now with respect to Mr. Goad and his ability to communicate with me. . . . It's as if the medication took a while to have its effect, this morning it hadn't fully activated.

Thus, any issue that Goad had during the morning of day four was resolved by that afternoon.

V.

Notably, at no point during this lengthy exchange did defense counsel argue that Goad was incompetent or suggest that there existed some additional evidence bearing on competency that the court should consider. Counsel's concern was not that Goad was

incapable of understanding enough to proceed, but only that he was being difficult and obstinate toward his attorneys (as he was simultaneously responsive to the courtroom marshals and the judge's canvass). Obstinacy is an entirely different problem than competency. Being difficult, even to the extent of being overtly rude and dismissive to counsel, is not the same thing as being incapable of understanding the nature of the proceedings.

Even to the extent that this exchange suggests something about competency rather than mere stubbornness, on appeal the question isn't whether we agree with the district court's observations. We can't see them, so we have no basis to either agree or disagree. The only question is whether the record indicates that the district court did what it was supposed to do, which is personally evaluate Goad's demeanor, and it did. The only other question is whether the record contains "substantial evidence" supporting the district court's conclusion that it did not need to probe further into Goad's competency, and without being able to see Goad ourselves, we must say that it does.

What this exchange tells us is this. Of the three things courts must weigh to determine whether a full competency hearing is required—the defendant's history of irrational behavior, his demeanor at trial, and prior medical opinion of his competence to stand trial—two of the three are nonexistent by Goad's own admission (no evidence of any prior history of behavior suggesting incompetency, no prior medical diagnosis of incompetency), and the third (Goad's demeanor at trial) is something the district court saw, made an extensive record about, and we cannot see ourselves on appeal. *See Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Drope*, 420 U.S. at 180). Then on top of that, Goad doesn't even quite assert that he was incompetent at the moment in question on day four, nor did his attorneys suggest that there existed some other evidence the court should consider when given an opportunity to do so. When all three of the factors, plus Goad's own argument, come out in favor of the district court, our inquiry ought to end there.

VI.

The majority nonetheless remands for the district court to review such things "in the aggregate" as medical records pre-dating the trial, Goad's medication and dosage during the trial, and even the gruesome facts of the crime itself six months earlier, in the apparent belief that, if the district court looks, maybe something about competency might come up. But that's not how the legal test works. The district court isn't supposed to conduct a full-blown hearing and investigation (and we're not supposed to reverse if it doesn't) until there first exists some threshold reason to believe that there's something worth finding. When Goad himself doesn't say there's anything at all to uncover—when he fails to mention any evidence

of incompetence to the district court and then admits on appeal that there is no evidence that he has ever been adjudicated incompetent—then the district court was well within its bounds to conclude that the threshold was not met and a hearing would be meaningless. *See Maxwell*, 606 F.3d at 576.

Perhaps one could take the position that there's no harm in trying to get more information, especially when the stakes involve a brutal murder and are at their highest. But I'm of a mind that courts must deal with the real rather than the conjectural, limiting ourselves to evidence for which a strong case has been made to actually exist, not merely hypothetical evidence that might exist in theory but not anywhere in the record we have. Courts aren't supposed to tolerate "fishing expeditions" in civil discovery, and we're certainly not supposed to order district courts to engage in them ourselves. *See Groom v. Standard Ins. Co.*, 492 F. Supp. 2d 1202, 1205 (C.D. Cal. 2007) ("[D]iscovery must be narrowly tailored and cannot be a fishing expedition."). Similarly, we're not supposed to vacate murder convictions on appeal just because the district court failed to conduct its own sua sponte search for something that Goad never claimed to exist. The idea of a retrospective hearing assumes a reason to believe that there actually was some concrete evidence that the district court failed to consider. When there is no reason to believe that such evidence exists, a retrospective hearing will accomplish nothing except waste time and resources in the pursuit of nothing useful to add to the existing record.

Could additional evidence nonetheless still be found if the district court looks further on remand, even though Goad himself doesn't assert that any such evidence exists? I suppose it's conceivable. As noted astronomer Carl Sagan used to say, absence of evidence is not necessarily evidence of absence. Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark* 213 (Ballantine, 1st ed. 1997). Lots of things that seem implausible today might turn out to be true tomorrow. *See* 2019 Chapman University Survey of American Fears (CSAF) (reporting that 57% of Americans believe in the existence of the lost continent of Atlantis and more than 1 in 5 believe that Bigfoot exists), published in Christopher D. Bader et al., *Fear Itself: The Causes and Consequences of Fear in America* (NYU Press 2019), available at https://www.chapman.edu/wilkinson/research-centers/babbie-center/survey-american-fears.aspx. Likewise, it's theoretically possible that some additional evidence of incompetence might exist somewhere in the universe even though Goad's own counsel never mentioned any, either to the district court or on appeal. Even completely random discovery "fishing expeditions" occasionally do uncover meaningful evidence.

But when the overall standard of appellate review is "abuse of discretion" and the district court decides as a factual matter that no additional hearing is warranted, the standard we apply—the

standard that Nevada appellate courts have applied in literally thousands of cases—is whether the court's decision is supported by "substantial evidence." *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). In the thousands of cases we've handled over the past six years, we have never assessed "substantial evidence" by speculating about hypothetical evidence that appeared nowhere in the record and was never presented to the trial court. "Substantial evidence" is assessed by looking at the evidence actually in the record before the court and asking whether it was enough to justify the finding. Once we enter into the realm of speculation, there can always be hypothetical countervailing evidence that might go the other way, whether it's a criminal case, workers' compensation case, or family law case. But we don't engage in that kind of speculation; at least, we never have before. If we did, no verdict could ever stand up on appeal because someone could always imagine the possibility of something more to find if someone else just looks a little harder.

Legality aside, consider as a practical matter how unlikely it really is that there could be something to find anyway. Goad admits on appeal that there is no evidence of past incompetence. Beyond that admission, can someone be legally competent every day for the entirety of a 74-year life, but yet incompetent for only a couple of hours one morning before becoming fully competent again by the early afternoon? Sure, it's possible. Just not in any way that matters to this case. One could be drunk or high on drugs that quickly wear off. Maybe one could suffer the effects of a concussion that impairs cognitive ability for a few hours. People suffering from Alzheimer's or dementia can sometimes float in and out of competency. But Goad wasn't suffering from any of this. Looking to mental health records from some other time well before trial might make sense if a defendant had a long history of floating in and out of legal competency over time. If someone was legally incompetent in the past, that suggests at least the possibility of being legally incompetent again later. But here, there's no evidence whatsoever that Goad was incompetent at any other time of his life, including even later during the afternoon of the same day, so evidence of Goad's mere mental illness months, weeks, or days before trial tells us nothing about whether he was legally competent for part of the morning of the fourth day of trial. As the majority notes, even assuming as true that there was incompetence for part of the morning of day four, that was only because the triggering event was Goad not being given medication that morning. So what, exactly, is the relevance of his mental health months or weeks earlier before trial when things were very different and Goad himself states that he was medication-free for seven years before trial yet was never suspected of being legally incompetent, much less adjudicated so?

The bottom line is that the question at hand—whether someone who's been competent their entire life suddenly became incompetent

for only a couple of hours one morning or not—is a fundamentally factual one which, in this case, the district court answered in the record in detail and at length based upon its personal interactions with Goad and its observations of his behavior. The district court is expressly required to consider its own observations about the defendant's demeanor, which we cannot see and can never second-guess. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Drope*, 420 U.S. at 180). The district court personally canvassed the defendant, made remarks and observations about the defendant's nonverbal conduct and in-court behavior, and then immediately found that there was no need to go further. It clearly gave a lot of weight to its personal observations. We must give deference to those observations which we cannot see in a typewritten transcript and therefore ought not second-guess. And deference on a purely factual matter means that, whenever the district court's factual findings are supported by any substantial evidence at all, we must affirm.

VII.

The district court was confronted with a factual inquiry that it answered based upon personal observations that we cannot see. Instead of speculating that there may be more evidence out there somewhere in the ether that the district court should investigate now, more than 21 months later, I would affirm.

EDWARD N. DETWILER, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE RICHARD SCOTTI, District Judge, Respondents, and BAKER BOYER NATIONAL BANK, Real Party in Interest.

No. 81220

May 6, 2021 486 P.3d 710

Original petition for a writ of prohibition or, in the alternative, writ of mandamus challenging a district court order sanctioning petitioner for contempt of court.

Petition granted in part and denied in part.

Hutchison & Steffen, LLC, and *Brenoch R. Wirthlin, Mark A. Hutchison*, and *Michael K. Wall*, Las Vegas, for Petitioner.

Lewis Roca Rothgerber Christie LLP and *John E. Bragonje, Daniel F. Polsenberg*, and *Abraham G. Smith*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, Parraguirre, Stiglich, and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

In this opinion, we examine the appropriate scope of compensatory fines and attorney fees imposed as sanctions in contempt proceedings. We conclude that monetary sanctions payable to the opponent are civil—not criminal—in nature because they serve a remedial purpose. However, these sanctions must be limited to the opponent's actual loss caused by the contemptuous conduct. To the extent such a sanction exceeds the opponent's actual loss, it is invalid. More specifically, an attorney fee award must not include fees that were incurred before the contemptuous conduct began, and an award of other damages must be based on evidence of an actual loss.

Before reaching this central issue, we address two threshold issues. First, we consider the effect of an error in naming a party—here, the erroneous description of a national bank as "a Washington corporation." We hold that where the correct parties are in fact involved and no party is actually misled or prejudiced by the naming error, such an error is purely clerical and the district court may correct it at any time. Second, we address the proper time for an accused

contemnor to demand a change of judge under NRS 22.030(3). We hold that such a demand must be made before the contempt trial. Although we need not decide whether any more stringent time limit applies, we encourage litigants to act without undue delay in exercising peremptory challenges to judges.

FACTS AND PROCEDURAL HISTORY

Real party in interest Baker Boyer National Bank loaned over $1 million to James Foust, who claimed an extensive classic car collection valued at several million dollars among his assets on his loan application.[1] Foust defaulted on the loan, and in July 2017, the Bank obtained a money judgment against him in Washington State for over $800,000.

Foust did not pay the judgment, and so the Bank began to seek out assets from which it could satisfy the judgment. As the classic car collection was—at least ostensibly—located in Nevada, the Bank applied to this state's district court for enforcement of the judgment. The Bank then moved the district court to require Foust to turn over the cars, or some subset of the cars, to satisfy the judgment under NRS 21.320. Foust opposed the motion. He claimed that he had liquidated his entire collection of cars and had no other assets. The district court was skeptical and ordered Foust to produce concrete evidence that he no longer owned the cars. At an evidentiary hearing, Foust represented that he had sold some of the cars, including a 1998 Prevost Marathon Motorcoach,[2] to Harry Hildibrand, LLC (HH), a Montana limited liability company. He testified that he owned less than one percent of HH. Nevertheless, the court authorized the Bank to seize the Motorcoach from an RV park in Las Vegas. The Motorcoach was the only vehicle that the Bank successfully located.

The court then granted the Bank's motion in full, permitting the Bank to maintain possession of the Motorcoach pursuant to its prior order and ordering Foust to produce all other cars identified in the Bank's motion. As Foust continued to insist that HH owned the Motorcoach, the court ordered Foust to produce evidence that the sale was legitimate. Foust produced only an uncertified photocopy of the Motorcoach's title indicating that HH was the owner. After another hearing, the court found that "no sale actually occurred and that Mr. Foust continues to own" the Motorcoach. It relied on evidence that Foust was not a minority owner of HH, but was in fact its *sole* member. It found Foust's testimony that he had "divested his interest on some uncertain date he could not recall" to be not credible in the face of contradictory documentary evidence. Accordingly, the court found the purported sale was fraudulent and void.

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[1]Foust, the defendant below, is not a party to this writ proceeding.

[2]The Motorcoach is not obviously either "classic" or a "car," but the parties have always treated it as part of Foust's classic car collection.

Soon afterwards, in March 2018, HH appeared in the lawsuit for the first time. It claimed a right in the Motorcoach and demanded a hearing to determine title. As NRS 31.070(1) required, the third-party claim included a sworn declaration by HH's manager and agent, petitioner Edward N. Detwiler. Detwiler swore that HH purchased the Motorcoach in early 2017, before the Washington judgment was entered, for approximately $135,000. But the district court denied the third-party claim. The case was then stayed for several months when HH filed for bankruptcy protection in California.

The Bank obtains an order requiring Detwiler to turn over certain cars

The California bankruptcy case was eventually dismissed, and the Nevada district court then held a hearing to determine whether HH and Foust were in privity such that HH could be bound by the court's order finding the sale fraudulent. In a January 9, 2019, order (the January turnover order), the court found that, though ostensibly separate, Foust and HH acted under common legal representation coordinated across judicial fora. The court further found that Foust "retained possession or control of the property transferred after the [purported] transfer," indicating the sale was fraudulent. Ultimately, it found that the relationship between Foust and HH "appears to the Court to be a scam for frustrating creditors' claims." It thus ruled in favor of the Bank on all claims. Crucially, it ordered Foust, HH, and any of their agents, employees, or affiliates—specifically including Detwiler—to turn over the cars on penalty of contempt.

Detwiler is held in contempt

The Bank unsuccessfully sought Foust's, Detwiler's, and HH's compliance with the January turnover order. In February 2019, the Bank moved to have Foust, Detwiler, and HH held in civil contempt of court. The court issued an order to show cause and scheduled a hearing. The order warned Foust, Detwiler, and HH that they faced "civil contempt" and noted that their failure to appear could result in a warrant for their arrest.

The hearing lasted four days in April and May 2019. Both Detwiler and Foust testified.[3] Not long after, the court held Foust in contempt.

[3]During the hearing, the court excluded Detwiler from the courtroom during some of Foust's testimony. Detwiler argues that this violated his rights, but we conclude that he forfeited this argument. He did not object to his exclusion from the courtroom or ask to cross-examine Foust, and "in the context of extraordinary writ relief, consideration of legal arguments not properly presented to and resolved by the district court will almost never be appropriate." *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017); *Burgers v. Maiben*, 652 P.2d 1320, 1323 (Utah 1982) (rejecting claim by an accused contemnor who did not ask to confront a witness at the show-cause hearing or claim a violation of his right to confront witnesses below).

But Foust absconded to California, and the Bank remained unable to secure his compliance. Several months after holding Foust in contempt, the district court announced by minute order that it would hold Detwiler and HH in contempt for refusing to turn over the cars and issued a warrant for Detwiler's arrest. However, the clerk did not enter on the docket the court's written order implementing its minute order, despite the written order being signed on December 16, 2019. Three days after signing the written order, the court sua sponte stayed the enforcement of Detwiler's arrest warrant and eventually set a new hearing for late January 2020.

Days before that hearing, Detwiler informed the court that he had resigned as a manager of HH in September, after the contempt hearing but before the court announced it was holding him in contempt. On the day of the January hearing, Detwiler for the first time sought to peremptorily challenge the judge pursuant to NRS 22.030(3). Detwiler argued that this motion was timely since the written contempt order had not been entered. After the hearing that day, the court entered the written contempt order signed on December 16, without modifications. It set a new hearing for February 12 and stayed Detwiler's arrest until then.

Detwiler then moved for relief from the judgment, for reconsideration, and for a new trial. He argued that his resignation as HH's manager made it impossible for him to comply with the order by turning over the cars. He further argued that as the district court had found that Foust owned the cars, it was contradictory to ask HH to turn them over.

At a hearing on the reconsideration motion, the court indicated that it believed Detwiler had been untruthful and that he had, at some point, had the ability to turn over the cars. The court asked the parties to address whether the resignation "convert[ed] this from a civil contempt to criminal contempt" by making it impossible for Detwiler to comply. The court remarked that "if it's no longer civil . . . due process requires . . . a new evidentiary hearing." The court ultimately found that Detwiler had the ability to comply with the court's order, at least until he resigned as manager of HH, and failed to do so. But the court agreed with Detwiler that his resignation now made it impossible for him to comply. As Detwiler could no longer comply, the district court vacated its order for his arrest. Instead, it ordered him to pay the Bank's attorney fees incurred since HH filed its NRS Chapter 31 third-party claim to the Motorcoach in March 2018. Further, the court imposed an additional fine of $100,000 payable to the Bank, which it explained was a fraction of the cars' value. The fine was not conditional, although the court noted it would be open to reconsideration if the cars were turned over. Detwiler now petitions this court for a writ of mandamus or prohibition, challenging the contempt order.

DISCUSSION

Where no rule or statute provides for an appeal of a contempt order, the order may properly be reviewed by writ petition. *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649-50, 5 P.3d 569, 571 (2000). "Whether a person is guilty of contempt is generally within the particular knowledge of the district court, and the district court's order should not lightly be overturned." *Id.* at 650, 5 P.3d at 571. Accordingly, this court "normally review[s] an order of contempt for abuse of discretion." *Lewis v. Lewis*, 132 Nev. 453, 456, 373 P.3d 878, 880 (2016). "However, we review constitutional issues de novo." *Id.*

A mistake in naming a party that causes no prejudice may be corrected by the district court

Before we reach the merits of the contempt sanctions, we must address two threshold issues. First, Detwiler contends that the Bank "does not exist" and that the judgment in its favor therefore is void. Because a "judgment for a legally nonexistent entity is a nullity," if Detwiler were correct, we would have to order the district court to vacate the judgment and start over. *See Causey v. Carpenters S. Nev. Vacation Tr.*, 95 Nev. 609, 610, 600 P.2d 244, 245 (1979).

Detwiler explains that the original caption of the district court case, including on the judgment against him, identified the Bank as "Baker Boyer National Bank, a Washington corporation." All parties acknowledge this was inaccurate. The Bank is not a Washington corporation, it is a national bank: a "corporate entit[y] chartered not by any State, but by the Comptroller of the Currency of the U.S. Treasury." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 306 (2006) (describing national banks). The record shows that the district court has corrected this error by removing the "Washington corporation" designation. Detwiler nevertheless insists that this error—which he identified for the first time in his opposition to a motion for attorney fees, nearly two years after filing his first sworn declaration in this case—voids the judgment. We disagree.

Other state courts have created a framework distinguishing "misnomers" from "misidentifications." A misidentification "arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity." *In re Greater Hous. Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009) (citations omitted). In contrast, "[a] misnomer occurs when a party misnames itself or another party, but the correct parties are involved." *Id.*; *see also Hampton v. Meyer*, 847 S.E.2d 287, 290 (Va. 2020) (distinguishing between misnomers and misjoinder). "Courts generally allow parties to correct a misnomer so long as it is not misleading." *Hous. Orthopaedic*, 295 S.W.3d at 325. We adopt this

analysis. Where the correct parties are involved and the error is not misleading, a misnomer amounts to nothing but a typographical or clerical error, which may be corrected "whenever one is found in a judgment, order, or other part of the record." NRCP 60(a).

The first issue is whether the correct parties are involved. In this regard, this case is distinguishable from *Causey v. Carpenters Southern Nevada Vacation Trust*, where a group of trusts sued and won summary judgment. We reversed because "[i]t is the trustee, or trustees, rather than the trust itself that is entitled to bring suit." 95 Nev. at 610, 600 P.2d at 245; *see Nelson v. Eighth Judicial Dist. Court*, 137 Nev. 139, 141, 484 P.3d 270, 273 (2021) (explaining that a trust is "a party to a lawsuit *through its trustee*" (emphasis added)). In other words, the caption *should* have referred to the trustees but instead referred to the trusts. But here, the caption has only ever referred to a single entity: the Bank, albeit mistakenly described as a Washington corporation. The "correct parties are involved," *Hous. Orthopaedic*, 295 S.W.3d at 325, and all of them have the capacity to sue and be sued. The error was, therefore, only a misnomer.

The next question is whether the misnomer was misleading. The Texas Supreme Court has recognized that when "the plaintiff misnames itself, the rationale for flexibility in the typical misnomer case—in which a plaintiff misnames the defendant—applies with even greater force," as the likelihood of confusion is low. *Id.* at 326. Here, Detwiler has not explained how including "a Washington corporation" in the caption misled or prejudiced him. To the contrary, he participated without apparent confusion for nearly two years before drawing the error to the court's attention. We conclude the error was not misleading. The district court did not err by amending the caption and is not required to vacate its judgment on this ground.

Detwiler waived a peremptory challenge to the judge

Detwiler next argues that the trial judge erred by failing to recuse himself after Detwiler objected. We disagree. Detwiler could have sought the trial judge's recusal at an earlier date, but he waived his right to do so by waiting until months after the trial.

Under NRS 22.030(3), an accused contemnor may file a "peremptory challenge" objecting to the judge who entered the order allegedly violated from also presiding over the contempt hearing. The objection should be granted automatically if it is "timely and properly made." *Awad v. Wright*, 106 Nev. 407, 410, 794 P.2d 713, 715 (1990), *abrogated on other grounds by Pengilly*, 116 Nev. at 649, 5 P.3d at 571. This statute recognizes that there is at least some potential for the appearance of bias when a judge tries an alleged contemnor for contempt of *that very judge*. *See id.* (citing *McCormick v. Sixth Judicial Dist. Court*, 67 Nev. 318, 331-32, 218 P.2d 939, 945 (1950)).

However, timeliness is essential, as "[g]rounds for disqualifying a judge can be waived by failure to timely assert such grounds." *City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 651, 940 P.2d 134, 139 (1997). When a litigant has reason to call for a judge's recusal, the litigant "'may not lie in wait' and raise those allegations in a motion 'only after learning the court's ruling on the merits.'" *Snyder v. Viani*, 112 Nev. 568, 573, 916 P.2d 170, 173 (1996) (quoting *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 260, 774 P.2d 1003, 1019 (1989)). That rule has special force when the challenge is peremptory, as the availability of the challenge is automatically known to the alleged contemnor as soon as he or she receives the order to show cause.

NRS 22.030(3) contains no express deadline but simply says that "if a contempt is not committed in the immediate view and presence of the court, the judge of the court in whose contempt the person is alleged to be shall not preside at the trial of the contempt over the objection of the person." Here, by the time Detwiler objected in January 2020, Judge Richard Scotti had *already presided* over the contempt hearing. Before the hearing, Detwiler had a right to object to Judge Scotti presiding, but he did not do so. Nothing indicates that such an objection may be retroactively made after the trial, and we hold that it may not. This aligns with the general peremptory challenge rule in civil actions providing that, while a litigant may peremptorily challenge a judge up to 10 days after notification of the trial date, SCR 48.1(3)(a),[4] such a challenge is unavailable after the judge "has made any ruling on a contested matter or commenced hearing any contested matter in the action," SCR 48.1(5). This rule ensures that peremptory challenges are not used as a reaction to an unfavorable ruling on the merits.

The district court did not abuse its discretion by holding Detwiler in contempt

Detwiler next argues that the contempt order, as a whole, was invalid. He contends that it was based on a self-contradictory order and on an unconstitutional alter-ego finding. We disagree on both points.

First, Detwiler argues that the January turnover order fails to spell out "the details of compliance in clear, specific and unambiguous terms," relying on *Southwest Gas Corp. v. Flintkote Co.*, 99 Nev. 127, 131, 659 P.2d 861, 864 (1983) (internal quotation omitted), to assert that unclear or ambiguous orders cannot be enforced. He contends

[4]Because Detwiler's objection was not filed until long after the trial was held and was therefore untimely under any possible standard, we have no occasion to decide whether NRS 22.030(3) incorporates any time limit stricter than SCR 48.1(5).

that the district court's orders, taken together, are contradictory and confusing because they found that Foust owned the cars but also ordered Detwiler to turn over the cars. We reject this argument. Unlike the order in *Southwest Gas*, which "d[id] not specifically direct [appellants] to do anything," *id.*, the order here clearly and unambiguously directed Foust, HH, and Detwiler to turn over the cars. There is no logical contradiction in the district court's finding that while Foust owned the cars—so they were properly subject to the Bank's levy under NRS 21.320—HH and Detwiler shared some level of control over the cars. The district court found, as a factual matter, that Detwiler had the ability to comply with the order and did not. Our review of the record reveals no abuse of discretion in that factual finding. *Lewis*, 132 Nev. at 456, 373 P.3d at 880.

Detwiler also argues that the district court improperly found an alter-ego relationship between Foust and HH without an "independent action against the alleged alter ego with the requisite notice, service of process, and other attributes of due process." *Callie v. Bowling*, 123 Nev. 181, 185, 160 P.3d 878, 881 (2007). We reject this attempt to stretch *Callie* far beyond its actual scope. Even if the district court did make an alter-ego finding—which is far from clear—due process would not be violated because HH entered this lawsuit of its own volition. Unlike the appellant in *Callie*, who was simply added to a judgment against his company without notice, HH had "notice, discovery, and an opportunity to be heard before potentially being found liable." *Id.* at 185, 160 P.3d at 881; *see DeMaranville v. Emp'rs Ins. Co. of Nev.*, 135 Nev. 259, 268, 448 P.3d 526, 534 (2019) (distinguishing *Callie* where the complaining party received notice and "participated in its own capacity" in the litigation).

Compensatory sanctions for contempt are civil, not criminal

We now turn to Detwiler's argument that the district court issued criminal sanctions against him without adhering to constitutionally required procedural safeguards such as the right to counsel, the right to confrontation, the right to a jury trial, and the right to proof of all elements of the crime beyond a reasonable doubt. We conclude that monetary sanctions should be treated as civil if they are payable to the opponent. To be sure, as discussed in the next section, a fine payable to the opponent may be invalid if it does not compensate the opponent for an actual loss. But it should still be analyzed as a civil penalty, not a criminal one.

We must acknowledge at the outset that "[c]ontempt proceedings, while usually called civil or criminal, are, strictly speaking, neither. They may best be characterized as *sui generis*, and may partake of the characteristics of both." *Warner v. Second Judicial Dist. Court*, 111 Nev. 1379, 1382, 906 P.2d 707, 709 (1995) (quoting *Marcisz v.*

Marcisz, 357 N.E.2d 477, 479 (Ill. 1976)). Nevertheless, it remains important to classify contempt sanctions as civil or criminal, because "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994) (internal quotation marks omitted); *see City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 893-94, 784 P.2d 974, 979 (1989).

"[W]hether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved. Thus, a contempt sanction is considered civil if it 'is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.'" *Bagwell*, 512 U.S. at 827-28 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). The United States Supreme Court has further explained as follows:

> The character of the relief imposed is thus ascertainable by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." [*Gompers*, 221 U.S. at 442.] *If the relief provided is a fine, it is remedial when it is paid to the complainant*, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 631-32 (1988) (emphasis added). *Hicks* sets forth a "straightforward rule" that is clear, simple, and easy to apply: contempt fines payable to the opponent are treated as civil.

Of course, the fine must in fact serve a remedial purpose to be a *valid* civil sanction. To be remedial, an unconditional fine must be compensatory. *See Bagwell*, 512 U.S. at 829 (explaining that "[w]here a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge"). To be sure, a court might order a contemnor to pay the complainant an amount that is, in fact, punitive and not compensatory. But that would not make the sanction a *criminal* sanction; rather, it would make it an *invalid* sanction. *See H.K. Dev., LLC v. Greer*, 32 So. 3d 178, 184-85 (Fla. Dist. Ct. App. 2010) (holding that sanctions payable to a private party cannot be construed as criminal and thus are "lawful only insofar as they compensate the private party litigant for damages the contumacious conduct caused"). Conversely, "when the act is punished as a criminal contempt, the court has no power to impose a fine the purpose of which

is to punish but which in fact inures to the benefit of a private litigant." *Horn v. Dist. Court*, 647 P.2d 1368, 1378 (Wyo. 1982). Rather, that fine must "of necessity inure to the benefit of the court and the state." *Id.*; *accord Englander Co. v. Tishler*, 139 N.Y.S.2d 707, 709 (App. Div. 1955); *In re Whitmore*, 35 P. 524, 529 (Utah 1894); 17 C.J.S. *Contempt* § 183 (2020). Accordingly, we follow the United States Supreme Court in *Hicks* and hold that a contempt sanction payable to the opponent is necessarily civil.

Detwiler contends that this conclusion is at odds with our holding in *Lewis v. Lewis*, where we held that "in order for a contempt order imposing a determinate sentence to be civil in nature, it must contain a purge clause . . . [which] gives the defendant the opportunity to purge himself of the contempt sentence by complying with the terms of the contempt order." *Lewis*, 132 Nev. at 457, 373 P.3d at 881 (citing *Hicks*, 485 U.S. at 640). We disagree. *Lewis* applied the same framework as we have here: a sanction is criminal if punitive, and civil if remedial. *Id.* at 457, 373 P.3d at 880 (citing *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804-05, 102 P.3d 41, 45-46 (2004)). There, we concluded that an order of *incarceration* must contain a purge clause to be civil. Incarceration remedies the contempt by coercing compliance. A purge clause incentivizes compliance, and thereby ensures that incarceration serves its remedial purpose. Conversely, if the defendant has "no way to purge his sentence to avoid or get out of jail," *see id.* at 458, 373 P.3d at 881, then the incarceration fails to incentivize any action and can have no purpose but punishment.[5]

Monetary sanctions, however, do not fall neatly into *Lewis*'s dichotomy. Unlike incarceration, they can serve a compensatory purpose that is neither punitive nor coercive. Like tort damages, compensatory contempt sanctions serve to make the innocent party whole. *See Lyon v. Bloomfield*, 247 N.E.2d 555, 559 (Mass. 1969). Whereas a coercive sanction must be conditional, compensatory sanctions are unconditional, as the damage is already done. Even if Detwiler belatedly complied with the order and turned over the cars, the Bank would still have to pay its attorney fees.

Compensatory sanctions are clearly "remedial" and therefore civil. *Bagwell*, 512 U.S. at 829. Thus, we conclude that *Lewis*, like *Bagwell*, did not affect "the longstanding authority of judges . . . to enter broad compensatory awards for all contempts through civil proceedings." *Id.* at 838. *Lewis*'s holding that "a contempt order that does not contain a purge clause is criminal in nature," 132 Nev. at 455, 373 P.3d at 879, applies to orders of incarceration and to fines

[5]Consequently, the district court was right to be concerned about incarcerating Detwiler when he no longer had the ability to comply. *See King v. Dep't of Social & Health Servs.*, 756 P.2d 1303, 1310 (Wash. 1988) (citing *Maggio v. Zeitz*, 333 U.S. 56, 72 (1948)).

payable to the government. *See Hicks*, 485 U.S. at 632 (explaining that fines payable to the government are punitive unless they contain a purge clause). If such a sanction is unconditional, it must be attended by criminal due process.[6] But the *Lewis* rule does *not* apply to fines that are payable to the contemnor's opponent, including attorney fees under NRS 22.100(3). Instead, we hold that contempt sanctions payable to the opponent cannot be construed as criminal. *H.K. Dev.*, 32 So. 3d at 184-85. They are civil, and the only question is whether they were validly imposed as civil fines.

Civil sanctions are limited to the opponent's actual loss resulting from the contempt

Of course, our conclusion that contempt sanctions payable to the complainant are civil does not mean that all such sanctions are automatically permissible. The contemnor may still challenge the amount of the fine. In particular, if an unconditional fine compensates for a party's loss, then it "is limited to that party's *actual* loss." *State, Dep't of Indus. Rel. v. Albanese*, 112 Nev. 851, 856, 919 P.2d 1067, 1071 (1996) (emphasis added) (quoting *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1366 (9th Cir. 1987)); *see Hanshaw v. Hanshaw*, 55 So. 3d 143, 147 (Miss. 2011) ("[B]ecause civil contempt vindicates a private party's rights, the imposed sanction should not exceed the injured party's damages and expenses."). Such a fine compensates for a loss "incurred *because of* the contempt." *In re Water Rights of the Humboldt River*, 118 Nev. 901, 909, 59 P.3d 1226, 1231 (2002) (emphasis added); *see also* NRS 22.100(3) (authorizing the district court to require a contemnor to pay "reasonable expenses, including . . . [those] incurred by the party as a result of the contempt").

Here, the sanctions were divisible into two parts: the attorney fee award and the additional $100,000 fine. Detwiler argues that the attorney fee award must be reduced on two grounds: first, that the fees ought to have been apportioned between him and Foust, who was also in contempt of court; and second, that the award is overbroad because it includes fees incurred before he was ordered to do

[6]This opinion pertains to indirect, out-of-court contempt—specifically, Detwiler's disobedience of the January turnover order. Nothing in this opinion should be read to affect the court's authority to impose summary sanctions for direct contempt under NRS 22.030(1). "Direct contempts that occur in the court's presence may be immediately adjudged and sanctioned summarily, and, except for serious criminal contempts in which a jury trial is required, the traditional distinction between civil and criminal contempt proceedings does not pertain." *Bagwell*, 512 U.S. at 827 n.2 (citations omitted); *see also Houston v. Eighth Judicial Dist. Court*, 122 Nev. 544, 553, 135 P.3d 1269, 1274 (2006) ("When faced with disruptive, contemptuous conduct during court proceedings, a judge must have the power to restore order immediately by issuing a verbal contempt order.").

anything.[7] He further argues that the $100,000 fine did not compensate for any actual loss. We address these contentions below.

All contemnors may be jointly liable for fees resulting from their contemptuous conduct

Detwiler argues that the district court erred by failing to apportion attorney fees between himself and Foust. He relies on *Mayfield v. Koroghli*, 124 Nev. 343, 184 P.3d 362 (2008). There, we held that when awarding costs, the district court must "attempt to apportion the costs" among multiple defendants. *Id.* at 353, 184 P.3d at 369. If the district court determines that apportionment is impracticable, it "must make specific findings" as to why. *Id.* at 353-54, 184 P.3d at 369. Detwiler argues that the district court made no attempt to apportion the attorney fees between himself and Foust and consequently made no findings, violating *Mayfield*.

We hold that *Mayfield* is inapplicable to a contempt order. That case dealt with an ordinary award of costs to a prevailing party, which is often available as of course with no showing of wrongful litigation conduct. NRS 18.020. In contrast, a contempt sanction is more like a remedy for an intentional tort. *See Lyon*, 247 N.E.2d at 559; 17 C.J.S. *Contempt* § 180 (2020). Intentional tortfeasors are generally jointly and severally liable for the entire injury and cannot take advantage of pure several liability or the right of contribution. *See* NRS 17.255; NRS 41.141(5)(b); *Café Moda, LLC v. Palma*, 128 Nev. 78, 79, 272 P.3d 137, 138 (2012) (holding intentional tortfeasor liable for 100 percent of the damages and negligent tortfeasor liable for 20 percent of the damages). Analogously, where the district court finds that a party has incurred attorney fees as a result of multiple contemnors' concerted conduct, each contemnor may be liable for the full amount.

Attorney fees are available only for the period of actual contempt

We turn now to Detwiler's argument that the district court impermissibly awarded fees that the Bank incurred before the entry of the order he was found to have disobeyed. We have not previously considered the scope of attorney fees recoverable under NRS 22.100(3). But the statute's text provides significant guidance. The fees must not only be "reasonable"—which implicates our usual attorney fee

[7]Detwiler further urges that the fee order is invalid in its entirety because the district court's order awards fees from the time HH "intervened as a party in this action pursuant to NRS Chapter 31." Detwiler appears to argue that "intervened" necessarily means intervention under NRCP 24, and so the order is simply meaningless. We reject this argument, as we have no difficulty understanding that the district court's order requires Detwiler to pay the Bank's fees from the time HH filed its NRS 31.070 application—i.e., March 2, 2018.

reasonableness analysis, *see Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969)—but must also be incurred "as a result of the contempt." NRS 22.100(3). The word "result" indicates that the fees must "proceed or arise as a consequence, effect, or conclusion" of the contempt. *Result*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/result (last visited April 13, 2021). Therefore, NRS 22.100(3) incorporates a causation requirement: fees may be awarded if they were incurred because of the contemptuous conduct. Clearly, disobedience of an order cannot "cause" fees incurred before the disobedience began, and we therefore hold that those fees are not recoverable as compensation under NRS 22.100(3). *See S.E.C. v. Bilzerian*, 641 F. Supp. 2d 16, 20 (D.D.C. 2009) (recognizing that fees incurred before contemptuous conduct began are not recoverable); *see also Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148-49 (9th Cir. 1983) (explaining that a contempt fine may only be imposed for "losses resulting from the period of actual contempt," not after the contempt ends); *cf. Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 646-47, 837 P.2d 1354, 1360 (1992) (holding that NRCP 37(b), the discovery sanctions rule, "limits an award of attorneys' fees to those incurred because of the alleged failure to obey the particular order in question" and reversing an order awarding "*all* attorneys' fees and costs").

In addition to its statutory authority, the district court also relied on EDCR 7.60(b)(5), which permits a district court to "impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of . . . attorney's fees when an attorney or a party without just cause . . . [f]ails or refuses to comply with any order of a judge of the court." Unlike NRS 22.100(3), the text of EDCR 7.60(b) does not contain an express causation requirement. Instead, it requires the sanction to be reasonable under the facts of the case. However, we conclude that in the context of a sanction for contempt based on the violation of a specific order, it is reasonable to impose only those fees that are directly caused by the particular "fail[ure] or refus[al] to comply." This harmonizes the rule with the statute and is consistent with our caselaw holding that fees awarded under the court's inherent authority as a sanction for contempt must have been incurred "because of the contempt." *See Humboldt River*, 118 Nev. at 909, 59 P.3d at 1231.[8]

Here, the district court ordered Detwiler to pay all of the Bank's attorney fees from "the time that HH intervened as a party in this

[8]Because we conclude EDCR 7.60(b) does not authorize attorney fees in excess of those authorized by NRS 22.100(3), we need not reach Detwiler's argument that EDCR 7.60(b) does not authorize sanctioning him because he is not a party. We further note that although the district court also cited NRS 21.340, that statute simply does not apply in a case, like this one, that does not involve a master.

action pursuant to NRS Chapter 31," which was on March 2, 2018. The Bank calculated its fees based on this date. However, the district court found Detwiler and HH in contempt for violating a specific court order—the January turnover order. *See* NRS 22.010(3).[9] We hold that the fees incurred prior to January 9, 2019, were improperly awarded.

The district court abused its discretion by imposing an additional $100,000 sanction

We turn finally to the additional $100,000 fine that the district court imposed. As explained above, because the award was made payable to the Bank and was unconditional, it was a compensatory award that is "limited to that party's actual loss." *Albanese*, 112 Nev. at 856, 919 P.2d at 1071 (internal quotation omitted). The Bank argues that the district court loosely based the $100,000 fine on the value of the cars and, therefore, the fine should be considered partial compensation for the Bank's "loss" due to Detwiler's failure to turn over the cars.

We disagree. The Bank conflates Detwiler's contempt with Foust's failure to pay the underlying judgment. The Bank still has its judgment against Foust and may still enforce it. To be sure, Detwiler's contemptuous conduct *delayed* the Bank's enforcement efforts, forcing the Bank to incur additional fees. But the Bank will be compensated for that through the fee award. If Detwiler were required to pay for the "loss" of the cars and the Bank were *also* permitted to collect the underlying judgment from Foust, the Bank would obtain a $100,000 windfall. Accordingly, there was no evidence that the Bank suffered an actual loss (other than its attorney fees) from Detwiler's contemptuous conduct, and the district court abused its discretion by awarding noncompensatory "compensation."

CONCLUSION

We hold that a contempt sanction requiring the contemnor to pay money to the complainant is civil in nature. Such a sanction, if unconditional, is limited to the complainant's actual damages caused by the contempt. Here, the district court did not abuse its discretion by holding Detwiler in contempt and did not impose a criminal

[9]The Bank argues that the contempt order was partially based on Detwiler's lying under oath, which began when he filed a false declaration on HH's behalf in March 2018. We disagree. The district court's finding that Detwiler lied under oath was the basis for the court's conclusion that Detwiler had the *ability* to comply with the order, despite his sworn statements to the contrary. But it was Detwiler's refusal to comply—not his lying—that the court found contemptuous. *Cf.* NRS 22.010 (not listing lying, without more, as a ground for contempt); *see generally* Annotation, *Perjury or False Swearing as Contempt*, 89 A.L.R.2d 1258 (1963).

sanction. But it did improperly require him to pay attorney fees incurred before his contempt began and order him to pay an additional $100,000 fine untethered to any actual loss. Accordingly, we grant the petition in part. *See Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 680, 476 P.3d 1194, 1196 (2020) (explaining that traditional mandamus is available to correct a manifest abuse or an arbitrary or capricious exercise of discretion). The clerk of this court is directed to issue a writ of mandamus instructing the district court to vacate its judgment and to recalculate the attorney fee award consistent with this opinion. All other requested relief is denied.

Parraguirre and Silver, JJ., concur.

STEVEN LAWRENCE DIXON, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 77535

May 6, 2021 485 P.3d 1254

Appeal from a judgment of conviction, pursuant to a jury verdict, of fourth-degree arson. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Affirmed.

Matthew J. Stermitz, Public Defender, Humboldt County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Michael Macdonald*, District Attorney, and *Maximilian Stovall*, Deputy District Attorney, Humboldt County, for Respondent.

Before the Supreme Court, Cadish, Pickering, and Herndon, JJ.

OPINION

By the Court, Cadish, J.:

The discriminatory use of a peremptory challenge during jury selection constitutes structural error requiring reversal and remand for a new trial. In this case, we consider whether the same is true where the discriminatory peremptory challenge was used to remove a prospective alternate juror and no alternate deliberated with the jury. We conclude there are compelling reasons to apply harmless-error review in those circumstances. Doing so here, we affirm the judgment of conviction.

BACKGROUND

Appellant Steven Dixon went to trial on charges of fourth-degree arson and child abuse, neglect, or endangerment. During jury selection, after both the State and the defense passed the venire for cause, the district court allowed both sides to exercise their peremptory challenges outside the venire's presence.

After the jury was selected, the district court allowed each side to exercise a peremptory challenge as to the three remaining prospective alternate jurors—two of whom were female and one of whom was male. The State exercised its challenge against the male prospective alternate juror, Mr. Lara. The defense objected pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), claiming "Mr. Lara is obviously Hispanic and I certainly didn't hear him say anything that would indicate he would be anything other than fair to both sides."

Without making a finding regarding a prima facie case of discrimination, the first step of a *Batson* analysis, the district court asked the State if it wished to respond. Accepting the court's invitation, the prosecutor explained his reason for using the State's peremptory challenge to remove Mr. Lara. As relevant here, the prosecutor referred to Mr. Lara's gender and the prosecutor's desire to balance the jury's makeup with a female:

> [A]t the moment the jury is heavily weighted in favor of men. I'd like to have at least a female alternate on it. The other two [prospective alternates], Ms. Graham and Ms. Delong, I think would be favorable.
>
> I don't know much about Mr. Lara; however, I do know enough about Ms. Graham and Ms. Delong. And I'd like to increase their chances of being on the jury, obviously, it has nothing to do with race.

That explanation prompted a discussion between defense counsel and the district court during which defense counsel argued that the prosecutor's gender-based explanation also violated *Batson*:

> [DEFENSE]: Apparently it has something to do with gender. It's a slippery slope to the top.
>
> THE COURT: Well, [defense counsel], you've made a *Batson* challenge for race. [The prosecutor] has presented his explanation for that challenge. Do you wish to further respond?
>
> [DEFENSE]: Well, my response is that he's used gender, which is an impermissible basis in itself. So, you know, that's not permissible either.
>
> THE COURT: [Defense counsel], I'm confused by this. I guess I have to ask, are you claiming because of your client's race that a—
>
> [DEFENSE]: No.
>
> THE COURT: —juror should not be stricken based on their race?
>
> [DEFENSE]: Just has to do with the juror himself.
>
> THE COURT: The juror himself.
>
> [DEFENSE]: It doesn't attach to my client's race or gender. Our allegation was that it was based on the fact that he was Hispanic, and could be because there didn't seem to be any disqualifiers in the voir dire. And his response was, well, it's not race based, it's gender based. And gender based is not a—that's also a *Batson* violation. So I think Mr. Lara can stand, or you've got error.
>
> THE COURT: You can take that up, if you want. But I'm going to find there was a mutual [sic] explanation that was clear and

> reasonably specific, and I find that there's no—there's no—the State is not striking Mr. Lara based on his race.
>
> [DEFENSE]: Just his gender.

The district court excused Mr. Lara, and the matter proceeded to trial. The alternate juror did not participate in the jury's deliberations, and Dixon was ultimately convicted of fourth-degree arson. This appeal followed.

DISCUSSION

The Equal Protection Clause prohibits the use of peremptory challenges to discriminate based on race or gender.[1] *Batson*, 476 U.S. at 89 (race); *J.E.B.*, 511 U.S. at 129 (gender). When a party objects to the alleged use of a race- or gender-based peremptory challenge, a district court must resolve the objection using a three-step process. *See Batson*, 476 U.S. at 93-98, 100; *see also Libby v. State (Libby II)*, 115 Nev. 45, 50, 975 P.2d 833, 836 (1999) (applying the *Batson* process to a claim of gender-based discrimination). The process consists of (1) the opponent of the peremptory challenge making a prima facie showing of discrimination; (2) if the prima facie showing is made, the proponent presenting a nondiscriminatory explanation for the peremptory challenge; and (3) the district court determining whether the opponent has proven purposeful discrimination. *Libby II*, 115 Nev. at 50, 975 P.2d at 836. At the final step, "[t]he district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a *Batson* objection and dismissing the challenged juror." *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014) (internal quotation marks omitted). A *Batson* objection should be sustained where "it is more likely than not that the challenge was improperly motivated." *Williams v. State*, 134 Nev. 687, 692, 429 P.3d 301, 307 (2018) (internal quotation marks omitted). We give great deference to a district court's findings regarding a *Batson* objection "and will only reverse if the district court clearly erred." *Id*. at 688, 429 P.3d at 305.

When Dixon objected to the State's use of a peremptory challenge to remove Mr. Lara, the district court asked the State if it wished to respond, without first determining whether Dixon had met his burden at *Batson*'s first step to make a prima facie showing of discrimination. The State responded with its explanation for the peremptory challenge. Therefore, step 1 is moot. *See id*. at 690-91, 429 P.3d at 306-07 ("Where, as here, the State provides a race-neutral

[1]The Equal Protection Clause protects not only "individual defendants from discrimination in the selection of jurors," *Powers v. Ohio*, 499 U.S. 400, 406 (1991), but also individual jurors who "possess the right not to be excluded . . . on account of race" or gender. *Id.* at 409; *J.E.B. v. Alabama*, 511 U.S. 127, 140-41 (1994).

reason for the exclusion of a veniremember before a determination at step one, the step-one analysis becomes moot and we move to step two.").

At step 2—a neutral explanation for the strike—the State said that it wanted a female alternate.[2] The State's explanation was clearly gender-based and thus impermissible. And although defense counsel initially objected to the peremptory challenge as being motivated by race, that did not give the State cover to instead discriminate based on gender. Once the State offered a clearly discriminatory reason for exercising the peremptory challenge, the district court had no choice but to find that the State had not met its burden at step 2. The district court thus should have sustained the *Batson* objection.

"Discriminatory jury selection in violation of *Batson* generally constitutes 'structural' error that mandates reversal." *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008). However, the State argues we should apply harmless-error review because Mr. Lara was a prospective alternate juror and no alternate deliberated on the jury. Dixon contends that structural error should still apply as with other *Batson* violations because the harm from a discriminatorily chosen jury extends beyond the defendant and the excused individual to affect the entire community and the integrity of the courts. *See Conner v. State*, 130 Nev. 457, 462, 327 P.3d 503, 507 (2014) (recognizing discriminatory jury selection affects more than the accused and the excused juror but also "invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication" (internal quotation marks omitted)).

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[2]We decline the State's invitation to adopt the dual-motivation analysis, as the State has not shown that it presented a permissible, neutral explanation for the strike. As the United States Supreme Court has admonished, "the proponent of a strike must give a clear and reasonably specific explanation of [the] legitimate reasons for exercising the challenges." *Purkett v. Elem*, 514 U.S. 765, 768-69 (1995) (internal citations and quotation marks omitted); *see also State v. Giles*, 754 S.E.2d 261, 265 (S.C. 2014) ("The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it."). The State's alternate reason for the strike—that "it did not have sufficient information to know whether Mr. Lara would make a good juror" but that it "thought both remaining female [prospective alternate] jurors would make good jurors"—does not satisfy those requirements. And without the transcript of the voir dire, we cannot further consider the State's explanation because it is unclear what information was disclosed by the three prospective alternates or what questions, if any, the State asked Mr. Lara. *See Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987) (listing evidence that can show the prosecutor's explanation was pretextual, including "a lack of questioning to the challenged juror, or a lack of meaningful questions" and "[d]isparate examination of members of the venire"); *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987) (recognizing the prosecutor's disparate examination of a struck juror or the prosecutor's failure to examine, or a perfunctory examination of, a struck juror to be factors "weigh[ing] heavily against the legitimacy of any race-neutral explanation").

"The Supreme Court has not said whether or not *Batson* requires automatic reversal when a prosecutor wrongly excludes an alternate juror, but no alternate joins deliberations." *Carter v. Kemna*, 255 F.3d 589, 591 (8th Cir. 2001). Other courts are split on the issue. Those courts that have rejected harmless-error review in that circumstance have done so for reasons similar to our reasoning in *Conner*—that the potential harm caused by discriminatory jury selection goes beyond the defendant and the prospective alternate juror. *See, e.g.*, *United States v. Harris*, 192 F.3d 580, 587-88 (6th Cir. 1999) (finding harmless-error review inappropriate because "the harm inherent in a discriminatorily chosen jury inures not only to the defendant, but also to the jurors not selected because of their race, and to the integrity of the judicial system as a whole" and "[b]ecause the process of jury selection—even the selection of alternate jurors—is one that affects the entire conduct of the trial"). However, a number of courts have applied harmless-error review where the challenged veniremember was a prospective alternate, concluding that there is no possible prejudice to the defendant where the alternate does not deliberate. *See, e.g.*, *United States v. Lane*, 866 F.2d 103, 106 n.3 (4th Cir. 1989) (claiming in a footnote that if the case had involved an alternate and no alternate deliberated, then the defendant "would not have been prejudiced by the peremptory challenge to [the excused juror], regardless of the stated reason"); *Nevius v. Sumner*, 852 F.2d 463, 468 (9th Cir. 1988) ("No alternate jurors were called upon to serve in [defendant's] case, however; the challenge was harmless."); *Roberts v. Singletary*, 794 F. Supp. 1106, 1125 (S.D. Fla. 1992) ("Since none of the [alternates] were called upon to replace any of the twelve jurors actually seated, there can be no possible prejudice to the defendant for failing to have [the excused juror] as a second alternate."); *People v. Turner*, 878 P.2d 521, 539 (Cal. 1994) ("[N]o alternate jurors were ever substituted in, and hence it is unnecessary to consider whether any *Wheeler*[/*Batson*] violation occurred in their selection. Moreover, any *Batson* violation could not possibly have prejudiced the defendant."), *abrogated on other grounds by People v. Griffin*, 93 P.3d 344 (Cal. 2004); *State v. Carter*, 889 S.W.2d 106, 109 (Mo. Ct. App. 1994) (stating "*Batson* does not stand for the proposition there is a Constitutional right to be an alternate juror" and concluding the defendant's and the alternate's rights were not violated by the alternate's exclusion); *State v. Ford*, 513 S.E.2d 385, 387 (S.C. Ct. App. 1999) ("Any *Batson* violation in regards to a possible alternate juror is harmless where an alternate was not needed for deliberations.").

We are persuaded that harmless-error review should be applied in the circumstances presented here. The United States Supreme Court has been clear that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any

other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579 (1986). The rare errors that are deemed "structural" and therefore require automatic reversal typically "affect[ ] the framework within which the trial proceeds" and "infect the entire trial process," rendering it "fundamentally unfair," *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal quotation marks omitted), or have effects that "are too hard to measure," *McCoy v. Louisiana*, 138 S. Ct. 1500, 1512 (2018). As relevant here, we have held that "[d]iscriminatory jury selection in violation of *Batson* constitutes structural error, or error that affects the framework of a trial . . . [, and] such error is intrinsically harmful," thus requiring automatic reversal. *Brass v. State*, 128 Nev. 748, 752, 291 P.3d 145, 148 (2012). But where the *Batson* violation involves a prospective alternate and no alternate participates in deliberations, the discrimination did not directly impact the jury's makeup and the defendant was not tried by a jury whose members were selected pursuant to discriminatory criteria. The effects of the error are thus not too hard to measure—we can be assured that a *Batson* violation involving a prospective alternate had no effect on the deliberations as to a defendant's guilt where no alternate participated in deliberations.[3] *See People v. Rodriguez*, 58 Cal. Rptr. 2d 108, 121 (Ct. App. 1996) ("With the benefit of hindsight, we can determine whether the defendant suffered any harm as a result of the [district] court's error only because no alternate juror was ever called upon to decide the defendant's guilt or innocence."). As a result, the fundamentals for harmless-error review are present—"[h]armless-error analysis . . . presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Rose*, 478 U.S. at 578.

There is no constitutional right to alternate jurors, nor is there a right to be an alternate juror. *See Carter*, 889 S.W.2d at 109. And while we are cognizant that discriminatory selection of an alternate juror does not reflect well on the judicial system, we also must consider the "human, social, and economic costs of reversal and retrial." *Williams*, 134 Nev. at 696, 429 P.3d at 310. Thus, it is only under the specific facts of this case—where a discriminatory peremptory challenge was made against a prospective alternate juror and no alternate was called upon to deliberate—that we believe the practicality of harmless-error review is warranted: "The practical objective of tests of harmless error is to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without

[3]Indeed, we have applied harmless-error review where a defendant was denied the opportunity to individually voir dire an alternate juror about exposure to publicity during trial because the alternate was "not involved in the ultimate decision of the case." *Libby v. State*, 109 Nev. 905, 913-14, 859 P.2d 1050, 1055-56 (1993), *vacated on other grounds by Libby v. Nevada*, 516 U.S. 1037 (1996).

becoming mired in harmless error. The grand objective is to conserve the vitality of the rules and procedures designed to assure a fair trial." *Rodriguez*, 58 Cal. Rptr. 2d at 122 (internal quotation marks omitted).

Although the district court clearly erred in rejecting Dixon's *Batson* objection to the State's use of a peremptory challenge to remove a prospective alternate juror based on gender, the error had no effect on the outcome of Dixon's trial and was therefore harmless because no alternate deliberated with the jury. We affirm the judgment of conviction.

PICKERING and HERNDON, JJ., concur.

IN THE MATTER OF THE PETITION OF CRAIG THOMAS TIFFEE.

CRAIG THOMAS TIFFEE, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 79871

May 6, 2021 485 P.3d 1249

Appeal from a district court order denying a petition to seal criminal records. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Reversed and remanded with instructions.

TCM Law Group and *Thomas C. Michaelides*, Las Vegas, for Appellant.

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

Before the Supreme Court, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, CADISH, J.:

In this appeal, we consider whether the district court properly denied a petition to seal criminal records. Appellant Craig Tiffee entered into an agreement with the State, under which he agreed to plead guilty to a felony sexual offense that falls into a category for which criminal records are not subject to sealing under NRS 179.245.[1] As provided in the plea agreement, however, Tiffee withdrew his guilty plea upon successfully completing probation and instead entered a guilty plea to unlawful contact with a child, a gross misdemeanor. He later filed the underlying petition to seal his criminal records, which the district court denied, concluding that both crimes to which appellant pleaded guilty fell under categories of crimes that were precluded from record sealing under NRS 179.245(6).

In so doing, the district court misapplied the statutes. Because appellant withdrew his guilty plea to the felony sexual offense and the gross misdemeanor crime of unlawful contact with a child is not listed in the applicable statute as an offense for which the records must remain open, the statutory presumption in favor of sealing

[1]The 2017 version of NRS 179.245 controlled when appellant filed his petition to seal his criminal record. 2017 Nev. Stat., ch. 378, § 7, at 2413. The Legislature subsequently amended NRS 179.245, 2019 Nev. Stat., ch. 633, § 37, at 4405, which became effective on July 1, 2020. However, nothing of import to this appeal changed with the 2019 amendments.

criminal records under NRS 179.2445(1) applies. Although the State opposed the petition, the district court did not apply the presumption or evaluate whether the State rebutted it. We conclude that on this record, the State failed to rebut the presumption and appellant is entitled to sealing. We therefore reverse the district court's order and remand with instructions to grant Tiffee's petition.

FACTS AND PROCEDURAL HISTORY

The Henderson Police Department (HPD) arrested appellant Craig Thomas Tiffee following an undercover operation wherein an HPD detective posed as a 15-year-old and agreed to meet Tiffee at a designated location for sex. Ultimately, Tiffee entered into a guilty plea agreement with the State, under which he agreed to plead guilty to luring children or mentally ill persons with the use of technology with the intent to engage in sexual conduct, a felony under NRS 201.560(4). Tiffee successfully completed probation, which, under the terms of the plea agreement, allowed him to withdraw his guilty plea and instead enter a guilty plea to unlawful contact with a child, a gross misdemeanor under NRS 207.260(4)(a). Pursuant to the plea agreement, the State acknowledged Tiffee's right to do so and cooperated in this process.

Tiffee later filed the underlying petition to seal his criminal records. The State opposed, arguing that NRS 179.245(6) precluded the district court from sealing records pertaining to a conviction of felony luring. Alternatively, the State argued that, even if the district court concluded that Tiffee's criminal records were sealable, it should not seal them because of the seriousness of the underlying offense and because Tiffee had not demonstrated that he was rehabilitated. After a hearing, the district court denied Tiffee's petition, concluding that both the crime he initially pleaded guilty to and the later pleaded crime constituted sexual offenses and crimes against a child, the records of which are not subject to sealing, and that public policy concerns also weighed against sealing.

DISCUSSION

"We review a district court's decision to grant or deny a petition to seal a criminal record for an abuse of discretion." *In re Aragon*, 136 Nev. 647, 648, 476 P.3d 465, 467 (2020). A district court abuses its record sealing discretion when it commits a legal error. *Id*. Whether the district court committed legal error here turns on whether a withdrawn guilty plea is implicated in Nevada's criminal record sealing statutes, the proper construction of NRS 179.245, which lists categories of crimes of which records may not be sealed, and what type of evidence the State must present to rebut the presumption in favor of sealing criminal records under NRS 179.2445(1).

A withdrawn guilty plea ceases to exist for all purposes and cannot justify the denial of a petition to seal criminal records after a subsequent guilty plea

NRS 179.245(6)(a) and (b), respectively, preclude the sealing of records relating to convictions of crimes against a child and sexual offenses. Tiffee argues that the district court erred by relying on his withdrawn guilty plea to deny his petition to seal criminal records. While he concedes that NRS 179.245(6) would preclude the sealing of a felony luring conviction, Tiffee argues that he withdrew that plea, and the district court should have confined its analysis to the offense of which he stands convicted. The State argues that the records pertaining to Tiffee's initial guilty plea to felony luring are ineligible for sealing under NRS 179.245(6)(b) because that crime is listed as a sexual offense under that statute. *See* NRS 179.245(8)(b)(16) (defining as a sexual offense "[l]uring a child or a person with mental illness pursuant to NRS 201.560, if punishable as a felony"). In so doing, the State suggests that a withdrawn guilty plea is still operative for purposes of evaluating a petition to seal the associated criminal records.

Upon completing probation, Tiffee successfully withdrew his initial guilty plea to the felony sexual offense and entered a new guilty plea to a gross misdemeanor offense, such that the withdrawn plea—and the conviction based on it—no longer exist. *See People v. Superior Court (Garcia)*, 182 Cal. Rptr. 426, 428 (Ct. App. 1982) ("Familiar and basic principles of law reinforced by simple justice require that when an accused withdraws his guilty plea the *status quo ante* must be restored."); *see also* 22 C.J.S. *Criminal Procedure and Rights of Accused* § 262 (2016) ("The situation, on the withdrawal of a plea, is the same as though the plea had not been entered."). Accordingly, Tiffee legally and factually returned to the situation he occupied before he entered the initial guilty plea, subject to the subsequent guilty plea. Instead of relying upon Tiffee's withdrawn guilty plea, the district court should have limited its inquiry under NRS 179.245(1) to the gross misdemeanor offense to which Tiffee ultimately pleaded guilty and of which he stands convicted. Therefore, to the extent the district court relied on Tiffee's withdrawn guilty plea in resolving his petition to seal criminal records, we conclude it erred.

Gross misdemeanor unlawful contact with a child is not a crime for which record sealing is precluded under NRS 179.245(6)

Gross misdemeanor unlawful contact with a child is not listed as a nonsealable sexual offense under NRS 179.245. *See* NRS 179.245(8)(b). As an alternative basis for denying Tiffee's petition, the district court concluded that the unlawful contact with a child

conviction pertained to "a crime perpetrated against [a] child," the records of which are ineligible for sealing under NRS 179.245(6)(a).

Upon de novo review, we conclude that the district court's interpretation was in error. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007) (applying de novo review to issues of statutory construction). For purposes of the record sealing statute, "crime against a child" is defined as set forth in NRS 179D.0357, which enumerates specific offenses not including gross misdemeanor unlawful contact with a child. *See* NRS 179.245(8)(a). As we recently held, a "[district] court may not independently evaluate the facts to make its own decision about whether the conviction relates to a 'crime against a child,' but instead must look to the crimes identified in the statute as being precluded from record sealing." *Aragon*, 136 Nev. at 649, 476 P.3d at 467-68; *see Leven*, 123 Nev. at 403, 168 P.3d at 715 (recognizing that we enforce a statute according to its terms when its language is clear and unambiguous). We explained in *In re Aragon*, "[h]ad the Legislature intended to preclude the sealing of criminal records relating to [a particular offense], it would have expressly done so by including it in [the] list of convictions that a defendant may not petition to seal." 136 Nev. at 649, 476 P.3d at 467. Therefore, the district court erroneously concluded that the records pertaining to Tiffee's guilty plea to gross misdemeanor unlawful contact with a child were ineligible for sealing under NRS 179.245(6).[2]

Tiffee is entitled to the presumption in favor of sealing criminal records under NRS 179.2445(1)

A person who meets the statutory requirements to seal his or her criminal records is entitled to a rebuttable presumption that the records should be sealed. NRS 179.2445(1). Tiffee successfully completed probation in 2012 and entered a guilty plea to gross misdemeanor unlawful contact with a child that same year. *Cf.* NRS 179.2445(2) (providing that the presumption that records should be sealed does not apply when a defendant is dishonorably discharged from probation). He filed the petition to seal his criminal records in 2019. Thus, Tiffee complied with the two-year waiting period to seal records pertaining to a gross misdemeanor conviction under

[2]The district court also cited to NRS 179.255 in its order denying Tiffee's petition. NRS 179.255(1)-(2) provides the process that a person may use to seal records of "alleged criminal conduct" where (1) the court dismissed the charges, (2) the prosecutor declined to prosecute the charges, (3) a jury acquitted the defendant, or (4) the court set aside a conviction. None of those circumstances apply here, as Tiffee withdrew his initial guilty plea and entered a guilty plea to a lesser offense. Accordingly, to the extent that the district court relied on NRS 179.255, that statute does not support denying Tiffee's record sealing petition.

NRS 179.245(1)(d). It also appears that Tiffee included a copy of his verified criminal record in his petition as required by NRS 179.245(2)(a).[3] Additionally, Tiffee's petition included information that completely identifies the records and a list of agencies that possess records of the conviction. *See* NRS 179.245(2)(c)-(d). Finally, as discussed above, none of the statutory exceptions to sealing eligibility apply. Thus, the record shows that Tiffee complied with all statutory requirements, and he is entitled to the statutory presumption in favor of sealing his criminal records.

The State failed to rebut the presumption in favor of sealing criminal records under NRS 179.2445(1)

The State contends that even if Tiffee's criminal records were eligible for sealing, the district court properly declined to seal them because Tiffee failed to demonstrate that he is rehabilitated and because of the seriousness of the underlying offense. However, those arguments are unavailing, as the statutory scheme does not impose such requirements or restrictions and instead presumes records for certain categories of crimes should be sealed.

First, NRS 179.2445(1) clearly and unambiguously provides that the presumption in favor of sealing eligible criminal records applies in favor of the petitioner and against the State. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) ("In general, rebuttable presumptions require the party against whom the presumption applies to disprove the presumed fact."). Therefore, it was the State's burden to provide evidence to rebut the presumption, not Tiffee's burden to provide additional evidence in support of sealing.

Second, although NRS 179.2445(1) does not, on its face, expressly state what type of evidence the State (or any party who objects) must present to rebut the presumption in favor of sealing criminal records, the criminal record sealing statutes exist within a common statutory scheme, and we may discern what type of showing the State must make by reviewing the statutory scheme in its entirety. *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (explaining that when "interpret[ing] provisions within a common statutory scheme," we must read them in harmony and in accordance with the overall purpose of the statutes). As NRS 179.2405 provides, "the public policy of this State is to favor the giving of second chances to offenders who *are rehabilitated* and the sealing of the records of such persons in accordance with [the governing statutes]." (Emphasis added.) NRS 179.2445 elaborates on

[3]Neither party included a copy of Tiffee's verified criminal record in the appendices. Tiffee asserts that he complied with the controlling procedures under NRS 179.245. The State does not contest this assertion.

this public policy, providing the conditions a petitioner must meet for the presumption that criminal records should be sealed to apply. If the petitioner complies with the governing statutes—here NRS 179.2445 and NRS 179.245—then courts must presume that the petitioner is, in fact, rehabilitated. To rebut this presumed fact, we hold that the State must present some affirmative proof demonstrating that a petitioner is not rehabilitated despite complying with the statutory provisions governing criminal record sealing.

Here, the State merely presented evidence of the facts relating to Tiffee's underlying crime, but such evidence does not demonstrate that a petitioner is not rehabilitated for purposes of sealing criminal records. *Cf.* NRS 179.2445(2) (providing that a dishonorable discharge from probation removes the presumption that the court should order criminal records sealed). Rehabilitation happens, if at all, *after* the underlying offense, and thus a lack of rehabilitation can only be shown by evidence of subsequent activities that would so demonstrate. As the State failed to present such evidence here, and in fact argued that it was Tiffee's burden to further show that he was rehabilitated, it did not rebut the presumption in favor of sealing Tiffee's criminal records.[4]

CONCLUSION

When, like here, a defendant withdraws a guilty plea, the plea legally and factually ceases to exist and the defendant returns to the situation he or she was in prior to entering the plea. Thus, district courts may not rely upon a withdrawn guilty plea or an associated conviction when evaluating whether to seal a petitioner's criminal records under NRS 179.245, but instead must confine their analysis to the crimes contained in the operative judgment of conviction. Furthermore, we reiterate that in evaluating whether an offense is "[a] crime against a child" or "[a] sexual offense" under NRS 179.245(6)(a)-(b), courts must abide by the express list of such offenses that the Legislature provided in NRS 179.245(8)(b) and NRS 179D.0357. Additionally, when the statutory requirements are met and a presumption in favor of sealing applies, it can only be rebutted by evidence that the petitioner is not rehabilitated, which cannot be shown by the facts underlying the conviction, but instead must be based on subsequent events tending to show a lack of rehabilitation despite the petitioner's compliance with the governing

[4]The State's claim that the seriousness of the crime provides a basis for either not applying the presumption or rebutting it is contrary to the statutory language, which lists categories of crimes (and exceptions thereto) for which it is presumed records should be sealed. NRS 179.2445(1); NRS 179.245(6). As this crime is within the scope of those eligible for sealing, the nature of the crime is already accounted for by the Legislature in making that determination and cannot be used to rebut the statutory presumption.

statutes. Here, Tiffee's crime fell within a category to which the presumption applies, and the evidence presented by the State provided nothing to rebut that presumption by showing a lack of rehabilitation. Accordingly, we reverse the district court's order and remand the matter with instructions to grant Tiffee's petition to seal his criminal records.

PICKERING and HERNDON, JJ., concur.