PEGGY CAIN, an Individual; JEFFREY CAIN, an Individual; and HELI OPS INTERNATIONAL, LLC, an Oregon Limited Liability Company, Appellants, *v*. RICHARD PRICE, an Individual; and MICKEY SHACKELFORD, an Individual, Respondents.

No. 69333

PEGGY CAIN, an Individual; JEFFREY CAIN, an Individual; and HELI OPS INTERNATIONAL, LLC, an Oregon Limited Liability Company, Appellants, *v*. RICHARD PRICE, an Individual; and MICKEY SHACKELFORD, an Individual, Respondents.

No. 69889

PEGGY CAIN, an Individual; JEFFREY CAIN, an Individual; and HELI OPS INTERNATIONAL, LLC, an Oregon Limited Liability Company, Appellants, *v*. RICHARD PRICE, an Individual; and MICKEY SHACKELFORD, an Individual, Respondents.

No. 70864

April 12, 2018 415 P.3d 25

Consolidated appeals from a district court summary judgment and post-judgment orders awarding attorney fees and sanctions in a contract and tort action. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

Affirmed in part, reversed in part, and remanded.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Matuska Law Offices, Ltd.*, and *Michael L. Matuska*, Carson City, for Appellants.

Oshinski & Forsberg, Ltd., and *Mark Forsberg*, Carson City, for Respondents.

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

OPINION

By the Court, Stiglich, J.:

In these appeals, we consider whether one party's material breach of a contract releases the non-breaching party's contractual obligation to a third-party beneficiary. We conclude that it does. Because the promisor in this case failed to fulfill its contractual obligations to

appellants under a settlement agreement, respondents as third-party beneficiaries were not entitled to the contract's release from liability. We therefore reverse the district court's orders granting summary judgment and other relief and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Appellants Peggy and Jeffrey Cain, as owners of Heli Ops International, entered into a joint venture agreement (JVA) with C4 Worldwide, Inc. The JVA provided that Heli Ops would loan $1,000,000 to C4 for the purpose of acquiring and then leveraging Collateralized Mortgage Obligations (CMOs). In return, Heli Ops would receive the first $20,000,000 in profits from C4's leveraging of the assets, while retaining a 49 percent security interest in the CMOs until C4 had paid out that amount. The Cains transferred $1,000,000 to C4, but C4 did not distribute any profits to the Cains.

The Cains subsequently entered into a "Settlement Agreement and Release of All Claims" with C4 and its CEO. In the Settlement Agreement, C4 agreed to pay the Cains $20,000,000 "no later than 90 days from February 25, 2010." In return, the Cains agreed to release C4 and its officers from any liability for C4's "financial misfortunes and resultant inability to timely pay." The Agreement further provided that California law governed its construction and interpretation and that the prevailing party in any action arising under the Settlement Agreement would be entitled to fees and costs.

C4 failed to pay $20,000,000 by the date specified in the Settlement Agreement. Consequently, the Cains sued C4 and six of its officers, including the respondents in this case: Richard Price and Mickey Shackelford. The Cains alleged breach of the Settlement Agreement, fraud, civil conspiracy, negligence, conversion, and intentional interference with contractual relations. After extended litigation, the district court awarded default judgment against C4, its CEO, and two other C4 officers on all claims in the amount of $20,000,000, plus costs and fees. Following the default judgment, only Price, Shackelford, and a third officer remained as defendants. The third officer subsequently settled with the Cains.

Price and Shackelford moved for summary judgment, claiming that the Settlement Agreement released them from liability for C4's actions and precluded the Cains' suit. The Cains opposed, arguing that the Settlement Agreement was invalid for lack of consideration. The district court granted summary judgment to Price and Shackelford, reasoning that the Settlement Agreement was supported by consideration and that the Cains bound themselves to that Agreement's release provision when they elected to seek damages for C4's breach of contract.

The Cains appeal from that order granting summary judgment. They also appeal several interlocutory and post-judgment orders, as described further below.

DISCUSSION

The district court erred in granting summary judgment because the Cains are not bound by the Settlement Agreement's release provision

The Cains argue that summary judgment was inappropriate for two reasons. First, the Cains argue that the Settlement Agreement was invalid, so the release provision had no effect. Second, the Cains argue that, even if the Settlement Agreement was valid, C4's material breach of that Agreement released the Cains from their obligation under that Agreement not to sue C4's officers. Reviewing the district court's order granting summary judgment de novo, *see Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), we conclude that summary judgment was improper.

The Settlement Agreement was a valid contract

The Cains first argue that the Settlement Agreement does not release Price and Shackelford from liability, because the Settlement Agreement was invalid for lack of consideration.[1] They argue that the Settlement Agreement merely acknowledged C4's preexisting obligation to pay the Cains $20,000,000 and thus provided no consideration to the Cains in exchange for the release of liability. We disagree and affirm the district court's ruling that the Settlement Agreement was supported by consideration—namely, removal of a condition precedent to payment.

To be legally enforceable, a contract "must be supported by consideration."[2] *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012). "Consideration is the exchange of a promise or performance, bargained for by the parties." *Id.* A party's affirmation of a preexisting duty is generally not adequate consideration to support a new agreement. *See Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980). However, where a party's promise, offered as consideration, differs from that which it already promised, there is sufficient consideration to support the subsequent agreement. 3 *Williston on Contracts* § 7:41 (4th ed. 2008).

When contracting, a promisor may incorporate into the agreement a "condition precedent"—that is, an event that must occur before the promisor becomes obligated to perform. *McCorquodale v. Holiday, Inc.*, 90 Nev. 67, 69, 518 P.2d 1097, 1098 (1974). An implicit condi-

[1]The Cains also argue that the Settlement Agreement is invalid due to fraud in the inducement. The facts underlying this issue were not adequately developed at the district court level for this court to review.

[2]We note that the Settlement Agreement's choice-of-law clause potentially raises a question as to whether California law or Nevada law governs this and other issues in this case. However, neither party's briefings address this choice-of-law issue; they both cite Nevada caselaw as governing, as does the district court's relevant orders. Therefore, we treat the choice-of-law provision as waived by mutual consent of both parties and apply Nevada law throughout this opinion.

tion precedent can be inferred from a contract's terms and context, even when the contract does not explicitly so provide. *Las Vegas Star Taxi, Inc. v. St. Paul Fire & Marine Ins. Co*., 102 Nev. 11, 12, 714 P.2d 562, 562 (1986).

Here, the JVA provided that C4 would pay the Cains "[t]he first twenty million USD ($20,000,000) received from the proceeds and profits of leveraging the CMOs." Implicit in that statement is that there must be $20,000,000 in "proceeds and profits" for the Cains to receive that money. Thus, the existence of $20,000,000 in "proceeds and profits" was a condition precedent to the Cains receiving $20,000,000 from C4.[3]

The Settlement Agreement, by contrast, contains no condition precedent. It unconditionally obligates C4 "to pay the sum of $20,000,000, plus all accumulated interest, to Cains no later than 90 days from February 25, 2010." Thus, the effect of the Settlement Agreement was to remove the condition precedent from C4's $20,000,000 obligation. Elimination of that condition precedent constitutes adequate consideration for the Settlement Agreement to be legally enforceable. *See Jones*, 128 Nev. at 191, 274 P.3d at 764. Therefore, the district court correctly held that the Settlement Agreement was a valid contract.

C4's breach of the Settlement Agreement releases the Cains from their obligation under that Agreement

The Cains next contend that, assuming the Settlement Agreement was a valid contract, the district court nonetheless erred in holding that the Settlement Agreement released Price and Shackelford from liability. In particular, they attack the district court's conclusion that the Cains bound themselves to the terms of the Settlement Agreement when they declined to rescind that Agreement and instead sought damages for C4's breach. The Cains argue that their suit for damages does not bind them to the terms of the Settlement Agreement. We agree with the Cains.

When parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform. Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981). If the non-breaching party's duty was to a third-party beneficiary, the same principle applies: the breaching party's "failure of performance" discharges the beneficiary's right to enforce the con-

[3]At oral argument before this court, the Cains' counsel argued that, the JVA's language notwithstanding, a promissory note attached to the JVA unconditionally obligated C4 to pay $20,000,000. That argument is untenable given this language within the promissory note: "C4 . . . promises to pay . . . the amount of Twenty Million USD . . . *as per the terms specified in the Joint Venture Agreement*." (Emphasis added.)

tract.[4] *Id.* at § 309(2) & cmt. b. Moreover, a material breach of contract also "gives rise to a claim for damages." *Id*. at § 243(1). Thus, the injured party is both excused from its contractual obligation *and* entitled to seek damages for the other party's breach. *See id.* § 243 cmt. a, illus. 1.

Here, the Settlement Agreement was an exchange of one promise to perform for another promise to perform. That is, C4 promised the Cains $20,000,000 in exchange for the Cains' promise to release C4's officers from liability for C4's conduct. The Cains were bound by their promise until C4 materially breached the contract 90 days after February 25, 2010, the date on which C4's $20,000,000 was due. At that point, the Cains were released from their promise not to sue C4's officers. *See id.* at § 309(2).

The complication in this case stems from the $20,000,000 default judgment previously awarded to the Cains. In briefing before the district court, the Cains elected to enforce that default judgment and rejected the possibility of rescinding the Settlement Agreement. Based on those facts, the district court reasoned that the Cains elected to honor the Agreement and therefore bound themselves to its terms—namely, the promise not to hold C4's officers liable.

In so reasoning, the district court conflated two remedy concepts: specific performance and damages for total breach of contract. Specific performance requires the parties to perform as they promised in the original agreement. *See Mayfield v. Koroghli*, 124 Nev. 343, 351, 184 P.3d 362, 367-68 (2008) (discussing when it is appropriate for a court to order specific performance). Damages for total breach, by contrast, awards the non-breaching party a monetary award sufficient to place that party in the position it expected to find itself had all parties honored the contract. *See* Restatement (Second) of Contracts § 347.

In the present case, the district court erroneously interpreted the $20,000,000 default judgment to be an order for specific performance. That misinterpretation likely occurred because $20,000,000 would have been the appropriate amount had the district court ordered specific performance. But the Cains never sought specific performance of the Settlement Agreement, and that is not what the district court ordered when it granted default judgment to the Cains. Rather, the district court awarded *damages* for breach of contract, fraud, and other claims. While $20,000,000 may greatly exceed the amount of damages the Cains actually suffered, the propriety of

[4]While there are several possible exceptions to this rule—for example, where the beneficiary changes its position in reliance on the agreement, or where the contract expressly or implicitly guarantees a beneficiary's right regardless of other parties' performance, *see* Restatement (Second) of Contracts § 309 cmt. b—the facts of this case do not implicate those exceptions.

that amount is not presently before this court. Because the default judgment awarded damages rather than specific performance, it did not bind the Cains to their original promise within the Settlement Agreement. *See* Restatement (Second) of Contracts § 243 cmt. a, illus. 1.

In sum, C4's breach of the Settlement Agreement relieved the Cains of their obligation to Price and Shackelford, third-party beneficiaries under that Agreement. We therefore reverse the district court's order granting summary judgment to Price and Shackelford. We also vacate the district court's order awarding $95,843.56 in attorney fees to Price and Shackelford as prevailing parties. They are no longer prevailing parties, so that award is inappropriate. *See Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 268, 71 P.3d 1258, 1263 (2003) (involving the reversal of an award of attorney fees where the district court's judgment on the verdict was overturned).

The district court abused its discretion when it denied the Cains' motion to compel discovery of Price and Shackelford's personal financial documents

Prior to the district court's grant of summary judgment, the Cains moved to compel discovery of Price and Shackelford's personal financial documents. The Cains sought those documents as evidence to support their fraud claim against Price and Shackelford. In denying the Cains' request, the district court found that the Cains presented an inadequate factual basis for fraud to support a punitive damages claim, so discovery of personal financial documents was inappropriate under *Hetter v. Eighth Judicial District Court*, 110 Nev. 513, 519-20, 874 P.2d 762, 765-66 (1994).

This court generally reviews discovery orders for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). However, this court reviews whether a district court has applied the proper legal standard de novo. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530 n.4, 170 P.3d 503, 506 n.4 (2007).

Discovery is proper for any matter that is not privileged and is relevant to the subject matter of the action before the court. NRCP 26(b)(1). However, due to privacy concerns and the potential for "abuse and harassment," a defendant's personal financial information can "not be had for the mere asking." *Hetter*, 110 Nev. at 520, 874 P.2d at 766. To discover that information, a "plaintiff must demonstrate some factual basis for [a] punitive damage claim." *Id.* To succeed on a punitive damage claim in this contractual context, the plaintiff must show by clear and convincing evidence that the defendant was guilty of "oppression, fraud or malice." NRS 42.005(1).

Here, the Cains pursued punitive damages on claims of fraud, civil conspiracy, and conversion. The Cains presented evidence show-

ing that their loan proceeds were distributed to C4 officers rather than being used to purchase CMOs, as per the JVA. While that evidence might not amount to "clear and convincing" evidence that Price and Shackelford committed "oppression, fraud, or malice," NRS 42.005(1), such alleged misuse of funds contrary to the JVA constitutes "some factual basis" for those claims such that discovery was proper. *Hetter*, 110 Nev. at 520, 874 P.2d at 766; *see also Sherwin v. Infinity Auto Ins. Co.*, No. 2:11–CV–00043–JCM–LRL, 2011 WL 4500883, at *3 (D. Nev. Sept. 27, 2011) (distinguishing plaintiffs' burdens at the discovery stage from their burdens at the trial stage). We therefore conclude that the district court improperly denied discovery of Price and Shackelford's personal financial documents.

The Cains' remaining claims are without merit

The Cains appeal several additional orders entered by the district court. First, they argue that the district court abused its discretion in bifurcating trial and resolving issues of personal jurisdiction and alter ego in a pretrial evidentiary hearing. Reviewing the district court's decision to bifurcate for an abuse of discretion, *see Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 621, 173 P.3d 707, 712 (2007), we find no abuse and therefore affirm.

Second, the Cains appeal post-judgment orders from the district court related to subpoenas and sanctions. In those orders, the district court found that the Cains had abused the discovery process by serving subpoenas on Price and Shackelford after the case was dismissed, so the district court quashed the subpoenas and awarded $9,514 in attorney fees to Price and Shackelford pursuant to NRS 18.010(2)(b) (authorizing courts to award attorney fees for claims "maintained without reasonable ground or to harass the prevailing party"). Having reviewed the court's decisions for an abuse of discretion, *see Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010) (stating the standard of review for a district court's order imposing sanctions); *Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (same for an order to quash subpoenas), we see no cause to reverse the district court's orders. We agree with the district court's conclusion that there was no "reasonable ground" to serve subpoenas on the defendants after the case was dismissed. NRS 18.010(2)(b). We reject the Cains' argument that our reversal of summary judgment also requires reversal of these post-judgment orders. While our reversal of the district court's final disposition requires us to reverse a grant of attorney fees to the extent that the fees were granted *because* a party prevailed,[5] s*ee Gibby's, Inc. v.*

[5]As noted above, we reverse the order granting attorney fees to Price and Shackelford *as prevailing parties*.

Aylett, 96 Nev. 678, 681, 615 P.2d 949, 951 (1980), we may reverse a district court's final disposition while affirming a district court's award of sanctions pursuant to NRS 18.010(2)(b). Thus, we affirm the district court's order granting Price and Shackelford $9,514 as a litigation sanction against the Cains.

CONCLUSION

Absent exceptions not relevant here, one party's material breach of a contract discharges the non-breaching party's duty to perform under that contract. In this case, C4's failure to pay the Cains the promised sum released the Cains from their promise not to hold C4's officers liable. Therefore, we reverse the district court's grant of summary judgment and remand this matter to the district court for proceedings consistent with this opinion.

Hardesty and Parraguirre, JJ., concur.

JOHN DEMON MORGAN, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 70424

May 3, 2018 416 P.3d 212

Appeal from a judgment of conviction, pursuant to a jury verdict, of robbery and misdemeanor battery. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Affirmed.

[Rehearing denied June 8, 2018]

[En banc reconsideration denied July 26, 2018]

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

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

Before the Supreme Court, Douglas, C.J., Gibbons and Pickering, JJ.

OPINION

By the Court, Douglas, C.J.:

In this appeal, we consider whether the district court made multiple errors from the time it held the competency hearing for appellant

John Demon Morgan to when it entered a judgment of conviction. In particular, after first considering whether the district court erred with respect to Morgan's competency hearing, we consider whether the delay in Morgan's subsequent transfer to a psychiatric facility for the purpose of restoring competency to stand trial warranted dismissal of the charges. Next, we consider whether the district court erred with respect to jury selection and closing arguments. Finally, we consider whether there was sufficient evidence for Morgan's conviction. We conclude that the district court did not commit any error during the time frame at issue and there was sufficient evidence for Morgan's conviction.[1] Furthermore, with respect to jury selection, although the district court properly overruled Morgan's challenge to the State's strike of a prospective juror, we take this opportunity to hold that striking a prospective juror based on sexual orientation is impermissible under the United States and Nevada Constitutions. Accordingly, we affirm Morgan's conviction.

FACTS AND PROCEDURAL HISTORY

On October 30, 2014, Maria Verduzco was working as a manager at an AM/PM convenience store when she saw a man grab a package of mixed nuts and put them into his pocket. Maria approached the man while he was at the checkout counter trying to pay for another item and asked him if he could please take out what he had placed into his pocket. The man told Maria to "get the f _ _ _ out of [his] face," and as she backed up in response, he approached and hit her in the chest.[2] Maria fell to the ground, got up, and hit the man's backpack with a stick as he left the store. The man's backpack ripped and containers of soup fell out. Maria called the police and indicated where the man departed. Police detained the man and identified him as Morgan. The State then charged Morgan by way of criminal complaint and information with one count of robbery and one count of battery with intent to commit a crime.

On December 1, 2014, Morgan was removed from his initial arraignment hearing for spitting, and a competency hearing was set for later that month. However, because the two court-appointed competency examiners reached opposite conclusions, the district court ordered a third evaluation and continued the competency hearing. After the third examiner found Morgan competent, he challenged his competency by requesting another hearing.

In February 2015, at the competency hearing, Morgan called only one witness to testify—the single examiner who had found him incompetent. Although the other two examiners who had found Morgan competent did not testify at the hearing, neither Morgan nor

[1]As there are no errors to cumulate, Morgan's argument that cumulative error warrants reversal lacks merit.

[2]Such action was depicted in the surveillance video, and Morgan admitted to this action in his opening statement.

his counsel requested their presence. The district court relied on the evaluations from the two court-appointed examiners who were not present at the hearing to find Morgan competent to proceed with trial proceedings.

Thereafter, Morgan pleaded not guilty to both counts. Morgan's counsel subsequently requested another competency evaluation, and thus, the matter was sent back to competency court. Because two examiners then found Morgan incompetent to proceed with adjudication, the district court ordered that he be transferred to Lake's Crossing Center for the purposes of treatment and restoring competency to stand trial.

While waiting over 100 days in the Clark County Detention Center for his scheduled transfer to Lake's Crossing Center, Morgan filed a motion to dismiss due to the delay of his transfer. The district court denied his motion, despite the fact that all agreed that the time frame to transfer Morgan to Lake's Crossing Center had not been met.

In February 2016, a three-day trial ensued. During jury selection, Morgan moved to strike the jury venire and requested an evidentiary hearing because there were only 3 African-Americans in the 45-person venire. The district court denied Morgan's motion. Morgan renewed his motion for an evidentiary hearing after the district court discovered that one of the African-American veniremembers was ineligible to serve on the jury. The district court initially denied Morgan's renewed motion but subsequently held a hearing to determine the merits of his motion, and the district court again denied Morgan's motion.

In conducting voir dire, the district court explained that it would first ask the jury panel general questions before the parties could request to strike jurors for cause. The district court further explained that it would then seat 13 of the remaining individuals from this panel inside the jury box and the parties would take turns asking questions. If both parties passed for cause after questioning, a party could chose to exercise a peremptory challenge on their turn. However, the district court stated that the parties would lose their peremptory challenge if they decided not to use it. Morgan opposed this "use or lose" method of exercising peremptory challenges, to no avail. Subsequently, the State used a peremptory challenge to strike juror no. 24, one of the two identifiable gay veniremembers.[3] Morgan challenged the State's strike based on sexual orientation because the State asked juror no. 24 whether he said "boyfriend, girlfriend or married," in response to the juror's reply when asked about

[3]Juror no. 24 revealed his sexual orientation by answering, "[h]e's an artist," after the State inquired about his partner's employment. Juror no. 11 replied to the State's same inquiry by answering, "[h]e is the head of props for a Broadway show in New York."

relationship status. The State justified its strike by explaining that juror no. 24 expressed an approval of the media's criticism towards police. Morgan contended that other jurors shared the same view on police criticism in the media, but that these individuals served on the jury because they were heterosexual. The district court, however, denied Morgan's challenge.

In the opening statements, Morgan asked the jury to find him guilty of misdemeanor battery only, but not robbery. The defense theory was that, although Morgan inexcusably hit Maria, he had no intent to rob the convenience store because he tried to pay. During closing arguments, the district court required Morgan to correct his statement that Maria was still a manager at the AM/PM convenience store because of the lack of evidence validating his statement of fact.

Ultimately, the jury found Morgan guilty of robbery and misdemeanor battery. The district court sentenced Morgan to serve his two counts concurrently for a maximum of 120 months with a minimum parole eligibility of 26 months and 533 days' credit for time served. Morgan now appeals.

DISCUSSION

The district court did not err with respect to Morgan's competency hearing

Morgan contends that the district court violated his constitutional right to due process and his statutory right to cross-examine the two examiners who had initially found him competent.[4] We disagree. We point out that the district court subsequently found Morgan incompetent prior to trial and conviction, as he desired, and we further conclude that because Morgan failed to object below, the court-appointed competency examiners were not required to testify at the competency hearing.

Because Morgan never objected at his competency hearing that the two examiners who had found him competent were not present, we review the alleged error for plain error. *See Calvin v. State*, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006) (stating that failure to object to the exclusion of witness testimony at a competency hearing elicits plain error review).

"In conducting a plain-error analysis, we must consider whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights." *Id.* at 1184, 147 P.3d at 1101. In considering whether error exists, "[i]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the

[4]Morgan also asserts a violation of his Sixth Amendment right to cross-examination. However, he fails to provide relevant authority. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

criminal prosecution of a defendant who is not competent to stand trial." *Olivares v. State*, 124 Nev. 1142, 1147, 195 P.3d 864, 868 (2008) (internal quotation marks omitted).

Nevada has provided that "[i]f the court finds that further competency proceedings are warranted, it 'shall appoint two [certified] psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant.'" *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 122, 206 P.3d 975, 978 (2009) (quoting NRS 178.415(1)).[5] Following the completion of the examinations, "at a hearing in open court, the court that orders the examination must receive the report of the examination." *Id.* at 123, 206 P.3d at 978 (quoting NRS 178.415(2)). After the court receives the reports of the examinations, it "shall permit counsel for both sides to examine the person or persons appointed to examine the defendant." *Id.* (quoting NRS 178.415(3)). This requirement "does not compel the participation of the court-appointed competency examiners at the competency hearing." *Id.* at 123 n.5, 206 P.3d at 978 n.5. However, the parties may subpoena the court-appointed examiners to require their appearance at the competency hearing. *See id.* Moreover, "[b]y providing counsel for both sides with full and complete copies of the competence examination reports [prior to the competency hearing], the prosecuting attorney and the defense counsel will be afforded a meaningful opportunity to be heard during the competency hearing." *Id.* at 125, 206 P.3d at 979. At the competency hearing, "[t]he court shall [ ] permit counsel to introduce other evidence and cross-examine one another's witnesses." *Id.* at 123, 206 P.3d at 978 (citing NRS 178.415(3)). Finally, "[the court] shall enter its finding as to competence." *Id.* (citing NRS 178.415(4)).

Here, plain error does not exist because under *Scarbo*, neither Morgan nor the State subpoenaed the two court-appointed examiners who had initially found him competent, and thus, their presence at the competency hearing was not required. As a result, the court could only permit Morgan's counsel to cross-examine the witnesses present at the hearing. Moreover, defense counsel received the examination reports prior to the competency hearing, affording Morgan due process and the opportunity to subpoena the examiners, if he so desired. Therefore, the district court did not err with respect to Morgan's competency hearing.

The district court did not err by rejecting Morgan's motion to dismiss the charges

In Morgan's motion to dismiss, he relied upon a proposed consent decree, order, and judgment that the United States District Court

[5]The Legislature revised NRS 178.415 substantially in 2017. *See* 2017 Nev. Stat., ch. 480, § 1 at 2996. However, because Morgan committed his crimes in 2014, we address the version of the statute in place at that time.

for the District of Nevada approved, involving a federal civil action filed by three Clark County Detention Center inmates (collectively, plaintiffs) against the administrator of the Nevada Division of Public and Behavioral Health, the director of Lake's Crossing Center, and the director of the Nevada Department of Health and Human Resources (collectively, defendants). *See Burnside v. Whitley*, No. 2:13-CV-01102-MMD-GWF (D. Nev. Jan. 28, 2014). The plaintiffs alleged that the defendants failed to provide court-ordered treatment to incompetent criminal defendants, in violation of the Due Process Clause of the Fourteenth Amendment. Because the parties agreed to resolve the lawsuit, the court issued an order pursuant to the parties' agreed-upon terms. Pursuant to the federal order, the defendants were to transport incompetent detainees for competency treatment within 7 days of receiving a court order. Here, Morgan argued that because he waited over 100 days for his transfer to Lake's Crossing Center, violation of the federal order warranted dismissal of the charges against him. However, the district court found that it was necessary to balance the interests of Morgan, whom the examiners deemed to be a danger to himself and to society, with the interests of the community. Thus, the district court found dismissal to be an extreme remedy. Instead, the district court determined that the proper remedy was to order compliance with the federal order and order Morgan's transfer to Lake's Crossing Center within 7 days, and it ultimately denied Morgan's motion.

Morgan argues that the district court erred in denying his motion to dismiss the charges due to the length of delay in transporting him to Lake's Crossing Center, in violation of a federal court order and his right to due process. We disagree and conclude that the delay in Morgan's transfer to Lake's Crossing Center did not require dismissal of the charges.

This court will not disturb a district court's decision on whether to dismiss a charging document absent an abuse of discretion. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (reviewing the dismissal of an indictment). Dismissal is an extreme sanction; however, "dismissal with prejudice at the state level is most appropriate upon a finding of aggravated circumstances and only after a balancing of its deterrent objectives with the interest of society in prosecuting those who violate its laws." *State v. Babayan*, 106 Nev. 155, 173, 787 P.2d 805, 817, 818 (1990) (emphasis omitted).

After balancing deterrent objectives with society's interest in prosecuting criminals, pursuant to *Babayan*, it follows that a violation of the federal order by those who are not parties to the case at hand did not amount to aggravated circumstances warranting the extreme sanction of dismissing Morgan's charges.[6] Therefore, the

[6]In addition to the federal order, Morgan also relied upon distinguishable cases inapplicable to his case, and he now alternatively argues for the first time

district court did not abuse its discretion in denying Morgan's motion to dismiss the charges.[7]

The district court did not err with respect to jury selection

Morgan contends that: (1) the district court committed structural error when it allegedly made a ruling on his motion to strike the jury venire before conducting an evidentiary hearing, (2) he was entitled to a new venire, (3) the district court abused its discretion in determining the manner in which voir dire was conducted, and (4) the district court erred in overruling his *Batson* challenge.[8] We disagree with each of Morgan's contentions in turn.

The district court did not commit structural error when Morgan moved to strike the jury venire

Morgan argues that the district court committed structural error when he moved to strike the jury venire, which mandates reversal of his conviction under *Buchanan v. State*, 130 Nev. 829, 335 P.3d 207 (2014). We disagree.

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on appeal, without providing any relevant authority, that he should be awarded 10 days' credit for each day over 7 that he remained in confinement. We decline to address this issue. *See State v. Powell*, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006) ("Generally, failure to raise an issue below bars consideration on appeal." (internal quotation marks omitted)); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[7]After considering Morgan's argument that the State's information was impermissibly vague and violated his Sixth Amendment right to be informed of his charges, we conclude that the information adequately notified Morgan of the charges he was expected to defend, and thus, the district court did not abuse its discretion in denying his motion to dismiss the charges or alternatively plead particular facts. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (stating that this court will not disturb a district court's decision on whether to dismiss a charging document absent an abuse of discretion).

[8]Morgan additionally contends that the district court made statements during voir dire that denied him the presumption of innocence. *See Watters v. State*, 129 Nev. 886, 889, 313 P.3d 243, 246 (2013) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (internal quotation marks omitted)); *see also* NRS 175.201 (providing that a criminal defendant is presumed innocent until the State proves otherwise beyond a reasonable doubt). The record demonstrates that the district court instructed the jury on the proper presumption of innocence and burden of proof shortly after the alleged error occurred. Further, after the jury was empaneled, the district court again correctly instructed the jury on the proper presumption of innocence. Finally, at the conclusion of trial, the jury was given the correct instructions on the burden of proof and the presumption of innocence. Because the district court properly instructed the jury, and no evidence indicated that the jury ignored its instructions, Morgan was not denied the presumption of innocence. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) ("A jury is presumed to follow its instructions." (internal quotation marks omitted)).

This court reviews de novo whether the district court's actions constituted structural error. *See Barral v. State*, 131 Nev. 520, 523, 353 P.3d 1197, 1198 (2015). This court has held that "when a defendant moves the court to strike a jury venire, and the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion." *Buchanan*, 130 Nev. at 833, 335 P.3d at 210.

Here, the district court's actions did not violate *Buchanan*. The court initially denied Morgan's first challenge to the jury panel and request for a hearing because it believed that the veniremembers were randomly chosen. Morgan renewed his motion for a hearing a few hours later because one of the three African-American veniremembers was not eligible to serve on the jury. Initially, the district court denied Morgan's renewed motion, but after the State brought the method by which the jury commissioner selects potential jurors to the district court's attention and Morgan stated that he would like to have a hearing with the jury commissioner to determine how the jury panels are assembled, the district court decided to allow the jury commissioner to testify in order to resolve the issue. The district court set the matter for hearing despite the fact that it knew that the jury commissioner did not inquire about race, creed, or color. After a hearing on the merits, the district court once again denied Morgan's motion to disqualify the jury panel. Based on the district court's actions, the district court met the requirements set forth in *Buchanan*, and thus, did not commit structural error warranting reversal.

Morgan was not entitled to a new venire

Morgan argues that he was entitled to a new venire because: (1) African-Americans are a distinctive group, (2) African-Americans were not fairly represented in the venire, and (3) the underrepresentation of African-Americans was due to systematic exclusion. In particular, Morgan argues that because 11.8% of Clark County residents are African-American,[9] the 45-person venire should have included at least 5 African-Americans, not 3. Although we agree that African-Americans are a distinctive group, we disagree with Morgan's remaining contentions.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee "a venire selected from a fair cross section of the community." *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

> To demonstrate a prima facie violation of the fair-cross-section requirement, the defendant must show:

[9]The State does not challenge the accuracy of this percentage obtained from the United States Census Bureau.

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 940, 125 P.3d at 631 (internal quotation marks and emphases omitted).

Under the first prong, the parties correctly agree that African-Americans are a distinctive group in the community. *See id.* Accordingly, we address the remaining contested prongs.

Under the second prong, to determine whether the representation of African-Americans in the venire is fair and reasonable, this court calculates the absolute and comparative disparities.[10] *See Evans v. State*, 112 Nev. 1172, 1187, 926 P.2d 265, 275 (1996) (stating that "a comparative disparity well below 50% is unlikely to be sufficient [to show underrepresentation]" (citing *State v. Lopez*, 692 P.2d 370, 377 (Idaho Ct. App. 1984) (holding that "a comparative disparity well over 50% is strong evidence of underrepresentation" and "[a] comparative disparity of about 50% may or may not be adequate to show such underrepresentation, depending in part upon the size of the group in question," and concluding that an absolute disparity of 5% and comparative disparity of 61%, taken together, were sufficient to show that the underrepresentation in the venire was not fair or reasonable) (internal quotation marks omitted))). Here, African-Americans comprised of 6.7% of the 45-person venire. This mathematically results in an absolute disparity of 5.1% and a comparative disparity of 43.2%.[11] Therefore, the given disparities here fail to sufficiently show underrepresentation. Because the second prong proves fatal for Morgan, analysis of the third prong is unnecessary. Based on the foregoing, Morgan failed to demonstrate a prima facie violation of his Sixth Amendment right to a venire composed of a fair cross section of the community, and thus, Morgan was not entitled to a new venire.

The district court did not abuse its discretion in determining the manner in which voir dire was conducted

The district court explained to the parties how it would conduct voir dire. First, the district court would ask the jury panel 20 basic

[10] "Unlike the absolute disparity, the comparative disparity takes into account the size of the group in addition to the absolute difference between the group's proportionate representation in the community and its representation in the jury pool." *Evans v. State*, 112 Nev. 1172, 1187 n.15, 926 P.2d 265, 275 n.15 (1996).

[11] Morgan miscalculates the comparative disparity to be 56.4%.

questions. The parties could then request to strike jurors for cause. After removing jurors for cause, the district court would seat 13 individuals inside the jury box. Once the 13 individuals were seated, the State would have the opportunity to ask its questions. Then the defense would have its turn to ask its questions. Once the defense concluded its questions, the parties would approach the bench and the district court would ask whether they passed the prospective jurors for cause. If any individuals were excused for cause, their open seats would be filled with a new prospective juror. The next round of questioning would then begin. If both the State and the defense passed for cause, the district court would ask the State for its peremptory challenge. Each side would have four peremptory challenges, and one for the alternate juror. If the State chose to exercise its first peremptory challenge and the juror was excused, that juror's seat would be filled by the next juror in the venire. Each party's opportunity to use a peremptory challenge would alternate, but if a party waived the peremptory challenge on their turn, they would lose it.

Morgan opposed the district court's "use or lose" method of peremptory challenges by arguing that he should be allowed to exercise all of his peremptory challenges on the worst prospective jurors, although he conceded that multiple courts utilize this use or lose method. Morgan relied on *Gyger v. Sunrise Hospital & Medical Center, LLC*, Docket No. 58972 (Order of Affirmance, December 18, 2013), an unpublished civil order, to support his position that it is error to require a party to exercise a peremptory challenge without knowing the next juror in the pool. In response to Morgan's opposition, the district court stated that he should pay attention to the 20 questions it would ask.

Morgan asserts that the district court unreasonably restricted his use of peremptory challenges during voir dire by requiring the parties to use or lose such challenges before qualifying 23 potential jurors.[12] We disagree and conclude that the district court did not abuse its discretion in determining the manner in which voir dire was conducted, as *Gyger* is distinguishable from this case.

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[12]Morgan additionally argues that in rejecting several questions he posed in voir dire, the district court denied his right to effective assistance of counsel and due process and, thus, the district court placed unreasonable restrictions on the scope of voir dire. "The court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted." NRS 175.031. We conclude that the district court did not unreasonably restrict the scope of Morgan's supplemental examination during voir dire and, thus, did not abuse its discretion because review of the record reveals that although the district court rejected several questions Morgan posed, he was still able to exercise the line of questioning on other occasions during voir dire. *See Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991) (stating that we review the scope of voir dire for an abuse of discretion).

"[T]he scope of voir dire and the method by which voir dire is pursued are within the discretion of the district court." *Salazar v. State*, 107 Nev. at 985, 823 P.2d at 274 (internal citations and quotation marks omitted). "If the offense charged is punishable by imprisonment . . . , each side is entitled to four peremptory challenges." NRS 175.051(2). "The State and the defendant shall exercise their challenges alternatively, in that order. Any challenge not exercised in its proper order is waived." NRS 175.051(3). Further, each side is entitled to one peremptory challenge for an alternate juror. NRS 175.061(5). In examining prospective jurors, NRS 16.030(4) is illustrative:[13]

> The persons whose names are called must be examined as to their qualifications to serve as jurors. If any persons on the panel are excused for cause, they must be replaced by additional persons who must also be examined as to their qualifications . . . . When a sufficient number of prospective jurors has been qualified to complete the panel, each side shall exercise its peremptory challenges out of the hearing of the panel by alternately striking names from the list of persons on the panel. After the peremptory challenges have been exercised, the persons remaining on the panel who are needed to complete the jury shall, in the order in which their names were drawn, be regular jurors or alternate jurors.

Here, the court examined the 45-person panel of prospective jurors as to their qualifications by asking 20 general questions before excusing 5 jurors for cause. This occurred prior to seating 13 individuals inside the jury box. Thus, only qualified individuals were selected to sit in the jury box, and the court replaced any juror who was removed with another who was also previously qualified. Further, the court agreed to ask certain questions that the parties requested before each side was allowed to individually voir dire the remaining panel members. Therefore, the district court did not unreasonably restrict supplemental examination and, thus, did not abuse its discretion by employing the use or lose method of peremptory challenges.

Moreover, *Gyger*, the unpublished civil order Morgan relied on below, is distinguishable from this case. In *Gyger*, the district court sat the 12 prospective jurors in the jury box *before* voir dire examination began. Thus, when the court would replace an excused juror, the district court would first question the newly seated juror before counsel would begin their questioning. This court concluded that the use or lose method of peremptory challenges the district court employed unreasonably restricted the voir dire process because

[13]Although this statute pertains to trial by jury in civil practice, "[t]rial juries for criminal actions are formed in the same manner as trial juries in civil actions." NRS 175.021(1).

"[t]he purpose of voir dire is to ensure that a fair and impartial jury is seated and the voir dire process used in this case worked directly against this purpose by forcing the parties' attorneys to guess about the comparative fairness of potential jurors who were not yet seated." (Internal citation omitted.) Although *Gyger* and the case at hand employed the same use or lose method of peremptory challenges, employing this method *after* the court conducts its initial examination of prospective jurors sets this case apart from *Gyger*. Therefore, in rejecting the application of *Gyger* in the instant case, and employing its chosen method of voir dire, the district court did not abuse its discretion.

The district court properly overruled Morgan's Batson challenge

The State used its second peremptory challenge to strike prospective juror no. 24, an identifiably gay member. Morgan made a *Batson* challenge against the State's strike based on sexual orientation. Although the district court never made a finding as to whether Morgan made out a prima face case of discrimination, it denied Morgan's challenge.[14] Before addressing Morgan's contention that the district court erred in overruling his *Batson* challenge based on sexual orientation, we take this opportunity to first address whether sexual orientation should be recognized under *Batson*—a novel issue before this court. In answering in the affirmative, we align this court with the Ninth Circuit.

"[T]he use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States Constitution." *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) (citing *Batson v. Kentucky*, 476 U.S. 79, 86 (1986)). The scope of *Batson* has been expanded "to prohibit striking jurors solely on account of gender." *Watson v. State*, 130 Nev. 764, 774, 335 P.3d 157, 165 (2014) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-43 (1994)). Although the United States Supreme Court has yet to address whether *Batson* extends to sexual orientation, the United States Court of Appeals for the Ninth Circuit concluded in the affirmative. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014). In reaching its decision, the Ninth Circuit first estab-

[14]Morgan contends that the district court prejudged his *Batson* challenge and that this amounted to structural error under *Brass v. State*, 128 Nev. 748, 291 P.3d 145 (2012). However, we conclude that Morgan's contention lacks merit because he concedes that the *Batson* hearing occurred prior to removing prospective juror no. 24. *See Brass*, 128 Nev. at 750, 291 P.3d at 147 (holding "that when a defendant asserts a *Batson* violation, it is structural error to dismiss the challenged juror prior to conducting the *Batson* hearing because it shows that the district court predetermined the challenge before actually hearing it").

lished that classifications based on sexual orientation are subject to heightened scrutiny, and the court further concluded that equal protection prohibited striking a juror on this basis. *Id.* at 484. The court elucidated how "[g]ays and lesbians have been systematically excluded from the most important institutions of self-governance." *Id.* Moreover, "[s]trikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals." *Id.* at 485. Such strikes "deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve." *Id.* In sum, "[t]he history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes [led] [the Ninth Circuit] to conclude that *Batson* applies to peremptory strikes based on sexual orientation." *Id.* at 486. We take this opportunity to adopt *SmithKline*'s holding and expand *Batson* to sexual orientation.

In addressing whether the district court erred in overruling Morgan's *Batson* challenge based on sexual orientation, "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Diomampo*, 124 Nev. at 422-23, 185 P.3d at 1036-37 (internal quotation marks omitted). Thus, "we will not reverse the district court's decision unless clearly erroneous." *Watson*, 130 Nev. at 775, 335 P.3d at 165 (internal citation and quotation marks omitted).

"We evaluate an equal-protection challenge to the exercise of a peremptory challenge using the three-step analysis set forth by the United States Supreme Court in *Batson*." *Id.* at 774, 335 P.3d at 165. Accordingly, this court engages in the following analysis:

> (1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination.

Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006).

In establishing a prima facie case of discrimination under the first step of the *Batson* analysis, "the opponent of the strike must show that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Watson*, 130 Nev. at 775, 335 P.3d at 166 (internal quotation marks omitted). This step is not onerous and "the opponent of a strike is not required to establish a pattern of strikes against members of the targeted group." *Id.* (emphasis omitted). However, "[w]here there is no pattern of strikes against members of the targeted group to give rise to an inference of discrimination,

the opponent of the strike must provide other evidence sufficient to permit an inference of discrimination based on membership in the targeted group." *Id.* at 776, 335 P.3d at 166. Thus, the opponent of the strike must provide "something more" to satisfy the first step. *Id.* (internal quotation marks omitted). For example, "circumstances that might support an inference of discrimination include, but are not limited to, the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." *Id.* at 776, 335 P.3d at 167. To successfully establish a prima facie case of discrimination based on sexual orientation, the opponent of the strike may produce evidence that "[the prospective juror] was the only juror to have identified himself as gay on the record, and the subject matter of the litigation presented an issue of consequence to the gay community." *SmithKline*, 740 F.3d at 476. However, even though striking one or two gay individuals "may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury." *Id.* (internal quotation marks omitted).

Here, juror no. 24 was not the only juror to have identified himself as gay on the record. The State did not use a peremptory strike against the other identifiable gay member, and thus, this individual served on the jury. Accordingly, there is no pattern of strikes against gay members, no disproportionate effect of peremptory strikes, and no disparate treatment of gay members. With regard to the nature of the State's questions and statements during voir dire, although the prosecutor inquired about juror no. 24's relationship status by asking him whether he said "boyfriend, girlfriend or married," which prompted juror no. 24 to answer "partner," the prosecutor intended to inquire about his marital status and not his sexual orientation, despite not phrasing the question as "married, single, [or] divorced," as the prosecutor did with other prospective jurors. Finally, the nature of Morgan's criminal case did not involve an issue sensitive to the gay community. Therefore, because we are not convinced that the totality of the circumstances gave rise to an inference of discrimination, Morgan failed to make out a prima face case of discrimination.

Further, the State, as the proponent of the peremptory challenge, provided a neutral explanation for the challenge that proved it did not engage in purposeful discrimination. After the State asserts a neutral explanation for its peremptory challenge, "the defendant bears a heavy burden in demonstrating that the State's facially [ ]neutral explanation is pretext for discrimination." *Conner v. State*, 130 Nev. 457, 464, 327 P.3d 503, 509 (2014). Thus, "to carry that burden, the defendant *must* offer some analysis of the relevant considerations which is sufficient to demonstrate that it is more likely than not that the State engaged in purposeful discrimination." *Id.*

Relevant considerations include, "(1) the similarity of answers to voir dire questions given by veniremembers who were struck by the prosecutor and answers by those veniremembers of another [sexual orientation] who remained in the venire," and "(2) the disparate questioning by the prosecutors of struck veniremembers and those veniremembers of another [sexual orientation] who remained in the venire." *Id.* Additionally, "[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." *Id.* (internal quotation marks omitted). "The court should evaluate all the evidence introduced by each side on the issue of whether [sexual orientation] was the real reason for the challenge and then address whether the defendant has met his burden of persuasion." *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

Here, the prosecutor provided the district court with a neutral explanation for striking prospective juror no. 24. The State contended that juror no. 24's response during voir dire indicated an approval of the media's criticism of the police, because after the prosecutor asked who had strong feelings about the criticism of police officers portrayed in the media, juror no. 24 responded that he felt "that it's about time that the police officers . . . are being charged" and that he thought "it's gone on way too long that [the police officers have] been able to abuse the public." In response to the State's neutral reason for striking prospective juror no. 24, Morgan argued that the State's reason was pretextual because prospective juror no. 27 shared a similar view concerning police criticism in the media, but he was heterosexual and served on the jury.[15] The district court overruled Morgan's *Batson* challenge after it determined that the State had reason to strike juror no. 24, and after it discredited Morgan's argument that sexual orientation was the real reason for the strike.

On appeal, Morgan additionally argues that heterosexual prospective juror no. 31 similarly expressed concern about police in the media but served on the jury. Thus, Morgan contends that the State's justification was implausible. The record reflects that prospective juror no. 24 had a stronger opinion on police criticism than prospective juror nos. 27 and 31, and thus, juror no. 24 provided a dissimilar answer when compared to the heterosexual veniremembers who served on the jury. Moreover, review of the record indicates that the State asked the other identifiable gay veniremember who served on the jury whether he was "married, single, [or] divorced," instead of phrasing the question "boyfriend, girlfriend or married," and thus, the State did not engage in disparate questioning. Therefore, Mor-

[15]For this reason, Morgan's argument that the court showed judicial bias by not allowing him to counter the State's neutral reason fails.

gan failed to demonstrate that the State's neutral explanation for striking prospective juror no. 24 was pretextual. Accordingly, the district court properly overruled Morgan's *Batson* challenge.[16]

The district court did not err with respect to closing arguments

In Morgan's closing argument, his counsel stated: "What else did we hear during this trial? Maria Verduzco is still a manager at the AM/PM . . . ." The district court sustained the State's objection because evidence was not produced at trial that Maria was still the manager at the convenience store. Accordingly, upon the district court's instruction, Morgan corrected his previous statement to the jury.

Morgan argues that his constitutional rights to effective assistance of counsel were denied when the court demanded that his counsel correct the alleged misstatement.[17] Conversely, the State contends that because Morgan misstated the facts, the district court did not abuse its discretion by demanding correction. We agree with the State and conclude that the district court acted within its discretion when it required Morgan to correct his misstatement of fact.

"[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process." *Herring v. New York*, 422 U.S. 853, 857 (1975). However, "[t]his is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained." *Id.* at 862. Accordingly, this court reviews a district court's "rulings respecting the latitude allowed counsel in closing arguments for an abuse of discretion." *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 704, 220 P.3d 684, 693 (2009) (internal citation omitted). A fundamental legal and ethical rule is that neither the prosecution nor the defense may argue facts not in evidence. *See id.* at 705, 220 P.3d

[16]Morgan next argues that the district court erred in denying his separate motions for a mistrial based on testimony from two witnesses. However, after review of the record, we conclude that Morgan's argument lacks merit, and thus, the district court did not abuse its discretion in denying Morgan's motions. *See Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (stating that this court will not disturb the district court's decision to deny a motion for a new trial absent an abuse of discretion).

[17]Morgan additionally argues that during closing argument, the State engaged in prosecutorial misconduct warranting reversal. After review of the record, we conclude that the alleged prosecutorial misconduct does not warrant reversal. *See Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) ("A prosecutor's comments should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." (internal quotation marks omitted)).

at 694. "The trial court has an array of measures available to deal with improper argument by counsel." *Id.* at 702, 220 P.3d at 692.

Here, Maria never testified that she was still the manager of the convenience store at the time of trial. Because Morgan failed to elicit such testimony during cross-examination, the district court did not hinder his ability to participate in the adversary factfinding process by requiring him to correct his misstatement of fact. Therefore, the district court did not abuse its discretion and did not deny Morgan his right to effective assistance of counsel.[18]

There was sufficient evidence for Morgan's conviction

Morgan argues that there was insufficient evidence for his conviction because no merchandise was recovered and the State failed to present evidence that the convenience store was missing inventory. We disagree.

"The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution." *Jackson v. State*, 117 Nev. 116, 122, 17 P.3d 998, 1002 (2001) (internal quotation marks omitted). It is well established that the jury determines the weight of the evidence and credibility of the witnesses. *State v. Thompson*, 31 Nev. 209, 217, 101 P. 557, 560 (1909).

Here, testimony and surveillance video provided sufficient evidence to support the jury's verdict. First, Maria testified that she saw a man, whom she identified in open court as Morgan, put a package of mixed nuts into his pocket, and when she asked if he could please take the nuts out of his pocket, he cursed at her. Maria further testified that when she stepped back in response, Morgan approached and made her feel nervous before he hit her. In addition to the nuts, Maria testified that she saw Morgan conceal containers of soup in his backpack after reviewing the surveillance video and that at no time did he pay the cashier.

Second, an officer also identified Morgan in open court as the perpetrator and testified that he saw a package of mixed nuts fall out of Morgan's pocket when Morgan fell to the ground at the time of arrest. The officer further testified that he grabbed the nuts, despite the fact that they were never impounded.

Finally, surveillance video showed Morgan place a package of mixed nuts into his pocket. Video also showed Morgan place a con-

[18]Because the court's action was appropriate, the district court further did not abuse its discretion by denying Morgan's motion for a mistrial based on his statement concerning Maria. *See Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (stating that this court will not disturb the district court's decision to deny a motion for a new trial absent an abuse of discretion).

tainer of red soup into his bag but place a container of yellow soup on the counter, showing that he only intended to pay for the container of yellow soup.

Although Morgan highlights the lack of recovered merchandise, the jury was properly instructed that the State was not required to recover or produce the proceeds of the alleged robbery at trial. Further, the surveillance video alone negated any need for the State to present evidence that the convenience store was missing inventory. Therefore, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of robbery and misdemeanor battery beyond a reasonable doubt. *See* NRS 200.380(1) (defining robbery as "the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury . . ."); NRS 200.481(1)(a) (defining misdemeanor battery as "any willful and unlawful use of force or violence upon the person of another").

CONCLUSION

We conclude that: (1) the district court did not err with respect to Morgan's competency hearing; (2) the district court did not err by rejecting Morgan's motion to dismiss the charges; (3) the district court did not commit structural error when Morgan moved to strike the jury venire; (4) Morgan was not entitled to a new venire; (5) the district court did not abuse its discretion in determining the manner in which voir dire was conducted; (6) the district court properly overruled Morgan's *Batson* challenge, despite the fact that *Batson* applies to peremptory strikes based on sexual orientation; (7) the district court did not err with respect to closing arguments; and (8) there was sufficient evidence for Morgan's conviction. Based on the foregoing, we affirm Morgan's judgment of conviction.

Gibbons and Pickering, JJ., concur.

SOLOMON COLEMAN, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 71052

May 3, 2018 416 P.3d 238

Appeal from a judgment of conviction, pursuant to a jury verdict, of capturing an image of the private area of another person. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Reversed.

The Law Office of Travis Akin and *Travis D. Akin*, Las Vegas; *Justice Law Center* and *Bret O. Whipple*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Krista D. Barrie*, Chief Deputy District Attorney, and *Elissa Luzaich*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Douglas, C.J., Gibbons and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

NRS 200.604 prohibits a person from knowingly and intentionally capturing an image of another person's private area without her consent, under circumstances in which she has a reasonable expectation of privacy. The question presented is whether the statute prohibits a person from copying, without permission, a consensually recorded video depicting sexual acts. We hold that such copying does not violate NRS 200.604 and therefore reverse.

I.

Coleman was arrested and charged with several crimes involving two alleged victims. After a five-day trial, the jury acquitted Coleman of all charges except one: capturing an image of the private area of another person in violation of NRS 200.604. The facts related to that charge involve one victim, L.M.

Coleman, a Las Vegas police officer, responded to a scene where another officer had detained L.M. and a friend of hers. L.M. admitted she had outstanding warrants, and after finding drugs in L.M.'s friend's purse, the officers arrested both women. At some point during the arrest, L.M. gave Coleman permission to go through her cell phone, where he found sexual videos of her and her boyfriend. Coleman copied these videos onto his cell phone by recording the video while it was playing on L.M.'s cell phone. Sometime later,

police had occasion to search Coleman's cell phone and they found the videos of L.M. and her boyfriend. Coleman was charged and convicted of violating NRS 200.604 and now appeals.

II.

Coleman argues that the State did not put forth sufficient evidence to convict him under NRS 200.604 because the statute prohibits voyeurism and Coleman did not take a video of L.M.'s physical body directly but merely copied an existing video. The State responds that the statute prohibits Coleman's conduct because he captured an image of L.M.'s private area from a video on her cell phone, in which she had a reasonable expectation of privacy.

Determining whether the State provided sufficient evidence to convict Coleman under NRS 200.604 requires us to interpret the statute to understand what conduct it prohibits. Issues of statutory interpretation are questions of law reviewed de novo. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). If a statute is unambiguous, this court does not look beyond its plain language in interpreting it. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). When a statute is ambiguous, meaning it is susceptible to two or more reasonable interpretations, the court may look to extrinsic aids such as legislative history, extra-jurisdictional authority, and principles of interpretation, including the rule of lenity, to disambiguate its text. *Id*.

A.

NRS 200.604(1) provides that "a person shall not knowingly and intentionally capture an image of the private area of another person: (a) [w]ithout the consent of the other person; and (b) [u]nder circumstances in which the other person has a reasonable expectation of privacy." " 'Capture,' with respect to an image means, to videotape, photograph, film, record by any means for broadcast." NRS 200.604(8)(b). Under NRS 200.604(2), it is also illegal to "distribute, disclose, display, transmit or publish an image that the person knows or has reasons to know was made in violation of subsection 1."

NRS 200.604 is ambiguous because "capture an image" is susceptible to two reasonable interpretations. NRS 200.604(1) could be limited to videotaping, photographing, filming, or recording a physical person in real time, or it could also include the copying of a pre-existing image that displays a private area. The plain meaning of the word "image" offers no clarification, as it includes both proposed definitions. *Merriam-Webster's* definition of "image" includes "a reproduction or imitation of the form of a person or thing," "a visual representation of something," or "a vivid or graphic representation or description." *See Image*, *Merriam-Webster*

https://www.merriam-webster.com/dictionary/image (last visited March 29, 2018). Thus, we must look to NRS 200.604's legislative history and other relevant extrinsic aids for guidance.

B.

NRS 200.604's legislative history reveals that the Legislature created NRS 200.604(1) to criminalize the act of taking photos or video of a person's private area in real time, either in a public or private physical location, when that person had a reasonable expectation of privacy. The Legislature recognized that using small cameras or video recording devices to take pictures of people under their clothing or places of privacy such as dressing rooms or bathrooms had become increasingly common, yet Nevada law did not criminalize such activity. *See* Hearing on S.B. 10 Before the Senate Judiciary Comm., 74th Leg. (Nev., February 8, 2007) (statement of Senator Barbara K. Cegavske) ("I received a call from parents whose daughter was at a casino when she discovered a man with a camera on his shoe filming underneath the skirts of women and showing the pictures on the Internet . . . . There was another case of showgirls unknowingly filmed in their dressing rooms changing clothes . . . . In the case of the young daughter, the parents had the man arrested. Unfortunately he was released because such an activity is not a criminal act."); *id.* (statement of Stan Olsen, Las Vegas Metropolitan Police Department) ("There was also the case of [S.W.] who rented a house where the landlord placed hidden cameras in the bedroom and bathroom filming her in various stages of nudity. Nothing could be done. A person has the right to privacy in the bathroom of their home.").

NRS 200.604 did not concern criminalizing the republication of consensually captured images of a person's private areas. *See* Hearing on S.B. 10 Before the Assembly Judiciary Comm., 74th Leg. (Nev., May 16, 2007) (statement of Assemblyman Marcus L. Conklin) ("We are trying to punish those who would make a living at doing this . . . . How do we get those people but not somebody . . . who in a social, consensual setting gets caught up in something ridiculous that happens and then somebody got mad."); *see also* Hearing on S.B. 10 Before the Assembly Judiciary Comm., 74th Leg. (Nev., April 18, 2007) (statement of Senator Barbara K. Cegavske) ("[Janet Jackson] had no expectancy of privacy [at the Superbowl]. She did not expect that people would not be taking pictures. This is geared more towards when you are in your home or underneath clothing.").

C.

A state court may consult federal law to disambiguate a state statute that is identical or similar to a federal act. *See* Shambie Singer, 2B *Sutherland Statutory Construction* § 52:2 (7th ed. 2017) (citing examples of states applying federal interpretations to statutes adopt-

ed from federal acts). The Legislature adopted NRS 200.604 and the related definitions in NRS 200.604(8) from 18 U.S.C. § 1801 (2006), the Video Voyeurism Prevention Act of 2004. The federal act prohibits taking videos or photographs of a person's private area without consent in settings where that person has a reasonable expectation of privacy. 18 U.S.C. § 1801(1).

Congress passed 18 U.S.C. § 1801 to thwart "video voyeurism," as "[t]he development of small, concealed cameras and cell phone cameras, along with the instantaneous distribution capabilities of the Internet, have combined to create a threat to the privacy of unsuspecting adults, high school students, and children." H.R. Rep. No. 108-504, at 3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 3292, 3293. Such invasions of privacy occur when the voyeur takes pictures or video of an unsuspecting person's private areas in real time, such as in "locker rooms, department store dressing rooms, and even homes." *Id.* Consistent with the statute's text and history, federal courts have interpreted 18 U.S.C. § 1801 as prohibiting a person from capturing nonconsensual images of a person's private area in situations in which that person has a reasonable expectation of privacy. *See United States v. Johnson*, No. 2:10-CR-71-FtM-36DNF, 2011 WL 2446567, at *9 (M.D. Florida June 15, 2011) (defendant committed voyeurism under 18 U.S.C. § 1801 when concealing his cell phone in a bathroom and recording a 13-year-old female). 18 U.S.C. § 1801 and its interpretive gloss support reading NRS 200.604 to prohibit the act of taking photos or video of a person's private area in real time, a type of voyeurism, not to prohibit the copying or dissemination of a person's pre-existing consensual pictures and videos.

D.

The rule of lenity dispels any lingering doubts as to the conduct NRS 200.604 criminalizes. Because "a fair system of laws requires precision in the definition of offenses and punishments," the rule of lenity holds that "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296, 301 (Thompson/West 2012); *compare* Singer, *supra* at § 59:3 ("It is an ancient rule of statutory construction that penal statutes should be strictly construed . . . in favor of the persons on whom penalties are sought to be imposed."), *with Buschauer v. State*, 106 Nev. 890, 896, 804 P.2d 1046, 1049 (1990) ("[T]his court will narrowly construe penal statutes where they are ambiguous."), *and Romero v. State*, 116 Nev. 344, 348, 996 P.2d 894, 897 (2000) (construing NRS 206.310 and NRS 193.155 narrowly to hold that the value of damages for partially damaged property resulting from malicious destruction "must be directly tied to the damage to the property," as opposed to any incidental effect).

In light of its history, the interpretation given the federal model from which it was drawn, and the rule of lenity, we conclude that NRS 200.604 prohibits capturing or disseminating an image of a person's private parts, taken without consent, under circumstances in which that person has a reasonable expectation of privacy. NRS 200.604(1) does not prohibit capturing an image of an image of a private area. Nor does NRS 200.604(2) apply where the original image was consensually taken.

III.

With NRS 200.604's meaning clarified, we now decide whether the State provided sufficient evidence to convict Coleman. A sufficiency-of-evidence challenge asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Middleton v. State*, 114 Nev. 1089, 1103, 968 P.2d 296, 306 (1998) (internal quotation marks omitted).

The State did not present sufficient evidence to convict Coleman under NRS 200.604. At trial, the State proved that Coleman used his cell phone to copy L.M.'s video while it played on her cell phone. NRS 200.604 does not prohibit this conduct. Under NRS 200.604(1), the State needed to show that Coleman took a video of L.M.'s private parts, without her consent, under circumstances in which she had a reasonable right to privacy. However, Coleman only copied a pre-existing video, and did not capture an image of L.M.'s private area in real time. And, pursuant to NRS 200.604(2), the State needed to show the original video depicting L.M.'s private area was not taken consensually. L.M. testified that the videos on her cell phone were consensual, thus NRS 200.604(2) did not prohibit their dissemination.

Our holding that NRS 200.604 does not criminalize copying a consensually recorded image of a sexual act makes it unnecessary to delve into the State's argument that, although L.M. gave her cell phone to Coleman, she did not thereby consent to his examination of its contents. *Compare Byars v. State*, 130 Nev. 848, 856, 336 P.3d 939, 945 (2014) ("Consent to a search . . . provides an exception to both the Fourth Amendment[ ] . . . and warrant requirements.") (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)), *with Riley v. California*, 573 U.S. 373, 386 (2014) (holding that the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested).

We reverse.

Douglas, C.J., and Gibbons, J., concur.

PHILIP R.; AND REGINA R., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE CYNTHIA N. GIULIANI, DISTRICT JUDGE, RESPONDENTS, AND STEPHANIE R.; JOEY R.; CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; AND E.R., A MINOR, REAL PARTIES IN INTEREST.

No. 73198

IN THE MATTER OF E.R., A MINOR.

CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; AND CLARK COUNTY DISTRICT ATTORNEY'S OFFICE, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE CYNTHIA N. GIULIANI, DISTRICT JUDGE, RESPONDENTS, AND PHILIP R.; REGINA R.; STEPHANIE R.; AND JOEY R.; AND E.R., A MINOR, REAL PARTIES IN INTEREST.

No. 73272

May 3, 2018 416 P.3d 242

Consolidated original petitions for writs of mandamus challenging a district court order concerning the placement of a minor child.

Petitions granted.

Steven B. Wolfson, District Attorney, and *Tanner L. Sharp*, Deputy District Attorney, Clark County, for Clark County Department of Family Services and Clark County District Attorney's Office.

Mills, Mills & Anderson and *Gregory S. Mills* and *Daniel W. Anderson*, Las Vegas, for Philip R. and Regina R.

Ford & Friedman, LLC, and *Christopher P. Ford*, Henderson, for Stephanie R. and Joey R.

McFarling Law Group and *Michael J. Burton* and *Emily M. McFarling*, Las Vegas; *Law Offices of Elizabeth R. Mikesell* and *Raymond E. McKay*, Las Vegas, for E.R., a minor.

Before the Supreme Court, CHERRY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, CHERRY, J.:

These consolidated original petitions for writs of mandamus challenge a district court order directing that the minor child be removed

from her current adoptive foster home and placed with maternal relatives in Georgia based on a familial placement preference under NRS 432B.550(5). Because the placement order was entered after parental rights to the child were terminated, the parties dispute whether the statutory preference for placement with a family member still applies. We conclude that a familial placement preference survives the termination of parental rights, but the placement preference is then governed by NRS 128.110(2) rather than NRS 432B.550(5). We further conclude that the maternal relatives had a reasonable excuse for their delay in seeking placement and they were entitled to a familial placement preference. However, the district court failed to enter factual findings or give adequate weight to the child's best interest or the Department of Family Services' discretion to determine placement in this case under NRS 128.110(2). Accordingly, we grant the petitions for writs of mandamus.

FACTS AND PROCEDURAL HISTORY

In July 2015, Clark County Department of Family Services (DFS) removed one-month-old E.R. (the child) from the custody of her mother, Nellie S., because of neglect and placed the child in foster care. The juvenile division of the district court adopted a goal of reunification between Nellie and the child. DFS conducted a search for relatives with whom to place the child but the search proved unsuccessful. By August 2016, Nellie had not maintained visitation with the child or contact with DFS, and the district court changed the permanency goal to termination of parental rights and adoption. DFS initiated a separate proceeding in the district court to terminate Nellie's parental rights. In September 2016, the child was placed with Philip R. and Regina R. (the foster parents), who were an adoptive resource.

In October 2016, approximately 15 months after the child's initial removal, Nellie's first cousin Stephanie R. contacted DFS to request placement of the child with her and her husband Joey R. in Georgia (the maternal relatives). DFS initiated the process under the Interstate Compact for the Placement of Children for obtaining out-of-state placement approval for the maternal relatives. The placement was approved in March 2017.

In the meantime, the district court in the termination proceeding entered an order terminating the parental rights of Nellie and any fathers claiming paternity of the child on February 18, 2017. The termination order decreed "that the custody and control of [the child] is vested in [DFS] with authority to place the minor child for adoption." The foster parents began the process for adopting the child.

In April 2017, DFS placed the matter on the district court's calendar to allow the maternal relatives to address the court regarding placement. An evidentiary hearing was held before a court master to determine whether the child's placement should be changed. DFS

caseworker Kristina Quinlan testified about DFS's search for relatives and provided that DFS was unaware of Stephanie until she contacted DFS in October 2016. Quinlan also testified that the then-two-year-old child was extremely bonded with the foster parents, whom she regarded as her mom and dad, and it was not in her best interest to be placed with the maternal relatives because it would delay permanency. Taryn Lamaison, a DFS supervisor and a national child trauma trainer, observed the child with the foster parents and opined that removing the child from their care was not in the child's best interest. Lamaison explained that removing a child at a young age can affect brain development and result in negative coping mechanisms. She also testified that the child was already very clingy and attached to the foster parents, another move would constitute the child's fourth removal and cause long-term trauma, and she would expect the child to regress. If the child were to be removed, Lamaison described a gradual transition to the new home that could lessen the trauma and would last several weeks and be accompanied by therapy.

The foster parents testified about the home, family, care, and educational development they had provided the child since September 2016, and that they were committed to an open adoption. Stephanie testified that although she knew Nellie had given birth to the child, she had never met the child and was unaware that the child was in protective custody until October 2016. Stephanie described the home and care she and Joey could provide the child, and she indicated her willingness to transition the child gradually in order to minimize the trauma.

Based on the testimony, the hearing master found that DFS should have located Stephanie earlier because DFS had contact with another relative who knew Stephanie, the maternal relatives demonstrated a reasonable excuse for the delay in requesting placement, and both couples would provide a good family and home for the child. The master found that although the child was "incredibly bonded" with the foster parents, the maternal relatives have a biological connection to the child and will likely end up with one of her siblings.[1] The hearing master found that the "family connection is the overriding consideration" and thus, the child should be placed with the maternal relatives, "despite the trauma that [the child] will experience." The hearing master recommended that the child be placed with the maternal relatives if they comply with "the trauma minimization transition as outlined by [DFS]." The foster parents and DFS filed objections to the hearing master's recommendation.

After hearing argument on the objections, the district court found that the master's findings were not clearly erroneous and affirmed

[1]The record indicates that Nellie was pregnant at the time of the evidentiary hearing and a child was born on April 24, 2017, and placed in protective custody shortly thereafter.

the recommendation. The court concluded that the maternal relatives had a reasonable excuse for the delay in seeking placement of the child, and thus, the familial placement preference under NRS 432B.550 applied. The court further concluded that the hearing master had considered the child's best interest when making his decision and that the maternal relatives will likely end up with one of the child's siblings.

The foster parents and DFS both filed petitions for a writ of mandamus in this court. We consolidated the two cases and entered a stay of the placement decision.

DISCUSSION

A petition for a writ of mandamus is the appropriate means to challenge a placement order entered in a proceeding under NRS Chapter 432B because the order is not appealable. *See Clark Cty. Dist. Att'y v. Eighth Judicial Dist. Court*, 123 Nev. 337, 342, 167 P.3d 922, 925 (2007). A writ of mandamus may be granted "to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion." *Id.*; *see also* NRS 34.160. Questions of law including statutory interpretation are reviewed de novo. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

Familial placement preference

The district court applied the familial placement preference under NRS 432B.550(5), which governs placement of a child who is found in need of protection and is not permitted to remain with the parents. It provides that when determining the child's placement:

> (a) It must be presumed to be in the best interests of the child to be placed together with the siblings of the child.
>
> (b) Preference must be given to placing the child in the following order:
>
> (1) With any person related within the fifth degree of consanguinity to the child or a fictive kin, and who is suitable and able to provide proper care and guidance for the child, regardless of whether the relative or fictive kin resides within this State.
>
> (2) In a foster home that is licensed pursuant to chapter 424 of NRS.

NRS 432B.550(5). The foster parents and DFS contend that the familial placement preference under NRS 432B.550(5) no longer applies once parental rights are terminated. The maternal relatives and the child argue that the familial preference remains intact after termination of parental rights and does not end until the time of adoption.

We conclude that although the placement decision was initially governed by NRS 432B.550(5) when the child was removed from Nellie's care and remained in protective custody during the period of reunification services, once parental rights were terminated, a different placement preference provision under NRS Chapter 128 applied. When the district court enters an order terminating parental rights, NRS 128.110(2) provides:

> If the child is placed in the custody and control of a person or agency qualified by the laws of this State to receive children for placement, the person or agency, in seeking to place the child:
>
> (a) May give preference to the placement of the child with any person related within the fifth degree of consanguinity to the child whom the person or agency finds suitable and able to provide proper care and guidance for the child, regardless of whether the relative resides within this State.
>
> (b) Shall, if practicable, give preference to the placement of the child together with his or her siblings.

Here, the order terminating Nellie's parental rights was entered before the placement hearing and gave custody and control of the child to DFS with the authority to place the child for adoption. Thus, we conclude that NRS 128.110(2) governed the placement decision in this case and the district court erred in applying the placement preference under NRS 432B.550(5).

Delay in requesting placement

The foster parents and DFS assert that Stephanie's 15-month delay in coming forward and requesting placement, without a reasonable excuse, rendered the familial placement preference inapplicable. We disagree. In *Clark County District Attorney v. Eighth Judicial District Court*, we discussed both the agency's and the potential relatives' obligations regarding the child's placement outside the home. 123 Nev. 337, 167 P.3d 922 (2007). In that case, the child was placed in protective custody shortly after birth, and the father requested DFS to contact his mother and sister for possible placement. *Id.* at 339, 167 P.3d at 923-24. DFS contacted the grandmother but not the sister because the grandmother discouraged DFS from doing so. *Id.* at 340, 167 P.3d at 924. Shortly after the child was placed with an adoptive foster family, the sister contacted DFS about adopting the child, but she and her husband were somewhat undecided at that time and did not file a motion for placement until a year later, when the child was two years old and had bonded with the foster family. *Id.* at 340-41, 167 P.3d at 924. The district court granted the sister's motion for placement, and on writ review, we concluded that because the father had requested DFS to contact his sister, DFS should have pursued whether that placement was a viable option despite the grandmother's request. *Id.* at 347, 167 P.3d

at 929. At the same time, the sister and her husband were on notice that the child was in protective custody and "had a concomitant duty to step forward and request custody, if they wished to have the child placed with them." *Id.* We held that

> [a] family member's failure to timely and definitively request custody of a child who has been placed in protective custody, *when that family member knows of the protective custody placement*, may ultimately either render the statutory familial preference inapplicable or influence the district court's determination of the child's best interest.

Id. (emphasis added). Although our decision in *Clark County* was interpreting NRS 432B.550, which requires that any search for relatives "be completed within 1 year after the initial placement of the child outside" the home,[2] NRS 128.110(2) similarly provides that "[a]ny search for a relative with whom to place a child pursuant to this subsection must be completed within 1 year after the initial placement of the child outside of his or her home." Thus, the explanation provided in *Clark County* is instructive in this case.

Here, the district court concluded that DFS should have located Stephanie earlier, and because she did not know the child was in protective custody, she had a reasonable excuse for the delay in seeking placement of the child. We conclude that the record supports the district court's decision in this regard. Therefore, the delay in seeking placement does not render the familial placement preference inapplicable.

The child's best interest

DFS and the foster parents contend that the district court misapplied the legal standard by relying too heavily on the familial preference and not adequately considering the child's best interest. We agree. In *Clark County*, we held that the child's best interest necessarily is the main consideration in the placement decision. 123 Nev. at 346, 167 P.3d at 928. We explained that when a child is initially placed with a non-family member, and interested relatives later come forward and timely request custody of the child, the court should first determine whether a familial preference exists. *Id.* The familial preference determination includes whether the relatives are sufficiently related to the child and are "suitable and able to provide proper care and guidance for the child." *Id.* (quoting NRS 432B.550(5)(b)); *accord* NRS 128.110(2)(a).

> Once the criteria for the statutory preference are established, the statute creates a familial preference, not a presumption,

[2]At the time *Clark County* was decided in 2007, the relevant language was contained in NRS 432B.550(5), but a 2011 legislative amendment to the statute moved the substance of that language to NRS 432B.550(6). *See* 2011 Nev. Stat., ch. 57, § 25, at 255-56.

> and the district court must then consider placing the child with the relatives. The placement decision ultimately rests in the district court's discretion, which must be guided by careful consideration of the child's best interest. In rendering its placement decision, the district court must make written findings with respect to any credibility issues and with regard to its ultimate conclusion regarding the child's best interest.

Clark Cty., 123 Nev. at 348, 167 P.3d at 929. Although in *Clark County* we were interpreting the familial placement preference under NRS 432B.550(5)(b), we conclude that a placement decision under NRS 128.110(2) is similarly guided by the child's best interest. *Cf.* NRS 128.005(2)(c) ("The continuing needs of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."); NRS 128.105(1) (stating that the primary consideration in any proceeding to terminate parental rights is the child's best interest).

In this case, the hearing master failed to give adequate weight to the child's best interest when he stated that "the courts and legislature have determined that when comparing bonding with biological, family connection, family connection is the overriding consideration and the family is where the child should be placed, despite the trauma that [the child] will experience with a fourth removal." After finding that both the foster parents and the maternal relatives were relatively equal in the home and life they could provide for the child, the master found the balance tipped in the maternal relatives' favor because of their biological connection and the likelihood one of the child's siblings would be placed with them. Absent from the master's recommendation are findings as to the child's best interest as required by *Clark County*, except for acknowledging that the removal will cause her trauma and ordering a trauma-minimization transition. And while the district court concluded in its written order that the hearing master had considered the child's best interest, the district court did not include written findings regarding the child's best interest.

Discretion of the agency

Finally, because the district court applied NRS 432B.550(5)(b), the district court did not consider the agency's discretion to determine the child's placement under NRS 128.110(2). NRS 128.110(2)(a) states that the agency "[m]ay give preference to the placement of the child" with a family member whom "the agency finds suitable and able to provide proper care and guidance for the child," while NRS 432B.550(5)(b) states that "preference must be given" to placement of the child with a suitable family member. *Compare State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) (stating that "may" is permissive unless the legislative intent indi-

cates otherwise), *with Washoe Cty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) ("The word 'must' generally imposes a mandatory requirement."). As for the sibling placement, NRS 128.110(2)(b) states that the agency "[s]hall, if practicable, give preference to the placement of the child together with his or her siblings," whereas NRS 432B.550(5)(a) provides that "[i]t must be presumed to be in the best interests of the child to be placed together with the siblings of the child." *See Practicable*, *Black's Law Dictionary* (10th ed. 2014) (defining "practicable" as "reasonably capable of being accomplished").

By applying the wrong statute, the court erroneously failed to consider DFS's discretion to give a preference to placement of the child with a relative and whether it was practicable to place the child with a sibling. Additionally, since the younger sibling's placement was not clear at the time of the underlying proceeding, the practicability of placing the siblings together requires more factual development. Accordingly, we conclude that the district court should conduct a trial de novo and consider the placement decision under NRS 128.110(2), and give appropriate weight to DFS's discretion and the child's best interest in this case.[3] *See In re A.B.*, 128 Nev. 764, 770-71, 291 P.3d 122, 126-27 (2012) (providing that the master's findings and recommendation are only advisory and the district court may conduct a trial de novo); *see also* EDCR 1.46(g)(7).

CONCLUSION

We conclude that the district court erred in applying the familial placement preference under NRS 432B.550(5) because NRS 128.110(2) is the applicable standard once parental rights are terminated. Further, the district court failed to set forth adequate factual findings concerning the child's best interest. Accordingly, we grant the petitions for writ relief and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate the order placing the child with the maternal relatives and to conduct a trial de novo and enter a decision consistent with the guidelines set forth in this opinion.[4]

Parraguirre and Stiglich, JJ., concur.

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[3]The master's recommendation also required the maternal relatives to provide proof of their familial relationship before the child would be placed with them. Because the familial relationship must be established before any placement preference applies, the district court must consider evidence of the familial relationship in the trial de novo. *See Clark Cty.*, 123 Nev. at 348, 167 P.3d at 929.

[4]In light of our disposition in these matters, we necessarily vacate the stay imposed by our order on July 13, 2017.

SEAN FITZGERALD, Appellant, *v.* MOBILE BILLBOARDS, LLC, a Nevada Limited Liability Company; and VINCENT BARTELLO, an Individual, Respondents.

No. 72803

May 3, 2018 416 P.3d 209

Appeal from a district court order granting a motion to dismiss in a defamation action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Reversed and remanded.

Kemp & Kemp and *James P. Kemp* and *Victoria L. Neal*, Las Vegas, for Appellant.

Mobile Billboards, LLC, in Pro Se.

Vincent Bartello, in Pro Se.

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

OPINION

By the Court, Hardesty, J.:

In this appeal, we address whether allegedly defamatory statements made by an employer regarding an employee's alleged abuse of the workers' compensation program to obtain prescription pain medication, a violation of NRS 616D.300, are absolutely privileged. While we have recognized that the common law absolute privilege applies to quasi-judicial proceedings, NRS 616D.020 provides a conditional privilege for statements alleging a violation of NRS 616D.300. Because the district court erred in finding that the allegedly defamatory statements in this case were absolutely privileged and did not determine whether the conditional privilege in NRS 616D.020 applied, we reverse the order of dismissal and remand this matter to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Appellant Sean Fitzgerald was employed as a head fleet mechanic by respondent Mobile Billboards, LLC, which is owned by respondent Vincent Bartello (collectively, respondents). Shortly after the start of his employment, appellant sustained a work-related injury. Appellant filed a workers' compensation claim with respondents' insurance company. Thereafter, respondents made statements to the insurance company expressing concern regarding appellant's usage of prescription pain medication, and the insurance company

informed appellant of these statements in a letter. The insurance company also repeated the statements to appellant's workers' compensation doctor.

Appellant filed a complaint in the district court against respondents for defamation, alleging that respondents' statements were false and harmed his reputation and livelihood. In particular, appellant alleged that respondents stated, "[appellant] was attempting to obtain more and different prescription painkillers after his industrial injury, that multiple prescription painkillers, and prescriptions for additional painkillers, were found in [appellant's] personal property." Respondents filed a motion to dismiss pursuant to NRCP 12(b)(5), arguing that their statements were immune under the absolute privilege. The district court agreed with respondents and dismissed the case. This appeal followed.[1]

DISCUSSION

Standard of review

This court reviews a district court's decision to dismiss a complaint pursuant to NRCP 12(b)(5) rigorously, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the plaintiff. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A complaint should be dismissed for failure to state a claim only when "it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [him] to relief." *Id*. at 228, 181 P.3d at 672. Further, this court reviews a party's legal entitlement to claim an absolute or conditional privilege de novo. *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009).

Absolute privilege

Appellant argues that the district court erred when it determined that respondents' statements to the insurance company were protected by an absolute common law privilege without considering the impact of the conditional privilege provided in NRS 616D.020. We agree.

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[1]This court entered an order removing counsel of record for respondents and directing respondents to retain new counsel, or in the case of Vincent Bartello, to inform this court whether he wished to proceed in pro se. *Fitzgerald v. Mobile Billboards, LLC*, Docket No. 72803 (Order Regarding Answering Brief and Conditionally Imposing Sanctions, Oct. 30, 2017). In addition, this court cautioned respondents that a failure to timely respond could result in this appeal being decided without an answering brief. *Id*. at 1-2. As respondents failed to respond to the order, this court ordered that "this matter . . . be decided on the opening brief alone, without an answering brief from either respondent." *Id*. at 2.

Nevada recognizes the common law absolute privilege that protects defamatory statements made during the course of a judicial proceeding. *Jacobs v. Adelson*, 130 Nev. 408, 412, 325 P.3d 1282, 1285 (2014). The privilege "has been extended to quasi-judicial proceedings before executive officers, boards, and commissions." *Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983). "In order for the absolute privilege to apply to defamatory statements . . . , (1) a judicial [or quasi-judicial] proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation." *Jacobs*, 130 Nev. at 413, 325 P.3d at 1285 (internal quotation marks omitted). "This privilege . . . acts as a complete bar to defamation claims based on privileged statements" and recognizes that certain defamatory communications should not serve as a basis for liability in a defamation suit "because the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Id*. (internal quotation marks omitted). Thus, the common law absolute privilege bars any civil litigation for defamatory statements even when the defamatory statements were published with malicious intent. *Id*.

In Nevada, "[t]he common law rule is the rule of decision in our courts unless in conflict with constitutional or statutory commands." *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 100, 450 P.2d 358, 359 (1969). The Nevada Industrial Insurance Act (NIIA) governs the administration of a workers' compensation claim in Nevada. *See* NRS 616A.010. The NIIA precludes liability in a defamation suit for certain statements made in relation to a violation of the NIIA. In particular, NRS 616D.020 provides as follows:

> No person is subject to any criminal penalty or civil liability for libel, slander or any similar cause of action in tort if the person, *without malice*, discloses information relating to a violation of . . . [NRS] 616D.300 . . . or any fraud in the administration of [the NIIA] . . . .

(Emphasis added.) NRS 616D.020 expressly applies to any statements made in relation to a violation of NRS 616D.300, which penalizes "a person . . . who knowingly conceals a material fact to obtain or attempt to obtain any benefit, including a controlled substance." NRS 616D.020 provides a conditional privilege because it requires that the statement was made without malice. *See Lubin v. Kunin*, 117 Nev. 107, 115, 17 P.3d 422, 428 (2001) (providing that "[t]he common interest privilege is conditional and exists *where a defamatory statement is made in good faith*" (emphasis added) (internal quotation marks omitted)).

Consequently, it appears that the Legislature did not believe that, in the context of a workers' compensation claim, speaking freely

about a person's actual or perceived violation of NRS 616D.300 outweighed the risks of statements made with malicious intent. The absolute privilege is in conflict with the conditional privilege in NRS 616D.020 because it protects statements even if they were made with malicious intent. We conclude that the common law absolute privilege has been abrogated by the statutory conditional privilege in the context of defamatory statements in a workers' compensation claim to which NRS 616D.020 is applicable. Therefore, the district court erred in concluding that all of respondents' statements were absolutely privileged justifying dismissal of the complaint as a matter of law.

Application of NRS 616D.020

Appellant argues that the conditional privilege provided by NRS 616D.020 is inapplicable because respondents' statements were made with malice. The district court made no determination as to whether the conditional privilege in NRS 616D.020 applied to respondents' statements.

The existence of a conditional privilege "is a question of law for the court." *Lubin*, 117 Nev. at 115, 17 P.3d at 428. "If the district court determines that the privilege is applicable, the action for defamation will be presented to the jury only if there is sufficient evidence for the jury reasonably to infer that the publication was made with malice in fact." *Id*. (internal quotation marks omitted).

Here, the limited record suggests that, so long as they did not act with malice, NRS 616D.020 provides respondents with immunity for the statements made because respondents' statements were related to appellant's possible concealment of facts to obtain prescription pain medication for his own benefit, a violation of NRS 616D.300. Respondents' statements also implied that appellant committed workers' compensation fraud by taking advantage of the program to obtain additional pain prescription medication after his work-related injury. Nevertheless, respondents' statements must have been made without malicious intent to qualify for the privilege stated in NRS 616D.020. However, without respondents' motion to dismiss in the record on appeal, it is unknown whether respondents asserted and fully presented NRS 616D.020 as a defense, especially in light of the fact that the district court dismissed appellant's complaint in its entirety based on the absolute privilege. Because NRS 616D.020 may not have been raised below, and because this case is at the NRCP 12(b)(5) stage, we decline to address the applicability of the privilege under NRS 616D.020 for the first time on appeal. *See Jacobs*, 130 Nev. at 418, 325 P.3d at 1288 (declining to address the conditional privilege of reply for the first time on appeal because the factual record had not yet been developed at the NRCP 12(b)(5) motion to dismiss stage); *see also Lubin*, 117 Nev. at 116, 17 P.3d at 428

(stating that a conditional privilege, the common interest privilege, should not be considered on an NRCP 12(b)(5) motion to dismiss, "but may or may not be applicable to the case when properly raised and fully presented to the district court").

For the foregoing reasons, we reverse the district court's dismissal order and remand this matter to the district court for further proceedings consistent with this opinion.

PICKERING and GIBBONS, JJ., concur.