CITY OF HENDERSON, a Political Subdivision of the State of Nevada, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE TIMOTHY C. WILLIAMS, District Judge, Respondents, and SOLID STATE PROPERTIES, LLC, a Nevada Limited Liability Company, Real Party in Interest.

No. 81474

June 24, 2021 489 P.3d 908

Original petition for a writ of mandamus challenging a district court order denying a motion to strike a petition for judicial review filed within an existing civil action.

Petition granted.

Nicholas G. Vaskov, City Attorney, and *Wade B. Gochnour* and *Brandon P. Kemble*, Assistant City Attorneys, Henderson, for Petitioner.

Erickson & Whitaker PC and *Brian C. Whitaker* and *Ryan B. Davis*, Henderson, for Real Party in Interest.

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

OPINION

By the Court, Stiglich, J.:

In this opinion, we consider whether a petition for judicial review of an administrative zoning decision pursuant to NRS 278.3195(4) may be filed within an existing civil suit. A petition for judicial review requests district court review of an administrative decision, while a civil action initiates litigation between two or more parties. Here, real party in interest Solid State Properties, LLC, sued petitioner City of Henderson for damages and other forms of civil relief related to the nonenforcement of a zoning decision. Later, after subsequent developments to the zoning decision, Solid State filed within that civil matter a document it titled "Amended Petition for Judicial Review" to challenge the zoning decision. The City moved to strike that document as improperly filed, which motion the district court denied. But because civil actions and judicial review proceedings are fundamentally different, such that they should not be filed together within the same docket, we conclude that the district court erred in denying the City's motion to strike the petition for judicial review. Accordingly, we grant the City's petition for a writ of mandamus.

BACKGROUND

Solid State's property abuts land owned by Eastgate, LLC, in Henderson. Eastgate obtained a conditional use permit (CUP) from the City of Henderson in order to lease its commercially zoned property to a charter school. Because the school creates significant traffic at the beginning and end of the school day, the CUP contained several provisions regarding the queuing pattern on the road alongside both properties. But these provisions were not enforced, and tensions arose between Solid State and Eastgate.

Solid State sued the City in district court, seeking damages, injunctive relief, and attorney fees. The district court denied the injunction, but Solid State's other claims remained pending.

The Henderson City Council thereafter held further proceedings, reviewing and adopting the CUP with amendments. The parties dispute whether this action was an adoption of new amendments to the CUP or a finalization of the CUP for the first time. Regardless, Solid State filed a document within the existing civil action entitled "Amended Petition for Judicial Review" (the Amended Petition), in which it sought "judicial review of [the CUP] . . . and relief from the conditions imposed by the City through its grant of [the CUP]." Solid State grounded the petition in NRS 278.3195(4), which permits parties that are aggrieved by the land use decision of a governing body to file a petition for judicial review in the district court, provided they have already appealed within the governing body. Solid State had not previously petitioned for judicial review in any court.

The City moved to strike the Amended Petition on the ground that it was an improper attempt to file a new action within an existing matter. The City argued that the existing action was a trial-level civil action for damages and injunctive relief that could not properly be coupled with a new action for judicial review of an administrative decision.[1] The district court denied the City's motion and permitted the Amended Petition to proceed as part of the existing civil action. The City then filed the instant petition for a writ of mandamus, arguing that the district court improperly denied its motion to strike the Amended Petition and that writ relief is appropriate.

DISCUSSION

Writ relief is appropriate

This court has held that, generally, "judicial economy and sound judicial administration militate against the utilization of mandamus petitions to review orders denying motions to dismiss and

[1]Further, the City argued that the Amended Petition did not comply with several court procedural rules, that it was not properly served, that Solid State did not pay a filing fee, and that petitions for judicial review could not be heard in business court, where the existing action was filed.

motions for summary judgment."[2] *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983). However, "this court may exercise its discretion to consider such writ petitions when the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule or when an important issue of law needs clarification and this court's review would serve considerations of public policy or sound judicial economy and administration." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006).

The issue of whether a party may file a petition for judicial review within a pending civil action is an issue of first impression for this court. As the law stands, Nevada litigants and judges lack guidance on this point. Therefore, we find it appropriate to entertain this writ petition in order to clarify Nevada law on this issue.

Standard of review

"In the context of writ petitions," this court "review[s] district court orders for an arbitrary or capricious abuse of discretion." *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 913, 362 P.3d 91, 94 (2015). "However, we review questions of law . . . de novo, even in the context of writ petitions." *Id*. While the decision to deny the motion to strike was addressed to the district court's discretion, the ultimate question presented in this petition is one of law: whether a petition for judicial review may be filed within a preexisting civil case. Therefore, we review the district court's decision de novo.

A petition for judicial review cannot be filed within an ongoing civil action

NRS 278.3195(4) provides that a person who has administratively challenged the land use decision of a governing body and is aggrieved by the decision resolving that challenge may appeal in district court through filing a petition for judicial review. A petition for judicial review initiates a new action. *See* NRS 278.0235 (setting 25-day time limit to "commence[ ]" an action or proceeding for judicial review); NRCP 3 advisory committee's note to 2019 amendment ("As used in these rules, 'complaint' includes a petition or other document that initiates a civil action.").

Under NRS 278.0235, a petition for judicial review must be filed within 25 days after the date notice of the governing body's final action is filed. The Eighth Judicial District Court has specific procedural rules governing petitions for judicial review. Once the administrative record is transmitted to the court, although the

[2]While the district court's order was characterized as denying a motion to strike a filing in the civil action, the effect of denying that motion to strike was equivalent to denying a motion to dismiss the petition for judicial review.

EDCR do not specify when or how this happens, the petitioner has 21 days to file and serve a memorandum of points and authorities. EDCR 2.15(a). Then, the respondent to the petition serves and files a memorandum of points and authorities in opposition, followed by the petitioner's reply points and authorities. EDCR 2.15(b)-(c). Only then may either party serve and file a notice for hearing. EDCR 2.15(d). These filings must conform to the guidelines for appellate briefs in Nevada Rule of Appellate Procedure (NRAP) 28. EDCR 2.15(e). In considering a petition for judicial review, the district court's task is to "review[ ] the agency record to determine whether the [agency's] decision is supported by substantial evidence." *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006).

Throughout the pendency of this matter, there has been confusion and contrary arguments about how, in fact, to characterize the filing by Solid State. It was labeled an "Amended Petition for Judicial Review," but it obviously cannot have been an *amended petition* when no previous petition had been filed. It appears that the document was either an amended pleading meant to supplant the original complaint or a first petition for judicial review of the city council's approval of the CUP and amendments. Given this ambiguity in the filing's title, we look to its content. Solid State cited to NRS 278.3195, which provides an aggrieved party the ability to appeal the land use decision of a governing body to the district court.[3] The filing did not comply with some requirements of a petition for judicial review,[4] but moreover, it complied with *none* of the requirements for an amended pleading laid out in EDCR 5.208 and NRCP 15.

We conclude that the "Amended Petition for Judicial Review" was not an amended pleading that replaced the original civil complaint, but rather a first petition for judicial review of the city council's approval of the CUP with amendments. Accordingly, when the district court denied the City's motion to strike the filing, it permitted two matters to proceed together: a review of an administrative decision and a civil suit.

We have not yet addressed whether a judicial review action can be coupled with a civil action. In *Kay v. Nunez*, this court held that a petition for judicial review, not a petition for a writ of mandamus, is the proper mechanism to seek review of a city's zoning decision. 122 Nev. at 1105-06, 146 P.3d at 805. A few years later, in *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 269-70, 236 P.3d 10, 14-15

[3]NRS 278.3195 is not operative on its own, though it requires that "each governing body" *adopt* the provisions of the section. NRS 278.3195(1). Henderson has adopted such an ordinance. Henderson Municipal Code § 19.6.9.E (2020), https://www.cityofhenderson.com/home/showpublisheddocument/3987/637471869017200000.

[4]The Amended Petition, for example, requested a hearing (violating EDCR 2.15(d)) and was filed in business court (violating EDCR 1.61(b)(18)).

(2010), we concluded that, under *Kay*, issues regarding compliance with the law when amending a master plan and adopting a rezoning ordinance were also properly pursued by way of petition for judicial review. In neither case, however, did we address whether a civil suit could proceed in the same docket with the judicial review petitions.

Civil actions and judicial review actions are distinct types of legal proceedings. As an initial matter, judicial review is statutorily created, and "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review." *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). Thus, the district court's role is entirely different in hearing a petition for judicial review, where the district court functions in a quasi-appellate role distinct from its usual role as a trial court. *See* NRS 278.3195(4) (providing that a party aggrieved by a governing body's decision "may appeal that decision to the district court . . . by filing a petition for judicial review"). Second, the district court, when considering a petition for judicial review, is limited to a review of the "agency record." *Kay*, 122 Nev. at 1105, 146 P.3d at 805. On judicial review, the district court does not examine evidence produced in discovery or through witnesses, as it does throughout the proceedings in a civil case; the district court is expressly constrained to only consider the record of the challenged administrative decision. Third, when each type of case is on appeal before the appellate court, the standard of review differs for each. For civil actions, we review questions of law de novo and the district court's discretionary decisions for an abuse of discretion. When reviewing dispositions of petitions for judicial review, "this court's function is *the same as the district court*: to determine, based on the administrative record, whether substantial evidence supports the *administrative decision*." *Id.* (emphases added).

While we have not yet addressed whether these two kinds of matters can be combined, caselaw from other jurisdictions provides persuasive guidance. For example, the Idaho Supreme Court found that "a petition for judicial review of a road-validation decision of a local governing board is a distinct form of proceeding and cannot be brought as a pleading or motion within an underlying civil lawsuit." *Cobbley v. City of Challis*, 139 P.3d 732, 735 (Idaho 2006). The proceedings must be kept separate, and not "conglomerated," because "one proceeding is appellate in nature and the other is an original action." *Euclid Ave. Tr. v. City of Boise*, 193 P.3d 853, 856 (Idaho 2008). The Arizona Supreme Court concluded that a private cause of action cannot be joined with a request for judicial review as a cross-claim or counterclaim because judicial review is limited in scope compared to a civil action, which does not have the same statutory limitations. *Madsen v. Fendler*, 626 P.2d 1094, 1096-98 (Ariz. 1981); *see also Rail N Ranch Corp. v. Hassell*, 868

P.2d 1070, 1075-76 (Ariz. Ct. App. 1994). And the Tennessee Court of Appeals has "heartily condemn[ed]" the joinder of an appeal of a government action and an original action at a trial court level. *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 386 (Tenn. Ct. App. 1983) ("The necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident. In the lower [c]ourt one is reviewed under the appropriate [a]ppellate rules and the other is tried under trial rules. . . . Like water and oil, the two will not mix.").

Similarly, we now hold that petitions for judicial review of land use decisions pursuant to NRS 278.3195 are distinct from civil actions, and as such, they cannot be joined together. To conclude otherwise would allow confusingly hybrid proceedings in the district courts, wherein the limited appellate review of an administrative decision would be combined with broad, original civil trial matters. Thus, Solid State could not initiate judicial review proceedings within the existing civil action against the City, and the district court erred in denying the City's motion to strike the Amended Petition.

CONCLUSION

We clarify that it is improper to combine (whether from the outset or through a later filing) a petition for judicial review with a related civil action. These actions are too dissimilar for a court to be tasked with balancing both trial and appellate functions in a way that does not lead each to bleed into the other. Further, allowing both matters to proceed together would create a convoluted appellate record for either decision. We therefore grant the City's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to strike the Amended Petition from this docket.[5]

Parraguirre and Silver, JJ., concur.

---

[5]In light of the previously unsettled law on this issue, nothing in this opinion prevents the court from also transferring the amended petition into a new docket if deemed warranted.

IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATE OF IDA RUBIN, AN ADULT PROTECTED PERSON.

JASON RUBIN, APPELLANT, *v.* IDA RUBIN; AND MARK RUBIN, RESPONDENTS.

No. 80300

July 1, 2021 491 P.3d 1

Appeal from a district court order denying a guardianship petition. Eighth Judicial District Court, Family Division, Clark County; Linda Marquis, Judge.

Affirmed.

Solomon Dwiggins & Freer, Ltd., and *Alan D. Freer, Mark A. Solomon*, and *Ross E. Evans*, Las Vegas, for Appellant.

Hutchison & Steffen, PLLC, and *Michael K. Wall*, Las Vegas, for Respondent Ida Rubin.

Grant Morris Dodds, PLLC, and *Jason M. Aivaz*, Henderson, for Respondent Mark Rubin.

Before the Supreme Court, EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

NRS 159.044(2)(i)(1) provides that a petition for adult guardianship must include a certificate from a physician or a qualified individual demonstrating need for a guardianship. We conclude that this certificate is required for the district court to consider the petition but the certificate does not need to be based on an in-person examination of the proposed protected person. Furthermore, whether the petition and certificate warrant the need for a guardianship or further proceedings is within the sound discretion of the district court. In this case, we conclude that although the district court relied on the wrong reasoning, the district court ultimately did not abuse its discretion when it dismissed the guardianship petition because the petition did not demonstrate that the proposed protected person was incapacitated.

FACTS AND PROCEDURAL HISTORY

Appellant Jason Rubin filed a petition for appointment of temporary guardian and to establish a general permanent guardianship

over his mother, respondent Ida Rubin.[1] Jason's petition requested a guardianship over Ida's estate and her person.[2] In his petition, Jason alleged that Ida suffered from paranoid schizophrenia and that her mental health was declining. Jason attached to his petition call logs from the Las Vegas Metropolitan Police Department (LVMPD), as well as incident reports from the security team at Ida's residence, Securitas USA, which detailed events where Ida would ask the officers to perform nonsensical acts.[3] Ida objected to Jason's petition for guardianship, attesting that she was "competent enough to handle [her] own medical and financial affairs." Respondent Mark Rubin, Ida's son and Jason's brother, joined Ida's objection to Jason's petition for guardianship. The district court held a hearing and denied the petition without prejudice, finding that under NRS 159.044(2)(i)(1) a guardianship over an adult proposed protected person cannot be granted without a physician's certificate. The district court ordered that Jason could refile the petition if he was able to obtain a physician's certificate.

Thereafter, Jason filed a "Petition for Rehearing and Reconsideration of Petition for Appointment of Guardians of the Person and Estate of Ida Rubin." The petition for rehearing incorporated the first guardianship petition, alleging the same facts, but it also included a physician's certificate prepared by Dr. Gregory P. Brown. Dr. Brown reviewed the LVMPD's call logs, the original petition for appointment of guardianship, and email correspondence from Securitas USA to make his evaluation. Dr. Brown did not personally evaluate Ida. However, based upon his review of the information provided to him, Dr. Brown opined in the certificate that the "series of events [reviewed] . . . strongly suggest[s] the presence of psychosis [a substantial break in the perception of consensual reality]." (Third alteration in original.) Dr. Brown further stated that he believed that Ida's "delusional beliefs . . . placed her at risk of harm [either to self or others]." (Alteration in original.) Dr. Brown recommended that Ida "receive a complete neurological evaluation and a complete psychiatric evaluation to assess her mental functioning

[1]Jason and his wife jointly requested a guardianship over Ida; however, only Jason filed a notice of appeal. Thus, we only refer to Jason in this appeal.

[2]Jason has not alleged any financial harm to warrant a guardianship over Ida's estate, and Jason's counsel acknowledged at oral argument that the guardianship petition only concerned Ida's person. Thus, we only address the guardianship petition over Ida's person, not her estate.

[3]Some of these acts included "check[ing] her home for drugs; . . . speak[ing] with golfers near hole #12 who she feels [are the Los Angeles Police Department (LAPD)]; . . . to conduct a perimeter check due to LAPD being on her property; [and] to assist with overhead flying planes which she alleges [are] burning her face." Securitas USA also reported that Ida stole a golf flag from the twelfth hole, approached golfers, and started yelling at them.

and possible need for treatment . . . [, which] could also provide further data to support [a] need for [a] guardianship."

At a hearing on the rehearing petition, the district court entertained arguments from both parties' counsel, but no evidence was offered or admitted. Despite the physician's certificate, the district court denied the petition and did not appoint a guardian over Ida or her estate. The district court reasoned that the physician's certificate Jason attached to his petition for rehearing was insufficient because it "was based on hearsay and double hearsay" and "was made without having seen [Ida]." The district court also found that, although "there is a concern for [Ida]'s well being and safety, . . . [the] guardianship may not be necessary because there are less restrictive means in place," referring to the fact that Mark is listed as Ida's attorney-in-fact in her power of attorney. In declining to reconsider the guardianship petition, the district court ordered that it would "not open discovery or require a[medical] evaluation of . . . I[da] . . . as it is an inappropriate shifting of the burden." Jason appealed.

DISCUSSION

This court has jurisdiction over the appeal

As an initial matter, we must decide whether Jason's appeal was timely filed. Ida argues that the district court's first order, which denied the guardianship petition, was the final, appealable judgment. Because Jason filed an appeal only from the district court's second order, which denied the rehearing petition, Ida contends that his appeal was untimely filed. Conversely, Jason argues that the first order denying his petition for guardianship was not a final order and was therefore not appealable.

We conclude that the district court's first order essentially dismissed the guardianship petition with leave to amend, making it an interlocutory, nonappealable order. *See Bergenfield v. BAC Home Loans Servicing, LP*, 131 Nev. 683, 685, 354 P.3d 1282, 1284 (2015) (holding that "a district court order dismissing a complaint with leave to amend is not final and appealable"). At the guardianship petition hearing, Jason asked the district court if it could give him time to obtain a physician's certificate before dismissing the petition. The district court responded that it was not dismissing the petition, but rather, was denying it until Jason could refile with a physician's certificate. The written order expressly stated that the denial was without prejudice and Jason could refile the petition if he obtained a physician's certificate. Although the district court did not explicitly characterize its order as one allowing leave to amend, it can be implied from the effect of the order and from the district court's reasoning at the hearing on the guardianship petition. *See id*. at 684, 354 P.3d at 1283 (stating that "[t]his court determines

the finality of an order or judgment by looking to what the order or judgment actually *does*, not what it is called" (internal quotation marks omitted)). This makes the first order an interlocutory order that is not appealable.

By contrast, the order on rehearing disposed of all the issues in the case and left nothing for the district court to consider in the future. *See Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 590, 356 P.3d 1085, 1090 (2015) (stating that "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney[ ] fees and costs" (internal quotation marks omitted)). The fact that Jason misnamed his amended petition as a "[p]etition for [r]ehearing and [r]econsideration" is of no consequence because it was, in effect, an amended petition that incorporated the first petition and also included a physician's certificate. *See Bergenfield*, 131 Nev. at 684, 354 P.3d at 1283. Therefore, we conclude that we have jurisdiction over this appeal because Jason timely filed a notice of appeal from the district court's final order.[4] NRAP 3A(b)(1).

The district court did not abuse its discretion by denying the guardianship petition

Jason argues that the district court erred when it concluded that a physician's certificate is required for a guardianship petition. And, he argues, even if one is required, the district court erred in finding that his physician's certificate was insufficient. Additionally, Jason argues that the district court erred when it denied the petition without allowing discovery or holding an evidentiary hearing.

"Absent a showing of abuse, we will not disturb the district court's exercise of discretion concerning guardianship determinations. However, we must be satisfied that the district court's decision was based upon appropriate reasons." *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 163, 87 P.3d 521, 525 (2004) (footnote omitted) (internal quotation marks omitted). Moreover, "[t]his court reviews questions of statutory construction de novo." *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 71, 458 P.3d 336, 339 (2020). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Id.* (alteration in original) (internal quotation marks omitted).

The statute at issue here, NRS 159.044, sets forth the requirements for a guardianship petition. NRS 159.044(2) provides that "*[t]o the extent the petitioner knows or reasonably may ascertain*

[4]NRS 159.375 enumerates certain guardianship orders that are appealable. However, none of the enumerated provisions include an appeal from an order denying a petition for guardianship. Because we review such an order as a final adjudication of the petition, we rely on the more general grant of authority to appeal final judgments set forth in NRAP 3A(b)(1).

or obtain, the petition *must include, without limitation*" certain information and documents. (Emphases added.) Such information and documents include "[a] certificate signed by a physician" or other qualified person that states (1) "[t]he need for a guardian;" (2) "[w]hether the proposed protected person presents a danger to himself or herself or others;" (3) "[w]hether the attendance of the proposed protected person at a hearing would be detrimental to the proposed protected person;" (4) "[w]hether the proposed protected person would comprehend the reason for a hearing or contribute to the proceeding;" and (5) "[w]hether the proposed protected person is capable of living independently with or without assistance." NRS 159.044(2)(i)(1)(I)-(V).[5] NRS 159.044(2)'s use of "must" makes it clear that a certificate is required for a guardianship petition. *See Must*, *A Dictionary of Modern Legal Usage* (Bryan A. Garner, ed., 2d ed. 1995) (defining "must" as "a strong *ought* . . . or an absolute requirement"). The qualifying language in the statute relates to the content in the certificate not whether the certificate must be provided. Thus, the district court did not err in requiring that Jason include a certificate with his guardianship petition.

It appears, however, that the district court found the physician's certificate insufficient to satisfy NRS 159.044(2)(i)(1)'s requirements. Specifically, the district court found that the physician's certificate was based on hearsay and was produced without conducting an in-person evaluation of the proposed protected person. We conclude that this was error. First, experts may, and commonly do, rely on hearsay when making expert opinions. *See* NRS 50.285(2) (providing that experts may rely on "facts or data [that are] not . . . admissible in evidence" so long as it is "of a type reasonably relied upon by experts in forming opinions or inferences upon the subject"). Second, while the statute specifies the subjects the certificate must address, NRS 159.044(2)(i)(1)(I)-(V), it is silent as to the basis required for the statements the certificate contains. Because the plain language of the statute does not compel an in-person physical examination of the proposed protected person, it is not appropriate for us to revise the statute to add one. *Felton v. Douglas Cty.*, 134 Nev. 34, 39 n.2, 410 P.3d 991, 996 n.2 (2018) ("[D]eclin[ing] the invitation to adopt a rule that is absent from statutory language."). While NRS 159.044(2) states what a guardianship petition "must" contain, it recognizes the exigency that guardianship petitions can involve and that, in an appropriate case, the requirements apply only "[t]o the extent the petitioner knows or reasonably may ascertain or obtain." A certificate based

[5]Under NRS 159.044(2)(i)(1), the certificate can be from "a physician who is licensed to practice medicine in this State or is employed by the Department of Veterans Affairs, a letter signed by any governmental agency in this State which conducts investigations or a certificate signed by any other person whom the court finds qualified."

on an in-person examination may in many cases be preferable or more persuasive than one based on a record review. But adding an in-person examination requirement to the requirement of a certificate from a physician or other qualified professional in every case detracts from the flexibility NRS 159.044(2) contemplates.

Although for reasons different from those given by the district court, we conclude that it reached the right result. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (stating that "[t]his court will affirm a district court's order if [it] reached the correct result, even if for the wrong reason"). It is within the district court's sound discretion to determine whether the contents of the petition and certificate demonstrate a need for a guardianship. *See In re Guardianship of L.S. & H.S.*, 120 Nev. at 163, 87 P.3d at 525. The certificate must include the five requirements set forth in NRS 159.044(2)(i)(1)(I)-(V), as stated above. Additionally, in order for a court to grant a guardianship petition, the petitioner must demonstrate that the proposed protected person is incapacitated. *See* NRS 159.054(1) (providing that "[i]f the court finds that the proposed protected person is not incapacitated and is not in need of a guardian, the court shall dismiss the petition"). NRS 159.019 defines "incapacitated" as an individual who "is unable to receive and evaluate information or make or communicate decisions to such an extent that the person lacks the ability to meet essential requirements for physical health, safety or self-care without appropriate assistance."

Although the allegations concerning Ida's mental health are concerning, they are not new. The record reflects that Ida has suffered from mental illness for some time but remains capable of caring for herself and handling her day-to-day activities. Notwithstanding the record, Dr. Brown declined to conclude that Ida was incapable of living independently. Further, although Dr. Brown expressed concern that Ida's mental illness may cause her to be a danger to herself or others, he provided no facts and the record does not support that Ida's safety is in jeopardy. In fact, the police call logs state that Ida is "ok but delusional" and that she is "able to care for [her]self and [that her] house was clean." Thus, the physician's certificate did not sufficiently address the requirements in NRS 159.044(2)(i)(1)(I)-(V), and Jason did not demonstrate that Ida was incapacitated as that term is defined under NRS 159.019. Accordingly, we conclude that the district court did not abuse its discretion when it found that a guardianship over Ida's person was not necessary, especially when coupled with the fact that Ida's other son Mark has a power of attorney over her.

We also conclude that, although the district court's reasoning was erroneous, it did not abuse its discretion in denying the petition without conducting discovery or holding an evidentiary hearing. While the guardianship statutes are silent on whether discovery is

proper in guardianship matters, we conclude that NRCP 26 generally permits discovery but the district court has discretion to control and limit discovery. *See In re the Creation of a Comm. to Study the Creation & Admin. of Guardianships*, ADKT 507 (Order, July 22, 2016) (clarifying that the civil procedure rules "apply in guardianship matters, unless there is a specific statute . . . regarding a procedure or practice that conflict with the NRCP"); *see also Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (reviewing discovery matters for an abuse of discretion). Further, a district court's decision to conduct an evidentiary hearing in a guardianship matter is within its sound discretion. *See Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (providing that for habeas petitions, a district court's decision to grant or deny a petitioner's request for an evidentiary hearing is discretionary); *see also Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993) (in the context of child custody proceedings, "a district court has the *discretion* to deny a motion to modify custody without holding a hearing unless the moving party demonstrates *adequate cause* for holding a hearing" (emphases added) (internal quotation marks omitted)).

Here, the district court declined to order discovery, reasoning that it would be "an inappropriate shifting of the burden." This statement was erroneous. Requiring the parties to submit to discovery does not shift the burden of proof on the petitioner to show by clear and convincing evidence that a guardianship should be ordered for the proposed protected person. NRS 159.055(1). However, we agree that further investigation and proceedings were not warranted. The record demonstrates, through Ida's affidavit and the police call logs, that Ida suffers from mental illness but not that she is unable to care for herself or is a danger to herself. Guardianships are not to be lightly granted and are not required for every individual who suffers from a mental illness. A reasonable judge could have concluded that these facts do not rise to a level that warrants further investigation. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (providing that "[a]n abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances"). Given these circumstances, we cannot conclude that the district court abused its discretion in denying the petition without ordering discovery or holding an evidentiary hearing.

For the reasons stated above, we affirm the district court's order.

Parraguirre, Stiglich, Cadish, Silver, Pickering, and Herndon, JJ., concur.

GUSTAVO ADONAY GUNERA-PASTRANA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 79861

July 8, 2021 490 P.3d 1262

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts each of lewdness with a child under the age of 14 and sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Reversed and remanded.

Darin F. Imlay, Public Defender, and *Deborah L. Westbrook*, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Taleen Pandukht* and *Sandra DiGiacomo*, Chief Deputy District Attorneys, Clark County, for Respondent.

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

OPINION

By the Court, Parraguirre, J.:

Appellant Gustavo Adonay Gunera-Pastrana received an aggregate sentence of 35 years to life in prison after being convicted of two counts each of sexual assault of a minor under 14 years of age and lewdness with a child under the age of 14. Despite the gravity of these crimes, the issue of guilt was close because the State presented no physical evidence to prove that Gunera-Pastrana committed the offenses. Moreover, serious errors—judicial, juror, and prosecutorial misconduct—affected the verdict. The cumulative effect of these errors violated Gunera-Pastrana's due process right to a fair trial. Thus, we reverse the judgment of conviction and remand for a new trial. In doing so, we clarify law pertaining to judicial, juror, and prosecutorial misconduct.

FACTS

The following facts, although the parties dispute them, led to the verdict. Gunera-Pastrana lived with his girlfriend and her two children—J.J.M., a boy, and M.M., a girl. M.M. had surgery to remove an ovary, leaving her with scars above her genitals. One day, Gunera-Pastrana was alone with M.M., who was 12 years old, and reached into her pants under the pretense that he needed to check her scars. Instead, Gunera-Pastrana rubbed M.M.'s genitals. Weeks

later, he kissed M.M. in a sexual manner. On a third occasion, he digitally penetrated M.M.'s vagina and performed cunnilingus on her. M.M. told J.J.M. that she was raped. M.M. then told her mother, who called the police.

PROCEDURAL HISTORY

Gunera-Pastrana was charged under NRS 201.230 with two counts of lewdness with a child under the age of 14 years for touching M.M.'s genitals and kissing her. He was also charged under NRS 200.366(1)(b) with two counts of sexual assault of a minor under the age of 14 years for digitally penetrating M.M.'s vagina and performing cunnilingus on her. The jury found him guilty on all counts. He was sentenced to serve an aggregate prison term totaling 35 years to life.

DISCUSSION

Judicial misconduct

During admonishments before opening statements, the district court told the jury, "the Defendant is presumed innocent," but then asked,

> [W]hat do you really mean by presumption of innocence when we know that the Defendant has been arrested by the police department and we know that the District Attorney is prosecuting the Defendant[?] *And we also know that the police department didn't go out and select somebody at random to prosecute*.
>
> So we know that you know these things, and you could legitimately ask well, *how can we maintain this presumption of innocence when we know that he's been arrested for something and we know that the District Attorney is prosecuting him*[?] Ladies and gentlemen, I hope that what I have to say here will help you understand exactly what we mean by this presumption of innocence.

(Emphases added.) The district court later told jurors that they must find Gunera-Pastrana guilty beyond a reasonable doubt and instructed the jury on the presumption of innocence, but the court never explained the meaning of its comment "that the police department didn't go out and select somebody at random to prosecute."

Gunera-Pastrana argues that the district court committed misconduct by undermining the presumption of innocence. He did not, however, preserve the error for appellate review by objecting below. The State argues that the district court's comments did not prejudice Gunera-Pastrana's substantial rights because the district court separately instructed the jury that the jury must presume he is innocent unless his guilt is proven beyond a reasonable doubt.

We apply plain-error review to unpreserved claims of judicial misconduct, *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995), and unpreserved constitutional errors, *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015). For plain-error review, "an appellant must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (internal quotation marks omitted).

The judicial canons require a judge to "uphold and apply the law." NCJC Canon 2.2. "In reviewing a claim of judicial misconduct, we consider the particular circumstances and facts surrounding the alleged misconduct to determine whether it was of such a nature as to have prejudiced the defendant's right to a fair trial." *Azucena v. State*, 135 Nev. 269, 272, 448 P.3d 534, 537 (2019). "The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." *Quercia v. United States*, 289 U.S. 466, 470 (1933) (internal quotation marks omitted). Thus, we have explained that "[w]hat may be innocuous conduct in some circumstances may constitute prejudicial conduct in a trial setting." *Parodi*, 111 Nev. at 367, 892 P.2d at 589.

"A defendant in a criminal action is presumed to be innocent until the contrary is proved [beyond a reasonable doubt] . . . ." NRS 175.191. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *see also* Nev. Const. art. 1, § 8. To this end, the United States Supreme Court "has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

Undermining the defendant's presumption of innocence constitutes judicial misconduct. The district court's comment that "we know that the Defendant has been arrested by the police department" and "that the police department didn't go out and select somebody at random to prosecute" undermined Gunera-Pastrana's presumption of innocence because it improperly underscored the facts of his arrest and prosecution. *See id.* at 485; *see also Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) ("[V]erbal references [to a defendant's in-custody status] may provide an appearance of guilt that a jury mistakenly might use as evidence of guilt.").

Because "[t]he influence of the trial judge on the jury is necessarily and properly of great weight," *Quercia*, 289 U.S. at 470 (internal quotation marks omitted), the district court's comment invited the jury to consider the facts of Gunera-Pastrana's arrest as evidence of his guilt. Thus, the district court's comment constitutes misconduct because its "words and conduct [were] likely to mold the opinion of the members of the jury to the extent that" Gunera-Pastrana may have been prejudiced. *Azucena*, 135 Nev. at 272, 448 P.3d at 538 (internal quotation marks omitted). As we have explained, the district court "should exercise restraint over judicial conduct and utterances." *Id.* at 273, 448 P.3d at 538 (quoting *State v. Miller*, 49 P.3d 458, 467 (Kan. 2002)). We conclude that this misconduct constitutes plain error.

However, we further conclude that this error did not prejudice Gunera-Pastrana's substantial rights because the jury was separately instructed on the presumption of innocence in a manner consistent with existing law. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (explaining that we presume that juries follow their instructions); *see also Morales v. State*, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006) (holding that an unpreserved violation of the defendant's presumption of innocence did not warrant reversal). Thus, this error alone does not warrant reversal.

Juror misconduct

At trial, M.M. testified against Gunera-Pastrana, but she had trouble remembering the precise sequence of each instance of sexual misconduct. In closing, the State repeatedly argued that, although M.M. did not remember the order of each instance of sexual misconduct, the jury should nonetheless apply common sense to evaluate her testimony. The district court also instructed the jury to apply common sense to its deliberations. After the verdict was announced, the jury foreman told the bailiff "that it took [g]oogling common sense . . . to reach a verdict." The district court told the parties about the jury's googling, noting that "both sides were . . . heavily emphasizing common sense [in closing]."

The district court held an evidentiary hearing, and the jury foreman testified that two jurors googled the definition of "common sense" on their cell phones—despite being instructed not to use the internet—and read the definitions to other jurors. He also testified that "[t]he [g]oogl[ing] was done toward the end of deliberation" and that the jury had already reached a verdict on the lewdness charges. After the foreman testified, the district court suggested to the parties that there was no reason to question other jurors. Thus, the jurors who actually googled "common sense" were not questioned as to what definition of the term they used. Gunera-Pastrana moved for a new trial, but the district court denied his motion. The district

court concluded that the term "common sense" was not in any of the charges and "was inconsequential and extraneous to the finding of guilt," but the court inexplicably omitted from the order denying the motion its previous statement on the record that "both sides were . . . heavily emphasizing common sense [in closing]."

Gunera-Pastrana argues that the district court erred by not analyzing the prejudicial effect of the extraneous evidence in the context of the trial as a whole. He adds that the district court found on the record that both parties relied heavily on the term "common sense" in closing but disregarded that finding in its order denying his motion for a new trial. The State concedes that jurors googling "common sense" was misconduct but argues that the term was not in any of the charges and there was no resulting prejudice.

"A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court," *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003), but we review de novo whether a jury's use of extraneous information was prejudicial, *Jeffries v. State*, 133 Nev. 331, 336, 397 P.3d 21, 27 (2017). To "prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." *Meyer*, 119 Nev. at 563-64, 80 P.3d at 455. In *Meyer v. State*, we explained that the jury's "exposure to extraneous information via independent research . . . must be analyzed [for prejudice] in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." *Id.* at 565, 80 P.3d at 456 (footnote omitted). To guide this analysis, we explained that the district court should consider "how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.)." *Id.* at 566, 80 P.3d at 456. These factors, however, are not exhaustive. *Jeffries*, 133 Nev. at 335, 397 P.3d at 26.

In this case, the jury's use of Google to define the term "common sense" is sufficiently analogous to the use of an extraneous dictionary definition to warrant application of the *Meyer* framework. While *Meyer* explained that the jury's use of an extrinsic dictionary definition is "unlikely to raise a presumption of prejudice," 119 Nev. at 565 & n.28, 80 P.3d at 456 & n.28, it left open the question of how the district court should analyze that issue. We now clarify that the district court should apply the *Meyer* framework and a juror who proffered an extraneous dictionary definition should be questioned as to what definition was applied, *see State v. Williamson*, 807 P.2d 593, 597 (Haw. 1991), so that the district court can ascertain whether "the jury might have been misled" by the definition, *People v. Karis*,

758 P.2d 1189, 1208 (Cal. 1988). In assessing whether the definition applied by jurors was prejudicial, the relevant inquiry remains "whether the average, hypothetical juror would be influenced by the juror misconduct," *Meyer*, 119 Nev. at 566, 80 P.3d at 456, and whether "there is a reasonable probability that [the information] affected the verdict," *id.* at 565, 80 P.3d at 456.

Although the State argues that no prejudice resulted because the term "common sense" was not in any of the charged crimes, we reject its position that prejudice can result only if an extraneous dictionary definition pertains to a term in the charges. As the district court stated on the record, both sides heavily emphasized the term in closing. Moreover, the district court instructed the jury to apply common sense to its deliberations. Because the term was emphasized at trial, the jury's use of Google to ascertain its meaning could have prejudiced Gunera-Pastrana. The crux of this analysis, then, is whether there was a reasonable probability that the definition the jurors applied "affected the verdict." *Id*. The district court suggested to the parties that there was no need to question the jurors who used Google, so there is no record of what definition the jury applied. Thus, Gunera-Pastrana was deprived of his ability to demonstrate that prejudice resulted from the jury's misconduct. Thus, we conclude that the jury's misconduct contributes to cumulative error.

Prosecutorial misconduct

At the end of the State's closing argument, the prosecutor asserted, "There really are two people who know exactly what happened in that living room and that bedroom that can talk about it. And that's [M.M.] and the—." Gunera-Pastrana objected, and the district court sustained the objection. The State then *repeated*, "There's two people that know what happened, and [M.M.] told you what happened. She told you what he did to her."

Gunera-Pastrana argues that the State's comments constitute prejudicial prosecutorial misconduct because the State indirectly commented on his decision not to testify in violation of the Fifth Amendment. U.S. Const. amend. V; *see also* Nev. Const. art. 1, § 8. The State answers that it did not indirectly comment on Gunera-Pastrana's failure to testify and that its comments were not of such a nature that the jury would naturally and necessarily take them that way. It adds that, even if the comments were improper, the jury was instructed to draw no inferences of guilt from the defendant's failure to testify, so any error was harmless.

We apply a two-step analysis in our review of prosecutorial misconduct claims. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Id.*

(footnote omitted). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." *Id.*

The Fifth Amendment and the Nevada Constitution alike forbid a prosecutor from directly commenting on the defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965); *see also* Nev. Const. art. 1, § 8. To determine whether an *indirect* reference violates the Fifth Amendment, we examine "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (quoting *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir. 1968)). "The standard for determining whether such remarks are prejudicial is whether the error is harmless beyond a reasonable doubt." *Id.*

In *Harkness*, the State commented that, "If we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts in this case?" *Id.* at 802, 820 P.2d at 760. The State also said, "[W]e know so little about the case really in terms of what the defendant told us, which naturally raises the logical question, what is he hiding?" *Id.* at 803, 820 P.2d at 760. In holding that the State violated the Fifth Amendment, we reasoned that "the question 'whose fault is it if we don't know the facts in this case?' suggests that the accused, rather than the [S]tate, has the burden of proving or disproving the crime." *Id.* at 804, 820 P.2d at 761.

We have not addressed whether comments like the prosecutor's in this case—i.e., "[t]here's two people that know what happened, and [the victim] told you what happened"—are indirect references to the defendant's failure to testify. Three persuasive opinions have held that similar comments are an indirect reference to a defendant's failure to testify. *See Bowler v. United States*, 480 A.2d 678, 682-84 (D.C. 1984) ("[Y]ou see there were two people there that day, Mr. Bowler and Mr. Jackson. And Mr. Jackson is dead now, so he can't talk."); *State v. Williams*, 673 S.W.2d 32, 35 (Mo. 1984) ("There's only two people back there that know[ ] exactly what happened and can tell you—who know[ ] exactly what happened back there."); *State v. Miller*, 412 P.2d 240, 245-46 (N.M. 1966) ("There's only two people that actually know what happened in the liquor store that night. One of those persons is dead . . . ."). We find the foregoing cases persuasive. Thus, we clarify that remarking that "[t]here's two people that know what happened," with one of those people being a defendant who has invoked the right not to testify, is an impermissible indirect reference because it is "of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Harkness*, 107 Nev. at 803, 820 P.2d at 761 (internal quotation marks omitted).

Here, like the prosecutorial statements in the foregoing persuasive cases, the State indirectly referenced Gunera-Pastrana's failure to testify by arguing that only two people know what happened, and M.M. was the only one of the two to testify. Thus, these comments were of such a character that the jury may have naturally and necessarily taken them to be a comment on Gunera-Pastrana's failure to testify, thereby suggesting that he had the burden of disproving these crimes. More troubling, the prosecutor repeated her comment after the district court sustained Gunera-Pastrana's objection. Accordingly, we conclude that this indirect reference to Gunera-Pastrana's failure to testify violated the Fifth Amendment and Nevada Constitution, and constituted prosecutorial misconduct.

The State argues that this error was harmless because the jury was instructed that it could not draw any inference of guilt from the fact that Gunera-Pastrana did not testify. This argument is contrary to our precedent. *See id.* at 804-05, 820 P.2d at 762 ("Although the jury was instructed to draw no inferences from appellant's silence, this instruction was not a sufficient cure for the prosecutor's unconstitutional remarks [on the defendant's failure to testify]."). Moreover, as explained below, we need not decide whether the separate jury instruction rendered this error harmless beyond a reasonable doubt because cumulative error warrants reversal.

Cumulative error

Although the State's misconduct alone potentially warrants reversal, the foregoing errors could have cumulatively prejudiced Gunera-Pastrana's due process right to a fair trial. *See DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000) ("Although we have concluded that . . . [one trial error] alone would warrant reversal, we have also analyzed the cumulative effect of the errors at trial."). Thus, our analysis turns to Gunera-Pastrana's argument that cumulative error warrants reversal.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (internal quotation marks omitted). We consider three factors when reviewing for cumulative error: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.* (internal quotation marks omitted).

The issue of guilt was close

Gunera-Pastrana argues that the issue of guilt was close because M.M.'s testimony changed significantly over time. The State argues that the issue of guilt was not close because overwhelming evidence supported the verdict.

M.M.'s testimony revealed three inconsistencies that led the parties to dispute her credibility. First, according to testimony from M.M.'s mother and a police officer, M.M. said that Gunera-Pastrana kissed her the day she told her mother about the sexual misconduct. M.M. separately testified at the preliminary hearing that immediately after Gunera-Pastrana kissed her, she told her mother about the sexual misconduct. At trial, however, M.M. testified that Gunera-Pastrana kissed her two weeks before she told her mother about the misconduct. Second, M.M. testified at the preliminary hearing that the cunnilingus and digital penetration occurred weeks before she told her mother. At trial, however, M.M. testified that these acts occurred the day before she told her mother. Third, M.M. testified at the preliminary hearing that Gunera-Pastrana touched her beneath her underwear, but testified at trial that the touching occurred over her underwear.

Given M.M.'s conflicting testimony, the parties disputed her credibility.[1] However, no physical evidence proved that Gunera-Pastrana committed these crimes. Thus, the issue of guilt came down to whether M.M.'s allegations were truthful. Based on M.M.'s conflicting testimony and the lack of physical evidence to prove the crimes, we conclude that the issue of guilt was close.

Three substantial errors undermined Gunera-Pastrana's defense

Gunera-Pastrana argues that the quantity and character of the errors warrant reversal. The State argues that Gunera-Pastrana presented no meritorious claim of error.

As we concluded, judicial, juror, and prosecutorial misconduct occurred at trial. The judicial misconduct violated Gunera-Pastrana's presumption of innocence by underscoring the facts of his arrest and prosecution. Jurors committed misconduct by googling a definition of "common sense" after the parties disputed the credibility of M.M.'s testimony and the State urged the jury to nonetheless apply common sense to find Gunera-Pastrana guilty. The State committed misconduct by insinuating that Gunera-Pastrana was less believable because he invoked his right not to testify. Moreover, the State *repeated* its argument that Gunera-Pastrana failed to testify after the district court sustained his objection. These errors "together had the effect of unfairly undermining [Gunera-Pastrana]'s credibility and defense in a rather close case." *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); *see also Valdez*, 124 Nev. at 1197, 196 P.3d at 482 (reversing for cumulative error where "the quantity and

[1]We recognize that other witnesses testified against Gunera-Pastrana. However, this testimony was based on M.M.'s statements, which were ultimately inconsistent.

character of the errors was substantial"). Thus, we conclude that these errors were substantial.

The charged crimes were grave

Gunera-Pastrana argues that the crimes he was convicted of were grave, which the State concedes. The crimes here were grave because they led to an aggregate sentence of 35 years to life in prison.

The errors cumulatively denied Gunera-Pastrana a fair trial

"[W]here the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). Here, the issue of guilt was close because—with no physical evidence to prove the crimes—the verdict came down to whether the jury believed M.M.'s testimony.[2] The judicial, juror, and prosecutorial misconduct was substantial because it undermined Gunera-Pastrana's credibility and defense. Gunera-Pastrana was convicted of grave crimes. Accordingly, we conclude that the cumulative effect of errors denied Gunera-Pastrana's due process right to a fair trial.[3]

CONCLUSION

"A criminal defendant has a fundamental right to a fair trial secured by the United States and Nevada Constitutions." *Watters v. State*, 129 Nev. 886, 889, 313 P.3d 243, 246 (2013) (internal quotation marks omitted). Indeed, "[i]t is elementary that a fair trial in a fair tribunal is a basic requirement of due process." *Weiss v. United States*, 510 U.S. 163, 178 (1994) (internal quotation marks omitted). Cumulative error here violated Gunera-Pastrana's due process right to a fair trial. We therefore reverse the judgment of conviction and remand for a new trial.

Stiglich and Silver, JJ., concur.

---

[2]In *Franks v. State*, we explained that, in the context of sufficiency-of-the-evidence review, a sexual assault victim's testimony "need not be corroborated." 135 Nev. 1, 7, 432 P.3d 752, 757-58 (2019). Our holding is consistent with *Franks* because we are reviewing whether the cumulative effect of trial errors denied Gunera-Pastrana the right to a fair trial, which requires us to ascertain whether the issue of guilt was close rather than the sufficiency of the evidence.

[3]Gunera-Pastrana also argues that (1) the district court gave erroneous lewdness and flight instructions, (2) the State committed misconduct by asking improper leading questions, and (3) he was denied a fair venire because the jury commissioner did not comply with NRS 6.045(3)(c). While we have considered these arguments, we need not reach them given the disposition of this appeal.

THE STATE OF NEVADA, Appellant, *v.* JOHN JOSEPH SEKA, Respondent.

No. 80925

July 8, 2021 490 P.3d 1272

Appeal from a district court order granting a motion for a new trial in a criminal matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed.

[Rehearing denied August 9, 2021]

[En banc reconsideration denied October 7, 2021]

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen* and *John T. Fattig*, Chief Deputy District Attorneys, Clark County, for Appellant.

Clark Hill PLLC and *Paola M. Armeni*, Las Vegas; *Jennifer Springer*, Salt Lake City, Utah, for Respondent.

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

OPINION

By the Court, Silver, J.:

John "Jack" Seka was convicted in 2001 of two counts of murder and two counts of robbery related to the 1998 killings of his boss Peter Limanni and contract worker Eric Hamilton. Both bodies were transported in work vehicles and dumped in remote desert areas. Although substantial circumstantial and physical evidence pointed to Seka as the killer, no physical evidence, aside from fingerprints on a board covering Hamilton's body, connected Seka to the desert locations where the bodies were found. Genetic marker analysis (DNA) testing at the time of trial could only exclude Seka from DNA collected from a few pieces of evidence. But DNA testing performed in 2018 and 2019 both excluded Seka from DNA on several pieces of evidence and discovered other DNA profiles on some of that evidence. In 2020, based on these new DNA test results, the district court granted a new trial.

NRS 176.515(1) allows a court to grant a new trial within two years after the original trial "on the ground of newly discovered evidence." But NRS 176.09187(1) allows a defendant to move for a new trial at any time where DNA test results are "favorable" to the defendant. We have never addressed what constitutes "favorable" results under that statute. We now clarify that, consistent with

Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. We conclude that the new evidence here fails to meet this requirement, and we reverse the district court's order granting a new trial.

I.

Peter Limanni established Cinergi HVAC, Inc., in May 1998. The business, located at 1933 Western Avenue in Las Vegas, was funded by investors Takeo Kato and Kaz Toe. Limanni hired his friend Jack Seka to help out with the business, paying Seka in cash. Limanni and Seka lived together at Cinergi.[1] Limanni typically drove the business's brown Toyota truck, while Seka drove one of the company vans.

The business did poorly, and by the beginning of that summer Kato and Toe wanted their investment returned. Instead, Limanni decided to open a cigar shop at Cinergi's address, and he, along with Seka, began building a wooden walk-in humidor to display the cigars.

Limanni also began dating Jennifer Harrison that August. He told Harrison and others that he could disappear and become a new person. Limanni closed his bank accounts on November 2 after removing large sums of money. On November 4, Limanni visited Harrison at her home and spoke of his plans for the cigar shop. As he left, he mentioned calling Harrison the next day and going with her to lunch. That same day, Limanni picked Seka up from the airport and drove him back to Cinergi after Seka returned from visiting family back East.

The morning of November 5, Harrison was unable to reach Limanni. Harrison drove to Cinergi and arrived around noon to find Seka passed out on the floor and a girl on the couch. A few hundred dollars in cash was lying on the desk. Limanni's clothes, belt, and shoes were in his room, but Limanni was not there. Harrison also found a bullet cartridge on the floor, which did not look as though it had been fired. Limanni's dog, whom Limanni took everywhere, was also at Cinergi. At the time, Harrison believed Limanni had simply disappeared, as he'd previously threatened to do. Seka dissuaded her from filing a missing person report.

On the morning of November 16, a truck driver noticed a body lying in a remote desert area between Las Vegas Boulevard South and the I-15, south of what is now St. Rose Parkway. The body, a male, was located approximately 20 feet off Las Vegas Boulevard South, in the middle of two tire tracks that made a half circle off and back onto that road. He had been shot through the back, in the left flank, and in the back of the right thigh with a .357 caliber

[1]According to Seka, no one else lived with them at the business.

gun. There was no evidence of skin stippling, suggesting the bullets were not fired at a close range. The victim was wearing a "gold nugget" ring and had a small laceration on his right wrist. Seven pieces of lumber had been haphazardly stacked on the body. The victim had a piece of paper in his pocket with the name "Jack" and a telephone number. Detectives learned the victim was Eric Hamilton, who struggled with drug use and mental illness and had come from California to Nevada for a fresh start. According to his sister, Hamilton had been doing construction work for a local business owner. Detectives determined Hamilton had died sometime in the prior 24 hours. They traced the telephone number in his pocket to Cinergi.

Notably, a cigarette butt was found a few feet from the body. A Skoal tobacco container, a second cigarette butt, a beer bottle, and a second beer bottle were found at varying distances of approximately 15 to 120 feet away from the body. All of the items were located in the desert area within several yards of Las Vegas Boulevard South.

The following day, a break-in was reported at 1929 Western Avenue, a vacant business next door to Cinergi. The front window was broken, and the glass and carpet were bloodied. There were also blood drag marks, and three bullets and bullet fragments. A bloodied dark blue jacket contained bullet holes that matched Hamilton's injuries. A baseball hat and a "gold nugget" bracelet were also found at the scene. An officer checked the perimeter that morning and looked into the communal dumpster, which contained only a few papers. A nearby business owner indicated the dumpster had been recently emptied.

While the police were investigating 1929 Western, Seka drove up in Cinergi's Toyota truck—Limanni's work vehicle. The truck had been recently washed. Officers talked to Seka, who seemed nervous. Seka told them he worked at Cinergi with Limanni, who was in the Reno area with his girlfriend. Officers asked Seka if they could check inside Cinergi to see if anyone was injured, and Seka agreed. Officers became concerned after spotting a bullet on the office desk and some knives, and they handcuffed Seka and searched the business. In the room being remodeled as a humidor, they found lumber that matched the lumber covering Hamilton's body. They also found a bullet hole in the couch, a .32 cartridge bullet in the toilet, and both .357 and .32 bullets in the ceiling. Officers looked above the ceiling tiles and found a wallet containing Limanni's driver's license, social security card, and birth certificate as well as credit cards and a stolen purse. In a garbage can inside, they found Limanni's photographs alongside some papers and personal belongings. The officers eventually left to go to lunch, unhandcuffing Seka and leaving him at Cinergi. They were gone for a little over an hour.

When the officers returned, they noticed that the bullet that had been on the desk was missing. Seka opined that the building owner

had removed it, but the building owner denied having been inside or having touched the bullet. Officers also checked the dumpster again and this time saw the bottom of the dumpster was now filled with clothing, papers, cards, and photographs, some of it in Limanni's name. Some of the items were burnt. Detectives also investigated and impounded the Toyota truck Seka drove up to the premises with, which had apparent blood inside of the truck and on a coil of twine inside.

Officers Mirandized Seka, who agreed to be interviewed at the detective bureau. Seka told the detective that Limanni had vanished weeks ago and that Seka was trying to keep up the business, alone. He described a man named "Seymore" who had done odd jobs for Cinergi and claimed he last spoke to Seymore in late October, when Seymore called Seka's cell phone to ask about doing odd jobs. Detectives determined "Seymore" was Hamilton. The detective interviewing Seka told Seka he was a murder suspect, at which point Seka "smiled" and stated, "You're really starting to scare me now. I think you'd better arrest me or take me home. Do you have enough to arrest me right now?" The detective explained that officers would wait until the forensic evidence returned before making an arrest, and then he drove Seka back to Cinergi.

Seka told detectives he had a dinner appointment and needed a vehicle. Detectives explained they were impounding the Toyota truck but told Seka that he could take a company van. At the time, there were two vans: a solid white van and a van with large advertising decals. Detectives handed Seka the keys to the solid white van, and Seka made a comment that suggested he would rather take the decaled van. Becoming suspicious, detectives searched the decaled van and found blood droplets in the back. They allowed Seka to leave in the solid white van; Seka promised to return following dinner. But Seka did not return. Instead he told property manager Michael Cerda he was leaving and asked Cerda to look after the dog. Seka also asked Harrison if he could borrow her car, telling her he needed to leave town to avoid prosecution for murder and that he was "going underground." Eventually, Seka returned to the East Coast to stay with his girlfriend.

Limanni's body was discovered December 23 in California, approximately 20 feet from Nipton Road in an isolated desert area near the Nevada border. Limanni was wearing only boxer shorts. Faded tire tracks showed a vehicle had driven away from the body. The body's condition indicated Limanni had been dead for several weeks. He had been shot at least 10 times with a .32 caliber gun. Seven shots were to the head.

Seka was arrested in Pennsylvania in March 1999. The murder weapons, a .32 caliber firearm and a .357 caliber firearm, were never found.

II.

The State charged Seka with two counts of murder with use of a deadly weapon (open murder) and two counts of robbery with use of a deadly weapon, and filed notice of its intent to seek the death penalty. The case went to trial from February 12 to March 1, 2001. The State's theory of the case was that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee.

Some of Seka's friends testified Limanni treated Seka well, but Jennifer Harrison recalled Limanni treating Seka poorly and testified that Limanni always referred to Seka as "his nigger." Harrison also explained Limanni controlled Seka's access to money and often ordered Seka to run menial errands. Seka once told Harrison that Limanni's anger and name-calling was "just the tip of the iceberg." Harrison further testified that she called Seka the morning Limanni disappeared, and Seka reported Limanni had left early that morning. Harrison thought Seka seemed "really down," and Seka told Harrison that he had just discovered his girlfriend was cheating on him. But Seka's girlfriend testified that nothing had happened between them during Seka's visit and that Seka had not been upset with her.

Notably, Seka's friend of 12 years, Thomas Cramer, testified to once overhearing Limanni treat Seka poorly during a phone call. Then, during the time that Seka was hiding from being apprehended by the police for murder, Cramer asked Seka about the rumor that he killed Limanni. Seka responded saying, "They didn't even find the body." On another occasion, Seka threatened Cramer by saying, "Do you want me to do to you what I did to Pete Limanni?" Finally, Cramer testified Seka told him that Limanni had come at Seka with a gun, and Seka had wrested the gun from Limanni and shot him in self-defense. During cross-examination by Seka's attorneys, Cramer was impeached by acknowledging to the jury that he had been treated for alcohol addiction and depression, had been diagnosed with major depressive disorder and PTSD, was on medication, and admitted that he had previously been treated at mental hospitals. He also admitted to being upset with Seka, who was friends with Cramer's girlfriend and helped her secure a restraining order against Cramer. Seka was also instrumental in having Cramer put into a mental institution.

During trial, the evidence established that a .32 caliber firearm was used to kill Limanni, while a .357 caliber firearm was used to kill Hamilton. Both types of ammunition were found at Cinergi, where Seka had been living and working. The evidence further suggested that only one gun had been used at each shooting. The

evidence also showed Limanni's body had been transported in the decaled company van, while Hamilton's body had been transported in the bed of the brown Toyota pickup truck. The tires on the Toyota truck made impressions similar to the tire tracks near Hamilton's body. DNA from a glass shard further established that Hamilton was the victim killed at 1929 Western, the business next to Cinergi. Of the wood covering Hamilton's body, two pieces bore Seka's prints, and one bore Limanni's. Beer bottles in Cinergi's trash yielded both Seka's and Hamilton's prints. But prints on the beer bottle found in the desert area near Hamilton's body did not match Seka, and DNA evidence from Hamilton's fingernails excluded Seka as a contributor. The State did not argue that Seka dropped the trash found near Hamilton's body.

During closing arguments, the State theorized that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee. But defense counsel theorized that Cinergi's investors, who had lost a substantial sum on Cinergi and disliked Limanni, came to the business after Seka had moved out, took Limanni out into the desert and killed him, and also shot Hamilton, an innocent bystander. Defense counsel argued that no evidence implicated Seka in the murders, that Seka had no motive to kill the victims, and that the State's case against Seka was not believable. Defense counsel contended Limanni was a con man and highlighted discrepancies and weaknesses in the circumstantial evidence to undermine the State's case and suggest alternative theories.[2] Relevant here, defense counsel pointed out, through photographs in evidence showing Seka smoking, that the cigarette butts found near Hamilton's body were a different kind than those Seka smoked and therefore did not tie Seka to the crime.

The jury found Seka guilty of first-degree murder with use of a deadly weapon and robbery in regard to Hamilton, and of second-degree murder with use of a deadly weapon and robbery as to Limanni, but the jury deadlocked at the penalty phase. Seka thereafter stipulated to life imprisonment without the possibility of parole to avoid the death penalty.

---

[2]For example, defense counsel argued that Cinergi investors lied to detectives; Cramer's testimony of Limanni gurgling blood was inconsistent with the lack of blood at Cinergi; Cramer suffered from mental illness and developed the story to get Seka away from Cramer's girlfriend; Cramer changed his story between the preliminary hearing and trial; testimony suggested other people had access to and frequented Cinergi; Seka was too small to have singlehandedly put Limanni's 200-pound corpse in the vehicle, drive him to the state line, and bury him; Seka would not have left his own phone number in Hamilton's pocket had he killed Hamilton; etc.

III.

Seka filed a direct appeal in May 2001, and we affirmed the conviction. Seka thereafter petitioned for a writ of habeas corpus, which the district court denied, and we affirmed the denial.

In 2017, Seka requested a DNA test of evidence collected at Hamilton's remote desert crime scene and the surrounding area. Seka argued that had items collected by detectives yielded exculpatory evidence at trial, he would not have been convicted, particularly in light of the evidence implicating Cinergi investors and undermining Cramer's testimony of Seka's confession. The district court granted Seka's request, and the following items were tested for DNA in late 2018 and early 2019:

(1) Two cigarette butts found near Hamilton's body. Testing in 1999 failed to find any testable DNA. Testing in 2018 failed to obtain DNA from one cigarette butt, but a partial profile from the second cigarette butt did not match either Hamilton or Seka, and both were excluded as contributors.[3]

(2) Hamilton's fingernail clippings. Testing in 1998 excluded Seka as a contributor to the DNA from the clippings on one hand. The 2018 DNA testing likewise excluded Seka as a contributor to the DNA from the clippings on both hands but found possible DNA from another person, although it was such a small amount of DNA[4] that it could have been transferred from something as benign as a handshake or DNA may not have actually existed.

(3) Hairs found underneath Hamilton's fingernails. In 1998, the DNA profile included Hamilton and excluded Seka. The 2018 testing likewise found only Hamilton's DNA on the hairs.[5]

(4) The Skoal tobacco container found near Hamilton's body. The 2019 testing showed two contributors, but Hamilton and Seka were excluded. The forensic scientist explained that an old technique used to find latent fingerprints, "huffing," may have been used on this item and may have contaminated the DNA profile. Moreover, because at the time of the original trial the State did not have the capability to test for "touch DNA," the scientists may not have worn gloves while examining the evidence, or crime scene analysts may have used the same gloves and same fingerprint dusting brush while processing evidence, thereby adding to or transferring DNA.

---

[3]The State put the results from the second cigarette butt into the CODIS system, a database of DNA profiles and other samples from various arrestees and offenders, but did not find any matches.

[4]The forensic scientist explained that the test results showed 99 percent of the DNA coming from Hamilton as the DNA contributor and 1 percent of the DNA coming from an unknown contributor.

[5]Statistically, it was 3.24 billion times more likely that the DNA was Hamilton's than that of a different, unknown contributor.

(5) A beer bottle found off the road in the desert in the vicinity of Hamilton's body. The 2019 DNA testing excluded Hamilton and Seka but included a female contributor. As with the Skoal tobacco container, the forensic scientist testified that huffing and other outdated procedures may have contributed unknown DNA onto the item.

(6) The baseball hat found at 1929 Western. The 2019 DNA testing showed three contributors, including Hamilton, but the results were inconclusive as to Seka. The forensic scientist explained the cap was kept in an unsealed bag along with a toothbrush also found at 1929 Western. Critically, he further testified that it was impossible to know how many times the bag had been opened or closed during the jury trial or whether the hat had been contaminated, such as by jurors holding it or talking over it.

Based on these DNA results, Seka moved for a new trial, arguing the new results both exculpated Seka and implicated an unknown person in the crimes. The district court found that "[t]he multiple unknown DNA profiles are favorable evidence" and granted the motion.

Arguing the new DNA evidence does not warrant a new trial, the State appeals.

IV.

NRS 176.515(1) allows a court to grant a new trial "on the ground of newly discovered evidence." That statute generally requires a defendant to move for a new trial within two years of the verdict.[6] NRS 176.515(3). An exception applies where the newly discovered evidence comes from DNA testing, in which case the defendant may move for a new trial at any time if the evidence is "favorable" to the defendant. NRS 176.09187(1). But NRS 176.09187 does not define the term "favorable." We review the district court's decision to grant a new trial for an abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). But we review issues involving statutory interpretation de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

We have never addressed what makes DNA evidence "favorable" under NRS 176.09187(1) or the circumstances under which new DNA evidence warrants a new trial. At the outset, we note "courts have uniformly held that the moving party bears a heavy burden" on a motion for a new trial on newly discovered evidence. *INS v. Abudu*, 485 U.S. 94, 110 (1988). And over a century ago we

[6]We note that generally the district court judge who presided at trial should be the judge who hears and determines the motion for a new trial whenever possible, as the trial judge is in the best position to determine whether new evidence is "favorable" to the defendant, *see* NRS 176.09187. We encourage the district courts to be exceptionally mindful of this and be very familiar with the trial record if the trial judge is unavailable to preside over a motion for a new trial.

set forth elements for determining whether newly discovered evidence in general warrants a new trial. *See Sanborn*, 107 Nev. at 406, 812 P.2d at 1284-85 (citing *McLemore v. State*, 94 Nev. 237, 239-40, 577 P.2d 871, 872 (1978)); *see also Oliver v. State*, 85 Nev. 418, 424, 456 P.2d 431, 435 (1969); *Whise v. Whise*, 36 Nev. 16, 24, 131 P. 967, 969 (1913). In *Sanborn* we explained

> the evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.

107 Nev. at 406, 812 P.2d at 1284-85. As these factors are conjunctive, *id*., a new trial must be denied where the movant fails to satisfy any factor.

We interpret NRS 176.09187's mandate that new evidence be "favorable" in concert with this long-honored caselaw.[7] *Cf. First Fin. Bank N.A. v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014) ("This court will not read a statute to abrogate the common law without clear legislative instruction to do so."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318-19 (2012) (addressing the presumption that a statute will not be read to alter the common law absent the statute's clear intent to do so). We conclude that to warrant a new trial, the "favorable" DNA evidence must do more than merely support the defendant's position or possibly alter the outcome of trial. *See Whise*, 36 Nev. at 24, 131 P. at 969 ("[I]t is not sufficient that the new evidence, had it been offered at trial, *might* have changed the judgment." (emphasis added)). The new DNA evidence must be material to a key part of the prosecution or defense, or so significant to the trial overall, such that had it been introduced at trial, a different result would have been reasonably probable. *See id.* ("Newly discovered evidence, to have any weight in the consideration of a trial court, must be material or important to the moving party . . . such as to render a different result reasonably certain.").

The weight of the new DNA evidence will ultimately depend on the facts and circumstances of each individual case, including the sufficiency of the evidence adduced at trial. *Cf. State v. Parmar*, 808 N.W.2d 623, 631-34 (Neb. 2012) (comparing and contrasting cases where the new DNA evidence "probably would [or would not] have produced a substantially different result if the evidence had been

[7]Seka acknowledges the term "favorable" in NRS 176.09187 is synonymous with *Sanborn*'s standard.

offered and admitted at . . . trial"); *see also Walker v. State*, 113 Nev. 853, 873, 944 P.2d 762, 775 (1997) (concluding evidence would support the defendant's argument but ultimately was not of a caliber that would likely lead to a different result). But we stress that newly discovered DNA evidence cannot be considered favorable where it does not undermine the jury's verdict and is cumulative under the facts of the case.[8] *Cf. Cutler v. State*, 95 Nev. 427, 429, 596 P.2d 216, 217 (1979) (concluding cumulative evidence did not warrant a new trial); *Bramlette v. Titus*, 70 Nev. 305, 312, 267 P.2d 620, 623-24 (1954) (same). Newly discovered evidence is also not favorable where it has no relevance to the circumstances of the crime. *Cf. Mortensen v. State*, 115 Nev. 273, 287, 986 P.2d 1105, 1114 (1999) (explaining the new evidence did not relate to the circumstances of the murder and did not inculpate a new suspect or exculpate the defendant). Nor is newly discovered evidence favorable where it impeaches a witness without contradicting or refuting any of the trial testimony supporting the verdict. *Cf. id.* at 288, 986 P.2d at 1114 (concluding introducing the evidence "would simply be an attempt to discredit" the witness where that evidence did not contradict or refute the witness's trial testimony). Likewise, the newly discovered evidence will not be favorable if it merely goes to an issue that was fully explored at trial and is not sufficiently material to make a different verdict probable. *Cf. D'Agostino v. State*, 112 Nev. 417, 423-24, 915 P.2d 264, 267-68 (1996) (concluding newly discovered evidence about benefits offered to a witness did not warrant a new trial where the witness's criminal background and cooperation with police had been explored at trial); *see also Simmons v. State*, 112 Nev. 91, 103, 912 P.2d 217, 224 (1996) (concluding newly discovered evidence that was relevant to the question of where the victim was killed did not warrant a new trial where substantial evidence already pointed to the murder scene).

With the exception of Seka's fingerprints on the wood stacked on Hamilton's body in the desert, the State at the 2001 trial presented no other physical evidence from where the body was found to tie Seka to the murders, instead relying on the circumstantial evidence. The DNA testing in 2018 and 2019 produced six new pieces of DNA evidence,[9] taken from Hamilton's fingernail clippings and

[8]Although *LaPena v. State*, Docket No. 73826 (Order of Affirmance, October 11, 2018), is unpublished, it is also instructive here. There, we considered newly discovered DNA evidence that impeached a key witness's testimony of the murder but concluded the DNA evidence did not warrant a new trial where the witness's testimony had been impeached at trial by the medical examiner. *Id.* Moreover, an additional, unknown DNA profile on the cord used to strangle the victim did not warrant a new trial where it merely showed that an unknown person had handled the cord at some unknown time. *Id.*

[9]Although the State argues the evidence is not "new" because similar evidence was presented at trial, we note the DNA tests performed in 2018 and 2019 were not available at the time of trial and the new DNA tests were able to find

hair under his fingernails; from a tobacco container, beer bottle, and cigarette butt found in the vicinity of his body; and from a hat found at Hamilton's murder scene. As set forth in detail below, although some of the evidence newly tested yielded other, unknown profiles, none of it exculpated Seka of the murders, necessarily implicated another suspect in the crimes, or otherwise materially supported his defense. Critically, too, the new DNA evidence from the scene where Hamilton's body was dumped was cumulative of the evidence adduced at trial as no DNA evidence inculpated Seka to that scene in 2001 and the new DNA results likewise do not inculpate Seka to that crime scene. Moreover, the new DNA evidence did not contradict or refute the totality of the evidence supporting the verdict. Thus, for the following reasons, the new DNA evidence was not favorable to the defense within the meaning of NRS 176.09187.[10]

First, as to the hairs found underneath Hamilton's fingernails, updated DNA testing showed only that those were Hamilton's hairs, mirroring the DNA results at the time of trial, and is cumulative here. As to the DNA collected from Hamilton's fingernail clippings, the bullet and lack of stippling evidence shows Hamilton was shot in the back from a distance, seemingly as he fled from the killer. There is no evidence of a struggle, reducing the evidentiary value of any newly discovered DNA under his fingernails.[11] Moreover, the fingernail clippings provided so little DNA that it is possible another profile might not actually exist, further reducing the evidence's already dwindling value.

The beer bottle, cigarette butt, and Skoal tobacco container were spread along the shoulder of a major road at increasing distances of up to 120 feet from Hamilton's body and may well have been nothing more than trash tossed by drivers or pedestrians in the desert area. The State did not argue at trial that Seka dropped those items, and to the extent DNA testing yielded unknown DNA profiles, the new DNA evidence shows only that an unidentified person touched those items at some unknown time.[12] Thus, any link to the killer is speculative at best. Moreover, testing at the time of trial used outdated techniques and procedures that may have contaminated any

---

additional profiles, making those test results newly discovered evidence that could not have been discovered at the time of trial.

[10]Seka also argues that a number of fingerprints taken from items at Cinergi and evidence around Hamilton's body were not tested and contends those fingerprints may have implicated another perpetrator. Because the narrow question before us is whether the new DNA evidence supports the granting of a new trial, we do not address the untested fingerprints.

[11]Although Seka distinguishes between the blood tested at trial and the epithelial cells tested in 2018, this distinction is not materially relevant under the facts here, where Seka was excluded as a contributor on both types of evidence.

[12]Notably, too, the beer bottle produced a female profile, and Seka has never argued that the killer was a woman.

DNA on those items, further calling into question their evidentiary value. And the jury was already aware that the cigarette butts found near Hamilton were different than those that Seka smoked, making the new DNA test results on that evidence cumulative.

Finally, the DNA on the hat has no probative value here. Although that testing produced other profiles, it was inconclusive as to Seka, and, moreover, the hat was not properly sealed and may have been contaminated before and during trial, including by the jury, making the presence of additional DNA profiles of no relevance under these circumstances.

Thus, at most this new DNA evidence showed only that another person may have come in contact with some of those items. It does not materially support Seka's defense, as it is cumulative of the evidence already adduced at trial excluding Seka as a contributor to DNA profiles or fingerprint evidence. The State did not rely upon any of these items at trial to argue Seka's guilt, further reducing the evidentiary value of the new DNA evidence, and, moreover, nothing supports that the killer actually touched any of the evidence tested in 2018 and 2019. Nor did any of the new DNA evidence implicate another killer or exonerate Seka under the totality of all of the evidence adduced in this case.

Importantly, none of this new evidence from Hamilton's crime scenes affects the evidence supporting the guilty verdict, where at trial no physical evidence of DNA tied Seka to the crime scenes and the State's case was completely circumstantial. It is clear from the circumstantial evidence that Hamilton was killed next door to Seka's business and residence on Western Avenue, and his body was transported and dumped in a remote desert area. The .357 bullet casings found at Cinergi were consistent with the caliber of gun that was used to shoot Hamilton next door, and Hamilton's blood was found at 1929 Western and in the truck Seka was driving the morning after Hamilton's body was discovered. Moreover, the truck's tire impressions were similar to the tire tracks found near Hamilton's body—tracks that drove off and back on the road consistent with the body being quickly dumped. Although crime scene analysts routinely gather items found around a body in hopes of implicating a killer, under these particular circumstances—where the body was driven to a remote area and dumped off the side of the road—the random trash items in the desert with unknown DNA contributors do not undermine the other evidence against Seka.

Moreover, the physical and circumstantial evidence overwhelmingly supported a guilty verdict as to both murders. Limanni was killed by a .32 caliber weapon, and Hamilton was killed by a .357 caliber weapon—and both types of ammunition were found at Cinergi, where Seka worked and lived. Hamilton was killed next door to Cinergi, and the bullet fragments suggest Limanni was

killed at Cinergi, a supposition corroborated by Seka's own confession to Cramer. Both Limanni's and Hamilton's bodies were dumped off a road in the desert. Limanni's body was transported in the company van Seka preferred to drive before Limanni disappeared, and Hamilton's body was transported in the Toyota truck that Seka was driving after Limanni disappeared—a truck that had been cleaned shortly before officers responded to Hamilton's murder scene. Hamilton had a note with Seka's name and business number in his pocket, and his body was covered in wood taken from Cinergi that contained Seka's fingerprints. Beer bottles found in the garbage the day after Hamilton's body was discovered had both Hamilton's and Seka's fingerprints, suggesting the two had been drinking at Cinergi just prior to the altercation at 1929 Western. Limanni's belongings were hidden at Cinergi, which Seka had access to after Limanni disappeared. Limanni made plans with Harrison for the day he went missing, and Seka was the last person to see Limanni alive. Specifically, Harrison testified that when Limanni left her home the night before he disappeared, the couple discussed calling each other and going to lunch the next day. But when Harrison was unable to reach Limanni the following morning and went to Cinergi searching for Limanni, she found a large amount of cash (notably, Limanni had just withdrawn his money from his bank accounts), all of Limanni's clothing, Limanni's dog (whom Limanni took everywhere), a bullet on the floor, and Seka—but not Limanni. Seka—whom Limanni had picked up at the airport the prior day—told Harrison that Limanni had left early that morning. And when Limanni failed to return, Seka discouraged Harrison from filing a missing person report. All of this evidence points to Seka as the killer.

Further, Seka's statements were contradicted by other evidence, undermining his truthfulness and, by extension, further implicating him in the crimes. For example, Seka claimed that Hamilton had worked at Cinergi in mid-October, but other evidence established Hamilton moved to Las Vegas in late October or early November. When officers searching Hamilton's murder scene asked Seka about Limanni, Seka told them that he believed Limanni was in the Reno area with his girlfriend, even though Seka knew this was untrue from his conversations with Harrison. Officers noticed a bullet on a desk in Cinergi when they first arrived, yet it mysteriously went missing after Seka arrived at the scene. Thereafter, Seka suggested to the police that the bullet's disappearance might be due to the building owner removing it, yet the owner confirmed to the police when questioned that he had not been inside the building when the bullet went missing. And when Harrison noticed Seka's upset demeanor the morning Limanni disappeared, Seka blamed his mood on his girlfriend, even though his girlfriend later testified nothing had happened between them that would have upset Seka.

Finally, there was substantial evidence of Seka's guilty conscience. Officers discovered someone had attempted to hide Limanni's personal papers in Cinergi's ceiling, and Seka had access to Cinergi after Limanni went missing. Circumstances suggested Seka removed the bullet on the desk that initially caught the officer's attention. A .32 caliber bullet was found in the toilet at Cinergi, as if Seka, the person living and working at Cinergi, had attempted to dispose of incriminating evidence down the toilet. The dumpster behind the business had been emptied shortly before officers arrived to investigate Hamilton's murder scene, and an officer observed that it was nearly empty that morning, yet by afternoon after Seka arrived at the location, that same dumpster was filled with Limanni's personal belongings and papers, some of them burned, even though officers were at that time only searching for clues as to Hamilton's death and were unaware of Limanni's disappearance. After Seka learned he was a suspect in Hamilton's murder, Seka attempted to leave the scene in the decaled van that held evidence of Limanni's murder. Seka told officers he would return to Cinergi after dinner, but instead Seka fled the state. Seka also told Harrison he was fleeing to avoid prosecution. And Seka made incriminating statements to his longtime friend, Cramer, and eventually confessed Limanni's murder to Cramer.[13] All of this evidence ties Seka to Limanni's death and ultimately ties him to Hamilton's death as well.

Whether newly discovered DNA evidence will warrant a new trial in a murder case is a fact-intensive inquiry. Under different facts, DNA evidence such as that discovered here could warrant a new trial. But the newly discovered DNA evidence was cumulative in this case, and the unknown DNA profiles on miscellaneous desert debris cannot, under these facts, be considered favorable. And although Seka points to discrepancies and weaknesses in the evidence adduced at trial and to speculative evidence that disgruntled investors were more likely suspects than himself, the totality of all of the physical and circumstantial evidence adduced at trial nevertheless pointed to Seka and supports the jury's verdict.

Accordingly, the new DNA evidence does not make a different outcome reasonably probable here and is not "favorable" to the defense as necessary to warrant a new trial.[14] We therefore conclude the district court abused its discretion by granting Seka a new trial based on the newly discovered DNA evidence, and we reverse the district court's decision.

---

[13]Seka argues on appeal that Cramer's testimony was not credible. However, the defense attacked Cramer's credibility at trial and the jury nevertheless convicted Seka, and we do not reweigh the evidence on appeal. *Clancy v. State*, 129 Nev. 840, 848, 313 P.3d 226, 231 (2013).

[14]Notably, too, Seka was *also* convicted of robbing the victims, and the jury therefore believed beyond a reasonable doubt that Seka not only murdered Limanni and Hamilton, but robbed them as well.

V.

Under NRS 176.09187(1), a party may move for a new trial at any time where DNA test results are "favorable" to the moving party. Consistent with *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), we hold that new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. Because the new evidence here fails to meet this standard, we reverse the district court's order granting a new trial.

Parraguirre and Stiglich, JJ., concur.