enacted the statute . . . had knowledge of the state of the law in regard to the subject-matter involved.''). And, because the Legislature did not define ''deadly weapon'' in its amendments to NRS 205.060, we conclude that the Legislature intended the term to have broad applicability.

[Headnote 4]

As a result, we conclude that, based on the Legislature's intent, the definitions set forth in NRS 193.165(6) are instructive to determine what constitutes a ''deadly weapon'' under NRS 205.060(4). Therefore, we determine that the district court did not err by instructing the jury that a BB gun is a deadly weapon as it constitutes a ''firearm'' under NRS 202.265(5)(b), a statute referenced in NRS 193.165(6)(c).[5]

CONCLUSION

We conclude that NRS 193.165(6)'s definitions are instructive for determining what constitutes a deadly weapon for enhancement purposes under NRS 205.060(4). Further, we determine that the district court did not err by instructing the jury on the definition of a ''firearm,'' as defined in NRS 202.265(5)(b), a statute referenced in NRS 193.165(6)(c). Accordingly, we affirm the judgment of conviction.

PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

DURAND EUGENE BERRY, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 49709

July 30, 2009 212 P.3d 1085

Appeal from a judgment of conviction, upon a jury verdict, of burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, and one count of open and gross lewdness. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

[5]Additionally, Funderburk alleges that the State failed to present sufficient evidence to support his conviction of robbery with the use of a deadly weapon regarding count 10. Having carefully reviewed this contention, we conclude that it does not warrant reversal. *See Brooks v. State*, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008) (stating that a defendant uses a deadly weapon and is subject to an additional sentence when (1) the defendant is liable as a principal for the offense, (2) another principal used a deadly weapon during the commission of the crime, and (3) the defendant knew that the other used a deadly weapon).

The supreme court, HARDESTY, C.J., held that: (1) district court did not err by instructing jury on definition of ''firearm'' found in statute prohibiting weapons on school property; (2) if trier of fact finds that weapon's capabilities are established by its design, not its operability, then weapon meets the definition of ''deadly weapon'' for purposes of statute providing additional penalty for offenders who use deadly weapon during crime; (3) evidence was insufficient to support defendant's deadly weapon enhancements; and (4) statute providing that person who commits any act of open or gross lewdness is guilty, for the first offense, of a gross misdemeanor, was not unconstitutionally vague.

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

Philip J. Kohn, Public Defender, and *Lauren Diefenbach* and *Nancy Lemcke*, Deputy Public Defenders, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Ercan E. Iscan*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   Supreme court generally reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error.
2. CRIMINAL LAW.
   Whether a jury instruction was an accurate statement of the law is a legal question subject to de novo review.
3. CRIMINAL LAW.
   Supreme court reviews the legal accuracy of the trial court's instructions de novo.
4. CRIMINAL LAW.
   Because list of weapons in statute prohibiting possession of dangerous weapon on school property was specifically referenced in statute providing additional penalty for offenders who use deadly weapon during crime as being deadly weapons, the district court did not err by instructing jury on definition of ''firearm'' found in statute prohibiting weapons on school property, and similarly, district court did not err by instructing jury on definition of ''firearm'' found in dangerous weapons statute, even though defendant was not charged with possession or use of a firearm and this statute was not referenced in statute providing additional penalty for offenders who use deadly weapon during crime. NRS 193.165(6)(c), 202.253(2), 202.265(5)(b).
5. SENTENCING AND PUNISHMENT.
   Statute provides various definitions of ''deadly weapon'' to enhance an offender's sentences for robbery with use of a deadly weapon, and those definitions are also relevant in determining whether a person had possession or gained possession of a deadly weapon during a burglary for purposes of the statutory aggravated sentencing range. NRS 193.165(6), 205.060(4).

6. SENTENCING AND PUNISHMENT.

For enhancement purposes, a firearm under statute prohibiting possession of dangerous weapon on property or in vehicle of school or child care facility and defining ''firearm'' as including any device from which a metallic projectile may be expelled by means of spring, gas, air, or other force is a ''deadly weapon.'' NRS 202.265(5)(b).

7. SENTENCING AND PUNISHMENT.

Dangerous-weapons-and-firearms statute's definition of ''firearm'' amounts to a ''deadly weapon'' under statute that provides various definitions of ''deadly weapon'' to enhance an offender's sentence. NRS 193.165(6), 202.253(2).

8. SENTENCING AND PUNISHMENT.

Because it is designed to cause substantial bodily harm or death, a device that is constructed to be a weapon and is designed to expel projectiles falls within the purview of the definition of ''deadly weapon'' set forth in statute that provides various definitions of ''deadly weapon'' to enhance an offender's sentence. NRS 193.165(6)(a).

9. WEAPONS.

The limitation as to weapons possessed on school grounds expressed in statute prohibiting possession of dangerous weapon on school property applies only to the crime it creates and does not limit its use as a definition of a ''deadly weapon.'' NRS 202.265(5).

10. SENTENCING AND PUNISHMENT.

Any weapon that meets the description of ''firearm'' in statute prohibiting possession of dangerous weapons on school property supports a deadly weapon finding for purposes of statute providing an additional penalty for offenders who use a deadly weapon during the commission of a crime. NRS 193.165(6), 202.265(5)(b).

11. SENTENCING AND PUNISHMENT.

Because the general statutory ''firearm'' definition found in dangerous weapon statute applies to all of the laws referenced in enhancement statute that provides an additional penalty for offenders who use a deadly weapon during the commission of a crime, the general definition of ''firearm'' is incorporated into the laws that the enhancement statute references and, therefore, that definition is applicable to define a ''deadly weapon.'' NRS 193.165(6)(c), 202.253(2).

12. SENTENCING AND PUNISHMENT.

Because statute prohibiting possession of dangerous weapon on school property defines ''firearm'' as a device from which metal projectile may be expelled by spring, air, gas, or other force, and dangerous weapons statute defines ''firearm'' as device from which projectile may be expelled by explosion or combustion, under both definitions, if trier of fact finds that weapon's capabilities are established by its design, not its operability, then weapon meets the definition of ''deadly weapon'' for purposes of statute providing additional penalty for offenders who use deadly weapon during crime, and thus, whether weapon was unloaded or inoperable at time of the crime is irrelevant. NRS 193.165(6), 202.253(2), 202.265(5)(b).

13. SENTENCING AND PUNISHMENT.

A weapon must fall within the definitions set forth in statute providing various definitions of ''deadly weapon'' to enhance an offender's sentence in order to uphold a finding that an instrument is a ''deadly weapon,'' and if the weapon is not a ''firearm'' under the general statutory definition, then the State must prove that the weapon supporting the deadly weapon finding

is a ''deadly weapon'' as defined in the statute, abrogating *Allen v. State*, 96 Nev. 334, 609 P.2d 321 (1980), and *Anderson v. State*, 96 Nev. 633, 614 P.2d 540 (1980). NRS 193.165(6), 202.253(2).

14. SENTENCING AND PUNISHMENT.

Whether a weapon was capable of producing reasonable fear is an ancillary consideration when determining whether a weapon is a ''deadly weapon'' for purposes of statute providing an additional penalty for offenders who use a deadly weapon during the commission of a crime. NRS 193.165(6).

15. SENTENCING AND PUNISHMENT.

The State failed to establish either that toy pellet gun could fire a projectile by the force of an explosion or combustion, or that it was capable of firing a metal projectile, and thus, evidence was insufficient to support defendant's deadly weapon enhancements. NRS 193.165(6), 202.253(2), 202.265(5)(b).

16. CRIMINAL LAW.

In reviewing the sufficiency of the evidence supporting a jury verdict in a criminal case, supreme court views the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

17. CONSTITUTIONAL LAW; LEWDNESS.

Because ''gross'' and ''lewdness'' were terms that conveyed to the average person what conduct was proscribed, statute providing that person who commits any act of open or gross lewdness is guilty, for the first offense, of a gross misdemeanor was not unconstitutionally vague; ''lewdness'' had a sufficiently definite meaning, such that the average person would know what kinds of acts were prohibited by statute, and the terms ''open,'' ''gross,'' and ''lewdness'' all had well-defined and well-understood meanings. NRS 201.210.

18. CRIMINAL LAW.

Supreme court reviews a challenge to the constitutionality of a statute de novo.

19. CONSTITUTIONAL LAW.

Because the court presumes that statutes are constitutional, a party challenging the statute has the burden of making a clear showing of invalidity.

20. CRIMINAL LAW.

A statute is void for vagueness, and therefore facially unconstitutional, if the statute both: (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary and discriminatory enforcement.

21. CRIMINAL LAW.

A statute, challenged on void-for-vagueness grounds, will be deemed to give sufficient notice of proscribed conduct when, viewing the context of the entire statute, the words used have a well-settled and ordinarily understood meaning.

22. LEWDNESS.

The fact that an act was committed openly was sufficient for the fact-finder to conclude that there was a likelihood that the act would be observed and that it would be offensive to observers, and accordingly, the term ''open'' was not vague, as used in statute providing that a person who commits any act of open or gross lewdness is guilty, for the first offense, of a gross misdemeanor. NRS 201.210.

23. LEWDNESS.

As used in statute providing that a person who commits any act of open or gross lewdness is guilty, for the first offense, of a gross misdemeanor, the term ''gross'' sufficiently informed people what degree of lewdness was prohibited, and the phrase ''gross lewdness'' was neither vague nor indefinite; placement of the term ''gross'' narrowed the meaning and breadth of ''lewdness'' by specifying the degree of ''lewdness'' required by the statute, and the statute prohibited lewd acts that were glaringly noticeable or obviously objectionable. NRS 201.210.

24. CRIMINAL LAW.

When a criminal defendant fails to object to a district court's action, supreme court reviews the record for plain error only.

25. CRIMINAL LAW.

To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record and the defendant must demonstrate that the error affected his substantial rights.

26. CRIMINAL LAW.

Based on the common law definition of ''open lewdness,'' and the ordinary meaning of terms in statute providing that person who commits any act of open or gross lewdness is guilty, for the first offense, of a gross misdemeanor, defendant failed to demonstrate that any error in the district court's instruction amounted to plain error affecting his substantial rights; instruction stated that term ''gross'' was defined as being indecent, obscene, or vulgar, and instruction defined term ''lewdness'' as any act of sexual nature which actor knew was likely to be observed by victim who would be affronted by the act, and court's instruction on word ''open'' was in conformity with prior court decisions. NRS 201.210.

27. CRIMINAL LAW.

Because defendant failed to object to the district court's jury instructions concerning his open and gross lewdness charges, supreme court would review the adequacy of the district court's instructions for plain error.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

A jury convicted appellant Durand Eugene Berry of burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, and one count of open and gross lewdness. In this opinion, we address three of the issues Berry raises on appeal and their accompanying subissues.

First, we consider Berry's challenges to the district court's jury instructions defining ''deadly weapon'' for purposes of the burglary-while-in-possession-of-a-deadly-weapon and robbery-with-use-of-a-deadly-weapon charges. Specifically, we discuss whether the district court erroneously instructed the jury on the meaning of ''deadly weapon'' by using NRS 202.265(5)(b)'s and NRS 202.253(2)'s definitions of ''firearm.'' The instruction at issue provided, in pertinent part:

> [A] deadly weapon includes:
>
> 1. Any device, whether loaded or unloaded, operable or inoperable, designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion; or
>
> 2. Any device, whether loaded or unloaded, operable or inoperable, from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.

We conclude that because NRS 202.265's list of weapons is specifically referenced in NRS 193.165(6)(c) as being deadly weapons, the district court did not err by instructing the jury on NRS 202.265(5)(b)'s definition of ''firearm.'' We similarly hold that the district court did not err by instructing the jury on NRS 202.253(2)'s definition of ''firearm,'' even though Berry was not charged with possession or use of a firearm and NRS 193.165(6) does not reference NRS 202.253. We are persuaded that a ''firearm'' under the general firearm definition of NRS 202.253(2) is an instrument designed to cause substantial bodily harm or death, and therefore, it falls within the meaning of ''deadly weapon'' under NRS 193.165(6)(a). As a result, we conclude that the district court did not err by using definitions from NRS 202.265(5)(b) and NRS 202.253(2) to define ''deadly weapon.''

Further, we discuss whether the law supports a jury instruction that a firearm is a deadly weapon despite it being unloaded or inoperable. Because NRS 202.265(5)(b) defines ''firearm'' as a device from which a metal projectile may be expelled by spring, air, gas, or other force, and NRS 202.253(2) defines ''firearm'' as a device from which a projectile may be expelled by explosion or combustion, we conclude that under both definitions, if the trier of fact finds that the weapon's capabilities are established by its design, not its operability, then the weapon meets the definition of a ''deadly weapon.'' Thus, whether the weapon was unloaded or inoperable at the time of the crime is irrelevant.

In reaching this conclusion, we take the opportunity to clarify this court's holdings in *Allen v. State*, 96 Nev. 334, 609 P.2d 321 (1980), and *Anderson v. State*, 96 Nev. 633, 614 P.2d 540 (1980). While we stated in *Allen* that the purpose of the deadly weapon statute was to penalize an offender's use of a weapon not only because of the weapon's ability to inflict deadly harm but also because of the deadly reaction the weapon is likely to provoke, we note that the Legislature subsequently spoke on the issue by enacting NRS 193.165(6) to define what constitutes a ''deadly weapon.'' Thus, although the rationale expressed in *Allen* is still part of this court's consideration, we conclude that a weapon must fall within NRS 193.165(6)'s definitions to uphold a finding that an instrument is a deadly weapon. And, contrary to *Anderson*'s implications, we reit-

erate that if the weapon is not a ''firearm'' under NRS 202.253(2), the State must prove that the weapon supporting the deadly weapon finding is a ''deadly weapon'' as defined in NRS 193.165(6).

Second, we consider whether sufficient evidence supports the deadly weapon findings for the charges of burglary while in possession of a deadly weapon and robbery with use of a deadly weapon. We conclude that based on the applicable statutory definitions of ''deadly weapon,'' no rational trier of fact could have found beyond a reasonable doubt that the toy pellet gun used in this case was a deadly weapon.

Third, we consider Berry's challenges to his open and gross lewdness conviction. In particular, we consider whether the open and gross lewdness statute, NRS 201.210, is unconstitutionally vague and whether the district court erred by instructing the jury on definitions of ''gross'' and ''lewdness'' that were not prescribed by Nevada law. We conclude that the terms ''gross'' and ''lewdness,'' although not statutorily defined, are common words with generally accepted meanings. Thus, we hold that NRS 201.210 is not unconstitutionally vague because an average person of ordinary intelligence can determine what conduct is proscribed by the statute. We further conclude that based on the common law definition of ''open lewdness,'' and the plain, ordinary meaning of NRS 201.210's terms, Berry failed to demonstrate that any error in the district court's instruction amounted to plain error affecting his substantial rights.

FACTS AND PROCEDURAL BACKGROUND

On February 26, 2006, the victim, Armstrong, was working by herself at Koster's Cash Loans, a payday loan store. At the end of her shift, Armstrong began to close the store by counting the money that the business had received that day and placing it in the store's safe. As she prepared to leave for the evening, she went outside to start her car, intending to return to the store only to retrieve her personal belongings and lock the doors. On her way back into the store, Berry approached her, held a gun (later determined to be a ''Speedy Toys'' pellet gun) to her neck, and told her to go into the store and give him all the money.

Berry and Armstrong went into the store and into the closet where the store's safe was kept. Armstrong explained to Berry that it was a time-delay safe and, therefore, he would have to wait ten minutes before it would open. Armstrong testified that Berry told her that he would not shoot her as long as she was not lying and that he would wait for the safe to open.

Armstrong testified that while they were waiting for the safe to open, Berry began touching her on her ''behind area and [her] hips and [her] back and shoulders.'' She testified that Berry said she had a nice body and that if he had known about the time-delay safe taking ten minutes he would have ''had his fun with [her].'' She

thought that he meant he would try to have sex with her. Armstrong described the touching as Berry standing behind her and holding her near him. She testified that he was rubbing his genitals against her for the entire ten minutes that they waited for the safe to open. At one point, Berry also massaged her shoulders and told her to relax.

When the safe's ten-minute time delay had elapsed, Armstrong opened the safe. Berry ordered her to kneel in the corner of the closet, facing away from him. Berry took everything out of the safe, placed it in a backpack, and ordered Armstrong to stay in the closet for one minute after he left, threatening that someone would shoot her otherwise. Armstrong, who had her cellular telephone in her jacket pocket, called 911 from the closet.

Police officers had already been dispatched to the store based on an anonymous 911 call. Upon arrival, an officer saw Berry exit the closet door and pull a mask over his face. As Berry exited the store, the officer identified himself to Berry and, with his gun pointed at Berry, demanded that he stop. Berry ran from the officer, jumped over some shrubs, and climbed a wall into a nearby apartment-style retirement community. The officer found Berry hiding behind a washing machine on a patio.

Berry dropped his backpack while fleeing. Inside the backpack, the crime scene analyst found a toy pellet gun, the contents of the safe, an identification card, a bandana, and a hammer.

On February 28, 2006, the State charged Berry with burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, first-degree kidnapping with use of a deadly weapon, and two counts of open and gross lewdness. Berry pleaded not guilty and the matter proceeded to trial. At trial, the State offered Detective Lance Spiotto as the single witness to testify as to the appearance and capabilities of the gun that Berry used during the crime. Detective Spiotto testified that it was a type of pellet gun with a plastic body and a spring action magazine, designed to look like a Beretta 9-millimeter handgun. The gun, manufactured by Speedy Toys, was available for purchase online for approximately $20. Detective Spiotto further testified that the gun would be capable of firing a projectile because normally a gun of its type was ''operated by a sealed-to-cartridge spring mechanism.'' When asked whether it could fire a bullet, he answered, ''Definitely not a .45, but I guess if you made one small enough, you can—I don't know what a .22 would do in there.'' To his knowledge, no one had tried to fire the gun when it was seized, and no pellets were found in Berry's possession. Additionally, the crime scene analyst testified that when impounding the evidence she labeled the gun a toy but that it appeared capable of firing a projectile. The gun was also admitted into evidence for the jury to examine.

At the conclusion of trial, the district court instructed the jury that a deadly weapon included: any device that constitutes a ''firearm''

pursuant to NRS 202.253(2) or NRS 202.265(5)(b), regardless of whether the gun was unloaded or inoperable; any instrument that was inherently dangerous, under NRS 193.165(6)(a); or any instrument or device that is readily capable of causing substantial bodily harm or death, pursuant to NRS 193.165(6)(b). The jury returned a verdict finding Berry guilty of burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, and one count of open and gross lewdness. After the district court denied Berry's motion to set aside his convictions, Berry appealed.

DISCUSSION

On appeal, we discuss three of Berry's challenges and their accompanying subissues. First, we consider the district court's use of NRS 202.265(5)(b)'s and NRS 202.253(2)'s ''firearm'' definitions, and its use of unloaded or inoperable language to define ''deadly weapon'' for the burglary-while-in-possession-of-a-deadly-weapon and robbery-with-use-of-a-deadly-weapon charges. Second, we consider whether sufficient evidence supports the jury's determination that the pellet gun possessed and used in the crimes was a deadly weapon. Third, we discuss Berry's challenges to the constitutionality of the open and gross lewdness statute and the district court's instructions on definitions of ''gross'' and ''lewdness.'' We address each of these arguments in turn.

Jury instruction defining ''deadly weapon''

Berry's challenge to the deadly weapon jury instruction is twofold. First, Berry argues that the district court erred by instructing the jury on definitions of ''firearm'' derived from NRS 202.265(5)(b) and NRS 202.253(2). He claims that those definitions are not applicable to his case, alleging that NRS 202.265(5)(b) is limited to weapons possessed on school grounds and that NRS 202.253(2) is not referenced in NRS 193.165(6)(c) as an applicable statutory definition. Second, Berry argues that the law does not support the district court's instruction that a firearm under NRS 202.265(5)(b) and NRS 202.253(2) is a deadly weapon regardless of whether it was unloaded or inoperable. After considering the statutes at issue, we reject Berry's assignments of error.

Standard of review

[Headnotes 1-3]

This court generally reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. *Brooks v. State*, 124 Nev. 203, 206, 180 P.3d 657, 658-59 (2008). However, whether the jury instruction was an accurate statement of the law is a legal question subject to de novo review. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). Because Berry argues that the

district court's deadly weapon instruction was a misstatement of law, we review the legal accuracy of the court's instructions de novo. *See id*.

Definitions of ''firearm''

[Headnotes 4, 5]

NRS 193.165 provides an additional penalty for offenders who use a deadly weapon during the commission of a crime. NRS 193.165(6) provides various definitions of ''deadly weapon'' to enhance an offender's sentences for robbery with use of a deadly weapon. Those definitions are also relevant in determining whether a person had possession or gained possession of a deadly weapon during a burglary for purposes of the aggravated sentencing range provided in NRS 205.060(4). *Funderburk v. State*, 125 Nev. 260, 212 P.3d 337 (2009). NRS 193.165(6)(a) through (b) defines ''deadly weapon'' as an instrument that is used in the manner in which it was designed to cause substantial bodily harm or death or, under the circumstances in which it was used, is likely to cause substantial bodily harm or death. NRS 193.165(6)(c) further defines ''deadly weapon'' to include ''[a] dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.''[1] Therefore, NRS 193.165(6)(c) expressly incorporates the definitions set forth in those particular statutes.

The five statutes referenced in NRS 193.165(6)(c) each pertain to crimes involving weapons. One of the referenced statutes, NRS 202.265, which is entitled, in part, ''[p]ossession of dangerous weapon on property or in vehicle of school or child care facility,'' makes possession of certain weapons on school grounds a gross misdemeanor. NRS 202.265(1)(e) prohibits, for example, possession of ''[a] pistol, revolver or other firearm.'' NRS 202.265(5)(b) defines the term ''firearm,'' ''[f]or the purposes of [that] section,'' as ''any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.''

The district court in this case used NRS 202.265(5)(b)'s definition of ''firearm'' in the deadly weapon instruction. In total, the court

[1]NRS 193.165(6) reads, in its entirety:

> As used in this section, ''deadly weapon'' means:
>
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or
>
> (c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

used definitions from NRS 193.165(a), NRS 193.165(b), NRS 202.265(5)(b), and NRS 202.253(2).[2]

First, Berry challenges the district court's use of the latter two statutes, arguing that the instruction on firearm definitions was erroneous because he was not charged with possession or use of a firearm. Rather, he was charged with possession and use of a deadly weapon. However, because the term ''deadly weapon'' is broad, and firearms are included within the meaning of that term, we disagree with Berry's argument.

[Headnote 6]

NRS 202.265(5)(b) and NRS 202.253(2) define ''firearm,'' and both definitions are included within NRS 193.165(6)'s definitions of ''deadly weapon.'' In particular, NRS 202.265(5)(b) (defining the term ''firearm'' as ''any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force'') is specifically referenced in NRS 193.165(6)(c). *See* NRS 193.165(6)(c) (providing that '' 'deadly weapon' means: . . . (c) [a] dangerous or deadly weapon specifically described in . . . NRS 202.265 . . .''). Therefore, for enhancement purposes, a firearm under NRS 202.265(5)(b) is a deadly weapon.

[Headnotes 7, 8]

Further, NRS 202.253(2)'s definition of ''firearm'' also amounts to a deadly weapon under NRS 193.165(6) because, under NRS 202.253(2), a firearm is ''any device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion.'' Naturally, a device that is constructed to be a weapon and is designed to expel projectiles falls within the purview of NRS 193.165(6)(a)'s definition of ''deadly weapon'' because it is designed to cause substantial bodily harm or death. In conclusion, because both of the ''firearm'' definitions that the district court used to instruct the jury are encompassed within NRS 193.165(6)'s definitions of ''deadly weapon,'' we conclude that the district court did not err.

Moreover, Berry asserts that these definitions are inapplicable to this case because (1) NRS 202.265 is limited to weapons possessed on school grounds, and (2) NRS 202.253 is not one of the statutes referenced by NRS 193.165(6). We reject Berry's arguments.

[Headnotes 9, 10]

With respect to Berry's challenge to the district court's use of NRS 202.265, we are convinced that the limitation expressed in

[2]NRS 202.253 provides, in pertinent part: ''As used in NRS 202.253 to 202.369, inclusive: . . . 2. '[f]irearm' means any device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion.''

NRS 202.265(5) applies only to the crime it creates and does not limit its use as a definition of a ''deadly weapon.'' Moreover, in *Funderburk v. State*, we established that NRS 193.165(6) includes in its definitions any weapon described in the statutes listed in paragraph (c). 125 Nev. 260, 212 P.3d 337 (2009). As a result, we reiterate our conclusion from *Funderburk* and hold that any weapon that meets the description set forth in NRS 202.265(5)(b) supports a deadly weapon finding. Accordingly, we conclude that the district court did not err by instructing the jury using language from NRS 202.265(5)(b)'s definition of ''firearm.''

[Headnote 11]

Turning to Berry's challenge to the district court's instruction using NRS 202.253(2)'s definition of ''firearm,'' we conclude that the district court did not err. As explained above, NRS 193.165(6)(a)'s definition of ''deadly weapon'' encompasses ''firearm'' under NRS 202.253(2)'s definition, as a firearm is a device that is designed to cause substantial bodily harm or death. In addition, NRS 202.253(2) is the general ''firearm'' definition for purposes of NRS 202.253 through 202.369. Thus, as a general definition, NRS 202.253 applies to every other statute referred to by NRS 193.165(6)(c) that employs the term ''firearm.'' *See* NRS 193.165(6)(c) (referencing NRS 202.255, 202.265, 202.290, 202.320, and 202.350). Because the general ''firearm'' definition of NRS 202.253(2) applies to all of the statutes referenced in NRS 193.165(6)(c), we conclude that NRS 202.253 is incorporated into the statutes that NRS 193.165(6)(c) references and, therefore, that definition is applicable to define a ''deadly weapon.''

In sum, we conclude that the district court did not err by using the ''firearm'' definitions from NRS 202.265(5)(b) and NRS 202.253(2) to define ''deadly weapon'' for Berry's burglary-while-in-possession-of-a-deadly-weapon and robbery-with-use-of-a-deadly-weapon charges.

Propriety of the unloaded or inoperable language

[Headnote 12]

Second, Berry argues that the district court erred by instructing the jury that a firearm under NRS 202.265(5)(b) and NRS 202.253(2) was a deadly weapon regardless of whether it was unloaded or inoperable. We disagree and conclude that this instruction is a correct statement of law.

NRS 202.265(5)(b)'s and NRS 202.253(2)'s definitions of ''firearm'' both include devices that are designed to be capable of expelling projectiles, one by means of spring, gas, air, or other force and the other by explosion or combustion. Under these definitions, if the fact-finder determines that by its design—for example, because it is constructed with a spring, gas, air, or explosion mechanism, the weapon is capable of expelling projectiles (specifically metallic pro-

jectiles under NRS 202.265(5)(b))—the definitions are met. Whether the weapon was unloaded or inoperable is therefore irrelevant. Hence, we conclude that the district court did not err.

Although we conclude that the district court's unloaded or inoperable instruction was not erroneous as a matter of law, we take this opportunity to clarify our holdings in *Allen v. State*, 96 Nev. 334, 609 P.2d 321 (1980), and *Anderson v. State*, 96 Nev. 633, 614 P.2d 540 (1980). In *Allen*, this court addressed whether an inoperable firearm was a deadly weapon under NRS 193.165. 96 Nev. at 336, 609 P.2d at 322. In holding that an inoperable firearm used in the commission of a crime could support a deadly weapon enhancement, this court reasoned, ''[a] firearm is dangerous, not only because it can inflict deadly harm, but because its use may provoke a deadly reaction from the victim or from bystanders.'' *Id*. Then, in *Anderson*, this court expanded its holding in *Allen* to apply to the use of a blank gun. 96 Nev. at 634, 614 P.2d at 540. Without describing the type of gun or its capabilities, the *Anderson* court summarily stated that it ''perceive[d] no substantial distinction between the inoperable firearm in *Allen* and the blank gun used in the instant case.'' *Id*. Here, the State relies on *Allen* and *Anderson*, maintaining that a pellet gun is per se a deadly weapon because there is no difference between the pellet gun used in this case and the guns used in *Allen* and *Anderson*.

[Headnotes 13, 14]

Although the *Allen* court considered the fear or deadly reaction that may be provoked by the use of a weapon, we now clarify that whether the weapon was capable of producing reasonable fear is an ancillary consideration when determining whether a weapon is a ''deadly weapon.'' Because the Legislature drafted specific provisions defining ''deadly weapon'' after this court decided *Allen* and *Anderson*, *see* 1995 Nev. Stat., ch. 455, § 1, at 1431, the statutory definitions set forth in NRS 193.165(6) control and the State must prove that the weapon is a ''deadly weapon'' pursuant to NRS 193.165(6). Thus, to the extent that *Allen* or *Anderson* imply that a weapon need not meet one of NRS 193.165(6)'s ''deadly weapon'' definitions, we take this opportunity to clarify that it does.

Sufficiency of the evidence supporting the finding of a deadly weapon

[Headnote 15]

Berry argues that even if the district court properly instructed the jury, there was insufficient evidence to support a finding that the toy pellet gun was a deadly weapon. Specifically, Berry claims that the State failed to establish either that the Speedy Toys pellet gun could fire a projectile by the force of an explosion or combustion, *see* NRS 202.253(2), or that it was capable of firing a metal projectile. *See* NRS 202.265(5)(b). We agree and conclude that this failure warrants reversal of the aggravated sentence for burglary while in possession

of a deadly weapon and the deadly weapon enhancement sentence for the robbery conviction.

[Headnote 16]

In reviewing the sufficiency of the evidence supporting a jury verdict in a criminal case, this court views the evidence in the light most favorable to the verdict and determines whether '' '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' '' *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

In this case, as previously discussed, in order to meet its burden of proof, the State had to establish that the pellet gun Berry possessed during, and used in, the commission of the crimes was indeed a ''deadly weapon'' under NRS 193.165. According to the applicable statutes, the pellet gun would have been a deadly weapon if it was (1) designed to cause substantial bodily harm or death, NRS 193.165(6)(a); (2) used in a manner which, under the circumstances, could cause substantial bodily harm or death pursuant to NRS 193.165(6)(b); (3) capable of expelling a metal projectile by use of spring, gas, air, or other force pursuant to NRS 202.265(5)(b); or (4) designed to expel a projectile by the force of an explosion pursuant to NRS 202.253(2). The record does not reveal any evidence presented by the State that suggests that the pellet gun at issue was specifically designed to cause substantial bodily harm or death, *see* NRS 193.165(6)(a), that Berry used the pellet gun in a manner that could cause substantial bodily harm or death, *see* NRS 193.165(6)(b), or that the gun was designed to expel a projectile by the force of an explosion. *See* NRS 202.253(2).

Instead, the record reflects that the State attempted to prove that the gun was a deadly weapon under NRS 202.265(5)(b) by presenting evidence that the gun was capable of firing metal projectiles. But the only evidence offered at trial consisted of testimony regarding the type of projectile that this gun was capable of firing, which came from Detective Spiotto. Detective Spiotto's testimony that the pellet gun would be capable of firing a projectile was based on the fact that ''[n]ormally'' a gun of its type was ''operated by a sealed-to-cartridge spring mechanism.'' He also explained that a pellet for the gun is usually plastic but could be metal. Notably, when specifically asked whether the gun could fire a bullet, he answered, ''Definitely not a .45, but I guess if you made one small enough, you can—I don't know what a .22 would do in there.'' According to Detective Spiotto, no one had tried to fire the gun and no projectiles of any kind were found in Berry's possession upon arrest. Based on the uncertainty of this testimony, we determine that no rational trier of

fact could have found beyond a reasonable doubt that the gun was capable of firing metal projectiles.[3]

Therefore, because Detective Spiotto's testimony did not prove beyond a reasonable doubt that this weapon was within NRS 202.265(5)(b)'s definition of ''firearm'' or any other definition of ''deadly weapon,'' we conclude that the State's evidence was insufficient to support Berry's deadly weapon enhancements.

Open or gross lewdness conviction

[Headnote 17]

Berry also challenges his open and gross lewdness conviction for two reasons. First, Berry argues that NRS 201.210 is unconstitutionally vague because the terms ''gross'' and ''lewdness'' lack definite meaning. Second, Berry argues that the district court erred by instructing the jury on definitions of ''gross'' and ''lewdness'' that were not prescribed by Nevada law. We conclude that because ''gross'' and ''lewdness'' are terms that convey to the average person what conduct is proscribed, NRS 201.210 is not unconstitutionally vague and any error made by the district court with respect to the open and gross lewdness instruction did not amount to plain error affecting Berry's substantial rights.

Constitutionality of NRS 201.210

[Headnotes 18, 19]

This court reviews a challenge to the constitutionality of a statute de novo. *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). Because the court presumes that statutes are constitutional, a party challenging the statute has the burden of making ''a clear showing of invalidity.'' *Id.*

[Headnotes 20, 21]

A statute is void for vagueness, and therefore facially unconstitutional, ''if the statute both: (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary and discriminatory enforcement.'' *City of Las Vegas v. Dist. Ct.*, 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). However, a statute will be deemed

[3]In response to questioning by this court at oral argument concerning the uncertain nature of Detective Spiotto's testimony, the State argued that the jury had the opportunity to examine the gun and its conclusion that the gun was a deadly weapon must be afforded deference. We reject this argument because, although he was not an expert, Detective Spiotto was experienced with guns and he was unable to determine whether the pellet gun used in this case could, beyond a reasonable doubt, fire a metal projectile. Thus, we conclude that no rational trier of fact could find that the pellet gun used in this case was indeed capable of firing a metal projectile.

to give sufficient notice of proscribed conduct when, viewing the context of the entire statute, the words used have a well-settled and ordinarily understood meaning. *Nelson v. State*, 123 Nev. 534, 540-41, 170 P.3d 517, 522 (2007). It has also been established that when an offense has not been defined by the Legislature, we generally look to the common law definitions of the related term or offense. *Ranson v. State*, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983).

In this case, the challenged statute provides: ''A person who commits any act of open or gross lewdness is guilty: (a) [f]or the first offense, of a gross misdemeanor [and] (b) [f]or any subsequent offense, of a category D felony and shall be punished as provided in NRS 193.130.'' NRS 201.210(1). At common law, ''open lewdness was defined as an 'unlawful indulgence of lust involving gross indecency with respect to sexual conduct' committed in a public place and observed by persons lawfully present.'' *Young v. State*, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993) (quoting 3 *Wharton's Criminal Law* § 315 (14th ed. 1980)). Thus, the definition of ''open lewdness'' at common law expressed elements concerning acts that were sexual in nature, public, and observed by others. *See id*.

''Open''

This court has previously considered what acts of lewdness were deemed ''open'' under NRS 201.210. *Ranson*, 99 Nev. 766, 670 P.2d 575; *Young*, 109 Nev. 205, 849 P.2d 336. The *Ranson* court concluded that because the term ''open'' modified the word ''lewdness,'' the Legislature ''intend[ed] to broaden the common law definition to include acts which are committed in a private place, but which are nevertheless committed in an 'open' as opposed to a 'secret' manner.'' 99 Nev. at 767, 670 P.2d at 575. Thus, the court held that even if an act is not committed in a public place, when the evidence shows that an offender clearly intended his acts to be offensive to his victim, he acted in an ''open'' fashion and is, therefore, guilty of open lewdness under NRS 201.210. *Id*. at 768, 670 P.2d at 575.

[Headnote 22]

We then expanded our interpretation of ''open lewdness'' in *Young*, when we expressed that NRS 201.210 ''does not require proof of intent to offend an observer or even that the exposure was observed.'' 109 Nev. at 215, 849 P.2d at 343. Instead, the court explained, ''[i]t is sufficient that the public sexual conduct or exposure was intentional.'' *Id*. Therefore, as the law stands with respect to the meaning of ''open'' for purposes of NRS 201.210, we determine that the term is not vague. Under *Ranson* and *Young*, the fact that an act is committed openly is sufficient for the fact-finder to conclude that there was a likelihood that the act would be observed and that

it would be offensive to observers. Accordingly, we conclude that the term ''open'' is not vague.

''Gross lewdness''

[Headnote 23]

In addition, we conclude that the phrase ''gross lewdness'' in NRS 201.210 is neither vague nor indefinite; rather, we are persuaded that it has a well-defined, well-understood, and generally accepted meaning, sufficient to inform an offender of the act that is prohibited. The term ''gross,'' as used in NRS 201.210, modifies the term ''lewdness.'' This placement of the term ''gross'' narrows the meaning and breadth of ''lewdness'' by specifying the degree of ''lewdness'' required by the statute. *Merriam-Webster's Collegiate Dictionary* defines ''gross'' to mean ''immediately obvious . . . glaringly noticeable usu[ally] because of inexcusable badness or objectionableness.'' 551 (11th ed. 2003). Therefore, for purposes of NRS 201.210, the statute prohibits lewd acts that are ''glaringly noticeable'' or obviously objectionable. *See id.* In light of the plain meaning of the word ''gross'' and its placement with respect to the term ''lewdness,'' we conclude that, as used in NRS 201.210, ''gross'' sufficiently informs people what degree of lewdness is prohibited.[4]

With respect to the term ''lewdness,'' this court has previously considered a vagueness challenge to that word in *Summers v. Sheriff*, 90 Nev. 180, 521 P.2d 1228 (1974). In *Summers*, this court established that the word ''lewd,'' under NRS 201.230, defining ''lewdness with a minor,'' was not exceedingly vague to render the statute void, stating, ''[w]hile 'lewd' is not specifically defined in our statutes, the word 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' '' *Id.* at 182, 521 P.2d at 1228 (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)). Even though the analysis in *Summers* concerned lewdness with a minor under NRS 201.230, and that analysis was brief, we are convinced that dictionary definitions and other jurisdictions' reasoning regarding similar lewdness statutes support the same conclusion here.

Modern authorities define ''lewd'' as pertaining to sexual conduct that is ''[o]bscene or indecent; tending to moral impurity or wantonness,'' *Black's Law Dictionary* 927 (8th ed. 2004), ''evil, wicked'' or ''sexually unchaste or licentious,'' *Merriam-Webster's Collegiate Dictionary* 715 (11th ed. 2003), and ''[p]reoccupied with sex and sexual desire; lustful,'' *The American Heritage Dictionary of*

[4]Other courts have also rejected vagueness challenges to the term ''gross,'' reasoning that it has an ordinary meaning: ''glaringly noticeable,'' ''glaringly obvious,'' or ''flagrant.'' *See, e.g.*, *Maun v. Dept. of Professional Regulation*, 701 N.E.2d 791, 798-99 (Ill. App. Ct. 1998); *State v. Welch*, 707 N.E.2d 1133, 1135 (Ohio Ct. App. 1997); *Chandler v. Housholder*, 722 S.W.2d 217, 218 (Tex. App. 1987).

the English Language 1035 (3d ed. 1996).[5] Other jurisdictions considering vagueness challenges to statutes worded similar to NRS 201.210 have upheld those statutes reasoning that the terms ''lewd'' or ''lewdness'' have ''generally accepted meanings,'' *State v. Cook*, 678 P.2d 987, 989 (Ariz. Ct. App. 1984), and ''the concept of lewdness is sufficiently a matter of common knowledge that the average citizen can determine what conduct is proscribed.'' *Profit v. City of Tulsa*, 574 P.2d 1053, 1056 (Okla. Crim. App. 1978). Therefore, we determine that ''lewdness'' has a sufficiently definite meaning such that the average person would know what kinds of acts are prohibited by NRS 201.210.[6] Because the terms ''open,'' ''gross,'' and ''lewdness'' all have well-defined and well-understood meanings, we hold that NRS 201.210 is not unconstitutionally vague.

Jury instructions defining ''gross'' and ''lewdness''

[Headnotes 24-26]

As previously mentioned, whether a jury instruction was an accurate statement of the law is a legal question subject to de novo review. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). But, when a criminal defendant fails to object to a district court's

[5]Several jurisdictions have likewise concluded that the term ''lewd'' or ''lewdness'' have commonplace meanings. *See, e.g.*, *State v. Gates*, 897 P.2d 1345, 1348 (Ariz. Ct. App. 1994) (''Although the term 'lewd' is not defined by statute or Arizona case law, it has been held to have an ordinary meaning, one that is 'easily understood by the common man.' '' (quoting *State v. Limpus*, 625 P.2d 960, 965 (Ariz. Ct. App. 1981)); *George v. State*, 189 S.W.3d 28, 34 (Ark. 2004) (' 'Though ''lewd'' is not defined in the Arkansas Code, the court of appeals has stated that ''lewd'' is a common word with an ordinary meaning [and] *Black's Law Dictionary* defines ''lewd'' as ''[o]bscene or indecent; tending to moral impurity or wantonness.'' ' '' (second alteration in original) (citations omitted) (quoting *Cummings v. State*, 110 S.W.3d 272, 278 (Ark. 2003))); *People v. Pinkoski*, 752 N.Y.S.2d 421, 424 (N.Y. App. Div. 2002) (''[T]he word [lewd] is not so arcane as to escape the understanding of the average juror.''); *State v. Hammett*, 642 S.E.2d 454, 458 (N.C. Ct. App. 2007) (''This Court has defined the words 'lewd' and 'lascivious' according to their plain meaning in ordinary usage.''); *Tovar v. State*, 165 S.W.3d 785, 790 (Tex. App. 2005) (' 'Lewd' is not defined by the penal code . . . [but] because 'lewd' has a common meaning that jurors can be fairly presumed to know and apply, the trial court was not required to define 'lewd' in the jury charge.''); *State v. Lubotsky*, 434 N.W.2d 859, 861 (Wis. Ct. App. 1988) (concluding that dictionary ''definitions reflect the ordinary and accepted meaning of the word 'lewd.' '' (citations omitted)).

[6]Additional jurisdictions have upheld their lewdness statutes after considering vagueness challenges. *See, e.g.*, *State v. B Bar Enterprises, Inc.*, 649 P.2d 978, 982 (Ariz. 1982) (''[L]ewdness as used in A.R.S. § 12-802 [the statute prohibiting the use of buildings 'for the purpose of lewdness'] is not unconstitutionally vague.''); *State v. Holstead*, 354 So. 2d 493, 497 (La. 1977) (' 'The word[ ] ''lewd'' . . . [is] not vague and indefinite. On the contrary, [it] ha[s] a well defined, well understood, and generally accepted meaning . . . . The word ''lewd'' means lustful, indecent, lascivious, and signifies that form of immorality which has relation to sexual impurity . . . .' '' (quoting *State v. Prejean*, 45 So. 2d 627, 629 (La. 1950))); *State v. Club Recreation and Pleasure*, 599

action, this court reviews the record for plain error only. *Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007). ''To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record'' and the defendant must demonstrate that the error affected his substantial rights. *Id*. (quoting *Garner v. State*, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002), *and by Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008)).

[Headnote 27]

In this case, Berry failed to object to the district court's jury instructions concerning his open and gross lewdness charges. Therefore, we review the adequacy of the district court's instructions for plain error.

The district court instructed the jury on Berry's open and gross lewdness charges as follows:

> With reference to the crime of Open and Gross Lewdness, you are instructed that the word ''open'' is used to modify the term ''lewdness[.]'' As such, it includes acts which are committed in a private place, but which are nevertheless committed in an ''open'' as opposed to a ''secret'' manner. You are further instructed that it includes an act done in an ''open'' fashion clearly intending that the act be offensive to the victim.
>
> The term ''gross'' is defined as being indecent, obscene or vulgar.
>
> The term ''lewdness'' is defined as any act of a sexual nature which the actor knows is likely to be observed by the victim who would be affronted by the act.

Berry concedes that the district court's instruction on the word ''open'' is in conformity with this court's decisions in *Ranson*, 99 Nev. 766, 670 P.2d 574, and *Young*, 109 Nev. 205, 849 P.2d 336. And, after considering the common law definition of ''open lewdness'' and the ordinary meanings of the terms ''gross'' and ''lewdness,'' we conclude that the trier of fact could have found that Berry's touching of Armstrong was sexual in nature, committed in an open fashion, and could have been observed by others who would have been offended. Accordingly, we conclude that Berry has failed to demonstrate that any error in the jury instruction affected his substantial rights.

P.2d 1194, 1200 (Or. Ct. App. 1979) (''Lewdness is defined as 'gross indecency so notorious as to tend to corrupt the community's morals.' . . . We find th[is] term[ ] [is] not unconstitutionally vague.'' (quoting *Black's Law Dictionary* 1052 (rev. 4th ed. 1968))); *State v. Carter*, 687 S.W.2d 292, 293-94 (Tenn. Crim. App. 1984) (''The constitutionality of the statute . . . is not vague. . . . [T]he words in the statute, lewd, lascivious, and obscene, are sufficient descriptions to put ordinary men of common intelligence on notice as to what conduct is prohibited.'').

CONCLUSION

We conclude that, for purposes of Berry's burglary-while-in-possession-of-a-deadly-weapon and robbery-with-use-of-a-deadly-weapon charges, the district court did not err by using NRS 202.265(5)(b)'s and NRS 202.253(2)'s definitions of ''firearm'' to instruct the jury on the meaning of ''deadly weapon.'' In particular, NRS 193.165(6)(c) specifically refers to weapons defined under NRS 202.265 as deadly weapons and, under NRS 193.165(6)(a), a ''firearm'' as defined under NRS 202.253(2) is also a ''deadly weapon.'' Further, after reexamining this court's holdings in *Allen* and *Anderson*, we overrule those cases to the extent that they suggest that a weapon that is likely to produce fear or a deadly reaction is a deadly weapon. Rather, a weapon must meet one of the definitions set forth in NRS 193.165(6) to qualify as a deadly weapon for enhancement purposes.

However, regarding Berry's deadly weapon convictions, we conclude that the State failed to present sufficient evidence to support a finding of a deadly weapon under NRS 193.165(6). While Detective Spiotto testified that pellet guns are designed to fire projectiles (normally due to the sealed-to-cartridge spring mechanism) and that the gun in this case could possibly fire a metal projectile, the State failed to demonstrate beyond a reasonable doubt that the weapon was designed to be capable of firing a metal projectile, as required under NRS 202.265(5)(b).

Finally, we conclude that NRS 201.210, the open and gross lewdness statute, is not unconstitutionally vague. Each of the terms set forth in the statute—''open,'' ''gross,'' and ''lewdness''—all have generally accepted meanings that impart sufficient notice on the average person of what conduct the statute proscribes. And, considering the common law definition of ''open lewdness'' and the ordinary meanings of NRS 201.210's terms, we are persuaded that the jury could have convicted Berry under NRS 201.210. Thus, any error made by the district court in giving the instruction does not rise to plain error.

Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.[7]

PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

[7]In addition to the specific challenges addressed in this opinion, Berry also raises separate challenges relating to the admission of Detective Spiotto's testimony, the admission of false identifications that were located in Berry's backpack upon arrest, and the district court's failure to admit evidence of Berry's statement to police. Additionally, Berry raises challenges concerning various instances of prosecutorial misconduct, sufficiency of the evidence supporting his open and gross lewdness conviction, and cumulative error. After careful review, we conclude that none of these challenges warrant reversal.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA, APPELLANT, *v.* WARREN B. HARDY II, IN HIS OFFICIAL CAPACITY AS NEVADA STATE SENATOR FOR CLARK COUNTY SENATORIAL DISTRICT NO. 12, RESPONDENT.

No. 53064

July 30, 2009 212 P.3d 1098

Appeal from a district court order granting judicial review of a Nevada Ethics Commission decision and entering a permanent injunction in an ethics matter. First Judicial District Court, Carson City; William A. Maddox, Judge.

The supreme court held that: (1) delegation to Commission on Ethics of each legislative house's power to discipline its members for disorderly conduct involving core legislative function activities ran afoul of separation of powers doctrine, (2) Senator's alleged ethics violation involved core legislative functions such that investigation into Senator's activities by Commission violated separation of powers doctrine, and (3) Legislature could not waive constitutionally based structural protections such as the separation of powers doctrine.

Affirmed.

Nevada Commission on Ethics and *Adriana G. Fralick*, Carson City, for Appellant.

Legislative Counsel Bureau Legal Division and *Brenda J. Erdoes*, Legislative Counsel, *Eileen G. O'Grady*, Chief Deputy Legislative Counsel, and *Kevin C. Powers*, Senior Principal Deputy Legislative Counsel, Carson City, for Respondent.

Jacob L. Hafter, Las Vegas, for Amicus Curiae Nevada Center for Public Ethics.

1. CONSTITUTIONAL LAW.

   To extent that a legislator's conduct, resulting in disciplinary proceeding, involves a core legislative function such as voting and, by extension, disclosure of potential conflicts of interest prior to voting, any discipline of legislator is a function constitutionally committed to each legislative house such that this power cannot be delegated to another branch of government; and thus, the Commission on Ethics being an agency of the executive branch, any delegation to Commission of each legislative house's power to discipline its members for disorderly conduct involving core legislative function activities runs afoul of separation of powers doctrine and is therefore unconstitutional. Const. art. 3, § 1; art. 4, § 6.

2. CONSTITUTIONAL LAW; STATES.

   State Senator's alleged ethics violation in failing to adequately disclose an alleged conflict of interest regarding a piece of legislation and by failing to abstain from voting on that legislation involved core legislative functions such that investigation into Senator's activities by Commission on Ethics, as

an agency of the executive branch, violated separation of powers doctrine. Const. art. 3, § 1; art. 4, § 6; NRS 281A.420.

3. CONSTITUTIONAL LAW.
   The Legislature cannot, by enacting a statute that delegates certain powers to another branch of the government, waive constitutionally based structural protections such as the separation of powers doctrine. Const. art. 3, § 1.
4. APPEAL AND ERROR.
   The decision of whether to grant a permanent injunction rests in the district court's sound discretion and supreme court will not overturn that decision unless it is an abuse of discretion.
5. APPEAL AND ERROR.
   When the facts surrounding the underlying issues are undisputed, the district court's permanent injunction will be reviewed de novo.
6. ADMINISTRATIVE LAW AND PROCEDURE.
   In the context of reviewing an administrative decision made under the Administrative Procedure Act, supreme court reviews purely legal questions de novo.
7. CONSTITUTIONAL LAW.
   The purpose of the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch. Const. art. 3, § 1; U.S. CONST. art. 3, §§ 1 *et seq*.
8. CONSTITUTIONAL LAW.
   When legislative conduct at issue constitutes a core legislative function, constitutional and prudential concerns protect members of the house from having that conduct scrutinized by another branch of state government; voting constitutes a core legislative function. Const. art. 3, § 1; art. 4, § 6.
9. CONSTITUTIONAL LAW; STATES.
   Legislature may delegate the power to discipline its own members with respect to conduct related to noncore legislative functions; using the ethics laws as an example, such proceedings could include discipline for legislators who use governmental time, property, equipment, or other facilities for nongovernmental purposes, bid or enter into governmental contracts, or accept or receive an honorarium. NRS 281A.400(8), 281A.430, 281A.510.
10. STATES.
    The ethics laws make disclosure of any potential conflicts of interest a prerequisite to voting or abstaining from voting on legislation.
11. CONSTITUTIONAL LAW.
    Departmental agencies can exist within each branch of government and exercise certain ministerial functions that appear to overlap with or duplicate the functions of another branch; such an overlapping or duplication of effort or function can be entirely valid so long as each can logically and legitimately trace its efforts or functions back to, and is derived from, its basic source of power.
12. STATES.
    Although the Commission on Ethics itself was created by the Legislature, the purpose for which it was created, to investigate and take appropriate action regarding alleged violations of the ethics laws, necessarily designates the Commission as an agency of the executive branch. Const. art. 5, § 7; NRS 281A.280(1).
13. CONSTITUTIONAL LAW.
    Regardless of the degree of assent or acquiescence by the Legislative or Executive Department, legislation which infringes on the structural pro-

tections of separation of powers is unconstitutional. Const. art. 3, § 1; art. 4, § 6.

14. CONSTITUTIONAL LAW.

Constitutionally based structural protections, like the separation of powers doctrine, cannot be waived by either the legislative or executive branch. Const. art. 3, § 1; U.S. CONST. art. 3, §§ 1 *et seq*.

Before HARDESTY, C.J., PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS and PICKERING, JJ.

OPINION

Per Curiam:

In this appeal, we consider whether appellant Nevada Commission on Ethics has the authority to conduct administrative proceedings regarding alleged ethical violations purportedly committed by respondent Senator Warren B. Hardy II. Specifically, we address the Commission's authorization to entertain allegations that Senator Hardy violated NRS 281A.420 by failing to adequately disclose an alleged conflict of interest regarding a piece of legislation and by failing to abstain from voting on that bill. In this regard, this appeal sets the very nature of the Commission's jurisdiction before us for evaluation, and calls into question whether the Legislature can delegate to the Commission the power to discipline legislators for alleged disorderly conduct. In particular, since the Nevada Constitution confers that power on each house of the Legislature, we must determine whether the Legislature's decision to pass that power to the Commission constitutes an unconstitutional delegation of legislative power. We further evaluate whether the Legislature, by enacting the Ethics in Government laws and creating the Commission, waived any claim to protection under the separation of powers doctrine.

Based on our review of the Nevada Constitution and relevant legal authority, we conclude that to the extent that a legislator's conduct, resulting in a disciplinary proceeding, involves a core legislative function such as voting and, by extension, disclosure of potential conflicts of interest prior to voting, any discipline of the legislator is a function constitutionally committed to each house of the Legislature by Article 4, Section 6 of the Nevada Constitution, and that this power cannot be delegated to another branch of government. We further hold that the Commission is an agency of the executive branch, and thus, any delegation to the Commission of each house of the Legislature's power to discipline its members for disorderly conduct involving core legislative function activities runs afoul of the separation of powers doctrine and is therefore unconstitutional. Finally, we hold that the Legislature cannot waive consti-

tutionally based structural protections such as the separation of powers doctrine. As a result, we affirm the district court's decision and conclude that the Commission is barred from conducting any further proceedings against Senator Hardy.

NEVADA COMMISSION ON ETHICS AND ETHICS LAWS

Because this appeal requires us to evaluate the Commission itself, we begin our discussion by providing a brief overview of the Commission and the ethics laws relevant to this appeal.

Commission on Ethics

The Commission on Ethics is charged with investigating and taking appropriate action regarding alleged violations of Nevada ethics laws by public officers and employees as well as former public officers and employees.[1] NRS 281A.280. Prior to the Commission's formation in 1985, two separate ethics commissions existed, one for the legislative branch and one for the executive branch. In 1985, both of those commissions were combined to form the current Commission on Ethics. *See* Hearing on S.B. 345 Before the Senate Comm. on Government Affairs, 63d Leg. (April 24, 1985) (introducing and explaining the history of the ethics commission and the intention of S.B. 345 to combine the Executive Ethics Commission and the Legislative Ethics Commission into one Commission on Ethics). The Commission is composed of eight members—four members appointed by the governor and four members appointed by the legislative commission. NRS 281A.200 (appointing Commission members).

Pursuant to NRS 281A.280, the Commission has jurisdiction over ethics violations purportedly committed by most public officers.[2] A ''public officer'' is defined as ''a person elected or appointed to a position which is established by the Constitution of the State of Nevada . . . and which involves the exercise of a public power, trust or duty.'' NRS 281A.160(1). NRS 281A.160(1) defines ''the exercise of a public power, trust, or duty'' as official actions involving ''substantial and material exercise of administrative dis-

[1]Nevada's ethics laws are contained in Chapter 281A of the Nevada Revised Statutes. We note that Chapter 281A has recently been amended to add language outlining the ethics laws' impact on state legislators' rights and responsibilities when performing their legislative functions. *See generally* NRS Chapter 281A (amended 2009). The instant matter involves the application of the previous version of the ethics laws, the version in effect when the underlying ethics proceeding against Senator Hardy was initiated.

[2]Supreme court justices, judges, officers of the court system, and court employees are specifically excluded from the Commission's jurisdiction. *See* NRS 281A.160(2)(a); NRS 281A.150.

cretion in the formation of public policy,'' ''[t]he expenditure of public money,'' and ''[t]he administration of laws and rules of the State, a county, or a city.'' In light of this language, it is clear that, for the purposes of the ethics laws, the term ''public officer'' encompasses members of the state senate and the assembly.

Under NRS 281A.280(1), the Commission's authority to investigate and take action regarding alleged violations of the ethics laws may be initiated by an individual. Any individual may also request an opinion regarding alleged ethical violations of a public officer.[3] After the Commission has investigated an ethics allegation, the Commission may issue an opinion applying the statutory ethical standards to ''a given set of facts or circumstances.'' NRS 281A.440(2). Additionally, if the Commission determines that an ethics violation has been ''willful,'' the Commission may impose a civil penalty for such a violation. NRS 281A.480.

Nevada ethics laws

Under Nevada's ethics laws, a public officer may not vote or abstain from voting upon any matter on which the officer has accepted a gift, that would reasonably be shaped by the officer's obligation in a private capacity to the interest of others, or that the officer has a pecuniary interest in, unless he or she publicly discloses to other members of the body to which the officer belongs, the gift, commitment, or interest. NRS 281A.420(4). For members of the Legislature, once disclosure is made pursuant to NRS 281A.420(4), the legislator may file a written conflict of interest disclosure statement with the Legislative Counsel Bureau prior to voting on such matters. *See* NRS 281A.420(6). After the written disclosure statement is made, the legislator need not orally disclose the interest when the matter is again considered by the Legislature. *Id*. With this framework, we turn to the present matter before us.

FACTS AND PROCEDURAL BACKGROUND

This case began when the Commission instituted administrative proceedings against Senator Hardy stemming from a citizen's complaint to the Commission based on allegations of ethics violations that involve Senator Hardy's voting on legislation during the 2007 legislative session. The ethics complaint, in relevant part, asserted that Senator Hardy violated NRS 281A.420, by failing to adequately disclose an alleged conflict of interest regarding Senate Bill 509 and

[3]The ethics laws also allow the Commission to render an opinion at the request of a public officer or employee who is seeking guidance on questions related ''to the propriety of his own past, present or future conduct as an officer or employee.'' *See* NRS 281A.440(1).

by failing to abstain from the voting on that bill.[4] NRS 281A.420(2) provides, in relevant part that

> a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by: (a) [h]is acceptance of a gift or loan; (b) [h]is pecuniary interest; or (c) [h]is commitment in a private capacity to the interests of others.

Senator Hardy moved the Commission to dismiss the administrative proceeding or for summary judgment on separation of powers and legislative immunity grounds. The Commission subsequently denied Senator Hardy's motion. Although an administrative hearing was scheduled to address the allegations against him, Senator Hardy filed a petition for judicial review of the Commission's denial of his motion to dismiss or for summary judgment in the district court. He also filed an emergency motion for a preliminary injunction.

Following a hearing on the petition and motion, the district court granted Senator Hardy's petition for judicial review of the Commission's decision and entered a permanent injunction preventing the Commission from conducting any further proceedings against Senator Hardy. The district court based its decision on several grounds. The court found that the Commission was barred as a matter of law from conducting administrative proceedings against Senator Hardy because of the constitutional doctrines of separation of powers and legislative immunity under Article 3, Section 1 of the Nevada Constitution. In reaching its determination, the district court found that the alleged ethics violations involved legislative actions taken by Senator Hardy within the sphere of legitimate legislative activity, and the court concluded that those legislative actions were constitutionally protected. The court further found that the Nevada Senate was the only governmental entity that could question Senator Hardy regarding those legislative actions and that the Commission, an agency of the executive branch, would violate the separation of powers doctrine by questioning Senator Hardy regarding the alleged ethics violations. The court also determined that there had not been an institutional legislative immunity waiver, through the enactment of NRS 281A.420, of the Legislature's constitutional right to discipline its members. Finally, the district court concluded that the Legislature's standing rules, regarding the disclosure of conflicts, voting, and abstention, took precedence over NRS 281A.420. The Commission subsequently filed an appeal from the district court's

[4]The record shows that in his private capacity, Senator Hardy serves as president of the Associated Builders and Contractors of Southern Nevada (ABC-LV). Senate Bill 509 related to lease-purchase and installment-purchase agreements that would have affected ABC-LV's members.

order. Because the issues presented pertained to the 2009 legislative session, this court granted Senator Hardy's motion to expedite briefing and argument and provided a memorandum disposition, with the formal disposition to follow. *See Ex Rel. Penrose v. Greathouse*, 48 Nev. 419, 233 P. 527 (1925).

DISCUSSION

[Headnotes 1-3]

Our consideration of the issues presented to us in this appeal begins with a brief examination of the separation of powers doctrine. We then examine Article 4, Section 6 of the Nevada Constitution to determine whether the separation of powers doctrine bars the Legislature from delegating this authority to another branch of government. After determining that the Legislature may not delegate its disciplinary authority to another governmental branch, we evaluate the Commission itself to determine its position in Nevada's tripartite government system. Determining that the Commission is part of the executive branch, we conclude by addressing whether the Legislature waived the protections of the separation of powers doctrine by creating the Commission and granting it authority to discipline legislators for ethics violations.

Standard of review

[Headnotes 4-6]

The decision of whether to grant a permanent injunction rests in the district court's sound discretion and we will not overturn that decision unless it is an abuse of discretion. *See Director, Dept. of Prisons v. Simmons*, 102 Nev. 610, 613, 729 P.2d 499, 502 (1986), *overruled on other grounds by Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 787 P.2d 772 (1990). Nonetheless, because the facts surrounding the underlying issues are undisputed, the district court's permanent injunction will be reviewed de novo. *See Secretary of State v. Give Nevada A Raise*, 120 Nev. 481, 486 n.8, 96 P.3d 732, 735 n.8 (2004). Moreover, in the context of reviewing an administrative decision made under the Administrative Procedure Act, this court, like the district court, reviews purely legal questions de novo. *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56, 200 P.3d 514, 520 (2009); *see also* NRS 233B.135(3).

The separation of powers doctrine prohibits one branch of government from impinging on the powers of another

[Headnote 7]

States are not required to structure their governments to incorporate the separation of powers doctrine, *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957), but Nevada has embraced this doctrine and incorporated it into its constitution. Nev. Const. art. 3, § 1. The

purpose of the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch. *Clinton v. Jones*, 520 U.S. 681, 699 (1997). In the United States Constitution, separation of powers is expressed by the discrete treatment of the three branches of government in Articles I (legislative), II (executive), and III (judicial). *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). The Nevada Constitution mirrors this structure in Articles 4, 5, and 6.

The Nevada Constitution vests the state's legislative power in a Legislature comprised of two bodies, the Senate and Assembly. Nev. Const. art. 4, § 1. Specifically, Article 4, Section 1 provides that ''[t]he Legislative authority of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of Nevada.' '' The powers of the executive branch are outlined in Article 5 of the Nevada Constitution, with the supreme executive power granted to the Governor. Nev. Const. art. 5, § 1. The powers of the judicial branch are set forth in Article 6 of the Nevada Constitution.

Unlike the United States Constitution, which expresses separation of powers through the establishment of the three branches of government, *see Buckley*, 424 U.S. at 124, Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another. *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) (noting that Nevada's separation of powers provision is contained in Article 3, Section 1 of the Nevada Constitution and that separation of powers ''works by preventing the accumulation of power in any one branch of government''). Specifically, Article 3, Section 1(1) provides that

> [t]he powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive,—and Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Accord Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) (recognizing that the Nevada Constitution establishes that ''each branch of government is considered to be co-equal, with inherent powers to administer its own affairs'').

Based on these separation of powers principles, we begin our application of the doctrine to this case by examining Article 4, Section 6 of the Nevada Constitution to determine whether the power to discipline legislators is a function constitutionally committed to each house of the Legislature and whether any delegation of that

power to another branch of government unconstitutionally violates separation of powers principles. We then evaluate the Commission itself, to determine its position within the three branches of Nevada's government.

The discipline of legislators is a function constitutionally committed to each house of the Legislature that cannot be delegated to another branch of government

The Commission contends that the separation of powers doctrine has not been violated because the Legislature properly delegated its power to discipline its members to the Commission for the purpose of enforcing Nevada's ethics laws. Senator Hardy maintains that the separation of powers doctrine is implicated because the Nevada Constitution clearly mandates that the regulation and discipline of legislators is a function constitutionally committed to each house of the Legislature. Senator Hardy also argues that the Commission is an agency of the executive branch, and thus the delegation of this authority to the Commission would violate the separation of powers doctrine. The district court agreed with Senator Hardy's argument, finding that the discipline of legislators is a constitutionally committed function of the Legislature. The court further determined that the Commission is an executive branch agency, and that under the separation of powers doctrine, it could not infringe on the Legislature's constitutionally committed function. We agree with the district court.

This court has recognized that separation of powers principles are ''particularly applicable when a constitution expressly grants authorization to one branch of government.'' *Secretary of State*, 120 Nev. at 466, 93 P.3d at 753. Article 4, Section 6 of the Nevada Constitution vests each house of the Legislature with the authority to regulate the conduct of its own members:

> Each House shall judge the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.

This provision expressly grants the authority to discipline legislators for disorderly conduct to the individual houses of the Legislature, thus the power to discipline legislators for disorderly conduct is a function constitutionally committed to each house of the Legislature. *See Brady v. Dean*, 790 A.2d 428, 432 (Vt. 2001) (recognizing a legislative body's ''exclusive constitutional prerogative'' to judge the qualifications of its own members); *see also Secretary of State*, 120 Nev. at 466, 93 P.3d at 753 (recognizing that the Nevada Constitution reserves the power to judge the qualifications of its members to

each house of the Legislature). The issue then turns on whether the Legislature can delegate this authority.

While not directly on point, this court's decision in *Dunphy v. Sheehan*, 92 Nev. 259, 549 P.2d 332 (1976), is instructional. In *Dunphy*, this court addressed the separation of powers doctrine as it related to the application of a previous version of the ethics laws and whether it was unconstitutional because it did not apply to members of the judicial branch. *Id.* at 265-66, 549 P.2d at 336-37. Noting that the Legislature had excluded members of the judiciary from being subject to the ethics laws out of deference to the separation of powers doctrine, the court nonetheless concluded that this exclusion was constitutionally mandated. *Id.* Specifically, the court stated that under the separation of powers doctrine, the legislative and executive branches may not exercise powers belonging to the judicial branch. *Id.* at 265, 549 P.2d at 336. And, concluding that the function of the judicial branch is ''the administration of justice'' and that ''[t]he judiciary, as a coequal branch of government, possesses the inherent power to protect itself and administer its affairs,'' the court held that ''[t]he promulgation of a Code of Judicial Ethics is a measure essential to the due administration of justice and within the inherent power of the judicial department of this state.'' *Id.* at 266, 549 P.2d at 336-37.

In essence, the *Dunphy* court relied on the importance of the power to promulgate an ethics code specifically applicable to the judicial department's function—the administration of justice—and the inherent powers of the judicial branch to conclude that the separation of powers principles barred the application of the ethics laws to the judiciary. Indeed, this court reached this conclusion even though, at the time the *Dunphy* decision was issued, no constitutional provision expressly reserved the power to discipline members of the judiciary to the judicial branch.[5]

Accordingly, we conclude that the Legislature may not delegate the constitutionally committed authority conferred on each house to discipline its members for disorderly conduct. What legislative actions are subject to discipline for disorderly conduct under this constitutional provision, however, is an issue we have not previously addressed.

The power to discipline for disorderly conduct applies to conduct undertaken in the course of engaging in core legislative function activities

Senator Hardy maintains that the power to punish legislators for disorderly conduct extends to punishing members for conduct related to their legislative actions, such as voting. The Commission re-

[5]Subsequent to *Dunphy*, the Nevada Constitution was amended to establish a Commission on Judicial Discipline to hear matters relating to the fitness of judges in Nevada. *See* Nev. Const. art. 6, § 21.

sponds, in cursory fashion, by asserting that the Commission's proceedings are distinguishable from efforts to discipline legislators for disorderly conduct. Because we have not addressed what legislative actions are subject to discipline for disorderly conduct under Article 4, Section 6 of the Nevada Constitution, we turn to other courts for guidance on this issue.

Core legislative function

In *Brady v. Dean*, the Vermont Supreme Court concluded that a challenge to a law, based on the contention that members of Vermont's House of Representatives were required to disqualify themselves from voting on that law, constituted a nonjusticiable political question. 790 A.2d 428, 432-33 (Vt. 2001). In reaching its conclusion, the court relied on Chapter 2, Section 14 of the Vermont Constitution, which provides that the House of Representatives shall have the power to '' 'judge of the elections and qualifications of its own members.' ''[6] *Brady*, 790 A.2d at 431 (quoting Vt. Const., ch. II, § 14). The court concluded that Chapter 2, Section 14 conferred the exclusive authority on the legislature to judge the qualifications of its members. *Id.* In that regard, the court determined that Section 14 applied to determinations as to whether members of the house were required to disqualify themselves from voting on legislation.[7] *Brady*, 790 A.2d at 431-32. As a result, the court held that a challenge to a law based on the argument that members of the house were required to disqualify themselves from voting constituted a political question. *Id.* at 432-33.

[Headnote 8]

The *Brady* court noted, however, that Chapter 2, Section 14 did not immunize members of the house from all conflicts of interest oversight by the executive and judicial branches. *Id.* at 432. Nonetheless, the court concluded that, when the conduct at issue constitutes a core legislative function, constitutional and prudential concerns protect members of the house from having that conduct scrutinized by another branch of state government. *Id.* at 432-33. The court reaffirmed that voting on legislation constituted such a core legislative function.[8] *Id.* at 432. In doing so, the *Brady* court

[6]Chapter 2, Section 14 of the Vermont Constitution deals with the powers of Vermont's House of Representatives. The powers of the Vermont Senate are set forth in Chapter 2, Section 19, which contains an identical reservation of the power to judge the elections and qualifications of its members to the Senate as Nevada's Constitution.

[7]Unlike the Nevada Constitution, the Vermont Constitution does not contain an express reservation of the power to discipline its legislators for disorderly conduct.

[8]*See Salt Lake City v. Ohms*, 881 P.2d 844, 848 (Utah 1994) (recognizing that a legislator's act of voting on legislation is a core legislative function); *Biblia Abierta v. Banks*, 129 F.3d 899, 903 (7th Cir. 1997) (same); *Burnette v. Bre-*

recognized that voting ''must remain inviolate to ensure the continued integrity and independence of [the house].'' *Id*.

[Headnote 9]

Although *Brady* involved an extension of the constitutionally granted power to judge members' qualifications to encompass determinations regarding whether members were required to disqualify themselves from voting on legislation, the principles set forth in *Brady* are applicable to the case before us. Specifically, *Brady*'s conclusion that Chapter 2, Section 14 shields members of the Vermont House of Representatives from scrutiny by another branch of government with regard to core legislative function activities is particularly persuasive. *Id*. at 432-33. Here, Article 4, Section 6 of the Nevada Constitution expressly grants the authority to discipline legislators for disorderly conduct to the individual houses of the Legislature. Applying *Brady* to the present case, we conclude that, to the extent that a legislator's actions are undertaken in the course of the legislator's participation in, or conduct of, a core legislative function, any discipline for purported disorderly conduct in the course of engaging in these core function activities is a function constitutionally committed to each legislative house with regard to its members that cannot be delegated to another branch of government.[9] *Id*. at 431-33. And because voting on legislation is a core legislative function, the authority to discipline legislators for disorderly conduct allegedly committed in the course of voting on legislation is also a function constitutionally committed to each house of the Legislature and cannot be delegated to another branch of the government.

Disclosure of any potential conflicts of interest

[Headnote 10]

The ethics allegations against Senator Hardy assert that he violated NRS 281A.420 by failing to adequately disclose an alleged conflict of interest regarding a piece of legislation and by failing to abstain from voting on that legislation. NRS 281A.420(2) provides that a legislator may not vote on legislation when his or her interest in that legislation presents a conflict of interest. Additionally, NRS 281A.420(4) provides that a public officer may not vote or abstain from voting upon any matter (1) on which the public officer

desen, 566 F. Supp. 2d 738, 745 (E.D. Tenn. 2008) (same); *Scott v. Office of Alexander*, 522 F. Supp. 2d 262, 267 (D.D.C. 2007) (same); *State v. Haley*, 687 P.2d 305, 319 (Alaska 1984) (same).

[9]In contrast, the Legislature may delegate the power to discipline with respect to conduct related to noncore legislative functions. Using the ethics laws as an example, such proceedings could include discipline for legislators who use governmental time, property, equipment, or other facilities for nongovernmental purposes (NRS 281A.400(8)), bid or enter into governmental contracts (NRS 281A.430), or accept or receive an honorarium (NRS 281A.510).

has accepted a gift, (2) that would reasonably be shaped by the officer's obligation in a private capacity to the interest of others, or (3) in which the officer has a ''pecuniary interest,'' without publicly disclosing to other members of the legislative body, the gift, commitment, or interest. The ethics laws thus make disclosure of any potential conflicts of interest a prerequisite to voting or abstaining from voting on legislation.

Because voting is a core legislative function, *see Brady*, 790 A.2d at 432; *Ohms*, 881 P.2d at 848, and NRS 281A.420 makes disclosure necessary in order to vote or abstain from voting on legislation, the disclosure of potential conflicts in this context is, by extension, likewise a core legislative function. As concluded above, the discipline of legislators for disorderly conduct related to the core function activities of voting and disclosure of conflicts of interest is constitutionally committed to each house of the Legislature. And, on that basis, this authority cannot be delegated to another branch of the government. *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004); *Brady*, 790 A.2d at 431-33. Thus, our determination of whether the Legislature's delegation of authority to discipline legislators for disorderly conduct related to voting and disclosure to the Commission violates separation of powers principles turns on our evaluation of the Commission's position within Nevada's tripartite government system.

The district court properly determined that the Commission is an executive branch agency

The Commission asserts that it is an independent agency with ''many types of powers blended together'' and contends that the legislative delegation of disciplinary power to the Commission does not violate the separation of powers doctrine. Senator Hardy responds that under Nevada law the Commission is part of the executive branch, and thus, the ethics proceedings, if allowed to go forward, would violate separation of powers principles. In addressing this issue, the district court determined that the Commission is part of the executive branch. We agree.

[Headnote 11]

Departmental agencies can exist within each branch of government and exercise certain ministerial functions that appear to overlap with or duplicate the functions of another branch. *Galloway v. Truesdell*, 83 Nev. 13, 21-22, 422 P.2d 237, 243-44 (1967). In fact, this court has recognized that administrative agencies from one branch can exercise functions linked to another branch without violating the separation of powers doctrine. *See Nevada Industrial Comm'n v. Reese*, 93 Nev. 115, 119-22, 560 P.2d 1352, 1354-56 (1977) (holding that appeals officers can exercise administrative powers ''that are quasi-judicial in nature without violating the separation of powers doctrine''). ''Such an overlapping or duplication

of effort or function can be entirely valid so long as each can logically and legitimately trace its efforts or functions back to, and is derived from, its basic source of power.'' *Galloway*, 83 Nev. at 22, 422 P.2d at 243. Thus, despite the Commission's arguments to the contrary, the Commission cannot be considered an independent agency because it must have a primary connection to and derive its power to act from one of the three branches of Nevada government.[10] *Id*.

[Headnote 12]

The Commission was created to ''investigate and take appropriate action regarding'' alleged violations of the ethics laws. NRS 281A.280(1). Upon completion of its investigation, the Commission has the authority to issue opinions interpreting and applying the ethics laws, NRS 281.440, and to impose civil penalties. NRS 281A.480. Thus, by statute, the Commission is tasked with carrying out and enforcing Nevada's ethics laws. Under Article 5, Section 7 of the Nevada Constitution, the executive branch is charged with carrying out and enforcing the laws enacted by the Legislature. Other jurisdictions have recognized that the executive branch in their respective states has the duty to execute the laws enacted by the legislature. *See generally Phelps v. Sybinsky*, 736 N.E.2d 809, 816 (Ind. Ct. App. 2000) (stating, in relevant part, members of the executive branch have the responsibility to execute the laws of the state); *Snider v. Bd of Com'rs, Walla Walla County*, 932 P.2d 704, 708 n.3 (Wash. Ct. App. 1997) (noting that executive branch executes the laws as enacted by the legislature). Considering the powers of and the purpose behind the Commission in light of Article 5, Section 7 thus demonstrates that the Commission is part of the executive branch. Thus, although the Commission itself was created by the Legislature, the purpose for which it was created necessarily designates the Commission as an agency of the executive branch with its basic source of power provided by Article 5 of the Nevada Constitution.

Based on our discussion above, we conclude that because the Commission is an executive branch agency, any delegation to the Commission by the Legislature of the power to discipline its members with respect to core legislative functions is an unconstitutional delegation of power in violation of the separation of powers provision of the Nevada Constitution. Having reached this conclusion, we turn to our final issue—whether the Legislature waived the protec-

[10]Although the Commission correctly argues that it also exercises quasi-legislative functions, such as adopting regulations, *see* NRS 281A.290, and quasi-judicial functions, such as adjudicating contested ethics cases and issuing subpoenas when investigating alleged violations, *see* NRS 281A.290-.300, this argument does not affect our conclusion. As noted in *Galloway*, agencies can exist within each branch to exercise certain ministerial functions that appear to overlap with or duplicate the functions of another branch. 83 Nev. at 21-22, 422 P.2d at 243-44.

tions of the separation of powers doctrine by enacting the ethics laws.

Structural protections such as the separation of powers doctrine cannot be waived

[Headnote 13]

The Commission contends that the Legislature's delegation of its disciplinary power to the Commission by enacting the ethics laws was an intentional institutional waiver of any constitutional protections that might bar the Commission from conducting disciplinary proceedings against Senator Hardy. Senator Hardy contends that there was no institutional waiver and that no such waiver is possible. He asserts that any conclusion that a waiver occurred would result in an unconstitutional delegation of each house of the Legislature's disciplinary responsibility. Moreover, the structural protections of the separation of powers doctrine cannot be waived. In addressing this issue, the district court agreed with Senator Hardy that any finding of an institutional waiver would ''raise the specter'' of an unconstitutional delegation of power to the Commission. It further noted that any such finding of waiver would create separation of powers concerns because neither the Legislature nor the executive branch can agree to waive the structural protections of separation of powers. Specifically, the district court held that ''regardless of the degree of assent or acquiescence by the Legislative or Executive Department, legislation which infringes on the structural protections of separation of powers is unconstitutional.'' We agree.

[Headnote 14]

In *Freytag v. Commissioner*, 501 U.S. 868, 878-80 (1991), the United States Supreme Court held that constitutionally based structural protections cannot be waived by either the legislative or executive branch. More specifically, in addressing the argument that it should defer to the Executive Branch's decision that a statute did not represent a legislative encroachment on the executive powers found in the Appointments Clause of Article II, Section 2 of the United States Constitution, the Court concluded that the ''roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political.'' *Id*. at 878. As a result, the Court rejected the argument that it should defer to the Executive Branch, concluding that neither Congress nor the Executive Branch can waive such a structural protection. *Id*. at 880. In reaching this conclusion, the Court noted that '' '[t]he assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield [the bill] from judicial review.' '' *Id*. (quoting *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983)).

This court has recognized that separation of powers ''is probably the most important single principle of government.'' *Galloway v.*

Truesdell, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967). Thus, considering this court's recognition of the fundamental nature of this structural protection to Nevada's tripartite system of government, guided by the Supreme Court's conclusion in *Freytag* that such structural protections cannot be waived, we conclude that the Legislature cannot, by enacting a statute that delegates certain powers to another branch of the government, waive any separation of powers violation inherent in such a delegation.

CONCLUSION

The power to discipline its membership with respect to the core legislative function of voting and, by extension, disclosure of conflicts of interest, is a function constitutionally committed to each house of the Legislature and it cannot be delegated to another branch of government. Because the Commission is part of the executive branch, any delegation to the Commission by the Legislature of the power to discipline its members with respect to such core legislative functions is an unconstitutional delegation of power in violation of the separation of powers provision of the Nevada Constitution. In light of the fundamental importance of the structural protections provided by the separation of powers doctrine, the Legislature cannot waive those protections by enacting a statute. Thus, we affirm the district court's order.[11]

ALLSTATE INSURANCE COMPANY, APPELLANT, *v.* WILLIAM MILLER, RESPONDENT.

No. 49760

July 30, 2009 212 P.3d 318

Appeal from a district court judgment in an insurance bad-faith action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Insured brought action against automobile liability insurer to recover for bad-faith failure to file interpleader complaint, inform insured of settlement offer, and agree to stipulated judgment in excess of policy limits. The district court denied insurer's request for special interrogatories and entered judgment on jury verdict for insured. Insurer appealed. The supreme court, GIBBONS, J., held that: (1) insurer had duty to adequately inform insured of injured claimant's offer to release insured if insurer filed interpleader action, (2) in-

[11]Based on our holding, we need not reach the district court's finding that legislative immunity barred the Commission from conducting administrative proceedings against Senator Hardy.

surer was not required to file interpleader action on insured's behalf, (3) it had no duty to accept offer of stipulated judgment in excess of policy limits, and (4) refusal to give special interrogatories without stating reasons on the record was abuse of discretion requiring reversal.

Affirmed in part, reversed in part, and remanded.

[Rehearing granted October 28, 2009]

CHERRY, J., dissented in part. SAITTA, J., dissented.

Lewis & Roca, LLP, and *Daniel F. Polsenberg*, Las Vegas; *Prince & Keating, LLP*, and *Dennis M. Prince*, Las Vegas; *Luce Forward Hamilton & Scripps, LLC*, and *Ronald D. Getchey*, San Diego, California, for Appellant.

Vannah & Vannah and *Matthew R. Vannah*, Las Vegas, for Respondent.

1. INSURANCE.
   Because a primary liability insurer's exercise of its right and duty to defend includes settlement duties and an insurer must give equal consideration to the insured's interest, the covenant of good faith and fair dealing includes a duty to adequately inform the insured of settlement offers, including reasonable offers in excess of the policy limits.
2. INSURANCE.
   A liability insurer's failure to adequately inform an insured of a settlement offer is a factor to consider in a bad-faith claim.
3. INSURANCE.
   Unless the policy says otherwise, a liability insurer does not have an independent duty to file an interpleader action on behalf of an insured.
4. INSURANCE.
   A liability insurer is not required to agree to a proposed stipulated judgment between the insured and the claimant if that stipulated judgment is beyond the policy limits.
5. TRIAL.
   If a party submits special verdicts or interrogatories to the court, the district court must approve or deny them on the record, and state its legal basis for doing so. NRCP 49.
6. APPEAL AND ERROR.
   Supreme court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented.
7. APPEAL AND ERROR.
   Supreme court reviews for abuse of discretion denial of request to submit special interrogatories and denial of motion for new trial.
8. INSURANCE.
   The law, not the insurance contract, imposes implied covenant of good faith and fair dealing on insurers.
9. INSURANCE.
   Insurer's violation of implied covenant of good faith and fair dealing gives rise to a bad-faith tort claim.

10. INSURANCE.
    Liability insurer's obligation in the duty to indemnify is narrower than the insurer's duty to defend.
11. INSURANCE.
    A primary liability insurer's right and duty to defend attaches when the insured tenders defense of the lawsuit to the insurer and carries with it the duty to communicate to the insured any reasonable settlement offer that could affect the insured's interests.
12. INSURANCE.
    A liability insurer's duty to adequately inform the insured begins upon receipt of a settlement demand and continues through litigation to final resolution of that claim.
13. INSURANCE.
    If liability insurer fails to adequately inform an insured of a known reasonable settlement opportunity after the filing of a claimant's lawsuit, then the insurer has breached its duty to defend the insured against lawsuits.
14. INSURANCE.
    Evidence created jury questions on whether automobile liability insurer adequately informed insured of claimant's offer to settle for policy limits and release insured from liability if insurer would file interpleader action and, thus, whether insurer breached covenant of good faith and fair dealing and proximately caused insured's damages.
15. INSURANCE.
    A liability insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim.
16. INSURANCE.
    Liability insurer's duty to adequately inform an insured of settlement offer arises from the special relationship between the insured and the insurer, which is similar to a fiduciary relationship.
17. INSURANCE.
    A liability insurer must equally consider the insured's interests and its own in settling tort claim.
18. INSURANCE.
    Automobile liability insurer's offer of policy limits within 13 days of accident and its subsequent issuance of check with the claimant and lienholders' names did not relieve insurer of liability for bad faith; insurer's duty to insured continued from the filing of claim until the duty to defend was discharged.
19. INTERPLEADER.
    Either automobile liability insurer or claimant had standing to commence interpleader action for distributing policy limits. NRCP 22.
20. INSURANCE.
    If a liability insurer violates its duty of good faith and fair dealing by failing to adequately inform the insured of a reasonable settlement opportunity, the insurer's actions can be a proximate cause of the insured's damages arising from a foreseeable settlement or excess judgment.
21. INSURANCE.
    Automobile liability insurer had duty to adequately inform insured of claimant's offer to release insured from liability if insurer filed interpleader action; insured could have chosen at that time to hire independent counsel to review the offer and pursue any available options, such as initiating an interpleader complaint at his expense or contributing additional funds.

22. INSURANCE.

Insured was not required to show possibility of settlement of tort claim within automobile liability policy limits before proceeding on claim of bad-faith failure to inform insured of offer to release insured if insurer filed interpleader action.

23. INSURANCE.

If a claimant offers to settle for the liability policy limits plus court costs, then the insurer must relay that offer to the insured; although the offer is technically beyond the policy limits, the insurer must provide the insured the opportunity to independently consider his or her options.

24. INSURANCE.

In order to provide the full benefit of the special relationship between liability insurer and the insured, the insurer must adequately inform the insured of the status of his or her case so the latter can protect his interests, although insurer need not accept excessive settlement demand.

25. INSURANCE.

A liability insurer can be liable for bad-faith failure to settle, even where a demand exceeds policy limits, if the insured is willing and able to pay the amount of the proposed settlement that exceeds policy coverage.

26. INSURANCE.

When there is a genuine dispute regarding an insurer's legal obligations, the district court can determine if the insurer's actions were reasonable.

27. APPEAL AND ERROR.

Supreme court reviews de novo district court's decision on reasonableness of insurer's actions in connection with settlement of a claim and evaluates the insurer's actions at the time it made the decision.

28. INSURANCE.

An insurer's obligations arise from the insurance contract and the law.

29. INSURANCE.

An insurer is not required to resolve lienholder claims unless the insurance policy names the lienholder as a loss payee, the claimant is the insured, or the insured assigns the policy to the lienholder; thus, an insurer is not required to resolve a third-party claimant's liens when the duty is not included in the insurance policy.

30. INSURANCE.

Automobile liability insurer was not contractually obligated to file an interpleader action on insured's behalf, but its refusal to do so without informing insured of claimant's offer to release insured if insurer filed the action was factor in determining whether insurer adequately informed insured, complied with duty of good faith and fair dealing, and adequately defended him.

31. INTERPLEADER.

An insurer cannot rely upon a perceived conflict of interest to avoid filing an interpleader action because an insurer can give the insured and claimant an opportunity to waive any potential conflicts.

32. INSURANCE.

An insurer's failure to advise an insured of his or her ability to file an interpleader action may be grounds for bad faith for breach of the duty to defend.

33. INSURANCE.

Automobile liability insurer had no duty to accept offer of stipulated judgment in excess of policy limits.

34. APPEAL AND ERROR.
Supreme court reviews for abuse of discretion a district court's decision to give a jury instruction.

35. APPEAL AND ERROR.
Supreme court reviews de novo whether proffered instruction is an incorrect statement of the law.

36. APPEAL AND ERROR.
If a jury instruction is a misstatement of the law, it only warrants reversal if it caused prejudice and, but for the error, a different result may have been reached.

37. INSURANCE.
Implied covenant of good faith and fair dealing does not require liability insurer to agree to settlement offer in excess of policy limits as it has a contractual right to have an underlying judgment determined by trial or settlement and is not required to take on monetary obligations outside its insurance contract.

38. APPEAL AND ERROR; TRIAL.
Trial court's refusal to give special interrogatories requested by automobile liability insurer without stating reasons on the record was abuse of discretion requiring reversal in insured's suit alleging bad faith in connection with settlement of tort claim, where two of insured's three theories were invalid and supreme court could not determine theory that jury relied on.

39. APPEAL AND ERROR.
Supreme court upholds the district court's decision to permit or refuse special interrogatories unless it was arbitrary or capricious.

40. TRIAL.
Where special verdicts or interrogatories are timely and properly submitted in a case involving multiple claims or multiple theories giving rise to a single claim, the district court should give the special verdicts or interrogatories or explain on the record the reason for refusing them. NRCP 49.

41. TRIAL.
District court does not have a sua sponte obligation to submit to jury its own special verdicts or interrogatories or to give improperly framed special verdicts or interrogatories; it is not required to submit them if the party does not timely and properly submit proper proposed special verdicts or interrogatories. NRCP 49.

42. TRIAL.
District court has discretion to impose requirements that the parties submit request for special verdicts or interrogatories no later than calendar call or other pretrial conference close to the date of trial. EDCR 2.69(a)(3).

43. CRIMINAL LAW; TRIAL.
The final settling of jury instructions, special verdicts, and special interrogatories in all criminal and civil jury trials must be done on the record, and in the event of an objection by a party, the district court must concisely rule on the objection on the record.

44. INSURANCE.
Neither contractual duties nor the implied covenant of good faith and fair dealing alone required automobile liability insurer to file an interpleader complaint to resolve competing claims to policy limits or to consent to a stipulated judgment in excess of policy limits.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

This case arises from a bad-faith claim filed by William Miller against his insurer, Allstate Insurance Company. Miller sued Allstate for breach of contract, negligence, and bad faith. In particular, Miller sued Allstate under three theories of bad-faith liability. Miller alleged that Allstate breached the covenant of good faith and fair dealing by failing to file an interpleader complaint, failing to adequately inform Miller of a settlement offer, and refusing to agree to a stipulated judgment in excess of Miller's policy limits. At the conclusion of the trial, the jury returned a verdict in Miller's favor on the bad-faith claim. However, the district court denied Allstate's request to submit special interrogatories to the jury to determine upon which theory of bad faith the jury returned its verdict. Allstate appeals the jury verdict and the district court's denial of Allstate's motion for a new trial and judgment as a matter of law. Allstate challenges the legal sufficiency of Miller's three bad-faith theories and the district court's refusal to submit Allstate's special interrogatories to the jury.

In this appeal, we address an insurer's duties under the implied covenant of good faith and fair dealing and its duty to defend. Specifically, we address an insurer's duty to inform an insured regarding settlement opportunities and its duties regarding interpleading funds and stipulated judgments. We also address the standards that govern our review of a district court's refusal to give special interrogatories when requested by a party in a civil case.

[Headnotes 1, 2]

Because a primary insurer's exercise of its right and duty to defend includes settlement duties and an insurer must give equal consideration to the insured's interest, we hold that the covenant of good faith and fair dealing includes a duty to adequately inform the insured of settlement offers. This includes reasonable offers in excess of the policy limits. Failure to adequately inform an insured is a factor to consider in a bad-faith claim and, if established, can be a proximate cause of any resulting damages. We conclude that whether Allstate violated its duty to adequately inform Miller of the settlement opportunities that existed in this case presented a question of fact for the jury. Therefore, the district court did not abuse its discretion when it submitted the failure-to-inform theory of bad faith to the jury.

[Headnotes 3, 4]

Miller's two alternative theories of bad faith fail. Unless the policy says otherwise, an insurer does not have an independent duty to file an interpleader action on behalf of an insured. Nor is an insurer

required to agree to a proposed stipulated judgment between the insured and the claimant if that stipulated judgment is beyond the policy limits. As a result, we conclude that the district court erred when it submitted these issues to the jury.

[Headnote 5]

Finally, we hold that the district court abused its discretion in refusing without explanation to give the jury the special interrogatories that Allstate proposed. Not giving special interrogatories in a case involving multiple claims or theories of liability compromises our ability to review the verdict for error, since it is often impossible to say after the fact whether a jury based its general verdict on a permissible or impermissible theory of liability. *See Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 148 P.3d 710 (2006). Thus, we further hold that if a party submits special verdicts or interrogatories to the court pursuant to NRCP 49, the district court must approve or deny them on the record, and state its legal basis for doing so. Because the record in this case is silent regarding why the district court rejected Allstate's requested special interrogatories, we conclude that the district court abused its discretion. Therefore, we affirm in part and reverse in part the district court's judgment and remand this matter for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Respondent William Miller struck and injured claimant Mark Hopkins. At the time of the accident, Miller's Allstate automobile insurance policy contained a bodily injury liability limit of $25,000.

After receiving a letter from attorney Steven Karen, which stated that he represented Hopkins, Allstate offered to settle Hopkins' claim for the $25,000 policy limit. Karen did not accept the offer on Hopkins' behalf. Allstate also informed Miller that Hopkins' damages already exceeded the $25,000 policy limit, that Miller may be personally liable for any damages above the $25,000 limit, and that he had the right to hire independent legal counsel at his own expense.

About a month later, attorney David Sampson replaced Karen as Hopkins' lawyer. Karen then notified Allstate of his $8,325 attorney fee lien. Later, University Medical Center (UMC) informed Allstate of its $67,564.84 hospital lien. Although Sampson told Allstate that Hopkins would not accept a policy-limit check with the lienholders' names included as joint payees, Allstate still sent him a $25,000 check made jointly payable to Hopkins, Sampson, Karen, and UMC. Sampson rejected the multiple-party joint check and advised Allstate that Hopkins was willing to release Miller from all liability if Allstate would agree to file an interpleader action, pursuant

to NRCP 22, to determine the rights of Hopkins, Sampson, Karen, and UMC as to the $25,000.

Allstate initially declined Hopkins' interpleader offer, stating that it could not represent Hopkins in an interpleader action. However, just a few months later, and weeks after Hopkins filed his lawsuit against Miller, Allstate changed its position and agreed to file the interpleader action. By this time, Hopkins' previous settlement offer had expired. Later, Hopkins made the following settlement offer to Miller: if Miller agreed to execute an excess stipulated judgment, Hopkins would release Miller from execution of the judgment if Miller pursued a bad-faith lawsuit against Allstate. Hopkins stated that this would cap Miller's liability. Allstate rejected this proposal and cautioned that without its consent, the stipulated judgment could not bind Allstate. Allstate also explained that if Miller agreed to the stipulated judgment, then issues could arise regarding his insurance policy's cooperation clause.[1] Miller did not accept the offer. Subsequently, Hopkins obtained a verdict against Miller totaling $703,619.88.

Miller filed a complaint against Allstate, alleging that Allstate breached its covenant of good faith and fair dealing when it failed to file an interpleader complaint, failed to adequately inform Miller of Hopkins' settlement offer(s), and refused to consent to Hopkins' stipulated excess judgment. After a seven-day trial, Allstate requested that the district court submit to the jury three special interrogatories. Allstate's special interrogatories focused on Miller's three theories of bad faith and asked which theory the jury found persuasive. The district court refused to submit the special interrogatories to the jury. Subsequently, the jury returned a general verdict in favor of Miller for $1,079,784.88. The district court entered a judgment on the verdict for that amount. Allstate filed a motion for a new trial and a renewed motion for judgment as a matter of law, which challenged Miller's three bad-faith theories and the district court's refusal to submit Allstate's special interrogatories. The district court denied these motions. Allstate now appeals.

DISCUSSION

In this case, Miller alleged three theories of bad-faith liability: (1) Allstate's failure to file an interpleader complaint, (2) its failure to inform Miller of Hopkins' interpleader offer, and (3) its refusal to agree to Hopkins' excessive stipulated judgment. We first address the standards of review that apply to jury verdicts and a district court's denial of a new trial and judgment notwithstanding the verdict before turning to the merits of this appeal.

[1]However, Allstate did not offer to retain independent counsel to advise Miller regarding this offer.

I. *Standards of review*

The standards of review for reversing a jury verdict and reversing a district court's denial of a motion for a new trial are different.

[Headnote 6]

In reviewing a jury verdict, ''[t]his court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented.'' *Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995). As a result, the jury verdict in this case cannot be reversed unless there is a lack of substantial evidence that Allstate violated the implied covenant of good faith and fair dealing.

[Headnote 7]

We review for abuse of discretion both the district court's denial of Allstate's request to submit the special interrogatories and its denial of a motion for a new trial. *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1110, 197 P.3d 1032, 1037-38 (2008); *Skender*, 122 Nev. at 1435, 148 P.3d at 714.

We now turn to the question of whether Allstate had a duty to inform Miller of Hopkins' interpleader offer, and whether Allstate was obligated to file an interpleader action on behalf of Miller. We then address whether Allstate had a duty to accept Hopkins' proposed stipulated excess judgment.

II. *The implied covenant of good faith and fair dealing includes a duty to adequately inform*

Allstate argues that Miller's failure-to-inform theory, which he bases upon the allegation that Allstate failed to advise Miller about the interpleader offer, is inapplicable to this case because the issue was whether Allstate would agree to be the plaintiff in an interpleader action. We disagree. We conclude that under the facts of this case, Miller's failure-to-inform theory is a viable basis for an allegation of bad faith against Allstate.

[Headnotes 8, 9]

One of the issues in this appeal is Allstate's obligations under the implied covenant of good faith and fair dealing. The law, not the insurance contract, imposes this covenant on insurers. *United States Fidelity v. Peterson*, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975). A violation of the covenant gives rise to a bad-faith tort claim. *Id.* This court has defined bad faith as ''an actual or implied awareness of the absence of a reasonable basis for denying benefits of the [insurance] policy.'' *Am. Excess Ins. Co. v. MGM*, 102 Nev. 601, 605, 729 P.2d 1352, 1354-55 (1986).

We first discuss the relationship between an insurer's duty to defend and the implied covenant of good faith and fair dealing. Then we discuss an insurer's duty to inform its insured of a settlement offer. Afterwards, we apply the duty to inform to the facts of this case.

A. *The relationship between an insurer's duty to defend and the implied covenant of good faith and fair dealing*

[Headnote 10]

Primary liability insurance policies create a cascading hierarchy of duties between the insurer and the insured. At the top of this hierarchy are two general duties: the duty to defend and the duty to indemnify. The obligation of the insurer in the duty to indemnify is narrower than the insurer's duty to defend. *Crawford v. Weather Shield Mfg. Inc.*, 187 P.3d 424, 427 (Cal. 2008). But we do not address the duty to indemnify in this case.

Instead, this case implicates the scope of an insurer's duty to defend. The duty to defend contains two potentially conflicting rights: the insurer's right to control settlement discussions and its right to control litigation against the insured. 14 *Couch on Insurance 3d* §§ 200:1, 203:1 (2005). Each of these contractual rights creates additional duties for the insurer. The right to control settlement discussions creates the duty of good faith and fair dealing during negotiations. *See Couch*, *supra*, § 203:1 (stating that the insurer's right to control settlement negotiations may create a conflict of interest between the insurer and the insured, and therefore, the insurer must act in good faith and give the insured's interests equal consideration with its own). The right to control litigation creates the duty to defend the insured from lawsuits within the insurance policy's coverage. *Couch*, *supra*, § 200:1.

[Headnotes 11-13]

A primary insurer's right and duty to defend attaches when the insured tenders defense of the lawsuit to the insurer and carries with it the duty to communicate to the insured any reasonable settlement offer that could affect the insured's interests. *Heredia v. Farmers Ins. Exchange*, 279 Cal. Rptr. 511, 519-20 (Ct. App. 1991). Thus, an insurer's duty to adequately inform the insured begins upon receipt of a settlement demand and continues through litigation to final resolution of that claim. As a result, if an insurer fails to adequately inform an insured of a known reasonable settlement opportunity *prior* to the filing of a claimant's lawsuit, the insurer may breach its duty of good faith and fair dealing. If the insurer fails to adequately inform an insured of such an opportunity *after* the filing of a claimant's lawsuit, then the insurer has breached its duty to defend the insured against lawsuits.

B. *Failure to adequately inform is a factor in a bad-faith claim*

Miller asserts that Allstate incorrectly informed him that Hopkins was still considering Allstate's policy-limits offer, and it failed to inform him of the possibility of his contributing to a settlement or initiating an interpleader action on his own. Miller testified that Natasha Szumilo, Allstate's claims adjustor, never mentioned the word ''interpleader'' or provided him with the opportunity to contribute additional monies to the $25,000 settlement offer or for Miller to initiate or pay for the interpleader action that Hopkins made part of his demand. Miller also testified that Allstate informed him there was a settlement offer, but ''[Szumilo] told me basically that Mr. Hopkins' attorney was asking her to do things that they don't do because they don't represent his client.'' Miller also testified that when he spoke to Szumilo, she stated that Hopkins had not rejected Allstate's policy-limits offer. However, she failed to tell him that Hopkins had conditionally rejected the offer unless Allstate agreed to file an interpleader complaint.

[Headnote 14]

Although not confirmed in Szumilo's testimony, there is a notation in Miller's file that Allstate advised Miller of Hopkins' settlement offer, but there are no details of what Allstate specifically told Miller. However, Allstate failed to provide testimonial evidence that there was no realistic possibility for settlement within the $25,000 policy limit or that Miller would not have filed, or made any contribution to the filing of, an interpleader complaint. Therefore, whether Allstate could have settled with Hopkins within the policy limits in conjunction with Miller is a disputed issue of material fact that the trier of fact must resolve.

[Headnote 15]

In addition, whether Allstate adequately informed Miller of Hopkins' settlement offer is also a question of fact. This court has previously held that a bad-faith action applies to more than just an insurer's denial or delay in paying a claim. *Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996). An insurer's failure to adequately inform an insured of a settlement offer may also constitute grounds for a bad-faith claim. *Allen v. Allstate Ins. Co.*, 656 F.2d 487, 489 (9th Cir. 1981); *Miller v. Elite Ins. Co.*, 161 Cal. Rptr. 322, 332 (Ct. App. 1980). Many jurisdictions hold that failure to inform is a factor in a bad-faith claim. *Couch*, *supra*, § 203:16. We now join these jurisdictions and conclude that an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim.

[Headnotes 16, 17]

This duty to adequately inform an insured arises from the special relationship between the insured and the insurer, which is similar to a fiduciary relationship. *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988) (describing the insurer-insured relationship as one of ''special confidence''); *Love v. Fire Ins. Exchange*, 271 Cal. Rptr. 246, 251-52 (Ct. App. 1990) (refusing to characterize the insurer-insured relationship as fiduciary but acknowledging it is a ''fiduciary-type'' relationship). Although this court has refused to adopt a standard where an insurance company must place the insured's interests over the company's interests, the nature of the relationship requires that the insurer adequately protect the insured's interest. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 701-02, 962 P.2d 596, 603 (1998), *modified on other grounds*, *Powers v. United Servs. Auto. Ass'n*, 115 Nev. 38, 979 P.2d 1286 (1999). Thus, at a minimum, an insurer must equally consider the insured's interests and its own. *Love*, 271 Cal. Rptr. at 253.

In considering an insured's interests, the insurer must realize that the elements of bad faith include more than an insurer's rejection of a settlement offer within the policy limits. *See Guaranty*, 112 Nev. at 206, 912 P.2d at 272 (holding that a bad-faith action applies to more than just an insurer's denial or delay in paying a claim, such as paying from an independent medical examination); *Anderson v. State Farm Mut. Ins. Co.*, 2 P.3d 1029, 1031 (Wash. Ct. App. 2000) (holding, as a matter of law, that bad faith includes an insurer's failure to disclose the existence of underinsured/uninsured motorist coverage to an injured insured).

[Headnote 18]

Allstate contends that since it offered Miller's policy limits within 13 days of the accident and it subsequently issued a check with the claimant and lienholders' names, it cannot be liable for bad faith. We disagree. A primary liability insurer's duty to its insured continues from the filing of the claim until the duty to defend has been discharged. We refuse to adopt the absolute rule that a primary liability insurer's bad-faith liability ends upon a timely offer of the insured's policy limits. While in most cases an insurer's timely policy-limit offer negates a finding of bad faith because the insurer has fulfilled its contractual obligations, the mere offering of the policy limit does not necessarily end a primary liability insurer's contractual obligations, specifically, its duty to defend the insured. *See United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004) (stating that once the duty to defend arises, because of an insured's potential liability, the insurer's duty continues throughout the entire litigation); 22 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d* § 137.4[B] (2003). Further, the law

binds the insurer, through the implied covenant of good faith and fair dealing, to discharge its remaining duties in a reasonable manner. *See* NRS 687A.150 (immunizing all member insurers from liability for reasonable actions taken during performance of their duties).

Particularly, courts have recognized that an insurer's failure to adequately inform an insured of a settlement offer is also grounds for a bad-faith claim. *Allen*, 656 F.2d at 489; *Miller*, 161 Cal. Rptr. at 332; *Loudon v. State Farm Mut. Auto. Ins. Co.*, 360 N.W.2d 575, 579 (Iowa Ct. App. 1984); *Henke v. Iowa Home Mut. Cas. Co.*, 97 N.W.2d 168, 174 (Iowa 1959) (holding that failure to adequately inform insured of possible excess liability or the status of settlement negotiations may indicate bad faith); *Prosser v. Leuck*, 592 N.W.2d 178, 183 (Wis. 1999) (holding that an insurer's fiduciary duty includes timely informing the insured of *any* settlement offers received). Some courts even go as far as to hold insurers liable for bad faith not only for failing to adequately inform, but also for failing to advise the insured to contribute. *Oppel v. Empire Mut. Ins.*, 517 F. Supp. 1305, 1306 (S.D.N.Y. 1981) (applying New York law).

In recognizing an insurer's bad-faith liability for failing to inform an insured of a settlement offer, other courts have outlined specific factors to consider. In *Archdale v. American International Specialty Lines*, 64 Cal. Rptr. 3d 632 (Ct. App. 2007), the California Court of Appeal stated that the following considerations are relevant in determining whether an insurer's settlement actions were reasonable: (1) ''the insurer must give the interests of the insured at least as much consideration as it gives to its own interests,'' and (2) the insurer must act as ''a prudent insurer *without policy limits*.'' *Id.* at 644-45 (emphasis added). Similarly, the Louisiana Court of Appeal has stated that the interest of the insured is paramount when considering a settlement offer, and the following factors address whether the insurer acted in bad faith when refusing to settle:

> (1) the probability of the insured's liability; (2) the adequacy of the insurer's investigation of the claim; (3) the extent of damages recoverable in excess of policy coverage; (4) the rejection of offers in settlement after trial; (5) the extent of the insured's exposure as compared to that of the insurer; and (6) *the nondisclosure of relevant factors by the insured or insurer*.

Fertitta v. Allstate Ins. Co., 439 So. 2d 531, 533 (La. Ct. App. 1983) (emphasis added).

[Headnote 19]

Here, Sampson, Hopkins' attorney, testified that Hopkins would have released Miller if Allstate had filed an interpleader complaint naming Hopkins and the lienholders, or transmitted the $25,000 bodily injury limit to Sampson with an express agreement for Samp-

son to distribute the monies pursuant to a district court interpleader order. In other words, Allstate had two choices regarding the $25,000 policy limit: it could either issue a check to Hopkins and Sampson without naming the lienholders and allow Sampson to file the interpleader action, in which case Sampson would distribute the monies pursuant to a district court order, or it could deposit the monies with the court clerk and file the interpleader action itself. Under NRCP 22, either Allstate or Hopkins had standing to commence the interpleader action. Regardless of whether Allstate or Hopkins initiated the interpleader action, Hopkins was willing to release Miller under either of these options.

If Allstate was opposed to filing the interpleader action itself and it was concerned about releasing the funds to Hopkins without the lienholders' names on the check, there was a third logical option. Allstate could have approached Miller with Hopkins' settlement offer and asked Miller to initiate the interpleader action pursuant to NRCP 22 once Allstate deposited the funds with the district court. The funds could only be distributed pursuant to a district court order. Allstate, however, never disclosed the details of Hopkins' offer to Miller. Thus, Allstate denied Miller the opportunity to contribute to Hopkins' settlement offer in exchange for Miller's release.

In sum, Allstate could have obtained a release for Miller simply by initiating an interpleader action itself or by depositing the $25,000 bodily injury limit with the district court clerk and allowing either Hopkins or Miller to initiate the interpleader action. *See* NRCP 22 (allowing either a plaintiff or defendant to initiate an interpleader action). But Allstate never told Miller about the details of Hopkins' settlement offer. Therefore, there is a factual dispute as to whether Allstate complied with its duty to adequately inform Miller of the offer and to protect Miller's interests.

As a result, we conclude that Miller's failure-to-inform theory is a viable basis for bad faith by itself, regardless of whether Allstate had a duty to file an interpleader complaint. Miller's allegation that Allstate did not adequately inform him of Hopkins' settlement offer is a question of fact. *Allen*, 656 F.2d at 489 (recognizing that under California law ''What is 'good faith' or 'bad faith' on an insurer's part has not yet proved susceptible to [definitive] legal definition. An insurer's 'good faith' is essentially a matter of fact.''). Thus, the district court did not abuse its discretion when it submitted this issue to the jury. *Id*.

1. *Failure to adequately inform is a proximate cause of an insured's damages*

[Headnote 20]

If an insurer violates its duty of good faith and fair dealing by failing to adequately inform the insured of a reasonable settlement op-

portunity, the insurer's actions can be a proximate cause of the insured's damages arising from a foreseeable settlement or excess judgment. *See Stark Liquidation v. Florists' Mut. Ins.*, 243 S.W.3d 385, 399 (Mo. Ct. App. 2007) (holding that an insurer who denies coverage is liable for the reasonable settlement costs incurred by the insured); *Noya v. A.W. Coulter Trucking*, 49 Cal. Rptr. 3d 584, 589-90 (Ct. App. 2006) (holding that a reasonable settlement is presumptive evidence of an insurer's liability for breach of its obligations). In *Neal v. Farmers Ins. Exchange*, 582 P.2d 980, 986 (Cal. 1978), the California Supreme Court held that once an insurer violates its duty of good faith and fair dealing, it is liable to pay all compensatory damages proximately caused by its breach; however, punitive damages require proof of motive and intent to violate a duty. The insurer may challenge the reasonableness of a damages amount, but its breach of duty is a proximate cause of the insurer's reasonable damages. *Noya*, 49 Cal. Rptr. 3d at 589-90.

Here, according to Allstate's own computerized record dated April 12, 2001, Miller never saw Hopkins approaching the intersection, and nothing prevented him from seeing Hopkins. The record also notes that Hopkins' damages, as of that date, were approximately $45,000. As a result, Allstate recognized that Miller's case was a ''clear limits case,'' meaning damages already exceeded the policy limits, and authorized resolution of the matter as soon as possible. Given Allstate's recognition of Miller's excess liability, Allstate's failure to adequately inform Miller of Hopkins' settlement offer may have prevented Miller from obtaining a release from Hopkins. The trier of fact could therefore conclude that Allstate's actions were a proximate cause of the excess verdict against Miller.

2. *Application of Allstate's duty to inform to the facts of this case*

[Headnote 21]

Here, Miller asserts that Allstate incorrectly informed him that Hopkins had not rejected Allstate's offer and it failed to inform him of the possibility of Miller's contributing to an interpleader action. At trial, Miller testified that he would have paid Allstate's interpleader costs and that he had the financial capability to do so, although on cross-examination Miller admitted that he did not know how much the action would cost.

We conclude that regardless of whether Miller had the financial capabilities to pay for the action, Allstate should have informed him of the settlement offer. Instead, Allstate rejected Hopkins' offer and told Miller that Hopkins was still considering Allstate's policy-limit offer. Allstate breached its duty to inform when it failed to inform Miller of the offer. Miller could have chosen at that time to hire independent counsel to review the offer and pursue any avail-

able options, such as initiating an interpleader complaint at his expense or contributing additional funds to Allstate's $25,000 settlement offer in return for a release from Hopkins. At a minimum, Allstate's failure to adequately inform Miller of Hopkins' settlement offer prevented Miller from considering his available options. Thus, Miller's failure-to-inform theory is viable and applies to the facts of this case.

C. *Miller is not required to show that there was a possibility of settling within the policy limits before he can proceed with his failure-to-inform theory of bad faith*

[Headnote 22]

Generally, ''[a]n insurer who has no opportunity to settle within policy limits is not liable for an excess judgment for failing to settle the claim.'' 14 *Couch on Insurance 3d* § 203:18 (2005). ''Other courts have held that the absence of a settlement offer within policy limits is not dispositive of the issue of the insurer's good or bad faith, but just one of the factors in determining whether an insurer acted in bad faith by failing to settle.'' *Id*. § 203:20 (citing *Berglund v. State Farm Mut. Auto. Ins. Co.*, 121 F.3d 1225, 1228 (8th Cir. 1997); *Hartford Ins. Co. v. Methodist Hosp.*, 785 F. Supp. 38, 40 (E.D.N.Y. 1992); and *State Auto. Ins. Co. of Columbus, Ohio v. Rowland*, 427 S.W.2d 30, 35 (Tenn. 1968)). Regardless, if there is a question of whether a settlement offer is within the policy limits or whether the insured has the ability or willingness to contribute to the offer's excess, then the issues ''should be resolved in favor of the insured, *unless the insurer can show by affirmative evidence that there was no realistic possibility for settlement within [policy] limits and that the insured would not have made any contribution to a settlement above that amount*.'' *Id*. § 203:18 (emphasis added).

[Headnotes 23, 24]

For example, if a claimant offers to settle for the policy limits plus court costs, then the insurer must relay that offer to the insured. Although the offer is technically beyond the policy limits, the insurer must provide the insured the opportunity to independently consider his options. In order to receive the full benefit of the special relationship between the insurer and the insured, the insurer must adequately inform the insured of the status of his case. This does not imply that the insurer must accept an excessive settlement demand; rather, it requires that the insurer adequately inform the insured so the latter can protect his interests.

Therefore, whether Hopkins' offer to Allstate was one that Allstate reasonably should have communicated to its insured so that he could, with Allstate's policy limits, protect himself by seeking the lien resolution by interpleader that Hopkins was demanding, was a

disputed issue of law and fact at the trial. At trial, Sampson, Hopkins' attorney, testified that Hopkins would have released Miller if Allstate had either: (1) filed an interpleader complaint naming Hopkins and the lienholders or (2) deposited the $25,000 bodily injury limit with the district court clerk and allowed Hopkins to initiate the interpleader complaint. Allstate did not refute Sampson's testimony on cross-examination or through its own witnesses. Instead, Allstate argued that the responsibility to interplead was beyond the policy obligation and it had to protect the lienholders despite its subsequent offer to file the interpleader action. Therefore, whether all the liens could be satisfied for $25,000 is not the determining factor as to Allstate's duty to Miller. If Allstate had deposited the $25,000 with the court clerk in order to facilitate an interpleader complaint, it would still have been Hopkins' responsibility to resolve his liens. However, Hopkins' lienholders would have no further claims against either Miller or Allstate.

In *Trustees v. Developers Surety*, this court noted that when a party is exposed to different claims, an interpleader proceeding may be initiated under NRCP 22

> to avoid exposure to double or multiple liability. The claims do not have to be identical or have a common origin. The court has the discretion to approve the interpleader and permit the [party] to deposit the [monies] remaining . . . limits with the court. The court may then discharge the [party] from any further liability and equitably distribute the proceeds among the various claimants.

120 Nev. 56, 64, 84 P.3d 59, 63-64 (2004) (citations omitted). Therefore, we conclude that the district court's decision to submit this issue to the jury was not an abuse of discretion. The evidence presented by Miller established that Allstate could have received a release for Miller from Hopkins by either initiating the interpleader action, or in exchange for Allstate depositing the $25,000 with the district court clerk and Miller paying for the costs of the interpleader action.

[Headnote 25]

Other courts have held that ''an insurer can be liable for bad faith failure to settle even where a demand exceeds policy limits if the insured is willing and able to pay the amount of the proposed settlement that exceeds policy coverage.'' *Couch*, *supra*, § 203:20 (citing *Continental Cas. Co. v. United States Fid. & Guar. Co.*, 516 F. Supp. 384, 388 (N.D. Cal. 1981)). We agree. Miller testified at trial that he would have contributed towards a settlement in excess of $25,000 by paying court costs and attorney fees to file an interpleader complaint and that he had the financial capability to do so.

In rebuttal, Allstate's attorney questioned Miller about his understanding of the costs associated with an interpleader action. However, at no point during this cross-examination did Allstate ask Miller what the limit was that he could afford to contribute or demonstrate that he would not have contributed towards either the interpleader action or a settlement with Hopkins in excess of $25,000. Therefore, Miller's financial ability and willingness to contribute money to effectuate a settlement with Hopkins became an issue of fact for the jury to resolve.

D. *Allstate did not have an independent duty to file an interpleader action*

[Headnotes 26, 27]

Miller asserts that Allstate had an independent duty to file an interpleader action on Miller's behalf. When there is a genuine dispute regarding an insurer's legal obligations, the district court can determine if the insurer's actions were reasonable. *See Lunsford v. American Guarantee & Liability Ins. Co.*, 18 F.3d 653, 656 (9th Cir. 1994) (interpreting California law); *CalFarm Ins. Co. v. Krusiewicz*, 31 Cal. Rptr. 3d 619, 629 (Ct. App. 2005) (holding that if an insurer's reasonableness depends on legal precedent, then the issue is reviewed de novo). This court reviews de novo the district court's decision in such cases and evaluates the insurer's actions at the time it made the decision. *CalFarm Ins. Co.*, 31 Cal. Rptr. at 629.

In *Homeowners Ass'n v. Associated International Insurance Co.*, 108 Cal. Rptr. 2d 776, 783 (Ct. App. 2001), the California Court of Appeals held that a bad-faith claim requires a showing that the insurer acted in deliberate refusal to discharge its contractual duties. Thus, if the insurer's actions resulted from '' 'an honest mistake, bad judgment or negligence,' '' then the insurer is not liable under a bad-faith theory. *Id.* (quoting *Careau & Co. v. Security Pacific Business Credit, Inc.*, 272 Cal. Rptr. 387 (Ct. App. 1990)); *see Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 793, 858 P.2d 380, 382 (1993) (holding that bad faith exists when an insurer acts without proper cause); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003) (interpreting and applying California law and holding that to prove bad faith, plaintiff must show insurer unreasonably or without cause withheld benefits due under the policy).

[Headnotes 28-30]

An insurer's obligations arise from the insurance contract and the law. Miller's policy did not require Allstate to file or prosecute an interpleader action to resolve a third-party claimant's liens. Further, there are some circumstances where an insurer has a contractual duty to resolve lienholder claims, but that duty does not extend to a third-party claimant and its lienholders. In other words, an insurer

is not required to resolve lienholder claims unless the insurance policy names the lienholder as a loss payee, the claimant is the insured, or the insured assigns the policy to the lienholder. *Allied Mut. v. Midplains Waste Management*, 612 N.W.2d 488, 499 (Neb. 2000). Thus, an insurer is not required to resolve a third-party claimant's liens when the duty is not included in the insurance policy. *See Heredia v. Farmers Ins. Exchange*, 279 Cal. Rptr. 511, 515-16 (Ct. App. 1991) (stating that the insurer is not required to accept an offer of settlement for more than the policy limits). Here, Allstate was not contractually obligated to file an interpleader action on Miller's behalf. However, an insurer still has obligations under the duty to defend, which is a legal duty that arises under the law, as opposed to a contractual duty arising from the policy.

[Headnotes 31, 32]

We conclude that under the factual circumstances presented in this case, an insurer's refusal to file an interpleader action on behalf of an insured may be a factor to consider in a bad-faith lawsuit.[2] Although interpleader actions are available in specific contexts—potential liability to multiple, conflicting claimants—an insurer is under no contractual obligation to commence an interpleader action. Regardless, as set forth above, the failure to advise an insured of his or her ability to file an interpleader action may be grounds for bad faith for breach of the duty to defend. *Benefit Trust Life Ins. Co. v. Union Nat. Bank*, 776 F.2d 1174, 1177-78 (3d Cir. 1985); *Schwartz v. State Farm Fire and Cas. Co.*, 106 Cal. Rptr. 2d 523, 533 (Ct. App. 2001). Here, Allstate rejected Hopkins' demand to file an interpleader complaint without informing Miller of the settlement offer. Thus, Allstate's refusal to file an interpleader complaint on Miller's behalf is a factor to consider in determining whether Allstate adequately informed Miller, and therefore, whether it adequately defended Miller.

III. *Miller's stipulated-judgment theory is not viable*

[Headnote 33]

Although we conclude that Miller's failure-to-inform theory of bad-faith liability is viable, we must also address his theory regarding Hopkins' stipulated-excess-judgment offer.

Allstate argues that the district court abused its discretion when it submitted Jury Instruction No. 42, which addressed Allstate's refusal to accept as binding Hopkins' stipulated judgment. We agree, because Allstate had no duty to accept a stipulated excess judgment.

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[2]We also note that an insurer cannot rely upon a perceived conflict of interest to avoid filing an interpleader action because an insurer can give the insured and claimant an opportunity to waive any potential conflicts.

[Headnotes 34-36]

This court reviews for abuse of discretion a district court's decision to give a jury instruction. *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). However, we review de novo whether ''a proffered instruction is an incorrect statement of the law.'' *Cook v. Sunrise Hospital & Medical Center*, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008). If a jury instruction is a misstatement of the law, it only warrants reversal if it caused prejudice and ''but for the error, a different result might have been reached.'' *Id.* at 1006, 194 P.3d at 1219.

Here, Jury Instruction No. 42 stated that ''[t]he implied covenant of good faith and fair dealing requires an insurance company to not unreasonably withhold its consent to enter into a stipulated judgment in excess of the policy limits.'' According to Allstate, the instruction was improper for, among other reasons, the following: the instruction (1) failed to clearly outline the terms of Hopkins' offer, (2) purportedly created a rule that held an insurer liable for bad faith for failing to consent to a stipulated excess judgment, and (3) required Allstate to take on noncontractual obligations. We agree and conclude that the district court abused its discretion when it submitted Jury Instruction No. 42 for the following two reasons.

[Headnote 37]

First, Sampson's May 13, 2003, letter did not contain all necessary terms of the settlement, namely the exact dollar amount. Therefore, the offer was not sufficiently defined. Second, the instruction is a misstatement of the law for two reasons. Allstate has a contractual right to have an underlying judgment determined by trial or settlement, and it is not required under the implied covenant of good faith and fair dealing to accept an excessive stipulated settlement offer between the insured and the claimant. *See Crisci v. Security Insurance Co. of New Haven, Conn.*, 426 P.2d 173, 176-77 (Cal. 1967) (holding that the implied covenant of good faith and fair dealing only requires an insurer to accept a reasonable settlement). In addition, Allstate is not required to take on monetary obligations outside its insurance contract, which includes agreeing to an excessive settlement offer. *See Hamilton v. Maryland Cas. Co.*, 41 P.3d 128, 138 (Cal. 2002) (holding that a stipulated judgment is not a presumptive measure of an insured's damages for the insurer's unreasonable rejection of settlement offers). As a result, the district court's submission of the jury instruction was an error of law because the jury may have relied upon it when the jury rendered its verdict. For these reasons, Miller's excessive-stipulated-judgment theory is not viable.

We next address whether the district court erred in denying Allstate's requests to submit its special interrogatories and for a new trial.

IV. *The district court abused its discretion when it denied Allstate's request to submit its special interrogatories to the jury*

[Headnotes 38, 39]

Allstate argues that the district court erred when it denied Allstate's request to submit special jury interrogatories. We agree. Allstate requested the following special interrogatories:

> 1. If you found that Allstate breached the covenant of good faith and fair dealing, did you find that Allstate breached a duty to file an interpleader action?
>
> 2. If you found that Allstate breached the covenant of good faith and fair dealing, did you find that Allstate breached a duty to keep Mr. Miller informed of settlement offers?
>
> 3. If you found that Allstate breached the covenant of good faith and fair dealing, did you find that Allstate breached a duty not to unreasonably withhold consent for Mr. Miller to enter into a stipulated judgment in excess of policy limits?

This court reviews for abuse of discretion a district court's determination to permit or refuse special interrogatories, and this court upholds the district court's decision unless it was arbitrary or capricious. *Skender*, 122 Nev. at 1435, 148 P.3d at 714.

Here, Miller asserted three claims: breach of contract, negligence, and breach of the covenant of good faith and fair dealing. In addition to Miller's three separate claims, Miller's bad-faith claim encompassed the following three subtheories: Allstate's failure to (1) file an interpleader complaint, (2) inform Miller of the interpleader offer and provide him with the opportunity to contribute, and (3) consent to a stipulated judgment. As discussed above, only the second of these theories was viable, and it is unclear under which theory the jury concluded that Allstate breached the implied covenant of good faith and fair dealing.

There are two perspectives regarding general verdicts. On one hand, there is the absolute certainty rule, which almost always requires reversal when there is an invalid theory presented to the jury. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 782, 790 (9th Cir. 1990) (Kozinski, J., dissenting) (citing United States Supreme court cases from 1884, 1907, 1959, and 1962). On the other hand, *other courts uphold a general verdict if there is sufficient evidence to support at least one viable theory*. *Kern*, 899 F.2d at 777-78; *McCord v. Maguire*, 873 F.2d 1271, 1273-74, *amended by* 885 F.2d 650 (9th Cir. 1989). In *Gillespie v. Sears, Roebuck & Co.*, the First Circuit stated that the rule in that circuit is '' 'a new trial is usually warranted if evidence is insufficient with respect to any one of multiple claims covered by a general verdict.' '' 386 F.3d 21, 29 (1st Cir. 2004) (quoting *Kerkhof v. MCI Worldcom, Inc.*, 282

F.3d 44, 52 (1st Cir. 2002)). The First Circuit applies this rule to both general verdicts covering multiple claims and ''special verdicts where a single verdict question encompasses multiple theories, one of which is defective.'' *Id*. at 30.

Although we do not go as far as the First Circuit by holding that a new trial is warranted whenever a general verdict encompasses a nonviable legal theory, we are holding that district courts should follow *Skender* by submitting timely and properly proposed special verdicts or interrogatories when a plaintiff presents claims of tort and contractual liability or multiple theories of liability under a single claim. In *Skender*, a constructional defect case, this court concluded that the use of special verdicts was necessary because the plaintiff asserted multiple theories of liability where comparative negligence was a defense to some but not all of the claims. *Id*. at 1439, 148 P.3d at 717.

[Headnote 40]

Where special verdicts or interrogatories are timely and properly submitted in a case involving multiple claims or multiple theories giving rise to a single claim, the district court should give the special verdicts or interrogatories or explain on the record the reason for refusing them. We are more inclined to reverse a general verdict where, as here, the party complaining of error associated with a claim or theory timely requested special verdicts or interrogatories and the district court denied them without stating its reasoning on the record. This is especially true when the special verdicts or interrogatories would have facilitated our review. As stated in *Gillespie*, ''[t]he reality is that the degree of confidence that the jury picked a theory with adequate evidentiary support varies along a spectrum of situations.'' 386 F.3d at 30. Our holding here will narrow that spectrum.

[Headnotes 41-43]

Applying *Skender* beyond constructional defect cases allows this court to adequately review the jury's decision and determine whether it relied on a viable theory of liability. However, the district court is not required to submit special verdicts or interrogatories to the jury if the party does not timely and properly submit proper proposed special verdicts or interrogatories to the court. NRCP 49. In other words, the district court does not have a sua sponte obligation to submit its own special verdicts or interrogatories or to give improperly framed special verdicts or interrogatories. Given the challenge preparing such interrogatories can pose, the court also has discretion to impose requirements that the parties submit their request no later than calendar call or other pretrial conference close to the date of trial. *See, e.g.*, EDCR 2.69(a)(3) (requiring trial counsel to provide settled and contested jury instructions, including supporting

authority, at the calendar call). Finally, the final settling of jury instructions, special verdicts, and special interrogatories in all criminal and civil jury trials must be done on the record. In the event of an objection by a party, the district court must concisely rule on the objection on the record.[3]

Our holding streamlines the appellate review process and, in doing so, supports *Skender*. If parties submit special verdicts or interrogatories, this court can focus on a legally valid theory and determine if there is substantial evidence supporting that theory. If there is substantial evidence supporting the theory, then this court will uphold the jury's verdict. On the other hand, if the evidence only supports a legally invalid theory, then this court can confidently reverse the jury's verdict. In either case, our holding that parties and district courts submit special verdicts or interrogatories will support this court's precedent, streamline future appellate review, conserve judicial resources, and promote confidence in this court's affirming or reversing a jury's verdict.

Here, Allstate requested special interrogatories, the plaintiff objected to them, and the district court refused to give them without stating on the record its reasons. *See Gillespie*, 386 F.3d at 29-31 (reversing where one of several theories supporting a single claim for relief was invalid); *McCord*, 873 F.2d at 1273-74 (declining to reverse where, although four of eight theories supporting a single claim were invalid, four were valid and the appellant failed to request special interrogatories that would have allowed informed appellate review of the verdict). This was an abuse of discretion requiring reversal and a new trial because two of Miller's three bad-faith theories were invalid and we are unable to determine what theory of bad faith the jury relied upon in this case.[4] Thus, we reverse the district court's denial of Allstate's motion for a new trial.

CONCLUSION

We conclude that under the facts of this case, Miller's failure-to-inform theory is a viable basis for a bad-faith claim against Allstate. Allstate was required to give Miller's interest equal consideration, which required Allstate to adequately inform Miller of Hopkins' interpleader settlement offer. Whether Allstate adequately

[3]In the event that the district court is not reporting or recording a civil jury trial, the district court does not have to make these rulings on the record.

[4]The record discusses certain additional special interrogatories that Allstate filed the Sunday before the final settling of jury instructions. The district court declined to give these interrogatories because it found there was only one claim for relief. Allstate does not cite to this discussion in its opening brief and, likewise, Miller does not cite to it in his answering brief. However, Allstate does cite to this discussion in its reply brief. As a result, it is not clear whether this discussion applies to the special interrogatories at issue.

informed Miller was a question of fact for the jury to decide. As a result, the district court did not err when it submitted the issue to the jury.

[Headnote 44]

We also conclude that neither contractual duties nor the implied covenant of good faith and fair dealing alone required Allstate to file an interpleader complaint or to consent to a stipulated excess judgment. As a result, the district court erred when it submitted these issues to the jury.

Finally, because Allstate did not have a duty to file an interpleader complaint or to consent to Hopkins' stipulated judgment, we are unable to determine what theory of bad faith the jury relied upon. As a result, district courts should follow *Skender*, 122 Nev. at 1435, 148 P.3d at 714, and submit special verdicts or interrogatories in cases when a plaintiff presents claims of tort and contract liability or multiple theories of liability under a single claim and a party timely and properly requests that the district court submit the special verdicts or interrogatories. Further, if there is an objection by a party to jury instructions, special verdicts, or special interrogatories, we are requiring district courts to state on the record their reasons for rejecting or admitting the jury instructions, special verdicts, or special interrogatories. Because the district court in this case did not state on the record its reasoning for rejecting Allstate's submitted special interrogatories, we reverse the district court's denial of Allstate's motion for a new trial.

Accordingly, we affirm in part and reverse in part the district court's judgment and remand this matter for further proceedings consistent with this opinion.[5]

HARDESTY, C.J., PARRAGUIRRE, DOUGLAS, and PICKERING, JJ., concur.

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

I agree with the majority that under the facts of this case, Miller's failure-to-inform theory is a viable basis for a bad-faith claim against Allstate. Allstate was required to give Miller's interest equal consideration, which required Allstate to adequately inform Miller of Hopkins' interpleader settlement offer. Whether Allstate adequately informed Miller was a question of fact for the jury to decide. As a

[5]Allstate also raises other issues, including whether Miller was required to present an expert witness to meet his burden of proof, whether the district court improperly denied Allstate's motion for continuance, whether the district court improperly excluded Allstate's evidence regarding Hopkins' attorney's motive, and whether the district court abused its discretion by failing to give a curative jury instruction regarding Miller's statements about Allstate's ability to file an interpleader action. We conclude that each of these issues is without merit.

result, I concur with the majority that the district court did not err when it submitted the issue to the jury.

The majority goes on to hold that Miller's two other theories of bad faith, which are Allstate's failure to file an interpleader action and Allstate's failure to consent to an excessive stipulated judgment, are not viable to establish the bad-faith claims against Allstate. Since the majority was unable to determine which of the three theories of bad faith the jury relied upon in this case, the majority felt constrained to reverse the jury verdict in favor of Miller and remand this matter for a new trial.

The majority goes on to hold that the district court erred when it refused to submit Allstate's special verdict questions to the jury. The majority reasons that if the special verdict questions were submitted to the jury, the court would then know which of the theories of bad faith the jury relied upon to find in favor of Miller and against Allstate. Further, to make sure that this court will always be aware of which theory of liability a jury relies upon to find in favor of a plaintiff in a tort case or contract case, the majority now extends *Skender v. Brunsonbuilt Construction & Development Co.*, 122 Nev. 1430, 148 P.3d 710 (2006), which recognized special verdict questions in constructional defect cases that contained both contract and tort theories and a comparative negligence defense, to cases where the plaintiff presents claims of tort and contract liability or where the plaintiff presents multiple theories of liability made under a single claim.

I do not disagree with the majority on its holding that two of the three claims of bad faith are not viable, nor do I disagree on the extension of *Skender* to future cases.

My quarrel with the majority in reversing this matter for a new trial is multifold. First and foremost, the district judge would have had to have been a psychic to know that the court would extend *Skender* to cases other than constructional defect cases. Therefore, the district judge did not abuse her discretion by failing to submit Allstate's special verdict questions to the jury. No one could possibly predict from a fair reading of *Skender* that special verdict questions should be used in tort and contract cases other than constructional defect cases and that failure to give the jury such a special verdict form would result in a reversal of a general jury verdict. As a result, the district court could not foresee that this court would significantly expand *Skender*'s holding. Speaking as a former district court judge, the district courts are required to follow the precedent established by this court. It is unreasonable to expect district courts to predict when and how this court will alter its precedent. As a result, I disagree with the majority's holding that the district court should have submitted Allstate's special verdict questions under *Skender*.

Further, the majority seems somewhat tentative on its pronouncement of extending *Skender*. Although the majority seems to strongly encourage and recommend the use of special verdict questions or interrogatories in cases other than constructional defect cases, the majority cites *Skender* throughout the opinion, giving the impression that *Skender* has in fact been extended to cases other than constructional defect cases.

Also, the majority distorts the discretionary nature of NRCP 49. The majority states that in order to facilitate appellate review ''district courts should follow *Skender*'' when a plaintiff presents claims of tort and contractual liability or multiple theories of liability under a single claim. The majority goes on to say, ''However, the district court is not required to submit special verdicts or interrogatories to the jury if the party does not timely and properly submit proper proposed special verdicts or interrogatories to the court.'' NRCP 49.

In other words, the majority recognizes the discretionary nature of special verdict questions and interrogatories, but it is still reversing this case because the district court refused to submit Allstate's proposed special interrogatories. The majority's reading of NRCP 49 makes it an abuse of discretion for a district court not to give special interrogatories if requested by one of the parties unless the district court makes findings as to the failure to give said special interrogatories. My reading of NRCP 49 is that said rule is completely discretionary and the majority fails to cite any authority regarding the mandatory nature of findings by the district court.

Is the majority relying on the extended application of *Skender*? However, *Skender* states this ''court will sustain a general verdict where several counts are tried if any one count is supported by substantial evidence.'' 122 Nev. at 1438, 148 P. 3d at 716.

Why strip a plaintiff of a sizable judgment on a general jury verdict when it is clear that said jury verdict could be based on the viable claim of bad faith and said jury verdict is supported by substantial evidence in the record of the trial proceedings? Under *Skender*, this court should affirm a general verdict when there is a viable claim supported by substantial evidence. Here, it is obvious that substantial evidence supported Miller's viable failure-to-inform claim of bad faith against Allstate, which was in fact presented to the jury by Miller. The majority so states that ''under the facts of this case, Miller's failure-to-inform theory is a viable basis for a bad-faith claim against Allstate.''

I also disagree vehemently with the majority that the district judge abused her discretion because she did not state on the record her reasoning for rejecting Allstate's submitted special interrogatories. What findings could the district judge have made at the trial without doing an injustice to the then present stare decisis? The district judge could have rightly stated that *Skender* applied only to con-

structional defect cases and NRCP 49 was purely discretionary. In light of the jurisprudence that existed at the time of the settling of jury instructions and special interrogatories, it seems inconceivable that the district judge abused her discretion. What she did do is follow the existing caselaw and statutes of the State of Nevada, which leaves only one conclusion. Therefore, the district judge did not abuse her discretion by failing to submit Allstate's special interrogatories to the jury. As a result, the jury verdict against Allstate and in favor of the respondent should be affirmed.

Next, it is obvious that sufficient and substantial evidence of a viable claim of bad faith by Allstate was in fact presented to the jury by Miller. The majority so states that ''under the facts of this case, Miller's failure-to-inform theory is a viable basis for a bad-faith claim against Allstate.''

In *Cortinas v. State*, 124 Nev. 1013, 195 P.3d 315 (2008), this court affirmed a conviction of first-degree murder with use of a deadly weapon and robbery with use of a deadly weapon in spite of the fact that the district court failed to give a requested jury instruction that afterthought robbery may not serve as a predicate felony for felony murder. *Cortinas* discusses the way to determine whether reversal is required when a trial court error allows a jury to return a verdict based on a legally invalid theory but the jury is also presented with one or more valid alternative theories. Since the absolute certainty approach[1] is found to be unsound in a criminal prosecution where the burden of proof is beyond a reasonable doubt, it seems sensible that the absolute certainty approach is unsound in a civil case where the burden on the plaintiff is less stringent.

Finally, the majority relies heavily on a products liability case, *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21 (1st Cir. 2004), in order to find an abuse of discretion by the district judge in this bad-faith case against Allstate. The majority was indeed fortunate to find a First Circuit case, not a Ninth Circuit case, to justify the reversal of the jury verdict. A careful examination of *Gillespie* informs the reader that ''[i]n assessing the sufficiency of the evidence, the question for the court is whether, viewing the evidence in the light most favorable to the verdict, a rational jury could find in favor of the party who prevailed.'' *Id.* at 25 (citing *DaSilva v. American Brands, Inc.*, 845 F.2d 356, 359 (1st Cir. 1988)). There is no question that there was sufficient evidence presented at trial to allow a rational jury to find in favor of Miller and against Allstate on the claim of bad faith.

The gravamen of the majority's rationale for reversal of the bad-faith verdict is that the district judge abused her discretion in refus-

[1]Under the absolute certainty approach, reversal is mandatory unless the court ''is absolutely certain that the jury relied upon the legally correct theory . . . .'' *Stromberg v. California*, 283 U.S. 359 (1931).

ing without explanation to give the jury the special interrogatories that Allstate proposed. However, even in *Gillespie*, that court does not hold that there is always a reversal if evidence is insufficient with respect to any one of the multiple claims covered by a general verdict. Rather, the *Gillespie* court stated '' 'a new trial is *usually* warranted if evidence is insufficient with respect to any one of the multiple claims covered by a general verdict.' '' *Gillespie*, 386 F.3d at 29 (emphasis added) (quoting *Kerkhof v. MCI Worldcom, Inc.*, 282 F.3d 44, 52 (1st Cir. 2002)). The *Gillespie* court also confesses that not all circuits follow the practice of the First Circuit in this regard. *Id.* at 30.

Rather than relying on *Gillespie* to reverse the bad-faith verdict against Allstate, I would affirm said verdict on the rationale of other courts, which have upheld a general verdict if there is sufficient evidence to support at least one viable theory. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772 (9th Cir. 1990); *McCord v. Maguire*, 873 F.2d 1271, *amended by* 885 F.2d 650 (9th Cir. 1989).

The *Gillespie* court also admits that even its

> own approach is by no means rigid. Recognizing that a jury is likely to prefer a better supported theory to one less supported, [the First Circuit has] generously applied the harmless error concept to rescue verdicts where [it] could be *reasonably sure* that the jury in fact relied upon a theory with adequate evidentiary support.

Gillespie, 386 F.3d at 30. It was clear in *Gillespie* that ''*none* of the theories was strongly supported by the evidence,'' *id.*, unlike the instant case against Allstate wherein one of the three theories was indeed viable, even according to the majority.

One must ask why would the majority choose the rationale of the First Circuit to reverse rather than the rationale of the Ninth Circuit to affirm this jury verdict? Unfortunately, I have no clue.

For the above reasons, I would affirm the jury verdict against Allstate and in favor of Miller and hold that the district judge did not abuse her discretion in any manner whatsoever. If there is in fact error, I would hold it to be harmless in light of the substantial evidence supporting Miller's failure-to-inform theory of bad faith against Allstate, which was presented to the jury.

SAITTA, J., dissenting:

I disagree with the majority on two points. First, *Skender v. Brunsonbuilt Construction & Development Co.*, 122 Nev. 1430, 148 P.3d 710 (2006), should be mandatory in all civil cases, not just preferred, as the majority suggests. Second, the majority's holding regarding *Skender* should be prospective, not retroactive. There was no indication at the time of trial that this court would extend *Skender* beyond constructional defect cases with comparative negligence de-

fenses. Therefore, I would affirm the jury verdict in this case and hold that the district court did not abuse its discretion by refusing to submit Allstate's special interrogatories.

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

No. 48847

July 30, 2009 213 P.3d 476

Appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of sexual assault on a child. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

The supreme court held that: (1) preliminary hearing testimony of minor victim, who was deceased at time of trial, could be admitted into evidence at trial without violating Sixth Amendment's confrontation clause or *Crawford v. Washington*, 541 U.S. 36 (2004); (2) admission of victim's videotaped testimony and other statements she made to officers did not violate defendant's confrontation clause rights; (3) victim's written statement on medical form, stating that defendant had ripped open her vagina, was not testimonial for confrontation clause purposes; (4) there was no manifest error in district court's decision to admit evidence of prior bad acts in the form of testimony by victim's sibling that defendant had physically abused him; (5) violation of district court's admonishment not to discuss any opinion about trial until case was submitted to jury occurred when alternate juror expressed her opinion that she believed defendant was guilty, and as such, alternate juror would be removed; and (6) sentence of four consecutive life terms for defendant's four convictions for sexual assault on a child did not constitute cruel and unusual punishment.

Affirmed.

Jeremy Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Joseph R. Plater*, Deputy District Attorney, Washoe County, for Respondent.

1. CRIMINAL LAW.

A preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), which holds that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine wit-

nesses, and the adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed. U.S. CONST. amend. 6.

2. CRIMINAL LAW.

Supreme court generally reviews a district court's evidentiary rulings for an abuse of discretion.

3. CRIMINAL LAW.

Whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo. U.S. CONST. amend. 6.

4. CRIMINAL LAW.

Preliminary hearing testimony of minor victim, who was deceased at time of trial, could be admitted into evidence at trial without violating Sixth Amendment's Confrontation Clause or *Crawford v. Washington*, 541 U.S. 36 (2004); victim's testimony at preliminary hearing was testimonial, victim was deceased at time of trial and, thus, was unavailable witness, there was nothing in state law that would hinder defendant's opportunity to cross-examine witness at preliminary hearing, state law did not preclude defendant from questioning witness's credibility or motive during preliminary hearing, and defendant's cross-examination of victim at preliminary hearing consisted of almost double the amount of questions that were asked on direct examination. U.S. CONST. amend. 6.

5. CRIMINAL LAW.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), which holds that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, the threshold question is whether the statement at issue is ''testimonial'' hearsay. U.S. CONST. amend. 6.

6. CRIMINAL LAW.

Although minor victim's statements were testimonial in nature because victim made them to police in formal, nonemergency setting and interviews were conducted for primary purpose of helping law enforcement build case of sexual abuse against defendant, the admission of victim's videotaped testimony and other statements she made to officers did not violate defendant's Confrontation Clause rights; victim was deceased at time of trial and, thus, unavailable, and because of discovery, defendant had statements that victim made to detectives, including copy of videotape, before preliminary hearing, and thus, defendant had opportunity to confront victim on all of her statements to officers at preliminary hearing. U.S. CONST. amend. 6.

7. CRIMINAL LAW.

Given the context in which it was asked, by a family therapist specializing in sexual assault victims and for the purpose of diagnosis and treatment, child victim's written statement on medical form, stating that defendant had ripped open her vagina, was not testimonial for Confrontation Clause purposes; victim's time with therapist served primary purpose of helping victim psychologically heal from five years of abuse, and the question that elicited victim's response did not ask anything specific about act of sexual assault, but, rather, asked if victim had been to hospital or required stitches. U.S. CONST. amend. 6.

8. CRIMINAL LAW.

Therapist's testimony regarding minor victim's answer on medical form, namely that defendant had ripped open her vagina, was admissible nontestimonial hearsay pursuant to statute providing for the admission of

hearsay statements made for purposes of medical diagnosis or treatment; the question was asked and answered in context of medical/psychological treatment for sexual assault, question was part of medical form that all new patients routinely filled out, victim was at therapist's office as a victim of sexual assault, and it was in that capacity that she filled out the form and made the statement. NRS 51.115.

9. CRIMINAL LAW.

Statements that are pertinent to the ongoing care of the patient are admissible pursuant to statute providing for the admission of hearsay statements made for purposes of medical diagnosis or treatment. NRS 51.115.

10. RAPE; SODOMY.

Adult magazines found during the search of defendant's apartment were not relevant because they had no tendency to make the existence of any fact of consequence as to whether defendant molested his daughter more or less probable, and thus, district court abused its discretion by admitting evidence regarding the adult magazines.

11. CRIMINAL LAW.

District court's error in admitting evidence regarding adult magazines, which were found during the search of defendant's apartment and which were not relevant to whether defendant molested his daughter, was harmless, given the overwhelming evidence presented by the State against defendant.

12. CRIMINAL LAW.

In prosecution of defendant for sexually assaulting victim, who was defendant's oldest child, there was no manifest error in district court's decision to admit evidence of prior bad acts in the form of testimony by victim's sibling that defendant had physically abused him; victim's sibling testified under oath and appeared to be a credible witness, the prior bad act was relevant to show sibling's fear of defendant and why sibling did not initially report the sexual abuse he had witnessed, and court instructed jury about limited use of the prior bad act.

13. CRIMINAL LAW.

A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by supreme court on appeal absent manifest error.

14. CRIMINAL LAW.

For evidence of prior bad acts to be admissible, the district court must hold a hearing outside the presence of the jury and determine that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

15. CRIMINAL LAW.

If evidence of a prior bad act is admitted, the district court must then issue a limiting instruction to the jury about the limited use of bad act evidence, unless waived by the defendant.

16. CRIMINAL LAW.

Exchange between prosecutor and victim's sibling, which occurred on re-direct and in which sibling alluded to victim's death, did not violate district court's order not to discuss circumstances of victim's death, and thus, mistrial was not warranted based on this exchange between prosecutor and victim's sibling; with respect to this exchange, prosecutor was trying to rehabilitate sibling because, during cross-examination, defendant questioned sibling's motivation as to why he was more forthcoming at trial, when he had repeatedly told investigators he had not seen any instances of sexual abuse of victim by defendant, and at most, the exchange revealed that sib-

ling knew that victim was deceased, a fact of which jury was already aware.

17. CRIMINAL LAW; JURY.
Violation of the trial court's admonishment not to discuss any opinion about the trial until the case was submitted to the jury occurred when an alternate juror expressed her opinion to the other jurors that she believed defendant was guilty, and as such, alternate juror was removed for violating court's order.

18. CRIMINAL LAW.
Alternate juror's expressing her opinion to the other jurors that she believed defendant was guilty did not warrant mistrial; the alternate juror was removed, and while three other jurors confirmed that they heard the alternate juror's comment, they stated that they could remain impartial, and all the other jurors stated that they did not hear anyone express an opinion about the ultimate outcome of the case.

19. CRIMINAL LAW.
Supreme court reviews a district court's decision to deny a motion for a mistrial based upon juror misconduct for an abuse of discretion.

20. SENTENCING AND PUNISHMENT.
Sentence of four consecutive life terms for defendant's four convictions for sexual assault on a child did not constitute cruel and unusual punishment under Eighth Amendment; defendant did not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes were unconstitutional, and the sentence imposed was within the parameters provided by the relevant statutes. U.S. CONST. amend. 8; NRS 176.035(1).

21. SENTENCING AND PUNISHMENT.
The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence but forbids only an extreme sentence that is grossly disproportionate to the crime. U.S. CONST. amend. 8.

22. SENTENCING AND PUNISHMENT.
Regardless of its severity, a sentence that is within the statutory limits is not cruel and unusual punishment, within meaning of Eighth Amendment, unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. U.S. CONST. amend. 8.

23. CRIMINAL LAW.
Supreme court will refrain from interfering with the sentence imposed so long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.

Before HARDESTY, C.J., PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS and PICKERING, JJ.

OPINION

Per Curiam:

In this appeal, we consider whether the preliminary hearing testimony of an unavailable witness may be admitted into evidence at trial without violating the Sixth Amendment Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36 (2004). We hold that it

can. We conclude that this issue, along with the other issues that appellant James Chavez raises on appeal, does not warrant reversal of Chavez's conviction and sentence. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Chavez and Korby Block married in 1993 and together had four children, including their eldest, D.C. Although the couple divorced in 1997, they continued to live together in Block's apartment. In 2004, as Block was driving all four children to an outing, she asked them how it affected them when she and Chavez fought. During the conversation, one of the children told Block that Chavez was doing something to D.C. D.C. then told her mom that Chavez had been sexually molesting her. Block immediately took D.C. to the hospital.

Before D.C. was examined at Northern Nevada Medical Center, police detectives interviewed Block and D.C. There, D.C. told Sergeant Patrick Dreelan of the Reno Police Department that Chavez had sexually assaulted her the day before, forcing her to have intercourse and perform oral sex on him. Sergeant Dreelan then escorted Block and D.C. to the police station where Detective Barbara Armitage interviewed them. D.C.'s interview was videotaped. During the interview, D.C. stated that Chavez had sexually molested her for five years and sometimes she would spit out his semen into a sock. D.C. told Detective Armitage that the day before, when Chavez forced her to perform oral sex on him on the living room couch, she had been wearing a purple top and purple pants. During a second interview with Detective Armitage, D.C. recounted many of the same facts, but also recounted new incidents of sexual abuse. D.C. told the police that the sexual abuse began when she was five years old. D.C. revealed that the injury for which she had to be taken to the hospital when she was five years old, which resulted in her receiving stitches in her vagina, was not the result of a fall on a fence post, but rather because of Chavez sexually molesting her. She further stated that Chavez had used a purple vibrator on her private parts.

With Block's permission, police officers entered Block's apartment and collected evidence, including the purple pants and top, several socks, evidentiary samples from the living room couch, and two vibrators. One of the socks contained adequate saliva and seminal fluid on which to perform DNA tests; those DNA tests revealed that D.C. was the dominant source of saliva and Chavez was the source of the seminal fluid. The other socks tested positive for seminal fluid, though it was not possible to develop a DNA profile. The couch samples, too, showed seminal fluid, but the low level of DNA prevented a determination of the source of the semen. The vibrators tested positive for Block's DNA.

The State charged Chavez with four counts of sexual assault on a child. On August 5, 2004, with almost all of the discovery complete, D.C. testified at a preliminary hearing. At the preliminary hearing, as a result of discovery, Chavez had a copy of D.C.'s videotaped interview with police and a list of the witnesses that the State planned on calling in its case in chief. On direct, D.C. testified about the sexual abuse Chavez committed upon her, including where, when, and how the assaults occurred.

During the preliminary hearing, Chavez, through his attorney, had opportunity to cross-examine D.C. In the course of the cross-examination and recross-examination, not including introductory questions, Chavez asked D.C. 240 questions. Chavez's examination of D.C. was almost twice the length of the State's examination of D.C. Chavez confronted D.C. about the statements she made to the State during direct examination, including repeatedly questioning D.C. about her claims that Chavez had digitally, vaginally, and anally penetrated her during a five-year span. Chavez inquired about the details of the incidents, including where and when they took place, why D.C. did not mention the incidents earlier, and whether any of her siblings ever witnessed the sexual abuse. Chavez asked D.C. about his penis, including its size, description, and feel when he was committing the sexual abuse. He questioned D.C. about the semen and how she would use the sock to clean it off of her. Chavez confronted D.C. about the incident that occurred when she was five years old, when Chavez said D.C. fell on a fence post. He also extensively questioned D.C. about her family life, including her relationship with her mother, Block. Chavez cross-examined D.C. about her feelings toward Chavez, the family's financial issues, their living situation, and Block's feelings about Chavez. He confronted D.C. about statements that she made about the sexual abuse to her mother, family friends, law enforcement, and health care providers. Chavez asked D.C. about her therapy sessions with her therapist, Sally Holt-Evarts. He asked D.C. whether she told Evarts about the sexual abuse and whether Block would sit in on the sessions. Chavez extensively questioned D.C. about her sexual education classes at school, including whether she knew what semen was and how she learned about semen.

During this long cross-examination and recross-examination, the magistrate judge interrupted Chavez only once. The sole interruption occurred when Chavez was questioning D.C. about her mother's new boyfriend, whether he visited, and whether Block was happy with him. The magistrate judge said that he was not going to allow the line of questioning unless counsel explained why it was relevant. Without objection, Chavez moved on to other questions.

After the preliminary hearing, but before trial, D.C. died. The State filed a notice of intent to admit the former testimony of deceased witness D.C. Chavez moved the district court to dismiss the

charges against him. The district court denied Chavez's motion. Further, it granted the State's motion to admit D.C.'s former testimony, reasoning that pursuant to *Crawford*, Chavez had the opportunity to cross-examine D.C. at the preliminary hearing and, as D.C. was now unavailable, her testimony was therefore admissible.

In light of the district court's ruling, Chavez asked the district court that the jury be instructed that D.C. was unavailable and thus preclude witnesses from mentioning that D.C. had died. The court ruled that, pursuant to NRS 51.055(1)(c), Nevada's statute on witness unavailability due to death, the jury could be instructed that D.C. was unavailable because she was deceased but that no other details concerning her death could be admitted.

At trial, Evarts testified that she had nearly 25 years of experience as a family therapist and that child assault victims constituted a quarter of her family therapy practice. Evarts testified that the first time she saw D.C. was three months after D.C. first made the allegations that Chavez had sexually abused her. Evarts said that on that first visit, pursuant to her general practice, she asked D.C. to fill out a form that asked a variety of questions that would help Evarts in treating her. Evarts testified that one question on the form inquired if the patient had ever been to the hospital or required stitches, and D.C.'s answer to that question was that at five years old her dad ripped open her vagina. When asked whether she ever doubted D.C.'s allegations of abuse, Evarts testified that ''[she] had no doubt . . . at all that [D.C.] was telling the truth, and [she] didn't think that [D.C.] was coached at all.''

Sergeant Dreelan testified that on March 28, 2004, he was dispatched to Northern Nevada Medical Center to respond to a report of sexual assault of a child. Sergeant Dreelan testified that he met D.C. and Block in the waiting area of the hospital. He stated that they both appeared upset and emotional and that D.C. was crying. Sergeant Dreelan testified that he had a conversation with D.C. in which he asked her what had happened. Sergeant Dreelan testified that D.C. told him that her father, Chavez, had forced her to have sex with him and to perform oral sex on him the day before.

Detective Barbara Armitage testified that she interviewed D.C. on two separate occasions. The first interview was conducted on March 28, 2004, and was videotaped. Over defense counsel's objection, the district court allowed the State to play the videotape for the jury. In it, D.C. describes how and when she was sexually molested by her father.

Doctor Ellen Clark, a specialist in clinical and forensic pathology, who performed the autopsy on D.C., testified that the autopsy revealed evidence of repetitive injury to the vaginal area, including a complete absence of a hymen.

Over defense counsel's objection, the district court allowed the State to present D.C.'s preliminary hearing testimony. The State also presented the testimony of all of Chavez and Block's children.

D.C.'s younger brother, T.C., testified that the day he and his siblings were in the car with their mother, he told Block that Chavez was doing ''something'' to D.C. He testified that he told Block because he wanted D.C. to have a better life and that he had witnessed the sexual abuse once or twice, when he saw D.C. with her head on Chavez's private part. T.C. testified that sometimes Chavez would instruct him and his other siblings to go to the bathroom or their rooms while he and D.C. remained together to clean. T.C. testified that after about a half hour, D.C. would go and ''clean her hands and cry.''

D.C.'s other brother, B.C., testified that he too knew that Chavez was doing something ''suspicious'' to D.C. because Chavez would always take D.C. into a room, while asking the rest of the siblings to stay either in the living room, their rooms, or the bathroom. B.C. further testified that once Chavez thought the other children were spying on him and D.C., so Chavez ''knocked'' out B.C. and slapped his other siblings. B.C. testified that he saw Chavez with his pants down and D.C. with her head between Chavez's legs on one occasion. B.C. admitted that initially he told police that he never saw anything happen between Chavez and D.C. but explained he had been embarrassed to speak of sexual things. When asked why he was being forthcoming now, this exchange took place between B.C. and the prosecutor:

> Q. When you talked to the police that second time and that first time, was [D.C.] still alive?
>
> A. Yes, I think so.
>
> Q. . . . How important is it now at this point, with [D.C.] not being here anymore—how does that affect why you're wanting to talk now?
>
> A. Because since she isn't here, I can, um—I know that she is gone because he—
>
> Q. Stop.
>
> . . . .
>
> Q. I don't want you to blame anybody. Just don't say anything like that.
>
> Do you feel it's your place to speak for her?
>
> A. Yes.

The final sibling to testify was D.C.'s sister, D.A.C. She testified that she once saw D.C. on the bed with Chavez on top of her. She further testified that another time she was in the bathroom and D.C. walked in with ''white stuff'' on her chin and that Chavez told D.C. to wipe her face clean.

Chavez testified that he never sexually molested his daughter D.C. When asked about D.C.'s preliminary hearing testimony, Chavez testified that he did not think that D.C. herself believed everything she was saying at the preliminary hearing. He testified that D.C. fell on the fence post outside their old home when she was

five years old, requiring stitches to her vagina. He further testified that he did not believe the testimony of his other children. Rather, he believed all his children, including D.C., had lied. Chavez denied ever telling any of his children to go to their rooms while he and D.C. stayed together. He further denied physically punishing any of his children, beyond swatting them on their behinds or making them do pushups.

During Chavez's cross-examination, the State sought to introduce evidence of pornographic magazines found under Chavez's bathroom sink during the search of Block's apartment. In a pretrial hearing, the district court ruled the evidence inadmissible. However, the district court noted that during direct examination, ''there was a line of questioning and responses that were given that would suggest that [Chavez was] shy or bashful about sexual issues.'' Thus, the district court ruled that the adult magazines were relevant and allowed the State to question Chavez about the evidence. Chavez answered a series of questions regarding the adult magazines.

During the trial, the district court informed the parties that an alternate juror had expressed her opinion to as many as four other jurors that Chavez was guilty. Chavez immediately moved for a mistrial. The district court decided that a voir dire of each juror would be conducted to determine whether the jury had been tainted. The next day, the district court canvassed each juror. The alternate juror stated that she indeed had expressed her opinion that Chavez was guilty. The district court excused the juror. Three other jurors confirmed that they heard the comment but could remain impartial, while all the other jurors stated they did not hear anyone express an opinion about the ultimate outcome of the case. Accordingly, the district court found that the jury would be able to remain fair and impartial and denied Chavez's motion for a mistrial.

The jury convicted Chavez of four counts of sexual assault on a child. The district court sentenced him to four consecutive terms of life with the possibility of parole beginning after a minimum of 20 years had been served.

On appeal, Chavez assigns numerous trial errors. The most significant issue raised on appeal is whether the admission of D.C.'s preliminary hearing testimony and other statements made to police violated the Sixth Amendment Confrontation Clause. Chavez asserts an additional Confrontation Clause violation in connection with the testimony of D.C.'s therapist, Evarts. Moreover, Chavez assigns several evidentiary errors, challenging the relevance of Dr. Clark's testimony and the reference to the adult magazines found in Chavez's bathroom. Chavez also argues that it was error to admit other bad act evidence with regard to how he punished his children. He further asserts that he is entitled to a new trial because the district court erred when it ruled that, pursuant to NRS 51.055, the jury could be instructed that D.C. was unavailable because she was

deceased. In addition, Chavez argues that the exchange between B.C. and the prosecutor and the instance of juror misconduct warranted a mistrial. Finally, he asserts that the consecutive sentences constitute cruel and unusual punishment.

DISCUSSION

[Headnote 1]

In resolving Chavez's arguments on appeal, we must first address whether the preliminary hearing process provides an adequate opportunity for the accused to confront the witnesses against him, as is required by the Sixth Amendment's Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36 (2004). We conclude that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to *Crawford*. The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed. We find support for our decision in the history and language of the Confrontation Clause and the bedrock principles of the inquisitorial process upon which the United States Supreme Court reached its decision in *Crawford*.

The Confrontation Clause and Crawford

The Confrontation Clause of the Sixth Amendment provides: ''In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'' U.S. Const. amend. VI. As the United States Supreme Court observed in *Crawford*, the scope of the right to confront was addressed just three years after the First Congress adopted the Sixth Amendment in *State v. Webb*, 2 N.C. 103 (1 Hayw. 1794), when a North Carolina court held that ''depositions could be read against an accused only if they were taken in his presence.'' 541 U.S. at 49.

Face-to-face confrontation is the foundation upon which the United States Supreme Court's Confrontation Clause jurisprudence evolved. In *Crawford*, the Court held that the Confrontation Clause bars ''admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'' 541 U.S. at 53-54. In so doing, the Supreme Court observed that the Confrontation Clause was a

> procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 61.

While much of *Crawford*'s progeny dealt with the definition of ''testimonial,'' *see Davis v. Washington*, 547 U.S. 813 (2006), *Crawford* discussed the Confrontation Clause primarily in terms of unavailability and an opportunity for cross-examination. *See Crawford*, 541 U.S. at 68. *Crawford* is grounded in the principle that the opportunity to cross-examine is the focal point of the right to confront. *See, e.g.*, *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (''Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' '' (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965))) (alteration in original).

This court's Confrontation Clause jurisprudence mirrors the Court's adherence to the historical roots of the Confrontation Clause. Some 200 years after the *Webb* decision, this court reaffirmed the cornerstone principle of the Confrontation Clause and its guarantee of a face-to-face meeting with an accuser. *Smith v. State*, 111 Nev. 499, 502, 894 P.2d 974, 975 (1995). In *Smith*, we held that the defendant's Sixth Amendment right to confrontation had been violated because the prosecutor blocked the child-victim's view of the defendant on direct examination. *Id*. at 502-03, 894 P.2d at 976. We determined that, even though Smith had an ''unfettered opportunity'' to cross-examine his accuser, it was not an effective cross-examination because the victim's view of Smith had been blocked. *Id*. at 502, 894 P.2d at 976. In so determining, we noted that '' '[i]t is always more difficult to tell a lie about a person ''to his face'' than ''behind his back.'' '' '' *Id*. (quoting *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988)).

We have applied *Crawford* to cases before us, stating that the testimonial hearsay of an unavailable witness requires a prior opportunity to cross-examine the witness concerning the statement for it to be admissible. *Flores v. State*, 121 Nev. 706, 714, 120 P.3d 1170, 1175 (2005). Further, we have observed that '' 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' '' *Pantano v. State*, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). And we have explained that discovery is a component of an effective cross-examination. *See Estes v. State*, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006).

Today, we further clarify our post-*Crawford* decisions by holding that a preliminary hearing can afford a defendant an opportunity for effective cross-examination. We will determine the adequacy of the opportunity on a case-by-case basis, taking into consideration such factors as the extent of discovery that was available to the defendant

at the time of cross-examination and whether the magistrate judge allowed the defendant a thorough opportunity to cross-examine the witness. We first address the standard of review for such a claim and then address each of Chavez's claims in turn.

Standard of review

[Headnotes 2, 3]

We generally review a district court's evidentiary rulings for an abuse of discretion. *See, e.g.*, *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). However, whether a defendant's Confrontation Clause rights were violated is ''ultimately a question of law that must be reviewed de novo.'' *U.S. v. Larson*, 495 F.3d 1094, 1102 (9th Cir. 2007); *see U.S. v. Holt*, 486 F.3d 997, 1001 (7th Cir. 2007); *U.S. v. Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007); *U.S. v. Townley*, 472 F.3d 1267, 1271 (10th Cir. 2007); *U.S. v. Hitt*, 473 F.3d 146, 155-56 (5th Cir. 2006).

D.C.'s preliminary hearing testimony and statements to law enforcement

[Headnote 4]

Chavez challenges the admission of D.C.'s preliminary hearing testimony, her videotaped statements to police, and her other statements to law enforcement officers. We first address whether the district court erred in admitting D.C.'s preliminary hearing testimony.

[Headnote 5]

The threshold question in the *Crawford v. Washington* framework is whether the statement at issue is ''testimonial'' hearsay. 541 U.S. 36, 68-69 (2004). While *Crawford* ''leave[s] for another day'' the definition of ''testimonial,'' it did observe that ''it applies at a minimum to prior testimony at a preliminary hearing.'' *Id.* at 68. Accordingly, D.C.'s testimony at the preliminary hearing was testimonial. Further, because D.C. was deceased at the time of trial, she was an unavailable witness. Thus, the primary issue before this court is whether Chavez had an opportunity for an effective cross-examination at the preliminary hearing.

Chavez argues that the limited nature of a preliminary hearing does not provide a defendant an adequate opportunity to cross-examine a witness appearing against him. He urges this court to adopt the standards set forth in *People v. Fry*, 92 P.3d 970 (Colo. 2004), and *State v. Stuart*, 695 N.W.2d 259 (Wis. 2005). Both cases are inapposite.

In *Fry*, the Colorado Supreme Court found that a defendant's opportunity to cross-examine a witness during a preliminary hearing was not adequate for Confrontation Clause purposes because of

''the limited nature of the preliminary hearing'' in that state. 92 P.3d at 976-77 (explaining that in Colorado a ''preliminary hearing is limited to matters necessary to a determination of probable cause''). In contrast, Nevada law is generally more permissive with regard to a defendant's right to discovery and cross-examination at the preliminary hearing. *See* NRS 171.196(5) (''The defendant may cross-examine witnesses against him and may introduce evidence on his own behalf.''); NRS 171.1965(1) (stating that, before the preliminary hearing, the defendant is entitled to written or recorded statements by the defendant or a witness, reports, and other evidence within the prosecutor's custody or possession). We do not find anything in our state law that would hinder a defendant's opportunity to cross-examine a witness at a preliminary hearing.[1]

In *Stuart*, the Wisconsin Supreme Court reversed a murder conviction, finding that the district court had erroneously admitted the preliminary hearing testimony of the defendant's brother. 695 N.W.2d at 267. During the preliminary hearing, the magistrate ruled that pursuant to Wisconsin law, the defense could not ask the brother a question that was meant to cast doubt on the brother's credibility at the preliminary hearing stage. *Id*. At trial, the brother became unavailable, and the court admitted his preliminary hearing testimony. *Id*. The Wisconsin Supreme Court reversed, determining that, at the trial level, a defendant had a right to question a witness's motive and credibility and, therefore, admitting the preliminary testimony violated the defendant's right to confrontation. *Id*.

Unlike Wisconsin, Nevada law does not preclude a defendant from questioning a witness's credibility or motive during a preliminary hearing. While the defendant in *Stuart* could not question the witness's credibility and motive, Chavez questioned D.C.'s credibility in a wide-ranging cross-examination.

Chavez's cross-examination of D.C. at the preliminary hearing consisted of almost double the amount of questions that were asked on direct examination. D.C. testified under oath and in Chavez's

[1]Chavez cites *Sheriff v. Witzenburg*, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006), for the proposition that in Nevada preliminary hearings do not afford sufficient opportunity for cross-examination. This argument misreads the case. In *Witzenburg*, this court held that the statutory grant of cross-examination at a preliminary examination pursuant to NRS 171.196(5) was a qualified right, subject to NRS 171.197, which provides the defendant with a mechanism to challenge affidavit testimony that the State attempts to introduce against him. *Id*. at 1062, 145 P.3d at 1006. Contrary to Chavez's assertion, *Witzenburg* does not hold that Nevada's preliminary hearing procedures limit a defendant's cross-examination rights to such an extent that Confrontation Clause rights cannot be satisfied. This court held to the contrary in *Aesoph v. State*, 102 Nev. 316, 319-20, 721 P.2d 379, 381-82 (1986). In this pre-*Crawford* decision, we specifically held that cross-examination during a preliminary hearing could satisfy the Confrontation Clause, a proposition which we extend today post-*Crawford*. *Id*.

presence. At the time Chavez conducted the cross-examination, nearly all the discovery was complete. In fact, most of Chavez's extensive cross-examination consisted of questions based upon statements that D.C. had made to authorities about the sexual abuse. Specifically, we note that Chavez had a copy of D.C.'s videotaped statements to police, as well as a list of the witnesses that would be testifying during the State's case in chief. Therefore, Chavez had most, if not all, of the pertinent facts of the State's case in chief at the preliminary hearing.

Chavez used the discovery to ask D.C. specific questions about the molestation, including details about each instance of abuse, the description of her father's penis, and how she cleaned up afterwards by using socks. He questioned D.C.'s veracity and motives by repeatedly asking her whether she told specific people about the sexual abuse during the five years that it was ongoing. Chavez asked D.C. whether her brothers or her sister ever saw the sexual abuse and about the conversation in the car between D.C., her siblings, and Block, and how and why D.C. told her mother about the abuse. Chavez asked D.C. specific questions about her parents' relationship. He further questioned D.C. about the alleged accident on the fence post and how it led to her initial injuries. He even asked D.C. if she was seeing a therapist.

These questions were only part of the 240 questions Chavez asked D.C. The record leaves no doubt in our minds that the preliminary hearing afforded Chavez an opportunity to cross-examine the unavailable witness, D.C., on the statements that she had made to her mother, health care providers, and law enforcement officers regarding the sexual abuse. The nature of the cross-examination was extensive and thorough because the defense took, and the magistrate judge allowed, full advantage of the opportunity to cross-examine. In fact, the magistrate judge only interrupted Chavez's cross-examination once, when Chavez asked D.C. a series of questions about her mother's new boyfriend. And, even then, the magistrate judge said that he would not allow the line of questioning unless counsel could explain its relevance. Chavez simply moved on to other questions. There is no evidence that the magistrate judge placed any inappropriate restrictions on the scope of Chavez's cross-examination of D.C. Rather, the record shows, save for one appropriate admonishment, the magistrate judge allowed Chavez to extensively question D.C. on all the key pieces of evidence the State had obtained against Chavez. Because discovery was almost entirely complete, Chavez was able to take full advantage of the opportunity to cross-examine the State's key witness against him at the preliminary hearing.

Therefore, in this instance, because the discovery was almost entirely complete and the magistrate judge allowed Chavez unrestricted opportunity to confront D.C. on all the pertinent issues, we con-

clude that Chavez's Confrontation Clause rights were not violated by the admission of D.C.'s preliminary hearing testimony at trial.

D.C.'s other statements to law enforcement

[Headnote 6]

In concluding that the admission of D.C.'s preliminary hearing testimony did not violate Chavez's rights pursuant to the Confrontation Clause and *Crawford*, we also conclude that the admission of D.C.'s videotaped testimony and other statements she made to officers did not violate Chavez's constitutional rights.

There is no question that the statements were testimonial in nature because D.C. made them to police in a formal, nonemergency setting and the interviews were conducted for the primary purpose of helping law enforcement build a case of sexual abuse against Chavez. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (explaining that nontestimonial statements are those made during an ongoing emergency; whereas, testimonial statements are those made during an interrogation that serve the primary purpose of helping establish or prove past events ''potentially relevant to later criminal prosecution'').

The only remaining issue is whether Chavez had opportunity to cross-examine D.C. regarding the videotaped testimony and her other statements to police. Because of discovery, Chavez had the statements that D.C. made to Detective Armitage and Sergeant Dreelan, including a copy of the videotape, before the preliminary hearing. Chavez, therefore, had the opportunity to confront D.C. on all of her statements to law enforcement officers at the preliminary hearing. Whether he questioned D.C. on each and every statement is not the relevant inquiry, as the Confrontation Clause only guarantees the opportunity to cross-examine, not a cross-examination in whatever way the defense might wish. As we have already concluded, Chavez was afforded an adequate opportunity to confront D.C. at the preliminary hearing. The breadth and scope of Chavez's cross-examination did not run afoul of the Confrontation Clause because of the nearly complete discovery available to Chavez at the time and manner in which the magistrate judge allowed the cross-examination to proceed.

Other testimonial hearsay

[Headnote 7]

Chavez next argues that his Confrontation Clause rights were violated when D.C.'s therapist, Evarts, was allowed to testify as to how D.C. had answered a question on a medical form. Evarts testified that D.C. wrote that at ''five years old, her dad ripped open her vagina.''

We first consider *Crawford*'s threshold question of whether the statement being offered is testimonial in nature. While we acknowl-

edge that the police likely referred D.C. to Evarts, there is no evidence that Evarts' time with D.C. served the purpose of furthering the investigation of D.C.'s sexual abuse allegations. Rather, their time together served the primary purpose of helping D.C. psychologically heal from five years of abuse. One quarter of Evarts' practice was made up of child assault victims. Her general practice was to have patients fill out a medical form upon their first visit. The question that elicited the response at issue did not ask anything specific about an act of sexual assault. Rather, it asked if the patient had been to the hospital or required stitches. Given the context in which it was asked, by a family therapist specializing in sexual assault victims and for the purpose of diagnosis and treatment, we conclude that D.C.'s written statement was not testimonial.

[Headnotes 8, 9]

Having concluded that D.C.'s statement was nontestimonial in nature, we must next determine whether it was admissible pursuant to a hearsay exception. NRS 51.115 provides for the admission of hearsay statements ''made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof.'' In essence, statements that are pertinent to the ongoing care of the patient are admissible pursuant to NRS 51.115. *See Koerschner v. State*, 116 Nev. 1111, 1118, 13 P.3d 451, 456 (2000).

We conclude that Evarts' testimony regarding D.C.'s answer that her father ripped open her vagina is admissible nontestimonial hearsay pursuant to NRS 51.115. The question was asked and answered in the context of medical/psychological treatment for sexual assault. As Evarts testified, the question was part of a medical form that all new patients routinely fill out to give Evarts an introduction to the patient for treatment and diagnosis. D.C. was at Evarts' office as a victim of sexual assault, and it was in that capacity that she filled out the form and made the statement. We therefore conclude that the district court did not abuse its discretion in allowing Evarts to testify as to D.C.'s statement on the medical form.[2]

Evidentiary issues

Chavez next raises several evidentiary issues. He contends that the district court abused its discretion when it admitted nonrelevant yet

[2]Chavez further objects to Evarts' testimony that she had ''no doubt . . . [D.C.] was telling the truth'' or that D.C. had not been ''coached.'' Chavez did not object at the time of the testimony. Rather, he moved for a mistrial the next day, alleging impermissible vouching on Evarts' part. On appeal, he argues that the district court abused its discretion when it denied his motion for a mistrial. Chavez's argument is without merit. In reviewing the district court's denial of a motion for a mistrial, we will reverse the decision only if there is a clear demonstration that the district court abused its discretion. *Rose*

highly prejudicial evidence at trial, namely, evidence of adult magazines found in his bathroom and evidence of prior bad acts.[3]

Adult magazines

[Headnotes 10, 11]

The district court initially ruled that any evidence or reference to the adult magazines found during the search of Block's apartment was inadmissible. However, after noting that Chavez conveyed a shy attitude toward sexual issues on direct examination, the district court allowed the State to question Chavez about the adult magazines.

Relevant evidence is ''evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence'' and is generally admissible. NRS 48.015; NRS 48.025. However, relevant evidence is inadmissible ''if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.'' NRS 48.035(1). As previously indicated, we review a district court's decision to admit or exclude evidence for abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

We fail to see the relevance of the adult magazines because they have no tendency to make the existence of any fact of consequence as to whether Chavez molested his daughter more or less probable. Thus, we conclude that the district court abused its discretion by admitting evidence regarding the adult magazines. While the probative value was minimal at best and unrelated to the elements of the crimes charged, we conclude that the introduction of the adult magazines was harmless error, given the overwhelming evidence pre-

v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007). Evarts did not vouch for D.C.'s credibility in terms of the allegations in this case. A close review of the trial transcript reveals that Evarts was responding to a question by the State about whether she felt D.C. had been coached. The question was asked because Evarts earlier had testified that, in her experience, she had treated kids that she felt had been ''coached[ ] or [had] falsely accused . . . their dads.'' Thus, Evarts' testimony went to her observations of D.C. as compared to other children she had treated, not to the veracity of D.C.'s allegations. We conclude that the district court did not abuse its discretion in denying Chavez's motion for a mistrial.

[3]Chavez also asserts that the testimony of Dr. Clark, who performed the autopsy on D.C., was not relevant because it was cumulative and highly prejudicial. Chavez did not make a contemporaneous objection and we therefore need not consider this claim. *McKague v. State*, 101 Nev. 327, 330, 705 P.2d 127, 129 (1985). However, in exercising our discretion to consider the claim under a plain error review pursuant to *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003), we determine that Chavez has failed to demonstrate a miscarriage of justice. As a practical matter, we note that Dr. Clark's testimony was highly probative, since it helped corroborate D.C.'s testimony that she had been sexually assaulted repeatedly over a number of years.

sented by the State against Chavez. *See, e.g.*, *Estes v. State*, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006) (determining that the introduction of a photograph at trial of the minor sexual assault victim was harmless error ''given the overwhelming evidence'' presented against defendant).

Prior bad acts

[Headnote 12]

Chavez also argues that he is entitled to a new trial because the district court abused its discretion when it admitted evidence of prior bad acts in the form of testimony by his three children that he had physically abused them.

[Headnote 13]

''A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by this court on appeal absent manifest error.'' *Somee v. State*, 124 Nev. 434, 446, 187 P.3d 152, 160 (2008).

[Headnotes 14, 15]

For evidence of prior bad acts to be admissible, the district court must hold a hearing outside the presence of the jury and determine '' 'that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.' '' *Diomampo v. State*, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008) (quoting *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). If evidence of the prior bad act is admitted, the district court must then issue a limiting instruction to the jury about the limited use of bad act evidence, unless waived by the defendant. *See, e.g.*, *Mclellan*, 124 Nev. at 269-70, 182 P.3d at 110-11.

Here, the district court conducted a pretrial hearing on the State's notice of intent to admit prior bad act evidence. It asked for the specific instances of conduct that the State wished to introduce and reserved ruling on the matters until trial. At trial, B.C. was the only child who testified to any prior bad acts by Chavez. B.C. testified that on one occasion Chavez ''knocked'' him out and slapped his other siblings because Chavez thought they were all spying on him and D.C. while the two were in the bedroom. We note that B.C. testified under oath and appeared to be a credible witness. Further, the prior bad act was relevant to show B.C.'s fear of Chavez and why B.C. did not initially report the sexual abuse he had witnessed. Moreover, the district court instructed the jury about the limited use of the prior bad act. We therefore conclude that there was no manifest error in the district court's decision to admit B.C.'s testimony regarding a prior bad act.

Prejudicial exchange between prosecutor and witness

[Headnote 16]

Chavez argues that the district court committed reversible error when it denied his motion for a mistrial based upon the exchange between the prosecutor and B.C. in which B.C. alluded to D.C.'s death. Prior to trial, the district court ruled that the parties could not discuss the cause or circumstances of D.C.'s death.[4] Chavez asserts that the exchange between the prosecutor and B.C. violated that court order and educated the jury to the fact that at least one sibling blamed Chavez for D.C.'s death. The exchange occurred on redirect. We note that the prosecutor was trying to rehabilitate B.C., because during cross-examination, Chavez questioned B.C.'s motivation as to why he was more forthcoming at trial, when he had repeatedly told investigators he had not seen any instances of sexual abuse of D.C. by Chavez.

We conclude that the exchange did not violate the district court order not to discuss the circumstances of D.C.'s death. At most, it revealed that B.C. knew that D.C. was deceased—a fact of which the jury was already aware.[5] Further, the district court instructed the jury not to speculate about D.C.'s death and that anything counsel said was not evidence. Because ''this court generally presumes that juries follow district court orders and instructions,'' *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), we conclude the district court did not abuse its discretion when it denied Chavez's motion for a mistrial based on the exchange between the prosecutor and B.C.

Juror misconduct

[Headnotes 17, 18]

Chavez further contends that reversal is required because of juror misconduct. We disagree.

[Headnote 19]

We review a district court's decision to deny a motion for a mistrial based upon juror misconduct for an abuse of discretion. *Valdez*

[4]Because of the sensitive nature of the cause of death, the district court forbade any reference to the manner of D.C.'s death.

[5]Regarding D.C.'s unavailability, Chavez also argues that the district court abused its discretion when it, pursuant to NRS 51.055(1)(c), informed the jury that D.C. was unavailable because she was deceased. NRS 51.055(1)(c) states, in pertinent part, that ''[a] declarant is 'unavailable as a witness' if he is: . . . [u]nable to be present or to testify . . . because of death.'' The statute does not speak to whether the jury can be informed as to why the declarant is unavailable. However, we note that the district court created a safeguard when it permitted the jury to be instructed regarding D.C.'s unavailability by ordering that nothing beyond the fact that she was deceased, such as the circumstances of her death, would be conveyed to the jury. We conclude that the measure taken was sufficient to protect Chavez's rights. Further, we note that informing the jury

v. State, 124 Nev. 1172, 1186, 196 P.3d 465, 475 (2008). We have held that a district court has discretion to remove a juror mid-trial for violating a court's admonishment, rather than declaring a mistrial. *Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005). Specifically, we have stated that:

> [i]n exercising its discretion, a district court must conduct a hearing to determine if the violation of the admonishment occurred and whether the misconduct is prejudicial to the defendant. Prejudice requires an evaluation of the quality and character of the misconduct, whether other jurors have been influenced by the discussion, and the extent to which a juror who has committed misconduct can withhold any opinion until deliberation.

Id. at 163-64, 111 P.3d at 1082.

In this case, the district court properly determined that the violation of the admonishment occurred when the alternate juror expressed her opinion to the other jurors that she believed Chavez was guilty. The district court proceeded in accord with *Viray* and held a hearing to determine the nature and quality of the misconduct, conducting a voir dire of each juror to determine whether the jury had been tainted. After canvassing each juror, the district court excused the alternate juror, who had expressed her opinion that Chavez was guilty. While three other jurors confirmed that they heard the alternate juror's comment, they stated that they could remain impartial. All the other jurors stated that they did not hear anyone express an opinion about the ultimate outcome of the case. Accordingly, a mistrial was not required. We, therefore, conclude that the district court properly exercised its discretion to remove the alternate juror for violating its order not to discuss any opinion about the trial until the case was submitted to the jury.

Cruel and unusual punishment

[Headnote 20]

Chavez contends that the sentence he received constitutes cruel and unusual punishment, in violation of the United States and Nevada Constitutions because the sentence was excessive. The district court sentenced Chavez to four consecutive life terms.

[Headnotes 21, 22]

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence but forbids only an extreme sentence that is grossly disproportionate to the

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that D.C. was unavailable because she is deceased was relevant as to why she did not testify. *See U.S. v. Accetturo*, 966 F.2d 631, 637 (11th Cir. 1992) (observing that the fact that the declarant was unavailable because she was dead was relevant as to why she had not testified).

crime. *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Regardless of its severity, a sentence that is within the statutory limits is not '' 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.' '' *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 222 (1979)); *see also Glegola v. State*, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

[Headnote 23]

This court has consistently afforded the district court wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court will refrain from interfering with the sentence imposed ''[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.'' *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In the instant case, Chavez does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statutes. *See* NRS 176.035(1); *Warden v. Peters*, 83 Nev. 298, 303, 429 P.2d 549, 552 (1967). Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment and, therefore, the district court did not abuse its discretion by imposing on Chavez a sentence of four consecutive life terms.

CONCLUSION

For the reasons discussed above, we reject all of Chavez's arguments on appeal and affirm the district court's judgment of conviction. In so doing, we clarify our Confrontation Clause jurisprudence post-*Crawford*, holding that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him. The adequacy of the opportunity will be determined on a case-by-case basis, determined by such considerations as to how much discovery was available to the defendant at the time of the cross-examination and the manner in which the magistrate judge allows the cross-examination to proceed.

JAMES GROSJEAN, APPELLANT/CROSS-RESPONDENT, *v.* IMPERIAL PALACE, INC., AND DONNIE ESPENSEN, RESPONDENTS/CROSS-APPELLANTS.

No. 44542

July 30, 2009 212 P.3d 1068

Appeal and cross-appeal from a district court judgment on a jury verdict, certified as final under NRCP 54(b), in a bifurcated civil rights/tort action. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Customer, who had a reputation as a skilled gambler, brought false imprisonment, conspiracy, battery, and 42 U.S.C. § 1983 action against casino and casino security supervisor. After dismissing customer's state law claims, the district court entered judgment on jury verdict for customer. Customer appealed, and casino and security supervisor cross-appealed. The supreme court, DOUGLAS, J., held that: (1) qualified immunity did not shield casino and casino security supervisor from customer's § 1983 claim, though they detained customer at the request of gaming control board (GCB) agents; (2) trial court did not abuse its discretion by sustaining objection to casino's question asking customer if his disguise was something cheaters would do; (3) trial court did not abuse its discretion by allowing customer to testify that casino security guard threatened to smack his head into a wall; (4) issue of whether casino violated customer's Fourth Amendment rights by continuing to detain customer after they confirmed he was not suspect sought by GCB was for the jury; (5) trial court did not abuse its discretion by denying casino's motion for a new trial on liability and compensatory damages based on misconduct by customer's attorney; (6) casino was entitled to a new trial on punitive damages based on misconduct by customer's attorney; and (7) prohibition against a double recovery for a single injury precluded any further litigation by customer on his state law claims.

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

[Rehearing denied October 20, 2009]

Nersesian & Sankiewicz and *Thea Marie Sankiewicz* and *Robert A. Nersesian*, Las Vegas, for Appellant/Cross-Respondent.

Cooper Levenson April Niedelman Wagenheim, P.A., and *Jerry S. Busby*, Las Vegas, for Respondent/Cross-Appellant Imperial Palace, Inc.

Lewis Brisbois Bisgaard & Smith LLP and *David L. Thomas*, Las Vegas, for Respondent/Cross-Appellant Donnie Espensen.

Potter Law Offices and *Cal J. Potter III* and *Lawrence W. Freiman*, Las Vegas, for Amicus Curiae Nevada Trial Lawyers Association.

1. APPEAL AND ERROR.
   Supreme court reviews conclusions of law, such as those involving statutory construction, de novo.
2. CIVIL RIGHTS.
   Alleged constitutional violations by a corporation generally do not provide a plaintiff with a private cause of action against the corporation under § 1983, unless the plaintiff can show that the corporation's actions were fairly attributable to the state. 42 U.S.C. § 1983.
3. CIVIL RIGHTS.
   Generally, qualified immunity applies to protect state officials from civil liability for damages resulting from discretionary acts, so long as those acts do not violate clearly established statutory or constitutional rights.
4. CIVIL RIGHTS.
   Qualified immunity did not shield casino and casino security supervisor from § 1983 claim of customer who they detained at the request of gaming control board agents, as casino was a private for-profit corporation that performed independently of the government, and the public policy considerations underlying qualified immunity would not be served by permitting casino and supervisor to assert it. 42 U.S.C. § 1983.
5. CIVIL RIGHTS.
   Though private parties, unlike state officials, are not entitled to qualified immunity from civil damages resulting from discretionary acts, the good-faith defense may apply to private parties who become liable solely because of their compliance with government agents' request or in attempting to comply with the law.
6. APPEAL AND ERROR; JUDGMENT; NEW TRIAL.
   Decisions concerning motions for judgment notwithstanding the verdict or for a new trial rest within the district court's sound discretion and will not be disturbed absent abuse of that discretion.
7. TRIAL.
   A directed verdict may be entered when the evidence is so overwhelming for one party that any other verdict would be contrary to the law. NRAP 50(b).
8. JUDGMENT; NEW TRIAL; TRIAL.
   A court may direct a verdict in the moving party's favor or grant a new trial if, as a matter of law, the jury could not have reached the conclusion that it reached. NRCP 50(b), 59(a)(1).
9. APPEAL AND ERROR.
   The supreme court will not overturn a district court's decision to exclude relevant evidence unless the court is convinced that the district court abused its discretion.
10. EVIDENCE.
    A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay.
11. EVIDENCE.
    Trial court did not abuse its discretion by sustaining an objection to question by casino and casino security supervisor asking customer if his disguise was something a cheater might do, in trial of customer's § 1983 claim against casino and supervisor arising out of his detention at the direction of gaming control board (GCB) agents; though customer had a reputation as

a skilled gambler and casino claimed as a result that customer had a lower expectation of privacy, customer was not seen doing anything suspicious at the casino when he was stopped by security, but instead was stopped because he fit a GCB suspect's description, and trial court allowed casino to question customer about his gambling behaviors, including his disguise and gambling expertise. 42 U.S.C. § 1983.

12. EVIDENCE.

Trial court did not abuse its discretion by allowing customer to testify that a casino security guard, after customer was seized and taken to security room, threatened to smack customer's head into the wall, in trial of customer's § 1983 action against casino and casino security supervisor, despite casino's hearsay objection, as the statement was arguably introduced to show its effect on customer and not for its truth; customer testified that the statement caused him to be fearful as he had a propensity for retinal detachment. 42 U.S.C. § 1983.

13. CIVIL RIGHTS.

Issue of whether casino security and gaming control board (GCB) agents continued to detain customer after they confirmed customer was not the suspect sought by GCB and thereby violated customer's Fourth Amendment rights was for the jury, in trial of customer's § 1983 claim against casino and casino security supervisor. U.S. CONST. amend. 4; 42 U.S.C. § 1983.

14. APPEAL AND ERROR.

Whether an attorney's comments are misconduct is a question of law subject to de novo review, though the supreme court gives deference to the district court's factual findings and to how it applied the standards to those facts.

15. TRIAL.

Although counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence, counsel nevertheless may not make improper or inflammatory arguments that appeal solely to the emotions of the jury.

16. APPEAL AND ERROR.

When a party objects to purported attorney misconduct and that objection is sustained, reversal is warranted only if the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect.

17. APPEAL AND ERROR.

When a party fails to object to attorney misconduct during the trial, the supreme court will reverse the judgment only when the misconduct amounted to irreparable and fundamental error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.

18. APPEAL AND ERROR.

The standard governing review of attorney misconduct to which an appellant did not object at trial essentially amounts to plain error review, under which the party claiming misconduct must show that no other reasonable explanation for the verdict exists, and covers the rare occasion when the attorney misconduct offsets the evidence adduced at trial in support of the verdict.

19. NEW TRIAL.

Objected-to and sustained misconduct by attorney for casino customer, in trial of customer's § 1983 action against casino and casino security supervisor arising out of customer's detention by casino security, by stating that defendants objected to certain testimony because they were afraid the jury would hear damaging information, by arguing casino should be penalized with punitive damages for its failure to make significant charitable con-

tributions, and by stating that supervisor lied, was not so extreme that the sustained objections and admonishment that trial court issued in response to one of the objections were ineffective in removing the misconduct's effect during the liability and compensatory portions of the trial, for purposes of determining whether casino and casino security supervisor were entitled to a new trial. 42 U.S.C. § 1983.

20. APPEAL AND ERROR.

In analyzing attorney misconduct in the context of an appeal from an order denying a new trial motion, the supreme court looks at the scope, nature, and quantity of misconduct as indicators of the verdict's reliability.

21. NEW TRIAL.

Trial court did not abuse its discretion by denying motion for new trial by casino and casino security supervisor as to liability and compensatory damages based on unobjected-to misconduct by customer's attorney, in trial of § 1983 action arising out of customer's detention by casino security in which jury awarded customer $99,000 in compensatory damages, as the evidence reasonably could support the jury verdict; though attorney argued he did not want his daughters to go through customer's experience, improperly mentioned parties' settlement efforts, stated police always claimed they did not violate the Fourth Amendment, improperly vouched for customer and called security personnel names, there was evidence that casino and gaming control board (GCB) agents continued to detain customer and examined the contents of customer's pockets after they confirmed customer was not the suspect sought by GCB, and that guard threatened to smack customer's head into a wall. U.S. CONST. amend. 4; 42 U.S.C. § 1983.

22. NEW TRIAL.

The cumulative effect of attorney misconduct on a jury's verdict is relevant in determining whether a party is entitled to a new trial.

23. APPEAL AND ERROR.

Any error by trial court in deferring ruling on directed verdict motion made by casino and casino security supervisor until after jury returned its punitive damages verdict was not prejudicial, in trial of customer's § 1983 action arising out of customer's detention by casino security, as the delay in the ruling did not prevent casino from presenting evidence to negate an award of punitive damages, and rules of civil procedure did not require the trial court to rule on a directed verdict motion before the jury returned a verdict. 42 U.S.C. § 1983; NRCP 50(a).

24. APPEAL AND ERROR.

The standards for reviewing orders resolving a motion for a directed verdict and a motion for an involuntary dismissal are the same. NRCP 41(b), 50(a).

25. CIVIL RIGHTS.

Oppression, fraud or malice can serve as the basis for a punitive damages award in a § 1983 action. 42 U.S.C. § 1983; NRS 42.005.

26. TRIAL.

Attorneys violate the ''golden rule'' by asking the jurors to place themselves in the plaintiff's position or nullify the jury's role by asking it to ''send a message'' to the defendant instead of evaluating the evidence. RPC 3.4(e).

27. NEW TRIAL.

Combination of objected-to and sustained and unobjected-to misconduct by attorney for casino customer was so egregious as to warrant a new trial on punitive damages, in trial of § 1983 action arising out of customer's detention by casino security in which jury awarded customer $500,000 in punitive damages; attorney essentially asked jury to send a message by pun-

ishing casino for not making substantial charitable contributions despite being highly profitable, though court sustained objection to and struck such statement; attorney proceeded to argue that casino should not have followed suggestions of gaming control board agents to continue to detain customer and started to cry; and, given that customer did not suffer physical injuries and was not jailed, the punitive damages award appeared to be driven not by evidence of malice, fraud, or oppression but by attorney's improper ''golden rule'' and emotional arguments. 42 U.S.C. § 1983.

28. TRIAL.
When an attorney must continuously object to repeated or persistent misconduct, the nonoffending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point.

29. TRIAL.
One factor to consider when evaluating attorney misconduct is that, while a single instance of improper conduct might be cured by objection and admonishment, the same may not hold true when the improper conduct is repeated.

30. DAMAGES.
The prohibition against a double recovery for a single injury precluded any further litigation by customer against casino and casino security supervisor on claims arising from casino security guards' acts of searching and detaining customer, regardless of whether trial court erred in dismissing customer's state law false imprisonment, conspiracy, and battery claims, as customer had prevailed on his § 1983 claim against casino and supervisor, and the invasion of customer's Fourth Amendment rights on which his § 1983 claim was premised had fundamental elements in common with the dismissed state law tort claims. U.S. CONST. amend. 4; 42 U.S.C. § 1983.

31. CIVIL RIGHTS.
The purpose for allowing the recovery of money damages in a § 1983 action for the violation of a constitutional right, like that of common law tort damages, is to compensate the plaintiff for his or her injury caused by the defendant's breach of duty or intentional tort. 42 U.S.C. § 1983.

32. DAMAGES.
Although a plaintiff may assert both a § 1983 claim and tort-based claims, he or she is not entitled to a separate compensatory damage award under each legal theory; instead, if liability is found, the plaintiff is entitled to only one compensatory damage award on one or both theories of liability. 42 U.S.C. § 1983.

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

In this appeal and cross-appeal, we address whether qualified immunity can extend to shield private actors from civil liability in a 42 U.S.C. § 1983 action and, if not, whether alleged evidentiary errors and attorney misconduct that occurred during trial on the § 1983

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision of this matter.

claim warrant a new trial. In addition to the qualified immunity and alleged trial error issues, we decide whether punitive damages were properly presented to the jury and, if so, whether its subsequent award was supported by the evidence. Finally, we determine whether previously dismissed state law claims should be reinstated against the same private actors against whom a judgment was entered on the § 1983 cause of action, when both the state law- and federal law-based claims were grounded on the same conduct, an allegedly illegal detention.

First, with regard to the private actor cross-appellants' assertion that the § 1983 claim against them should have been dismissed on qualified immunity grounds, after examining policy considerations underlying the qualified immunity doctrine on the disputed facts, we are not persuaded that such immunity extends to protect private actors. Thus, the district court properly refused to dismiss those claims.

Next, addressing cross-appellants' concern that allegedly erroneous evidentiary rulings and attorney misconduct led to the jury's verdict against them, we conclude that the evidentiary rulings in question were within the district court's considerable discretion and that the attorney misconduct in this case, while prevalent, did not override the jury's verdict, which was based on substantial evidence in the damages phase of the trial.

As for the argument on cross-appeal that the district court improperly allowed the punitive damages request to be presented to the jury, even though the punitive damages request was grounded on a state statute and all of the pertinent state law claims had been dismissed, we conclude that the district court properly allowed the request to go forward, as the state standard conforms to federal law requirements governing punitive damage awards in § 1983 actions. With regard to the punitive damages awarded, we conclude that the jury's $500,000 award was a result of continued attorney misconduct, including a ''golden rule'' violation and improper emotional arguments, such that a new trial is warranted as to punitive damages.

Finally, addressing the appeal, which challenges the dismissal of certain state law claims, because appellant already recovered damages for identical conduct under § 1983, he is precluded from recovering additional damages for that injury under state law-based theories. In particular, because the common law torts for which he seeks to recover coincide substantially with the § 1983 action that he was allowed to maintain and for which a money judgment was entered in his favor, he may not again recover damages for that conduct, and thus we need not further review the district court's decision to dismiss the state law claims against Imperial Palace. Accordingly, we affirm the compensatory damages portion of the

district court's judgment, reverse the punitive damages portion, and remand for a new trial on punitive damages only.

FACTS AND PROCEDURAL HISTORY

The complaint

This matter arose from an incident at Imperial Palace casino in Las Vegas, Nevada, when casino security personnel and two Gaming Control Board (GCB) agents detained appellant James Grosjean because he matched the description of a person in whom another GCB agent was interested. According to the complaint later filed in the district court, even though Grosjean was ''undertaking no suspicious activity,'' he was offensively touched, handcuffed, searched, and detained by Imperial Palace security officers.[2] In a proposed amendment to that complaint, Grosjean maintained that the two GCB agents instructed Imperial Palace security staff to detain him, despite lacking reasonable suspicion to do so. According to Grosjean, during the course of his detention, the GCB agents were informed by a third GCB agent that Grosjean was not the suspect for whom the GCB was looking and that he should be released. Nevertheless, Grosjean asserted, the detention continued so that the items removed from Grosjean's person during the patdown search could be further examined.

The relevant allegations in the complaint asserted that the detention was executed without reasonable suspicion and named as a defendant Imperial Palace, among others. Grosjean sought compensatory and punitive damages for false imprisonment, conspiracy, and battery. Later, Grosjean filed a motion that asked, among other things, for leave to amend the complaint to add a claim for federal civil rights violations under 42 U.S.C. § 1983 against, among others, Imperial Palace and Imperial Palace's security supervisor, respondent/cross-appellant Donnie Espensen.

Pretrial motions

As the case proceeded in the district court, the court granted Imperial Palace's motion to dismiss the state law claims against it, determining that Imperial Palace was entitled to discretionary-function immunity. Thereafter, the district court allowed Grosjean leave to amend the complaint to add a federal law civil rights claim under 42 U.S.C. § 1983 against Imperial Palace and Espensen. Although Imperial Palace and Espensen subsequently moved to dismiss

[2]The complaint also contained allegations regarding a detention incident involving Grosjean and another party that occurred at Caesars Palace ten months earlier. Because the allegations concerning the Caesars Palace incident are mostly irrelevant to our decision here, that incident is not fully discussed in this opinion.

and for summary judgment as to that claim, arguing that it was entitled to qualified immunity from § 1983 liability, the district court denied the motion. Thus, the matter proceeded on the remaining claims, including the § 1983 claims against Imperial Palace and Espensen.

Upon Imperial Palace's motion, the district court bifurcated the case as it related to Imperial Palace, and the case went to trial against Imperial Palace and Espensen on the only claims remaining against them, the § 1983 claims.

The trial on Grosjean's § 1983 claims

During the trial, testimony revealed that Grosjean was detained by Imperial Palace security personnel because he matched the description of a suspect being pursued by GCB agent Paul Stolberg. Grosjean testified that an Imperial Palace security guard instructed him to stop, and when Grosjean kept walking, the security guard grabbed his arm, ''kind of pushed [Grosjean's] face into the side [of] the wall,'' and handcuffed him. After being escorted to a security office, Grosjean was searched. The search revealed that Grosjean was wearing two pairs of pants containing a large sum of money (mostly $100 bills), chips from various casinos, and two sets of identification, one bearing a false identity.

Espensen testified that because the GCB agents on the premises had not been able to reach agent Stolberg, they asked Espensen to delay Grosjean without letting Grosjean know of the GCB's involvement. Espensen explained to Grosjean that he would be let go if it was confirmed that he was not a suspect. Upon Espensen's return to the surveillance room, a GCB agent advised that he had reached agent Stolberg, who instructed the agents to release Grosjean, but because the agents wished to examine the contents of Grosjean's pockets more closely, Grosjean was not immediately released. According to Espensen, because the agents did not want to reveal their involvement, Espensen suggested that they act as though they were Imperial Palace employees. The GCB agents did so, and after viewing Grosjean's belongings, they left the room. Testimony indicated that Grosjean ultimately was detained for approximately 20 minutes beyond when the agents had been instructed to release him.

On redirect examination of Grosjean, Grosjean's attorney posed a rhetorical question, ''We know Don Espensen can lie, don't we?'' Imperial Palace objected to the question as being argumentative, and the court sustained the objection. While Imperial Palace's expert witness was testifying on direct examination about the reasonableness of Grosjean's detention, Grosjean's attorney commented that ''[p]olice officers always say, 'I didn't violate the Fourth Amendment,' even when they're violating it, and we know that.'' The court asked Grosjean's attorney whether he was arguing or object-

ing, to which the attorney responded that he was objecting to the form of the question asked of the expert. The court sustained the objection.

After the jury was excused, Imperial Palace orally moved for an NRCP 41(b) involuntary dismissal as to Grosjean's request for punitive damages, explaining that, because all of the state law tort claims had been dismissed, there was no basis to support Grosjean's request, which was grounded on a state statute, NRS 42.005. The court deferred ruling on the motion. When the jury returned to the courtroom, the court issued the jury instructions, including that the jury may, at its discretion, award punitive damages if it found, by clear and convincing evidence, fraud, oppression, or malice with respect to the conduct upon which the jury based any finding of liability.

Closing arguments followed, during which Grosjean's attorney explained to the jury that its decision was so important because it would give parties in the same position as Imperial Palace the ''impression'' that these kinds of cases ''can get settled really quick or not—and nothing goes to court and people don't have their lives upset.'' Imperial Palace's attorney then asked to approach the bench, which the court allowed. During this sidebar conference, according to Imperial Palace, it objected to Grosjean's reference to settlement and moved for a mistrial or at least an admonition to the jury, which, according to Imperial Palace, the district court denied. Continuing with his closing argument, Grosjean's attorney explained that he did not want to ''pick on'' security guards because ''one of the things that makes some of this hard for me is my mother's life was saved by [security guards].'' According to Imperial Palace, Grosjean's attorney started crying when he said this; no objection was raised, however.

Grosjean's attorney later stated that the kind of unconstitutional behavior that Imperial Palace engaged in has to be stopped because

> I don't want my daughters or your daughters or sons or the rest of us to have to be going through this and wondering why, when we've done nothing, we're getting told we're going to get our heads banged against the wall. . . . You heard the other lawyer stand up and object because he was afraid you were going to hear [that Imperial Palace violated Grosjean's constitutional rights] and he knew what was coming.

Imperial Palace objected, arguing that it was improper to imply that its earlier objection was made because it was afraid of the evidence. After initially arguing that his comment was proper, Grosjean's attorney then apologized, acknowledging that an objection is not evidence upon which he could comment.

Also during closing argument, Grosjean's attorney (while crying, according to Imperial Palace) described Imperial Palace's conduct as

''tyranny'' and informed the jury, ''this is where [the tyranny] has to stop. Please protect our Constitution. Please.'' In explaining to the jury why he gets emotional, Grosjean's attorney stated,

> Every time I think about a violation of constitutional rights, I get butterflies. I get angry. You saw me yell a couple of minutes ago. . . . [I]t's what I do, because I so passionately believe in this, and I think you saw that [Grosjean's] passion matches, if not surpasses mine.

No objection was made to these comments.

Before the punitive damages portion of the trial began, Imperial Palace renewed its motion to dismiss as to Grosjean's request for punitive damages. The court again deferred ruling on the motion. The jury subsequently returned a general verdict against Imperial Palace for $99,000 and against Espensen for $9.

The punitive damages phase of the trial

The court then asked the jury if it found any defendant liable for punitive damages, and the jury responded yes, as to Imperial Palace only. The court instructed the parties to submit briefs on the punitive damages request, and after a hearing, it allowed the punitive damages portion of the trial to proceed.

During argument, Grosjean's attorney stated, ''I frankly—I would hope the Court would agree that a company that makes over $7 million and gives back a grand total of $3,026 [to] charity needs to be told firmly . . . .'' At that point Imperial Palace objected and moved to strike. The court sustained the objection, ordered the statement stricken, and instructed the jury to disregard the statement. Grosjean's attorney then argued that a person should not follow a police officer's instructions to do something illegal, pausing in the middle of his statement to explain, ''the emotion is getting over me again,'' at which time, according to Imperial Palace, Grosjean's attorney began crying again.

The jury later returned a verdict, awarding Grosjean punitive damages, which verdict the court sealed at Imperial Palace's request. At the hearing later that week, the district court denied Imperial Palace's motion to dismiss as to the punitive damages request, and the punitive damages verdict was then unsealed, revealing a $500,000 award in favor of Grosjean. The court remitted the award to $300,000 pursuant to statute. Imperial Palace moved for judgment as a matter of law (JNOV), or, in the alternative, a new trial and remittitur. The court summarily denied the JNOV and new trial motions and summarily granted the request for remittitur, reducing the punitive damages award to $150,000. The district court then certified as final its amended judgment, which included an attorney fees and costs award in favor of Grosjean. Grosjean appealed, challeng-

ing the dismissal of his state law claims against Imperial Palace, and Imperial Palace and Espensen cross-appealed asserting that they are entitled to qualified immunity and that various trial errors warranted reversal of the district court's amended judgment.

DISCUSSION

In resolving this matter, we first address whether Imperial Palace and Espensen were entitled to qualified immunity from liability on Grosjean's § 1983 claims, based on their assertions that they were acting at the direction of the GCB agents when detaining Grosjean. Next, we resolve the issues regarding evidentiary rulings and attorney misconduct, and whether those alleged trial errors warrant a new trial. We then address Imperial Palace's argument that the district court improperly permitted Grosjean to seek punitive damages under state law even though his state law claims had been dismissed. After concluding that punitive damages were properly presented to the jury, we next determine whether the punitive damages award was a result of any trial errors or attorney misconduct, warranting a new trial on punitive damages. Finally, given that Grosjean recovered for the unlawful detention under § 1983, we decide whether he should be allowed to proceed with his state law claims against Imperial Palace, which were grounded on the same allegations that his detention was unlawful.

Motion to dismiss § 1983 claim against Imperial Palace and Espensen

On cross-appeal, Imperial Palace and Espensen argue that, as private corporate actors carrying out the GCB's instructions, qualified immunity should have applied to shield them from Grosjean's § 1983 claim.

[Headnotes 1, 2]

This court reviews conclusions of law, such as those involving statutory construction, de novo. *Martinez v. Maruszczak*, 123 Nev. 433, 438, 168 P.3d 720, 724 (2007). Alleged constitutional violations by a corporation generally do not provide a plaintiff with a private cause of action against the corporation under § 1983, unless the plaintiff can show that the corporation's actions were fairly attributable to the state. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). In this case, however, Imperial Palace and Espensen do not argue that their actions cannot be attributed to the state. Instead, they contend that their actions are so attributable to the state as to afford them qualified immunity from suit.

[Headnotes 3, 4]

Generally, qualified immunity applies to protect ''state officials from civil liability for damages resulting from discretionary acts, so

long as those acts do not violate clearly established statutory or constitutional rights.'' *Butler v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007). Relevant to whether qualified immunity applies to private parties, the United States Supreme Court, in *Richardson v. McKnight*, considered whether prison guards employed by a private corporation should enjoy qualified immunity from suit in a § 1983 case. 521 U.S. 399, 401-04 (1997). In reaching the conclusion that the private prison guards were not entitled to qualified immunity protections, the Court examined historical practices and the public policy considerations underlying the qualified immunity doctrine. *Id*. at 404-12. Recognizing that the qualified immunity doctrine serves the purposes of protecting the public from unwarranted timidity on the part of public officials, ensuring that qualified candidates are not deterred from entering public service, and reducing the chance that lawsuits will detract public officials from their duties, the Court reasoned that these purposes would not be served by extending qualified immunity to private prison guards. *Id*. at 410-12. The Court expressly limited its holding to the facts of that case, however, noting that the immunity question was narrowly answered in the context of a private for-profit firm organized to manage an institution with limited direct supervision by the government. *Id*. at 413. The Court explained that its holding did not bear on the application of qualified immunity in cases ''involv[ing] a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.'' *Id*.

Applying the legal principles set forth in *Richardson*, we cannot conclude that the qualified immunity doctrine shields Imperial Palace and Espensen from liability. Imperial Palace, acting through its employees, is a private for-profit corporation that performs independently of the government, is subject to market pressures and competes with other casinos, and engages in operational and administrative tasks with limited direct supervision by the government. *See id*. at 409. Thus, the policy considerations underlying qualified immunity noted above would not be served by permitting Imperial Palace and Espensen to assert qualified immunity. *Id*. at 409-10 (noting that competitive pressures create incentives for private organizations to avoid lawsuits and increase profits, and that these pressures, which are not present in the public sector, provide private firms with ''strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'nonarduous' employee job performance''). Moreover, there is no firmly rooted historical basis supporting extending qualified immunity to casinos and their employees. *Id*. at 404-05.

[Headnote 5]

Although Imperial Palace and Espensen argue that they served as the GCB's adjunct and under its close supervision in the essential

governmental activity of preventing crime, Grosjean maintained that Imperial Palace and Espensen acted independently. In light of the factual disputes, even though qualified immunity was not available to Imperial Palace and Espensen, we note that the district court properly allowed them to assert a good-faith defense to liability for damages associated with Grosjean's § 1983 claim, *see id.* at 413-14 (rejecting the argument that qualified immunity should apply to shield private prison guards but leaving open the possibility of a good-faith defense); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008), which defense, if accepted by the jury, would have served to insulate Imperial Palace and Espensen by providing them with protections similar to qualified immunity. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993); *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988). The good-faith defense may apply to private parties who become liable solely because of their compliance with government agents' request or in attempting to comply with the law. *See Clement*, 518 F.3d at 1097. Accordingly, under *Richardson*, we perceive no error in the district court's decision to deny Imperial Palace's and Espensen's motion to dismiss Grosjean's § 1983 claim on qualified immunity grounds and instead allowing a good-faith defense. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (recognizing that a ''complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief'').

Imperial Palace's and Espensen's motion for judgment notwithstanding the verdict, or, alternatively, a new trial

Evidentiary rulings

On cross-appeal, Imperial Palace and Espensen maintain that the district court improperly excluded evidence as to the totality of the circumstances surrounding Grosjean's detention, including evidence of Grosjean's gaming knowledge and reputation as a skilled gambler, which evidence, if allowed, would have supported their argument that Grosjean had a lowered expectation of privacy while in the casino and, consequently, that his Fourth Amendment rights were not violated by his detention. *See United States v. Santana*, 427 U.S. 38, 42 (1976) (explaining that persons in public places have a lower expectation of privacy than persons in their homes); *M & R Investment Co. v. Mandarino*, 103 Nev. 711, 719, 748 P.2d 488, 493 (1987) (noting that a gaming patron who was in disguise and winning a great deal of money within a short period of time due to his card-counting skills did not have a reasonable expectation that casino personnel would not investigate by requesting identification or even detaining him for questioning after he fled the premises). Thus, Imperial Palace and Espensen argue that the district court abused its

discretion by denying their motion for judgment notwithstanding the verdict or for a new trial, which was grounded in part on improperly excluded evidence. They also argue that the court abused its discretion by allowing hearsay testimony, over objection, regarding a security guard's alleged threats to Grosjean.

[Headnotes 6-10]

Decisions concerning motions for judgment notwithstanding the verdict or for a new trial rest within the district court's sound discretion and will not be disturbed absent abuse of that discretion. *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978). NRCP 50(b) allows a party to renew a motion for judgment as a matter of law, notwithstanding the verdict, after trial. Such a directed verdict may be entered when '' 'the evidence is so overwhelming for one party that any other verdict would be contrary to the law.' '' *M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008) (quoting *Bliss v. DePrang*, 81 Nev. 599, 602, 407 P.2d 726, 727-28 (1965)). Under NRCP 59(a)(1), a new trial may be granted in the event of irregularity in the jury proceedings. Thus, a court may direct a verdict in the moving party's favor or grant a new trial if, as a matter of law, the jury could not have reached the conclusion that it reached. *See Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 467 (1975). As for Imperial Palace's and Espensen's evidentiary concerns, we will not overturn the district court's decision to exclude relevant evidence unless we are convinced that the district court abused its discretion. *Hansen v. Universal Health Servs.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999). In terms of admissible testimony, ''[a] statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay.'' *Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

[Headnote 11]

In this case, the district court reasonably allowed Imperial Palace and Espensen to question Grosjean about his gambling behaviors, including disguise methods, and his gaming expertise. When Grosjean was asked whether his disguise methods were ''something that a cheater might do,'' the district court sustained Grosjean's objection, since Grosjean was not seen doing anything suspicious at Imperial Palace when he was stopped by security, but instead he was stopped because he fit a GCB suspect's description.

[Headnote 12]

With respect to the ''smack his head into the wall'' statement that an Imperial Palace security guard allegedly made after Grosjean was seized and while he was being taken to a security

room, Grosjean testified that it caused Grosjean to be fearful, since he had a propensity for retinal detachment. Thus, arguably, the statement was introduced to show its effect on Grosjean, and not for its truth.

[Headnote 13]

Accordingly, the district court acted within its discretion in sustaining Grosjean's objection to the ''cheater'' testimony and in allowing Grosjean to testify about the security guard's statement. Further, since the other testimony and evidence revealed that the GCB agents and Imperial Palace security continued to detain Grosjean after they had confirmed that he was not a suspect, there was sufficient evidence for the § 1983 claim to go to the jury. Thus, the district court did not abuse its discretion by denying the renewed motion for judgment as a matter of law. For similar reasons, the district court acted within its discretion by denying the new trial motion, since it was possible, based on the testimony and evidence, for the jury to conclude that Grosjean's constitutional rights were violated.

Attorney misconduct

Also on cross-appeal, Imperial Palace and Espensen contend that it was improper for Grosjean's attorney to inject his personal life into the trial by referring to his marriage, discussing his hometown during voir dire, stating that security guards saved his mother's life, and explaining that he did not want his daughters or the jury's daughters or sons to have to go through the type of experience that Grosjean had been through. According to Imperial Palace, Grosjean's attorney cried several times during the trial, again personalizing the matter. Imperial Palace and Espensen point out that Grosjean's attorney improperly mentioned the parties' settlement efforts, which were not in evidence, implying that Imperial Palace unreasonably failed to settle the case. They also assert that Grosjean's attorney impermissibly vouched for Grosjean's cause, by stating that police always say that they did not violate the Fourth Amendment, and also impermissibly vouched for Grosjean, by explaining that he had known Grosjean for two years and that he knew that Grosjean's emotion on the witness stand was real. Finally, Imperial Palace and Espensen contend that Grosjean's attorney displayed improper disdain toward them and their witnesses, pointing to his comment that Espensen was a liar, references to Imperial Palace's arguments as ''smoke and mirrors,'' calling the security personnel names such as ''rent-a-cops'' and ''goons,'' and referring to Imperial Palace's expert witness's testimony as ''garbage.''

Grosjean responds that Imperial Palace and Espensen waived any misconduct argument by not timely objecting in the district court. Regardless, he asserts, no attorney misconduct occurred in this

case, any personal fact statements were innocuous, and exhibiting passion and showing disdain for the opposing side is permissible. Grosjean asserts that the record does not disclose that his attorney cried, although his attorney admits that ''his voice cracked a few times.''

[Headnotes 14, 15]

Whether an attorney's comments are misconduct is a question of law, subject to de novo review. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). Still, we give deference to the district court's factual findings and to how it applied the standards to those facts. *Id.* Although counsel ''enjoys wide latitude in arguing facts and drawing inferences from the evidence,'' *Jain v. McFarland*, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993) (citation omitted), counsel nevertheless may not make improper or inflammatory arguments that appeal solely to the emotions of the jury. *See DeJesus v. Flick*, 116 Nev. 812, 819, 7 P.3d 459, 464 (2000), *overruled on other grounds by Lioce*, 124 Nev. 1, 174 P.3d 970; *Barrett v. Baird*, 111 Nev. 1496, 1514, 908 P.2d 689, 701-02 (1995), *overruled on other grounds by Lioce*, 124 Nev. 1, 174 P.3d 970.

[Headnotes 16-18]

We recently redefined, in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970, when a new trial is warranted based on attorney misconduct. In that case, we explained that when a party objects to purported misconduct and that objection is sustained, reversal is warranted only if the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect. *Id.* at 17, 174 P.3d at 981. When a party fails to object to attorney misconduct during the trial, however, we will reverse the judgment only when the misconduct amounted to ''irreparable and fundamental error . . . that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.'' *Id.* at 19, 174 P.3d at 982. That standard essentially amounts to plain error review, under which the party claiming misconduct must show '' 'that no other reasonable explanation for the verdict exists.' '' *Id.* (quoting *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)). This covers the rare occasion when the attorney misconduct ''offsets the evidence adduced at trial in support of the verdict.'' *Id.*

Here, the statements to which Imperial Palace assigns error amounted to misconduct. *See id.* at 20-23, 174 P.3d at 982-84 (explaining that it is impermissible for an attorney to make a so-called golden rule argument by asking the jurors to place themselves in plaintiff's position or to nullify the jury's role by asking it to instead ''send a message'' to the defendant); *see also* RPC 3.4(e) (explaining that it is improper for a lawyer to offer a personal opinion as to the justness of a cause, the credibility of a witness, or the culpabil-

ity of a civil litigant). Grosjean's attorney's comments during witness examination, during closing argument, and later during the punitive damages portion of the trial encouraged the jurors to look beyond the law and the relevant facts in deciding the issue before them. Whether that misconduct warrants a new trial, we examine under the *Lioce* standards.

[Headnote 19]

From the record, we discern that Imperial Palace objected to three of the challenged statements.[3] The district court sustained all three objections, and in one of those instances it struck the statement and admonished the jury not to consider it. Imperial Palace, as the party moving for a new trial, bore the burden of demonstrating that the misconduct was so extreme that the objection and admonishment were ineffective in removing the misconduct's effect. *Lioce*, 124 Nev. at 17, 174 P.3d at 981. With regard to the liability and compensatory damages phase of the trial, it did not meet that burden.

[Headnotes 20-22]

And although most of the unobjected-to statements that Imperial Palace challenges here likewise were improper, those statements did not amount to misconduct rising to a level of irreparable and fundamental error requiring reversal. In analyzing attorney misconduct in the context of an appeal from an order denying a new trial motion, we look at the scope, nature, and quantity of misconduct as indicators of the verdict's reliability. *Id.* at 17, 174 P.3d at 980. While the cumulative effect of such conduct is therefore relevant, under *Lioce*'s unobjected-to review standard, Imperial Palace must demonstrate that no other reasonable explanation for the verdict exists. That it failed to do.

Instead, the testimony and evidence adduced during the five-day trial reasonably could support the verdict rendered here. The jury awarded Grosjean $99,000 in compensatory damages for a 45-minute detention, during which no physical injury occurred, and while Imperial Palace argues that the award was excessive and could be based on nothing other than attorney misconduct and erroneous exclusion of evidence, we disagree. Both Grosjean and Imperial

[3]In particular, the court sustained objections that were made after Grosjean's attorney (1) stated that Imperial Palace earlier had objected to certain testimony because it was ''afraid'' the jury would hear damaging information, (2) argued that Imperial Palace should be penalized with punitive damages for its failure to make significant charitable contributions, and (3) stated that Espensen lied.

Although Imperial Palace asserts that it objected, at sidebar, when Grosjean's attorney improperly referred to settlement negotiations by implying that the jury had to sit through the trial because Imperial Palace failed to reach a settlement, and that the district court overruled the objection, Imperial Palace neglected to make a proper record of any such objection. Thus, that statement will be reviewed under the standard that applies for unobjected-to misconduct.

Palace presented numerous witnesses and evidence during the trial, and credibility determinations and the weighing of evidence are left to the trier of fact. *See El Dorado Hotel v. Brown*, 100 Nev. 622, 626, 691 P.2d 436, 440 (1984), *overruled on other grounds by Vinci v. Las Vegas Sands*, 115 Nev. 243, 246, 984 P.2d 750, 752 (1999). Since we assume that the jury believed all of the evidence favorable to Grosjean, drawing reasonable inferences therefrom, *see First Interstate Bank v. Jafbros Auto Body*, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990), *abrogated on other grounds by Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 743, 192 P.3d 243, 255 (2008), we cannot conclude that the jury's verdict as to liability and compensatory damages for emotional harm was derivative solely of the attorney misconduct or that the evidence was offset by the comments from Grosjean's attorney. Accordingly, we perceive no abuse of discretion in the district court's decision to deny Imperial Palace's new trial motion on misconduct grounds as to the liability and compensatory damages phase of the trial.

As explained below, however, we cannot conclude that the jury's $500,000 punitive damage award, which was $300,000 more than Grosjean had requested, was not a product of attorney misconduct, rising to a level warranting reversal. *Lioce*, 124 Nev. at 17-18, 174 P.3d at 981 (explaining that when misconduct is so extreme that a sustained objection and admonishment are insufficient to remove the misconduct's effect, a new trial is warranted).

Punitive damages

Motion for a directed verdict

On cross-appeal, Imperial Palace argues that the district court erred when it deferred ruling on its directed verdict motion until after the jury returned its punitive damages verdict. According to Imperial Palace, the district court's delay prevented Imperial Palace from properly presenting its punitive damages defense because there remained a question as to whether the court would allow the jury to consider punitive damages. Thus, it argues, any evidence it may have presented in opposition to punitive damages would have been objectionable.

[Headnotes 23, 24]

Here, although the court delayed in ruling on the motion, it is not clear that the delay prevented Imperial Palace from presenting evidence to negate an award of punitive damages. Regardless, although Imperial Palace inquired about the status of its motion, it was complacent in the delay, since it never objected to the court's deferral of its ruling. The district court in this case requested supplemental briefing on the punitive damages matter, and the court subsequently held a hearing to determine whether Grosjean would be allowed to request punitive damages. Although the jury had already been in-

structed on punitive damages and returned a verdict in Grosjean's favor, nothing within NRCP 50(a) requires the district court to rule on a directed verdict motion before the jury returns a verdict.[4] At any rate, we perceive no prejudicial error that would support overturning the district court's decision to deny the motion.

Standard for awarding punitive damages in a § 1983 action

Imperial Palace argues that the court improperly allowed Grosjean to pursue his punitive damage request under NRS 42.005, when his only remaining claim against Imperial Palace was based on a federal civil rights violation under § 1983. Imperial Palace asserts that there was no evidence that it acted with evil motive or reckless indifference to support a § 1983 punitive damage award, also arguing that it was error for the court to allow Grosjean to assert NRS 42.005's malice standard, especially when he did not plead malice.

Grosjean argues that Imperial Palace mischaracterizes punitive damages as a claim under NRS 42.005, when it is simply a remedy that was always before the court and did not evaporate with the dismissal of his state law claims. Grosjean maintains that it was appropriate to apply state punitive damages law, *i.e.*, NRS 42.005, in a federal § 1983 action, especially since Nevada law requires a higher degree of misconduct to support a punitive damages award than does federal law, so that Imperial Palace suffered no prejudice from the NRS 42.005 instruction.

The United States Supreme Court set forth the requisite mental state and conduct that a jury must find to award punitive damages in a § 1983 action in *Smith v. Wade*, 461 U.S. 30, 38 (1983). In considering whether punitive damages under § 1983 were limited to intentionally malicious conduct, the Court recognized that federal and state courts generally ''permitted punitive awards on variously stated standards of negligence, recklessness, or other culpable conduct short of actual malicious intent.'' *Id.* at 45. Reasoning that there was ''no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action,'' *id.* at 48-49, the Supreme Court concluded that a jury may assess punitive damages in a § 1983 action when the ''defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'' *Id.* at 56.

[4]According to Grosjean, Imperial Palace never moved for a directed verdict under NRCP 50(a) but instead reserved its earlier NRCP 41(b) motion for an involuntary dismissal. Regardless, the standards for reviewing orders resolving either motion are the same, *Nelson v. Heer*, 123 Nev. 217, 222-23, 163 P.3d 420, 424 (2007), and whether Imperial Palace challenged the punitive damages under NRCP 41(b) or NRCP 50(a) is not material to our decision here.

In analyzing whether a punitive damage request in a § 1983 action was presented to the jury under the appropriate instruction, the Ninth Circuit concluded in *Dang v. Cross*, 422 F.3d 800, 805, 808 (9th Cir. 2005), that a § 1983 plaintiff's proposed jury instruction that punitive damages could be awarded if the defendant's acts or omissions were ''callously or, maliciously, or wantonly, or oppressively done,'' was within the scope of the standard set by *Smith*. The United States Court of Appeals for the Ninth Circuit concluded that a jury instruction that allows for imposing punitive damages for an act that caused the plaintiff's injury, and was '' 'oppressively done,' '' was '' 'accurate and complete.' '' *Dang* at 808 (quoting *McKinley v. Trattles*, 732 F.2d 1320, 1326 (7th Cir. 1984)); *see also Walker v. Norris*, 917 F.2d 1449, 1459 (6th Cir. 1990) (affirming an award of punitive damages in a § 1983 action, concluding that the ''maliciously, wantonly, or oppressively done'' jury instruction was ''as strict as the standard articulated by the Supreme Court in *Smith v. Wade*''); *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987) (explaining that punitive damages may be awarded in a § 1983 action if the ''defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard for the civil rights of the plaintiff''); *Stokes v. Delcambre*, 710 F.2d 1120, 1126 (5th Cir. 1983) (concluding that in the § 1983 context, malicious, wanton, or oppressive acts are within the traditional tort punitive damages standards as required by *Smith v. Wade*).

[Headnote 25]

Here, the jury was instructed under NRS 42.005, which provides that punitive damages may be recovered if the plaintiff proves ''by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice.'' Applying the standards set forth in *Smith*, and *Dang*, we conclude that the district court properly instructed the jury that oppression, fraud, or malice can serve as a basis for a punitive damages award in a § 1983 action.

Attorney misconduct

[Headnotes 26-28]

As explained above, attorney misconduct occurred throughout the underlying proceeding and the cumulative effect of that conduct on the jury's verdict is relevant in analyzing whether a new trial is warranted. *Lioce*, 124 Nev. 17, 174 P.3d at 980 (recognizing that ''the scope, nature, and quantity of misconduct are themselves relevant to whether the verdict is reliable''). During the punitive damages phase of the trial, Grosjean's attorney essentially asked the jury to send a message to Imperial Palace by punishing it with punitive damages for not making substantial charitable contributions, despite being a highly profitable corporation. As explained in *Lioce*, attorneys violate the ''golden rule'' by asking the jurors to place themselves in

the plaintiff's position or nullify the jury's role by asking it to ''send a message'' to the defendant instead of evaluating the evidence. *Lioce*, 124 Nev. at 20-23, 174 P.3d at 982-84; *see also* RPC 3.4(e) (providing that professional conduct standards prohibit an attorney from offering personal opinions regarding the justness of a cause or the culpability of the defendant). Although the district court sustained Imperial Palace's objection and struck the statement, Grosjean's attorney proceeded to argue that Imperial Palace should not have followed the GCB agents' instructions to do something illegal, pausing in the middle of his statement to explain, ''the emotion is getting over me again,'' while crying, according to Imperial Palace. Imperial Palace did not object, but as pointed out in *Lioce*, ''when . . . an attorney must continuously object to repeated or persistent misconduct, the nonoffending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point.'' *Id.* at 18, 174 P.3d at 981.

[Headnote 29]

Here, there is a combination of objected-to and sustained and unobjected-to attorney misconduct. With regard to objected-to and sustained misconduct, the party seeking a new trial must demonstrate that the misconduct is so extreme that a sustained objection and admonishment are insufficient to remove the misconduct's effect. With regard to unobjected-to misconduct, the moving party must show ''a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.'' *Id.* at 19, 174 P.3d at 982. Another factor to consider when evaluating attorney misconduct is that, while a single instance of improper conduct might be cured by objection and admonishment, the same may not hold true when the improper conduct is repeated. *Id.* at 19, 174 P.3d at 981. Bearing in mind that Grosjean suffered no physical injuries and was not jailed, but instead was detained in a security office for 45 minutes, the jury's $500,000 punitive damage verdict appears driven not by evidence of malice, fraud, or oppression, but instead by Grosjean's attorney's improper golden rule and emotional arguments. Thus, having considered Grosjean's attorney's statements and behavior in light of the *Lioce* standards, we conclude that the misconduct in this matter is so egregious as to warrant a new trial on punitive damages.

Remittitur

Although Grosjean argues that, by summarily remitting the punitive damages award and failing to make any finding that the award was excessive, the court erred as a matter of law, in light of our conclusion that the attorney misconduct in this matter warrants a new

trial as to punitive damages, we need not address Grosjean's argument in that regard.

Dismissal of the state law claims against Imperial Palace

Grosjean argues that because the Legislature has provided immunity only to governmental agencies, the district court improperly allowed Imperial Palace to avail itself of NRS 41.032(2)'s protections, under which the State and its agents who exercise or fail to exercise discretionary functions are entitled to immunity from tort liability. Imperial Palace, on the other hand, argues that because its security guards were acting at the GCB agents' direction, it should be entitled to the same discretionary-function immunity protection that applies to shield the GCB agents from liability.

[Headnote 30]

Our resolution of this particular issue is not necessary here. Grosjean was allowed to proceed with his § 1983 claim against Imperial Palace, with the jury awarding him $99,000 in compensatory damages. The invasion of Grosjean's Fourth Amendment rights, on which his § 1983 claim was predicated, has fundamental elements in common with the dismissed state law tort claims. Thus, the general rule against double satisfaction for a single injury precludes any further litigation against Imperial Palace on claims arising from Imperial Palace security guards' acts of searching and detaining Grosjean. *See Kassman v. American University*, 546 F.2d 1029, 1033-34 (D.C. Cir. 1976) (noting that a plaintiff can recover no more than the loss actually suffered); *Zarcone v. Perry*, 434 N.Y.S.2d 437, 439-43 (App. Div. 1980) (upholding the dismissal of the plaintiff's common law tort claims, which included false arrest, defamation, and intentional infliction of mental and physical injury, in part because the plaintiff already had recovered adequate damages in a § 1983 action on the same facts constituting the injury, thus precluding further recovery).

Grosjean asserted claims against Imperial Palace for conspiracy, battery,[5] and false imprisonment.[6] His conspiracy claim was grounded on allegations that casinos, including Imperial Palace, rely on false information contained in a publication about professional gamblers, that casinos fabricate bases for arresting and prosecuting gamblers engaged in lawful gaming activities, and that casi-

[5]With regard to his battery claim, Grosjean alleged that Imperial Palace security guards, in the process of detaining him, offensively and oppressively touched and/or handcuffed him without cause for doing so, and that as a result, he was damaged through outrage, loss of freedom, and emotional distress.

[6]In a proposed amended complaint, Grosjean also sought to add a libel and slander claim against Imperial Palace. To the extent that Grosjean challenges the district court's decision to deny leave to amend as to that claim, we perceive no abuse of discretion in that decision.

nos deter lawful gaming activities through intimidation, threats, false imprisonment, and battery. According to the complaint, the detention and ''battery'' at the Imperial Palace was part and parcel of, and in furtherance of, the conspiracy to exclude professional gamblers from participating in gaming activities. The battery and false imprisonment claims likewise were based on allegations that Imperial Palace's security guards apprehended, detained, and searched Grosjean without legal grounds, *i.e.*, reasonable suspicion or probable cause, for doing so. While those claims were dismissed, he was allowed to amend his complaint to assert a § 1983 claim, which claim proceeded to trial, resulting in a judgment in his favor.

[Headnote 31]

The purpose for allowing the recovery of money damages in a § 1983 action for the violation of a constitutional right, like that of common law tort damages, is to compensate the plaintiff for his or her injury caused by the defendant's breach of duty or intentional tort. *Woodward & Lothrop v. Hillary*, 598 A.2d 1142, 1147 (D.C. Cir. 1991) (citing *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986), and *Carey v. Piphus*, 435 U.S. 247, 266 (1978)). The United States Supreme Court has instructed courts to look first to common law tort rules that apply to recovering pecuniary and nonpecuniary loss when determining the elements of damages that may be recovered in a § 1983 action. *Carey*, 435 U.S. at 257-58. In that regard, the Supreme Court has explained that, ''whatever the constitutional basis for § 1983 liability, such damages must always be designed 'to compensate injuries caused by the [constitutional] deprivation,' '' *Stachura*, 477 U.S. at 309 (quoting *Carey*, 435 U.S. at 265), which ''leaves no room for noncompensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right.'' *Id.* at 309-10.

In a case that has some similar factual elements as the present matter, the New York Supreme Court, Appellate Division, concluded that a plaintiff who already had recovered damages in a § 1983 action was precluded from bringing an action to recover damages for state law torts based on the same negligent or wrongful conduct of the defendants. *Zarcone v. Perry*, 434 N.Y.S.2d 437, 438 (App. Div. 1980). In that case, the plaintiff sued in federal court under § 1983, claiming that he suffered damages from the deprivation of his Fourth Amendment rights. According to the plaintiff's complaint, he suffered both physical and mental injuries, nervous shock and humiliation, and harm to his reputation and business. *Id.* at 439. As a result of that action, he recovered compensatory and punitive damages against the defendants. *Id.*

The plaintiff later commenced a state court action, alleging, among other things, that he suffered damages for false arrest, intentional infliction of mental and physical injury, and intentional in-

fliction of mental distress. *Id.* The defendants challenged the state court action, asserting that res judicata principles and the rule against double recovery should shelter them from further attack under common law tort theories. *Id.* at 440. In agreeing with the defendants on the double recovery theory, the New York court explained that because the plaintiff had already recovered adequate damages in his § 1983 action on the same facts constituting the injury underlying the common law tort action for false arrest, intentional infliction of mental distress, and mental and physical injury, ''in justice and fairness, no further recovery should be allowed.'' *Id.* at 444.

[Headnote 32]

While preclusion principles are not a bar to Grosjean's state law claims here, the prohibition against double recovery for a single injury operates to foreclose any further recovery against Imperial Palace. His tort claims and his § 1983 claims are alternative theories for recovering damages resulting from the Imperial Palace security guards' actions of detaining and searching him. *See Zarcone*, 434 N.Y.S.2d at 441 (noting that the plaintiff's causes of action for, among other things, false arrest and intentional infliction of emotional and physical harm, required ''virtually the same proof, both as to the prima facie elements and damages, which a cause of action under section 1983 comprehends''); *compare Marschall v. City of Carson*, 86 Nev. 107, 110, 464 P.2d 494, 497 (1970) (noting that to establish false imprisonment, a plaintiff must prove that he was ''restrained of his liberty under the probable imminence of force without any legal cause or justification therefore''), *with Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (explaining that the Fourth Amendment's purpose is to ''safeguard the privacy and security of individuals against arbitrary invasions by governmental officials''). Although a plaintiff may assert both a § 1983 claim and tort-based claims, he or she is not entitled to a separate compensatory damage award under each legal theory. *See Clappier v. Flynn*, 605 F.2d 519, 529 (10th Cir. 1979); *Zarcone*, 434 N.Y.S.2d at 444. Instead, if liability is found, the plaintiff is entitled to only one compensatory damage award on one or both theories of liability. *Clappier*, 605 F.2d at 529 (concluding that the district court erred in awarding judgment under both negligence and deprivation of civil rights theories of liability on the claims because the interest protected by the common law of negligence, as applied to the facts, closely paralleled the interest protected by the constitutional amendment on which the plaintiff was relying, such that the relief afforded under the common law of torts and § 1983 were identical); *Woodward & Lothrop v. Hillary*, 598 A.2d 1142, 1148 (D.C. 1991) (explaining that in cases grounded on both § 1983 and tort liability the-

ories, the jury must be explicitly instructed that the plaintiff may be compensated only for damages that fairly compensate for actual injuries in the aggregate).

As for punitive damages, NRS 42.005 limits recovery based on the amount of compensatory damages awarded. Accordingly, regardless of whether the district court properly dismissed Grosjean's state law claims against Imperial Palace on discretionary-function immunity grounds, because he succeeded on his § 1983 claim, the double recovery rule precludes him from now proceeding on the state law claims. Therefore, we do not further address the district court's decision to dismiss those claims.

CONCLUSION

First, addressing Imperial Palace's and Espensen's arguments on cross-appeal that reversal is warranted because they are entitled to qualified immunity for any § 1983 liability, on the disputed facts and for policy reasons, we conclude that qualified immunity does not apply to protect Imperial Palace and Espensen from liability in this matter. Next, although Imperial Palace and Espensen assert that they are entitled to a new trial based on certain evidentiary rulings, we perceive no abuse of discretion in the way in which the court managed the trial and testimony. Further, with regard to the liability and compensatory damages phase of the trial, the misconduct on behalf of Grosjean's attorney properly was addressed by the district court on those occasions when Imperial Palace objected, and any unobjected-to comments did not rise to the irreparable and fundamental error level warranting a new trial as to liability and compensatory damages. Thus, the district court acted within its discretion by denying Imperial Palace's motions for judgment notwithstanding the verdict and new trial in that regard.

Next, addressing the punitive damages award, because the NRS 42.005 standard for awarding punitive damages comports with federal guidelines for determining whether punitive damages are available in § 1983 actions, punitive damages properly were presented to the jury, and the district court therefore properly denied Imperial Palace's motion for a directed verdict. Since, however, the nature and extent of Grosjean's attorney's misconduct during the punitive damages phase of the trial was egregious and could not have been cured by a sustained objection, and the jury's verdict appeared controlled by the misconduct rather than the evidence, a new trial is warranted as to punitive damages.

Finally, with regard to Grosjean's dismissed state law claims against Imperial Palace, because he already recovered from Imperial Palace on his § 1983 claim on the same facts that would give rise to any injury allowing him to recover damages on his state law claims,

he is foreclosed from further pursuing damages for that injury. Thus, Grosjean cannot now reinstate his state law claims against Imperial Palace.

Accordingly, we affirm the district court's NRCP 54(b) certified judgment as to Imperial Palace and Espensen with respect to compensatory damages, reverse the judgment as to punitive damages, and remand this matter to the district court for a new trial as to the punitive damages.

HARDESTY, C.J., CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

CLARK COUNTY SCHOOL DISTRICT, A NEVADA POLITICAL SUBDIVISION, APPELLANT, *v.* VIRTUAL EDUCATION SOFTWARE, INC., A NEVADA CORPORATION, RESPONDENT.

No. 50313

August 6, 2009 213 P.3d 496

Appeal from a district court judgment on a jury verdict in a defamation action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Provider of computer-based instruction brought defamation claim against county school district, relating to a letter from associate superintendent of district's human resources department to provider's president, and to at least 12 communications to district's teachers, including e-mails sent by district's administrative staff, which letter and other communications concerned district's determination that teachers who completed provider's courses would not be eligible for salary enhancement under collective bargaining agreement. The district court granted partial summary judgment to district, thereby limiting the actionable claims to the letter and five e-mail communications; the district court later entered judgment on jury's verdict finding that the letter and three e-mail communications from the associate superintendent's assistant to individual teachers were defamatory and awarding provider $161,024 in damages, and also found that provider met its offer of judgment and therefore was entitled to attorney fees, awarded attorney fees and prejudgment interest to provider, and entered judgment for provider in total amount of $340,622.40. District appealed. The supreme court, HARDESTY, C.J., held that: (1) as a matter of first impression, absolute privilege from defamation claims, for communications made in the course of judicial proceedings, extends to instances where a nonlawyer makes an allegedly defamatory communication in response to threatened litigation or during a judicial proceeding; (2) letter from associate