MALCOLM MANNING, AKA MALCOLM DENZEL MANNING, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 63274

May 7, 2015 348 P.3d 1015

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, battery with intent to commit a crime (victim 60 years of age or older), and robbery (victim 60 years of age or older). Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

The supreme court, CHERRY, J., held that: (1) as a matter of first impression, the district court's failure to notify and confer with parties after receiving note from jury indicating that jury was deadlocked violated defendant's due process rights to be present at all stages of trial and to have counsel present; (2) the district court's error in failing to notify and confer with parties after it received note from jury indicating that jury was deadlocked, in violation of defendant's due process rights, was harmless; (3) testimony from district attorney's investigator regarding his attempt to locate nontestifying witness who made out-of-court testimonial statements about defendant did not violate defendant's Confrontation Clause rights; and (4) victim's in-court identification of defendant was sufficiently reliable to be admissible.

Affirmed.

[Rehearing denied September 25, 2015]

[En banc reconsideration denied November 6, 2015]

Philip J. Kohn, Public Defender, and *Deborah L. Westbrook*, Deputy Public Defender, Clark County, for Appellant.

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

1. CRIMINAL LAW.

   Whether the district court's failure to notify and confer with parties when the court received and responded to note from jury indicating that jury was deadlocked violated defendant's rights to counsel, to be present at trial, to a fair trial, and to due process are constitutional issues that the supreme court reviews de novo. U.S. CONST. amends. 6, 14.

2. CONSTITUTIONAL LAW; CRIMINAL LAW.

   The district court's failure to notify and confer with parties after receiving note from jury indicating that jury was deadlocked violated defendant's due process right to be present at every stage of trial and to have counsel present, in prosecution for burglary and other crimes. U.S. CONST. amend. 14.

3. Constitutional Law.
   Due process gives a defendant the right to be present when a judge communicates to the jury, whether directly or via his or her marshal or other staff. U.S. Const. amend. 14.
4. Constitutional Law.
   The district court violates a defendant's due process right to be present at every stage of trial and to have counsel present when it fails to notify and confer with the parties after receiving a note from the jury. U.S. Const. amend. 14.
5. Criminal Law.
   When a district court responds to a note from the jury without notifying the parties or counsel or seeking input on the response, in violation of a defendant's due process rights, the error will be reviewed to determine if it was harmless beyond a reasonable doubt. U.S. Const. amend. 14.
6. Criminal Law.
   An adequate appellate record that will allow appellate review of a defendant's challenge to a violation of his due process rights arising from a court's failure to notify and confer with the parties after it receives a note from the jury will contain: (1) the contents of the note from the jury, (2) any argument from counsel pertaining to the jury's note and the court's response, (3) the court's instructions to its marshal regarding the response, and (4) the marshal's actual response to the jury; in the event that the court fails to sua sponte make a record or if the court fails to inform the parties of the note and its response until after the jury returns its verdict, a party should make as complete a record as possible once it learns of the ex parte communications. U.S. Const. amend. 14.
7. Criminal Law.
   The district court's error in failing to notify and confer with parties after it received note from jury indicating that jury was deadlocked, in violation of defendant's due process rights, was harmless, in prosecution for burglary and other crimes; note indicated that, after only a little more than an hour of deliberations, jury was deadlocked "10-2," in response to which the court told the marshal to excuse the jury for the day and instruct them to return the next day to continue deliberations, without providing any legal instruction, such that it was unlikely that anything would have been handled differently even if the court had conferred with parties. U.S. Const. amend. 14.
8. Constitutional Law; Jury.
   In prosecution for burglary and other crimes, the State did not violate defendant's equal protection rights by using four out of its five peremptory challenges to exclude females from jury. U.S. Const. amend. 14.
9. Criminal Law.
   Testimony from district attorney's investigator regarding his attempt to locate nontestifying witness who made out-of-court testimonial statements about defendant did not violate defendant's Confrontation Clause rights, where investigator did not refer to any testimonial statement. U.S. Const. amend. 6.
10. Criminal Law.
    By waiving redaction of phone calls, burglary defendant waived argument that his Confrontation Clause rights to have witness testify were violated when the district court admitted hearsay statements from prison phone calls indicating that defendant did something wrong. U.S. Const. amend. 6.
11. Criminal Law.
    Three phone calls defendant made from jail, which included evidence of possible plea negotiations, were admissible as evidence of consciousness of guilt, in prosecution for burglary and other crimes.

12. Criminal Law.
Prosecutor's statements during closing argument, reminding jury that officers arrested defendant after speaking with individual who was acquainted with defendant, and that district attorney's investigator searched for such individual to have him testify, did not constitute plain error, in prosecution for burglary and other crimes, as prosecutor was entitled to make inferences from admitted testimony and evidence.

13. Criminal Law.
Victim's in-court identification of defendant was sufficiently reliable to be admissible in robbery and burglary prosecution, despite defendant's claims that victim only briefly viewed suspect, was making cross-racial identification, and made identification several months after crimes in question; victim recognized defendant because he had previously been in the store that was robbed, had seen defendant during robbery for approximately one minute at very close range, and also immediately picked him out of a photo lineup.

14. Criminal Law.
The district court did not abuse its discretion in allowing unnoticed expert testimony from forensic scientist who reviewed fingerprints police took from crime scene, in prosecution for robbery and burglary, despite defendant's asserted violation of his Confrontation Clause rights, where defense acknowledged at calendar call that it was on notice that the State might call a fingerprint expert to testify. U.S. Const. amend. 6.

15. Criminal Law.
Officer's testimony that police were "informed" that defendant was a possible suspect, instead of stating that police "developed" defendant as a possible suspect, did not violate defendant's Confrontation Clause rights, despite defendant's claim that such language left jury with unchallenged statements that individuals provided inculpatory information about him, in prosecution for robbery and burglary, given that officer could have been informed in various ways that defendant was a possible suspect. U.S. Const. amend. 6.

Before Hardesty, C.J., Douglas and Cherry, JJ.

OPINION

By the Court, Cherry, J.:

In addition to other errors that are not issues of first impression, this opinion addresses whether it is constitutional error for a district court to fail to notify and confer with the parties when the court receives and responds to a note from the jury that it is deadlocked. We hold that it is. We also hold that such error will be reviewed for harmlessness beyond a reasonable doubt.

FACTS AND PROCEDURAL HISTORY

This case involves the robbery of an ABC Beer and Wine Store in Las Vegas. A man entered the store where Luz Potente, a 64-year-old Filipino cashier, who spoke primarily Tagalog, was working. Potente recognized the man because she had seen him in the store

two to three times before. During one of his prior visits, he spoke to Potente about selling either DVDs or CDs. When the man robbed the store, Potente stated that he looked around the store and then proceeded around the counter to where she stood behind the cash register. According to Potente, the man roughly pushed her aside and went to a set of plastic drawers where the store kept gaming money and receipts in envelopes, he took an envelope, and he then left the store. The robbery took approximately one minute to complete. Potente initially thought that the man took an envelope containing $500, but she later realized the cash was still there.

Three days after the incident, a responding officer returned to the convenience store with a six-person photo lineup. The officer showed Potente the lineup and asked her if she saw anyone in it that she recognized. Potente promptly identified Manning as the individual who came into the store that day and took the envelope. Manning was arrested after police discussed the case with Akeem Schafer, who was acquainted with Manning. The State subsequently charged Manning with burglary, battery with intent to commit a crime with a victim 60 years of age or older, and robbery with a victim 60 years of age or older.

The case proceeded to trial. The jury retired for deliberations late in the day and, about an hour later, gave the court a note indicating that it was deadlocked 10-2 in favor of conviction. The court instructed the marshal to tell the jury to come back the next day and continue deliberating. The court failed to inform the parties of the note until the next day after the jury returned its verdict finding Manning guilty of all charges.

After receiving the verdict and learning of the jury's note that it was deadlocked, Manning filed a motion for a new trial. He argued *inter alia* that a new trial was warranted because he did not receive notice that the jury considered itself deadlocked, thus depriving him of his right to request a mistrial. The court denied the motion because the jury's note did not contain a question about law or evidence.

The district court entered a judgment of conviction, sentencing Manning to 6 to 15 years in the Nevada Department of Corrections. Manning appealed.

DISCUSSION

[Headnote 1]

Manning argues that the district court's failure to notify and seek input from the parties after receiving the jury's note that it was deadlocked constitutes a constitutional error. Whether the district court's actions in this case violated Manning's rights to counsel, to be present at trial, to a fair trial, and to due process are constitutional issues

that we review de novo. *See Jackson v. State*, 128 Nev. 598, 603-04, 291 P.3d 1274, 1277 (2012).

We have yet to address in a published opinion the constitutional implications of a district court's failure to advise counsel about the existence of a jury note.[1] Numerous federal courts have pondered this question. While these decisions do not bind us, they are illuminating. *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987).

The Ninth Circuit has determined that a district court's failure to notify defense counsel about a jury's inquiry during deliberations violates the defendant's constitutional right to counsel during a critical stage of trial. *See Musladin v. Lamarque*, 555 F.3d 830, 840-43 (9th Cir. 2009) (finding defendant had a constitutional right to participate in district court's communication with the jury during deliberation); *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) (finding a constitutional right to participate in court's decision of whether to respond to jury question during deliberation and the response itself); *United States v. Frazin*, 780 F.2d 1461, 1468-69 (9th Cir. 1986) (finding a due process violation where the district court (1) instructed the jury to continue deliberating despite deadlock vote and (2) the court failed to advise defendants or counsel).

In *Frazin*, the jury sent a note to the judge indicating that it was hopelessly deadlocked. 780 F.2d at 1464. The district court, without consulting counsel, ordered the marshal to instruct the jury that it was to continue deliberations. *Id.* The Ninth Circuit explained that "[t]he failure of the court to notify appellants or their counsel of the jury's deadlock vote, and the court's ex parte message to the jury to continue its deliberations, violated appellants' [due process] constitutional rights" to be present at every stage of trial. *Id.* at 1468-69.

The Ninth Circuit again explained the significance of communications with a deliberating jury in *Musladin*: "[t]he delicate nature of communication with a deliberating jury means that defense counsel has an important role to play in helping to shape that communication." 555 F.3d at 840. Accordingly, the presence of both the defendant and his or her counsel is required when discussing questions from the jury "because counsel might object to the instruction or may suggest an alternative manner of stating the message—a critical opportunity given the great weight that jurors give a judge's words. The defendant's or attorney's presence may also be an important opportunity to try and persuade the judge to respond." *Id.* at 841. The importance of this opportunity is heightened when a court responds to a jury's note indicating a deadlock:

---

[1]We discussed the issue in *Grimes v. State*, Docket No. 62835 (Order of Affirmance, Feb. 27, 2014), an unpublished disposition. *See* SCR 123 (unpublished dispositions shall not be cited as legal authority).

> A defendant's participation in formulating a response to a deadlocked jury, whether through his counsel or by his personal presence as well, may be important to ensuring the fairness of the verdict. . . . [M]inority members of a deadlocked jury are especially susceptible to pressure from the majority to change their views. A defendant should be afforded the opportunity to request that the jury be reinstructed on the burden of proof or on its members' duty to decide according to their own consciences.

Id. (quoting *Frazin*, 780 F.2d at 1469). The Third Circuit agrees that this is a constitutional violation. *See United States v. Toliver*, 330 F.3d 607, 616-17 (3d Cir. 2003) (holding that a criminal defendant's Fifth Amendment right to be present at every critical stage of trial and Sixth Amendment right to counsel are violated when a judge fails to inform counsel of a note from the jury and fails to allow counsel to argue prior to responding to the jury). The *Musladin* court further explained that

> [t]he "stage" at which the deprivation of counsel may be critical should be understood as the *formulation* of the response to a jury's request for additional instructions, rather than its delivery. Counsel is most acutely needed before a decision about how to respond to the jury is made, because it is the substance of the response—or the decision whether to respond substantively or not—that is crucial.

555 F.3d at 842.

[Headnotes 2-4]

Like the Ninth Circuit and the Third Circuit, we believe that due process gives a defendant the right to be present when a judge communicates to the jury (whether directly or via his or her marshal or other staff). A defendant also has the right to have his or her attorney present to provide input in crafting the court's response to a jury's inquiry. Accordingly, we hold that the court violates a defendant's due process rights when it fails to notify and confer with the parties after receiving a note from the jury. Therefore, we conclude that the district court erred in this regard in Manning's case.

[Headnotes 5, 6]

Manning argues that in such a case, the Ninth Circuit requires automatic reversal; he is incorrect. The proposed rule of automatic reversal that a panel of the Ninth Circuit put forth in *Musladin* is dicta. *Musladin*, 555 F.3d at 842-43. Further, the Ninth Circuit has since departed from this notion. *See United States v. Mohsen*, 587 F.3d 1028, 1032 (9th Cir. 2009) (stating, in reference to *Musladin*, that "[w]e never suggested that all errors regarding jury commu-

nications during deliberations were subject to automatic reversal," and holding that a court's error in responding to a jury's note without consulting the parties or counsel constitutes error that is reviewed for harmlessness beyond a reasonable doubt). Accordingly, we hold that when a district court responds to a note from the jury without notifying the parties or counsel or seeking input on the response, the error will be reviewed to determine if it was harmless beyond a reasonable doubt.[2]

The Ninth Circuit provides three factors to determine the harmlessness of the error in this context: (1) "the probable effect of the message actually sent"; (2) "the likelihood that the court would have sent a different message had it consulted with appellants beforehand"; and (3) "whether any changes in the message that appellants might have obtained would have affected the verdict in any way." *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998); *United States v. Frazin*, 780 F.2d 1461, 1470 (9th Cir. 1986).

[Headnote 7]

We conclude that the district court's error was harmless beyond a reasonable doubt. In this case, at the end of the day, after only a little more than an hour of deliberations, the jury's note informed the district court that it was deadlocked 10-2. In response, the court told the marshal to excuse the jury for the day and instruct them to return the next day to continue deliberations. The message that the court instructed the marshal to give to the jury was simple and did not contain any legal instructions. Although the court should have reconvened the proceedings and, on the record, discussed the jury's note and conferred with counsel in developing a response, we do not believe that the result here would have been substantively different had it done so. It is unlikely that after only an hour of deliberations the court would have proffered additional instructions to the jury or required the jurors to continue deliberating past 5 p.m. Moreover, the court correctly directed its marshal to excuse the jury and tell them to return the next day to continue deliberating. It is unlikely

[2]Manning further argues that we cannot determine whether the district court's error was harmless because the district court failed to make a record of the ex parte communication. However, we have previously held that "[t]he burden to make a proper appellate record rests on [the] appellant." *Greene v. State*, 96 Nev. 555, 558, 612 P.3d 686, 688 (1980). Under these circumstances, an adequate record will contain (1) the contents of the note from the jury, (2) any argument from counsel pertaining to the jury's note and the court's response, (3) the court's instructions to its marshal regarding the response, and (4) the marshal's actual response to the jury. In the event that the court fails to sua sponte make a record or if the court fails to inform the parties of the note and its response until after the jury returns its verdict, a party should make as complete a record as possible once it learns of the ex parte communications.

that the marshal would have altered this simple instruction in any meaningful or prejudicial manner.

Some courts have also assessed whether the statement to the jury was inherently coercive. *Frazin*, 780 F.2d at 1470-71. The statement to the jury in this case was not inherently coercive because it did not inform the jury in any way that the court would not accept a deadlocked jury. The Court simply informed the jury that it would need to continue deliberations, which the jury did the next morning. Accordingly, this error does not warrant reversal.

We have reviewed Manning's remaining claims and conclude that they lack merit.

[Headnote 8]

First, Manning contends that the State violated his right to equal protection when it used four out of its five peremptory challenges to exclude females from the jury. We conclude that the trial court did not err when it found that the State used its peremptory challenges as permitted by the Constitution, and we decline to address Manning's additional arguments expanding this issue. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

[Headnote 9]

Second, Manning argues that the district court violated his rights under the Confrontation Clause when the court admitted evidence of the State's efforts to locate Schafer, a nontestifying witness who made out-of-court testimonial statements about Manning. We conclude that the testimony from the district attorney's investigator concerning his attempt to locate Schafer did not violate Manning's Confrontation Clause rights because the investigator did not refer to any testimonial statement. *See Vega v. State*, 126 Nev. 332, 339, 236 P.3d 632, 637 (2010) (holding that "[t]he threshold question in evaluating a confrontation right . . . is whether the statement was testimonial in nature").

[Headnote 10]

Third, Manning also argues that his Confrontation Clause rights to have Schafer testify were violated because the district court admitted hearsay statements from prison phone calls indicating that Manning did something wrong. He also argues that the calls were not relevant and contained evidence of his prior bad acts and the prior bad acts of others. We conclude that Manning waived his Confrontation Clause argument and prior bad acts evidence arguments when he waived redaction of the calls. *Cf. United States v. Peeper*, 685 F.2d 328, 329 (9th Cir. 1982) (finding no confrontation clause violation when defense counsel's failure to object resulted from a tactical decision).

[Headnote 11]

Fourth, Manning argues that the district court erred in admitting three phone calls he made from jail because the calls included evidence of possible plea negotiations and were irrelevant and unfairly prejudicial. We conclude that the district court properly admitted the phone calls because they evidenced consciousness of guilt. *See Abram v. State*, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) ("Declarations made after the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence, or tend to establish intent may be admissible.").

[Headnote 12]

Fifth, Manning argues that prosecutors committed misconduct by reminding the jury in closing arguments that officers arrested Manning after speaking with Schafer and that the district attorney's investigator searched for Schafer to have him testify. We conclude that the prosecution's statements about Schafer during closing arguments did not constitute plain error because the prosecution is entitled to make inferences from the admitted testimony and evidence. *See Jain v. McFarland*, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993).

Sixth, Manning argues that the district court's error of admitting the phone calls that referenced his desire to obtain his discovery was compounded by the district court's refusal to proffer a curative instruction when the prosecution repeatedly insinuated that Manning's assertion of a legal right was evidence of guilt. Because we conclude that the district court did not err in admitting the calls, we need not address this issue.

[Headnote 13]

Seventh, Manning contends that the victim's in-court identification was unreliable because she only briefly viewed the suspect, she was making a cross-racial identification, her anxiety decreased her degree of attention, her prior description was vague, her prior identification was unsure, and her in-court identification occurred several months after the crime. The victim recognized Manning because he had previously been in the store, she saw him during the robbery for approximately one minute at very close range, and she also immediately picked him out of a photo lineup. We conclude that the admission of the in-court identification was not erroneous. *See Dieudonne v. State*, 127 Nev. 1, 5, 245 P.3d 1202, 1205 (2011) (holding that "[t]o amount to plain error, an error must be so unmistakable that it is apparent from a casual inspection of the record").

[Headnote 14]

Eighth, Manning argues that the district court violated his Confrontation Clause rights in allowing unnoticed expert testimony

from Eric Sahota, the forensic scientist who reviewed the fingerprints that police took from the crime scene. He also argues that the district court violated his rights to due process and a fundamentally fair trial when Sahota was allowed to testify to matters outside his expertise. We conclude that the district court did not abuse its discretion in allowing Sahota to testify at trial because the defense acknowledged at calendar call that it was on notice that the State might call a fingerprint expert to testify. We also conclude that the district court did not abuse its discretion in allowing Sahota to apply this testimony to the surveillance video from the store. *See* NRS 50.275.

[Headnote 15]

Ninth, Manning contends that because an officer testified that police were "informed" that he was a possible suspect instead of stating that police "developed" him as a possible suspect, the jury was improperly left with unchallenged statements that individuals provided inculpatory information about him. We conclude that because the officer could have been informed in various ways that Manning was a possible suspect, this testimony does not fall within the purview of the Confrontation Clause's protections. *See Vega*, 126 Nev. at 339, 236 P.3d at 637.

CONCLUSION

We conclude that the district court's error in responding to the note from the jury without notifying the parties or counsel was harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of conviction as to all counts.

HARDESTY, C.J., and DOUGLAS, J., concur.

MIGUEL JOSE GUITRON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64215

May 21, 2015 350 P.3d 93

Appeal from a conviction by a jury of incest, four counts of sexual assault with a minor under the age of 14, and two counts of lewdness with a minor under the age of 14. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

The court of appeals, SILVER, J., held that: (1) substantial evidence supported incest conviction, (2) substantial evidence supported conviction of sexual assault with a minor under the age of 14, (3) the district court's error in summarily denying defendant's mo-

tion in limine was harmless, (4) the district court's error in rejecting defendant's proposed inverse elements instruction as to the crime of sexual assault with a minor was harmless, and (5) the State's reason for exercising peremptory challenges against an Asian juror and an African-American juror were race-neutral.

Affirmed.

Phillip J. Kohn, Public Defender, and *Amy A. Feliciano* and *Kedric A. Bassett*, Deputy Public Defenders, Clark County, for Appellant.

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

1. Criminal Law.
   In reviewing a challenge to the sufficiency of the evidence, the supreme court views the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. Criminal Law.
   As it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness, the appellate court does not determine the defendant's guilt, but rather considers whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt by the evidence it had a right to consider.
3. Criminal Law.
   The jury determines the weight and credibility of conflicting testimony, and the appellate court will not disturb the jury's verdict where substantial evidence supports the jury's findings.
4. Incest.
   The term "fornication," as used in incest statute, is defined as sexual intercourse between two unmarried people. NRS 201.180.
5. Incest.
   Despite the State's lack of DNA evidence of paternity to the jury, substantial evidence supported conviction of incest, where both the victim and her mother had testified that defendant was the victim's father, defendant had paid child support for the victim after paternity tests concluded he was the father of the victim, and evidence presented at the trial demonstrated that defendant himself had admitted numerous times he was the biological father of the victim. NRS 51.035(3)(a), 51.265, 122.020(1), 201.180.
6. Criminal Law; Incest.
   In prosecution for incest, defendant's numerous admissions to detectives, that DNA testing had confirmed his paternity in prior child support proceedings and that the victim was his biological child, were admissible evidence, under rule providing that a party's own statement offered against him is not hearsay and admissible against him, sufficient to prove paternity beyond a reasonable doubt, despite the State's lack of DNA evidence of paternity to the jury. NRS 51.035(3)(a), 201.180.

7. Criminal Law; Incest.

In prosecution for incest, letters written by defendant to victim, telling her "you are my beautiful daughter" and "I love you," and "me and you got a daughter together," were admissible evidence, under exception to hearsay rule allowing statements that, at the time they are made, would subject the declarant to criminal liability or social disapproval, upon which the jury may have based its verdict. NRS 51.345(1).

8. Infants; Rape.

Substantial evidence supported jury's verdict finding defendant guilty of sexual assault with a minor under the age of 14, when the State presented evidence that the victim did not understand the consequences of her actions, she was incapable of giving her consent, and defendant knew or should have known that the victim was mentally or physically incapable of resisting his conduct when he engaged in sex with her. NRS 200.366.

9. Criminal Law.

The appellate court reviews a district court's decision to admit or exclude evidence for an abuse of discretion.

10. Criminal Law.

Even if a court's error is a constitutional violation, the guilty conviction may still stand if the error was harmless beyond a reasonable doubt; to be harmless beyond a reasonable doubt, an error of constitutional dimension cannot have contributed to the verdict. NRS 178.598.

11. Constitutional Law; Rape.

Due process affords a defendant the right to present evidence to support arguments, and Nevada's rape-shield law does not bar evidence of the victim's past sexual history when its admission is necessary to protect the defendant's fundamental rights under the Sixth and Fourteenth Amendments, including when the evidence is used to show the victim's prior independent knowledge. U.S. Const. amends. 6, 14; NRS 50.090.

12. Rape.

When a defendant accused of rape uses evidence of the victim's past sexual history, not to advance a theory of the victim's general lack of chastity, but to show knowledge or motive, it may be admissible at trial. NRS 50.090.

13. Infants; Rape.

The district court abused its discretion and erred by denying defendant's motion to admit evidence of victim's past sexual knowledge, in prosecution for sexual assault with a minor under the age of 14, when the evidence was relevant to defendant's defense of statutory sexual seduction, and defendant had not sought to admit the evidence that the victim had watched online pornography to call the victim's reputation into question or to attack her credibility, but rather, defendant sought to bolster his defense through the statement he made to police that the victim had prior knowledge of sex, wanted to experience sex as a result of her curiosity, and had consented to have sex with him. NRS 50.090.

14. Criminal Law.

The district court's error, in prosecution for sexual assault with a minor under the age of 14, in failing to explain its findings regarding defendant's motion in limine and offer of proof that the victim had obtained prior sexual knowledge by watching online pornography, in light of the defense theory of consent, and making no findings regarding the probative value of the evidence and summarily denying defendant's motion, was harmless where overwhelming evidence supported the verdict and defendant was allowed

to present evidence and argue that the victim was knowledgeable about sex prior to having sexual intercourse with him.

15. Infants; Rape.

Defendant's proposed inverse elements instruction, in prosecution for sexual assault with a minor under the age of 14, that, if the State fails to prove beyond a reasonable doubt that any sexual penetration of a minor under 14 was against the minor's will or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his or her conduct, then the jury must find defendant not guilty, was not misleading and would not have created confusion for the jury, and, therefore, the district court abused its discretion when it denied defendant's proposed instruction.

16. Criminal Law.

The district court's error in rejecting defendant's proposed inverse elements instruction as to the crime of sexual assault with a minor under the age of 14 was harmless, when the jury was accurately instructed regarding the elements of sexual assault and overwhelming evidence supported the jury verdict.

17. Criminal Law.

The district court has broad discretion to settle jury instructions, and the appellate court reviews the district court's decision for an abuse of that discretion or judicial error; however, the district court may not refuse to give a proposed defense instruction simply because it is substantially covered by the other instructions given.

18. Criminal Law.

If a proposed inverse or negatively phrased element instruction is misleading or would confuse the issues, the district court will not err by refusing to give it to the jury.

19. Criminal Law.

Even if a court errs by refusing to give an instruction, the error will be harmless if the reviewing court is convinced beyond a reasonable doubt that the jury's verdict was not attributable to that error.

20. Jury.

The *Batson v. Kentucky*, 476 U.S. 79 (1986), three-pronged test for determining whether illegal discrimination has occurred requires: (1) the opponent of the peremptory strike to show a prima facie case of discrimination, (2) the proponent of the strike to provide a race-neutral explanation, and (3) the district court to determine whether the proponent has in fact demonstrated purposeful discrimination.

21. Jury.

The reason for excluding a juror under the second prong of the *Batson v. Kentucky*, 476 U.S. 79 (1986), test, requiring that the proponent of the peremptory strike provide a race-neutral explanation, need not be either persuasive or plausible so long as it does not deny equal protection. U.S. Const. amend. 14.

22. Jury.

At the third prong of the *Batson v. Kentucky*, 476 U.S. 79 (1986), test, the district court must determine whether the opponent of the peremptory strike of a prospective juror has met the burden of demonstrating that the proponent's explanation is a pretext for discrimination; this is a heavy burden.

23. Criminal Law.

The district court's factual findings regarding whether the proponent of a peremptory strike of a prospective juror has acted with discriminatory

intent is given great deference on review, and the appellate court will not reverse the district court's decision unless clearly erroneous.

24. JURY.

The State's reasons for exercising peremptory strike against prospective juror, an Asian male, and exercising a peremptory challenge to excuse an African-American female prospective juror, were clear, reasonably specific, facially legitimate, and did not communicate any inherent discriminatory intent for *Batson v. Kentucky*, 476 U.S. 79 (1986), purposes, in prosecution for incest and sexual assault with a minor under the age of 14, when the State had indicated that it had struck the Asian male because he was a single father who would automatically believe children and that it was currently prosecuting the African-American female for a sex offense.

Before GIBBONS, C.J., TAO and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

In this appeal, we consider whether evidence presented at trial was sufficient to support a jury verdict finding appellant Miguel Guitron guilty of incest and sexual assault with a minor under the age of 14. Additionally, we must determine whether the district court erred by denying Guitron's motion to admit evidence of the victim's prior sexual knowledge, and clarify the procedure for the admission of such evidence. We also consider whether the district court erred by refusing to give Guitron's proposed inverse instruction and denying Guitron's *Batson* challenges. Although we conclude the district court erred in denying the motion to admit evidence and in failing to give the proposed instruction, these errors were harmless. Accordingly, we affirm.

FACTS

Guitron met the victim's mother, Anita, in Las Vegas in 1997 or 1998. The couple dated for some time, after which Anita moved to Michigan. When she left Las Vegas, Anita was approximately two to three months pregnant with the victim, who she asserts is Guitron's child. However, Anita did not tell Guitron she was pregnant and she had no contact with Guitron for some years after leaving Las Vegas. When the victim was five years old, Anita applied for child support from Guitron, which the court awarded following a positive paternity test.

In October 2010, Guitron called Anita while she was living in Ohio with the victim and her two other children fathered by another man. The victim, who was then 11 years old, overheard the conversation, realized it was her father on the phone, and asked to speak with him. The victim testified that during this first telephone conversation, Guitron told her he was her father. Anita described the

victim as "a kid in a candy store" upon speaking with her father for the first time.

Following this phone call, Anita moved back to Las Vegas in late 2010 and resumed her relationship with Guitron. The victim, who was in elementary school and enrolled in an Individualized Education Plan because she was a slow learner, was thrilled to finally meet her father. Guitron began living with the family shortly after the move. During this time, the victim discussed sex with Anita and had at least some knowledge and understanding of sex.

When the victim was 12 years old, Anita realized the victim was pregnant. Initially, the victim told Anita a neighbor boy was the father. The next day, Anita took the victim to a pregnancy center where medical personnel confirmed she was eight months pregnant. Based on the victim's statements during the examination, the medical staff called the police and alleged Guitron had sexually assaulted the victim. The victim then admitted to both Anita and the police that Guitron was the baby's father. She explained she initially lied because Guitron told her to say the neighbor boy was the father. DNA testing by the Las Vegas Metropolitan Police Department conclusively proved Guitron was the father of the victim's baby. Additionally, Guitron sent letters to the victim during the pendency of the case, openly admitting he was the baby's father.

At trial, based on his statement during an interview to detectives prior to his arrest, Guitron asserted he and the victim only engaged in sex on one occasion. Further, he alleged the victim initiated that single sexual encounter, which occurred while Guitron was intoxicated and partially unconscious. Guitron argued the victim was sexually curious and wanted to have sex with him, and she was capable of understanding the consequences of her actions despite her age. He also asserted the State did not meet its burden of proof on the incest charge because the State did not present DNA evidence proving he was the victim's father. The State countered with evidence Guitron had groomed the victim and engaged in sexual conduct with her on multiple occasions, even when the victim resisted his advances. The State also presented witness testimony that Guitron was the victim's father.

The jury convicted Guitron of incest, four counts of sexual assault with a minor under the age of 14, and two counts of lewdness with a child under the age of 14. Guitron appeals.

DISCUSSION

On appeal, Guitron contends (1) the State presented insufficient evidence for the jury to convict him of incest and sexual assault with a minor under the age of 14; (2) the district court erred by denying Guitron's motion to admit evidence of the victim's prior sexual knowledge; (3) the district court erred by refusing to give Guitron's

proposed inverse instruction; and (4) the district court erred by denying Guitron's *Batson* challenges.

Sufficiency of evidence

Guitron contends the State presented insufficient evidence for the jury to convict him of incest and sexual assault with a minor under the age of 14. We disagree.

[Headnotes 1-3]

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). As "it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness," *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975), we do not determine the defendant's guilt, but rather consider "whether the jury, acting reasonably, could have been convinced [beyond a reasonable doubt] by the evidence it had a right to consider," *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). The jury determines the weight and credibility of conflicting testimony, and we will not disturb the jury's verdict where substantial evidence supports the jury's findings. *See Shannon v. State*, 105 Nev. 782, 791, 783 P.2d 942, 947 (1989); *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *see also McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Incest

[Headnote 4]

NRS 201.180 defines incest as occurring when "[p]ersons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void [either] intermarry with each other or . . . commit fornication or adultery with each other." A parent and natural child are within the degree of consanguinity wherein a marriage between the two would be declared by law incestuous and void. *See* NRS 122.020(1), *held unconstitutional on other grounds by Latta v. Otter*, 771 F.3d 456, 476-77 (9th Cir. 2014). Further, fornication is defined as sexual intercourse between two unmarried people. *Douglas v. State*, 130 Nev. 285, 288, 327 P.3d 492, 494 (2014).

[Headnote 5]

On appeal, Guitron argues his conviction for incest is not supported by the evidence, solely because the State failed to present DNA evidence conclusively proving he is the father of the victim.

Although neither party raises NRS 51.265, that statute provides:

> Reputation among members of a person's family by blood or marriage, or among his or her associates, or in the community, is not inadmissible under the hearsay rule if it concerns his or her birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, ancestry or other similar fact of his or her personal or family history.

Here, both the victim and her mother, Anita, testified Guitron was the victim's father. The victim testified that the first time she spoke with Guitron by telephone he identified himself as her father. Anita testified she was pregnant by Guitron when she broke up with him and moved from Las Vegas. Further, Guitron paid child support for the victim after paternity tests concluded he was the father of the victim. Thus, the jury heard testimony from both the victim and Anita that Guitron was the victim's father. Therefore, under NRS 51.265, the jury could reasonably conclude from the evidence presented, Guitron was the victim's father.

[Headnote 6]

Additionally, evidence presented at trial demonstrates that Guitron himself admitted numerous times he was the biological father of the victim. NRS 51.035(3)(a) provides a party's own statement offered against him is not hearsay and is admissible against him. Here, Guitron admitted to detectives that DNA testing confirmed his paternity in prior child support proceedings and he repeatedly told detectives the victim was his biological child. Thus, Guitron's numerous admissions to detectives are admissible evidence sufficient to prove paternity beyond a reasonable doubt, despite the State's lack of DNA evidence of paternity to the jury.

[Headnote 7]

Furthermore, although not addressed by either party, NRS 51.345(1) excepts from the hearsay rule statements that, at the time they are made, would subject the declarant to criminal liability or social disapproval, and that a reasonable person in the position of the declarant would not have made unless he believed it to be true. At trial, the State presented letters written by Guitron to the victim. In those letters, Guitron told the victim "you are my beautiful daughter" and "I love you," and instructed the victim to remember "we had [a] talk in the backyard about the fact about [C.G.] being your sister and your daughter and my daughter, too. Remember me and you said that's going to be weird like on Jerry Springer show. But me and you got a daughter together." This final line was followed by a drawing of three pink hearts. Guitron further told the victim he was "sorry," stating "I will be back. I can't wait till I can see you and the baby. . . . [C.G.] is my daughter and I need to see her."

Thus, in addition to the DNA evidence showing conclusively Guitron was the baby's father, Guitron wrote several letters to the victim asserting she was his daughter and the victim's baby was also his child. As this open admission of incest would (and did) subject Guitron to both criminal liability and social disapproval, and because Guitron did not argue he did not believe the statements to be true, these letters were likewise admissible evidence upon which the jury may have based its verdict. Thus, based on Guitron's own statements, the jury could reasonably infer he was the biological father of the victim.

Accordingly, because ample evidence reflects Guitron is the father of both the victim and her baby, we affirm the incest conviction.

Sexual assault with a minor under the age of 14

[Headnote 8]

We next turn to the question of whether the evidence supported the jury's verdict finding Guitron guilty of sexual assault with a minor under the age of 14. As relevant to this appeal, NRS 200.366 defines sexual assault as occurring where a person "subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct." Guitron argues he should not have been convicted on this charge because the evidence showed the victim consented to having sex, and did not support the jury's finding Guitron knew or should have known the victim did not understand the consequences of her conduct.

At trial, Guitron did not dispute he and the victim had sexual intercourse or the victim's baby was his child. Instead, Guitron asserted he had committed a lesser crime of statutory sexual seduction. The victim testified at trial that she was in love with Guitron and Guitron was in love with her. Guitron's counsel argued to the jury the victim initiated sex by climbing on top of him while he was intoxicated because she was curious about sex and wanted to know what a penis felt like inside of her vagina.

The State, however, countered that this victim was vulnerable and unable to understand the consequences of her actions. Further, because of the victim's age and vulnerability, Guitron intentionally manipulated the victim into having sex with him. The State presented evidence the victim was "like a kid in a candy store" the first time she spoke with Guitron on the telephone, as she was excited to meet the father she had never known. Anita, her mother, testified the victim was a slow learner and was in a special program at school, which required the victim to have an Individualized Education Plan. During the time Guitron lived with the victim and her family, he groomed the victim by telling her he loved her, he wanted to marry

her, and he wanted to spend the rest of his life with her. The victim testified at one point Guitron gave her a diamond ring and told her he wanted to marry her. When the victim gave the ring back, Guitron swallowed the ring. Thereafter, Guitron left her a teddy bear with his ring around the bear's neck. The victim took the necklace from the bear's neck and began to wear his ring on a necklace. Ultimately, the 12-year-old victim fell in love with Guitron, a man in his mid-40s.

The State also presented evidence the victim was initially reluctant to have sex with Guitron for fear of getting pregnant. The victim testified Guitron began having sexual intercourse with her around November or December 2011, when she was 12 years old. She testified she did not initiate sex with Guitron. Instead, she testified to several specific instances where Guitron had pressured her into having sex with him, and at least one occasion where she voiced her concern to Guitron about becoming pregnant. The victim also told the jury they had engaged in sex more than ten times.

The State argued the victim was not capable of understanding her actions due to her age and immaturity, and thus she was incapable of giving consent. She did not know how to prevent pregnancy: she took One-A-Day vitamins because she believed they would prevent pregnancy and did not use condoms. A caseworker testified the victim did not know how to adequately care for a newborn, and the victim was initially more concerned about continuing her relationship with Guitron than about trying to understand her situation as a parent. These facts support the State's position that this victim was not prepared for pregnancy, did not understand how to prevent it, and did not understand the stigma associated with having her father's baby.

Therefore, the record reflects sufficient evidence supporting the verdict Guitron was guilty of sexual assault with a minor under the age of 14. The State presented sufficient evidence for a rational trier of fact to conclude the victim did not understand the consequences of her actions, she was incapable of giving her consent, and Guitron knew or should have known the victim was mentally or physically incapable of resisting his conduct when he engaged in sex with her. *See Jackson*, 443 U.S. at 319; *Shannon*, 105 Nev. at 790-91, 783 P.2d at 947 (citing NRS 200.366).

Motions to admit evidence of a victim's prior sexual knowledge

We next consider Guitron's argument the district court erred by denying his motion to admit evidence of the victim's prior knowledge of sexual conduct. Prior to trial, Guitron filed a motion in limine requesting the district court grant his motion to introduce evidence the 12-year-old victim had gleaned "vast sexual knowledge" from

viewing Internet pornography with her friend from middle school. He argued this evidence was relevant to his defense the victim was actually the one who initiated sex with him because she was curious from viewing pornography and wanted to know what a penis felt like in her vagina. He also argued this evidence contradicted the State's theory this victim was slow or immature, as it showed she actually understood the consequences of her actions and consented to sexual intercourse with Guitron while he lay intoxicated on his couch.

[Headnotes 9, 10]

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). A court's error will not be grounds for reversal where it does not affect the defendant's substantial rights, NRS 178.598, and even if the error is a constitutional violation, the guilty conviction may still stand if the error was harmless beyond a reasonable doubt. *Obermeyer v. State*, 97 Nev. 158, 162, 625 P.2d 95, 97 (1981). To be harmless beyond a reasonable doubt, an error of constitutional dimension cannot have contributed to the verdict. *See Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008).

[Headnotes 11, 12]

Nevada's rape shield law limits the degree to which a defendant may inquire into the victim's past sexual history. NRS 50.090; *Summitt v. State*, 101 Nev. 159, 161, 697 P.2d 1374, 1375 (1985). But, due process affords defendants the right to present evidence in support of their arguments, *Vipperman v. State*, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980), and the rape-shield law does not bar such evidence where its admission is necessary to protect the defendant's fundamental rights under the Sixth and Fourteenth Amendments, including where the evidence is used to show the victim's prior independent knowledge. *Summitt*, 101 Nev. at 162-64, 697 P.2d at 1376-77. Thus, where the defense uses such evidence *not to advance a theory of the victim's general lack of chastity*, but to show knowledge or motive, it may be admissible. *Id*. at 163-64, 697 P.2d at 1377.

In *Summitt*, the Nevada Supreme Court addressed this exception, holding a district court committed reversible error by denying a defendant's motion to admit evidence of the six-year-old victim's prior sexual knowledge. 101 Nev. at 160, 697 P.2d at 1375. The supreme court held the district court should admit evidence offered by the defendant that the victim had been sexually assaulted when she was four in order to dispel the inference—which the jury would otherwise likely draw—that a six-year-old victim would be incapa-

ble of describing a sexual assault unless it had actually occurred.[1] *Id*. at 162, 697 P.2d at 1376. The Nevada Supreme Court approved New Hampshire's approach to determining whether to admit such evidence, adopting the rule that once the defendant seeks to admit evidence that may be precluded by the rape shield law, the district court must provide an opportunity whereby the defendant may show the evidence should be admitted because its probative value outweighs its prejudicial effect. *Id.* at 163, 697 P.2d at 1377. In making this determination,

> the trial court must undertake to balance the probative value of the evidence against its prejudicial effect, *see* NRS 48.035(1), and . . . the inquiry should particularly focus upon "potential prejudice to the truthfinding process itself," *i.e.*, "whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis."

Id. (footnote omitted) (quoting *State v. Hudlow*, 659 P.2d 514, 521 (Wash. 1983)).

[Headnote 13]

Here, the district court held a hearing prior to trial regarding the defendant's motion in limine. Guitron made an offer of proof the victim had obtained prior sexual knowledge by watching Internet pornography with one of her friends and her knowledge was relevant to rebut the State's theories the victim did not consent and Guitron knew the victim was mentally incapable of consenting to having sexual intercourse. Further, Guitron argued this evidence was relevant to support his statement to the police that this victim was curious about sex and had actually initiated sex with him. If admitted, Guitron argued, this evidence would be probative to his defense

---

[1]The supreme court in *Summitt* quoted favorably the New Hampshire Supreme Court in *State v. Howard*, 426 A.2d 457, 462 (N.H. 1981), wherein it stated:

> "We believe that the average juror would perceive the average twelve-year-old girl as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it. However, if statutory rape victims have had other sexual experiences, it would be possible for them to provide detailed, realistic testimony concerning an incident that may never have happened. To preclude a defendant from presenting such evidence to the jury, if it is otherwise admissible, would be obvious error. *Accordingly, a defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him.*"

Summitt, 101 Nev. at 164, 697 P.2d at 1377 (emphasis added) (quoting *Howard*, 426 A.2d at 462).

of statutory sexual seduction and would rebut the State's theory this case involved sexual assault. In response, the State presented almost no argument except to assert evidence that the victim's prior sexual knowledge was irrelevant because the victim had the defendant's baby and the pair clearly engaged in sex. The State never expressly addressed Guitron's defense.

[Headnote 14]

The district court's subsequent ruling denying the defendant's motion was flawed under *Summitt*. The district court failed to explain its findings in light of the defense theory in this case and made no findings regarding the probative value of the evidence. Instead, the court summarily denied Guitron's motion, finding this evidence was too prejudicial.

As relevant here, statutory sexual seduction occurs when any sexual penetration or ordinary sexual intercourse transpires between a person older than 18 and a person younger than 16, where either of the parties act "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons." NRS 200.364(6)(b).

Here, Guitron was an adult over the age of 18 and the victim was under the age of 16. The victim had known Guitron for only a short time, not her entire life. The victim told the police, and later the jury, she and Guitron had fallen in love with one another.[2] Testimony suggested the victim was sexually curious and willing to engage in sex with Guitron.[3] Because the baby's DNA conclusively showed Guitron and the victim had sexual contact, the only issue for the jury to determine was whether this victim was incapable of understanding the consequences of her actions (the State's theory) or whether the victim consented to having sex with Guitron (the defendant's theory).

Significantly, Guitron did not seek to admit evidence that the victim had watched Internet pornography to muddy the victim's reputation or to attack her credibility; rather, he sought to bolster his defense through the statement he made to police that this victim had prior knowledge of sex, wanted to experience sex as a result of her curiosity, and consented to have sex with him. Thus, under the analysis set forth in *Summitt*, this evidence was relevant to his defense of statutory sexual seduction, and was more probative than prejudicial considering the facts of this case.

Accordingly, the district court abused its discretion and erred by denying the defendant's motion to admit evidence of the victim's

---

[2]Guitron gave the victim presents, including rings and teddy bears, and promised to marry her. She gave her baby Guitron's name.

[3]Anita told the police the victim said she wanted to know what a penis felt like inside of her.

past sexual knowledge. Furthermore, the district court made inadequate findings regarding the admission of this evidence.

We take this opportunity to clarify the procedure for submitting and admitting or denying evidence of a victim's prior sexual knowledge. We hold that if a defendant in a criminal case makes a motion in limine pursuant to *Summitt* prior to trial, the defendant must make a detailed offer of proof as to what evidence the defendant seeks to admit at trial. The district court must conduct a hearing and the defendant must present justification for admission of the evidence, detailing how the evidence is relevant to the defense under the facts in the case. The district court must, thereafter, weigh the probative value of the proffered evidence against its prejudicial effect. In weighing the offer of proof, the district court must consider the prejudicial effect to the truthfinding process, as well as whether this evidence may confuse the issues, mislead the jury, or cause the jury to decide the case based on an improper or emotional basis. *See Summitt*, 101 Nev. at 163, 697 P.2d at 1377.

The district court must conduct this hearing on the record so as to provide the appellate court with a meaningful opportunity to review the district court's decision for abuse of discretion. We also hold, following this hearing, the district court must state on the record its findings of fact and conclusions of law, detailing what evidence shall be admissible and what evidence will not be admissible according to its ruling.

Despite the lack of findings by the district court in this case, we nevertheless affirm Guitron's conviction because the district court's error was harmless. Unlike the facts in *Summitt*, where a six-year-old alleged sexual assault and no admitted facts provided an alternate basis for the child's knowledge of sexual conduct, the facts in this case are notably distinguishable. Specifically, although Guitron was precluded from presenting evidence regarding the victim's conduct of viewing Internet pornography, the district court allowed Guitron to present evidence and argue the victim was knowledgeable about sex prior to having sexual intercourse with Guitron.

Here, the 12-year-old victim admitted at trial she had knowledge about sexual conduct prior to having sex with Guitron. In fact, she explained to the jury she had conversations with her mother about sex, she knew about the birds and the bees, and she knew where babies came from. She even elaborated she told Guitron not to ejaculate inside of her vagina because she did not want to get pregnant. Anita confirmed this testimony and even told the jury the victim stated she was the one who initiated sex with Guitron.

During closing arguments, defense counsel analogized the victim to other teenage girls starring in the MTV reality show *16 and Pregnant.* Defense counsel argued the victim was knowledgeable about sex, understood the consequences of her actions, consented to and initiated sex, was in love with Guitron, and wanted to continue

the romantic relationship. The defense urged the jury to disregard the State's theory that this crime was a sexual assault under conditions in which Guitron knew or should have known the victim was mentally or physically incapable of resisting his conduct. Finally, the district court specifically instructed the jury on statutory sexual seduction, and provided this charge as an alternative option for the jury's consideration on the verdict form. Therefore, the record overwhelmingly reflects Guitron was not precluded from advancing the defense theory that Guitron committed the lesser offense of statutory sexual seduction as opposed to sexual assault of a minor.

Given the overwhelming evidence supporting the verdict in this case, and the fact that Guitron was not precluded from advancing his defense to the jury, we conclude the district court's error did not contribute to the jury's verdict and was therefore harmless. Accordingly, we will not overturn the jury's verdict despite the district court's error.

The inverse elements instruction

[Headnotes 15, 16]

Guitron further claims the district court erred by rejecting his proposed inverse elements instruction as to the crime of sexual assault with a minor under the age of 14. He asserts under *Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005), the district court was required to give the jury his inverse elements instruction. We agree.

[Headnote 17]

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Id.* at 748, 121 P.3d at 585. However, the district court may not refuse to give a proposed defense instruction simply because it is substantially covered by the other instructions given. *Id.* at 750-54, 121 P.3d at 586-89. In *Crawford*, the Nevada Supreme Court stated:

> This court has consistently recognized that specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request. This court has also recognized that a positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased position or theory instruction.

Id. at 753, 121 P.3d at 588 (footnote omitted) (internal quotations omitted).

[Headnotes 18, 19]

Notwithstanding, if a proposed inverse or negatively phrased element instruction is misleading or would confuse the issues, the

district court will not err by refusing to give it to the jury. *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). In *Carter*, the Nevada Supreme Court clarified a defendant is not entitled to instructions that are "misleading, inaccurate or duplicitous." *Id.* Even if a court errs by refusing to give an instruction, the error will be harmless if the reviewing court is "convinced beyond a reasonable doubt that the jury's verdict was not attributable to [that] error." *Crawford*, 121 Nev. at 756, 121 P.3d at 590.

At trial, the court's elements instruction read:

> A person who subjects a minor under fourteen to sexual penetration, against the minor's will or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his/her conduct, is guilty of sexual assault with a minor under fourteen.

Guitron proposed a negatively phrased elements instruction that stated:

> If the State fails to prove beyond a reasonable doubt that any sexual penetration of a minor under fourteen was against the minor's will or under conditions in which the perpetrator knows or should know that the minor is mentally or physically incapable of resisting or understanding the nature of his/her conduct, then you must find the Defendant not guilty of the offense of Sexual Assault with a Minor Under Fourteen.

The district court rejected Guitron's proposed instruction after considering *Crawford*. It reasoned inverse instructions generally create confusion and lack clarity for jurors, as inverse instructions add unnecessary extra explanations.

Here, the record shows Guitron proposed a negatively phrased elements instruction pursuant to *Crawford*. Contrary to the district court's conclusion, the proposed inverse instruction was not misleading and would not have created confusion. Thus, the district court abused its discretion and erred when it denied the defendant's proposed inverse elements instruction.

Nevertheless, we conclude this error was harmless under the circumstances presented here. The jury was accurately instructed regarding the elements of sexual assault. As discussed above, substantial evidence supported the jury's verdict Guitron committed sexual assault with a minor under the age of 14. The State presented considerable evidence the 12-year-old victim was unable to understand the consequences of her actions or consent to having sexual relations with Guitron. The State's evidence showed Guitron groomed the victim and pressured her into having sexual relations against her will. Given the overwhelming evidence supporting the verdict,

we are convinced beyond a reasonable doubt the verdict was not attributable to the court's refusal to give the inverse instruction. *See Crawford*, 121 Nev. at 756, 121 P.3d at 590. Accordingly, we do not reverse the verdict on this ground.

Batson challenges

Finally, Guitron contends that under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, the State improperly used its peremptory challenges to remove non-white venire persons from the jury pool in violation of Guitron's Fourteenth Amendment right to equal protection. We disagree.

The United States Supreme Court has consistently held "that prosecutorial discretion cannot be exercised on the basis of race, *Wayte v. United States*, 470 U.S. 598, 608 (1985), and that, where racial bias is likely to influence a jury, an inquiry *must* be made into such bias." *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (emphasis added) (citing *Ristaino v. Ross*, 424 U.S. 589, 596 (1976), and *Turner v. Murray*, 476 U.S. 28 (1986)); *Batson*, 476 U.S. at 95.

[Headnotes 20-23]

The three-pronged *Batson* test for determining whether illegal discrimination has occurred requires: (1) the opponent of the peremptory strike to show a prima facie case of discrimination, (2) the proponent of the strike to provide a race-neutral explanation, and (3) the district court to determine whether the proponent has "in fact demonstrated purposeful discrimination." *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) (citing *Batson*, 476 U.S. at 96-98). The reason for excluding a juror under the second prong need not be either persuasive or plausible so long as it does not deny equal protection. *Id*. At the third prong, the district court must determine whether the opponent of the strike has met his burden of demonstrating the proponent's explanation is a pretext for discrimination. *See Conner v. State*, 130 Nev. 457, 464, 327 P.3d 503, 508-09 (2014), *petition for cert. filed*, 83 U.S.L.W. 3767 (U.S. Mar. 18, 2015) (No. 14-1130). This burden is a heavy one. *See Hawkins v. State*, 127 Nev. 575, 579, 256 P.3d 965, 967 (2011) (discussing the Seventh Circuit's upholding of a preemptory strike despite the prosecution's "lame" race-neutral reason). The district court's factual findings regarding whether the proponent of a strike has acted with discriminatory intent is given great deference, *Diamampo*, 124 Nev. at 422-23, 185 P.3d at 1036-37, and we will not reverse the district court's decision "unless clearly erroneous," *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

[Headnote 24]

Here, the record indicates Guitron initially objected to the State's preemptory strike of Prospective Juror 31, an Asian male, and the

district court initially determined Guitron had failed to make a prima facie case as to that juror. After the State exercised a peremptory challenge to excuse Prospective Juror 52, an African-American female, Guitron renewed his objection, arguing the State had exercised more than half of its peremptory challenges on minorities. The district court did not specifically find Guitron had established a prima facie case; instead, the court turned to the State for the race-neutral explanations. Under these circumstances we conclude the district court mooted the first step of the *Batson* analysis. *See Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). *Cf. Watson v. State*, 130 Nev. 764, 779-80, 335 P.3d 157, 169 (2014) (discussing situations where the first *Batson* step is not mooted). It therefore fell to the State to provide a race-neutral explanation. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

The State indicated it had struck Juror 31 because he was a single father who automatically believes children.[4] As to Juror 52, the State indicated it was currently prosecuting Juror 52 for a sex offense. The State further noted Juror 52 claimed she was molested when she was young and her daughters were also molested, but she did not think it appropriate to move forward with charges. Further, Juror 52 appeared more upset over being the victim of identity theft than over being molested. Following these explanations, Guitron acknowledged he had the burden to demonstrate these reasons were a pretext for discrimination. *See Conner*, 130 Nev. at 464, 327 P.3d at 508-09. To meet this burden, Guitron argued the State's failure to strike similarly situated jurors evinced pretext. The district court found the State's reasons to be race-neutral and rejected the *Batson* challenge.

The State's reasons were clear, reasonably specific, facially legitimate, and did not communicate any inherent discriminatory intent. *See id.* at 464, 327 P.3d at 508. The record reflects key differences between Jurors 31 and 52 and the jurors who were not struck by the State.[5] As Guitron was required to sufficiently demonstrate it was more likely than not the State acted with racially discriminatory intent or purpose, *id.* at 464, 327 P.3d at 509; *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30, Guitron failed to meet his burden and these differences undermine Guitron's argument and support the district

[4]The record reflects that Juror 31 automatically believes children merely because they are children, and he articulated no reason for his tendency to believe children.

[5]Guitron argued Proposed Jurors 24 and 47 were similarly situated to Proposed Jurors 52 and 31. Juror 24, however, was not being prosecuted for a crime, and Juror 47 stated she would consider all of the evidence and try to be fair in weighing a child's testimony. We further note Guitron used a preemptory challenge to strike Proposed Juror 47 from the jury.

court's finding. Under these facts, the district court did not err in denying the *Batson* challenges.

CONCLUSION

Guitron's convictions of incest and sexual assault with a minor under the age of 14 are supported by substantial evidence. To the extent the district court erred in failing to allow evidence of the victim's prior sexual knowledge and failing to give Guitron's inverse elements instruction, those errors were harmless and do not warrant reversal. Finally, Guitron failed to show the district court erred by denying his *Batson* challenges. Accordingly, we affirm the jury's verdict.

Gibbons, C.J., and Tao, J., concur.

ROLLAND P. WEDDELL, an Individual, Appellant, *v.* F. DEARMOND SHARP, Esq., an Individual; ROBISON BELAUSTEGUI SHARP & LOW, a Nevada Professional Corporation; CHRIS D. NICHOLS, Esq., an Individual; BELDING, HARRIS & PETRONI; JEFFREY L. HARTMAN, an Individual; and HARTMAN & HARTMAN, P.C., Respondents.

No. 60944

ROLLAND P. WEDDELL, Appellant, *v.* F. DEARMOND SHARP, Esq., an Individual; ROBISON BELAUSTEGUI SHARP & LOW, a Nevada Professional Corporation; CHRIS D. NICHOLS, Esq., an Individual; BELDING, HARRIS & PETRONI; JEFFREY L. HARTMAN, an Individual; and HARTMAN & HARTMAN, P.C., Respondents.

No. 61329

May 28, 2015 350 P.3d 80

Consolidated appeals from a district court order dismissing a contract and tort action and a post-judgment order awarding attorney fees. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Former business partner brought action against mediators of business dispute following entry of declaratory judgment that mediators' decision as to the two partners was valid and enforceable. The district court granted mediators' motion to dismiss on the basis of claim preclusion. The supreme court, Saitta, J., held that: (1) privity did

not exist between mediators and businessman under an adequate representation analysis; (2) the supreme court would adopt the doctrine of nonmutual claim preclusion; and (3) former business partner lacked a good reason for not asserting his claims against the mediators in the declaratory relief action, therefore his claims were barred.

Affirmed in part and reversed in part.

[Rehearing denied July 23, 2015]

PICKERING, J., with whom DOUGLAS, J., agreed, dissented.

Day R. Williams, Carson City; *Kenneth Dale Sisco*, Norco, California, for Appellant.

Robison Belaustegui Sharp & Low and *Keegan G. Low*, Reno, for Respondents.

1. JUDGMENT.
   Privity did not exist between mediators of business dispute and businessman under an "adequate representation" analysis, as businessman did not purport to represent the mediators' interests during prior declaratory relief action between him and former business partner, for purposes of claim preclusion determination in former business partner's subsequent action against the mediators seeking damages for the mediators' alleged breaches of contract, fiduciary duty, and obligations of good faith and fair dealing.
2. JUDGMENT.
   In the interest of further promoting finality of litigation and judicial economy, the supreme court would adopt the doctrine of nonmutual claim preclusion, meaning that a defendant may validly use claim preclusion as a defense by demonstrating that (1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) privity exists between the new defendant and the previous defendant or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff cannot provide a good reason for failing to include the new defendant in the previous action.
3. JUDGMENT.
   The purpose of nonmutual claim preclusion is generally the same as that of claim preclusion: to obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit.
4. JUDGMENT.
   Former business partner lacked a good reason for not asserting his claims against mediators of business dispute in his partner's prior declaratory relief action, seeking a judicial determination that the mediators' dispute-resolution decision was valid and enforceable as between the partners, the entry of which the former business partner had stipulated to, and therefore, business partner's later claims against the mediators, premised on the mediators' alleged collusion with his partner in the dispute-resolution process, were barred by claim preclusion, where the business partner's current claims against the mediators clearly could have been brought in the earlier declaratory judgment case.

Before the Court EN BANC.

OPINION

By the Court, Saitta, J.:

In this appeal, we consider whether a defendant may validly use claim preclusion as a defense against a plaintiff's complaint even when that defendant was not a party or in privity with a defendant in an earlier action brought by the plaintiff based on the same type of claims. Despite lacking a common defendant or privity with a defendant, some courts have applied the doctrine of nonmutual claim preclusion in cases where the defendants in the second action can demonstrate that they should have been included as parties in the first action and the plaintiff cannot show a good reason for not having included them. As this concept of nonmutual claim preclusion is designed to obtain finality of litigation and promote judicial economy in situations where the rules of civil procedure governing noncompulsory joinder, permissive counterclaims, and permissive cross-claims fall short, we adopt the doctrine of nonmutual claim preclusion. We do so because, as this appeal exemplifies, the privity requirement can be unnecessarily restrictive in terms of governing when the defense of claim preclusion may be validly asserted. Accordingly, as set forth in this opinion, we modify the privity requirement established in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008), to incorporate the principles of nonmutual claim preclusion, meaning that for claim preclusion to apply, a defendant must demonstrate that (1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, *or* the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a "good reason" for not having done so. Here, because respondents established that they should have been named as defendants in an earlier lawsuit and appellant failed to provide a good reason for not doing so, we affirm the district court's dismissal of appellant's complaint on the basis of claim preclusion.

FACTS AND PROCEDURAL HISTORY

Appellant Rolland Weddell and nonparty Michael Stewart are former business partners who were engaged in multiple business ventures. Through time, several disputes arose between the partners regarding their business dealings. The partners agreed to informally settle their disputes by presenting them to a panel of three attorneys, the respondents herein. Because respondents had previous dealings with appellant and Stewart, both appellant and Stewart signed a Memorandum of Understanding in which they acknowledged

the potential for conflicts of interest, waived those potential conflicts, recognized that respondents would be neutral in the dispute-resolution process, and agreed that the decision rendered by respondents would be "binding, non-appealable and c[ould] be judicially enforced."

The Memorandum of Understanding did not specify the process by which respondents would go about rendering their decision, and the record on appeal does not clearly reflect the process that was actually taken. In any event, respondents issued a decision resolving the partners' disputes that, for the most part, was favorable to Stewart. Stewart then filed a lawsuit against appellant, seeking a declaratory judgment that respondents' decision was valid and enforceable. Appellant filed an answer and counterclaim to Stewart's complaint in which he asked the district court to enforce only the portion of respondents' decision that was favorable to him. In support of his requested relief, appellant questioned respondents' neutrality in rendering their decision, specifically alleging that respondents had failed to answer certain questions that appellant had wanted answered, that respondents had concealed pertinent facts from each other, and that respondents had concealed from appellant their knowledge that Stewart had defrauded appellant. Appellant, however, did not assert cross-claims against any of the respondents.

During the first day of a bench trial, appellant informed the district court that he would enter a confession of judgment acknowledging that respondents' decision was, indeed, valid and enforceable against him in its entirety. Appellant proceeded to confess judgment and stipulated to dismiss his counterclaim. Over two years later, however, appellant instituted the underlying action against respondents in which he asserted causes of action stemming from respondents' conduct in the dispute-resolution process. Respondents filed a motion to dismiss the complaint and requested attorney fees as sanctions, contending that, among other reasons, dismissal was warranted on claim preclusion principles and that appellant had filed the complaint without reasonable grounds, warranting sanctions under NRS 18.010(2)(b). The district court granted respondents' motion to dismiss, finding that the three factors for claim preclusion articulated by this court in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008), had been satisfied. The district court also entered a subsequent order granting the request for attorney fees. Appellant appealed both orders.

DISCUSSION

In *Five Star*, we clarified the conceptual differences between the defenses of claim preclusion and issue preclusion, and we identified the important policy purposes served by recognizing those defenses. In particular, we recognized that the purpose of claim preclusion "is

to obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit." *Id.* at 1054, 194 P.3d at 712. In light of this purpose, we considered this court's previous four-factor test for claim preclusion, and we concluded that the test was "overly rigid," as one of the factors required that the "same relief" be sought in both complaints, thereby making the test susceptible to manipulation by litigious plaintiffs. *Id.* at 1053-54, 194 P.3d at 712-13 (abrogating *Edwards v. Ghandour*, 123 Nev. 105, 159 P.3d 1086 (2007)).

Five Star's test for applying claim preclusion

Consequently, *Five Star* modified the previous four-factor test for when claim preclusion could be asserted as a valid defense in favor of the following three-factor test, which is the test that the district court in the underlying matter employed: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star*, 124 Nev. at 1054, 194 P.3d at 713. In so doing, we expressed our belief that this three-factor test would sufficiently "maintain[ ] the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case." *Id.* at 1054-55, 194 P.3d at 713.

[Headnote 1]

Here, appellant's primary argument on appeal is that the district court erroneously found the first factor to have been satisfied—i.e., that respondents were in privity with Stewart, the defendant against whom appellant asserted his counterclaim in Stewart's declaratory relief action. In so finding, the district court ruled that respondents were sufficiently in privity with Stewart because Stewart played a role in selecting respondents as the panel members and because both Stewart and respondents had an interest in upholding respondents' dispute-resolution decision. We agree with appellant that this relationship between respondents and Stewart does not fall within this court's previously used definition of privity, which recognizes that one person is in privity with another if the person had "'acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase.'" *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009) (*quoting Paradise Palms Cmty. Ass'n v. Paradise Homes*, 89 Nev. 27, 31, 505 P.2d 596, 599 (1973)). Similarly, even under this court's recent adoption of the Restatement (Second) of Judgments section 41, *see Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 261, 321 P.3d 912, 917-18 (2014), we conclude that privity does not exist between respondents and Stewart under an

"adequate representation" analysis, as Stewart did not purport to represent respondents' interests during the declaratory relief action between him and appellant.

Thus, contrary to the district court's determination, we conclude that privity does not exist between respondents and Stewart and that *Five Star*'s test for claim preclusion was not satisfied in this instance. This conclusion, however, reveals that *Five Star*'s test for claim preclusion does not fully cover the important principles of finality and judicial economy that it intended to capture. *Cf. Five Star*, 124 Nev. at 1054-55, 194 P.3d at 713 (adopting the three-factor test based on the belief that those factors would sufficiently "maintain[ ] the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case"). Specifically, appellant's causes of action against respondents in the underlying action and his counterclaim against Stewart in the previous declaratory relief action were premised on the same alleged facts: that respondents and Stewart loosely colluded with one another to render a dispute-resolution decision unfavorable to appellant. Given these circumstances, *Five Star*'s third requirement that "the subsequent action [be] based on the same claims or any part of them that were *or could have been brought in the first case*" would be satisfied.[1] *Id.* at 1054, 194 P.3d at 713 (emphasis added); *see G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 706-07, 262 P.3d 1135, 1139 (2011) (recognizing that *Five Star*'s third factor can be satisfied when the two actions are "based on the same facts and alleged wrongful conduct" (internal quotation omitted)). Thus, but for *Five Star*'s privity requirement, appellant's causes of action against respondents would be barred by claim preclusion.

The doctrine of nonmutual claim preclusion

Implicit in *Five Star*'s privity requirement was this court's recognition that, generally, a party need not assert every conceivable claim against every conceivable defendant in a single action. *See, e.g.*, *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 796, 312 P.3d 484, 490 (2013) (recognizing that neither NRCP 19(a) nor public policy warrant adopting "a per se rule requiring a plaintiff to

[1]Appellant also argues on appeal that his confession of judgment in Stewart's declaratory relief action does not satisfy *Five Star*'s valid-final-judgment requirement because the enforceability of the dispute-resolution decision was not actually litigated. This argument, however, has no bearing on the applicability of claim preclusion. *See Five Star*, 124 Nev. at 1054 n.27, 194 P.3d at 713 n.27 (recognizing that the valid-final-judgment requirement for claim preclusion does not necessarily require a determination on the merits). Moreover, this court has recognized that a consent judgment can form a basis for claim preclusion, *see Willerton v. Bassham*, 111 Nev. 10, 16-17, 889 P.2d 823, 826-27 (1995), and we see no reason to differentiate between consent judgments and the judgment by confession at issue in this case.

join cotortfeasors to an action as necessary parties"); *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 837, 963 P.2d 465, 474 (1998) ("[A]pplying claim preclusion to subsequent litigation between former codefendants would have the effect of negating permissive cross-claim rules . . . ."). Yet despite this generally accepted premise, federal courts capably apply claim preclusion even in situations where the defendant in the second suit was not a party or in privity with a party in the first suit.

For example, in *Airframe Systems, Inc. v. Raytheon Co.*, Airframe Systems filed a lawsuit against a parent company and one of its subsidiaries alleging that the subsidiary had engaged in copyright infringement over a span of several years, the latter portion of which was during the time that the parent owned the subsidiary. 601 F.3d 9, 11-14 (1st Cir. 2010). That lawsuit was dismissed, and Airframe Systems then filed a second suit against the subsidiary and the *former* parent company that owned the subsidiary during the earlier portion of the subsidiary's alleged infringement. *Id.* On appeal, the First Circuit was presented with the question of whether the former parent company could assert claim preclusion even though it was not in privity with the then-current parent company. *Id.* at 16-17. The First Circuit recognized that "privity is a sufficient but not a necessary condition for a new defendant to invoke a claim preclusion defense." *Id.* at 17. The court then concluded that the former parent company could assert claim preclusion because it had a "close and significant relationship" with the current parent company, in that both companies had simply been serving "as interchangeable proxies" in Airframe Systems' successive attempts to hold the subsidiary company liable. *Id.* at 17-18.

Similarly, in *Gambocz v. Yelencsics*, Gambocz filed a lawsuit against a group of individuals alleging that the group had conspired to thwart Gambocz's candidacy for mayor. 468 F.2d 837, 839 & n.1 (3d Cir. 1972). The lawsuit was dismissed, and Gambocz then filed a second suit against the same group of individuals as well as against three additional defendants, once again alleging that all the defendants had conspired to thwart his candidacy for mayor. *Id.* at 839. On appeal, the Third Circuit was presented with the question of whether Gambocz's suit against the newly named defendants was barred by claim preclusion. *Id.* at 840-41. The Third Circuit concluded that claim preclusion can be validly invoked by newly named defendants when those defendants have "a close or significant relationship" with previously named defendants. *Id.* at 841. The Third Circuit then concluded that such a relationship existed in the case at hand in light of the fact that the newly named defendants had allegedly participated in a conspiracy with the previously named defendants and were even mentioned in Gambocz's complaint in his first lawsuit. *Id.* at 842; *see also Randles v. Gregart*, 965 F.2d 90, 93

(6th Cir. 1992) (applying claim preclusion in the absence of privity); *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1288-89 (5th Cir. 1989) (same); *In re El San Juan Hotel Corp.*, 841 F.2d 6, 10-11 (1st Cir. 1988) (same); *Silva v. City of New Bedford, Mass.*, 677 F. Supp. 2d 367, 371-72 (D. Mass. 2009) (same); *McLaughlin v. Bradlee*, 599 F. Supp. 839, 847-48 (D. D.C. 1984) (same).

This concept of "nonmutual" claim preclusion embraces the idea that a plaintiff's second suit against a new party should be precluded "if the new party can show good reasons why he should have been joined in the first action and the [plaintiff] cannot show any good reasons to justify a second chance." 18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4464.1 (2d ed. 2002); *see Airframe Sys.*, 601 F.3d at 18 (recognizing this standard as the primary focus in determining whether nonmutual claim preclusion is appropriate); *Mars Inc. v. Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616, 620 (3d Cir. 1995) (same).[2] Thus, in this sense, the doctrine of nonmutual claim preclusion is designed to obtain finality and promote judicial economy in situations where the civil procedure rules governing noncompulsory joinder, permissive counterclaims, and permissive cross-claims fall short. *See* Wright, *supra*, § 4464.1 ("Nonmutual claim preclusion is most attractive in cases that seem to reflect no more than a last desperate effort by a plaintiff who is pursuing a thin claim against defendants who were omitted from the first action because they were less directly involved than the original defendants.").

[Headnotes 2, 3]

The purpose of nonmutual claim preclusion, then, is the same as that of claim preclusion in general: "to obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit." *Five Star*, 124 Nev. at 1054, 194 P.3d at 712. Thus, whereas in *Five Star* we adopted a three-factor test for claim preclusion based on our conclusion that our previous

[2]To be sure, when considering whether a plaintiff had "good reasons" to justify a second suit against a new defendant, many, if not most, federal courts focus on whether the new defendant had a "close and significant relationship" with the defendant in the first suit. *See, e.g.*, *Airframe Sys.,* 601 F.3d at 17-18; *Gambocz*, 468 F.2d at 841; *see also Russell v. SunAmerica Secs., Inc.*, 962 F.2d 1169, 1175-76 (5th Cir. 1992) (concluding that the relationship between two defendants was "close enough" to apply nonmutual claim preclusion); *Fowler v. Wolff*, 479 F.2d 338, 340 (8th Cir. 1973) (recognizing that defendants' relationship with each other was "so close" that nonmutual claim preclusion should be applied). This focus, however, simply reverts back to a consideration of whether privity exists between the new defendant and the previous defendant. Thus, while a "close and significant" relationship between defendants may be sufficient in some cases to show that a plaintiff lacked "good reasons" to justify a second lawsuit, we are not persuaded that a close and significant relationship is always necessary to demonstrate that a plaintiff lacked good reasons to justify the second lawsuit.

four-factor test was "overly rigid," *id.*, we now adopt the doctrine of nonmutual claim preclusion for the same reason. In so doing, we modify *Five Star*'s test for claim preclusion to the following three-factor test: "[(1)] the final judgment is valid, . . . [(2)] the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case," *id.* at 1054, 194 P.3d at 713, and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, *or* the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a "good reason" for not having done so. Wright, *supra*, § 4464.1.

[Headnote 4]

Here, and as explained previously, there was a valid final judgment in the declaratory relief action between appellant and Stewart. As for the second factor, appellant's claims against respondents in this lawsuit are premised on respondents' alleged collusion with Stewart in the dispute-resolution process. Because Stewart's declaratory relief action sought a judicial determination that the dispute-resolution decision was valid and enforceable, and because appellant's counterclaim against Stewart sought the opposite, appellant's current claims against respondents clearly could have been brought in that case. Thus, our inquiry focuses on whether appellant has shown a good reason to justify this second lawsuit.

As his reason, appellant asserts that he lacked the necessary facts to bring suit against respondents until after he had made his confession of judgment. This assertion, if accurate, would constitute a good reason to justify appellant's second lawsuit. Appellant's assertion, however, is belied by the record. In particular, appellant's answer and counterclaim in the declaratory relief action alleged that respondents had concealed their knowledge of Stewart's attempt to defraud appellant, concealed pertinent facts from each other, refused to allow appellant to present evidence, and failed to answer certain questions that appellant wanted answered. Under NRCP 11(b)(3), those allegations were deemed to have evidentiary support at the time they were made in the answer and counterclaim. Those same allegations, however, formed the basis for appellant's causes of action against respondents in the underlying action, which was filed over two years later. In particular, appellant's complaint asserted a claim for fraud in which he alleged that "at the time [appellant] executed the Memorandum [of Understanding], [respondents] intended to decide in favor of Stewart and to conceal [respondents'] misrepresentations to courts." Appellant's complaint also asserted a claim for breach of fiduciary duty in which he alleged that respondents "put[ ] the interests of [respondents] and Stewart over the interests of [appellant] in the legal matters assigned to them." Appellant's complaint further asserted a claim for breach of contract in which

he alleged that respondents had "failed to take all actions reasonably necessary to consider the questions presented to them."

Consequently, we conclude that appellant lacked a good reason for not asserting his claims against respondents in Stewart's declaratory relief action. We therefore affirm the district court's dismissal of appellant's complaint on the ground that it was barred by claim preclusion. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (recognizing that this court will affirm the district court's judgment if the district court reached the right result, albeit for different reasons).[3]

CONCLUSION

In the interest of further promoting finality of litigation and judicial economy, we adopt the doctrine of nonmutual claim preclusion, meaning that a defendant may validly use claim preclusion as a defense by demonstrating that (1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) privity exists between the new defendant and the previous defendant *or* the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff cannot provide a "good reason" for failing to include the new defendant in the previous action. Because appellant failed to provide such a reason in this case, the district court properly dismissed appellant's complaint on the basis of claim preclusion.

Hardesty, C.J., and Parraguirre, Cherry, and Gibbons, JJ., concur.

Pickering, J., with whom Douglas, J., agrees, dissenting:

It is a mistake to resolve this case based on nonmutual claim preclusion, a doctrine the parties neither briefed nor argued until directed to do so by this court. The declaratory judgment the majority deems preclusive—to the entry of which Weddell stipulated—established only that the mediation panel's decision was valid and enforceable as between Stewart and Weddell. This is not the same claim, and it does not involve the same parties, as Weddell's later claims against the mediators, seeking damages for the mediators' alleged breaches of contract, fiduciary duty, and obligations of good faith and fair dealing.

In *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 712-13 (2008), this court lamented the "lack of clarity in our

[3]Because appellant's complaint would not have been barred under this court's articulation of the claim preclusion factors in *Five Star*, appellant had arguably reasonable grounds for filing the complaint. *See* NRS 18.010(2)(b). We therefore reverse the post-judgment award of attorney fees.

caselaw regarding the factors relevant to determining whether claim or issue preclusion apply" and undertook to provide "clear tests for making such determinations." For claim preclusion, we adopted a three-part test: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Id.* at 1054, 194 P.3d at 713 (footnotes omitted). Today's decision substantially dilutes both the first and third factors and in so doing disturbs the balance between need for repose, fairness, and efficiency that informs our claim preclusion law, reintroducing the uncertainty *Five Star* sought to dispel.

Claim preclusion requires the assertion of claims against a litigation opponent on penalty of forfeiture. The doctrine promotes consistent outcomes and repose but its requirements recognize that, if the second suit involves different parties or different claims, fairness and efficiency may require allowing a second, factually related suit to proceed except as to those matters that were actually litigated, to which issue preclusion may attach. *See* 18 Charles Alan Wright, Arthur R. Miller & Edwin H. Cooper, *Federal Practice and Procedure* § 4407 (2d ed. 2002) (noting that "maximum expansion" of claim preclusion is undesirable since "[r]ules requiring assertion of all claims at once on pain of forfeiture would often increase litigation of matters that otherwise would be forgotten or forgiven"). Because nonmutual claim preclusion expands the persons who can assert claim preclusion beyond the parties and their privies, courts approach the doctrine "cautiously," 18A Wright, Miller & Cooper, *supra*, § 4463. As a rule, nonmutual claim preclusion is "'generally disfavored,'" *N.Y. Pizzeria, Inc. v. Syal*, 53 F. Supp. 3d 962, 969 (S.D. Tex. 2014) (quoting *Novell, Inc. v. Microsoft Corp.*, 429 Fed. App'x 254, 261 (4th Cir. 2011)), and, when recognized, has been applied mainly to circumstances involving indemnification or derivative liability relationships, or to prevent indirect defeat of a prior judgment, usually one involving complex natural resource or patent law issues. For a general discussion see 18A Wright, Miller & Cooper, *supra*, § 4464.1 (noting that "[t]he arguments for nonmutual claim preclusion beyond these situations are substantially weaker than the arguments for nonmutual issue preclusion").

The hallmark characteristic of—and "only cogent argument" for—"nonmutual claim preclusion is that the party to be precluded should have joined his new adversary in the original litigation." *Id.* This case does not fit that mold. In the first place, the judgment the majority treats as preclusive was the declaratory judgment Stewart sued Weddell to obtain in Stewart v. Weddell, to the entry of which Weddell confessed. It is questionable whether a declaratory judgment carries claim, as distinct from issue, preclusive effect, *see* Restatement (Second) of Judgments § 33 (1982); 18A Wright, Miller &

Cooper, *supra*, § 4446 (describing the claim-preclusion effects of a declaratory judgment as "shrouded in miserable obscurity")—even ignoring the problems with using a *confessed* judgment to effect preclusion on nonlitigated issues involving one or more nonparties, *see* 18A Wright, Miller & Cooper, *supra*, § 4463. Second, and more precisely germane to nonmutual claim preclusion, Weddell was the defendant to Stewart's declaratory judgment complaint and, as such, did not control the persons Stewart sued or joined.

The majority suggests, *ante* at 236, that Weddell could have "assert[ed] cross-claims against . . . the respondent[ ]" mediators in Stewart v. Weddell. I acknowledge that Weddell counterclaimed against Stewart when he answered Stewart's declaratory judgment complaint[1] and take the majority to be saying that Weddell should have joined the mediators as additional third-party or counterclaim defendants in Stewart v. Weddell. But parties seeking to confirm or vacate arbitration (here mediation) awards do not join the arbitrators or mediators; they join the others who were party to the alternative dispute resolution process. As the majority's finding of "no privity" between Stewart and the mediators suggests, whether the award (decision) is confirmed or not does not matter to the mediator, since he or she is not personally liable on the claims in dispute. It is thus far from clear that the mediators, as neutrals, were persons whose joinder was appropriate under NRCP 19 and 20, *see* NRCP 13(h), much less persons "who [are] or may be liable to [Weddell] for all or part of [Stewart's] claim against [Weddell]," whose joinder NRCP 14 would authorize. *See N.Y. Pizzeria*, 53 F. Supp. 3d at 971 (similarly questioning third-party practice under the Texas cognate to NRCP 14). And, procedure aside, Weddell's claims against the mediators depended on Stewart winning declaratory judgment validating the panel's decision against Weddell. Given this, it is not reasonable to require the mediators' joinder, on penalty of forfeiture, as parties to the dispute between Stewart and Weddell. Indeed, imposing such a penalty incentivizes the unnecessary expansion of litigation that claim preclusion's three-factor test seeks to avoid.

Gambocz v. Yelencsics, 468 F.2d 837 (3d Cir. 1972), on which the majority relies, does not support application of nonmutual claim preclusion here. The plaintiff in *Gambocz* alleged conspiracy to thwart his candidacy for mayor. *Id*. at 839 n.1. After his first suit was dismissed, the plaintiff filed a second suit, repeating the same claims but adding three new defendants. *Id*. at 839. Given the "close

[1]Weddell sued Stewart before Stewart sued him. While the two suits apparently were consolidated, with Weddell initially incorporating his complaint against Stewart into his answer and counterclaims, the Stewart v. Weddell suit proceeded to trial first and resulted in a stipulated judgment that was limited to the declaration of validity Stewart sought as to the mediation panel decision. Weddell's complaint against Stewart proceeded to separate judgment and the majority does not treat it as relevant to its preclusion analysis.

or significant relationship" between the defendants to the first and second suits, who were alleged to have conspired with one another, and the identity of factual and legal theories, claim preclusion applied. *Id*. at 842.

In this case, by contrast, Stewart's and Weddell's dispute with one another differs from Weddell's dispute with the mediators. Weddell and Stewart did not deal with one another as lawyer to client, or neutral to party; they were failed former business associates, in combat with one another. Weddell's claims against the neutrals, by contrast, are for breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing, among others. This suit by Weddell against the mediators seems doomed as a matter of common law arbitral immunity. *See* Rebekah Ryan Clark, *The Writing on the Wall: The Potential Liability of Mediators as Fiduciaries*, 2006 B.Y.U. L. Rev. 1033 (2006); William M. Howard, *Liability of Organization Sponsoring or Administering Arbitration to Parties Involved in Proceeding*, 69 A.L.R.6th 513 (2011) (collecting cases). But this does not change the fact that his claims against the neutrals arise from his allegations that they owed him fiduciary duties by reason of their status as attorneys and the role they undertook contractually to act as neutrals in mediating the dispute between Stewart and Weddell. These claims are legally and analytically distinct from Weddell's claims against Stewart and Stewart's claims against him, even as those claims relate to the agreement to submit their disagreements to binding mediation.

For these reasons, I respectfully dissent. I would reverse and remand for the district court to decide whether this suit is subject to dismissal on the basis of immunity or one of the alternative bases asserted by respondents but not decided by the district court in their motion to dismiss. I cannot agree that Weddell, on penalty of claim preclusion, was required to join the mediators as third-party or counterclaim defendants to the Stewart v. Weddell declaratory judgment suit.

CATHOLIC DIOCESE OF GREEN BAY, INC., Appellant, *v.* JOHN DOE 119, Respondent.

No. 62840

May 28, 2015 349 P.3d 518

Appeal from a final judgment in a tort action. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Alleged victim who claimed to have been molested by priest as a child brought action against Catholic diocese in Wisconsin for negligently retaining, supervising, and failing to warn others about priest. The district court entered judgment for alleged victim following jury trial. Diocese appealed. The supreme court, Cherry, J., held that ecclesiastical doctrine of incardination did not conclusively establish employment or agency relationship between diocese and priest and, thus, did not support personal jurisdiction.

Reversed.

[Rehearing denied July 23, 2015]

Mazzeo Law LLC and *Peter A. Mazzeo*, Las Vegas, for Appellant.

Matthew L. Sharp, Reno; *Jeff Anderson & Associates, P.A.*, and *Michael G. Finnegan* and *Jeffrey R. Anderson*, St. Paul, Minnesota, for Respondent.

1. Appeal and Error.
   When reviewing a district court's exercise of jurisdiction, the supreme court reviews legal issues de novo but defers to the district court's findings of fact if they are supported by substantial evidence.
2. Constitutional Law; Courts.
   For a Nevada court to have personal jurisdiction over a nonresident defendant, a plaintiff must establish, by a preponderance of the evidence, that (1) Nevada's long-arm statute is satisfied, and (2) the exercise of jurisdiction does not offend due process; because Nevada's long-arm statute is coterminous with the limits of constitutional due process, these two requirements are the same. U.S. Const. amend. 14; NRS 14.065.
3. Constitutional Law; Courts.
   A court has specific personal jurisdiction over a defendant when the defendant has certain minimum contacts with the forum state and an exercise of jurisdiction would not offend traditional notions of fair play and substantial justice.
4. Courts.
   Under a three-part test to determine whether a court may exercise specific personal jurisdiction, the defendant must, first, purposefully avail himself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum, or the defendant must purposefully establish contacts with the forum state and affirmatively direct conduct toward the forum state; second, the cause of action must arise from the purposeful contact with the forum or conduct targeting the forum; and, third, the court must consider whether requiring the defendant to appear in the action would be reasonable or whether the exercise of jurisdiction comports with fair play and substantial justice.

5. COURTS.
   Purposeful availment, as required to support specific personal jurisdiction over a nonresident defendant in the forum state, occurs when one purposefully directs his or her conduct towards the forum state.
6. COURTS.
   The mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state for personal jurisdiction purposes.
7. CONSTITUTIONAL LAW.
   The foreseeability relevant to due process, for personal jurisdiction purposes, is that the defendant's conduct and connection with the forum state are such that he or she should reasonably anticipate being haled into court there. U.S. CONST. amend. 14.
8. COURTS.
   Letter of recommendation regarding priest, sent by Catholic diocese in Wisconsin to bishop in California, and phone call, possibly regarding priest's employment recommendation, from diocese in Nevada to diocese in Wisconsin, were not evidence of purposeful availment in Nevada by the Wisconsin diocese and, thus, did not support exercise of personal jurisdiction over Wisconsin diocese, in action against Wisconsin diocese for negligently retaining, supervising, and failing to warn others about priest, who served in Nevada and allegedly molested child; the acts of sending the letter and receiving the phone call were merely the result of the priest's unilateral act of seeking employment in Nevada.
9. PRINCIPAL AND AGENT.
   An agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which he or she was hired.
10. LABOR AND EMPLOYMENT.
    To determine control in an employment relationship, courts consider the following indicia: whether the employer has the right to direct the daily manner and means of a person's work, whether the worker is required to follow the putative employer's instructions, and whether the worker can refuse work offered without ramification.
11. COURTS; RELIGIOUS SOCIETIES.
    Ecclesiastical doctrine of incardination, whereby a bond existed between a Catholic priest and the diocese where he was ordained, did not conclusively establish employment or agency relationship between Wisconsin diocese and priest and, thus, did not support personal jurisdiction, in action against Wisconsin diocese for negligently retaining, supervising, and failing to warn others about priest, who served in Nevada and allegedly molested child; doctrine of incardination did not give Wisconsin diocese control or supervision over priest's day-to-day work in Nevada.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

Here we consider whether Nevada courts have personal jurisdiction over a foreign Catholic diocese. The Catholic Diocese of Green Bay, a religious organization incorporated and headquartered

in Wisconsin, employed Father John Feeney as a priest. Feeney later served as a priest in California before coming to the Diocese of Reno-Las Vegas. It was alleged that, during Feeney's time in Las Vegas, Feeney sexually assaulted John Doe 119. Doe sued the Diocese of Green Bay for negligently hiring and retaining Feeney, asserting that the Diocese is responsible for the injuries caused by the sexual abuse.

We conclude that the district court did not have personal jurisdiction over the Diocese of Green Bay in this case. The Diocese did not have sufficient contacts with Nevada. The Catholic doctrine of incardination, whereby Feeney promised obedience to the Diocese of Green Bay, is insufficient to establish a legal employment or agency relationship between Feeney and the Diocese. Accordingly, we reverse the judgment against the Diocese.

FACTS AND PROCEDURAL HISTORY

Doe filed this negligence suit against the Diocese of Green Bay in the Eighth Judicial District Court. Doe alleged that Feeney molested him in 1984, but that it was not until around 2008 that he discovered that his psychological injuries were the result of Feeney's acts of abuse. Doe alleged that Feeney was an agent of the Diocese of Green Bay at the time that he molested Doe in Las Vegas. Doe further alleged that, at the time of the abuse, the Diocese was aware that Feeney had molested other children in Wisconsin. He claimed that the Diocese negligently retained and supervised Feeney and failed to warn others that Feeney was a danger to children.

After an evidentiary hearing held during the trial, the district court concluded that it had jurisdiction over the Diocese. The district court found that Feeney served both the Reno-Las Vegas and the Green Bay Dioceses: While the Diocese of Reno-Las Vegas oversaw Feeney's daily activities, the court found that Feeney was originally incardinated in the Diocese of Green Bay and, therefore, had made a promise of obedience to the Diocese of Green Bay. The court further found that the Diocese of Green Bay had the ability to restrict Feeney's ministry, could recall him to Green Bay, and maintained his pension.

Besides any employment relationship, the district court also found that the Diocese of Green Bay had two other contacts with Nevada. It found that the Diocese of Green Bay gave Feeney a positive recommendation via a letter of good standing. And it further found that the Vicar-General of the Diocese of Green Bay spoke to the Bishop of Reno-Las Vegas about Feeney's placement.

After a lengthy trial, the jury returned a verdict in favor of Doe on the negligence claims. The Diocese of Green Bay appealed, arguing that the district court lacked personal jurisdiction over the Diocese.

DISCUSSION

[Headnote 1]

When reviewing a district court's exercise of jurisdiction, we review legal issues de novo but defer to the district court's findings of fact if they are supported by substantial evidence. *See Baker v. Eighth Judicial Dist. Court*, 116 Nev. 527, 531, 999 P.2d 1020, 1023 (2000) (stating standard of review for personal jurisdiction).

[Headnote 2]

For a court to have personal jurisdiction over a nonresident defendant, a plaintiff must establish, by a preponderance of the evidence, that (1) Nevada's long-arm statute, NRS 14.065, is satisfied; and (2) the exercise of jurisdiction does not offend due process. *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 512, 134 P.3d 710, 712 (2006); *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993). Because Nevada's long-arm statute is coterminous with the limits of constitutional due process, *Arbella Mut. Ins.*, 122 Nev. at 512, 134 P.3d at 712; *see* NRS 14.065, these two requirements are the same.

The United States Supreme Court analyzes the constitutionality of an exercise of jurisdiction in two distinct ways: general personal jurisdiction and specific personal jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014). With respect to general jurisdiction, the Supreme Court typically looks at a corporation's place of incorporation or its principal place of business in ascertaining whether jurisdiction exists. *Id*. at 137. The parties here do not dispute that the Diocese of Green Bay is incorporated in Wisconsin and that its principal place of business is also in Wisconsin. Doe does not present any argument that the Diocese is essentially at home in Nevada. *See id.* Therefore, general jurisdiction does not apply to this case.

[Headnotes 3, 4]

A court has specific jurisdiction over a defendant when the defendant has certain minimum contacts with the forum state and an exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. *Id*. at 127. This court follows a three-part test to determine whether a court may exercise specific jurisdiction. First, the defendant must "purposefully avail[ ] himself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum," or the defendant must "purposefully establish[ ] contacts with the forum state and affirmatively direct[ ] conduct toward the forum state." *Arbella*, 122 Nev. at 513, 134 P.3d at 712-13 (internal quotations omitted). Second, the cause of action must arise "from that purposeful contact with the forum or conduct targeting the forum." *Id.* at 513, 134 P.3d

at 713 (internal quotations omitted). Third, "a court must consider whether requiring the defendant to appear in the action would be reasonable" or, in the United States Supreme Court's terminology, whether the exercise of jurisdiction comports with fair play and substantial justice. *Id.* at 512-13, 134 P.3d at 712-13.

Our inquiry is focused on the first part of the test: Did the Diocese purposefully avail itself of Nevada law or otherwise establish contacts with or direct conduct toward Nevada? We conclude that it did not.

Purposeful availment

[Headnotes 5-7]

Purposeful availment occurs when one "purposefully directs her conduct towards Nevada." *Dogra v. Liles*, 129 Nev. 932, 937, 314 P.3d 952, 955 (2013). "Thus, 'the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'" *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Furthermore, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. "Rather, [the foreseeability relevant to due process] is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

In a case factually similar to this one, the New Mexico Court of Appeals held that a Boise priest "select[ing] New Mexico from among several other possible diocesan destinations in which to seek employment . . . does not constitute a purposeful act by the Boise Diocese to avail itself of the benefits and protections of New Mexico law." *Doe v. Roman Catholic Diocese of Boise, Inc.*, 918 P.2d 17, 23 (N.M. Ct. App. 1996). The New Mexico court also noted that giving "permission to leave Idaho [does not] constitute activity whereby the Boise Diocese could reasonably anticipate being haled into court in New Mexico for any and all tortious acts alleged to have subsequently been committed by" the priest. *Id.* The court emphasized that it was "the acts of the Boise Diocese, not the acts of [the priest], that must provide the basis for this state exercising personal jurisdiction over the Boise Diocese." *Id.*

Other courts have also focused the inquiry on whether a diocese purposefully placed a priest in another state or, conversely, the priest was acting of his own accord. The Washington Court of Appeals held that jurisdiction *did* exist where the diocese itself placed the priest in Washington. *Does 1-9 v. Compcare, Inc.*, 763 P.2d 1237, 1243 (Wash. Ct. App. 1988). Conversely, in an unpublished case, a Delaware Superior Court found no jurisdiction where the priest unilaterally traveled into Delaware to molest children. *Tell v. Roman*

Catholic Bishops of Diocese of Allentown, 2010 WL 1691199, at *15-16 (Del. Super. Ct. Apr. 26, 2010).

Likewise, our inquiry focuses on the Diocese's purposeful conduct toward Nevada. Feeney's unilateral choice to seek employment here is not relevant. The question is whether the Diocese established minimum contacts with Nevada, either by direct contact with the state or through Feeney as its agent.

The Diocese's contacts with Nevada

According to the district court's findings, the Diocese of Green Bay had the following contacts with Nevada: (1) it gave Feeney a letter of recommendation, (2) it spoke to the Bishop of Reno-Las Vegas about Feeney, (3) it periodically monitored and had contact with Feeney, and (4) it maintained some sort of employment or controlling relationship with Feeney.

[Headnote 8]

Contrary to the district court's findings, the Green Bay Diocese's letter of recommendation is not evidence of purposeful availment in Nevada. The letter was addressed to a Bishop in California regarding Feeney's possible employment in California. It was merely Feeney's unilateral act of seeking employment in Nevada that resulted in the letter's transmission to the Diocese of Reno-Las Vegas. Such unilateral acts on the part of a third party cannot create jurisdiction over a defendant. *See Dogra*, 129 Nev. at 937, 314 P.3d at 955. And, along the same lines, the Green Bay Diocese's receipt of a phone call from the Las Vegas Diocese, possibly regarding an employment recommendation, is not purposeful availment of a foreign jurisdiction's law.

Only the third and fourth facts, the alleged monitoring and employment of Feeney, could have any bearing on personal jurisdiction. The alleged monitoring appears to have been little more than the occasional letter between Feeney and the Vicar General of the Diocese of Green Bay—but receiving and sending letters is not purposeful availment. The content of the letters, however, may indicate a relationship with Feeney during his time in Las Vegas. This of course suggests the following issue: Was Feeney an employee or agent of the Diocese of Green Bay such that it, through Feeney, subjected itself to Nevada's jurisdiction?

Agency, control, and the doctrine of incardination

The district court found that Feeney was employed by both the Diocese of Reno-Las Vegas and the Diocese of Green Bay. The district court's analysis appears to center on three findings. First, it found that the Diocese of Green Bay maintained Feeney's pension. Second, it found that the Diocese monitored Feeney and could

restrict his ministry. Third, it found that Feeney had made a promise of obedience to the Diocese through the Catholic doctrine of incardination.

[Headnotes 9, 10]

"At common law, an employment relationship was defined by agency principles . . . ." *Boucher v. Shaw*, 124 Nev. 1164, 1167, 196 P.3d 959, 961 (2008). "An agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which he or she was hired." *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 299, 183 P.3d 895, 902 (2008). To determine control in an employment relationship under Nevada labor statutes, courts consider the following indicia: "whether the employer has the right to direct the daily manner and means of a person's work, whether the worker is required to follow the putative employer's instructions, and whether the worker can refuse work offered without ramification." *State Dep't of Emp't, Training & Rehab., Emp't Sec. Div. v. Reliable Health Care Servs. of S. Nev., Inc.*, 115 Nev. 253, 258, 983 P.2d 414, 417 (1999).

The district court's finding that the Diocese of Green Bay maintained Feeney's pension is not supported by the record. The record shows that Feeney's pension was maintained by a separate group, the Leo Benevolent Association. This association maintained contact with the Reno-Las Vegas Diocese during Feeney's employment there.

The district court also found that the Diocese of Green Bay monitored Feeney and that the Diocese could restrict Feeney's ministry or recall him to Green Bay. But there does not appear to be any evidence that the Diocese of Green Bay assigned daily tasks to Feeney that he could not refuse consistent with his employment.

[Headnote 11]

The court's remaining support for finding an employment or agency relationship is the ecclesiastical doctrine of incardination. The Diocese's canonical law expert gave uncontradicted testimony explaining incardination as a kind of bond tying the priest to the diocese that ordains him:

> Let's say for example, a priest with the Diocese of Salt Lake City, who's incardinated there, chooses to serve in the Diocese of Las Vegas. Well, he remains incardinated in virtue of his ordination the Diocese of Salt Lake City.
>
> . . . .
>
> So when a cleric, deacon, priest or bishop, is incardinated in the diocese, it creates a bond with that diocese where that is kind of home base for that cleric. The diocese of incardination would have, for example, obligations of support. The diocese

> also makes a determination that there's a pastoral need in this diocese for you to help out with pastoral ministry. That's why we're ordaining you to this diocese and that's why we're going to create this tight relationship with the diocese.

The expert testified that incardination has no bearing on supervisory authority; the bishop in whose territory the priest is serving has supervisory authority. In other words, incardination alone is irrelevant to supervision and supervisory authority in the Catholic Church is tied to geographical location, with a bishop having complete authority to supervise priests ministering in his particular territory. Further, the Diocese's expert gave uncontradicted testimony that the Diocese did not have unrestricted authority, under Catholic doctrine, to recall Feeney or restrict his ministry.

We conclude that the ecclesiastical system of incardination does not conclusively establish employment or agency. The doctrine of incardination did not give the Diocese of Green Bay control or supervision over Feeney's day-to-day work in the Diocese of Reno-Las Vegas. In light of the uncontradicted deposition and expert testimony, the district court's finding that Feeney could be recalled to Green Bay at any time was clearly erroneous. The district court made no other finding, and Doe does not point to any evidence showing, that the Diocese of Green Bay controlled Feeney's ministry in Las Vegas. Accordingly, the district court erred in holding that the Diocese of Green Bay controlled Feeney as an employee or agent in Nevada.

The doctrine of incardination may have some significance for courts. Certainly courts must sometimes consider a religious organization's ecclesiastical structure when making decisions regarding the organization. *See Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1976). We cannot opine on ecclesiastical matters; on those we must defer to the religious entity. *Id*. But whether the religious entity's corporate structure creates an employment relationship is a question of civil law that we may determine without opining on ecclesiastical matters. *Cf.* Ira C. Lupu & Robert W. Tuttle, *Secular Government, Religious People* 60 (Eerdmans 2014) ("If . . . the subject of a dispute falls outside" of ecclesiastical matters, "the court should . . . hear the case. Many aspects of the relationship between clergy and religious employers do not implicate ecclesiastical matters."). Here, the legal standards of employment such as control and direction, *see Reliable Health Care Servs.*, 115 Nev. at 258, 983 P.2d at 417, control our analysis, not the ecclesiastical doctrine of incardination.[1]

---

[1]Relatedly, the United States Supreme Court recently held that churches have absolute autonomy to determine who will serve as their ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012) ("According the state the power to determine which individuals will

CONCLUSION

The Diocese of Green Bay did not have sufficient contacts with Nevada to show that it purposefully availed itself of the state's laws and protections. Feeney was not the Diocese's agent during his ministry in Las Vegas. His promise of obedience to the Diocese of Green Bay, through the ecclesiastical doctrine of incardination, is not sufficient to establish an agency or employment relationship. Therefore, we conclude that the district court did not have personal jurisdiction over the Diocese. We reverse the district court's decision.

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

JENNIFER L., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE FRANK P. SULLIVAN, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA; AND R.L., REAL PARTIES IN INTEREST.

No. 63176

June 4, 2015 351 P.3d 694

Original petition for a writ of mandamus seeking an order directing the juvenile division of the district court to dismiss the underlying neglect petition sustained against petitioner.

The State filed an abuse and neglect petition naming child as a minor in need of protection and asking the court to declare child a ward of the court, alleging that mother's mental health issues adversely affected her ability to care for child. The district court sustained the allegations in the abuse and neglect petition, found that it was in child's best interest to be adjudicated a child in need of protection, and recommended that child remain in the custody and control of the Department of Family Services. Mother petitioned for writ of mandamus. The supreme court, DOUGLAS, J., held that: (1) guardianship did not preclude neglect finding against mother, and (2) mother did not leave child "in an environment where the child is known to be receiving proper care."

Petition denied.

---

minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."). Although we do not opine on the issue today, courts must be aware of the First Amendment issues that may be raised by these kinds of negligence actions.

David M. Schieck, Special Public Defender, and *Abira Grigsby*, Deputy Special Public Defender, Clark County, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jennifer I. Kuhlman*, Chief Deputy District Attorney, Clark County, for Real Party in Interest State of Nevada.

Gordon Silver and *Paola M. Armeni* and *Puneet K. Garg*, Las Vegas, for Real Party in Interest R.L.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion.
2. MANDAMUS.
   The supreme court exercises its discretion to consider a writ petition when there is no plain, speedy, and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration.
3. INFANTS.
   Mother could not substantively appeal from abuse and neglect determination of the district court's juvenile division. NRAP 3A(b)(7).
4. MANDAMUS.
   The supreme court would exercise its discretion to consider mother's petition for writ of mandamus challenging the district court's abuse and neglect determination against mother, where the petition raised the important legal question of whether a parent may be responsible for abuse or neglect when parental rights have not been relinquished and a guardianship over the child is in place. NRS 128.014, 159.079(7).
5. GUARDIAN AND WARD; INFANTS.
   The establishment of a guardianship over child did not preclude a finding on the State's abuse and neglect petition that mother was responsible for neglecting child during the guardianship, since the guardianship did not relieve mother of the duty to provide for child's care, support, and maintenance. NRS 128.014, 159.079(7).
6. STATUTES.
   When a statute is clear and unambiguous, the supreme court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.
7. INFANTS.
   The rule that "neglect is not established when the child is left by the parent in an environment where the child is known to be receiving proper care" did not bar the juvenile court from making a neglect finding against a mother who was civilly committed and who left the child in the father's care until the father's death, even if after the father's death the child initially was properly cared for under guardianships, where the child's most recent guardian left the child under the care of a caretaker who was never legitimately established as the child's guardian, the child made abuse allegations against the caretaker, and the caretaker decided that she no longer wanted the child living in her home. NRS 128.014, 159.079(7).

Before PARRAGUIRRE, DOUGLAS and CHERRY, JJ.

OPINION

By the Court, DOUGLAS, J.:

Petitioner Jennifer L. seeks a writ of mandamus compelling the juvenile division of the district court to dismiss a neglect petition and finding of neglect entered against her. We take this opportunity to consider whether a parent may be held responsible for neglecting a child when a legal guardianship is in place over the child.[1] We conclude that even while a child is under an NRS Chapter 159 guardianship, the child's parents have a statutory duty to continue to care for the child, and parental responsibility for neglect may coincide with the guardianship.

FACTS

Jennifer is civilly committed and resides in Wisconsin under a doctor's care. She has been diagnosed with schizoaffective disorder. A court order requires that Jennifer take her prescribed medication and see a caseworker.

Real party in interest R.L. is Jennifer's daughter. R.L. was residing in Nevada with her father, David L., and his wife, Evelyn, at the time of David's death in 2009. Evelyn cared for R.L. for a short time after David's death and was appointed R.L.'s guardian in December 2009. However, in May 2010, Evelyn terminated her guardianship and Evelyn's neighbor, Marjorie F., became R.L.'s legal guardian.[2] Thereafter, Marjorie moved to California and left R.L. under the care of Brenda D. Although school documents identified Brenda as R.L.'s guardian, Brenda's guardianship was never legitimately established pursuant to NRS Chapter 159.[3]

While R.L. was residing with Brenda, she accused Brenda of battering her, encouraging her to sell marijuana, threatening to kill her if she called Child Protective Services, and spending her social security checks without providing for her basic needs. After R.L. resided with Brenda for three years, the Department of Family Services (DFS) removed R.L. The allegations against Brenda were unsubstantiated, but Brenda no longer wanted R.L. living in her home.

Subsequently, the State filed an abuse and neglect petition naming R.L. as a minor in need of protection pursuant to

[1]We decline to consider Jennifer's other contentions because we find they lack merit.

[2]Marjorie and Evelyn were appointed as guardians under NRS Chapter 159.

[3]Marjorie thought she completed the proper paperwork to transfer temporary guardianship of R.L. to Brenda, but her actions were not legally recognized and Marjorie's guardianship was never terminated.

NRS Chapter 432B and asking the court to declare R.L. a ward of the court. The petition identified Jennifer and Marjorie as R.L.'s mother and legal guardian, respectively, and alleged that Jennifer's mental health issues adversely affected her ability to care for R.L. Marjorie was eventually removed from the petition, leaving Jennifer as the sole responsible party.

Jennifer entered a denial in response to the petition. She also filed a motion to dismiss the petition, arguing that no material facts were at issue because she had neither legal nor physical custody of R.L. and therefore could not be responsible for neglect.

On October 31, 2012, an order of reasonable efforts was issued by the hearing master. The hearing master found that DFS made reasonable efforts pursuant to NRS Chapter 432B to prevent removal, including discussion with Jennifer about placing R.L. in her home. The hearing master further found that allowing R.L. to reside with Jennifer was contradictory to R.L.'s welfare.

On February 20, 2013, the hearing master issued a decision sustaining the allegations in the abuse and neglect petition and finding that Jennifer's anxiety and depression affected her ability to provide care for R.L. Among other findings, the hearing master found specifically that (1) Jennifer was receiving intensive in-home care; (2) Jennifer had a co-occurring diagnosis of schizoaffective disorder with delusions and alcohol dependence; (3) Jennifer had severe memory impairment, for which she was required by court order to take medication; and (4) when R.L. last visited Jennifer, R.L. took on the parent role. The hearing master found that it was in R.L.'s best interest to be adjudicated a child in need of protection pursuant to NRS 432B.330 and recommended that R.L. remain in the custody and control of DFS. The juvenile division of the district court adopted the hearing master's recommendation, finding Jennifer responsible for neglect because her mental condition prevented her from providing care for R.L. Jennifer's request to stay the proceedings pending a writ petition to this court was denied by the juvenile division of the district court.

DISCUSSION

[Headnotes 1, 2]

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 868-69, 124 P.3d 550, 552 (2005). We exercise our discretion to consider a writ petition "when there is no plain, speedy and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration." *Id.* at 869, 124 P.3d at 552 (internal quotation omitted).

[Headnotes 3, 4]

Jennifer cannot substantively appeal from the juvenile division of the district court's abuse and neglect determination. *See* NRAP 3A(b)(7) (limiting appeals to orders finally establishing or altering child custody when proceedings *do not* arise from juvenile court); *In re A.B.*, 128 Nev. 764, 769, 291 P.3d 122, 126 (2012) (noting that the lower court's order arose from a juvenile proceeding and therefore was not substantively appealable under NRAP 3A). Moreover, this petition raises the important legal question of whether a parent may be responsible for abuse or neglect when parental rights have not been relinquished and a guardianship over the child pursuant to NRS Chapter 159 is in place. Thus, we exercise our discretion to consider the petition, reviewing the legal question presented de novo. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) ("Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition.").

NRS 159.079

[Headnote 5]

Jennifer argues that she cannot be responsible for neglect because Marjorie was R.L.'s guardian when the petition was filed. The State contends that NRS 159.079, the statute under which Marjorie's guardianship was established, does not relieve a parent from the duty to provide for the care, support, or maintenance of a child. The juvenile court concluded that a guardianship need not be set aside for parental responsibility to exist. We agree.

[Headnote 6]

"When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction." *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). NRS 159.079(7) provides: "This section does not relieve a parent or other person of any duty required by law to provide for the care, support and maintenance of any dependent." Applying the plain and ordinary meaning of NRS 159.079(7) here leads us to conclude that, as R.L.'s natural mother, Jennifer continues to be responsible for R.L.'s care, irrespective of Marjorie's guardianship. Accordingly, Jennifer may be held legally responsible for neglect.

Chapman

Despite NRS 159.079's plain meaning, Jennifer contends that the instant case is similar to *Chapman v. Chapman*, 96 Nev. 290, 294, 607 P.2d 1141, 1144 (1980), where we determined that a parent could not be responsible for neglect when the child was left with

someone known to be providing proper care for the child. According to Jennifer, R.L. had been receiving proper care from Brenda, and there is no dispute over that fact. On the contrary, that fact is disputed by both the State and the juvenile division of the district court; the facts established that Brenda was no longer willing or able to care for R.L. Thus, the juvenile court concluded that *Chapman* was inapplicable. We agree that the rule announced in *Chapman* does not apply here.

In *Chapman*, a child's father took custody and allowed his brother and sister-in-law, who were appointed as the child's legal guardians when the father died, to care for the minor. *Id.* at 291, 607 P.2d at 1142-43. The guardians then petitioned to terminate the mother's parental rights. *Id.* at 292, 607 P.2d at 1143. The juvenile division of the district court granted the guardians' petition and found that the mother was an unfit parent and that she abandoned and neglected the child. *Id.* This court reversed that decision and determined that:

> NRS 128.014 defines a neglected child. As we read the statute, a finding of neglect must be based upon the treatment of the child while the parent has custody: neglect is not established when the child is left by the parent in an environment where the child is known to be receiving proper care.

Id. at 294, 607 P.2d at 1144 (footnote omitted) (citing *In re Adoption of R.R.R.*, 96 Cal. Rptr. 308 (Ct. App. 1971)).

[Headnote 7]

Here, it may be true that R.L. was initially being properly cared for by her stepmother Evelyn and then by Marjorie. However, those circumstances changed when R.L. was residing with Brenda and reports of alleged abuse and neglect surfaced. Although the reports against Brenda were unsubstantiated, Brenda was no longer willing to provide care for R.L. Moreover, Jennifer was unable to provide care for R.L. due to her mental illness. Thus, at the time of the petition, R.L. was not receiving proper care, making this case distinguishable from *Chapman*.

Because *Chapman* is inapposite and NRS 159.079(7) explicitly preserves parental responsibility for a child, even when a guardianship is in place, the juvenile court properly sustained the neglect petition based on Jennifer's inability to provide proper care for R.L. Accordingly, we decline to issue a writ of mandamus.

Parraguirre and Cherry, JJ., concur.