LANDON SHORES, Appellant, *v.* GLOBAL EXPERIENCE SPECIALISTS, INC., Respondent.

No. 72716

August 2, 2018 422 P.3d 1238

Appeal from a district court order granting a preliminary injunction in an employment matter. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

**Reversed.**

*Kemp, Jones & Coulthard, LLP*, and *Mark M. Jones* and *Madison Zornes-Vela*, Las Vegas, for Appellant.

*Jolley Urga Woodbury & Little* and *David J. Malley* and *William R. Urga*, Las Vegas, for Respondent.

Before the Supreme Court, Cherry and Stiglich, JJ., and Saitta, Sr. J.[1]

## OPINION

By the Court, Cherry, J.:

In this appeal, we consider a preliminary injunction enforcing a noncompete agreement against a former employee. The question presented to this court is whether respondent Global Experience Specialists, Inc. (GES) demonstrated a likelihood of success on the merits sufficient to warrant temporarily upholding the agreement with a preliminary injunction, where the noncompete agreement geographically covers the entire United States, but the evidence presented demonstrated that GES had business contacts in a limited number of jurisdictions. To be upheld as reasonable, a noncompete agreement must be limited to geographical areas in which the employer has particular business interests. While an employer claiming breach of a noncompete agreement need not prove its case in order to obtain a preliminary injunction, it must make a prima facie showing that the noncompete agreement is reasonable in scope in order to establish a likelihood of success on the merits of such a claim. As that was not done here, we reverse.

### *FACTS AND PROCEDURAL HISTORY*

Appellant Landon Shores worked as a sales associate for GES from June 2013 to September 2016. In September 2016, GES pro-

[1]The Honorable Nancy M. Saitta, Senior Justice, was appointed by the court to sit in place of The Honorable Ron Parraguirre, Justice, who is disqualified from participation in this matter. Nev. Const. art. 6, § 19(1)(c); SCR 10.

moted Shores to sales manager, where his duties involved soliciting trade shows and conventions to contract with GES to build show floors and exhibits. As a condition of his promotion, Shores was required to sign a Confidentiality and Non-Competition Agreement (NCA).

The NCA stated, in relevant part, that Shores would be unable to compete with GES directly or indirectly, or work in a similar capacity for any of GES's competitors, for the 12 months following the end of his employment. It indicated that these restrictions would apply throughout the United States.

In January 2017, Shores informed GES that he had taken a position with one of GES's competitors in Southern California in a position that was the same or substantially similar to his position at GES. He moved to Southern California shortly thereafter and began working for the competitor, but he states that he has made no attempts to solicit the clients he solicited on behalf of GES, undisputed by GES to this point.

GES filed a complaint against Shores, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment, and seeking damages and injunctive relief. GES moved for a preliminary injunction, seeking to enforce the terms of the NCA against Shores. Shores opposed the motion, arguing that, in order to make the requisite showing of a likelihood of success on the merits, GES was required to provide evidence that the restrictions in the NCA were reasonable. He asserted that, because GES had not provided the court with evidence of protectable business interests across the United States, it had not made a prima facie showing of reasonableness and thus failed to demonstrate a likelihood of success. GES replied by providing a spreadsheet showing that over the last two years it had conducted business with clients in at least one city in 33 states, the District of Columbia, and Puerto Rico.

The district court granted the preliminary injunction, enjoining Shores from performing services "that are competitive with and/or similar to the services he performed for GES." The court concluded that (1) GES's contracts in 33 states established that it had a national client base and Shores had interacted with clients on behalf of GES in a number of major American cities; (2) by actively marketing to customers in competition with GES, Shores obtained an unfair advantage and GES suffered a corresponding unfair disadvantage; (3) the geographic scope of the NCA was reasonable given GES's nationwide dealings; (4) if Shores was knowingly and intentionally accepting competing employment in violation of the NCA, the balance of hardships would weigh in favor of GES based on GES's potential loss of clients; and (5) Shores' competitive conduct created an unreasonable interference with GES's business. The court con-

cluded that compensatory damages would be an inadequate remedy, such that GES met the irreparable harm element for preliminary injunctive relief. Shores now appeals that decision.

## *DISCUSSION*

### *Standard of review*

A party seeking a preliminary injunction must show a likelihood of success on the merits of their case and that they will suffer irreparable harm without preliminary relief. *Clark Cty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996). "[T]his court will only reverse the district court's decision when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015) (quoting *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (internal quotation marks omitted)). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion." *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 72-73, 270 P.3d 1259, 1262 (2012) (quoting *Stratosphere Gaming Corp. v. Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004) (internal quotation marks omitted)). "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016).

### *The district court abused its discretion in finding that the nationwide noncompete agreement was reasonable*

Shores argues that, in order for a noncompete agreement to be reasonable, its geographical scope must be limited to areas in which the enforcing party has protectable business interests. He further contends that the conclusory characterization of a business as nationwide does not automatically make a nationwide restriction reasonable. He asserts that the district court abused its discretion by finding that a nationwide restriction is reasonable, because the evidence showed GES's client-base was limited to 33 states, and often further limited to just 1 city within those states. Thus, he argues that the preliminary injunction improperly prevents him from working in his chosen profession in a number of jurisdictions for which GES has presented no evidence of previously existing business contacts. We agree.

In order to establish that a party is likely to succeed in enforcing a noncompete agreement for the purpose of a preliminary injunction, the court must look to whether the terms of the noncompete agree-

ment are likely to be found reasonable at trial. *Camco, Inc. v. Baker*, 113 Nev. 512, 518, 936 P.2d 829, 832 (1997).[2] Reasonable restrictions are those that are "reasonably necessary to protect the business and goodwill of the employer." *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996). Conversely, "[a] restraint of trade is unreasonable . . . if it is greater than is required for the protection of the person for whose benefit the restraint is imposed." *Hansen v. Edwards*, 83 Nev. 189, 191-92, 426 P.2d 792, 793 (1967). This court evaluates post-employment noncompete agreements with a higher degree of scrutiny than other kinds of noncompete agreements because of the seriousness of restricting an individual's ability to earn an income. *Ellis v. McDaniel*, 95 Nev. 455, 459, 596 P.2d 222, 224 (1979). We consider (1) the duration of the restriction, (2) the geographical scope of the restriction, and (3) the hardship that will be faced by the restricted party in determining whether a noncompete agreement is reasonable. *Jones*, 112 Nev. at 296, 913 P.2d at 1275; *see also* NRS 613.200(4) (stating that noncompete agreements are enforceable when reasonable in scope and duration).

The geographical scope of a restriction must be limited to areas where the employer has "established customer contacts and good will." *Camco*, 113 Nev. at 520, 936 P.2d at 834 (internal quotation marks omitted). In *Camco*, we considered a district court order denying a motion for a preliminary injunction to enforce a noncompete agreement that prohibited former employees from opening competing businesses within 50 miles of any of the former employer's stores or areas the former employer had targeted for expansion. *Id.* at 519-20, 936 P.2d at 833-34. We concluded that, because the noncompete agreement covered territory in which the former employer had not established business contacts, its geographical scope was overly broad, it was not likely to be found reasonable at trial, and the district court properly denied preliminary injunctive relief. *Id.* at 520, 936 P.2d at 834.

While *Camco* did not involve a business entity with clients in multiple states or a nationwide territorial restriction, it announced clear precedent that is no less applicable in this case. A noncompete agreement that reaches beyond the geographical areas in which an entity has protectable business interests, by definition, is not "reasonably necessary to protect the business and goodwill of the employer." *Jones*, 112 Nev. at 296, 913 P.2d at 1275. There is no trans-

[2]We do not here overturn or abrogate our caselaw permitting this court to modify preliminary injunctions enforcing noncompete agreements after finding the agreements to be unreasonable. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 483, 376 P.3d 151, 156 (2016). However, neither party argued for modification of the preliminary injunction or what a reasonable scope of that modified preliminary injunction would be, only seeking preliminarily injunctive relief by the terms of the NCA. As such, we do not address the appropriateness of that relief here.

formation resulting from the semantic designation as a nationwide business that renders our precedent on noncompete agreements inapplicable.

In the present case, GES presented evidence that it had conducted business in 33 states, the District of Columbia, and Puerto Rico. To then find that enforcement of the NCA throughout the United States is reasonable would apply its restrictions to geographical areas in which GES has made no showing of business interests. In concluding that GES conducted business nationwide and a nationwide noncompete agreement was consequently reasonable, the district court made no mention of existing precedent requiring the geographical scope of a noncompete agreement to be limited to areas where the enforcing party has "established customer contacts and good will." *Camco*, 113 Nev. at 520, 936 P.2d at 834 (internal quotation marks omitted). The NCA was, therefore, overbroad in relation to the preliminary evidence presented to the district court, and the court abused its discretion in failing to apply controlling precedent.

GES contends, however, that even without showing business contacts in the restricted areas, the district court did not err because preliminary injunctions are necessarily granted on incomplete evidence. With the understanding that there will be further factual development during trial proceedings, a district court ordinarily does not decide the ultimate merits of a case in deciding whether to grant temporal relief in the form of a preliminary injunction. *Hansen*, 83 Nev. at 192-93, 426 P.2d at 794. But the party seeking a preliminary injunction must demonstrate a reasonable probability of success on the merits, which in this case means that GES had to demonstrate a reasonable probability of meeting its burden of proof that the noncompete agreement satisfied reasonability criteria, such that it would be enforceable. *Camco*, 113 Nev. at 518, 936 P.2d at 832-33; *Clark Cty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996); *Jones*, 112 Nev. at 296, 913 P.2d at 1275. While the moving party need not establish certain victory on the merits, it must make a prima facie showing through substantial evidence that it is entitled to the preliminary relief requested. *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 72, 270 P.3d 1259, 1262 (2012); *see* 43A C.J.S. *Injunctions* § 55 (2014) ("It is necessary and sufficient that the petition make out a prima facie case showing a right to the final relief sought.").

Trial proceedings may ultimately reveal that GES is, in fact, ubiquitous throughout the United States, or that its contacts within certain areas are insufficient to create protectable business interests justifying a broad territorial restriction. Thus, absent an appeal from any judgment rendered on the merits of GES's complaint based on a fully developed record, our analysis does not express any opinion about the ultimate merits of whether the NCA itself is reasonable. However, on the record before us, GES failed to make a prima facie

demonstration that the NCA is reasonable by showing its restrictions do not extend beyond the geographical areas in which GES conducts business. To require any less would render ineffective the requirement that the moving party demonstrate a likelihood of success on the merits. In failing to apply this court's relevant precedent on noncompete agreements, the district court abused its discretion.[3]

*CONCLUSION*

We reaffirm our previous holdings that a noncompete agreement must be limited to the geographical areas in which an employer has particular business interests, and we conclude that this precedent is no less applicable in instances where the noncompete agreement imposes a nationwide restriction on the former employee. Furthermore, an employer seeking a preliminary injunction enforcing a noncompete agreement bears the burden of making a prima facie showing, through substantial evidence, of the agreement's reasonableness. We therefore reverse the district court's order granting GES's motion for a preliminary injunction.[4]

Stiglich, J., and Saitta, Sr. J., concur.

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BRENT A. COLES, Appellant, *v.* CONNIE S. BISBEE, Chairman; THE NEVADA BOARD OF PAROLE COMMISSIONERS; THE NEVADA DEPARTMENT OF CORRECTIONS; and THE STATE OF NEVADA, Respondents.

No. 74707

August 2, 2018 422 P.3d 718

Pro se appeal from a district court order dismissing a petition for declaratory relief. First Judicial District Court, Carson City; James E. Wilson, Judge.

**Affirmed.**

*Brent A. Coles*, Carson City, in Pro Se.

*Adam Paul Laxalt*, Attorney General, and *Kathleen Brady*, Deputy Attorney General, Carson City, for Respondents.

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[3]Because we conclude that the district court abused its discretion in finding that GES was likely to succeed on the merits, we need not reach the remaining questions raised by the parties.

[4]In light of this disposition, we vacate the stay imposed by our May 30, 2017, order.

Before the Supreme Court, PICKERING, GIBBONS and HARDESTY, JJ.

## OPINION

*Per Curiam:*

In this appeal, we address whether the Parole Board's use of the Static-99R recidivism risk assessment complies with the relevant statutory provisions governing parole review for prisoners convicted of sexual offenses, as well as whether changes to the statutory scheme regarding parole review violate the Ex Post Facto Clause of the United States Constitution. We conclude that the use of the Static-99R assessment comports with NRS 213.1214's assessment requirements and that changes to parole procedures do not constitute an ex post facto violation unless they create a significant risk of prolonging the inmate's incarceration, which is not the case here. Further, we reject appellant's argument that the use of the Static-99R assessment violates an inmate's due process rights and reaffirm that Nevada's parole statute does not create a liberty interest to sustain a due process claim.

### *FACTS AND PROCEDURAL HISTORY*

Appellant Brent A. Coles is currently incarcerated for a sexual offense and eligible for parole. As part of his parole review, Coles' recidivism risk was assessed with the Static-99R risk assessment. The assessment scores ten characteristics of an inmate's personal history and are "static" in that they are based on objective facts about the inmate and the offense and do not change, except as to the inmate's age at release. The assessment classified Coles as a high risk to recidivate, and the Parole Board denied parole.

Coles filed a petition for declaratory judgment, arguing that (1) the Static-99R assessment does not constitute a "currently accepted standard of assessment" for purposes of NRS 213.1214(1); (2) assessing the risk of recidivism is relevant only where an inmate is to be paroled into the community, not here where Coles would be paroled to serve a consecutive sentence, and the assessment should accordingly not be considered in this instance; (3) he has a due process right to be provided with a copy of the risk assessment; (4) changes to the parole statutes enacted after Coles was initially convicted violate the constitutional prohibition against ex post facto punishments; and (5) he should receive a new risk assessment that includes "dynamic" as well as "static" factors. The State moved to dismiss under NRCP 12(b)(5) for failure to state a claim on which

relief could be granted, and the district court granted the State's motion. Coles appealed to this court, renewing his arguments that the Static-99R does not comply with NRS 213.1214(1) and that the parole review procedures subjected him to an unconstitutional ex post facto law and violated his due process rights.

*DISCUSSION*

This court will not review challenges to the evidence supporting Parole Board decisions, but will consider whether the Board has properly complied with the applicable statutes and regulations. *See Anselmo v. Bisbee*, 133 Nev. 317, 320-21, 323, 396 P.3d 848, 851, 853 (2017). As Coles' claims do not support a declaratory judgment, we affirm. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (reviewing de novo an order granting a motion to dismiss under NRCP 12(b)(5)); *Kress v. Corey*, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948) (providing that, to obtain declaratory relief, a plaintiff must show (1) a justiciable controversy, (2) between persons with adverse interests, (3) where the party seeking declaratory relief has a legal interest in the controversy, and (4) the issue is ripe for judicial determination).

Coles first argues that the Static-99R assessment was not formally adopted as or determined to be a "currently accepted standard of assessment" for use in his parole hearing. This argument goes beyond what the statute requires and does not provide a basis for reversal. NRS 213.1214(1) requires the Department of Corrections to "assess each prisoner who has been convicted of a sexual offense to determine the prisoner's risk to reoffend in a sexual manner using a currently accepted standard of assessment." The assessment must determine the risk that a prisoner would reoffend in a sexual manner and be provided to the Parole Board before the prisoner's hearing. *Id.* The legislative history shows that the Static-99R assessment was considered as an accepted standard of assessment in enacting a parole statute that more accurately assessed recidivism risk. Hearing on S.B. 104 Before the Assembly Judiciary Comm., 77th Leg. (Nev., April 29, 2013); Hearing on S.B. 104 Before the Senate Judiciary Comm., 77th Leg. (Nev., April 10, 2013). The statute does not require that any entity must designate a currently accepted standard of assessment or that it be otherwise certified for the use of the Static-99R to comply with NRS 213.1214. To the extent that Coles argues that his risk assessment should have been processed differently because the convictions for his sex crimes had expired, he is mistaken because the assessment is considered if an inmate "has ever been convicted of a sexual offense." NAC 213.514(3). We decline to consider Coles' further arguments against the wisdom of applying this particular assessment tool. *See* NRS 213.1214(3) (providing that no cause of action regarding parole assessments may be raised if the actions comply with the statutory provisions). The dis-

trict court therefore did not err in denying this claim. *See Williams v. Nev. Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (reviewing issues of statutory interpretation de novo).

Coles next argues that changes to the parole statute enacted after his conviction rendered parole more difficult to obtain and thus constituted impermissible ex post facto punishment. This argument likewise does not provide a basis for reversal because Coles has not shown that the changes created a risk of prolonged imprisonment. An ex post facto law is one that retroactively changes the definition of a crime or increases the applicable punishment. *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995). Retroactive changes in laws regarding parole procedures may violate the Ex Post Facto Clause when they create a significant risk of prolonging the inmate's incarceration. *Garner v. Jones*, 529 U.S. 244, 250-51 (2000). To the extent that Coles challenges the application of NRS 213.1214 to him as an ex post facto violation, this claim fails. *See Moor v. Palmer*, 603 F.3d 658, 664-66 (9th Cir. 2010) (rejecting ex post facto challenge to NRS 213.1214, adopted after the inmate's conviction, because the statute did not pose a significant risk of extended incarceration). To the extent that Coles challenges the elimination of the Psychological Review Panel after *Moor* was decided, the legislative history shows that the Panel was eliminated in part because it rated inmates as too high a risk to reoffend, Hearing on S.B. 104 Before the Senate Judiciary Comm., 77th Leg. (Nev., March 5, 2013), and thus the risk posed by the Panel's elimination favored inmates. And even assuming the accuracy of Coles' representation that he was classified as a lower risk to recidivate under a prior metric, by his own admission that classification occurred before he violated his parole and received another felony conviction, such that he has failed to show that any change in regulation brought about his purported change in risk classification. *See Moor*, 603 F.3d at 665 (observing that the risk of prolonging incarceration was less likely where the inmate had previously violated his parole). The district court therefore did not err in denying this claim. *See Flemming v. Or. Bd. of Parole*, 998 F.2d 721, 723 (9th Cir. 1993) (reviewing ex post facto claims de novo).

Lastly, Coles argues that the use of the Static-99R violates his due process rights because he has not been permitted to review the results for errors and contest them. Nevada's parole statute does not create a liberty interest to sustain a due process claim. *Anselmo*, 133 Nev. at 320, 396 P.3d at 850-51. Moreover, NRS 213.1075 specifically provides that the information gathered by the Board in executing its duties is privileged and may not be disclosed except in limited circumstances that Coles has not presented. Insofar as Coles asserts a right to challenge the assessment, the Legislature has foreclosed such a right. NRS 213.1214(3); *see also* NRS 213.10705

(declaring that release on parole "is an act of grace of the State"). The district court therefore did not err in denying this claim.

Because Coles' contentions do not provide a basis for granting declaratory relief, the district court properly granted the State's motion to dismiss Coles' petition. We therefore affirm the district court's order.[1]

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DONOVINE MICHAEL MATHEWS, AKA DONOVIAN MATHEWS, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 72701

August 23, 2018 424 P.3d 634

Appeal from a judgment of conviction, pursuant to a jury verdict, of child abuse, neglect or endangerment with substantial harm. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

**Reversed and remanded.**

*Philip J. Kohn*, Public Defender, and *Kristy S. Holiday, Deborah L. Westbrook*, and *Howard Brooks*, 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 *Michelle Y. Jobe* and *Charles W. Thoman*, Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, PICKERING, GIBBONS and HARDESTY, JJ.

## OPINION[1]

By the Court, HARDESTY, J.:

Appellant Donovine Mathews' conviction stems from an incident involving his girlfriend's two-year-old son, C.J., who incurred burns on his hands while Mathews was babysitting him and his sibling. From the time of the incident, Mathews has maintained that the burns happened accidentally, while the State has argued that Mathews in-

[1]To the extent that Coles' requests for relief on appeal could be construed as seeking injunctive relief, we reject the request.

[1]We originally reversed and remanded in an unpublished order. Appellant has moved to publish the order as an opinion. We grant the motion and publish this opinion in place of our earlier order. *See* NRAP 36(f).

tentionally burned C.J. We are asked to determine whether the district court abused its discretion in excluding Mathews' expert witness and in rejecting his proffered jury instruction. To answer these questions, we must determine, as an issue of first impression, how to assess the "assistance requirement" in *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), in the context of the burden of proof and the purpose for which the expert witness's testimony is being offered. Because the State bears the burden of proof in a criminal case, the district court improperly excluded Mathews' proffered expert witness and improperly refused his jury instruction. Thus, we conclude that Mathews was denied a fair trial because these errors were not harmless.

## *FACTS AND PROCEDURAL HISTORY*

On the morning of January 5, 2016, Mathews babysat his girlfriend Jasmin's two children, C.J. and J.J., at Jasmin's apartment while she went to a meeting at her apartment complex. Mathews' account of the incident as told to detectives is that while he was babysitting, he boiled water on the stove and poured it into a mug to make instant coffee. After putting the water in the mug, he set it on the counter and went to change J.J.'s diaper. When he returned to the kitchen, C.J. was screaming, the backs of his hands were burned, and the mug was on the floor. Mathews maintains that C.J. accidentally spilled the water in the mug and burned himself, while the State contends that Mathews intentionally burned C.J.

During trial, the State presented testimony from three expert witnesses, all of whom opined that Mathews intentionally burned C.J. Mathews attempted to have Dr. Lindsay "Dutch" Johnson, a biomechanics expert, testify to rebut the State's theory and to testify about the mechanism of C.J.'s injuries. The State filed a motion in limine to strike or limit Dr. Johnson's testimony, which the district court granted following an evidentiary hearing. Mathews appeals his conviction, arguing that he was denied a fair trial because the district court abused its discretion in excluding his expert witness and in rejecting his proffered jury instruction on his theory of the case. We agree.

## *DISCUSSION*

### *The district court abused its discretion in excluding Dr. Johnson*

At the evidentiary hearing, the district court asked Dr. Johnson questions about his experience with burn injuries but cut short his testimony, and eventually excluded him from testifying at trial. The district court concluded that Dr. Johnson was not qualified to testify about burns on a child's skin, and further, his testimony did not have an adequate factual foundation because nobody could testify to his theory of how C.J.'s injuries occurred. Mathews repeatedly re-

quested that Dr. Johnson be able to testify to rebut the State's expert witnesses, but the district court refused each request.

On appeal, Mathews argues that the district court abused its discretion in excluding Dr. Johnson because he was qualified to testify as an expert in biomechanics and his testimony would assist the jury in assessing the mechanism of C.J.'s injuries. The State argues that this court has determined that Nevada law does not recognize biomechanics as a field of expertise, and regardless, Dr. Johnson was not qualified to testify as an expert regarding burn injuries on a child's skin.

"Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion." *Mulder v. State*, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000). An expert witness must satisfy three requirements before being permitted to testify as an expert under NRS 50.275: "(1) he or she must be qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of [his or her specialized] knowledge (the limited scope requirement)." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (alteration in original) (internal quotation marks omitted).

In assessing the "qualification requirement," the district court stated, "I really don't believe your expert can testify about burn patterns on a child's skin. . . . I don't think that taking an anatomy class and . . . his first aid training in the Marines allows him to testify about the different burn patterns on a child's skin . . . ." It does not appear from the record before us that the district court considered Dr. Johnson's academic degrees, licensure, and other experience, which he not only testified to but evidence of which was also included in Mathews' supplemental briefing and offer of proof. *See id.* at 499, 189 P.3d at 650-51 (stating that to determine whether an expert meets the "qualification requirement," the district court should consider, among other things, the witness's "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." (footnotes omitted)). Rather, the district court made conclusory findings about Dr. Johnson's medical qualifications without considering whether Dr. Johnson was qualified to testify about the mechanism of C.J.'s injuries. Thus, the district court abused its discretion by failing to apply the *Hallmark* factors for the "qualification requirement" before disqualifying Dr. Johnson as an expert witness.

The district court also improperly analyzed the "assistance requirement." *See id*. at 500, 189 P.3d at 651 (stating that the district court must determine whether the expert's testimony will assist the trier of fact, and explaining that the testimony will assist the trier of fact "only when it is relevant and the product of reliable methodology" (footnote omitted)). Mathews argued to the district court that Dr. Johnson's testimony would assist the trier of fact because his testimony offered an alternate mechanism of C.J.'s injuries, which directly refuted the State's theory. The State argued that Dr. Johnson's testimony was based on assumption and not grounded in the facts of the case. The district court repeatedly stated that Dr. Johnson was making up scenarios that were not supported by the facts of the case.

The "assistance requirement" must be assessed in the context of what the burden of proof is and who bears that burden. In a criminal case, such as here, the State has the burden to prove the elements of a crime beyond a reasonable doubt. *See Burnside v. State*, 131 Nev. 371, 385, 352 P.3d 627, 638 (2015). Thus, the State had the burden to prove that Mathews intentionally burned C.J. beyond a reasonable doubt. It is clear from the transcript of the evidentiary hearing that the district court failed to consider the purpose for which Mathews was offering Dr. Johnson's testimony, which was to rebut the State's theory that Mathews intentionally burned C.J. *See Leavitt v. Siems*, 130 Nev. 503, 510, 330 P.3d 1, 6 (2014) (explaining that rebuttal testimony "contradict[s] the [opposing party]'s expert or furnish[es] reasonable alternative causes to that offered by the [opposing party]" (internal quotation marks omitted)). Indeed, the State presented testimony from three experts, all of whom opined that Mathews intentionally burned C.J., including one expert who stated it was "as next to impossible as it comes" that C.J.'s injuries were accidental. Dr. Johnson was prepared to testify that it was not impossible and to explain how the child could have tipped the cup and spilled the scalding water on his hands accidentally.

In concluding that Dr. Johnson's testimony lacked an adequate factual foundation, the district court presumed that the State's experts were correct and consequently placed the burden on Mathews to prove beyond a reasonable doubt that C.J.'s burns occurred accidentally. But this was not Mathews' burden of proof to bear. *See Jorgensen v. State*, 100 Nev. 541, 544, 688 P.2d 308, 310 (1984) (explaining that "when a defense negates an element of the offense, the state must disprove the defense because of the prosecution's burden to prove all elements of the charged offense beyond a reasonable doubt").

In this case, Dr. Johnson's testimony would assist the trier of fact by demonstrating that an accidental mode of injury was possible.

Notably, Dr. Johnson was not testifying to medical causation; rather, the focus of Dr. Johnson's testimony would have been on the mechanics of C.J.'s injury, which was within his scope of expertise and directly refuted the State's theory. Accordingly, we conclude that the district court abused its discretion by failing to assess the purpose of Dr. Johnson's testimony in the context of the burden of proof when analyzing the "assistance requirement."

Finally, according to the State's argument on appeal, we previously determined that biomechanics is not a recognized field of expertise in Nevada, suggesting that biomechanical experts are not permitted to testify. However, the State misapprehends our holdings in *Hallmark* and *Rish v. Simao*, 132 Nev. 189, 195-96, 368 P.3d 1203, 1208 (2016).

In *Hallmark*, we concluded that while the expert witness met the "qualification requirement," he did not satisfy the "assistance requirement" because there was no evidence presented to show that biomechanics was a recognized field of expertise, or that the expert's methodology was reliable, had been tested, or was published or subject to peer review. 124 Nev. at 499-502, 189 P.3d at 651-52. Additionally, we concluded that the expert's opinion was highly speculative because he admitted that he formed it without knowing several pertinent facts of the case. *Id*. at 501-02, 189 P.3d at 652-53. In *Rish*, we clarified that "*Hallmark* stands for the well-established proposition that expert testimony, biomechanical or otherwise, must have a sufficient foundation before it may be admitted into evidence." 132 Nev. at 196, 368 P.3d at 1208.

Thus, biomechanical experts are not precluded from testifying altogether, and weaknesses in a purported expert's testimony, including that one expert may have lesser qualifications than the opposing party's expert witness, "goes to the weight, not the admissibility, of the evidence." *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303-04 (1989); *see also Mulder*, 116 Nev. at 13, 992 P.2d at 852 ("It is a function of the jury, not the court, to determine the weight and credibility to give [expert] testimony."); *Leavitt*, 130 Nev. at 510, 330 P.3d at 6 (concluding that in the context of a challenge to expert testimony as speculative, "even if portions of [an expert's] testimony [are] speculative, it [i]s for the jury to assess the weight to be assigned to [the] testimony").

We conclude that the district court abused its discretion by improperly applying the *Hallmark* factors in disqualifying Dr. Johnson as an expert witness under NRS 50.275 and thus not permitting him to testify. Having so concluded, we must now determine whether the error was harmless. *See Lobato v. State*, 120 Nev. 512, 521, 96 P.3d 765, 772 (2004) (stating that "any error that does not affect a defendant's substantial rights shall be disregarded"); *see also*

NRS 178.598. We conclude that it was not harmless, as "[t]he exclusion of a witness' testimony is prejudicial if there is a reasonable probability that the witness' testimony would have affected the outcome of the trial." *Lobato*, 120 Nev. at 521, 96 P.3d at 772 (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (internal quotation marks omitted). Accordingly, we conclude that reversal is warranted.

*The district court abused its discretion in rejecting Mathews' proffered jury instruction*

Although we need not address Mathews' argument regarding his proffered jury instruction, we do so to avoid repetition on retrial. Mathews requested the following jury instruction:

> A person who committed an act or made the omission charged, through misfortune or accident, when it appears that there was no evil design, intention or culpable negligence, must be found not guilty of the charge.

In the district court, Mathews argued that this instruction should be given because the facts in evidence could show C.J.'s injuries happened accidentally. The State argued that Mathew's theory was that he did not do any act, not that he did an act accidentally. The district court refused Mathews' proffered jury instruction without explanation.

"The district court has broad discretion to settle jury instructions and decide evidentiary issues," thus, this court reviews the decision to give or not give a specific jury instruction for abuse of discretion. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "This court has consistently held that the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Crawford v. State*, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005) (internal quotation marks omitted). "This court evaluates appellate claims concerning jury instructions using a harmless error standard of review." *Barnier v. State*, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). If "a defendant has contested the omitted element [of a criminal offense] and there is sufficient evidence to support a contrary finding, the error [in the instruction] is not harmless." *Id*. at 132-33, 67 P.3d at 322 (alterations in original) (internal quotation marks omitted). However, the defense is not entitled to an instruction that misstates the law. *Ducksworth v. State*, 113 Nev. 780, 792, 942 P.2d 157, 165 (1997).

If not for the district court's error in excluding Dr. Johnson's expert witness testimony, there may have been evidence presented that would have warranted Mathews' proffered jury instruction.

Further, the instruction was based on Mathews' theory of the case and correctly stated the law. *See McCraney v. State*, 110 Nev. 250, 254-55, 871 P.2d 922, 925 (1994) (approving a jury instruction that stated: "All persons are liable to punishment except those persons who committed the act through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence."). Had Dr. Johnson been permitted to testify, it is reasonably probable that the jury could have found that the "act" Mathews committed, and which resulted in C.J.'s injuries, was accidentally leaving a mug of hot water on the counter within C.J.'s reach. Therefore, we conclude that the district court abused its discretion in rejecting Mathews' proffered instruction and such error was not harmless.[2] *See Barnier*, 119 Nev. at 132, 67 P.3d at 322; NRS 178.598.

Accordingly, for the reasons set forth above, we reverse the judgment of conviction and remand this matter to the district court for a new trial.

Pickering and Gibbons, JJ., concur.

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DVONTAE DSHAWN RICHARD, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 70542

August 23, 2018 424 P.3d 626

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of conspiracy to commit robbery and one count each of burglary while in possession of a firearm, grand larceny of a firearm, grand larceny, robbery with use of a deadly weapon, attempted robbery, and battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

**Affirmed.**

*Brent D. Percival*, Las Vegas, for Appellant.

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

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

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[2]Because we are reversing and remanding for a new trial, we need not address Mathews' additional claims of error.

## OPINION

By the Court, Stiglich, J.:

We take this opportunity to clarify the definition of statutory nonhearsay pursuant to NRS 51.035. In order for a statement to be excluded from the definition of hearsay either as a prior inconsistent statement or a prior identification made soon after perceiving a person, the declarant must have testified and have been subject to cross-examination concerning the out-of-court statement. Although we determine that hearsay statements were improperly admitted, such errors were harmless in light of other evidence in the case.

Richard also challenges the admission of his two statements to police. We conclude that substantial evidence supports the district court's determination that both statements were voluntary.

### *FACTUAL AND PROCEDURAL HISTORY*

Appellant Dvontae Richard was convicted of crimes he committed during two incidents that occurred four days apart. Only the facts surrounding the second incident are relevant to this appeal.

On the date of the second incident, Kirsten Kinard and his cousin, Eric Blake, were having Kinard's car cleaned at a car wash in Las Vegas. Kinard was wearing a Cuban link gold necklace with an estimated value of $45,000. Richard, walking with an unidentified man, approached Kinard and grabbed Kinard's necklace with enough force to pull him down by the neck. Blake reacted by drawing and discharging his firearm 17 times. Richard's accomplice returned fire. A number of people were hit amidst the chaotic shooting, including Kinard and, according to Blake, a person wearing a red hood.

Police responded to the car wash and, by following a blood trail and the directions of witnesses, found Richard. The officers described Richard as an African-American male wearing a sweatshirt with a red hood who had been shot in the leg. Richard was treated and taken to the emergency room at University Medical Center (UMC) where Kinard was also being treated for his gunshot wounds.

Detectives from the Las Vegas Metropolitan Police Department (LVMPD) interviewed Kinard as a victim and Richard as a suspect. Soon after the shooting, Richard made two statements, one to Detective Weirauch and another to Detective Spiotto, in which he made a number of inculpatory remarks. Both statements were audio-recorded, transcribed, and made after both detectives separately advised Richard of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

While at UMC for treatment of his gunshot wounds, Kinard described his attacker to Detective Weirauch. Additionally, as Richard was being wheeled by Kinard's room, Kinard flagged down Detec-

tive Weirauch and identified Richard as the man who tried to take his necklace.

Before trial, Richard moved to suppress his prior statements to police. After conducting an evidentiary hearing on the motion, the district court found that the State had met its burden to show, by a preponderance of the evidence, that Richard's statements were voluntary and made after he was properly given his *Miranda* warnings. Accordingly, the court denied the motion and permitted the State to present testimony regarding Richard's statements.

By the time of trial, Kinard was in custody on unrelated charges and was an unwilling witness for the State. Kinard testified in broad terms, but when asked if he could identify Richard as the person who "snatched" his chain, he simply stated "No." Kinard was never asked about his prior identification of Richard at the hospital and was never asked whether he had ever been able to identify Richard as the man who grabbed his chain.

Following the jury trial, Richard was convicted of two counts of conspiracy to commit robbery and one count each of burglary while in possession of a firearm, grand larceny of a firearm, grand larceny, robbery with use of a deadly weapon, attempted robbery, and battery with intent to commit a crime.[1] Additionally, he pleaded guilty to the bifurcated charge of ownership or possession of a firearm by a prohibited person.

Richard raises two primary arguments on appeal: (1) that Kinard's prior description and identification of Richard, which were elicited during the testimony of Detective Weirauch, were inadmissible hearsay, admission of which violated his right to confrontation; and (2) that admission of Richard's inculpatory statements at trial violated the Fourteenth Amendment because his statements to police in the hospital were involuntary.

## *DISCUSSION*

### *Detective Weirauch's testimony*

Richard argues that the district court erred in permitting the State to present hearsay testimony by Detective Weirauch regarding Kinard's statements in the hospital describing and identifying Richard as the man who grabbed his gold chain. Richard also contends that both the description and subsequent identification violated his Sixth Amendment right to confront Kinard as a witness against him.

NRS 51.035 defines "hearsay" as "a statement offered in evidence to prove the truth of the matter asserted," but exempts certain statements from that broad definition. A statement is not hearsay if: "[t]he declarant testifies at the trial or hearing and is subject to

[1]The jury acquitted Richard of first-degree kidnapping with use of a deadly weapon.

cross-examination concerning the statement, and the statement is: (a) Inconsistent with the declarant's testimony." NRS 51.035(2)(a). We review the admission of Kinard's description and identification for an abuse of discretion.

*Kinard's description of his attacker*

Although Kinard was willing to speak in general terms about the attempted robbery, he was unwilling to testify about the identifying characteristics of his attacker. The following exchange between the State and Kinard is representative of his testimony:

> Q: Okay. Now, I want to be upfront. Did you ever see the person's face that snatched your chain?
>
> A: No, I didn't, he had a hood on.
>
> Q: Okay. Do you remember the color of the hood?
>
> A: Nope, it happened so fast.
>
> Q: All right. So if I were to ask you to identify him, do you see that person in the courtroom today, what would your response be?
>
> A: No.

On direct examination, the State did not ask Kinard about his prior statements to Detective Weirauch. However, on cross-examination, Richard asked Kinard: "Do you remember giving a tape recorded voluntary statement to the police about this incident?" When Kinard claimed that he did not remember doing so, Richard showed him the transcript of his statement. Kinard confirmed that the document helped refresh his memory that he had made such a statement to police.

Kinard's statements to Detective Weirauch regarding the perpetrators were raised for the first time on redirect by the State, but they focused on Kinard's description of the other man, the shooter who accompanied Richard. The State asked about Kinard's prior description of that accomplice, referencing his race, skin tone, and haircut, but the State did not ask about Kinard's physical description of the man in the sweatshirt with a red hood. However, the State referenced Kinard's description of the hood when it asked:

> Q: Okay. Do you recall telling Detective Weirauch on the day you were in the hospital that it was a reddish hoodie?
>
> A: No, I don't remember that.
>
> Q: Okay.
>
> . . . .
>
> Q: Page five of the voluntary statement. Do you see here where you say—right here, "Do you remember what color the hoodie was"—

A: Yeah.

Q: —is the question asked to you and you say, "Like reddish or something. My cousin probably seen him more because, you know"—

A: Yeah.

Kinard further testified that although he did not remember making that statement, he did not dispute that portion of the transcript. The relevant portion of Weirauch's testimony, to which Richard now takes issue, reads as follows:

Q: And did you ask him, as far as identification was, of the person who took his—or attempted to take his chain?

[Weirauch]: Yes.

Q: Did he give you a description of that person?

[Weirauch]: He said he was a black male adult wearing a hoodie.

Q: Did he give you the color of that hoodie?

[Weirauch]: He said red.

Richard did not object to this testimony at trial; therefore, we review for plain error. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id*. (footnote omitted).

The State argues that Weirauch's testimony that Kinard described his attacker as "a black male adult wearing a [red] hoodie" was properly admitted pursuant to NRS 51.035(2)(a) because Kinard testified, he was subject to cross-examination, and his trial testimony was inconsistent with that statement to Weirauch. However, Kinard was never asked about the race of the man who grabbed his chain; he was only asked about the race of the second man, the one who drew a gun.

Because Kinard did not provide any testimony that was inconsistent with his prior description of his attacker as a black male, we conclude that Weirauch's testimony regarding that racial description should not have been admitted pursuant to NRS 51.035(2)(a). However, as discussed below, Richard admitted to grabbing Kinard's chain, so the testimony regarding Richard's race did not cause him actual prejudice.

Regarding the statement about the color of the attacker's hood, Kinard testified that he did not remember telling Weirauch the color of the hood. When presented with the transcript of his voluntary statement, he did not dispute having said that. We previously held that "the failure of recollection constitutes a denial of the prior

statement that makes it a prior inconsistent statement pursuant to NRS 51.035(2)(a). The previous statement is not hearsay and may be admitted both substantively and for impeachment." *Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004). Pursuant to *Crowley*, Kinard's memory lapse was akin to a denial of his prior statement, and the State could properly present his prior inconsistent statement.[2]

*Kinard's identification*

Richard argues that the district court erred in permitting Detective Weirauch to testify about Kinard's statements to him in the hospital wherein he identified Richard as the man who grabbed his chain. The disputed testimony occurred during the State's examination of the detective:

> Q: And was there a point in the interview or after the interview where [Kinard] made some identification of the defendant?
>
> A: Yes, there was.
>
> Q: And explain that to the ladies and gentlemen of the jury.
>
> A: While Mr. Kinard or Kirsten Kinard was laying in his bed he kind of flagged me down and he says that he saw the suspect that tried to grab—

At that point, Richard objected to the testimony as hearsay. The court ruled that "[p]ursuant to 50.1352 I'm going to allow it."[3]

The State continued:

> Q: Officer, when you were at the hospital with Kirsten Trevon Kinard was there a point in time where he identified the defendant as being the person who pulled off his gold chain?
>
> A: Yes, there was.
>
> Q: Tell me exactly how that went.
>
> A: Mr. Kinard kind of flagged me down while he was in his hospital bed and said, hey, I saw the guy get wheeled by and that's the one that actually tried to pull my chain off. And he points towards the gurney that the suspect's in.
>
> Q: The person he's pointing towards was the person that you just identified in court today as the defendant?
>
> A: Yes.

---

[2]By the time the State introduced Kinard's statements through Weirauch, Blake had already testified that the man who grabbed Kinard's chain was wearing a sweatshirt with a red hood. Because that testimony regarding the color of Richard's hood was duplicative of other evidence in the case, we conclude that its admission was not error at all, much less plain error, as Richard's substantial rights were not harmed.

[3]The district court was presumably referring to NRS 50.135(2).

Before the district court, the State argued that this testimony was proper impeachment as a prior inconsistent statement. On appeal, in addition to its argument that it was properly admitted as a prior inconsistent statement, the State alleges that the statement was also admissible as an identifying statement pursuant to NRS 51.035(2)(c). We address the State's contentions separately.

*Prior inconsistent statement*

The State's first theory of admissibility is that Kinard's prior statement was properly admitted as a prior inconsistent statement. The district court allowed Weirauch to testify about Kinard's alleged identification of Richard pursuant to NRS 50.135(2), which provides in relevant part that

> [e]xtrinsic evidence of a prior contradictory statement by a witness is inadmissible unless:
>
> . . .
>
> (b) The witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness thereon.

This statute is consistent with NRS 51.035(2)(a), discussed above, as it permits the admission of an out-of-court statement offered for the truth of the matter asserted if "[t]he declarant testifies at the trial or hearing *and is subject to cross-examination concerning the statement*, and the statement is: [i]nconsistent with the declarant's testimony." (Emphasis added.)

In this case, Kinard was never asked about his statement to Weirauch identifying Richard as the man wheeled by on a stretcher. The State asked Kinard whether he saw the face of the man who snatched his chain, what his response would be if he were asked to identify that man in court, and a number of questions about Kinard's prior descriptions of the other man who accompanied the one who grabbed his chain. Kinard's reply that he did not get a good look at his attacker because the events happened quickly and that he would say "No" to identifying the man in court are arguably inconsistent with telling Weirauch that he saw his attacker wheeled by on a stretcher in the hospital soon after the attempted robbery.

If we accept that Kinard's trial testimony was inconsistent with his statements to Weirauch, the out-of-court statements still fail to meet the requirements for admission under NRS 51.035(2)(a) and NRS 50.135(2)(b) because the State never asked Kinard about his identification of Richard in the hospital; therefore, he was never "subject to cross-examination *concerning the statement*" as required by NRS 51.035(2) (emphasis added) or "afforded an opportunity to explain or deny the statement" as required by NRS 50.135(2)(b). Additionally, because the State never asked Kinard about that prior statement, Richard did not have "an opportunity to interrogate

[Kinard]" about his out-of-court statement as is required before extrinsic evidence of a prior contradictory statement by a witness can be admitted into evidence. NRS 50.135(2)(b).

Therefore, Kinard's alleged identification of Richard in the hospital through Weirauch's testimony was not properly admitted as a prior inconsistent statement pursuant to NRS 50.135(2).

*Prior identification*

The State's second theory of admissibility is that the relevant portion of Weirauch's testimony was properly admitted as an identifying statement pursuant to NRS 51.035(2)(c). NRS 51.035(2)(c) provides that an out-of-court statement is not hearsay if: "[t]he declarant testifies at the trial or hearing and is subject to cross-examination *concerning the statement*, and the statement is . . . [o]ne of identification of a person made soon after perceiving the person." (Emphasis added.) The State argues that "identifying statements made by a declarant who testifies and is subject to cross examination are not hearsay."

The State relies upon *Jones v. State*, 95 Nev. 154, 591 P.2d 263 (1979), to support its assertion that when a "declarant identifies the defendant out-of-court, soon after perceiving the defendant, the identifying statement may be admitted as an exception to hearsay." That reliance on *Jones* is misplaced, however, because there, this court referenced the same statute and affirmed the admission of a prior identification when "[t]he declarant testified at trial, and was subject to cross-examination *concerning the statement*." *Id.* at 156, 591 P.2d at 264 (emphasis added). The State recognizes that in order for a prior statement of identification to be admissible, the declarant must have been subject to cross-examination, as Kinard was, but ignores that the declarant must be subject to cross-examination *concerning the relevant statement*, which Kinard was not.

The State could have asked Kinard if he told Weirauch that he had seen his attacker in the hospital; the State could have asked if he had identified Richard as the man who had grabbed his chain. Had they done so, and received a negative response, then the State could have permissibly presented Weirauch's account of the identification. Since the State did not ask Kinard about that prior identification, Kinard was not subject to cross-examination about the statement. Therefore, it was not admissible pursuant to NRS 51.035(2)(c).

Based on the foregoing, we conclude that the district court abused its discretion by admitting Weirauch's testimony about Kinard's hearsay statement identifying Richard as the man who grabbed his chain. The statement was not properly admitted either as a prior inconsistent statement or as a prior identification. *See Crowley*, 120 Nev. at 34, 83 P.3d at 286 ("An appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion." (internal quotations marks omitted)).

Although the district court abused its discretion, we conclude that this error was harmless. Hearsay "errors are subject to harmless error analysis." *Franco v. State*, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993). Because Richard identified himself as the man who grabbed Kinard's chain,[4] the erroneous admission of Kinard's statement attesting to the same was merely duplicative evidence. Therefore, the district court's error was harmless.[5]

*Richard's inculpatory statements*

Richard argues that the admission of his inculpatory statements to police violated his Fourteenth Amendment rights because the circumstances rendered those statements involuntary. In particular, Richard takes issue with the fact that he made both statements while he was still in the hospital after being shot and in the midst of receiving medical treatment. Richard now appeals the district court's determination that his statements were voluntary and made after he was properly given *Miranda* warnings.

"A confession is inadmissible unless freely and voluntarily given." *Chambers v. State*, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997). "The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal." *Id*. In order to assess whether a confession was made voluntarily, we consider the totality of the circumstances, including such factors as: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." *Id.* (internal quotations omitted). Because Richard sought to exclude statements to both Detective Weirauch and Detective Spiotto, we discuss them individually.

*Richard's statement to Detective Weirauch*

At the time he gave a statement to Detective Weirauch, Richard had recently been shot in the back of his calf, broke his leg, and lost

[4]As discussed below, we deny Richard's claims asserting error in the admission of his statements.

[5]Additionally, Richard argues that the admission of Kinard's description through Weirauch's testimony violated his Sixth Amendment right to confront Kinard regarding the description and identification of Richard. Unlike the statutes discussed above, the plain language of the Sixth Amendment only requires that a defendant have the opportunity to confront the witnesses against him, but it does not explicitly require that the defendant be availed of the opportunity to confront the witness concerning a prior statement. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). We summarily reject this claim.

enough blood to completely soil his clothes and leave a bloody trail in his wake. Richard was lying in a hospital gurney in the emergency room when Detective Weirauch arrived, and Weirauch interviewed Richard without speaking to a treating physician about Richard's injuries or learning about his treatment or medication. Richard contends that these circumstances render this interview involuntary and that his statements should not have been admitted. Richard also argues that some of his answers were incoherent and, as an example, he points to the following exchange that occurred after Richard affirmatively answered Weirauch's question whether this was "all over a stolen necklace":

> Q: Somebody stole your necklace or was it a friend's necklace?
>
> A: I got robbed a couple weeks ago.
>
> Q: Did you file a report? Okay, and you thought that was your necklace?
>
> A: Nah, I thought he had some of my jewelry.

Furthermore, Richard would not identify the man he was with, and he argues on appeal that the discussion on that topic indicates that he was not understanding the questions or responding appropriately.

Richard's attempts to rely on the circumstances of his injury and medical treatment to undermine the validity of his *Miranda* waiver and statement to Weirauch are unavailing. We previously affirmed a district court's admission of statements when an appellant argued "that his statements were not voluntarily given in light of the fact that he was questioned for four hours after having been stabbed, that he was not well rested, and that he was intoxicated." *Chambers*, 113 Nev. at 980, 944 P.2d at 809. There, the court considered the totality of the circumstances, including the fact that Chambers was "relatively coherent" and that he appeared "to have had an understanding of what was going on, often talking legalese with police."[6] *Id*. at 982, 944 P.2d at 809-10 (internal quotation marks omitted). Similarly, we have affirmed a district court's admission of a confession made about an hour and a half after the defendant shot himself in the face; the defendant made the statement from a hospital gurney surrounded by police, bleeding, and without any medication. *Wallace v. State*, 84 Nev. 603, 605, 447 P.2d 30, 31 (1968).[7]

Weirauch testified that he read the *Miranda* warning from a card while his audio-recorder was on and that Richard "shook his head" to indicate that he understood his rights, waived them, and was willing to speak with Weirauch. The entire interview lasted a minute and

[6]"Chambers' blood alcohol level was 0.27 percent right after questioning, and four hours later it was 0.19 percent and descending." *Id*. at 980, 944 P.2d at 808.

[7]We note that unlike in this case, Wallace signed a written acknowledgment of his rights, read the written form back to the officers, and stated that he understood what he had read. *Id.* at 605, 447 P.2d at 31.

a half to two minutes before the interview had to be cut short to allow medical personnel to treat Richard. Although Richard's answers were not directly responsive to the detective's questions, they do not necessarily indicate that Richard was confused or in an altered state of consciousness. Considering the holdings of *Chambers* and *Wallace*, the circumstances surrounding Richard's statement, including his calm demeanor, support the voluntary nature of his answers. We conclude that substantial evidence supports the district court's determination that Richard received a proper *Miranda* warning and that his statement to Weirauch was voluntary. Therefore, the district court did not err in denying the motion to suppress Richard's statement to Detective Weirauch.

*Richard's statement to Detective Spiotto*

Detective Spiotto, the lead detective assigned to investigate the shooting at the car wash, spoke with Richard at the hospital on the day after the shooting. Spiotto testified that he advised Richard of his *Miranda* rights, and that Richard acknowledged those rights and agreed to speak with him. Richard argues that the information gathered by Detective Spiotto during his interrogation "was not the product of a rational intellect and a free will and was involuntary." Richard's argument lists the details of that interview in an attempt to demonstrate how Richard's statement was not voluntary.

In sum, Richard argues that all of the circumstances surrounding his statement—the fact that the interview took place at 10:30 p.m., his injuries, his location and previous treatment at the hospital, the need of the medical staff to have sole access to him, and the fact that he had undergone surgery—established that his statement to Detective Spiotto was not voluntary. Richard does not allege that anything within the statement itself indicates that he was making an involuntary statement.

Considering the circumstances surrounding Richard's second custodial statement, there is nothing in the record that would undermine the district court's determination that Richard's statement to Detective Spiotto was voluntary. *See Chambers*, 113 Nev. at 981, 944 P.2d at 809. Because we conclude substantial evidence supports the district court's determination, we affirm the district court's decision to deny Richard's motion to suppress his statement to Detective Spiotto.[8]

## *CONCLUSION*

We clarify that in order for an out-of-court statement to be excluded from the definition of hearsay as a prior inconsistent statement

[8]In his opening brief, Richard also challenged the sufficiency of the *Miranda* warning, but at oral argument, appeared to withdraw this argument. Regardless of that withdrawal, we have considered the validity of the *Miranda* warning and see no basis to reverse the district court's determination that it was sufficient.

or as a prior identification, the declarant must have testified and have been subject to cross-examination concerning that out-of-court statement. Although the admission of some of Kinard's prior statements was error, the errors were harmless. We also affirm the district court's admission of Richard's statements to Detectives Weirauch and Spiotto as voluntary statements.

Accordingly, we affirm the judgment of conviction.

Cherry and Parraguirre, JJ., concur.

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THOMAS WILLIAM MOONEY, aka TOM MOONEY, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 72736-COA

August 30, 2018 429 P.3d 953

Appeal from a judgment of conviction, pursuant to a jury verdict, of fourteen counts of possession of a component of an explosive or incendiary device with the intent to manufacture an explosive or incendiary device and, pursuant to a guilty plea, of three counts of possession of a firearm by a person previously convicted of a felony offense. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

**Affirmed.**

*Kriston N. Hill*, Public Defender, and *Benjamin C. Gaumond*, Deputy Public Defender, Elko County, for Appellant.

*Adam Paul Laxalt*, Attorney General, Carson City; *Tyler J. Ingram*, District Attorney, and *David A. Buchler*, Deputy District Attorney, Elko County, for Respondent.

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

## OPINION

By the Court, Gibbons, J.:

Aline Mooney opened the locked bedroom door of Thomas William Mooney, her adult son, while a sheriff's deputy stood nearby. The deputy did not ask Aline to open the door or suggest that he wanted to see inside the bedroom. Once the door was open, the deputy saw firearms and bomb-making materials inside the room.

This case requires us to consider whether Aline's decision to open Mooney's locked bedroom door in the presence of a law enforcement officer was sufficiently connected or related to governmental

action to implicate the protections of the Fourth Amendment. Nevada caselaw, however, provides us with scant guidance on how to resolve this question.

Turning to and adopting federal caselaw, we conclude Aline's actions were sufficiently independent as to constitute private conduct. Therefore, we affirm the district court's decision denying Mooney's motion to suppress evidence because the Fourth Amendment's protections are inapplicable to such private conduct.

*FACTS*

William Mooney dialed 9-1-1 to contact emergency services because his and Aline's adult son, Mooney, and an unidentified woman were allegedly using drugs and the woman was threatening suicide. Elko County Sheriff's Deputy Brian Shoaf was dispatched to William's residence.

Upon his arrival at the residence, Deputy Shoaf was invited into the house. William spoke with Deputy Shoaf in the kitchen and, upon inquiry, informed Deputy Shoaf that the incidents occurred in Mooney's bedroom, which was located down a hallway. William informed Deputy Shoaf that Mooney and the woman were using drugs, repeatedly stated he was angry with Mooney, and complained that Mooney had been "destroying a lot of the house." William then guided Deputy Shoaf from the kitchen to the hallway, pointed to a closed door at the end of a hallway, and said, "that's Thomas'[ ] bedroom."

At this point, without any prompting or encouragement from Deputy Shoaf or William, Aline approached and attempted to open Mooney's bedroom door. Aline, however, could not open the door because it was locked.

Deputy Shoaf made several inquiries regarding William's and Aline's access to Mooney's room, and based on the information he gathered, informed William and Aline that Mooney "had a reasonable expectation of privacy to that room." In response, William became very agitated and denounced Deputy Shoaf's admonishment about Mooney's reasonable expectation of privacy because he owned the house and "pay[s] for it."

Though Deputy Shoaf did not ask about a key to the door or request either William or Aline to open the door, they informed Deputy Shoaf that they had a key to the door, and Aline proceeded to get the key. Deputy Shoaf cautioned William and Aline that, even though they had a key to the door, Mooney still had a reasonable expectation of privacy.

Nevertheless, Aline unlocked Mooney's bedroom door and opened it. At this time, Deputy Shoaf was down the hallway approximately ten feet from the doorway, and a majority of the room was out of his sight.

William indicated he wanted Deputy Shoaf to see the condition of Mooney's bedroom. Deputy Shoaf followed William down the hallway, stopping just outside the door. Because it was too dark in the room for him to see anything with his naked eye, Deputy Shoaf stood at the doorway, just outside the room, and shined his flashlight into the room. At some point, William entered the bedroom and turned on the lights, and Deputy Shoaf could then see the interior of the room without the aid of his flashlight.

Standing in the hallway and looking inside the room, Deputy Shoaf observed drug paraphernalia, what appeared to be firearms, and bomb-making materials. Based on his experience in the United States Marine Corps, Deputy Shoaf recognized that some of the bomb-making materials "are very easy to accelerate, very easy to set off." Thus, Deputy Shoaf chose to enter Mooney's bedroom to examine these potentially dangerous objects more closely.

Upon entering the room, Deputy Shoaf handled one of the objects that looked like a bomb or a component thereof. Deputy Shoaf testified that this item's appearance was significant to him because it was "the makeup of an anti-personnel explosive" that could easily explode and cause severe injuries to anyone nearby. Because of this observation, Deputy Shoaf secured and left the room, and he directed William and Aline to a safe location.

Deputy Shoaf applied for and obtained a warrant to search Mooney's bedroom. Deputy Shoaf, along with several detectives and members of the Elko County Bomb Squad, executed the warrant and seized "the devices, explosive components and firearms" that Deputy Shoaf had previously observed.

## *PROCEDURAL HISTORY*

Mooney moved to suppress all the evidence obtained as a result of Deputy Shoaf's observations of his bedroom. He argued that he had exclusive possession and use of the bedroom such that his parents did not have authority to consent to a search of the room. Thus, he argued, Deputy Shoaf's observations of his bedroom from the hallway constituted an unreasonable, warrantless search in violation of the Fourth Amendment.

The State opposed Mooney's motion, arguing that Deputy Shoaf did not request to search Mooney's room and Mooney's parents acted independently, not as agents of the state, when Aline opened the locked bedroom door. Accordingly, it argued, the Fourth Amendment's protections did not apply to their actions as private persons, or to Deputy Shoaf's observations from the hallway, which did not exceed the parents' intrusion. Alternatively, the State argued that William and Aline had authority to consent to a search of Mooney's bedroom.

Mooney replied to the State's opposition, arguing that, regardless of whether Aline was a state agent, Deputy Shoaf's observations

from the hallway constituted an unreasonable, warrantless search given what Deputy Shoaf knew about Mooney's history of living in the room and habits concerning keeping the door closed and locked.

The district court denied Mooney's motion to suppress evidence. In so doing, it found, in relevant part, that despite Deputy Shoaf's admonition that Mooney "had a reasonable expectation of privacy to that room," Aline retrieved her key to the room and proceeded to unlock and open the door to the room "[w]ithout any request or other prompting from [Deputy] Shoaf." It also found "that Aline and William were not acting as agents of the government when they provided [Deputy] Shoaf with a view of the bedroom." As a result, the district court concluded that Deputy Shoaf was not conducting a Fourth Amendment "search" when he made plain-view observations of the bedroom from the hallway. The court further concluded that Deputy Shoaf lawfully entered Mooney's bedroom because, based on his military training and experience, he "had probable cause to believe [Mooney] constructively possessed dangerous, life-threatening contraband" such that "exigent circumstances" justified Deputy Shoaf's warrantless entry into the room to inspect the bomb-making materials and secure the room before applying for a search warrant.

The case against Mooney proceeded to a jury trial on the explosives charges. The jury found him guilty of 14 counts of possession of a component of an explosive or incendiary device with the intent to manufacture an explosive or incendiary device. Subsequently, Mooney pleaded guilty to 3 counts of possession of a firearm by a person previously convicted of a felony offense in exchange for reserving his right to appeal the district court's denial of his motion to suppress evidence. Mooney was sentenced to serve a prison term of 52 months to 11 years. This appeal follows.

## *ANALYSIS*

Mooney raises one issue on appeal: whether the district court erred by denying his motion to suppress evidence. Mooney argues the district court erred by determining that Deputy Shoaf was not conducting a Fourth Amendment search when he saw the bomb-making materials in Mooney's bedroom from the hallway. Specifically, Mooney takes issue with the district court's conclusion that Aline's decision to open Mooney's bedroom door did not implicate the Fourth Amendment because she was not an agent or instrument of the government.[1] Mooney does not challenge the dis-

[1]Evidence of a crime or contraband that is observed by a law enforcement officer from a position that the officer has a right to be in is not a search under the Fourth Amendment as the items were observed in plain view. *See State v. Conners*, 116 Nev. 184, 187 n.3, 994 P.2d 44, 46 n.3 (2000) (noting that under "[t]he plain-view doctrine . . . if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent,

trict court's conclusion that exigent circumstances justified Deputy Shoaf's entry into his bedroom, nor does he contest the subsequent issuance and execution of the search warrant.[2]

"This court reviews the lawfulness of a search de novo because such a review requires consideration of both factual circumstances and legal issues." *Casteel v. State*, 122 Nev. 356, 360, 131 P.3d 1, 3 (2006) (internal quotation marks omitted). In so doing, "this court treats the district court's findings of fact deferentially." *McMorran v. State*, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002).

*State action*

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." The Fourth Amendment's protections, however, only apply to governmental action and are "wholly inapplicable" to any searches or seizures, even those that are unreasonable, that are performed by private individuals not acting as agents for the government or with the knowledge or participation of some government official. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

The Nevada Supreme Court has recognized that the Fourth Amendment's protections are limited and generally do not apply to the conduct of private individuals except under specific circumstances with sufficient indicia of governmental involvement. *See, e.g.*, *Golden v. State*, 95 Nev. 481, 482, 596 P.2d 495, 496 (1979) (holding that a search of air freight shipment by an airline employee was a private search that lacked "the significant state involvement required to place it within the purview of the Fourth Amendment"); *Radkus v. State*, 90 Nev. 406, 408, 528 P.2d 697, 698 (1974) ("The Fourth Amendment simply does not apply where evidence is discovered and turned over to the government by private citizens.").

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and if the officers have a lawful right of access to the object, they may seize it without a warrant" (internal quotation marks omitted)). Therefore, Deputy Shoaf's observations from outside the bedroom were not a violation of the Fourth Amendment unless the door to the room was unlawfully opened, which, as explained in this opinion, it was not. Mooney also argues that his parents lacked actual or apparent authority to consent to a search of his bedroom. We do not address this argument in light of our disposition.

[2]Though Mooney does not raise this issue on appeal, we agree with the district court's finding that exigent circumstances justified Deputy Shoaf's entry into Mooney's bedroom. *See Hannon v. State*, 125 Nev. 142, 147, 207 P.3d 344, 347 (2009) (exigent circumstances justify a warrantless search when law enforcement officers possess "an objectively reasonable basis to believe that there was an immediate need to protect the lives or safety of themselves or others").

Still, the supreme court has only issued one opinion in which it discussed in depth whether a private individual's conduct could be considered sufficiently related to governmental action as to be subject to the protections of the Fourth Amendment. *See State v. Miller*, 110 Nev. 690, 695-97, 877 P.2d 1044, 1047-49 (1994).[3] In *Miller*, the court did not announce any guiding principles or factors other courts should consider when faced with this question beyond pointing to *Jacobsen* and other similarly general decisions from the United States Supreme Court. *See id.* We therefore look primarily to federal caselaw to complete our analysis.

While there is no bright line or defined set of features distinguishing purely private conduct from governmental action, it is well established that the Fourth Amendment's protections only apply to searches or seizures conducted by a private individual when that private individual acts as an agent or instrument for the government. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971), *overruled in part on other grounds by Horton v. California*, 496 U.S. 128 (1990). Still, "there exists a gray area between the extremes of overt governmental participation in a search and the complete absence of such participation." *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994) (internal quotation marks omitted). "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614-15 (1989) (citations and internal quotation marks omitted). "This is a fact-intensive inquiry that is guided by common law agency principles." *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003) (internal quotation marks omitted). And it is the defendant's burden to establish "government involvement in a private search." *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994).

When determining whether the requisite agency relationship exists, the majority of the federal courts of appeals that have addressed the issue have held two factors should be considered: "(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist

[3]In one other case, the Nevada Supreme Court briefly discussed the limits of "private conduct" for Fourth Amendment purposes. *See Barnato v. State*, 88 Nev. 508, 501 P.2d 643 (1972). In *Barnato*, the supreme court considered, in part, whether an animal control officer who suspected appellants were growing marijuana on their property was a state actor when he "surreptitiously entered [appellants'] enclosed yard" with a sheriff's deputy and "they took a leaf from one of the plants." *Id.* at 510, 501 P.2d at 644. It concluded summarily that "even if the Control Officer himself may be considered a private citizen, State action clearly was involved when he surreptitiously seized plant samples from the [appellants'] garden." *Id.* at 511-12, 501 P.2d at 645.

law enforcement efforts or to further his own ends." *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982) (internal quotation marks omitted); *see also United States v. Ginglen*, 467 F.3d 1071, 1074 (7th Cir. 2006); *United States v. Alexander*, 447 F.3d 1290, 1295 (10th Cir. 2006); *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003); *United States v. Young*, 153 F.3d 1079, 1080 (9th Cir. 1998); *United States v. Jenkins*, 46 F.3d 447, 460 (5th Cir. 1995); *United States v. Malbrough*, 922 F.2d 458, 462 (8th Cir. 1990). To establish the requisite agency relationship, the defendant must meet both factors. *See Miller*, 688 F.2d at 657 (using the conjunctive "and" when describing the two-factor test); *cf. Jarrett*, 338 F.3d at 345 ("[T]he Government concedes the existence of the second factor . . . . Thus, the only question before us concerns the first factor . . . ."); *Reed*, 15 F.3d at 931 (deciding that because the knowledge-and-acquiescence factor was clearly met, the court must determine whether a private individual intended "to further his own ends . . . or assist law enforcement efforts").

Concerning the first factor, "[a] private person cannot act unilaterally as an agent or instrument of the state; there must be some degree of governmental knowledge and acquiescence." *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976). "In order to run afoul of the Fourth Amendment, therefore, the Government must do more than passively accept or acquiesce in a private party's search efforts. Rather, there must be some degree of Government participation in the private search." *Jarrett*, 338 F.3d at 344. For example, in *Skinner*, the United States Supreme Court found that certain federal regulations governing private rail workers demonstrated "the Government did more than adopt a passive position toward the underlying private conduct," such that the rail workers acted as government actors. 489 U.S. at 615; *see also People v. Wilkinson*, 78 Cal. Rptr. 3d 501, 513 (Ct. App. 2008) (rejecting the argument that an officer telling a third party he could search the defendant's room was active encouragement under factor one).

Concerning the second factor, where a private individual has "a legitimate, independent motivation to further" that individual's own ends, "any dual motive to detect or prevent crime or assist the police" must negate the independent motivation for the private intrusion to be considered governmental action. *Cleaveland*, 38 F.3d at 1094 (internal quotation marks omitted). For example, in *Cleaveland*, the court held that the intent of a power company employee who inspected an electric meter as part of his job duties to determine if the defendant was stealing electricity was not negated by any secondary intent to also assist law enforcement. *Id.* In contrast, in *Reed*, the Ninth Circuit concluded that a private individual "intended to help police" because that individual testified "that he knew from his previous dealings with the police that he was not an agent of the police

department" and he "wanted to give [the police] enough information so that they knew that there may be things happening . . . that they wanted to take action on." 15 F.3d at 931 (alteration in original).

We conclude the two-factor approach provides a logical framework for analyzing whether a private party should be deemed an agent of the government, and we adopt that approach. Therefore, when determining whether the requisite agency relationship exists, two factors should be considered: (1) whether the government knew of and acquiesced in the private individual's intrusive conduct, and (2) whether the private individual performing the search or seizure intended to assist law enforcement or had some other independent motivation. Both factors must be met for a private individual to be considered an agent or instrument of the government and implicate the Fourth Amendment. And the burden to demonstrate that a private individual has acted as a government agent or instrument rests upon the defendant who seeks refuge under the Fourth Amendment's protections. To satisfy the burden to establish the requisite agency relationship under the first factor, the defendant must show government agents knew of the intrusive conduct and acquiesced in the conduct by actively participating in or encouraging the private individual's actions. To satisfy the burden under the second factor, the defendant must show either the private individual solely intended to assist law enforcement when conducting the search or seizure, or, if dual motives exist, any independent motive for conducting the search or seizure was negated by an intent to assist law enforcement efforts.

We turn now to apply this test to the facts of the present case.

*Application to Mooney*

Although Deputy Shoaf certainly knew Aline was unlocking and opening Mooney's bedroom door, Mooney failed to meet his burden to demonstrate that Deputy Shoaf actively participated in or encouraged Aline's actions. The record demonstrates Deputy Shoaf was present when Aline opened the door and he informed Aline (as well as William) that the fact that she had access to a key to the door did not undermine Mooney's reasonable expectation of privacy in the room. Far from "affirmatively encourag[ing], instigat[ing], or initiat[ing]," *Wilkinson*, 78 Cal. Rptr. 3d at 513, Aline's intrusive conduct, Mooney can only show that Deputy Shoaf was physically present and he implicitly *discouraged* her conduct. Thus, we conclude Mooney failed to demonstrate the requisite agency relationship under the first factor.

Because we conclude that Mooney failed to demonstrate that a government officer acquiesced to Aline's conduct, we need not consider whether Aline intended to assist law enforcement in opening

Mooney's bedroom door. Still, to instruct future courts on how to apply this test when faced with a similar scenario, and to provide an alternative basis for our decision, we choose to address the second factor concerning Aline's intent here.

Our inquiry focuses on Aline because she retrieved the key and opened the door. The record demonstrates Aline testified that Deputy Shoaf did not ask her to get her key to Mooney's room or to open the door. Rather, she testified that she did not feel compelled or forced "by law enforcement" to open the door, but chose to open the door after overhearing William and Deputy Shoaf go down the hall toward Mooney's room. The record shows that William insisted that Deputy Shoaf see the state of Mooney's bedroom, not because he believed explosives or evidence of a crime were present inside, but because he was angry with the way Mooney had been living. Deputy Shoaf's cautionary admonition that Mooney had a reasonable expectation of privacy in his bedroom caused William to become incensed. The record demonstrates that, in response to William's outrage, Aline opened the door. Thus, rather than intending to assist Deputy Shoaf, the record suggests that Aline's only intent was to pacify her husband by opening the bedroom door. Mooney identifies no evidence pointing to another motive. Accordingly, we also conclude that Mooney could not have met his burden to demonstrate the requisite agency relationship under the second factor.

As the district court correctly found, the record demonstrates that Deputy Shoaf's only participation in Aline's efforts was his physical presence and several verbal admonishments pointing out that Mooney enjoyed a reasonable expectation of privacy in his bedroom, which was protected by a locked door. Therefore, we conclude that the district court did not err in finding that Aline did not act as an agent of the government when she opened Mooney's door. Consequently, Deputy Shoaf's observations of bomb-making materials inside Mooney's room in plain view from the hallway involved no Fourth Amendment search. *See Horton*, 496 U.S. at 133 n.5.[4] Accordingly, we conclude the district court did not err by denying Mooney's motion to suppress evidence.

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[4]Mooney argues in his reply brief that "the plain view doctrine" is inapplicable to Deputy Shoaf's observation of the items in his room from the hallway because he did not come across these items inadvertently, but was engaged in "a fishing expedition." The United States Supreme Court, however, eliminated the "inadvertence" element from this doctrine in *Horton* such that it is immaterial whether Deputy Shoaf came across the incriminating evidence in Mooney's room inadvertently or otherwise. *See Horton*, 496 U.S. at 130 ("[E]ven though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition."); *United States v. Williams*, 592 F.3d 511, 522-23 & n.3 (4th Cir. 2010) (overruling cases requiring "inadvertence" for plain-view seizures due to conflict with *Horton*). Thus, we reject Mooney's plain-view argument.

*CONCLUSION*

Searches and seizures conducted by a private individual only implicate the Fourth Amendment when a private individual acts as an agent or instrument for the government. Because there is no bright line or defined set of features for distinguishing purely private conduct from governmental action, turning to federal caselaw, we adopt a two-factor approach for analyzing whether a private party should be deemed an agent of the government. To determine whether the requisite agency relationship exists, two factors should be considered: (1) whether the government knew of and acquiesced in the private individual's intrusive conduct, and (2) whether the private individual performing the search or seizure intended to assist law enforcement or had some other independent motivation. Applying this test to the facts in this case, we conclude Mooney did not meet his burden and demonstrate Aline was acting as an agent or instrument of the government. We conclude that Deputy Shoaf did not violate Mooney's Fourth Amendment rights by peering into and entering his room to secure it and protect others from the potential harms that may have resulted from the explosives Deputy Shoaf perceived in plain view. We therefore affirm the district court's order denying Mooney's motion to suppress evidence and affirm his judgment of conviction.

Silver, C.J., and Tao, J., concur.