IN THE SUPREME COURT OF THE STATE OF NEVADA
CASE NO. 65193

MICHAEL J. SCHOFIELD,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

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APPEAL

From the Eighth Judicial District Court, Clark County
District Court Case No. C-13-287009-1

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

There are no such corporations related to Appellant which require disclosure pursuant to NRAP 26.1. The only law firm to appear on behalf of Appellant in this Court is Karen K. Wong, Esq., of Wong Appellate Law. Appellant was represented by the Clark County Public Defender, John Parris, Esq., and Jess Matsuda, Esq., in the District Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, entered on July 28, 2014. (JA 1736.) The notice of appeal was filed on March 6, 2014, and is treated as filed on the date the judgment of conviction was entered under NRAP 4(b)(2). This Court has jurisdiction over this appeal under NRS 177.015(3).

ROUTING STATEMENT

This is a direct appeal from a judgment of conviction for first-degree kidnapping, a category A felony. This case is presumptively retained by the Supreme Court by exception to NRAP 17(b)(1) (stating a case will be presumptively assigned to the Court of Appeals if it is a "direct appeal from a judgment of conviction based on a jury verdict that does not involve a conviction for any offenses that are category A or category B felonies"). In addition, this case raises questions of first impression in Nevada and should be considered by the Supreme Court under NRAP 17(a)(13). The issues of first impression include the interpretation and constitutionality of NRS 200.310, as related to the elements of first-degree kidnapping of a minor. (OB at 8–24.)

NEVADA STATUTES

NRS 200.310 Degrees.

1. A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

2. A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree which is a category B felony.

NRS 200.359 Detention, concealment or removal of child from person having lawful custody or from jurisdiction of court: Penalties; limitation on issuance of arrest warrant; restitution; exceptions.

1. A person having a limited right of custody to a child by operation of law or pursuant to an order, judgment or decree of any court, including a judgment or decree which grants another person rights to custody or visitation of the child, or any parent having no right of custody to the child, who:

(a) In violation of an order, judgment or decree of any court willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child; or

(b) In the case of an order, judgment or decree of any court that does not specify when the right to physical custody or visitation is to be exercised, removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation,

is guilty of a category D felony and shall be punished as provided in NRS 193.130.

….

4. Before an arrest warrant may be issued for a violation of this section, the court must find that:

(a) This is the home state of the child, as defined in NRS 125A.085; and

(b) There is cause to believe that the entry of a court order in a civil proceeding brought pursuant to chapter 125, 125A or 125C of NRS will not be effective to enforce the rights of the parties and would not be in the best interests of the child.

STATEMENT OF THE ISSUES

I. **Whether a parent's intent to bring his child to a grocery store can constitute "intent to keep" the minor from his guardians and ground a conviction for first-degree kidnapping?**

II. **Whether a parent, as a matter of law, can have the intent to keep his child from the child's "parents, guardians, or any other person having lawful custody" under the child-kidnapping portion of the first-degree kidnapping statute?**

III. **Whether the trial court committed plain error by failing to instruct the jury on movement incidental to child abuse in accordance with** *Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006)**?**

IV. **Whether the trial court abused its discretion in refusing Mr. Schofield's request to instruct the jury that lack of the guardians' consent was an essential element of the child kidnapping charge, thus requiring the jury to find lack of consent beyond a reasonable doubt?**

V. **Whether sufficient evidence supports the conviction for first-degree kidnapping under a correct interpretation of the statute and the fact that Mr. Schofield did not succeed in leaving with his son?**

STATEMENT OF THE CASE

This case concerns a father convicted of first-degree kidnapping for trying to take his teenage son to the store with him. The son's grandparents had been appointed guardians years earlier, but the father and son maintained a close relationship, which included overnight visits and long periods of living together. The grandparents and father all shared an active role in parenting the son.

One day during a visit at the grandparents' house, the father got into an argument with his son about whether the son would accompany him to the store. When the son refused, the father—in an admittedly disproportionate act of discipline—grabbed the son in a headlock and forced him to the father's minivan. The grandparents, upset by the use of force and believing that the son was being choked, yelled at the father to stop and called 911. Police then intervened. A jury found the father guilty of child abuse and first-degree kidnapping. The father was sentenced to 13 to 60 months for child abuse and 5 to 15 years for kidnapping.

The father readily admitted his guilt on the child abuse charge; however, neither he nor the guardians believe a kidnapping was even attempted. The trial court misinterpreted the *intent to keep* requirement of child kidnapping, failed to recognize that a parent cannot commit first-degree child kidnapping as a matter of law, failed to instruct the jury in accordance with *Mendoza*, and failed to instruct the jury on lack of consent as an element of the offense. Correctly interpreting the law, insufficient evidence supports Mr. Schofield's first-degree kidnapping conviction.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

In 2001, the defendant, Michael John Schofield ("Mr. Schofield") could not care for his son, Michael Joshua Schofield ("Michael"), and Mr. Schofield's mother and stepfather, Patricia and Norman Duplissie ("Pat" and "Norman," respectively), became Michael's legal guardians. (3AA 688–89, 5AA 1094.) Michael lived with his father off and on, sometimes for years at a time, but Mr. Schofield never formally terminated the guardianship. (3AA 736). In 2012, Michael returned to live with his grandparents, but he maintained a close relationship with his father. (*See* 2AA 475, 3AA 555, 739–40.) Mr. Schofield had an active role in his son's life—the two watched football and played catch together "just about every Sunday," and in the off-season would go the park, play basketball, watch movies, or just "hang out." (3AA 558, 562, 693.) Mr. Schofield, Pat and Norman all had a hand in raising Michael. (3AA 689.)

On Sunday, January 6, 2013, one of the typical days for Michael and Mr. Schofield to spend together, Mr. Schofield rang the doorbell of his mother and stepfather's house. (2AA 479.) Norman opened the door and allowed Mr. Schofield to come inside. (3AA 578, 697.) Mr. Schofield had come to see his son, and after a brief conversation, Norman went to do something else. (3AA 698.) Mr. Schofield found Michael and asked him to go outside in front of the house to play catch. (2AA 482, 3AA 579.) Michael agreed. (2AA 483.)

The testimony differs as to whether Michael and his father went outside first, but soon after, Mr. Schofield, Pat, and Michael had a discussion near the front door. (2AA 485, 3AA 582–83, 650.) Mr. Schofield realized he had left something at the store and told Michael to go with him to retrieve it. (2AA 485, 3AA 585, 5AA 1003.) Michael testified that Pat did not want him to accompany his father because his father did not "look right" and looked "tired." (2AA 485–86.)[1] Pat testified that Michael did not want to go and that, at first, she had said Michael did not have to go with his father. (3AA 583–84.) Following that, however, she testified that she changed her mind: "Michael, you can go to the store with your dad, it won't hurt you. . . . Michael, go to the store with your dad. It's not going to hurt you. You know, it's the right thing to do." (3AA 585; *see also* 3AA 650.) Mr. Schofield recalled that Pat had said to Michael: "[D]on't say no to your father, go." (5AA 1007.) After Michael again refused, Mr. Schofield, trying to exercise parental authority, stated: "[Y]ou're going to go or I'm going to make you go." (5AA 1008.) Michael recalled this statement as: "You're going to listen to me, I'm your father, and if you don't listen, I'm going to break your teeth." (2AA 486–87.)

Mr. Schofield and Michael went outside either to continue the discussion or to throw the football, but the two argued. (2AA 486–89.) Michael came back in and ran around the first floor of the house. (2AA 489, 3AA 589.) Mr. Schofield chased him and caught up with him in the living/dining area. (2AA 489, 3AA

[1] Earlier that day, Pat and Norman had brought cold medicine over to Mr. Schofield because he was not feeling well. (3AA 570–72.)

590.) Pat yelled at them to stop and get outside, and threatened to call 911. (3AA 589–90.) A chair was knocked over, and the dog "was barking like crazy." (3AA 594.) In the commotion, Pat called 911. (3AA 590.) After Pat called 911, Mr. Schofield grabbed Michael and put Michael in a headlock.[2] (2AA 491, 3AA 658.)

Norman came over from the kitchen and yelled at Mr. Schofield to stop because he "felt" that Mr. Schofield was hurting Michael. (3AA 700, 702, 705.) Mr. Schofield was saying to Michael: "You're going to do what I . . . tell you and getting in that . . . car because I'm your . . . father, and you'll do what I tell you to do." (3AA 705.) Mr. Schofield pushed Michael outside. (2AA 495–96.) Norman stopped to place their dog in its cage, but otherwise, Norman and Pat both followed Mr. Schofield and Michael outside. (3AA 613, 710, 727.)

Mr. Schofield's van was parked in the driveway, close to the front door of the house. (2AA 499.) Mr. Schofield threw Michael in the passenger seat. (3AA 502.) Neighbors who happened to be off-duty police officers then ran over and tackled Mr. Schofield to the ground. (3AA 505, 613, 618–19, 728–29.) Another police officer arrived in her patrol car, and Mr. Schofield was handcuffed and placed inside the vehicle. (4AA 813.) While in the patrol car, Mr. Schofield was angry and "screamed about how his son doesn't listen to him so he makes him

[2] Michael described the headlock as a "chokehold" and indicated that he had trouble breathing; however, the jury acquitted Mr. Schofield of the Battery Constituting Domestic Violence – Strangulation charge, indicating a finding that Mr. Schofield did not intentionally impede Michael's breathing.

listen." (4AA 817.) Mr. Schofield explained on the stand that "it was me trying to discipline my child, I didn't feel like I should be arrested . . . . " (5AA 1014.)

II. PROCEDURAL BACKGROUND

The State charged Mr. Schofield with burglary, child abuse, neglect or endangerment, battery domestic violence – strangulation, and first-degree kidnapping. Trial began on January 27, 2014, and lasted six days. (AA 23–1185.) On the fourth day, Mr. Schofield decided to represent himself.[3] (4AA 870.) Jury Instructions 10 through 12 involved the kidnapping charge. (5AA 1196–1198) Jury Instruction No. 10 stated, as relevant here:

> Every person who leads, takes, entices, or carries away, or detains, any minor, with the intent to keep, imprison, or confine the minor from his parents, guardians, or any other person having lawful custody of the minor is guilty of kidnapping in the first degree. . . .

(5AA 1196.) Mr. Schofield objected to the fact that Instruction No. 10 did not include any requirement that his actions were without parental permission. (4AA 936.) Defendant interpreted the instruction as: "[I]f you have the parent's permission, you still don't have the right to take the child is what it's saying." (4AA 940.) The court responded: "No, that's not what it's saying. And if you had

[3] Following initial appearances, Mr. Schofield's counsel, John Parris, announced to the Court that he had represented the State's trial attorney on two separate traffic ticket matters. (1AA 25.) Mr. Schofield contends that this conflict, as well as the fact that Mr. Parris was paid by the State's star witness, caused ineffective assistance of counsel. Mr. Schofield, however, recognizes that an ineffective assistance of counsel claim is more appropriately raised in the first instance in a post-conviction proceeding pursuant to *Johnson v. State*, 117 Nev. 153, 160-61, 17 P.3d 1008 (2001).

the child—if you had the guardian's permission, it would not be first degree kidnapping." (4AA 941.) Essentially, the court agreed with Mr. Schofield regarding the requirement for lack of consent, but agreed with the State that the issue was one for argument rather than a jury instruction. (4AA 942–43.)

Jury Instruction No. 12 stated:

> In order for you to find the defendant guilty of both first-degree kidnapping and an associated offense of battery domestic violence strangulation, you must also find beyond a reasonable doubt either:
>
> 1. That any movement of the victim was not incidental to the battery domestic violence strangulation;
>
> 2. That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the battery domestic violence strangulation;
>
> 3. That any incidental movement of the victim substantially exceeded that required to complete the battery domestic violence strangulation; or
>
> 4. The movement had an independent purpose or significance.

(5AA 1198.)

During closing arguments, the prosecutor told the jury she would go through the elements of the kidnapping charge with them, and she read them Jury Instruction 10. (5AA 1134.) After describing Mr. Schofield's taking or carrying away of Michael to the car, she explained the *intent to keep* element of the statute:

> So how do you know what he intended to? Wait, let me go back for a moment, where he, with the intent to keep, imprison or confine the minor from his parents or guardians. Right, Norman and Patricia. That's who he was taking away or intending to keep away from his

> parents or guardians. . . . So how do you know that he was intending to take that child from Norman and Patricia? Well, he said it himself, I'm fucking taking him. You will go with me because I'm your father. And he says—well, and acts are that he's taking Michael Joshua from the home, and that's where Norman and Patricia are. He's physically taking him from the safety of that home where Norman and Patricia are, taking him away from the home and he's putting them into a vehicle. Why? So he can take him away, and there's no safety, no Norman, no Patricia.
>
> And they're all trying to stop him. Think about how many people were trying to stop the Defendant from taking little Michael. Little Michael tried to stop it, Norman tried to stop it, Patricia called 911, she tried to stop it. Liza from next door came, and so did Won. Five different people are trying to stop the Defendant from taking Michael Joshua.

(5AA 1134–35.) Later, in explaining the kidnapping charge, she entirely omits the requirement that Mr. Schofield have had an *intent to keep*, stating:

> Kidnapping as it's charged in this Information and specific to this count, is his taking this kid away without the permission of his lawful guardians. There's nothing in the statute . . . that says he has to permanently keep the child, have the intention of permanently keeping the child. (5AA 1167.)

On February 3, 2014, the jury found Mr. Schofield not guilty of Burglary and Battery Constituting Domestic Violence – Strangulation. (5AA 1215.) The jury found Mr. Schofield guilty of Child Abuse, Neglect, or Endangerment and First Degree Kidnapping. (5AA 1215.)

On March 6, 2014, Mr. Schofield filed a Notice of Appeal. (5AA 1217.) The district court sentenced Mr. Schofield to 13 to 60 months for the child abuse conviction and 5 to 15 years for the kidnapping conviction. (6AA 1563.) The Judgment of Conviction was entered on July 28, 2014. (6AA 1563.)

SUMMARY OF ARGUMENT

Four material errors of law permeated the trial proceedings below. First, the trial court misinterpreted the *intent to keep* requirement of the statute. *Keep*, in context, means a permanent keeping—something Mr. Schofield never intended. Second, the child-kidnapping statute should be interpreted not to apply to parents because the statute requires specific intent to keep the minor *from* his parents or guardians, and parents are covered instead by NRS 200.359. Third, the trial court committed plain error by failing to instruct the jury that a dual conviction of kidnapping and child abuse requires that the kidnapping not be merely incidental to the child abuse. Fourth, the trial court abused its discretion by refusing to instruct the jury on lack of consent as an essential element of the offense of child kidnapping. Finally, based on these errors of law and the plain fact that Mr. Schofield did not kidnap his son, there was insufficient evidence to support the first-degree kidnapping conviction. The kidnapping charge was a result of overzealous prosecution and should be reversed for the reasons below.

ARGUMENT

I. Mr. Schofield's intent to bring his son on a routine errand does not constitute "intent to keep" within the meaning of Nevada's first-degree kidnapping statute.

Under NRS 200.310, a person who takes away a minor with the intent to keep the minor from his or her parents, guardians, or any other person having lawful custody of the minor, is guilty of first-degree kidnapping—a category A felony in the same class as first-degree murder and sexual assault. The record

clearly shows that Mr. Schofield only intended to bring Michael to the store. Mr. Schofield had no *intent to keep* his son from Pat and Norman; he was convicted under an erroneous interpretation of the specific intent element of the statute. Mr. Schofield's conviction for first-degree kidnapping should be reversed.

A. Standard of Review and Applicable Law

An appellate court reviews questions of statutory interpretation de novo. *Clay v. Eighth Judicial Dist. Court of State*, 305 P.3d 898, 902 (Nev. 2013). When interpreting a statute, the Court must look first to the plain language of the statute. *Id.* In doing so, the statute must be read as a whole so that words or phrases are not rendered superfluous. *Flamingo Paradise Gaming, L.L.C. v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009).

If the plain language is ambiguous, then the Court will try to effectuate the intent of the Legislature. *Zgombic v. State*, 106 Nev. 571, 575, 798 P.2d 548, 551 (1990). The Court will construe statutory language to avoid absurd or unreasonable results; but even if a result is not patently absurd, the Court may interpret the statute to avoid a result at odds with legislative intent. *Id.* at 576, 798 P.2d at 551 ("While this result is not patently absurd or unreasonable, we do not believe that this was the public policy which the legislature intended . . . ."). In the criminal context, the Court must strictly construe an ambiguous statue in favor of the defendant. *Id.* at 575, 798 P.2d at 551. Furthermore, a statute should be construed to avoid an unconstitutional interpretation. *State v. Kopp*, 118 Nev. 199, 202, 43 P.3d 340, 342 (2002).

B. The plain language of NRS 200.310 shows that "intent to keep" requires a specific purpose to keep the minor from his parents or guardians permanently—an intent Mr. Schofield did not have.

Nevada's child-kidnapping statute requires, as one element, the "intent to keep, imprison, or confine the minor from his or her parents [or] guardians." NRS 200.310. At trial, the State misinterpreted both *intent* and *keep*, and essentially argued to the jury that a general intent was sufficient to convict rather than the specific intent required by the statute. (*See* AA 1134–35.) The evidence shows that Mr. Schofield lacked the intent to keep Michael from his guardians within the meaning of the statute because he only intended to bring his son to the store.

1. The intent element requires that the action was taken for the purpose proscribed.

First-degree kidnapping in Nevada is a specific intent crime and thus requires "the intent to accomplish the precise act which the law prohibits." *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026–27, 195 P.3d 315, 324 (2008). As opposed to a general intent crime, which requires only intent to do the physical act, a specific intent crime requires "a particular criminal intent beyond the act done." *People v. Gould*, 570 N.W.2d 140, 143 (Mich. 1997). Intent is defined as "an aim or purpose,"[4] and "in order to act with specific intent, an individual 'must expressly intend to achieve the forbidden act.'" *Pierre v. AG of the United States*,

[4] "intent," *Merriam-Webster.com*, http://www.merriam-webster.com/dictionary/intent, (last visited March 9, 2015).

528 F.3d 180, 187 (3d Cir. 2008)[5] (holding that "the specific intent standard would not be satisfied" where the forbidden purpose is merely a foreseeable consequence of the act); *State v. Nath*, 52 P.3d 857, 861 (Idaho 2002) ("[T]here must exist in the mind of the perpetrator the specific intent to cause the child who is kidnapped to be unlawfully kept from persons having lawful care or control of the child.").

Here, the prosecutor told the jury that the intent element of the crime was fulfilled by Mr. Schofield's *intent to take* Michael to the car:

> So how do you know what he intended to do? . . . . So how do you know that he was intending to take that child from [his guardians]? Well he said it himself, I'm . . . taking him. You will go with me because I'm your father. . . . He's physically taking him . . . . Why? So he can take him away.

(JA 1206–07.) The prosecutor essentially collapsed the specific intent requirement of *intent to keep* into the general intent requirement of consciously taking Michael away. The intent to keep the minor from his parents or guardians, however, must have been the aim and purpose of the perpetrator.

Mr. Schofield did not purpose to keep Michael from Michael's guardians. There is no evidence that Mr. Schofield wanted to separate Michael from his guardians. Mr. Schofield's goal was to make a trip to the store. Although a temporary separation between Michael and his guardians was a foreseeable result of bringing Michael to the store, that separation was not Mr. Schofield's aim and

[5] Although *Pierre* did not directly involve the interpretation of criminal law, the Third Circuit noted that "specific intent should be interpreted with reference to its ordinary meaning in American criminal law." 528 F.3d at 187.

purpose. The State failed to prove an essential element of the crime, and Mr. Schofield's conviction for first-degree kidnapping should be reversed.

2. As used in NRS 200.310, intent to *keep* means to intent to possess permanently or indefinitely.

The State also misinterpreted *keep* as used in NRS 200.310 by assuming that a momentary possession satisfies that requirement. The English word *keep* refers to possession over a period of time. Merriam-Webster defines *keep* as:

- to continue having or holding (something) : to not return, lose, sell, give away, or throw away (something)
- to continue in a specified state, condition, or position
- to cause (someone or something) to continue in a specified state, condition, or position[6]

All of these definitions require continuing to do something indefinitely, if not permanently. In the absence of a limitation, *to keep* implies permanency, for example: "I intend to keep the money." *Keeping* terminates only when an ending condition is specified, as in, "I will keep it for one month," or "I will keep it until you return." At a minimum, because *to keep* requires continuing possession, the *keeping* must occur over a period of time: momentary possession is not *keeping*. NRS 200.310 does not impose a time limit or other condition on *keep*; therefore, *intent to keep* means intent to keep permanently.

[6] "keep," Merriam-Webster.com, http://www.merriam-webster.com/dictionary/keep (last visited March 9, 2015).

In addition, interpreting the statutory language this way harmonizes *keep* with the rest of the phrase: "intent to keep, imprison, or confine the minor." If *keep* is construed to include even momentary possession, then the words *imprison* and *confine* are rendered superfluous because any imprisonment or confinement necessarily involves at least a momentary keeping.

C. Even assuming "intent to keep" is ambiguous, the Court should construe *keep* strictly to avoid absurd and unreasonable results.

Even if the Court were to find that a plain English construction of *intent to keep* does not require the *intent to keep permanently*, the Court should nevertheless strictly construe *keep* to require a permanent or indefinite keeping in order to avoid absurd and unreasonable results. As discussed above, permanency is implied in common usage of the word *keep*. Such common usage, if it does not conclusively resolve the meaning of *keep*, at least creates an ambiguity. Because principles of statutory construction dictate that "penal statutes should be strictly construed and resolved in favor of the defendant when the applicability of such statute is uncertain," *Anderson v. State*, 95 Nev. 625, 629, 600 P.2d 241, 243 (1979), the Court should construe *intent to keep* as intent to keep permanently or indefinitely.

Moreover, courts have recognized that the broad language of kidnapping statues is prone to prosecutorial abuse and that a literal construction may lead to absurd results. *See, e.g.*, *United States v. Corralez*, 61 M.J. 737, 748–49 (A.F. Ct. Crim. App. 2005) (analogizing the "brief holdings" to "a feuding couple driving down the road" and disapproving of the "overzealous prosecution" of the

kidnapping charges).[7] At least one court has even limited the construction of less severe custodial interference statutes. *See State v. Smith*, 764 P.2d 997, 998–99 (Utah Ct. App. 1988) ("[The statute] is not so broad and general as to create a 'catch-all' remedy for every instance when a parent's wishes are not followed.").

The U.S. Supreme Court has cautioned that the broad interpretation of kidnapping statutes could result in unbounded liability. In *Chatwin v. United States*, 326 U.S. 455 (1946), the Court strictly interpreted the "held for ransom or reward or otherwise" provision of the Federal Kidnapping Act. *Id.* at 456. The facts involved a teenager who had escaped from a probation officer, traveled with the defendants to Mexico, married one of them, and then moved to Utah. *Id.* at 458, 459. The Court rejected the government's broad interpretation of the statute, reasoning that the facts "reveal a situation quite different" from the kidnapping that the statute was designed to address and that a broad interpretation would lead to absurd results and unfair punishment. *Id.* at 462–63, 464–65. The Court stated that if it were "to sanction a careless concept of the crime of [kidnapping] . . . the boundaries of potential liability would be lost in infinity." *Id.* at 464.

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[7] *See also United States v. Etsitty*, 140 F.3d 1274, 1275 (9th Cir. 1998) (Kleinfeld, J., concurring) ("Some prosecutors . . . use kidnapping as a club every time a boyfriend and girlfriend are driving down the highway arguing, one of them says 'let me out of this car right now,' and the driver keeps arguing instead of pulling onto the shoulder."); *Gov't of V.I. v. Berry*, 604 F.2d 221, 225 (3d Cir. 1979) ("[B]earing in mind that the . . . statute carries a Mandatory sentence of life imprisonment, we must determine whether the . . . legislature intended that every act which comes within the literal language of the statute be deemed to constitute kidnapping.").

If this Court were to interpret the *intent to keep* element broadly as the State advocates, this "careless concept of the crime of kidnapping" would lead to absurd and unreasonable results—particularly since first-degree kidnapping is a category A felony. For example, under a broad construction of *keep*:

- A private security officer who "detains" a lost child would be guilty of first-degree kidnapping, notwithstanding the fact that he intends to return the child to her parents once they are identified.

- In a joint custody situation, a mother who intentionally returns her children to their father five minutes late so they can finish up an art project would have "detained" the minors with the intent to keep them from their father—a category A felony.

- A teenage boy who "entices" his girlfriend to sneak out for a late night movie could be incarcerated for five to fifteen years for that act.

Although some of these acts may be objectionable, none rise to the level of a category A felony. The Legislature certainly did not intend for these examples to constitute first-degree kidnapping. The examples could go on, and they clearly illustrate the absurd consequences of interpreting *intent to keep* to include momentary or even short-duration keeping. Because a broad construction of *keep* would lead to absurd results, a permanency requirement should be implied. Mr. Schofield did not have an *intent to keep* Michael from his guardians permanently in violation of NRS 200.310, and his conviction should be reversed.[8]

[8]Not only did Mr. Schofield not intend to keep Michael permanently, his intent to bring Michael to the store appears to have been normal for their relationship. Michael often went places with Mr. Schofield. (*See* AA 558, 562, 693.) Thus, even if this Court were to conclude that the statute requires something

D. If "intent to keep" is construed broadly, then the statute would be unconstitutional under the Fourteenth Amendment.

Assuming *arguendo* that *intent to keep* captures any action whose foreseeable consequence is a minor's brief separation from his or her parents or guardians, the statute is unconstitutionally vague and overbroad.

1. A broad construction of "intent to keep" renders the statute void for vagueness.

A state statute may be void for vagueness under the Due Process Clause of the Fourteenth Amendment. *See Flamingo Paradise Gaming*, 125 Nev. at 512, 217 P.3d at 553. A facial vagueness challenge must show that the statute "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Id.* In the criminal context, the statute is void if "vagueness permeates the text"—that is, if the statute cannot meet these requirements in most circumstances. *Id.*

Here, vagueness permeates the portion of NRS 200.310 under which Mr. Schofield was charged. As illustrated by the examples above, the statute does not provide notice to ordinary people of what conduct is prohibited. Every day, in the course of everyday life, hundreds of thousands of children in this state are *taken away* or *detained* with the intent to keep them from a parent or guardian for some period of time. The statute lacks any specific standard as to how long one must

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less than a permanent keeping, the *intent to keep* here was still insubstantial in the context of Mr. Schofield's relationship with Michael and Michael's guardians.

intend to keep a child to be guilty of first-degree kidnapping or what constitutes a keeping. Arbitrary enforcement is therefore encouraged because a prosecutor could bring charges against almost anyone in this State who cares for another person's child, shares joint custody of a child with another person, or who even "detains" another person's child for a few seconds by asking for directions.

The statute is also invalid as applied to Mr. Schofield. It did not provide Mr. Schofield with fair notice that taking Michael to the store, under the circumstances of their relationship, would constitute an *intent to keep* Michael from his guardians in violation of NRS 200.310. Although Mr. Schofield had never sought to regain legal custody of Michael, Mr. Schofield had an ongoing relationship with his son and shared parenting with Norman and Pat. The statutory language was not clear enough to give Mr. Schofield notice that any disagreement over where Michael should be at a given time could ground a kidnapping charge.

2. A broad construction of "intent to keep" renders the statute void for overbreadth.

A criminal statute is overbroad if it inhibits constitutionally protected conduct. The "sweep of this part of the statute" under the State's interpretation is so broad that it requires this Court to limit its application to prevent a violation of due process. *See People v. Adams ("Adams II")*, 205 N.W.2d 415, 418–19 (Mich. 1973). A broad construction of *intent to keep* infringes on constitutionally protected freedom of association.

In *People v. Adams ("Adams I")*, 192 N.W.2d 19, 20–21 (Mich. App. 1971) (reversed in part by *Adams II*), the Michigan court noted:

> Our kidnapping statute, like most, is so all-encompassing in its literal breadth that unless its operative effect is confined by objective standards it would be void for overbreadth.

To avoid an unconstitutional result, the court read into the statute an asportation requirement. *Id.*. This reasoning was affirmed in *Adams II*. *Cf. People v. Jones*, 108 Cal. App. 4th 455, 462 (2003) (recounting that the California Supreme Court had added an illegal intent element to the kidnapping crime in order to avoid constitutional concerns). Similarly, here, the child-kidnapping statute must be strictly construed to avoid an unconstitutional result.

E. The jury convicted Mr. Schofield under an erroneous construction of NRS 200.310, warranting reversal.

Reversal is warranted in this case because the jury convicted Mr. Schofield based on the prosecutor's incorrect interpretation of *intent to keep*, as discussed above. During closing arguments, the prosecutor summed up the kidnapping charge as follows:

> Kidnapping as it's charged in this Information and specific to this count, is his taking this kid away without the permission of his lawful guardians. There's nothing in the statute . . . that says he has to permanently keep the child, have the intention of permanently keeping the child. (JA 1239.)

She explained the intent element as follows:

> So how do you know what he intended to? Wait, let me go back for a moment, where he, with the intent to keep, imprison or confine the minor from his parents or guardians. Right, Norman and Patricia.

> That's who he was taking away or intending to keep away from his parents or guardians. . . .
>
> So how do you know that he was intending to take that child from Norman and Patricia? Well, he said it himself, I'm fucking taking him. . . . Why? So he can take him away . . . .

The prosecutor started with the element of the offense: *intent to keep*. In her argument, however, she described the intent to "take." The jury, relying on the prosecutor's arguments, would have concluded that the *intent to keep* element could be satisfied by taking away with the general intent to take. Because the jury did not find that Mr. Schofield specifically intended to keep Michael more than momentarily, the conviction for first-degree kidnapping should be reversed.

II. The child-kidnapping provisions of NRS 200.310 do not apply to the minor's parents, guardians, or any other person having legal custody.

The child-kidnapping provisions of NRS 200.310 prohibit the taking away of a minor with the intent to keep the minor "from his or her parents, guardians, or any other person having lawful custody." This language is ambiguous and should not apply to the keeping away of a minor from one parent or guardian by another.

A. The plain language is ambiguous.

The statutory language uses the conjunction *or* in listing whom the minor must be kept from. NRS 200.310 ("parents, guardians, or any other person having lawful custody"). Although *or* is generally used as a disjunctive, courts have sometimes interpreted *or* as meaning *and*, or vice versa, in order to effectuate the legislature's intent. *United States v. Fisk*, 70 U.S. (3 Wall.) 445, 447 (1866); *Doss v. State*, 123 So. 237, 242 (Ala. Ct. App. 1929) (interpreting "forcible or unlawful"

confinement in a kidnapping statute to require both forcible and unlawful confinement). In *Doss*, the Alabama statute at issue read:

> Any person who forcibly or unlawfully confines . . . another, with the intent to cause him to be secretly confined, or imprisoned against his will . . . must, on conviction, be imprisoned in the penitentiary for not less than two nor more than ten years.

Doss, 123 So. at 239. The court pointed out that if *or* were interpreted as a disjunctive, then "every school teacher who keeps a recalcitrant pupil in after school, and every parent or guardian who compels a child to stand in the corner, is technically guilty of kidnapping." *Id.* at 242.

Here, given the severity of first-degree kidnapping, it is doubtful that the Legislature intended the child-kidnapping portion of NRS 200.310 to apply to a parent's taking away of a child from another parent or guardian. This would turn minor domestic disputes into first-degree kidnappings. In a joint custody situation, even a slight violation of a custody order would be a category A felony. A guardian with lawful custody would commit first-degree kidnapping by keeping a child from his parents. Conversely, a parent who exercises visitation rights with her child pursuant to a court order would violate the first-degree kidnapping statute by keeping her child from a lawful custodian. These absurd consequences are avoided by reading *or* in the conjunctive and dovetailing the child-kidnapping provisions of NRS 200.310 with NRS 200.359, as explained below.

B. The child-kidnapping portion of NRS 200.310 dovetails with the custodial interference provisions of NRS 200.359 and suggests that child kidnapping was not intended to apply to parents.

NRS 200.359 is essentially a custodial interference statute. It covers situations where a person with a limited right of custody or a parent with no custody rights removes a child from the child's lawful custodian. Custodial interference is only a category D felony but the statute imposes the additional requirement that a child's removal be in violation of a court order. That requirement is not found in NRS 200.310 because NRS 200.310 is not intended to apply to situations where a parent intends to keep a child from the child's other parent, guardians, or custodian. NRS 200.359 parallels the child-kidnapping statute and shows that the Legislature intended custodial interference by a parent to be a category D felony rather than a category A felony.

NRS 200.359(1) states:

> A person having a limited right of custody to a child . . . or any parent having no right of custody to the child, who . . . (a) In violation of an order, judgment or decree of any court willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child; . . . is guilty of a category D felony . . . .

If the child-kidnapping prohibition in NRS 200.310 can also apply to those persons covered under NRS 200.359—persons with a limited right of custody or a parent with no right to custody—then NRS 200.310(1) would completely swallow up the custody violation statute. NRS 200.359 penalizes willfully detaining, concealing, or removing the child from a parent, guardian or other person having lawful

custody or a right of visitation of the child. NRS 200.310 penalizes taking away or detaining a minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians or any other person having lawful custody. The following chart compares the two statutes:

	NRS 200.310 (kidnapping)	**NRS 200.359 (custody violation)**
Applicable to:	- A person	- A person having a limited right of custody . . . or any parent having no right of custody to the child
Actus Reas:	- - Leads, takes, entices, carries away, or detains any minor - From his or her parents, guardians, or any other person having lawful custody of the minor . . .	- *In violation of an order, judgment or decree* - Detains, conceals or removes the child - From a parent, guardian or other person having lawful custody or a right of visitation of the child
Mens Rea:	- With the intent to keep, imprison, or confine	- Willfully
Penalty:	- Category A felony	- Category D felony

In addition, NRS 200.359 provides that before an arrest warrant may be issued for custodial interference, a court must determine that a civil remedy would not be effective to enforce the rights of the parties. NRS 200.310, of course, offers no similar protection.

It is hard, if not impossible, to imagine any custody violation under NRS 200.359 that would not also constitute first-degree kidnapping if that statute were to be read literally. The most logical way to read the two statutes together is to interpret the child-kidnapping statute as requiring that the minor be taken with the intent to keep him or her from all of the parents, guardians, and lawful custodians that the minor may have. Under this interpretation, a parent could not intend to keep a minor in violation of NRS 200.310 because the minor would necessarily not be kept from at least one parent.

Admittedly, this Court held in *Hernandez* that whether a parent is charged under NRS 200.310 or NRS 200.359 is within the prosecutor's discretion, and Mr. Schofield is not challenging that holding. *Hernandez v. State*, 118 Nev. 513, 523–24, 50 P.3d 1100 (2002), *overruled on other grounds by Armenta-Carpio v. State*, 306 P.3d 395, 396 (Nev. 2013). In *Hernandez*, however, the defendant was convicted under the general second-degree kidnapping statute—he had killed the child's mother and was taking his daughter to Mexico. *Hernandez* is inapposite here because the he was not convicted under the child-kidnapping portion of NRS 200.310, and the analogy between the child-kidnapping statute and the custodial interference statute did not apply.

Furthermore, *Hernandez* was not convicted under the lower standards applicable to the kidnapping of children. Generally, first-degree kidnapping is kidnapping committed for such purposes as ransom, sexual assault, robbery, or murder. When a minor is involved, however, the purpose need only be to keep,

imprison, or confine the minor from his or her parents or guardians. A parent should not be subject to the lower standards of child kidnapping because he or she is part of the group that the statute is meant to protect. The Court should hold that the child-kidnapping portion of NRS 200.310 does not apply to parents, and consequently should reverse Mr. Schofield's first-degree kidnapping conviction.

III. The district court's failure to instruct the jury on movement incidental to the child abuse charge in accordance with *Mendoza*, 122 Nev. 267, 130 P.3d 176 (2006), was plain error.

A. Standard of Review

Although a district court has broad discretion to settle jury instructions, this Court applies de novo review where the issue involves a question of law. *Hoagland v. State*, 240 P.3d 1043, 1045 (Nev. 2010). A district court has the duty to instruct the jury regarding the applicable law in this case, *see* NRS 175.161, and *sua sponte* to protect a defendant's right to a fair trial. *Valdez v. State*, 124 Nev. 1172, 1183 n.5, 196 P.3d 465, 473 (2008). Where a proposed jury instruction was not offered by the defense, the court's failure to instruct the jury is reviewed for plain error. *Garcia v. State*, 121 Nev. 327, 334, 113 P.3d 836, 840 (2005).

B. The jury should have been instructed that *Mendoza* applies to dual convictions of kidnapping and child abuse.

The trial court properly instructed the jury that to find Mr. Schofield guilty of both first-degree kidnapping and battery domestic violence strangulation, it must

find the factors described in *Mendoza*, 122 Nev. at 274-75, 130 P.3d at 180-81.[9] The jury was not given any similar instruction, however, regarding a dual conviction of first-degree kidnapping and child abuse. This failure was plain error and warrants reversal of the first-degree kidnapping conviction.

In *Mendoza*, this Court held:

> [T]o sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

122 Nev. at 274–75, 130 P.3d at 180–81. The clarification provided by *Mendoza* arises from a line of cases, wherein the Court has explained its duty to "determine whether the legislature intended that the offender be punished for both [robbery and kidnapping], or whether its intention was that he be punished only for robbery." *Wright v. State*, 94 Nev. 415, 417, 581 P.2d 442 (1978). The *Wright* court noted that the kidnapping statute "is broad in its sweep," and that a literal interpretation of the kidnapping statute would include any robbery. *Id.* The court concluded that because robbery involves a lesser punishment than kidnapping, "it would be unreasonable to believe that the legislature intended a double punishment." *Id.*; *see also Berry*, 604 F.2d at 226 ("The principal danger of

[9] The *Mendoza* opinion contains suggested jury instructions, which were incorporated into Jury Instruction 12, regarding the requirements for a dual conviction of kidnapping and battery domestic violence strangulation. (AA 1198.)

overzealous enforcement of kidnapping statutes is that persons who have committed such substantive crimes as robbery or assault which inherently involve the temporary detention or seizure of the victim will suffer the far greater penalties prescribed by the kidnapping statutes."). This reasoning is applicable not only to robbery but to any other offense associated with the kidnapping. *Wright v. State*, 106 Nev. 647, 648-49, 799 P.2d 548, 549 (1990); *see also Seddiq v. Commonwealth*, 2010 Va. App. LEXIS 238, at *22 (Va. Ct. App. June 15, 2010) (reasoning that a literal reading of the kidnapping statute would convert any misdemeanor assault into a capital offense). Whether an associated offense was incidental to the kidnapping should be decided by the trier of fact "in all but the clearest of cases." *Wright*, 106 Nev. at 649, 799 P.2d at 549.

Here, it would be unreasonable to believe the Legislature intended a parent who commits child abuse to also be guilty of first-degree kidnapping where the movement is incidental to the child abuse.

The trial court's failure to give a *Mendoza* instruction in this case is plain error. In the similar case of *Garcia v. State*, the defendant had failed to propose an instruction requiring the jury to find that the detention of the victims was not incidental to the *Garcia*, 121 Nev. at 334, 113, 113 P.3d 836P.3d at 840. This Court held that the court's failure to give the instruction was plain error and reversed the conviction. *Id.* at 334–35, 113 P.3d at 840–41. *Garcia* involved false imprisonment; however, following *Mendoza*, the requirement for an accompanying instruction in the kidnapping context is even more plain.

Mr. Schofield testified during trial that the act of trying to take Michael to the store was an act of discipline, and this is supported by the police officer's testimony that after being placed in the police car Mr. Schofield was yelling "about how his son doesn't listen to him so he makes him listen." (4AA 817, 5AA 1014.) Mr. Schofield admits that his actions that day were excessive and that he was guilty of child abuse. (AA 1008.) Arguably, without the child abuse, there would not have been a kidnapping. Pat and Norman objected to Mr. Schofield's conduct based on their perception that Mr. Schofield was choking his son (AA 700, 702, 705), but they may not have objected to the trip itself. In fact, the evidence shows that Michael often accompanied Mr. Schofield to other places, such as Mr. Schofield's residence or the park. (AA 558, 562, 693.)

Because the jury was never instructed to determine whether the movement of Michael was only part of the disciplining or whether the movement exceeded the child abuse, we do not know beyond a reasonable doubt whether the jury would have found any independent purpose or significance to the movement. Even the prosecutor, in discussing the *Mendoza* instruction with respect to strangulation, suggested that it was important for her case that the strangulation ended before the movement ended; otherwise she would not be able to get both convictions. (AA 1117–18, 1140–41.) Similarly, it would have been important to know whether the child abuse ended prior to the movement or whether the movement was incidental to the child abuse. The failure to give the *Mendoza* instruction with respect to the child abuse charge is plain error and warrants reversal.

IV. The trial court abused its discretion by refusing to instruct the jury regarding one of the defense theories, namely that the guardians' lack of consent is an element of first-degree kidnapping of a minor.

Mr. Schofield requested that the jury instructions on kidnapping be clarified to inform the jury that, in order to convict Mr. Schofield of the kidnapping charge, it must find that Mr. Schofield lacked the of consent of Michael's guardians to bring Michael to the store. (AA 940–43.)

"A defendant has the right to have the jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Brooks v. State*, 124 Nev. 203, 211, 180 P.3d 657, 662 (2008). "A proposed instruction may not be refused because the legal principle it espouses may be inferred from other instructions." *Id.* "Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." *Crawford v. State*, 121 Nev. 746, 754, 121 P.3d 582, 588 (2005). The failure to instruct the jury on an element of the crime is subject to harmless error review; however, the review must be harmless beyond a reasonable doubt. *See Cortinas*, 124 Nev. at 1024–25, 195 P.3d at 323.

Here, Mr. Schofield was entitled to an instruction on consent. The trial court agreed with Mr. Schofield that lack of consent was a requirement for kidnapping, but refused to instruct the jury on this. (AA 941–43.) Although the prosecutor stated during closing argument that the kidnapping charge was based upon Mr.

Schofield's "taking this kid away without the permission of his lawful guardians," (AA 1167), the jurors were bound to follow the jury instructions, not the prosecutor's arguments. This error was not harmless beyond a reasonable doubt because the instructions did not require the jury to find beyond a reasonable doubt that Mr. Schofield lacked permission to bring Michael to the store. The prosecutor relied on evidence that Pat and Norman were trying to stop Michael (AA 1134–35), but the attempts to stop Mr. Schofield were primarily because of a fear that Michael would be choked—not a fear that he would be taken to the store. (*See, e.g.*, AA 700, 702, 705.) Pat even testified that after the commotion started, she yelled at her son and grandson to get outside. (AA 589–90.) Moreover, Pat testified that she gave Mr. Schofield consent to take Michael to the store. (AA 585, 650.) While the jury could have discredited Pat's testimony, we cannot say beyond a reasonable doubt that the jury found a lack of consent. The kidnapping conviction should therefore be reversed.

V. Insufficient evidence supports the first-degree kidnapping conviction under a correct interpretation of the statute and the fact that Mr. Schofield did not succeed in leaving with his son.

As Mr. Schofield argued in his March 7, 2013, Petition for Writ of Habeas Corpus, the State presented insufficient evidence to sustain the first-degree kidnapping charge. (AA 11–12.) Mr. Schofield and his son had regular contact, and the guardians habitually allowed Mr. Schofield freedom to interact with his son and to leave the house with his son. The reason for the police's intervention on January 6, 2013, was the passionate argument and physical altercation that resulted

in the child abuse conviction. The State did not prove any purposeful intent on the part of Mr. Schofield to deprive Norman and Pat of their care of Michael, much less an intent to keep Michael permanently or indefinitely.

Furthermore, Mr. Schofield did not succeed in taking Michael away from his guardians. Although the rule in Nevada has long been that it is the fact, not the distance of forcible movement, that comprises kidnapping, this rule has not been applied in the child kidnapping context. In the child kidnapping context, the thrust of the statute involves taking or carrying away a minor *from* his parents or guardians. Mr. Schofield never succeeded in taking Michael away from Norman and Pat, who were present during the entire incident, and he never succeeded in removing Michael from the property. The neighbors intervened before Mr. Schofield could leave and take Michael to the store. Consequently, there was insufficient evidence at trial to convict Mr. Schofield of the kidnapping charge.

CONCLUSION

The jury verdict in this case was based on an overbroad interpretation of *intent to keep* in NRS 200.310. The charge should also never have been brought because the child-kidnapping portion of NRS 200.310 does not apply to parents as a matter of law. Finally, the district court erred by failing to instruct the jury that a dual conviction for kidnapping and child abuse requires that the kidnapping was not incidental to the child abuse charge, and that the jury must find lack of consent beyond a reasonable doubt. Accordingly, this Court should reverse Mr. Schofield's kidnapping conviction.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of March, 2015.

/s/ Karen K. Wong
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