IN THE SUPREME COURT OF THE STATE OF NEVADA

IAN ANDRE HAGER, No. 72613

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

Appeal from a Judgment of Conviction in Case Number CR16-1457
The Second Judicial District Court of the State of Nevada
Honorable Scott N. Freeman, District Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

NEVADA RULES OF APPELLATE PROCEDURE

MISCELLANEOUS

I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on February 9, 2017. 1JA 185-86 (Judgment).[1] Appellant, Ian Andre Hager (Mr. Hager), timely filed a notice of appeal from that judgment on March 10, 2017. 1JA 187-88 (Notice of Appeal). This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

This appeal is not presumptively assigned to the Nevada Court of Appeals because it involves jury-based convictions on category B felonies. NRAP 17(b)(2). The Nevada Supreme Court should retain and hear this appeal because, among other things, this appeal:

- Presents the Court the opportunity to decide an issue it left undecided in *Byars v. State*, 130 Nev. Adv. Op. 85, 336 P.3d 939, 947 (2014)—what constitutes "use" sufficient to support being an unlawful user or addict in possession of a firearm under NRS 202.360(1)(c);

[1] "JA" stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1). The number preceding "JA" represents the Volume number.

- Presents the Court a question of first impression—what constitutes "adjudicated as mentally ill" for purposes of the prohibited person element of NRS 202.360(2)(a);
- Presents the Court the opportunity to state the criminal intent element of NRS 202.360 because although a criminal intent is not specifically mentioned in NRS 202.360, such intent cannot be entirely dispensed with; and,
- Presents the Court jury instruction questions that relate to the issues listed above.

These issues are properly before the Nevada Supreme Court under NRAP 17(a)(10) and (11). Accordingly, the Nevada Supreme Court should keep and decide these and the other appellate issues presented in this appeal.

III. STATEMENT OF THE LEGAL ISSUES PRESENTED

A. Was the evidence presented at trial constitutionally sufficient to support the "prohibited person" element of all six charged offenses beyond a reasonable doubt?

B. Although NRS 202.360 does not expressly state a criminal intent element, can Mr. Hager be convicted of the charged offenses if he truly believed—based on the facts of this case—that he could possess firearms that had recently been returned to him by law enforcement?

C. Did the district court err in instructing the jury on the elements of the offenses where the instructions were misleading, confusing, and wrong?

D. Did the district court err in allowing the State to use videos in its rebuttal case where the videos had previously been deemed inadmissible and the predicate for their use now was suspect?

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. The State charged Mr. Hager with six felony counts. The first three counts charged category D felonies under NRS 202.360(2)(a) for his being in possession of a firearm "having been previously adjudicated as mentally ill in the Sixth and/or Second Judicial District Courts of Nevada and committed to Mental Health Court, or after having been committed to any mental health facility." 1JA 1-3 (Information). The next three counts charged category B felonies under NRS 202.360(1)(c) for his being in possession of a firearm "while being an unlawful user of, or addicted to, any controlled substance." *Id.* at 3-5.

Counts I and IV alleged the firearms to be a "Bushmaster .223 caliber assault rifle" and a "Winchester 20-gauge shotgun"; Counts II and V alleged the firearms to be a "Navy Arms handgun" and a "Colt 1911 handgun"; and Counts III and VI alleged the firearms to be a

"Sears & Roebuck shotgun" and a "Ruger .22 caliber rifle." *Id.* at 1-4. All six counts were alleged to have been committed between November 6, 2015 and April 8, 2016 in Washoe County, Nevada. *Id.*

A jury convicted Mr. Hager of all six counts. 1JA 179-84 (Verdicts); 5JA 996-98.

At Mr. Hager's sentencing hearing the district court imposed concurrent sentences of 19 to 48 months in the Nevada Department of Corrections on each count. The district court credited him for 307 days in predisposition custody. 1JA 185-86 (Judgment). The district court also imposed required fees and assessments and ordered Mr. Hager to reimburse Washoe County $500.00 for legal representation. *Id.*

Mr. Hager appeals from his convictions. 1JA 187-88 (Notice of Appeal).

V. STATEMENT OF THE FACTS[2]

A.

The State charged Mr. Hager with six counts of possession of a firearm by a prohibited person. The State alleged that Mr. Hager was prohibited from possessing firearms because he had been previously

[2] Additional facts specific to a particular argument are contained that that argument's section of this Opening Brief.

adjudicated as mentally ill in the Sixth and/or Second Judicial District Courts of Nevada and committed to Mental Health Court, or had been *committed to a mental health facility*; and that he was an *unlawful user of*, or *addicted to*, a controlled substance. On the first day of trial Mr. Hager's defense counsel offered to stipulate "to the element of possession of the firearms in this case." 2JA 203. Counsel stated:

> We would stipulate that Mr. Hager was in possession of all of the charged firearms during the time that it's charged. We would also agree to a jury instruction that says that if the State proves all of the elements other than possession beyond a reasonable doubt the jury must convict him, because we would agree -- we would stipulate to the fact that he would have possession.

Id. Based on that stipulation defense counsel asked the court to "exclude the Facebook videos that the State intends to introduce to show that he had possession during that time, because we would agree that he possessed them and that he was in continuous possession of those firearms during the time that the Facebook videos were made, but more importantly during the time that he was charged in the information." *Id.* at 203-04. The prosecutor did not accept the stipulation. *Id.* at 206.

B.

In February 2016 Scott Johnson, a detective in the Reno Police Department, met with Mr. Hager to discuss a past investigation regarding the death of Mr. Hager's older brother, who had died in 2012. 3JA 539-41. Mr. Hager was consumed about the investigation because he believed his brother had been murdered. 3JA 550. Detective Johnson was not familiar with the case and promised to look into it. Detective Johnson later reported to Mr. Hager that the investigation was closed and that the conclusion appeared to be that his brother died as a result of a combination of methamphetamine overdose and accidental conduct. 3JA 542, 548-49. They had additional communications afterwards. On March 31, 2016, Mr. Hager sent the detective a link to an entry on his Facebook page, containing a video posted on February 28, 2016. 3JA 543-47, 552-59. Detective Johnson passed this information over to the Sparks Police Department. 3JA 572-73.

On April 5, 2016, in response to Detective Johnson's information, Sparks Police Sergeant (then detective) Christopher Rowe viewed videos Mr. Hager had posted on Facebook. 2JA 273-79. In the videos he saw several firearms. 2JA 280-81. And in one edited video (posted on

February 28, 2016) Mr. Hager displayed what appeared to be "a baggy of narcotics" and "sniffs them." 2JA 295-96, 299, 301, 340-42 (acknowledging that he could not "definitively say it was methamphetamine"), 350 (the video "appeared to be edited").[3]

On April 8, 2016, Sergeant Rowe applied for a search warrant to search Mr. Hager's home for "firearms, ammunition, and indicia of occupancy." 2JA 306. Notably, he did not apply for a warrant to search for narcotics or evidence of narcotics use. 2JA 348. The search took place after Mr. Hager had left his home and had been taken into custody. 2JA 308.[4] Mr. Hager's iPhone was taken from him.[5] Sergeant Rowe sought a search warrant to search the iPhone as well. 2JA 321-22.

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[3] Sergeant Rowe did not do any investigation into whether Mr. Hager routinely used methamphetamine. 2JA 347-48.

[4] For a description of the search of Mr. Hager's home, and firearms seized, see generally 2JA 360-99 (testimony of Detective Brian Orr). No narcotics were in the home. 2JA 396. Suspected paraphernalia—a glass pipe "commonly used to smoke methamphetamine"—was found in a drawer in the master bedroom. 2JA 412-13 (Detective Dach). The pipe however was not tested for residue and it is unknown whether it was ever used for an "illicit" purpose. There were no controlled substances found in the drawer or in the home. 3JA 473-76 (Detective Dach).

[5] Sparks Police Detective Kevin Dach and other officers took Mr. Hager into custody at a Quik Stop minimart located in Sparks. 2JA 400-01, 403-04. Mr. Hager consented to a search of his car, and some ammunition was found. 2JA 404-05. But no controlled substances were found in the car. 3JA 477-78. And Mr. Hager did not appear to be under

In a subsequent interview, Mr. Hager confirmed that the firearms found in his home belonged to him. 2JA 311-12. According to Sergeant Rowe, in the same interview Mr. Hager stated that he was snorting meth in the video. 2JA 312-13. And in the same interview Mr. Hager told the sergeant that based on a diagnosis of post-traumatic stress disorder (PTSD), he had previously been admitted into Mental Health Court in Washoe County. 2JA 315-16. During the interview it did not appear that Mr. Hager was under the influence of methamphetamine. 2JA 358-59.

James Popovich, the manager of the specialty courts for the Second Judicial District, testified that the court's Mental Health Court was established under Chapter 176A of the Nevada Revised Statutes, that it is one of the court's multi-jurisdictional courts, and that it accepts referrals from other courts. 3JA 485-87. To be admitted into Mental Health Court, the applicant must have a diagnosed mental illness, which can include a finding of PTSD. 3JA 487-88. If a defendant's admission into Mental Health Court is by diversion (as opposed to as a condition of a grant of probation), his or her successful

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the influence of methamphetamine at the time of his arrest. 3JA 478. Detective Dach took custody of Mr. Hager's iPhone. 2JA 405-06.

completion of the program results in the criminal case being dismissed. 3JA 500. A successful discharge and dismissal restores the defendant to his or her status before the arrest. 3JA 501. In 2013 Mr. Hager was referred to Mental Health Court by the Sixth Judicial District Court, and on May 7, 2013, following routine staffing, he was accepted into the program. 3JA 490-91, 506-08. He completed Mental Health Court in May 2014. 4JA 720-21.

Debbie Okuma, a presentence investigation specialist with the Division of Parole and Probation, testified that in 2013, in preparation of the presentence report she would file in Mr. Hager's Sixth Judicial Court case, she interviewed Mr. Hager. 3JA 520-25. According to Ms. Okuma, Mr. Hager—then 28 years old—admitted to regular use of methamphetamine when he was between 12 and 19 years of age, and that he "was addicted" at that time. 3JA 526, 532. He reported a onetime use of methamphetamine in January 2013. 3JA 526-27, 533. He also told her that in 2011 he had been addicted to OxyContin, a prescription medication. 3JA 527.

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C.

On March 6, 2015, Jason Edmonson, a sergeant with the Sparks Police Department, took possession of several firearms that belonged to Mr. Hager. 3JA 602-13. At the time there was no indication of Mr. Hager being under the influence of controlled substances, but Mr. Hager had consumed alcohol. 3JA 605. The firearms—the Colt 1911 and the Remington shotgun—were removed from Mr. Hager's home. 3JA 607-09. On August 20, 2015, Sparks Police officers took possession of Mr. Hager's Winchester 20-gauge shotgun. 3JA 614-19. Mr. Hager was intoxicated (alcohol) at the time. 3JA 618.

Joanna Bellamy, an evidence technician at the Sparks Police Department, testified that between December 2015 and January 2016 she assisted Mr. Hager in getting his firearms back from the Sparks Police Department. 4JA 639-41. She had him fill out an ATF Form 4473[6] as to the firearms to be released. 4JA 641. The firearms were a Winchester shotgun, a Marlin rifle, a Browning rifle and a Colt 1911 handgun. 4JA 643, 656. Ms. Bellamy testified concerning the background check she undertook before releasing the firearms,

[6] The completed form was admitted at trial as Exhibit 98. 4JA 642. It is reproduced in the Joint Appendix at 1JA 129-36.

including running a criminal history which showed Mr. Hager's criminal case in the Sixth Judicial District Court as dismissed. 4JA 644-51. And on January 14, 2016 the firearms were released to Mr. Hager. 4JA 643, 657. Ms. Bellamy helped him carry the firearms to his car. 4JA 677-78.

Lori Renfroe, an evidence technician for the State of Nevada, testified that between February 2015 and August 2015 she helped Mr. Hager regain possession of his firearms—a SIG Sauer and a Bushmaster 223 assault rifle—that were in the custody of the State (as a result of his arrest in Humboldt County). 4JA 683-86, 705-06, 724. She explained that she sent an evidence release request to the Humboldt District Attorney's Office and, in February 2015 received authorization to release Mr. Hager's firearms to him any time after August 26, 2015. 4JA 686-88, 696. Ms. Renfroe also conducted a background check. 4JA 688-89. And on August 28, 2015, Ms. Renfroe returned Mr. Hager's firearms to him. 4JA 690-92.

D.

Ian Hager testified. He told the jury that he had been addicted to prescription medicine in 2011, and to methamphetamine between the

ages of 12 and 19. 4JA 707-08. Owing to a collection of serious life loss events in his family, in January 2013 he resorted to a onetime use of methamphetamine. 4JA 708-11.

In February 2013 Mr. Hager was arrested for outstanding warrants after being stopped on I-80 for speeding. 4JA 712, 830. He was charged with carrying a concealed weapon and for being a prohibited person in possession of a firearm. The possession charge was dismissed and he entered a guilty plea to the charge of carrying a concealed weapon. Following his guilty plea, Mr. Hager was diverted into Mental Health Court. 4JA 712-14, 719, 851. He actively participated in Mental Health Court for one year and was successfully discharged in May 2014. 4JA 720-21, 855. The case in Humboldt County was dismissed. 4JA 722.

Later, after being discharged from Mental Health Court, he contacted local and state police agencies to retrieve his firearms. In February 2015 he contacted the Nevada Highway Patrol and spoke with Ms. Renfroe. 4JA 727. She assisted him in getting back firearms—a SIG Sauer handgun and a Bushmaster assault rifle—that were in the State's possession. 4JA 727-33. In December 2015 he contacted the Sparks Police Department. After filing out and submitting an

application, Mr. Hager was contacted by the department's evidence technician to schedule a time to pick up his firearms. 4JA 740-45. In January 2016 he was returned four or five guns including a Colt 1911 handgun and a Winchester 20-gauge shotgun. 4JA 748-49. Mr. Hager testified that the firearms found in his house on April 8, 2016 were the firearms that had been returned to him by the Sparks Police Department and the Nevada Highway Patrol. 4JA 785-88.

In January 2016 he attempted to get a better resolution out of his brother's case. 4JA 749-50. He spoke with Reno Police Detective Johnson, who ultimately told him that the case was closed and that his brother had died of methamphetamine intoxication. Mr. Hager was hurt and frustrated by this news. 4JA 750-51. In late February 2016 Mr. Hager made a video (which he shared with Detective Johnson) that mirrored a conversation they had. He wanted to get the detective's attention. 4JA 752-76.[7] The video did not have the desired effect of getting the detective to reopen the investigation. 4JA 776-77. In fact the

[7] The video is a dramatization suggesting that Mr. Hager's brother could not have died of methamphetamine intoxication. It purports to show Mr. Hager ingest a large amount of "methamphetamine." The substance was kosher salt and he did not ingest it. 4JA 754, 759, 761, 769-72.

detective did not contact him again; which was "part of his own doing." 4JA 776. On April 8, 2016 Mr. Hager was arrested by Sparks Police. 4JA 777, 785.

Mr. Hager testified that after his ex-wife left him he stopped sleeping in the master bedroom. 4JA 780. He recognized the glass pipe the police found in a junk drawer in the bedroom. He testified that he did not recall if he had used it in January 2013, but definitely did not use it in 2012, 2014, 2015 or 2016. 4JA 782-84, 817. Mr. Hager further testified that he was not addicted to methamphetamine in November 2015 or at any time up until the day he was arrested. 4JA 787.

VI. SUMMARY OF ARGUMENT

The State charged Mr. Hager with six counts of possession of a firearm by a prohibited person. Mr. Hager did not contest the possession element of the offenses. The State alleged that Mr. Hager was prohibited from possessing firearms on the basis that he had been "adjudicated mentally ill" or had been "committed to a mental health facility," or because he was an "unlawful user of" or "addicted to" controlled substances. The State's evidence failed to support either of the alleged prohibitions. The State did not prove that Mr. Hager had

ever been "adjudicated mentally ill" or had ever been committed to a mental health facility. At best the State showed that Mr. Hager had been admitted into the Second Judicial District Court's Mental Health Court program, and had successfully completed it. The admission into Mental Health Court did not require Mr. Hager to be "adjudicated as mentally ill," and does not constitute an adjudication as mentally ill.

Nevada law does not define "an unlawful user" of a controlled substance, but the Ninth Circuit has. There, to prove an accused to be an "unlawful user of" controlled substances the government must prove that the accused took drugs with regularity, over an extended period of time, and contemporaneously with his possession of a firearm. This Court should adopt this test. Applying this three-prong test to the facts of this case, Mr. Hager cannot be deemed an "unlawful user of" controlled substances. Similarly, under Nevada's definition of "drug addict"—borrowed from NRS 458.290—Mr. Hager cannot be deemed a person "addicted to" controlled substances. Because the evidence was insufficient to sustain any of Mr. Hager's convictions beyond a reasonable doubt, this Court must reverse.

NRS 202.360 does not expressly contain a criminal intent element, but criminal intent cannot be entirely dispensed with. That a statute does not specify any required mental state does not mean that one does not exist. Wrongdoing must be conscious to be criminal. And here the Court should read an intent element into the statute such that under the facts of this case—which showed that the firearms in question had been recently returned to Mr. Hager by both the Sparks Police Department and by the Nevada Highway Patrol after completing background checks—Mr. Hager cannot be found liable if he truly believed that his firearms had been properly returned to him by city and state law enforcement agencies.

The district court's instructions on the elements of the charged offenses suffered many infirmities. Chief among them was the fact that the district court read a "willfulness" intent element into the statute but did not bother to define "willfulness." Instead, as to all of the offenses, he announced that they were "strict liability" crimes. And, notwithstanding willfulness, that a prohibited person "need not have known that his possession of the firearm was illegal, and need not have intended to violate the law. Ignorance or misapprehension of the law is

not a defense to [these crimes]." This was a misleading, confusing, and incorrect statement of the law which this Court, on de novo review, must correct. Even if the district court's reading of a willfulness element into NRS 202.360 was permissible, the district court should have also instructed the jury that in order to establish a willful violation in this case, the State must prove beyond a reasonable doubt that when Mr. Hager possessed the firearms, *he knew his conduct was unlawful and he intended to disobey the law.*

Finally, the district court abused its discretion when it allowed the State to use certain videos in its "rebuttal" case where the predicate for their admission late in trial—having previously been deemed inadmissible—was an arbitrary and capricious finding by the district court that an innocuous statement *cum* question posed by defense counsel to Mr. Hager had "opened the door" to the admission of prejudicial, confusing, and misleading evidence.

As argued more fully below, this Court should reverse on grounds of insufficiency of the evidence and direct the district court to dismiss the case. Alternatively, this Court should remand for a new trial where

the jury can determine Mr. Hager's guilt or innocence after having been properly instructed on the elements of the charged offenses.

VII. ARGUMENT

A.

The evidence presented at trial was constitutionally insufficient to support the "prohibited person" element of all six charged offenses beyond a reasonable doubt; this Court must reverse.

Standard of Review

In reviewing a challenge to the sufficiency of the evidence presented at trial, a court's focus is on "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational [juror] could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (italics in original, alteration added). A conviction that fails that test violates due process. *Mikes v. Borg*, 947 F.2d 353, 356 (9th Cir. 1991).

Discussion

"The Due Process Clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with

which he is charged." *Origel-Candido v. State*, 114 Nev. 378, 382, 956 P.2d 1378, 1380 (1998) (citing *Carl v. State*, 100 Nev. 164, 165, 678 P.2d 669, 669 (1984) (italics in the original)); *Watson v. State*, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994) ("It is axiomatic that the state must prove every element of a charged offense beyond a reasonable doubt.") (citing *Slobodian v. State*, 107 Nev. 145, 147-48, 808 P.2d 2, 3-4 (1991).

This Court "cannot sustain a conviction where the record is wholly devoid of evidence of an element of a crime." *Batin* v. State, 118 Nev. 61, 38 P.3d 880, 883 (2002) (footnotes omitted). Instead, this Court must "give concrete substance to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Id.* (internal quotation marks and footnotes omitted).

The State did not prove that Mr. Hager had been adjudicated as mentally ill or committed to a mental health facility

Mr. Hager possessed the firearms identified in counts I, II, and III over the period of time alleged in the Information. NRS 202.360(2)(a) makes it unlawful for a person to own, possess, or to have under his or her custody or control any firearm if the person "[h]as been adjudicated as mentally ill or has been committed to any mental health facility by a

court of this State, any other state or the United States." Mr. Hager's ownership, possession, and control over these firearms did not violate this statute.

The second condition—"committed to any mental health facility" is easily disposed of. Preliminarily, it is unclear whether the State abandoned this condition as an alleged prohibition. See e.g., 1JA 162-63 (Jury Instruction No. 18) (the "committed to any mental health facility" language of NRS 202.360(2)(a) is not included as part of the elements of Court I, II, and III). Nonetheless, because it is charged in the Information, the inapplicability of this condition to the facts of this case is discussed.

In Nevada a public mental health facility is a "Division facility," which is defined as "any unit or subunit operated by the Division [of Public and Behavioral Health of the Department of Health and Human Services]." NRS 433.064, NRS 433.084, and NRS 433.094. Division facilities include the Northern Nevada Adult Mental Health Services, Southern Nevada Adult Mental Health Services, Rural clinics, and Lakes Crossing Center. See NRS 433.233(1). Here there was no

evidence[8] presented at Mr. Hager's trial to prove that he was ever "committed by a court" to any of these mental health facilities. Similarly, there was no evidence presented at Mr. Hager's trial that he was ever "committed by a court" to a mental health facility in "any other state or the United States." And, to complete the thought: There was no evidence presented at trial that Mr. Hager was ever committed by a court to a *private* mental health facility, either. The State failed to prove the existence of this condition.

Thus, for subsection (2)(a) of the statute to apply the State was obligated to prove that Mr. Hager had been "adjudicated mentally ill." Adjudication is a judicial act. See Bryan A. Garner, Garner's Dictionary of Legal Usage 26 (3rd ed. 2011) ("*Adjudication* = (1) the process of judging; (2) a court's pronouncement of a judgment or degree; (3) the judgment so given."); The American Heritage Dictionary of the English Language 21 (5th ed. 2011) ("*Adjudicate*[:] "1. To make a decision in a legal case or proceeding; *a judge adjudicating on land claims.*) (italics in the original)); *cf. Miller v. Hayes*, 95 Nev. 927, 929, 604 P.2d 117, 118

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[8] Defined in Jury Instruction No. 11 as consisting "of the testimony of the witnesses, the exhibits admitted into evidence, and stipulations." 1JA 155.

(1979) ("Only after a judgment of conviction 'is signed by the judge and entered by the clerk,' as provided by NRS 176.105, does it become final[.]").

The "by a court" language in the statute's second condition is instructive to understanding the context of the first condition. In Nevada "a district court may issue *an order* involuntarily admitting a person to a mental health facility if clear and convincing evidence demonstrates that the person 'has a mental illness and, because of that illness, is likely to harm himself or herself or others if allowed his or her liberty.'" *Vu v. Second Judicial Dist. Court*, 132 Nev. Adv. Op. 21, 371 P.3d 1015, 1016 (2016) (quoting NRS 433A.310(1)(b)) (italics added). The statute's "clear and convincing" evidentiary standard ensures "that [a] district court does not wrongfully deprive a person of [his or her constitutionally protected liberty interests]." *Id.* 371 P.3d at 1019 (citing *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)). Necessarily then, when that standard is met and a court issues a commitment order the court has "adjudicated [a person] as mentally ill," and such person would be subject to the provisions of NRS 202.360(2)(d).[9] As noted

[9] See e.g. NRS 433A.310(5) (if a court enters a commitment order under

above, the jury heard no evidence to suggest, let alone prove, that Mr. Hager was ever committed by a court to a mental health facility. Nor did the jury receive any evidence that Mr. Hager had ever been *adjudicated* mentally ill by a court.

Instead, the jury heard evidence that in 2013, as a result of Mr. Hager's guilty plea in the Sixth Judicial District Court to one count of carrying a concealed weapon, his case was suspended and he was diverted into (and accepted by) the Mental Health Court of the Second Judicial District Court. There he fulfilled the terms and conditions of Mental Health Court, and successfully completed the program in 2014, or one year later. See 1JA 104-09 (Trial Exhibit No. 36) (Order Suspending Further Proceedings Pursuant to NRS 176A.250); 1JA 110-28 (Trial Exhibit No. 38) (Second Judicial District Court Mental Health Court Eligibility Criteria; Mr. Hager's "Acceptance" Letter into Mental Health Court; Mental Health Court Referral; Orientation Data; Mental Health Court Rules about Medications; Mental Health Court Contract;

NRS 433A.310(1)(b) it must transmit, within a specified time frame, a copy of that order to the Central Repository for Nevada Records of Criminal History "along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.")

Appearances in Court; Consent to Disclosure of Confidential Mental Health Information; Authorization to release HIPAA information; and Pet Responsibility); 1JA 137-40 (Trial Exhibit No. 99) (Petition and Order of Dismissal and Discharge and Setting Aside of Conviction); and 1JA 141-42 (Trial Exhibit 100-A) (Order, filed in the Sixth Judicial District, dismissing case).

Mr. Hager's acceptance into, and completion of the diversion program, did not require him to be "adjudicated as mentally ill" by a court. Rather, all he needed was a clinical diagnosis. And here he had been diagnosed as suffering from PTSD, which qualified as a suitable diagnosis for entry into the program. See NRS 176A.260(1) (allowing a defendant who "suffers from mental illness" to be placed "on probation upon terms and conditions that must include attendance and successful completion of a program established pursuant to NRS 176A.250"). Additionally, by fulfilling "the terms and conditions" of Mental Health Court no "adjudication" ever took place. See NRS 176A.260(4) (noting that successful completion requires the district court to discharge the defendant and dismiss the proceedings, and that the dismissal "is without adjudication of guilt and is not a conviction").

The two conditions under NRS 202.360(2)(a) that prohibits a person from owning, possessing, or having control over firearms are not present here. Thus, the evidence presented at trial was constitutionally insufficient to establish the prohibited person" element beyond a reasonable doubt, and this Court must reverse Mr. Hager's convictions on Counts I, II, and III.

The State did not prove that Mr. Hager is an unlawful user of, or addicted to, controlled substances

Mr. Hager possessed the firearms identified in counts VI, V, and VI over the period of time alleged in the Information. NRS 202.360(1)(d) makes it unlawful for a person to own, possess, or to have under his or her custody or control any firearm if the person "[i]s an unlawful user of, or addicted to, any controlled substance." Mr. Hager's ownership, possession, and control over these firearms did not violate this statute.

One issue presented in *Byars v. State*, 130 Nev. Adv. Op. 85, 336 P.3d 939 (2014), concerned the amount of use necessary to satisfy the "unlawful user of, or addicted to, a controlled substance" element of the statute. *Id.*, 336 P.3d at 943.[10] The Court however elected not to address

[10] While it is tempting to address this prohibition as a single synonymous term, it will be treated as having two separate meanings,

the issue because of the district court's merger sentencing decision, which allowed the Court to leave the question unaddressed. *Id.*, 336 P.3d at 947-98. This appeal puts the manner and extent of "amount of use" question squarely before the Court.

Unlawful user of

The statute does not define its terms but frames, in the present tense, the prohibition as being an "unlawful user of" any controlled substance. This term does not appear to have been defined by the Court. It is instructive then to look to persuasive authority in the Ninth Circuit. In *United States v. Purdy*, 264 F.3d 809 (9th Cir. 2001), the appellate court had the occasion to consider similar language set out in 18 U.S.C. § 922(g)(3). That section made it unlawful for "any person ... who is an unlawful user of or addicted to any controlled substance ... to ship or transport ...or possess ... any firearm." 264 F.3d at 811 (italics and citation omitted, first and second alteration in the original). In *Purdy* it was conceded that the defendant "possessed a firearm." The question was whether the statute provided Purdy with sufficient notice

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i.e. "unlawful user of" and "addicted to." See *United States v. Grover*, 364 F.Supp.2d 1298, 1300-03 (D, Utah 2005) (following *United States v. Bennett*, 329 F.3d 769 (10th 2003)).

that the manner and extent of his use "qualified him as an 'unlawful user of ... a [] controlled substance.'" *Id.* (ellipsis and alteration in the original). Drawing on an earlier case—*United States v. Ocegueda*, 564 F.2d 1364 (9th Cir. 1977)—the court examined the contours of the term "unlawful user"—noting that the definition "is not without limits"—and concluded that "to sustain a conviction under §922(g)(3), the government must prove ... that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm." 264 F.3d at 812-13. The court also noted that infrequent use in the distant past would not make a defendant an "unlawful user of" controlled substances. 264 F.3d at 812; and see, *United States v. Herrera*, 289 F.3d 311, 323-24, rev'd on other grounds, 313 F.3d 882 (5th Cir. 2002) ("unlawful user" implies pattern of use "just short of addition").

In *United States v. Grover*, 364 F.Supp.2d 1298, the federal district court, combining the elements identified in *Purdy* with a Tenth Circuit case (*Bennett*, 329 F.3d 769), found three operative elements that qualify a person as an "unlawful user of" a controlled substance:

(1) regular use of any controlled substance (or, in the words of *Purdy*, "[use of] drugs with regularity");

(2) on an ongoing basis (or, in the words of *Purdy*, "over an extended period of time"); and

(3) during the same time period as (or, in the words of *Purdy*, "contemporaneously with") the possession.

364 F.Supp.2d at 1303 (footnotes omitted). Based on this analysis, the federal district court held that "an unlawful user of any controlled substance ... is an individual who regularly and unlawfully uses any controlled substance over an extended period of time that is contemporaneous with the possession of a firearm." This Court should adopt this test and required Nevada jurors to be so instructed.

Under this three-part test, Mr. Hager cannot be considered an "unlawful user of" controlled substances under the statute because he did not use drugs with "regularity" or evince "regular use"; did not use drugs on an "ongoing basis", *i.e.* "over an extended period of time"; and did not regularly use controlled substances contemporaneously with or

during the period—between November 2015 and April 2016—alleged in the Information. In Trial Exhibit 38 (Mental Health Court Orientation Data), 1JA 120, Mr. Hager listed his "substance abuse history" as "Methamphetamine from '98 to '02[,] short relapse in '12[, and] Oxycotton [*sic*] in '11—prescribed for pain management but abuse after a death in family. All of the evidence presented to the jury was consistent with this description: admitted addictive use of methamphetamine between the ages of 12 and 19 years, use of OxyContin in 2011, and a onetime use of methamphetamine in 2012. Notably, the State presented no evidence of "regular," "ongoing" use of a controlled substance between November 2015 and April 2016—the time period alleged in the Information. The lack of contemporaneous use is corroborated by the search warrants that were executed by the Sparks Police. When Mr. Hager's home and vehicle were searched—an unexpected event—there were no controlled substances found in either his home or vehicle. When Mr. Hager was arrested he did not appear to be under the influence of controlled substances. The lack of contemporaneous use means that Mr. Hager cannot be considered an "unlawful user of" controlled substances. Therefore, he cannot be

considered an "addict." See *Herrera*, 289 F.3d 311, 323-24 ("unlawful user" implies pattern of use "just short of addiction").

Addicted to

NRS 202.360(1)(d) does not define "addicted to." But NRS 458.290 defines "drug addict" to mean "any person who habitually takes or otherwise uses any controlled substance, other than any maintenance dosage of a narcotic or habit-forming drug administered pursuant to chapter 453 of NRS, to the extent that the person endangers the health, safety or welfare of himself or herself or any other person." Such as there was no evidence of continuous or regular use of a controlled substance, there was no evidence presented demonstrating "habitual use" of a controlled substance, let alone a habitual use that endangered him or others.

The two conditions under NRS 202.360(1)(d) that prohibits a person from owning, possessing, or having control over firearms are not present here. Thus, the evidence presented at trial was constitutionally insufficient to establish the prohibited person" element beyond a reasonable doubt, and this Court must reverse Mr. Hager's convictions on Counts IV, V, and VI.

B.

NRS 202.360 does not expressly state a criminal intent, but criminal intent cannot be entirely dispensed with. Because Mr. Hager was returned his firearms by two separate Nevada law enforcement agencies after a background check, he could not be found liable where he truly believed that he could possess them.

Standard of Review

Questions of statutory interpretation are reviewed de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

Discussion

NRS 202.360 provides: "A person shall not own or have in his or her possession or under his custody or control any firearm if the person: [is a prohibited person as defined in subsections 1 and 2 of the statute]." The statute does not contain any express language regarding criminal intent. "Because strict liability offenses generally are disfavored, the simple omission of appropriate terminology does not end [this Court's] inquiry." *Clancy v. State*, 129 Nev. Adv. Op. 89, 313 P.3d 226, 229 (2013) (citation omitted).

In *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015), the United States Supreme Court—building on *Morissette v. United States*, 342 U.S. 246 (1952)—explained that the fact that a statute "does not

specify any required mental state, however, does not mean that none exists." Adding, "[w]e have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" (citation omitted). This is so because "wrongdoing must be conscious to be criminal." Writing for the Court in *Elonis*, Chief Justice Roberts said:

> [t]he "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept the courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like.

135 S. Ct. at 2009 (citation omitted). Chief Justice Roberts clarified that the requirement of an appropriate criminal intent did not mean that "a defendant must know that his conduct is illegal before he may be found guilty," only that he knows "the facts that make his conduct fit the definition of the offense." *Id.* (internal quotation marks and citation omitted). Thus in *Morissette*—a case involving "an individual who had taken spent shell casings from a Government bombing range, believing them to have been abandoned"—the Supreme Court reversed his conviction "ruling that he had to know not only that he was taking the casings, but also that someone else still had property rights to them. *He*

could not be found liable 'if he truly believed [the casings] to be abandoned.'" Id. (italics added, citation omitted, alteration in the original).

In interpreting "federal criminal statutes that are silent on the mental state," the United States Supreme Court reads into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.*, 135 S. Ct. at 2010 (citation and some internal quotation marks omitted). Similarly, this Court should read only that *mens rea* which is necessary to separate wrongful conduct under the statute from innocent conduct, and read into the NRS 202.360 a knowledge element, such that as in *Morissette*, Mr. Hager cannot (could not) be found liable under the statute if he "truly believed" that his firearms had been properly returned to him by state and local law enforcement agencies *after* a background check. Here the combined testimony of Ms. Bellamy (Sparks), Ms. Renfroe (State), coupled with Mr. Hager's testimony established that he truly believed that he was permitted to own, possess, and have under his control the firearms that had been returned to him after a background check. And

because his belief was a reasonable one, this Court should reverse Mr. Hager's convictions.

C.

The district court's jury instructions on the necessary elements of the offense were misleading, confusing, and wrong.

Standard of Review

A district court has broad discretion to settle jury instructions, "this court reviews the district court's decision for an abuse of discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted). "Whether a jury instruction accurately states the law is reviewed de novo." *Gonzalez v. State*, 131 Nev. Adv. Op. 99, 366 P.3d 680, 684 (2015) (citation omitted).

Discussion

The district court provided the jury with twenty-eight instructions. 1JA 143-75 (Jury Instructions). At issue here are Jury Instructions 16 and 18 (purporting to define the elements of the charged offenses). Both of these instructions were objected to. See 5JA 905-11.

Jury Instruction No. 16

This instruction defined the elements of Counts III, IV, and V as follows:

> "7. The defendant willfully owned or had in his possession or under his custody or control;
>
> 8. Any firearm;
>
> 3. a. While an unlawful user of any controlled substance,
> b. While addicted to any controlled substance.
>
> Possession of a Firearm by a Prohibited Person is a strict liability offense. A person commits the offense if he willfully possesses a firearm while being addicted to or while an unlawful user of any controlled substance. The prohibited person need not have known that his possession of the firearm was illegal, and need not have intended to violate the law. Ignorance or misapprehension of the law is not a defense to this crime."

1JA 160 (irregular numbering in the original). The Instruction states further that a person is "addicted to" any controlled substance "if he habitually takes or otherwise uses any controlled substance, other than [in a pilot clinic program not applicable here] to the extent that the person endangers the health, safety or welfare of himself or herself or any other person." And defines a "user" of any controlled substance tautologically as "a person who uses any controlled substance." Finally, the last paragraph of the Instruction provides:

> "In order for a person who is an unlawful user of or addicted to any controlled substance to be guilty of Possession of a Firearm by a Prohibited Person, he must have owned or had a firearm in his possession or under his custody or control while addicted to a while an unlawful user of any controlled substance."

1JA 161.

This instruction suffers many infirmities. First, with the exception of the last paragraph, the instruction does not adequately inform the jury that to be "an lawful user of" a controlled substance the State must prove beyond a reasonable doubt *regular* use of any controlled substance on an *ongoing basis*, and at the same time of the alleged possession. *United States v. Grover*, 364 F.Supp.2d at 1303 (unlawful user of controlled substances is a person who "regularly and unlawfully uses any controlled substances over an extended period of time that is contemporaneous with the possession of a firearm"); and *Purdy v. United States*, 264 F.3d at 812-13 (government must prove that "the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his ... possession of a firearm."). The last paragraph of this Instruction at least states one of elements of

the offense correctly. But the Instruction as a whole completely misses the two other critical elements of the offense.[11]

Second, the tautological definition of "user" of a controlled substances as "a person who uses any controlled substance" is way too overbroad to cabin an offender. As Mr. Hager's counsel argued: "I don't think that is an appropriate definition of the law. I think that is overly broad. I think that it encompasses way too many people to be a user. What [the Instruction] essentially says is if at one time in your life you've used methamphetamine, you are a prohibited person from owing [or possessing] a firearm. I think it is far too broad. It is far too vague. It pulls far too many people [into] the realm of a prohibited person." 5JA 907. See also *Purdy v. United States*, 264 F.3d at 812-13 (infrequent use in the distant past would not make a defendant "an unlawful user of" a controlled substance).

Third, although the statute contains no criminal mental state element, the district court defined the offense as a "strict liability offense." It then twice read a "willful" element into the offense, but did not specifically define the term "willfully." 1JA 160. It then instructed

[11] The proposed jury instruction offered by the defense covered all three elements. See 1JA 176 (Defendant's Rejected # 2).

that a prohibited person "need not have known that his possession of the firearm was illegal, and need not have intended to violate the law. Ignorance or misapprehension of the law is not a defense to this crime." This was judicial error.

Even if the incorporation of a willfulness element by the district court did not constitute judicial error or an abuse of discretion, the subsequent failure to define "willfulness"—either standing alone, or coupled with the district court's elaboration of strict liability—did. See *United States v. Hernandez*, 859 F.3d 817, 821-24 (9th Cit. 2017). In *Hernandez* the appellate court reversed jury convictions on instructional error involving the term "willfully." There the federal district court rejected Hernandez's proposed jury instruction, which "made clear that Hernandez could have acted willfully *only if* he knew that bringing guns into California was somehow unlawful." 859 F.3d at 823 (italics in the original. *Hernandez* involved a prosecution under 18 U.S.C. §§ 922(a)(3) and 924, for possession and transportation of firearms from Arizona into California. The federal district court instructed the jury that:

> A person acts willfully if he acts intentionally and purposefully and with the intent to do something

> the law forbids, that is, with the bad purpose to disobey or disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with intent to do something the law forbids.

In contrast, Hernandez had offered the following:

> An act done willfully is one which is done knowingly and purposely and with the intent to do something the law forbids, that is the bad purpose to disobey the law. Therefore, in order to establish a willful violation in this case, the government must prove beyond a reasonable doubt that when Hernandez transported firearms purchased in Arizona to California, *he knew his conduct was unlawful and he intended to disobey the law.*

859 F.3d at 823 (italics added). The appellate court said that both instruction "accurately stated the law," but, as noted above, the instruction offered by Hernandez "made clear that Hernandez could have acted willfully *only if* he knew that bringing guns to California was somehow unlawful. *Id.*

Here Mr. Hager came into possession of his firearms only after they were returned to him by law enforcement agencies after a background check. The State should have been required to prove that Mr. Hager knew his conduct was illegal and that he intended to disobey the law. Of course, under these facts the State could never meet that

burden beyond a reasonable doubt. Instruction 16 failed to put the State to the test; it diluted the State's burden of proof; and it did not adequately instruct the jury on the elements of the charged offenses.

Jury Instruction No. 18

This instruction defined the elements of Counts I, II, and III as follows:

> "1. The defendant willfully owned or had in his possession or under his custody or control;
>
> 2. Any firearm;
>
> 3. After having been adjudicated mentally ill by a court of this State, any other state or the United States.
>
> Possession of a Firearm by a Prohibited Person is a strict liability offense. A person who has been adjudicated mentally ill commits the offense if he willfully possesses a firearm. The prohibited person need not have known that his possession of the firearm was illegal, and need not have intended to violate the law. Ignorance or misapprehension of the law is not a defense to this crime."

1JA 163.

As relevant here the Instruction then defines "adjudicate" to mean "to rule upon judicially," and "mental illness" to mean a "clinically significant disorder of thought, mood, perception, orientation, memory

or behavior." First, this Instruction carries the same "willfulness" error as Jury Instruction No. 16 and the argument made against Instruction 16's "willfulness" element above, is incorporated in full against Jury Instruction No. 18.

Additionally, the Instruction is incomplete because it does not locate the limited application of the phrase, "adjudicated as mentally ill" to the involuntary commitment process, and therefore allowed the jury to mistakenly think that an admission to, and completion of, Mental Health Court necessarily required Mr. Hager to be "adjudicated as mentally ill." This was judicial error. Instruction 18 failed to put the State to the test; it diluted the State's burden of proof; and it did not adequately instruct the jury on the elements of the charged offenses. Compare, 1JA 178 (Defendant's Rejected # 3) (implicitly contextualizing adjudication with other criminal judicial findings such as NRS 175.539 (acquittal by reason of insanity) and NRS 178.425 (finding of incompetency)

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D.

The district court erred in allowing the State to use videos in its rebuttal case where the videos had previously been deemed inadmissible, and where the predicate for their admissibility was an arbitrary and capricious finding by the court that defense counsel had "opened the door."

Standard of Review

A trial court is vested with broad discretion in determining the admissibility of evidence, and a decision to admit or exclude particular evidence will not be reversed absent a clear abuse of discretion. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

Discussion

Prior to the start of trial Mr. Hager's counsel offered to stipulate to the possession of firearms element as to each count and for the time period alleged in each count. 2JA 203. Based on the offered stipulation counsel asked the court to preclude the State's use of Facebook videos that the State intended to use. *Id.* 203-04. The prosecutor said that he "would think about it, yeah." *Id.* at 16. The court allowed the prosecutor the lunch hour "to think about it," and commented: "But an offer of a stipulation doesn't mean that it is. So it will be up to [the prosecutor] whether he wants to take that or not." *Id/* at 204. Mr. Hager's counsel

disagreed and politely noted that the State did not have to agree, "it doesn't necessarily have to be with the State's permission. The Court can then decide whether or not the State can introduce that evidence." *Id.* The court answered, "Just so you know for the record, a stipulation by definition is an agreement." *Id.*

Prior to trial Mr. Hager's counsel had filed a motion to preclude the State from presenting any evidence purporting to show Mr. Hager making threats to law enforcement as they were not relevant to any of the elements of the charged offenses. 1JA 6-8 (Motion In Limine to Preclude Irrelevant Testimony). The State filed an opposition, 1JA 10-17 (Opposition to Defendant's "Motion in Limine to Preclude Irrelevant Testimony), arguing that "[s]everal of the videos posted by the Defendant to his Facebook page, while they do not show the Defendant in possession of firearms, are nonetheless relevant to showing that the firearm-possession videos were posted on or near the dates they were created." 1JA 11 (footnote omitted). They State quoted some of content that purported to show Mr. Hager's "frustration with the Reno Police Department." For example, "better do you f—king job," and "I do what I

say I'm going to do," and "does it look like I'm f—king playing? I'm sick of this sh-t," and "if you guys don't do your job I'll finish it for you." *Id.*

At a pretrial motions hearing the district court allowed some of the Facebook videos to be admitted, but correctly asked, "How is it threatening law enforcement any relevance to the case?" 1JA 88 (Transcript of Proceedings: Motions in Limine). After watching some of the videos, the district court ruled that it was not going to allow this evidence because it was "too prejudicial, that its prejudicial impact is too great and outweighs its probative value." *Id.* at 91, 93 (same), 97 (concluding, "Clearly I would not be allowing him threatening police officers as part of this particular trial. It's about possessing firearms by a prohibited person by two different reasons, and that's what would remain relevant for the Court.").

At trial, during defense counsel's cross-examination of Reno Police Detective Johnson regarding the February 28th video, she said, "And so the video got your attention, this video up here, from February 28th?" The detective answered, "Oh, yes, ma'am, it did." 3JA 552. Outside the presence of the jury the prosecutor argued that this question and answer had "opened the door" to allow him the opportunity to play the

companion videos containing the "threats" to law enforcement. Mr. Hager's counsel argued otherwise. 3JA 560-66. The district found "it's a very, very close line with this door being open." It nonetheless kept the "threat" videos out, but allowed the prosecutor to "inquire of the officer:" whether as a result of his concern caused by the video "he chose to discontinue communication with the defendant." 3JA 566. The prosecutor ended his re-direct examination of the detective this way:

> [The prosecutor] You're watching these videos on March 31st or very close to that day when you got the link?
>
> [The detective] Yes, sir.
>
> [The prosecutor] You were asked why you didn't, for instance, do a welfare check or go check on Mr. Hager. Is it true that when you looked at some of the later March videos you had concerns about what you saw in terms of the message in those videos?
>
> [The detective] Yes, sir. I was concerned not only with the message, but his well-being.
>
> [The prosecutor] Okay. But is it true that the reason you had no further contact or communication with Mr. Hager after you followed that link is because of those, the concerns that you had?
>
> [The detective] Yes, definitely the concerns that I had. Yes, sir.

> [The prosecutor] And then based on those concerns, did you refer what you had seen to the Sparks Police Department?
>
> [The detective] Absolutely? I was unable to meet with him personally, so I directed that information to my superiors and to the Sparks Police Department.
>
> [The prosecutor] Okay. That you very much, Detective.

3JA 572-73.

Mr. Hager testified. In response to questions from his counsel he noted that he was unable to get Detective Johnson to reopen the investigation into his brother's death—even with the video he had made. 4JA 776. Mr. Hager testified the detective "didn't even contact me again." His counsel added, "And part of that was your own doing, right?" Mr. Hager answered, "Yes." 4JA 776. Based on the last two sentences exchanged between Mr. Hager and his counsel, the prosecutor renewed his argument that the "door had been opened" allow the playing of the "threat" videos in his rebuttal case. 4JA 789-91. Defense counsel objected noting that she "did not get into anything else about a threat, about unstable behavior." *Id* at 791-92. Inexplicably, this time the district court agreed. The district court characterized

defense counsel's statement: "Part of that was your own doing," as "classic opening the door to allow what that doing was." *Id.* 792 and 795. And allowed the prosecutor to play certain videos during the detective's rebuttal testimony, with commentary by the detective. See 4JA 875-80. Detective Johnson testified that his communication with Mr. Hager ended "based on the threats that I could see directly to me from those videos." 4JA 880.

The Court should ask, as the district court initially asked: "How is it threatening law enforcement any relevance to the case?" And the Court might wish to expand its inquiry: how did Mr. Hager's agreement with his counsel's statement cum question, "And part of that was your own doing, right?", open *any* door let alone *the* door to the admission of videos that the district court had previously characterized as "too prejudicial," and that "its prejudicial impact is too great and outweighs its probative value," such that it would not allow the videos as "as part of this particular trial" because "it's about possessing firearms by a prohibited person by two different reasons."

To prove the offense of possession of a firearm by a prohibited person the State had to show that Mr. Hager possessed firearms—an

element he stipulated to and otherwise did not contest at trial—while being prohibited "by two different reasons." NRS 202.360. While the State is generally "entitled to prove its case by evidence of its own choice, *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997); *Edwards v. State*, 122 Nev. 378, 380-82, 132 P.3d 581, 583 (2006), a caveat exists: Otherwise relevant evidence is nevertheless inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1); see also NRS 48.045(2) (prior bad acts).

The admission of evidence is within a district court's discretion. However, "[a]n abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason," *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). Respectfully, the district court had it right the first time. It abused its discretion by admitting prejudicial, confusing, and misleading videos during the prosecutor's "rebuttal" case. The district court abused its discretion by finding that defense counsel's statement *cum* question: "And part of it was your own doing, right?" somehow

constituted an opening to allow the prosecutor to use prejudicial, confusing, and misleading evidence in its rebuttal case. This "finding" was arbitrary and capricious and unsupported by the record.

Prejudice resulted. As noted in earlier arguments, even with the possession element of the charged offense unchallenged or otherwise contested, the evidence presented to the jury was insufficient to establish either of the alleged "prohibited person" elements beyond a reasonable doubt. The so-called threats against law enforcement that the jury saw and heard at the close of the trial had their intended effect: Mr. Hager's legally unsupported criminal conviction.

This Court should find the admission of this evidence was unduly prejudicial and reverse.

VIII. CONCLUSION

For the reasons set out above this Court should reverse all of Mr. Hager's convictions on grounds of insufficiency of the evidence and, on remand, direct the district court to dismiss the case. Alternatively, this Court should remand for a new trial where the jury can determine Mr. Hager's guilt or innocence after being properly instructed on the

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elements of the charged offenses.

DATED this 16th day of August 2017.

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CERTIFICATE OF COMPLIANCE

1. 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: This brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 9,910 words. NRAP 32(a)(7)(A)(i), (ii).

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 of the transcript or appendix where the matter relied upon 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 16th day of August 2017.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of August 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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