IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RENE HARRIS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ERIC JOHNSON, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 77319-COA

ORDER DENYING PETITION

Rene Harris filed an original petition for a writ of mandamus or prohibition challenging a district court order denying a pretrial petition for a writ of habeas corpus.

A grand jury indicted Harris on charges of conspiracy to commit murder, attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, and child abuse, neglect, or endangerment.[1] The State alleged that Harris shot his brother, Michael Harris (Michael), in the back with a shotgun in front of Michael's minor child. The State failed to provide Harris with a *Marcum*[2] notice prior to the grand jury returning a true bill and the State's filing of the indictment, but it later gave him notice of the proceedings and an opportunity to testify before the grand jury, to which Harris failed to

[1]We do not recount the facts except as necessary to our disposition.

[2]*Sheriff v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989).

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respond. Harris later filed a petition for a writ of habeas corpus with the district court requesting that it dismiss the indictment, alleging that the State failed to (1) provide him adequate notice of the grand-jury proceedings and his right to testify, (2) provide the district court with a good-faith explanation for that failure, (3) correctly instruct the grand jury on the child-abuse charge, and (4) present sufficient evidence to support the indictment on that charge. The district court denied the petition, and Harris now challenges that decision by way of a petition for a writ of mandamus,[3] asserting largely the same arguments he advanced below and requesting that this court direct the district court to dismiss the indictment. However, we must first decide whether to consider Harris' petition.

"A writ of mandamus may issue to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion." *Clay*, 129 Nev. at 449, 305 P.3d at 901 (citation and internal quotation marks omitted). Such a writ is an extraordinary remedy, and whether to consider a petition seeking it is within this court's discretion. *Id.* at 450, 305 P.3d at 901. Generally, this court will issue such a writ only "if the petitioner has [no] plain, speedy, and adequate remedy in the ordinary course of the law." *Id.* at 449, 305 P.3d at 901 (citing NRS 34.170). Though issues like those

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[3]We construe Harris' petition as one seeking a writ of mandamus because "he has not asserted a claim that challenges the district court's jurisdiction" as required for a writ of prohibition. *Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 450 n.1, 305 P.3d 898, 901 n.1 (2013) (construing a similar petition solely as one for a writ of mandamus); *see also* NRS 34.320 (providing that a writ of prohibition is available to stop proceedings that are without or in excess of the district court's jurisdiction).

raised in the instant petition "can be reviewed on direct appeal," the Nevada Supreme Court has held that "a writ of mandamus is an appropriate remedy for violations of grand-jury procedures" because errors in such proceedings are "likely to be harmless after a conviction." *Id.* at 450, 305 P.3d at 901 (alterations and internal quotation marks omitted). Accordingly, we reach most of the issues Harris raises.[4]

First, we consider whether the district court should have dismissed the indictment on grounds that the State failed to provide Harris with a timely *Marcum* notice and to provide a good-faith explanation for doing so. Harris argues that these failures prejudiced him because he was unable to testify at the time the grand jury originally considered the case and returned a true bill. While the State concedes that it failed to provide a timely *Marcum* notice, it argues that it nevertheless cured that failure under the remedial provision of NRS 172.241(5) by providing Harris an opportunity to testify after the fact. We agree with the State.

NRS 172.241(1) provides that a person for whom a district attorney intends to seek an indictment "may testify before the grand jury if the person requests to do so and executes a valid waiver in writing of the person's constitutional privilege against self-incrimination." Further, NRS

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[4]Nevada's appellate courts generally decline to consider writ petitions challenging probable-cause determinations in grand-jury proceedings. *Clay*, 129 Nev. at 450 n.2, 305 P.3d at 902 n.2 (citing *Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 546, 612 P.2d 679, 680 (1980) (noting that the Legislature "has expressed its disapproval of our pretrial review of a probable cause determination denying habeas relief")). Accordingly, we decline to consider Harris' argument that the State failed to present sufficient evidence to the grand jury to support the child-abuse charge.

172.241(2) states that a district attorney or a peace officer shall serve reasonable notice on such a person or his or her attorney informing the person of his or her right to testify and providing him or her with at least five judicial days to submit a request to do so, "unless the court determines that adequate cause exists to withhold notice."[5] NRS 172.241(2)(a). However, NRS 172.241(5) provides that if the State gives inadequate notice, "the person must be given the opportunity to testify before the grand jury," and if the person so testifies, "the grand jury must be instructed to deliberate again on all the charges contained in the indictment following such testimony."

Here, the State concedes that it failed to provide Harris with adequate notice under NRS 172.241—indeed, it concedes that it provided Harris no notice at all until after the grand jury returned a true bill and the State filed the indictment. However, pursuant to NRS 172.241(5), the State gave Harris an opportunity to testify, and had Harris accepted that invitation and testified, the grand jury would have needed to deliberate again on all of the charges in light of that testimony. But Harris failed to respond to the State's invitation. Thus, he suffered no prejudice and the district court did not err in declining to dismiss the indictment on grounds of inadequate notice. Moreover, nothing in the text of the statute requires the State to provide a good-faith basis for failing to give notice if it invokes

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[5]NRS 172.241(3) and (4) govern the procedures surrounding a district attorney's request to the court to withhold notice outright for adequate cause. However, these sections do not apply in the instant matter. The district court found that the State failed to give adequate notice, but then shortly after committing the error cured it. Accordingly, there was no intent from the State to outright deny Harris notice of his right to testify; the State merely failed to provide adequate notice in the first instance and then corrected its error.

the curative provision of NRS 172.241(5); instead, the State must only demonstrate adequate cause if it intends to withhold notice of the grand-jury proceedings from someone outright. *See* NRS 172.241(2)-(4). We also note that Harris failed to cite to any authority in support of the notion that the State was required to provide an excuse. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Accordingly, Harris' argument on this point is without merit.

Next, we consider whether the State improperly instructed the grand jury on the child-abuse charge. Harris argues that the State instructed the grand jury on the meaning of "negligent treatment or maltreatment of a child" using language he claims is not provided for by statute and supposedly contradicts the requirement of willfulness in NRS 200.508(1). He also argues that the State was required and failed to instruct the grand jury on the meaning of the terms "permit," "allow," and "substantial mental harm." We disagree.

While the prosecution generally does not have to instruct grand jurors on the law, it does have to instruct them on the specific elements of the crimes for which they are seeking an indictment. *Clay*, 129 Nev. at 450-51, 305 P.3d at 902 (citing NRS 172.095(2)). NRS 200.508(1) provides in relevant part:

> A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect [is guilty of a felony].

As observed by the Nevada Supreme Court in *Clay*, this statute "sets forth alternative means of committing the offense," both of which require proof of "abuse or neglect." 129 Nev. at 451-52, 305 P.3d at 903-04. Where a term within the elements of the crime is statutorily defined, the prosecution need not instruct grand jurors on that specific definition if it "is not technical and reflects a layperson's common understanding of the term." *Id.* at 456, 305 P.3d at 905.

Here, the State instructed the grand jury on all of the elements of both alternative means of committing the offense. In defining "negligent treatment or maltreatment of a child," which is a species of "abuse or neglect" as defined under NRS 200.508(4)(a), the State used the exact language from a separate statute referenced in NRS 200.508(4)(a) that defines the term. *See* NRS 432B.140. Moreover, nothing about the State's instruction runs afoul of the willfulness requirement of NRS 200.508(1). "The child abuse statute is a general intent crime." *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984) (holding that the district court properly instructed the jury that "willfully" under NRS 200.508 "implies simply a purpose or willingness to commit the act or to make the omission in question," not "any intent to violate law, or to injure another, or to acquire any advantage"). The State alleges that Harris willfully shot Michael in the presence of his minor daughter and that such conduct amounts to negligent treatment or maltreatment of a child. Accordingly, the State properly instructed the grand jury on the elements of the crime charged.

With respect to Harris' argument that the State failed to define certain specific terms, we note that he fails to argue that these terms are technical and do not reflect a layperson's understanding of their meanings, and thus he fails to cogently argue why he believes the State should have

instructed the grand jury on the terms' meanings. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6. Moreover, the terms "permit" and "allow" are not set forth in NRS 200.508(1), which is the only statutory provision under which the State charged Harris for child abuse; instead, those terms are set forth in NRS 200.508(2), which sets forth a separate crime prohibiting individuals from permitting or allowing a child to suffer unjustifiable physical pain or mental suffering. Finally, the State was not required to define "substantial mental harm." That term appears in the statute only to the extent that persons found guilty of the crimes described therein are subject to different penalties "[i]f substantial bodily or mental harm [did or did not] result[ ] to the child." NRS 200.508(1)(a)-(b), (2)(a)-(b). Accordingly, "substantial mental harm" is not an element of the offense charged—meaning the State does not have to prove it at trial to secure a conviction—and thus the State did not have to instruct the grand jury as to its meaning.

Based on the foregoing, we

ORDER the petition DENIED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
James J. Ruggeroli
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk