IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLAUDIA LILY GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78250-COA

FILED

MAY 29 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Claudia Lily Gonzalez appeals from a judgment of conviction, pursuant to a jury verdict, of driving under the influence of alcohol resulting in death pursuant to NRS 484C.430. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

At 4:26 a.m. on December 25, 2016, two Las Vegas Metropolitan Police Department (LVMPD) Officers—Sandeep Liske and Joshua Griffith—responded to a disturbance call at the Walgreens store on the northwest corner of East Flamingo Road and Maryland Parkway. In the parking lot, the officers made contact with Terrance Darnell Henderson,[1] who had been shouting profanities at a Walgreens employee. The officers gave Henderson a trespass warning and let him leave. As Officers Liske and Griffith were finishing their reports—in separate patrol cars, parked slightly off the north side of East Flamingo Road, with their cars facing south—they observed Henderson walk into the westbound lane of East Flamingo Road, heading south, away from the Walgreens. Henderson was pushing a wheelchair with several clothing items placed in the chair.

[1]The dissent twice characterizes Henderson as elderly. The record, however, shows that Henderson was born in 1961, and that he was 55 when the collision occurred in 2016.

Henderson was walking slowly, was not in a crosswalk, and was wearing a black shirt and dark pants. When Henderson reached the center median, he dropped several items and picked them up, which took up to 20 seconds. Officer Liske shined his spotlight on Henderson, but did not turn on his overhead lights or get out of his patrol car. Officer Griffith used his public address system to "advise[ ] Terrance not to jaywalk, to stop jaywalking, and also warned him that he possibly might get hit by a vehicle." As Henderson left the center median and entered the eastbound lane of East Flamingo Road, he did not stop and look for traffic. At this point, Officer Liske took his spotlight off Henderson.

At approximately 4:46 a.m., Officers Liske and Griffith saw a Jeep Cherokee approaching in an eastbound lane with its headlights on. The Jeep was not failing to maintain its lane, weaving, speeding, or committing any traffic violation. A few seconds later, as Henderson was in the southernmost lane of East Flamingo Road—just prior to reaching the sidewalk—he stopped walking, stood still, and the Jeep struck him. The Jeep's driver, Gonzalez, had not braked, swerved or applied the horn. Henderson was instantly killed, and his body remained in the travel lane.[2] The wheelchair Henderson had been pushing was not struck because it was resting against the curb.

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[2]Contrary to the dissent's assertions, no witness testified that Henderson was in or adjacent to a crosswalk when the collision occurred. The dissent contends that Henderson was possibly "walking mere inches outside of a clearly marked crosswalk" when Gonzalez collided with him. Erik Tufteland, a crime scene analyst with LVMPD, testified that Henderson's body and personal effects were not near the crosswalk following the collision. Moreover, Officers Liske and Griffith—eyewitnesses to the collision—both testified that Henderson was not in a crosswalk. Thus, the dissent's speculative assertion is unsupported by the record.

William Redfairn, a retired LVMPD Detective in the Fatal Detail, described surveillance footage from an AM/PM gas station as showing that—before Gonzalez collided with Henderson—three other vehicles passed Henderson in the same eastbound lane while he was in the street, and none of them braked or made steering corrections.[3] The cars that passed

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[3]Our dissenting colleague criticizes the majority for not having watched the surveillance video, and speculates that this footage could have shown Gonzalez's guilt. We note that the record does not include the surveillance video, other exhibits, or demonstrative evidence. Under NRAP 10(b)(1)-(2), the parties are responsible for filing the appendices and exhibits. However, under Rule 30(d), only relevant and necessary exhibits shall be included in the appendix and the court does not permit the transmittal of original exhibits except upon motion with a showing that the exhibits are relevant to the issues raised on appeal, and the court's review of the original exhibits is necessary to the determination of the issues. The State, unlike the dissent, never argues that the record is incomplete, that any inferences should be made against Gonzalez based upon an incomplete record, or that Gonzalez failed to comply with the NRAP in any way. Indeed, the only reference the State makes to exhibits offered in evidence is to assert that the video reveals that Gonzalez was able to use it to argue her theory of the case regarding Henderson's actions including jaywalking and standing in Gonzalez's travel lane. However, the State does not argue that the video helps prove its case.

Further, the dissent identifies no portions from the lengthy trial transcript wherein a witness testified that the surveillance video showed that Gonzalez could have avoided the collision with Henderson, nor does the State argue that on appeal. A description of the surveillance footage at trial revealed that at least three other drivers, moving in the same direction as Gonzalez, also passed Henderson on the road narrowly missing him. The fact that these drivers were fortunate enough not to collide with Henderson does not support the conclusion that Gonzalez committed any illegal act or neglected any duty before colliding with him. Importantly, the dissent ignores testimony from Officers Liske and Griffith, both of whom testified that they did not observe Gonzalez violate any traffic duty preceding the collision. Therefore, we conclude that based on the testimony in the record, a further review of the surveillance video is not essential for this court to

Henderson did not brake until they approached the red light at the intersection of East Flamingo Road and Maryland Parkway.

Officers Liske and Griffith immediately headed westbound on East Flamingo Road, made a U-turn on Claymont Street, and returned eastbound to secure the accident scene. Both officers exited their patrol cars, checked Henderson, and told Gonzalez that the collision was not her fault. Henderson died of blunt force trauma. Officer Liske did not detect alcohol on Gonzalez's breath. LVMPD Officer Michael Ross arrived within minutes and asked Gonzalez for her driver's license, registration, and proof of insurance. Officer Ross detected an odor of alcohol, and asked Gonzalez if she had been drinking. Gonzalez admitted to drinking wine at a party at the Vegas Tower Apartments. After field sobriety tests, officers arrested her for misdemeanor driving under the influence of alcohol, and obtained a warrant to draw Gonzalez's blood. The first blood draw, at 6:28 a.m., showed that Gonzalez had a blood alcohol concentration (BAC) of 0.163, twice the legal limit, and the second blood draw, at 7:27 a.m., showed that her BAC was 0.137. A postmortem blood toxicology test revealed that Henderson had a BAC of 0.285, three and one-half times the legal limit for drivers, as well as detectable levels of nordiazepam, chlordiazepoxide, and Delta-9 Carboxy THC in his system.

Gonzalez was charged initially by complaint. She was later charged by information with driving under the influence of alcohol resulting in death under NRS 484C.430 and NRS 484C.110. The information alleged that she "fail[ed] to pay full time and attention to her driving, and/or fail[ed]

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decide the legality of the jury instructions or the other pretrial orders of the district court.

to exercise due care, and/or fail[ed] to drive in a careful and prudent manner," which proximately caused the collision and the death of Henderson.

Gonzalez filed a pretrial petition for a writ of habeas corpus, alleging that probable cause did not support the criminal charges against her because no evidence was introduced "to support [the] legal conclusion that [she] failed to pay attention in any way." She further argued that "it is not enough that [she was] merely . . . driving when the accident occurred," and that "there was no evidence presented whatsoever that [she] was speeding, weaving, failed to pay attention, or had any diminished reaction time." The State's opposition contended the following:

> To prove the crime of DUI Resulting in Death, the State must prove that [Gonzalez] was intoxicated under one of the theories of intoxication listed in NRS 484C.430(1)(a)-(f). The State must also prove that [Gonzalez] "d[id] any act or neglect[ed] any duty imposed by law while driving," and that the "act or neglect of duty" proximately caused the collision with the victim, and that the collision proximately caused the death of the victim.

(Third and fourth alterations in original.)

In response to Gonzalez's pretrial petition for a writ of habeas corpus, the State further averred that its "burden is to prove that a violation of a traffic duty proximately caused the accident and death, not that the alcohol caused the death." The State also argued that Gonzalez violated NRS 484B.280(1)(a), which provides that a "driver of a motor vehicle shall exercise due care to avoid a collision with a pedestrian," and contended—which it repeats on appeal—that it "could instead argue that [Gonzalez] had been up all night and was too tired to exercise due care or pay full time and attention to driving." The State clarified that it "only needs to prove that [Gonzalez] violated a traffic duty, and the violation of that duty proximately caused the collision and the victim's death, *separate from proving intoxication* under

NRS 484C.430(1)(a)-(f)." (Emphasis added.) Gonzalez replied that there was "no evidence in the record to support th[e] allegation that [she] failed to exercise due care." The district court denied the writ petition without explanation.

Before trial, the State submitted its proposed jury instructions and moved to exclude evidence of Henderson's intoxication on the ground that it was irrelevant because "[t]he real issue to be decided by the jury is whether [Gonzalez] should have seen the victim crossing the street to avoid the collision."[4] The State also asserted that the probative value of the evidence was outweighed by its prejudicial effect because "there [was] a very strong danger that the jury will decide the case based on a visceral emotional reaction to the victim's intoxication levels." Finally, the State also sought to exclude evidence of Henderson's actions in Walgreens as irrelevant because "it was too remote to have any bearing on the collision."

Gonzalez opposed the State's motion in limine on the ground that Henderson's intoxication was relevant to her defense (i.e., that Henderson was the sole cause of his death). She also averred that Henderson's actions at Walgreens were not "too remote" as to be irrelevant. Also, she argued that

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[4]The dissent avers that the majority is "second-guess[ing]" the jury's verdict and reweighing evidence. We disagree. As the subsequent analysis shows, the district court—*before trial commenced*—abused its discretion in excluding evidence of Henderson's intoxication, and erred in the manner it indicated the jury would be instructed on NRS 484C.430(1). Thus, *before* trial commenced Gonzalez was erroneously barred from adequately presenting her defense theory along with evidence that could have persuaded the jury to find that Henderson's actions were an intervening superseding cause of the collision. Therefore, the jury was left in the unfortunate position of deciding the case without all of the relevant evidence and with incomplete or misleading instructions of law. Thus, reversal is warranted based on pretrial errors that were not corrected at trial and the majority is not reweighing the evidence.

it was premature for the court to decide the jury instructions before trial; rather, the court should hear the evidence first.

The district court, without analysis or citation to authority, concluded that evidence regarding Henderson's intoxication, as well as his actions at Walgreens, was irrelevant and unfairly prejudicial, and excluded any mention of it in front of the jury. The court also preliminarily approved the State's proposed instructions of law.

At trial, the State presented testimony from eight witnesses, none of whom testified that Gonzalez was tired or fatigued, violated any traffic law, failed to pay attention, failed to exercise due care, or did not drive as an ordinary reasonably prudent person. The State called Dr. Raymond Kelly, a forensic toxicologist, who testified to the results of the blood testing. He further opined that (1) your chances of getting into an accident increase with alcohol consumption, and (2) fatigue from being up all night can exacerbate alcohol impairment. The State, however, laid no foundation or presented any evidence to show how long Gonzalez had been awake, or showed that Gonzalez's reduced reaction time caused the collision.[5]

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[5]The dissent notes that an NFL quarterback has "2.4 seconds to drop back, scan the filed, read the defense, find an open receiver, and throw a pass," to show that Gonzalez should have reacted timely to Henderson. This analogy is inapplicable. The only witness that calculated reaction times, Redfairn, was called by Gonzalez, and he concluded that the collision was unavoidable. The State also presented no evidence that Gonzalez or any other driver could have reacted in time to have avoided the collision with Henderson (i.e., the only evidence presented by the State was that intoxicated drivers, in general, have reduced reaction times). The dissent then cites to the Nevada Driver's Handbook for reaction times, which was never used as evidence below, and therefore its applicability was not subject to the customary evidentiary foundation requirements, nor was its accuracy subject to cross-examination or expert opinion. Thus, it is not properly before this court. Further, the dissent, without any proof in the record, speculates

Officer John Nelson testified that *no* reaction time calculations were performed during LVMPD's investigation of the collision. Officers Liske and Griffith—the eyewitnesses to the collision—testified that they observed Gonzalez commit no traffic violations before the collision, and that they both immediately told her the accident was not her fault. They both testified that it was dark outside but the area was well lit, but Officer Liske also testified that if he had not turned off his spotlight, it would have "illuminated [Henderson] to oncoming drivers." Testimony described the security footage as showing three other cars pass Henderson before the collision, and none of these vehicles braked or took evasive maneuvers to avoid Henderson even though they were only feet away from him as they passed him in the roadway.

Gonzalez's first witness was LVMPD Fatal Detail Detective Eric Grimmesey, the lead investigator examining the cause of Henderson's death. Detective Grimmesey testified that Henderson was jaywalking because he did not use the crosswalk, which was some distance down the highway. His calculations showed that Gonzalez's Jeep was probably traveling at 42 or 43 miles per hour at the time of the collision, which was under the 45 mile per hour limit. Detective Grimmesey testified that he performed no reaction time calculations, that there were no skid marks, and that he did not

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that Gonzalez saw Henderson 150 feet before she collided with him. There is nothing in the record to show that Gonzalez ever saw Henderson before she collided with him, and the fact that police officers could see Henderson from 150 feet as they were studiously focused on his actions as they feared an imminent collision, fails to equate to Gonzalez seeing a stationary pedestrian in the roadway in time to have avoided the collision, just like the other drivers that passed Henderson and did not appear to have seen him. Moreover, the record unequivocally shows that Henderson was dressed in dark clothing, and that shortly before the collision, the police inexplicably turned off the spotlight they had previously shined on him.

conclude that Gonzalez had committed any traffic violations, other than "failing to yield to a pedestrian."

The defense's second witness was Redfairn, who used 29 equations to calculate Gonzalez's speed, which showed that her vehicle was driving between 22 and 51 miles per hour, with an average estimated speed of 43 miles per hour, at the time of the collision. Redfairn said that he calculated that Gonzalez only had 1.7 seconds to react to Henderson, which was insufficient time to recognize the danger and take evasive action and avoid him, and therefore, the collision was unavoidable. He further opined that the cause of the accident was Henderson entering the street, standing or walking slowly in the street, as well as the dark conditions. The district judge presiding over the trial asked Redfairn—in the presence of the jury—if he was "doing this out of the goodness of [his] heart . . . or [do] you get paid?" Gonzalez's attorney interjected, and the judge again asked, "[h]ow much do you get paid to come in and testify?" Redfairn stated that he was not being paid to testify. As previously noted, the court did not allow testimony or other evidence as to Henderson's mental or physical condition.

In the State's closing argument, it explained, "[t]here's four elements [under NRS 484C.430] and each one of these elements . . . we have a burden to prove these beyond a reasonable doubt." It then noted, "the question that proximate cause is asking is, did Claudia Gonzalez neglect a traffic duty that contributed to Terrance Henderson's death?" The State added, "we need to prove beyond a reasonable doubt that the neglect of traffic duty was the proximate cause." It went on to argue that the traffic duties violated were that "Claudia Gonzalez failed to pay full time and attention, failed to use due care, [and] failed to drive carefully and prudently." The State further noted that "we have alleged . . . four traffic duties here," and argued that "[y]ou can slowdown" "[t]o avoid a collision with a pedestrian,

[you can] take evasive maneuvers," and "[y]ou have a duty to exercise due care in all aspects when you're out there on the roads." The State continued by noting, "[s]omebody jaywalks across the street, you don't get to plow into them. . . . *If you can stop, you have to stop.*" (Emphasis added.) After stating that the violation of a traffic duty must be a proximate cause, the State also told the jury, "alcohols [sic] affect to any extent, no matter how small, may be enough to show proximate cause if it contributed to the victim's death." The State, unlike the dissent, never contended Gonzalez was speeding or driving too fast for the conditions.[6]

In Gonzalez's closing argument, she stated that the State "has absolutely no evidence" to show that she could have avoided the collision. In rebuttal, the State argued, "You better be perfect if you decide to [drive intoxicated]. Because if somebody . . . gets killed, if somebody gets hurt, you're criminally liable. Even if you're only [one] percent at fault." The jury convicted Gonzalez of driving under the influence of alcohol resulting in death.

On appeal, Gonzalez argues (1) the district court abused its discretion by imposing a ten-year sentence, (2) the district court denied her constitutional right to present a defense by refusing her jury instructions, (3) there was insufficient evidence for a rational juror to find that she was the

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[6]The dissent also contends that Gonzalez was speeding while making a right hand turn. We conclude that the record does not support this assertion. There was no evidence admitted to support that she was speeding or in the process of making a right hand turn when she collided with Henderson. The testimony cited by the dissent describes where Gonzalez's vehicle was parked after the collision, which "was pretty much right there at the right-hand turn lane." On the same page of the trial transcript, however, the testimony states that her car was roughly 200 feet beyond where Henderson's body was found, suggesting that she parked on the side of the road following the collision and much further from the area of impact.

proximate cause of Henderson's death, (4) the district court abused its discretion in excluding evidence of Henderson's intoxication, (5) the district court erred when it denied her pretrial writ of habeas corpus, (6) the district court abused its discretion in denying Gonzalez's motion for a new trial, and (7) cumulative error warrants reversal. We conclude that the district court abused its discretion by instructing the jury with erroneous statements of law, and that it should have allowed Gonzalez to present evidence of Henderson's intoxication. Thus, we reverse and remand for a new trial.

NRS 484C.430 requires proof of four elements

Our analysis begins with a discussion of NRS 484.430, because it appears that the parties and the district court may not have had a clear understanding of this statute before and during Gonzalez's trial. This confusion led to erroneous jury instructions.

To support a conviction under the plain meaning of NRS 484C.430(1)(a)-(c), the State must prove the defendant (1) "[i]s under the influence of intoxicating liquor," or "[h]as a concentration of alcohol of 0.08 or more in his or her blood or breath," or "[i]s found by measurement within [two] hours after driving . . . to have a concentration of alcohol of 0.08 or more in his or her blood or breath," and (2) "does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this State," and (3) "the act or neglect of duty proximately causes," (4) "the death of, or substantial bodily harm to, another person." *See Stanley v. State*, Docket No. 73166, at *5 (Order of Affirmance, September 19, 2019) ("The State demonstrated that Stanley [(1)] was under the influence of alcohol while driving, [(2)] *operated his vehicle well above the legal speed limit*, [(3)] collided with the victim, and [(4)] caused his death." (emphasis added)); *State v. McKern*, Docket No. 78842 at *4 (Order of Affirmance, March 2, 2020) ("[The State] must show that the defendant did

any act or neglected any duty imposed by law, and that the act or neglect of duty proximately caused the substantial bodily harm."); *see also Cabrera v. State*, 135 Nev. 492, 496, 454 P.3d 722, 725 (2019) ("[T]his court cannot go beyond the plain meaning of a statute when it is clear on its face.").

Nevada does not have a published opinion that interprets NRS 484C.430(1)(a)-(c). The Nevada Supreme Court, however, interpreted NRS 484.040—which has been repealed, but had substantially similar language to NRS 484C.430(1)—to mean that the defendant must commit an act or neglect a duty "*in addition* to driving a vehicle on a public highway while under the influence." *Anderson v. State*, 85 Nev. 415, 417, 456 P.2d 445, 446 (1969) (emphasis added); *see also Anderson v. Neven*, No. 2:14-CV-02015, 2018 WL 3518461, at *4 n.53 (D. Nev. 2018) ("[T]he Nevada statute at issue here, NRS [ ] 484C.430(1), requires proof of an independent offense [other than alcohol consumption]." (citing *Anderson*, 85 Nev. at 417, 456 P.2d at 446)).[7] California also has a statute prohibiting driving under the influence

[7]The dissent contends that the majority is "wrong on the law." To support this argument, the dissent avers that this court should disregard the holding of *Anderson*, 85 Nev. at 417, 456 P.2d at 446. We decline to do so. The dissent also claims that California's statutory scheme for driving under the influence of alcohol, Cal. Veh. Code. § 23153(a) (West 2019), requires a "criminal act or a traffic code violation," and not the neglect of a duty. California's courts, however, have noted that a neglect of duty alone will support a conviction. *See People v. Oyaas*, 219 Cal. Rptr. 243, 246 (Ct. App. 1985) ("The unlawful act or omission element with which we are here concerned need not be a violation of any specific section of the Vehicle Code."). Further, the statutory text for Cal. Veh. Code. § 23153(a) (West 2019) and NRS 484C.430(1)(a)-(c) both mandate that the prosecution must show that the defendant committed any act or neglected any duty imposed by law. Thus, the dissent's analysis is inconsistent with existing law from Nevada and California's interpretations of a similar statute, which require the prosecution to show violation of a legal duty in addition to intoxication. Furthermore, the discussion from the dissent is not argued by the State and

of alcohol and causing bodily injury, with nearly identical language to NRS 484C.430(1).

> It is unlawful for a person, [(1)] while under the influence of any alcoholic beverage to drive a vehicle and [(2)] concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, [(3)] which act or neglect proximately causes [(4)] bodily injury to any person other than the driver.

Cal. Veh. Code § 23153(a) (West 2019). California courts have concluded that driving under the influence alone, without proof that the driver breached another duty, will not allow a felony conviction under Cal. Veh. Code § 23153(a). *See People v. Weems*, 62 Cal. Rptr. 2d 903, 905 (Ct. App. 1997) ("To satisfy the second element, the evidence must show an unlawful act or neglect of duty *in addition to driving under the influence*." (emphasis added)); *see also People v. Givan*, 182 Cal. Rptr. 3d 592, 604 (Ct. App. 2015).

A plain meaning interpretation of NRS 484C.430 that requires the State to prove the violation of a duty—separate from driving under the influence—comports with unpublished orders from the Nevada Supreme Court. *See Stanley*, Docket No. 73166, at *5 (speeding); *Anderson v. State*, Docket No. 63225, at *1 (Order of Affirmance, September 18, 2013) (failure to yield); *Brown v. State*, Docket No. 58210, at *1 (Order of Affirmance, April 12, 2012) (veering into oncoming traffic).[8] Our interpretation is further

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therefore we decline to consider it further, except to say that it provides little support for the actions of the district court.

[8]NRAP 36(c)(3) bars *parties*—with exceptions as noted in NRAP 36(c)(2)—from citing "an unpublished disposition issued by the Supreme Court" before January 1, 2016. By its plain language, NRAP 36(c)(3) does not apply to appellate courts, as the rule only specifies "parties." *See, e.g.*, *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS,' the expression of one

supported by the State's own arguments: in its opposition to Gonzalez's pretrial petition for a writ of habeas corpus, it argued that it "only needs to prove that Defendant [(1)] violated a traffic duty, and [(2)] the violation of that duty [(3)] proximately caused the collision and the victim's death, separate from [(4)] proving intoxication under NRS 484C.430(1)(a)-(f)." The State further argued that its "burden is to prove that a violation of a traffic duty proximately caused the accident and death, not that the alcohol caused the death."[9]

The district court instructed the jury with erroneous statements of law

Gonzalez challenges two jury instructions, as well as the denial of her jury instructions, on the grounds that either they did not allow her to present her theory of the case, or that they were erroneous statements of law. We agree.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Whether an instruction correctly states the law presents a legal question that is reviewed de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). "[A] defendant is entitled to a jury

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thing is the exclusion of another, has been repeatedly confirmed in this State."). Nevertheless, we cite these cases only as examples of proper convictions for felony driving under the influence.

[9]The State's information and amended information alleged that Gonzalez "fail[ed] to pay full time and attention to her driving, and/or fail[ed] to exercise due care, and/or fail[ed] to drive in a careful and prudent manner, which . . . proximately caused the vehicle being driven by the Defendant to strike and collide with a pedestrian." Neither information specified facts alleging that Gonzalez failed to use due care except to say that there was a collision with a pedestrian.

instruction on his theory of the case, so long as there is evidence to support it, regardless of whether the evidence is weak, inconsistent, believable, or incredible." *Newson v. State*, 136 Nev., Adv. Op. 22, at *13, __ P.3d __ (2020) (internal quotations omitted); *accord United States v. Boulware*, 558 F.3d 971, 974 (9th Cir. 2009). Erroneous jury instructions are reviewed under a harmless error analysis. *See Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). "An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.*

Instruction 10A was an erroneous statement of Nevada law

Gonzalez argues that Instruction 10A, because of the last paragraph in the instruction, improperly allowed the jury to use the consumption of alcohol as a basis for finding proximate cause, and she was not allowed to present evidence of Henderson's intoxication in rebuttal. The State argues that Gonzalez is essentially using jury Instruction 10A to aver that the district court abused its discretion in excluding evidence of Henderson's intoxication. The State also argues that Gonzalez misunderstands proximate cause because, "the fact that Terrance was a concurrent proximate cause was not a cognizable defense" unless Henderson's "negligence was the sole cause of death."

> Instruction 10A stated, in relevant part:
>
> The burden is on the State to prove beyond a reasonable doubt that Defendant's act or neglect of a traffic duty was a proximate cause of the pedestrian's death. If you have a reasonable doubt about whether Defendant's act or neglect of [a] traffic duty was the proximate cause of the pedestrian's death, then you must find the Defendant not guilty . . . .
>
> With regard to the element of "proximate cause," alcohol's effect to any extent, no matter how

> small, may be enough to show proximate cause if it contributed to the victim's death.

Here, Instruction 10A allowed the jury to use evidence that Gonzalez was intoxicated to conclude that Gonzalez "d[id] any act or neglect[ed] any duty imposed by law while driving" and "the act or neglect of duty proximately caus[ed]" the death of Henderson. NRS 484C.430(1). Thus, the jury was allowed to make the erroneous inference that alcohol's effect, no matter how small, would satisfy the elements of duty and proximate cause, whereas the plain language of NRS 484C.430(1) requires the violation of a duty—other than alcohol consumption—to cause the victim's death. *Anderson*, 85 Nev. at 417, 456 P.2d at 446. The instruction should have explicitly stated that the duty element had to be met by evidence other than the consumption of alcohol, contrary to what was permitted here.

We note that the last paragraph of Instruction 10A correctly quoted *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) ("[Alcohol's] effect to any extent . . . no matter how small, may be enough to show proximate cause."). This statement of law, although correct in regard to proximate cause generally, is not proper with respect to the violation of a legal duty for the purposes of NRS 484C.430(1) because the violation of a legal duty that proximately causes the victim's death must be separate and apart from alcohol consumption. *Anderson*, 85 Nev. at 417, 456 P.2d at 446; *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." (quoting *Cohens v. Va.*, 19 U.S. 264, 399 (1821))).

In *Etcheverry*, the defendant committed an act or violated a legal duty *in addition* to being intoxicated—he veered out of his lane into oncoming traffic. 107 Nev. at 783, 821 P.2d at 351; *see also* NRS 484B.223(1).

Etcheverry maintained that the proximate cause of the victim's injury was not his intoxication, but instead was his mechanic's alleged failure to maintain the steering column on Etcheverry's vehicle. *Etcheverry*, 107 Nev. at 784, 821 P.2d at 351. In rejecting this argument, the *Etcheverry* court concluded that alcohol's "effect to any extent in contributing to [the victim]'s injuries, no matter how small, may be enough to show proximate cause." *Id.* at 785, 821 P.2d at 351.

Here, unlike in *Etcheverry*, it is unclear precisely what duty, other than alcohol consumption, Gonzalez violated, as the State on appeal has not argued nor pointed to any violation of a duty, except for speculation (e.g., the State contended that it "could instead argue that [Gonzalez] had been up all night and was too tired to exercise due care or pay full time and attention to driving"). Further, although the State referenced NRS 484B.280(1)(a), which imposes upon drivers a duty of care to avoid a collision with a pedestrian, the State argued that the facts of the case created the "inference that [Gonzalez]'s ability to safely drive was impaired by alcohol and that the alcohol in her system was the reason she failed to see Terrance." As noted, the violation of a legal duty has to be separate and apart from alcohol consumption.

Because Instruction 10A erroneously allowed the jury to conclude that Gonzalez's alcohol consumption or intoxication satisfied the element of the violation of a traffic duty separate and apart from intoxication, which proximately causes the death of the victim, we conclude that the district court erred in giving this instruction as written.

Instruction 14 was an erroneous statement of Nevada law

Gonzalez also argues that Instruction 14 gave three theories of intoxication for DUI liability, but did not state, and failed to incorporate, all the elements of NRS 484C.430(1) for felony DUI. We agree.

Instruction 14 stated:

> The State has alleged that the Defendant is criminally liable for the charge of Driving a [sic] Under the Influence *Resulting in Death* under one or more of the following theories of criminal liability:
>
> > (1) That Defendant was under the influence of an intoxicating liquor to a degree that rendered defendant incapable of safely driving; or
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> > (2) That Defendant had a concentration of alcohol of 0.08 or more of alcohol in Defendant's blood; or
> >
> > (3) That Defendant was found by measurement within [two] hours after driving a vehicle to have a concentration of 0.08 or more in her blood.
>
> Your verdict must be unanimous as to the charge, but does not have to be unanimous on the theory of criminal liability. You may return a guilty verdict if you unanimously find beyond a reasonable doubt that Defendant committed the crime of Driving Under the Influence Resulting in Death, but disagree as to which of the theories was proven.

(Emphasis added.) Here, this instruction noted that Gonzalez could be convicted of the felony offense utilizing only one element of the felony statute. *See* NRS 484C.430(1)(a)-(c). Specifically, this instruction allowed the jury to conclude that it would convict Gonzalez of the felony offense with only the misdemeanor theories of DUI liability. This instruction omitted any reference to the additional elements under NRS 484C.130(1), including that the defendant must "do[ ] any act or neglect[ ] any duty imposed by law while driving" and that "the act or neglect of duty" must proximately cause "the death of, or substantial bodily harm to," the victim. *See Stanley*, Docket No. 73166, at *5. Thus, this instruction was an erroneous statement of law. We recognize that the district court provided other instructions that were correct

statements of the law. Nevertheless, Instruction 14 was misleading because it was incomplete and failed to reference the other instructions, which would have eliminated any possible confusion.

Therefore, we conclude that the district court erred in giving this instruction.

The district court abused its discretion in refusing Gonzalez's proposed jury instruction

Gonzalez contends that the district court's refusal to instruct the jury on her theories of the case was an abuse of discretion. We agree.

As noted, a criminal defendant is entitled to an instruction on her theory of the case, so long as there is evidence in the record to support it. *Newson*, 136 Nev., Adv. Op. 22, at *13, __ P.3d at __.

Gonzalez offered the following instruction, which was not given to the jury:

> It is unlawful for any pedestrian who is under the influence of intoxicating liquors or any narcotic or stupefying drug to be within the traveled portion of the highway. (Citing NRS 484B.297(4)).

This instruction was relevant to Gonzalez's defense on two separate, but legally significant, grounds. First, Gonzalez was entitled to put forth the defense that she did not breach a *duty* in failing to yield to Henderson. Pedestrians have their own independent duties of not leaving a curb or place of safety and run or walk into upcoming traffic, NRS 484B.238(1)(b), and yielding to traffic when crossing outside a marked crosswalk, 434B.287(1)(a). Because the evidence of Henderson's actions leading up the collision and the extent of his own intoxication and actions was excluded, the jury was not able to fairly consider whether Gonzalez breached the duty of failing to yield to a pedestrian taking into account Henderson's own conduct as well.

Second, Gonzalez was prevented from presenting her theory that Henderson was the sole *cause* of the accident. *See Etcheverry*, 107 Nev. at 785, 821 P.2d at 351 ("[A]n intervening cause must be a superseding cause, or the *sole cause* of the injury in order to completely excuse the prior act.").[10] The failure to allow this instruction was an abuse of discretion, as it was a correct statement of the law and it would have allowed Gonzalez to attempt to show that Henderson's actions were a superseding cause or the sole cause of his death. Moreover, the State recognized "the fact that Terrance was a concurrent proximate cause" but qualified this admission by arguing that it "was not a cognizable defense."

However, it is a defense, because under the facts of this case, the jury could have found that Henderson's intoxication and related actions combined were an intervening superseding cause or the sole proximate cause of his death, and the instructions on the defense theory must be given even if the evidence is weak.[11] The State also recognized that "[t]he real issue to be decided by the jury is whether [Gonzalez] should have seen the victim

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[10]The dissent contends that Gonzalez "does not even bother to argue that there existed any other intervening cause that broke the chain of causation between the collision and Henderson's death." This statement misconstrues Gonzalez's brief and the record, as Gonzalez argued that Henderson's severe intoxication was an intervening cause of the collision and the sole proximate cause of death. Gonzalez was barred, however, from presenting any evidence in this regard by the district court in the pretrial ruling and the court would not reconsider it at trial.

[11]The dissent contends that "Gonzalez argues that the definition of 'proximate cause' within NRS 484C.430 must mean the same thing as it means in civil tort cases." We note that Gonzalez never makes this statement in her appellate briefs, and instead, cites to *Etcheverry*, 107 Nev. at 784, 821 P.2d at 351, to aver that she should have been entitled to present evidence of Henderson's intoxication to show that Henderson was the sole cause of his death.

crossing the street to avoid the collision." The proposed defense instruction squarely addressed the argument of whether a driver would expect to see an intoxicated pedestrian standing in the travel portion of the highway, and is consistent with Nevada jurisprudence that failure to yield to a pedestrian does not impose strict liability. *See Johnson v. Brown*, 77 Nev. 61, 66, 359 P. 2d 80, 82 (1961) ("A driver cannot be charged with failure to exercise due care toward a person so crossing the boulevard, unless such person is observed in time for the driver to avoid colliding with him."); *see also Fennell v. Miller*, 92 Nev. 528, 531, 583 P.2d 455, 457 (1978).

Further, the other theories that the State offered—including that Gonzalez failed to pay full time and attention to driving, failed to use due care, or failed to drive in a careful and prudent manner—cannot be proven only by the fact of injury. *See Carver v. El-Sabawi*, 121 Nev. 11, 15, 107 P.3d 1283, 1285 (2005) ("The general negligence rule is that a mere happening of an accident or injury will not give rise to the presumption of negligence." (footnote omitted)); *see also Johnson*, 77 Nev. at 65, 359 P.2d at 82 ("An inference of negligence cannot be drawn from the bare fact that an injury has occurred.").

Thus, the district court abused its discretion by refusing to provide this instruction supporting Gonzalez's theory of the case.

The errors pertaining to the jury instructions were not harmless

Here, the State argues that even if there was any instructional error, such error was harmless. We disagree.

"An error is harmless and not reversible if it did not have a substantial and injurious effect or influence in determining the jury's verdict." *Hubbard v. State*, 134 Nev. 450, 459, 422 P.3d 1260, 1267 (2018); *see also Allred v. State*, 120 Nev. 410, 416, 92 P.3d 1246, 1250 (2004) ("An

error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.").

Here, we cannot conclude that the instructional errors on the elements of the offense were harmless beyond a reasonable doubt based upon the record before this court. The State presented at best nominal evidence[12] that Gonzalez violated a legal duty, and thus, the instructional errors here could have caused the jury to conclude that it could use evidence of Gonzalez's intoxication alone to convict her under NRS 484C.430(1). The State even argued in rebuttal: "You better be perfect if you decide to [drive intoxicated]. Because if somebody . . . gets killed, if somebody gets hurt, you're criminally liable. Even if you're only [one] percent at fault." Furthermore, the defense theory of the case instruction on the duties imposed on an intoxicated pedestrian was critical in light of the unique facts presented in this case. For this reason, we conclude that these instructional errors were not harmless. Thus, we reverse Gonzalez's conviction and remand for a new trial. We also address a further ground for reversal as the issue will likely be presented again on remand.

The district court abused its discretion in excluding evidence of Henderson's intoxication and behavior before the collision

Gonzalez contends that evidence of Henderson's intoxication, as well as his behavior, was relevant to proximate cause, and thus, should not have been excluded on the grounds that it was irrelevant and unfairly prejudicial. The State contends that both motions were properly granted

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[12]The dissent incorrectly characterizes this statement as referring to all evidence presented at trial. As stated in the body of this order, this statement is limited solely to the evidence the State presented showing Gonzalez committed an act or neglected a legal duty, separate from intoxication, as required for a conviction pursuant to NRS 484C.430(1), and in the context of harmless error analysis.

because this evidence would only be relevant if Henderson was the sole proximate cause of his death.

"[A] district court's decision to admit or exclude evidence [is reviewed] for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." *Archanian v. State*, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006).

Here, under the facts of this case, the district court's pretrial decision to exclude evidence of Henderson's intoxication on the ground that it was both irrelevant and unfairly prejudicial was an abuse of discretion because Henderson's severe intoxication, as well as erratic behavior before the collision, could have led the jury to the conclusion that Henderson's actions were an intervening superseding cause, or the sole cause of his death (i.e., Henderson's intoxication was so severe that the jury could have reasonably concluded that he actually stood in the travel lane, when a non-intoxicated person would not have been stationary and oblivious to the danger, and acted in disregard to the commands from the police officers, and therefore, his acts were an intervening cause in his death). *See Etcheverry*, 107 Nev. at 785, 821 P.2d at 351 ("[A]n intervening cause must be a *superseding cause*, or the *sole cause* of the injury in order to completely excuse the prior act.").

Therefore, pursuant to the facts of this case, this evidence had a tendency to prove a fact of consequence, specifically that Henderson's erratic behavior and severe inebriation may have been an intervening superseding cause or the sole cause of his death.[13] *See* NRS 48.015. Thus, because this

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[13]In arguing that the district court did not abuse its discretion in excluding evidence, the dissent cites to *Bernal-Cuadra v. State*, Docket No.

evidence was highly relevant to a key issue in the case and its accuracy was unchallenged, its probative value was not substantially outweighed by its potentially unfair prejudicial effect.[14] NRS 48.035(1). Therefore, we conclude that the district court's decision to exclude this evidence was an abuse of discretion.

Further, we conclude that the district court's decision to exclude this evidence was not harmless, as this evidence was crucial for establishing

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62899 at *1-2 (Order of Affirmance, January 15, 2014) (supporting a conviction under NRS 484C.430(1)(f) after the defendant admitted that he could not see because of the sun, failed to yield to a pedestrian in a crosswalk, and blood and urine tests confirmed he consumed marijuana). Here, unlike in *Bernal-Cuadra*, the State presented nominal evidence—other than Gonzalez's intoxication—to show that Gonzalez violated a legal duty. In *Bernal-Cuadra*, the State presented the defendant's own admission that he could not see and continued driving, showing he violated a legal duty. Thus, because the victim in *Bernal-Cuadra* was not the sole cause of the collision, the victim's intoxication was irrelevant. Here, because nominal evidence was presented to show that Gonzalez violated a separate legal duty apart from intoxication, Henderson's intoxication was relevant to show whether or not he was the sole cause of the collision. Further, the district court refused to reconsider the pretrial ruling at trial thereby compounding an easily correctable pretrial error.

[14]We note that the State's argument is disingenuous. If Gonzalez's intoxication was relevant to prove that she contributed to the collision, Henderson's intoxication was also relevant to determine the extent that he contributed to the collision (i.e., whether his actions were an intervening cause) and was a superseding cause or the sole cause of his death. We further note that, to the extent that evidence of Henderson's intoxication and erratic behavior could have caused prejudice to the State, a limiting instruction could have been given to the jury to not consider Henderson's inebriation beyond the purposes of duty and causation. *See, e.g., Koenig v. State*, 99 Nev. 780, 784 n.4, 672 P.2d 37, 40 n.4 (1983).

Gonzalez's theory of her defense, and the evidence in this case to support that she violated a separate traffic duty was far from overwhelming.[15]

Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for a new trial.[16]

_____, C.J.
Gibbons

_____, J.
Bulla

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[15]Insofar as Gonzalez raises arguments that are not specifically addressed in this order—including those pertaining to her pretrial petition for a writ of habeas corpus, the sufficiency of evidence supporting her conviction, the district court's decision to admit evidence of her retrograde BAC results, her motion for a new trial, the district court's sentencing decision, and cumulative error—we have considered the same and conclude they are either unpersuasive or do not need to be reached given the disposition of this appeal.

[16]In reaching our decision, we acknowledge that the death of Henderson was a tragedy, and we do not lightly remand this case to the district court for a new trial. Like our dissenting colleague, we too recognize that countless people have lost their lives or have had their lives devastated because of intoxicated drivers. This case illustrates, however, that a bedrock principle in our system of justice is that a criminal defendant is entitled to a fair trial, and we must apply the law regardless of any personal views. *See Lutwak v. United States*, 344 U.S. 604, 619 (1953) (explaining that criminal defendants are entitled to a fair trial); *see generally A.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting). Because Gonzalez was not afforded a fair trial, a new trial is necessary in accordance with Nevada law. We note that Gonzalez's prayer for relief was for reversal and remand for a new trial.

TAO, J., dissenting:

Not many people would characterize a crime captured on video in its entirety from start to finish, as well as personally witnessed by two police officers standing nearby, as one proven by only "nominal" evidence. Quite to the contrary, the combination of videotape plus eyewitnesses is usually deemed more than sufficient to render many trial errors harmless. For example, in *Harris v. State*, 134 Nev. 877, 883, 432 P.3d 207, 212-13 (2018), the Nevada Supreme Court held that a crime that was "captured on video and eyewitness testimony filled in any gaps" was one that was "conclusively" proven when the jury "could see the relevant events unfold for themselves." This court itself has followed that common-sense approach. In *Dale v. State*, 2016 WL 763159 (Nev. App. Feb. 17, 2016) (unpublished), we concluded that when "[t]he entire event was captured on surveillance video and the video was shown to the jury," then "substantial evidence supports the verdict."

At a minimum, whenever a video of the crime exists, I would think we'd need to watch it carefully before passing judgment on what it shows or doesn't show. Yet here the majority reverses a felony jury verdict without bothering to even see the video. How do I know that the majority never watched the video? Because this court doesn't have a copy of it. The jury had a copy; the district court admitted it into evidence and the State played it three separate times at trial, repeatedly rewinding, freeze-framing, magnifying, and highlighting parts of it for the jury. Indeed, the video (along with dozens of photographs, maps, drawings, and police body-cam footage, which we also do not have) was the principal focus of the trial, consuming large portions of trial time. But nobody bothered to include a copy in the appellate record for us. And without having any idea of what it shows, the

majority dismisses it, sight unseen, as mere "nominal" evidence of guilt. I couldn't disagree more strongly, and dissent.

I.

Without a copy of the video that played so important a role at trial, we know only the barest shadow of what the jury knew. What we know is that the jury convicted Gonzalez of violating NRS 484C.430 after she stayed up partying and drinking until 4:46 a.m. and then drove with a BAC of .207 (more than twice the legal limit of .08), and mowed down Terrance Henderson, an elderly pedestrian slowly pushing his wheelchair across a brightly lit street, without bothering to swerve or slow down, killing him instantly. A tragedy like this should remind us of the importance of properly interpreting and applying statutes like NRS 484C.430. "Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166 (2016). "[D]runk driving accounts for approximately one-third of all US highway fatalities." National Transportation Safety Board Safety Recommendation H-13-005, Report # SR-13-01 (June 3, 2013), available at https://www.ntsb.gov/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=H-13-005.

The majority reverses based upon four alleged trial errors, concluding that all of them tainted the jury's verdict. But it understates the trial evidence based upon an incomplete record, and then incorrectly interprets and applies NRS 484C.430 to that evidence.

II.

It is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Nevada Constitution assigns the

role of writing criminal laws to the Legislature, not to the courts. It further assigns the role of adjudicating facts in criminal trials to a jury, "the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution" (Thomas Jefferson letter to Thomas Paine, 1798). These bedrock principles dictate our approach to this appeal: we must follow the criminal law as the Legislature defined it even if we wish the statute said something else; and we must apply that law to the facts as the jury determined those facts even if we might have decided the facts differently had we ourselves been jurors.

Thus, the first premise governing this appeal is that in reviewing a jury verdict we do not second-guess the jury on any matter falling within its domain. "This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Rather, we must view the evidence in the light most favorable to the jury's verdict, because that is how the jury must have viewed it when it decided the case. *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). Wherever the evidence in the record is disputed or can be interpreted in two different ways, we must construe it in the way that most strongly supports the verdict, and cannot reverse a conviction based upon our own view of contested facts inconsistent with what the jury must have found to be true when it convicted the defendant. *Id.*

This first premise comes with a second. When evidence that the jury considered is entirely missing from the appellate record, there's no way to view it in favor of either the State or the defendant when we don't know what it even is. So when it comes to missing evidence, our second premise is that the burden falls on the appellant trying to overturn a jury verdict to provide us with a complete enough record to know why the jury did what it

did. If the appellant fails to do so, we "necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). This premise is sometimes phrased in an alternative: we "cannot properly consider matters not appearing in th[e] record." *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997). The reason for this second premise is simple: if we don't know exactly what the jury or the district court based their decisions upon, then it's not fair to conclude that either of them did anything wrong. This premise also acknowledges that if important pieces of the record are missing, it may well be because the appellant intentionally and strategically omitted the parts that weighed most heavily against him, thereby manufacturing a false and unfairly skewed picture of the events below.

The final premise relevant to this appeal is that we read statutes not to rewrite them into laws we think would be better, but only to effectuate the intent of the Legislature when it wrote the statute. When a court interprets a statute, "[t]he legislature's intent should be given full effect." *Freeman v. Davidson,* 105 Nev. 13, 16, 768 P.2d 885, 887 (1989). "It is the prerogative of the Legislature, not this court, to change or rewrite a statute." *Holiday Ret. Corp. v. State of Nev., Div. of Indus. Relations,* 128 Nev. 150, 154, 274 P.3d 759, 761 (2012). "In construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended." *Beazer Homes Nevada Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580, 97 P.3d 1132, 1135 (2004)) (internal quotation marks omitted).

Applying all of these premises here leads to affirmance. Or at least it should have.

III.

Before addressing the specific grounds for reversal that the majority cites, we need to examine the events of the trial. In this case, the question of guilt was simple enough: it turned on whether Gonzalez could see Henderson with enough time to avoid hitting and killing him. Gonzalez's principal defense both at trial and on appeal is to argue that she "exercised due care" to avoid the collision and it occurred despite her exercise of care (in her words, the collision was "unavoidable"). But much of the evidence presented at trial flatly belies that argument. "We will generally not consider on appeal statements made by counsel portraying what purportedly occurred below," but must independently examine the record for ourselves. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009).

Here, the entire incident was captured by a surveillance camera from a nearby 24-hour AM/PM gas station, (AA839-841), and a crime scene analyst took 300 photographs of the scene (AA849, AA851) and prepared detailed aerial photos, maps, and diagrams illustrating the dynamics of the collision (for example, AA861, AA942, AA944-45). The State also played police body-cam footage of Gonzalez immediately after the collision. (AA957-58). The jury saw all of this, and indeed the surveillance video was played for them on three separate occasions during the trial (AA840, AA864, AA947, AA999). But Gonzalez did not bother to include any of this in the appellate record for us to review. We have little more than the typed transcript of the trial testimony, without the accompanying video or photographic exhibits that were admitted into evidence. Without them, long portions of the witness testimony become unintelligible and entire pages of the trial transcript consist of witnesses commenting on the video, photos, maps and aerial diagrams in a way that we cannot see or follow along with.

And even if the appellant had supplied raw copies of the video, photos, and maps for us to review, the record would still make considerably less sense to us than it did to the jury because multiple witnesses devoted much of their testimony to using hand gestures to point at, circle, underline, emphasize, and draw on the maps and exhibits in ways that the jury could easily see in person but the transcript cannot convey on appeal. The witnesses spent much of their time using hand motions to describe lighting, sightlines, visual angles, and relative distances in a manner that must have been clear in the courtroom but becomes maddeningly vague in the transcript. (See, for example, AA841 ("Q: And which direction would be west? A: West would be to our left. Q: Do you see traffic flowing there? A: There."), AA864 ("Q: And if you will use that mouse there, you can circle where you're at. A: [Witness complies]. Q: Okay, So there's several people there, which one of these is you? A: [Witness complies]"), AA943-45 ("Q: Where did you first see him? A: I saw him right — approximately here [witness complies]"), AA947 ("Q; Go ahead and draw a box around your patrol vehicle. A: [Witness complies]"), AA952-53 ("Q: Now, can you draw a box around the person that you're talking about? A: He's right here. Q: Can you draw a line on the screen, the general direction he's going to travel? A: [Witness complies]"), AA1000-1001 ("Q: [Playing video] At this point, do you see Terrance Henderson crossing the street there? A: Yes, I do."). By way of example, at one point a witness (Griffith) was asked on cross-examination to describe a particular distance in relation to the size of the courtroom: "Q: [A]bout how far away from him were you when he got hit? I'm standing here in the back of the courtroom, you got this far away? A: It was further . . . Q: Okay. So another 20 feet, maybe out in the hallway, the back of the wall? A: Yes." (AA1006). Anyone present in the courtroom that day could understand the distance being referenced. But we can't.

On all of these points, nobody bothered to supplement the record by explaining distances, angles, sightlines, or clarifying the witnesses' gestures for appellate review, which leaves us with less of a record than the jury had. Indeed, for anyone who thinks the existing record is sufficient for a thorough and fair review, answer this most fundamental question: exactly how many feet outside of the nearest crosswalk was the "point of impact" where Gonzalez hit Henderson? Three different trial witnesses were asked this question (Tufteland, Liske, and Griffith), and all three responded by pointing to a photograph — a gesture that the jury could see but is conveyed utterly nowhere in the printed transcript. Yet it's a critical question: isn't Gonzalez potentially more culpable for hitting someone walking mere inches outside of a clearly marked crosswalk than for hitting someone crossing nowhere near a marked crosswalk?

When this much of the trial evidence is absent, our well-established approach is that when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Indeed, I would think that surveillance video, aerial maps, and witness drawings capturing the entire incident would be the most comprehensive evidence that exists and, without it, we "cannot properly consider matters not appearing in th[e] record." *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997).

Nor can we blindly assume that whatever is missing must be unimportant and we have enough of a record to decide the appeal without it. That's self-evidently circular; if we can't see what's missing, then there's no way to tell how important it was to the trial. Indeed, what's missing could easily have been far more important than what is there, particularly when the State spent so much trial time methodically introducing dozens of

exhibits and the lawyers for both parties asked five different witnesses (Tufteland, Liske, Griffith, Nelson, and Grimmesey, not counting the expert witnesses who referred to their own different sets of exhibits) to refer to, gesture, draw on, point to, trace, circle, and highlight them in painstaking detail. What the transcript makes clear, through question after question to witness after witness, is that the missing hand gestures and verbal references to visual angles and distances weren't merely incidental to the trial — they were what the entire verdict turned on. Either Gonzalez could see Henderson in time to safely swerve or stop, or she couldn't, and it all depends on where everything was in relation to everything else and how far apart everything was from each other. The jury could see all of it while we can see only a fraction. Casually treating all of this missing evidence as unimportant ignores what the trial was actually about, and beyond that it represents the opposite of what we're supposed to do with an incomplete record. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

IV.

The majority cites four specific trial "errors" that warrant reversal. But all four only rise to the level of error if we assume away missing portions of the trial record that we don't have.

The first supposed error is that the district court abused its discretion in excluding possible evidence of Henderson's own intoxication. A district court's "determination to admit or exclude evidence is given great deference and will not be reversed absent manifest error." *Vega v. State*, 126 Nev. 332, 342, 236 P.3d 632, 638 (2010). I don't know how anyone can conclude that such a "manifest" abuse of discretion occurred when the district court was able to balance the probative versus prejudicial effect of the evidence against trial exhibits, witness hand gestures, and surveillance video

that it could see but we cannot. Indeed, even when the Nevada Supreme Court has all of the trial evidence (which we do not here), it does not second-guess the trial court's decision to exclude evidence of the victim's intoxication in drunk driving death cases. For example, in *Bernal-Cuadra v. State*, 130 Nev. 1153, 2014 WL 495469 (Nev. Jan. 15, 2014) (unpublished), it reasoned that "Bernal–Cuadra contends that the district court erred by disallowing evidence of the victim's blood-alcohol level because that evidence would have explained why the victim entered the crosswalk against the signal. The district court concluded that the evidence was irrelevant for this purpose and we conclude Bernal–Cuadra fails to demonstrate an abuse of discretion."

The same goes for the allegation that Henderson was asked to leave the Walgreen's store — does that have any legal relevance to Gonzalez hitting him with a car minutes later? Though I'm having trouble seeing why, I suppose one might consider it plausible. But shouldn't we at least be able to see the same evidence that the district court did before we can conclude that it abused its discretion on this discretionary call to which we are supposed to exercise restraint and deference?

Next, the majority asserts that "the State...laid no foundation or presented any evidence to show how long Gonzalez had been awake, or showed that Gonzalez's reduced reaction time caused the collision." However, in the portion of the trial transcript that the majority cites, the State was directly referencing Gonzalez's own statements during her arrest that she had spent the night at a friend's party and believed that it was "1 or 2 in the morning" when in actuality it was three hours later, 4:46 a.m. Is this not evidence by itself that Gonzalez was confused, impaired, fatigued, and had been up all night much later than she thought at what she admitted was a party? Reasonable minds could certainly interpret it that way. An "abuse of discretion" occurs when "no reasonable judge could reach

a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Here, reasonable minds could certainly agree with the district court, and, again, when evidence can be viewed in two different ways, our duty is to interpret it in the way most favorable to the verdict. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). And the jury viewed police body-cam footage of Gonzalez immediately after the collision, footage that we cannot see. Without seeing much of the evidence that the jury could, can we really accurately conclude that the State introduced no evidence whatsoever that Gonzalez was fatigued at the scene?

The majority next concludes that the State failed to lay a proper foundation for Dr. Kelly to testify regarding Gonzales' fatigue. When asked about the correlation between alcohol and fatigue, Kelly testified that fatigue and impairment from alcohol reinforce one another. (AA1063). But Gonzalez never objected to this line of testimony. When a defendant fails to object at trial, this court is limited to reviewing for plain error, defined as an error so egregious that even a casual inspection of the record reveals it. *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996). But don't we need to be able to inspect the entire trial record to know if this standard is met? It seems fairly obvious to me that if we don't have the complete trial record (indeed, are missing virtually every exhibit admitted into evidence), we can't determine if an "inspection" of that record reveals a plain error or not. Beyond that, when Gonzalez herself admitted that she attended a party and thought it was still 1 or 2 in the morning when it was actually 4:46, and had a BAC of .207, I'd conclude that a proper foundation was laid and no "plain error" occurred. And there's one more thing: the State introduced police body-cam video of Gonzalez speaking with police immediately after the collision. Don't we need to see the footage before we can know whether it might have showed that she was just as fatigued as Dr. Kelly thought?

The next supposed error relates to a jury instruction that Gonzalez proposed and the district court rejected that would have instructed that "it is unlawful for any pedestrian under the influence of intoxicating liquor . . . to be within the traveled portion of the highway." A defendant is entitled to a jury instruction on her theory of the case, so long as there is some evidence to support it. *Newson v. State*, 135 Nev. 381, 386, 449 P.3d 1247, 1251 (2019). But the district court has broad discretion to settle jury instructions. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Don't we need to know what the trial evidence was — all of it — before we can conclude that the district court abused its broad discretion when it concluded that the trial evidence did not require this instruction? As I already rhetorically asked above, don't we need to know how far outside of the crosswalk Henderson was (inches, feet, or miles) before we can decide whether this instruction has any proper place in this trial? Maybe Henderson's own intoxication had something to do with the case. But maybe it didn't. Maybe he walked in a wobbly manner. But maybe his manner of walking had nothing to do with the collision. In at least one case the supreme court has concluded that the trial court has discretion to decide the question. *See Bernal-Cuadra v. State*, 130 Nev. 1153, 2014 WL 495469 (Nev. Jan. 15, 2014) (unpublished). At a minimum, don't we need to know what the trial evidence was before we can fairly conclude that the district court committed an abuse of discretion?

The final error cited by the majority relates to jury instruction 14. Jury instruction 14 merely clarifies jury instruction 4, which actually tracks the text of NRS 484C.430 quite accurately. The problem here isn't that either instruction is wrong on the law. It's that the majority is wrong on the law. This is complex question that warrants further explanation, which I'll get to below.

For now, suffice it to say that three of the four "errors" that the majority cites for reversal depend upon the one thing we do not have: knowledge of the full scope of the evidence that the district court and the jury had. Without being able to see what they could, I don't know how we can conclude that the district court committed any error in its discretionary decisions. Beyond that, even if it did commit some error, without all of the evidence we have no way of knowing whether any such error affected the verdict or was merely "harmless error." The majority concludes that the errors loomed large and were not harmless because the evidence against Gonzalez was "nominal." But I have no idea how it can reach that conclusion when we have no idea what most of the evidence was.

V.

So what did the State establish at trial? It's hard to say exactly when so much of the most critical evidence is missing from the appellate record, but here are some of the facts included in the transcript that the majority overlooks. The collision occurred near the southwest corner of the intersection of Maryland Parkway and Flamingo Road, in an area that police officers testified was "very bright" (AA862) and "well lit" (AA997) by a row of streetlights as well as by "really bright lights" (AA996) on surrounding buildings located on "all four corners" of the intersection (AA997). Those buildings included a 24-hour Walgreen's store to the north (what would have been to Gonzalez' left as she drove eastbound), a 24-hour AM/PM gas station to the south (Gonzalez's right), a lighted 24-hour Arco gas station to the northeast (in front of Gonzalez and to her left), and a large shopping plaza with a Target store (AA997) adjoining the Walgreen's to the north (to Gonzalez's left). Indeed, police described the area as so bright that a driver would not need headlights to see there at night and might not even know if their headlights were on or off. (AA997).

At that location, Flamingo Road is seven lanes wide, consisting of three main travel lanes in either direction separated by a raised concrete median strip (AA957, 1006), plus a seventh right-hand turn lane for traffic heading east on Flamingo to turn onto southbound Maryland Parkway. (AA832). Gonzalez drove eastward in the right-hand lane, which is the most southern (right-most to Gonzalez) travel lane of the seven lanes there, possibly about to take a right turn onto Maryland Parkway. The police crime scene analyst described her car as located "pretty much right there at the right-hand turn lane at the corner of the intersection." (AA832). Traffic at the time was minimal ("light") so that Gonzalez's vision was not obstructed by other vehicles. (AA1018). Indeed, the street was so clear of traffic that Officer Liske saw the headlights of Gonzalez's car approaching from some distance before the collision, (AA956-57), and only two other cars passed by in any of the seven lanes during the moments before the collision.

Henderson was an elderly man slowly pushing his wheelchair as he walked. (AA1017). Officer Liske was standing in the Walgreen's parking lot with his partner, Officer Griffith, doing paperwork when they saw Henderson start to cross Flamingo Road from north to south (from Gonzalez's left toward her right). (AA1015). The majority misleadingly asserts that the officers shined their spotlight on him in order to see him in the dark, but that's not what the officers said: at trial they clearly testified that they could already see him but shined their spotlight on him in order get his attention. (AA1022). They testified, repeatedly, that they did not need the spotlight to see him or to allow other passing cars to see him. (AA998, AA1006, AA1015).

Henderson's wheelchair was of light color and white on the side, (AA965), and Henderson did not dart into the road but walked in a manner described as "slow" while pushing the wheelchair in front of him. (AA946). He was so slow that officers watched two other cars pass him safely before

Gonzalez arrived. By observing time stamps on surveillance videos, officers testified that it took approximately 28 seconds for Henderson to cross the entire street to the collision point, including a lengthy pause on the center median "waiting for some vehicles to pass" and possibly re-arrange his belongings. (AA1004, AA1021). For 18 of those 28 seconds the officers had their spotlight focused on him, illuminating him even more than the surrounding lights already did. (AA1021-22).

At some point while Henderson waited on the center median strip, the officers turned their spotlight off, but even after doing so Henderson remained so clearly visible that officers standing in the Walgreen's parking lot doing paperwork could see him the entire time up until the moment Gonzalez hit him. (AA998). Indeed, visibility was so good that Officer Liske wasn't even paying full attention but still saw the collision about to happen before it did and tried to yell a warning that his partner heard, and when Griffith looked up from his paperwork things were so bright that he immediately saw what Liske was yelling about and watched the collision happen. (AA1015). Because the officers were standing in the Walgreen's parking lot to the north and Henderson was hit in the southernmost lane, that means the officers could see him clearly from a distance equal to six traffic lanes plus the concrete median strip in the middle plus the width of the sidewalk adjoining the Walgreen's parking lot, (AA1006), a distance Officer Liske estimated as being around forty or fifty yards away. (AA953). Indeed, things were bright enough that a surveillance camera from the AM/PM gas station captured the collision clearly, and officers testified that they could see Henderson without needing him to be illuminated by any passing automobile headlights or their own spotlight. (AA998).

Gonzalez was driving at 4:46 in the morning despite staying up all night drinking, resulting in a BAC of .207. (AA1064). She drove in the southernmost lane (the lane farthest to the right from her point of view), which was the lane farthest from the officers in the Walgreen's parking lot to her left. Despite being in the right lane closest to the brightly lit 24-hour AM/PM store, she still apparently failed to see Henderson because she did not brake, honk her horn, attempt to swerve, or stop in any fashion before crashing into him at full driving speed. (AA956, AA993). Notably, Henderson did not just suddenly step into Gonzalez's travel lane immediately from the nearest sidewalk. Rather, he pushed the wheelchair all the way across the road from north to south (from left to right for Gonzalez), across six of the seven lanes and the median strip and even pausing for several seconds on the concrete median strip "waiting for some vehicles to pass" before stepping into the eastbound lanes, (AA1004), taking 28 seconds to finally reach the spot where Gonzalez hit him in the lane farthest across the road from where he started. (AA1021-22). Henderson first walked into Gonzalez's lane pushing his wheelchair while the headlights of her car were still approaching from some distance away west on Flamingo, (AA956), and was still walking when Gonzalez hit him. (AA955). Henderson almost made it across the entire road before he was hit "just prior to entering the sidewalk" on the opposite side of the street from where he started. (AA993). After the collision his wheelchair ended up standing upright, completely undamaged, in the gutter on the south side of the road, inches away from the safety of the far sidewalk. (AA849).

At trial, Gonzalez's expert witness estimated that she only had 1.7 seconds to see and react to Henderson, and Gonzalez argues that this was too little time for her to avoid the collision, making it "unavoidable." But the expert admitted that this estimate depended upon very basic yet hotly

contested factual assumptions such as the speed at which she was driving, which various experts testified ranged from 22 miles per hour all the way up to 52 miles per hour. His estimate also depends upon the one thing that the jury could see from the video and photographic exhibits that we cannot: the lighting and visibility at the moment of impact. Without those exhibits in hand, the law requires us to "presume that [they] support[] the district court's [judgment]." *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

We could rely upon that presumption alone and just stop the analysis there. But if we were to go deeper, the record abounds with evidence that Gonzalez's expert was wrong and that the jury was entitled to disbelieve the entirety of his opinion and conclude that she had far more time to avoid killing Henderson. Henderson slowly pushed a wheelchair across six of seven lanes of traffic plus a raised median strip before Gonzalez finally hit him in the farthest lane from where he started. Police officers standing on the far side of the road at the Walgreen's testified that Henderson was clearly visible for the entire 28 seconds he took to slowly cross all six lanes and the median before Gonzalez hit him in the last lane, mere inches from the sidewalk. Forensic pathologist Dr. Raymond Kelly testified that intoxication impairs a driver's vision and awareness, and the more intoxicated the person is, the more serious the impairment. From all of this, a jury could conclude that Henderson was clearly visible as he slowly crossed a seven-lane road (plus median strip) under nearby bright lights, yet Gonzalez failed to react either because she was simply not paying attention, or because alcohol impaired her ability to see or her ability to react to what she could see. Indeed, two sober eyewitnesses (the police officers) could see Henderson the whole time despite not being as close to Henderson as Gonzalez, but rather all the way on the other side across all of the traffic lanes, a median strip, and a sidewalk. Officer Nelson testified as follows:

Q: So is it fair to say that a person who is stone sober might be able to react in a specific amount of time, while somebody who's intoxicated would not?

A: That stone sober person should be able to react faster than someone that's intoxicated, yes.

***

Q: In your experience, if a person is paying full time attention and they're driving and they're not impaired, are they better able to deal with obstacles in the roadway?

A: Yes.

Q: For example, what if it's not a person, just a road hazard, is that the sort of thing that we expect drivers to be able to avoid?

A: Yes, I think it's something people do on a daily basis.

Q: In fact, is there a citation for failing to pay full time and attention?

A: Yes.

***

Q: I believe you've testified that you're familiar with this intersection?

A: Yes.

Q: And you've driven through there at 4:46 or those times of the day?

A: Yes.

Q: So you would say you're very familiar with this particular area?

A: Yes, I'm very familiar with this area.

Q: You're familiar with the lighting in this intersection?

A: Yes.

> Q: Is it your personal belief, based upon your familiarity with this intersection and your training and experience, that even outside the crosswalk a pedestrian should be visible in this section?
>
> A: Yes.

Moreover, Dr. Kelly also testified that once a person's BAC rises over 0.18 (and Gonzalez was at 0.207 per retrograde extrapolation, AA1064), that person's risk of causing an accident while driving increases by a factor of 70. Dr. Kelly further testified that Gonzalez could be even more impaired than her BAC indicated from fatigue after having stayed up all night. In other words, the evidence showed that in her inebriated state Gonzalez was at least 70 times more likely cause a collision than a sober driver would be (more counting fatigue), quite seriously undermining her assertion that the collision would have been "unavoidable" by someone sober. 70 times is a staggering number: mathematically, if a sober driver is only likely to cause an accident one percent of the time, then in her severely impaired state Gonzalez would statistically trigger one 70% of the time. Something "unavoidable" to Gonzalez while drunk would have been 70 times more avoidable had she been sober.

Could a jury have found something different, as the majority proposes? Of course. Some of this evidence was disputed by Gonzalez's witnesses. But whenever evidence is disputed, we resolve that dispute by viewing it in the light most favorable to the jury's verdict. *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). For example, the majority makes much of Officer Liske's verbal assurance at the scene that it was not Gonzalez's fault. But it takes that statement out of context. At trial, Officer Liske testified that he said that only to make Gonzalez feel better and did not mean it because he had no basis to conclude that it was not her fault before any

investigation had been done, and further that he would never have said that had he known she was intoxicated rather than sober. (AA987-88). Viewing this in the light most favorable to the jury's verdict, we must conclude that Liske's statement of comfort was not an accurate assessment of the collision, just as he testified that it was never intended to be.

The majority also cites other competing evidence, including that Henderson wore dark clothes and walked across the road erratically rather than steadily. But the police officers had no trouble seeing Henderson the entire time from their posts to the far side of the road across seven lanes, a median strip, and a sidewalk. In any event, these competing pieces of evidence demonstrate only that a jury could have decided the other way. But the jury that decided this trial did not. When it did not, we do not second-guess the jury in order to take their place to play at being jurors ourselves based on nothing more than reading a written transcript. The jury heard and saw the witnesses firsthand, something we cannot do, and could compare the relative credibility of the competing experts in a way that we cannot on appeal. In this case, they also saw the surveillance video, the crime scene photos, and the aerial maps and diagrams that the witnesses drew, circled, and pointed to while they testified, which we cannot. For that reason, we are required to interpret the facts in the light most favorable to the actual verdict rendered, not comb the transcript for evidence that the jury might not have believed or considered important in order to argue for another verdict that this jury did not reach. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

The majority ignores this standard in favor of its own construction of the evidence in favor of Gonzalez, including evidence that the jury did not consider because the district judge excluded it from admission, namely that Henderson himself was intoxicated and had THC in his system.

By citing to excluded evidence of Henderson's BAC, the majority doesn't just avoid its duty to consider the trial evidence in the light most favorable to the verdict; it gives weight to irrelevant evidence that the jury did not consider at all. But "[t]he sufficiency of the evidence is not based on its quantity in comparison to evidence rendered inadmissible." *House v. Kent Worldwide Machine Works, Inc.*, 359 Fed.App'x. 206, 208, 2010 WL 10020 at *2 (2d Cir. 2010). Rather, in calculating the weight of the trial evidence, the court must consider only the evidence admitted at trial because "it is impossible to know what additional evidence the government might have produced or . . . what theory the government might have pursued had the evidence before the jury been different." *United States v. Huber*, 765 F.2d 890, 900 (9th Cir. 1985).

Summing up, what this all comes down to is very simple. When we have far less evidence in the appellate record than the jury had before it, we have neither a legal nor factual basis to conclude that its verdict was wrong or that the trial evidence was insufficient in any way. This case revolves largely around what Gonzalez could and could not see that night and how much time she had to react to what she could and should have seen. Yet the evidentiary gap between what we have, and what the jury had, is illustrated by the following snippet of testimony:

> Q: How would you describe the ambient lighting in the area?
>
> A: As it appears in the video.
>
> Q: Okay. Would you say that it's better than some area of Las Vegas?
>
> [Defense counsel]: Objection, the picture speaks for itself.

(AA948). In this instance I agree with Gonzalez's defense counsel. A picture can be worth a thousand words. The jury had the whole picture. We do not. The incomplete portion of the trial evidence that we do possess seems to indicate that this collision was not unavoidable at all, but rather that Gonzalez failed to even start braking despite being able to see Henderson from as much as 50 yards (half a football field) away had she only been paying attention, driving properly, and not highly intoxicated.

VI.

Once the facts are settled, every law student is taught that the next step of any legal analysis is to apply the governing law to the facts. But that's simply impossible to do when we don't have all of the evidence before us that the jury did, and consequently we have no way of knowing what "facts" the jury must have decided to be true or false. Although we don't have all the facts or evidence, what we have suggests that Gonzalez drove very carelessly and dangerously that night, plowing into a pedestrian that other witnesses could see clearly from very far away. But for completeness, let's ignore everything that's missing for a moment (even though we really can't, but let's do it anyway) and go to the next step anyway with the partial fragment of the trial record we do have.

Given the limited and incomplete fraction of trial evidence that we do possess, what legal analysis should apply to this partial evidence? The relevant statute at issue here is NRS 484C.430. It says this:

> 1. Unless a greater penalty is provided pursuant to NRS 484C.440, a person who:
>
> (a) Is under the influence of intoxicating liquor;
>
> (b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath;

> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath;
>
> (d) Is under the influence of a controlled substance or is under the combined influence of intoxicating liquor and a controlled substance;
>
> (e) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders the person incapable of safely driving or exercising actual physical control of a vehicle; or
>
> (f) Has a prohibited substance in his or her blood or urine, as applicable, in an amount that is equal to or greater than the amount set forth in subsection 3 or 4 of NRS 484C.110,
>
> and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this State, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, another person, is guilty of a category B felony . . . .

The majority order merges them together, but there are actually two completely different and independent ways to potentially commit a crime under this statute, not just one. A defendant is guilty if she drives drunk on a public street and, while driving, then does one of two alternative things: either (a) "does any act . . . while driving . . . if the act . . . proximately causes the death of, or substantial bodily harm to another person"; or, alternatively, (b) "neglects any duty imposed by law while driving . . . if the . . . neglect of duty proximately causes the death of, or substantial bodily harm to another person."

Thus, a defendant is guilty for either driving drunk on a public street and performing "any act" that proximately causes injury or death, or, as an alternative, driving drunk on a public street and "neglect[ing] any duty imposed by law" that proximately causes injury or death. The first type of crime relates to an affirmative act, while the second type of crime relates to a failure to act when a legal duty required action. In order to be found guilty, a defendant need not do both things, but only one. Because the statute provides two alternatives and only requires that one be met, on appeal the question is whether the evidence fits either section. If it does, then the conviction must stand.

This distinction matters here because Gonzalez was charged with violating NRS 484C.430 by "failing to yield to a pedestrian." It seems to me that a failure to yield is, by definition, an omission rather than an affirmative action, meaning that it falls within the "neglect of duty" prong of NRS 484C.430 rather than the "act" prong. The majority relies upon some Nevada cases, namely *Anderson* and *Johnson*, as well as California law, but these interpret only the "act" portion of the statute rather than the "neglect of duty" portion of the statute that actually applies here.

VII.

Did Gonzalez do either one of the things that the statute prohibits? Yes. Gonzalez drove seriously drunk on a public street after staying up most of the night, and then rammed her car into a clearly visible pedestrian walking in the roadway without swerving or braking. Even Gonzalez's own defense witness, Officer Grimmesey, admitted on cross-examination that Gonzalez committed a traffic violation by failing to yield to a pedestrian. (AA 1146). Further, expert witnesses calculated that she may also have been speeding at the time, driving perhaps as fast as 52 miles per hour in an area where the posted speed limit was 45. That seems pretty

clearly to constitute a neglect of several legal duties, and it may also constitute a series of illegal affirmative acts. Either way, the statute is met.

Here's more. Putting aside the State's evidence of potential speeding and focusing instead on Gonzalez's own expert, Gonzalez argues that she was driving probably around 43 miles per hour when she hit Henderson. But police crime scene analyst Erik Tufteland testified that she was driving in the "right hand turn lane" when she hit Henderson, and was "pretty much right there at the right-hand turn lane at the corner of the intersection" (AA829, AA832). Doesn't 43 miles per hour seem a little fast for someone about to make a right turn from the turn lane? Most people I know slow down to well below the speed limit when making right turns. Or else, if she wasn't about to make a right turn at all (which might actually be slightly more consistent with her driving at 43 miles per hour at that instant), then she was driving illegally in a right turn lane at an excessive speed with no intention of turning. But either way, whether she was about to turn right or not, she was going way too fast for someone in the right turn lane of a major intersection. I'd call that a "neglect of duty," as well as an illegal affirmative act, that qualifies under NRS 484C.430.

And while we're on the subject of speed, here's more. Even if we believe Gonzalez's expert over the other evidence and accept that she was not technically speeding, what her own expert admits is that she was driving barely below the posted limit (43 in a posted 45 mph zone) and thus not trying very hard to make up for her excessively tired and drunken condition. Despite staying up all night drinking, Gonzalez failed to take even the most basic and common sense step to avoid the tragedy: aside from not driving at all, perhaps driving a little more slowly to compensate for her impairment. Under black-letter law, driving barely under the posted speed limit does not immunize drivers from prosecution for otherwise failing to exercise due care

under the circumstances. The posted speed limit is a maximum, not the universally allowable speed under every conceivable circumstance. The "basic speed rule" taught to every teenager in driving school is codified in Nevada at NRS 484B.600, and it says:

> NRS 484B.600 Basic rule; additional penalties for violation committed in work zone or pedestrian safety zone or if driver is proximate cause of collision with pedestrian or person riding bicycle, electric bicycle or electric scooter; discretion of court to reduce violation in certain circumstances; maximum fine.
>
> 1. It is unlawful for any person to drive or operate a vehicle of any kind or character at:
>
> (a) A rate of speed greater than is reasonable or proper, having due regard for the traffic, surface and width of the highway, the weather and other highway conditions.
>
> (b) Such a rate of speed as to endanger the life, limb or property of any person.
>
> (c) A rate of speed greater than that posted by a public authority for the particular portion of highway being traversed.
>
> (d) A rate of speed that results in the injury of another person or of any property.
>
> (e) In any event, a rate of speed greater than 80 miles per hour.
>
> 2. If, while violating any provision of subsection 1, the driver of a motor vehicle is the proximate cause of a collision with a pedestrian or a person riding a bicycle, an electric bicycle or an electric scooter, the driver is subject to the additional penalty set forth in subsection 4 of NRS 484B.653.

NRS 484B.280 also recites that a driver "shall: (a) Exercise due care to avoid a collision with a pedestrian; (b) Give an audible warning with the horn of the vehicle if appropriate and when necessary to avoid such a collision; and (c) Exercise proper caution upon observing a pedestrian." Under these rules, "irrespective of speed limits specified in miles per hour, the basic speed [rule] governs all motor vehicles at all times: no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." *Fortier Trans. Corp. v. Union Packing Co.*, 216 P.2d 470, 473 (Cal.App. 1950 (internal quotation marks omitted). "The law provides that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. The fact that the speed of a vehicle is lower than the prima facie limits shall not relieve the driver from the duty to decrease speed by reason of the highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care." *Carlson v. Hanson*, 88 N.W.2d 140, 145 (Neb. 1958).

Thus, regardless of any posted speed limits, drivers must always exercise a level of care that is appropriate under the conditions. *See CJS Motor Vehicles*, sec. 683 ("Generally, as to speed") (March 2020), and citations therein. In certain situations driving at exactly the posted speed limit is itself a violation of law, such as when some street lanes are closed due to damage or construction, the street is crowded with pedestrians, traffic flow is snarled by a disabled car or some other obstacle, traffic signal light are malfunctioning or inoperative, school buses are unloading children, police cars or fire engines are passing through with their sirens on, or when

visibility or maneuverability are impeded by such things as fog, snow, ice, or heavy rain. *See* NRS 484B.600(1)(a) (unlawful to drive at a "rate of speed greater than is reasonable or proper, having due regard for the traffic, surface and width of the highway, the weather and other highway conditions."). Here, Gonzalez may or may not have been driving under the posted speed limit (depending on which expert you believe), but she was also severely drunk and fatigued after staying awake all night until 4:46 a.m., and she somehow could not see (or at least did try to not stop for) a slow-moving pedestrian that police officers could clearly see from half a football field away across six lanes of traffic. Under these circumstances a jury was free to conclude that she should not have been driving at a speed anywhere near the maximum posted speed limit, and that even driving at 43 miles per hour constituted a neglect of duty violating NRS 484B.600 under the conditions that she knew to exist.

VIII.

Was the collision "unavoidable," as Gonzalez argues?

Let's do some elementary school-level math on the data the jury was given. *See United States v. Kajoyan*, 8 F.3d 1315, 1321 (9th Cir. 1993) (juries can use common sense to make sense of trial evidence). Assume that Gonzalez was only driving at 43 miles per hour, as her expert testified, even though other evidence indicated other speeds and we're supposed to accept the evidence most favorable to the State, not Gonzalez. But assume 43 for now (the opposite of what we're supposed to assume, but let's do it anyway). Mathematically, a car driving at 43 miles per hour covers about 63 feet per second. The officers testified that they could easily see Henderson from their position 50 yards (150 feet) away. That doesn't mean they couldn't see him from farther away, it only means they could easily see him from where they stood 150 feet away and might have been able to see him from much farther

had they been standing farther away. But let's focus on the smaller number of 150 feet for now as an easy marker because it's the most favorable number for Gonzalez's defense.

A driver traveling at 63 feet per second would have been 150 feet away from Henderson (the same distance as the officers were) about 2.4 seconds before the collision. That means that, taking every number in the light most favorable to Gonzalez (again, the opposite of what we're supposed to do, but let's do it anyway), Gonzalez had at least 2.4 seconds to react to Henderson after he became clearly visible, and much more if we use other numbers offered during the trial that the jury may well have accepted instead.

That means the best-case scenario (again, not the scenario that the jury must have accepted, but the best-case one) for Gonzalez is that she continued barreling straight toward a clearly visible pedestrian for 2.4 seconds after seeing him, covering 150 feet (half the length of a football field) in that time without any attempt at braking or swerving. Could she have at least tried to swerve a bit or hit the brakes in 2.4 seconds while her car hurtled 150 feet? Here are some things that human beings can do in 2.4 seconds. NFL quarterbacks have 2.4 seconds to drop back, scan the field, read the defense, find an open receiver, and throw a pass on target, before being sacked. *See* https://nextgenstats.nfl.com/stats/passing/2018/all. One of the most famous college basketball games ever played, the 1992 National Final Four semi-final game pitting Duke University against the University of Kentucky, was won by Duke when Grant Hill passed the ball the length of the court to Christian Laettner who "managed to catch it, dribble, make a spin move and get off a clean shot that went in" for the win, all in 2.1 seconds. *See* https://www.foxsports.com/college-basketball/story/christian-laettner-duke-the-shot-kentucky-25-years-ago-ncaa-tournament-032817 (including a

link to video of the event). It seems to me that if athletes can do all of that in 2.4 seconds, then in that same time Gonzalez could have moved her right foot a mere three inches from the accelerator to the brakes or turned the steering wheel slightly to the left with no other traffic around. Recall that Henderson had almost made it across the street and was inches away from the safety of the sidewalk when Gonzalez killed him, so the difference between life and death was a swerve of only a couple of feet.

But maybe it's unfair to compare Gonzalez to high-level athletes. So let's compare her instead to the Nevada Driver's Handbook issued by the Nevada Department of Motor Vehicles (DMV) to everyone who wants a license to drive in Nevada. *See Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 633-34 (1983) (courts may take judicial notice of official government publications); *Greeson v. Imperial Irrig. Dist.*, 59 F.2d 529, 531 (9th Cir. 1932) (courts may take judicial notice of "public documents [and] reports of Commissions"); NRS 47.150. The Handbook reports that "[h]ighway safety studies show normal reaction times are 2 to 2.5 seconds." *Nevada Driver's Handbook* p. 39 (Nevada DMV January 2018), available at www.dmvnv.com. So according to the Nevada DMV, from the moment Henderson became clearly visible, Gonzalez had the "normal" amount of time to react that the DMV teaches new (sober) drivers to plan around. Indeed, even her own expert's testimony was that she had 1.7 seconds to react, or only a fraction (.3 of a second) less than the "normal" reaction time, and that's the very best-case scenario for her (which is the opposite of the scenario that we're supposed to adopt on appeal).

Further, the same DMV manual reports that the average stopping distance for a typical passenger car traveling at 45 miles per hour is 113 feet, considerably less than the 150 feet Gonzalez was given to stop before killing Henderson — and not only did she fail to come to a full stop in

that distance, she didn't even begin to hit the brakes at all. From this, a jury could easily conclude that Gonzalez was either not paying attention while driving or, if she was, her impaired condition left her unable to react as would an ordinary person following the driving guidelines issued by the Nevada DMV.

Contrary to Gonzalez's argument, I'd say that being unable to stop (or, worse, to even begin applying the brakes) with 2.4 seconds of warning while a car hurtles a distance equal to half of a football field is evidence not of unavoidability, but rather of the sheer dangerousness of her actions that night. If the statutory term "neglect of duty" means anything at all, it must encompass an utter failure to even begin to brake for a pedestrian clearly visible for 2.4 seconds from 150 feet away before impact. At the very least, a rational jury could wholeheartedly reject her argument that this was unavoidable and instead conclude that even Gonzalez's best and most exculpatory defense evidence shows that her actions that night violated NRS 484C.430.

And remember, that's the very best case for her, not necessarily the set of facts that actually occurred or that the jury believed. Everything gets so much worse under the set of facts most favorable to the State that we must assume on appeal that the jury accepted. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). Doing the exact same math at 22 miles per hour (the lowest speed at which Gonzalez's own expert estimated she could have been traveling) gives her almost five full seconds to simply switch one lane over or brake (ideally, both) after Henderson became obviously visible. At 25 miles per hour, the DMV reports that the average vehicle can come to a full stop in only 35 feet. Things get even worse for Gonzalez if we calculate that, if the two officers saw Henderson very clearly from 150 feet as they testified, the jury could easily conclude that they (and Gonzalez) likely would

have seen him just as clearly at 151, 155, 160, or 170 feet (or more) as well. The longer the distance, the more reaction time Gonzalez had (and remember also that the jury could judge the lighting distances in the video while we cannot).

So the jury could easily conclude that Gonzalez neglected a number of legal duties. Alternatively, it could easily conclude that she committed a number of dangerous "acts." She neglected to obey the speed limit while driving drunk on a public street. Alternatively, even ignoring the best evidence for the State and assuming that she didn't speed, she drove illegally at 43 miles per hour or more in, or straddling, a right turn lane. Even ignoring that, she violated the basic speed rule of NRS 484B.600 by driving too fast for her intoxicated and fatigued state and then failed to yield to a clearly visible pedestrian despite having between 2.4 and 5 seconds (or more) of warning from at least 150 feet away (or more).

Moreover, whether analyzed as an "act" or a "neglect of duty," in both alternatives Henderson died as a proximate cause of being hit by Gonzalez's car. Notably, Gonzalez does not even bother to argue that there existed any other intervening cause that broke the chain of causation between the collision and Henderson's death. *See Bostic v. State,* 104 Nev. 367, 370, 760 P.2d 1241, 1243 (1988) (to break the chain of causation, an intervening cause must be "an unforeseeable, independent, and non-concurrent cause of the injury").

Thus, every element of NRS 484C.430 is met by the evidence presented by trial when we view that evidence in the manner in which the law requires us to consider it. The only way to reach a different conclusion is to ignore the legal standard, something we're not supposed to do. The proper outcome here is to affirm the conviction.

IX.

The majority compresses NRS 484C.430 into one analysis, but the statute clearly provides for two alternatives, encompassing either an "act" or an independent "neglect of duty." The majority then cites to California law as well a cluster of older Nevada cases interpreting an earlier version of the statute (previously codified as NRS 484.040). *See Anderson v. State*, 85 Nev. 415, 417, 456 P.2d 445, 446 (1969). Applying this language, the majority concludes that the district court gave the wrong jury instructions.

But the cases cited by the majority deal only with defining an affirmative "act." They don't define what's needed for a "neglect of duty," which is what Gonzalez was actually charged with doing (failing to yield to a pedestrian). When it comes to neglect of duty, the jury instructions correctly track the statutory text, and the statute is met quite easily when we apply it to the evidence in the record that the majority overlooks. Nothing is wrong with these jury instructions.

Beyond that, there's another question lurking here: even focusing on the "act" portion of the statute (which isn't even the part of the statute Gonzalez is charged with violating, but let's look at it anyway for completeness), what is the proper legal framework under which to analyze that portion of NRS 484C.430? The prior version of the state, NRS 484.040, was abolished in 1969 and a new version was enacted in 1973. In interpreting the old version of NRS 484.040, *Anderson* held that the statute requires some additional "act" beyond the act of merely driving drunk, and in *State v. Johnson*, 93 Nev. 279, 281-82, 563 P.2d 1147, 1148 (1977) the Nevada Supreme Court held that this requirement was kept in the amended version of the statute. Fair enough, and quite correct, as both versions of the statute state that there must be either an "act" or a "neglect of duty." But

what's different between the pre-1973 version and the post-1973 version in effect today is what kind of act is required.

Prior to 1973, *Anderson* equated the "act" to a requirement under California law that specified that the act must be one "forbidden by law." 85 Nev. at 417, 456 P.2d at 446. In 1969, NRS 484.040 read as follows:

> NRS 484.040 Person driving under influence of intoxicating liquor guilty of felony. Any person while intoxicated or under the influence of intoxicating liquor who drives or operates a vehicle of any kind, and who, *by reason of such intoxication or condition*, does any act or neglects any duty now or hereafter imposed by law, which act or neglect of duty causes the death of, or bodily injury to, any person, shall be punished as for a felony. (Italics added).

NRS 484.040 used to expressly require not merely that the driver perform some "act" that proximately caused death or injury, but a specific kind of act: one committed "by reason of such intoxication." This is a phrase that at one time was very common in statutes defining crimes committed by intoxicated persons. *See e.g.*, Tex. Penal Code Ann. 19.05(a)(2) (abolished 1985); *Landrio v. State*, 692 S.W.2d 543 (Tex. App. 1985); *Staples v. Lucas*, 18 Conn.Supp. 224, 1953 WL 642 (Conn. Super. Ct. 1953); *Carbaugh v. Grove*, 84 Pa. D. & C. 489, 1953 WL 4570 (Pa. Ct. Comm. Pleas 1951); *Barrett v. Pere Marquette Ry.*, 25 Ohio C.D. 430, 35 Ohio C.C. 430 (1914); *Hammers v. Knight*, 168 Ill.App. 203, 205, 1912 WL 2015 (Ill App. 1912); *Campbell v. Johnson*, 127 N.W.2d 468 (S.D. 1910); *McMaster v. Dyer*, 29 S.E. 1016 (W.Va. 1898); *McClay v. Worrell*, 24 N.W. 429 (Neb. 1885); *Wrightman v. Devere*, 33 Wis. 570, 1873 WL 2989 (Wis. 1873).

As used in intoxicated driver cases, the phrase operates to add an additional wrinkle to the causation requirement by specifying that the

injury or death must be due not merely to the car being driven by someone intoxicated, but specifically due to the driver's state of intoxication. *See Sanchez v. State*, 398 S.W.2d 117, 120 (Tex. Crim. App 1965). (Prior to 1985, Texas' statute was not merely similar but identical to old NRS 484.040, word for word down to the last comma, so it's a far better analytical tool than California law, *see* Tex. Penal Code Ann. 19.05(a)(2) (abolished 1985)). In effect, it means that the injury or death would not have occurred "but for" the driver's intoxication, and not merely because the car was driven by someone who happened to be intoxicated. *Robbins v.* State, 717 S.W.2d 348, 351-52 (Tex. Crim. App. 1986) (en banc) (discussing at length the meaning of "but for" causation in DUI death statute). This is the language that *Anderson* observed made the Nevada statute (in 1969) "similar" in operation to the California statute (in 1969). NRS 484.040 (as it existed in 1969) required that the injury or death be caused "by reason of the intoxication." The California statute required that the injury be caused by an act "forbidden by law." Under both, the "but for" causation test must link to not merely to the act of driving drunk, but to some other additional illegal or at least negligent "act." *Anderson*, 85 Nev. at 417, 456 P.2d at 446.

This is the exact construction that the majority now gives to NRS 484C.430 as it reads today. Under it, Gonzalez can only be guilty under the statute if the collision with Henderson would not have occurred "but for" the fact of her intoxication. Per the majority, she cannot be convicted merely because she was driving drunk and happened to hit Henderson when she did nothing else either itself independently illegal or that a sober driver would not also have done under the circumstances.

The problem with this analysis is simple: this language ("by reason of intoxication") was very specifically omitted in 1969 when the Legislature abolished NRS 484.040. The Legislature later replaced NRS

484.040 in 1973 with NRS 484.3795, and then later replaced it again with NRS 484C.430, but both pointedly omit the "by reason of intoxication" language. The majority's approach ignores the statute as it reads today and instead resurrects the old statute that the Legislature abolished, even though in replacing the old with the new the Legislature intentionally deleted the very language that the majority (and *Anderson*) needs to support its conclusion. This isn't interpreting a statute, it's rewriting it in a way that totally ignores what the Legislature actually did. When we read a statutory amendment, what we're supposed to do instead is to assume that "a material variation in terms suggests a variation in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). Reading pre-1973 NRS 404.040 to mean the exact same thing as NRS 484C.430 does today rests upon the predicate that the words of the statute don't matter. But "[t]he words of a governing text are of paramount concern." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). Further, "[n]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." *Indep. Am. Party v. Lau,* 110 Nev. 1151, 1154, 880 P.2d 1391, 1392 (1994) (quotations omitted); *see* Scalia & Garner 176.

And it further ignores that there's a simple enough explanation for why the Legislature made the change it did in 1969 and then later in 1973. When the old language "by reason of intoxication" existed, it required courts and juries to engage in philosophical musing over what hypothetical drunk people and hypothetical sober people might have done differently in the same situation, asking whether "under the same or similar circumstances a 'sober' or 'reasonably prudent person who was not intoxicated' could not have avoided the collision." *Long v. State,* 229 S.W.2d 366 (Tex. Crim. App. 1950); *see* Susan Dimock, *Intoxication and the*

Act/Control/Agency Requirement, 6 Crim. Law & Phil. 341, 348 (2012). In effect, the jury was asked to calculate how much of an "act" causing injury or death was due to intoxication and how much of it was not. This approach was widely criticized and became recognized as unworkable, especially when multiple "concurrent causes" may have contributed to a particular act. *Robbins v.* State, 717 S.W.2d 348, 351-52 (Tex. Crim. App. 1986) (en banc) (surveying cases reaching conflicting conclusions under the same statute). In response, many state legislatures abandoned the phrase and today the majority of states conclude that the act of drinking until intoxication is enough by itself to furnish the requisite mens rea, as well as the requisite causation, if the driver kills a pedestrian even if no other traffic laws were violated. "[D]riving an automobile while under the influence of an intoxicant . . . is conduct *malum in se* which supplies the necessary criminal intent and eliminates the necessity of showing that death was the natural and probable result of the criminal act." Dora W. Klein, *Is Felony Murder the New Depraved Heart Murder? Considering the Appropriate Punishment For Drunken Drivers Who Kill*, 67 South Car. L. R. 1, 28-29 (2015) and authorities cited therein. *See Landrio v. State*, 692 S.W.2d 543, 544-45 (Tex. Crim. App. 1985).

The Nevada Legislature didn't go quite that far. Unlike some states, even after 1973 our Legislature still retained the requirement that there must exist an "act" or a "neglect of duty." But it broadened the definition of the kind of "act" required by eliminating the requirement that it be committed "by reason of such intoxication." So in 1969, almost immediately after *Anderson* (and perhaps in direct response to it), the Nevada Legislature, like most state legislatures at the time, junked the old statutory scheme requiring proof of "by reason of intoxication" and four years later in 1973 wrote an entirely new statute that specifically omitted the

language. Although amended numerous times over the years, as it currently stands NRS 484C.430 is far broader than either the California statute or the now-defunct NRS 484.040 used to be. NRS 484C.430 only requires an "act" that proximately causes injury or death, without further requiring that the act be either performed "by reason of such intoxication" (as in pre-1973 NRS 484.040) or that the act be "forbidden by law" (as in Cal. Veh. Code 23153(a)).

Consequently, it seems self-evident to me that NRS 484C.430 ought not be interpreted the same way as old NRS 484.040 was interpreted in accordance with such cases as *Anderson*. Indeed, the Nevada Supreme Court has been confronted with various drunk-driving cases over the years, but in resolving them the court notably avoids citing to *Anderson*. *See Stanley v. State*, Docket No. 73166, at *5 (Order of Affirmance, September 19, 2019) (speeding); *Anderson v. State*, Docket No. 63225, at *1 (Order of Affirmance, September 18, 2013) (failure to yield); *Brown v. State*, Docket No. 58210, at *1 (Order of Affirmance, April 12, 2012) (veering into oncoming traffic).

Ultimately, the goal of statutory interpretation is to give effect to the Legislature's intent. *See Beazer Homes Nevada Inc. v. District Court*, 120 Nev. 575, 580, 97 P.3d 1132, 1135 (2004) ("In construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended"); *Freeman v. Davidson,* 105 Nev. 13, 16, 768 P.2d 885, 887 (1989) (when interpreting statutes, "[t]he legislature's intent should be given full effect."). In doing so, we must presume that when the Legislature makes changes to an existing statute, those changes must mean something, and "a material variation in terms suggests a variation in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). Ignoring statutory changes and treating a Legislature's revisions to a statute as if they

changed nothing is not that at all. It's actually something of the exact opposite. It writes the Legislature out of the lawmaking process by writing statutory amendments out of existence as if they never happened. By doing so, it elevates the judicial branch into the legislative, because under that approach only courts are permitted to amend or revise statutes no matter what the Legislature actually intended to do, when we must actually do the reverse. "It is the prerogative of the Legislature, not this court, to change or rewrite a statute." *Holiday Ret. Corp. v. State of Nev., Div. of Indus. Relations,* 128 Nev. 150, 154, 274 P.3d 759, 761 (2012). "When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch." *Beazer Homes Nev. Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578 n. 4, 97 P.3d 1132, 1134 n. 4 (2004); *see City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 867, 59 P.3d 477, 483 (2002) (invalidating vague statute because, to enforce it, "this court would have to engage in judicial legislation and rewrite the statute substantially."), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010).

X.

So what does the broadened definition of an "act" in NRS 484C.430 mean now? Unfortunately, the parties have not bothered to argue this issue in their briefing, so we have no input from those most directly interested and affected. But looking at its plain language, at a minimum it seems clear to me that the new statute is no longer "similar" to California's (because its plain words are no longer similar or even parallel) and therefore the "act" that is required to satisfy NRS 484C.430 need not necessarily be a criminal act or traffic code violation (as it must expressly be under California's statutory scheme). Moreover, the omission of the words "by

reason of intoxication" indicates that the "act" need not be necessarily something that a sober person would not do in like circumstances, as NRS 484.040 used to require before 1969. Thus, under its plain terms, NRS 484C.430 could be violated by either a "neglect of duty" (such as failing to yield to a pedestrian, as Gonzalez was charged with doing) or alternatively by an "act" that need not be criminal and need not be something that only an intoxicated person would do that a sober person would not. This is what the plain language of NRS 484C.430 says on its face. The tricky question that nobody briefed is whether the statutory language requires anything more beyond that.

But we need not resolve that question in this appeal, because under the facts of this case, the outcome remains the same under any possible interpretation of the phrase "act," as Gonzalez was charged with the statutory alternative of neglecting a duty rather than committing an affirmative act. An even if we somehow needed to reach that question, the fact that we were given a woefully incomplete record would prohibit us from doing so and require affirmance nonetheless.

XI.

A word about "proximate cause." The question of causation becomes moot if Gonzalez never committed an "act" or "neglect of duty" that violates NRS 484C.430, as the majority concludes. But it must be addressed if Gonzalez's conduct did indeed constitute an "act" or "neglect of duty" under NRS 484C.430.

Gonzalez argues that the causation requirement of NRS 484C.430 means that the injury or death must not have occurred "but for" the intoxication. But that resurrects the archaic "by reason of intoxication" language that old NRS 484.040 used to contain but that the Legislature specifically deleted in 1969.

Here, Gonzalez committed an "act" that killed Henderson when she ran straight into him while speeding and without trying to stop, and she "neglected a duty" by failing to yield or exercise due care under the circumstances. Do the facts also meet the proximate cause requirement of NRS 484C.430? Yes. In a criminal case, proximate cause is "that cause which is natural and a continuous sequence, unbroken by any other intervening cause, that produces the injury and without which the injury would not have occurred." *Williams v. State*, 118 Nev. 536, 550, 50 P.3d 1116, 1125 (2002). An intervening cause "must be a superseding cause, or the *sole* cause of the injury, in order to completely excuse the prior act." *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) (emphasis original). Here, the sole cause of Henderson's death was being hit by Gonzalez's car, with no other even arguable other intervening cause. Gonzalez does not argue that there existed any other "an unforeseeable, independent, and non-concurrent cause" of Henderson's death that might have broken the chain of causation. *Bostic v. State*, 104 Nev. 367, 370, 760 P.2d 1241, 1243 (1988). He was not, for example, hit by Gonzalez, then hit by another car, then further victimized by medical malpractice, leaving the jury to sort out what really killed him.

Gonzalez argues that the definition of "proximate cause" within NRS 484C.430 must mean the same thing as it means in civil tort cases, because the Legislature must have used the term "proximate cause" to mean the same thing in the criminal DUI statute as it means in tort law. Maybe. But I'm not so sure.

As a preliminary observation, the concept of "causation" is usually not interpreted or applied in the same way in criminal law as it is in civil tort cases. Indeed, in certain aspects of criminal law, there has been the "greatest move away from the notion that legal cause in tort cases is

controlling." Wayne R. LaFave & Auston W. Scott, Jr., *Criminal Law* sec. 3.12 p. 282 (2d Ed. West 1986). This is because "with crimes . . . the consequences of a determination of guilt are more drastic (death or imprisonment, generally accompanied by moral condemnation, as contrasted with a mere money payment [in tort law])." *Id.* On the other hand, though, the Nevada Legislature is always free to take a different approach than the majority of other states do, as it famously has in other contexts such as gambling (the first state in the country to legalize it), community property (recognized by only two other states, Arizona and California) and laws governing legalized prostitution (still legal nowhere in the United States but Nevada). So let's not assume that the Nevada Legislature chose to follow the majority and instead analyze the text that expresses what it did choose to do in NRS 484C.430.

The text of NRS 484C.430 uses the term "proximate cause" but does not define it. So we must consider some rules of interpretation. One settled rule of interpretation is that the Legislature is presumed to mean the same thing when it uses the same word; this is the rule that the majority applies. But that rule has a sub-rule: the presumption is strongest when the two statutes are connected or related and cover the same subject matter. *See New Prime Inc. v. Olivera*, 139 S. Ct. 536, 538 (2019) (in interpreting the meaning of statutes, "[w]e've long stressed the significance of the statute's sequencing."); *Erlenbaugh v. U.S.*, 409 U.S. 239, 243 (1972) (statutes addressing "the same subject matter" should be read "as if they were one law"); *see also* Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*, sec. 51.2 (7th ed. 2019). *Cf.* Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 Wash. & Lee L. Rev. 177, 182 (2020). For example, if the Legislature uses the same word in adjacent subsections within the same chapter covering the same subject matter, the

presumption is strong because it is likely as a matter of practicality that the Legislature meant to say the same thing. But when comparing words used in two completely different statutes covering different and unrelated subject matter, the presumption is weaker and might not apply at all. A good example of this is the word "priority": that word has a clear meaning in the context of liens (NRS 108.225), and it means one lien has precedence over another for purposes of paying it off and the first lien might extinguish the second lien. But the same word "priority" has a very different meaning in a statute like NRS 139.040 covering the appointment of administrators where the word simply refers to a sequence and there is no such thing as a "payout" or "extinguishment" or anything "subordinate" to another thing.

That sub-rule is related to another rule of interpretation: the Legislature is generally not presumed to use words the same way in criminal statutes and in civil statutes, because those kinds of statutes serve very different purposes. *See* Wayne R. LaFave & Auston W. Scott, Jr., *Criminal Law* sec. 3.12 p. 282 (2d Ed. West 1986). Accordingly, the Legislature frequently defines words differently in civil and criminal statutes. A simple example of this is the word "information." In criminal statutes it means a charging document that is an alternative to a grand jury indictment. NRS 173.035. But it means nothing like that in civil statutes. *See* NRS 242.055, 057, 059 (defining "Information Service," "Information System," and "Information Technology"). Another simple (currently newsworthy) example is the word "public charge" – in criminal statutes a "charge" is an accusation, as in someone is "charged" with a crime, but as we've seen it means something entirely different in immigration law.

Another rule of interpretation relates to whether the Legislature invented a term, or rather adopted it from common law. *See Samantar* v. *Yousuf*, 560 U. S. 305, 320, n. 13 (2010) ("Congress 'is understood to legislate

against a back-ground of common-law . . . principles'"). If the Legislature invents a term for the first time, then we presume that it uses it same way in every connected statute. But the Legislature did not invent the word "proximate cause" for the first time in the year 1973. "Proximate cause" is a common-law word that goes back centuries, so we have to consider whether the Legislature meant to adopt the common-law definition, or use it differently. Further, at common law "proximate cause" frequently had different meanings in criminal law than in tort law. *See* Wayne R. LaFave & Auston W. Scott, Jr., *Criminal Law* sec. 3.12 p. 277 (2d Ed. West 1986). Common-law criminal law involved such rules of causation as the "year and a day rule" under which if a defendant inflicts harm on someone who dies a year later, the defendant can still be charged with the crime of murder. *See People v. Stephenson*, 331 N.W.2d 143, 144-47 (Mich. 1982) (abolishing "year and a day" rule in Michigan and canvassing similar rules in other states); *State v. Picotte*, 661 N.W.2d 381 (Wis. 2003) (abolishing common law "year and a day" rule in murder cases in Wisconsin); *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999) (same in Tennessee). There is no such comparable rule in tort law. Criminal law also has specific rules of causation that relate to such things as felony murder, in which a defendant can be vicariously liable for "causing" a death that he wasn't even present in the room for, like the liability of a getaway driver. *See State v. Contreras*, 118 Nev. 332, 46 P.3d 661 (2002). But these have no analogues in tort law. More broadly, Nevada recognizes the doctrine of "comparative negligence" in tort cases. NRS 41.141. But as a general concept criminal law does not usually consider the relative fault of the victim. It does not say that a victim bears the fault for being mugged when he walks into a bad part of town with money spilling out of his pockets. Similarly, when a women gets drunk and passes out at a fraternity party, the criminal law never says that she was 51% at fault for

being raped while unconscious. The victim's conduct is usually never part of the defense to, or the elements of, any crime (except in cases of self-defense, not applicable here). Following this lead, the Nevada Supreme Court has held that, in drunk driving injury or death cases, the intoxication of the victim is irrelevant to whether the driver is criminally guilty. *Bernal-Cuadra v. State*, 130 Nev. 1153, 2014 WL 495469 (Nev. Jan. 15, 2014) (unpublished).

So there exist many rules and reasons suggesting that the Legislature likely did not intend the term "proximate cause" to mean the same thing in NRS 484C.430 as it means in civil tort law. More likely, the Legislature meant to adopt the broader common-law criminal standard of causation when it enacted this felony criminal statute. This is confirmed by the Nevada Supreme Court's application of NRS 484C.430 in practice.

At common law, the concept of "proximate cause" consists of two different but overlapping ideas, "cause in fact" and "legal cause." *See* LaFave & Scott, sec. 3.12 pp. 279-282. "Cause in fact" is usually expressed as the familiar "but for" test: an action is said to proximately cause the result if the result would not have occurred "but for" the action. But this test can potentially be applied very broadly, encompassing a wide swath of results which defy common sense and for which no legal liability should lie. To borrow a concept from chaos theory, "but for" a butterfly flapping its wings in New Mexico a hurricane might not have struck China. *See* Albert Rutherford & Russell Newton, *Systems Thinking and Chaos: Simple Scientific Analysis on How Chaos and Unpredictability Shape Our World* (VDZ 2019).

To limit the scope of the cause in fact test, common law imposes a second requirement of "legal cause," which refers to the artificial legal limits that courts impose in order to avoid results that factually meet the "but for" test but that offend public policy. Thus, the concept of "legal cause"

operates to narrow the otherwise potentially broad application of the "but for" test.

In civil tort law, "legal cause" is expressed in such tests as "foreseeability" or the "zone of danger." *See Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. 855, 265 P.3d 688 (2011). But the Nevada Supreme Court has not adopted that usage in connection with NRS 484C.430. Rather, it has said that the "proximate cause" requirement of NRS 484C.430 is met by the "but for" test unless the causal chain is broken by "an unforeseeable, independent, and non-concurrent cause," without adopting the civil tort standard. *Bostic v. State*, 104 Nev. 367, 370, 760 P.2d 1241, 1243 (1988).

All in all, it appears to me that NRS 484C.430 was not designed to adopt the civil tort standard of "proximate cause," and the Nevada Supreme Court seems not to have adopted it into the statute. As actually articulated by the supreme court, no "unforeseeable, independent, and non-concurrent" cause or event occurred between Gonzalez and Henderson other than Gonzalez crashing into Henderson. Therefore, Gonzalez meets the proximate cause requirement of NRS 484C.430.

Moreover, even if we were to apply the civil tort definition as the majority proposes, I would conclude that Gonzalez meets that standard as well. Is a pedestrian walking across the street within the "zone of danger" such that crashing into and killing him was a "foreseeable" consequence of Gonzalez driving a car while intoxicated with a BAC level more than twice the legal limit at 4:30 a.m. after staying up all night? Unequivocally yes. In no civil case would there be any question of causation when a car rams straight into a pedestrian and kills him on the spot and there is no other even arguable intervening cause. In fact, crashing into pedestrians or other cars is the precise thing that DUI statutes were created to prevent. The entire problem with drinking and driving is, as Dr. Kelly explained at Gonzalez's

trial, that intoxication slows the driver's reflexes and impairs the ability to react by swerving or hitting the brakes when a pedestrian crosses the street, and that impairment is made much worse when a drunk driver tries to drive when tired late at night. Hitting a crossing pedestrian is more than just a random thing that happens to fall within the foreseeable "zone of danger" created by driving drunk; it is the very definition of what is most foreseeably dangerous about driving drunk.

(In a civil case, that conclusion doesn't automatically result in liability because the question of causation is only one of the elements of a negligence claim, and tort liability would also require a separate determination that the driver breached a legal duty. But NRS 484C.430 doesn't incorporate the concept of tortious breach of duty; only (very arguably and at best) the question of proximate causation).

So every element of NRS 484C.430 is satisfied by the facts of this case under any definition of "proximate cause."

XII.

For all of the foregoing reasons, I respectfully dissent and would affirm the conviction.

Tao, J.

Tao

cc: Linda Marie Bell, Chief Judge
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