IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHELDON EUGENE PLEHN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86040-COA

ORDER OF REVERSAL AND REMAND

Sheldon Eugene Plehn appeals from an amended judgment of conviction, pursuant to a jury verdict, of one count of misdemeanor battery constituting domestic violence. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

In December 2018, Plehn lived with his then-wife Jaclyn Stecki in Cold Creek, Nevada. At the time, Plehn had been a firefighter with the City of Las Vegas Fire Rescue for nearly two decades, and Stecki was a clinical pharmacist at University Medical Center Southern Nevada. Soon after Plehn discovered that Stecki had an affair with a co-worker, the two were involved in an incident on December 8 that led to the State charging Plehn with three felonies: (1) battery constituting domestic violence–strangulation, (2) battery resulting in substantial bodily harm constituting domestic violence, and (3) coercion.

At trial, Plehn and Stecki offered vastly different accounts of the December 8 incident.[1] The incident began when Plehn confronted

[1]We recount the facts only as necessary for our disposition. Although the dissent describes the December 8 incident almost entirely from Stecki's point of view, we note that the jury was presented with Stecki's and Plehn's highly conflicting testimony, and it acquitted Plehn of all three felony charges. Had the jury credited Stecki's account, as described by the dissent, it necessarily would have convicted Plehn of all three felonies. We do not reweigh the jury's credibility determinations on appeal. *See Gaxiola v.*

Stecki about her affair, which led to a heated argument regarding Stecki's infidelity, their marriage, and the inevitability of divorce. During the argument, which occurred in their home, Stecki was admittedly drinking alcohol.[2]

Stecki testified at trial that during their argument, Plehn made threatening statements and lunged at her before she fled. According to Stecki, Plehn told her, "there's consequences for your actions, and people get murdered for this." Plehn also allegedly told her he wanted to "bang [her] head in, into the wall, but he lunged at [her] in front of the stairs, because he said he wanted to throw [her] down the stairs also." Stecki testified that she tried to "save [her] life" by flirting and told Plehn she felt so depressed about her infidelity that she could "shoot [herself] in the head," and that Plehn responded, "why [don't] you[?]"

At trial, Plehn denied threatening Stecki, lunging at her, or suggesting that she kill herself. Rather, Plehn testified that after he told Stecki that he was leaving her, Stecki said she was "going to blow [her] effing head off."[3] Then, Stecki grabbed her purse and her Glock-19 handgun,[4] and ran to their garage. Plehn tried to stop her from leaving by

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State, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005) ("The jury determines the weight and credibility to give conflicting testimony.").

[2]Stecki testified that she only drank one or two glasses of wine; Plehn testified that she consumed three-to-four glasses. Although Stecki testified that Plehn was drinking whiskey, Plehn denied consuming alcohol.

[3]On cross-examination, Stecki acknowledged that Plehn, as a trained firefighter and paramedic, had been called out to scenes where people had died by suicide. However, she testified that when she told Plehn that she wanted to shoot herself in the head, she meant it "figuratively" and "did not mean it" as an actual threat.

[4]Stecki had a concealed carry weapons (CCW) permit.

pressing the panic button on their Jeep's spare key. Stecki eventually left their home in the Jeep around 8:00 p.m.

Shortly after she left, Stecki sent Plehn a text message that read, "I loved you more than anything, I hope, you know, it's a crime to tell someone, 'why [don't] you,' [after they] say 'it makes me depressed and want to shoot myself in the head.'" At trial, Stecki acknowledged that her text sounded like a goodbye message, but again denied that the text was an "actual" suicidal threat. Plehn testified that Stecki's text prompted him to get in his Tesla and drive after Stecki to prevent her from taking her own life, and he was particularly concerned because Stecki had been drinking and had taken her gun.[5]

Stecki testified that as she drove out of their neighborhood, she noticed Plehn's Tesla rapidly approaching her Jeep from behind. Plehn moved next to Stecki—putting him in the oncoming traffic lane—and then maneuvered his Tesla to force Stecki's Jeep to stop, wedging the Jeep between his Tesla and a Joshua tree. At this time, Stecki was on her cell phone with her parents, who had already started driving to meet her.

After Stecki stopped the Jeep, Plehn entered her vehicle through the passenger side door. Then, according to Stecki, while she was still talking to her parents, Plehn grabbed her cell phone and crushed it in his hands. She stated that Plehn also grabbed her by the hair, tearing out her hair extensions, and swore at her, threatening that she would "pay." Plehn exited the Jeep and went around to her driver's side door. Stecki testified that Plehn opened the door, pulled Stecki out of the vehicle by her

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[5]Plehn also testified about his experience with suicidal response calls. He stated that he did not call 9-1-1 because it would have taken officers at least 45 minutes to arrive at their remote home. Plehn also worried that if he reported Stecki's suicidal threat, she might be placed on a "Legal 2000" hold which could adversely affect her employment as a pharmacist.

arm and covered her mouth with his hands to stifle her screams for help. She further testified that Plehn wrapped both of his forearms around her neck but removed one arm. Then, Plehn lifted her off the ground with one arm and carried her to the passenger side of the Jeep while keeping his other arm around her neck. She said that while Plehn carried her, her vision went in and out and she could not breathe. According to Stecki, Plehn threw her against the passenger door, which caused her to hit her head and fall to the ground. Plehn then purportedly picked her up and threw her again to get her into the Jeep through the passenger door.

Plehn described a vastly different version of events. Plehn testified that after he maneuvered his Tesla to slowly stop Stecki's Jeep, he entered the passenger side of the Jeep and Stecki was screaming and flailing her arms trying to hit him. After Stecki struck him in the head with her phone, he grabbed it and threw it on the ground.[6] Plehn tried to de-escalate the situation and calm Stecki down, but she grabbed the steering wheel and put her foot on the accelerator, causing the Jeep to rapidly accelerate backwards. When her vehicle hit a berm, Plehn reached over to the shifter to put it in park. He stated that once the Jeep stopped, Stecki opened the door and took off running into the dark desert night, wearing next to nothing in the freezing cold. He denied dragging her out of vehicle or ripping out her hair extensions.[7]

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[6]The phone was not recovered by police.

[7]Plehn also testified that Stecki's hair extensions were clip-in, and she would regularly keep extra hair extensions in the Jeep. Though Stecki testified that Plehn ripped out her extensions while she was sitting in the driver's seat, at trial photos were introduced showing several hair extensions sitting in the Jeep's front cupholder.

Plehn testified that after Stecki ran off into the desert, he was afraid for her life, so he went after Stecki and carried her back to the Jeep. Plehn denied covering Stecki's mouth or placing his hands or arms around Stecki's neck. Instead, Plehn admitted that he wrapped his hands around Stecki's waist in a "bear hug" and carried her back to the Jeep against her will. Plehn testified that when they got back to the Jeep and he opened the passenger door, Stecki continued to thrash, kick, and flail wildly in his arms, causing her to hit her head against the car and injure herself. Plehn denied throwing Stecki against or into the car or onto the ground.

Stecki testified that once she was inside of the car, she felt the back of her head and noticed that her hands were covered in blood. She then jumped out of the car again and ran down the road. Stecki flagged down an oncoming car, which belonged to Liz and George Hirst. Plehn, who was following behind Stecki, eventually made it to the Hirsts' car. Plehn pleaded with Stecki to come home with him, but Stecki refused. Plehn spoke with George Hirst, and the two realized that they had mutual acquaintances, and Plehn testified he then felt comfortable leaving Stecki in the Hirsts' care. The Hirsts called 9-1-1 and drove Stecki to meet with police and first responders, as well as Stecki's parents. After the Hirsts drove away with Stecki, Plehn also left the scene.

It took the first responders 30 minutes to arrive. Stecki gave a statement to the police and asked them not to include her suicidal threat in their report.[8] Stecki was subsequently treated at Centennial Hills Hospital,

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[8]Stecki testified that she was worried her suicidal threat could be "misinterpreted." She told police that she was not actually suicidal but had told Plehn that she was to "get him off [her] back." On cross-examination, Stecki also claimed that she made additional statements to police about Plehn threatening to kill her, but the police did not document the disclosures because "it was after the recording stopped."

where she was diagnosed with a concussion, cervical strain, and a scalp laceration that required four staples to close. Stecki testified that she still suffers from severe migraines that require ongoing treatment, and that the cut left a significant scar.

The State brought the three felony charges against Plehn in March 2019. Count 1 alleged battery constituting domestic violence by strangulation.[9] Count 2 alleged battery resulting in substantial bodily harm constituting domestic violence, "by pulling [Stecki] out of [the] car by her hair and/or by throwing her into the car and/or onto the ground, resulting in substantial bodily harm." Count 3 alleged felony coercion, "by taking [Stecki's] phone, to prevent her from calling for help."

The case proceeded to a five-day jury trial in October 2022 where both Plehn and Stecki presented the jury with their differing versions of events. The jury was given a verdict form listing the lesser-included offense of misdemeanor battery constituting domestic violence as an alternative to both Count 1 and Count 2. The lesser-included offense had the exact same wording for both counts and did not include any factual distinction.[10] When the parties were settling jury instructions, Plehn requested that the jury be instructed on the defense of necessity based on his defense theory that he acted to stop Stecki from committing suicide for all three counts. Plehn argued that the necessity defense applied to "every single charge, every single time, even the strangulation, because [the State]

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[9]The Amended Information alleged "strangulation" but did not specify which of Plehn's acts constituted strangulation. However, based on Stecki's testimony, at least some of the alleged strangulation occurred while Plehn was carrying her to the passenger side of the Jeep.

[10]The verdict form listed "Guilty of Battery Constituting Domestic Violence" as a lesser included offense of both Counts 1 and 2.

presented evidence [that it's] what it was." The State conceded that the defense of necessity could apply to the coercion charge but opposed the instruction for the two felony domestic violence charges because Plehn denied strangling Stecki and because "he's not charged with a bear hug."

Plehn responded that although he denied strangling Stecki, he admitted to grabbing her around the waist when he carried her back to the Jeep. Plehn pointed out that the entire incident could be seen as a battery—which he argued is just a "harmful or offensive touching"—that formed the basis for the lesser-included misdemeanor offenses for both felony domestic violence charges. The district court concluded that the necessity instruction could apply to coercion, as well as battery resulting in substantial bodily harm constituting domestic violence because Plehn admitted to the touching which could have formed the basis of that lesser included offense. However, the court ruled that the necessity defense could not apply to the strangulation charge, or its lesser-included offense, for one reason alone: because Plehn denied strangling Stecki.[11]

Jury Instruction 20 addressed the defense of necessity as applied to Counts 2 and 3 as follows:

> In order for necessity to excuse the crime of battery resulting in substantial bodily harm constituting domestic violence and coercion, the Defendant must prove that 1, he acted in an emergency to prevent substantial bodily harm or death; 2, he did not substantially contribute to the emergency or create the situation; 3, his actions did not create the danger; 4, he had no adequate legal alternative; 5, when the defendant acted, he actually believed that

[11]After the district court announced its ruling, Plehn's attorney said, "Fair enough." Contrary to our dissenting colleague, we do not believe that counsel's politeness to the district court after receiving an adverse ruling operates to forfeit Plehn's prior express request that the instruction be given on all three counts.

> the act was necessary to prevent the threatened harm or evil; and 6, a reasonable person would have also believed that the act was necessary under the circumstances.
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> The Defendant has the burden of proving this by a preponderance of the evidence. This is a different standard of proof than beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the Defendant must prove that it is more likely than not that each of these items listed is true.

During deliberations, the jury sent a question to the district court asking whether the necessity defense instruction applied to Count 1. Based on the district court's prior ruling, Plehn requested the court answer the question as, "[N]o[,] because the Defendant, Mr. Plehn, said he didn't touch her." The State asked the court to answer no without the "add on" explanation, and the district court ruled in favor of the State and answered the question in the negative without further explanation.

The jury apparently found Stecki's version of events to be not credible and acquitted Plehn on Counts 2 and 3—the felony of battery resulting in substantial bodily harm constituting domestic violence, its lesser-included offense of misdemeanor battery constituting domestic violence, and coercion—the two charges for which the jury was instructed on the defense of necessity. The jury also acquitted Plehn on Count 1—the felony of battery constituting domestic violence–strangulation. Even though the jury did not believe that Plehn strangled Stecki, it nevertheless found him guilty of Count 1's lesser-included offense—misdemeanor battery constituting domestic violence.[12]

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[12]Plehn moved for a new trial a week later. He argued that the district court should have applied the necessity defense instruction to the strangulation charge or, at least, to that charge's lesser included offense.

Plehn was not required to admit the factual allegations in order to assert an inconsistent affirmative defense

On appeal, Plehn contends that the district court erred when it denied his requested jury instruction on the defense of necessity as applied to Count 1 simply because he denied strangling Stecki. We agree and conclude that the district court erred in refusing to give Plehn's requested necessity instruction on the basis that Plehn denied strangling Stecki, because a defendant is not required to admit the truth of the factual allegations to assert an affirmative defense and the record contained some evidence of strangulation, in the form of Stecki's testimony, and of necessity to warrant the instruction. Therefore, we reverse Plehn's judgment of conviction and remand for a new trial on the misdemeanor charge.

"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). A district court abuses its discretion if "its decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). "This court evaluates appellate claims concerning jury instructions using a harmless error standard of review." *Mathews v. State*, 134 Nev. 512, 517, 424 P.3d 634, 639 (2018). A district court's erroneous refusal to give a jury instruction will not be found harmless unless "we are convinced beyond

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Additionally, Plehn argued that the district court's refusal to instruct the jury on necessity for the strangulation charge was illogical. He contended that the court permitted the necessity instruction for one felony domestic violence charge based on Plehn's admission to the "bear hug," but an unlawful touching formed the basis for the lesser included misdemeanor offense for *both* felony charges. The district court denied the motion on the grounds that the defense challenged an inconsistency in the verdict, which was not a proper basis for relief in a motion for a new trial.

a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of th[e] case." *Honea v. State*, 136 Nev. 285, 289-90, 466 P.3d 522, 526 (2020) (quoting *Crawford*, 121 Nev. at 756, 121 P.3d at 590).

"A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). Further, "*[i]t makes no difference which side presents the evidence,* as the trier of the fact is required to weigh all of the evidence *produced by either the state or the defense* before arriving at a verdict." *Rosas v. State*, 122 Nev. 1258, 1268, 147 P.3d 1101, 1108 (2006) (emphasis in original) (citing *Allen v. State*, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981)), *abrogated on other grounds by Alotaibi v. State*, 133 Nev. 650, 404 P.3d 761 (2017).

Plehn argues that he was entitled to a necessity instruction because a defendant is entitled to receive jury instructions on his theory of the case so long as there is some evidence to support it, and the State presented evidence of strangulation through Stecki's testimony while Plehn's own testimony established necessity for the act that he admitted—carrying Stecki back to the Jeep in a "bear hug." The State responds that Plehn was not entitled to the instruction because he denied strangling Stecki.[13]

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[13]We briefly address the procedural arguments raised by the dissent. We believe that Plehn properly preserved his request for a necessity instruction on both the greater and lesser offenses when he requested it for "every single charge, every single time," including Count 1, where Plehn acknowledged that the State presented evidence of strangulation. There is also no requirement that a defendant argue a rejected jury instruction in their closing arguments to preserve an error for appellate review, though

Necessity is a common law defense that "justifies criminal acts taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime." *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991). Asserting necessity implies an admission to the underlying conduct charged for the sake of argument but claims that any criminal liability was justified because the defendant's conduct was necessary under the circumstances. *See, e.g., Hoagland v. State*, 126 Nev. 381, 385, 240 P.3d 1043, 1046 (2010) (arguing necessity when the defendant admitted to operating his truck under the influence).

By asserting the defense of necessity, Plehn would have impliedly admitted the factual allegations for the sake of argument to assert that his actions were necessary. *See id.* However, in his argument and testimony at trial, he denied strangling Stecki. Thus, Plehn sought to introduce two apparently contradictory defenses: that he did not strangle Stecki, but if the jury found that he *did* strangle Stecki, his conduct was justified.

Nevada courts have yet to explicitly answer the question of whether a defendant must admit to the underlying conduct in order to assert a necessity defense and receive a necessity instruction, or whether

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we note that both the State and Plehn argued legal necessity for the two charges where the district court permitted the instruction. We further believe that Plehn has cogently presented his claim on appeal by arguing that the district court abused its discretion when it refused his requested necessity instruction because he denied strangling Stecki, and we disagree with the State's arguments to the contrary. Lastly, Plehn's claim is not moot as to the misdemeanor lesser included offense. The parties do not dispute that misdemeanor battery domestic violence was a lesser included offense of both Counts 1 and 2, and an affirmative defense for the greater offense necessarily applies to an encompassed lesser included offense.

they are entitled to present contradictory defenses in the alternative.[14] While a limited number of jurisdictions have held that a defendant must admit to the elements of the underlying offense for all purposes in order to assert the affirmative defense of necessity, the weight of both state and federal authority permits a defendant to assert contradictory defenses without admitting the truth of the allegations. *See* 22 C.J.S. Criminal Law: Substantive Principles § 48; *see also* 6 Wayne R. La Fave et. al., Crim. Proc. § 24.8(g) (4th ed.) (addressing instructions on affirmative defenses).

The principle that a defendant is entitled to assert inconsistent defenses was, perhaps, best explained by the United States Supreme Court in *Mathews v. United States*, 485 U.S. 58 (1988). Mathews had been convicted of bribery after a district court "refused to instruct the jury as to entrapment because [Mathews] would not admit committing all of the elements of the crime of accepting a bribe." *Id.* at 60. The Seventh Circuit Court of Appeals ruled that the defense of entrapment was not available to Mathews because he could not simultaneously claim that he lacked criminal intent to take a bribe while asserting that the government implanted that design in his mind. *Id.* at 59-62. When the case reached the United States Supreme Court, the government similarly argued that "a defendant should not be allowed to both deny the offense and to rely on the affirmative defense

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[14]We note that in *Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006), the Nevada Supreme Court addressed the closely related question of whether a defendant was required to admit to wrongdoing to request a jury instruction on a lesser-included offense. The court concluded that "if any evidence does lay such a foundation [for a lesser included offense], then an instruction should be given—regardless of whether the defendant denies complicity." *Id.* at 1267, 147 P.3d at 1108. In reaching this conclusion, the supreme court expressly overruled any prior cases "insofar as they have required a defendant to present a defense or evidence consistent with or to admit culpability for a lesser-included offense in order to obtain an instruction on a lesser-included offense." *Id.* at 1269, 147 P.3d at 1109.

of entrapment. Because entrapment presupposes the commission of a crime, a jury could not logically conclude that the defendant had both failed to commit the elements of the offense *and* been entrapped." *Id.* at 63 (internal citations omitted).

The Supreme Court disagreed and concluded that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Id.* at 62. The Court began its analysis by noting that "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Id.* at 63. The Court then recognized other instances where contradictory defenses were permitted, such as conceding guilt to manslaughter while simultaneously arguing that a murder was committed in self-defense, *Stevenson v. United States*, 162 U.S. 313 (1896), and arguing both that a rape did not take place and that the victim consented, *Johnston v. United States*, 138 U.S. App. D.C. 174, 179 (1970). *Id.* The Court also acknowledged that "a homicide defendant may be entitled to an instruction on both accident and self-defense, two inconsistent affirmative defenses." *Id.* at 64.

Mathews "wished to testify that he had no intent to commit the crime, and have his attorney argue to the jury that if it concluded otherwise, then it should consider whether that intent was the result of Government inducement," and the Supreme Court determined that this was a permissible strategy. *Id.* at 62, 65. In doing so, the Court declined to "make the availability of an instruction on entrapment where the evidence justifies it subject to a requirement of consistency *to which no other such defense is subject.*" *Id.* at 66 (emphasis added). The reasoning in *Mathews* provides

strong guidance because both entrapment and necessity "presuppose[ ] the commission of a crime." *Id.* at 63.

The United States Court of Appeals for the Eighth Circuit reached a similar conclusion regarding inconsistent defenses. In *Arcoren v. United States*, 929 F.2d 1235, 1244-45 (8th Cir. 1991), the defendant asserted that he had no sexual contact with victim and also that he *did* have sexual contact but did not have knowledge that she was underage. After the district court excluded any testimony that the defendant lacked knowledge of the victim's age because of the inconsistency, the Eight Circuit reversed, holding that "[t]he fact that the 'recognized defense' may be inconsistent with another defense the defendant is asserting does not justify excluding evidence and failing to give an instruction on the 'recognized defense.'" *Id.* at 1245 (*citing to United States v. Fay*, 668 F.2d 375, 378 (8th Cir.1981) ("[D]efenses need not be consistent . . . ."); *Sherrill v. Wyrick*, 524 F.2d 186, 188 (8th Cir. 1975), *cert. denied* 424 U.S. 923 (1976) ("[D]efenses do not have to be consistent.")).

The United States Court of Appeals for the Ninth Circuit likewise expressly permits a defendant to assert inconsistent defenses. In *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975), the court held that "[i]t is well established that a defendant in a criminal prosecution may assert inconsistent defenses," and "[t]he rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution." *See also United States v. King*, 587 F.2d 956, 965 (9th Cir. 1978) (concluding that the defendant properly asserted inconsistent defenses when he argued "first, that he did not give cocaine nor prescribe cocaine for [the witness]; and second, that if he did give cocaine to [the witness], it was in the course of his professional

practice"); *United States v. Demmler*, 655 F.3d 451, 458 (6th Cir. 2011) ("Demmler was certainly entitled to offer contradictory defenses.").

Several states also permit the defendant to assert contradictory or inconsistent defenses—including affirmative defenses like necessity—without conceding the underlying conduct. For example, California does not require a defendant to admit to the underlying conduct to raise an affirmative defense. Rather, as the California Court of Appeals stated in *People v. Frye*, "necessity is a defense which admits, *for the sake of argument*, the elements of the charged offense, but offers a justification to avoid criminal culpability." 10 Cal. Rptr. 2d 217, 223 (Ct. App. 1992) (emphasis added). The court further concluded that "we impose only the most minimal burden upon a defendant with respect to excuse or justification. All that is required is that there be some evidence supportive of excuse or justification or that the defendant in some manner inform the court that he is relying upon such a defense." *Id.* Lastly, the court reiterated that if a defense is supported by the evidence, then the trial court must provide a requested instruction to the jury. *Id.*

The State of Georgia also directly addressed whether a defendant is required to concede the underlying conduct to assert an affirmative defense, and in doing so, relinquish his right to assert the contradictory defense that the conduct did not occur. *McClure v. State*, 834 S.E.2d 96, 103-04 (Ga. 2019). Following a jury trial, McClure was convicted of two counts of aggravated assault. *Id.* at 98. He requested that the jury be instructed on several different affirmative defenses, but the trial court "refused to give the requested instructions on justification on the basis that McClure, who . . . denied pointing the gun at them, could not both deny that he performed the act of pointing the gun at someone and at the same time argue that he was justified in performing the act." *Id.*

The Georgia Supreme Court granted McClure's petition for discretionary review to answer the following question: "What, if anything, must a criminal defendant admit in order to raise an affirmative defense? Must the defendant make any such admissions for all purposes or only for more limited purposes?" *Id.* In answering that question, the court concluded that:

> A defendant may assert alternative affirmative defenses and may assert one or more affirmative defenses while also arguing that the State failed to carry its burden of proving every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. In asserting an affirmative defense, a criminal defendant may accept *for the sake of argument* that the evidence authorizes a finding that he committed the act alleged in the charge at issue. Based on these principles, we answer the certiorari questions as follows:
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> A criminal defendant is not required to "admit" anything, in the sense of acknowledging that any particular facts are true, in order to raise an affirmative defense. To the extent a defendant in raising an affirmative defense accepts for the sake of argument that he committed the act alleged in a charge, the defendant may do so only for the limited purpose of raising the affirmative defense at issue.

Id. (emphasis and quotation marks in original).

The court then distinguished between the implicit admission inherent in the nature of an affirmative defense and a legal requirement that the defendant must admit the elements of the charge for other purposes. *Id.* at 98-99. "[D]efining an affirmative defense as a defense that 'admits' the doing of the act charged does not explain whether the 'admission' necessary to an affirmative defense is a legal admission that is binding upon the defendant or merely a non-binding assumption of facts for the sake of argument." *Id.* at 99. It concluded that "when a defendant raises

or asserts an affirmative defense, 'admit[ting] the doing of the act charged' does *not* entail stipulating to the truth of the facts alleged in the indictment or accusation." *Id.* (emphasis in original) (citing 21 Am. Jur. 2d Criminal Law § 177 (2d ed.). Rather, defendants "are entitled to pursue alternative theories, even when those theories are inconsistent." *Id.* at 100.

The court further held that requiring a defendant to admit the facts of a crime to raise an affirmative defense "creates practical quandaries for defendants who, like McClure, have both a viable claim that he committed no crime and a viable claim that, if the jury believes him to have committed a crime, the act was justifiable or subject to another affirmative defense." *Id.* (internal quotation marks omitted). Thus, the court concluded that "a trial court errs in denying a defendant's request for a jury instruction on an affirmative defense solely on the basis that the defendant did not admit for all purposes the truth of the allegations in the indictment or accusation regarding the allegedly unlawful act."[15] *Id.* at 103.

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[15]We are not persuaded that the dissent's discussion of cases from Georgia, Michigan and Illinois fully and accurately reflect the positions of those jurisdictions. The dissent cites to *McClure* for the proposition that "a defendant need not admit liability but must admit 'the doing of the act charged.'" 834 S.E.2d 96, 103-04. However, *McClure* clarified that a defendant is *not* required to admit to the conduct that forms the basis for the charge. *Id.* at 99 (explaining that when a defendant raises or asserts an affirmative defense, "'admit[ting] the doing of the act charged' does *not* entail stipulating to the truth of the facts alleged in the indictment or accusation"). In addition, both Michigan and Illinois permit a defendant to assert an affirmative defense while simultaneously denying the conduct. *See, e.g., People v. Lemons*, 562 N.W.2d 447, 455 n.27 (Mich. 1997) (recognizing that "an inconsistent defense does not necessarily stand in the way of presenting an affirmative defense" so long as the defendant produces evidence to support it); *People v. Houseworth*, 903 N.E.2d 1, 16 (Ill. 2008) ("It is clear under Illinois law that a defendant may both, as the defendant did here, assert the affirmative defense of insanity and deny that he committed the act charged . . . ").

We agree with the reasoning of these courts and conclude that a criminal defendant is not required to admit to the underlying facts of a crime to assert the affirmative defense of necessity; rather, a defendant may properly assert inconsistent defenses in the alternative that they did not commit the crime, but if they did, that their actions were justified.

The dissent contends cases from Texas, Washington, and Idaho support the contrary position that a defendant must admit to the allegations for all purposes in order to assert a necessity defense. We recognize that Texas represents the minority view that a defendant may not assert contradictory or inconsistent defenses. However, the cited cases from Washington and Idaho do not support the dissent's legal position.

In *State v. Walker*, neither the trial court nor the appellate court addressed the issue of whether a defendant must admit to the conduct to assert a necessity defense, nor does that opinion contain an indication that either court treated the two instances of strangulation differently based on Walker's admission to the conduct or lack thereof. No. 55159-1-1, 2006 WL 322352 (Wash. App. Div. 1, 2006). Further, the appellant in *State v. Cruse* did not challenge any jury instructions pertaining to his strangulation charge. No. 47801-COA, 2021 WL 3046028, *1 (Idaho Ct. App. July 20, 2021) ("On appeal, Cruse does not challenge any of the instructions, or lack thereof, as they apply to the attempted strangulation charge in Count 1. Thus, the opinion only addresses Count II–the felony domestic battery charge."). Similarly, the appellate court did not address whether a defendant must admit to the underlying conduct to raise an affirmative defense.

Accordingly, we conclude that Plehn was not required to admit to strangling Stecki in order to assert necessity. Therefore, the district

court abused its discretion when it denied Plehn's requested jury instruction on the basis that he denied wrongdoing.[16]

The evidence supported a necessity instruction for Count 1's lesser included offense

The State contends that Plehn did not provide legal authority applying necessity to a charge of domestic violence–strangulation and that he failed to satisfy the elements of the defense as to that charge. However, as noted above, the district court denied Plehn's requested necessity instruction on the sole basis that he denied the underlying conduct. Thus, the parties did not argue below whether necessity could theoretically apply to a strangulation charge or whether the evidence was otherwise sufficient to obtain an instruction on that charge, and we decline to address it. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) ("The district court did not address this issue. Therefore, we need not reach the issue.").[17]

As noted above, Plehn was charged in Count 1 with domestic violence–strangulation, and the verdict form also included a lesser included

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[16]The State also argues that Plehn waived his challenge on appeal by agreeing to negatively answer the jury's question about necessity's application to strangulation. We disagree. The district court had previously ruled that necessity did not apply to the strangulation charge, and Plehn's attempt to fashion a response to the jury's question within the confines of that prior ruling was not a waiver of his earlier request to instruct the jury on necessity as to that charge. *See Sayedzada v. State*, 134 Nev. 283, 288, 419 P.3d 184, 190 (Ct. App. 2018) (explaining that waiver is an intentional relinquishment of a known right (citing *United States v. Olano*, 507 U.S. 725, 733 (1993))).

[17]Plehn was acquitted of strangulation. We limit our analysis to whether the evidence could have reasonably supported a necessity instruction for the charge that Plehn was actually convicted of, namely the lesser included misdemeanor offense.

offense of misdemeanor battery domestic violence. While the Amended Information did not specify which of Plehn's acts constituted strangulation or formed the basis for the lesser included offense, based on Stecki's testimony, at least some of the alleged strangulation could have occurred while Plehn was carrying her to the passenger side of the Jeep. Although Plehn denied strangling Stecki, he did admit to carrying her back to her vehicle against her will in a "bear hug." Because the jury could have found that Plehn's "bear hug" while carrying Stecki back to the vehicle was necessary, he was entitled to assert a defense of necessity in connection with *that* act.

The dissent asserts that Count 1's lesser included offense could not have been premised on Plehn's "bear hug" because it required a touching of Stecki's neck, mouth or nose, and so the "bear hug" could have only been a lesser *related* offense. However, Count 1's lesser included offense did not include a factual basis, and the elements of misdemeanor domestic violence require *any* willful or unlawful use of force or violence against a domestic relation as defined in NRS 33.018(1). *See* NRS 200.481(1)(a). As the dissent notes, there were two ways in which the jury could have found Plehn not guilty of strangulation prior to considering the lesser included offense: (1) by determining that Plehn did not *actually impede* Stecki's breathing or circulation; or (2) by finding that Plehn did not *intend* to apply pressure to her throat or neck or block her nose or mouth. And as the dissent further notes, we cannot discern why the jury came to the conclusions it did. Thus, it is entirely possible that the jury determined that, in the course of carrying Stecki back to his vehicle against her will, Plehn *inadvertently* applied pressure to her throat or neck or blocked her nose or mouth.

To this point, the trial testimony indicates that the bear hug and alleged strangulation both occurred when Plehn carried Stecki back to

her Jeep; Stecki testified that Plehn carried her with one arm around her waist and the other around her neck, and Plehn testified that he carried her with both arms around her waist. As such, the jury could have reasonably interpreted the evidence to find that Plehn's admitted "bear hug" formed the basis for Count 1's lesser included offense, which may have been why the jury asked the question as to whether the necessity defense applied to Count 1.

We further conclude the record contained "some evidence, no matter how weak or incredible" to support the six elements of necessity that were agreed to by the parties and set forth in Jury Instruction 20. *See Williams*, 99 Nev. at 531, 665 P.2d at 261. As to the first element—that Plehn acted in an emergency to prevent substantial bodily harm or death—Stecki conceded on cross-examination that she "left the house with [her] gun after drinking two glasses of wine and telling [her] paramedic husband that [she] wanted to shoot [herself] in the head." Plehn testified that he followed Stecki in his Tesla in order to prevent her from committing suicide. In addition, Plehn testified that when he caught up to Stecki's vehicle, she ran out into the cold desert night, wearing next to nothing, prompting him to fear for her life. After hearing both Stecki's and Plehn's testimony, the jury could have determined that Plehn did in fact carry Stecki in a "bear hug" back to her vehicle but that his actions were undertaken to save, rather than harm, Stecki.

As to the second element—that Plehn did not "substantially contribute" to the emergency or "create" the situation—if the jury believed Plehn's testimony, it could have found that Plehn did not cause Stecki to flee from their home or run off into the desert in freezing temperatures at night. The jury was not obligated to credit Stecki's testimony that she drove away because Plehn threatened and lunged at her in their home, her

testimony that she threatened suicide but was not actually suicidal, or her testimony that Plehn violently attacked her after catching up with her Jeep. Rather, the jury could have found that Stecki created the emergency by threatening suicide, grabbing her gun, driving away while intoxicated, and then running off into the desert. For the same reason, if the jury believed Plehn's version of events as opposed to Stecki's, the jury could have found that Plehn's actions did not create this danger, thereby satisfying the third element.

As to the fourth element—that Plehn had no adequate legal alternative—Plehn testified that he chose to follow Stecki rather than call 9-1-1 because they lived so remotely that it would have taken first responders 45 minutes to arrive. Additionally, Plehn testified that he did not want to jeopardize Stecki's employment as a clinical pharmacist by reporting that she was suicidal, and Stecki conceded that she asked police not to include information about her suicidal threat in their report because she worried it would be "misinterpreted." Thus, the jury could have found that calling 9-1-1 would not have been an adequate legal alternative. Additionally, the jury could have found that leaving Stecki alone in the desert under the circumstances was not adequate considering the temperature and her mental state.

As to the fifth element—that Plehn actually believed the act was necessary to prevent the threatened harm or evil—Plehn testified that he believed his actions were necessary to protect Stecki's life. When asked why he didn't just let Stecki run off into the desert, Plehn testified,

> My entire purpose for leaving the house is to make sure she is safe, and she doesn't hurt herself. Now, okay, she's—now she's away from the gun when she's taken off running. But now I have an intoxicated wife running through pitch black, freezing desert, also not a good spot for her to be.

The act that Plehn took—carrying Stecki back to the Jeep—was an act that Plehn believed to be necessary under the circumstances.

With respect to the sixth element—that a reasonable person would have believed the act was necessary—we believe that the jury could have found that Plehn's actions in carrying Stecki back to the vehicle were necessary under the circumstances. Plehn, a seventeen-year firefighter and paramedic with experience dealing with suicidal response calls, testified that Stecki was hysterical and suicidal, behaving in a manner that posed a danger to herself. Under the circumstances, where Stecki had just threatened to shoot herself in the head, driven away from her home after drinking, and ran off into the desert, a reasonable person might have believed it necessary to carry Stecki back to her vehicle to keep her safe.

Therefore, because there was "some evidence" to support a necessity defense on the lesser included offense, *see id.*, Plehn was entitled to the jury instruction for that offense, and the district court abused its discretion in denying his request, *see Crawford*, 121 Nev. at 748, 121 P.3d at 585; *see also Keeble v. United States*, 412 U.S. 205, 208 (1973) ("[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater.").

The instructional error was not harmless

Finally, under the facts and circumstances of this case, we are not convinced that the error was harmless beyond a reasonable doubt. *Honea*, 136 Nev. at 289-90, 466 P.3d at 526. The crux of Plehn's defense theory was that his conduct was necessary in order to prevent Stecki from carrying out her suicidal threat. During their deliberations, the jury specifically asked if necessity applied to the strangulation charge and then acquitted Plehn of both other charges where the instruction was given;

indeed, the dissent acknowledges that the jury's question may have suggested confusion on a significant element of applicable law. Necessity was a central issue in the case and the jury asked specific questions about its application to Count 1—which encompasses its lesser included offense—before acquitting Plehn of all charges to which necessity applied.

Further, the jury found Plehn guilty of the misdemeanor lesser included offense after Plehn admitted that he carried Stecki back to the vehicle in a "bear hug" without the benefit of the necessity defense, which was given for the exact same lesser offense in Count 2. Because Plehn admitted to willfully using force on Stecki, *see* NRS 200.481(1)(a), his chance of acquittal on Count 1's lesser included offense rested squarely on whether the jury believed his conduct could be legally excused by necessity. And since Plehn was entitled to a necessity instruction for this offense, in conjunction with Plehn's acquittal of all other charges where the jury was instructed on necessity, we conclude that the district court's failure to instruct the jury on necessity for Count 1's lesser included offense was not harmless.

Accordingly, we

ORDER the judgment of conviction REVERSED and REMAND for a new trial.[18]

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[18]Plehn also argues that the district court abused its discretion in responding to the jury's question on whether necessity applied to Count 1. Given our conclusion that the district court erroneously refused Plehn's necessity instruction on that count, we need not reach this issue. *See Engelson v. Dignity Health*, 139 Nev., Adv. Op. 58, 542 P.3d 430, 446 n.14 (Ct. App. 2023) (recognizing that appellate courts will not resolve questions that are unnecessary to the disposition of the case at hand (citing to *Miller v. Burk*, 124 Nev. 579, 588-89, 188 P.3d 1112, 118-19 (2008))). Lastly, Plehn contends that the district court erred in denying his request to admit a text message Stecki sent to her co-worker, with whom she was having an affair,

Bulla, J.

Westbrook, J.

GIBBONS, C.J., dissenting:

Today, the majority's decision establishes that a defendant can invoke the affirmative defense of necessity to excuse otherwise criminal behavior, even when the defendant denies committing any acts that could form the basis for the charged offense. As a result, the majority concludes that Sheldon Plehn was entitled to a jury instruction allowing the jury to find that, if he strangled Jaclyn Stecki, he did so out of necessity and could be acquitted—despite the fact that he adamantly denied strangling Jaclyn or even touching her neck, mouth, or nose. By extension, the majority also concludes that a criminal defendant impliedly raises an alternative and inconsistent, or even contradictory, affirmative defense wherein a

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which stated that if anybody found out about the affair, Stecki would "tell them you raped me, LOL." Plehn sought to use this text for impeachment purposes. We review a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). In this case, the district court denied Plehn's request to use the text message because the State did not open the door to Stecki's affair, which was a collateral issue. After reviewing the record, we conclude the district court did not abuse its discretion. *Id.*

Insofar as Plehn has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

defendant is not required to admit anything, so long as there are any facts in the record to support it.

Yet, in Plehn's case, he neither argued at trial nor argues now on appeal that necessity includes either an alternative or inconsistent theory of his defense wherein he was not required to admit to anything. The majority asserts that Plehn impliedly admitted all factual allegations for the sake of argument when he requested a jury instruction for the necessity defense. However, Plehn's failure to argue alternative or inconsistent theories appears to have been a strategic decision, particularly as it relates to the charge of battery constituting domestic violence-strangulation. Plehn's articulated theory of defense during his closing argument was that he did not commit the charged acts, and that the State failed to prove the elements of the charged offenses beyond a reasonable doubt. The majority now challenges this largely successful strategy by basing its conclusion on a premise Plehn never argued.[19] *Cf. Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (stating that "trial counsel's strategic or tactical decisions will be virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)).

Indeed, the words "alternative," "inconsistent," and "contradictory" appeared in neither Plehn's closing argument nor his appellate briefs. Plehn also never uttered the words "necessity" or "lesser included offense," in his closing, despite his posttrial insistence that these terms apply to all counts. In fact, the opening comments in his closing argument to the jury were antithetical to the majority's stated alternative and contradictory affirmative defense of necessity and appear to be based on Plehn's credibility as a firefighter. That is, Plehn argued: "On that

[19]Plehn was acquitted of all three felony counts and convicted of only the misdemeanor associated with count I.

day, . . . he never tried to strangle Jaclyn. That never happened. He never threw her to the ground. He never intentionally hurt her. He was there to try and help her. Sheldon Plehn didn't commit any crimes that night." Plehn never argued, or even presented for the sake of argument, the majority's stated alternative that "Plehn sought to introduce two apparently contradictory defenses: that he did not strangle [Jaclyn], but if the jury found that he did strangle [Jaclyn], his conduct was justified." Majority Ord. at 11. Clearly, Plehn chose not to argue inconsistent or contradictory defenses, and this court should respect his choice of trial and appellate strategy.

The principle of party presentation is a core tenant of Anglo-American jurisprudence and integral to the proper administration of justice, which makes the majority's choice to reverse a conviction by answering an unargued and unbriefed question perplexing. *See Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."); *see also United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc) ("[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide *only questions presented by the parties*. Counsel almost always know a great deal more about their cases than we do . . . ." (emphasis added)).

Pursuant to this principle, this court should recognize that Plehn was in the best position to frame the issues both at trial and on appeal and should not supply an argument on his behalf. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that courts follow the "principle of

party presentation" on appeal, which requires litigants to frame the issues); *State v. Eighth Jud. Dist. Ct. (Doane)*, 138 Nev., Adv. Op. 90, 521 P.3d 1215, 1221 (2022) ("In both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present." (quoting *Greenlaw*, 554 U.S. at 243)); *see also Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) ("We will not supply an argument on a party's behalf but review only the issues the parties present.").

In addition to addressing an unargued question, the majority's reasoning also overlooks significant procedural and substantive flaws in the arguments Plehn actually made on appeal. Procedurally, Plehn forfeited his argument that the necessity instruction could apply to battery with strangulation's lesser included offense because he did not request the instruction or otherwise properly preserve the issue at trial and does not argue plain error on appeal. On the merits, Plehn's only admitted physical conduct—a bear hug around Jaclyn's waist—cannot form the factual basis for either strangulation or its lesser included offense of battery constituting domestic violence because the lesser included offense must have been based on a neck, mouth, or nose touching. I therefore disagree with the majority, conclude that Plehn has not established a basis for reversal, and respectfully dissent. I note that, due to the novel and expansive nature of the majority's decision, I am now compelled to address points that neither party raised in order to clarify the law.

On the night of December 8, 2018, Plehn initiated an altercation against his then-wife, Jaclyn Stecki, that resulted in Jaclyn running down a dark, two-lane highway, screaming for help, covered in blood, and terrified for her life. After successfully flagging down the first car she saw, Jaclyn

begged for assistance, said her husband had hurt her, and repeated, "he's trying to kill me. He's trying to kill me."

The events leading up to, and culminating in, that catastrophic December evening are illuminating and must be described in detail to examine the issues in this case. While these events are, for the most part, not materially disputed, they are vigorously contested as to the acts that constituted the charged offenses. Plehn, a firefighter and paramedic, and Jaclyn, a clinical pharmacist, met in 2011 and were married in 2015.[20] Once married, Plehn and Jaclyn moved to an "off the grid" home in Cold Creek, Nevada, where both parties agree that their marriage rapidly deteriorated.[21] At trial, Jaclyn alleged that Plehn was controlling and aggressive. For instance, Jaclyn contended that Plehn would restrict her ability to perform basic self-care tasks and isolated her from friends and family. Plehn also regularly berated Jaclyn and called her demeaning names including "a**hole," "f****** c***," and a "piece of s***."

By November 2018, Jaclyn knew that her marriage was over and had a sexual encounter with a coworker. Shortly after the encounter, Jaclyn underwent an unrelated medical procedure, and Plehn surreptitiously invaded Jaclyn's privacy by manipulating her finger onto her cell phone while she was partially sedated following surgery. He used her fingerprint to bypass the digital password safety feature in Jaclyn's phone. After examining her now-unlocked phone and discovering the text messages between Jaclyn and her coworker, Plehn was furious but waited

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[20]Plehn and Jaclyn both testified at trial, and the facts stated hereinafter are based primarily on their testimony.

[21]Cold Creek is a small town near Mount Charleston that is accessible via a single, two-lane road. It takes approximately 75 minutes to get from the parties' Cold Creek home to the UMC hospital in Las Vegas.

to confront Jaclyn about the affair until the next day, while he was driving Jaclyn home from her follow-up medical appointment. According to Jaclyn, Plehn began driving erratically while making cryptic statements about the text messages he had seen. Plehn's demeanor was aggressive, his tone was hostile, and Jaclyn expressed deep remorse in an attempt to calm him down. Once home, the two continued to argue for several hours.

The next day, in the early morning hours of December 8, Jaclyn recalled Plehn shaking her awake around 4:00 a.m. to reinitiate his recriminations against her. He shoved Jaclyn's phone in her face, made Jaclyn promise to never see her coworker again, and Jaclyn—scared and confused—once again agreed in an effort to placate him. Later that morning, Jaclyn drove from Cold Creek to Las Vegas to run errands. While she was away, Jaclyn testified that Plehn sent her text messages stating, "I can't get this pain to stop," and "I need to make it stop," which startled her and prompted her to return home.

Jaclyn made it back to Cold Creek in the late afternoon where she found Plehn alone in the garage drinking whiskey. His head was down, his hood was on, and he was listening to Johnny Cash's cover of "Hurt"—a song that appears to be about a young person on the downward spiral to self-destruction and contains the refrain "I will make you hurt."[22] Initially, Jaclyn maintained that Plehn was nonresponsive and began speaking only to tell Jaclyn how much she had hurt him. Eventually, Jaclyn and Plehn

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[22]The song begins "I hurt myself today - To see if I still feel - I focus on the pain - The only thing that's real." And the chorus twice repeats "I will let you down I will make you hurt." *See* AZLyrics, *Johnny Cash Lyrics*, https://www.azlyrics.com/lyrics/johnnycash/hurt.html (last visited Mar. 12, 2024).

moved from the garage into the main kitchen/living area, where Jaclyn poured herself a glass of wine, and Plehn poured himself more whiskey.

Instead of sitting on the couch, Jaclyn testified that she stood near a hallway in order to distance herself from Plehn, who at that point had "[gone] on a tirade," was throwing things, and had a "creepy" look in his eyes. Plehn allegedly told Jaclyn "there's consequences for your actions, and people get murdered for this." Plehn lunged at Jaclyn and threatened to "bang her head in" and throw her down the stairs. After dodging Plehn's aggressive advances, Jaclyn testified that she was petrified and in survival mode. She profusely apologized, begged Plehn not to hurt her, and told Plehn that she felt so terrible about her infidelity that she "could shoot" herself. Plehn responded, "why [don't] you[?]" Jaclyn was insistent that when she said she could shoot herself, she meant it figuratively, as in "I feel horrible. Don't hurt me. I feel bad enough." This explanation is consistent with Jaclyn's previous stated attempts to pacify Plehn by expressing deep remorse about her conduct. From Jaclyn's perspective, her statement could be understood as an effort to appease her abuser, whose words and actions indicated that he was ready, willing, and able to harm her.

During this encounter, Jaclyn discreetly grabbed her purse and planned an escape. Inside Jaclyn's purse was her Glock-19 (the handgun) and the concealed weapons permit (CCW) she obtained after completing gun safety training. Plehn knew that Jaclyn's handgun was in her purse because, as a matter of course, Jaclyn always carried her handgun and CCW with her, and he had seen the handgun in her purse before. Jaclyn fled the house and ran to the garage to get in her Jeep Cherokee, but Plehn—who had access to the Jeep's spare keys—grabbed the keys and pressed the panic button, which kept the doors locked and prevented Jaclyn from entering her vehicle and leaving. Eventually, Jaclyn was able to enter the Jeep, and she

told Plehn that she was going to her parents' house in Las Vegas because she felt unsafe.

Plehn did not pursue Jaclyn, despite knowing she was in possession of her handgun, until Jaclyn sent a follow up text message to Plehn shortly after she left that read, "I loved you more than anything, I hope, you know, it's a crime to tell someone, [']why [don't] you,['] [after they] say [']it makes me depressed and want to shoot myself in the head.[']" Jaclyn explained that she sent this text message regarding her earlier remark to let Plehn know that his words have consequences. For his part, Plehn testified that he interpreted this message as a confirmation that Jaclyn intended to harm herself.

Yet, as concerned as Plehn claimed to be for Jaclyn's safety—and in spite of his professional training on how to handle suicidal individuals—Plehn did nothing to de-escalate the situation or calm Jaclyn down. He did not respond to Jaclyn's text message, and he did not call either Jaclyn, 9-1-1, or other emergency responders he knew in the area. He also did not call Jaclyn's parents, despite knowing that their home was Jaclyn's stated destination. Instead, Plehn, who had been drinking whiskey, became determined to pursue Jaclyn in his Tesla and force her to stop her Jeep by running her off the road, if necessary.[23] Plehn's choice to go after Jaclyn himself resulted in a harrowing pursuit, and the following events ensued.

With no other cars on the dark, two-lane road, Jaclyn testified that Plehn aggressively chased her at a high speed and eventually moved next to her—a mere few feet away in the oncoming traffic lane—in order to overtake her. From this dangerous vantage, Plehn swerved towards Jaclyn multiple times, apparently to force her to either stop or crash. Jaclyn was

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[23]Plehn testified that he believed calling 9-1-1 would be ineffective.

able to avoid Plehn initially, but when she slowed to avoid a collision, Plehn cut in front of her, forced her to side of the road, and successfully pinned Jaclyn's Jeep between his Tesla and a Joshua tree.[24] Now trapped, Jaclyn felt helpless as Plehn, who still had the Jeep's spare key with him, unlocked the doors. Jaclyn testified that Plehn then entered the car and commenced loud, vulgar, and threatening verbal abuse.

Throughout the car chase, Jaclyn had been on the phone with her parents, Robert and Elissa Stecki. Robert—himself a retired firefighter and paramedic—testified that Jaclyn was screaming and hysterical when she called, and that her screams intensified once she discovered Plehn following her. Jaclyn's obvious terror, coupled with their own fear of what Plehn might do to their daughter, prompted Robert to call 9-1-1 and to immediately drive towards Cold Creek with Elissa. On the drive to Cold Creek, Robert recalled Elissa repeating, "We're not going to make it in time."

Jaclyn maintained that she tried to call her father again, but as soon as Plehn opened the passenger door, he tore Jaclyn's phone out of her hands and crushed it in his. Plehn testified that he did not crush Jaclyn's phone but instead threw Jaclyn's phone towards the Jeep's floorboard.[25] At no point did Plehn try to recover Jaclyn's purse with the

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[24]On appeal, Plehn describes his actions as maneuvering his car so that Jaclyn would pull over. NRS 484B.207(1) requires a driver of a vehicle overtaking another vehicle to pass at a safe distance and not drive to the right again until safely clear of the overtaken vehicle.

[25]On appeal, Plehn averred he merely "directed" Jaclyn's phone towards the floor of the car. Jaclyn did not see her smart phone again, and the phone was never recovered. Indeed, after Plehn departed the scene, Jaclyn returned to her Jeep to recover her purse and gun from the passenger side floorboard, and her phone was not present.

gun—his alleged impetus for chasing down and confronting Jaclyn in the first place—despite the fact that (1) the purse was on the passenger side of the vehicle where Plehn entered the car, and (2) the purse was on the floorboard where Plehn testified he threw Jaclyn's phone. Instead, after either crushing or throwing Jaclyn's phone, Jaclyn alleged that Plehn grabbed her by her hair, ripped out her hair extensions, repeated the vulgar names he called her earlier, and threatened, "you're going to pay for this." Plehn then dragged Jaclyn out of her car. All the while, Plehn knew that Jaclyn's purse, with the handgun inside, remained safely on the passenger side floor.[26] At trial, both parties agreed that Jaclyn's gun never left her purse, and that Jaclyn's purse remained in the Jeep throughout the entire incident.

Outside the car, Jaclyn broke free from Plehn's grasp and ran. She wanted to get as far from Plehn as possible, but Plehn, a trained and fit firefighter, quickly caught up to her, and she began screaming. Jaclyn testified that when Plehn reached her, he covered her mouth to stifle her screams for help. He then moved behind Jaclyn, where Jaclyn maintained that Plehn first placed both hands around her neck, and then maneuvered to put his right forearm around her throat. The force on her neck was such that Jaclyn declared she "could no longer scream [o]r pass any air

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[26]On direct examination, when asked "Why d[id]n't you . . . just let her continue . . . to go . . . into the desert?" Plehn responded, "My entire purpose for leaving the house is to make sure she is safe, and she doesn't hurt herself. Now, okay, she's . . . *away from the gun when she's taken off running.* But now I have an intoxicated wife running through pitch black, freezing desert, also not a good spot for her to be." (emphasis added). In his closing argument, Plehn also implied that he knew the handgun was not on Jaclyn's person when she ran from the Jeep. Specifically, he stated that, by leaving Jaclyn with the Hirsts (the people who later stopped their car to assist Jaclyn) he "le[ft] her away from the gun."

movement," after which her vision "[went] black," and she urinated on herself. It was in this position, with his forearm around her neck, that Jaclyn felt Plehn lift her off the ground and carry her back to the Jeep's passenger side—a notable choice given that, by forcibly carrying Jaclyn back to the Jeep, Plehn also placed Jaclyn closer to the handgun.

For his part, Plehn was adamant that he never strangled Jaclyn, touched Jaclyn's neck, put his fingers around her throat, or even came close to touching "her throat area." He similarly denied touching Jaclyn's mouth or nose. At trial, Plehn admitted only to a "bear hug," in which he carried Jaclyn back to the Jeep by wrapping his arms around her waist, just above her hips and nowhere near her neck. Plehn maintained that he was concerned for Jaclyn's safety, and that it was safer for him to carry her back to the car than to allow her to run into the dark, freezing desert or call for help. Yet, back at the car, Jaclyn testified that Plehn threw her against the passenger side door so hard that "every muscle in [her] body . . . went . . . limp." That throw against the door—the first of two—Jaclyn alleged caused her to hit the back of her head, as well as her knee and arm. Jaclyn recalled that, as she tried to stand up, Plehn picked her up and threw her again into the door "just as hard, if not harder." Plehn declared that he never threw Jaclyn, and that Jaclyn hit her head while flailing in his arms. Either way, Jaclyn injured her head during the scuffle Plehn initiated and began bleeding profusely.

Jaclyn and Plehn agreed that Plehn did not take her back to his Tesla. Instead, he placed her in the Jeep's passenger seat, where the purse and handgun were now in close range at her feet. At this point, Jaclyn was covered in blood and pleaded with Plehn to call 9-1-1, but he refused. Plehn testified that Jaclyn allowed him to briefly look at her head to check the

wound, and that he then started driving back towards Cold Creek. Jacyln asserted that all she could think about was escaping.

To effectuate this escape, Jaclyn opened the car door, jumped out, and "took off into the night." Running and crying, with blood dripping down her back, Jaclyn recalled thinking that she was going to die on the side of the road. Suddenly, however, she saw headlights, and she flagged down that car. The car's occupants—George and Liz Hirst—graciously came to Jaclyn's aid and called 9-1-1. When Plehn reached the car, he and George discovered that they had a "mutual acquaintance." Plehn attempted to persuade Jaclyn to leave with him and go home, but Jaclyn, still petrified and in need of immediate medical attention, refused. And with that, after learning that the Hirsts had called 9-1-1, Plehn was gone. Plehn left his injured wife—the woman whose life he would purportedly do anything to protect—on the side of a desolate road with near strangers. Plehn neither obtained the Hirsts' contact information nor provided his own for a follow-up.

Later, at the hospital, Jaclyn was diagnosed with a concussion, cervical strain, and scalp laceration that required four staples to close. The treating doctor testified that a head laceration like Jacyln's takes substantial force to cause. Jaclyn testified that she still suffers from severe migraines that require ongoing treatment, that the gash on her head left a significant scar that gets caught in her hairbrush, and that she receives 31 Botox injections every three months in the sides and back of her head, forehead, shoulders, and neck to manage the pain.

Jaclyn gave a statement to police at the hospital, and officers testified that they attempted to contact Plehn multiple times. Yet, both on the night of the incident and the following day, Plehn was unreachable and seemingly made no effort to speak with either Jaclyn or her parents.

Neither Robert, Jaclyn, nor the responding officers could reach Plehn by phone or text message, and Plehn did not respond to officers' subsequent text messages and voicemails asking him to contact them. Notably, no one but Plehn testified that Jaclyn was intoxicated that night. In fact, Elizabeth Hirst recalled that, while she smelled blood on Jaclyn, she smelled no alcohol.

At trial, Plehn's main theory of the case was that he acted to protect Jaclyn from committing suicide by gun, and he requested that the jury be instructed on the affirmative defense of necessity on all three charged counts.[27] The State argued that the instruction should apply solely to the coercion charge because Plehn denied committing the acts that formed the basis for counts I and II.[28] Namely, as to count I, Plehn denied strangling Jaclyn or having any contact with her neck, mouth, or nose; as to count II, Plehn denied throwing Jaclyn against the car door. Plehn acknowledged that he denied strangling Jaclyn but argued that he was entitled to a necessity instruction for counts I and II because he admitted to grabbing Jaclyn around the waist in a "bear hug" in order to carry her back to the car. Plehn did not admit to any touching around Jaclyn's neck, mouth, or nose, even for the sake of argument. He also never argued that he was presenting inconsistent or contradictory theories of defense and neither suggested nor requested that the necessity defense be applied to the lesser included battery offenses.

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[27]Count I was battery constituting domestic violence-strangulation; count II was battery resulting in substantial bodily harm constituting domestic violence; count III was coercion.

[28]As to count I, Plehn denied strangling Jaclyn. As to count II, Plehn admitted touching Jaclyn, but denied throwing her against the car door.

Despite Plehn not making the argument during the settling of jury instructions, the district court spontaneously concluded that the necessity instruction could apply to count II battery resulting in substantial bodily harm because the bear hug could form the factual basis for count II's lesser included offense of misdemeanor battery constituting domestic violence. The court also determined that the necessity instruction could apply to count III coercion because Plehn admitted to grabbing Jaclyn's phone. Consistent with its stated rationale on counts II and III, the court refused to instruct the jury on necessity as to count I strangulation because Plehn did not admit to strangling Jaclyn or touching her neck, mouth, or nose. The district court's decision regarding count I seemingly recognized that count I's lesser included offense must have been based on a neck, mouth, or nose touching, and that Plehn's admitted bear hug around Jaclyn's waist was therefore inapplicable. At no point did Plehn object to the district court's reasoning. He also did not request or offer any jury instructions that would have permitted necessity to either (1) apply to count I as an inconsistent or contradictory defense or (2) apply to count I's lesser included offense.

During deliberations, the jury sent a question to the district court asking whether the necessity defense instruction applied to count I. The State wanted the court to answer with a simple "No," while Plehn wanted the court to answer "No, because the Defendant, Mr. Plehn, said he didn't touch her." The district court chose to answer "No" with no additional explanation.[29]

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[29]Plehn later argued that he wanted the court to answer "that [necessity] did not apply because [he] denied any touching of Stecki's neck," as opposed to "No, because he denied strangling her." The difference is meaningful. Strangling is a term of art—the State's strangulation medical

The jury acquitted Plehn of all three felony charges and only found him guilty of count I's lesser included offense of battery constituting domestic violence.[30] This appeal followed.

On appeal, Plehn raises three issues: whether the district court (1) erred when it denied giving the necessity jury instruction to count I, or, in the alternative, to count I's lesser included offense; (2) abused its discretion in its response to the jury question during deliberations; and (3) abused its discretion when it denied evidence of a text message from Jaclyn to be used on cross-examination for impeachment. The majority concludes that the first issue is now moot as to strangulation, and I agree, albeit for different reasons.[31] Nonetheless, the majority surmises that Plehn's first

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expert described Jaclyn's symptoms as consistent with strangulation, and defined strangulation as "an energy force applied to the neck that interrupts the ability to draw breath in or have blood flow go to or from the brain." In contrast to strangulation, a battery committed by a touching to the neck could encapsulate *any* offensive contact, no matter how small.

[30]Plehn moved for a new trial a week later. He argued that the district court should have applied the necessity defense instruction to count I or, at least, to count I's lesser included offense. Additionally, Plehn argued that the court did not provide a sufficient answer to the jury question when it failed to explain *why* the defense instruction did not apply to count I. The district court denied the motion and Plehn did not appeal this post-trial order.

[31]The majority concludes that the first issue is moot as to strangulation because Plehn was acquitted of that charge; yet, it still considers necessity's application to strangulation's lesser included offense on the merits. While I agree that the issue as to strangulation is moot, I agree for different reasons, and these reasons render Plehn's argument moot as to the lesser included offense as well. As such, I must address where my reasoning diverges from the majority, because if the issue is moot as to both strangulation *and* its lesser included offense, then Plehn's entire argument fails. The majority avoids both the fact that Plehn is the appellant in this case and the State's assertion that Plehn failed to cogently

argument still warrants a reversal due to the district court's failure to provide a necessity instruction based on count I's lesser included offense. Since it finds a reversal warranted, the majority only briefly addresses the remaining two issues. While I agree with the majority's conclusion that Plehn's second and third arguments, identified above, do not provide a basis for reversal, I take this opportunity to explain why Plehn's arguments on all three issues are unpersuasive. Not only is the second issue linked to the first, but some of the concerns presented in issues two and three may also reoccur on remand.

Regarding the jury instruction for the affirmative defense of necessity, the district court did not err in refusing to instruct the jury that necessity applied to count I because Plehn adamantly denied strangling Jaclyn or touching her neck, mouth, or nose, and he never argued that he was attempting to invoke necessity as an alternative, inconsistent, or contradictory defense that absolved him from having to admit anything. On appeal, necessity's application to strangulation is moot because Plehn was acquitted of that charge. As to the instruction's application to count I's lesser included offense, Plehn forfeited this argument because he did not properly preserve the issue at trial. To that end, he did not request that necessity apply to count I's lesser included offense, does not argue plain

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argue how necessity *could* apply to strangulation. Instead, the majority points out that the State provided no authority explicitly stating that necessity *could not* apply to strangulation. Such an interpretation, however, fails to appreciate that (1) as the appellant, Plehn has the burden to make a cogent argument on appeal, (2) as the defendant, Plehn had the burden to prove the elements of necessity at trial, *see Haddad v. State*, No. 55260, 2011 WL 1225795 (Nev. Mar. 31, 2011) (Order of Affirmance), and (3) the State unequivocally stated in its answering brief that Plehn "[did] not provide legal authority or cogent argument to show he was entitled to [a] necessity defense instruction as to count 1." Plehn made no similar argument against the State on appeal, either in his opening brief or in reply.

error on appeal, and presents a non-cogent argument. On the merits, Plehn also denied committing any acts that might have formed the factual basis for the lesser included offense. With respect to the jury question and text message, the district court's response to the jury question was accurate, and the denial of the text message's use for impeachment was within the district court's broad discretion over cross-examination. Consequently, as I find no basis for reversal, I would affirm Plehn's misdemeanor judgment of conviction.

The district court did not abuse its discretion when it denied giving the necessity jury instruction to count I

Plehn argues that the district court abused its discretion when it denied giving a necessity jury instruction as an affirmative defense to count I, battery constituting domestic violence-strangulation, because Plehn's entire defense was based on the necessity of his actions, and the State's evidence at trial tended to support strangulation.[32] In the alternative, Plehn argues that, even if the defense did not apply to count I strangulation, it still applied to count I's lesser included offense of battery constituting domestic violence without strangulation. The State responds that Plehn was not entitled to the instruction because he denied strangling Jaclyn at trial and does not cogently argue this point on appeal. I agree with the State and conclude that the necessity affirmative defense instruction was not applicable to count I, battery constituting domestic violence with strangulation.

Not only is the issue now moot, due to Plehn's acquittal, but Plehn also adamantly denied strangling Jaclyn or touching her neck, mouth, or nose. Additionally, as to Plehn's alternative lesser included

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[32]Plehn does not argue that the instruction itself was an inaccurate statement of law. Both parties agreed to the instruction's content.

offense argument, Plehn forfeited this argument at trial because he failed to object, and he does not now argue plain error on appeal. Further, on appeal, Plehn briefed the lesser included offense argument in a few conclusory sentences with no authority cited to support his position; thus, his argument is non-cogent. Finally, Plehn's only admitted conduct—a bear hug around Jaclyn's waist—cannot form the factual basis for count I's lesser included offense of battery constituting domestic violence without strangulation. Rather, as it relates to count I strangulation, this bear hug could form the basis for only a lesser *related* offense, to which the necessity instruction could not apply. Consequently, based upon these multiple, independent grounds, I conclude that Plehn has not established a basis for reversal on this issue.

Procedurally, the issue is moot and not cogently argued as to count I strangulation

Whether an issue is moot is a question of law that this court reviews de novo. *See Martinez-Hernandez v. State*, 132 Nev. 623, 625, 380 P.3d 861, 863 (2016). A moot case is one which seeks to determine an abstract question that "does not rest upon existing facts or rights." *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981)). The supreme court "has frequently refused to determine questions presented in purely moot cases," *id.* (quoting *NCAA*, 97 Nev. at 58, 624 P.2d at 11), but there are exceptions to this general rule, *see Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 136 Nev. 155, 158, 460 P.3d 976, 982 (2020). This court may, for example, consider a moot issue "if it involves a matter of widespread importance that is capable of repetition, yet evading review." *Id.* For this exception to apply, the party seeking to overcome mootness "must prove 'that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.'" *Id.* (quoting *Bisch v.*

Las Vegas Metro. Police Dep't, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013)).

Here, Plehn's argument as to count I's primary charge of strangulation is moot because the jury found Plehn not guilty of that charge, and Plehn does not argue that any exceptions apply. Moreover, Plehn cites only one case in support of his necessity argument, *Hoagland v. State*, 126 Nev. 381, 240 P.3d 1043 (2010). This case, as will be explained below, ultimately supports the position that necessity cannot apply to strangulation as it was charged in this case, which renders Plehn's argument non-cogent. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

The majority agrees that the issue is moot as to strangulation because Plehn was acquitted of that charge. However, it does not address the practical consequences associated with this conclusion. Namely, on remand, the strangulation allegation must be stricken. The State will then be left with no option other than to amend the charge so that it is based on an illegal touching of the neck, mouth, or nose.[33] It almost certainly could not charge Plehn with the bear hug because the statute of limitations has run on that potential offense.[34] Notably, as will also be explained in greater

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[33]The State is required to allege the factual basis for the charge. NRS 173.075(1) ("[T]he information must be a plain, concise and definite written statement of the essential facts constituting the offense charged.").

[34]There is a one-year statute of limitations on misdemeanors, and the incidents that gave rise to this appeal, including the bear hug, occurred in 2018. NRS 171.090(2). The State has already unequivocally stated at trial that Plehn was not charged in the amended information with any crime related to a bear hug. *See* NRS 173.095(1) ("The court may permit

depth below, the fact that the newly stated charge cannot include a bear hug demonstrates that the bear hug could *never* have been the factual basis for strangulation's lesser included offense. Simply put, the practical consequences associated with amending the charging document on remand support that necessity has always been irrelevant to the bear hug, at least as the bear hug relates to count I strangulation.

Even if the State attempted to amend the charging document to encapsulate conduct broader than a battery associated with a neck touching—like a bear hug—it would face serious double jeopardy concerns because the jury acquitted Plehn of a bear hug when it found him not guilty of count II's lesser included offense.[35] *See Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012) ("The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense."); *Wilson v. State*, 123 Nev. 587, 590, 170 P.3d 975, 977 (2007) ("Under Article 1, Section 8(1) of the Nevada constitution, '[n]o person shall be subject to be twice put in jeopardy for the same offense.'"); U.S. Const. amend. V (providing that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb"); *see also* NRS 178.391 ("No person can be subject to a second prosecution for a public offense for which the person has once been

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an . . . information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.").

[35]The district court explained that the bear hug could form the factual basis for count II's lesser included offense, which is the sole reason it permitted the necessity instruction to apply to count II.

prosecuted and duly convicted or acquitted.").[36] Because Plehn cites no authority explaining how a court can consider an appeal on a charge for which the appellant was found not guilty, this court should not consider necessity's application to strangulation. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

Further, I note here that the majority's consideration of count I hinges upon the assertion that, had the necessity instruction been given, the instruction would have automatically applied to count I's lesser included offense. It is uncontested that necessity's application to count I strangulation is moot. Thus, *a fortiori*, if Plehn's argument as to the lesser offense is either forfeited, waived, or improper, then the discussion as to *all* of count I, including the lesser included offense, is also moot from the outset. As will be further explained, Plehn did, in fact, forfeit his argument as to the lesser included offense, so this appeal should be denied in a short order.[37] Be that as it may, the majority's reasoning compels me to address necessity's application to strangulation on the merits.

> *On the merits, Plehn could not claim the necessity defense on count I strangulation because he denied strangling Jaclyn or even touching her neck*

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[36]Tellingly, although not binding, a Florida court of appeals concluded that concerns of double jeopardy are significant enough to preclude an otherwise viable remand based on improper jury instructions. *See Flesner v. State*, 890 So.2d 331, 332 (Fla. Dist. Ct. App. 2004) (holding that "[e]ven if the trial court erred when instructing the jury on [a particular] charge, double jeopardy . . . prevent[s] a second trial on remand").

[37]*See, e.g.*, *Campos v. State*, No. 85473-COA, 2024 WL 227349 (Nev. Ct. App. Jan. 19, 2024) (Order of Affirmance) (a recent case involving over 50 counts of felony domestic violence in which this court unanimously affirmed a judgment of conviction vis a vis a short order based on the rules of forfeiture and plain error, despite numerous evidentiary and constitutional issues raised on appeal).

An affirmative defense "does not negate any facts that the prosecution is required to prove" and "is a 'separate issue on which the defendant is required to carry the burden of persuasion.'" *Haddad v. State*, No. 55260, 2011 WL 1225795 (Nev. Mar. 31, 2011) (Order of Affirmance). The defendant must prove the affirmative defense by a preponderance of the evidence. *Ybarra v. State*, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984). Crucially, affirmative defenses each have distinct elements and policy rationales, and it is improper to treat all affirmative defenses identically. *People v. Frye*, 10 Cal. Rptr. 2d 217, 223 (Ct. App. 1992) (recognizing the distinctions between affirmative defenses and noting, by way of example, that some affirmative defenses, *like necessity,* require a defendant to admit the elements of the crime charged for the sake of argument, while others, *like alibi or voluntary intoxication*, do not).

"Necessity" is a common law affirmative defense that justifies criminal acts where those acts "avert a greater harm." *Hoagland*, 126 Nev. at 385, 240 P.3d at 1046 (internal quotation marks omitted). Nevada courts have not specifically formulated the elements of a necessity defense, but in every case where the defense has been offered, the defendant first admitted to committing the illegal act. *See, e.g., id.* (allowing a defendant to argue necessity after he admitted to operating his truck under the influence of alcohol); *Browning v. State*, 120 Nev. 347, 361, 91 P.3d 39, 49-50 (2004) (defendant admitted escaping after he was arrested but claimed that he did so out of necessity because he was under duress); *Jorgensen v. State*, 100 Nev. 541, 543, 688 P.2d 308, 309 (1984) (defendant admitted to escaping prison and then argued that necessity should excuse his illegal escape). The defendant bears the burden to prove that necessity justified their otherwise illegal acts. *See Las Vegas Metro, Police Dep't v. Holland*, 139 Nev., Adv. Op. 10, 527 P.3d 958, 963 (2023) ("It is well[ ]established that a party

asserting an affirmative defense has the burden of proving each element of that defense.").

In contrast to Nevada, California has articulated a precise test to determine whether a defendant is entitled to a necessity defense instruction. Namely, a defendant must present evidence sufficient to establish that they violated the law "(1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [they] did not substantially contribute to the emergency." *See People v. Kearns*, 64 Cal. Rptr. 2d 654, 657 (Ct. App. 1997), *as modified on denial of reh'g* (June 17, 1997). This test stems from California's recognition that necessity is an affirmative defense that allows defendants to "offer[ ] a justification [for their acts] to avoid criminal culpability." *Frye*, 10 Cal. Rptr. 2d at 223.

Outside California, jurisdictions that have similarly formulated elements around the necessity defense all coalesce around the general principles of California's test and require a defendant to admit to the conduct that forms the basis for the charge. *See, e.g., Mitchell v. State*, 891 S.E.2d 915, 922 (Ga. 2023) (holding that, in raising an affirmative defense, a defendant must accept certain facts as true for argument's sake); *McClure v. State*, 834 S.E.2d 96, 103-04 (Ga. 2019) (clarifying that a defendant need not admit liability but must admit "the doing of the act charged"); *People v. Dupree*, 788 N.W.2d 399, 405 n.11 (Mich. 2010) (noting that a defendant must "admit[ ] the crime" before they can invoke an affirmative defense, like necessity); *People v. Picket*, 577 N.E.2d 502, 504 (Ill. App. 1991) (reasoning that a defendant "must admit he committed the offense[,] since necessity merely justifies an otherwise criminal act"); *People v. Huckleberry*, 768 P.2d

1235, 1239 (Colo. 1989) (stating that, in asserting an affirmative defense, a defendant acknowledges "presence at and participation in the event" but claims that he or she was legally justified in doing so).

Texas is unique in that it has a robust body of caselaw pertaining to the necessity defense. At the outset, Texas makes clear that in order to raise necessity as a defense, a defendant must "admit[ ] violating the statute under which he was charged and then offer[ ] necessity as a justification." *Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999). In *Bowen v. State*, the Texas Court of Criminal Appeals went so far as to call admission of conduct a "judicially imposed prerequisite" to a defendant's ability to invoke the necessity defense. 162 S.W.3d 226, 230 (Tex. Crim. App. 2005). Notably, in Texas, a defendant's admission to conduct must be specific to the conduct charged in the indictment in order to successfully invoke the necessity defense. *See McGarity v. State*, 5 S.W.3d 223, 227 (Tex. Crim. App. 1999). In *McGarity*, the court held that a defendant charged with assault was not entitled to an instruction on necessity—despite the fact that he admitted to throwing the victim on a bed to prevent her from jumping out of a window—because the defendant did not admit to hitting the victim in the face with his hand, which was the *specific* conduct that formed the basis for the charge. *Id.*

Regarding necessity's specific application to strangulation, two unpublished opinions, one from Washington and one from Idaho, are instructive. In 2006, the Court of Appeals of Washington faced a situation in which a defendant charged with felony harassment, second degree assault, and strangulation following three separate domestic violence incidents attempted to invoke the necessity defense. *State v. Walker*, No. 55159-1-I, 2006 WL 322352, *1-*2 (Wash. App. Div. 1, 2006). There were two separate instances of alleged strangulation. As to the first alleged

instance, the defendant adamantly denied strangling the victim, while the victim maintained that the defendant strangled her after a fight about a rent check. *Id.* at *1. As to the second instance, the defendant admitted to placing his hands around the victim's neck but alleged that he did so out of necessity, in order to prevent the victim from swallowing pain pills. *Id.* at *2. The trial court concluded that the necessity defense instruction could apply to the second instance of strangulation, but not the first, based on the defendant's denial of strangulation in the first instance, and the court of appeals agreed. *Id.* at *2-*3. This rationale is noteworthy because—similar to Plehn's case—the court treated the two counts of felony battery differently based on the defendant's admission to the conduct or lack thereof.

In 2021, the Idaho Court of Appeals decided *State v. Cruse*, a case that bears striking similarities to the case at issue here. No. 47801-COA, 2021 WL 3046028 (Idaho Ct. App. July 20, 2021). In *Cruse*, the defendant was charged with attempted strangulation and felony domestic battery following an incident in which the victim—the defendant's girlfriend—alleged that the defendant put his hands around her neck, made it difficult for her to breathe, and carried her back to the couples' home when she attempted to leave in the defendant's car. *Id.* at *1. The defendant denied strangling the victim but admitted to carrying the victim away from the car when she attempted to leave. *Id.* at *3. Pretrial, the defendant submitted a proposed general necessity defense instruction that would have applied to both the strangulation and felony domestic violence counts. *Id.* He argued that he was entitled to the instruction because the victim was intoxicated on the night of the altercation, and he acted out of necessity to keep the victim from wrecking his car and/or getting arrested for DUI. *Id.* The trial court denied the instruction on both the strangulation and the

felony domestic violence counts, but for different reasons. Namely, the court deemed that the defendant was not entitled to the instruction on the strangulation charge because the defendant denied strangling the victim. *Id.* As to felony domestic violence, the court concluded that the defense could apply, but that the defendant's other proposed defense instructions (e.g., defense of property, self-defense), adequately "covered the defense" of justification, so it was denied. *Id.* at *1.

On appeal, the defendant in *Cruse* argued that the district court erred when it declined to apply the general necessity defense instruction. *Id.* at *2. The court of appeals concluded that the district court did not err because (1) the defendant lost his ability to invoke the necessity defense when he denied strangling the victim; (2) the defendant "provided no authority that [the defendant] could legally commit a battery to 'protect' [the victim] from the consequences of her own illegal behavior," and (3) addressing felony battery on the merits, the evidence did not support the necessity defense instruction because the defendant failed to prove that the harm was immediate. *Id.* at *3-*4 & n.2.

Here, in determining whether to instruct the jury on the necessity defense, the district court had broad discretion to settle instructions and decide evidentiary issues, and this court reviews its decisions to give, or not give, specific jury instructions for an abuse of discretion or judicial error. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An abuse of discretion occurs if the district court's decision is arbitrary or capricious, or if it exceeds the bounds of law or reason. *Id.*

As an initial matter, I note that the majority cites *Mathews v. United States*, 485 U.S. 58 (1988) to support its premise that a defendant is entitled to assert inconsistent or contradictory defenses to the jury and

receive relevant instructions. However, *Mathews*, a case decided in 1988, concerned the affirmative defense of entrapment, and this court should be singularly focused on necessity. *See id.* at 58. Because entrapment is an entirely distinct affirmative defense from necessity, it is improper to impart *Mathews'* legal principles regarding entrapment to Plehn's necessity claim, regardless of how apropos these principles may intuitively seem. The California court perceived as much in *Frye*, 10 Cal. Rptr. 2d at 223 (recognizing the significant distinctions and divergent policy justifications between different affirmative defenses, particularly those that seek to justify criminal acts and those that attempt to negate an element of proof). Notably, in contrast to necessity—a justification defense meant to excuse conduct after-the-fact—entrapment seeks to negate a defendant's intent and predisposition to commit the crime at the outset.

Further, Plehn's jury instruction on the necessity affirmative defense was similar to the California test and reflected the trend towards requiring admission of conduct as a prerequisite to invoking the necessity defense.[38] The instruction read:

> In order for necessity to excuse the crime . . . the Defendant must prove that 1, he acted in an emergency to prevent substantial bodily harm or death; 2, he did not substantially contribute to the emergency or create the situation; 3, his actions did not create the danger; 4, he had no adequate legal alternative; 5, when the Defendant acted, *he actually believed that the act was necessary* to prevent the threatened harm or evil; and 6, a

[38]In fact, Plehn's instruction was even stricter than the California test. Whereas element 1 of the California necessity test requires defendants to broadly show that they acted "to prevent a significant imminent evil[,]" element 1 of Plehn's necessity instruction required him to specifically prove that "he acted in an emergency to prevent substantial bodily harm or death."

> reasonable person would have also believed that the act was necessary under the circumstances.

(Emphasis added.)

Element 5 is of particular note because it is predicated on Plehn's admission of acts that could have resulted in the charged conduct.[39] As instructed, Plehn could not both "actually believe[ ] that the [charged] act was necessary" while, in the same breath, fully deny that he committed

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[39]Elements 1-4 and 6 are similarly lackluster. As to element 1, there was no immediate threat of substantial bodily harm or death. Plehn admitted on direct examination that he knew Jaclyn did not have the handgun with her when she ran into the desert; he reiterated as much in his closing argument. From that perspective, there was no threat of suicide by gun when he ran after Jaclyn and carried her back to her car. As to element 2, Plehn was a major contributing factor to the emergency. While Plehn claims that Jaclyn created the emergency by sending the text message after she left their house in Cold Creek, it was *Plehn* who chased Jaclyn down and ran her off the road, *Plehn* who forcibly carried Jaclyn back to the Jeep with the handgun inside instead of to his Tesla, and *Plehn* who placed Jaclyn close to the handgun by situating her on the Jeep's passenger side. In contrast, it was *Jaclyn* who removed herself from the volatile home environment in an attempt to deescalate the situation and *Plehn* who chose to re-initiate the conflict after Jaclyn sent him a chastising text message. Further, Plehn never attempted to calm Jaclyn down in the ways he indicated at trial had worked for them in the past and had proved successful in his experience responding to potential suicides as a firefighter. Element 3 is unpersuasive for largely the same reasons—Plehn's actions from the moment he confronted Jaclyn about the affair created an environment where Jaclyn felt threatened and scared. Regarding element 4, Plehn had ample legal alternatives. Most obviously, Plehn could have called Jaclyn's parents or 9-1-1. Finally, as to element 6, no reasonable person would find it necessary carry a suicidal individual closer to their handgun. In fact, testimony from the defense itself underscored the importance of keeping a potentially suicidal person away from any means that person could use to commit suicide. Therefore, like the Idaho Court of Appeals, I conclude that Plehn did not offer sufficient evidence as to all six elements to justify a necessity instruction as to count I. *See Cruse,* No. 47801-COA, 2021 WL 3046028 at *3-*4 & n.2

the act at all, or even a *lesser* act like a neck touching but without sufficient force or intent for strangulation. The majority's decision otherwise not only contradicts the jury instruction but also runs afoul of the California and other extra jurisdictional, post-*Mathews* precedent on which the instruction was apparently based.[40] Moreover, although not binding, the national precedent suggests that a defendant must admit to the charged conduct, although not necessarily the crime, before he or she is entitled to an instruction on necessity, and also that the necessity instruction is specific to the charging language. The cases the majority cites, while helpful in defining the general principles associated with affirmative defenses, are inapposite to the facts of this case.

Plehn chased Jaclyn into the desert—despite knowing that she left her handgun in the Jeep—and adamantly denied strangling her or touching her neck after he caught her.[41] Yet, he maintains that the district

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[40]The majority reasons that Plehn was entitled to a necessity instruction on count I, regardless of whether he actually admitted to strangling Jaclyn, or touching her neck. Pursuant to the majority's reasoning, once Plehn argued necessity as a defense, he impliedly admitted to the charged acts for the sake of argument. Yet, I reiterate that Plehn never argued inconsistent or contradictory defenses either at trial or on appeal wherein he was not required to admit to anything, and this court should not base its conclusions on an untested, hypothetical situation that may also have been contrary to the defense strategy.

[41]During his direct examination, when asked "At any point, did you put your fingers around her throat?" Plehn responded, "Absolutely not." Plehn also responded, "Absolutely not" when asked "At any point, did you bring either of your arms around her throat area?" Later, when asked again whether "[A]t any point when you [were] putting her into the Jeep, [did] you put your fingers around her throat?" Plehn answered, "Absolutely not." When asked a second time whether "At any point, [did] you put your arm around her throat?" Plehn stated, "No. Never." On cross-examination, the only touching Plehn admitted to was "bodily carrying [Jaclyn]" back to the Jeep.

court was obligated to permit the necessity defense instruction as to count I because the State's evidence tended to support strangulation.[42] Tellingly, however, Plehn did not testify or argue that he "believed the act was necessary" to stop Jaclyn from running further into the desert and suffering substantial bodily harm or death. Instead, in recounting the actions he claimed were necessary to protect Jaclyn—which at that point would have meant protecting her from the desert conditions and not from suicide by gun—he completely denied strangling Jaclyn or touching her neck, mouth, or nose. The State similarly presented no evidence tending to support that Plehn believed he had to strangle Jaclyn or forcefully touch her neck while she was in the desert in order to save her life. *Compare Rosas v. State*, 122 Nev. 1258, 1268, 147 P.3d 1101, 1108 (2006) ("[I]t makes no difference which side presents the evidence, as the trier of the fact is required to weigh all of the evidence produced by either the state or the defense before arriving at a verdict." (quoting *Allen v. State*, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981))), *with Holland*, 139 Nev., Adv. Op. 10, 527 P.3d at 963 ("It is well[ ]established that a party asserting an affirmative defense has the burden of proving each element of that defense.").

Thus, as charged in count I, neither Plehn nor the State proffered sufficient evidence to support either element 5 or the instruction's remaining elements, and the district court was therefore not required to provide the instruction as to count I. *See Williams v. State*, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975) (holding that a court need not give an instruction on a defense where there is not sufficient evidence to support

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[42]Specifically, Plehn stated, "I think it is fair to have the necessity [defense] for every single charge . . . even the strangulation, because [the State] presented evidence that [Plehn strangled Jaclyn]."

each element of that defense). Nevertheless, the district court provided the instruction for count II out of "[an] abundance of caution."

With the national precedent, Plehn's jury instruction, and both Plehn's and the State's evidence in mind, I conclude that Plehn's argument fails, and that, in order for the necessity defense to apply, a defendant must first admit to having at least committed an act that formed the basis for the charge, though not necessarily the crime itself. *See Frye*, 10 Cal. Rptr. 2d at 223; *see also McClure*, 834 S.E.2d 96, 103-04 (clarifying that a defendant need not admit liability but must admit "the doing of the act charged"). Plehn presents no authority to the contrary. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6. Even if the district court in this case applied the broader principle of admission to the crime itself, I see no reason to deviate from either the general rules discussed in the *Hoagland, Browning*, and *Jorgensen* cases from the Nevada Supreme Court or the multi-state consensus that *some* admission is necessary before a defendant is entitled to invoke the necessity defense. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

Accordingly, because the issue is moot and Plehn has not cogently argued his case, and because Plehn denied strangling Jaclyn or even touching her neck, mouth, or nose, I conclude that the district court did not err or abuse its discretion when it declined to apply the necessity affirmative defense instruction to count I, battery constituting domestic violence with strangulation.

Plehn was not entitled to a necessity instruction on count I's lesser included offense

Plehn argues in the alternative that, even if the necessity defense does not apply to count I, it still applies to count I's lesser included

offense of battery constituting domestic violence without strangulation. Specifically, Plehn asserts that he admitted to wrapping his arms around Jaclyn's waist in a "bear hug," and that this bear hug formed the basis for both count I's and count II's lesser included offenses of misdemeanor battery constituting domestic violence. On that basis, Plehn contends that when the district court permitted the necessity defense instruction on count II based on the lesser included offense, but not on count I, the district court acted inconsistently and arbitrarily. Yet, procedurally, Plehn forfeited this argument by not making it at trial and by not arguing plain error on appeal. Further, Plehn's argument is non-cogent because it is summary, and he fails to cite any authority to support it. Even on the merits, Plehn's comparison of count I's lesser included offense to count II's is inapposite because he mischaracterizes and conflates the conduct that formed the basis for the two charges.

Plehn forfeited his lesser included offense argument and did not cogently argue it on appeal

While district courts have broad discretion regarding jury instructions, due process requires that defendants have an opportunity to present every available defense. *Hoagland*, 126 Nev. at 386, 240 P.3d at 1047. To that end, defendants have a right to have the jury instructed on their theory of the case, so long as there is evidence to support that theory, even if that evidence is "weak, inconsistent, believable, or incredible." *Id.*

Be that as it may, if a defendant maintains that the district court erred by failing to give an instruction on their theory of the case, then the defendant must object at trial on the same grounds asserted on appeal. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (concluding a defendant's objection to an expert at trial failed to preserve an argument that there was inadequate notice for appeal because the objection was based on the expert's qualifications and not a lack of notice). Otherwise, this court

cannot properly consider the issue, unless the error is constitutional, or the defendant argues plain error. *Id.* (noting that, although "[f]ailure to object below generally precludes review by this court[,] . . . we may address plain error and constitutional error sua sponte") (quoting *Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992)); *see also Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) ("The failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal."); *cf. Cook v. Sunrise Hosp. Med. Ctr., LLC*, 124 Nev. 997, 1001-02, 194 P.3d 1214, 1216-17 (2008) (noting that, with respect to jury instructions, "a party objecting to an instruction, or the failure to give an instruction, must 'distinctly' state the matter objected to and the grounds for the objection," and that "[a] general objection . . . is not sufficient to preserve the issue on appeal, unless there is plain error" (quoting NRCP 51(c))).

Here, Plehn states in his opening brief, inaccurately, that he "specifically asked that [necessity] apply to the lesser included offenses." The majority similarly and mistakenly asserts that the district "court ruled that the necessity defense could not apply to the strangulation charge, *or its lesser-included offense*." Majority Ord. at 7 (emphasis added). In fact, at trial, Plehn never requested that the instruction apply to *any* lesser included battery offense, let alone to count I's. Instead, the district court spontaneously mentioned count II's lesser included offense, of its own accord, as a reason to provide the instruction to count II—not as a reason to deny the instruction as to count I. Plehn responded: "Fair enough."

Thus, the record unequivocally reveals that Plehn never asked that the necessity defense apply to the lesser included battery offenses.[43] Therefore, he did not properly preserve his objection at trial as to count I's lesser included offense and argues neither constitutional nor plain error on appeal; consequently, he forfeited the argument. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Further, in the few sentences of argument Plehn provides on appeal, he does not cogently argue the facts or provide *any* legal authority to support his position. Therefore, this court should not consider his argument. *See Maresca,* 103 Nev. at 673, 748 P.2d at 6.

In arriving at this conclusion, I note that Plehn had myriad opportunities to raise his specific lesser included offense argument either before or during trial, yet he availed himself of none.[44] Instead, at every juncture, Plehn argued only that the necessity instruction should apply to all charged counts. Plehn could have made a request or an objection based on count I's lesser included offense while settling jury instructions. This would have been an opportune time to do so, as the district court specifically mentioned count II's lesser included battery offense when it reasoned that

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[43]During the settling of jury instructions, Plehn requested the necessity instruction apply "for every single charge, every single time, even the strangulation." The next time Plehn spoke was to say "Fair enough" after the district court issued its ruling that necessity could apply to count II because of its lesser included offense. No discussion occurred as to necessity and count I's lesser included offense.

[44]Eighth Judicial District Court civil practice rules require parties to bring their proposed jury instructions to pretrial calendar calls. EDCR 2.69(a)(3). Although not required in criminal cases unless ordered by the court, best practice suggests that parties present their special jury instructions pretrial. *See generally* NRS 175.161(3) ("Either party may present to the court any written charge, and request that it be given [as an instruction]."); NRS 175.161(4) ("An original and one copy of each instruction requested by any party must be tendered to the court.").

count II's lesser included offense made the necessity instruction appropriate as to count II, substantial bodily harm, but not count I, strangulation. In lieu of requesting or objecting, however, Plehn responded, "Fair enough." Plehn now labels the district court's decision "arbitrary," but he never gave the court the chance to correct this supposed error by bringing it to the court's attention. *Cf.* NRS 47.040(1)(b) (stating "error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected . . . and . . . the substance of the evidence was made known to the judge by offer").

Later, when the jury asked about the necessity defense during deliberations, Plehn again did not object or propose an answer with language based on count I's lesser included offense. Neither did Plehn proffer an alternative instruction that would have permitted the jury to consider the necessity defense on count I's lesser included offense if it found him not guilty of strangulation. Thus, at trial, Plehn never made the specific objection he now improperly raises on appeal, s*ee Grey*, 124 Nev. at 120, 178 P.3d at 161, and he does not now argue plain error. Therefore, Plehn forfeited his argument by not properly preserving it, *see Jeremias*, 134 Nev. at 50, 412 P.3d at 48, and waived it by not cogently arguing it, *see Maresca*, 103 Nev. at 673, 748 P.2d at 6. Further, as explained at the outset of this dissent, this court should not make new arguments for appellants on appeal. *See Greenlaw*, 554 U.S. at 243.

> *On the merits, Plehn was not entitled to the necessity instruction because his admitted conduct can form the basis for only a lesser related offense—not a lesser included offense*

Even if Plehn had not forfeited the argument, Plehn's assertion that necessity should have applied to count I's lesser included offense fails because his only admitted conduct—a bear hug—could not have formed the

factual basis for that charge.[45] NRS 175.501 provides that a "defendant may be found guilty . . . of an offense necessarily included in the offense charged." In determining whether an offense is necessary included, i.e., a "lesser included" offense, this court applies the "elements test." *Alotaibi v. State*, 133 Nev. 650, 652, 404 P.3d 761, 764 (2017). Under the elements test, a lesser offense is necessarily included in the greater offense "when the elements of the greater offense include *all* of the elements in the lesser offense," such that "the offense charged cannot be committed without committing the lesser offense." *Id.* at 653, 404 P.3d at 764 (quoting *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas*, 122 Nev. at 1263, 147 P.3d at 1105. Importantly, if the offense "contains a necessary element not included in the charged offense, then it is not a lesser included offense[,] and no jury instruction is warranted." *Id.*; *see also Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (noting that the test for whether an offense is considered a lesser included offense—as opposed to a lesser related offense—is "whether the offense charged cannot be committed without committing the lesser offense").

In contrast to a lesser included offense, a lesser related offense is associated with the primary charge but not necessarily included. *Stanifer v. State*, 109 Nev. 304, 307, 849 P.2d 282, 284 (1993), *overruled on other*

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[45]This is further supported by my discussion of the amended charges in Part I(a) *supra*. Namely, the newly stated charge likely cannot include a bear hug because the jury already implicitly acquitted Plehn of the bear hug when it found him not guilty of count II's lesser included offense. As charged, count I's lesser included offense could therefore never have been based on a bear hug and must instead have been based on a touching to the neck, mouth, or nose. *Cf. Orth v. State*, No. 85229-COA, 2024 WL 1340687 (Nev. Ct. App. Mar. 28, 2024) (recognizing that separate charges arising from a single, continuous encounter do not present double jeopardy concerns if the charges are based on different conduct).

grounds by Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000). In the past, a defendant in Nevada was entitled to an instruction on a lesser related offense if (1) the lesser offense was closely related to the offense charged; (2) the defendant's theory of defense was consistent with a conviction for the related offense; and (3) evidence of the lesser offense existed. *Moore v. State*, 105 Nev. 378, 383, 776 P.2d 1235, 1239 (1989). In 2000, however, the Nevada Supreme Court expressly overruled *Moore* as it pertained to the necessity of giving a jury instruction on lesser related offenses. *Peck*, 116 Nev. at 845, 7 P.3d at 473, *overruled on other grounds by Rosas*, 122 Nev. at 1263, 147 P.3d at 1105 (reasoning that "allowing instructions on offenses that are not included offenses, but are merely related offenses, makes the fairness of a verdict questionable," and ultimately holding that "the district court did not err in refusing to give a jury instruction on [a] lesser-related offense[ ]"). The decision to instruct the jury on a lesser related offense, as opposed to a lesser included, is therefore almost wholly discretionary. *See Peck*, 116 Nev. at 845, 7 P.3d at 473.

Here, even if Plehn *had* properly requested a necessity instruction that applied to count I's lesser included offense at trial, the district court would not have abused its discretion by denying that request. As charged, a "bear hug" around Jaclyn's waist was not "necessarily included" in strangulation pursuant to the elements test, because the offense charged, strangulation, could have been committed without committing a bear hug. Consequently, as it relates to strangulation, Plehn's bear hug admission should have been categorized as a lesser related offense, as opposed to a lesser included.

The jury instruction defined strangulation as an "*intentional*[ ] imped[iment] [to] the normal breathing or circulation of the blood by

applying pressure on the *throat or neck, or by blocking the nose or mouth* of another person in a manner that creates a risk of substantial bodily harm." (Emphases added.) Pursuant to the elements test, count I's lesser included offense must necessarily have been based on a neck, mouth, or nose touching—acts without which the strangulation could not have occurred—and not a bear hug. *See Lisby*, 82 Nev. at 187, 414 P.2d at 594. The State, as it vehemently argued below, did not charge Plehn in count I with an offense based on the bear hug. The jury instruction on necessity mandates that Plehn could be absolved only of the acts that gave rise to the charged offense. As Count I was based entirely on strangulation, Plehn's attempt to extend his bear hug admission to count I's lesser included offense is therefore inappropriate because the bear hug was an uncharged act.[46]

Additionally, there were two ways in which the jury could have found Plehn not guilty of count I's primary strangulation charge before it considered count I's lesser included offense or the affirmative defense of necessity. First, it could have determined that the State failed to prove that Plehn *actually impeded* Jaclyn's breathing or blood circulation (i.e., that Plehn never *forcefully* put his hands or arms around Jacyln's neck, mouth, or nose creating a risk of substantial bodily harm). Second, it could have found that the State failed to prove that Plehn *intended* to apply pressure to Jaclyn's throat or neck or block Jaclyn's nose or mouth. On appeal, this court has no ability to discern why the jury came to the conclusions it did. Regardless, if the jury found Plehn not guilty either because he lacked the requisite intent to commit the acts, or because his actions were without

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[46]*See, e.g., McCovery v. State*, No. 85340-COA, 2023 WL 8228489, *1-*2 (Nev. Ct. App. Nov. 27, 2023) (Order of Affirmance) (this court's recent case in which the defendant was separately charged with battery domestic violence and battery domestic violence by strangulation after he grabbed the victim by her neck, threw her on the ground, and then strangled her).

sufficient force to the neck to actually impede Jaclyn's breathing or circulation, the bear hug is not only unnecessary to the primary strangulation charge—it is entirely irrelevant, especially on remand.

In contrast to count I's lesser included offense, Plehn's admitted bear hug *could* potentially form the factual basis for count II's lesser included offense under the elements test. Count II was based on battery resulting in substantial bodily harm, which the instructions defined as "*pulling* . . . [Jaclyn] out of the car *by her hair* and/or by *throwing* her into the car and/or onto the ground." (Emphases added.) As Plehn's bear hug relates to count II, Plehn could have wrapped Jaclyn in a bear hug and thrown her, but not seriously injured her as the State alleged, which could conceivably render him guilty of count II's lesser included offense but not count II's felony charge that requires substantial bodily harm. In other words, as charged, the bear hug may have been necessarily included in count II's primary charge of battery resulting in substantial bodily harm. Consequently, the district court's decision to allow the necessity defense instruction on count II based on count II's lesser included offense was within its discretion and not arbitrary.[47]

Considering the foregoing, I conclude that the district court acted within its discretion when it declined to either (1) apply the necessity instruction to count I, or (2) in the alternative, apply the instruction sua sponte to count I's lesser included offense. My conclusion stems from three main tenets. First, the issue is moot as to strangulation because Plehn was acquitted of that charge and has not cogently argued the issue on appeal. Second, Plehn denied strangling Jaclyn and also denied any act associated with that conduct, such as touching Jaclyn's neck, mouth, or nose. Third,

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[47]With this in mind, any potential error is harmless because district courts are never required to instruct the jury on lesser related offenses.

Plehn forfeited his argument as to count I's lesser included offense, did not cogently argue it, and admitted to no act that could have formed the basis for that charge. Accordingly, I disagree with the majority that the district court abused its discretion because Plehn was not entitled to a necessity instruction on count I or its lesser included offense.

The district court did not abuse its discretion in its response to a jury question during deliberations

Plehn argues that the district court erred when it failed to explain why the necessity defense did not apply to all counts and that further elaboration was required to fully answer the jury's question.[48] The State counters that Plehn provides no cogent authority to support his claim that further explanation was required and that any error was harmless because the instruction was "not incorrect."

This court reviews a district court's response to a jury question, or refusal to answer a question, for an abuse of discretion. *Gonzalez v. State*, 131 Nev. 991, 995, 366 P.3d 680, 683 (2015). Trial courts have a duty to instruct on general principles of law relevant to the issues raised by the evidence. *Id.* at 997, 366 P.3d at 684. With this duty comes a correlative duty to refrain from instructing on irrelevant issues that may confuse the jury or relieve the jury from making findings on the relevant issues. *Id.* In situations where a jury's question during deliberations suggests confusion on a significant element of the applicable law, the court has a duty to give additional instructions to resolve the jury's doubt or confusion. *Id.* at 996, 366 P.3d. at 684. This is true even where the jury is given correct instructions. *Id.* Notably, courts are not required to answer questions already answered in the instructions if the court concludes that those

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[48]Namely, when the court answered the juror's question with "No" and not "No because the defendant . . . said he didn't touch her."

instructions are adequate, correctly state the law, and fully advise the jury of its duties. *See Lamb v. State*, 127 Nev. 26, 46, 251 P.3d 700, 713 (2011). In answering the jury's questions, the district court should do so in a way that is "prompt, complete[,] and responsive." *Id.* at 43, 251 P.3d at 711 (quoting *ABA Principles for Juries and Jury Trials*, Principle 15(D) (2005)).

Here, as noted above, the jury found Plehn not guilty of count I, so the issue is moot. *See Martinez-Hernandez*, 132 Nev. at 625, 380 P.3d at 863. Further, when the district court responded to the jury question, Plehn did not request a response that would have allowed the jury to apply the affirmative defense to count I's lesser included offense if it found him not guilty of strangulation. Regardless, the district court did not abuse its discretion when it answered "No" without further explanation. Although the jury's question may have indicated confusion on a significant element of the applicable law (i.e., whether the necessity defense applied to count I, such that Plehn's actions of chasing Jaclyn into the desert, forcefully subduing her, and carrying her to her car may be excused) the district court answered the question accurately. The answer "No" and Plehn's proposed answer "No because the defendant . . . said he didn't touch her" both result in the same conclusion: instruction 20 (the necessity defense instruction) did not apply to count I, strangulation, as the district court had previously instructed.

Accordingly, I conclude that the district court did not abuse its discretion when it answered the jury's question "Does Instruction 20 apply to Count I?" with "No."

The district court did not abuse its discretion when it denied evidence of a text message offered for impeachment

Plehn argues that the district court should have allowed him to question Jaclyn on cross-examination about a text message Jaclyn sent to the coworker with whom she had the sexual encounter. The message stated

that, if people found out, then Jaclyn would "tell them you raped me, LOL."[49] Plehn contends that the statement was admissible to impeach Jaclyn because it was inconsistent with her testimony and demonstrated a potential motivation to testify in a certain manner. The State counters that the statement was consistent with Jaclyn's testimony and inadmissible for impeachment purposes because Jaclyn's credibility regarding the extramarital affair was not at issue.[50] Additionally, the State argues that any error was harmless because the text message was between Jaclyn and a third party and had no bearing on whether Plehn committed battery constituting domestic violence against Jaclyn.

This court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). An abuse of discretion occurs if the court's decision is arbitrary or capricious, or if it exceeds the bounds of law or reason. *See Jackson*, 117 Nev. at 120, 17 P.3d at 1000. Because the message's probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, *see* NRS 48.035(1), and undue delay, *see* NRS 48.035(2), I conclude that the district court did not abuse its discretion when it denied the text message's use for impeachment.

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[49]Nothing in the record indicates what Jaclyn meant by "LOL," but common usage supports that LOL means "laugh out loud." *See LOL*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/LOL, (last visited Mar. 6, 2024).

[50]The State also argues that Plehn's briefing on the issue is inadequate because he does not "cite to the record or identify which of his proposed impeachment evidence he complains about." However, Plehn cites to the Appellant's Appendix, so I will address his arguments on the merits.

To protect witnesses from undue harassment or embarrassment, cross-examination must be limited to either matters introduced during direct examination or matters that speak to the witness's credibility. *See* NRS 50.115(1)(c), (2). To that end, trial courts have broad discretion to limit the scope of cross-examination, provided that "sufficient cross-examination has been permitted to satisfy the Sixth Amendment." *Crawford v. State*, 121 Nev. 744, 758, 121 P.3d 582, 591 (2005) (quoting *Crew v. State*, 100 Nev. 38, 45, 675 P.2d 986, 990 (1984)).

Here, the district court's decision to prohibit Plehn from questioning Jaclyn about the text message was a permissible exercise of its discretion to control the manner of cross-examination. Plehn's argument that the text message was relevant to Jaclyn's general credibility is not persuasive, though not for the same reasons the district court stated at trial. Plehn asserted that he wanted to question Jaclyn on whether she would be willing to accuse others of crimes that they did not commit, and then impeach her with the text message if she said she would not. The court barred Plehn from questioning Jaclyn about the text message, reasoning that Jaclyn had not "open[ed] the door" to false accusations during her direct examination. This determination, while factually accurate, was not the determinative inquiry. Although Plehn did not cite to NRS 50.085(3), the district court could have permitted questioning about the text message as a specific instance of Jaclyn's conduct if it related to credibility and truthfulness, regardless of whether Jaclyn opened the door to false accusations. *See* NRS 50.085(3).

The determinative inquiry was therefore whether the district court could exclude the message based on the general limitations of relevant evidence. Because the text message presented issues of unfair prejudice, misleading the jury, and undue delay, the court's decision to preclude

questioning on it was within its discretion. When discussing the text message, the court agreed with the State that permitting Plehn to question Jaclyn about the text message would likely serve only to "besmirch" Jaclyn's reputation. Moreover, Jaclyn's inclusion of "LOL" (laugh out loud) at the end of the text message suggests that Jaclyn did not intend for the message's content to be taken literally. Consequently, the district court could also have concluded that the text message was not sufficiently probative of Jaclyn's truthfulness, and that permitting Plehn to question her on it would therefore be unfairly prejudicial, misleading, or a waste of time.[51] *See* NRS 48.035(1), (2).

Consequently, I conclude that the district court did not abuse its discretion when it prohibited Plehn from questioning Jaclyn about the text message on cross-examination.

Thus, the entire court agrees on all issues except the first. Where the majority implies that the district court should have permitted a necessity defense instruction on count I and, by implication, its lesser included offense, I conclude that the district court's decision not to do so was within its discretion. To start, the majority bases its holding on an unargued theory of contradictory defenses wherein Plehn was not required to admit to anything, which violates the principle of party presentation. Plehn's arguments as to count I are also moot because Plehn was acquitted of strangulation, and he forfeited his lesser included offense argument by

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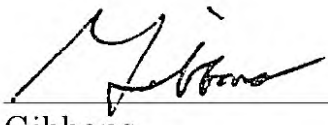
[51]Plehn also does not explain on appeal how impeaching Jaclyn's credibility with the text message would have altered the outcome of this case in any meaningful way, especially considering that the jury found him not guilty of all three charged felony offenses, and evidence supports that Jaclyn sent the message in jest. *See Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999) (noting that an error is harmless if, in the error's absence, the outcome would have been the same).

not making the argument at trial. Forfeiture aside, the summary argument Plehn makes on appeal as to count I's lesser included offense is non-cogent and therefore should not be considered.

Even on the merits, Plehn's claims do not warrant relief. Specifically, because Plehn's admitted bear hug can form the basis for only a lesser related offense—and not a lesser included—the district court was entirely within its discretion to both decline the instruction as to count I, and to not sua sponte give the instruction to count I's lesser included offense. Further, a remand may implicate double jeopardy concerns if either the charging document or evidence adduced at trial implicate any illegal conduct apart from a forceful or offensive touching of the neck, nose, or mouth. Finally, both the Nevada Supreme Court's cases and extra-jurisdictional precedent suggest that, in order for the necessity defense to apply, a defendant must first admit to having at least committed an act that formed the basis for the charge, although not necessarily the crime itself. Accordingly, I dissent and would affirm the misdemeanor judgment of conviction.



, C.J.
Gibbons

cc: Hon. Monica Trujillo, District Judge
Kendall S. Stone
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk