IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES BUSH; AND KRISTIN BUSH,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELISSA F. CADISH, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 73808-COA



*ORDER DENYING PETITION*

This original petition for a writ of mandamus or, alternatively, prohibition challenges a district court order denying a pretrial petition for a writ of habeas corpus and a motion to dismiss the indictment.

Petitioners James and Kristin Bush sought dismissal of their indictment for two counts of child abuse, neglect, or endangerment resulting in substantial bodily harm on the grounds that there were several irregularities in the grand jury proceedings and indictment. In this petition, they seek an order directing the district court to grant their petition and/or motion. While a writ of mandamus is an appropriate remedy for any such violations, it is nevertheless within this court's discretion whether to consider the petition.[1] *See Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 449-50, 305 P.3d 898, 901-02 (2013).

[1]A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. The Bushes do not allege the district court exceeded its jurisdiction, and accordingly, prohibition is not an appropriate remedy.

The Bushes claimed NRS 200.508 is unconstitutional. While recognizing the Nevada Supreme Court has upheld the constitutionality of the statute, *see, e.g.*, *Rimer v. State*, 131 Nev. 307, 325-26, 351 P.3d 697, 710-11 (2015), they claim the statute is unconstitutional as applied to them. Specifically, they claimed the statutory language, "unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect," was so vague and ambiguous as to be almost meaningless. Because the Bushes are challenging the language of the statute itself, they are not making an as-applied argument. *See Pimentel v. State*, 133 Nev. ___, ___, 396 P.3d 759, 764 (2017). We therefore conclude our intervention by way of extraordinary relief is not warranted on this claim.

The Bushes next claimed there could be no "educational neglect" in this case because federal law gave them the right to make educational choices for their mentally impaired children. The federal authority on which the Bushes relied (20 U.S.C. § 1414(a)(1) and various subsections of 34 C.F.R. § 300) aims to ensure children have the opportunity to receive an education. *See* 20 U.S.C. § 1400(d)(1)(A) ("The purposes of this chapter are . . . to ensure that all children with disabilities have available to them a free appropriate public education . . . ."); *accord* 300 C.F.R. § 300.1(a) (same). The Bushes cited to no authority giving parents the right to decline to educate their minor children. We therefore conclude our intervention by way of extraordinary relief is not warranted on this claim.

The Bushes next challenged the facial validity of their indictment on several fronts.

First, they argued the indictment fails to adequately specify the conduct that gave rise to the charges and to identify what unjustifiable pain or suffering the victims endured, what medical care was not provided, and

what therapies either child would have materially benefitted from. Each count of the indictment specifies that the Bushes "fail[ed] to provide adequate and/or appropriate nourishment and/or medical care and/or therapy and/or education, resulting in substantial bodily harm or mental harm" to the relevant child. This language adequately apprised the Bushes "of the essential facts constituting the offense charged," which is all that is required. NRS 173.075(1).

Second, they argued the indictment failed to narrow the timeframe of the crimes. Child abuse or neglect is commonly violated over a period of time, *Rimer*, 131 Nev. at 320, 351 P.3d at 707, and we perceive no issue with the long alleged timeframe since it is not an element of the offense, *see Wilson v. State*, 121 Nev. 345, 368-69, 114 P.3d 285, 301 (2005).

Third, they argued the indictment failed to narrow the theories of liability under which the State is proceeding. The Nevada Supreme Court has held the State may allege alternate theories of liability so long as there is some evidence to support them. *See Desai for Desai v. State*, 133 Nev. ___, ___ n.4, 398 P.3d 889, 892 n.4 (2017). Except for the malnourishment theory, which is discussed below, the Bushes did not claim there was insufficient evidence to support any of the theories.

For these reasons, we conclude our intervention by way of extraordinary relief is not warranted on these claims challenging the facial validity of the indictment.

The Bushes next claimed the State failed to prove beyond a reasonable doubt that they deliberately withheld food or nutrients. The Bushes misstate the State's burden of proof. At the grand jury level, the State need only provide slight or marginal evidence. *See Sheriff, Clark County v. Burcham*, 124 Nev. 1247, 1257-58, 198 P.3d 326, 332-33 (2008). And the State met its burden when it presented the following evidence: The Bushes were the sole caregivers of the two boys; E.H. was nearly 14 years

old at the time of his death and weighed only 22 pounds, down from 60 pounds close to three years prior; and M.H., who was 16 years old when he was hospitalized, weighed 76 pounds upon admittance and 120 pounds upon discharge from the rehabilitation facility. We therefore conclude our intervention by way of extraordinary relief is not warranted on this claim.

The Bushes next raised several allegations of prosecutorial misconduct during the grand jury proceedings.

First, they claimed the State presented inadmissible hearsay testimony: State's investigator Kisha Earhart testified as to statements the Bushes made. A party's own statements are not hearsay when offered by the party opponent. NRS 51.035(3)(a). The Bushes' arguments as to the reliability of the statements go to the weight, not the admissibility, of the evidence. *Cf. Wilson v. State*, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970) ("[T]he ultimate fact and the weight, credence and significance to be given to the statement [admitted under an exception to the hearsay rule] is for the jury.").

Second, they claimed a State's witness, pediatrician Dr. Sandra Cetl, did not satisfy Nevada's expert-witness standards. Specifically, the Bushes challenged Dr. Cetl's lack of certifications in pediatric neurology or forensic pathology. The Bushes did not point to any testimony of Dr. Cetl's in which she offered an expert opinion as to either pediatric neurology or forensic pathology.

Third, they claimed the State failed to present exculpatory evidence: the coroner's report for E.H., and evidence that Child Protective Services twice before closed investigations into allegations of neglect. The district attorney is required to submit "any evidence which will explain away the charge." NRS 172.145(2). Contrary to the Bushes' claim, the coroner's report tended to support the charges because it listed "malnutrition" as a contributing factor to the child's death and could not

determine how much of the malnutrition could be attributed to the child's underlying neurological condition "or solely to insufficient caloric and protein intake." And the Bushes provided no evidence they were twice cleared in previous child-neglect investigations. Neither the report nor allegedly being cleared of past neglect allegations explains away the Bushes' charges.

For these reasons, we conclude our intervention by way of extraordinary relief is not warranted on these claims alleging prosecutorial misconduct.[2]

For the foregoing reasons, we

ORDER the petition DENIED.[3]

_____, C.J.
Silver

_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
Robert W. Lueck, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]The Bushes also claim the State elicited hearsay testimony from Dr. Cetl. They did not raise this argument in the district court. We therefore conclude our intervention by way of extraordinary relief is not warranted on this claim.

[3]The Honorable Jerome T. Tao did not participate in the decision in this matter.