IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALEX RIVAS-VALENZUELA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80652-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Alex Rivas-Valenzuela appeals from a judgment of conviction, pursuant to a jury verdict, of domestic battery by strangulation and domestic battery with substantial bodily harm. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Kristina Tremaine and Rivas-Valenzuela were romantically involved around the time of the alleged offenses. Tremaine often stayed with Rivas-Valenzuela at his Reno apartment, as she did on the night of July 13, 2019. The following morning, Rivas-Valenzuela took Tremaine's dog, Sparky for a walk. According to Tremaine, when Rivas-Valenzuela returned to the apartment, he untied Sparky, at which point Sparky ran out of the apartment. Rivas-Valenzuela charged at Tremaine and pushed her to the floor, and stated, "I'm going to kill you, bitch, I'm going to kill you."

Tremaine testified that, while straddling her on the floor, Rivas-Valenzuela wrapped the rope he used to walk Sparky around her neck. He then repeatedly cinched and loosened the rope, allowing Tremaine to gasp for air but tightening the rope immediately afterward. Tremaine eventually "smacked" Rivas-Valenzuela, which dazed him, and rolled Rivas-Valenzuela off her. Tremaine then crawled away, got up, and ran out of the apartment to look for Sparky.

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By the time Tremaine found Sparky and returned to Rivas-Valenzuela's apartment, police had arrived in response to a call from the apartment manager. The manager called police because Tremaine had previously been removed from the property and told she could not return; the manager did not report an altercation. One of the responding officers called paramedics to examine Tremaine because she had ligature marks on her neck.

Police knocked on Rivas-Valenzuela's door but there was no answer. Police did not seek an arrest warrant for Rivas-Valenzuela, a search warrant for his apartment, or interact with Rivas-Valenzuela on July 14. Rivas-Valenzuela was arrested the following day. Police never recovered the rope that Rivas-Valenzuela allegedly used on Tremaine.

One of the responding officers obtained a statement from Rivas-Valenzuela's neighbor, Howard Foster. In his statement to police, Foster did not indicate that he heard Rivas-Valenzuela say that he was going to kill Tremaine or that he observed Rivas-Valenzuela hitting, choking, or pushing Tremaine, or any altercation at all.

The State filed an amended information alleging domestic battery by strangulation using a rope or rope-like object (count 1), coercion constituting domestic violence (count 2), and domestic battery with substantial bodily harm (count 3). Each count provided that Rivas-Valenzuela pushed Tremaine to the ground and placed "a rope or rope-like object around her neck."[1]

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[1]Count 2 alleged alternatively that Rivas-Valenzuela pushed and/or held Tremaine to the ground when she tried to get up and leave the premises. Count 3 also alleged alternative means of commission. ("[D]id push Kristina Tremaine to the ground *and/or* place a rope or rope-like

A month after the State filed its amended information—four days before the start of Rivas-Valenzuela's October 2019 trial—the district court held a hearing in which it considered a number of matters, including the admissibility of Foster's testimony. The State did not file a motion or points and authorities regarding the admissibility of Foster's testimony.

During the pretrial hearing, Foster claimed for the first time that he saw Rivas-Valenzuela and Tremaine in a physical conflict in the doorway to Rivas-Valenzuela's apartment on July 14. In particular, Foster testified that Rivas-Valenzuela threatened to kill Tremaine at some point, struck Tremaine, choked her with his bare hands, and that Rivas-Valenzuela appeared to be pushing Tremaine out of his apartment. The State's amended information did not provide, nor was it ever amended to provide, separate charges for the acts Foster observed in the doorway or that the acts constituted alternative means of committing existing charges. Foster further testified that he could not see *inside* the apartment, did not observe Rivas-Valenzuela straddling Tremaine on the floor, and did not see Rivas-Valenzuela choke Tremaine with a rope or rope-like object. Foster explained that he did not report the physical conflict in his statement to police because he had recently completed probation, did not want to be involved with the law, and because he was scared of Rivas-Valenzuela.

In an oral ruling, the district court admitted Foster's testimony as res gestae evidence over Rivas-Valenzuela's objection. The court found that Foster's testimony was "day in question testimony" and stated, "[i]t's

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object around her neck and choked her, such force and violence causing substantial bodily harm to the victim, to wit, prolonged pain including difficulty swallowing and/or pain in the neck area that lasted longer than the pain immediately felt from the pushing *and/or* choking with the rope.").

this court's feeling that [Foster's observations are] res gestae. These things happen contemporaneous with what was going on in that apartment, that [are] the basis for the underlying offenses all three of them in this case." The court did not rule on the State's alternative argument that Foster's testimony was admissible bad act evidence insofar as it could rebut Rivas-Valenzuela's potential claim of self-defense.

At trial, Tremaine testified to Rivas-Valenzuela's alleged attack. She added that, in the months following the alleged strangulation, she experienced difficulty swallowing, ongoing pain from contusions caused by the cinching of the rope, and chronic migraines, all of which she attributed to Rivas-Valenzuela attacking her.

Rivas-Valenzuela drew attention to potential issues with Tremaine's testimony on cross-examination. His questions suggested that Tremaine was biased and revealed that Tremaine could not remember details of events during and around the time of the offense.[2]

Diana Emerson, a forensic nurse practitioner, provided expert testimony on strangulation for the State. Emerson concluded that Tremaine was strangled with a ligature, leaving a pattern injury. The ligature marks were at two different locations on Tremaine's neck, which Emerson testified was consistent with a ligature being repeatedly applied and released. Further, Emerson testified that this type of strangulation caused a risk of death or substantial bodily harm. She also testified that

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[2]The State moved pretrial to admit three prior acts of battery that Tremaine alleged Rivas-Valenzuela perpetrated against her. Rivas-Valenzuela was never arrested or charged for these allegations and Tremaine did not report Rivas-Valenzuela's conduct to the police. The district court ruled that evidence of the three prior alleged batteries was inadmissible evidence of uncharged bad acts.

strangulation victims can have trouble swallowing, headaches, and memory loss. Emerson agreed that she did not see any defensive injuries on Tremaine and there was no petechiae in Tremaine's eyes.

At trial, Foster again admitted that he did not disclose the extent of what he observed on July 14 in his statement to police and waited months to fully disclose his observations. He reiterated that, although he witnessed Rivas-Valenzuela and Tremaine in an altercation in the doorway, he never saw inside Rivas-Valenzuela's apartment, never witnessed Rivas-Valenzuela holding Tremaine down against her will, and did not observe a rope around Tremaine's neck—only Rivas-Valenzuela's bare hands.

Javier Fuentes, Rivas-Valenzuela's upstairs neighbor, testified that on July 14 he heard Rivas-Valenzuela say, "[g]et the fuck out, I'm gonna kill you," through the "[p]aper thin" walls of his apartment. When Fuentes walked out of his apartment, he saw Tremaine with blood on her face. Fuentes did not see any confrontation inside or outside of Rivas-Valenzuela's apartment, nor did he call the police.

In closing, the State argued that Rivas-Valenzuela strangled Tremaine with a rope inside Rivas-Valenzuela's apartment. The State, however, portrayed the battery and strangulation that Foster allegedly observed in the doorway as the same battery and strangulation that occurred inside the apartment according to Tremaine's testimony. After explaining that Rivas-Valenzuela strangled Tremaine with a rope while he straddled her on the floor, the State declared that Foster "saw the tail end of this fight." The State also commented, "apparently [Rivas-Valenzuela]

didn't finish off what he did on that floor, putting his hands around her neck."[3]

Rivas-Valenzuela's closing argument posited inconsistencies in Tremaine's testimony and that she had incentives to lie. Rivas-Valenzuela argued that Tremaine likely lied to police to avoid being arrested for trespassing given that the manager forbade her from being on the premises. Rivas-Valenzuela highlighted that Tremaine was homeless when she reported Rivas-Valenzuela, but as a result of her cooperation with the State, she received a victim's advocate, financial assistance, and housing assistance. Rivas-Valenzuela argued that Tremaine would lose her assistance if she admitted that she and Rivas-Valenzuela had gotten into a fight or that she refused to leave the apartment on July 14. At one point, Rivas-Valenzuela contrasted Tremaine's testimony with Foster's testimony to show that Tremaine was unreliable, apparently presuming that bolstering Foster's testimony would not harm his case.

In rebuttal, the State continued to conflate the uncharged battery and strangulation in the doorway that Foster described with the charged offenses that Tremaine described in her testimony. The State declared that Foster "heard the defendant yelling 'I'm gonna fucking kill you.' He comes down and sees the tail end of the fight . . . . He saw the end

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[3]Unlike the dissent, the State never suggested that Foster's testimony uniquely supported a particular count such as count 2, coercion, in contradistinction to counts 1 and 3. Rather, the district court permitted the State to introduce Foster's testimony as res gestae evidence, implying that Foster's testimony was not direct evidence (e.g., eyewitness testimony) of any of the counts since admission under the res gestae statute would have been unnecessary if Foster's testimony was direct evidence.

of a strangulation." The State did not argue that Foster's testimony supported count 2, coercion.

During deliberations, the jury asked the district court about the instructions for count 1, domestic battery by strangulation: "[o]n the back of [page] 3 it states 'placed a rope or rope-like object' [b]ut on [page] 28 it just says 'strangulation.' Does the strangulation (count 1) have to include the rope?" The court directed the jury to apply the definition of strangulation that was already in the instructions. The jury responded with a more precise question: "We are not looking for the definition of strangulation, we are attempting to understand for count 1, must the strangulation occur by the rope or can the charge of the strangulation occur without the said rope or rope like object?" The district court answered, "No. Strangulation is established by any evidence introduced at trial that satisfies the definition of strangulation as provided in Instruction 34."

At one point, the jurors were "at a standstill with 11 to 1 with no further progress for one of the counts" and asked the district court how to proceed. The jury ultimately reached its verdict without receiving an answer. The jury found Rivas-Valenzuela guilty of domestic battery by strangulation (count 1), not guilty of coercion constituting domestic violence (count 2), and guilty of domestic battery with substantial bodily harm (count 3).

On appeal, Rivas-Valenzuela argues that (1) the district court abused its discretion when it admitted Foster's testimony as res gestae evidence, (2) the district court erred when it informed the jury that it could convict Rivas-Valenzuela of domestic battery by strangulation without finding that he used a rope or rope-like object, and (3) there is insufficient evidence to support the domestic battery with substantial bodily harm

conviction because the State failed to prove the requisite harm. This court agrees with Rivas-Valenzuela as to his first contention, does not need to reach his second, and disagrees with his third.[4]

The district court abused its discretion when it allowed the State to introduce Foster's testimony as res gestae evidence

Rivas-Valenzuela argues that the district court abused its discretion by admitting Foster's testimony as res gestae evidence because Foster did not describe a charged offense. Relying upon *State v. Shade*, 111 Nev. 887, 900 P.2d 327 (1995), the State argues that the district court properly admitted Foster's testimony because it described events that occurred immediately after the events that gave rise to the charges against Rivas-Valenzuela.

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[4]This court does not reach the second contention given its disposition on the first. However, the facts of this case are very similar to the facts of *Wright v. State*, in which case the Nevada Supreme Court held that "the State impermissibly changed its theory from charging [the defendant] as a principal to proceeding against him as an aider and abettor" without sufficient notice and contrary to the allegations in the charging document. 101 Nev. 269, 271, 272, 701 P.2d 743, 744, 745 (1985). *See also* NRS 173.095(1). According to the dissent, the State's arguments in closing prove that the State intended Foster's testimony to prove count 2. This is not accurate, but if it was, then the State violated *Wright*. The State sought and obtained admission of Foster's testimony under NRS 48.035(3). Admission under NRS 48.035(3) necessarily implies that testimony describes an uncharged act given the express language of NRS 48.035(3). Since the dissent's position is that the State used Foster's testimony to prove count 2 in closing, the State accordingly allowed Rivas-Valenzuela to presume Foster's testimony only described an uncharged act throughout trial—not count 2. In doing so, the State impermissibly changed its theory in closing without giving sufficient notice to Rivas-Valenzuela, thereby violating Rivas-Valenzuela's right to notice of the theory upon which the State would prosecute its case and prejudicing the outcome of the trial.

This court "review[s] 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). "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." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001); *see also Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018) ("An abuse of discretion can occur when the district court . . . disregards controlling law." (citation omitted)).

"Under [NRS 48.035(3)], a witness may only testify to [an] uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime." *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). "Th[e] basis for admissibility [under NRS 48.035(3)] is extremely narrow, as we have stated before and as the plain language of the statute makes evident." *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017). NRS 48.035(3) "applies to testimony by an actual witness who cannot describe the charged crime without referring to another uncharged act; it does not contemplate a hypothetical witness or an abstract viewpoint from which two or more acts might be considered intertwined" and "refers to a witness's ability to 'describe'—not 'explain'—a charged crime." *Id.* "To the extent that the prosecution might want to introduce evidence of other acts to make sense of or provide context for a charged crime[,] . . . NRS 48.035(3) is not a basis for admissibility."[5] *Id.*

[5]The plain text of the res gestae statute also supersedes the common law res gestae and "complete the story" doctrines. *See State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) ("If the doctrine of res gestae is

Thus, evidence of an uncharged bad act is not admissible as res gestae evidence under NRS 48.035(3) if the State can introduce evidence of the charged act or acts without referring to the uncharged act in question. *See Sutton v. State*, 114 Nev. 1327, 1332, 972 P.2d 334, 336 (1998). Here, the district court abused its discretion in admitting Foster's testimony as res gestae evidence because it failed to apply the express language of NRS 48.035(3), which Foster's uncharged act testimony does not satisfy.

First, Foster's testimony describing the altercation in the doorway, including an uncharged strangulation and battery, did not describe any of the charged acts such that NRS 48.035(3) applied. The parties and the district court concurred that the acts Foster described as occurring in the doorway were distinct from the charged acts insofar as none of them treated Foster's doorway altercation testimony as that of an eyewitness to the charged acts at the pretrial hearing.[6] Comparatively, Tremaine described all of the charged acts in her testimony without mentioning the doorway altercation that Foster described, obviating the

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invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts."); *Bellon*, 121 Nev. at 444, 117 P.3d at 181 (stating that one cannot substitute the "complete story of the crime" doctrine for the express language of NRS 48.035(3) to admit evidence thereunder); *Weber*, 121 Nev. at 574, 119 P.3d at 121 (rejecting the State's argument that evidence may be admitted under NRS 48.035(3) because it completes the story of charged crimes).

[6]Even if Foster overheard Rivas-Valenzuela say he was going to kill Tremaine during the transpiration of the offenses, particularly if the voice emanated from inside the apartment during the commission of the offenses as Tremaine testified, this possibility does not render the remainder of his testimony *necessary* to describe the charged acts, because the charged acts occurred inside and Foster described acts that occurred outside.

need for *any* witness to describe the uncharged acts that Foster witnessed. *See Sutton*, 114 Nev. at 1332, 972 P.2d at 336.

Moreover, Foster's doorway altercation testimony is incongruous with the description of the charged acts in the amended information. Each charge alleged that Rivas-Valenzuela pushed Tremaine to the floor and placed a rope or rope-like object around her neck. In contrast, Foster testified that, from a short distance away, he saw Rivas-Valenzuela strangle Tremaine with his bare hands, not a rope or rope-like object. Foster testified that Rivas-Valenzuela and Tremaine were standing upright, not that they were on the ground. Foster could not see inside Rivas-Valenzuela's apartment, but Tremaine testified that the entire altercation occurred inside Rivas-Valenzuela's apartment. Thus, Foster's doorway altercation testimony is not res gestae evidence under NRS 48.035(3) because it did not describe any of the charged offenses, the parties concurred it did not describe any of the charged offenses, and it contradicts the description of the charges.

Under the guise of deference, the dissent argues the State presented Foster's testimony to prove count 2 and, accordingly, the district court admitted Foster's testimony for the wrong reason, but correctly concluded that it was admissible. The dissent cites a single line from the State's closing argument to show that the State unequivocally proffered Foster's testimony to substantiate count 2 whereas the State presented Tremaine's testimony to prove counts 1 and 3: "Viewing the evidence as we're supposed to, what the victim describes supports counts 1 and 3, but what Foster describes is the event separately charged in Count 2 . . . ." The dissent contradicts the State's arguments in its brief and the plethora of

statements the district court and State made pretrial acknowledging that Foster's testimony described uncharged acts.

The State never argued below, nor does it on appeal, that Foster was an eyewitness to any of the charged offenses. At the pretrial hearing, the State argued that Foster overheard a threat at some point that may have been the same threat that Tremaine described in her testimony. This was the closest Foster's testimony came to describing a charged offense: Foster overheard a threat that Rivas-Valenzuela might have made during the commission of the offenses—but the threat itself was not a charged crime. The State argued the remainder of Foster's testimony was admissible because it described acts "so contemporaneous and [] inextricably linked *to what Ms. Tremaine talked about* that [they are] res gestae" and that "you can't tell the story without [them]." (Emphasis added.)[7] If Foster was an eyewitness to count 2, the State would have proffered Foster's testimony as that of an eyewitness to count 2, not merely as testimony describing uncharged offenses that were "contemporaneous" or "linked" to the charged offenses. Additionally, a pretrial hearing would have been unnecessary unless the State believed Foster's testimony was inadmissible in the first place, necessitating grounds for admission beyond simply being competent evidence that was relevant to the charged offenses.

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[7]NRS 48.035(3) does not allow a witness to testify to uncharged acts to "complete the story" of *another witness's* description of the charged offenses. Foster could not testify to uncharged acts simply because they provided context for the aftermath of Tremaine's description of the charged offenses; Foster's description of uncharged acts needed to be necessary *for Foster* to describe charged offenses.

Furthermore, the State could not possibly have intended Foster's testimony alone to prove count 2 because the State was unaware until the week before trial that Foster lied in his July 14 statement to police and actually witnessed a physical altercation. As a result, the State did not notify Rivas-Valenzuela of its intent to elicit Foster's testimony regarding the doorway altercation until four days before trial, almost two months after the State filed its first information alleging count 2.[8] If Foster's testimony supported count 2 alone and Tremaine's testimony only supported counts 1 and 3, then for two months the State maintained a charge with virtually no evidentiary support. The State would not maintain a baseless charge on the off-chance that evidence would surface days before trial.

The district court's statements at the pretrial hearing show the court did not believe Foster was an eyewitness to count 2. The court ruled, "It's this court's feeling that [Foster's observations are] res gestae. These things happen contemporaneous with what was going on in that apartment, [which] is the basis for the underlying offenses all three of them in this case." It would not make sense for the district court to state that Foster described events "contemporaneous" with the charged offenses if Foster in fact *described* a charged offense. It would be redundant to say that an event is contemporaneous with itself. Accordingly, the dissent misinterprets the express statements of the State and district court, and unwittingly imputes underhanded tactics to the State.

Second, *Shade* is distinguishable from the facts of Rivas-Valenzuela's case. In *Shade*, the district court erred in failing to admit evidence of an uncharged heroin purchase under the res gestae statute.

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[8]The substance of Count 2 did not change in the Amended Information filed one month later on September 17, 2019.

Shade, 111 Nev. at 895, 900 P.2d at 331. The supreme court reasoned that the purchase occurred contemporaneously with the "charges at issue"—possession and transportation of cocaine and methamphetamine—such that an ordinary witness could not describe the charges without describing the uncharged heroin purchase. *Id.* All three substances "arose out of the same [drug] transaction, and involved the same participants." *Id.* at 895, 900 P.2d at 331. In other words, the uncharged acts in *Shade* occurred simultaneously with the charged offenses. *Id.* at 894-95, 900 P.2d at 331. However, *Shade* clarified that, while contemporaneousness, being inextricably intertwined, and completing the story of an offense can be relevant in a res gestae analysis, "[i]f the doctrine of res gestae is invoked, the *controlling question* is whether witnesses can describe the crime charged without referring to related uncharged acts." *Id.* at 894, 900 P.2d at 331 (emphasis added).

Unlike *Shade*, the uncharged acts Foster described were not simultaneous with the charged acts such that Foster could not describe the charged offenses without describing said uncharged acts. Rather, Foster described acts that occurred *subsequent* to the charged acts that occurred inside Rivas-Valenzuela's apartment. Although the State argued in closing that Foster saw the "tail end" of a continuous altercation, this does not render the acts Foster described simultaneous with the charged offenses. Thus, Foster testified to uncharged acts that occurred subsequent to the charged acts in Rivas-Valenzuela's case, which distinguishes it from the testimony describing simultaneous charged and uncharged acts in *Shade*.

This court notes that while the simultaneity of the acts in *Shade* informed the supreme court's determination that an ordinary witness could not describe the charged offenses without describing the uncharged acts at

issue, the court did not declare that simultaneity was necessary or sufficient by itself to satisfy NRS 48.035(3). Indeed, considerations such as temporal proximity, the need for context, or whether acts were part of the same transaction are subordinate to the "controlling question" expounded in NRS 48.035(3). *Id.* at 894, 900 P.2d at 331. Accordingly, regardless of the similarity of *Shade* to Rivas-Valenzuela's case, the dispositive question remains whether Foster could describe the charged offenses without describing uncharged acts, however close or far apart in time the acts are.

More instructive is *Sutton v. State*, 114 Nev. 1327, 972 P.2d 334 (1998). There, the Nevada Supreme Court rejected an argument that testimony relating to the discovery of prescription drugs was admissible as res gestae evidence because the drugs were "found in the same relative location at approximately the same time" as the marijuana, methamphetamine, and short-barrel shotgun constituting the basis of the charges against the defendant. *Id.* at 1331-32, 972 P.2d at 336. Notably, the supreme court distinguished the facts of *Sutton* from *Shade* on the ground that, unlike the charged acts in *Shade* that could not be described without mentioning the uncharged heroin purchase, "the State could have easily introduced testimony pertaining to the discovery and seizure of the illegal drugs and short-barreled shotgun without introducing the container of highly prejudicial prescription pills for which Sutton was not charged." *Id.* at 1332, 972 P.2d at 336.

Here, the State could—and did—introduce testimony describing the charged acts without referring to the uncharged acts. Indeed, Tremaine testified to all of the charged offenses without referring to the uncharged acts that Foster allegedly witnessed. This obviated the need to present Foster's doorway altercation testimony just as the

availability of testimony regarding the charged acts in *Sutton* obviated the need to introduce testimony regarding the container of prescription pills. Likewise, the fact that Foster's testimony described acts that occurred shortly after the charged offenses and in a nearby location is unavailing given that the supreme court rejected a spatiotemporal argument like this in *Sutton*.

Central to this court's decision is the fact that the district court concluded that the entirety of Foster's testimony was res gestae evidence due to its "contemporaneousness" with the charged offenses. As *Shade* and *Sutton* show, contemporaneousness is neither necessary nor sufficient to satisfy NRS 48.035(3). Because the district court failed to base its ruling on whether an "ordinary witness;" (i.e., Foster), could describe a charged act without describing uncharged acts, the district court "exceeded the bounds of law or reason" in admitting Foster's testimony pursuant to NRS 48.035(3). *See Jackson*, 117 Nev. at 120, 17 P.3d at 1000. Thus, the district court abused its discretion in admitting Foster's testimony as res gestae evidence.[9]

Like the district court, the State (in its briefing) and the dissent both conclude that Foster's doorway altercation testimony was admissible pursuant to NRS 48.035(3) without showing that the testimony was necessary to enable Foster to describe the charged acts. The State cites *Payne v. State*, 81 Nev. 503, 507, 406 P.2d 922, 925 (1965) and *State v. Fouquette*, 67 Nev. 505, 529, 221 P.2d 404, 417 (1950), to argue that events immediately following a criminal act qualify as res gestae evidence. *Payne*

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[9]The State does not contend on appeal that Foster's testimony was admissible on another ground. Nevertheless, upon remand, the issue may be revisited.

and *Fouquette*, however, predate the enactment of NRS 48.035(3) and do not discuss the res gestae of an offense with regard to witness testimony or mention a witness's ability to "describe [an] act in controversy or [a] crime charged without referring to [an]other act or crime."[10] NRS 48.035(3); *see Bellon*, 121 Nev. at 444, 117 P.3d at 181 (stating the "admission of evidence under NRS 48.035(3) is limited to the statute's express provisions"). This court will not interpret NRS 48.035(3) to admit evidence of an uncharged act that is *unnecessary* to an ordinary witness's description of a charged offense. *See Shade*, 111 Nev. at 894, 900 P.2d at 331 ("If the doctrine of res gestae is invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts."); *Flynn v. State*, Docket No. 80317 (Order of Affirmance, February 16, 2021) (agreeing with the district court that evidence showing the defendant sold drugs was admissible as res gestae evidence because witnesses could not testify about the charged murder without mentioning the uncharged drug sale).

Ironically, the dissent accuses the majority of a "complete misunderstanding and misapplication of NRS 48.035(3)," but the dissent

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[10]Another case, *Allan v. State*, post-dates the enactment of NRS 48.035(3) in 1971, but concluded acts were "res gestae" because they "complete[d] the story of the crime" and were part of the "same transaction" as the charged offenses. 92 Nev. 318, 320, 549 P.2d 1402, 1403 (1976). *Allan* did not apply the "controlling question" in NRS 48.035(3), which subsequent opinions clarified is the only dispositive consideration in a res gestae analysis. *See, e.g., Shade*, 111 Nev. at 894, 900 P.2d at 331. Instead, the two-justice majority, in a footnote, cited extrajurisdictional cases predating NRS 48.035(3) that applied common law concepts as its only authority, and did not discuss the application of NRS 48.035(3) in any way. *See Allan*, 92 Nev. at 320, n.2, 549 P.2d at 1403, n.2.

fundamentally *misreads* NRS 48.035(3) as synonymous with the common law notion of the "res gestae" of an offense[11] or the "complete the story" doctrine.[12] In doing so, the dissent conflates the Sorites Paradox with the slippery slope fallacy[13] in order to arrive at a false dilemma: that this court must either set forth a rule demarcating the end of one act and the

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[11]While NRS 48.035(3) is referred to as the "res gestae statute" in Nevada precedent, nowhere in the text of NRS 48.035(3) or greater NRS 48.035 does the phrase "res gestae" or "complete the story" appear.

[12]In addition to conflating common law res gestae doctrine with NRS 48.035(3), the dissent appears to characterize NRS 48.035(3) as a rule of exclusion. ("The majority concludes that because the two witnesses described two different acts, one must be *excluded* under NRS 48.035(3)." (emphasis added)); ("The doctrine of 'res gestae' only *excludes* different acts that are both prejudicial and uncharged, not different acts that are actually charged together in separate counts in the same case." (emphasis added)); ("Deeming [Foster's testimony] *inadmissible* under NRS 48.035(3) raises an even bigger problem." (emphasis added)). NRS 48.035(3) is a rule of inclusion, providing that evidence satisfying its criteria "shall not be excluded" even if it implicates a bad act.

[13]The dissent claims the Sorites Paradox is a "cousin of" or "the same" idea as the "slippery slope" fallacy. Neither the Stanford Encyclopedia of Philosophy nor the Harvard Law Review article to which the dissent cites posit such a relationship. The dissent asserts that the "right way to avoid the paradox" is to "draw a line or define a term using the most objective definition you can" but cites to the same Harvard Law Review article regarding slippery slope arguments in which the phrase "Sorites Paradox" is nowhere to be found. The Sorites Paradox is far more complex than something "every law student knows;" it is a paradigm of the problem of vagueness in certain predicates and the apparent irreconcilability of such predicates with classical logic. Indeed, it would hardly be a "paradox," troubling philosophers like Graff Fara, Gottlob Frege, and Bertrand Russell, if it could be dispensed with by merely drawing "clear lines." In any case, the dissent fails to recognize that there is no vagueness or indeterminacy between the acts Foster described and those that Tremaine described.

beginning of another, or this court must affirm the district court's decision because it cannot be expected to parse semantic or metaphysical questions with no clear answer.

This court need not discern when an act becomes distinct from some "other" act, however, because the statute provides a bright line test that is conspicuously absent from both the district court's and the dissent's analyses: whether "*an ordinary witness* cannot describe the act in controversy or the crime charged without referring to the other act or crime[.]" NRS 48.035(3) (emphasis added). Simply put, the district court abused its discretion because it admitted bad act evidence pursuant to NRS 48.035(3) on grounds other than whether an ordinary witness could describe the charged offense without describing the uncharged acts Foster described.

Additionally, when the district court ruled that the evidence was admissible as res gestae evidence, it did not make any findings as to whether Foster's testimony was admissible under the statute or as bad act evidence. Rivas-Valenzuela argues on appeal that Foster's testimony would *not* otherwise be admissible for a non-propensity purpose. *See* NRS 48.045(2) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith[.]"). The State does not respond to this contention in its answering brief; therefore, for purposes of this appeal only, the State has conceded the point. *See Polk v. State*, 126 Nev. 180, 184-85, 233 P.3d 357, 360 (2010) (stating that a party confesses error when its answering brief "effectively fail[s] to address a significant issue on appeal").

The admission of Foster's testimony was not harmless

Given that the district court erroneously admitted bad act evidence, this court must evaluate whether this error was harmless. Rivas-

Valenzuela argues that the jury convicted him of count 1 based on Foster's testimony that he observed Rivas-Valenzuela strangle Tremaine in the doorway with his bare hands. Rivas-Valenzuela emphasizes the jury's question asking whether it could convict Rivas-Valenzuela without finding that he used a rope or rope-like object. Insofar as Tremaine never testified that Rivas-Valenzuela strangled her without a rope, Rivas-Valenzuela argues, this question in effect asked if Foster's testimony was a permissible basis for conviction because Foster *did* testify to Rivas-Valenzuela strangling Tremaine without a rope. Rivas-Valenzuela further asserts that the district court's answer to the jury's question that it need not find that he used a rope or rope-like object to convict him of count 1 exacerbated the prejudice from Foster's testimony. In essence, Rivas-Valenzuela argues that the district court effectively permitted the jury to convict him based upon acts that the State did not allege in the amended information in count 1. The State responds that there was overwhelming evidence of Rivas-Valenzuela's guilt adduced at trial such that any error was harmless. Rivas-Valenzuela's argument is persuasive.

"The harmless error-doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). "It also 'promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *Id.* (quoting *Van Arsdall*, 475 U.S. at 681). "A nonconstitutional error, such as the erroneous admission of evidence . . . , is deemed harmless unless it had 'a substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Tavares*

v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001), *holding modified by Mclellan*, 124 Nev. at 270, 182 P.3d at 111); *see also* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").[14] Here, the district court's error was not harmless because we cannot conclude the jury did not rely upon Foster's testimony to reach its guilty verdict on the domestic violence by strangulation charge.

An indictment or information must state, "the means by which the offense was accomplished or show the means are unknown." *Wright v. State*, 101 Nev. 269, 271, 701 P.2d 743, 744 (1985); *see also* NRS 173.075(2). Alternative theories or means are permissible but must be included in the charging document. *Jenkins v. Fourth Judicial Dist. Court*, 109 Nev. 337, 849 P.2d 1055 (1993). Here, the State could have moved to amend the amended information to include the allegations from Foster as to strangulation by other means prior to trial, or even during trial. *See* NRS 173.095(1) ("The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different

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[14]The seminal United States Supreme Court case regarding harmless error, *Kotteakos v. United States*, described the non-constitutional harmless error analysis as follows: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. 750, 764-65 (1946) (citation omitted).

offense is charged and if substantial rights of the defendant are not prejudiced."). However, because the State failed to do so, it was required to prove count 1 as stated in the amended information.

Foster's testimony had a substantial and injurious influence on the jury's verdict on count 1, domestic violence by strangulation with a rope or rope-like object. The impact of Foster's testimony cannot be understated. *See Tavares*, 117 Nev. at 730, 30 P.3d at 1131 (noting that "the use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges"). First, the State alleged only one count of domestic battery by strangulation and did not allege alternative means in count 1 by which the strangulation could have occurred, providing only for strangulation with a rope or rope-like object. Thus, the State laid the foundation for an inconsistency that ultimately confused the jury in its deliberations when it presented Foster's testimony describing another alleged strangulation without amending the information. *See* NRS 173.095(1).

Second, the jury's acquittal on the coercion constituting domestic violence charge shows that the jury's conviction on the strangulation charge was close, even with Foster's testimony in evidence. Count 2, coercion constituting domestic violence, differed from counts 1 and 3 only insofar as it required the State to prove that Rivas-Valenzuela compelled Tremaine "to do or abstain from doing an act which [she] has a right to do or abstain from doing." *See* NRS 207.190(1). Tremaine's testimony appears to satisfy the allegations in count 2. According to Tremaine, Rivas-Valenzuela straddled her while he strangled her, which

prevented her from getting up and leaving the apartment when she had a right to leave. If Rivas-Valenzuela was atop Tremaine strangling her as Tremaine testified, then her testimony satisfied all three counts at once: it proved Rivas-Valenzuela strangled her, caused her substantial bodily harm, and prevented her from leaving, which is something she had a right to do. Indeed, there appears to be no reason to doubt the portion of Tremaine's testimony proving that Rivas-Valenzuela prevented her from leaving that would not apply to the remainder of her testimony supporting counts 1 and 3. However, the jury acquitted Rivas-Valenzuela of count 2, which implies that the jury acquitted Rivas-Valenzuela of count 2 based on evidence other than Tremaine's testimony.

In comparison, acquittal on count 2 and conviction on counts 1 and 3 is logically consistent with Foster's testimony. Foster described a strangulation—albeit an uncharged one—but testified that Rivas-Valenzuela shoved Tremaine out of the apartment. Tremaine did not have a right to be in Rivas-Valenzuela's apartment. Foster did not describe Rivas-Valenzuela preventing Tremaine from abstaining from something she had a right to do either. Thus, Foster's testimony likely influenced the jury's conviction on count 1, particularly if the jury did not find Tremaine's testimony entirely credible.[15]

The dissent concludes that Foster's testimony was harmless because he testified that Rivas-Valenzuela pushed Tremaine out of the apartment, which led to acquittal on count 2. The dissent cites no authority

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[15]Foster's testimony may have influenced the jury's conviction on count 3 as well, but the jury's questions which were particular to count 1 shows, among other things, that Foster's testimony substantially and injuriously influenced the conviction on count 1, whereas any influence to count 3 was harmless.

for the proposition that a district court's error is harmless or may be overlooked because it resulted in an evidentiary windfall to the defendant. Rivas-Valenzuela did not invite admission of Foster's testimony, so if Foster's testimony substantially and injuriously influenced the jury's conviction of Rivas-Valenzuela on any count, this court must reverse on that count, regardless of whether Foster's testimony led to acquittal on another.

Third, the jury's questions indicate that Foster's testimony influenced its conviction on count 1. The jury's question regarding whether it had to find that Rivas-Valenzuela committed the strangulation alleged in count 1 with a rope or rope-like object was tantamount to asking whether Foster's testimony was a permissible basis for finding guilt. Foster's testimony was the only evidence probative of strangulation without a rope or rope-like object, whereas Tremaine's testimony provided that Rivas-Valenzuela strangled her solely by using a rope or rope-like object. Having no other reason to infer that Rivas-Valenzuela strangled Tremaine without a rope or rope-like object, Foster's testimony likely prompted the jury's question. The fact that Foster's testimony confused the jurors to the point where they felt compelled to ask the district court if they could convict Rivas-Valenzuela of count 1 on grounds contrary to its express language—which unequivocally required the use of a rope or rope-like object—shows that Foster's testimony was substantial and injurious.[16]

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[16]Additionally, the State's argument that Rivas-Valenzuela "participated" in the district court answering the jury's question is inapposite to this court's harmless error analysis because this court need not conclude that the answer was error in its own right. It is sufficient that the answer facilitated or carried the prejudice from the res gestae error—which occurred pretrial and which error Rivas-Valenzuela did not participate in and correctly objected to—through to the jury's deliberations

Moreover, by replying "[n]o, strangulation is established by any evidence . . . that satisfies the definition of 'strangulation' . . . ," the district court approved of the jury reaching its verdict on count 1 based on *any* evidence of strangulation, which included Foster's testimony. Thus, Foster's inadmissible testimony introduced an uncharged strangulation, and the court's answer to the jury's question allowed the jury to disregard the distinction between the strangulation Tremaine described and that which Foster described. Given that the court also failed to issue any sort of limiting instruction regarding Foster's testimony, there was no reason for the jury to believe Foster's testimony *was not* proper grounds for conviction.

The jury also could have reasonably inferred that the evidence besides Tremaine's testimony was lacking. No one called the police regarding Rivas-Valenzuela's alleged attack on Tremaine, the police did not obtain a search warrant or immediately arrest Rivas-Valenzuela in order to inspect his person for evidence, the police never found the rope or rope-like object or DNA evidence such as Tremaine's blood on Rivas-Valenzuela, nor did the police obtain surveillance footage, whether from security cameras or smartphone cameras. Thus, while Tremaine's testimony may have been sufficient to support a guilty verdict on count 1, Foster's bad act testimony "permeated the entire charge, indeed the entire trial" by ultimately providing the jury with an account of an uncharged strangulation that it

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and verdict. Moreover, even if participating in prejudice rather than error could negate prejudice, here, Rivas-Valenzuela's "participation" entailed assent to an answer written by the district court that directed the jury to apply the plain text of a jury instruction that accurately stated the statutory definition of "strangulation." The State has provided no authority to show Rivas-Valenzuela was under a duty to mitigate the prejudice of the district court's res gestae error, and absent the district court's error, Rivas-Valenzuela's assent to the answer would have been permissible.

could rely on to convict Rivas-Valenzuela if it was unsure of Tremaine's account. *Kotteakos*, 328 U.S. at 769. Without Foster's bad act testimony, the jury would have had to reconcile any reservations it may have had about Tremaine's testimony and may not have been able to conclude that Rivas-Valenzuela committed count 1 beyond a reasonable doubt.

Lastly, the district court did not give an instruction to the jury limiting the purpose for which it could use Foster's testimony. *See Berner v. State*, 104 Nev. 695, 698, 765 P.2d 1144, 1146 (1988) (concluding that the district court abused its discretion by admitting highly prejudicial prior bad act evidence without a limiting instruction). Although a limiting instruction was not mandatory if the evidence was proper res gestae evidence, *see* NRS 48.035(3), it was required if the evidence was admitted as bad act evidence. *See Berner*, 104 Nev. at 698, 765 P.2d at 1146. The failure to provide a limiting instruction is paramount when determining whether the improper admission of evidence was harmless. Without an appropriate limiting instruction, the admission of Foster's testimony created a pronounced risk that the jury would use it as propensity evidence. *See Old Chief v. United States*, 519 U.S. 172, 181 (1997) (providing that while propensity evidence may be relevant, "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, [the jury] will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance" (internal quotations omitted)). Overall, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [conviction] was not substantially swayed by the error . . . ." *Kotteakos*, 328 U.S. at 765.

Because Foster's testimony had a substantial and injurious effect or influence on the jury's verdict on the domestic violence by strangulation charge, this court must reverse Rivas-Valenzuela's conviction on count 1 and remand this case for further proceedings. Accordingly, this court

ORDERS the judgment of conviction AFFIRMED[17] on the domestic battery with substantial bodily harm charge, REVERSED on the domestic battery by strangulation charge, and REMANDS for proceedings consistent with this order.[18]

_____, C.J.
Gibbons

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[17]Rivas-Valenzuela's contention regarding the sufficiency of the evidence to support the bodily harm element of the domestic battery with substantial bodily harm conviction is unpersuasive because a reasonable juror could find each of the elements of the offense beyond a reasonable doubt, including that Tremaine's injuries established the requisite harm. *See* NRS 0.060 (defining substantial bodily harm); *LaChance v. State*, 130 Nev. 263, 271-72, 321 P.3d 919, 925-26 (2014) (holding physical suffering that lasts longer than the pain immediately resulting from the wrongful act establishes the requisite degree of harm to support a conviction for domestic battery causing substantial harm); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (stating it is the jury's function to assess the weight of the evidence). Therefore, the judgment of conviction for this offense is affirmed.

[18]This court is mindful that Kristina Tremaine was the victim of at least one senseless act of violence, and understands that remanding this case for further proceedings as to count 1 will be difficult for her. The State, however, made a last-minute change to the nature of its case without seeking to amend the charges, and instead, chose to offer new evidence as res gestae or bad act evidence.

BULLA, J., concurring:

I concur in reversing and remanding count 1 of Rivas-Valenzuela's judgment of conviction. I agree with the majority order that this court cannot conclude the district court's decision to admit testimony of the uncharged act of manual strangulation as res gestae was harmless. I also agree that the district court erred in its response to the jury's questions that a conviction under count 1 (domestic battery by strangulation) did not require a rope or rope-like object, when it did as charged, thereby depriving the defendant of a fair trial on count 1.

I write separately because I do not believe the district court abused its discretion in admitting all of Foster's testimony as res gestae, only part of it. In 1971, the Nevada Legislature codified the common law doctrine of res gestae into NRS 48.035(3). Nevertheless, courts, including the Nevada Supreme Court, often refer to the common law in deciding what constitutes res gestae evidence. In *Allan v. State*, which the supreme court cited with approval in the recent unpublished decision of *Sanchez*,[19] the court affirmed the district court's admission of res gestae evidence, concluding that, generally, "[t]estimony regarding [closely related uncharged acts] is admissible because the acts complete the story of the crime charged by *proving the immediate context of happenings near in time and place*." 92 Nev. 318, 320, 549 P.2d 1402, 1403 (1976) (emphasis added). Simply because a common law doctrine has been codified does not mean that the court is precluded from considering relevant precedent to interpret

[19]*Sanchez v. State*, Docket No. 77457 (Order of Affirmance, July 20, 2020) (affirming the admission of "res gestae or 'same transaction' evidence testimony regarding additional criminal acts because it complete[d] the story of the crime charged by providing the immediate context of happenings near in time and place" (alteration in original)).

the scope of the statute. Indeed, the opposite is true, as "this court strictly construes statutes in derogation of the common law," and it is "presumed" that the Legislature did not "intend to overturn long-established principles of law." *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016); *see also* 82 C.J.S. *Statutes* § 534 (2019) (explaining that "a statute in derogation of the common law cannot be construed as changing the common law beyond what the statutory language expresses . . . ." (footnotes omitted)).

NRS 48.035(3) allows evidence to be admitted as res gestae if "[e]vidence of another act or crime . . . is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or crime charged without referring to the other act or crime . . . ." While Foster never observed the charged acts that occurred inside the apartment, this is not dispositive of precluding the entirety of his testimony under the doctrine of res gestae. Indeed, the Nevada Supreme Court on several occasions, including within the last year, has not interpreted NRS 48.035(3) so narrowly as to preclude the admission of part of Foster's testimony as res gestae.

In this case, Foster heard a "commotion" in the apartment below (belonging to Rivas-Valenzuela), which "sounded like something being thrown against a wall." Thus, although Foster did not *observe* the charged acts inside the apartment, he arguably *perceived* some of the charged acts as they occurred. The parties do not dispute that this part of Foster's testimony was admissible. Further, neither party below or on appeal suggests that the court should have precluded Foster from testifying altogether.

Upon hearing the commotion, Foster made his way to Rivas-Valenzuela's apartment to see what was going on. He then heard language to the effect of "I'm going to kill you bitch." Foster then observed Rivas-Valenzuela punching Tremaine, placing his hands around her neck and pushing her out of his apartment. Foster's testimony not only showed the end of the interaction or "transaction" between the victim and the defendant, but also allowed Foster to complete the story of his involvement beginning with what he heard and ending with what he observed, which is consistent with the purpose of admitting evidence as res gestae, even as codified.

As the dissent points out, from the start of the charged crimes to the termination of the transaction between the victim and the defendant was likely only minutes. Thus, allowing Foster's testimony regarding what he witnessed as Tremaine exited the apartment completed the picture of what occurred on that day and "provid[ed] the immediate context of happenings near in time and place," specifically that Rivas-Valenzuela had violently attacked Tremaine. *Allan*, 92 Nev. at 320, 549 P.2d at 1403.

As a result, the district court admitted all of Foster's testimony as to what he observed occurring between Rivas-Valenzuela and Tremaine in the doorway of the defendant's apartment as res gestae. The State consistently argued that Foster saw the end of a strangulation, which included Rivas-Valenzuela "punching" Tremaine, putting "his hands around her neck," and "push[ing] her out of the apartment." Thus, the State

argued that Foster's testimony described the *last* transaction between the two on the day in question.[20]

I agree with the district court that part of Foster's testimony—"push[ing] her out of the apartment," for example— is arguably relevant to the "same transaction" or "complete story" principles that underpin the common law doctrine of res gestae. Foster's observations were arguably part of the same transaction, between the same two people, and at or near the same time and place. Therefore, I disagree that none of Foster's testimony as to what he observed in the doorway of the apartment could be admitted as res gestae. Further, although the district court is not required to give a limiting instruction for res gestae evidence, Rivas-Valenzuela could have requested one once the court decided to admit Foster's testimony regarding his observations as res gestae, but he chose not to do so.

Importantly, it appears that the State, by agreeing with the district court's decision to admit Foster's testimony regarding his observations in the doorway as res gestae, abided by the parameters of the doctrine and did not proffer his testimony to support counts 2 or 3.

So what is the concern? The problem is that part of Foster's testimony—"placing his hands around her neck"—describes an uncharged act of attempted strangulation. As such, it was simply too prejudicial to be admitted as res gestae, even though this part of his testimony was contemporaneous with his testimony of other uncharged conduct. *See, e.g., Sutton v. State*, 114 Nev. 1327, 1332, 972 P.2d 334, 336 (1998).

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[20]Based on Foster's testimony being admitted as res gestae, the State properly argued that what Foster observed was the tail end of one event—the first part of which occurred inside the apartment. This is a classic approach for addressing res gestae evidence.

Thus, even if part of Foster's testimony could have been admitted as res gestae, under the circumstances presented here, the court abused its discretion in admitting his testimony regarding the strangulation attempt because of the danger of the jury convicting Rivas-Valenzuela on count 1 based on this uncharged act.

The rationale for this is because the State was required to prove count 1 as charged, which necessarily required strangulation by means of a rope or rope-like object. The State's position on appeal that the amended information for count 1 set forth a general allegation of strangulation is not persuasive in that it does not encompass the *complete* charge—to wit the *means* by which the crime occurred—strangulation with a rope or rope-like object. Specifically, the State did not charge the crime of strangulation by any other means or even by unknown means, nor did it seek to amend the information to include manual strangulation. To reinforce this point: an indictment or information must state the "means by which the offense was accomplished or show the means are unknown." *Cf. Wright v. State*, 101 Nev. 269, 271, 701 P.2d 743, 744 (1985); *see also* NRS 173.075(2). A charging document may set forth alternative means of committing a crime. *Jenkins v. Fourth Judicial Dist. Court*, 109 Nev. 337, 849 P.2d 1055 (1993).

In this case, the prosecutor knew the content of Foster's testimony, albeit only days before trial, and indeed, the court conducted a hearing on the admissibility of his testimony. At or near that time, the State could have sought to amend its information for count 1 to include the Foster facts regarding the manual strangulation attempt prior to trial. *See* NRS 173.095(1) ("The court may permit an indictment or 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."). If there was a concern about the amendment being made too close to trial, because the defense was unaware of Foster's testimony until days before trial, thereby prejudicing the defense's ability to adequately prepare for trial, a brief trial continuance could have been granted.

Further, I disagree that we only need to determine that Foster's testimony could have been admitted as directly relevant to count 2 (or even count 3), *or* even as other bad act evidence, in order to conclude that it was not an abuse of discretion for the district court to have admitted Foster's testimony (even if for the wrong reason). First, by its very nature res gestae evidence is not relevant to any charged crime—because it involves uncharged conduct. Thus, it does not matter if Foster's testimony was somehow relevant to count 2 or count 3 (although arguably it may have proved exculpatory as to count 2). Further, there is no indication in the record that the State relied on Foster's testimony to prove counts 2 and 3. Therefore, logically, the potential relevance of Foster's testimony to other charged counts cannot be the basis for justifying the admission of his prejudicial testimony as res gestae. Second, because the State relied on the admission of Foster's testimony as res gestae, we cannot now affirm its admissibility based on other admissible bad act evidence. *See Bellon v. State*, 121 Nev. 436, 443-44, 117 P.3d 176, 180 (2005). Otherwise, the admission of the prejudicial part of Foster's testimony—the strangulation attempt he witnessed—that would typically be subject to a *Petrocelli*[21] hearing to determine if it was admissible as other bad act evidence, would be deemed admissible without the required hearing. Thus, affirming the admission of this part of Foster's testimony on appeal would be contrary to

[21]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

Bellon, even if independently there was sufficient evidence to convict. 121 Nev. at 445, 117 P.3d at 181.

Therefore, I concur that the district court abused its discretion in admitting Foster's testimony describing the uncharged act of manual strangulation as res gestae. I am confident that the district court would have had no problem parsing out Foster's testimony describing this uncharged act from the remainder of his observations admitted as res gestae. *Sutton,* 114 Nev. at 1332, 972 P.2d at 336.[22]

Unfortunately, the admission of the prejudicial uncharged act evidence in this case was not without legal consequence.

The record supports that the jury was confused as to precisely what proof was required to convict under count 1—and the court potentially contributed to this confusion by incorrectly advising the jury that a rope or rope-like object was not required, when based on the presentment of count 1 in the charging document it was. Specifically, before reaching its verdict, the jury asked the judge *twice* for instruction in order to clarify whether strangulation had to have occurred by using a rope or rope-like object, to which the judge replied "no" and then further advised the jury that it could consider any "evidence" of strangulation introduced during trial, which included Foster's testimony.

In fairness to both the district court and the State, the defendant arguably invited the error by not objecting to the court's

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[22]I would note that in *Sutton* the contraband that formed the basis of the charges were found in a freezer shed in the backyard, whereas the illegal prescription drugs that formed the basis for the evidence improperly admitted as res gestae, were found in Sutton's house. This arguably made the testimony regarding the unrelated prescription drugs easier to parse out from the charges at issue.

instruction to the jury, and indeed by affirmatively agreeing to it, which under certain circumstances could also be considered forfeiture. *See Turner v. State*, 136 Nev., Adv. Op. 62, 473 P.3d 438, 445 (2020). However, because the jury had already considered Foster's testimony during its deliberations before sending its questions to the judge, it would be difficult to conclude, even reviewing the judge's response under a plain error review, that Rivas-Valenzuela's substantial rights, including a fair trial on count 1, were not adversely affected by the court's error. Specifically, the court's improper instruction to the jury to consider "any evidence" of strangulation, including the prejudicial evidence improperly admitted as res gestae, may also have contributed to juror confusion when deliberating on count 1. As an aside, the district court would not permit the defendant to poll the jury regarding count 1 to determine if the individual jurors found that strangulation had occurred by using a rope or rope-like object in order to have ruled out whether the defendant was convicted based on uncharged conduct.

Based on the foregoing, I cannot conclude that Rivas-Valenzuela was not convicted based on the uncharged crime of manual strangulation as witnessed by Foster and, therefore, concur in reversing and remanding for a new trial on count 1. Mindful of the adverse effect this decision will have on the victim, I do not make it lightly.

_____, J.
Bulla

TAO, J., concurring in part and dissenting in part:

I would affirm on both Counts 1 and 3, and therefore respectfully concur in affirming the conviction on Count 3, but dissent with respect to Count 1 which I believe we must affirm. The majority reverses

the conviction on Count 1 because it characterizes the testimony of Howard Foster as improperly admitted "res gestae" evidence under NRS 48.035(3).

But the doctrine doesn't apply here. The majority's fundamental error is that it compares Foster's testimony to only the counts on which the jury returned a verdict of guilty, rather than all counts that were pending at trial. Rivas-Valenzuela was charged in an Amended Information with three counts, which recited as follows:

> COUNT I. DOMESTIC BATTERY BY STRANGULATION, a violation of NRS 200.485.2, 33.018, a category C felony, (54740) in the manner following, to wit:
>
> That the said defendant ALEX RIVAS-VALENZUELA, on or about July 14, 2019, within the County of Washoe, State of Nevada, did willfully and unlawfully use force or violence upon the person of KRISTINA TREMAINE a person with whom he has had or is having a dating relationship at 1800 Purdue Drive, #131, by strangulation, to wit: the defendant pushed KRISTINA TREMAINE to the ground, placed a rope or rope-like object around her neck and applied pressure to KRISTINA TREMAINE's neck and/or throat, intentionally impeding the normal breathing or circulation of the blood in a manner that created a risk of death or substantial bodily harm.
>
> COUNT II. COERCION CONSTITUTING DOMESTIC VIOLENCE, a violation of NRS 207.190 and NRS 33.018, a felony, (53159) in the manner following, to wit:
>
> That the said defendant ALEX VALENZUELA-RIVAS [*sic*] on or about July 14, 2019, within the County of Washoe, State of Nevada, did willfully and unlawfully, with the intent to compel KRISTINA TREMAINE, a person with whom he has had or is having a dating relationship, to do or

> abstain from doing an act which she has a right to do, use violence or inflict injury upon KRISTINA TREMAINE, to wit: the defendant did push and/or hold KRISTINA TREMAINE to the ground when she tried to get up and leave the premises of 1800 Purdue Drive, #131 and/or placed a rope or rope-like object around her neck and choked her when she tried to leave the premises of 1800 Purdue Drive, #131.
>
> COUNT III. DOMESTIC BATTERY WITH SUBSTANTIAL BODILY HARM, a violation of NRS 200.485(5) and NRS 33.018, a category B felony, in the manner following, to wit:
>
> That the said defendant ALEX VALENZUELA-RIVAS [*sic*] on or about July 14, 2019, within the County of Washoe, State of Nevada, did willfully and unlawfully use force or violence upon the person of KRISTINA TREMAINE, a person with whom he has had or is having a dating relationship, did push KRISTINA TREMAINE to the ground and/or place a rope or rope-like object around her neck and choked her, such force and violence causing substantial bodily harm to the victim, to wit, prolonged pain including difficulty swallowing and/or pain in the neck area that lasted longer than the pain immediately felt from the pushing and/or choking with the rope.

Rivas-Valenzuela was eventually acquitted of Count 2. But he was initially charged with distinctly different things: pushing the victim to the ground and strangling her inside the apartment (Counts 1 and 3), and then the separate act of pushing her and preventing her from leaving the apartment when she tried to get up and flee out the door (Count 2).

The evidence supporting these counts must be viewed in the light most favorable to the State. "This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of

the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Rather, we must view the evidence in the light most favorable to the jury's verdict, because that is how the jury must have viewed it when it decided the case. *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). Here, viewing the evidence that way, the victim testified that she was initially strangled with a ligature after being pushed to the floor inside the apartment. Foster, on the other hand, was standing outside of the apartment and saw only a later portion of the attack. During the preliminary hearing (which the district court reviewed when deciding admissibility), Foster testified to this: "I witnessed him [defendant] punching her [victim] and then strangling her with his hand and pushing her out the door." 1 JA 26. He also testified that "He [defendant] extended his hands and put them around the [gal's] neck and kind of like shook her and then shoved her out the door." 1 JA 30. During trial, Foster testified:

> [Foster:] So, I proceeded down the stairs, which is just a little bit farther past from where my door is there, and I saw Mr. Rivas and a young lady in a commotion against one another fighting. . . . After that—the striking of her, he had put his hands, like, around her throat area, shook her and more or less pushed her out the door.
>
> Q: Did you see any other type of altercation between them?
>
> A: Yes, sir.
>
> Q: What did you see?
>
> A: After that—the striking of her, he had put his hands, like around her throat area, shook her and more or less pushed her out the door.
>
> 3 JA 441-43.

* * *

[Cross-examination]:

Q: And then you come down the stairs—

A. Yes.

Q.—right? And you see a female in the threshold of Apartment 131. Is that right?

A. That's correct, sir.

Q. Okay. And at that time you see the female yelling at the male.

A. Yes, sir.

Q. And the male was standing further inside the threshold of that apartment, right?

A. That's correct, sir.

Q. And you then claim that you see the male punch the female. Is that right?

A. Yes, sir.

Q. And you don't know what hand it was, though?

A. No, sir.

Q. You then saw the male grab this female by the neck and push her out of the apartment. Is that correct?

A. Kinda shook her a little bit and pushes her out of the apartment.

Q. So, he shakes her and pushes her out.

A. With his hands around her neck, yes, sir.

Q. At any point did you see a rope around this female's neck?

A. No, sir.

Q. When you see the female, you notice that she has facial abrasions. Is that true?

A. Yes, sir.

3 JA 447-48.

> Q. Isn't it a fact that you didn't see what happened inside that apartment?
>
> A. That's correct.
>
> Q. You did not see Mr. Rivas tie a rope around Ms. Tremaine's neck, did you?
>
> A. No, sir.
>
> Q. You didn't see Mr. Rivas hold her down against her will, did you?
>
> A. No, sir.
>
> Q. And you didn't see him prevent her from leaving the apartment, right?
>
> A. No, sir.
>
> 3 JA 456.

Note the differences here. The victim testified that she was strangled with a ligature on the floor inside the apartment, while Foster saw the victim pushed and strangled with bare hands in the doorway (while possibly standing, but Foster was never asked to clarify the victim's body posture).

The majority concludes that because the two witnesses described two different acts, one must be excluded under NRS 48.035(3). But what the majority overlooks is: the difference in location. What the victim described initially happened on the floor inside the apartment, but what Foster saw happened later in the doorway. Viewing the evidence the way we're supposed to, what the victim describes supports Counts 1 and 3, but what Foster describes is the event separately charged in Count 2: namely, Rivas-Valenzuela's second attack in the doorway after the initial attack on the floor inside the apartment. This is exactly how the State characterized it during closing argument:

> And Howard Foster came down the stairs after he was cleaning that apartment, and he saw the tail end of *this* fight. He saw the defendant punch

> Kristina Tremaine. And he saw the same defendant, apparently he didn't finish off what he did on that floor, putting his hands around her neck. 4 JA 712. (emphasis added).

Thus, the State's theory was that Rivas-Valenzuela first attacked the victim with a ligature on the floor of the apartment (an act that Foster was not present to see), but then subsequently tried to "finish off what he did on that floor" when the victim moved to the doorway of the apartment. Consequently, Foster's testimony relates to a different act, but one that was specifically charged in Count 2. Rivas-Valenzuela was eventually acquitted of Count 2, but that does not mean that the evidence in support of it was never admissible for the jury to weigh and decide.

The doctrine of "res gestae" only excludes different acts that are both prejudicial and uncharged, not different acts that are actually charged together in separate counts in the same case. This is simply a mis-application of NRS 48.035(3) to wrongfully exclude an act that was specifically and separately charged, not an uncharged act at all. So this represents an improper use of NRS 48.035(3). But the majority goes on to cumulate its error by further concluding that:

> Here, the district court's error was not harmless because we cannot conclude the jury did not rely upon Foster's testimony to reach its guilty verdict on the domestic violence by strangulation charge.

(Order at page 21). But this errs by conflating the different counts of the Amended Information together (and ignores how the State described things during closing argument), essentially ignoring Count 2, and further it makes no sense when Foster's testimony was different than the victim's, both in whether a ligature was used as well as the location of the attack. If Foster's testimony truly related to Counts 1 and 3 rather than the separate act of Count 2, then it constituted exculpatory evidence that helped Rivas-

Valenzuela, not incriminatory evidence that prejudiced him, because it flatly contradicted the victim's description of the attack thereby rendering her less credible. The jury could not possibly have relied upon exculpatory evidence to convict, and therefore any error (if there was any) could not possibly have been harmful.

If anything, the jury likely relied upon Foster's testimony to acquit Rivas-Valenzuela of Count 2. Although Foster's testimony comes close to establishing Count 2, he does not say that the victim was either pushed to the ground, he does not say that she was strangled with a ligature, and his testimony only ambiguously shows that the victim was prevented from fleeing the apartment, suggesting instead that she was detained only momentarily but then pushed out of the door. Count 2 recites all three things. Thus, Foster actually demonstrates that the facts recited in Count 2 were partly true but partly inaccurate.

Far from being prejudicial, Foster's testimony is almost certainly the reason that the jury acquitted on Count 2. But for the differences between Foster's testimony and the victim's, there was no factual basis for the jury to acquit on any charge had it simply accepted the victim's testimony as true. The jury clearly believed the victim in part when it convicted on Counts 1 and 3 relating to the attack inside the apartment that Foster never saw. But then it acquitted on Count 2, the only portion of the attack that Foster witnessed. But for the fact that Foster described it differently, the jury could have simply believed the victim and convicted on all three counts; it possessed a basis to acquit on Count 2 only because Foster's testimony undermined and contradicted the victim's.

This isn't inadmissible incriminatory evidence at all. It's the exact opposite: Foster's exculpatory testimony is why Rivas-Valenzuela

stands convicted of only two felony counts rather than all three. Foster's testimony didn't prejudice Rivas-Valenzuela, it partially exonerated him. Yet the majority orders that Rivas-Valenzuela must be re-tried on Count 1 anyway, and without Foster's testimony the second time around. Maybe this makes no difference to the State anyway, because it can't retry Rivas-Valenzuela on Count 2 due to double jeopardy and Foster saw only the events of Count 2. So the State might not have needed Foster's testimony during a retrial on Count 1 in any event. But applying Foster's testimony correctly to the charges, there should be no retrial at all on any count, and we should simply affirm. Anything else is a complete misunderstanding and misapplication of NRS 48.035(3).

I.

The majority sees things differently. To figure out whether it's correct, let's put aside everything that the State said during trial and instead assume for a moment that the majority correctly characterizes Foster's testimony as supporting not Count 2, but rather some other additional uncharged crime. That doesn't fit what Foster describes, but put that aside and assume Foster is actually describing some third uncharged crime. Deeming that inadmissible under NRS 48.035(3) raises an even bigger problem.

The district court concluded that Foster's testimony met the requirements of "res gestae" under NRS 48.035(3). *See Bellon v. State*, 121 Nev. 436, 443, 117 P.3d 176, 180 (2005) (identifying NRS 48.035(3) as "the res gestae statute"). We need not agree with the district court's exact reasoning if we agree with the conclusion it reached; after all, we're supposed to affirm if the district court reached the right result even if for

the wrong reasons. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010). If Foster's testimony was admissible under any legal principle, then we must affirm regardless of which principle the district court adopted. So on appeal we have to consider all of the alternatives.

The doctrine of res gestae says this:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

NRS 48.035(3). Here, the entire attack lasted mere moments and occurred within a confined space. There's the initial attack inside the apartment represented by Counts 1 and 3, then the second attack moments later represented by Count 2, and then whatever the majority think Foster is describing. As described by the victim, it all happened within a span of moments; it didn't last hours while the defendant roamed all across the city but rather took minutes at best and everything occurred within a tiny apartment. We know this because that's how the victim described it at trial, plus she had "severe" ligature marks on her neck, and strangulation for more than ten seconds would have rendered her unconscious, while strangulation for four minutes would have left her dead. *See Strangulation Can Leave Long-Lasting Injuries*, Training Institute on Strangulation Prevention (Apr. 4, 2016, 10:06 PM), https://www.strangulationtraininginstitute.com/strangulation-can-leave-long-lasting-injuries/.

What's the consequence of surgically parsing out such a brief flurry of events into discrete events the way the majority does? The question becomes: Is one part of the same brief attack legally "another" different act from the same brief attack that occurred only seconds or moments earlier, and can the story of the last few seconds of the attack be told without mentioning the seconds that came earlier? Common sense says it can't be. When judicial rulings defy common sense, courts run the risk of losing their legitimacy. *See* Bruce Cannon Gibney, *The Nonsense Factory: The Making and Breaking of the American Legal System* (Hachette Books 2019).

Here, the majority concludes that the jury may hear about the attack inside the apartment, but it cannot hear Foster's description of how the attack finally ceased when the victim was pushed out the door. It can learn how the attack started but not how it ended. That's hardly a "complete" story of the crime, but only just an incomplete and interrupted beginning without an end. If I were a member of the jury, I'd certainly wonder what happened next, how the victim got away, and if any other witnesses saw anything. By photo-shopping Foster out of the picture, the majority limits the jury to an artificially contrived and incomplete version of events rather than the actual story of that day.

II.

Parsing out a single brief attack into discrete and independent "acts" falls into the trap of what philosophers call the "Sorites Paradox." *See* Dominic Hyde & Diana Raffman, *Sorites Paradox*, Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/sorites-paradox/ (last updated Mar. 26, 2018). The Paradox is a cousin of an idea known to every

law student as the "slippery slope." *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

The Paradox works this way. The law frequently strives to draw boundary lines between things that are acceptable and things that are not. Where the boundaries are sharp and objectively well-defined, it's easy to apply them to any set of facts. For example, when the law says that one must be 18 years old to vote, there is no vagueness; the line between who can vote and who cannot is perfectly obvious. Similarly, when the law says that a paper must be filed before ten days following a certain date, the line between papers filed timely or late is also simple and clear. When lines are that objective, it's easy to figure out whether any given situation falls on one side or the other.

But boundaries are not always that simple. When they are not, the Sorites Paradox identifies a type of false logic that can arise when one tries to differentiate between related terms that are inherently vague and subjective. Take words like "smooth" versus "rough," "blue" versus "green," or "young" versus "old"; when interpreting those amorphous terms, the paradox arises when one seeks to draw the boundary using a form of reasoning via step-by-step analogy. As an example, take the terms "young" and "old." Where does the line between them fall? Here's the Paradox in action. Begin with the premise that a one-year-old child is young rather than old. Just about everyone would agree with this. From this, reason that a tiny marginal increase, a single step, does not change the result, and therefore a two-year-old child is also young rather than old. So far, so good. The next conclusion is that a three-year-old is also young rather than old, and also a four-year-old, then a five-year-old, and so on and so on. If followed through to its logical conclusion, one ends up with the conclusion

that a hundred-year-old man is also young. Or, you can start with the premise that a one-hundred-year-old man is old and count down to the conclusion that a one-year-old child is also old. Either way we reach a conclusion that's obviously wrong, yet was deduced through a seemingly logical chain of reasoning.

That's the Sorites Paradox: a series of seemingly logical steps, each apparently sensible on its own, that collectively lead to the wrong result. Lawyers more commonly say that this kind of reasoning slides down a "slippery slope," but the idea is the same. It's illogic rather than logic. The right way to avoid the Paradox is to actually draw a line or define a term using the most objective definition you can come up with. *See* Volokh, 116 HARV. L. REV. at 1034-35 (explaining that one way to avoid the slippery slope argument is simply to draw principled distinctions, i.e., lines). The wrong way—the method that falls right into the Paradox—is to take one existing answer that seems correct and add an increment to it. That's exactly how the Paradox starts.

III.

The Paradox arises here because the law of res gestae relies upon courts drawing distinctions between multiple vague terms. Res gestae assumes the ability to differentiate one criminal "act" from "another" or "other" such "act." The premise of NRS 48.035(3) (as well as NRS 48.045, commonly referred to as the "other bad act" statute) is that different criminal "acts" should not be lumped together at trial in an unfairly prejudicial way. The language courts use is this. "Acts" that are "other" than the charged crime cannot be improperly coupled together prejudicially except in certain narrow circumstances. Such "other" acts must either be

charged together in the same charging document, or alternatively if one "act" is uncharged, then the uncharged "act" is only admissible in a trial of the charged "act" if the uncharged "act" is necessary to tell the complete story of the charged crime.

The words "act" and "other" are the terms that Legislatures and courts have long used. *See* NRS 48.035(3). But the problem is that, much like the words "young" and "old," they seek to define a boundary that is inherently amorphous, and in the hands of the unwary invite the false sophistry of the Sorites Paradox. It goes like this. The Nevada Supreme Court has held that criminal acts that occur on different days constitute "other" acts distinct from each other. *See, e.g., Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (concluding that appellant's conduct "several days before the killing . . . was evidence of 'other acts,' admissible under NRS 48.045(2) to demonstrate ill-will as a motive for the crime"). It has also treated acts that occur on different times and in different locations on the same day as distinct "other" acts. *See In re N.J.*, 134 Nev. 358, 358-61, 420 P.3d 1029, 1030-32 (2018) (evaluating the applicability of NRS 48.045(2) to a juvenile matter where appellant had challenged the victim to a fight at a different location earlier in the day of the charged battery, and also spat on the victim immediately after the charged battery). It follows that acts that occur at different times in the same location should also constitute "separate" or "other" acts. *See Fernandez v. State*, 81 Nev. 276, 278, 402 P.2d 38, 39 (1965) (concluding that "[e]vidence of appellant's conduct two days before his arrest. . . , at the same place, in a like manner and under similar circumstances is admissible to show motive, intent, identity, absence of mistake or accident, or a common scheme or plan").

From here, the Paradox begins to takes hold when you take one more step and conclude that acts that supposedly occur mere seconds apart in the same location during the same attack also constitute separate "other" acts. That may be true in situations where the supposedly separate "other" acts clearly constitute independent crimes. *Cf. In re N.J.*, 134 Nev. at 361, 420 P.3d at 1032 (noting that although appellant could have been charged for a second battery for the spitting that immediately followed the first, the district court nevertheless appropriately admitted evidence of the spitting under the governing juvenile statute because it was competent, material, and relevant). For example, the Nevada Supreme Court has held that a rapist can be separately charged with a different count of sexual assault for each act of penetrating the victim, even if they occur in rapid succession as part of the same encounter. *See* NRS 200.366(1) (identifying the unit of prosecution as a sexual penetration); *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) ("[S]eparate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions even though the acts were the result of a single encounter and all occurred within a relatively short time." (internal quotation marks omitted)).

But in those cases there's a line, because the Legislature defined the crimes that way. The problem arises when there is no such legislative line. If we accept that acts occurring a few seconds apart in the same location during the same attack constitute distinct "other" acts, the next step from that is to conclude that acts that are virtually simultaneous, mere milliseconds apart, can be separate and "other." And that's only one small increment from concluding that simultaneous acts in the same place—i.e., the same act—are actually somehow legally separate acts. It's the Sorites Paradox in action: every single step is only a tiny increment from

the step before and therefore apparently reasonable, but the totality of the chain itself ultimately leads to absurdity.

The limit to this kind of reasoning is that we're not supposed to base our decisions upon "hypertechnical division[s] of what was essentially a single act." *Townsend v. State*, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987) (concluding that defendant committed only one sexual assault when he lubricated the victim's genitals, removed his hand to apply more lubricant, and then penetrated the victim). The Legislature has also taken steps to avoid the Paradox by redefining certain crimes to explicitly capture acts that might otherwise be considered separate or "other." For example, it amended the robbery statute to cover a defendant's use of force several moments (or even many moments) after a theft if the use of force was to facilitate the defendant's escape with the property. *See* 1993 Nev. Stat., ch. 142, § 1, at 253. And even before that amendment, the supreme court held that a defendant's post-theft use of force, combined with the actual theft, "[wa]s all one transaction and constitute[d] robbery" because it aided the defendant in his attempt to prevent the property from being retaken. *Mangerich v. State*, 93 Nev. 683, 685, 572 P.2d 542, 543 (1977) (internal quotation marks omitted)

Here are some simple examples of this kind of false logic applied to other types of crimes. If a defendant punches a victim and then several moments later wrestles away her purse, would that constitute the single crime of robbery, or rather the "separate" crime of battery followed a second or two later by the "other" crime of larceny? If a defendant quickly fires two bullets at a victim a few seconds apart and the first bullet non-fatally wounds the victim and the second bullet kills him, how many crimes have occurred—only one murder, or one "separate" crime of battery with a deadly

weapon followed by the "other" crime of murder? If a defendant points a gun at someone, takes a moment to aim, and then fires, did he commit a single act of shooting the victim, or rather the separate acts of first aiming a firearm at a human being (itself a crime under NRS 202.290) followed by the separate act of pulling the trigger?

The question at stake here, then, is whether the events that Foster saw truly represent a different "other" act than described by others, or whether dividing his testimony represents a "hypertechnical division of what was essentially a single act." *Townsend*, 103 Nev. at 121, 734 P.2d at 710.

IV.

Philosophers have long debated solutions to the Sorites Paradox. *See, e.g.*, Terence E. Horgan & Matjaž Potrč, *Austere Realism: Contextual Semantics Meets Minimal Ontology* (Mass. Inst. of Tech. 2008) (invoking the susceptibility of vaguely defined objects to the Sorites Paradox in support of a metaphysical monism). The simplest solution is to actually draw objective lines rather than rely on the case-by-case application of pairs of contrasting words. Don't try to distinguish between "young" and "old"; say that those who are 18 or older fall on one side while those who are under 18 fall on the other side. Don't call something "long" or "short"; say that things that are over four feet fall on one side while things that are shorter fall on the other. Don't fall into the Paradox by applying the chain mindlessly just because the first step seems safe. If you're trying to distinguish between "young" and "old," then don't unthinkingly start with the premise that adding or subtracting one year makes no difference and

then follow that chain all the way to the conclusion that a 100-year old man is young or a newborn baby is old.

Here, we're stuck with amorphous terms. One act versus "another" act are, unfortunately, the words that Legislature and courts use. So we have no choice but to use them as well. If you're required to use such pairs of contrasting words, then the next solution is not to lose sight of the larger semantic context in which they operate. Any human action or event can be theoretically subdivided into infinity; but when dealing with crimes, we're supposed to stay on the level at which the Legislature and supreme court operate, not go down a rabbit hole into absurdity. Cocking an arm and throwing the punch might represent two different acts to a philosopher, but to any reasonable judge they're both just one act of battery. Maybe a philosopher can describe one act without describing the other, but to any juror, the story of cocking the arm makes no reasonable sense without knowing what happened next.

In this case, the victim testified that Rivas-Valenzuela violently strangled her with a ligature inside her apartment, and Foster testified that he saw Rivas-Valenzuela violently strangle her with his hands in the doorway of the apartment. Are these the same act remembered differently, or different "other" acts occurring separately?

In answering this, we don't need to consult a philosopher, because the supreme court has given us our answer: the standard of review on appeal is "abuse of discretion." *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). An "abuse of discretion" occurs when "no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). If there are two potentially reasonable answers to the question at hand, we must affirm.

And here, I don't know how anyone can reasonably say that there is only one possible answer to the question of whether portions of a single continuous violent attack occurring seconds apart in the same apartment between the same two people must be considered two different acts that each can be independently described without describing the other, or could instead be reasonably construed as one continuous act with each portion necessary to sensibly tell the full story of the other. Indeed, I would conclude that the fact that even phrasing the question requires so many descriptors and qualifiers is, itself, the answer: the law does not clearly, unequivocally, and unilaterally demand, with no possible alternative, that we view Foster's testimony as evidence of an "other" act rather than the same one. Without such an unequivocal demand, we have no choice but to affirm.

V.

There's another way to think about this. As an appellate court, we review the district court's treatment of "other" acts under the most deferential standard of review available, which is reversal only for "a manifest abuse of discretion." *Bigpond*, 128 Nev. at 117, 270 P.3d at 1250. That means we don't need to articulate our own clear definition; we need only permit district courts try to apply those vague terms in the first instance, and we reverse only those applications that are manifestly unreasonable even if we might not totally agree. Under that approach, no single clear definition is needed, because district courts have room to maneuver and we keep our hands off for the most part unless they apply it in a an extreme way. With deference, district courts don't need to always

get it precisely right or wrong; they need only be reasonable whether or not they are exactly right.

The alternative to this—if we just reverse what we think is wrong with no deference—requires that we come up with a clear definition ourselves, and that we publicly announce it so that every defendant, prosecutor, and district judge knows what it is. Either we have a clear definition or we don't. But we ought not act as if we do when we really don't. If we just reverse what we think is wrong without defining what that means, all we're doing is sowing confusion over something we ourselves can't explain. That's the literal definition of acting in a way that is arbitrary, capricious, and unpredictable. The law should never work that way. "Law, however, unlike science, is concerned not only with getting the result right but also with stability, to which it will frequently sacrifice substantive justice." Richard A. Posner, *The Problems of Jurisprudence*, Chapter 1: Law as Logic, Rules, and Science, p.51 (Harvard 1990). Anything and everything this court does in a criminal (as opposed to common-law) case must stem from law, meaning the neutral application of neutrally-derived principles to the facts determined below. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (explaining that judicial decisions must, when possible, rest upon reasoning and analysis which transcend the immediate result so that non-parties can know whether the holding extends to them); *see also United States v. Fidelity and Deposit Co.*, 895 F.2d 546, 554 (9th Cir. 1990) ("When crafting rules of law, appellate courts must attend to the very real problems of applying those rules in the crucible of litigation.") (Kozinski, J., dissenting).

Under the doctrine of stare decisis, appellate courts should not make rulings whose reasoning applies only to a single case and no other. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (doctrine of stare decisis "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'") (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (following general rules of law is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.").

Resolving criminal appeals on a case-by-case basis without neutrally applying neutral rules of law risks reducing this court into a "naked power organ" that just does what it pleases, when it pleases, and how it pleases, without any controlling or restraining principle; when in fact quite the opposite should be true and the ideals of stability, consistency, and predictability ought to sometimes trump the individual outcome of any particular appeal. *See Dickerson v. U.S.*, 530 U.S. 428, 444-55 (2000) (Scalia, J., dissenting) (judicial decisions should not be "an unconnected series of judgments that produce either favored or disfavored results"; rather, consistently applying rules that "make sense" is "the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy").

VI.

Either we apply deference or we don't. Either we clearly define what's "other" or we don't. But if we do neither of these things, then the reasoning we're left with is the trap of the Sorites Paradox.

True legal reasoning usually follows the IRAC form known to every law student: identify the issue (I), state the neutral rule (R), and then apply (A) that rule to the facts to reach a conclusion (C). Here, the issue is whether the doctrine of res gestae applies, and the majority concludes that it does. But what's missing is any neutral rule of law that generates that conclusion; in the IRAC, there's no "R" that links the "I" to the "C."

Simply announcing that one set of facts meets the test doesn't give any guidance to lawyers or lower courts, because all it says is this. Because prior supreme court opinions say that different events occurring on the same day can be "other," then it's a small step to conclude that different events occurring a few hours apart can be "other." Then, we take the next step and conclude that different events occurring a few minutes apart can also be "other." Then, to resolve the appeal at hand, we take the next step and conclude that different actions occurring a few seconds apart in the same location between the same two people can also be "other." Voila, reversal.

But this proves too much, because there's no logical reason the chain stops there. No rule of law says that the doctrine of res gestae sees any difference between days, hours, minutes, seconds, or fractions of seconds; indeed, that's the entire premise of Rivas-Valenzuela's argument, that seconds are as good as days. If we as an appellate court don't try to draw a boundary, then by definition there is no boundary. And if there is no boundary, then once we've established in this appeal that acts occurring

seconds apart can be "other," then in the next appeal we must (must, because there is no boundary) take it the next step and conclude that acts occurring mere milliseconds apart are also "other." That leads, ultimately, to the conclusion that events that occur simultaneously are actually "other." Alternatively, perhaps judges can invent some place to stop before that, but if there is such a stopping point, it's not one defined neutrally, but rather only where the majority thinks things become unfair. But without a neutral definition articulated in advance, the stopping point comes perilously close to just the idea that "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Potter, J., concurring). That approach tells district courts nothing about what to do in the next case with different facts or when they'll be affirmed or reversed in the future.

Without such boundaries, what we end up with is the Sorites Paradox: a chain in which every step is only a small and seemingly innocuous increment from the last, but leads eventually to nonsense. The act of pointing a gun is a different act than the act of pulling its trigger; each punch thrown in a bar fight is a separate act from every other punch; and at the extreme, the act of speaking a word is a separate act from the act of speaking the next word in the same sentence. What's the boundary? If what Foster saw is indeed distinct and "other" from what the other witnesses did, then if the boundary exists at all then it must exist in increments so small that they no longer make sense in the world of reality. Indeed, the case at hand is already far enough down the rabbit hole when we parse out different moments of one continuous attack and conclude that the district court "abused its discretion" and nobody in the universe could parse them out any differently.

VII.

I can't blame the majority for not trying to define those words; no other court has come up with a good definition either. But as a foundational principle, I would think that any result that demolishes common sense is one that must be wrong no matter how elegant the chain of reasons that led to it. And here, when everyone agrees that the crime arose from a single brief attack that lasted mere moments, concluding that the law demands (make no mistake, when we reverse for "abuse of discretion" we are saying the law demands a result and permits no other) Foster's testimony be excluded because it doesn't quite match other testimony doesn't make sense to me. We're just carving "hypertechnical division[s] of what was essentially a single act." *Townsend*, 103 Nev. at 121, 734 P.2d at 710.

But if the majority isn't going to even try to define what those words mean, then in the absence of a definition it cannot logically say, as a matter of legal reasoning, that the district court was either right or wrong in admitting the evidence under the doctrine. Concluding that the res gestae doctrine either applies or doesn't apply requires a clear definition of when it applies. Without one, we must conclude that the district court was necessarily not wrong, because there is no definition of what "other" means and there's nothing to be "right" or "wrong" about. So what we're left with is this: the only question before us is whether the district court acted unreasonably, meaning in a way that no other reasonable judge would have. *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5. Under the facts of this case, that's an easy call: there is nothing unreasonable (no "abuse of discretion") in admitting the testimony of one witness who saw a portion of the same

brief, seconds-long attack that the other witnesses saw and heard, even if he describes it somewhat differently.

VIII.

The most serious problem with this line of reasoning isn't the outcome it generates in this case. It's what it incentivizes lawyers and prosecutors to do in other cases.

Here, Rivas-Valenzuela argues that because what Foster saw could theoretically have been charged as an additional separate crime (an additional act of strangulation), it must be treated as an "other" uncharged act unnecessary to describe the first crime, even though it happened during the same brief and continuous attack. But this is taking hypertechnicality to the extreme. *See Townsend*, 103 Nev. at 121, 734 P.2d at 710 (1987) (courts are not supposed to break crimes into "hypertechnical division[s] of what was essentially a single act."). At first blush it seems to make sense to parse things out where one crime ends and another one begins. But think it through. Under this approach, each punch thrown in a bar fight cannot be mentioned while discussing other punches, because every punch could be separately charged as an independent battery. More, witnesses could not describe any verbal threats made during the fight if those could have been charged as independent acts of assault. This is the Sorites Paradox in full display: the majority's approach operates to treat a fight not as a single continuous melee forming one fluid event, but instead requires it to be broken down into the smallest constituent parts that could potentially have been charged as a crime. Thus, a one-minute bar fight isn't one event but rather a series of separate and independent micro-events, each lasting a

second, and each of which is unnecessary to describe the others—even though all of them happened one right after the other.

Following this logic, if a killer fires three bullets at his victim in rapid succession, only one of which is fatal, under the majority's theory each of the non-fatal shots cannot be part of the story of the fatal shot because each shot could have been charged separately as an independent count of battery and/or attempted murder. Indeed, any eyewitness would be prohibited from testifying that the killer brought a concealed weapon to the scene, because carrying a concealed weapon can be charged as a separate crime in Nevada. *See* NRS 202.350. Eyewitnesses also couldn't mention that the victim aimed first before pulling the trigger, as the act of aiming a firearm at a human being could have been separately charged. *See* NRS 202.290. So unless all of these crimes are separately charged, the only way to describe the murder becomes that the weapon suddenly appeared at the scene with no explanation, was never aimed, no verbal threats (which would be separate crimes of assaults) were ever uttered, and only the fatal shot was fired. Like a bar fight, killing a victim by bringing a concealed gun to the scene, threatening the victim, pointing the gun, and shooting him three times isn't one act of murder but rather a series of unconnected micro-events that cannot be described together even if they all happened within a few seconds: the first act of carrying a concealed weapon; the second act of uttering any verbal threat; the third act of aiming the firearm; two separate acts of attempted murder; the act of murder; the act of fleeing the scene; and the act of failing to report a body; none of which are necessary to tell the story of any other.

If this is how courts view the doctrine of res gestae, then think about what's being incentivized. Acts can always be referenced together if

they are charged together in the same charging document; NRS 48.035(3) only comes into play when the "other" act was uncharged. So if the prosecutor wants it in, the solution is simple: just charge it. When appellate courts sow confusion as to whether different acts will be considered part of the same story or not, or whether and when a district court's decision will be given deference, the simple solution is for prosecutors to charge everything—break the incident down into as many micro-crimes as they can think of, and charge them all, right down to the last one. Then, res gestae cannot apply and all acts are guaranteed to come in. If you're a prosecutor, don't charge a fistfight as a battery, because two judges of this court might not let in every punch or kick. Instead, guarantee that everything comes in by separately charging each and every punch, every kick, every push, every unwanted touch, every verbal threat, and every intimidating gesture. Make one crime into as many as you can come up with and heap them on. Likewise, don't charge a murder as just a murder, but heap on a different count for every individual gunshot, every individual knife stab, every threat, every gesture, every threatening wave, every touch. When everything is charged, then even judges of this court can't keep it all out under any rule of res gestae. The solution to the Sorites Paradox is to wildly overcharge every case, piling on as many counts as a prosecutor can creatively imagine; only then is the whole story guaranteed to come in.

Make no mistake: this is what the majority's reasoning encourages. If judges are going to break down a domestic violence attack this microscopically, then the State should do so as well—into as many micro-crimes as it can conceive—and charge it all, because prosecutors must try to anticipate what this court might later do on appeal.

And the cost of this is clear: gone are mercy and compassion. Before now, I wouldn't have wanted, much less encouraged, prosecutors to irresponsibly overcharge, nor do I think we ought to do so now. But that's where this is going. Surely a well-designed and humane criminal justice system shouldn't be designed to incentivize prosecutors to heap on every possible charge they can potentially envision in order to artificially squeeze in the whole story of an event, while punishing those prosecutors who show mercy by reversing their convictions on appeal based upon what they chose not to charge. That approach rewards exactly the wrong kind of prosecutor. But that's where this understanding of res gestae will lead: if courts think of single attacks as micro-crimes divisible into the briefest of seconds, then prosecutors must do so as well. They'd be remiss not to.

2020 has been an interesting year. We're living in an era of reckoning in which society is re-thinking the relationship between law enforcement and our citizenry. Maybe that reckoning is past due. But I doubt that the solution is to punish prosecutors who show the most compassion and reward those who show the least.

IX.

I would affirm on both Counts 1 and 3, and therefore respectfully concur in part and dissent in part.

Tao, J.

Tao

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk