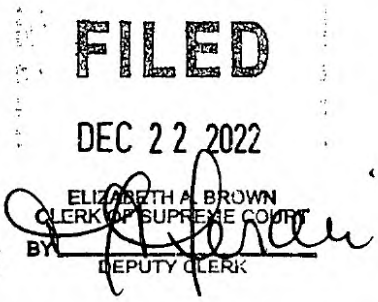
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AVERYAUNA CHEYENNE ENOCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83998-COA



ORDER OF AFFIRMANCE

Averyauna Cheyenne Enoch appeals from a judgment of conviction, pursuant to a jury verdict, of first-degree murder, child neglect and/or endangerment resulting in death, and destruction of evidence. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Enoch and Tyler Anderson met while in high school and began dating.[1] Thereafter, Anderson discovered he was the father to a baby girl, Cali, who was conceived during a previous romantic encounter and born on September 27, 2012. Enoch was described by a close friend as "upset" when she learned about Cali's existence. Anderson later obtained sole legal and physical custody of Cali, and Cali began to live with him and Enoch. The three moved to Woodland, California, where Enoch gave birth to her first child with Anderson.

Anderson's aunt, Maylene Duenas, visited Woodland to see Anderson and Enoch's newborn child. On one occasion, while Duenas was holding Enoch's newborn son, Cali excitedly ran to her. Before she could reach Duenas, Enoch shoved Cali to the ground and caused her to cry. When Duenas asked why she had shoved Cali, Enoch responded, "She was going to

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

hurt my baby boy." Following the birth of Enoch's first child, Enoch began suggesting that Anderson's family cared for Cali more than her biological son.

Duenas and Anderson's mother, Donna Howard, both noticed peculiar markings on Cali's face when they attended multiple family parties in 2015. At one party, Duenas noticed that Cali had fingernail marks on both sides of her face. At another family party, Duenas and Howard observed what appeared to be bruises on Cali's face. They additionally noticed that each time they saw Cali, she appeared to be getting thinner. On one occasion, Duenas was scolded by Enoch for feeding Cali.[2]

These troubling observations led Duenas to file a report with Child Protective Services (CPS) in California. A social worker practitioner with CPS visited Enoch and Anderson at their Woodland residence to follow up on this report; however, the investigation was inconclusive. In July 2017, following the CPS investigation, Enoch and Anderson moved to Reno with Cali and their son to distance themselves from Anderson's family. There, Enoch gave birth to the second of her and Anderson's biological children.

Following Anderson and Enoch's move to Reno, Anderson's family rarely saw Cali. When Howard visited to drop off a bassinet for Enoch's second child shortly after his birth in 2017, she noticed that Cali was absent. However, Howard was able to see Cali the following day when she met Cali and Anderson for lunch. Howard described Cali's appearance as sickly, adding that Cali was not as cheerful or lively as she typically was. Additionally, when a close friend of Enoch's visited her, she was able to see Enoch's two children, but she did not see Cali. This friend specifically

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[2]When Duenas began feeding Cali at one family party, Enoch said, "Don't feed her that. We don't want her to get fat."

recalled Enoch preventing her from using their guest bathroom because, according to Enoch, they kept their vicious dog in there. To explain her absence to visitors, Enoch claimed that she had been taking Cali to a 24-hour daycare center in Reno.[3]

On May 10, 2018, after living in Reno for several months, Anderson and Enoch drove to a Reno U-Haul facility where Anderson rented a van. On May 11, Anderson contacted an acquaintance, Joe Garcia, and asked if he could store some things in Garcia's Sacramento storage unit. Garcia accepted this request, and Anderson drove the van to Sacramento, followed by Enoch in her car. Garcia then escorted Anderson and Enoch to the storage unit in his red Oldsmobile.[4] Anderson proceeded to unload several boxes from the van and placed them in the storage unit. Meanwhile, Enoch remained in her car on a nearby street. After unloading the boxes, Anderson left the storage facility and Enoch followed him.

Garcia became concerned that the boxes unloaded by Anderson contained drugs, so he returned to the storage unit on May 15 to check their contents. Garcia opened a blue barrel to find a duffel bag that contained Cali's body, whereupon he immediately contacted law enforcement.

The following day, Anderson made a second trip to Garcia's storage unit and contacted Garcia to let him know. Garcia contacted law enforcement and Anderson was apprehended at the storage unit.

Detective Sergeant Ayers of the Sacramento Police Department interviewed Anderson at the police station shortly after his arrest.

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[3]Police investigation did not uncover evidence of Cali's presence at any of the 24-hour daycare centers in the area.

[4]A later search of Enoch's text messages revealed that she received a message from Anderson on this night instructing her to "[f]ollow red car."

Approximately two hours into the interview, Anderson requested to speak to his attorney. Pursuant to this request, Ayers ceased his questioning and left Anderson alone in the room. However, while Anderson was alone in the interview room and still being recorded, he stated, "I f***ing killed her."

On May 16, Detective Boyd—a detective with the Robbery-Homicide Unit at the City of Reno Police Department—interviewed Enoch regarding the investigation into Cali's death. After being confronted about Cali being found dead in the Sacramento storage unit, Enoch explained that she went to feed Cali a couple weeks prior and found her unresponsive.[5]

Pursuant to a search warrant, law enforcement performed a sweep of Enoch and Anderson's Reno apartment the night of May 16. In the guest bathroom, officers found and collected clumps of hair and a dog crate with a pair of handcuffs latched to it. DNA analysis revealed that the hair recovered belonged to Cali. Further, DNA obtained from the interior of the handcuffs also matched Cali's.

Dr. Jason Tovar, the Chief Forensic Pathologist for the Sacramento County Coroner's Office, performed Cali's autopsy on May 16. Tovar recorded that Cali, age 5, was 36 inches tall and weighed only 16 pounds, and it was noted that she was wearing a pajama onesie in size 18-months. Cali's height was in the third percentile for her age, and her weight was too low to be charted in accordance with Centers for Disease Control and Prevention guidelines. Tovar's initial observations indicated that Cali looked malnourished and frail, as her ribs were very pronounced. Tovar first

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[5]Enoch further explained that she attempted to perform CPR to resuscitate Cali, but she was too late. However, Cali's autopsy revealed no evidence that CPR was ever administered and there is no indication in the record that she sought medical assistance or other help.

conducted an external exam of Cali and found discoloration in the skin around her right arm, left arm, and her hip, which indicated that Cali suffered injuries to these areas prior to her death. The injury to Cali's hip was peculiar to Tovar, as it appeared to be consistent with a "pressure sore."[6] Tovar noted that this type of injury is common in elderly individuals confined to wheelchairs but not for young children.

Tovar weighed Cali's organs to compare them with the average weight of corresponding organs in children her age. Testimony of Tovar revealed that each of Cali's organs weighed significantly less than expected for a five-year-old female. The small size of Cali's thymus stood out to Tovar as particularly significant.[7] Cali's thymus, which is usually large in young children, seemed to have rapidly shrunk prior to her death. Tovar attributed the size of Cali's thymus to her nutritional status, which would have caused her significant physiologic stress leading up to her death. In his testimony, Tovar stated, "[S]eeing that thymus that small was an indication to me that, yes, this has been going on for a period of time . . . this didn't happen overnight." Additionally, Tovar highlighted Cali's low body fat, adding, "[t]hat's really - - you know, a big, red flag that there's something that's going

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[6]Tovar testified that a pressure sore is an injury "that happen[s] to the skin when you have prolonged pressure to [a] particular area. . . . [B]ecause the bone is pressed against the skin and the skin is laying on a surface for a prolonged period of time . . . it ends up causing that skin to have less blood flow because of the pressure and ultimately undergoes breakdown."

[7]The purpose of the thymus is to prevent the body from identifying itself as a foreign entity to prevent it from attacking itself. The thymus is typically very prominent and pronounced in children up to adulthood, and it slowly fades away as a person ages. Although children are expected to have a prominent thymus, certain conditions such as prolonged physiologic stress can cause the thymus to rapidly shrink.

on with this child to get to that point where you don't have those fat reserves on the muscles or in the abdomen inside or underneath the skin, it's a very severe state." Tovar estimated that Cali's physical deterioration occurred over a span of weeks or months. In his report, Tovar concluded that Cali's death was a homicide due to complications of malnutrition.

While Tovar did not give an approximate date of Cali's death, electronic device evidence recovered by law enforcement suggested her death occurred on April 26 or 27 of 2018. The night of April 26, Enoch used the Internet to search the term "CPR." Additionally, on April 28, Enoch's searches included "liquids that deteriorate," "acid," and "storage units."

Enoch and Anderson were charged with murder, child endangerment/neglect resulting in death, and destruction of evidence. Enoch and Anderson were initially charged as co-defendants. However, Anderson pleaded guilty to second-degree murder, leaving Enoch as the sole defendant. Following Anderson's guilty plea, the district court ordered the State to file a third amended information to remove references to Anderson as a co-defendant, though his name remained regarding his involvement as an aider and abettor and co-conspirator to Enoch. Enoch's counsel objected, stating, "Your Honor, just for the record, I want to maintain our objection to striking Mr. Anderson entirely from the Information." Enoch renewed this objection at a subsequent court appearance, stating, "Your Honor, we would just renew our objection to striking out Mr. Anderson's name as it's basically another defendant in this case."

Prior to Enoch's trial, the State filed a motion to admit prior bad acts evidence of Enoch's past abusive treatment of Cali. The State argued that this evidence was relevant to show motive and intent, as it went directly to the State's theory of the case: that Enoch despised Cali and believed

Anderson's family cared for Cali more than her biological children, which prompted her to torture and abuse Cali. The State further argued that the acts could be proven by clear and convincing evidence through the testimony of Duenas and Anderson, as well as through video evidence recovered from Enoch's phone. Finally, the State argued that the facts surrounding Cali's murder made the probative value of these prior acts extremely high and not substantially outweighed by the danger of unfair prejudice to Enoch.

In her opposition to the State's motion, Enoch argued that the State could not overcome the presumption of inadmissibility that applies to prior bad acts evidence. Enoch argued that the State could not prove these acts by clear and convincing evidence. Additionally, Enoch argued that because these past acts occurred in the years prior to Cali's death, they were not offered for a relevant non-propensity purpose, but rather to show that Enoch was a bad person.

Following an evidentiary hearing on this issue, the district court granted the State's motion to admit the prior bad acts evidence. The district court found that Enoch's prior acts were relevant to show her motive and intent in committing the charged crimes of murder and child neglect/endangerment. Additionally, the court found that the State proved such acts by clear and convincing evidence, as it found Duenas' testimony regarding the acts to be credible. Finally, the district court concluded that the probative value of these acts was significant and not substantially outweighed by the danger of unfair prejudice to Enoch. The court also ruled that it would give a limiting instruction to minimize any prejudicial effect.

During trial, counsel for Enoch introduced Anderson's statement: "I f***ing killed her." In the presence of the jury, and without laying a foundation for a hearsay exception, Enoch's counsel asked Detective

Ayers, "And when he was in that room he said I f***ing killed her," which the State interrupted with a hearsay objection before the detective could answer. Outside the presence of the jury, Enoch attempted to lay the foundation for the statement to be admitted as an excited utterance. Enoch argued that Anderson made the statement regarding Cali's death while under the stress and excitement of being arrested and taken into custody to be interviewed. The district court ruled that while Anderson's statement was spontaneous, it was not an excited utterance, and therefore did not qualify for admission under this hearsay exception. Accordingly, the district court instructed the jury "not to consider [the] statement during the course of [the] trial . . . [or] during the course of [its] deliberations."

Following a 15-day trial, the jury found Enoch guilty of all charges. As to count one, first-degree murder, Enoch was sentenced to imprisonment for a term of life with the possibility of parole in the Nevada Department of Corrections after a minimum of twenty years had been served. As to count two, child endangerment/neglect resulting in death, Enoch was sentenced to imprisonment in the Nevada Department of Corrections for a minimum term of eight years to a maximum term of twenty years, to run consecutively to count one. As to count three, destruction of evidence, Enoch was sentenced to imprisonment in the Washoe County Detention Facility for a term of 364 days, to run concurrently with count one. This appeal followed.

On appeal, Enoch presents this court with three issues: (1) whether the district court abused its discretion in ordering the State to amend the criminal information to strike references to Anderson as a direct perpetrator of the charged offenses after he pleaded guilty; (2) whether the district court abused its discretion in concluding that Anderson's recorded statement made while he was in the custody of the Sacramento Police

Department and alone in an interview room was inadmissible hearsay; and (3) whether the district court abused its discretion by admitting evidence of prior bad acts committed by Enoch. For the following reasons, we conclude that the district court did not abuse its discretion and therefore affirm.

The district court did not abuse its discretion in ordering the State to amend the criminal information to strike references to Anderson as a direct perpetrator of the charged offenses after he pleaded guilty

Enoch makes two arguments on appeal regarding the amendment to the criminal information. First, she argues that the district court erred by sua sponte ordering the State to file a third amended information to remove any references to Anderson as a co-defendant. Second, Enoch argues that this removal of Anderson as a co-defendant prejudiced her substantial rights by "making her the focal point of the crimes directly as the named sole perpetrator." The State contends that Enoch did not properly preserve the first issue for appeal. The State further argues that Enoch's failure to object suggests that this court should conduct a plain error review of this issue. Additionally, the State argues that, even if the district court's order was erroneous, Enoch has failed to demonstrate that such error prejudiced her substantial rights. The State supports this argument by explaining that the State's theory of prosecuting Enoch did not change following the amendment and no new or additional charges were filed against Enoch pursuant to the amendment. The State also argues that Enoch was still permitted to pursue her theory of defense by calling Anderson as a witness at trial, if she so chose, and questioning him regarding his conviction following his guilty plea. However, Anderson was never called as a witness.

Generally, this court reviews a district court's order to amend an indictment or information for an abuse of discretion. *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005). "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). Further, the failure to object below precludes appellate review of the matter absent plain error. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2019) (explaining that the court will not consider or correct a forfeited error absent a showing that the error is plain); *see also Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Additionally, a party's failure to object at trial to a matter on the specific grounds asserted on appeal "is generally insufficient to preserve the claimed error for appellate review unless it rises to plain error affecting substantial rights." *Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485 (2006) (internal footnotes omitted). "The decision whether to correct a forfeited error is discretionary," *Jeremias,* 134 Nev. at 52, 412 P.3d at 49, and an appellant bears the burden of demonstrating plain error, *see Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005).

With regard to Enoch's first argument, that the district court abused its discretion in sua sponte ordering the State to file the third amended information without a motion before it, we disagree. The State argues that Enoch's objection at trial was insufficient to preserve this exact issue for appeal and we should review for plain error. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." *Green*, 119 Nev. at 545, 80 P.3d at 95.

Under NRS 173.095(1), "[t]he 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." Pursuant to this statute, the district court generally cannot amend a criminal information without a motion from the State, but it may order the amendment sua sponte if the issue of amendment is raised by one of the parties in the pleadings. *Grant v. State*, 117 Nev. 427, 433, 24 P.3d 761, 765 (2001).

While Enoch argues that the district court unilaterally ordered the information to be amended without any request from the State, the record on appeal is insufficient to determine whether the State made a motion to amend or otherwise raised the issue in its pleadings. On the first day of Enoch's trial and after Anderson had pleaded guilty to second-degree murder, the district court stated:

> We talked about amending the Information in this case. Here's my ruling on this. Mr. Anderson is out of the Information, the way it's going to be read to the jurors – unless the parties stipulate that it's okay in certain places to mention him – but for this Court's purposes, he's out . . . . Ms. Kossow, I'm ordering the State to file a Third Amended Information consistent with this Court's ruling . . . . This Court's sense about that is it doesn't need to be in there. He's not on trial. And that's just the aiding and abetting as to him.

While the district court's language may suggest this order was given pursuant to a motion by the State, the prior discussion referenced by the district court regarding amending the information is not included in the parties' appendices. In fact, Enoch concedes that this conversation is not included in the record on appeal, but does not indicate that it was unavailable to her to transmit as part of the record. "If such material is not contained in the record on appeal, the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary." *Riggins v. State*, 107 Nev. 178, 182, 808 P.2d

535, 538 (1991), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127, 138 (1992). Thus, from a review of the record, we cannot conclude that the district court sua sponte ordered the State to amend the information to exclude Anderson, therefore plain error review applies, and Enoch has not shown error, plain or otherwise on this claim.

Further, Enoch has failed to demonstrate that any such error by the district court in allegedly issuing a sua sponte order affected her substantial rights, as she was still able to present her theory of the defense and to call Anderson as a witness at trial if she chose, which she did not do. Finally, Enoch failed to request a review of this issue for plain error on appeal, as she incorrectly asserts that plain error is not applicable. Thus, we decline to consider the issue further. *Jeremias,* 134 Nev. at 52, 412 P.3d at 49; *Miller*, 121 Nev. at 99, 110 P.3d at 58.

We review Enoch's second argument, that the removal of Anderson as a co-defendant prejudiced her substantial rights by "making her the focal point of the crimes directly as the named sole perpetrator," for an abuse of discretion, as this was the basis of her objection below, which is preserved for review. *See Viray*, 121 Nev. at 162, 111 P.3d at 1081 (a district court order to amend an information is reviewed for abuse of discretion).

We first note that Enoch has not cited any relevant authority showing error in this context, and we need not consider her argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Second, amending an information is not improper unless a criminal defendant suffers prejudice affecting substantial rights. This occurs where amending the information alters the State's theory of prosecution. *See State v. Eighth Judicial Dist. Court*, 116

Nev. 374, 378, 997 P.2d 126, 129 (2000) (concluding that the State's delay in amending the information to include an additional theory that the defendant aided and abetted the murder of the victim prejudiced the defendant's substantial rights). Additionally, amending the information prejudices a defendant's substantial rights where it negates the defendant's theory of defense. *Green v. State*, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978).

In contrast, amending the information does not prejudice a defendant's substantial rights where the amendment does not add new charges and the defendant has notice of the State's theory of prosecution. *Grant*, 117 Nev. at 433-34, 24 P.3d at 765; *Viray*, 121 Nev. at 162-63, 111 P.3d at 1082. While this jurisdiction has not examined whether amending the information to remove a former co-defendant prejudices the substantial rights of a defendant, other jurisdictions have ruled on this issue. For example, in *Forney v. State*, the Supreme Court of Indiana approved amending the charging information to remove references to Forney's co-defendant where both were initially charged with felony murder. 742 N.E.2d 934, 939 (Ind. 2001). Forney argued that this amendment prejudiced his substantial rights because it "served to diminish [his former co-defendant's] role, if any, in the incident." *Id.* (internal quotation marks omitted). Despite Forney's contention, the court concluded that the amendment did not prejudice Forney's substantial rights. *Id.*

Enoch suggests that removing Anderson from the information as a co-defendant prejudiced her substantial rights by making her the focal point of the charged crimes. However, she was always charged as the principal actor and the State did not add new or different charges or theories against Enoch in the third amended information. Additionally, Enoch had adequate notice of the State's theory of prosecution against her. Prior to

Anderson's removal as a co-defendant, the State's theory of prosecution was that Enoch despised Cali for not being her biological daughter, and that this disdain prompted her to abuse and torture Cali, resulting in Cali's death. The State maintained its theory of the case against Enoch even after Anderson was removed from the information as a co-defendant. Therefore, Enoch had adequate notice of the State's theory of prosecution to allow her to prepare her defense.

Finally, the amendment did not prevent Enoch from presenting her theory of defense. Instead, Enoch was still permitted to point out Anderson's role and his conviction for second-degree murder. The district court also permitted Anderson to be called as a witness at trial. For these reasons, we conclude that the district court's ordering the State to file the third amended information did not prejudice Enoch's substantial rights in accordance with Nevada law. *Grant*, 117 Nev. at 433-34, 24 P.3d at 765; *Viray*, 121 Nev. at 162-63, 111 P.3d at 1082. Accordingly, we conclude that the district court did not abuse its discretion in allowing a third amended criminal information to redact Anderson as a co-defendant.

The district court did not abuse its discretion in concluding that Anderson's statement, made while in the custody of the Sacramento Police Department and alone in an interview room, was inadmissible hearsay

According to Enoch, Anderson's statement made while alone in the Sacramento Police Department interview room constituted a classic excited utterance and, therefore, it should have been admitted by the district court. Enoch suggests that Anderson's *arrest* was the startling event for this inquiry and that his statement, "I f***ing killed her," was made while under the stress of his arrest. In support of this contention, Enoch argues that custodial interrogations are agitating and inherently coercive. Enoch cites to *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006), to illustrate

that the relevant inquiry for determining whether a statement is admissible as an excited utterance is whether the declarant made the statement while under the stress of the startling event. Enoch further asserts that, because NRS 51.095 contains no express time requirement, the Nevada Legislature did not intend to limit the statute's application to statements made within a certain time of the startling event. She also relies on *Rowland v. State*, 118 Nev. 31, 43, 39 P.3d 114, 121 (2002), to argue that Anderson's statement should have been admissible as an excited utterance because it was made shortly after his arrest.

Conversely, the State argues that the facts do not support the idea that Anderson's statement should have been admitted as an excited utterance. The State distinguishes the facts of this case from *Medina* by pointing out that the time which elapsed between Cali's murder and Anderson's statement was far greater than that between the startling event and statement admitted in *Medina*. Even if Enoch is correct in claiming that the exciting event for purposes of the excited utterance inquiry is Anderson's arrest, the State maintains that Enoch's argument fails because Anderson did not exhibit any behavior which suggested he was still under this stress and excitement during and following his interview. The State further argues that it would have been improper to admit Anderson's statement because it would likely have misled the jury in their deliberations, as Anderson also made several statements that contradicted the statement which Enoch sought to admit. Finally, the State argues that, even if the district court erred in precluding the admission of Anderson's statement, the error should be considered harmless in light of the overwhelming evidence of Enoch's guilt.

A district court's decision to admit or exclude hearsay evidence is reviewed for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008); *see also Jackson*, 117 Nev. at 120, 17 P.3d at 1000 ("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.").

An out-of-court statement that is offered to prove the truth of the matter asserted constitutes hearsay and is inadmissible unless it falls within a recognized hearsay exception. NRS 51.035; NRS 51.065. One such exception applies to statements qualifying as an excited utterance, which is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." NRS 51.095. As the Nevada Supreme Court explained in *Medina*:

> The proper focus of the excited utterance inquiry is whether the declarant made the statement while under the stress of the startling event. The elapsed time between the event and the statement is a factor to be considered but only to aid in determining whether the declarant was under the stress of the startling event when he or she made the statement.

122 Nev. at 352, 143 P.3d at 475. Courts may rely on testimony as to the appearance and demeanor of the declarant to aid their conclusion as to whether a statement qualifies as an excited utterance. *See id.* at 353, 143 P.3d at 475 (concluding that the district court correctly admitted the statement of the victim of rape made to a witness who observed the victim exhibiting physical signs of being raped); *see also Dearing v. State*, 100 Nev. 590, 592, 691 P.2d 419, 420 (1984) (explaining that a statement was properly admitted as an excited utterance where the declarant was agitated and nervous when speaking).

In *United States v. Alarcon-Simi*, 300 F.3d 1172, 1174 (9th Cir. 2002), the defendant sought to introduce a statement he made to a special agent following the defendant's arrest for bank fraud. The defendant argued that this statement was an excited utterance because it was made following the startling event of being arrested. *Id.* at 1175. However, the Ninth Circuit concluded otherwise, reasoning that the defendant's statement to the special agent "did not relate to any incident that occurred at the time of his arrest. Instead, it related to earlier events." *Id.* at 1176. For this reason, the court held that the district court did not abuse its discretion in finding that the statement was not an excited utterance. *Id.*

Here, the district court properly acted within its discretion when it determined that Anderson's statement was not admissible as an excited utterance. Although Enoch insists that Anderson was in a state of stress because custodial interviews are inherently coercive, he did not exhibit behavior that indicated he was under any stress or excitement. Rather, Detective Ayers—who conducted Anderson's interview following his arrest—described Anderson as calm and stoic. Enoch is correct in her assertion that the proper focus in the excited utterance inquiry is whether the declarant remained under the stress and excitement of the startling event. *Medina*, 122 Nev. at 352, 143 P.3d at 475. However, the authority she cites for support discusses different factual circumstances than are present here. In this case, Anderson's statement was made five days after hiding Cali's body in a storage unit and nearly three weeks after Cali's approximate date of death. *Cf. Medina*, 122 Nev. at 349, 143 P.3d at 473 (concluding that the victim's statement regarding being raped was admissible as an excited utterance when the statement was given the day after the rape occurred); *Rowland*, 118 Nev. at 43, 39 P.3d at 121 (concluding that the declarant's

statement regarding the murder of a prison inmate was admissible as an excited utterance where the statement was made within 45 minutes of the declarant participating in the inmate's murder).

Enoch attempts to decrease this disparity in time by arguing that the startling event related to Anderson's statement was his arrest, and not Cali's death. We are not persuaded. Like the declarant in *Alarcon-Simi*, Anderson's statement did not relate to any incident occurring at or near the time of his arrest. 300 F.3d at 1176. Instead, Anderson's statement related to the earlier event of Cali's death. But even if we only considered the circumstances surrounding the arrest and interview, Enoch has not demonstrated sufficient facts to establish error. For these reasons, we conclude that the district court did not abuse its discretion in precluding the admission of Anderson's statement as an excited utterance at trial. We need not reach the issue as to whether Anderson's statement could have been admitted under another hearsay exception because only the excited utterance exception is at issue here. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (explaining that, on appeal, the court relies on the parties to present the issues for decisions).

Even if we assume that the district court abused its discretion in precluding this statement, we conclude that any such error was harmless. Under NRS 178.598, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Here, there was an overwhelming amount of evidence supporting Enoch's guilt. Video evidence from Enoch's phone and testimony from her friends and family indicated that Enoch had mistreated and abused Cali. Cali's DNA was found on the inside of a pair of handcuffs that were latched to a dog crate in Enoch's guest bathroom to which Enoch excluded guests from using. Evidence further

showed that Enoch had been withholding food from Cali. Cali weighed only 16 pounds when her body was recovered from the storage unit. Several areas of discoloration on her body suggested that Cali sustained multiple physical injuries prior to her death.

Furthermore, all of Cali's organs were below the average weight for her age. Her thymus had rapidly shrunk prior to her death, suggesting that her nutritional health was remarkably insufficient. Tovar's testimony suggested that Cali was experiencing significant physiological stress from these changes for a period of weeks or months leading up to her death. Following the date of Cali's estimated death, Enoch's internet history revealed searches for "liquids that deteriorate," "acid," and "storage units." Enoch was seen accompanying Anderson to purchase a U-Haul van to drive Cali's body to Sacramento and seen following Anderson to Garcia's storage unit where he placed Cali's body. Additionally, Enoch made several admissions, including that she found Cali unresponsive on one occasion when she went to feed her. Because the evidence of Enoch's guilt in this case was overwhelming, we conclude that any error by the district court regarding hearsay evidence was harmless. *See Green*, 119 Nev. at 548, 80 P.3d at 97.

The district court did not abuse its discretion by admitting evidence of prior bad acts committed by Enoch

Following an evidentiary hearing on the matter, the district court granted the State's motion to admit evidence of prior bad acts committed by Enoch. Specifically, these prior bad acts included evidence of fingernail marks observed on Cali's face on two occasions, evidence of Cali's substantial weight loss, an instance of Cali being shoved by Enoch, and video evidence of Enoch disciplining Cali. Enoch argues that the prior bad acts evidence admitted by the district court falls within parental privilege and cannot be considered relevant to establish motive or intent for her murder

and child endangerment/neglect charges. Enoch persists in her contention, raised at trial, that the prior acts were not admitted for a relevant, non-propensity purpose, but to portray her in a negative light. Further, Enoch argues that these prior bad acts have little, if any, relevance because they occurred so remote in time from Cali's death. On the other hand, the State argues that the prior bad acts in question were relevant to determining whether Enoch's punishment of Cali is more appropriately characterized as abuse or discipline. The State similarly contends that the prior acts are relevant because they go directly to Enoch's motive and intent in committing the charged crimes. Finally, the State avers that, even if the district court erred in admitting Enoch's prior bad acts as evidence, the error should be considered harmless because there was overwhelming evidence supporting Enoch's guilt.

"[A] district court's decision to admit or exclude evidence [is reviewed] for an abuse of discretion." *Mclellan*, 124 Nev. at 267, 182 P.3d at 109; *see also Jackson*, 117 Nev. at 120, 17 P.3d at 1000 ("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.").

NRS 48.045(2) provides that, "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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, [or] intent." The admission of prior bad acts evidence is generally disfavored because it is often irrelevant and prejudicial, *Rhymes v. State*, 121 Nev. 17, 21, 107 P.3d 1278, 1280-81 (2005), and carries with it a risk that jurors may improperly look upon it as proof of the defendant's bad character. *Walker v. State*, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000) ("The principal concern

with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because the jury believes the accused is a bad person."). For this reason, evidence of prior bad acts is "presumed to be inadmissible, and the State bears the burden of requesting the admission of the evidence and establishing its admissibility." *Rhymes*, 121 Nev. at 21, 107 P.3d at 1281.

In *Bigpond v. State*, 128 Nev. 108, 116-17, 270 P.3d 1244, 1249 (2012), the Nevada Supreme Court highlighted that prior bad acts evidence is admissible only if, outside the presence of the jury, the trial court determines that "(1) the evidence is relevant to the crime charged, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." The Nevada Supreme Court previously determined the relevance of prior bad acts of a parent regarding charges for child abuse in *Newman v. State*, 129 Nev. 222, 232, 298 P.3d 1171, 1179 (2013) (stating that a parent's history of disciplining their child can be the "most probative evidence" in determining whether a particular punishment amounts to child abuse (internal quotation marks omitted)).

Here, the district court did not abuse its discretion in admitting the evidence of fingernail marks observed on Cali's face on two occasions, evidence of Cali's substantial weight loss, an instance of Cali being shoved by Enoch, and video evidence of Enoch disciplining Cali. In granting the State's motion to admit evidence of these prior acts, the district court found that the State had satisfied each factor set forth in *Bigpond*. The district court found that these acts were relevant to show Enoch's motive and intent in committing the charged crimes of murder and child neglect/endangerment. The district court rejected Enoch's contention that the incidents were not

relevant because they occurred in the years prior to Cali's death because the cause of Cali's death was prolonged malnutrition and neglect. The district court also found that the State proved such acts by clear and convincing evidence, as the district court found Duenas' testimony regarding the acts to be credible. Finally, the district court found that the probative value of these acts was significant and not substantially outweighed by the danger of unfair prejudice to Enoch.

Additionally, the district court properly instructed the jury regarding the limited purposes for which it could consider this evidence. *See Summers v. State*, 122 Nev. 1326, 1333-34, 148 P.3d 778, 783 (2006) (recognizing "that jurors are intellectually capable of properly following instructions regarding the limited use of prior bad act evidence"). Enoch still insists that the admitted prior bad acts fall within parental privilege. The State argues that because Enoch did not raise this defense in her opposition to the State's motion to admit the prior acts heard below, we should decline to consider the issue on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal"); *see also State v. Taylor*, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998) ("Generally, failure to raise an issue below bars consideration on appeal."). We agree and decline to consider Enoch's argument in this regard, but we would also note that the bad acts evidence would be relevant in evaluating parental privilege even though there is no "parental privilege" codified under Nevada law.[8]

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[8]While a number of states have codified the defense of parental privilege, Nevada has not. In Nevada, parental privilege exists only by virtue of common law. *Newman*, 129 Nev. at 232, 298 P.3d at 1178. However, as noted above, this privilege does not protect a parent's history of disciplining

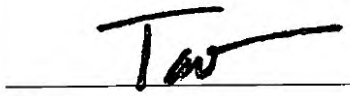
Therefore, because the district court properly applied the *Bigpond* analysis in admitting the evidence of Enoch's prior bad acts, we conclude that the district court did not abuse its discretion.

Even if we assume that the district court abused its discretion in admitting this evidence, any such error was harmless. Under NRS 178.598, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." As indicated above, the evidence of Enoch's guilt was overwhelming. For this reason, any error regarding the admission of prior bad acts was harmless. *See Green*, 119 Nev. at 548, 80 P.3d at 97.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

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

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his or her child when determining whether the parent's actions should be classified as discipline or abuse. Therefore, even if Enoch's argument is considered on the merits, the alleged parental privilege would not protect the admission of Enoch's prior acts.