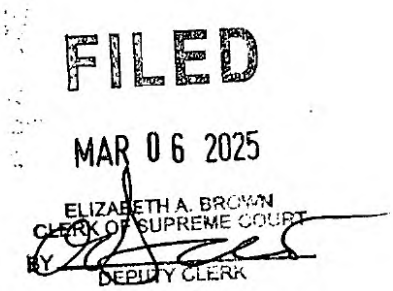
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE JENNIFER L. SCHWARTZ, DISTRICT JUDGE,
Respondents,
and
JOVAHN BANKHEAD,
Real Party in Interest.

No. 90113



ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This emergency petition for a writ of mandamus or prohibition challenges a district court order granting real party in interest's request to use jury instruction 18 in his criminal trial. Although we now enter this order to resolve the petition expeditiously, as necessitated by the trial currently underway, a published opinion will follow at a later date. *Cf. State v. Robles-Nieves*, 129 Nev. 537, 540 n.1, 306 P.3d 399, 402 n.1 (2013).

Real party in interest Jovahn Bankhead is on trial for assault with a deadly weapon under NRS 200.471, based on allegations that he approached the victim's residence, pointed a firearm at the victim, and told the victim to come outside. Upon Bankhead's request and over the State's objection, the district court agreed to provide jury instruction 18, which states as follows:

> For Assault with a Deadly Weapon, the State must prove beyond a reasonable doubt the Defendant

> had the present ability to use a weapon, and that the weapon was both loaded and operable.
>
> If you find that the State did not prove beyond a reasonable doubt that that Defendant had the present ability to use a weapon, and that the weapon was both loaded and operable, then you must find the Defendant not guilty of Assault with use of a Deadly Weapon.

The State has filed this emergency petition for a writ of mandamus or prohibition challenging this instruction as an inaccurate statement of the law. The State filed a supplemental appendix containing the district court's written order; Bankhead has filed an answer, as directed; and the State has filed a reply.

Under the circumstances, the State has no adequate remedy at law and this matter is properly before us on writ petition. *State v. Second Jud. Dist. Ct. (Radonski)*, 136 Nev. 191, 194, 462 P.3d 671, 674 (2020) (citing *State v. Second Jud. Dist. Ct. (Garcia)*, 108 Nev. 1030, 1034, 842 P.2d 733, 735-36 (1992)). A writ of mandamus may issue to correct a manifest abuse or arbitrary or capricious exercise of discretion.[1] *Id.*; *see also Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 819-20, 407 P.3d 702, 706 (2017) (recognizing that mandamus relief also may be warranted when the district court has committed clear legal error). While settling jury instructions is within the district court's discretion, whether a jury instruction accurately states the law is subject to this court's de novo review. *Berry v. State*, 125

[1]The State properly seeks mandamus, rather than prohibition, in this instance. *Radonski*, 136 Nev. at 194 n.1, 462 P.3d at 673 n.1. Thus, we do not further consider the State's request for a writ of prohibition.

Nev. 265, 273, 212 P.3d 1085, 1091 (2009), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010).

Jury instruction 18 is based on the 1977 case *Loretta v. Sheriff, Clark County*, in which this court recognized that, to show probable cause for assault with a deadly weapon, the State must "submit evidence of [the defendant's] 'present ability' to use a 'loaded' weapon." 93 Nev. 344, 345, 565 P.2d 1008, 1009 (1977) (citing *State of Nevada v. Napper*, 6 Nev. 113, 115 (1870)). As the State argues, however, the assault statute, NRS 200.471, has changed significantly since 1977, such that *Loretta* no longer applies.

When *Loretta* was decided, NRS 200.471 defined assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." 1971 Nev. Stat., ch. 612, § 2, at 1384. Thus, a "mere menace" or threat to injure was insufficient; instead, the State had to show "an effort to carry the intention into execution." *Wilkerson v. State*, 87 Nev. 123, 126, 482 P.2d 314, 316 (1971). These requirements, in turn, meant that, when a firearm was used as the deadly weapon, the State had to show that the defendant could actually use the firearm to injure the victim—that the firearm was both loaded and operable.[2] *Napper*, 6 Nev. at 115 (recognizing that a deadly weapon for assault purposes is a "weapon deadly either in its nature, or capable of being used in a deadly manner," and that to show "both the ability and intention to assault [with a deadly

[2]These cases do not involve a situation where a firearm was used in circumstances suggesting some other means of harm, such as to inflict a blunt force injury.

weapon]," the State must show that the deadly weapon—in this case, a pistol—was loaded and operable).

The legislature significantly amended NRS 200.471 in 2001. The statute today provides that "'Assault' means: (1) Unlawfully attempting to use physical force against another person; or (2) Intentionally placing another person in reasonable apprehension of immediate bodily harm." NRS 200.471(1)(a); *see* 2001 Nev. Stat., ch. 216, § 1, at 986 (redefining assault under what is now the subsection 1(a)(2) language). The amendment in 2001 was intended to, and did, remove the requirement that the defendant have a "present ability" and intent to injure another. Hearing on A.B. 344 Before the S. Judiciary Comm., 71st Leg. (Nev., May 3, 2001), at 7 ("[T]he current law does not take into account the intent to cause fear; Assembly Bill 344 attempts to close this loophole by including new, additional language." (statement of Assemblyperson and bill sponsor Bonnie Parnell)); *see generally People v. Lattin*, 328 Cal. Rptr. 3d 241, 255 (Ct. App. 2024), *review filed* (Jan. 21, 2025) (describing the historical split between states that require a present ability to commit a battery and those that, like the civil tort of assault, require only an intent to frighten and not the present ability to batter). Thus, as the statute currently stands, under subsection 1(a)(2), a mere fear of immediate injury, intentionally caused by the defendant and reasonably believed by the victim, is enough.

Bankhead counters that, under either version of the statute, a firearm is not a deadly weapon unless it is loaded and operable. This is so, he contends, because both versions of NRS 200.471 provide for greater punishment "[i]f the assault is made with the use of a deadly weapon or the present ability to use a deadly weapon." NRS 200.471(2)(b); *see* 1971 Nev.

Stat., ch. 612, § 2, at 1385. Bankhead thus reasons that even under an intent-to-frighten theory of culpability, the State must prove that he had the present ability to use a loaded firearm, as set forth in *Loretta*, or at least that the weapon had deadly capabilities, citing *McIntyre v. State*, 104 Nev. 622, 624, 764 P.2d 482, 483 (1988).

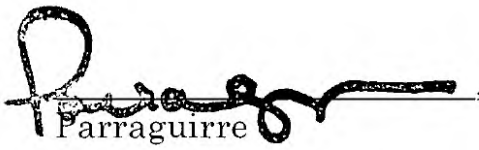
But subsection 2(b) refers to the use of a deadly weapon in committing the assault and thus must be read in light of the definition of assault. In other words, the State must show that the defendant used a deadly weapon to unlawfully attempt to use physical force against another or to intentionally place another in fear of harm. Neither of these uses necessarily requires that the weapon be operable and loaded.

As discussed above, *Loretta*'s loaded-and-operable holding was based on the definition of assault at the time and no longer applies. And Bankhead mischaracterizes *McIntyre*, which merely recognized that, under NRS 193.165 (governing penalty enhancements for use of a firearm or other deadly weapon in the commission of a crime), "proof of a firearm's deadly capabilities is not required," *id.* at 623, 764 P.2d at 483, but where a weapon other than a firearm is used, such proof may be required, *id.* at 624, 764 P.2d at 483.

Assault with a deadly weapon requires the use of a deadly weapon or the present ability to use a deadly weapon to unlawfully attempt to use physical force against another or to intentionally place another in reasonable apprehension of immediate bodily harm; no present ability or

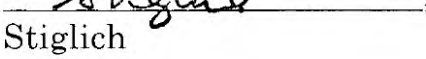
intent *to injure* is necessarily required.[3] Consequently, caselaw requiring that a firearm be loaded and operable to prove a present ability and intent to injure no longer applies. Thus, jury instruction no. 18 is inaccurate as a matter of law. It is incomplete, as it requires a "present ability to use a weapon" even though actual use is sufficient. Moreover, it is misleading because it requires that the "weapon was both loaded and operable," neither of which are required by the current version of the statute. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order approving the use of jury instruction 18 at trial.



Parraguirre, J.

Bell, J.



Stiglich, J.

cc: Hon. Jennifer L. Schwartz, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk

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[3]The jury instruction on what constitutes a deadly weapon is not before this court at this time.