IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACOB BUNKER,
Appellant,
vs.
CLARK COUNTY SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; AND RODNEY PITTS, AN INDIVIDUAL,
Respondent.

No. 83624-COA

FILED

APR 19 2023

ORDER OF AFFIRMANCE

Jacob Bunker appeals from a final judgment following a short trial and a post-judgment order denying a motion for relief under NRCP 59 and NRCP 60. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.[1]

Bunker filed the underlying tort action alleging that respondent Rodney Pitts and Joey McDermott[2] physically ambushed him in the parking lot of his high school during school hours, that McDermott filmed the incident and posted the video online, and that respondent Clark County School District (CCSD) failed to take proper action to stop the incident from occurring or to protect Bunker from bullying. On these grounds, Bunker

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[1]Brent J. Jordan, Pro Tempore Judge, presided as the short trial judge in this case.

[2]McDermott is not a party to this appeal.

23-12166

asserted theories of negligence against CCSD, and intentional infliction of emotional distress and invasion of privacy against Pitts and McDermott. The matter ultimately proceeded through court-annexed arbitration, following which the arbitrator found against Bunker on all of his claims.

After Bunker requested a trial de novo, the case entered the short trial program. Prior to trial, Bunker filed a motion in limine seeking to exclude video footage of the subject altercation, arguing primarily that it was unauthenticated. Bunker also filed a motion to dismiss his claims against Pitts, arguing that he and Pitts had stipulated to the dismissal and that CCSD was wrongly refusing to join the stipulation on grounds that Pitts was a necessary party. The short trial judge denied both motions, and the matter proceeded to a short jury trial, following which the jury returned a verdict in favor of Bunker on his claims against McDermott—who was previously defaulted and did not participate in the litigation—awarding Bunker $5,000 in damages. But the jury found against Bunker on all of his claims against CCSD and Pitts. The district court subsequently entered a final judgment on the jury verdict, and Bunker filed a motion alternatively seeking relief from the judgment under NRCP 59(a), NRCP 59(e), and NRCP 60(b). The short trial judge denied the motion, and this appeal followed.

On appeal, Bunker sets forth various reasons why he believes the short trial judge should have granted his post-judgment motion. We review the denial of a motion for a new trial under NRCP 59(a), to alter or amend a judgment under NRCP 59(e), and to set aside a judgment under NRCP 60(b) for an abuse of discretion. *See Cox v. Copperfield*, 138 Nev., Adv. Op. 27, 507 P.3d 1216, 1222 (2022) (discussing NRCP 59(a)); *AA Primo*

Builders, LLC v. Washington, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (discussing NRCP 59(e)); *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996) (discussing NRCP 60(b)). Among the grounds for a new trial under NRCP 59(a) are an "irregularity in the proceedings of the court . . . or in any order of the court . . . , or any abuse of discretion by which either party was prevented from having a fair trial," as well as an "error in law occurring at the trial and objected to by the party making the motion," if the court's actions materially affected the moving party's substantial rights. NRCP 59(a)(1)(A), (G). And, in relevant part, a motion to alter or amend under NRCP 59(e) is available to "correct manifest errors of law or fact" or "to prevent manifest injustice." *AA Primo*, 126 Nev. at 582, 245 P.3d at 1193 (alteration and internal quotation marks omitted). Finally, NRCP 60(b)(1) allows the court to set aside a judgment on grounds of "mistake," which includes a mistake of law by the district court. *See Kemp v. United States*, ___ U.S. ___, 142 S. Ct. 1856, 1860 (2022) (interpreting the materially identical FRCP 60(b)(1) and holding that "a judge's errors of law are indeed 'mistake[s]' under Rule 60(b)(1)" (alteration in original)); *cf. A-Mark Coin Co. v. Redfield's Estate*, 94 Nev. 495, 498, 582 P.2d 359, 361 (1978) (acknowledging that a court may correct its own mistake under NRCP 60(b)).

As a preliminary matter, Bunker did not provide this court with a transcript of the short trial, and we are therefore unable to fully evaluate all of the issues raised on appeal. Although there is no formal reporting of short trials unless paid for by the parties, NSTR 20, it is an appellant's burden to provide the "portions of the record essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3). And where, as was

apparently the case here, the trial proceedings were not reported or recorded, "the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection," which "shall be served on the respondent, who may serve objections or proposed amendments within 14 days after being served." NRAP 9(d). Here, Bunker failed to utilize this option, resulting in a deficient record on appeal and the application of the necessary presumption that the missing portion of the record supports the lower court's decisions. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

Turning to Bunker's arguments on appeal, he first argues that the short trial judge abused his discretion in denying the post-judgment motion for relief because he should have granted Bunker's earlier motion to dismiss Pitts from the action. Specifically, Bunker contends that he "determined that it would be in his best interest to dismiss . . . Pitts from the lawsuit," and that the district court erred by determining that Pitts was a necessary party and declining to dismiss him on that ground.

Even if Bunker is correct on this latter point, he fails to demonstrate how he was in any way prejudiced by Pitts' continued involvement in the case. *See Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) ("To be reversible, an error must be prejudicial and not harmless."); *cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Bunker wholly fails to explain how his substantial rights were affected by Pitts remaining in the action or how the result of this case would have been meaningfully different had the short trial judge dismissed Pitts.

See McClendon v. Collins, 132 Nev. 327, 333, 372 P.3d 492, 495-96 (2016) (providing that reversal is warranted only where an error affects a party's substantial rights such that "a different result might reasonably have been reached" but for the error); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument). We therefore discern no basis for reversal on this point.

Bunker next contends that the short trial judge should have granted the post-judgment motion because he wrongly denied an earlier motion in limine to exclude video footage of the subject altercation. Bunker argues that the video was not properly authenticated, that it was incomplete, that it would have been irrelevant had the short trial judge dismissed Pitts from the action, and that, at the very least, the video was substantially more prejudicial than it was probative.

With respect to authentication, Bunker fails to show any abuse of discretion on the part of the short trial judge in admitting the video footage. *See M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) ("We review a district court's decision to admit or exclude evidence for abuse of discretion, and we will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse."). Because we have no record of the trial proceedings, we are unable to evaluate the foundation on which the short trial judge admitted the video, and we therefore presume CCSD laid a proper foundation. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 135. Further, the short trial judge concluded in his order denying Bunker's post-judgment motion that the investigating police officer properly preserved the video, that both

Bunker and Pitts authenticated the video at trial, and that no evidence was presented showing that the video was tampered with or edited. Accordingly, Bunker's authentication argument does not provide a basis for relief. And insofar as Bunker contends that the video appears to be incomplete, Bunker's concerns go more to the video's weight as evidence than its admissibility, and we are not at liberty to reweigh evidence on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007).

Concerning the video's relevance, even assuming Bunker is correct that Pitts should have been dismissed from the action, Bunker fails to adequately explain why he believes the video would have been irrelevant in Pitts' absence or why it was substantially more prejudicial than probative. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Despite his contention that the video was irrelevant to his negligence claim against CCSD, any video evidence of the subject altercation, even if limited in its scope, would have informed the jury of the circumstances surrounding the incident, which were generally relevant to CCSD's defense that it was not negligent in failing to prevent those circumstances from arising. *See* NRS 48.015 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"). And to the extent that Bunker contends that the video was substantially more prejudicial than probative and should therefore have been excluded under NRS 48.035, his bare assertion that the video was likely to "cause the jury to make brash [sic] judgments regarding the character of [Bunker] because of the fight" is not enough to persuade us that the short trial judge palpably abused his discretion in admitting the evidence. *See M.C. Multi-*

Family Dev., LLC, 124 Nev. at 913, 193 P.3d at 544; *see also Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001) (providing that "NRS 48.035 strongly favors admissibility" (alteration and internal quotation marks omitted)).

Bunker next argues that the short trial judge erred by engaging in ex parte communication with Pitts—who proceeded in pro se in the underlying proceedings—outside the presence of Bunker and CCSD. *See* NCJC Rule 2.9(A) (providing that, generally, "[a] judge shall not initiate . . . ex parte communications [with a party]"). In his order denying Bunker's post-judgment motion, the short trial judge stated that he had informed the parties at the pretrial conference, for which Pitts was not present, that he would be calling Pitts to inform him that he must appear for trial. The short trial judge further stated that he made the call to Pitts and that the only statement he made was that Pitts was under court order to appear for trial.

Although Bunker—through counsel in his opening brief—claims not to recall the short trial judge informing the parties that he was going to call Pitts, this does not constitute adequate reason for this court to disbelieve the short trial judge's account. *See* NCJC Rule 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . . ."); *Jones v. State*, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991) (providing that judges are presumed to follow the law); *see also Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (providing that arguments of counsel are not evidence). And under NCJC Rule 2.9, ex parte communications between a judge and a party are

permissible for scheduling and administrative purposes "[w]hen circumstances require it," so long as "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication," and "the judge promptly . . . notif[ies] all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond." NCJC Rule 2.9(A)(1)(a)-(b). Moreover, even if this exception does not apply, Bunker nevertheless fails to allege or identify any portion of the record indicating that the result of this case might reasonably have been different had the short trial judge not engaged in ex parte communication with Pitts, and he therefore fails to demonstrate that relief is warranted on this issue. *See McClendon*, 132 Nev. at 333, 372 P.3d at 495-96.

Lastly, Bunker argues that the short trial judge abused his discretion by granting a *Batson*[3] challenge lodged by CCSD during voir dire, primarily because CCSD, as an entity, supposedly lacked standing to make such a challenge. But Bunker fails to cite any authority preventing entities from raising *Batson* challenges, *see Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38, and the United States Supreme Court has recognized that civil litigants, including business entities, may raise *Batson* challenges to protect the equal protection rights of jurors, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616, 628-30 (1991). Moreover, to the extent Bunker contends he was prejudiced because the short trial judge did not engage in an appropriate *Batson* analysis, in light of Bunker's failure to provide this

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[3]*Batson v. Kentucky*, 476 U.S. 79 (1986).

court any record of the trial proceedings, we are unable to adequately review this issue, and we necessarily presume the short trial judge conducted the requisite analysis. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 135; *see also Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (acknowledging that a court's ultimate ruling on a *Batson* challenge constitutes a factual finding "of the sort accorded great deference on appeal" (internal quotation marks omitted)).

Because Bunker fails to demonstrate any basis for reversal, we ORDER the judgment of the district court AFFIRMED.[4]

_______________, C.J.
Gibbons

_______________, J.
Bulla

_______________, J.
Westbrook

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

cc: Hon. Gloria Sturman, District Judge
Brent J. Jordan, Pro Tempore Judge
Bowen Law Offices
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Rodney Pitts
Eighth District Court Clerk