IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORDAN CRISTOS,
Appellant,
vs.
SARAH TOLAGSON,
Respondent.

No. 84167-COA

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT CLERICAL ERROR

Jordan Cristos appeals from a district court order establishing custody of minor children. Eighth Judicial District Court, Family Court Division, Clark County; Bill Henderson, Judge.

Jordan Cristos and respondent Sarah Tolagson share two minor children, J.C., age five at the time of trial, and A.C., age three at the time of trial.[1] Jordan and Sarah separated in February 2019. After their separation, Sarah obtained temporary protection orders (TPO), in 2019, 2020, and 2021, and the 2021 order was extended and expires in 2023. Despite the TPO in place, Jordan and Sarah were involved in an altercation in June 2019. During this incident, Jordan became frustrated when A.C. was crying, and Jordan began yelling at Sarah. Sarah started to film the incident despite Jordan's protests. Then, Jordan placed Sarah in a chokehold and took her phone. Sarah managed to break free from Jordan, picked up A.C., and ran into the kitchen. While in the kitchen, she grabbed a knife and held A.C. in one hand and the knife in the other to defend A.C. and herself. Jordan filmed her holding the knife and A.C. The police were called, and Jordan was

[1]We recount the facts only as necessary for our disposition.

arrested and apparently charged with battery constituting domestic violence, a misdemeanor, but the charges were dismissed when Sarah did not appear to testify at trial.

The next significant incident occurred in June 2020. Jordan missed an exchange and did not return the children, so Sarah and her mother drove to Jordan's house. Sarah parked her car in the street and walked up to Jordan's car, which was in his driveway. Sarah began removing a car seat from Jordan's car. Jordan exited the house and began arguing with Sarah. Next, Sarah entered Jordan's house and picked up A.C. Jordan tried to keep Sarah inside his house by grabbing her arm, but she broke free. Sarah buckled A.C. into his car seat as Jordan exited the house again. Jordan threw Sarah to the ground and held her down. Sarah's mother called the police while Sarah broke free. The police arrived and Jordan was arrested and charged with battery constituting domestic violence, a misdemeanor. Jordan entered a nolo contendere plea to the charge and was criminally convicted.

The final significant conflict involving Jordan and Sarah occurred in August 2021. Jordan was late to a supervised visit with the children and asked the supervisor if he could have more time with the children. His request was denied, and he began calling the supervisor names and refused to return the children. Jordan then took the children and ran to the opposite side of the park. The police arrived and Jordan was arrested in front of the children, who were returned to Sarah. Jordan was arrested for violating a TPO after the police learned he had messaged Sarah the previous day despite a no contact order. It is unclear from the record whether Jordan was formally charged with any crimes after this incident.

In addition to domestic violence, Jordan was also accused of neglecting the children, which resulted in a child dependency case under

NRS Chapter 432B alleging abuse and neglect. This case was eventually either closed or dismissed by the juvenile court. The exact allegations against Jordan are unclear from the record, and no documents from the proceedings are in the record, but the case was closed after Jordan complied with the requirements Child Protective Services (CPS) recommended. Additionally, during the trial, a CPS report was mentioned. This report was not admitted as evidence but was apparently reviewed by the district court. The contents of this report are unclear from the record, but the district court did conclude that some of the allegations in the report were "insufficient" for the district court's consideration.

Jordan and Sarah each filed complaints seeking primary physical custody and joint legal custody of the children. These cases were consolidated in June 2020 with Sarah's case being designated as the lead case. In August 2020, Jordan and Sarah attended mediation but were unable to reach an agreement.

Beginning in October 2021, the district court held a six-day bench trial.[2] In December 2021, the district court entered an order awarding Sarah primary physical custody and creating a hybrid joint legal custody arrangement. Under this hybrid arrangement, Sarah is responsible for making day-to-day decisions for the children and Jordan is to have access to their medical and school reports, and to be involved in making major and moderate decisions concerning healthcare, education, and religious matters. The court also ordered Jordan to pay $1,985 per month in child support. Jordan now appeals from the district court's order.

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[2]The trial was held on non-consecutive days throughout October and November.

Jordan raises four arguments on appeal: (1) the district court erred by considering inadmissible evidence, specifically Jordan's nolo contendere plea arising from his second battery arrest, the closed child dependency case due to res judicata,[3] and hearsay from the CPS report; (2) the district court abused its discretion when it awarded Sarah primary physical custody; (3) the district court abused its discretion in its determination of legal custody; and (4) the district court erred in its determination of Jordan's child support obligation. We agree that Jordan's child support obligation is incorrect due to a clerical error, but we disagree with his remaining arguments.

The district court did not plainly err in considering inadmissible evidence

Jordan argues that the district court improperly considered his nolo contendere plea for a domestic violence case, his child dependency case alleging abuse and neglect, and a CPS report during the bench trial. Sarah argues that both sides brought up and discussed the evidence during trial. Sarah also contends that even if inadmissible evidence was considered, it was harmless error.

After a bench trial, we review a district court's legal conclusions de novo and uphold the district court's factual findings as long as they are supported by substantial evidence. *Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev. 456, 458-59, 453 P.3d 1229, 1231 (2019). Additionally, we review claims of error in the admission of evidence for objections below and to determine if the admission of evidence substantially

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[3]Although Jordan uses the term "res judicata," the Nevada Supreme Court has explained that such terminology may create confusion and, therefore, we use issue preclusion here. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1051-52, 194 P.3d 709, 711 (2008).

affected the rights of the appellant. NRS 47.040(1)(a) (providing the failure to object generally precludes appellate review); *Hallmark v. Eldridge*, 124 Nev. 492, 505, 189 P.3d 646, 654 (2008) ("We review claims of prejudice concerning errors in the admission of evidence based upon whether the error substantially affected the rights of the appellant."); *see also Abid v. Abid*, 133 Nev. 770, 772, 406 P.3d 476, 478 (2017) (stating that we review a district court's evidentiary decisions for an abuse of discretion).

It is true that "[e]vidence of a plea of nolo contendere . . . is not admissible in a civil or criminal proceeding involving the person who made the plea." NRS 48.125(2). However, records related to the plea and conviction were not formally admitted into evidence and Jordan did not object to the discussion of his nolo contendere plea at trial. Therefore, his argument is waived. *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"). We may review for plain error, but this is discretionary, and Jordan has failed to argue plain error; therefore, we need not consider this claim. *See, e.g., City of Las Vegas v. Eighth Judicial Dist. Court*, 133 Nev. 658, 660, 405 P.3d 110, 112 (2017) (explaining that "[t]he plain error rule affords an appellate court discretion to consider an issue raised for the first time on appeal"); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Even if we consider the merits of Jordan's argument, he relies on what he considers the district court's dismissive attitude towards Sarah's poor behavior when she held both A.C. and a knife during the incident in 2019. A careful review of the record reveals that the district court did not

look approvingly upon Sarah's actions but found that Jordan's conduct, particularly in 2020 when he threw her to the ground, to be more problematic after weighing and considering the testimony of both parties. And the court concluded that there was "no doubt" he committed domestic violence in 2020 after hearing Sarah's testimony. The district court also found that Sarah's testimony that he put her in a chokehold in 2019 "was convincing."[4] We do not reweigh the credibility of witnesses or the evidence presented to the district court. *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (stating that appellate courts do not reweigh the credibility of witnesses on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183-84, 14 P.3d 522, 523-24 (2000) (refusing to reweigh evidence on appeal). Therefore, as the district court's findings are supported by substantial evidence, Jordan has failed to show that his substantial rights were affected by the court's consideration of his nolo contendere plea. Accordingly, we conclude that reversal on this issue is not warranted.

Next, Jordan argues that the child dependency case was "dismissed" so when the district court considered that case in the present matter, that case was essentially relitigated, which is barred by issue preclusion. Jordan also argues that the district court improperly concluded that he neglected his children and, in doing so, effectively acted as an appellate court by reviewing and reversing the prior dismissal.

Jordan did not object to the discussion of the child dependency case at trial. Therefore, his argument is waived. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Further, Jordan does not cogently argue the point.

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[4]The district court appears to have mistakenly indicated that this incident occurred in June 2020 though it occurred in June 2019.

He cites no authority supporting the proposition that if a case is dismissed, the facts of the case cannot be considered in a separate proceeding when supported by independent evidence. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Even if the merits of his argument are considered, the record does not reveal that the child dependency case was relitigated during the bench trial. It is undisputed that the dependency case was discussed by both parties during the trial. However, the specific allegations were not discussed in detail, and the district court did not find that Jordan abused the children. While the district court did find that the abuse and neglect child custody factor favored Sarah, the district court also stated that Jordan does not abuse the children per se, but that Jordan has exposed them to his rage and anger towards Sarah. Admittedly, the district court determined that Jordan had neglected the children and referenced leaving them unattended and the park incident. It is possible that leaving the children unattended was part of the child dependency case, but that is not clear from the record and Jordan does not clarify the issue with any references to the record. *See* NRAP 28(a)(10)(A) (stating that a party is required to identify the places in the record where the evidence supports its assertions).

Jordan nevertheless argues that issue preclusion applies. For issue preclusion to apply, four elements must be present: "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party . . . to the prior litigation; and (4) the issue was actually and necessarily litigated." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048,

1055, 194 P.3d 709, 713 (2008) (internal quotation marks and footnote omitted).

Jordan argues that the issue of abuse and neglect was resolved in his favor when the case was "dismissed." However, this is an oversimplification of the issues and does not meet the elements of issue preclusion. First, the issues were different in the custody case as compared to the neglect case. The primary issue before the district court in the present matter was to determine custody of the children. While abuse and neglect are among the factors that the district court is required to consider when addressing custody, this does not mean these issues are the same. *See* NRS 125C.0035(4)(j); *see generally* NRS Chapter 432B. Here, Jordan does not identify the issues decided in the juvenile court proceedings nor does he provide any record on appeal for an accurate comparison. Second, he does not provide a record of the final ruling from the juvenile court to support his assertion that the matter resulted in a "dismissal;" therefore, there is nothing in the record to show that the ruling was on the merits and was final. Third, he does not show the parties were the same. Finally, he does not argue nor establish that the same issue was actually and necessarily litigated. Therefore, Jordan fails to demonstrate that the elements of issue preclusion as explained in *Five Star* are satisfied. *See Five Star*, 124 Nev. at 1055, 194 P.3d at 713.

Further, as discussed above, the record does not show that the district court acted as an appellate court over the child dependency case. Instead, it followed the requirements of NRS 125C.0035(4) to arrive at its decision to award primary physical custody to Sarah. Accordingly, we conclude that the district court did not plainly err in considering the child dependency case.

Finally, Jordan argues that the CPS report was a hearsay document with no applicable exception. He also argues that a CPS case worker is not a judicial official and does not make determinations upon which a court can lawfully rely. Sarah responds that Jordan never asserted a hearsay objection, and he waived any such objection because he discussed the contents of the CPS report during his testimony. We note that Jordan failed to file a reply brief addressing Sarah's waiver arguments. Additionally, Jordan failed to provide a citation to the record showing where the report was admitted into evidence as required by the appellate rule. *See* NRAP 28(e)(1). We could treat this as a concession that Sarah's argument is meritorious that he did not object below and waived any claims by offering his own testimony about the report. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious); *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").[5]

However, we will consider the merits of Jordan's argument, but the argument fails because the CPS report is not in the record on appeal, and he has not shown that his substantial rights were affected by any error in considering the report. *See* NRS 47.040(1); NRAP 28(e)(1); *Hallmark*, 124 Nev. at 505, 189 P.3d at 654.

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[5]During oral argument, Jordan stated that he objected to the CPS report, but the record does not reveal a formal objection or that the report was offered into evidence.

The district court considered the factors found in NRS 125C.0035(4). It is true that one of these factors requires the court to consider parental abuse or neglect of the child. NRS 125C.0035(4)(j). It is also true that the district court found that this factor favored Sarah. However, the district court also found that the following factors favored Sarah: "[w]hich parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent;" "[t]he ability of the parents to cooperate to meet the needs of the child;" "[t]he physical, developmental and emotional needs of the child;" and "[w]hether either parent . . . has engaged in an act of domestic violence against the child, a parent of the child or any person residing with the child." *See* NRS 125C.0035(4)(c), (e), (g), (k). Additionally, the district court found by clear and convincing evidence that Jordan had committed domestic violence against Sarah. This created a rebuttable presumption that Jordan should not have sole or joint physical custody. *See* NRS 125C.035(5). And the district court found that Jordan did not rebut this presumption.

Jordan does not claim that the district court incorrectly found that the factors listed above favored Sarah, nor does he argue that finding the abuse and neglect factor neutral would have resulted in the court granting him primary physical custody. Accordingly, because Jordan's substantial rights were not affected, the district court did not plainly err to the extent it considered the CPS report.

The district court did not abuse its discretion when it awarded Sarah primary physical custody

Jordan repeats his argument that the district court improperly relied on inadmissible evidence when it awarded Sarah primary physical custody. Sarah responds that the district court properly considered the best interest of the child factors and did not abuse its discretion. Since we have

already determined that the district court did not plainly err in considering allegedly inadmissible evidence, we conclude that the district court did not abuse its discretion when it awarded Sarah primary physical custody and Jordan unsupervised parenting time every weekend beginning Fridays at 6:00 p.m. and ending Sundays at 6:00 p.m.[6]

The district court did not abuse its discretion in its award of legal custody

Jordan argues that the district court committed legal error when it awarded Sarah "hybrid" joint legal custody, giving Sarah day-to-day decision-making authority while only requiring Sarah to provide information to Jordan. Jordan argues that since Sarah requested sole legal custody on

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[6]Child custody decisions are reviewed for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). A district court abuses its discretion when its decision is clearly erroneous. *See Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018). Additionally, this court will not set aside child custody determinations if they are supported by substantial evidence. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). Evidence is substantial if a reasonable person would accept it as adequate to sustain a judgment. *Id.* When determining the best interest of the child, a court is required to consider and make findings on 12 enumerated factors. NRS 125C.0035(4). It is undisputed that the district court considered the required factors and made findings on each of these factors. The court found that none of these factors favored Jordan and that five of the factors favored Sarah. Additionally, the district court found that one of the factors was neutral and four of the factors did not apply. The district court did not make explicit findings on two of the factors but did comment on these factors throughout its order, indicating that these factors are also neutral or slightly favor Sarah. The court also correctly applied the domestic violence presumption against Jordan receiving physical custody. Substantial evidence supports each of the district court's findings; therefore, the district court did not abuse its discretion.

the second day of trial,[7] and not in her pleadings, he was deprived of his due process rights when the court allegedly granted "most of" Sarah's request for sole legal custody in its hybrid joint legal custody award. Jordan also argues that the hybrid legal custody award is deficient because the written order contained no legal analysis as to why or what factors the court considered. Sarah responds that the district court made the correct decision when it awarded hybrid joint legal custody.

As a preliminary matter, we note that the district court's written order awarded hybrid joint legal custody, not sole custody, and gave Sarah day-to-day decision-making authority and ordered that Jordan must have access to school and medical records. Although not expressly referenced in the written order, the district court also orally stated that Jordan was to be involved in making major or moderate health, education, and religious decisions.

Child custody decisions are reviewed for an abuse of discretion. *Wallace*, 112 Nev. at 1019, 922 P.2d at 543. A district court abuses its discretion when its decision is clearly erroneous. *See Bautista*, 134 Nev. at 336, 419 P.3d at 159. Additionally, this court will not set aside child custody determinations if they are supported by substantial evidence. *Ellis*, 123 Nev. at 149, 161 P.3d at 242. Evidence is substantial if a reasonable person would accept it as adequate to sustain a judgment. *Id.*

Legal custody is the basic legal responsibility for a child and the responsibility to make major decisions regarding the child. *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009), *overruled in part on other*

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[7]We note that Sarah's counsel actually requested sole legal custody on the first day of trial.

grounds by Romano v. Romano, 138 Nev., Adv. Op. 1, 501 P.3d 980 (2022). For example, legal custody involves decisions regarding healthcare, education, and religion while the parent with whom the child is residing at that time usually makes the day-to-day decisions. *Id.* at 420-21, 216 P.3d at 221. Additionally, joint legal custody does not require that the parents have equal decision-making power. *Id.*

Jordan's due process argument has three prongs.[8] The first prong of his argument is that the district court essentially awarded Sarah sole legal custody because Sarah has day-to-day decision-making authority and has thus taken away one of his fundamental liberty interests. As noted, in a joint legal custody situation, the parent who has physical custody of the child at the time usually makes the day-to-day decisions. Sarah has primary physical custody of the children while Jordan has parenting time with the children from 6:00 p.m. on Fridays to 6:00 p.m. on Sundays. The district court's order does not exclude Jordan from participating in major or moderate decisions or decisions during his parenting time. Further, the order ensures that Jordan has access to school and medical records to be an active participant in making major or moderate parenting decisions with Sarah.

We also note that we can turn to the district court's oral statement to help interpret its order. *See Kirsch v. Traber*, 134 Nev. 163, 168 n.3, 414 P.3d 818, 822 n.3 (2018) (stating that this court may look to oral statements that do not conflict with the written judgment when the judgment is ambiguous). The district court orally stated that Jordan was to be involved in making major or moderate healthcare, education, and religious decisions,

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[8]We note at the outset that he does not cite any authority showing a due process violation.

thereby granting him the essential components of joint legal custody. The district court also orally stated that it did not want the parties "communicating unduly," which explains the day-to-day decision making language in favor of Sarah in the written order. Therefore, Sarah was *not* awarded sole legal custody and the parties are mandated to communicate regarding major or moderate decisions.[9] We recognize that during Jordan's parenting time he should be permitted to seek emergency care for the children, particularly if Sarah is unavailable to consult. We see no language in the district court's order that would prevent Jordan from seeking emergency care should such care be necessary.[10]

Finally, Jordan argues that the district court provided no legal analysis for its decision and failed to conduct a best interest analysis under NRS 125C.0045 or under NRS 125C.0035(4). At the outset, we note that NRS 125C.0035 only applies to the determination of physical custody not

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[9]Since we have concluded that Sarah was not awarded sole legal custody, we need not discuss Jordan's second prong in detail. Jordan's second prong is that the issue of sole legal custody was never before the court. Nevada is a notice pleading jurisdiction, but a party must still "be given reasonable advance notice of an issue to be raised and an opportunity to respond." *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 653 (1996) (citing *Schwartz v. Schwartz*, 95 Nev. 202, 206, 591 P.2d 1137, 1140 (1979)). While Sarah did not request sole legal custody until the first day of trial, Jordan had time to respond throughout the lengthy trial, and the district court did not award Sarah sole legal custody. Therefore, even if the district court considered Sarah's request for sole legal custody, no error occurred because sole legal custody was not awarded. *Cf.* NRCP 61 ("[T]he court must disregard all errors and defects that do not affect any party's substantial rights.").

[10]Nevertheless, the district court could consider clarifying the order in this regard.

legal custody, therefore this portion of Jordan's argument does not need to be considered. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. As to the merits, NRS 125C.002 (joint legal custody) and NRS 125C.0045 (custody), unlike NRS 125C.0035(4) (physical custody), do not require the consideration of any specific best interest factors when making an order. Instead, NRS 125C.0045(1)(a) provides that the district court may enter an order for the custody, care, education, maintenance, and support as appears in the minor child's best interest, and NRS 125C.002 contains a presumption for joint legal custody in certain circumstances.

While it is accurate that the district court never explicitly conducted a best interest analysis for the determination of joint legal custody, the district court thoroughly examined the best interest factors necessary for the determination of physical custody. These findings necessarily support the district court's award of hybrid joint legal custody, particularly because of the domestic violence findings and presumption. *See* NRS 125C.230 (establishing a presumption against sole or joint custody for a perpetrator of domestic violence without making a distinction between legal and physical custody, unlike NRS 125C.0035(5)). Therefore, we conclude that the district court did not abuse its discretion.

The district court order does not accurately reflect Jordan's child support obligation

Jordan argues that the district court incorrectly calculated his child support obligation and Sarah agrees. The district court instructed Jordan to pay $1,985 per month in child support. When the requirements of NAC 425.140(2) are applied to Jordan's gross monthly income, his base child support obligation is $1,895 per month. Thus, upon this court's issuance of remittitur, the district court shall enter an amended order correctly stating Jordan's child support obligation.

Accordingly, we

ORDER the judgment of the district court AFFIRMED but REMAND the matter for the limited purpose of correcting the clerical error.[11]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Bill Henderson, District Judge, Family Division
Page Law Firm
Law Office of Christopher P. Burke
Eighth District Court Clerk

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