

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL DOTY,  
Appellant,  
vs.  
TONYA DUBIN,  
Respondent.

No. 69190

FILED

JAN 25 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court child custody order and a subsequent order denying relief from the custody order.<sup>1</sup> Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.<sup>2</sup>

As an initial matter, appellant Michael Doty challenges the district court's exclusion of certain of his documents at trial on the ground that he failed to produce those documents before the close of discovery. In particular, Doty argues these were case-concluding discovery sanctions, which were not appropriate to resolve the child custody issues in the

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<sup>1</sup>To the extent that appellant's arguments relate to the district court's pre-judgment temporary custody orders, those orders were superseded by the final custody order. As a result, they are moot, and we do not consider them in the context of this appeal. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) ("The question of mootness is one of justiciability. This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment.").

<sup>2</sup>The child custody order was entered by former district court judge William Gonzalez, and the post-judgment order denying relief was entered by the Honorable Denise L. Gentile.

underlying case. *See Blanco v. Blanco*, 129 Nev. 723, 731, 311 P.3d 1170, 1175 (2013) (“[G]iven the statutory and constitutional directives that govern child custody and support determinations, resolution of these matters on a default basis without addressing the child’s best interest and other relevant considerations is improper.”).

The district court excluded some of Doty’s documentary exhibits but informed Doty that he could present testimony to provide evidence that otherwise would have been introduced through the excluded exhibits. Moreover, the court held a three-day evidentiary hearing, at which both sides presented testimony and other evidence relating to the child’s best interest. At the conclusion of the hearing, the court made a decision on the merits based on the evidence before it, rather than as a sanction for a discovery violation. Thus, the exclusion of these documents was not a case-concluding discovery sanction. *See id.*

Instead, this was a sanction consistent with NRCP 37(c)(1), which generally precludes a party from using evidence at trial when that evidence was not disclosed as required by the rules of civil procedure. Exclusion of evidence under this rule is a matter within the district court’s discretion. *See* NRCP 37(c)(1) (providing that undisclosed evidence may not be used at trial, but permitting the district court to impose other sanctions in lieu of exclusion); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010) (explaining that the district court’s imposition of sanctions is reviewed for an abuse of discretion).

But regardless, even assuming the district court abused its discretion by excluding the documents, Doty has not established that the exclusion was prejudicial. *See* NRCP 61 (requiring the court to disregard errors that do not affect the substantial rights of a party). In particular,

with one exception, Doty does not identify any evidence he would have presented or explain how the excluded evidence would have changed the outcome of the case.<sup>3</sup> As a result, this argument does not provide a basis for reversing the district court's custody decision. *See id.*

Next, Doty contends the district court improperly concluded that Dubin was more credible than him based on findings that he alleges were not supported by substantial evidence. *See Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (explaining that a district court's factual findings will not be set aside unless they are clearly erroneous or not supported by substantial evidence). But the district court's factual findings underlying its credibility determination were supported by hearing testimony, which constitutes substantial evidence in support of these findings. Moreover, the use of these findings in evaluating the parties' credibility was within the court's discretion, and we will not reweigh the credibility of witnesses on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (“[W]e leave witness credibility determinations to the district court and will not reweigh credibility on appeal.”).

Doty also argues the district court clearly erred by failing to find that Dubin committed an act of domestic violence in light of a charge

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<sup>3</sup>In his fast track statement, Doty asserts he would have presented documents relating to Dubin's mental health treatment history, but he did not present any testimony relating to this issue at the parties' hearing. Under these circumstances, Doty has not demonstrated that the exclusion of these purported documents would have changed the custody decision.

being filed against her and a police report documenting the incident.<sup>4</sup> At the evidentiary hearing, the parties presented conflicting testimony as to an incident that occurred before the birth of the parties' child. As the district court's decision resolved conflicting testimony, we will not disturb that decision. *See Barelli v. Barelli*, 113 Nev. 873, 880, 944 P.2d 246, 250 (1997) (recognizing that an appellate court will not disturb a trial court's resolution of conflicting evidence if substantial evidence supports the trial court's decision); *see also Ellis*, 123 Nev. at 152, 161 P.3d at 244.

Moreover, to the extent Doty argues that Dubin's subsequent no contest plea constituted new evidence based on which the court should have revisited its decision, the no contest plea was not admissible against Dubin in the underlying proceeding. *See* NRS 48.125(2) ("Evidence of a plea of nolo contendere or of an offer to plead nolo contendere to the crime charged or any other crime is not admissible in a civil or criminal proceeding involving the person who made the plea or offer."). Thus, the district court's conclusion that Doty failed to establish by clear and convincing evidence that Dubin had committed an act of domestic violence was not clearly erroneous, and we will not disturb that conclusion on appeal. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704; *Barelli*, 113 Nev. at 880, 944 P.2d at 250.

Finally, Doty argues the district court should not have awarded Dubin primary physical custody because doing so was not in the child's best interest. The court made specific findings as to each of the

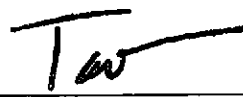
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<sup>4</sup>Doty also refers to "digital evidence" against Dubin, but he does not explain what this evidence was or how it demonstrated that she engaged in an act of domestic violence.

best interest factors,<sup>5</sup> and those findings were supported by substantial evidence and were not clearly erroneous. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704. In asking this court to conclude that the factors weighed in his favor, Doty is essentially asking us to reconsider the parties' credibility and reweigh the evidence on appeal, which we cannot do. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244; *Barelli*, 113 Nev. at 880, 944 P.2d at 250. Thus, as Doty has not presented a basis for reversing the district court's custody order or the subsequent order denying relief from the custody decision, we affirm both orders.<sup>6</sup>

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

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<sup>5</sup>Doty also argues the court failed to consider the child's relationship with her siblings even though his son was living with him at the time of the hearing. While the written order did not mention this factor, the court orally concluded it was not applicable. No evidence was presented at the hearing to demonstrate that the parties' child had a relationship with Doty's son. Thus, the district court did not abuse its discretion in finding this factor to be inapplicable to the custody decision.

<sup>6</sup>We have considered Doty's remaining arguments and we conclude that they also do not present a basis for reversal.

cc: Hon. Denise L. Gentile, District Judge, Family Court Division  
Michael Doty  
Robinson Law Group  
Eighth District Court Clerk