IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES BURROWS,
Appellant,
vs.
MARK RILEY, INDIVIDUALLY; AND ARS INVESTMENT HOLDINGS, LLC, A LIMITED LIABILITY COMPANY, D/B/A YES AIR CONDITIONING & PLUMBING,
Respondents.

No. 71350

JAN 19 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

James Burrows appeals from an order granting defendants' motion to strike plaintiff's expert report and opinions, order granting defendants' motion to strike plaintiff's fifth amended 16.1 disclosures, order denying plaintiff's motion to admit photographs and video evidence, order denying plaintiff's motion for new trial, and final judgment. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.[1]

Respondent Mark Riley, while acting in his employment capacity with ARS Investment Holdings, LLC (collectively ARS), was involved in a motor vehicle accident with Burrows in a gas station parking lot.[2] Burrows sued Riley and ARS, alleging negligence, which culminated in a bifurcated six-day trial determining liability. During the trial, five witnesses testified: Carla Bywaters, an eyewitness to the accident;

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[1]The Honorable Elizabeth Gonzalez signed the order granting defendant's motion to strike plaintiff's expert report and opinions and order granting defendant's motion to strike plaintiff's fifth amended 16.1 disclosures for Judge Leavitt.

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

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Burrows; Riley; an ARS manager; and an ARS representative. The jury returned a defense verdict. Burrows appeals the final judgment and also argues that the district court abused its discretion when it ruled against him in several pre-trial orders and an order denying his motion for a new trial.

First, we consider whether the district court abused its discretion when it granted ARS's motion to strike the reports and opinions of Burrows' accident reconstruction expert, William N. Morrison,[3] finding that Morrison's testimony would not assist the jury. "The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987); *see* NRS 50.275. "An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology." *Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008) (citations omitted). In determining whether an expert's opinion is based upon reliable methodology, the court considers, among other things, whether the opinion is "based more on particularized facts rather than

[3]Burrows also challenges ARS's arguments from the trial court proceedings regarding Morrison's failure to cite authority for his opinions, whether his failure to know Bywaters' height when creating the demonstrative video was of consequence, whether Morrison's testimony was biased, and whether Morrison's supplemental report and demonstrative video were timely disclosed. However, the district court specifically granted ARS's motion to strike Morrison's reports and opinions because they would not assist the jury—not for any of these reasons Burrows reasserts on appeal. Thus, these arguments are irrelevant to whether the district court abused its discretion on this issue.

assumption, conjecture, or generalization." *Id.* at 500-01, 189 P.3d at 651-52.

Expert testimony that "impermissibly encroaches on the trier of fact's province" should be properly excluded. *In re Assad*, 124 Nev. 391, 400, 185 P.3d 1044, 1050 (2008). And expert testimony concerning a witness' credibility improperly invades the jury's province. *See Townsend*, 103 Nev. at 118–19, 734 P.2d at 709; *Rowland v. Lepire*, 99 Nev. 308, 312, 662 P.2d 1332, 1334 (1983) (noting that it is exclusively within the province of the trier of fact to weigh evidence and pass on credibility of witnesses and their testimony). This court reviews a district court's decision to admit expert testimony for an abuse of discretion. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014).

Here, the district court did not err in striking Morrison's reports and opinions because they would not have assisted the jury, were speculative and conjectural, and would have improperly invaded the jury's province. First, in his investigation, Morrison did not conduct any experiments, calculations, or any other specialized analysis that resulted in information beyond a jury's common knowledge. Second, Morrison's opinions were speculative and conjectural because he did not know Bywaters' height when he created the demonstrative video purporting to show her line of sight. Third, Morrison's testimony and the demonstrative video would have exceeded the scope of an expert's testimony because they inappropriately challenged Bywaters' credibility by concluding that "her line of sight was obscured as she [] testified to." Specifically, this proposed testimony would have improperly invaded the jury's province by effectively telling (and showing) the jury that Bywaters could not have seen what she

says she saw. Therefore, we conclude that the district court did not err in granting ARS's motion to strike Burrows' expert.

Second, we consider whether the district court abused its discretion by denying Burrows' motion to admit the photographs and demonstrative video evidence taken by Morrison and/or to allow Morrison to testify as a lay witness to authenticate that evidence. "We review a district court's decision to admit or exclude evidence for an abuse of discretion . . . ." *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 408, 305 P.3d 70, 73 (2013) (citation omitted). Further, this court reviews the erroneous exclusion of evidence for harmless error. *McCourt v. J.C. Penney Co., Inc.*, 103 Nev. 101, 103, 734 P.2d 696, 698 (1987). We conclude that the district court did not abuse its discretion because it did not exclude any of the contested evidence—it merely required Burrows to lay the appropriate foundation before the evidence would be admitted at trial. The parties stipulated to most of the photos and to the use of Google Earth, which provided a detailed vantage point of the accident scene to assist the jury. Burrows also laid proper foundation for several of the photos not stipulated to and conducted a voir dire of Bywaters regarding whether the demonstrative video accurately reflected her line of sight. Therefore, the court did not err. But even if the exclusion had been in error, Burrows has not demonstrated that he was substantially prejudiced by the district court's denial to pre-admit the disputed photos and video, so any error would have been harmless.

Third, we consider whether the district court erred by "informing the jury that entering a verdict in favor of the plaintiff would cause them to return in approximately one month for a four week period to hear the damages portion of the trial." To begin, the record reflects that the

district court said that "depending on what happens in the case" the jury may have to return and did not mention the plaintiff at all in this context. What's more, Burrows specifically asked the district court to notify the jury about the four-week break and did not object when the court did as he himself requested. *See Cottonwood Cove Corp. v. Bates*, 86 Nev. 751, 753, 476 P.2d 171, 172 (1970) ("It has long been a rule of this Court that a party on appeal cannot assume an attitude or adopt a theory inconsistent with or different from that taken at the hearing below." (quoting *County of Clark v. State of Nev.*, 65 Nev. 490, 199 P.2d 137 (1948))). Therefore, he is estopped from raising this issue on appeal because he invited the error, if any, by asking the district court to instruct the jury. *See Rhyne v. State*, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002) (concluding defendant "estopped from raising claim on appeal because he invited the error by asking the district court to allow him to call the witness").

Last, we consider whether the district court abused its discretion in denying Burrows' motion for new trial, or in the alternative, motion to alter or amend judgment. Burrows offers several arguments to support reversal: substantial evidence did not support the jury verdict, the district court failed to properly instruct the jury, the district court failed to resolve the inconsistencies in the jury's verdict pursuant to NRCP 49(b), the jury disregarded the jury instructions, two juror affidavits supported the contention that the jury did not understand the court's instructions, and if it had, it would have found the parties 50/50 liable, and the jurors' affidavits should be considered to support a new trial because they reflect what physically transpired in the jury room and the court could independently verify their content. However, all of Burrows' arguments fail.

"The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse." *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007) (quoting *Edwards Indus. v. DTE/BTE Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996)). Indeed, this court will not overturn a jury's verdict unless it is "clearly erroneous when viewed in light of all the evidence presented." *Frances v. Plaza Pac. Equities, Inc.*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993). But a new trial may be granted for "[m]anifest disregard by the jury of the instructions of the court." NRCP 59(a)(5). When determining whether a new trial should be granted pursuant to NRCP 59(a)(5), this court must be "able to declare that, had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict which they reached." *Weaver Bros., LTD. v. Misskelly*, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982). However, if there is conflicting evidence and a reasonable person could draw different inferences from the facts, the question is one of fact for the jury. *See Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 840, 102 P.3d 52, 64 (2004) (noting the parties presented conflicting testimony and the jury was free to conclude that one side was more persuasive than the other).

First, substantial evidence supported the jury verdict through Bywaters' and Riley's testimony, with the assistance of the Google Earth aerial photography and other admitted photographic evidence. *Seyden v. Frade*, 88 Nev. 174, 177, 494 P.2d 1281, 1283 (1972) (holding this court will not disturb a judgment supported by substantial evidence unless it is clear that a wrong conclusion has been reached upon all the evidence). There was sufficient evidence for the jury to assess the credibility of the witnesses and determine liability, and thus the verdict was supported by substantial

evidence. *See Sierra Pac. Power Co. v. Day*, 80 Nev. 224, 229, 391 P.2d 501, 503 (1964) (concluding "any case where no irregularity or error whatsoever is shown prejudicial to a plaintiff during the trial of a negligence action and where there is a conflict in the evidence with respect to the plaintiff's . . . contributory negligence upon which reasonable men might differ, the question of contributory negligence should be submitted to the jury and that, under such circumstances, it is an abuse of discretion on the part of a trial court to weigh the evidence in this regard after a jury verdict for the defendant").

Second, the district court did not err in instructing the jury. Burrows failed to object to the jury instructions, verdict form, and the court's responses to the jury's questions. *See D & D Tire v. Ouellette*, 131 Nev. ___, ___, 352 P.3d 32, 37 (2015) (reviewing a decision to admit or refuse jury instructions for an abuse of discretion or judicial error). Because the jury instructions were not erroneous as a matter of law and Burrows did not object to the instructions or the verdict form, the district court did not err. *See Lublin v. Weber*, 108 Nev. 452, 455 n.1, 833 P.2d 1139, 1141 n.1 (1992) (holding a party who fails to object to a jury instruction may appeal if the instruction is "erroneous as a matter of law and constitutes reversible error . . . ."); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Further, the district court had no obligation to resolve any inconsistency in the jury's verdict because the verdict contains no inconsistency. The verdict form reflected only the jury's finding in favor of the defendant, which eliminated the need for the jury to address percentage

of liability. Therefore, no inconsistency was possible. Burrows also appears to claim that the jury's note requesting clarification of whether it could find 50/50 liability constitutes part of the verdict, creating an inconsistency. However, the jury's note came during deliberation and was not part of the verdict. But even if there had been an inconsistent verdict, Burrows failed to challenge it before the jury was discharged, therefore the challenge is waived. *Brascia v. Johnson*, 105 Nev. 592, 596 n.2, 781 P.2d 765, 768 n.2 (1989) (holding that a party must challenge inconsistencies in a verdict before the jury is discharged, and failure to object while the jury is available to clarify its verdict constitutes waiver).

Third, the district court properly disregarded the jurors' post-verdict affidavits when it considered Burrows' motion for a new trial. Generally, affidavits cannot be used to impeach a jury's verdict, subject to a few exceptions. *McNally v. Walkowski*, 85 Nev. 696, 699, 462 P.2d 1016, 1017 (1969) (noting that "cases may arise in which it would be impossible to refuse jurors' statements without violating the plainest principles of justice" (internal quotation marks and citations omitted)). Courts have considered affidavits detailing what physically transpired in the jury room, often involving juror misconduct. *Barker v. State*, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979) (admitting juror's affidavit detailing that the jury foreman had performed independent research and disclosed his findings to the jury because the affidavits simply relayed "objective facts, overt and capable of ascertainment by any observer, without regard to the state of mind of any juror"); *see also* NRS 50.065 The affidavits here were improper to support a new trial because they specifically discussed the jurors' state of mind and not jury misconduct.

Further, "juror affidavits [are] inadmissible to show that the jurors misunderstood the judge's instructions." *ACP Reno Assocs. v. Airmotive & Villanova, Inc.*, 109 Nev. 314, 318, 849 P.2d 277, 279 (1993) (reversing district court's grant of a new trial because the case was one where the jury "simply misunderstood the instructions given it" and therefore considering the jurors' affidavits was an abuse of discretion); *Weaver Bros.*, 98 Nev. at 233-34, 645 P.2d at 439 (reversing district court's grant of a new trial because it believed the jury had disregarded its instructions). Here, the jury sent a note asking whether they could find 50/50 liability, and the two jurors' affidavits claim the jury was confused as to whether they could find the parties equally liable. Both suggest that the jury misunderstood the court's instructions. Moreover, contrary to Burrows' assertions, the district court cannot independently verify the affidavits because the court here did not witness the jury's deliberations and cannot confirm that the jurors wanted to vote for 50/50 liability at the conclusion of deliberations. *See Vaise v. Delaval*, 1 Term.Rep. 11 (K.B. 1785) (". . . the Court must derive their knowledge from some other source, such as some person having seen the transaction through a window or by some such other means."). Therefore, we conclude the district court properly did not consider the jurors' affidavits in denying Burrows' motion for a new trial.

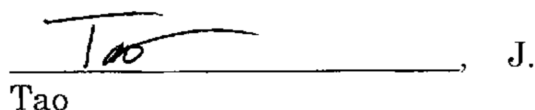
Finally, the district court did not err by failing to inform the parties that there had been a polling error and that two of the eight jurors did not agree with the verdict they had rendered. Only six of the eight jurors' votes were needed to support the civil verdict, so the polling discrepancy would not have changed the outcome of the trial. Further, Burrows failed to object or seek relief on any issue relating to the verdict when the jury was still present or immediately thereafter. *See Brascia*, 105

Nev. at 596 n.2, 781 P.2d at 768 n.2 (holding where inconsistent verdicts are returned, party must challenge the verdicts before the jury is discharged and "failure to object while the jury [is] still available and able to clarify its verdict constitute[s] a waiver"). Therefore, the district court did not err.[4]

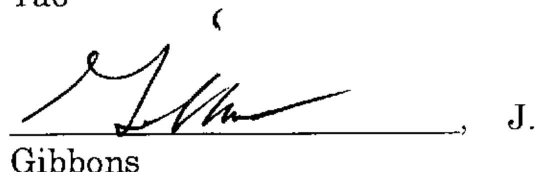
Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Silver



_______________, J.
Tao



_______________, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Hon. Elizabeth Goff Gonzalez, Chief Judge
Lansford W. Levitt, Settlement Judge
Roger P. Croteau & Associates, Ltd.
Moran Brandon Bendavid Moran
Eighth District Court Clerk

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[4]Burrows also argues the district court abused its discretion in granting ARS's motion to strike Burrows' fifth amended disclosures designating six additional witnesses, which were offered to counter ARS's subrosa video of Burrows. Because this was a bifurcated trial and only liability was at issue here, the subrosa video was not presented and thus Burrows did not need any of the witnesses he sought to designate. Therefore, we need not address this issue. *See generally Prabhu v. Levine*, 112 Nev. 1538, 1548, 930 P.2d 103, 110 (1996) ("The district court enjoys broad discretion in determining whether evidence should be admitted.").