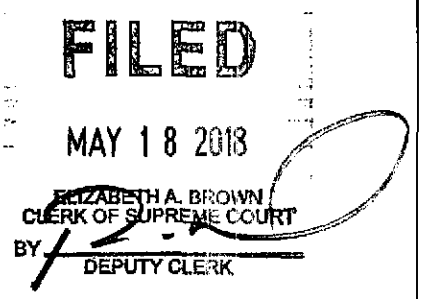
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUSSELL NEVINS, M.D.; R. NEVINS, M.D., LTD., A NEVADA PROFESSIONAL CORPORATION; AND NEVADA ORTHOPEDIC & SPINE CENTER, LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP,
Appellants,
vs.
MARILYN MARTYN,
Respondent.

No. 72752



ORDER OF AFFIRMANCE

Russell Nevins, M.D. et. al., appeal from an order following an evidentiary hearing regarding conflicting juror questionnaires and the district court's previous order granting a new trial. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

This case previously came before this court in docket no. 69249.[1] In that case, Dr. Nevins appealed the district court's decision to grant respondent Marilyn Martyn's motion for a new trial in a medical malpractice case. The district court granted a new trial on the basis of juror misconduct after respondent Marilyn Martyn presented affidavits from Juror 4 and Juror 6 stating that a third juror, Juror 7, had concealed the fact that her mother is a physician. Dr. Nevins thereafter moved for reconsideration and presented a declaration from the juror, who is an emigrant from Uzbekistan, stating that her mother is a "doctor" because she has a Ph.D. in biology and physiology, but her mother is not a medical doctor. The district court denied the motion for reconsideration, finding

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

that the juror concealed the fact that her mother is a "doctor." Following Dr. Nevins' appeal, this court thereafter remanded the case for an evidentiary hearing to determine the veracity of those jurors' affidavits and declaration.

At the evidentiary hearing on remand, all three jurors testified. Juror 6 stated that after the jury reached its verdict, Juror 7 began to cry and stated she had not slept. When Juror 6 asked why, Juror 7 asserted the trial would have never happened in her home country and it made her think of her mother, a doctor. Juror 6 could not recall if Juror 7 used the term "doctor" or "physician" but assumed that Juror 7's mother was a medical doctor. Juror 4, however, testified that Juror 7 said her mother was a physician and that people do not sue doctors in the Soviet Union.

Juror 7 testified that during a conversation with another juror about Uzbekistan, she said "my mom is a doctor," but that she never called her mother a physician nor did she consider her mother to be a physician in any way. She clarified that her mother holds a doctorate degree in biology, and that in Russia it is common to refer to those who hold doctorate degrees as "doctor." Although Juror 7 considered both her mother and Dr. Nevins to be a "doctor," she did not consider her mother to be the same kind of doctor as Dr. Nevins. She testified she is proud of her mother's achievement and, when asked, always tells people that her mother is a doctor. Juror 7 clarified that her mother taught high school biology after obtaining her degree. She stated she did not disclose her mother's work history on her juror questionnaire because her mother stopped working in the mid-to-late 1990s. Juror 7 admitted to commenting that doctors could not be sued in Russia, but clarified that her comment referred to her parents' educational level and the fact that nobody would ever sue them because they were too

poor. She denied crying or stating that the case made her think of her mother or that she had not slept.

The district court found that Juror 7 was trying to defend herself against its earlier decision that she had intentionally concealed bias, and found jurors 4 and 6 were more credible than Juror 7. The district court also noted the inconsistencies between Juror 7's questionnaire, declaration, and testimony. The district court again concluded that the parties were deprived of their right to a fair trial and an impartial jury because Juror 7 intentionally concealed the fact that her mother is a "doctor." Citing *Sanders v. Sears-Page*, 131 Nev. 500, 354 P.3d 201 (Ct. App. 2015), the district court again concluded a new trial for juror misconduct was warranted and denied the motion for reconsideration. This appeal followed.

On appeal, Dr. Nevins argues the district court abused its discretion by granting a new trial and thereafter denying his motion for reconsideration because (1) the district court failed to follow the applicable law, including *Khoury v. Seastrand*, 132 Nev. ___, 377 P.3d 81 (2016), (2) no admissible evidence supports the district court's conclusions, and (3) the evidence does not provide a basis for invalidating the jury's verdict. We disagree.[2]

We review the district court's decision to grant a new trial based on juror misconduct for an abuse of discretion. *Brioady v. State*, 133 Nev. ___, ___, 396 P.3d 822, 824 (2017). And, although the denial of a motion for reconsideration is not independently appealable, we may review that

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[2]Dr. Nevins advances various arguments regarding the differences between *Khoury* and *Sanders* and the applicability of those cases here, but we need not address those arguments as those cases dealt with challenges for cause rather than juror misconduct during voir dire, and the law provided in this order resolves the issues before this court.

decision for an abuse of discretion where, as here, the decision is part of the appellate record from the final judgment and the district court addressed the motion on the merits. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010); *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007). We will affirm the district court's decision if the evidence supports the findings. *See Maestas v. State*, 128 Nev. 124, 141, 275 P.3d 74, 85 (2012).

The Nevada Supreme Court recently addressed juror misconduct during voir dire in *Brioady v. State*, and held that a party is entitled to a new trial where the party demonstrates both "(1) that the juror at issue failed to honestly answer a material question, and (2) that a correct response would have provided a valid basis for a challenge for cause." 133 Nev. at ___, 396 P.3d at 823; *see also Maestas*, 128 Nev. at 138, 275 P.3d at 84 ("To obtain a new trial based on juror misconduct, the defendant must establish that (1) misconduct occurred and (2) the misconduct was prejudicial.").

In considering the first prong, our courts recognize that the juror's "'motives for concealing the information may vary but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.'" *Brioady*, 133 Nev. at ___, 396 P.3d at 824-25, *quoting United States v. Edmond*, 43 F.3d 472, 473 (9th Cir. 1994). This determination generally turns on whether the juror *intentionally* concealed the information, and is within the district court's sound discretion. *Id.*; *McNally v. Walkowski*, 85 Nev. 696, 701, 462 P.2d 1016, 1019 (1969) ("the determination of what result should follow the failure of a juror to answer fully a question touching upon his qualification turns upon whether or not he was guilty of an intentional concealment").

Where a juror intentionally conceals material information in a criminal trial, courts must grant a new trial "unless it appears, beyond a reasonable doubt, that no prejudice has resulted." *Canada v. State*, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997) (internal quotations omitted); *see also McNally*, 85 Nev. at 701, 462 P.2d at 1019 (holding a new trial may be required if a juror intentionally conceals a material fact related to the juror's ability to be fair and impartial). Importantly, the right to a trial by jury requires the jury be entirely composed of impartial jurors. *McNally*, 85 Nev. at 700, 462 P.2d at 1018. The presence of a single biased juror on the jury panel results in prejudice, even if the juror's vote does not change the final outcome. *See Jitnan v. Oliver*, 127 Nev. 424, 434, 254 P.3d 623, 630 (2011); *McNally*, 85 Nev. at 700, 462 P.2d at 1018 (holding that the parties are entitled to an impartial jury, even where the verdict need not be unanimous).

Thus, potential jurors must honestly answer voir dire questions so that each party may intelligently exercise their challenges.[3] *McNally*, 85 Nev. at 700-01, 462 P.2d at 1018-19; *cf. Brioady*, 133 Nev. at ___, 396 P.3d at 825 (concluding prejudice resulted where the defendant was unable to exercise a peremptory challenge to remove the juror). A new trial will be warranted where a party intentionally conceals bias. *See Maestas*, 128 Nev. at 140-41, 275 P.3d at 85 (holding "the critical question is whether the juror intentionally concealed *bias*") (emphasis added); *Canada*, 113 Nev. at 941, 944 P.2d at 783 (holding a new trial must be granted unless, beyond a reasonable doubt, prejudice did not result from the concealment); *McNally*,

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[3]It is for the court, not the juror, to determine whether information is relevant to a juror's ability to be impartial. *See Brioady*, 133 Nev. at ___, 396 P.3d at 825.

85 Nev. at 700-02, 462 P.2d at 1018-19 (holding that parties have a right to an impartial jury and that a juror's intentional concealment of a fact relating to the juror's ability to be impartial may require the grant of a new trial); *cf. Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (noting that where "the falsehood . . . bespeak[s] a lack of impartiality," a new trial is required).

Here, the evidence supports the district court's decision to grant a new trial. First, because Martyn alleged juror misconduct, the juror affidavits were admissible to show what occurred. *Walkowski v. McNally*, 87 Nev. 474, 476, 488 P.2d 1164, 1165 (1971) (creating a limited exception to inadmissibility of juror affidavits regarding the validly of a verdict where a party presents juror affidavits to show juror misconduct); *see also Meyer v. State*, 119 Nev. 554, 563, 80 P.3d 447, 454 (2003) (holding misconduct is ascertained by objective facts and overt conduct). And, jurors 4 and 6 could testify to those matters they personally witnessed.[4] *See* NRS 50.025.

Second, the evidence supports that Juror 7 intentionally concealed information. *See Maestas*, 128 Nev. at 140-41, 275 P.3d at 85. Juror 7's own testimony establishes that she is proud of her mother's degree, tells people her mother is a "doctor" whenever she is asked about her parents, and told her fellow jurors that her mother was a doctor in Russia

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[4]We do not determine whether the affidavits were hearsay, as Dr. Nevins did not raise that argument when opposing the motion for a new trial. *See Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996) (addressing a motion for reconsideration and holding that arguments "not raised in the original hearing cannot be maintained or considered on rehearing"); *see also 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.").

and that doctors are not sued there. Yet, she failed to disclose her mother's occupation on the juror questionnaire, even though instructed to do so, instead stating that her mother was unemployed. Notably, too, Juror 7 provided inconsistent answers throughout the proceedings when questioned about her mother's occupation. And, two of her fellow jurors testified that Juror 7 made comments in a context that correlated Juror 7's mother to Dr. Nevins. Juror 6 further testified that Juror 7 cried when she made the statement about her mother being a doctor and that doctors could not be sued in Russia. This evidence supports that Juror 7 failed to honestly answer a material question. *Cf. Brioady*, 133 Nev. at ___, 396 P.3d at 824-25 (concluding a juror intentionally concealed a material fact where the evidence showed that the voir dire questions and the facts of the case made the juror think of the concealed fact, but that she deliberately decided not to disclose it because she believed it was not relevant to her ability to be fair and impartial).

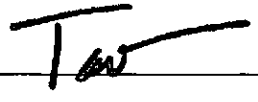
Finally, the record supports that this concealment prejudiced Martyn. Both the statements and the context of those statements support that Juror 7 correlated her mother's position as a "doctor" to Dr. Nevins's position as a physician and was biased in his favor. Nevada law is clear: the presence of a biased juror on the jury panel prejudices the parties. *See Jitnan*, 127 Nev. at 434, 254 P.3d at 630 (a party is prejudiced when a biased juror is empaneled). Moreover, the deliberate nature of the concealment supports that the concealment affected the fairness of the trial. *See Brioady*, 133 Nev. at ___, 396 P.3d at 824-25. Importantly, had Juror 7 disclosed on her juror questionnaire that her mother is a "doctor," the parties would have had the opportunity to question and challenge her on

this material point.[5] Instead, Juror 7's failure to honestly answer the question deprived Martyn of these opportunities, resulting in prejudice. *See Brioady*, 133 Nev. at ___, 396 P.3d at 825 (holding a new trial was warranted where a juror's failure to honestly answer voir dire questions deprived the defendant of his opportunity to challenge the juror); *McNally*, 85 Nev. at 700-02, 462 P.2d at 1018-19 (prospective jurors must honestly answer voir dire questions so that the parties may determine whether to challenge the juror).

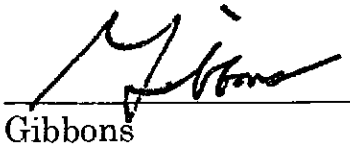
Because the record indicates both misconduct and resulting prejudice, we conclude the district court did not abuse its discretion by granting the motion for a new trial and thereafter denying the motion for reconsideration. *See Canada*, 113 Nev. at 941, 944 P.2d at 783 (where a juror intentionally conceals information, a new trial must be granted unless it appears beyond a reasonable doubt that the concealment did not prejudice the moving party).[6] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

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[5]We disagree with Dr. Nevins's contention that no objective fact supported a new trial here once Juror 7 testified her mother is not a physician. As set forth herein, a new trial is warranted where a juror intentionally conceals bias, and the facts here support the district court's conclusion.

[6]We have carefully considered Dr. Nevins's remaining arguments and conclude they are unpersuasive.

cc: Hon. Jerry A. Wiese, District Judge
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Eighth District Court Clerk