IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NEREYDA SALAZAR,
Appellant,
vs.
STEPHEN STUBBS, INDIVIDUALLY AND IN HIS CAPACITY AS MANAGER OF SIN CITY CITATIONS, LLC,
Respondent.

No. 73392

ORDER OF REVERSAL AND REMAND

Nereyda Salazar appeals from a judgment pursuant to a short trial jury verdict in a tort action. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.[1]

On July 3, 2014, while attempting to pick up a check for a business contract, Stephen Stubbs battered Nereyda Salazar, a receptionist at The Law Office of Mark Coburn.[2] The City of Las Vegas prosecuted Stubbs for two misdemeanors: battery under NRS 200.481 and disturbing the peace under NRS 203.010. He was convicted at a bench trial and the conviction was affirmed on appeal. Several employees of the law firm, including Salazar, sued Stubbs for various claims stemming from his July 3 actions. Most of the claims were either severed or settled, except, pertinent to this appeal, Salazar's claims of intentional infliction of emotional distress, battery, and negligence.

A short trial was held, resulting in a complete finding in favor of Stubbs. Salazar appeals the judgment, arguing that the short trial judge

[1]Pro Tempore Judge George E. Cromer presided over the short trial.

[2]The facts are not recounted except as necessary to the disposition.

abused his discretion: 1) by failing to grant an unopposed motion to continue and 2) in instructing the jury regarding Stubbs' criminal conviction, consent, and specific intent.

The motion to continue

The first issue to consider is whether the short trial judge abused his discretion in denying Salazar's motion to continue the trial and the subsequent emergency motion to continue. Salazar contends that her motions were made only after her doctors advised her about the current state of her high-risk pregnancy and recommended she avoid stressful situations, and that she was prejudiced by not being present at the trial, and could not provide in-person testimony. Under the Nevada Short Trial rules, "[n]o request for the continuance of a trial scheduled in the short trial program may be granted except upon extraordinary circumstances." NSTR 13. A motion to continue is reviewed for abuse of discretion. *Bongiovi v. Sullivan*, 122 Nev. 556, 570, 138 P.3d 433, 444 (2006) (noting that an attorney's illness is generally an adequate ground to grant a continuance).

Here, the court's review of this issue is limited because Salazar failed to include her motion to continue or the short trial judge's order of denial of the motion in the appellate record. Nevertheless, Salazar included her subsequent emergency motion to continue trial. That emergency motion described the history of the case and the trial court rulings, and the motion was supported by declarations and medical documentation. She repeated the factual and legal basis for a continuance in her appellate briefs and explained why it was an abuse of discretion and prejudicial for the short trial judge to have denied her unopposed motions. Stubbs did not directly oppose the arguments on appeal regarding the denial of the motion to continue. Instead, he briefly argued that Salazar was not prejudiced by the

denial of the motion for a continuance because she testified over the telephone and evidence supporting her claims was otherwise presented.

As Stubbs does not respond to Salazar's primary argument on appeal that a continuance should have been granted, he has conceded that argument. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating respondent's failure to address one of appellant's arguments "as a confession of error"). Stubbs nevertheless implies the denial of a continuance did not have any effect on the proceedings as the trial court allowed Salazar to appear by telephone at the trial. Yet, he admits that he has no evidence from the record that she appeared telephonically. And, the Nevada Supreme Court Rules that provide for appearances by telephonic means under certain circumstances do not allow such an appearance at trial. SCR Part IX-B(A)(4)(1)-(2). Therefore, as Stubbs has legally conceded the argument that the failure to grant the unopposed motion to continue trial was an abuse of discretion, and his alternative argument about a telephonic appearance is unpersuasive, the judgment must be reversed and the case remanded for a new trial. As the issues regarding the jury instructions may be repeated at the new trial, they will be discussed next.

The jury instructions

Salazar contends the short trial judge abused his discretion in instructing the jury in three different instructions: Stubbs' criminal conviction, consent, and specific intent. "A party is entitled to have the jury instructed on all of his theories of the case that are supported by the evidence." *Beattie v. Thomas*, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983). This court reviews a district court's instructions to a jury for an abuse of discretion. *Banks v. Sunrise Hosp.*, 120 Nev. 822, 832, 102 P.3d 52, 59 (2004); *see Carver v. El-Sabawi*, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005)

(providing that this court will not reverse a district court judgment for an erroneous instruction unless upon review of the entire record the error resulted in a "miscarriage of justice").

To begin, nothing in the record shows that Salazar objected to the instructions given to the jury. *See 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."). Therefore, we need only determine whether the jury instructions are "erroneous as a matter of law and constitute[ ] reversible error . . . ." *Lublin v. Weber*, 108 Nev. 452, 455 n.1, 833 P.2d 1139, 1141 n.1 (1992).

Regarding Stubbs' criminal conviction, Salazar argues that the short trial judge abused his discretion by failing to inform the jury that under Nevada law, a criminal conviction creates a presumption of liability in a later civil case on that same matter. *See* NRS 41.133 ("If an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury."). Below, the short trial judge did not fully instruct the jury as he failed to apply this statute. The short trial judge only stated: "You have heard that Mr. Stubbs was convicted of battery by a criminal court. The criminal court found Mr. Stubbs guilty of simple battery not resulting in substantial bodily harm. The criminal conviction does not alleviate Ms. Salazar's requirement to show that she was damaged [by] Mr. Stubbs' conduct." This instruction was incomplete and must include the statutory conclusive presumption.

Regarding the consent jury instruction,[3] Salazar argues that the short trial judge abused his discretion by instructing the jury to consider whether Salazar consented to the battery. The instruction was erroneous as Stubbs had been convicted of battery and the conclusive presumption in NRS 41.133 had to be applied here, too. Therefore, consent was no longer an issue as to the battery claim. The instruction on consent did not, however, necessarily apply only to battery, because the judge also instructed the jury as to consent in the context of Salazar's intentional infliction of emotional distress claim. Thus, the short trial judge on remand will need to clearly distinguish between the different claims for relief when instructing the jury.

Regarding the intent instruction, Salazar argues that the short trial judge abused his discretion by instructing the jury that battery is a specific intent crime.[4] The instruction was erroneous as a matter of law. Civil battery, like criminal battery, is a general intent offense. *See In re B.L.*, 192 Cal. Rptr. 3d 154, 157 (Ct. App. 2015); *see also Byars v. State*, 130 Nev. 848, 863, 336 P.3d 939, 949 (2014). Thus, the intent necessary for a civil battery is the intent to do an act that causes harm, not the intent to cause the harm. *See* Cal. Jury Instr. Civ. § 7.50 cmt. (2018) ("The intent necessary to constitute civil battery is not an intent to cause harm, but an

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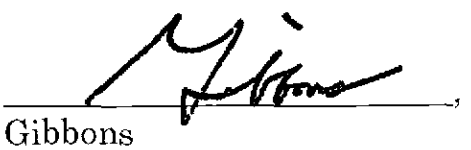
[3]Below, the jury was instructed that: "You have heard that Mr. Stubbs was convicted of battery by a criminal court. A criminal court does not consider the element of consent. The fact that a criminal court convicted Mr. Stubbs of battery does not establish lack of consent."

[4]The short trial judge instructed the jury that: "Mr. Stubbs acted intentionally if he intended to commit a battery or if he was substantially certain that a battery would result from his conduct."

intent to do the act which causes the harm."). Therefore, the instruction was erroneous as a matter of law and must be corrected on remand.

As three jury instructions were either inaccurate or incomplete, and Salazar did not testify in person due to the failure to grant a continuance, it cannot be said that these errors did not affect Salazar's substantial rights; a new trial is necessary for substantial justice. *See* NRCP 61. Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND for proceedings consistent with this order.



_____, J.
Gibbons

SILVER, C.J., concurring:

Stubbs was charged with misdemeanor battery and later convicted by a Las Vegas Municipal Court judge. After Stubbs appealed his battery conviction, an Eighth Judicial District Court judge affirmed Stubbs' conviction. Thereafter, Salazar filed a civil suit and at the conclusion of the civil trial, the arbitrator found Stubbs liable and awarded Salazar $25,355 in damages.

Stubbs then filed for a trial de novo and the case proceeded to a short jury trial. Salazar was eight and a half months pregnant at the time of trial. She had been diagnosed as a high-risk pregnancy and just prior to trial was hospitalized as a result of the pregnancy. Prior to trial, Salazar filed a motion to continue trial and attached medical documentation reflecting that her perinatologist ordered that she remain bedridden and

would absolutely not be able to attend the short trial because of her condition and the danger to the life of her unborn child. Ironically, Stubbs did not oppose the continuance of trial if the court found that the continuance was medically necessary. No evidence was presented to refute the perinatologist's order. Importantly, Salazar requested only a relatively short continuance of six weeks. Further, the facts do not suggest that granting the continuance would have prejudiced Stubbs because the trial had already been continued in the past.

Under these facts, I believe the short trial judge abused its discretion by not continuing trial at Salazar's request. Because Stubbs was criminally convicted by a judge for conduct underlying Salazar's civil action, which is conclusive on the issue of liability, the only question for the jury was damages on the battery charge. I cannot say that Salazar's inability to appear in front of the jury under these circumstances did not unfairly prejudice her or affect the verdict in this case. This is not, for example, a contract case, where a party can simply "call in" and testify over the phone. To the contrary, a party's demeanor upon the stand, the party's differences in physicality, and the party's credibility upon the stand play a major role in providing a jury with information necessary to determine damages under these facts. Moreover, in this case, a municipal court judge, a district court judge, and an arbitrator all found for Salazar in prior proceedings. Yet at the short trial, where Salazar was unable to personally attend and appear before the jury, a defense verdict was rendered. Based on the foregoing, under these specific facts I believe the short trial judge abused its discretion, resulting in prejudice to Salazar that requires reversal. *See Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007) (explaining that the denial of a

continuance is an abuse of discretion where prejudice results). Accordingly, I respectfully concur.[5]

Silver, C.J.

TAO, J., concurring in part and dissenting in part:

I agree that the jury instructions given below appear to have been erroneous. Stubbs was convicted (i.e., found guilty beyond any reasonable doubt) of the crime of battery, which means that every factual element underlying the conviction has already been conclusively proven to be true, and the jury should have been affirmatively instructed accordingly. Furthermore, an essential element of a criminal battery is that the victim never consented to the touching, and the short trial judge therefore erred in instructing the jury that it should consider whether Salazar may have "consented" to the battery when her lack of consent had already been conclusively proven by the very fact of Stubbs' criminal conviction.

I also agree that the short trial judge likely erred in refusing to grant Salazar's request for a continuance based on her physician's advice that she not testify so late in her pregnancy. Although trial judges possess broad discretion in controlling their dockets and deciding whether to grant last-minute continuances, if a physician's medical instructions during a high-risk pregnancy don't qualify as good cause for continuing a trial, I don't know what would.

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[5]For the reasons stated above, I would also concur regarding the additional causes of actions alleged by Salazar but not specifically addressed by this concurrence.

Having said all of that, where I don't agree is in concluding that either of these errors were either legally harmless or harmful to the outcome of the trial. The record includes only partial transcripts of the trial and motion arguments, and the parties have not bothered to provide us with authentic file-stamped copies of all of the written motions and briefs that the short trial judge had, or even a copy of the jury's verdict form indicating the basis for its verdict. We normally presume that missing pieces of the record support the district court's decision, which to me means that affirmance is in order when we know as little about what happened below as we do here. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"). Consequently, I respectfully dissent.

Tao, J.

Tao

cc: Hon. Eric Johnson, District Judge
Stephen E. Haberfeld, Settlement Judge
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Clear Counsel Law Group
Eighth District Court Clerk