

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON MORRIS,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA; AND CLARK COUNTY
DETENTION CENTER
CORRECTIONAL OFFICER DAVE
BENNETT, JR.,
Respondents.

No. 74533-COA

FILED

DEC 10 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jason Morris appeals from a district court order denying a motion for a new trial in a tort action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Morris sued the Las Vegas Metropolitan Police Department (LVMPD) and Officer Dave Bennett, Jr., for negligence, alleging that Bennett struck a curb while driving the van that was transporting Morris from the Clark County Detention Center to the Las Vegas Detention Center.¹ Morris claimed that the impact from driving over the curb caused him to slam into an interior wall of the van, thereby injuring his shoulder and necessitating medical treatment for a labral tear, including surgery.

At trial, the parties presented conflicting evidence concerning the nature of the accident and causation of the injury. For example, Morris estimated that Bennett was traveling close to 30 miles per hour and testified that the impact caused multiple inmates to go airborne and fall down on top of him. Contrarily, Bennett testified that he was traveling around two miles

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



per hour and characterized the curb strike as a “non-event,” with no inmates complaining of injury either during transport or upon arrival at the city jail. Morris’ expert (a treating physician, Dr. Liu) opined that the accident caused Morris’ injury, noting the presence of a bone contusion on his MRI indicating an acute injury. However, Bennett’s expert (a radiologist, Dr. Snyder) opined that the injury predated the accident because a paralabral cyst on Morris’ shoulder indicated that the tear was a chronic condition.

During closing argument, Bennett’s counsel seemed to imply that one of Morris’ prior accidents or injuries—evidence of which Bennett’s counsel elicited while cross-examining Morris—may have caused the injury at issue in this case. Bennett’s counsel also questioned Dr. Liu’s credibility, suggesting he had a financial incentive to testify in the manner that he did. After the jury returned a verdict in favor of LVMPD and Bennett, Morris moved for a new trial on grounds that Bennett’s counsel committed prejudicial misconduct, particularly with respect to the foregoing arguments. The district court denied the motion, noting that Morris failed to object to virtually all of the misconduct alleged and treating the issues as waived. The district court further determined that evidence of Morris’ prior injuries and accidents was admissible for impeachment in light of Morris’ answering “none” in response to an interrogatory Bennett had propounded inquiring whether any such injuries or accidents existed. The district court also concluded that Dr. Liu’s financial incentive in testifying was an appropriate topic for cross-examination. Accordingly, the district court determined that Bennett’s counsel’s arguments on these topics did not constitute misconduct.

On appeal, Morris asserts generally the same grounds for a new trial as he did below. He argues that this court should reverse the district court’s order and grant a new trial under NRCP 59(a) because Bennett’s counsel committed misconduct affecting Morris’ substantial rights.

Specifically, he contends that Bennett's counsel (1) referred to Morris' medical history as "complicated" without providing any supporting evidence; (2) referred to Morris' accident history without ever showing that the prior accidents caused his injury; and (3) misleadingly referred to Dr. Liu as the "\$15 million guy" with "53,000 reasons why he testified the way he [did]" in an effort to inflame the jury. Morris also argues that Bennett's counsel improperly invited the jury to speculate that something other than the subject accident caused Morris' injuries.

This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion, and it "must view the evidence and all inferences most favorably to the party against whom the motion [wa]s made." *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 814, 357 P.3d 387, 395 (Ct. App. 2015). "Under NRCP 59(a)(2), the district court may grant a new trial if the prevailing party[']s counsel] committed misconduct that affected the aggrieved party's substantial rights." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). An attorney commits misconduct when he or she "encourage[s] the jurors to look beyond the law and the relevant facts in deciding the case[] before them." *Lioce v. Cohen*, 124 Nev. 1, 6, 174 P.3d 970, 973 (2008).

Determining whether attorney misconduct warrants a new trial requires application of a three-step analysis. *Michaels*, 131 Nev. at 815, 357 P.3d at 395. We must first determine whether an attorney's comments constitute misconduct, which is a question of law reviewed de novo. *Id.* If there was misconduct, we must then decide which legal standard to apply to determine whether the misconduct warrants a new trial—a question resolved by whether the party claiming misconduct timely objected to it below. *Id.* Finally, we "must determine whether the district court abused its discretion in applying that standard." *Id.*

If the party claiming misconduct did not object at trial, “the district court shall first conclude that the failure to object is critical and . . . treat the attorney misconduct issue as having been waived, unless plain error exists.” *Lioce*, 124 Nev. at 19, 174 P.3d at 982. Plain error exists only where misconduct occurred and “no other reasonable explanation for the verdict exists.” *Michaels*, 131 Nev. at 816, 357 P.3d at 396 (internal quotation omitted).

Here, Morris failed to object to all of the alleged misconduct challenged in his motion below and on appeal.² Accordingly, the jury’s verdict must stand unless Morris can demonstrate that misconduct occurred and that it is the only reasonable explanation for the verdict. We conclude that, even if all of the conduct Morris challenges on appeal amounted to attorney misconduct, there would still be a reasonable explanation for the jury’s verdict in favor of LVMPD and Bennett apart from any misconduct.

It is “for the jury to weigh the evidence and assess the credibility” of witnesses. *Fox v. Cusick*, 91 Nev. 218, 221, 533 P.2d 466, 468 (1975). In

²Though he concedes that he did not object during Bennett’s counsel’s opening or closing arguments, Morris claims to have objected at trial when counsel brought up Morris’ medical history. However, Morris objected only when Bennett’s counsel questioned him about his response of “none” to the medical history interrogatory, and only on grounds that the question was argumentative and cumulative. Bennett’s counsel voluntarily moved on from that line of questioning. Morris also objected during Bennett’s counsel’s cross-examination of Dr. Liu, but only on grounds that she was asking Dr. Liu to speculate that a prior accident or injury contributed to the labral tear. The district court sustained the objection, and counsel moved on. These objections were not predicated upon attorney misconduct and thus were not sufficient to fully preserve the issue. See *Lioce*, 124 Nev. at 17-18, 174 P.3d at 980-81 (requiring parties to object *to attorney misconduct* to preserve the issue).

this case, it was for the jury to decide whether it believed Morris' account that the curb strike was a major disturbance that injured him or Bennett's account that it was a low-speed non-event that prompted no reaction from any of the passengers. It was also for the jury to decide whether it believed Dr. Liu's conclusion that the labral tear was an acute injury or Dr. Snyder's conclusion that it was a chronic condition predating the accident.³ Moreover, we agree with the district court that Bennett's counsel properly cross-examined Morris on his prior inconsistent statements about his accident and injury history. See NRS 50.085(3) (stating that specific instances of a witness's conduct "may, . . . if relevant to truthfulness, be inquired into on cross-examination of the witness"); *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004) (noting that a witness's prior inconsistent statements may be used to impeach that witness).⁴ Given the foregoing, the record on

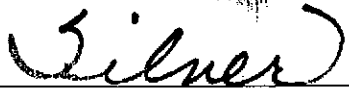
³Morris makes much of the fact that Dr. Snyder based his opinion solely on the MRI, which showed only a *posterior* labral tear and paralabral cyst, not the *anterior* tear Dr. Liu later discovered during surgery and ultimately repaired. Dr. Liu testified that the posterior tear ended up being a stable tear that did not need to be repaired, but that the anterior tear was unstable and thus warranted repair. However, we note that even Dr. Liu acknowledged that the cyst—which he initially stated related to the minor posterior tear—likely also related to the more severe anterior tear. For instance, he testified that if Morris had an MRI on the day of trial, the cyst would probably not appear because those kinds of cysts tend to disappear when a shoulder is stabilized. He also testified that because shoulders are circular, it is not unusual to see damage to the posterior labrum when there is an anterior tear. Accordingly, Dr. Snyder's opinion that the cyst predated the accident constituted sufficient evidence for the jury to conclude that Morris' injury did as well.

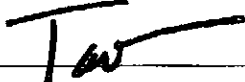
⁴It may have been inappropriate for Bennett's counsel to imply that Morris' prior accidents or injuries somehow related to the labral tear. See *FGA, Inc. v. Giglio*, 128 Nev. 271, 283-84, 278 P.3d 490, 498 (2012) (holding that evidence of prior injuries or accidents is admissible only when it shows

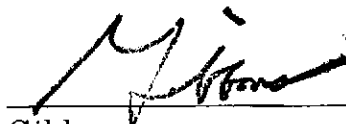
appeal demonstrates that the alleged misconduct of Bennett's counsel at trial does not constitute the only reasonable explanation for the jury's verdict. Thus, we conclude that plain error does not exist, and we must uphold the district court's denial of Morris' motion for a new trial.⁵

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver

 _____, J.
Tao

 _____, J.
Gibbons

cc: Hon. Ronald J. Israel, District Judge
Nettles Law Firm
Marquis Aurbach Coffing
Eighth District Court Clerk

a causal connection between them and the injury at issue). Nevertheless, Bennett's counsel appropriately used evidence of Morris' inconsistent statements about those incidents throughout the litigation to undermine his credibility as a witness.

⁵Notwithstanding our disposition of this case, we caution Bennett's trial counsel to avoid the kind of language she used in closing to describe Dr. Liu. While he did testify that the global fee for Morris' surgery was in the vicinity of \$50,000 and that he performs close to 300 similar surgeries a year, Bennett's counsel improperly disparaged the witness by referring to him as the "\$15 million guy." Dr. Liu definitively stated that his portion of the global fee was much smaller than \$50,000, so the implication that he made \$15 million a year from shoulder surgeries was not based on the facts adduced at trial.