

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH SERHAL,
Appellant,
vs.
NEVADA POWER COMPANY DBA NV
ENERGY; AND RICE CONSTRUCTION
COMPANY,
Respondents.

No. 87067-COA

FILED

JAN 28 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Joseph Serhal appeals from a district court judgment after a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

During the late hours of May 5, 2014, Serhal fell in a construction trench after his shift at the Golden Nugget Las Vegas Hotel and Casino.¹ Respondent Nevada Power Company had hired respondent Rice Construction Company (collectively Rice Construction) to dig a trench at the intersection of Fremont Street and Main Street to replace power utility lines. Rice Construction had posted warnings regarding the trench. Barricades had also been placed nearby. Shortly after Serhal's fall, an insurance adjuster interviewed the construction workers employed by Rice Construction who were present at the time of the accident. The adjuster recorded the interviews and wrote reports on the incident.

As a result of his fall, Serhal suffered a laceration and developed chronic back pain that surgery was unable to mitigate. Serhal brought suit in 2016 against Nevada Power, Rice Construction, Blue Star

¹We recount the facts only as necessary for our disposition.

Barricades,² and the City of Las Vegas. The latter two were dismissed with prejudice from the suit during the litigation. Rice Construction had an indemnity provision in its contract with Nevada Power, and it represented both parties in the lawsuit. During discovery, Serhal made a discovery request that encompassed interviews and reports, but Rice Construction objected to the request and Serhal never moved to compel production nor sought other assistance.³

A week before trial in 2022, Serhal learned from Rice Construction that it had the insurance adjuster's interviews and reports which were responsive to his prior discovery request, and he orally brought the issue to the attention of the district court after jury selection started. The district court, without objection from the parties, immediately ordered Rice Construction to provide the interviews and reports to Serhal within 24 hours, and Rice Construction complied that same day by providing Serhal with the oral recordings of the interviews.

During voir dire, Serhal asked the entire venire whether anyone believed that a slip-and-fall plaintiff was always partially at fault, and a dozen prospective jurors raised their hands. Serhal questioned them further, and he was able to get most of them to reconsider their opinion and affirm that they would listen to the facts of the case before determining

²Rice Construction argued at trial that Blue Star Barricades, a subcontractor, had improperly installed barricades near the trench.

³Although Rice Construction's original lawyer objected to the discovery request, that objection was never resolved, and Rice Construction did not divulge the interviews and reports. Rice Construction's original lawyer passed away during the litigation and the new lawyers apparently overlooked these interviews and reports until shortly before trial after being notified by Serhal.

fault. Likewise, the district court explained the trial process and the court and Rice Construction asked the prospective jurors if they would decide the case based on the evidence; most of them said that they would. During this process, Serhal never moved to strike the prospective jurors for cause, nor did he object when the court and Rice Construction attempted to explain the process and rehabilitate them. Further, none of the prospective jurors who failed to change their minds were ultimately empaneled on the jury.

The next day, Serhal moved for a continuance after he viewed the newly provided interviews, arguing that they included critical evidence that could affect the outcome of the trial. The district court did not rule on the motion at that time but discussed with the parties extending the proceedings in the trial by a few days to allow them to depose the workers, and Serhal agreed to that procedure. The court thus paused the trial and allowed the parties to depose the workers over the long weekend. The district court also scheduled a status conference the night before the next trial day to see if a continuance was necessary.

The parties were able to depose the workers over the weekend. During the status conference, Serhal said that the depositions were a good solution to the problem and he was ready to proceed with the trial. Further, at a later point and for a different reason, the district court offered the parties the option to continue the trial, and Serhal specifically declined the offered continuance and asked to move forward with the trial.⁴

⁴When the jury was empaneled there was only one alternate juror, so the district court wanted to select more alternate jurors, which would pause the presentation of opening statements by another day. At that point, the court offered the parties a continuance of the trial, but Serhal stated he would rather extend by a day and move forward with the trial.

Serhal also asked the district court for an “order to compel” the insurance company and parties to divulge any other related reports or evidence. The court agreed and asked Serhal to submit a proposed order, which he later submitted. However, the court added language to the order stating if the evidence did not exist (because the reports may have been created nearly a decade earlier by an insurance adjuster no longer in business and the lawyer who made the objection to producing the reports was deceased) that sanctions would not be imposed if reasons were provided as to why the evidence was no longer available. Serhal did not oppose the addition of that language, and the district court signed the order. The record does not reveal that, in response to the order, Rice Construction withheld any other evidence, or that the parties offered anything that affected the proceedings.

During the settling of jury instructions, Serhal stated that he wanted to instruct the jury on legal causation, but the district court said it was going to instruct the jury on both legal and proximate cause.⁵ The court, however, said that it would provide an instruction informing the jury that it need only find either proximate or legal cause for causation to be established, and Serhal agreed with that process and legal proposition.

During closing arguments, Rice Construction responded to Serhal’s argument by advancing a theme that Serhal was performing a sleight-of-hand by misdirecting the jury with evidence that did not prove his liability in the case while telling the jury that Serhal wanted to “pick your pocket” by asking it to return a verdict in favor of Serhal. Rice

⁵The Nevada pattern jury instructions provide separate instructions for proximate causation and legal causation. See Nevada Jury Instructions: Civil §§ 4.4-4.6 (2018 ed.).

Construction mentioned this “pick your pocket” phrase six times during closing argument, but Serhal never objected to the comments, and instead, responded to it during his rebuttal closing argument.

The jury returned a verdict that all parties were partially at fault and that Serhal was 60 percent at fault for his fall, precluding him from recovering any award. The district court entered judgment for Rice Construction and Serhal now appeals.

Serhal argues that the district court abused its discretion when it denied his motion for a continuance after the undisclosed evidence of the interviews with the construction workers came to light. He argues that the court de facto denied his motion for a continuance and he worked with the court thereafter only to salvage the situation as much as possible. Rice Construction counters that Serhal waived and withdrew his motion to continue by working with the court to craft an alternative remedy and, even if the issue was not waived, there was no error because Serhal expressed his satisfaction with the remedy and did not renew his motion to continue the trial.

“[F]ailure to object to a ruling or order of the court results in [forfeiture] of the objection and such objection may not be considered on appeal.” *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988). But, if the party makes an objection and the court does not make a formal ruling, this court treats that as an implicit denial of the objection or motion, and the alleged error is preserved for appeal. See *Bd. of Gallery of Hist., Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (explaining that the absence of a ruling by the district court on a motion constitutes a denial of the motion). However, if the party

withdraws an objection, then the issue is waived and cannot be considered on appeal. *Jefferes v. Cannon*, 80 Nev. 551, 553-54, 397 P.2d 1, 2 (1964).

“We review the district court’s decision on a motion for continuance for an abuse of discretion.” *Bongioui v. Sullivan*, 122 Nev. 556, 570, 138 P.3d 433, 444 (2006). “Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made.” *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010). The Nevada Supreme Court has held that generally, a denial of a motion to continue is an abuse of discretion if it leaves a party with inadequate time to prepare for trial. *See S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). The failure to disclose evidence normally does prejudice a party, and a continuance is a method to cure that error. *See generally id.*; *see also Higgs*, 126 Nev. at 9, 222 P.3d at 653.

Here, the district court did not formally rule on the motion for a continuance, but it delayed a decision when it initiated discussion with the parties about the alternatives to remedy the issue after the motion was made. *Cf. Bd. of Gallery*, 116 Nev. at 289, 994 P.2d at 1150. However, even if that process was an effective denial, it was not an abuse of discretion for two reasons. First, the district court worked with the parties to remediate the problem with the undisclosed evidence by pausing the trial and allowing Serhal to depose the witnesses and receive all the remaining information that was available. Second, the court left the option for a continuance open to the parties if they felt that the remedy did not adequately resolve the issue of the undisclosed evidence—an option that Serhal declined, not once but twice.

Additionally, Serhal has not demonstrated that his substantial rights were adversely affected because he used the late disclosed evidence to impeach the three construction workers who testified at trial. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (“To establish that an error is prejudicial, the movant must show that the error affects the party’s substantial rights so that, but for the alleged error, a different result might reasonably have been reached.”). Further, Serhal participated in the error now alleged on appeal by not renewing his motion to continue and, instead, asking the court to proceed with trial. *See Jefferes*, 80 Nev. at 553-54, 397 P.2d at 2; *cf. Eivazi v. Eivazi*, 139 Nev., Adv. Op. 44, 537 P.3d 476, 494 (Ct. App. 2023) (“The doctrine of ‘invited error’ embodies the principle that a party will not be heard to complain on appeal of errors which he himself has introduced or provoked the court or the opposite party to commit.” (further internal quotation marks omitted)). Therefore, we conclude that no relief is warranted on this claim.

Next, Serhal argues that the district court committed plain error when it failed to sua sponte admonish Rice Construction for misconduct when Rice Construction repeatedly stated during its closing argument that Serhal was trying to “pick your pocket.” Rice Construction responds that Serhal waived the issue by not objecting and, if the court considers it, that a casual inspection of the record does not show that these comments affected Serhal’s substantial rights.

Under plain error review, “the decision whether to correct a forfeited error is discretionary.” *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018); *see also Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973) (discussing plain error in a civil context, stating that the court “will not consider the [issue], unless the error is so unmistakable that it

reveals itself by a casual inspection of the record” (internal quotation marks omitted)). This standard encourages parties to litigate first in the district court to “provide[] for more accurate appellate review” because the district court has a better view of the issues during trial, and without the findings that stem from preserved error, the appellate court “would be left with review of a potentially misleading record.” *United States v. Ameline*, 409 F.3d 1073, 1082 (9th Cir. 2005) (en banc) (discussing how an appellate court cannot determine whether a district judge’s comments during sentencing were prejudicial under plain error review because there were no explicit district court findings).

Specifically, “[i]n the context of unobjected-to attorney misconduct,” the appellant must show irreparable and fundamental error, meaning “error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.” *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008). Further, “plain error requires a party to show ‘that no other reasonable explanation for the verdict exists.’” *Id.* (quoting *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)).

In the case of plain error-review of unobjected to attorney misconduct when there is an order deciding a motion for a new trial, appellate courts analyze the district court’s decision to determine “whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error.” *Id.* And appellate courts also require that “the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standard[]” described above. *Id.* at 19-20, 174 P.3d at 982. This

requirement illustrates the importance of bringing any alleged error to the district court, so that court gets the first chance to resolve issues and create a record for appellate review. *See generally id.* If a party does not raise this issue with the district court, then we may be left reviewing an incomplete record. *See Ameline*, 409 F.3d at 1082.

Here, Serhal did not object to the alleged misconduct, request a mistrial, or file a motion for a new trial after the verdict. Therefore, the district court did not hear arguments from the parties, make factual findings, or resolve the alleged error. Thus, our review is hampered by an incomplete record. *Cf. Rives v. Farris*, 138 Nev. 138, 142-43, 506 P.3d 1064, 1068-69 (2022) (recognizing that “a timely objection alone is sufficient to raise and preserve an issue for appellate review”).

Nevertheless, Serhal argues for the first time on appeal that Rice Construction committed misconduct by violating the golden rule and making inflammatory statements during its closing argument such that the district court plainly erred in not sua sponte admonishing Rice Construction for its misconduct.⁶ While Rice Construction’s repeated suggestions to the jury that Serhal’s counsel was attempting to “pick your pocket” was no doubt inflammatory and arguably misconduct, we cannot determine from the sparse record on this issue that the use of this phrase resulted in a “substantial impairment of justice or denial of fundamental rights such

⁶The golden rule states that a party cannot ask the jurors to put themselves in the place of the party because that would cause an emotional response that would prevent the jury from fairly judging the evidence as it was produced during trial. *Lioce*, 124 Nev. at 22, 174 P.3d at 984. Here, there is not a violation of the golden rule because Rice Construction did not ask the jurors to put themselves in the place of the party.

that, but for the misconduct, the verdict would have been different.” *Lioce*, 124 Nev. at 19, 174 P.3d at 982.


Serhal further argues that the comments impaired his rights because the fault between him and Rice Construction was extremely close, in that the percentage of fault attributed to the parties in the verdict was only 60-40 against Serhal. However, that circumstance does not show that but for the comments, the verdict would have been different. *See id.* We note that, instead of contemporaneously objecting, Serhal responded to Rice Construction’s “pick your pocket” argument on rebuttal. Thus, Serhal may have strategically chosen not to object so that he could address the argument head-on before the jury during his rebuttal argument as the jury was about to retire for deliberations. *See Jeremias*, 134 Nev. at 52, 412 P.3d at 49-50 (declining to correct a forfeited error, in part, because the defendant’s “failure to object could reasonably be construed as intentional”).


Here, Serhal’s opportunity to rebut Rice Construction’s arguments, along with all the other evidence that the jury considered when judging the comparative fault of the parties, including the existence of barriers and warnings at the construction site, leaves us in a position of not being able to determine that there was no other reasonable explanation for the jury’s verdict such that there was irreparable and fundamental error. *See Lioce*, 124 Nev. at 19, 174 P.3d at 982. Thus, we conclude that Serhal does not demonstrate that the district court committed plain error when it did not sua sponte admonish Rice Construction.

Lastly, Serhal argues that the district court abused its discretion when it: waited to issue the order to compel discovery from Rice Construction; added the language stating the relevant parties would not be sanctioned if they were unable to produce evidence in response to that order;

failed to excuse the biased prospective jurors for cause while also allowing Rice Construction to rehabilitate them; and included both legal and proximate causation jury instructions. However, Serhal either agreed to these procedures below, or failed to object or otherwise preserve these claims of error for review on appeal. Serhal does not argue plain error for these issues, so we decline to consider them. *See Landmark Hotel*, 104 Nev. at 299, 757 P.2d at 362. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Jessica K. Peterson, District Judge
Persi J. Mishel, Settlement Judge
Cloward Trial Lawyers
Richard Harris Law Firm
Pacific West Injury Law
Springel & Fink, LLP
Lemons, Grundy & Eisenberg
Eighth District Court Clerk

⁷Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.