

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DIAMOND HALL,  
Appellant,  
vs.  
JUSTIN MARTIN,  
Respondent.

No. 83979-COA

**FILED**

SEP 22 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Diamond Hall appeals from a district court child custody order awarding primary physical custody to Justin Martin. Eighth Judicial District Court, Family Court Division, Clark County; Soonhee Bailey, Judge.

Diamond Hall and Justin Martin were never married but have one child together, G.M.<sup>1</sup> On December 1, 2019, Diamond visited Justin's house unannounced and uninvited.<sup>2</sup> After Diamond texted Justin she was at his home, she entered the house through the dog door. She exited but reentered again without permission. Justin asked her to leave, but she refused. She pursued Justin throughout the house even when Justin tried to disengage. Diamond testified she was trying to talk with him. Justin testified she poked him in the eye and the chest. A video presented at trial showed Diamond making a poking motion towards Justin's face and chest.<sup>3</sup>

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

<sup>2</sup>Diamond had been living on her own since 2019, though she previously lived with Justin at his house.

<sup>3</sup>Justin testified that the video presented at trial came from his Swan security surveillance system.

The video also revealed Diamond attempting to grab Justin's phone from his hand while he was apparently attempting to call the police. In both instances, the video showed Justin trying to retreat, but Diamond blocked his path. Diamond testified she did not try to take his phone from his hand and denied poking Justin. She admitted behaving badly but asserted Justin pushed or grabbed her first and she had to defend herself. Diamond also admitted to shoving Justin on one occasion in the 12 months prior to the December 2019 incident. Diamond was arrested on December 2 and charged with trespass and battery constituting domestic violence.

On December 4, Diamond filed a complaint for child custody and Justin filed an answer and counterclaim shortly thereafter. Meanwhile, Diamond was still facing pending domestic violence charges from her December arrest. The custody case was twice set for trial in 2020, but it was continued to May 2021 because of the COVID-19 pandemic. During a pretrial hearing in April 2021, the district court asked the parties about the status of Diamond's domestic violence case. When it learned that the criminal case had twice been reset for trial, the court stated it needed to resolve the custody case and hold trial because there was no possible way it could continue the case again. The district court also directed Diamond to discuss with her criminal attorney how to proceed with testifying at the custody trial or if she should invoke her Fifth Amendment privilege. The custody trial was reset for July 30 or August 2.

Diamond's criminal matter was reset again to the end of October. At Justin's request, Diamond stipulated to continue the custody trial until after her domestic violence case concluded. However, the district court rejected their stipulation. Justin then filed a motion to continue the custody trial; the district court denied his motion, noting that it wanted the

custody trial resolved. The district court stated Diamond could invoke her Fifth Amendment right to remain silent and that the domestic violence presumption would be available during trial. The court also noted Justin could testify as to the entire domestic violence incident. The district court reset the custody trial one more time to August 16, without objection by Diamond. Diamond never filed a motion to continue the trial.

The district court held a one-day child custody trial, on August 16. During the custody trial, Diamond elected to testify and claimed self-defense, thereby waiving her Fifth Amendment rights. While on cross-examination, Justin's attorney referenced hours of video that Diamond alleges had not been previously disclosed or produced by Justin during discovery. Justin produced short video clips during trial, which were admitted without objection following Diamond's testimony.

Following the custody trial, the district court found by clear and convincing evidence that Diamond committed two acts of domestic violence against Justin on December 1, 2019, battery and coercion, and another act of domestic violence in the preceding 12 months. The court found Justin's testimony about the December incident credible and specifically highlighted certain video clips as corroboration of his testimony. The court found Diamond's testimony characterizing the incident as mutual combat was not persuasive. As such, the court found that each of the incidents of domestic violence by Diamond created a rebuttable presumption that sole or joint physical custody of G.M. by Diamond was not in G.M.'s best interest.<sup>4</sup> The

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<sup>4</sup>NRS 125C.0035 states that the sole consideration of the court in determining physical custody of a minor child is the best interest of the child. In determining the best interest of the child, the court must consider and set forth its specific findings applying, among other things, the factors

court further found that Diamond had not overcome the presumption and that it was in G.M.'s best interest for Justin to exercise primary physical custody. Diamond received parenting time for 48 hours every weekend.

Diamond filed a motion to reconsider requesting that the court amend its findings because Justin had failed to disclose evidence requested by Diamond during discovery. The district court found that while Diamond claimed Justin committed discovery violations, she failed to file a motion to compel and did not raise any issue with the discovery commissioner. The court further found that although Diamond claimed she only became aware of the full four-hour video at the custody trial, Diamond previously disclosed the existence of videos in her pretrial memorandum. Lastly, the court found that while Diamond argued the rule of completeness at the evidentiary hearing, neither party provided the video to the court even though the court stated it would view the entire video if submitted. In its order following the motion to reconsider, the court denied Diamond's motion in its entirety and ordered her to pay Justin's attorney fees and costs.

On appeal, Diamond argues that the district court's decision to proceed with the custody trial while her criminal trial had not been fully adjudicated violated her Fifth and Fourteenth Amendment rights. Diamond also argues that the district court abused its discretion when it failed to order Justin to introduce the complete video and audio files and

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listed in NRS 125C.0035(4). NRS 125C.0035(5) creates a rebuttable presumption that sole or joint physical custody by a perpetrator of domestic violence is not in the best interest of the child, if after an evidentiary hearing, the court finds by clear and convincing evidence that a parent engaged in one or more acts of domestic violence against the child or a parent of the child. The district court followed all of the statutory procedures.

allowed him to introduce only snippets of the video file at the custody trial. Diamond asserts this court should grant her a new trial. We disagree.

*The district court did not violate Diamond's Fifth and Fourteenth Amendment rights because Diamond fails to establish a true deprivation of her constitutional rights*

Diamond argues the district court violated her Fifth and Fourteenth Amendment rights when it proceeded with the custody trial before a final adjudication of her domestic violence case. Diamond claims the district court's decision to deny a stay on the custody trial essentially "forced" her to waive her Fifth Amendment rights.

Issues not argued below are "deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Constitutional challenges are reviewed de novo. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). The Constitutions of the United States and Nevada guarantee a person due process before that person is deprived of a constitutional interest. *See id.* The Fifth Amendment to the United States Constitution, which applies in both civil and criminal proceedings, allows a party to refuse to answer questions which may lead to answers that could incriminate the answering party to future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

Despite Diamond's claim that the district court violated her Fifth Amendment rights, the record lacks evidence that Diamond objected below to the custody trial being held before the criminal trial. Moreover, Justin moved for a continuance, not Diamond. Therefore, this court need not consider her claim about the timing of the trial. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Regardless, the district court's decision to proceed with the custody trial was not a deprivation of her constitutional

rights. The court merely reminded Diamond she had the choice to invoke her Fifth Amendment privilege or testify at the custody trial. The district court never prevented Diamond from invoking her right to remain silent. Notably, the district court even suggested Diamond speak with her criminal attorney about invoking her Fifth Amendment privilege. Further, Diamond fails to show her testimony at trial was potentially incriminating testimony under the Fifth Amendment because her testimony consisted of denials and an assertion of self-defense regarding the domestic violence incident at Justin's home. This testimony could be interpreted in different ways and would not necessarily have subjected Diamond to potential criminal liability during her criminal trial; her testimony may have served to help her defense in the parallel domestic violence matter.

Ultimately, Diamond chose to testify at the custody trial as to self-defense, thereby voluntarily waiving her Fifth Amendment privilege and rendering her argument on appeal unpersuasive.<sup>5</sup> Diamond mischaracterizes the district court's decision to deny another continuance in the custody trial as a constitutional violation of her Fifth Amendment rights. Diamond was never obligated to testify at trial, and the district court did not compel her to testify or claim self-defense.

Diamond similarly alleges the district court's decision to move forward with the custody trial violated her Due Process rights under the Fourteenth Amendment. The Fourteenth Amendment affords a party due process before the government deprives it of property or a protected

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<sup>5</sup>See generally, *Blalark v. State*, 112 Nev. 795, 796, 918 P.2d 1314, 1315 (1996) (providing that a knowing and voluntary waiver of a right prevents a party from seeking enforcement or claiming a violation of that right on appeal).

constitutional interest. *Callie*, 123 Nev. at 183, 160 P.3d at 879. The Nevada Supreme Court has recognized that procedural due process “requires notice and an opportunity to be heard.” *Id.* (internal quotation marks omitted). The United States Supreme Court has categorized the interest of parents in the care, custody, and control of their children as fundamental rights. *Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812, 818 (2005). Since parents have identical fundamental interests in the custody and care of their children, the Nevada Supreme Court has concluded that a dispute as to this fundamental right is best resolved in applying the best interest of the child standard. *Id.*; see also NRS 125C.0035.

The district court gave Diamond a fair opportunity to be heard and notice of her hearing. Since both Diamond and Justin equally possessed a fundamental right to the custody and care of G.M., the district court correctly applied the best interest of the child standard under NRS 125C.0035, using all the factors listed in NRS 125C.0035(4).<sup>6</sup> The district court found by clear and convincing evidence that Diamond engaged in multiple acts of domestic violence against Justin, thus creating a rebuttable presumption under NRS 125C.0035(5) against joint physical custody. Diamond failed to present any evidence to overcome the rebuttable presumption, and therefore, the district court’s decision to award Justin primary physical custody was not a violation of due process.

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<sup>6</sup>In its Decision and Order following the custody trial, the district court found three of the best interest factors under NRS 125C.0035(4) favored Justin. The court found the remaining factors were all neutral or inapplicable, and none favored Diamond.

*The district court did not abuse its discretion when it proceeded with the custody trial while Diamond's criminal domestic violence trial had not yet concluded*

As previously explained, although Diamond alleges a constitutional violation, the record clearly establishes that the district court did not deprive Diamond of her ability to invoke her Fifth Amendment privilege during the custody trial. Therefore, this court must review the district court's decision to proceed with the custody trial for an abuse of discretion.

The Nevada Supreme Court has recognized that a party facing parallel criminal and civil proceedings often must choose between providing testimony in the civil proceeding that could be used in the criminal matter or assert their Fifth Amendment privilege, usually negatively impacting the civil trial. *See Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 638, 289 P.3d 201, 203 (2012). Nonetheless, civil and criminal matters may constitutionally proceed simultaneously, and the authority to grant a stay of the civil proceedings ultimately rests within the district court's discretion. *See id.* "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted). Further, courts in other jurisdictions have agreed that a party has no constitutional right to have a stay granted simply because there is an active parallel criminal proceeding. *See Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012) (holding that a stay of a civil case to allow for determination of a parallel criminal case is an "extraordinary remedy" hardly ever required under the Constitution); *Microfinacial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77-78 (1st Cir. 2004) (noting that

a party has no constitutional right to be granted a stay simply because a parallel criminal proceeding is pending); *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989) (stating that a district court's decision to stay civil proceedings pending an outcome of parallel criminal proceedings is not required by the Constitution).

The district court's decision to deny a continuance of the custody trial did not amount to an abuse of discretion for several reasons. First, the custody case had been pending since 2019. Though there were attempts to continue the custody case until Diamond's criminal matter was resolved, the district court was under an obligation to proceed with and promptly conclude the custody trial. See SCR 251 (requiring courts to conclude proceedings related to custody and parenting time within six months of the matter being contested absent findings of extraordinary or unforeseeable circumstances). Second, Diamond's criminal matter had been continued several times before the district court eventually decided the child custody case would not be further continued. The criminal trial had been reset multiple times in 2020 and 2021, finally to October 28, while the custody trial was reset for the final time for August 16. It was wholly within the district court's discretion to deny another continuance because granting another continuance in the custody matter would have possibly forced the court to hold trial for the custody matter more than two years after the case became contested, depending on the duration of the criminal domestic violence proceedings. The district court was not outside the bounds of law or reason when it made its best effort to comply with SCR 251 and proceeded with the custody trial, after affording the parties previous continuances.

Finally, Diamond has not established how she was prejudiced by either the lack of another continuance or by taking the witness stand. *Cf.* NRCPC 61 (a court must disregard all errors that do not affect a party's substantial rights). Therefore, the district court did not abuse its discretion when it did not stay the custody proceedings.

*The district court did not abuse its discretion when it did not continue the child custody trial to order production of the complete audio and video files*

Diamond argues she was deprived proper discovery when the full video recording of the domestic violence incident was not given to her before the custody trial; thus, she argues this court should order a new trial with the complete files available for review. On the other hand, Justin claims Diamond was in possession of the four and one-half hours of tape from the incident at issue and other significant audio and video from the same incident date. We conclude that while it is not fully clear from the record whether Diamond was in actual or constructive possession of the full video and audio, she nonetheless fails to show the district court abused its discretion when it did not continue the custody trial to order Justin to produce the complete evidence files. Additionally, Diamond does not allege how the additional evidence would have altered the district court's order and findings following the custody trial.

A district court's decision to admit or exclude evidence during trial will not be disturbed unless the district court clearly abused its discretion. *See Davis v. Beling*, 128 Nev. 301, 310, 278 P.3d 501, 508 (2012); *M.C. Multi-Fam. Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008); *see also Castillo v. State*, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998) (“[d]istrict courts are vested with considerable discretion in determining the relevance and admissibility of evidence”). Similarly, a district court's decision to grant or refuse a continuance is

discretionary and will not be reversed unless the district court abused its discretion. *Benson v. Benson*, 66 Nev. 94, 99, 204 P.2d 316, 319 (1949). Additionally, under the Eighth Judicial District Court Rules (EDCR), parties are required to bring all discovery disputes before the discovery hearing master, unless otherwise ordered. *See* EDCR 5.602(a).

Though Diamond claims she could not have raised the discovery dispute with the discovery commissioner nor through a motion to compel because she only learned about the additional hours of video and audio during the custody trial, the district court's post-trial order found this claim misleading. In its post-trial order, the district court found she "disclosed videos regarding the December 2, 2019, incident in her Pretrial Memorandum."<sup>7</sup> Thus, she apparently knew about the video and audio evidence long before the August 2021 trial date. Diamond's failure to bring these discovery issues before the discovery commissioner or file a motion to compel violates the rules of practice for family matters in the Eighth Judicial District Court. *See* EDCR 5.602(a). Had Diamond raised these discovery issues with the discovery commissioner, the commissioner could have facilitated production of the video and audio files between the parties in a directed manner.

Moreover, Diamond does not state what the contents of the additional video and audio evidence are, nor does she indicate how the additional evidence would alter the district court's trial or post-trial findings. Even if the district court had ordered Justin to produce this

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<sup>7</sup>The district court's order refers to an incident on "December 2, 2019," but the district court previously referenced an incident on "December 1, 2019." The parties reference a "December 1, 2019" incident in the record and in their briefs. We assume the court and parties are referring to the same domestic violence incident in December 2019.

evidence, Diamond fails to show why the district court's findings that she committed acts of domestic violence would change or that Justin's failure to produce the complete files at trial affected her substantial rights. The district court viewed the video files available to it at the child custody trial and made appropriate conclusions about Diamond's culpability on the day of the domestic violence incident based on this video evidence. Without any showing by Diamond that the district court's decision fell outside the bounds of law or reason, the district court did not abuse its discretion in proceeding with the custody trial even without the complete video evidence.

Finally, because the district court also found Diamond committed domestic violence in a separate incident before December 2019 sufficient to raise the rebuttable presumption against joint physical custody, any error as to the discovery issues was harmless. Therefore, Diamond has not established reversible error. *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."); *see also* NRS 47.040(1). Thus, the district court's custody decision and order should not be disturbed.

*Diamond has not established that the district court abused its discretion by allowing Justin to play video snippets during trial*

On a related note, Diamond argues that the district court abused its discretion in allowing only snippets of the complete video of the December 1 domestic violence incident into evidence at the custody trial,

and therefore this court should order a new trial.<sup>8</sup> Diamond argues Justin was ordered multiple times to provide the complete audio and video files to the district court. Similar to Diamond's argument that Justin violated discovery procedures by not producing the complete video and audio files, Diamond's argument regarding introduction of the video snippets lacks any showing that a substantial right was affected or that the district court abused its discretion.

The rule of completeness states that when a party introduces a writing or recorded statement, that party may be required to introduce any other relevant part of that same writing or recorded statement. *See* NRS 47.120(1). In addition, "any party may introduce any other relevant parts" of that same writing or recorded statement. *Id.* Moreover, a party alleging error based upon a district court's decision to admit or exclude evidence must show that the district court's ruling affected a substantial right of the party. *See* NRS 47.040(1).

The district court's custody order should not be disturbed because Diamond has not shown why allowing introduction of the video snippets was misleading or how the use of the video snippets affected her substantial rights. The purpose of NRS 47.120(1) is to prevent a party from confusing or misrepresenting facts to the court when the party introduces only portions of a writing or recorded statement. *See United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014).<sup>9</sup> The district court heard

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<sup>8</sup>The district court's order following Diamond's motion for reconsideration mentions Diamond argued the rule of completeness during a pretrial evidentiary hearing.

<sup>9</sup>*See also Patterson v. State*, 111 Nev. 1525, 1530-31, 907 P.2d 984, 988 (1995) (concluding Federal Rule of Evidence (FRE) 106 and the advisory

Diamond's testimony as to self-defense and weighed it against the evidence presented at trial by Justin. In its order, the district court noted the video snippets introduced at trial corroborated Justin's testimony regarding the domestic violence incident at Justin's home. According to the court, the videos demonstrated that Diamond committed acts of battery and coercion as Justin attempted to disengage from Diamond, and Diamond continued to engage in the altercation. Thus, the district court did not find Diamond's mutual combat argument persuasive in light of the testimony and evidence presented at trial.

The rule of completeness would not have aided Diamond because of her failure to describe the expected content of the full video or show how it would have been exculpatory. Diamond does not allege how the additional hours of video would be relevant to her arguments or why the additional evidence would change the district court's determination that she committed acts of domestic violence, and that primary physical custody of G.M. by Diamond was not in G.M.'s best interest. Additionally, Diamond could have testified to the contents of the full video at trial as a percipient witness without the video being introduced into evidence. Finally, because the district court found she committed domestic violence in a separate

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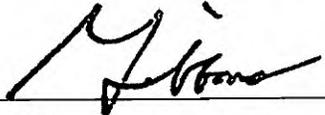
committee's note regarding the rule's limitations and applicability instructive on the applicability of NRS 47.120).

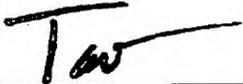
FRE 106 states: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time." The only noticeable language distinguishing FRE 106 and NRS 47.120 is the requirement that additional evidence introduced must be "relevant" under NRS 47.120 versus the fairness consideration in FRE 106.

incident before December 2019, any error related to the full video is harmless. *See Wyeth*, 126 Nev. at 465, 244 P.3d at 778. Thus, Diamond has not established that the district court abused its discretion by allowing introduction of the video snippets.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>10</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Soonhee Bailey, District Judge, Family Court Division  
McFarling Law Group, Esq.  
Justin Martin  
Eighth District Court Clerk

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<sup>10</sup>Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.