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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001919-MR

JOSHUA SLONE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 05-CI-02971

CRAIG IBERT AND
OLDHAM'S TRUCK AND
CAR SOURCE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

STUMBO, JUDGE: This is a motor vehicle collision litigation in which Joshua Slone, Appellant, appeals from a jury verdict in favor of the Appellees, Craig Ibert and Oldham's Truck and Car Source, Inc. The jury found that Ibert caused the collision, but that he "blacked out" and was therefore not liable for damages.

Slone appeals a number of issues. We find there was no reversible error in this case and affirm.

On November 6, 2003, Ibert was employed by Oldham's Truck and Car Source in Lexington, Kentucky. Ibert was driving a Ford Expedition to show a potential buyer in Nicholasville. He was traveling along Nicholasville Road when he struck Slone's car in the rear. At the time, Slone was stopped at a red light. At the scene of the accident, Ibert reported that he lost consciousness as he approached the red light. Both Slone and Ibert were taken to the Emergency Department at the University of Kentucky Medical Center.

Dr. Julia Martin treated Ibert at the ER. She took a history and was told by Ibert that he passed out while driving. Blood tests showed that Ibert had elevated levels of carbon dioxide in his blood, which could be a sign of someone passing out. During trial, Dr. Martin testified that Ibert was also falling asleep during his examination in the ER. From this, Dr. Martin believed Ibert may have sleep apnea, which can cause fatigue and falling asleep unexpectedly during the day. Dr. Martin suggested Ibert refrain from driving and follow up with his primary physician. Ibert did not immediately follow up with his physician, but the sleep apnea diagnosis was confirmed over a year later by the St. Claire Medical Center in Morehead, Kentucky.

On July 11, 2005, Slone filed suit alleging physical and mental injuries. He claimed he experienced a worsening of preexisting back pain, the

onset of new shoulder pain which required surgery, and a worsening of a preexisting bipolar disorder.

During the discovery phase of the trial, Slone filed a motion in limine to exclude evidence of his criminal convictions. Slone's only criminal convictions were for misdemeanors. The appellees asked the court to address this issue at a later date. The trial court sustained the motion to exclude the records stating that only felony convictions could be used at trial. It also held that the issue could be brought up again at a later date upon motion from the appellees if they thought they had grounds to present the records to the jury.

The trial of this case was originally scheduled for February 4, 2008; however, the week before trial, Dr. Stephen Cox, Slone's treating psychiatrist, was told by Slone that he was thinking about harming the appellees' counsel if he lost his case. Dr. Cox sent a duty-to-warn letter to the appellees' counsel informing her of Slone's thoughts of harming her. The letter stated that Slone was having thoughts of harming counsel, but that there was no actual plan or intention to do so. Dr. Cox also admitted Slone to the behavioral unit of Good Samaritan Hospital in Lexington, Kentucky. Slone spent three days there. This also caused additional security measures to be taken at the Fayette Circuit Courthouse.

A new trial date was set for July 28, 2008. Prior to trial, the appellees amended their witness and exhibit lists to include the duty-to-warn letter and evidence concerning Slone's admission to Good Samaritan Hospital. Slone moved to exclude this material. The trial court excluded the letter, but allowed the

medical records from the hospitalization to come in and to allow evidence concerning Slone's threat, with the caveat that it would not be revealed that it was counsel who had been threatened.

The trial began on July 28, 2008, and concluded July 30. Ibert did not deny causing the accident. The trial focused on Slone's damages and the blackout defense.[1] The jury ultimately found that Ibert's negligence caused the accident, but that immediately before the accident he became suddenly and unforeseeably incapacitated and was therefore not liable for damages. A defense verdict was then entered. Slone moved for a new trial and to vacate the judgment, but was overruled. This appeal followed.

Slone first argues that it was error for the trial court to admit evidence that he made a threat. Slone claims that his thoughts of harming defense counsel did not amount to a threat because there was no intent or plan to harm counsel, only general thoughts. He claims this prejudiced the jury against him. The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We find no error.

[1] The blackout defense was first recognized by the Kentucky Court of Appeals in *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988). *Rogers* states that "[w]here a defendant demonstrates that he suddenly became incapacitated while driving, and the ensuing accident was a result thereof, and further demonstrates that the sudden incapacity was not reasonably foreseeable, he shall have a defense to any liability that would otherwise arise from the accident."

It was appropriate for this evidence to be introduced and for it to be characterized as a threat. Because Slone claimed a worsening of a preexisting mental condition, it was relevant to show his mental state, which was at issue in this case in regards to damages. Also, it was not an error to characterize it as a threat. Dr. Cox thought it was enough of a threat to send a letter warning defense counsel that Slone had thoughts of harming her. Further, the threat was part of the reason Slone was admitted to Good Samaritan's behavioral unit. There was no abuse of discretion.

Slone also argues that the trial court erred in allowing the defense to characterize the threat as a way to bolster his case for mental damages. In the Good Samaritan medical records, a notation stated that Slone "[n]eeded to bolster case going to trial . . . ." Ibert argues that this evidence was relevant since Slone's mental issues were a main concern at trial. We agree.

If Slone was making the threat to bolster his case, this fact would be relevant as impeachment evidence concerning his claimed worsening mental condition. Further, even if admission of this evidence was in error, it would amount to harmless error. Dr. Cox, Slone's psychiatrist, testified at trial that the threat was not made to bolster Slone's case, but was a genuine manifestation of his mental condition.

Slone next argues that he is entitled to a new trial because the appellees improperly presented evidence of Slone's past criminal activity. During trial, counsel for the appellees showed the jury an enlarged medical record. Part of

the medical record stated "in court several times for felony assault." Slone objected and the record was removed. The trial court, however, refused to grant a mistrial stating that the record was handwritten and difficult to read and that the jury most likely did not have time to read it before it was removed or could not read it due to the almost illegible handwriting.

Slone argues that the appellees purposefully introduced this information of his criminal history in order to prejudice the jury against him. Also, during the pretrial phase of this case, the court sustained a motion in limine from Slone that prohibited the appellees from introducing criminal records from Jessamine and Fayette Counties. The trial court stated that Slone had no felony convictions and that misdemeanor convictions would not be admitted. The trial court did state that the appellees could file a motion to introduce criminal records later if they thought there were grounds for such evidence to be introduced. No motion was filed prior to this enlarged medical record being shown to the jury.

We find no error in this instance. As with our review of evidentiary issues, the abuse of discretion standard applies to motions for mistrial. *Jones v. Commonwealth*, 662 S.W.2d 483, 484 (Ky. App. 1983). The trial court was correct when it told counsel for the appellees that showing this information was "unacceptable" and we note that evidence of past criminal behavior is usually prejudicial; however, in this case, the evidence of past criminal behavior was not prejudicial.

As stated above, the jury found that Ibert caused the accident, but because he passed out, he was not liable for damages. The jury apparently believed the blackout defense and returned a defense verdict. We do not see how evidence of past criminal behavior could have prejudiced the jury against Slone on this issue. Had the jury returned a verdict finding Ibert did not cause the accident or returned a verdict in Slone's favor, but with only nominal damages, our finding might be different. However, because the jury accepted the blackout defense, we do not find that a new trial is warranted.

Slone next argues that a new trial is warranted because there was no competent evidence to allow the jury to consider the blackout defense. We find this argument without merit. As previously stated, the blackout defense was first recognized by the Kentucky Court of Appeals in *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988). *Rogers* states that "[w]here a defendant demonstrates that he suddenly became incapacitated while driving, and the ensuing accident was a result thereof, and further demonstrates that the sudden incapacity was not reasonably foreseeable, he shall have a defense to any liability that would otherwise arise from the accident." *Id*. at 673.

Testimony was presented that Ibert had two doctors give a diagnosis of sleep apnea, which can cause one to suddenly lose consciousness. Also, previous statements of Ibert were introduced in which he claimed he passed out, thereby causing the accident. "Once the court is satisfied that the defendant had produced sufficient evidence of the defense to withstand a peremptory verdict, the

question of liability thereon is a factual one for the jury to decide." *Id.* We find there was sufficient evidence to present a factual question for the jury.

Slone next argues that he should receive a new trial because the jury found that Ibert violated statutory duties and said breach was a substantial factor in causing the accident. The blackout defense

> is unavailable where the defendant was put on notice of facts sufficient to cause an ordinary and reasonable person to anticipate that his or her driving might likely lead to the injury of others. The defense is neither available if at the time of the accident the incapacitated driver was violating a statutory duty such as to refrain from driving while intoxicated, or to drive within the posted speed limit.

Id. Ibert claims the jury found Slone violated several statutory duties and therefore the blackout defense should not have been allowed.

The relevant jury instructions are as follows:

INSTRUCTION NO. 3

> It was the duty of the Defendant, Craig Ibert, in driving his vehicle to exercise ordinary care for his own safety and for the safety of other persons using the highway and this general duty included the following specific duties:
> (a) to keep a lookout ahead for other vehicles in front of him or so near his intended line of travel as to be in danger of collision;
> (b) to have his automobile under reasonable control;
> (c) to drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the condition and use of the roadway and not exceeding 45 miles per hour; and
> (d) to exercise ordinary care generally to avoid collision with other persons or vehicles using the highway.

INTERROGATORY NO. 1

> Are you satisfied from the evidence that the Defendant, Craig Ibert, failed to comply with one or more of these duties and that such failure was a substantial factor in causing the accident?
>
> INSTRUCTION NO. 4
>
> Even though you might otherwise find for the Plaintiff, Joshua Slone, under Interrogatory No. 1, if you are satisfied from the evidence that immediately before the accident, the Defendant, Craig Ibert, suddenly became incapacitated, and that such incapacity was not originally foreseeable by him, and that the accident resulted from it, you will find for the Defendant.
>
> INTERROGATORY NO. 2
>
> Are you satisfied from the evidence that immediately before the accident, the Defendant, Craig Ibert, suddenly became incapacitated, and that such incapacity was not originally foreseeable by him, and that the accident resulted from it?

The jury returned a unanimous verdict of YES for Interrogatory No. 1 and a majority verdict of YES for Interrogatory No. 2, finding that Ibert was the cause of the accident, but because he blacked out he was not liable. Slone argues that the specific duties listed in Instruction No. 3 are statutory duties and because the jury found he violated one or more of these duties, then the jury should not have also found the blackout defense applicable.

We disagree. In this instance, there was no evidence that Ibert was speeding or driving his vehicle unsafely at the time he lost consciousness. Ibert did not deny hitting Slone. The only evidence presented dealt with Slone's damages and the potential cause of the blackout. There was no evidence Ibert was violating

any statutory duty at the time he lost consciousness; therefore, the jury verdict is appropriate and Slone suffered no prejudice.

Slone next argues that Ibert should have been estopped from raising the blackout defense because he did not follow up with his primary physician regarding the sleep apnea diagnosis and he continued to drive. Had the diagnoses been made prior to the collision that gave rise to this suit and disregarded by Ibert, it would have been admissible to demonstrate the sudden incapacity was not reasonably foreseeable. *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988).

Slone also argues that a new trial is warranted because the Fayette County Sheriff's Office placed a picture of him near the metal detector with the words "Person of Interest." After the trial of this case, Slone informed his counsel that when he entered the courthouse on July 28, 2008, he saw his picture by the metal detector with the words "Person of Interest" by the picture. Slone then brought this to the trial court's attention in his motion for a new trial and motion to vacate. The court stated the picture was placed by the metal detector as an added security measure after Slone made the threat to opposing counsel.

We find that no new trial is warranted. There is no evidence that any member of the jury saw the picture. During *voir dire*, the jury members were asked if any of them knew Slone. None of the potential jury members responded in the affirmative. Also, no one on the defense team or the judge herself saw the photo. The only people who stated they saw the photo were Slone and his father.

Without proof that a member of the jury saw the photo, we cannot conclude that there was prejudice to Slone. Therefore Slone is not entitled to a new trial.

Finally, Slone sets forth a list of alleged instances of misconduct by defense counsel, the cumulative effect of which is that Slone should receive a new trial. We find that this list of alleged instances of misconduct is not a sufficient basis for a new trial. Some allegations in the list have been previously discussed by this Court, others were cured at the trial court level by rulings on objections, and some do not amount to misconduct. In sum, taken individually and collectively, these alleged instances of misconduct do not merit a new trial.

For the above reasons we affirm the jury verdict in favor of Ibert.

ALL CONCUR.

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