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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001544-MR
AND
NO. 2011-CA-001664-MR

ALISHA WILSON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 09-CI-006163

MIKAIL MADZHITOV

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Alisha Wilson appeals from the Jefferson Circuit Court judgment ruling in favor of Mikail Madzhitov following a jury trial on her claim of negligence. Mikail cross-appeals from the same judgment. Based on the following, we affirm.

Alisha filed the underlying negligence action against Mikail following an accident that occurred on April 17, 2007 in Louisville, Kentucky. The parties do not dispute that while crossing the street at Broadway and First Street in downtown Louisville, Alisha was struck by an automobile driven by Mikail. At trial, the testimony of two eyewitnesses to the accident, an expert accident reconstructionist, and both parties were presented. Upon the conclusion of evidence, the jury returned a verdict in favor of Mikail. This appeal and cross-appeal followed.

Alisha's appeal alleges three errors by the trial court regarding its admission of evidence. This court reviews a trial court's evidentiary rulings under the abuse of discretion standard of review. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (citations omitted). An abuse of discretion occurs if the trial court's decision "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citation omitted).

Alisha first argues that the trial court erred by permitting Mikail's expert accident reconstructionist, Sonny Cease, to testify as to the issue of liability without any scientific basis, and thereby invading the province of the jury. We disagree.

KRE¹ 702 permits expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue[.]" Upon acceptance as an expert, the witness is not

¹ Kentucky Rules of Evidence.

permitted to draw legal conclusions from the evidence. *Humana of Kentucky, Inc. v. McKee*, 834 S.W.2d 711, 724 (Ky. App. 1992).

In the case at hand, our review of the record indicates that Cease did not testify as to a legal conclusion within the context of the negligence action. The only conceivable instance cited by Alisha when Cease could have testified as to a legal conclusion is when Cease was asked whether Mikail could have avoided Alisha. However, Alisha's counsel objected to the question, which was sustained, and the jury was admonished accordingly. As such, the appropriateness of the question is not a basis for appellate review. *See Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993) (holding that when a trial court sustained objections to questions, admonished the jury, and no further relief was sought, any error regarding the questions was not preserved for review). With respect to the scientific basis for Cease's testimony, the record indicates his testimony was based upon his expert observation of the intersection, his study of the sequence and timing of the traffic lights at the intersection, his observation of the photos of Mikail's vehicle taken after the accident, and his review of the eyewitness accounts of the accident. A detailed history of Cease's educational background and work experience were elicited during his testimony, which the court found qualified him to provide expert opinion concerning traffic collisions. Alisha points to no other instance in which Cease's testimony invaded the province of the jury. As such, we find that Cease's testimony complied with KRE 702 and did not usurp the role of the jury to draw legal conclusions.

Next, Alisha argues the trial court erred by permitting Mikail to attack Alisha's credibility with a prior inconsistent statement made in an answer to an interrogatory that was later supplemented to omit and deny the statement. We disagree.

KRE 801A(a)(1) permits the admission of prior statements of witnesses if the statement is inconsistent with the declarant's testimony. Here, in response to an interrogatory, Alisha answered under oath that she was waved into the crosswalk by a bus driver stopped at the intersection. Later, Alisha supplemented her answer and specifically denied that the bus driver waved her into the crosswalk. During cross-examination of Alisha, counsel for Mikail used the prior inconsistent statement to impeach her testimony regarding her recollection of the circumstances leading to the accident.

Alisha argues that since she supplemented her interrogatory, the prior statement was not inconsistent, and that Mikail is attempting to create a credibility issue similar to that in *Simmons v. Small*, 986 S.W.2d 452 (Ky. App. 1998). However, we find *Simmons* distinguishable. In *Simmons*, the appellant filed a negligence action against the driver of an automobile that rear-ended him. *Id.* at 453. Months later, the appellant was involved in a second automobile accident. *Id.* In an interrogatory, the appellant answered that he had not yet settled the case he filed against the driver in the latter accident. *Id.* at 454. Upon reaching a settlement, Appellant then supplemented the answer to reflect that he settled the matter with the second driver. *Id.* at 455. At trial, Appellee attempted to use the

initial interrogatory answer as a prior inconsistent statement to damage Appellant's credibility. *Id.* This court found such use to be an attempt to manufacture a credibility issue since at the time the interrogatory was answered the statement that the case had not been settled was true. *Id.* In other words, both answers were and could have been true at the time given, and thus not inconsistent with one another.

Here, unlike in *Simmons*, both statements by Alisha could not have been an accurate account of the circumstances. Thus, Alisha's prior statement was inconsistent with her subsequent supplemented answer and testimony at trial regarding her account of the circumstances leading to the accident in question. Since the two statements reflect an inconsistency in Alisha's account of the circumstances, the prior inconsistent statement was relevant to her credibility as an eyewitness to the accident. We further note that, as required by Kentucky law, Alisha was afforded an opportunity at trial to explain the inconsistency. *See White v. Piles*, 589 S.W.2d 220, 223 (Ky. App. 1979) (holding "that where a witness has made a prior sworn statement which is arguably contradictory, he is especially entitled to have that fact pointed out to him and to be afforded an opportunity to explain the inconsistency[[]]"). As a result, we do not find the trial court to have abused its discretion by admitting the prior inconsistent statement.

Finally, Alisha argues the trial court erred by allowing Mikail's counsel to make statements during closing argument about counsel's own observations of the intersection where the accident took place, and thereby comment upon matters outside of the record. We disagree.

Specifically, Alisha takes issue with the following portion of Mikail's counsel's closing argument:

On my way here today I was sitting on the corner of Jefferson and 7th Street and Jefferson is a one-way headed west and I was in the curb, and my light was green and I could see pedestrians on the corner that were intending to cross heading south and when the lights were green I could see cars coming up from my left and I thought "there is no way, there is no way that if a car coming up . . ."

[objection by Plaintiff and bench conference]

So as I sat there in the westbound turn lane of Jefferson and cars were coming upon my left it occurred to me the similarities between that situation and this and I hoped we were all lucky enough that nobody decided to cross that intersection at that given time because another accident like this would have happened."

With every alleged error we must adhere to the harmless error standard set forth in CR² 61.01, and disregard any errors or defects in the proceedings that do not affect the substantial rights of the parties. We note than an isolated instance of an alleged improper remark "will seldom be found prejudicial[.]" as opposed to when the remark "is repeated and reitared in colorful variety[.]" *Stanley v. Ellegood*, 382 S.W.2d 572, 575 (Ky. App. 1964) (citation omitted). In this case, we see no prejudicial effect as a result of counsel's comments. Of importance, the remarks were an isolated instance within the context of a broader argument summarizing the evidence. Furthermore, by way of Alisha's counsel's multiple objections during closing argument, the jury was repeatedly informed by the trial

² Kentucky Rules of Civil Procedure.

court that the closing argument was not evidence to be considered, but was simply counsel's own summary of the evidence. Given the wide latitude afforded counsel during closing arguments, we are unable to conclude a counsel's mere mention of observing the intersection where an accident took place would justify a reversal of the trial court's ruling. *See Stopher v. Commonwealth*, 57 S.W.3d 787, 805-06 (Ky. 2001) (under Kentucky law, counsel is afforded wide latitude during closing arguments). Assuming *arguendo* that counsel's comments were outside the bounds of permissible advocacy, the comments were not prejudicial nor did they affect Alisha's substantial rights. Accordingly, this point of error is not a basis for reversal of the judgment.³

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
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³ We will not address the errors raised in Mikail's cross-appeal since he only requests our review upon the reversal of the judgment.