IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-432

No. COA20-478

Filed 17 August 2021

Mecklenburg County, No. 18 CVS 22182

ANGELA WILSON FREEMAN, Plaintiff,

v.

TOMMIE LEE GLENN, Defendant.

Appeal by plaintiff from judgment entered 16 December 2019 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 March 2021.

DeVore Acton & Stafford, PA, by Fred W. DeVore, III, and Brittany N. Conner, for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by John T. Jeffries, for defendant-appellee.

DIETZ, Judge.

¶ 1 Plaintiff Angela Freeman appeals a defense verdict in her automobile negligence suit against Defendant Tommie Lee Glenn. Freeman's central argument is that the trial court improperly permitted Glenn's counsel to cross-examine Freeman about her seat belt use.

¶ 2 Evidence of seat belt use in this type of tort action is barred by statute and

categorically inadmissible. But the same evidence Freeman challenges was admitted at trial by stipulation of the parties, without objection, through separate evidence. Freeman does not challenge the admission of that separate evidence on appeal. Moreover, both the challenged testimony and the unchallenged, duplicative evidence had little, if any, bearing on the factual issues before the jury. Thus, even assuming the admission of the challenged testimony was error, Freeman has not shown a reasonable possibility that, but for that evidence, the jury would have reached a different outcome. We thus find no prejudicial error in this evidentiary ruling.

¶ 3 Freeman also challenges the trial court's denial of her motion for judgment notwithstanding the verdict on the claim of contributory negligence, and the trial court's refusal to provide a peremptory instruction on Glenn's negligence. We reject these arguments because there was conflicting evidence from which the jury could draw different inferences about both Freeman's and Glenn's negligence. This competing evidence supports the trial court's decision not to provide the requested peremptory instruction and to deny the motion for judgment notwithstanding the verdict. We therefore find no error in the trial court's judgment.

Facts and Procedural History

¶ 4 Plaintiff Angela Freeman and Defendant Tommie Glenn were involved in a vehicle collision on a boulevard in Mecklenburg County. Freeman was traveling west and Glenn was traveling in the opposite direction. Glenn attempted a left-hand turn

across the oncoming lanes into a parking lot. Freeman's car struck the rear portion of Glenn's car as Glenn crossed the oncoming lanes.

¶ 5 Freeman was injured in the accident. She brought an action for negligence and negligence *per se* alleging that Glenn drove into her path, failed to yield to oncoming traffic, failed to keep a proper lookout, and committed other acts of negligence. Glenn denied the allegations and asserted contributory negligence. The case went to trial and the jury returned a verdict finding Glenn negligent and Freeman contributorily negligent. The trial court entered judgment in favor of Glenn, and Freeman timely appealed.

Analysis

I. Challenge to testimony concerning seat belt misuse

¶ 6 Freeman first argues that the trial court erred by allowing evidence of her seat belt use, including the fact that Freeman wore the shoulder strap in an irregular manner. As explained below, Freeman introduced the same evidence at trial following a stipulation of the parties and does not challenge that duplicative evidence on appeal. Moreover, this evidence had little impact on the key fact issues before the jury. We thus find any error harmless.

¶ 7 This Court reviews evidentiary rulings by the trial court under the abuse of discretion standard. *State v. Cortes-Serrano*, 195 N.C. App. 644, 656, 673 S.E.2d 756, 763 (2009). Under this standard, we will not overturn the trial court's discretionary

decision unless "the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Kearney v. Bolling*, 242 N.C. App. 67, 72, 774 S.E.2d 841, 846 (2015).

¶ 8 By statute, evidence "of failure to wear a seat belt shall not be admissible in any criminal or civil trial." N.C. Gen. Stat. § 20-135.2A(d). This Court has held that evidence of irregular seat belt use falls within this statutory prohibition and is thus inadmissible. *Chaney v. Young*, 122 N.C. App. 260, 264, 468 S.E.2d 837, 839 (1996).

¶ 9 Here, the following exchange occurred between Freeman and counsel for Glenn on cross-examination:

> [DEFENSE COUNSEL]: Were you wearing your seat belt at the time of the impact?
>
> [FREEMAN]: Yes, sir.
>
> . . .
>
> [DEFENSE COUNSEL]: Okay. So you were wearing your seat belt?
>
> [FREEMAN]: Yes, sir.
>
> [DEFENSE COUNSEL]: Was there anything unusual about the way you were wearing your seat belt?
>
> [FREEMAN]: I generally wear my seat belt with it coming across.
>
> [PLAINTIFF'S COUNSEL]: Objection, Your Honor. May we approach?

> THE COURT: Yes.
>
> (Bench conference)
>
> THE COURT: Mr. Jeffries, if you'll just restate the question.
>
> [DEFENSE COUNSEL]: I think you [*sic*] I had asked you, Mrs. Freeman, if there was anything unusual about the way you were wearing the seat belt. And you had begun to describe that for the jury. Can you complete your answer?
>
> [FREEMAN]: I do wear my seat belt at all times. But since I have it dig into my neck right here, I generally wear it right through here.
>
> [DEFENSE COUNSEL]: So you're saying your left arm up and above and over the shoulder strap?
>
> [FREEMAN]: Yes, sir.
>
> [DEFENSE COUNSEL]: So the shoulder strap comes under your armpit?
>
> [FREEMAN]: Yes, sir.
>
> [DEFENSE COUNSEL]: And that's the way you were wearing the seat belt that day?
>
> [FREEMAN]: Yes, sir.

¶ 10 When Freeman objected to this questioning, the trial court conducted a sidebar conference that was not recorded by the court reporter. The parties did not prepare a narrative of this sidebar conference under Rule 9 of the Rules of Appellate Procedure and, at oral argument before this Court, Freeman acknowledged that the trial court's

reasoning, whatever it was, is simply not available in the appellate record:

> JUDGE DIETZ: So when you made that objection there was a sidebar, where in the record can we see what the parties discussed with the trial court during that sidebar conference?
>
> FREEMAN'S COUNSEL: Judge Dietz, the sidebar was not recorded. What we do know is I objected, Judge Trosch had the parties, the attorneys come to the bench, that we returned to the table, and he allowed the question. That's what the record reflects.

¶ 11 Ordinarily, it is "the appellant's duty and responsibility to see that the record is in proper form and complete" but, even assuming that the trial court's reasoning (whatever it was) was error, we must also determine if that evidentiary error was prejudicial. *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015). Evidentiary rulings are prejudicial only if the appellant shows that "there was a reasonable possibility that, but for the error, the outcome would have been different." *Id.*

¶ 12 Here, the testimony Freeman challenges on appeal duplicated other evidence that Freeman tendered for admission, following a stipulation of the parties, in records from emergency personnel who responded to the accident. Those records indicated that, when emergency personnel spoke to Freeman, she "stated that she was wearing her seat belt but had the shoulder strap under her arm." Thus, the evidence elicited from the challenged testimony, following the sidebar conference, was the *identical*

evidence introduced by Freeman in the written report of emergency personnel. Importantly, Freeman tendered that evidence in the trial court, it was admitted without objection, and Freeman does not challenge the admission of that separate evidence on appeal. As a result, any challenge to that evidence is both waived and abandoned on appeal and this Court lacks the authority to examine whether admission of that evidence was erroneous. N.C. R. App. P. 28(b)(6). Thus, this case is no different from countless other cases where a litigant challenged the admission of evidence and this Court or our Supreme Court was constrained to reject the argument because "evidence of like import was admitted without objection, thereby rendering any error harmless." *Gaddy v. North Carolina Nat. Bank*, 25 N.C. App. 169, 173–74, 212 S.E.2d 561, 564 (1975).

¶ 13 Moreover, as explained below, the central factual question for the jury was whether Freeman and Glenn exercised due care to avoid the collision. This seat belt evidence has little, if any, bearing on that question and there was other, separate evidence from which the jury reasonably could find negligence by both Freeman and Glenn in failing to avoid the collision. Thus, given the duplicative nature of the challenged evidence and its relative unimportance to the key factual issues before the jury, Freeman has not shown a reasonable possibility that, had the challenged evidence been excluded, the jury would have reached a different result. *Faucette*, 242 N.C. App. at 274, 775 S.E.2d at 323. We thus find no prejudicial error in the trial

court's ruling.

II. Motion for judgment notwithstanding the verdict

¶ 14 Freeman next challenges the trial court's denial of her motion for judgment notwithstanding the verdict, which renewed her motion for directed verdict. Freeman argues that the evidence concerning contributory negligence was no more than mere conjecture and, thus, the trial court should have allowed Freeman's motion for directed verdict.

¶ 15 "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). A motion for judgment notwithstanding the verdict is "essentially a renewal of an earlier motion for directed verdict." *Whaley v. White Consol. Indus., Inc.*, 144 N.C. App. 88, 92, 548 S.E.2d 177, 180 (2001). Thus, "[t]he same test is applied when ruling on either motion." *Id.*

¶ 16 "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710

(1989). A "motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element" of the claim. *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 31, 795 S.E.2d 253, 257 (2016).

¶ 17 A defendant who asserts contributory negligence as a defense has the burden of showing "(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Seay v. Snyder*, 181 N.C. App. 248, 251, 638 S.E.2d 584, 587 (2007). Although a driver does not have a duty to anticipate another driver's negligence, "one who has the right of way at an intersection does not have the absolute right of way" and still must use ordinary care "to avoid collision and injury," even in situations where an opposing driver is not exercising due care. *Carr v. Lee*, 249 N.C. 712, 716, 107 S.E.2d 544, 547–48 (1959). In these circumstances, a driver "must use such care as an ordinarily prudent person would use under the same or similar circumstances" by "keeping a reasonable lookout, keeping his vehicle under control, and taking reasonable precautions to avoid injury." *Id.*

¶ 18 Applying these legal principles, Glenn presented sufficient evidence for the trial court to properly deny the motion for directed verdict and motion for judgment notwithstanding the verdict. First, the jury heard Glenn's testimony that he slowed to a stop before turning, yielded to oncoming traffic, and, when he did not see any oncoming traffic, turned slowly across the opposing lanes. Glenn also testified that

he did not see Freeman's car until after the impact. He further testified that Freeman struck the back portion of his car after he had pulled almost entirely into the parking lot and there are photographs in the trial record confirming that the damage to Glenn's car is largely confined to the rear portion of the vehicle. Freeman testified that she did not see Glenn's "long big car" until seconds before impact and explained that she was driving "straight and very close" and watching "directly ahead" because she was traveling across a narrow bridge.

¶ 19 The jury reasonably could infer from this testimony that Freeman might have been too focused on the narrow road directly ahead of her on the bridge and was not keeping a proper lookout for turning vehicles further up the road. This, in turn, would permit the jury to find that Freeman failed to act to avoid the collision through the exercise of ordinary care.

¶ 20 To be sure, Freeman presented her own competing testimony and evidence, but on Freeman's motions we must take the evidence in the light most favorable to Glenn, as the non-moving party. Under this standard, the trial court properly denied the motions for directed verdict and judgment notwithstanding the verdict. *Turner*, 325 N.C. at 158, 381 S.E.2d at 710.

III. Request for peremptory jury charge

¶ 21 Freeman next challenges the trial court's denial of her request for a peremptory instruction on Glenn's negligence.

¶ 22 This Court reviews a trial court's jury instructions for abuse of discretion but when "a party's requested jury instruction is correct and supported by the evidence, the trial court is required to give the instruction." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 55, 607 S.E.2d 286, 291 (2005). The failure to give a properly requested instruction, at least in substance, is a legal error that amounts to *per se* abuse of discretion. *Id.* at 56, 607 S.E.2d at 291.

¶ 23 Freeman requested a peremptory instruction on negligence using the applicable pattern jury instruction. *See* N.C.P.I. – Motor Vehicle Negligence 101.65, Peremptory Instruction. This sort of peremptory instruction is proper "when there is no conflict in the evidence and all the evidence tends to support the party's right to relief. But a peremptory instruction for plaintiff is error when different inferences can be drawn from the facts admitted or established, or when the evidence is conflicting upon the issue." *Braswell v. Purser*, 16 N.C. App. 14, 25, 190 S.E.2d 857, 864, *aff'd*, 282 N.C. 388, 193 S.E.2d 90 (1972) (citation omitted). Here, as explained above, there was conflicting evidence from which the jury could draw different inferences about both Freeman's and Glenn's negligence. Thus, the trial court did not err by declining to provide a peremptory instruction on Glenn's negligence.

IV. Motion for a mistrial

¶ 24 Finally, Freeman challenges the trial court's denial of her motion for a mistrial. She argues that the trial court deprived her of a fair trial by admitting the evidence

of her irregular seat belt use. In a civil case, the trial court has discretion "to order a mistrial at any time before the verdict is returned." *Bryant v. Thalhimer Bros.*, 113 N.C. App. 1, 18, 437 S.E.2d 519, 529 (1993). Our case law is somewhat conflicting with respect to whether the denial of a motion for a mistrial in a civil action can be appealed after entry of a jury's verdict and corresponding judgment, or whether that motion must be renewed in the form of a motion for a new trial. *See*, *e.g.*, *Elks v. Hannan*, 68 N.C. App. 757, 758–59, 315 S.E.2d 553, 554 (1984). In any event, as discussed above, the trial court properly overruled Freeman's objection and admitted the testimony concerning her seat belt use for the reasons explained above and, even if that ruling were erroneous, that same evidence was admitted without objection, by stipulation of the parties. Given that the challenged testimony was the same as other unchallenged evidence admitted during the trial, the trial court was well within its sound discretion to deny the motion for a mistrial. *Bryant*, 113 N.C. App. at 18, 437 S.E.2d at 529.

V. Admission of evidence of medical expenses

¶ 25 In his appellee brief, Glenn challenges the denial of his motion in limine with respect to evidence of Freeman's medical expenses. Because this argument is not an alternative basis in law to support the trial court's judgment, it should have been the subject of a separate cross-appeal. N.C. R. App. P. 10(c). But we need not address whether we have jurisdiction to examine this issue because, having found no error in

the trial court's judgment in Glenn's favor, this issue is moot.

Conclusion

¶ 26 We find no error in the trial court's judgment.

NO ERROR.

Judges WOOD and CARPENTER concur.

Report per Rule 30(e).