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# IN THE
# COURT OF APPEALS OF INDIANA

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| FLAT ROCK TAP, INC., and MICHAEL C. REPAY, | ) | |
| Appellants-Defendants, | ) | |
| vs. | ) | No. 45A03-0905-CV-192 |
| MERERDO VILLARREAL, | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0704-CT-109

**December 22, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Flat Rock Tap, Inc. (Flat Rock), appeals from the trial court's judgment holding it liable for negligence and ordering it to pay $275,000 in damages to appellee-plaintiff Mererdo Villarreal (Villarreal). Specifically, Flat Rock argues that the trial court abused its discretion by allowing the testimony of Detective Alfred Villarreal (Detective Villarreal). Similarly, Flat Rock contends that the trial court abused its discretion by admitting a police report and by refusing to give a tendered jury instruction. Finally, Flat Rock argues that the amount of damages is excessive and resulted from improper motives. Finding no reversible error, we affirm the judgment of the trial court.

FACTS

On St. Patrick's Day, March 18, 2007, Villarreal, his girlfriend, Carrie Martinez, and her brothers, Alfonso and Alfredo Martinez, went to the Flat Rock, a tavern located in or around Hammond. The Flat Rock was crowded, so Villarreal and his companions drank for a while near the bar until a table opened up.

While Villarreal was at the Flat Rock, Michael Repay, who is co-owner of the Flat Rock, learned that James Sarr had choked another patron. Repay approached Sarr, who was belligerent and angry, and motioned Matt Przewoznik, the other co-owner of the Flat Rock, to assist him. Przewoznik was friends with Sarr, and Repay was hoping that Przewoznik could help defuse the situation. For about five to ten minutes, Repay yelled at Sarr repeatedly while Przewoznik tried to convince Sarr to leave. During this time, Pryzewoznik and Repay managed to steer Sarr towards the side entrance. As they

approached the side door, Sarr resisted because he did not want to leave without his girlfriend, who refused to leave with him.

Around the same time, which was approximately 2:00 a.m., Villarreal and his companions decided to leave the bar. Carrie and Alfredo went to use the restroom before leaving the bar, while Alfonso and Villarreal stayed at the table.

The situation with Sarr continued to escalate at the side door. Finally, Przewoznik physically forced Sarr through the side door. Alfonso followed all three of them and Villarreal followed Alfonso. Alfonso exited safely, but as Villarreal pushed the door open, Repay kicked the door shut, catching Villarreal's finger between the door and the door frame.

Alfonso went back inside to get Carrie. Because Villarreal was not satisfied with the help he was receiving from the police officers with the Hammond Police Department, he told Carrie to call his brother, who was a detective with the Lake County Police Department. While waiting for Detective Villarreal to arrive, Villarreal was told by a Hammond police officer that he needed to get into the ambulance or he would be taken to jail. Villarreal got into the ambulance and was transported to St. Margaret Mercy Hospital in Hammond, where he received x-rays and pain medication.

While Villarreal was being transported to the hospital, his brother, Detective Villarreal, arrived at the Flat Rock. He testified that the Hammond police officers were not very helpful and that he left to check on his brother at the hospital. After arriving at the hospital, Detective Villarreal contacted the Hammond Police Department to request that an officer go to the hospital and complete a report regarding his brother's injuries.

His request was refused several times before a lieutenant agreed to send an officer to the hospital.

After the police report was completed, Villarreal had to choose between going to the University of Chicago for surgery and having his finger amputated at St. Margaret-Mercy Hospital. Villarreal chose to go to the University of Chicago and was transported by ambulance.

While at the University of Chicago, Villarreal was treated by Dr. Ginard Henry, who is board certified in plastic reconstructive surgery. Dr. Henry diagnosed Villarreal with an open fracture of the left small middle phalanx. On March 19, 2007, Dr. Henry operated on the finger. Dr. Henry performed an open reduction with internal fixation by percutaneous pins, a radial-sided digital nerve repair, and an A-4 pulley repair.

At trial, Dr. Henry was questioned about the radial-sided digital nerve repair that he performed during the operation. Dr. Henry stated that the nerve had been cut and that he had performed micro-surgery to repair it. Dr. Henry explained that when a nerve is cut, it can never return to 100% of its previous functional level.

Villarreal began physical therapy on April 30, 2007. In addition, Dr. Henry continued to see Villarreal until July 20, 2007. Dr. Henry testified that although Villarreal was left with permanent nerve and joint damage, he had returned to almost 100% functionality without any complaints.

On April 23, 2007, Villarrreal filed a complaint against Flat Rock and Michael Repay, alleging personal injuries caused by negligence. On September 8, 2008, Flat

Rock filed a motion in limine seeking to exclude any expert testimony that was not disclosed during discovery. The trial court granted this motion.

During the course of the four-day jury trial, which commenced on January 12, 2009, Flat Rock made numerous objections, including objections to the testimony of Detective Villarreal, the introduction of a police report, and the trial court's refusal to give a jury instruction on sudden emergency. These objections were overruled.

On January 15, 2009, a directed verdict was entered in Repay's favor as to claims involving Repay in his individual capacity. The jury found Flat Rock solely at fault and awarded damages to Villarreal in the amount of $275,000.

On February 16, 2009, Flat Rock filed a motion to correct error, which the trial court subsequently denied. Flat Rock now appeals.

## DISCUSSION AND DECISION

### I. Admission of Evidence

#### A. Standard of Review

Flat Rock argues that the trial court erred by admitting certain evidence, namely, the testimony of Detective Villarreal and a police report. A trial court has broad discretion when ruling on the admission of evidence, and this court will review its rulings for an abuse of discretion. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. 2006). An abuse of discretion occurs when the court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

B. Detective Villarreal

Flat Rock maintains that Detective Villarreal testified as an expert witness but was disclosed only as a fact witness during discovery. Villarreal counters that Detective Villarreal was not an expert witness, but rather a lay witness who possessed specialized knowledge. Thus, the issue before us is whether Detective Villarreal was an expert witness or a lay witness.

"'Qualification under [Indiana Evidence] Rule 702 (and hence designation as an expert) is only required if the witness's opinion is based on information received from others pursuant to [Indiana Evidence] Rule 703 or on a hypothetical question.'" Farrell v. Littell, 790 N.E.2d 612, 617 (Ind. Ct. App. 2003) (quoting 13 Robert Lowell Miller, Jr., Indiana Evidence § 701.105 at 321 (2d. 1995)). By contrast, "the testimony of an observer, skilled in an art or possessing knowledge beyond the ken of the average juror may be nothing more than a report of what the witness observed, and therefore, admissible as lay testimony." Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). This type of evidence is not a matter of scientific principles governed by Rule 702, but rather, a matter of the observations of persons with specialized knowledge. See Jervis v. State, 679 N.E.2d 875, 881 (Ind. 1997) (holding that a lab technician's explanation regarding a discrepancy between lab tests was based on specialized knowledge and not scientific principles under Rule 702).

Lay witnesses with specialized knowledge, also known as skilled witnesses, possess knowledge that is beyond that of an ordinary juror, but less than what is necessary to be declared an expert under Rule 702. Mariscal v. State, 687 N.E.2d 378,

380 (Ind. Ct. App. 1997). For opinion testimony of a skilled witness to be admissible under Indiana Evidence Rule 701, it must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Ind. Evidence Rule 701.

In the instant case, Detective Villarreal testified that he thought it was "odd" when he learned that the Hammond police officers had failed to fill out a police report because it was the practice of the Lake County Police Department to take police reports whenever personal injuries are involved. Tr. p. 187. Our Supreme Court has held that police officers may give lay testimony based on their observations and experience. See Vasquez, 741 N.E.2d at 1217 (concluding that a police officer could give lay opinion testimony that the defendant appeared to be under the influence of toluene because the officer was sufficiently experienced with the drug); Warren v. State, 725 N.E.2d 828, 831 (Ind. 2000) (holding that the fact that a police officer was not an expert did not preclude him from testifying that "[t]here appeared to be possible blood on the back of the tee shirt"). Therefore, Detective Villarreal testified as a skilled witness rather than an expert witness when he stated that based on his experience, he thought it was strange that the Hammond Police Department had not completed a police report regarding his brother's injuries.

Nevertheless, Flat Rock argues that because Detective Villarreal relied on the information from the dispatcher that no police report had been taken, he gave expert testimony. As stated earlier, "'[q]ualification under Rule 702 (and hence designation as an expert) is only required if the witness's opinion is based on information received from

others pursuant to [Indiana Evidence] Rule 703 or on a hypothetical question.'" Farrell, 790 N.E.2d at 617 (quoting 13 Robert Lowell Miller, Jr., Indiana Evidence § 701.105 at 321 (2d. 1995)). Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing."

Here, after arriving at the hospital, Detective Villarreal contacted the Hammond Police Department and, after finding out that a police report had not been taken, he requested that a police officer be sent to the hospital to complete a police report. After his request was refused by the dispatcher, he spoke with a lieutenant, who finally agreed to send an officer. Sometime later, a Hammond police officer arrived at the hospital to take a report. In these circumstances, we cannot say that Detective Villarreal relied on information provided by others pursuant to Rule 703, rather than his own perception. Indeed, Detective Villarreal's request to the Hammond Police Department to take a police report was refused at least twice, and he could opine that based on his experience, he thought it was strange that they had not taken a police report.

In a related argument, Flat Rock maintains that Detective Villarreal's testimony pertaining to the Hammond Police Department's failure to take a police report is irrelevant and therefore inadmissible. Indiana Evidence Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." Indiana Evidence Rule 402 states that "[e]vidence which is not relevant is not admissible." Nevertheless, "the admission of irrelevant evidence will

result in reversal only if it can be shown that the testimony substantially influenced the jury's verdict." Cline v. State, 726 N.E.2d 1249, 1255 (Ind. 2000).

We agree with Flat Rock that Detective Villarreal's testimony regarding the Hammond Police Department was irrelevant, inasmuch as "nothing that the Hammond Police Department did, or failed to do, is alleged to have caused or exacerbated an injury to Villarreal." Appellant's Reply Br. p. 4. Notwithstanding this conclusion, the evidence presented at trial established that Repay and Przewoznik spent five to ten minutes trying to talk Sarr into leaving the bar after Sarr had gotten into an altercation with another patron. Instead of calling the police to remove Sarr, Przewoznik "bearhugged" Sarr and went out the side door with him. Tr. p. 268. After Przewoznik had removed Sarr, Villarreal approached the side door and as he opened it, Repay kicked the metal door shut, catching Villarreal's finger in the door.

As the result of this incident, Villarreal was forced to undergo surgery to save his finger. After a successful surgery, Villarreal went through physical therapy, but is still left with two permanent injuries to his finger as well as numbness. With this evidence before the jury, we cannot conclude that the jury was substantially influenced by Detective Villarreal's irrelevant testimony and, therefore, its admission was harmless error that does not require reversal.

C. The Police Report

Similarly, Flat Rock contends that the trial court abused its discretion by admitting the police report because it was inadmissible hearsay. Generally, police reports are inadmissible hearsay. Duncan v. Duncan, 764 N.E.2d 763, 767 (Ind. Ct. App. 2002).

However, errors in the admission of hearsay evidence are harmless unless they affect the substantial rights of a party. Montgomery v. State, 694 N.E.2d 1137, 1140 (Ind. 1998). In determining whether a party's substantial rights have been affected, we assess the probable impact of the evidence on the jury. McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996). Moreover, admission of hearsay is not grounds for reversal where it is merely cumulative of other properly admitted evidence. Id. at 331-32.

In the instant case, the police report contained Villarreal's statements as to how his finger was injured at the Flat Rock. These statements were merely cumulative of Villarreal's trial testimony.

Nevertheless, Flat Rock maintains that the police report was unfairly prejudicial because it was used to inflame the jury. Specifically, Flat Rock points out that Villarreal highlighted that the police report's heading included the term's "Crime" and "Battery," tr. p. 389, and that this information was used during Villarreal's closing statement to improperly argue that Villarreal was a victim of a crime and that the Hammond Police Department refused to investigate Villarreal's injury because Repay's brother works for the Hammond Police Department.

As an initial matter, we note that Flat Rock did not object when Villarreal made the allegedly improper arguments during his closing statement. Consequently, Flat Rock has waived the issue on appeal. See Szpunar v. State, 783 N.E.2d 1213, 1218 (Ind. Ct. 2003) (holding that the defendant waived his argument when he failed to object at trial to the prosecutor's improper statements during the closing argument).

Waiver notwithstanding, this court will reverse a judgment based on counsel's improper argument only where it appears from the entire record that the remarks of counsel were, "'in all probability, the basis for securing an incorrect verdict.'" Ritter v. Stanton, 745 N.E.2d 828, 857 (Ind. Ct. App. 2001) (quoting Chaiken v. Eldon Emmor & Co., 597 N.E.2d 337, 345 (Ind. Ct. App. 1992)). Here, even assuming that counsel made improper statements during his closing argument, there is no evidence that they had an inflammatory impact on the jury. As stated earlier, there was ample evidence for the jury to conclude that Flat Rock was liable to Villarreal for the injuries that he sustained. And, as discussed below, there is no evidence that the jury's damage award of $275,000 was the result of improper motives. Thus, this argument fails.

## II. Jury Instruction

Flat Rock contends that the trial court erred when it refused to give its tendered jury instruction regarding sudden emergency.[1] The trial court's refusal to give a jury instruction is reviewed for an abuse of discretion. Brooks v. Friedman, 769 N.E.2d 696, 699 (Ind. Ct. App. 2002). The trial court should give an instruction if the instruction

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[1] Flat Rock's tendered jury instruction on sudden emergency read:

> Flat Rock Tap and Michael C. Repay claim they were not negligent because they acted with reasonable care in an emergency situation. Flat Rock Tap and Michael Repay are not negligent if they prove the following by a preponderance of the evidence:
>
> 1. They were confronted with a sudden emergency;
> 2. The emergency was not of their own making;
> 3. They did not have sufficient time to deliberate; and
> 4. They exercised such care as an ordinarily prudent person would exercise when confronted with a similar emergency, even if it appears later that a different course of action would have been safer.

Appellant's App. p. 84.

correctly states the law, the substance is not covered by other instructions, and the evidence supports the instruction. Collins v. Rambo, 831 N.E.2d 241, 245 (Ind. Ct. App. 2005).

The sudden emergency doctrine "recognizes that a reasonable person innocently deprived of time to consider his actions does not always exercise the same accuracy of judgment as one who has had the opportunity for reflection." Brooks, 769 N.E.2d at 699. Consequently, an instruction on sudden emergency is only appropriate when there is evidence that the defendant did not create the emergency through his own negligence, the danger confronting the defendant appeared to be so imminent as to leave no time for deliberation, and the defendant's apprehension of the peril was reasonable. Collins, 831 N.E.2d at 246.

In support of its argument, Flat Rock directs us to Brooks, where this court held that the trial court committed reversible error by refusing to give an instruction on sudden emergency. 769 N.E.2d at 700. However, Brooks is readily distinguishable from the instant case.

In Brooks, the defendant testified that he was following a red vehicle at two to three vehicle lengths and noticed that traffic was slowing. Id. When the defendant looked up after glancing at his cigarette lighter for two to three seconds, a light-colored vehicle had come to an abrupt stop in front of him. Id. The defendant "stood on the brakes," but collided with the light-colored vehicle. Id. This court held that the trial court erred by not instructing the jury on sudden emergency because the defendant had

presented evidence that the light-colored vehicle had created the sudden emergency, and this created a question of fact for the jury to decide. Id.

Here, the evidence shows that Repay and Przewoznik spent five to ten minutes trying to convince Sarr to leave the bar instead of calling the police for assistance. Under these circumstances, we cannot conclude that Repay and Przewoznik did not have adequate time to deliberate or that the emergency was not created by their own negligence. Therefore, the trial court did not abuse its discretion when it refused to give an instruction on sudden emergency.

III. Excessive Damage Award

Flat Rock argues that the "judgment of $275,000 in damages on these facts is excessive and outrageous and is evidence that the jury was motivated by passion or prejudice." Appellant's Br. p. 27. When reviewing a damage award, we consider only the evidence that supports the award along with the reasonable inferences therefrom. Ritter, 745 N.E.2d at 843. A damage award will be upheld if it falls within the bounds of the evidence. City of Carmel v. Leeper Elec. Servs., Inc., 805 N.E.2d 389, 393 (Ind. Ct. App. 2004). The jury has broad discretion in determining an award of damages, and when the evidence is conflicting, the jury is in the best position to assess the damages. Ritter, 745 N.E.2d at 844. Finally, this court has stated that engaging in a comparative analysis of damages awards is "a significant departure from Indiana's historical regard of the uniqueness of every tort claim and the belief that compensatory damage assessments should be individualized and within the discretion of the factfinder." Id. at 849.

Here, Dr. Henry testified that Villarreal sustained a severe injury to his finger, which required open reduction surgery under general anesthesia. Following surgery, Villarreal was required to attend physical therapy three times a week for six weeks and is still left with two permanent injuries to his finger at the age of twenty-seven. Because of his injuries, Villarreal incurred nearly $45,000 in medical expenses and faces an uncertain future as to how the injury will affect the functioning of his hand. Presented with this evidence, we cannot say that the jury's verdict was outside the scope of evidence or that it was motivated by passion or prejudice. Accordingly, the jury's verdict of $275,000 was not excessive, and we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.