STATE OF MICHIGAN

COURT OF APPEALS

LULA PUTMAN,

Plaintiff-Appellee,

v

DAVID MUHAMMAD, a/k/a DAVID COLEMAN,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 194366
Wayne Circuit Court
LC No. 94-431239 NI

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial judgment and award in favor of plaintiff in this assault and battery case. We affirm.

Defendant first argues that the trial court erred by admitting the deposition testimony of Maureen Blackwell, plaintiff's therapist, and Dr. Matena Raju, plaintiff's treating psychiatrist, because the depositions were taken after the discovery cutoff date, defendant was not properly notified of the depositions,[1] plaintiff did not show that Blackwell and Raju were unavailable prior to introducing the depositions, and plaintiff had not identified them as expert witnesses as she had not filed a witness list. We disagree.

We review a trial court's determination to admit evidence for abuse of discretion. *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1993).

The trial court did not err in finding that Blackwell and Dr. Raju were experts. MRE 702. Further, it is not necessary to show that experts are unavailable to use their depositions at trial. MRE 803(18). Defendant's arguments that plaintiff did not file a witness list and that the depositions were taken after the close of discovery were not raised below and therefore are unpreserved.[2] *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

At trial, defendant objected to the introduction of the deposition testimony on the basis that defense counsel had not received timely notice of the depositions and had not been able to attend

because of a conflict. The court overruled the objection stating that it should have been raised pre-trial. The depositions were taken November 14, 1995. Trial was not held until January 30, 1996. Under the circumstances, the trial court did not abuse its discretion in allowing the depositions to be read to the jury.[3]

Defendant next argues that the trial court erred by excluding business records of plaintiff's employer that he sought to admit on the issue of proximate cause and for impeachment purposes. Defendant argues that the business records would have shown plaintiff's job duties and performance evaluations, that plaintiff previously had been admonished for her handling of tenants' mail, that plaintiff had a drinking problem, that plaintiff violated company policy, that there was an investigation that made no mention of a gun, the absence of an incident report, and that plaintiff falsely stated on her employment application that she had gone to high school. Defendant attempted to introduce business records at the start of trial, arguing that they would indicate that the official reason for plaintiff's termination was for her use of profanity against defendant. Plaintiff objected on the basis that the records would be cumulative, because plaintiff would testify to that matter. The trial court reserved its ruling, eventually excluding the records on relevancy grounds.

Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. However, even if relevant, evidence may be excluded for reasons of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *McDonald v Stroh Brewery Co*, 191 Mich App 601, 605; 478 NW2d 669 (1991). Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996).

Plaintiff's job duties and performance evaluations would not have made the existence of a fact which was of consequence to this action more or less probable and therefore were irrelevant and properly excluded. MRE 401. Any error in failing to admit the remaining records was harmless as the evidence was cumulative to plaintiff's own trial testimony. Plaintiff testified that she and another employee were admonished for having signed for defendant's certified mail, and that she was terminated for cursing at defendant, which was a violation of company policy. Regarding plaintiff's alleged drinking problem, defendant did not offer any of plaintiff's employer's records, but rather referred to plaintiff's (post-incident) medical records as indicating an alcohol problem. Defense counsel cross-examined plaintiff on this issue and plaintiff testified that, after the incident, she discussed with Blackwell that she was drinking more than usual and was beginning to have an alcohol problem. Regarding the Millender Center's investigation of the incident, the trial transcript reveals that plaintiff's counsel attempted to introduce the report as a business record and the trial court excluded it on hearsay grounds. Defense counsel did not attempt to introduce the incident report, but later tried to admit a "corrective action for self-improvement" form indicating plaintiff was suspended and then terminated because of the incident. Defense counsel argued that it was relevant to impeach plaintiff. The trial court asked counsel if the report contained a statement made by plaintiff, and when defense counsel indicated that it did not, the trial court sustained plaintiff's objection. As noted above, plaintiff had already testified that she was terminated for cursing at defendant during the incident at issue. We find no abuse of discretion.

Although evidence that plaintiff falsified her high school attendance on her employment application would have been relevant to plaintiff's credibility, the exclusion of this evidence was harmless error as its bearing on plaintiff's veracity was limited because plaintiff was hired in 1985 and the incident occurred in 1993.[4]

Defendant last argues that the trial court erred in not enforcing a subpoena he served on plaintiff and in refusing to permit defendant to recall plaintiff as part of his defense.

A trial court's decision to allow a witness to be recalled is reviewed for abuse of discretion. *Potts v Shepard Marine Const Co*, 151 Mich App 19, 26; 391 NW2d 375 (1986).

The subpoena requested plaintiff's tax returns for the years 1991 through 1993, a document evidencing plaintiff's termination of employment, and an incident report. The incident at issue occurred on June 15, 1993. The trial court ruled that the income tax returns should have been requested pre-trial and were not discoverable, further ruling that the other matters the subpoena sought to produce should have been addressed pre-trial and the subpoena was thus untimely, and that it would not allow defendant to recall plaintiff in order to ask her why such documents were not produced. The court then asked defense counsel if he had any other questions for plaintiff, and after defense counsel responded, the trial court stated that those questions had been asked and answered during cross-examination, and it would not permit defendant to recall plaintiff.

Defendant has not established that he was prejudiced by the failure to produce the documents. To the extent defendant is unable to make such a showing because he does not know the contents of the documents, the trial court properly ruled that the subpoena was untimely. The court's scheduling order set a discovery cutoff date of June 5, 1995. Defendant's subpoena was dated November 27, 1995.

Finally, the trial court did not abuse its discretion in refusing to allow defendant to recall plaintiff for further cross-examination under the circumstances that plaintiff had been cross-examined at length, most of the areas had been covered in cross-examination, and defendant could have addressed the subject matter of the records at the time defense counsel cross-examined plaintiff. MRE 611(a); *Potts, supra*, 151 Mich App at 26-27.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage

[1] Defense counsel was not present at either deposition.

[2] We observe that the lower court record contains no witness list for plaintiff or defendant.

[3] Because the court ruled in a summary fashion after defense counsel made his objection, plaintiff's counsel was unable to make a record regarding the adequacy of notice except to state: ". . . I think the allegations are unfair. We had scheduled these depositions twice." In her brief on appeal plaintiff asserts, and attaches notices of deposition to support, that the depositions had been scheduled before but defense counsel did not appear, so plaintiff's counsel rescheduled the depositions as a professional courtesy, but proceeded with the depositions when counsel failed to appear again.

On appeal, defendant attaches a letter of objection to the rescheduled depositions, addressed to plaintiff's counsel and dated November 14, 1995, asserting that the only notice he received of the depositions was a phone call that same day. Plaintiff's notices of deposition for the November 14 depositions are dated November 8, 1995, as is a proof of service by mail. In any event, defendant has not explained why he waited until trial to raise the issue, except to assert that he did not know that plaintiff intended to call the witnesses. Plaintiff, however, asserts that the witnesses were mentioned in her mediation summary. We also observe that it was plaintiff who scheduled and took the depositions, presumably for use at trial, as she would have no need to discover her own witnesses' testimony.

[4] Regarding defendant's argument that the proffered evidence showed the absence of an incident report, defendant does not cite where he made this argument during trial, and our review of the record found no such argument.