

STATE OF MICHIGAN
COURT OF APPEALS

VIOLET POPOVICH and HELENE POPOVICH,
Personal Representatives of the Estate of OBREN
VALDO POPOVICH,

UNPUBLISHED
February 3, 2004

Plaintiffs-Appellants,

v

NANCY J. KEMP,

No. 243129
Macomb Circuit Court
LC No. 00-004032-NI

Defendant-Appellee.

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's order that denied their motion for a new trial and the trial court's December 7, 2001 order that affirmed the jury's verdict of no cause of action.

I

This case arises out of a December 1, 1997 accident wherein defendant, who was driving a car, hit Obren Popovich, who was riding a bicycle. The accident occurred at approximately 5:50 p.m., during rush hour when it was dark outside, and it took place on 13 Mile Road, a four lane highway with two eastbound lanes and two westbound lanes. According to eyewitness Michael Fraser, Popovich was riding his bicycle across 13 Mile Road from north to south in a perpendicular direction, and had already crossed the two eastbound lanes and the inside westbound lane before being struck in the westbound curb lane. According to witnesses, Popovich was wearing dark clothing and did not have any reflective devices or lights on his clothing or on his bicycle, except for the reflectors in the pedals. Fraser testified that, based on his observation of the accident, there was no way defendant could have avoided the accident. Defendant testified that there was no crosswalk where she hit Popovich, that he "came out of no where," and that she had no chance to avoid the accident "because he was in front of [her] before [she] even had a chance to see him."

Detective Randall Ricotta analyzed the skid marks and determined that defendant was traveling at a speed of approximately thirty-seven to forty-two miles per hour at the time of the accident, in a forty-mile per hour speed zone. Detective Ricotta believed it was unlikely that defendant had been speeding, and testified that based on his experience as an accident reconstructionist and his investigation of the scene, defendant did not do anything to cause the

accident. Officer Robert Eidt was the first police officer to respond to the accident scene, and authored the police report. He testified that defendant was assigned a “00” hazardous action number, meaning no hazardous action, and that Popovich was assigned a “03” hazardous action number, meaning that he failed to yield the right of way, “because the bicycle crossed into traffic, which basically caused the accident.” According to Officer Eidt, “[t]he bicyclist was not in a crosswalk of any sort and did not have the right of way to cross in front of both east and west bound traffic on 13 Mile Road.”

Violet Popovich, the decedent’s wife, and Helene Popovich, the decedent’s daughter, as individuals and as personal representatives of the decedent’s estate, sued defendant for negligence and wrongful death. Following trial, the jury found that defendant was not negligent. Accordingly, the trial court entered an order of no cause of action. Plaintiffs moved for a new trial pursuant to MCR 2.611(A)(1)(a), (b), and (g), and the trial court denied their motion. Plaintiffs now appeal.

II

Plaintiffs argue that the trial court abused its discretion by allowing the testimony of lay witnesses Fraser, Ricotta, and Eidt concerning defendant’s conduct. We disagree. We review a trial court’s decision to allow lay witness testimony for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 455; 540 NW2d 696 (1995). “An abuse of discretion exists when an unbiased person, considering the facts on which the trial court relied, would conclude that there was no justification or excuse for the decision.” *Miller v Hensley*, 244 Mich App 528, 529; 624 NW2d 582 (2001).

MRE 701, Opinion Testimony by Lay Witnesses, provides in pertinent part:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.

MRE 704, Opinion on Ultimate Issues, provides in pertinent part:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

In *Sells v Monroe County*, 158 Mich App 637, 646-647; 405 NW2d 387 (1987), this Court opined:

[A]n eyewitness to a collision need not view the collision from the same perspective as the driver before giving his opinion as to whether the accident was unavoidable. The test is whether the opinion is rationally based on the perception of the witness, not whether the opinion was based on the same perception as the defendant’s. Hence, once a witness’s opportunity to observe is demonstrated, the opinion is admissible in the discretion of the trial court, and the weight to be accorded the testimony is for the jury to decide.

Here, the trial court admitted Fraser's testimony that the accident was unavoidable. Before offering his opinion, Fraser testified to the facts upon which he based his opinion: it was dark outside during rush hour; Popovich was wearing dark clothing, and there were no reflective devices on his clothing or his bicycle; further, Fraser did not see the bicycle cross the eastbound lanes of traffic because of the glare from the headlights of the oncoming cars. Consistent with MRE 701, Fraser's testimony was rationally based on his perception of the accident, and was helpful to determine a fact in issue. Because Fraser "clearly indicated [his] opportunity to observe the accident and articulated the facts upon which [his] opinion[] w[as] based, the trial court did not abuse its discretion in allowing [his] testimony as to the avoidability of the accident." *Sells, supra*, 647-648.

"This Court has admitted lay opinion testimony from investigating police officers regarding fault in traffic accidents when the testimony was the result of direct observations and analysis of the accident scene." *Miller, supra*, 531. In *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629; 415 NW2d 224 (1987), the trial court allowed an investigating police officer to testify regarding what he saw at the accident scene. In *Mitchell*, the plaintiffs argued that the trial court erred when it allowed the police officer to offer his conclusions based on what he observed. The plaintiffs in *Mitchell* argued that the trial court erred by admitting "his statements as to the position of the two vehicles prior to and at the time of impact, and as to the estimated speed defendant's vehicle was traveling at impact based upon the length of the skid marks from defendant's vehicle and applying calculations from a chart used by the Michigan State Police." *Id.* This Court held that the police officer's testimony was proper under MRE 701, that he "made reliable conclusions from given facts which people in general could make," and that his "testimony was not overly dependent on scientific, technical or other specialized knowledge." *Id.*, 629-630. This Court explained that the police officer was "quite familiar with the area of the accident," and that his opinion that the plaintiff had turned too soon was "based on his view of the accident site and his observation of the point where the impact occurred." *Id.*, 630. This Court concluded that the police officer's testimony "pertained to his perception of the accident scene which aided a clearer understanding of the facts at issue." *Id.*

Similarly, here, Ricotta's testimony about the speed at which defendant was traveling, based on the skid marks, as well as his opinion that defendant did not do anything to cause the accident, was rationally based on his perception of the accident scene and was helpful to the jury in making a determination of a fact in issue. For the same reasons, Eidt's testimony that defendant was assigned a "00" hazardous action number and that Popovich was assigned a "03" hazardous action number, as well as his testimony that Popovich failed to yield the right of way, which caused the accident, was rationally based on his perception of the accident scene and was helpful to the jury in deciding a fact in issue. Therefore, the trial court did not abuse its discretion in allowing Ricotta and Eidt's testimony.

Plaintiffs also argue that the trial court abused its discretion when it refused to give plaintiffs' requested supplemental jury instruction. Plaintiffs' requested supplemental instruction included "a quote from a Supreme Court case." Plaintiffs have abandoned this issue by failing to provide any citations to support their argument and for failing to adequately brief this issue. *Flint City Council v State of Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2003); *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 77; 577 NW2d 150 (1998).

We note, however, that Officer Eidt's testimony concerning the hazardous action level of "03" assigned to Popovich was properly allowed by the trial court. The trial court gave the jury the applicable standard jury instructions concerning the burden of proof in negligence cases, as set forth in SJ12d 16.02. "After reviewing the evidence presented and the jury instructions in their entirety . . . the trial court 'adequately informed the jury regarding the applicable law reflecting and reflected by the evidentiary claims in the particular case.'" *Novi v Woodson*, 251 Mich App 614, 632; 651 NW2d 448 (2002), quoting *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 459; 633 NW2d 418 (2001).

Plaintiffs also contend that the trial court abused its discretion in instructing the jury as to the requirements of MCL 257.662(1), which provides:

A bicycle . . . being operated on a roadway between 1/2 hour after sunset and 1/2 hour before sunrise shall be equipped with a lamp on the front which shall emit a white light visible from a distance of at least 500 feet to the front and with a red reflector on the rear which shall be visible from all distances from 100 feet to 600 feet to the rear when directly in front of lawful lower beams of head lamps on a motor vehicle. A lamp emitting a red light visible from a distance of 500 feet to the rear may be used in addition to the red reflector.

In *Ertzbischoff v Smith*, 286 Mich 306, 308; 282 NW 159 (1938), the plaintiff's decedent was riding his bicycle when he was struck by the defendant's car. The defendant argued that the plaintiff's decedent was guilty of contributory negligence because there were no lights on the bicycle. *Id.*, 309. The trial court had instructed the jury on the law requiring that bicycles be equipped with a front light and rear reflector. *Id.*, 311. Our Supreme Court held that "so far as the absence of a lighted headlight on the bicycle is concerned, the violation [of the statute] would not preclude recovery unless it was a proximate cause of the accident. The jury could have believed the testimony that the decedent, when struck, was riding on an angle in front of the defendant and could have concluded, therefore, that, even if the bicycle had been equipped with a headlight, it would not have been visible to defendant. The question as to whether failure to have a lighted [headlight was] one for the jury." *Id.* (citations omitted).

Similarly, here, the trial court instructed the jury on the statute requiring that bicycles, when in use at nighttime, be equipped with a front headlight and rear reflector. The trial court declined, however, to instruct the jury that it could infer negligence from Popovich's violation of the statute. Rather, the trial court instructed the jury that they "must infer that [Popovich] exercised ordinary care for his safety at and before the time of the occurrence and was not negligent." Viewing the jury instructions in their entirety, the parties' theories and the applicable law were adequately and fairly presented to the jury. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). The trial court did not abuse its discretion in instructing the jury as to the requirements of MCL 257.662(1).

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly