STATE OF MICHIGAN

COURT OF APPEALS

ROBERT RIGGS,

Plaintiff-Appellant,

v

JACK B. ANDERSON and ANDERSON NWTT LLL, d/b/a NORTHERN WHOLESALE TRAILERS RV WORLD USA,

Defendants-Appellees.

UNPUBLISHED
June 17, 2010

No. 290771; 293218; 293831
Saginaw Circuit Court
LC No. 07-063214-CL

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury verdict of no cause of action in favor of defendants. We affirm.

Defendant, Jack B. Anderson, purchased a tractor and recreational vehicle (RV) business in Petoskey, Michigan. Although Anderson was familiar with tractors, he was not interested in learning how to operate the RV business. Therefore, Anderson sought an experienced salesperson to operate the RV business and potentially purchase this portion of the Petoskey business. Plaintiff was the sales manager of General RV in Birch Run, but he initially turned down the opportunity. Plaintiff earned $100,000 plus commissions, medical benefits, and retirement benefits at General RV. However, plaintiff asserted that Anderson made promises that he would be a partner in the Petoskey business and a $100,000, held in escrow, would be provided to plaintiff if the business was not successful.

Plaintiff began working for defendants, but after approximately two months, his employment ended. Plaintiff asserted that he had made the business successful, and Anderson broke his promises regarding the partnership. On the contrary, Anderson asserted that plaintiff's unauthorized and improper personal spending on the corporate credit card and his removal of lawn equipment from the business warranted termination. After plaintiff left the premises, Anderson asserted that receipts were found in the garbage that established plaintiff's improper spending on satellite radio, a telescope, and convenience store purchases. Initially, plaintiff was charged with the crime of embezzlement arising from his employment with defendants. Plaintiff hired an attorney, and the charge was dismissed. The criminal defense attorney referred plaintiff to his civil attorney, who filed a ten-count complaint arising out of the alleged promises of partnership, employment, termination, and criminal charges. The jury rendered a verdict of no

cause of action. In Docket No. 290771, plaintiff raises evidentiary error, attorney misconduct, and instructional error. In Docket Nos. 293218 and 293831, plaintiff challenges the timing and collection of case evaluation sanctions pending the resolution of the appellate process.

Plaintiff first alleges that the trial court committed reversible error by allowing improper propensity and character evidence in violation of MRE 404(a). We disagree. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*. Any error in the admission or exclusion of evidence does not warrant appellate relief unless refusal to take this action is inconsistent with substantial justice or affects a substantial right of the party. *Id*. citing 2.613(A); MRE 103(a).

The general rule is that all relevant evidence is admissible, but irrelevant evidence is not. MRE 402; *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002). Evidence is relevant if it has "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 be without the evidence." MRE 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith. MRE 404(a). Additionally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show conformity therewith. MRE 404(b)(1). However, it "may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b)(1).

MRE 404(b) evidence may be admitted when the evidence is offered for some purpose other than character or a propensity theory and is relevant and material. *Lewis v LeGrow*, 258 Mich App 175, 208; 670 NW2d 675 (2003). In the present case, plaintiff alleged that defendants' improper conduct caused him to leave his employment with General RV wherein he earned $100,000 per year, plus medical and retirement benefits, and he was unable to return to that employment because of defendants' malicious prosecution for embezzlement and the publicity from that prosecution. Therefore, plaintiff sought damages in excess of $1,000,000.

In light of plaintiff's theory of the case regarding his monetary losses, defendants countered with the testimony of Scott Dodge, the general manager of General RV. Dodge testified that he initially tried to persuade plaintiff from leaving General RV. However, in preparing for plaintiff's departure from the dealership, Dodge learned that plaintiff placed personal charges on the company credit cards that were not authorized by the dealership. Specifically, plaintiff had run a tab or bill at a local hotel and placed alcohol and beer charges on the credit card. Additionally, plaintiff had "purchased" a "fifth wheel" and a "travel trailer," but the dealership never received payment for them. Ultimately, before plaintiff left General RV, he signed a $26,000 promissory note, although Dodge acknowledged that $15,000 was an advance or loan given to plaintiff by the owner. Dodge testified that plaintiff asked to come back to

General RV after things ended with defendants. When asked if he would hire plaintiff, Dodge responded that he would not "[b]ecause of all the things we have discovered, credit card usage, you know, having accounts at a bar, trailers we never got paid for, you know, the list goes on and on."

Irrespective of whether the evidence at issue was improper character evidence, plaintiff's theory of the case made the evidence relevant for another purpose, specifically to address the issue of damages. Therefore, the trial court's decision to admit this evidence did not constitute an abuse of discretion. *Waknin*, 467 Mich at 333.

Next, plaintiff asserts that the defense attorney engaged in misconduct by improperly asserting that plaintiff's counsel and his criminal defense attorney engaged in unethical conduct, and the trial court erred by failing to give a curative instruction. We disagree. Comments by an attorney during trial will warrant reversal when there is a deliberate course of conduct designed to prevent a fair and impartial trial or when the remarks are designed to deflect the jury's attention from the issues. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501-502; 668 NW2d 402 (2003). When reviewing an appeal premised on attorney misconduct, first it must be determined if the conduct constituted error, and if so, whether it was harmless. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102; 330 NW2d 638 (1982). The trial court's denial of a request for a curative instruction is reviewed for an abuse of discretion. *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992).

Following a review of the trial transcripts, a deliberate course of conduct designed to prevent a fair and impartial trial was not found. *Wiley*, 257 Mich App at 501-502. Although defense counsel expressed surprise regarding the testimony by the witness in light of the referral fee, the trial court sustained the objection to defense counsel's comment. Regarding the propriety of a curative instruction, the trial court instructed the parties to brief the issue. When the parties failed to present authority addressing the specific facts at issue, the trial court denied the request for a curative instruction. The next time the issue was raised before the jury, *plaintiff's* counsel commented in closing argument that defense counsel had "feigned shock" and further advised the jury that the practice was "specifically approved by the rules" despite the trial court's ruling that the parties could challenge the *weight* of the testimony. Defense counsel then responded to the statements by plaintiff's counsel in his own closing argument. Plaintiff cannot claim error when his counsel opened the door to such commentary by raising the previously isolated and sustained comment in his closing argument. *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 704 n 47; 630 NW2d 356 (2001). Under the circumstances, the trial court did not abuse its discretion by failing to provide a curative instruction. *Schutte*, 196 Mich App at 142.[1]

[1] Because plaintiff failed to identify an error requiring reversal, we need not address his challenge to case evaluation sanctions as raised in docket nos. 293218 and 293831.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens