REL: November 5, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1190570

Dolgencorp, LLC, d/b/a Dollar General, and Martin Sauceda

v.

Sakeena Rena Smith

Appeal from Calhoun Circuit Court
(CV-16-900444.80)

MENDHEIM, Justice.[1]

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[1]This case was originally assigned to another Justice on this Court; it was reassigned to Justice Mendheim on August 26, 2021.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(B) and (F), Ala. R. App. P.

Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.

Parker, C.J., and Bolin and Shaw, JJ., dissent.

SHAW, Justice (dissenting).

Dolgencorp, LLC, d/b/a Dollar General ("Dollar General"), and Martin Sauceda, the defendants in a tort action below, appeal from a judgment entered on a jury verdict in favor of the plaintiff, Sakeena Rena Smith. Because I would reverse the trial court's judgment and remand the case, I respectfully dissent.

In July 2016, Smith went to a Dollar General store in Anniston to purchase a beverage and a can of chili. While in the store, an altercation occurred between Smith and Sauceda, the assistant store manager. Smith and Sauceda provided differing accounts regarding the altercation.

According to Sauceda, Smith passed by him while walking through the store cursing as Sauceda was stocking shelves. When he asked Smith if she needed help finding anything, Smith cursed at him in saying that she did not need his help. Sauceda stated that he "let her go on her way" and that he went back to stocking the shelves.

After locating her items to purchase, Smith proceeded to the front of the store to check out. When Sauceda got to the front of the store, he told Smith that she could check out at his register, but Smith responded

with curses and indicated that she was fine where she was. Sauceda then told Smith that "that's no way to speak in the store" and asked her to "calm down." According to Sauceda, at that point, Smith "became more agitated and aggravated" and "just kept cussing, throwing a lot of F words here and there." As their exchange continued, Smith threatened to "knock the hell out of [Sauceda] with [her] can of chili" and that she was going to "whoop [his] ass."

Sauceda told Smith that if she did not calm down, she would have to leave the store or he would call the police. At some point, Smith grabbed a store telephone that was near the register and threatened to call the police herself. According to Sauceda, this scared him because that telephone was his only means of contacting law-enforcement officers if Smith attempted to harm him. Sauceda eventually walked around the register and tried to retrieve the telephone from Smith. As he did so, Sauceda stated, Smith grabbed him by the hair and began repeatedly hitting him in the face and head with the can of chili. Evidence in the record clearly indicates that Sauceda was beaten on the face with the can. Sauceda admitted to hitting Smith back but said that he felt that he had

to do so to defend himself. At some point, Sauceda's coworker tried to separate Smith and Sauceda but was unable to do so. The altercation ended with all three of them falling on the ground.

Shortly thereafter, Smith got up and left the store, and Sauceda called the police. While he was on the phone, Sauceda said, Smith came back into the store acting like "she was ready for round two" and told him that he was "in f*****g trouble." She then left. When law-enforcement officers arrived, Sauceda told them what had occurred, but Smith was no longer there. Smith did not contact law-enforcement officers after she left.

Smith testified that, when she first entered the store, she recognized Sauceda as a store employee who had previously accused her of shoplifting, and Smith decided to avoid him. After locating the items she needed, Smith proceeded to the front of the store to check out. When Sauceda opened another register and told her to check out there, Smith told Sauceda that she was fine where she was. Smith claimed that Sauceda then walked over to where she was and began moving her items to his register. Smith said that Sauceda also told her that if she did not come to his register, she would need to leave the store. According to

Smith, Sauceda's actions "made [her] feel angry," and she told him that he could not make her leave. At that point, Smith said that Sauceda pointed his finger in her face and told her, once more, to either come to his register or leave the store. Smith also indicated that he called her a "b***h." She told Sauceda that if he did not leave her alone she would "knock the hell out of him with [her] can of chili."

Smith said that she felt uncomfortable, so she took the store phone so that she could call the police. Sauceda then tried to grab the phone from Smith's hands. As he did so, Smith said, she turned her back toward him. Smith testified that Sauceda eventually put all of his weight on her, which resulted in her falling to the ground. As she tried to push Sauceda off of her, Smith said, he started hitting and kicking her. In an effort to defend herself, Smith said, she hit Sauceda with her can of chili. At that point, Smith said, she hit her head on the floor and Sauceda continued to hit and kick her. When the altercation finally ended, Smith said, she got up and left.

Smith later commenced a tort action against Dollar General and Sauceda ("the defendants"). Following a jury trial, Smith received a

verdict in her favor and was awarded $75,000 in compensatory damages and $225,000 in punitive damages. After the trial court entered judgment on the jury's verdict, the defendants filed a postjudgment motion in which they argued, among other things, that they were entitled to a new trial because one of the jurors, Q.M., had failed to give a necessary response to a question during voir dire. That motion was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. The defendants appealed.

A challenge alleging juror misconduct because of a juror's failure to properly answer a question during voir dire may be raised for the first time in a motion for a new trial. See, e.g., Hood v. McElroy, 127 So. 3d 325, 327 (Ala. 2011), and Holly v. Huntsville Hosp., 925 So. 2d 160, 161 (Ala. 2005). In addressing the standard for determining whether juror misconduct warrants a new trial, this Court has previously stated:

> "The proper standard ..., as set out by this Court's precedent, is whether the misconduct might have prejudiced, not whether it actually did prejudice, the [complaining party]. See Ex parte Stewart, 659 So. 2d 12 (Ala. 1993). ... The 'might-have-been-prejudiced' standard, of course, casts a 'lighter' burden on the [complaining party] than the actual-prejudice standard. See Tomlin v. State, ... 695 So. 2d [157] at 170 [(Ala. Crim. App. 1996)]. ...

> "It is true that the parties in a case are entitled to true and honest answers to their questions on voir dire, so that they may exercise their peremptory strikes wisely. ... However, not every failure to respond properly to questions propounded during voir dire 'automatically entitles [the complaining party] to a new trial or reversal of the cause on appeal.' Freeman v. Hall, 286 Ala. 161, 166, 238 So. 2d 330, 335 (1970). ... As stated previously, the proper standard to apply in determining whether a party is entitled to a new trial in this circumstance is 'whether the [the complaining party] might have been prejudiced by a veniremember's failure to make a proper response.' Ex parte Stewart, 659 So. 2d at 124."

Ex parte Dobyne, 805 So. 2d 763, 771-72 (Ala. 2001). " 'The determination of whether the complaining party was prejudiced by a juror's failure to answer voir dire questions is a matter within the discretion of the trial court and will not be reversed unless the court has abused its discretion.' " Holly, 925 So. 2d at 162 (quoting Union Mortg. Co. v. Barlow, 595 So. 2d 1335, 1342 (Ala. 1992)).

In the present case, during voir dire, Smith's counsel posed the following question to the veniremembers:

> "Now, as far as the altercation in this case, it was something that started as a verbal altercation, and then it became physical. I am going to ask the question if anybody in here has ever been in a physical fight. If it is something that you don't want to talk about ... then we can talk about it at the end. But

> has anyone ever been in a physical fight, and are you okay to talk about it?"

One veniremember responded that he had gotten into many physical fights with his siblings when he was growing up. Another veniremember admitted that she had been in a physical altercation with her mother and sister. Both of those veniremembers were ultimately struck from the jury. Q.M., however, did not respond to the question.

After the jury rendered its verdict and the trial ended, defense counsel discovered an online newspaper article from November 2014 that stated that Q.M. was among six high-school football players who had been suspended from playing in a high-school playoff game because they had been involved in an "incident" during a previous game. According to the article, the incident had occurred toward the end of the game, when the final play ended near one team's bench, which resulted in both teams running onto the field and players confronting each other. Witnesses described the six players that were ultimately suspended as having been "under attack" by players from the other team, with one of Q.M.'s teammates stating: "I didn't want to go out and fight with [the other

team's players] .... [But when] they came off their sideline and got into it with my teammates, I [wasn't] going to let that happen."

In light of that newspaper article, the defendants argued that Q.M.'s failure to disclose information about the fight had denied them the opportunity to exercise a peremptory challenge to strike him from the venire. In support of their motion, the defendants attached a copy of the November 2014 article along with affidavits from their trial counsel. In each of their affidavits, the defendants' attorneys confirmed that Q.M. did not respond when asked if any of the jurors had ever been involved in a physical fight and explained that, had they known about the fight discussed in the November 2014 article, they would have used a peremptory strike to remove Q.M. from the jury. As stated previously, that motion was denied by operation of law.

On appeal, the defendants maintain their position that Q.M.'s failure to disclose his involvement in the fight at his high-school football game requires a new trial. Smith contends, however, that, although the defendants included with their motion for a new trial a copy of the online article and affidavits from their trial counsel, the evidence on the motion

for a new trial was neither presented to the trial court in a hearing on that motion nor properly "verified" by the defendants' trial counsel.

Our appellate courts have previously recognized:

> " 'Assertions of counsel in an unverified[or unsupported] motion for new trial are bare allegations and cannot be considered as evidence or proof of the facts alleged.' Smith v. State, 364 So. 2d 1, 14 (Ala. Cr. App. 1978). 'A motion for a new trial must be heard and determined on the evidence submitted on that motion and on the evidence heard on the main trial, though not reintroduced.' Taylor v. State, 222 Ala. 140, 141, 131 So. 236[, 238] (1930)."

Daniels v. State, 416 So. 2d 760, 762 (Ala. Crim. App. 1982) (emphasis added). It is when nothing is offered in support of a motion for a new trial -- by verification or evidence -- that the assertions contained in the motion are deemed unsupported "bare allegations" requiring the denial of the motion. Id.

Affidavits may be used to support a motion for a new trial. See Loera v. Loera, 553 So. 2d 128, 128 (Ala. Civ. App. 1989), and Rule 43(e), Ala. R. Civ. P. The defendants' trial counsel each submitted affidavits in which they stated that, had they known that Q.M. was involved in the fight

following the high-school football game, they would have struck him from the jury, just as had been done with other similarly situated jurors.

This Court has previously stated that affidavits in support of a motion for a new trial " 'should be based on the knowledge of the affiant, and not on hearsay, ' " and that " 'hearsay evidence is not admissible in support of a motion for new trial.' " Jefferson Cnty. v. Kellum, 630 So. 2d 426, 427-28 (Ala. 1993) (quoting 66 C.J.S. New Trial § 172 (1970)). Generally, newspaper articles, like the one in the present case, constitute hearsay. See Ex parte Monsanto Co., 862 So. 2d 595, 627 (Ala. 2003). Nevertheless, this Court has held that "an affidavit containing hearsay ... is competent evidence in support of a motion for a new trial" when no objection to that affidavit is made. Petty-Fitzmaurice v. Steen, 871 So. 2d 771, 775 (Ala. 2003). Nothing in the record indicates that Smith objected either to the November 2014 article or to the contents of the affidavits submitted in support of the motion for a new trial. Thus, contrary to Smith's contention, the defendants provided "competent evidence" in support of their motion for a new trial. Id.

Smith also argues, however, that the defendants still have not established that they were prejudiced by Q.M.'s failure to disclose the information at issue.

> " 'Although the factors upon which the trial court's determination of prejudice is made must necessarily vary from case to case, some of the factors which other courts have considered pertinent are: temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about.' "

Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 5 (Ala. 2007) (quoting Freeman v. Hall, 286 Ala. 161, 167, 238 So. 2d 330, 336 (1970)).

First, with regard to temporal remoteness, the matter about which juror Q.M. failed to respond -- the fight at his high-school football game -- took place in November 2014. The trial in the present case began in November 2019. Smith points to that length of time, states that the incident occurred when Q.M. "was a school boy," and concludes that the remoteness of the incident "does not weigh in favor a new trial." Smith's brief at 42. The defendants, however, note that because Q.M. was suspended from participating in a postseason football game, which they

describe as "a highlight of the season for a football player," the defendants' brief at 46-47, it "is unlikely to have slipped his mind. Certainly, it was not so temporally remote that one could reasonably conclude that it could not affect his decision-making as a juror in the instant case." Id. at 46. I see nothing indicating that the period between the fight and the trial is too remote as a matter law. Given the unique nature of the fight, this factor weighs in favor of the defendants' arguments.

With regard to the "ambiguity of the question propounded" during voir dire, the defendants contend that there "is nothing ambiguous about the question" because other jurors understood it, responded, and were ultimately struck as a result of their responses. Id. Smith argues, however, that the question was ambiguous because the article that the defendants attached to their motion did not explicitly state that the "incident" in which Q.M. and his teammates became involved was in fact a "physical fight." I disagree. The article relates that witnesses described Q.M. and his teammates as being "under attack," and one of Q.M.'s suspended teammates even stated that he "didn't want to go out and fight with [the other team's players]" but that, "when they came off their

sideline and got into it with my teammates, I [wasn't] going to let that happen." These facts indicate that a fight took place. Further, the question contained no legal jargon that might confuse a nonattorney. Thus, under these circumstances, I see nothing ambiguous or unclear about the question.

Next, with regard to the possibility of the "inadvertence or willfulness" of a prospective juror's failure to disclose certain information and the failure of the juror to recollect the information not disclosed, this Court has previously stated that the "concealment by a juror of information called for in voir dire examination need not be deliberate in order to justify a reversal, for it may be unintentional, but insofar as the resultant prejudice to a party is concerned it is the same." Sanders v. Scarvey, 284 Ala. 215, 219, 224 So. 2d 247, 251 (1969) (finding prejudice when jurors failed to reveal that they had commenced a personal-injury case). See also Dunaway v. State, 198 So. 3d 567, 583 (Ala. 2014). Similarly, in Alabama Gas Corp. v. American Furniture Galleries, Inc., 439 So. 2d 33, 36 (Ala. 1983), this Court stated: "Nevertheless, if the

failure to answer was prejudicial to the inquiring party, the result is the same as if it had been deliberate."

The defendants contend that, "[b]ecause the fight [Q.M.] was involved in resulted in his suspension from participating in his high school football team's post-season playoff game, a highlight of the season for a football player, one cannot reasonably conclude that he simply failed to recollect the event." The defendants' brief at 46-47. Smith contends, however, that there is no evidence indicating that Q.M. was "intentionally dishonest" about the incident. Although it may be unclear if Q.M. deliberately failed to respond to the question at issue, as shown by the caselaw discussed above, any inadvertence in a prospective juror's failure to respond to questioning on voir dire does not foreclose the probability of prejudice resulting from the nondisclosure.

Finally, with regard to the materiality of the matter inquired about during voir dire, this Court has previously stated:

> "In the context of a juror's failure to disclose requested information, 'a material fact [is] "'one which an attorney[,] acting as a reasonably competent attorney, would consider important in making the decision whether or not to excuse a prospective juror.'"' Conference America, Inc. v.

> Telecommunications Coop. Network, Inc., 885 So. 2d 772, 777 (Ala. 2003)(quoting Gold Kist v. Brown, 495 So. 2d 540, 545 (Ala. 1986))."

Jimmy Day Plumbing, 964 So. 2d at 5.

> "If the party establishes that the juror's disclosure of the truth would have caused the party either to (successfully) challenge the juror for cause or to exercise a peremptory challenge to strike the juror, then the party has made a prima facie showing of prejudice. ... Such prejudice can be established by the obvious tendency of the true facts to bias the juror ... or by direct testimony of trial counsel that the true facts would have prompted a challenge against the juror, as in State v. Freeman, 605 So. 2d 1258 (Ala. Crim. App. 1992)."

Ex parte Dobyne, 805 So. 2d at 773 (emphasis added).

The defendants' attorneys testified by affidavit that, had they known about Q.M.'s participation in the fight after the football game, they would have struck him from the jury. Moreover, in the newspaper article, witnesses described the players that were ultimately suspended, which included Q.M., as having been "under attack," and one of Q.M.'s suspended teammates stated that he "didn't want to go out and fight with [the other team's players]" but that, "when they came off their sideline and got into it with my teammates, I [wasn't] going to let that happen." Q.M.'s actions caused him and five teammates to be suspended from

playing in a postseason playoff football game a few days later. The fact that Q.M. was the victim of an attack indicates an "obvious tendency" to bias Q.M. in favor of a plaintiff, like Smith, who also claimed to have been attacked. Dobyne, 805 So. 2d at 773. Thus, under the legal principles discussed above, the defendants demonstrated probable prejudice warranting a new trial. Smith offered nothing to rebut the defendants' arguments or evidence.

As stated previously, to prevail on their juror-misconduct claim, the defendants were required to demonstrate that Q.M.'s misconduct "might have prejudiced" them. Id. at 771. Given that all the factors above are met, they satisfied that burden and are entitled to a new trial. Based on the foregoing, I believe that the trial court exceeded its discretion in failing to grant their motion for a new trial. Therefore, I respectfully dissent.

Parker, C.J., and Bolin, J., concur.