STATE OF MICHIGAN

COURT OF APPEALS

COLUMBUS JAMES,

Plaintiff-Appellant,

v

ANN ARBOR PUBLIC SCHOOLS,

Defendant-Appellee.

and

DENNIS KELLER

Defendant.

UNPUBLISHED
May 30, 2000

No. 212786
Washtenaw Circuit Court
LC No. 96-007616-CZ

Before: Jansen, P.J., and Hood and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying his motion for judgment notwithstanding the verdict (JNOV) or for a new trial following the jury's verdict of no cause of action in this hostile work environment racial and sexual harassment case. We affirm.

This case arises out of plaintiff's claims of racial and sexual harassment allegedly perpetrated by Dennis Keller, a head custodian at one of defendant's[1] elementary schools, and by Holly Keller, Dennis Keller's wife who also worked for a short time as a noon hour lunch aide at the same school. Plaintiff, an African-American male, worked for defendant since 1985 and had been assigned to work "light duty," which essentially involved helping teachers in their classrooms. There was evidence presented at trial that Dennis Keller engaged in sexual and racial harassment of plaintiff, although all acts were either denied by Keller or he claimed that plaintiff was a willing participant. Plaintiff's claim against the school district was premised on vicarious liability in that defendant's supervisors failed to adequately respond to plaintiff's complaints concerning Keller's behavior. The jury found in favor of both defendants. On appeal, plaintiff raises eight issues, none of which require reversal.

I

Plaintiff first argues that the trial court erred in denying plaintiff's motion to quash the subpoenas to take the depositions of Nancy Wright, plaintiff's former girlfriend of thirteen years and the mother of two of his four children, and Kevin Brown, plaintiff's childhood friend who became romantically involved with Wright after she ended her relationship with plaintiff, on the basis of insufficient notice. Plaintiff also argues that the trial court abused its discretion in allowing the testimony of prior written statements of the witnesses to be read into the record as part of the deposition testimony.

Pursuant to MCR 2.306(B)(1), a party desiring to take the deposition of a person on oral examination must give reasonable notice in writing to every other party to the action and the notice must include the time and place for taking the deposition and the name and address of each person to be examined, if known. The question here is whether plaintiff's counsel received reasonable notice, and we conclude that she did.

The lower court record contains a January 7, 1998, letter sent by defendant's counsel by telecopier and first class mail along with the notices of taking de bene esse depositions of Wright and Brown to plaintiff's counsel. In the appellate brief, plaintiff's counsel claims that she was informed of the subpoenas by telephone on January 6, 1998, when she received a telephone call from Wright stating that she had been issued a subpoena for her deposition. Plaintiff filed a motion to quash the subpoenas or cancel the depositions on January 7, 1998. The depositions were noticed for and taken in Tennessee, where Wright and Brown resided, on January 14, 1998. Plaintiff's counsel claimed that she could not attend the depositions due to a scheduling conflict. The depositions were indeed taken on January 14, 1998, and a lawyer in Tennessee was hired to represent plaintiff at the depositions. Plaintiff's motion to quash or cancel the depositions was heard by the trial court on January 14, 1998, however, that motion was denied as being moot because the depositions had been taken.

We find that plaintiff received reasonable notice (one week) of the taking of the depositions, especially because these were not unknown witnesses. Both witnesses were listed on defendant's May 13, 1997, witness list and defendant attached witness statements of both Wright and Brown to its mediation summary (mediation was held on July 2, 1997). Moreover, any error or irregularity in the notice of the depositions was harmless because it cannot be concluded that the error substantially destroyed the value of the depositions as evidence or rendered their use unfair or prejudicial. MCR 2.308(C)(5). Accordingly, the trial court did not err in denying the motion to quash the subpoenas or cancel the depositions.

With respect to the admission of the witness' deposition testimony, we review the trial court's evidentiary ruling for an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361; 533 NW2d 373 (1995).

The prior unsworn statements that plaintiff challenges are handwritten statements by Brown and Wright that were signed at the bottom of each page by the declarant, are dated March 20, 1997, and were apparently attached to defendant's mediation summary. Plaintiff argues that no proper foundation was laid to use the statements to refresh the witnesses' recollection or to impeach the witnesses; however, a review of the deposition testimony indicates that the prior statements were used as prior inconsistent statements, MRE 801(d)(1)(A), or as impeachment, MRE 607. Thus, the statements were

used for a proper purpose. Further, we note that the trial court ordered that both Wright's and Brown's depositions be redacted for trial.

To the extent that plaintiff notes in the statement of the issue that Wright testified that she was promised legal services by defense counsel's wife (also a lawyer) in exchange for Wright's testimony, that allegation is not argued in the brief and is not supported by the record. The written statement signed by Wright indicates that she was promised nothing in exchange for her testimony. Further, although Wright testified at her deposition that defense counsel told her that his wife would be calling Wright about getting visitation with her children, no one ever called Wright.

Accordingly, we find that the trial court did not abuse of discretion in admitting Wright's and Brown's depositions in the manner that it did.

II

Plaintiff next challenges several evidentiary rulings made by the trial court. Specifically, plaintiff contends that evidence of his prior conviction, prior drug use, past relationships with women, and sexually transmitted diseases should not have been admitted. A trial court's decision to admit evidence is within its sound discretion and will not be disturbed absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

A

First, we address plaintiff's claim that his prior misdemeanor conviction of assault and battery should not have been admitted. Before opening arguments, the trial court, in granting plaintiff's request, instructed defense counsel not to refer to plaintiff as a convicted felon. However, during her opening statement, plaintiff's counsel referred to plaintiff's conviction and spoke about the circumstances surrounding the conviction at great length. Later, during plaintiff's case-in-chief, plaintiff's counsel directed specific questions to plaintiff's mother about the conviction. Under these circumstances, we must agree with defendant that plaintiff opened the door to allow defendant to further explore this issue at trial.

At trial, defendant used the prior misdemeanor conviction as a means of attacking plaintiff's credibility, not to show that plaintiff was a "bad person" or for some other improper purpose. On his employment application, plaintiff indicated that he had never been convicted or a felony or misdemeanor, and conceded at trial that he knew that was not a true statement. In light of the fact that plaintiff first brought out the conviction, even after the trial court told defense counsel not to refer to plaintiff as a convicted felon, there was no error in defendant using the prior misdemeanor conviction to attack plaintiff's credibility.

B

Next, plaintiff contends that evidence of his prior drug use should not have been admitted. Once again, plaintiff's counsel opened the door by stating during opening argument that plaintiff admitted to using marijuana up to three or four times a week, but that there was no evidence that plaintiff was

using marijuana in the fall of 1995. During plaintiff's case-in-chief, plaintiff's counsel again elicited testimony from one of plaintiff's former girlfriends that she never saw any signs of substance abuse, and elicited testimony from plaintiff's mother that she had no reason to believe that plaintiff used drugs in her house while he lived there. Further, plaintiff's counsel asked virtually every witness who testified before plaintiff whether they were aware of plaintiff using drugs and all witnesses testified that they were not aware. Plaintiff himself testified that he believed he stopped using marijuana in 1991, and that he may have tried cocaine on a couple of occasions.

Having opened the door to allow rebuttal testimony regarding plaintiff's drug use, we find that defendant's use of the evidence to attack plaintiff's credibility was proper. Further, defendant proffered evidence of the drug use to explain why plaintiff might have had a mental breakdown, as opposed to plaintiff's explanation that it was caused by the Kellers' behavior and the school district's failure to take action. Accordingly, plaintiff opened the door to allow defendant to use evidence of his prior drug use as an attack on plaintiff's credibility and as a possible reason for plaintiff's mental breakdown.

C

The issue of plaintiff's past relationships with women involved allegations that plaintiff was a "womanizer" and of domestic violence committed by plaintiff. This evidence was again first brought out by plaintiff's counsel during his case-in-chief when counsel elicited testimony from plaintiff's mother, plaintiff's current girlfriend, and a prior girlfriend that they did not consider plaintiff to be a "womanizer." Thus, defendant rebutted the denials to attack plaintiff's credibility.

Also, the trial court ruled that plaintiff's reputation as a "womanizer" was admissible regarding the issue of the welcomeness and offensiveness of the harassment. It was essentially defendant's theory, consistent with the Kellers' claims that plaintiff elicited the sexual conduct, that the Kellers' conduct was not offensive to or unwelcome by plaintiff and that his treatment of women was relevant, material, and probative of the offensiveness and welcomeness of the conduct. Pursuant to *Radtke v Everett*, 442 Mich 368, 384; 501 NW2d 155 (1993) (the gravamen of a sexual harassment claim is that the alleged sexual advances were unwelcome and the threshold for determining whether the conduct was unwelcome is that the employee did not solicit or incite it and that the employee regarded the conduct as undesirable or offensive), we find no abuse of the trial court's discretion.

D

Plaintiff also argues that evidence of his alleged sexually transmitted diseases should not have been admitted. The trial court ultimately ruled that the evidence was admissible because it was a part of plaintiff's overall health and could bear on plaintiff's psychological well-being and this related directly to plaintiff's damages claim. Plaintiff did testify at trial that all of his cultures for possible sexually transmitted diseases were negative; however, there were questions put forth as to whether plaintiff suffered from any sexually transmitted diseases. Although this would appear to be a rather peripheral matter, to the extent that the trial court found that the issue was relevant concerning emotional health and damages, we discern no abuse of discretion.

Accordingly, the trial court did not abuse its discretion in denying plaintiff's attempts to exclude evidence of his prior misdemeanor conviction, his prior drug use, his past relationships with women, and his alleged sexually transmitted diseases. Because the trial court did not rule on these issues before trial, but stated that it would rule on them as they occurred during trial, plaintiff's claim that counsel was forced to address these issues during opening argument and during his case-in-chief lacks merit because plaintiff could have used an entirely different strategy of not mentioning these rather peripheral matters first and then objecting to attempts by defendant to admit this evidence. However, plaintiff's counsel clearly opened the door regarding these evidentiary matters, and, ultimately, considering the length of this trial, we find that the above-challenged evidence did not affect plaintiff's substantial rights. MRE 103(a)(1).

III

Plaintiff next argues that the trial court abused its discretion in excluding the testimony of Tamara Bond, the school librarian, and Delia Johnson, a school lunch hour supervisor, that would have corroborated plaintiff's testimony and explained why he was afraid of Dennis Keller. We review the exclusion of evidence for an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

On direct examination, plaintiff's counsel attempted to elicit testimony from Johnson that Dennis Keller took playground balls, hid them, and slashed them. Following defendant's objection and a bench conference, the trial court sustained the objection on the ground of relevance. On direct examination of Bond, plaintiff's counsel elicited testimony that Dennis Keller had verbalized some threats toward her, but the trial court sustained defendant's objection that the evidence was irrelevant and prejudicial.

We agree with the trial court that the evidence was not relevant to this case. Relevant evidence is defined 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 be without the evidence." MRE 401. All relevant evidence is admissible, except as otherwise provided, and irrelevant evidence is not admissible. MRE 402. Here, the proffered evidence did not relate to plaintiff's claims, especially because the proffered evidence had nothing to do with any behavior of Keller's directed toward plaintiff and there was no offer of proof that plaintiff had any knowledge of Keller's behavior at school directed at other school employees.

Accordingly, the trial court did not abuse its discretion in excluding this testimony on the basis that it was not relevant.

IV

Next, plaintiff argues that the trial court erred by not allowing plaintiff's counsel to object to defense counsel's "highly improper" closing argument.

We find no error requiring reversal in the trial court's handling of the closing arguments. During defense counsel's closing argument, plaintiff's counsel initially objected to a statement that plaintiff had

been convicted of assault and battery and charged with larceny from a person, but had put on his employment application that he had not been convicted of any crime. Plaintiff's counsel objected, stating that plaintiff was not convicted of larceny from a person. A review of the transcript indicates that plaintiff's counsel must have misheard defense counsel, because he did not state that plaintiff was convicted of larceny from a person. The trial court told plaintiff's counsel not to interrupt defense counsel's argument. Plaintiff's counsel later lodged a second objection to a statement made by defense counsel and the trial court simply overruled the objection. After a third objection, the trial court told plaintiff's counsel that defense counsel "didn't interrupt your argument. Don't interrupt his."

The trial court did not preclude plaintiff's counsel from objecting to defense counsel's closing argument, and, in fact, objections were made. Moreover, upon reading defense counsel's closing argument in its entirety, we find that the remarks, taken in their proper context, were not improper, inflammatory, or unduly prejudicial and aimed at preventing plaintiff from receiving a fair and impartial trial. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996).

Further, the trial court instructed the jury on three separate occasions that the statements and arguments of the lawyers were not evidence, that evidence was only the sworn testimony of the witnesses or documents introduced, and that the jury was to determine the facts of the case only from the evidence. Thus, these instructions would have dispelled any prejudicial effect of the lawyer's arguments. *Rogers v Detroit*, 457 Mich 125, 149; 579 NW2d 840 (1998); *People v Bahoda*, 448 Mich 261, 271-272; 531 NW2d 659 (1995).

V

Next, plaintiff argues that he is entitled to a new trial because defendant's "wordly man" defense is not a valid defense to a sexual harassment claim.

While we would agree with plaintiff that there is no recognized "worldly man" defense to a sexual harassment claim, defendant did not proffer a "worldly man" defense in this case. Rather, a review of the transcripts reveals that defendant's references to plaintiff being a "worldly man" were really attacks on his credibility, but not presented as a defense. In fact, defendant's contention at trial was that this case was about credibility and that plaintiff was not a credible witness. Defendant also maintained that even if plaintiff established that he was the victim of racial and sexual harassment, defendant promptly and properly addressed any harassment and, thus, there was no liability.

Further, the trial court properly instructed the jury regarding the parties' theories of the case. The trial court instructed the jury that it was defendant's theory that it was not liable because (1) plaintiff was neither racially nor sexually harassed because plaintiff's version was not credible, and (2) even if plaintiff was subjected to racial and sexual harassment, defendant promptly and properly addressed the harassment.

Accordingly, there was no improper "worldly man" defense proffered by defendant to rebut the claims of racial and sexual harassment.

VI

Plaintiff next argues that he is entitled to a new trial because defendant appealed to racial bias during closing argument. More specifically, the following occurred at closing argument:

> [DEFENDANT'S COUNSEL]: Mr. James is a take-charge, confident type guy. Have you ever seen him walk when you're not looking? Have you ever seen that?
>
> [PLAINTIFF'S COUNSEL]: Your Honor, I object to this –
>
> THE COURT: Well, ma'am, he didn't interrupt your argument. Don't interrupt his.
>
> [DEFENDANT'S COUNSEL]: Very confident black man walk. I don't have it.[2] I grew up in Maybee, Michigan, on a farm. I have a – my sister says I have a horrible walk. But he has that confident black man walk, if you see him when you're not looking.

Our Supreme Court in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), stated:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interest of the prejudiced party by timely action. [Accord, *Rogers, supra*, p 147.]

Further, an attorney's comments usually will not be cause for reversal unless the comments indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Hunt, supra*, p 95. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice the jury or deflect the jury's attention from the issues involved. *Id.*

Here, while we agree that defense counsel's "confident black man walk" comment is improper and irrelevant, it was the only comment made in this regard and does not rise to the level of error requiring reversal. The record does not reveal a pattern of prejudicial statements reflecting a studied purpose to prejudice the jury or deflect the jury's attention from the issues involved, nor was there a deliberate course of conduct aimed at preventing plaintiff from having a fair and impartial trial. *Bahoda, supra*, pp 271-272; *Hunt, supra*, p 95. Further, the trial court instructed the jury on more than one

occasion that the arguments, statements, and remarks of the attorneys were evidence, thereby dispelling any prejudice. *Bahoda, supra,* p 281.

VII

Plaintiff next argues that the trial court erred in denying his motion for JNOV or a new trial.

The standard of review for a motion for JNOV requires a review of the evidence and all legitimate inferences in a light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law should a motion for JNOV be granted. *Forge v Smith,* 458 Mich 198, 204; 580 NW2d 876 (1998). If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *Pontiac School Dist v Miller, Canfield, Paddock & Stone,* 221 Mich App 601, 612; 563 NW2d 693 (1997). With respect to a motion for new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. This Court's function is to determine whether the trial court abused its discretion in making such a finding. *Arrington v Detroit Osteopathic Hosp (On Remand),* 196 Mich App 544, 564; 493 NW2d 492 (1992). A trial court's determination that a verdict is not against the great weight of the evidence is to be given substantial deference. *Id.,* p 560. However, it is incumbent upon the reviewing court to engage in an in-depth analysis of the record on appeal. *Id.*

First, we find that the trial court did not err in denying plaintiff's motion for JNOV. The jury found specifically that plaintiff was not subjected to racial or sexual harassment. There was a great deal of conflicting evidence presented, and if the jury believed the Kellers, then there was no racial or sexual harassment or plaintiff welcomed the conduct, and plaintiff's credibility was strongly attacked by defendant. It was for the jury to find the facts, determine the credibility of the witnesses, and the weight to be given each witness' testimony. *People v Lemmon,* 456 Mich 625, 637; 576 NW2d 129 (1998). Reasonable jurors could have found for the defendants, thus, neither the trial court nor this Court may substitute its judgment for that of the jury. *McLemore v Detroit Receiving Hosp & Univ Medical Center,* 196 Mich App 391, 395; 493 NW2d 441 (1992).

Second, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the basis that the verdict was against the great weight of the evidence. The overwhelming weight of the evidence did not favor plaintiff because this case turned largely on the credibility of the witnesses. Thus, it cannot be concluded that the overwhelming weight of the evidence favored either side and we will not substitute our judgment for that of the jury. *Ellsworth, supra,* p 194.

Accordingly, the trial court did not err in denying plaintiff's motion for JNOV or new trial.

VIII

Lastly, plaintiff argues that he was denied procedural due process because of certain "logistical irregularities" in the conduct of the trial. Plaintiff specifically notes that the trial was held in three different courtrooms in two different cities over a six-week period where only seventeen days were actually spent in trial. Apparently, one of the courtrooms was also cold. Although these problems may have

been inconvenient, these irregularities were borne by all the parties involved, not just plaintiff. Further, plaintiff never objected below on this basis. Therefore, plaintiff was not denied due process in this regard. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998) (due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisonmaker).

Plaintiff's further argument that the jury did not receive a written copy of the court's instructions does not compel reversal because MCR 2.516(B)(5)(a) states that the court *may* provide the jury with a full set of written instructions either on request of the jury or on the court's own motion. There is no indication in the record that the jury requested a set of the instructions. Further, the fact that the jury did not review the trial exhibits is not error because the court informed the jury that if it requested the exhibits, they would be provided and the jury did not request any exhibits.

Affirmed.

/s/ Kathleen Jansen
/s/ Harold Hood
/s/ Kurtis T. Wilder

[1] After trial, defendant Dennis Keller entered into a settlement agreement with plaintiff, thus Keller is not a party to this appeal. The use of "defendant" in this opinion will refer exclusively to Ann Arbor Public Schools.

[2] Apparently, this comparison was made because defendant's counsel is also African-American, according to defendant's appellate brief.