STATE OF MINNESOTA
IN COURT OF APPEALS
A10-683

Ronald George Schroepfer,
Appellant,

vs.

Fun Time Entertainment, Inc.
d/b/a Finish Line Cafe,
Respondent.

Filed March 8, 2011
Affirmed
Shumaker, Judge

Sherburne County District Court
File No. 71-CV-08-1877

Joseph J. Walsh, Richard W. Curott, Curott & Associates, LLC, Milaca, Minnesota (for appellant)

Steven E. Tomsche, Matthew R. Smith, Tomsche, Sonnesyn & Tomsche, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant contends that the district court erred in its evidentiary and procedural rulings and in its denial of his motion for a new trial. We affirm.

FACTS

Appellant Ronald Schroepfer sued respondent Fun Time Entertainment, Inc. d/b/a Finish Line Café, a bar, for damages, alleging that respondent had negligently failed to protect him from an assault at the bar by another customer. Although a jury found both the bar and Schroepfer negligent, it found that Schroepfer's conduct, rather than the bar's omission, was the direct cause of Schroepfer's injury. On appeal, Schroepfer contends that the district court's evidentiary and procedural errors led to the verdict and that a new trial is warranted.

There is no dispute that Schroepfer was assaulted while on the bar's premises. Viewed in a light most favorable to the jury verdict, the facts surrounding the assault show that, as soon as Schroepfer arrived at the bar, another customer came up to him and told him that "somebody [had] kicked her in the back." She then pointed to the man who had kicked her, the same man who would later assault Schroepfer. As he watched this man, Schroepfer noticed that "[h]e was pushing people around" and "was definitely trying to start fights." At one point, Schroepfer went to the bathroom and, when he came back into the bar, the man yelled profanities at him. The man was 20 feet away at that time, and Schroepfer agreed on cross-examination that he "walked right up to [the man] and confronted him face-to-face." Schroepfer asked the man, "What's going on?" He then told the man that "[e]verybody's having a good time; let's just keep it mellow." As Schroepfer turned to walk away, the man spit on him. When he turned back, the man punched him once in the face, breaking his jaw. The man was then either thrown out of the bar or he left voluntarily.

Additional facts pertaining to Schroepfer's evidentiary and procedural challenges are discussed below.

D E C I S I O N

Scope of the Evidence

Schroepfer challenges the district court's evidentiary rulings, contending that the court impermissibly limited the scope of the evidence he sought to present. As Schroepfer acknowledges, rulings on the admissibility of evidence are within the district court's discretion. *Pederson v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986). Evidentiary rulings will not be reversed on appeal absent a showing of a clear abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). Furthermore, "[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990).

Schroepfer specifically asserts that the district court abused its discretion in limiting the evidence to the events of the evening of the assault, rather than allowing evidence of an alleged history of fights at the bar; in excluding expert testimony regarding what constitutes adequate security at a bar; and in precluding evidence of the bar's value and gross receipts, ostensibly offered to prove the bar's financial ability to provide adequate security.

We need not analyze each of these rulings because, even if they all amounted to an abuse of the district court's discretion—and we do not so hold—Schroepfer has failed to demonstrate that the rulings resulted in prejudicial error. All of the offered evidence

pertained to the issue of the bar's negligence. The bar's allegedly raucous history would arguably show the bar's need for security and, inferentially, the bar's negligence in failing to provide security. The expert's opinion arguably would show the reasons for, and the particulars of, adequate security, and, inferentially, the bar's negligence in failing to meet the standards of adequate security. Evidence of the bar's value and gross receipts arguably would show the bar's financial ability to hire security personnel, and, inferentially, its negligence in failing to do so. Even without this evidence, the jury found the bar negligent. But the dispositive issue was that of causation. The excluded evidence could not have addressed causation because that issue depended on the narrow particulars of the conduct of the bar, Schroepfer, and the assailant at the time of the assault. The resolution of the issue of causation in turn depended on what the jury believed. "It is the jury's function to determine credibility." *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). A plausible possibility, consistent with the jury's finding, is that Schroepfer's own conduct was a substantial contributing factor to his harm. Before the assault, Schroepfer knew that the assailant had kicked a woman in the back and had been acting belligerently toward other customers, pushing them and apparently trying to start fights. When the assailant used profanity toward Schroepfer, the two men were 20 feet apart. Nevertheless, Schroepfer chose to close the distance and to confront the assailant face-to-face. Thus, despite the bar's negligence in allowing arguably dangerous circumstances to exist on the premises, there was no threat of harm to Schroepfer in particular until he placed himself in those circumstances. The jury could reasonably attribute the cause of

the injury to Schroepfer, and certainly to the assailant as well, but the assailant was not listed on the verdict form.

Exclusion of Depositions

During the trial, Schroepfer's attorney notified the court and the bar's lawyer that he intended to offer portions of the transcripts of the depositions of certain employees of the bar. The bar's attorney objected on the ground that there was "no reason or basis or authority to read back people who you could have listed and called as witnesses in this case." The district court sustained the objection because the deponents had not been listed on the witness list.

Because the testimony of the deponents related only to the issue of negligence and not to specific causation, the exclusion of this evidence was, like the other excluded evidence, not prejudicial, even if we assume, as Schroepfer argues, that exclusion as a sanction was an abuse of discretion.

Furthermore, Schroepfer made no offer of proof that any testimony of any of the deponents would relate to the issue of causation. *See* Minn. R. Evid. 103(a)(2) (error in excluding evidence is not preserved for review without an offer of proof).

Admission of Character Evidence

During cross-examination of Schroepfer, the court allowed counsel for the bar to elicit, over objection, evidence that Schroepfer lost his driver's license in 1998, had three previous DWIs, and suffered a concussion in 2008 when he collided with a utility pole while riding a bicycle. Schroepfer argues that this evidence was brought out to portray Schroepfer as a drunk and was inadmissible character evidence.

Minn. R. Evid. 404(a) provides that, subject to listed exceptions, evidence of a person's character or trait of character is inadmissible to show that the person acted in conformity therewith on a particular occasion. The district court abuses its discretion by allowing clearly inadmissible evidence. *See Kroning*, 567 N.W.2d at 45-46.

The evidence of Schroepfer's bicycle accident, which caused a concussion, related generally to damages and impeached his testimony on direct examination that he had never had headaches from any previous injury. The bicycle accident happened in the summer of 2008, after the assault in March 2008. Schroepfer testified that he suffered headaches after the assault. Furthermore, counsel's questions about the bicycle accident did not contain references to Schroepfer's sobriety or lack thereof at the time.

But evidence of Schroepfer's three DWIs and the apparently related loss of his driver's license suggests the character trait of intemperance. This evidence was clearly inadmissible under rule 404(a). Nevertheless, Schroepfer has failed to show how the evidence was sufficiently prejudicial to warrant a new trial. There was neither direct nor circumstantial evidence that, at the time of the assault, Schroepfer was intoxicated. His own unrebutted testimony showed that he had consumed relatively little alcohol over the span of several hours. We are not persuaded that this inadmissible evidence influenced the verdict.

Admission of Hearsay

Schroepfer contends that the district court allowed inadmissible hearsay evidence when, on cross-examination, the bar's attorney asked Schroepfer what the assailant said to him. Over objection, the court permitted Schroepfer to agree that his assailant said that

this was his first time at the Finish Line. Schroepfer asserts that this answer permitted the bar's attorney to argue that the assailant was not the same person who Schroepfer alleged had been served liquor illegally, thus weakening both Schroepfer's dram shop and negligence claims.

Although the assailant's statement that this was his first time at the bar was likely inadmissible hearsay, Schroepfer's argument is without merit. As to the dram shop claim, the question is whether the bar sold alcohol to the assailant while he was obviously intoxicated. *See* Minn. Stat. § 340A.502 (2010); 4 *Minnesota Practice*, CIVJIG 45.15 (2010). That question must be answered with reference to the occasion of the assault. Whether this was the assailant's first time at the bar had no bearing on that issue. Respecting the negligence claim, prior unruly conduct of the assailant could have put the bar on notice of the assailant's dangerous propensity. *See* 4A *Minnesota Practice*, CIVJIG 85.70 (2010). If this was the assailant's first time at the bar, there could be no prior notice of his dangerous propensity. Nevertheless, the bar could acquire notice through the assailant's conduct on the evening of the assault. Whether the bar had prior notice or immediate notice, the issue relates only to negligence and not to causation. *See id.*

Schroepfer has failed to demonstrate prejudicial error from the admission of this hearsay evidence.

Spoliation

After the assault, the bar's proprietor told Schroepfer that the incident had been captured on videotape. Although the testimony is equivocal, it is a reasonable inference

that Schroepfer stated that he would like to see the tape. But he made no effort to do so for several months, and the tape was automatically erased seven days after the date of the assault. Schroepfer requested that the district court instruct the jury that it could draw an adverse inference from the destruction of the videotape; the court denied the request.

Schroepfer argues that "[t]he security videos would have provided evidence of any number of important facts, including the number of people in the bar, the identity of eye-witnesses, the identity of the puncher, other aggressive actions of the puncher and what happened to the puncher." None of these alleged facts would have assisted the jury in deciding the issue of causation, for they all relate to the question of the bar's negligence. Moreover, the causation facts—that is, what occurred from the time of the profanity the assailant directed at Schroepfer until the punch—were undisputed. Thus, the court's refusal to give the requested instruction was not prejudicial error.

Additional Issues

Schroepfer also argues that the district court erred in denying his motions to join in the action the owners and lessor of the bar and to amend his complaint to add a claim for punitive damages. Because the causation issue is controlling and dispositive, these rulings, even if erroneous, could not have been prejudicial.

Affirmed.