IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-614

Filed: 20 December 2016

Madison County, No. 13 SP 52

ARVEL LEE GENTRY, a/k/a Arvel Lee Gentry, Orville Gentry, Petitioner

v.

GARY BROOKS, STEPHEN FRANKLIN, SANDY McDEVITT, VAN FRANKLIN (life tenant), and J.C. GENTRY, Respondents

Appeal by respondents from judgment entered 4 December 2015 by Judge Gary M. Gavenus in Madison County Superior Court. Heard in the Court of Appeals 15 November 2016.

Marshall Roth & Gregory, P.C., by Clifford C. Marshall, Jr., for petitioner-appellee and respondent-appellee J.C. Gentry.

Long, Parker, Warren, Anderson & Payne, P.A., by Robert B. Long, Jr., for respondent-appellants Gary Brooks, Stephen Franklin, Sandy McDevitt and Van Franklin.

CALABRIA, Judge.

Where no objection was raised to the testimony of an expert witness, and he relied on a plat normally relied upon in his field, respondents failed to show that the trial court committed prejudicial error in admitting the expert's testimony with respect to the plat. Respondents further failed to show that the trial court committed prejudicial error in declining to give special jury instructions. We affirm.

I. Factual and Procedural Background

On 13 June 2013, Arvel Lee Gentry ("petitioner") filed a Boundary Processioning petition before the Madison County Clerk of Superior Court regarding a boundary line dispute. The respondent in that matter was Gary Brooks ("Brooks"). Petitioner's petition alleged that petitioner owned a certain tract of real property, that a specific boundary line existed, and that Brooks owned an adjoining property which might be impacted by the boundary line at issue. The petition further alleged that the description and location of the boundary line had been resolved in 1944 in a Boundary Line Agreement ("the agreement") recorded in the Madison County Registry, and that petitioner had contracted with a surveyor, Kenneth T. Mills ("Mills"), who submitted a survey plat ("the plat") of the boundary line. Petitioner thus requested that the court fix the boundary line as expressed in the agreement and illustrated on the plat.

Brooks subsequently filed an answer, counterclaim, and a motion to dismiss. The motion alleged that petitioner's petition was not filed under oath, as required by N.C. Gen. Stat. § 38-3, and thus that the petition should be dismissed. Brooks' answer then raised the counterclaim of title by deed, or, in the alternative, adverse possession under color of title, or, in the alternative, adverse possession over a period of twenty years. Brooks therefore requested that the trial court deny petitioner's petition and find that Brooks was the owner of the disputed land.

On 6 November 2013, the Clerk of Court entered a consent order permitting petitioner to amend his petition to include adjoining landowners in the dispute. That same day, petitioner filed an amended petition, naming as respondents Brooks, Steven Franklin, Sandy McDevitt, Van Franklin (life tenant), (collectively, "respondents"), J.C. Gentry and Pearl Gentry (life tenant), and William O'Connor and Herbert L. Newton. The amended petition was, in all other respects, substantially similar to the original petition.

Respondents collectively filed an amended answer to the amended petition. Brooks once more asserted alternative counterclaims of title by deed, adverse possession by color of title, and adverse possession over a period of twenty years. Additionally, Brooks asserted a crossclaim against J.C. Gentry and Pearl Gentry, challenging their purported ownership of a portion of the land. Steven Franklin, Sandy McDevitt, and Van Franklin (collectively, "the Franklins") likewise asserted crossclaims against J.C. Gentry and Pearl Gentry, alleging adverse possession by color of title or, in the alternative, adverse possession over a period of twenty years.

William O'Connor and Herbert L. Newton likewise filed a motion and answer, moving to dismiss the petition under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and asserting adverse possession by color of title and adverse possession over a period of twenty years.

J.C. Gentry and Pearl Gentry also filed an answer to the petition and crossclaims, bringing a claim to quiet title against Brooks, and claims for boundary processioning, quiet title, and trespass against the Franklins. Petitioner, J.C. Gentry and Pearl Gentry (collectively, "the Gentrys"), then filed an answer and response to crossclaims and counterclaims. Respondents then filed their answer to the crossclaims of J.C. Gentry and Pearl Gentry.

On 3 March 2014, the Clerk of Court entered a consent order, recognizing that the matter was no longer a boundary processioning proceeding, but a quiet title action. As such, the matter was transferred to Madison County Superior Court. On 19 May 2014, the parties collectively voluntarily dismissed all claims pending against William O'Connor and Herbert L. Newton.

At a hearing on 3 November 2015, petitioner tendered Mills as an expert witness "in surveying and boundary line surveys." Respondents did not object. However, when petitioner sought to admit the plat produced by Mills, respondents objected, contending that:

> [Mills] has not located a correct beginning for that one boundary, he has not located a correct beginning point for it, he has something that he says is an approximate terminus point of it down at the creek, he doesn't follow the old line, it's got an adjusted call in there that he says has been there erroneous for years, and it doesn't locate to a single monument called for in the boundary line agreement or in the deeds that were executed. And if you don't have a good beginning point and you don't have a monument and the only monument that I know of that they could find was

> this gate, gap gate in the fence where -- I think it's pure conjecture and that's why I'm objecting to its admissibility. And based on this report that we've all reviewed.

The trial court heard and overruled respondents' objections and permitted the plat to be admitted into evidence. Mills then offered testimony concerning the plat. Although respondents objected to the introduction of the plat into evidence, they did not object to Mills' subsequent testimony.

On 9 November 2015, respondents requested two special jury instructions in writing. First, Brooks requested that the jury be instructed that, if Brooks exercised adverse possession by mistake, he might nonetheless be entitled to the contested property. Second, the Franklins requested that the jury be instructed that, where Van Franklin, having title to a portion of the land, entered upon the land and laid claim to all of it based on color of title, he might be entitled to the entirety of the contested property.

The jury charge conference proceeded at length, with various instructions extensively discussed and agreed upon by the parties. Respondents then raised the matter of their written request for instructions. With respect to the mistake instruction, petitioner argued that, "[t]here is no evidence that [Brooks] was acting under a mistake. It's been presented." The trial court agreed, noting that, "I don't recall any evidence that he was mistaken." The trial court denied Brooks' request for a special instruction on mistake, instead opting to instruct the jury as per the pattern

instructions. Likewise, with respect to the Franklins' request concerning possession of a portion of the land, the trial court denied the request, noting that, "I think it says pretty clearly there that if the evidence shows [Van Franklin] had possession of some part of the land, then the law presumed that he had possession of all of it." The trial court found it sufficient to instruct the jury as per the pattern instructions.

The jury returned a verdict finding that the boundary was as depicted in the plat and that respondents held no title in the Gentrys' land. On 4 December 2015, the trial court entered judgment upon this verdict, granting judgment in favor of the Gentrys against respondents, declaring the boundary line and quieting title accordingly.

Respondents filed notice of appeal on 2 February 2016. In their notice of appeal, respondents contend that the trial court's judgment was not served upon them until 5 January 2016. However, there is no certificate of receipt in the record to support this contention, and thus no evidence that respondents' appeal is timely. Nonetheless, this Court may, pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, treat an untimely appeal as a petition for certiorari and, in our discretion, grant it. *See Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002) (where plaintiff's notice of appeal was filed 127 days after entry of judgment, and was thus untimely, this Court nonetheless could treat the appeal as a

petition for certiorari). As such, we treat respondents' appeal as a petition for writ of certiorari, and grant it, in our discretion.

II. Admission of Evidence

In their first argument, respondents contend that the trial court erred in admitting the plat, and testimony concerning it, into evidence. We disagree.

A. Standard of Review

"Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

"[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard,* 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005).

B. Analysis

Respondents contend, specifically, that "[t]he trial court erred in admitting the plat . . . and testimony concerning it." However, respondents concede that "it was undisputed that Mills was an expert in the area of land surveying," and we note as a preliminary matter that no objection was raised to his testimony. Even assuming

arguendo that respondents properly preserved their objection to the introduction of the plat, they made no such objection to Mills' own testimony. For an issue to be raised on appeal, it must have been properly preserved by timely objection at trial, and a ruling on that objection must be obtained. N.C.R. App. P. 10(a)(1). Since respondents failed to preserve an objection to Mills' testimony, we decline to entertain their arguments with respect to his testimony for the first time on appeal, and dismiss such arguments.

Further, even assuming *arguendo* that the trial court erred in admitting the plat into evidence, respondents have the burden on appeal of proving that "absent the error a different result would have been reached at trial." *Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893. We are not convinced that respondents have done so.

Mills testified as to his own expert opinion, based in part on the plat. Our Supreme Court has held that "admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *State v. Brent*, 367 N.C. 73, 77, 743 S.E.2d 152, 155 (2013) (quoting *State v. Ortiz–Zape,* 367 N.C. 1, 9, 743 S.E.2d 156, 161 (2013)). Moreover, "[i]f an expert's opinion is admissible, the expert may testify to the information he relied on in forming it for the purpose of showing the basis of his opinion, even when that information would otherwise be inadmissible, so long as

the information is of a type reasonably relied upon by experts in his field." *State v. Purdie*, 93 N.C. App. 269, 277, 377 S.E.2d 789, 793 (1989).

Respondents do not contend that plats are not the sort of information reasonably relied upon in the field of land surveying. Rather, respondents assert that the plat and Mills' testimony "were not based upon sufficient facts and data, were not the product of reliable principles and methods, and Mills did not apply the principles and methods reliably to the facts of this case." These are attacks on Mills' expert testimony, not the plat itself, and as previously noted we will not entertain such arguments for the first time on appeal.

There is no dispute that a survey plat is information of a type reasonably relied upon in the field of land surveying. Pursuant to *State v. Brent*, it was not error for the trial court to permit Mills, indisputably an expert in the field of land surveying, to rely upon the plat, even assuming that it was otherwise inadmissible. Pursuant to *Purdie*, it was not error for the trial court to permit Mills to testify with respect to the plat to establish the basis for his opinion. Mills was allowed to testify regarding the plat, admissible or not. Even assuming *arguendo* that the trial court erred in admitting the plat, we hold that respondents have failed to show that the trial court committed prejudicial error in admitting the plat and testimony regarding it into evidence.

III. Jury Instructions

In their second and third arguments, respondents contend that the trial court erred in declining to give the jury special instructions. We disagree.

A. Standard of Review

"[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are 'sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.' " *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (quoting *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E.2d 505, 507 (1967)).

"A specific jury instruction should be given when '(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.' " *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002)).

"Erroneous or incomplete instructions notwithstanding, the 'party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result.' " *Barnard v. Rowland*, 132 N.C.

App. 416, 427, 512 S.E.2d 458, 466 (1999) (quoting *Lawing v. Lawing,* 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986)).

B. Analysis

The first requested instruction at issue was an instruction on the doctrine of adverse possession based on mistake. The second requested instruction at issue was an instruction on the doctrine of assertion of ownership by color of title.

At trial, the trial court instructed the jury that respondents "contend that they have superior title by adverse possession to a portion of the property of Arvel Gentry and J.C. Gentry[.]" The trial court then directed the jury to consider four issues. First, the jury was to determine "the location of the true boundary between the petitioner Arvel Gentry's land and the respondent Gary Brooks'[.]" Second, the jury was to determine "the location of the true boundary between the petitioner Arvel Gentry and respondent J.C. Gentry's lands, and the respondents Gary Brooks, Steven Franklin, Sandy McDevitt, and Van Franklin's[.]" Third, the jury was asked whether "Gary Brooks hold[s] title to lands claimed as owned by petitioner Arvel Gentry and respondent J.C. Gentry that lie north of what respondent Gary Brooks contends is the boundary line[.]" Lastly, the jury was instructed to determine whether "the respondents Steven Franklin, Sandy McDevitt, and Van Franklin hold title by adverse possession under color of title to that portion of the tract . . . lying south of the boundary line[.]"

The first two issues submitted to the jury were completely independent of the doctrines of adverse possession or color of title. The location of boundary lines is a question of pure, objective fact, independent of the parties' assertions as to how they might claim ownership.

With respect to the third issue, the question was whether Brooks held title to lands north of the boundary line. The trial court instructed the jury on Brooks' alleged adverse possession, but did not instruct on adverse possession by mistake. Admittedly, our Supreme Court has held that,

> when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake.

Walls v. Grohman, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985).

Importantly, however, mistake does not preclude any other element of adverse possession. Even under the doctrine of adverse possession by mistake, the party asserting possession must still meet the elements of adverse possession generally. Even assuming that the trial court erred in declining to give the additional instruction on mistake, the burden is on respondents to demonstrate that they were prejudiced by that error. *Barnard*, 132 N.C. App. at 427, 512 S.E.2d at 466. Given that the jury found no adverse possession, it seems clear that the additional element

of mistake would have made no difference to their determination. We hold, therefore, that respondents have failed to show that the trial court committed prejudicial error in declining to instruct the jury on adverse possession by mistake.

With respect to the fourth issue, the jury was instructed generally on the doctrine of possession by color of title. The requested instruction, however, would have expanded that possession to include not only a portion of the property, but the whole property. The instruction the trial court gave to the jury included an explanation of the doctrine of color of title, and reference to the deeds granting purported title to Van Franklin, and from Van Franklin to Steven Franklin and Sandy McDevitt.

As with its instructions on adverse possession, its instructions on color of title were generally applicable and correct. The only modification the requested instructions added was that, if color of title were to be found by the jury, it could increase the amount of land to which the Franklins could claim ownership.

The jury found that the Franklins did not possess color of title. Respondents have not shown on appeal that they could have obtained a different verdict had the jury been instructed on a subspecies of color of title, where respondents did not in fact receive a verdict in their favor on color of title *at all*. As above, therefore, we hold that respondents have failed to demonstrate that the trial court committed prejudicial error.

IV. Conclusion

Respondents have failed to demonstrate that the trial court's error, if any, in admitting the plat into evidence, in admitting testimony regarding the plat into evidence, or in declining to give special jury instructions, was prejudicial. As such, we affirm.

AFFIRMED.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).