Affirmed and Memorandum Opinion filed January 6, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00894-CV

BOMA A. OPUIYO, Appellant

V.

HOUSTON AUTO M. IMPORTS, LTD. D/B/A MERCEDES-BENZ OF HOUSTON GREENWAY AND MERCEDES-BENZ USA, LLC, Appellees

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2005-74327

MEMORANDUM OPINION

We affirm the trial court's judgment arising from Boma Opuiyo's suit under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), which she filed in connection with a vehicle she purchased from Houston Auto M. Imports, Ltd. d/b/a Mercedes-Benz of Houston Greenway and Mercedes-Benz USA, LLC (collectively "Mercedes-Benz"). *See* Tex. Bus. & Com. Code Ann. §§ 17.41–17.63 (Vernon 2002).

BACKGROUND

Opuiyo sued under the DTPA after buying a ML350 vehicle from Mercedes-Benz in 2003. Opuiyo claimed that Mercedes-Benz engaged in false, misleading, and deceptive acts when it sold the vehicle to her. *See id.*

Opuiyo alleged that Mercedes-Benz violated the DTPA by (1) falsely representing that the vehicle was new, even though 47 miles showed on the odometer and the floor mats appeared worn; (2) failing to deliver a Texas navigation system CD for use with the built-in navigation system; (3) misrepresenting that the vehicle had a "powerful V6 engine;" and (4) misrepresenting that the vinyl interior was leather. Opuiyo claimed that she sustained a "high degree of pain and distress" in connection with this conduct and sought $250,000 for mental anguish damages. Opuiyo also claimed that Mercedes-Benz engaged in common-law fraud, breached a contract with Opuiyo, made negligent misrepresentations, and negligently hired, supervised, and managed its employees. Mercedes-Benz raised a counter-claim asserting that Opuiyo filed a groundless, bad faith, or harassing DTPA claim. *See id*. § 17.50(c).

Mercedes-Benz filed a no-evidence motion for summary judgment on Opuiyo's claims, as well as a motion to strike evidence Opuiyo proffered in response to Mercedes-Benz's motion. The trial court granted both motions, thereby disposing of all affirmative claims Opuiyo asserted against Mercedes-Benz. Mercedes-Benz also filed a motion for summary judgment on its counter-claim, which the trial court granted. The ruling entitles Mercedes-Benz to obtain "reasonable and necessary attorney's fees and court costs" under the DTPA. *See id*.

The parties tried the issue of Mercedes-Benz's fees and costs to a jury. The jury awarded Mercedes-Benz $77,586.50 in attorney's fees for preparation and trial, $12,500 for an appeal to the court of appeals, and $10,000 for an appeal to the Texas Supreme Court. Opuiyo appeals.

ANALYSIS

I. Rulings in Connection with Mercedes-Benz's No-Evidence Motion for Summary Judgment

Opuiyo argues in Issue 1 that the trial court erred by (1) striking the affidavits she proffered in response to Mercedes-Benz's no-evidence motion for summary judgment without granting her time to amend them; (2) striking her other summary judgment evidence; and (3) granting Mercedes-Benz's no-evidence motion for summary judgment on all of her affirmative claims against Mercedes-Benz.

The record does not indicate that Opuiyo requested additional time to address the issues raised in Mercedes-Benz's motion to strike or to amend her affidavits. Accordingly, Opuiyo was not entitled to additional time to amend affidavits. *See Webster v. Allstate Ins. Co.*, 833 S.W.2d 747, 750 (Tex. App.—Houston [1st Dist.] 1992, no writ).

Further, the record does not contain any summary judgment evidence filed by Opuiyo in response to Mercedes-Benz's motion. We presume that the trial court properly struck Opuiyo's evidence and granted Mercedes-Benz's no-evidence motion for summary judgment. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 689 (Tex. 1990) (party appealing grant of summary judgment bears burden to bring forward sufficient record). We overrule Opuiyo's issue regarding the trial court's rulings in connection with Mercedes-Benz's no-evidence motion for summary judgment.

II. Opuiyo's Request for "Judgment as a Matter of Law"

Opuiyo claims in Issues 2 and 3 that the she was entitled to "judgment as a matter of law" on her affirmative claims against Mercedes-Benz. However, the record does not reveal that Opuiyo filed a motion for summary judgment or used any other procedural mechanism to request judgment in her favor on her affirmative claims against Mercedes-

Benz.[1] Accordingly, Opuiyo has not preserved this issue for our review. *See* Tex. R. App. P. 33.1(a) ("As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion . . . ."). We overrule Opuiyo's issues regarding "judgment as a matter of law" on Opuiyo's affirmative claims against Mercedes-Benz.

III. Denial of Motion for Mistrial

Opuiyo argues in Issue 4 that Mercedes-Benz violated the trial court's order granting portions of Opuiyo's motion in limine, and that these violations entitle her to a new trial. Opuiyo's request on appeal for a new trial rests solely on asserted violations of this order; she does not challenge the admissibility of the evidence at issue.

The order granting portions of Opuiyo's motion in limine addresses (1) "opposing counsel's 'personal opinions' regarding the case;" (2) the financial condition, wealth or net worth, or status of any party; and (3) the fact that any damages awarded by the jury in the case could be increased by operation of law.

During trial, Opuiyo filed a motion for mistrial based on purported violations of these provisions of the trial court's order on her motion in limine. Opuiyo's motion for mistrial focused on the testimony of Mercedes-Benz's attorney's fee expert, John Zavitsanos, in which he (1) opined that the case is "extraordinary" because Opuiyo failed to comply with various DTPA requirements; (2) referred to Opuiyo as an attorney; and (3) stated that Opuiyo initially sued for $500,000, and that any damage award could have been tripled under the DTPA. Opuiyo's motion for mistrial asserted that Mercedes-Benz violated the trial court's order by proffering this testimony because it "did not ask[] the Court

[1]On September 29, 2009, Opuiyo filed a motion for judgment notwithstanding the verdict after the jury trial on the amount of Mercedes-Benz's reasonable and necessary attorney's fees and court costs. Opuiyo's September 2009 motion did not address the merits of her affirmative claims against Mercedes-Benz, which were resolved by the trial court's order granting Mercedes-Benz's no-evidence motion for summary judgment signed on September 18, 2008. Opuiyo's brief contains one sentence regarding her motion for judgment notwithstanding the verdict: "Further, the trial court erred in denying Opuiyo's 'Motion for Judgment notwithstanding Verdict.'" This statement does not present anything for our review. *See* Tex. R. App. P. 38.1(i).

for a ruling out of the hearing of the jury before offering the testimony and said misconduct has adversely affected [Opuiyo's] fundamental rights." Opuiyo also requested an instruction for the jury to disregard Zavitsanos's testimony.[2]

Mercedes-Benz argued that the trial court's order on Opuiyo's motion in limine did not apply to the challenged testimony because (1) Zavitsanos testified as an expert giving his opinion on the reasonableness of certain fees necessary to defend against Opuiyo's claims, not as opposing counsel injecting his personal opinion about the case; (2) a reference to Opuiyo's occupation does not comment on her financial status; and (3) Opuiyo's potential entitlement to treble damages if she had prevailed on her underlying claims does not concern the amount of attorney's fees or court costs that could be "awarded by the jury in the case."

The trial court rejected Opuiyo's request for a jury instruction and denied her motion for mistrial. Opuiyo argues on appeal only that the alleged violations entitle her to a new trial.

An order granting a traditional motion in limine does not constitute a ruling on admissibility; rather, such an order prevents a party, counsel, and witnesses from uttering potentially prejudicial statements in front of the jury without first seeking the trial court's permission. *See Weidner v. Sanchez*, 14 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see also Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 91 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (distinguishing between order on motion in limine and pre-trial ruling on admissibility). Opuiyo's issue regarding the asserted violations of the order granting portions of her motion in limine was not raised in conjunction with an admissibility complaint on appeal. Accordingly, we do not address whether the trial court should have excluded the testimony. *See* Tex. R. Evid. 403; *see also Fort Worth Hotel Ltd. P'ship v. Enserch Corp*., 977 S.W.2d 746, 755–57 (Tex. App.—Fort Worth 1998, no pet.)

[2] Opuiyo argued at the hearing on her motion for mistrial that this testimony "prejudiced the jury," and that the reference to Opuiyo's profession was "irrelevant." This admissibility complaint was made separately from Opuiyo's motion for mistrial based on alleged violations of the trial court's order on her motion in limine. The trial court held that the testimony is admissible. Opuiyo does not challenge on appeal the admissibility of this testimony, and we do not address admissibility.

(addressing appellant's complaints regarding admissibility and prejudice from motion in limine violations); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Kwiatkowski*, 915 S.W.2d 662, 664 (Tex. App.—Houston [14th Dist.] 1996, no writ) (addressing appellant's complaints regarding relevancy of evidence and prejudice from motion in limine violations). Because Mercedes Benz's alleged limine violations involve only evidence for which no admissibility challenge has been asserted on appeal, we do not address the necessity of a jury instruction or other measures to ameliorate prejudice from references to inadmissible evidence. *Cf. Weidner*, 14 S.W.3d at 363–65; *Kwiatkowski*, 915 S.W.2d at 664–65; *Weeks Marine, Inc.*, No. 04-08-00681-CV, 2010 WL 307878, at *5–6 (Tex. App.—San Antonio Jan. 27, 2010, pet. denied).

Standing alone, a party's failure to request a ruling outside of the jury's presence in violation of a limine ruling may entitle a party to relief, but any remedies available with regard to such a violation lie within the trial court's discretion. *See Onstad v. Wright*, 54 S.W.3d 799, 806 (Tex. App.—Texarkana 2001, pet. denied). If the trial court's order has been violated, the court may apply the sanctions of contempt or take other appropriate action. *Id*.

By denying Opuiyo's motion for mistrial, the trial court concluded that (1) the testimony did not violate the order on Opuiyo's motion in limine; or (2) the alleged violations did not warrant the severe sanction of a mistrial. In either event, the trial court acted within its discretion. *See id*. at 805. We overrule Opuiyo's issue regarding asserted violations of the order granting portions of her motion in limine.

IV. Mercedes-Benz's Trial Evidence

Opuiyo argues in Issue 5 that the trial court erred by admitting assertedly irrelevant evidence at trial. Specific objections to evidence are required to enable the trial court to understand the precise question of law raised by the objecting party and to make an informed ruling. *See* Tex. R. Evid. 103(a)(1); *Seymour v. Gillespie*, 608 S.W.2d 897, 898 (Tex. 1980). Opuiyo did not object at trial to Mercedes-Benz's first exhibit. Opuiyo

objected to Mercedes-Benz's second exhibit, but the objection was based on hearsay rather than relevance. Opuiyo does not identify on appeal any other specific evidence that should not have been admitted. Opuiyo has not preserved this issue or properly presented it for our review. *See* Tex. R. App. P. 33.1(a), 38(i). We overrule Opuiyo's issue regarding Mercedes-Benz's trial evidence.

V. Opuiyo's Trial Evidence

Opuiyo argues in Issue 6 that the trial court erred by preventing her from presenting evidence at trial. However, Opuiyo does not point to any specific evidence that was excluded by the trial court. Opuiyo does not cite any authority to support her position on appeal or explain her assertion that the trial court erred in excluding "certain" evidence. Opuiyo has waived this issue on appeal. *See* Tex. R. App. P. 38.1(i). We overrule Opuiyo's issue regarding her trial evidence.

VI. *Batson* Challenge

Opuiyo argues in Issue 7 that the trial court erred by overruling her challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), and empanelling a jury that "did not represent a cross section of the community" and "did not include members of [Opuiyo's] race."

Batson declared that the use of racially motivated peremptory challenges to exclude potential jurors in criminal cases violates due process of law. *Id.*; *see also Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 915 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). The *Batson* rule extends to civil trials. *See Brumfield*, 63 S.W.3d at 915 (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618–28 (1991)).

Resolution of a *Batson* challenge is a three-step process: (1) the party challenging the use of a peremptory challenge to strike a potential juror must establish a prima facie case of racial discrimination; (2) the party who exercised the strike must come forward with a race-neutral explanation; and (3) if the striking party does so, the party challenging the strike must prove purposeful racial discrimination. *Id.* (citing *Purkett v. Elem*, 514

U.S. 765, 767 (1995), *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991), and *Goode v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex. 1997)). We review a trial court's *Batson* ruling for abuse of discretion. *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 515 (Tex. 2008).

Mercedes-Benz asked the trial court to strike four venire members for cause. Opuiyo and Mercedes-Benz agreed to strike Venire member 24; the trial court denied Mercedes-Benz's requests to strike Venire members 10 and 27; and Venire member 33 was not empanelled due to the arrangement of the venire. The parties did not exercise any peremptory challenges.

The trial court denied Opuiyo's *Batson* challenge after the following colloquy:

> COUNSEL: [Opuiyo] is hereby making a *Batson* challenge to the jury panel and we believe that the jury does not adequately represent the peers of the defendant and we would request that there be a reshuffle.
>
> COURT: There be a what?
>
> COUNSEL: Reshuffle.
>
> COURT: Your request for a reshuffle is denied. This is not the time for a reshuffle. A *Batson* challenge is not to request a reshuffle. Is there anything else you want to say on the record about a *Batson* challenge?
>
> COUNSEL: We believe that the members of the jurors that were selected does not reflect — adequately reflect the peers of the defendant in this case.
>
> COURT: Is there anything more specific you want to say about that?
>
> COUNSEL: No.
>
> COURT: Okay. In what way do you think that the jury does not represent a jury of peers for [Opuiyo]?
>
> COUNSEL: [Opuiyo], who is African-American. And this panel that was selected only has two African-Americans on this panel, and the range of people of [Opuiyo's] race that were eliminated does not reflect — does not allow adequate numerical combination for this jury.
>
> COURT: I don't know what that means. What's "numerical combination"?

> COUNSEL: What I mean, Your Honor, is that within the range that were available that were stricken after cause and the amount of African-Americans that are on this panel, you know, does not present a fair combination for [Opuiyo].
>
> COURT: Okay. Is there anything else you would like to say on the record about that?
>
> COUNSEL: That's it, Judge.
>
> COURT. Okay. I don't think you've adequately presented a *Batson* challenge. So, I think we can go back into the courtroom.

The trial court properly overruled Opuiyo's *Batson* challenge; no peremptory challenges were made, and no prima facie case of racial discrimination in the use of peremptory challenges was established. *See Brumfield*, 63 S.W.3d at 915. We overrule Opuiyo's issue regarding her *Batson* challenge.

CONCLUSION

Having overruled all of Opuiyo's issues on appeal, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.