Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-245

JANUARY TERM, 2018

Claude Ammons, Jr.* v. MVM, Inc., Martin Novia & Michael Rand	}	APPEALED FROM:
	}	Superior Court, Lamoille Unit, Civil Division
	}	DOCKET NO. 301-12-12 Lecv
		Trial Judge: Thomas Z. Carlson

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from an adverse jury verdict on his complaint against defendants. He argues that the court erred in denying his motion for a mistrial. We affirm.

The record indicates the following. Plaintiff was employed by MVM, Inc., which provides security services for federal government facilities. Plaintiff, who is black, sued defendants, alleging that he was discriminated against to the point where he was forced to resign. He raised a racial discrimination claim under the Vermont Fair Employment Practices Act, a claim for intentional infliction of emotional distress, and a breach of contract claim. At trial, the following exchange occurred between plaintiff and defense counsel during cross-examination. Defense counsel asked plaintiff if he talked to any colleagues about the stress that he was experiencing at work. Plaintiff testified that he had talked to a certain colleague, who empathized with him. Defense counsel then asked plaintiff if this colleague had ever suggested to him that he was "playing the race card here." Plaintiff's counsel objected, noting that the colleague was not present to testify. Defense counsel responded that he was trying to elicit what the colleague told plaintiff. The court overruled the objection. Plaintiff replied that the colleague had never said this to him and that he was unaware that she had made that comment to anyone else. Defense counsel then stated that he was going to have plaintiff examine an email that the colleague wrote to determine if he had seen it before. Counsel referred to an email that was "in his exhibit book." The court informed counsel that regardless of whether it was in his exhibit book, there must be a basis to admit this document, which was absent here. Counsel did not pursue this line of questioning.

Plaintiff later moved for a mistrial. He argued that by referring to an email that was not in evidence, defendants' attorney was improperly attempting to give authority to a problematic statement about "playing the race card." The court denied the motion, finding the exchange referenced above did not create the kind of prejudice that was grounds for a mistrial. The court explained that it would offer a limiting instruction to the jury informing them to disregard any reference to any question about what the colleague might have said to anyone else or to any other

exhibit. The court observed that plaintiff might have reservations about such an instruction and asked plaintiff to consider how he wanted to proceed and/or how best to craft the limiting instruction. Defendants state that the court gave a curative instruction to the jury the following morning; plaintiff did not order a transcript of this portion of the trial. The jury rendered a verdict in defendants' favor. This appeal followed.

Plaintiff asserts that the introduction of racially inflammatory information required the court to declare a mistrial. He cites various out-of-state cases in support of his assertion. He maintains that the court failed to appreciate that "racialized trial misconduct" is different than other kinds of trial misconduct.

First, we reject plaintiff's suggestion that there is or should be a per se rule that a mistrial must be declared whenever race is mentioned at trial. None of the cases cited by plaintiff so hold. See, e.g., LeBlanc v. Am. Honda Motor Co., 688 A.2d 556, 559-60 (N.H. 1997) (stating that "[b]ecause the trial court is in the best position to gauge prejudicial impact, it has broad discretion to determine whether a mistrial or other remedial action is necessary," and rejecting argument that appeals to racial bias are per se incurable (quotation omitted)). Our case law is to the contrary. A movant must establish prejudice to be entitled to a mistrial. Turner v. Roman Catholic Diocese of Burlington, 2009 VT 101, ¶ 10, 186 Vt. 396; see also English v. Myers, 142 Vt. 144, 151 (1982) (recognizing that movant bears burden "to show the existence of circumstances capable of prejudicing the deliberative function of the jury"). The trial court has broad discretion in considering a motion for mistrial, and its decision will stand "unless the court's discretion was either totally withheld or exercised on grounds clearly untenable or unreasonable." Turner, 2009 VT 101, ¶ 10 (quotation omitted).

We cannot review plaintiff's claim of error because he failed to provide this Court with a complete record of the proceedings below. See V.R.A.P. 10(b) (stating that appellant must order transcript "of all parts of the proceedings relevant to the issues raised by the appellant and necessary to demonstrate how the issues were preserved"). "By failing to order a transcript, the appellant waives the right to raise any issue for which a transcript is necessary for informed appellate review." Id. Informed appellate review requires consideration of any curative instruction provided to the jury as well as the ability to review the trial proceedings, which would allow a more thorough examination of the likely effect of the statements at issue. Plaintiff only ordered the transcript for the afternoon session of one day of a week-long trial.

As one of the cases cited by plaintiff explains, "[t]o justify a mistrial, remarks or the conduct must be more than merely inadmissible; they must constitute an irreparable injustice that cannot be cured by jury instructions." LeBlanc, 688 A.2d at 559 (quotation omitted). As indicated above, it is for the trial court to determine if "a mistrial or other remedial action is necessary," and "[r]emedial action includes . . . curative jury instructions, which the jury is presumed to follow." Id. We have reiterated this principle in our caselaw. "We have held, in previous rulings on mistrial motions, that any potential prejudice to [a party] could be reduced in large part by the court's prompt issuance of a curative instruction," and the decision to request and/or provide such an instruction is considered "significant in our determination that the trial court did not abuse its discretion in denying a motion for mistrial." State v. Pettitt, 2014 VT 98, ¶ 6, 197 Vt. 403. While plaintiff states that he did not agree to a curative instruction, defendants represent that the court

did provide such an instruction to the jury. The court indicated that it intended to do so and provided plaintiff the opportunity to weigh in on this decision. Although the transcript reveals that plaintiff's counsel acknowledged the court's offer to consider whether plaintiff wanted a curative instruction, the transcript provided by plaintiff does not reflect any further discussion on this issue nor what the ultimate instruction said. In the absence of a transcript, which would have allowed review of any curative instruction that was given and the record as a whole, we are unable to assess the prejudicial impact of the statements at issue. Thus, we cannot conclude that there was an abuse of discretion.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice