SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5397-14T1

NICOLE C. BARNES,

Plaintiff-Respondent,

v.

RUTH FLANNERY,

Defendant-Appellant.

Argued September 20, 2016 – Decided November 22, 2016

Before Judges Fisher and Leone.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0694-12.

Mario J. Delano argued the cause for appellant (Campbell, Foley, Delano & Adams, LLC, attorneys; Mr. Delano, on the briefs).

Gabriel R. Lependorf argued the cause for respondent (Lependorf Silverstein, PC, attorneys; Mr. Lependorf, of counsel and on the brief; Robert J. Jones, on the brief).

PER CURIAM

Defendant Ruth Flannery appeals the trial court's judgment, arguing that counsel's mention of her municipal court convictions

was prejudicial despite the court's curative instruction to strike and disregard it. We affirm.

I.

This case stems from an automobile accident occurring on February 8, 2012, involving defendant and plaintiff, Nicole C. Barnes. The accident was a head-on collision on a two-lane road. After the collision, defendant's vehicle was completely in plaintiff's lane of travel. Plaintiff's vehicle was in plaintiff's lane of travel with only the rear-driver-side portion in the defendant's lane. There was extensive damage to both vehicles, and plaintiff was injured.

Plaintiff brought this negligence action against defendant. Trial was held over the course of three days in 2015 — March 31, April 2, and April 6.

On March 31, prior to the start of trial, the trial court ruled that plaintiff could introduce defendant's municipal court convictions for careless driving and failure to maintain lane. The court also permitted counsel to mention the convictions in his opening statement. Accordingly, plaintiff's counsel stated during his opening:

> We're also going to hear from the officer that he issued two citations. And both those citations were issued to the defendant. One was for careless driving, one was for failure to maintain lane. Both those tickets were

> heard in municipal court by a municipal court judge. The municipal court judge took the testimony and heard the evidence. And the municipal court judge determined beyond a reasonable doubt that the defendant was guilty for both tickets, careless driving and failure to maintain lane.

However, minutes after opening statements ended, the trial court realized it would be erroneous to admit evidence of defendant's municipal court convictions.[1] The court also recognized it should not have allowed plaintiff's counsel to mention those convictions in his opening, but the court was confident that a curative instruction would cure any harm to defendant. Neither the tickets nor the convictions were ever mentioned in the testimony of the officer or any other witness, and no further mention was made by counsel.

On April 2, the second day of trial, defendant moved for a mistrial based on plaintiff's opening. The trial court denied the motion and stated it would cure the error during the jury charge.

On April 6, the third day of trial, during the jury charge, the trial court instructed:

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[1] We agree that evidence of the municipal court convictions was inadmissible because, in municipal court, defendant contested the traffic offense charges and did not testify. "If a person contested the charge, a conviction following a trial is not admissible because the contesting defendant never admitted his guilt." Maida v. Kuskin, 221 N.J. 112, 126 (2015). N.J.R.E. 803(c)(22) allows "admission of evidence of a final judgment of guilt only to an indictable offense." Ibid.

> The statement that the Defendant, Ruth Flannery, received two traffic tickets and was found guilty in municipal court is being stricken from the record, okay. You are not to consider this statement in any manner during deliberations and you are not to draw any inferences from this statement during deliberations.

At the same time, the court instructed the jurors: "Any testimony and/or statements I have stricken from the record is not evidence and it should not be considered by you in your deliberations. This means that even though you remember the testimony and/or statements, you are not to use it in your discussions or deliberations."

Later that day, the jury issued its verdict, finding defendant 100% negligent and awarding plaintiff $375,000. On April 21, 2015, the trial court entered judgment against defendant for $375,000.

Defendant filed a notice of motion for a new trial. On July 6, 2015, the court denied defendant's motion, finding the "curative instruction was sufficient to cure any prejudice."

Defendant appealed the judgment and the order denying her motion for a new trial.

II.

We must hew to our standard of review. Our Supreme Court has long held:

> The decision on whether inadmissible evidence is of such a nature as to be susceptible of being cured by a cautionary or limiting instruction, or instead requires the more severe response of a mistrial, is one that is peculiarly within the competence of the trial judge, who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting.
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> [State v. Winter, 96 N.J. 640, 646–47 (1984).]

The same is true in civil cases, Khan v. Singh, 397 N.J. Super. 184, 202 (App. Div. 2007), aff'd, 200 N.J. 82 (2009), and for comments by counsel, State v. Yough, 208 N.J. 385, 397 (2011). "'The determination of whether the appropriate response is a curative instruction, as well as the language and detail of the instruction, is within the discretion of the trial judge[.]'" State v. Wakefield, 190 N.J. 397, 486 (2007) (citation omitted), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008).

"The grant of a mistrial is an extraordinary remedy to be exercised only when necessary 'to prevent an obvious failure of justice.'" Yough, supra, 208 N.J. at 397 (citation omitted). "For that reason, an appellate court should not reverse a trial court's denial of a mistrial motion absent a 'clear showing' that 'the defendant suffered actual harm' or that the court otherwise 'abused its discretion.'" Ibid. (citation omitted).

Similarly, motions for a new trial "are addressed to the sound discretion of the trial court and will not be disturbed unless that discretion has been clearly abused." Quick Chek Food Stores v. Township of Springfield, 83 N.J. 438, 446 (1980). "The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge — whether there was a miscarriage of justice under the law." Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011).

III.

Defendant argues the curative instruction was insufficient to cure the court's error in allowing her municipal court convictions to be mentioned in opening statements. Defendant also contends the trial court erred in waiting several days before issuing the curative instruction.

A.

We agree with the trial court that the language of its curative instruction was adequate to cure the error. The court's instruction specifically referenced the statement by plaintiff's counsel, told the jury the statement was "being stricken from the record," and instructed the jurors "not to consider this statement in any manner during deliberations." Similar instructions have been found sufficient to cure similar error. For example, our Supreme Court found "no abuse of discretion" in denying a mistrial

after counsel asked the defendant "whether he was convicted in a magistrate's court as the result of this accident," because the court instructed the jury to "disregard that entirely." Melone v. Jersey Cent. Power & Light Co., 18 N.J. 163, 177 (1955).

Importantly, as in Melone, the offending reference here was only a statement by counsel, not actual evidence. Even before plaintiff's counsel made the statement in opening, the trial court instructed the jurors that they were to judge the facts "based only upon the evidence," that "what the attorneys are saying is not evidence," and that the attorneys "are not witnesses" but only "advocates and spokespersons for their client's position." Moreover, in its final jury charge, the trial court reiterated that the attorneys were merely "advocates for their clients" in their opening statements and that "nothing that the attorneys say is evidence and their comments are not binding upon you."

"We presume the jury followed the court's instructions" that "the remarks made by the attorneys . . . were not evidence, but argument." State v. Smith, 212 N.J. 365, 409 (2012), cert. denied, __ U.S. __, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013). These additional instructions provide further reassurance that counsel's comments in opening, which were never supported by evidence, "did not deprive this defendant of a fair trial." State v. Feaster, 156 N.J. 1, 64 (1998), cert. denied, 532 U.S. 932, 121 S. Ct.

1380, 149 L. Ed. 2d 306 (2001); see, e.g., Mahoney v. Podolnick, 168 N.J. 202, 229 (2001).

In addition, defendant's counsel in opening had mitigated the harm by pointing out that plaintiff's counsel "did not mention . . . that my client did not in fact testify" in municipal court, so its "findings were made without the judge actually hearing [defendant's] side of the story." Defendant's counsel made clear the jury was "going to hear my client testify as to how the accident occurred" and why she "was not responsible for the February 8th, 2012 accident."

Most importantly, the trial court's curative instruction was specific and thorough. Our Supreme Court "has repeatedly held that improper arguments of counsel are rendered harmless by the court's correct instructions because the jury is presumed to follow the court's instruction rather than counsel's argument." State v. Nelson, 155 N.J. 487, 526–27 (1998), cert. denied, 525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 788 (1999). Because courts "act on the belief and expectation that jurors will follow the instructions given them by the court," State v. T.J.M., 220 N.J. 220, 237 (2015), and "hold in high regard the capacity and integrity of juries, [we] have no doubt that the . . . jury was capable of following the trial court's curative instruction." Mahoney, supra, 168 N.J. at 222.

B.

Defendant also contends the trial court should have given its curative instruction immediately after it realized its error, rather than in its jury charge. However, that "issue was not raised at trial, and thus defendant can prevail on it only by demonstrating 'plain error.'" State v. Angoy, 329 N.J. Super. 79, 89 (App. Div.), certif. denied, 165 N.J. 138 (2000).

The Supreme Court "has consistently stressed the importance of immediacy and specificity when trial judges provide curative instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial." State v. Vallejo, 198 N.J. 122, 134-35 (2009). However, "the preferred remedy" of an immediate curative instruction was not possible here because the trial court did not discover its error until after opening arguments ended and the first witness was testifying. See Feaster, supra, 156 N.J. at 87. Nonetheless, it would have been "preferable" for the trial court to give the curative instruction on March 31 when it discovered the impropriety in the opening rather than wait until its jury charge on April 6. See Angoy, supra, 329 N.J. Super. at 89-90.

Nevertheless, "if the final charge is 'accurate, clear and comprehensive,' we have concluded any delay, even if two weeks have elapsed between the introduction of the evidence and the

final instruction, is not plain error." State v. Baker, 400 N.J. Super. 28, 47 (App. Div. 2008) (citing Angoy, supra, 329 N.J. Super. at 89), aff'd, 198 N.J. 189 (2009). Here, the trial court's accurate, clear, and comprehensive curative instruction in "the final jury charge was given one week," and only two trial days, after the opening. See ibid.

Moreover, as noted above, the jurors had already been instructed that counsel's opening was not evidence, and that they had to wait to base their ruling on the evidence. Further, before the opening, the trial court instructed the jurors they had to "keep an open mind" and they were "not to make any judgments or come to any conclusions about this case" until "all the evidence is presented and then I explain the law to you." Finally, the record gives "no reason to believe the [one] week delay would lead either to the jury's disregarding that instruction or to prejudice against the defendant." See Angoy, supra, 329 N.J. Super. at 89. Thus, the "[d]elay in giving the limiting charge, therefore, was not in and of itself plain error." Baker, supra, 400 N.J. Super. at 47.

"That is particularly so, given the overwhelming evidence against defendant." Angoy, supra, 329 N.J. Super. at 89. The police officer found defendant's car and plaintiff's car in plaintiff's lane. To counter this solid physical evidence that

she had driven into plaintiff's lane, defendant had only her testimony that plaintiff was driving without headlights in defendant's lane, that defendant saw plaintiff's car in defendant's lane only at a range of ten feet or less "a split second" before the accident, that defendant swerved to the left, and that they collided. Defendant could not explain how plaintiff's car ended up in plaintiff's lane. In denying defendant's motion for a new trial, the trial court noted that defendant's testimony was unsupported and "metaphysically impossible." The court added that defendant's testimony was "totally not credible."

C.

Defendant argues the trial court should not have commented on credibility when deciding whether to grant her new trial motion. Rule 4:49-1(a) instructs: "The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." Under Rule 4:49-1(a),

> in ruling on a motion for a new trial, the trial judge takes into account[] not only tangible factors relative to the proofs as shown by the record, but also appropriate matters of credibility, generally peculiarly within the jury's domain so-called "demeanor evidence," and the intangible "feel of the

> case" which he gained by presiding over the trial.
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> [Dolson v. Anastasia, 55 N.J. 2, 6–7 (1969).]

Here, the trial court appropriately considered defendant's credibility and demeanor, giving due regard to the jury's credibility determination, which the verdict suggests was the same as the court's determination. The court, applying its "feel of the case," was "best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting." Winter, supra, 96 N.J. at 646–47. We find no abuse of discretion.

Affirmed.