2017 IL App (3d) 150850-U

Order filed January 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

RAUL MENDOZA, Plaintiff-Appellant, v. PEORIA SPEAKEASY, INC., d/b/a BIG AL'S SPEAKEASY; MAIN STREET LAND TRUST; JOSEPH ABRAHAM; and BRADLEY HOOPINGARNER, Defendants (Peoria Speakeasy, Inc., d/b/a Big Al's Speakeasy, Defendant-Appellee).	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois. Appeal No. 3-15-0850 Circuit No. 12-L-118 Honorable Jodi M. Hoos Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: In dramshop action, trial court did not err in allowing defendants to raise provocation as affirmative defense where there was testimony to support it. Trial court did not err in providing jury with pattern instruction on elements of dramshop action. Defense counsel's use of exhibit during closing argument was

harmless error where jury was instructed that closing arguments are not evidence and plaintiff's counsel corrected defense counsel's misstatements. Plaintiff was not entitled to directed verdict where contested issues existed.

¶ 2 Plaintiff Raul Mendoza filed a complaint against defendant Peoria Speakeasy, Inc., d/b/a Big Al's Speakeasy (Big Al's), and the owners of the property on which it is situated, Main Street Land Trust and Joseph Abraham, alleging a violation of the Dramshop Act. Following a trial, the jury found in favor of defendants. On appeal, plaintiff argues that the trial court erred in (1) allowing defendants to raise provocation and failure to mitigate damages as affirmative defenses, (2) instructing the jury regarding the elements plaintiff had to prove in his dramshop action, (3) allowing defense counsel to present an exhibit to the jury during closing arguments, and (4) not entering a directed verdict in his favor. We affirm.

¶ 3 In September 2011, plaintiff was injured during a physical altercation with Bradley Hoopingarner in Peoria. Six months later, plaintiff filed a complaint against defendants Peoria Speakeasy, Inc., d/b/a Big Al's Speakeasy, Main Street Land Trust and Joseph Abraham, alleging that they violated the Dramshop Act (235 ILCS 5/6-21 (West 2012)). Defendants answered the complaint and later sought to add the affirmative defenses of provocation and failure to mitigate damages. Plaintiff filed motions to dismiss defendants' affirmative defenses. The trial court denied plaintiff's motions and allowed defendants to add their affirmative defenses.

¶ 4 The evidence at trial revealed that plaintiff was walking on Main Street in Peoria during the early morning hours of September 18, 2011, with Jessica Shoemake and her husband, Brian, when Hoopingarner and another man walked toward them from the opposite direction. Plaintiff and Hoopingarner bumped shoulders "pretty hard." Jessica then saw Hoopingarner turn around and begin walking in their direction. Hoopingarner "took a swing" at both plaintiff and Brian

but missed them both. Plaintiff then put Hoopingarner "in kind of a headlock." While in the headlock, Hoopingarner bit plaintiff's hand, which "started bleeding pretty bad[ly]."

¶ 5 After Hoopingarner bit plaintiff, plaintiff released Hoopingarner from the headlock, and he and plaintiff ended up on the ground. Jessica saw plaintiff kick Hoopingarner twice in the head. Hoopingarner's friend yelled, "I'm calling the police," and plaintiff, Jessica and Brian left.

¶ 6 According to Jessica, Hoopingarner "seemed very intoxicated." He was walking erratically, making grunting noises, and stumbling. Plaintiff had also been drinking that night but was able to walk without stumbling and carry on a conversation without slurring his words.

¶ 7 Brian Shoemake, Jessica's husband, testified that after plaintiff and Hoopingarner "brushed shoulders," they exchanged "words," and walked toward each other. Hoopingarner took a swing at Brian, but he ducked, and Hoopingarner "missed completely." After that, plaintiff put Hoopingarner in a headlock. The two ended up on the ground with plaintiff bouncing Hoopingarner's head on the concrete several times.

¶ 8 Hoopingarner testified that he began drinking on September 17, 2011, at dinnertime when he had two beers. Several hours later, he had three shots of Rumple Minze, a 100-proof liquor, at Pere Marquette, a Peoria hotel. After that, he went to a bar called Hoops and drank two pints of Guinness and two "car bombs," which each contained half a pint of Guinness and a shot of Irish Cream and Jamison. At that point, Hoopingarner was feeling "tingly" and "[f]uzzy faced."

¶ 9 From there, Hoopingarner went to Big Al's, where he drank three bottles of Bud Light and seven "pucker shots." The shots were served in small plastic cups that were smaller than regular shot glasses and "weren't strong at all," according to Hoopingarner. After that, Hoopingarner went to a bar called Richard's on Main, where he had two more "car bombs" and one-and-a-half more bottles of Guinness. At that point, he "was done" and "ready to go to bed."

¶ 10 Two of Hoopingarner's friends, Michael Sanders and Justin Light, took Hoopingarner outside of Richard's on Main to get some air. As Hoopingarner was leaning against a post on the sidewalk outside the bar, he felt plaintiff ram into his right shoulder "pretty hard," causing him to spin around. At that point, he was "hopping mad" and started yelling at plaintiff. Plaintiff and his friends were walking away, but Hoopingarner continued yelling. Plaintiff eventually turned around and walked back towards Hoopingarner. The two continued yelling and got into "a little shoving match." Hoopingarner's friends broke it up, and plaintiff walked away.

¶ 11 Plaintiff walked back toward Hoopingarner a second time and pushed him. Hoopingarner took a swing at plaintiff, missed completely and fell to the ground, hitting his head. He blacked out for a minute, and when he came to, plaintiff was on top of him slamming his head on the ground. Hoopingarner bit plaintiff's finger as hard as he could to try to get him to stop. Plaintiff hit his head on the ground at least two more times. When Hoopingarner heard someone say he was going to call the police, plaintiff "just took off."

¶ 12 Plaintiff testified that he was at a wedding reception at Pere Marquette during the evening of September 17, 2011, where he drank six to eight beers. When the reception was over, he decided to walk to a bar a few blocks away with Brian and Jessica Shoemake. As they were walking on Main Street, he and Hoopingarner bumped into each other. Hoopingarner began verbally badgering him and walking toward him.

¶ 13 Plaintiff and Brian turned around and began walking toward Hoopingarner. There was more "verbalizing" and possibly some "macho man kind of chest bumping stuff." After that, Hoopingarner "took a swing" at Brian and missed. Plaintiff then put Hoopingarner in a choke hold. After that, there was tussling, and plaintiff and Hoopingarner ended up on the ground.

While they were on the ground, plaintiff's "finger somehow ended up in" Hoopingarner's mouth. Plaintiff banged Hoopingarner's head on the ground two to four times to try to free his finger.

¶ 14 Two days later, plaintiff went to the emergency room for his bite wound. The medical staff "put something on" the wound and prescribed him antibiotics. Two days after that, plaintiff was experiencing "intense pain," so he returned to the emergency room. He was admitted to the hospital and a surgeon immediately performed a procedure on his finger "because the infection was starting to take over." Plaintiff remained in the hospital for three days and received intravenous antibiotics for two weeks after that.

¶ 15 Dr. Jeffrey Corwin, an emergency room physician, treated plaintiff on September 20, 2011. At that time, plaintiff's wound was infected. Dr. Corwin believed that plaintiff's finger could have become infected even if plaintiff sought medical treatment immediately after being bitten. In his experience, many people "don't understand how serious human bites are especially to hands." He agreed that, in general, the sooner antibiotics are started, the better.

¶ 16 Michael Sanders was with Hoopingarner during his altercation with plaintiff and described Hoopingarner as "very inebriated." He said that he and another friend were standing with Hoopingarner in front of Richard's on Main when plaintiff "walked into or pushed" Hoopingarner, "causing him to nearly topple over." Hoopingarner started yelling at plaintiff, and the two engaged in a "short scuffle." After that, plaintiff walked away. Hoopingarner kept yelling at plaintiff, and plaintiff turned around and walked toward Hoopingarner again. When he reached Hoopingarner, plaintiff pushed him, and then "there was some pushing and punches thrown." Sanders did not want to get involved, so he walked away. The last thing he saw was plaintiff and Hoopingarner on the ground with plaintiff on top of Hoopingarner.

¶ 17 Justin Light testified that as he was standing outside Richard's on Main with Hoopingarner and Sanders, plaintiff walked by and "[s]houlder checked him." Hoopingarner stumbled, and he and plaintiff exchanged words. After that, they shoved each other, and plaintiff put Hoopingarner in a headlock. Light was able to pry the men apart, and plaintiff walked away. Hoopingarner and plaintiff continued yelling at each other, and then plaintiff turned around and walked toward Hoopingarner. As plaintiff approached, Hoopingarner tried to swing at plaintiff but missed and stumbled. Plaintiff joined Hoopingarner on the ground and started "slamming his head like a basketball" on the ground. After plaintiff slammed Hoopingarner's head three times, Light said, "I'm calling the police." Plaintiff then got up and walked away.

¶ 18 Light, who had worked as a bartender, agreed that two Irish "car bombs" would be the equivalent of three normal-sized alcoholic drinks. He testified that the "pucker shots" plaintiff drank at Big Al's were less than one ounce each. Light testified that Pucker is a 40-proof liquor.

¶ 19 Dr. Alexander Cummings, who has practiced emergency medicine for over 20 years, described plaintiff's bite wound as "significant." He believes to a reasonable degree of medical certainty that if plaintiff had gone to the emergency room within a few hours of being bitten, his finger "probably would have not gotten infected." Cummings did not think it was reasonable for plaintiff to wait two days to seek medical treatment for his wound.

¶ 20 After the evidence was presented, a jury instruction conference was held. At the conference, defendants tendered instruction No. 14, based on Illinois Pattern Jury Instructions, Civil, No. 150.02 (2011) (IPI Civil No. 150.02), which stated:

> "Plaintiff Raul Mendoza claims he is entitled to recover damages from defendant, Peoria Speakeasy, Inc. The plaintiff must prove:
>
> First, Bradley Hoopingarner was intoxicated at the time of the occurrence.

> Second, defendant, Peoria Speakeasy, Inc., its agents or servants, sold or gave intoxicating liquor consumed by Bradley Hoopingarner.
>
> Third, the liquor thus consumed caused the intoxication of Bradley Hoopingarner.
>
> Fourth, Bradley Hoopingarner's intoxication was at least one cause of the occurrence in question.
>
> Fifth, as a result of the occurrence, plaintiff suffered bodily injury.
>
> If you find from your consideration of all the evidence that each of those propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant Peoria Speakeasy, Inc."

Plaintiff objected, but the trial court allowed the instruction to be given to the jury. Defendants also requested, over plaintiff's objection, that the jury be instructed regarding provocation and failure to mitigate damages. The court allowed those instructions to be given.

¶ 21 Before closing arguments, the trial court told jurors: "What the lawyers say during the arguments is not evidence and should not be considered by you as evidence." During closing arguments, defense counsel presented to the jury a PowerPoint slide he created showing how much Hoopingarner drank at each establishment on September 17 and 18, 2011. Defense counsel prefaced the exhibit by stating: "This is *** what I think the evidence shows. If you remember it differently *** you go with your recollection." Defense counsel then stated that five shots of the "20 proof pucker drink" Hoopingarner drank at Big Al's were equivalent to one shot of 100-proof Rumple Minze Hoopingarner drank at Pere Marquette. In rebuttal, plaintiff's counsel responded by stating that there was no evidence that the "pucker shots" Hoopingarner

drank were 20-proof drinks and further clarified that Hoopingarner drank a total of seven "pucker shots" at Big Al's.

¶ 22 The jury found in favor of defendants. Plaintiff filed a motion for new trial, seeking a judgment notwithstanding the verdict or, alternatively, a new trial. The trial court denied the motion.

¶ 23 I. Provocation

¶ 24 A. Affirmative Defense

¶ 25 Plaintiff first argues that the trial court erred in allowing defendants to raise the affirmative defense of provocation because it is not a valid defense in a dramshop action.

¶ 26 The Dramshop Act provides: "Every person who is injured within this State, in person or property, by any intoxicated person has a right of action in his or her own name *** against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor *** causes the intoxication of such person." 235 ILCS 5/6-21(a) (West 2012). A remedy under the Dramshop Act is available only to innocent third parties who are injured as a result of the sale or gift of alcoholic beverages. *Akin v. J.R.'s Lounge, Inc.*, 158 Ill. App. 3d 834, 837 (1987). In *Akin*, this court said: "Although there are cases going both ways on the question of whether provocation can be a defense in a dramshop action, we believe the weight of authority, and the better reasoned view as well, is that provocation is an affirmative defense in a dramshop case." *Id.* (citing *Foster v. Lanciault*, 70 Ill. App. 3d 962 (1979); *Williams v. Franks*, 11 Ill. App. 3d 937 (1973); *Tresch v. Nielsen*, 57 Ill. App. 2d 469 (1965); *Taylor v. Hughes*, 17 Ill. App. 2d 138 (1958); *Martin v. Blackburn*, 312 Ill. App. 549 (1942); *Bowman v. O'Brien*, 303 Ill. App. 630 (1940)).

¶ 27 Other courts have agreed with our decision in *Akin*, recognizing provocation as an affirmative defense in dramshop suits. See *Olle v. C House Corp.*, 2012 IL App (1st) 110427, ¶ 13; *Werner v. Nebal*, 377 Ill. App. 3d 447, 456 (2007); *Gilman v. Kessler*, 192 Ill. App. 3d 630, 644 (1989). Only one appellate court in this state, the Fifth District, has ruled that provocation is not a defense in a dramshop action. See *Galyean v. Duncan*, 125 Ill. App. 3d 464, 466 (1984). However, this court expressly rejected the Fifth District's ruling, noting "the long line of precedent * * * recognizing provocation as a defense available to a defendant in dramshop litigation." See *Akin*, 158 Ill. App. 3d at 837; see also *Gilman*, 192 Ill. App. 3d at 643-44 (rejecting the Fifth District's decision in *Galyean* and finding that our decision in *Akin* "is the better reasoned view").

¶ 28 Based on our ruling in *Akin* and the vast weight of authority in this state, we agree that provocation is a valid defense in a dramshop action because a remedy under the Act should be available only to innocent parties. See *Akin*, 158 Ill. App. 3d at 837. The trial court properly ruled that defendants could raise provocation as an affirmative defense.

¶ 29 B. Jury Instruction

¶ 30 Plaintiff additionally argues that the trial court improperly instructed the jury regarding provocation because there was no evidence to support such an instruction.

¶ 31 Parties are entitled to jury instructions on their theories as long as there is some supporting evidence. *Werner*, 377 Ill. App. 3d at 456. Where there is some evidence that the plaintiff attacked first, a provocation instruction should be given. See *id*. The decision to give a jury instruction is ultimately within the trial court's discretion. *Id*.

¶ 32 Here, there was conflicting testimony about who initiated the physical contact between plaintiff and Hoopingarner. Plaintiff and his friends, Brian and Jessica Shoemake, testified that

Hoopingarner attacked first, while Hoopingarner and Sanders testified that plaintiff initiated the physical contact that resulted in his injuries. Because there was some testimony to support defendant's provocation defense, the trial court did not abuse its discretion in instructing the jury on provocation. See *id*.

¶ 33 II. Defendants' Instruction No. 14

¶ 34 Plaintiff argues that the court should not have given the jury defendants' instruction No. 14. He further contends that the court should have instructed the jury about what it meant to be the "cause" of Hoopingarner's intoxication.

¶ 35 In a dramshop action, IPI Civil 150.02, entitled "Dram Shop Act – Issue/Burden of Proof" is to be given to the jury. IPI Civil 150.02 (2011). That instruction provides as follows:

> "[In this lawsuit] [In Count_____,] plaintiff (name) claims (he/she) is entitled to recover damages from the defendant. The plaintiff must prove:
>
> First (allegedly intoxicated person) was intoxicated at the time of the (e.g. collision).
>
> Second, the defendant, his agents or servants, sold or gave intoxicating liquor consumed by (allegedly intoxicated person).
>
> Third, the liquor thus consumed caused the intoxication of (allegedly intoxicated person).
>
> Fourth, (allegedly intoxicated person)'s intoxication was at least one cause of the occurrence in question.
>
> Fifth, as a result of the occurrence, plaintiff suffered [injury] [damage to his property].

> If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant." IPI Civil 150.02 (2011).

This instruction correctly states the burden of proof in a dramshop case. See *Hartness v. Ruzich*, 155 Ill. App. 3d 878, 885 (1987); *Walls v. Jul*, 118 Ill. App. 2d 242, 252 (1969).

¶ 36 It is unnecessary and improper to define the phrase "caused the intoxication" for the jury in a dramshop case because it is commonly understood by jurors. *Kingston v. Turner*, 115 Ill. 2d 445, 459-60 (1987). Providing a definition of the phrase would only confuse the jury. *Id*. at 459.

¶ 37 Illinois Supreme Court Rule 239 (eff. April 8, 2013) requires the use of an IPI instruction unless the trial court determines that it does not inaccurately state the law. Only when the IPI does not contain a proper instruction on the subject may another instruction on the subject be given. *Taylor v. Village Commons Plaza, Inc.*, 164 Ill. App. 3d 460, 465 (1987).

¶ 38 Here, defendants' instruction No. 14 is the standard IPI Civil 150.02 instruction that is to be used in dramshop cases. It correctly sets forth the elements a plaintiff must prove in a dramshop action. See *Hartness*, 155 Ill. App. 3d at 885; *Walls*, 118 Ill. App. 2d at 252. Instructing the jury regarding the meaning of the phrase "caused the intoxication" contained in IPI Civil 150.02 is not only unnecessary but improper, as it would only serve to confuse the jury. See *Kingston*, 115 Ill. 2d at 459. Because defendants' instruction No. 14 was an IPI instruction that correctly stated the law, the trial court did not abuse its discretion in providing it to the jury. See Ill. S. Ct. R. 239(a) (eff. April 8, 2013).

¶ 39 III. Defendants' Closing Argument Exhibit

¶ 40 Plaintiff argues that the trial court should have prohibited defense counsel from showing its PowerPoint slide to the jury during closing arguments because it was not based on evidence presented at trial.

¶ 41 Generally, the use of an exhibit during closing argument is within the discretion of the trial court. *Martin v. Zucker*, 133 Ill. App. 3d 982, 989 (1985). The use of exhibits to illustrate a closing argument is proper as long as they are not misleading to the jury. *Id.* Exhibits, like closing arguments themselves, must be based on facts in evidence. *Id*.

¶ 42 Nevertheless, when a party misstates evidence in closing argument, reversal is not warranted absent a showing of substantial prejudice to the other party. *Ryan v. Katz*, 234 Ill. App. 3d 536, 542-43 (1992). Where defense counsel misstates evidence in closing argument, the misstatements can be cured by the trial court's cautionary remarks that the jury should decide the case on the basis of the evidence it heard and plaintiff's rebuttal of the misstatements in closing argument. See *Bruske v. Arnold*, 44 Ill. 2d 132, 138 (1969); *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 759 (2010). A court's instructions that the jury is to consider only evidence in reaching its verdict and that arguments of counsel are not evidence renders harmless misstatements of counsel because the jury is presumed to follow the court's instructions. *Brooke Inns, Inc. v. S & R Hi-Fi & TV*, 249 Ill. App. 3d 1064, 1089 (1993).

¶ 43 Here, it was error for the trial court to allow defense counsel to show the jury the PowerPoint slide reflecting that the "pucker shots" plaintiff drank at Big Al's contained 20-proof alcohol because it misstated the evidence at trial. The only testimony regarding those shots was that they contained 40-proof alcohol. Nevertheless, the error is harmless because the court told the jury that closing arguments are not evidence and plaintiff's counsel corrected defense

counsel's misstatements. See *Bruske*, 44 Ill. 2d at 138; *Wilson*, 399 Ill. App. 3d at 759; *Brooke Inns*, 249 Ill. App. 3d at 1089.

¶ 44 IV. Directed Verdict

¶ 45 Finally, plaintiff argues that the trial court should have entered a directed verdict in his favor because the evidence showed that Hoopingarner became intoxicated at Big Al's and that his consumption of alcohol was at least one cause of plaintiff's injuries.

¶ 46 A directed verdict in favor of the plaintiff is proper where the evidence, viewed in the light most favorable to defendant, so overwhelmingly favors the plaintiff that no contrary verdict would be permitted to stand. *Newlin v. Foresman*, 103 Ill. App. 3d 1038, 1041 (1982). Where there is a conflict in evidence, a directed verdict is not appropriate because the trier of fact is to resolve conflicting evidence. *Holeman v. Smallwood*, 89 Ill. App. 3d 796, 799 (1980).

¶ 47 Here, there was conflicting evidence regarding who started the physical altercation between plaintiff and Hoopingarner. There was also conflicting evidence regarding which establishment or establishments caused Hoopingarner's intoxication. Because there were contested factual issues, the trial court did not err by failing to enter a directed verdict in plaintiff's favor. See *id*.

¶ 48 V. Failure to Mitigate Damages

¶ 49 Plaintiff also argues that the trial court should have prohibited defendants from asserting the affirmative defense of failure to mitigate damages. We find it unnecessary to reach this issue. The jury considers damages only if it determined that one or more of the defendants are liable for plaintiff's injuries. *Aimonette v. Hartmann*, 214 Ill. App. 3d 314, 320 (1991). Because the jury found in favor of all defendants, it had no reason to consider reducing plaintiff's damages. *Id*.

¶ 50 The judgment of the circuit court of Peoria County is affirmed.

¶ 51 Affirmed.

¶ 52 JUSTICE SCHMIDT, specially concurring.

¶ 53 I concur in the judgment but write separately with respect to defendant's instruction No. 14. *Supra* ¶¶ 33-38. Plaintiff neither objected to defendant's instruction No. 14 nor offered an alternate instruction. A party forfeits the right to challenge a jury instruction given at trial unless the party makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 19. Because the plaintiff has forfeited this argument, I would not reach the merits, or the lack thereof, of plaintiff's arguments with respect to defendant's instruction No. 14.

¶ 54 I also write separately to point out the obvious: the better view mandates the availability of the provocation defense in a dramshop action. This case could serve as the poster child for the argument. We are to avoid absurd construction of statutes. Plaintiff's counsel agreed at oral argument that without a provocation defense, one could go about the business of assaulting drunks and then sue a dramshop if injured in the process. The evidence in this case supports a jury finding that the only connection the AIP's intoxication had to plaintiff's injury is that plaintiff might well have left him alone had he not appeared too drunk to defend himself. One would reasonably expect even a sober person to do whatever was necessary at the time to release himself from a chokehold. This is even more true if the one exerting the chokehold is also banging the fellow's head into the sidewalk. The principle that counsels against sticking one's head in the mouth of a lion holds equally true for sticking one's finger in the mouth of a drunk, or any person, while holding him in a chokehold and banging his head against the concrete

pavement. It seems totally unreasonable to believe that the General Assembly intended for dramshops to have liability in fact scenarios such as the one before us.