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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2979-20**

MATT MANZELLA,

Plaintiff-Appellant,

v.

DIVANTE WORTHEN,

Defendant-Respondent.

Argued May 3, 2022 – Decided May 26, 2022

Before Judges Hoffman, Whipple, and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4219-17.

Scott M. McPherson argued the cause for appellant (Escandon, Fernicola, Anderson, Covelli & McPherson, attorneys; Robert M. Anderson, of counsel and on the briefs; Scott M. McPherson, on the briefs).

John V. Mallon argued the cause for respondent (Chasan Lamparello Mallon & Cappuzzo, PC, attorneys; Ryan J. Gaffney, on the brief).

PER CURIAM

Plaintiff Matt Manzella appeals from a unanimous jury verdict and entry of a judgment of no cause for action on his claim for personal injuries sustained in an automobile accident. The judgment was based on the jury's negative answer to Question # 1 of the verdict sheet, which asked: "Was defendant [Divante] Worthen negligent and was this negligence a proximate cause of the accident?" Finding no basis to disturb the jury's verdict, we affirm.

I.

We briefly set forth the facts relevant to the issues on appeal. On November 26, 2015, a vehicle driven by defendant collided with plaintiff's vehicle when plaintiff attempted to make a left turn at the intersection of Mill Street and Washington Avenue in Belleville. The parties were traveling in opposite directions, and plaintiff initially stopped at a red traffic light. Once the light turned green, plaintiff proceeded into the intersection; at this point, the parties disagree as to whether plaintiff began his left turn or remained stopped in his lane at the time of the collision.

After approximately fifteen seconds, defendant's vehicle entered the intersection from the opposite direction and collided with plaintiff. The speed limit at the intersection was twenty-five miles per hour, and traffic conditions at the time were busy.

On November 21, 2017, plaintiff filed a personal injury action against defendant for injuries sustained in the accident. Defendant filed an answer denying all allegations of negligence.

During discovery, plaintiff produced property damage photographs depicting the points of impact. Plaintiff's front passenger side door and front bumper were damaged, and the hood of his vehicle was bent backwards towards the driver's side. As for defendant's vehicle, the front bumper displayed significant damage.

This matter proceeded to trial on May 12 and 13, 2021, only on the issue of liability. In his testimony, plaintiff claimed he had not begun his left turn at the time of the collision; instead, he stated that he came to a stop at an angle while staying in his own lane. In plaintiff's written discovery responses, he indicated he was "unaware" whether he observed defendant's vehicle at the time of the collision. At trial, plaintiff testified that defendant, driving at a high speed, lost control of his vehicle and collided head-on with plaintiff's vehicle.

Plaintiff recounted that defendant was "in a panic and his hands were up by the side of his face while he was entering the intersection. It looked like he was yelling or screaming." Furthermore, at several times throughout the trial, plaintiff testified that defendant was driving "at a high rate of speed" and

traveling faster than other vehicles on the road. In contrast, defendant testified that he drove straight when entering the intersection, and that he only struck plaintiff's vehicle after plaintiff began to turn left and entered defendant's lane of travel.

Relevant to this appeal, when plaintiff's counsel asked plaintiff whether defendant's vehicle was traveling at a speed greater than twenty-five miles per hour, defense counsel objected, claiming that "the question that's posed [calls] for an opinion. Plaintiff – the witness is not an expert and the estimate of the speed, an opinion is to be required as expert testimony under these circumstances." The trial judge sustained the objection and instructed counsel to rephrase the question. Plaintiff's counsel then asked plaintiff how fast defendant's vehicle traveling. Defense counsel raised the same objection, which the judge sustained.

Finally, plaintiff's counsel asked plaintiff to "[d]escribe what you saw when you saw [defendant's] vehicle[.]" Plaintiff responded that he remembered the vehicle "moving much faster than [the twenty-five speed limit] that was posted." Sua sponte, the judge immediately directed that plaintiff's answer be stricken, and instructed the jurors "not to consider [the answer] in any form." On direct examination, defendant testified that he entered the intersection at

about twenty miles per hour; on cross-examination, defendant repeated this claim.

On the cross-examination of plaintiff, his counsel objected to a question regarding plaintiff's interrogatory response indicating that he was "unaware" of the speed of defendant's vehicle. In his objection, plaintiff's counsel asserted the same basis that the judge cited in sustaining earlier objections against plaintiff – that a lay witness cannot testify to his perception of speed, and that an expert opinion is required for such testimony. However, the judge overruled the objection, since plaintiff's interrogatory answer did not provide an estimate of speed, but instead stated that he did not know the speed.

After deliberating, the jury returned a unanimous verdict of no cause for action, finding that defendant did not act negligently. This appeal followed.

II.

On appeal, plaintiff contends that the exclusion of his lay testimony as to the speed of defendant's vehicle prior to impact constituted reversible error, warranting a new trial. We disagree, finding no reversible error.

"We defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). We do so because "the decision to admit or exclude evidence is one firmly entrusted to the trial court's

discretion." State v. Prall, 231 N.J. 567, 580 (2018) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). "Under that deferential standard, we review a trial court's evidentiary ruling only for a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)). The trial court's ruling should not be disturbed unless it "was so wide of the mark that a manifest denial of justice resulted." State v. Brown, 17 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

Rule 1:7-2 governs the preservation of issues for appeal, and provides:

For the purpose of reserving questions for review or appeal relating to rulings or orders of the court or instructions to the jury, a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which the party desires the court to take or the party's objection to the action taken and the grounds therefor.

Where there is no objection to testimony, we review for plain error. The admission of the unchallenged evidence constitutes plain error if it was "clearly capable of producing an unjust result." R. 2:10-2. "Thus, the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." State v. Singh, 245 N.J. 1, 13 (2021) (quoting State v. R.K., 220 N.J. 444, 456 (2015)).

However, when a specified error was brought to the trial judge's attention, the harmful error rule is applied. See State v. G.E.P., 243 N.J. 362, 389 (2020); State v. Mohammed, 226 N.J. 71, 86 (2016). Harmful error is tested by the standard set forth in Rule 2:10-2. That is, whether the error is "clearly capable of producing an unjust result." R. 2:10-2. Thus, even though an alleged error was brought to the trial judge's attention, it will not be ground for reversal if it was "harmless error." See Willner v. Vertical Reality, Inc., 235 N.J. 65, 79 (2018); State v. J.R., 227 N.J. 393, 417 (2017); State v. Macon, 57 N.J. 325, 338 (1971).

N.J.R.E. 701 permits testimony by lay witnesses "in the form of opinions or inferences" if it "(a) is rationally based on the witness's perception; and (b) will assist in understanding the witness' testimony or determining a fact in issue." This testimony "must 'assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.'" State v. Sanchez, 247 N.J. 450, 469 (2021) (quoting Singh, 245 N.J. at 15). A witness should not offer an opinion on something that the jury can come to a decision to on its own. Id. at 469-70. The purpose of the rule "is to ensure that lay opinion is based on an adequate foundation." Singh, 245 N.J. at 14 (quoting State v. Bealor, 187 N.J. 574, 586 (2006)).

Regarding a lay witness' estimate as to a vehicle's speed, our Supreme Court has observed "[t]raditional examples of permissible lay opinions include the speed at which a vehicle was traveling." State v. McLean, 205 N.J. 438, 457 (2011); see also State v. Locurto, 157 N.J. 463, 471-72 (1999) (finding that a police officer's opinion that defendant was speeding constitutes admissible lay testimony); State v. Hyman, 451 N.J. Super. 429, 442 (App. Div. 2017) ("examples [of admissible lay witness testimony] include opinions of a vehicle's speed, based on seeing or hearing it go by").

As a threshold matter, we conclude the trial judge erred in excluding plaintiff's testimony regarding his estimate as to defendant's rate of speed at the time of the accident. See McLean, 205 N.J. at 457. Therefore, we must determine whether to review for plain error or harmful error.

At trial, the judge sustained several objections to plaintiff counsel's questioning regarding plaintiff's estimate as to defendant's rate of speed. The judge also struck plaintiff's testimony sua sponte, after plaintiff's counsel elicited testimony from plaintiff that he believed defendant was driving at a speed exceeding twenty-five miles per hour. Notably, throughout these exchanges, although plaintiff's counsel rephrased the question multiple times,

he did not specifically object to the trial judge's ruling that an expert opinion was needed to address the speed at which defendant was traveling.

Here, plaintiff failed to object to the judge's ruling at trial, and therefore we review for plain error. Based upon our careful review of the entire record, we are satisfied that the judge's error was not clearly capable of producing an unjust result. We conclude the possibility of an unjust result under the present circumstances is not "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." See G.E.P., 243 N.J. at 389.

On several occasions throughout the trial, the jury heard plaintiff's testimony that he believed that defendant's vehicle was driving fast. Plaintiff testified that "a vehicle came in from under the trees you see there in the picture, at a high rate of speed, and struck my vehicle." When asked to describe the collision, plaintiff responded, "I was stopped at the intersection and it was a busy day, traffic was passing my vehicle on both sides. . . . [A] vehicle entered the intersection at a high rate of speed and struck my front end." In an exchange between plaintiff's counsel and plaintiff, counsel asked, "was it your testimony just now that [defendant's] vehicle was moving faster than the other vehicle that had moved through the intersection?" Plaintiff responded, "Yes, sir."

Moreover, plaintiff responded "[a]bsolutely" when counsel asked, "and although you don't know the exact speed of [defendant's] vehicle, he did appear to you in that short period of time to be traveling faster than the other vehicles in the roadway, correct?" Lastly, in counsel's summation, he argued, "I certainly think it's a fair inference to make that [defendant] took his eyes off the road. He had two passengers in his car and his speed was certainly in excess . . . [of] the other vehicles that had passed [plaintiff]."

In short, the trial judge's error in barring plaintiff's lay testimony was not clearly capable of producing an unjust result, as the jury heard plaintiff on multiple occasions testify that defendant was driving at a high rate of speed, or at a rate faster than other vehicles on the roadway. The above comments provided the same impact that testimony stating defendant's vehicle exceeded twenty-five miles per hour would have elicited – that defendant was speeding at the time of the collision.

Additionally, plaintiff's theory of liability demonstrates that the trial judge's error was not clearly capable of reaching an unjust result. At trial, plaintiff argued that defendant lost control of his vehicle, crossed into oncoming traffic, and collided with plaintiff's vehicle while defendant's vehicle remained in its own lane, albeit at an angle preparing to make a left turn. The jury heard

this theory and rejected it. Therefore, defendant's speed was not critical evidence to the present action, as the alleged cause of the collision, according to plaintiff, was that defendant crossed over into oncoming traffic, not that he was speeding. See N.J.R.E. 401 ("'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.").

Here, the jury returned a verdict in favor of defendant, which meant they found that defendant did not cross over into the opposite lane of travel, but rather that plaintiff started his left turn too early and subsequently stuck out into oncoming traffic. Thus, the speed of defendant's vehicle was not consequential in determining this action, as the core factual dispute involved whether defendant's vehicle crossed into the opposite lane of traffic, or whether plaintiff made his left turn prematurely.

Put differently, the jurors deliberated as to whether defendant crossed into oncoming traffic, not why he may have done so; by their verdict, they unanimously found that defendant did not cross over into plaintiff's lane of travel. If plaintiff conceded that he began his left turn but could not complete it because defendant was speeding through the intersection, then the issue of defendant's speed would be consequential in determining liability in this case.

However, plaintiff made no such concession. As such, we conclude the judge's failure to admit plaintiff's estimate of the speed of defendant's vehicle was not clearly capable of producing an unjust result.

To conclude, the trial judge's error in not permitting lay testimony regarding plaintiff's estimate of defendant's speed at the time of the collision did not constitute plain error. Accordingly, we find no basis for a new trial.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION