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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-210

JANUARY TERM, 2009

Bruce Laforce	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
Jeffrey Billado and Paul Billado	}	DOCKET NO. S0611-06 CnC
		Trial Judge: Matthew I. Katz

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

Plaintiff appeals from a jury verdict in this personal injury action, arguing that rulings by the trial court after the close of evidence deprived him of a fair trial. We affirm.

Plaintiff's complaint alleged that he suffered serious personal injury resulting from an assault by the two defendants, who were father and son. There was evidence that plaintiff invited the younger defendant to fight, but that both defendants struck plaintiff. Defendants claimed consent and self-defense. The jury had to determine whether one, both, or neither of the defendants was liable for the assault, and if only one was, which injuries that defendant had caused. Following presentation of the evidence and closing arguments, the jury found only the father liable for the assault, and awarded plaintiff $3,000, well short of the $14,000 in medical expenses he claimed. Plaintiff moved for a new trial or additur, which the court denied, ruling that the verdict was supported by evidence and that its decision to allow defendants' counsel a sur-rebuttal during closing argument was neither unfair nor prejudicial, as plaintiff claimed.

On appeal, plaintiff argues that he was deprived of a fair trial when the trial court allowed defendants' counsel to present an erroneous and prejudicial sur-rebuttal during closing argument. Plaintiff also argues that the trial court gave an erroneous and prejudicial answer to a jury question during the jury's deliberation, and that there is no adequate record for this Court to resolve his claims of error on appeal. We reject each of these arguments.

Plaintiff's principal argument is that the trial court's decision to allow defendants' counsel a limited sur-rebuttal on a specific point made during closing argument deprived him of a fair trial. During closing argument, defendants' counsel repeatedly suggested to the jury that plaintiff was not credible when he claimed that he did not remember what had happened during an eight-to-ten minute period at the time of the assault. At one point, defendants' counsel asked

the jurors if they had heard any medical evidence to explain this phenomenon. In rebuttal, plaintiff's counsel told the jury that anybody who has had a closed head injury knows that eight to ten minutes of amnesia is not unusual. After plaintiff's counsel completed his argument, defendants' counsel asked the court to allow him to inform the jury that there was no evidence in the record of plaintiff suffering a closed head injury. Plaintiff's counsel responded that there was ample evidence of a brutal beating, and that the doctor had testified that such a beating could cause a closed head injury. The court stated that there is a big difference between whether one actually suffered, or merely could have suffered, such an injury. When the court suggested that there was no evidence that plaintiff had suffered such an injury, plaintiff's counsel disagreed, but was not able to cite any such evidence. Consequently, the court allowed defendants' counsel to remind the jury that plaintiff's witness, a plastic surgeon, had testified that he did not know whether plaintiff had suffered a closed head injury. Defendants' counsel also asked the jury to examine the medical records and to note the absence of anything that sounded like a closed head injury or a concussion.

On appeal, plaintiff argues that emergency room records indicated he suffered a head injury, and that defendants' counsel was aware of those records and their admission into evidence, but nonetheless misrepresented to the court that there was no medical evidence of a head injury. According to plaintiff, the court accepted this misrepresentation without checking the record or giving his attorney enough time to cite the evidence, and then allowed defendants' counsel to falsely inform the jury that no such evidence existed, all of which deprived him of a fair trial. We find neither error by the court nor deprivation of a fair trial. In his deposition testimony admitted into evidence, the doctor who repaired plaintiff's fractures described a syndrome he called "closed head injury," which can cause a person to exhibit changed behavior. Plaintiff apparently elicited this testimony to explain his belligerent behavior after rescue personnel arrived at the scene of the assault. The doctor did not testify that a closed head injury could result in memory loss. Further, he explicitly testified that he did not know whether plaintiff had suffered a closed head injury. During closing argument, in explaining plaintiff's memory loss, plaintiff's counsel made reference to a "closed head injury," the specific term used by the doctor. Not surprisingly, given the doctor's testimony that he did not know if plaintiff had suffered a closed head injury, defendants' counsel complained that there was no evidence to support the notion that plaintiff had a closed head injury or that such an injury could explain his amnesia. See Wilson v. Dyer, 116 Vt. 342, 347 (1950) (stating that courts must be careful to restrict arguments of counsel to legitimate evidence). During the ensuing bench conference, both counsel referred to the doctor's testimony. Yet, on appeal, defendant points to the emergency room reports to support the notion that he had a closed head injury.

We have no doubt that plaintiff's counsel could have argued to the jury that the blows plaintiff took to his face, combined with his intoxication, might explain his loss of memory. Nonetheless, we find no abuse of discretion in the trial court allowing a sur-rebuttal by defendants' counsel as to whether there was evidentiary support for the notion that plaintiff had suffered a "closed head injury," a specific term addressed at trial by plaintiff's witness. The emergency room reports note a head injury in general terms, but do not mention the term "closed head injury," and do not suggest that plaintiff's head injury could have led to memory loss. At best, the reports merely indicate that defendant had been struck in the head, which was undisputed. During closing argument and the ensuring bench conference, both attorneys focused on the doctor's testimony regarding the specific term used by plaintiff's counsel. Given the state

of the evidence and the circumstances, the court acted well within its discretion in allowing the brief sur-rebuttal.

Next, plaintiff argues that the trial court erred in how it responded to a jury question during jury deliberations. The jurors submitted the following request to the court during their deliberations: "Could we see the affidavit from the police officers taken from" four specified witnesses. The court wrote the following note to the jurors: "That affidavit is not part of the evidence, it is hearsay (a statement outside the court), so I cannot show it you." In plaintiff's view, the jurors were not actually seeking the police affidavit, but rather the original statements by the named witnesses—statements that were not in evidence. Plaintiff argues that the court should have told them to rely on the witnesses' statements as referred to in the trial testimony. Instead, according to plaintiff, by telling them that the police affidavit was hearsay, the court likely confused the jurors into thinking that any statement by any of the named witnesses was not evidence upon which they could rely. We find no error, assuming that plaintiff objected at trial to the court's response. The trial court plainly and correctly stated that the police affidavit had not been admitted into evidence and was hearsay. The court made no reference to statements contained in the affidavit or referred to in trial testimony.

Finally, we reject plaintiff's argument that the record is not adequate for us to resolve the issues raised on appeal. The decisions being appealed are plain on their face, and the record is sufficient for informed appellate review of plaintiff's claims of error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice