IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2833

CALVIN VERDIN,

Plaintiff-Appellee,

VERSUS

SEA-LAND SERVICE, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 90 1798)

(October 25, 1993)

Before WISDOM, HIGGINBOTHAM, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Sea-Land Service, Inc. ("Sea-Land"), appeals a jury verdict of $880,000 for Calvin Verdin, a ship captain injured on board Sea-Land's vessel. Finding only harmless error, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Verdin was employed by Hollywood Marine, Inc. ("Hollywood"), as a relief captain. At the time of the accident, he was the acting captain of the M/V CREOLE LISA, a Hollywood tug boat pushing a barge loaded with bunker fuel oil. Verdin was to deliver the bunker fuel to the M/V NEWARK BAY, a vessel owned and operated by Sea-Land.

Upon the tug's arrival alongside the NEWARK BAY, the crew of the tug moored the tug and barge. An independent oil surveyor and one other person extended a ladder from the Sea-Land vessel down to the barge. Verdin attempted to climb the ladder from the barge to the NEWARK BAY. The ladder was neither secured nor held by any of the Sea-Land crew. The ladder slipped and Verdin fell, suffering a severely broken ankle.

II.

Verdin filed suit against Sea-Land for damages arising out of this incident. During the second day of testimony, Verdin's counsel called Mrs. Verdin to testify. Moments after she began her testimony, she suffered an epileptic seizure, the severity of which is in some dispute. Sea-Land moved for a mistrial, which the district court denied.

During closing argument, Verdin's counsel referred to Sea-Land's decision not to call its employees as witnesses, implying that such a failure was tantamount to an admission of liability. Sea-Land contends that this uncalled-witness reference unduly

prejudiced the jury by implying that Sea-Land improperly concealed evidence.

Sea-Land also attributes error to the district court's refusal to allow Sea-Land to examine whether Verdin's counsel and Verdin's expert witness violated a sequestration order. Furthermore, Sea-Land charges that the district court maintained a recognizable bias in favor of Verdin that deprived Sea-Land of a fair trial.

The jury returned a verdict for Verdin and awarded him damages of $880,000. The district court denied Sea-Land's motion for remittitur and its motion for a new trial.

III.

Sea-Land raises five issues on appeal. It argues that Mrs. Verdin's epileptic seizure was so prejudicial as to warrant a new trial; that Verdin improperly argued that Sea-Land's failure to call its employees to testify was an admission of liability; that Verdin's witnesses violated the sequestration order; that the district court showed bias in comments made during trial; and that the damages awarded were disproportionate to the injury suffered.

A.

The standard of review for a denial of a motion for a new trial is whether the court abused its discretion. United States v. Brechtel, 997 F.2d 1108, 1120 (5th Cir. 1993); Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1426 (5th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Where the district court has made a determina-

tion regarding whether the verdict is the result of passion or prejudice, we will not disturb the finding unless clearly erroneous. Guaranty Serv. Corp. v. American Employers' Ins. Co., 893 F.2d 725, 729 (5th Cir. 1990); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 281 (5th Cir. 1975).

The issue presented by the epileptic seizure is precisely the type of issue that the abuse of discretion standard carves out for a trial court. The district judge had the opportunity to observe the witnesses and consider the evidence in the context of "a living trial rather than upon a cold record." Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033, 1045 (5th Cir. 1970) (quoting Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969), cert. denied, 396 U.S. 835 (1969)), cert. denied, 407 U.S. 921 (1972).

Although there was genuine dispute between the parties as to how violent and, thus, startling the seizure actually was, the court concluded that the seizure was moderate. The judge described it as an uncontrolled shaking of the witness's left arm. It was not, in his opinion, a violent seizure.

The law places great latitude in the trial court's perception of allegedly prejudicial events. In each of the cases cited by Sea-Land, the judge's determination ultimately was upheld on appeal. For example, when a widow broke down on the stand while testifying as to the identity of her husband's killers, opposing counsel sought a mistrial. Willis v. Kemp, 838 F.2d 1510, 1521 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989). The attorney argued that other, less potentially prejudicial witnesses should

have been called. Nonetheless, the court refused to declare a mistrial.

In another case upon which Sea-Land relies, the appellate court refused to grant a new trial where the mere presence of the plaintiff, whose severely disfigured face gave powerful evidence of his damages, created undue sympathy and excessive compassion in the eyes of the jury. Gorsalitz, 429 F.2d at 1044.

Sea-Land charges that Verdin's counsel should have recognized the potential for Mrs. Verdin to have a seizure and that counsel's failure to do so, in the face of evidence of foreseeability, constituted neglect of his responsibility. Sea-Land contends that a new trial is "more readily granted" when counsel for one party fails to take steps to avoid potential outbursts. See Worthington v. United States, 64 F.2d 936, 939 (7th Cir. 1933).

Here, the court communicated its concern that Verdin's counsel should have foreseen the possibility of a seizure. It appears, however, that Verdin did all that he could to determine whether a seizure was likely. Given that Mrs. Verdin had almost daily seizures and had already had one that very day, the likelihood that she would have one during the stress of testifying in open court admittedly was great.

Counsel's sole alternative was to disregard the reassurances of the witness herself and not call her. His choice to "chance it" was reasonable, given that his only option was to proceed without her testimony. The district court's denial of the motion for a mistrial and the motion for new trial reflected its belief that

Verdin's counsel had done nothing to jeopardize the fairness of the outcome.

The court also took proper steps to remedy any prejudice that might have occurred. The judge apologized for the disturbance caused by the seizure and instructed the jury that the epileptic condition from which Mrs. Verdin suffers has long antedated the events at issue in the lawsuit and, further, that those events had no impact whatsoever on her condition. He instructed the jury to disregard completely all of Mrs. Verdin's testimony and, further, to erase from their minds any reaction they might have had to her seizure.

Although Sea-Land correctly states that some prejudice simply cannot be cured by an instruction, it fails to acknowledge that this, too, is a question for the trial judge. Accordingly, the judge did not err in denying the motion for a new trial.

B.

Verdin's counsel argued to the jury that Sea-Land's failure to call any of its employees as witnesses was tantamount to an admission of liability. Sea-Land charges that the court should have entertained its objection to this "uncalled-witness" argument and that the judge's failure to do so constitutes reversible error. We review the court's control of the trial for abuse of discretion. Stine v. Marathon Oil Co., 976 F.2d 254, 266 (5th Cir. 1992).

The missing witness argument creates a presumption that the testimony of an uncalled witness would have been unfavorable had he

been called. McQuaig v. McCoy, 806 F.2d 1298, 1303 (5th Cir. 1987). Historically, however, a party could invoke the presumption or raise the inference only if the missing witness was under the opposing counsel's control. Id.

The rules of evidence and civil procedure have rendered the uncalled-witness rule "an anachronism." See Herbert v. Wal-Mart Stores, 911 F.2d 1044, 1048 (5th Cir. 1990). The federal rules no longer categorize witnesses as in the "control" of one party or another. As a result, the rule's original purpose)) to prevent parties from concealing damaging evidence)) has been largely vitiated by the liberal discovery rules that allow both sides to ascertain the identity of potential witnesses "aligned" with opposing counsel. When a hostile witness is unwilling to testify, the court's compulsory process provides access.

In the case at hand, Verdin has offered no evidence that he was denied access to any potential witnesses or that any witnesses he wanted to call were controlled exclusively by Sea-Land. Hence, the court erred when it overruled the objection to Verdin's uncalled-witness argument. Nevertheless, improper comments by counsel will not warrant reversal unless they so permeate the proceedings that, in the light of all evidence presented, manifest injustice would result if the court allowed the verdict to stand. See Johnson v. Ford Motor Co., 988 F.2d 573, 582 (5th Cir. 1993); Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985). In particular, an improper closing argument may be the basis for reversal only if counsel introduced extraneous information that had

a reasonable probability of influencing the jury. Pregeant v. Pan Am. World Airways, 762 F.2d 1245 (5th Cir. 1985).

Although the disfavor with which we greet the uncalled-witness presumption renders it an improper argument in most circumstances, it does not rise to the level of reversible error in this case. We can find no case in which improper comment on an uncalled witness required reversal by the reviewing court. Instead, the courts that have addressed this question inquire as to whether the case had been proved with the evidence properly admitted. See, e.g., McQuaig, 806 F.2d at 1303; Geimer v. Pastrovich, 946 F.2d 1379, 1382 (8th Cir. 1991). The Edwards case, upon which Sea-Land relies as authority, did not involve comment on an uncalled witness but, rather, counsel's deliberate mischaracterization of crucial testimony heard in the case. Edwards, 512 F.2d at 284. Whereas reversal was warranted in those circumstances, here it is not.

C.

At the start of the trial, Sea-Land invoked its right to have the court sequester all non-party witnesses from the courtroom. See FED. R. EVID. 615. The court ordered the witnesses not to discuss the case. The standard of review in this context is whether the court abused its discretion in allowing the testimony of a witness who violated the order. See United States v. Payan, 992 F.2d 1387, 1394 (5th Cir. 1993); United States v. Suarez, 487 F.2d 236, 238 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974).

The existence of a violation of the sequestration order is, itself, a matter in dispute. Sea-Land contends that Verdin's liability expert, Captain Richards, admitted that he violated the order by discussing his testimony with three other witnesses prior to testifying. Moreover, Richards and other witnesses remained outside the courtroom during the trial, allowing the inference that they discussed their testimony. When counsel for Sea-Land asked to approach the bench to articulate an objection, the court refused.

In general, failure of a witness to abide by the sequestration order rarely will require reversal. See Suarez, 487 F.2d at 238. The purpose of the rule is to discourage a witness from tailoring his testimony to be consistent with that of another witness. See Miller v. Universal City Studios, 650 F.2d 1365, 1373 (5th Cir. July 1981); United States v. Hargrove, 929 F.2d 316, 320 (7th Cir. 1991).

Even if Richards did violate the order, it is unlikely that prejudice resulted. Sea-Land has not shown that he changed his testimony as a result or that the other witnesses changed their testimony to match his. See United States v. Payan, 992 F.2d 1387, 1394 (5th Cir. 1993). Moreover, the district court took convincing steps to ensure that Richards had not violated the order.

D.

Sea-Land charges that the district court demonstrated a bias in favor of Verdin by (1) directing biting verbal jabs at defense counsel; (2) making one-sided comments to the jury;

(3) consistently eliciting testimony on behalf of Verdin; and (4) preferring Verdin in its rulings.

A district court's conduct is measured against a standard of fairness and impartiality. Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416, 1423 (5th Cir. 1986). In evaluating a judge's remarks, we consider the record as a whole, as opposed to isolated comments. Newman v. A. E. Staley Mfg. Co., 648 F.2d 330, 334-35 (5th Cir. Unit B June 1981). If counsel objected to a particular remark, the standard of review is whether the comment impaired a substantial right of the objecting party. FED. R. CIV. P. 61; Newman, 648 F.2d at 335. But the reviewing court will excuse a failure to object in this context, for one need not jeopardize a client's position with further objections that may antagonize the court. Newman, 648 F.2d at 335.

The trial judge has a duty to expedite the trial, particularly in the face of repetitious objections by counsel. See Johnson v. Helmerich & Payne, Inc., 892 F.2d 422, 425 (5th Cir. 1990). Moreover, the court has the right and duty to comment on the evidence in an effort to ensure that both parties receive a fair trial. Dixon, 754 F.2d at 585.

A review of the cases leads to the conclusion that the court's remarks in the instant case, while arguably contentious, were not sufficiently demonstrative of bias as to warrant reversal. Moreover, any potential prejudice were cured by the court's instructions to the jury. Johnson, 892 F.2d at 424-25.

Although Sea-Land argues that the instructions themselves were

flawed, a verdict-based judgment will be reversed for instruction error when the charge as a whole leaves the reviewing court with substantial doubt as to whether the jury was properly guided in its deliberations. Mayo v. Borden, Inc., 784 F.2d 671, 672 (5th Cir. 1986). This reflects the wide latitude given trial courts in shaping their instructions. The ultimate question is whether the jury was misled or failed to have a proper understanding of the issues. Theriot v. Bay Drilling Corp., 783 F.2d 527, 534 (5th Cir. 1986).

In the case at hand, the instructions were, on the whole, fair. Although Sea-Land contends that the district court should not have contrasted the economic positions of the parties, Sea-Land fails to acknowledge the context in which this remark was made. See Travelers Ins. Co. v. Ryan, 416 F.2d 362, 364 (5th Cir. 1969). The court stated, "You have)) on the one hand, you have Mr. Verdin, a man of obvious limited education and modest means. You have on the other hand Sea-Land Service which is a very large corporation."

After contrasting the parties, however, the court said, "But in court, jurors, everybody under our system of justice, everybody is the same. Everybody is equal. There are no powerful people or weak people. There are no rich or poor. Everybody is treated the same way. And you don't hold against some big corporation because they've got more than somebody else."

Viewing the comments as a whole, we find that the court did not substantially impair Sea-Land's rights or commit plain error.

Although the court made some comments that the jury might have perceived as contentious, they do not rise to the level of reversible error.

E.

Sea-Land contends that the damages awarded to Verdin were grossly disproportionate to the injury suffered. This court follows the "maximum recovery rule," Caldarera v. Eastern Airlines, 705 F.2d 778, 784 (5th Cir. 1983), under which remittitur can reduce the verdict only to the maximum amount the jury properly could have awarded.

A jury's damage award should not be disturbed unless it is "clearly disproportionate to the injury sustained." Simeon, 852 F.2d at 1426 (quoting Caldarera, 705 F.2d at 784). If the damages are disproportionate, either the trial court or the reviewing court should reduce the award to the maximum amount the jury could have awarded. These rules acknowledge the requisite latitude that comes with terms such as "pain and suffering," yet ensure that some parameters bind the factfinder. See Osburn v. Anchor Lab., 825 F.2d 908, 920 (5th Cir. 1987), cert. denied, 485 U.S. 1009 (1988).

Although the jury's sympathy for the plaintiff may have been increased by the realization that his wife struggles with epilepsy, there is no evidence that such sympathy informed the determination of liability. In fact, Sea-Land's brief devotes a scant one page to the amount of damages and presents no information on the basis of which this court might infer that the jury's award was

excessive. On the other hand, Verdin's brief graphically describes the injury: Verdin's foot was twisted back to his calf and the bone was sticking out through his sock. He lay screaming and conscious until paramedics arrived.

The jury calculated Verdin's past damages to be $240,000. This amount breaks down into approximately $80,000 for past lost income and $160,000 for past pain and suffering. Verdin was awarded $640,000 in future damages. According to the evidence presented, the present value of lost future income alone exceeded that figure. Verdin presented evidence that he would most likely never walk correctly again. We conclude that the verdict was not excessive.

IV.

We find that the district court did not commit reversible error and that the verdict was within the maximum permissible range. The judgment, accordingly, is AFFIRMED.