

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60633
Summary Calendar

JOSE ARTEAGAPILOTO,

Plaintiff-Appellant,

VERSUS

COL. ARMSTRONG, ET AL.,

Defendants,

COL. ARMSTRONG, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Mississippi
(91-CV-163)

July 6, 1995

Before THORNBERRY, HIGGINBOTHAM, AND BARKSDALE, Circuit Judges.

PER CURIAM:*

Jose Arteagapiloto is currently incarcerated in the Mississippi Department of Corrections (MDOC) at Parchman. He filed this 42 U.S.C. § 1983 suit against Colonel Robert Armstrong, Lieutenant Robert Moniette, and Officer Sidney Havard, all employees of the MDOC. Arteagapiloto appeals a jury verdict in

*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

favor of the Appellees. Finding no reversible error, we will affirm.

I. FACTS AND PROCEDURAL HISTORY

Arteagapiloto alleged in his complaint that Moniette pushed him out of his cell into the hall where he was handcuffed, kicked and beaten by Moniette and Havard, and then Armstrong arrived on the scene, pushed Arteagapiloto into Moniette's office, slapped and beat him. After a trial before the magistrate judge, the jury returned a verdict in favor of the Appellees.

Arteagapiloto first asserts that the magistrate judge abused his discretion by excluding the written statement of Darile Johnson, a fellow inmate who allegedly witnessed the assault. He also contends the jury's verdict was not supported by the evidence.

II. ANALYSIS

A. Failure to Admit Statement

Admission of evidence is within the sound discretion of the district court. Joh-T Chemicals, Inc. v. Freeport Chemical Co., 704 F.2d 1412, 1417 (5th Cir. 1983). Absent an abuse of discretion, this Court will not disturb the district court's evidentiary ruling. Ibid.

Darile Johnson was Arteagapiloto's cell mate and an eyewitness to the altercation with Moniette. He gave Arteagapiloto a written statement shortly after the incident, describing what he had seen. Before trial, Arteagapiloto sought to depose Johnson, but the court

denied this request, instead issuing an order that witnesses would be available at Parchman for interviews on a certain date. However, Johnson was released from confinement, was not interviewed, and did not appear at the trial. Arteagapiloto therefore attempted to introduce Johnson's statement at trial. After a hearsay objection was lodged, Arteagapiloto claimed it was admissible under FED. R. EVID. 804 because Johnson was unavailable. The court sustained the objection and refused to allow the statement because it was hearsay, cumulative of previous testimony, and there were no special circumstances that would make it admissible. Arteagapiloto asserts that, had this statement been admitted, this evidence would have given additional weight and credence to his other witnesses' testimony.

A witness is unavailable to testify under Rule 804(a)(5) if he "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." To introduce a statement in lieu of the actual witness' testimony, the proponent must establish the unavailability of the witness. See Moore v. Mississippi Valley State Univ., 871 F.2d 545, 552 (5th Cir. 1989).

The record reflects that Arteagapiloto had been notified by court order that any witnesses he required who were not inmates could be subpoenaed at government expense, and the district court observed that Arteagapiloto made no effort to bring Johnson to the trial. In addition, although in his appellate brief Arteagapiloto states he did not know that Johnson had been released from custody

until the day of trial, the record reflects that he told the district court that he found out about Johnson's release the last time he went to the prison library. Therefore, he had ample time to inform the court of this fact, and secure Johnson's attendance for trial. Arteagapiloto has failed to support his assertion that Johnson was unavailable within the meaning of Rule 804(a)(5). See Moore, 871 F.2d at 552. The district court did not abuse its discretion in excluding the statement.¹

B. Sufficiency of the Evidence

Arteagapiloto argues the jury verdict was not supported by the evidence, that Moniette, Havard, and Armstrong used excessive force against him which served no institutional purpose, and that he established damages that resulted from the assault, including bruises, scratches, back pain, and mental anguish. He asserts the evidence would support a directed verdict in his favor.

This Court reviews a challenge to the sufficiency of the evidence supporting a jury verdict to determine whether "reasonable and fair-minded jurors in the exercise of their impartial judgment might reach different conclusions." MacArthur v. Univ. of Texas Health Ctr., 45 F.3d 890, 896 (5th Cir. 1995)(internal citation and

¹ Arteagapiloto also admitted to the district court that Johnson's statement was cumulative of testimony provided by three of his other witnesses, and that he himself would testify to the same facts. We have reviewed the statement in question and the record, and agree with the district court that Johnson's statement did not add anything new to the testimony of his other inmate witnesses. It is not an abuse of discretion for the district court to exclude evidence that is merely cumulative. FED. R. EVID. 403.

quotation omitted). "A mere scintilla of evidence is insufficient to present a question for the jury." Ibid. "[I]t is the function of the jury to weigh conflicting evidence and inferences, and determine the credibility of the witnesses." Ibid.

This Court has repeatedly held that in the absence of a motion for directed verdict, the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal. Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978), and cases cited therein. See also, Roberts v. Wal-Mart Stores, 7 F.3d 1256, 1259 (5th Cir. 1993). The appellate court's inquiry then becomes limited to "whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a 'manifest miscarriage of justice.'" Coughlin, 571 F.2d at 297; see also, MacArthur, 45 F.3d at 896 n.8, citing with approval the Coughlin standard.

Arteagapiloto did not move for a directed verdict at the close of all evidence, nor did he file a motion for a new trial following the jury's verdict. Therefore, we must determine whether there was any evidence to support the jury's verdict.

In order to prevail at trial, Arteagapiloto was required to show that the force used against him was maliciously and sadistically applied to cause harm, and was not a good-faith effort to maintain or restore discipline. Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995, 999 (1992). Arteagapiloto testified that after Moniette ordered him to get ready for an inspection, he was ordered

to pack his belongings and go to the yard. When Arteagapiloto protested, Moniette cursed him, dragged him from his cell, threw him against a wall and struck him from behind. After Arteagapiloto fell to the floor unconscious, Moniette and Havard handcuffed him after beating and kicking him. Arteagapiloto was lifted from the floor by the handcuffs, and Armstrong dragged him to Moniette's office and slapped him in the face. Arteagapiloto stated the attack was unprovoked. Fellow inmates Anthony Steel, David Byrd, and Statie Smith, called on behalf of Arteagapiloto, were present during the altercation and corroborated to an extent his version of events.

In direct contradiction, Moniette testified that when told to get out of bed for the morning inspection, Arteagapiloto complained he was tired of the inspections, jumped off the bed and pushed Moniette in the chest. Moniette wrestled Arteagapiloto to the floor, handcuffed him, and took him into the hall. Armstrong and other MDOC officers then escorted Arteagapiloto out of the area. Arteagapiloto was later taken to the hospital, and Moniette wrote a rule violation on the incident. Moniette said he never told Arteagapiloto to pack his property and go into the yard, and that it was prison policy to have those persons involved in a physical altercation go to the unit hospital afterwards.

Armstrong testified that when he arrived on the scene, Arteagapiloto was in the hall in handcuffs cursing, and being loud and vulgar. Armstrong said he saw nothing wrong with

Arteagapiloto, and denied slapping, hitting or kicking him. He also denied observing anyone else strike Arteagapiloto.

Dr. John Dial testified Arteagapiloto's medical records indicated that after the altercation he complained of pain in the left side of his face as well as shoulder pain. Examination revealed no injury to the jaw and an x-ray of Arteagapiloto's shoulder was normal. Dial testified that Arteagapiloto did not complain of back pain at the time of the examination, and in fact the only visible injury was a small scratch on his back which required no treatment. Dial said that if Arteagapiloto had been picked up while handcuffed he would have expected to see cuts on his wrists. Dial stated that in his opinion, on the day of the confrontation with Moniette, Arteagapiloto suffered no injury other than possibly the superficial scratch on his back, and that his subsequent neck and back pain were not related to the incident.

The above rendition of the trial testimony demonstrates that Armstrong, *et al.*, presented evidence to refute Arteagapiloto's claims that excessive force was used against him. Apparently, the jury chose to believe Armstrong's and Moniette's version of the altercation, and to disbelieve Arteagapiloto's. The evidence was sufficient to support the jury's verdict and there was no plain error resulting in a manifest miscarriage of justice. Coughlin, 571 F.2d at 299.

III. CONCLUSION

The district court did not abuse its discretion in excluding the statement of Darile Johnson, and there was sufficient evidence to support the jury's verdict. The judgment of the district court is therefore

AFFIRMED.