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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BRANDON JAMES MAXFIELD,

Plaintiff and Respondent,

v.

BRYCO ARMS et al.,

Defendants and Appellants.

A103358

(Alameda County
Super. Ct. No. 841636-4)

In this gun design defect litigation, defendants Bryco Arms, Bruce Lee Jennings, and B.L. Jennings, Inc., appeal from a judgment upon a special verdict finding in favor of plaintiff Brandon James Maxfield. Defendants contend that there is insufficient evidence to support the verdict and that the trial court committed numerous evidentiary errors. We affirm.

I. FACTUAL BACKGROUND

On April 6, 1994, John McCullough, 13, was living with his sister, Susan Stansberry, at her home in Willits. Rocky and Brandon, two of Mrs. Stansberry's children, were at home at the time as was Larry William Morford, 20 years old, a family friend who was living at the home and in charge of the children. At approximately 10:30 that morning, the Stansberrys' neighbors were having an argument. McCullough and Morford heard one of the neighbor's scream, "don't kill me" and saw that a man was pursuing her with an ax or hatchet. McCullough called 911. The sheriff responded to the call and spoke to the neighbors but no arrest was made. After the sheriff left,

McCullough and Morford became worried when they heard a couple of .22 gun shots, so McCullough called Mrs. Stansberry. Mrs. Stansberry told him to get the Bryco Model 38 (Model 38) gun and unload it. McCullough went to the Stansberrys' bedroom and retrieved the box containing the gun from the couple's dresser. McCullough opened the box and noticed that a bullet magazine was next to the gun. He unloaded the magazine. At that point, Morford came into the room and took the gun away from him. McCullough followed Morford into the living room. Morford was trying to make sure that the gun was unloaded. He held the gun with his right hand, pulled the slide back with his left hand when the slide slipped out of his hand and the gun fired. Within a couple of seconds, McCulloch, who was standing to the left of and behind Brandon, realized that Brandon was shot. McCulloch called 911. Brandon, who was seven at the time of the accident, suffered a fractured jaw and a permanent injury to his spinal cord and was rendered a quadriplegic.

The Model 38 gun used in the incident was designed by Bruce Lee Jennings and manufactured by Bryco Arms. It was distributed by B.L. Jennings, Inc., Nationwide Sports Distributors, Inc., and NSD West, Inc., without changes or modifications. The Model 38 was equipped with a manual safety that disabled the trigger. It was sold with an instruction sheet.

The Model 38 was designed with a safety mechanism that locked the slide. The purpose of the design was to eliminate any possibility of partially feeding a cartridge into the chamber of the gun, and to prevent the gun from jamming. The design, however, required that the safety be released in order to pull the slide and check the chamber to see whether the gun was loaded. Hence, it was necessary to place the gun in the "fire" position to unload it. Expert testimony established that the gun could be fired by pulling the trigger a distance of a tenth of an inch. Experts further opined that Morford inadvertently fired the gun when, in attempting to prevent the gun from falling, he gripped it and accidentally pulled the trigger.

II. DISCUSSION

A. Evidentiary Errors

Defendants contend that the trial court committed numerous evidentiary errors that require reversal. We review a trial court's ruling as to the admissibility of evidence for abuse of discretion. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639.) "This standard of review applies to a trial court's determination of the relevance of evidence, as well as to whether the evidence's probative value is substantially outweighed by its prejudicial effect." (*Ibid.*)

1. *Janice Jennings's Salary*

Defendants first argue that the trial court erred in refusing to admonish the jury to disregard the testimony that Janice Jennings received a salary of \$28,000 per month.

During phase I of the trial, Maxfield introduced the videotaped deposition testimony of Janice Jennings. The videotape was played for the jury. The parties acknowledge that defendants' counsel interposed an objection to the videotape when the videotape subtitle displayed Jennings's salary and that the objection was sustained. The portion of the deposition in which Jennings states her salary was not played to the jury.

Defendants argue that the videotape subtitle display of Jennings's salary was prejudicial, and that the trial court abused its discretion in denying their request to admonish the jury to disregard the evidence. The record, however, fails to show that defendants requested an admonition. It is, of course, axiomatic, that an appellant must affirmatively show error by an adequate record. (*Buckhart v. San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 518, pp. 562-563.) Here, there is no record of the request for an admonition or of the specific admonishment requested. In any event, we cannot conclude on the record presented that defendants were prejudiced by the momentary videotape showing Jennings's salary in a subtitle. The issue of damages, and hence Jennings's wealth, was not before the jury during phase I of the trial; and the only question before the jury was whether defendants were liable for the defective design of the Model 38. In the brief discussion on the record of defendants' objection to the Jennings's salary

testimony, counsel for Maxfield acquiesced in defendants' request that the salary not be discussed in closing argument and acknowledged that the objection to the evidence was sustained. Under these circumstances, defendants fail to show how they were prejudiced.

2. Evidence of Defendants' Automobiles

Defendants next contend that the trial court abused its discretion in allowing evidence that Bruce Lee Jennings stored several automobiles, including a Ferrari, a Lamborghini and a Lincoln, and a 36-foot boat at the Bryco Arms plant. They argue that this evidence of wealth was prejudicial.

Defendants, however, did not timely object to the evidence. They moved to strike the evidence after the videotape was played to the jury; and prior to closing argument, they requested that the evidence not be referenced during argument. Counsel for Maxfield argued that the evidence was relevant to show defendants' level of sophistication regarding engineering, noting that the Lamborghini was "probably the most highly-engineered non-racing automobile [in] the world. . . . It's state of the art. [¶] This guy spends not a dime on engineering for millions of guns that he's putting out there. It shows a level of sophistication on engineering, and I should be able to argue that. He's the designer of the gun. He's a guy who knows engineering. . . ." The trial court denied defendants' request, ruling that Maxfield could make the engineering argument but that he could not argue regarding Jennings's wealth and his failure to spend his money or any money on design.

We need not determine whether the ruling on relevance was correct, because we conclude any error was harmless. The evidence concerning the automobiles and boat was limited to the names of the vehicles, the size of the boat, and testimony that the vehicles might be owned by the Jenningses. There was no evidence admitted concerning the value of the vehicles and Maxfield's counsel did not make any argument regarding defendants' wealth. The cars were mentioned but once in a lengthy closing argument. Given the quantity of evidence supporting Maxfield's defective design theory, we find no likelihood that the jury would have reached a different verdict had this evidence been excluded.

3. Evidence of J-22 Instructions

Defendants next assert that the trial court erred in allowing evidence comparing the instructions for the Model 38 and the J-22 pistols. They argue that the evidence was likely to mislead or confuse the jury.

The J-22 was the predecessor model for the Model 38. The safety on the J-22 had to be placed in the “safe” position in order to be unloaded and the instructions for the model clearly so indicated. By contrast, in designing the Model 38 to prevent a jamming problem, users were required to place the safety in the “fire” position in order to unload the gun. In preparing the instructions for the Model 38, defendants modified the J-22 instructions by deleting that portion of the instruction warning users to place the safety in the “Safe” position before unloading the pistol. Maxfield asserted that the instructions were relevant to his arguments that defendants were aware of the danger of the new design and for impeachment on that issue. The trial court ruled that the evidence of the instructions on the J-22 was admissible assuming Maxfield laid a foundation that the Model 38 was merely a dimensional change of the J-22. The trial court did not abuse its discretion in admitting the evidence. It was relevant to defendants’ knowledge of the danger of the new design; there was no error in its admission.

4. Use of the Term, “Saturday Night Special”

Defendants further argue that the trial court erred in permitting counsel for Maxfield and Morford to use the term Saturday Night Special when referring to the Model 38. This argument lacks merit.

The trial court ruled that use of the term would be allowed, noting that “[y]ou can’t expect somebody to talk in as you call it politically correct or pristine language.” Counsel for Maxfield had argued that the term was relevant because it was used by defendants to describe the Model 38 and used in their marketing materials. And, evidence was admitted at trial substantiating that argument, including evidence that defendants used an airplane with the term written on both sides of the fuselage to market their guns, and that postcards with that image were distributed at gun shows. Given this record, the trial court did not abuse its discretion in permitting use of the term.

5. The Exemplar Pistol

The Model 38 with which Maxfield was shot was lost following the death of the attorney who took possession of it after the accident. In its stead, Maxfield offered an exemplar Model 38. The trial court ruled that the Model 38 was admissible, but that the trigger pull and slide, which defendants argued might have a different tension than the actual gun used in the accident, would be rendered inoperable. The jury was thereafter instructed that “[a]n exemplar Model 38 pistol, which is Exhibit Number 279, has been admitted into evidence along with its box and instructions and warnings. [¶] However, since the trigger pull and the slide spring tension on the subject pistol is not the same as the trigger pull or slide spring tension on the exemplar pistol, Exhibit 279 has been modified so that the trigger and the slide are inoperable. [¶] The modification involved drilling a hole in the rear of the slide and inserting a pin to prevent slide movement or trigger movement. The modification may not be permanent. Accordingly, you are not to attempt to pull the trigger or pull the slide to the rear during your deliberations.”

The trial court did not abuse its discretion in admitting the exemplar. It was the same model used in the accident and the jury was informed that there might be differences in tension and that they were not to manipulate the trigger or slide. We fail to see how defendants were prejudiced by admission of the evidence.

6. Order of Presenting Evidence

Defendants further contend that the trial court abused its discretion in denying their request to order defendant Morford to proceed in the production of evidence and closing argument immediately following Maxfield. They argue that the interests of Morford and Maxfield were aligned and that permitting Morford to follow the other defendants served to support Maxfield’s case.

“When several defendants, each having separate defenses, appear by separate counsel, the court must determine their relative order of presentation. (Code Civ. Proc., § 607, subd. 8; see also Evid. Code, § 320.) The reviewing court will uphold such a determination unless abuse of discretion is clear and a miscarriage of justice has

resulted.” (*Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 602.)

The trial court’s ruling here was within its sound discretion. A codefendant in a tort case may legitimately attempt to shift liability to another. (*Diamond Springs Lime Co. v. American River Constructors, supra*, 16 Cal.App.3d at p. 602.) And, the trial court left open the possibility that a defendant could seek rebuttal to Morford’s questioning before Maxfield was allowed redirect examination but defendants did not avail themselves of the opportunity. In denying defendants’ request on the order of presentation, the court stated “if, in fact, there is something that is examined by Mr. Hoffman [counsel for Morford] that you want to go ask, and even before Mr. Ruggieri [counsel for Maxfield] gets back on redirect, I will allow you to do so or any other defense counsel. But I’m not going to — I don’t think anybody’s going to get any real advantage. ¶] It would be no different than Mr. Hoffman didn’t ask any questions, Mr. Ruggieri goes back and revisits following your questions.” Defendants fail to demonstrate that the court abused its discretion in ruling on the order of presentation.

B. Substantial Evidence

Defendants contend that the evidence is insufficient to support the verdict because the opinions of Maxfield’s expert witnesses were not supported by the testimony of the percipient witnesses to the accident. In particular, they assert that there was no substantial evidence that an inadvertent trigger pull caused the accident because Morford testified that he did not pull the trigger of the gun.

It is well settled that in reviewing a challenge to the sufficiency of the evidence to support a verdict, “[o]ur authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. . . . We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court’s findings and decision, resolving every conflict in favor of the judgment.” (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

Here, expert testimony established that Morford convulsively or accidentally grasped the gun so that his finger came in contact with the gun's trigger pull. Contrary to defendants' characterization of Morford's testimony, Morford acknowledged that he was holding the gun and pulling the slide back when the gun discharged. He also admitted that it was possible that he may have accidentally put his finger on the trigger. Hence, the jury was permitted to conclude that the accident occurred when Morford inadvertently pulled the gun's trigger.

III. DISPOSITION

The judgment is affirmed. Maxfield is to recover his costs on appeal.

RIVERA, J.

We concur:

KAY, P.J.

REARDON, J.