In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00288-CV

EMIL DEON NELSON, Appellant

V.

DONALD W. DUESLER, Appellee

On Appeal from the County Court at Law No. 1
Jefferson County, Texas
Trial Cause No. 110978

MEMORANDUM OPINION

Appellant Emil Deon Nelson appeals the trial court's ruling that prevented him from presenting any evidence at trial as a result of his alleged failure to properly respond to discovery requests of appellee Donald W. Duesler. The trial court rendered an instructed verdict and a take-nothing judgment against Nelson. Because Nelson failed to preserve error, we must affirm the judgment of the trial court.

Duesler represented Nelson in divorce proceedings from December 1, 2006, through March 2008. In 2008 Duesler filed suit against Nelson as a result of Nelson's failure to pay Duesler $12,650 for legal services rendered by Duesler in connection with

Nelson's divorce. Nelson answered the suit and filed a counterclaim asserting causes of action for legal malpractice, negligent misrepresentation and breach of fiduciary duty. The case was called for trial in March 2009. Nelson represented himself pro se at trial. Duesler was represented by counsel.

The record establishes that after Duesler presented his evidence and moved for an instructed verdict, the following exchange took place:

> [Duesler's Counsel]: Your Honor, at this time we would rest, except for rebuttal, or whatever; but we're asking the Court to give an instructed verdict due to the circumstances that Mr. Nelson flat refused to answer our discovery request that we sent him back in January.
>
> THE COURT: All right. . . . We'll do that out of the presence of the jury.
>
> [Duesler's Counsel]: . . . I'm just going to make an oral motion. We didn't know what to expect this morning. But we're going to move the Court to prevent Mr. Nelson from putting on any evidence because he did not respond in a timely fashion to our request for admissions nor our interrogatories or request for production. So, it prevented us from examining any evidence he had, preparing for trial.
>
> And under the rules, I think it's Texas Rules of Civil Procedure 190.3, he must sign interrogatories and admissions and stuff like that under oath and return them to our office . . . within 30 days; and that 30 days would have been up March 1st. I sent it to him on January the 30th. I believe; and he signed for it January 31st. He failed to list any witness or tell us anything about any of the case in chief.
>
> So, under the rules, we're asking the Court to recognize the Texas Rules of Civil Procedure and prevent him from putting on any evidence.
>
> . . . .
>
> THE COURT: All right. Do you have any response?
>
> MR. NELSON: No, sir.

THE COURT: Well, the Court is going to grant the motion.

You understand what happened here, don't you?

MR. NELSON: I can't present any evidence?

THE COURT: Correct.

MR. NELSON: Do I get to testify myself?

THE COURT: No, sir.

Thereafter the trial court rendered an instructed verdict in favor of Duesler and awarded damages in the amount of $12,650 and ordered that Nelson take nothing by his counterclaims.

On appeal Nelson contends that after the case was called for trial, the trial judge called Duesler, Duesler's counsel, and Nelson to his chambers to discuss the case. During the in-chambers discussion, Duesler, for the first time, complained that Nelson's discovery objections and responses were deficient. According to Nelson, instead of holding a hearing on the discovery objections and responses, the trial judge "without a written motion or notice to Nelson" ruled that Nelson would not be allowed to present any evidence at trial. Therefore, Nelson asserts "[t]he case proceeded to trial with the understanding that Nelson would not be allowed to present any evidence whatsoever per the Trial Judge's ruling." The alleged pretrial ruling was not made part of the record.

In two issues, Nelson appeals the trial court's judgment. Nelson argues (1) the trial court erred in sanctioning Nelson because Nelson's discovery responses were proper and Duesler waived discovery by not requesting a hearing and securing a pretrial ruling,

and (2) the trial court effectively issued an improper death penalty sanction. Duesler argues that the trial court's actions were proper, and to the extent they were erroneous, Nelson has failed to preserve his issues for appeal.

It is not enough for Nelson to show that the trial court erred in its discovery ruling; he must also show harm to obtain a reversal on appeal. *See Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009). "Harmful error is error that 'probably caused the rendition of an improper judgment' or 'probably prevented the appellant from properly presenting the case to the court of appeals.'" *Id*. (quoting TEX. R. APP. P. 44.1(a)). Moreover, the Texas Rules of Evidence provide that error may not be predicated upon a ruling that excludes evidence unless a substantial right of the party is affected and "the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked." TEX. R. EVID. 103(a)(2). "To adequately and effectively preserve error, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility." *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.--Houston [14th Dist.] 2002, pet. denied). We note that the rules do not require formal proof. S*ee id*. A brief factual recitation of what the excluded testimony would show is sufficient to preserve error. *Id*. Without an offer of proof, the appellate court cannot determine whether the exclusion of evidence was harmful. *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 335 (Tex. App.--Dallas 2008, no pet.).

When no offer of proof is made in the trial court, the complaining party must

introduce the excluded testimony into the record by filing a formal bill of exception within thirty days of filing the notice of appeal. *Id.*; *see also* TEX. R. APP. P. 33.2. The bill must set forth the precise evidence the party desires admitted. *In re Estate of Miller*, 243 S.W.3d 831, 837-38 (Tex. App.--Dallas 2008, no pet.). "Failure to demonstrate the substance of the excluded evidence results in waiver." *Bobbora*, 255 S.W.3d at 335; *see also Sw. Country Enters., Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 494 (Tex. App.--Fort Worth 1999, pet. denied).

In addition, to preserve an issue for appellate review, a party must make a timely request, motion, or objection, state the specific grounds thereof, and obtain a ruling. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999) (citing TEX. R. APP. P. 33.1(a)). This rule exists so that the trial court will have the opportunity to correct any errors without the necessity and cost of an appeal. *In re Estate of Womack*, 280 S.W.3d 317, 321 (Tex. App.--Amarillo 2008, pet. denied). An objection is considered timely "when asserted at the earliest opportunity, or when the potential error becomes apparent." *Hoxie Implement Co. v. Baker*, 65 S.W.3d 140, 145 (Tex. App.--Amarillo 2001, pet. denied). The requirement--that a complaining party act timely--requires that a party timely assert both its objection and the legal basis for its objection. *Id.* "[I]ncluding the objection and grounds in a motion for new trial does not satisfy the contemporaneous objection rule if the complaint could have been urged earlier." *Id.*

We recognize that Nelson represented himself pro se in the trial court proceedings. Nevertheless, Texas law requires that pro se litigants be held to the same standard as

licensed attorneys and comply with all applicable rules of procedure. *Giddens v. Brooks*, 92 S.W.3d 878, 880-81 (Tex. App.--Beaumont 2002, pet. denied); *see also Canton-Carter v. Baylor College of Med.*, 271 S.W.3d 928, 930 (Tex. App.--Houston [14th Dist.] 2008, no pet. h); *Martinez v. El Paso County*, 218 S.W.3d 841, 844 (Tex. App.--El Paso 2007, pet. struck); *Clemens v. Allen*, 47 S.W.3d 26, 28 (Tex. App.--Amarillo 2000, no pet.); *Scoville v. Shaffer*, 9 S.W.3d 201, 204 (Tex. App.--San Antonio 1999, no pet.). Only in the exceptional circumstance when a rule itself turns on an actor's state of mind may the application of this rule require a different result when the actor is not a lawyer. *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005).

Assuming, without deciding, that the trial court erred in preventing Nelson from presenting evidence in his defense,[1] we have no way of determining on appeal whether any such error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). Nelson failed to make an offer of proof or file a bill of exceptions regarding the testimony or evidence he would have offered in support of his defense. *See* TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.2. Nelson failed to preserve his complaint that the trial court erred in its discovery ruling. In addition, Nelson had the opportunity at trial to object or respond to Duesler's request that the trial court exclude evidence and render a directed verdict on the basis that he should be allowed to present evidence in

[1] Rule 193.6(a) of the Texas Rules of Civil Procedure expressly excepts a named party from being excluded from testifying at trial when witnesses are not identified in response to proper discovery requests. TEX. R. CIV. P. 193.6(a).

support of his counterclaims. However, Nelson did not object on this basis or any other. *See* TEX. R. APP. P. 33.1(a). Significantly, when the trial court asked Nelson if he had any response to counsel's motion, Nelson replied that he did not.[2] *See Hoxie*, 65 S.W.3d at 145 ("[A] motion for new trial does not satisfy the contemporaneous objection rule if the complaint could have been urged earlier."); *see also Sw. Country*, 991 S.W.2d at 493-95 (holding defendant/appellant failed to preserve complaint that trial court's ruling constituted improper death penalty sanctions under similar circumstances). Nelson did not contest the ruling at a time when the court could have corrected the error. *See In re Estate of Womack*, 280 S.W.3d at 322. Generally, "when evidence is excluded by the trial court, the proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal." *Bobbora*, 255 S.W.3d at 335.

We conclude that Nelson failed to preserve his issues for review. *See* TEX. R. APP. P. 33.1, 33.2. We overrule both issues and affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on March 26, 2010
Opinion Delivered May 6, 2010

Before Gaultney, Kreger, and Horton, JJ.

[2] Nelson was allowed to cross-examine Duesler but failed to elicit any evidence either in support of his counterclaims or any defense to Duesler's cause of action.