NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1985

ENVAR YOBANI FIGEROHA

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND CAROL C. BILLON

Judgment Rendered: May 3, 2012

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2009-13176

Honorable William J. Burris, Judge Presiding

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* * * * *

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Parro, J., concurs.

HIGGINBOTHAM, J.

Plaintiff, Envar Figeroha,[1] appeals from a judgment in favor of defendants, State Farm Mutual Automobile Insurance Company (State Farm) and Carol Billon. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

This matter arises out of a collision between a motor vehicle driven by Billon and a bicycle ridden by Figeroha that occurred on June 28, 2008, on U.S. Highway 190 (Hwy. 190) in Mandeville, Louisiana. As a result of the accident, Figeroha suffered physical injury. On June 3, 2009, Figeroha filed the instant suit in the 22nd Judicial District Court naming as defendants State Farm and its insured Billon. On July 29, 2009, State Farm and Billon answered the suit and reconvened for property damage to Billon's vehicle. The matter proceeded to a jury trial after which the jury returned a verdict finding that Billon was not negligent and awarding her $500.00 for her deductible and $4159.16 for her property damage.

Figeroha appealed alleging five assignments of error: (1) the trial court erred by admitting into evidence the deposition testimony of Officer William Foil without defendants' demonstrating they made a diligent and good faith effort to obtain his presence at trial and without defendants' listing Officer Foil on the will call list; (2) the trial court erred by allowing into evidence the deposition testimony of Officer Foil who was not qualified as an expert and was not offered as an expert, even though his testimony contained inadmissible expert opinion as to liability and/or causation and/or accident reconstruction; (3) the trial court erred by admitting into evidence the deposition testimony of Officer Foil, over the objection of the plaintiff, that contained inadmissible reference to his issuance of a traffic citation to plaintiff and Figeroha's payment of the fine thereafter, even though the

[1] Figeroha filed a motion to strike on January 3, 2012, requesting that the last paragraph of page two and the first paragraph of page three be stricken from State Farm's brief. His motion to strike is granted as requested. See Uniform Rule 2-12.5 Louisiana Courts of Appeal.

final disposition of the citation was *nolo contendere*; (4) the trial court erred by refusing plaintiff's request to give a proper limiting jury instruction advising the jury that Officer Foil was not an accident reconstruction expert and that any opinion or action on his part that may suggest his opinion was to be disregarded; and (5) the trial court erred by refusing plaintiff's request to give a jury instruction advising that the uncontradicted expert testimony should be accepted as true in the absence of circumstances in the record that cast suspicion on the reliability of that testimony.

The accident giving rise to this litigation occurred on Hwy. 190 near its intersection with Wilkinson Street in Mandeville, Louisiana. Figeroha was riding his bicycle on Wilkinson Street and attempting to cross Hwy. 190 when he was struck by a vehicle driven by Billon. There was a stop sign for Figeroha who was traveling northbound on Wilkinson Street, but no traffic controls or stop sign for Billon, who was traveling westbound on Hwy. 190. Figeroha testified that he did not remember anything about the accident. He did not recall if he stopped at the stop sign or if he looked right or left. Billon testified that she did not see Figeroha until right before impact. She stated that as she was headed westbound a large vehicle to her left, headed eastbound, passed her and immediately after the vehicle passed her the bicycle was in front of her left bumper. According to Billon, she immediately slammed on her brakes and veered right in an effort to avoid hitting Figeroha. Mr. Matthew Todd Shreve, who was travelling in the opposite direction from Billon, witnessed the accident. He testified that Figeroha was traveling on his bike at a nice, steady speed and did not stop or look left or right. After the accident, he went to Billon to assure her she had done nothing wrong. Jeff Hudman also witnessed the accident. According to Hudman, Figeroha was peddling at a pretty good speed and never slowed down, stopped, or looked left or right. He stated, "[h]e just crossed the road like he was crossing the road and never looked

either way." Other witnesses to the accident testified about what they saw that day; however; no one testified that Figeroha stopped at the stop sign, or that Billon should have seen him prior to hitting him.

Dr. Frank Griffith, a physics professor at the University of New Orleans who was accepted as an expert in physics with accident reconstruction experience, testified on behalf of Figeroha. He used the measurements, witnesses' testimony, and properties of the vehicles to reconstruct the accident. He determined that under none of the scenarios presented to him by the different witnesses was the accident unavoidable.

Officer Foil's deposition testimony was read into the record. According to Officer Foil, he has been a police officer for seventeen years, has investigated traffic collisions for approximately ten years, has been through accident reconstruction certification, and handles all traffic fatalities or serious injury crashes for the city of Mandeville. He was not offered or accepted as an expert. He arrived at the scene soon after the accident. He saw the location and condition of the bicycle and vehicle, made measurements, and took many photographs. He also interviewed eye witnesses to the accident, Figeroha, and Billon. In his deposition testimony, he said he cited Figeroha for failure to yield, but did not cite Billon for any violation.

The first four of Figeroha's assignments of error relate to the deposition testimony of Officer Foil that was read into the record.

STANDARD OF REVIEW

Initially, the standard of review for evidentiary rulings of a trial court is abuse of discretion; the trial court's ruling will not be disturbed unless it is clearly erroneous. **Brandt v. Engle**, 2000-3416 (La. 6/29/01), 791 So.2d 614, 620-621. If the trial court has abused its discretion in its evidentiary rulings, such that the jury verdict is tainted by the errors, the appellate court should conduct a *de novo*

review. See **McLean v. Hunter**, 495 So.2d 1298, 1304 (La. 1986). Errors are prejudicial when they materially affect the outcome of the trial and deprive a party of substantial rights. **Evans v. Lungrin**, 97-0541, 97-0577 (La. 2/6/98), 708 So.2d 731, 735. Thus, a *de novo* review should not be undertaken for every evidentiary error, but should be limited to errors that interdict the fact-finding process. **Wingfield v. State, Department of Transportation and Development**, 2001-2668, 2001-2669, (La. App. 1st Cir. 11/8/02), 835 So.2d 785, 799, writs denied, 2003-0313, 2003-0339, 2003-0349 (La. 5/30/03), 845 So.2d 1059-60, cert. denied, 540 U.S. 950, 124 S.Ct. 419, 157 L.Ed.2d 282 (2003).

In reaching a decision on an alleged evidentiary error, the court must consider whether the challenged ruling was erroneous and whether the error prejudiced the adverse party's cause, for unless it did, reversal is not warranted. **Wallace v. Upjohn Co.**, 535 So.2d 1110, 1118 (La. App. 1st Cir. 1988), writ denied, 539 So.2d 630 (La. 1989); See La. Code Evid. art. 103. Moreover, the party alleging error has the burden of showing the error was prejudicial and had "a substantial effect on the outcome of the case." **Brumfield v. Guilmino**, 93-0366 (La. App. 1st Cir. 3/11/94), 633 So.2d 903, 911, writ denied, 94-0806 (La. 5/6/94), 637 So.2d 1056. Ultimately, the determination is whether the error, when compared to the record in its totality, has a substantial effect on the outcome of the case. **Wallace**, 535 So.2d at 1118. Absent a prejudicial error of law, this Court is not required to review the appellate record *de novo*. **Brumfield**, 633 So.2d at 911 (citing **Rosell v. ESCO**, 549 So.2d 840 (La.1989)).

DISCUSSION

In his first assignment of error, Figeroha claims that the trial court erred by admitting the deposition of Officer Foil without the defendants' demonstrating that they made a good faith effort to obtain his presence at trial. Figeroha's attorney,

Mr. Redmann stated the following in a discussion with the court regarding Officer Foil's deposition:

> Mr. Redmann: Ms. Simon wants to have his deposition introduced. I said its fine for me except I don't want a police who admits under oath that he is not an academic construction expert, and so therefore I don't think he should - his testimony in the deposition where he decides who he thinks is at fault, I don't think that testimony should be read to the jury.

Mr. Redmann also had the following conversation with the court.

> The Court: It seems to me like now you're objecting to the introduction of the deposition.
>
> Mr. Redmann: No, no.
>
> The Court: I've dealt with that.
>
> Mr. Redmann: No, Your Honor, I'm not trying to say that.

The record before us does not reflect that Figeroha objected to the use of Officer Foil's deposition in lieu of his appearance. He only objected to specific sections of the deposition. Figeroha's attorney did complain that he had limited time to go through the deposition and determine what he was objecting to; however, he did not object to the court reading the deposition. A contemporaneous objection to the disputed evidence must be entered on the trial record in order to preserve the objection for appellate review. **Harris v. State ex rel. Dept. of Transp. and Development**, 2007-1566 (La. App. 1st. Cir. 11/10/08), 997 So.2d 849, 868, writ denied, 2008-2886 (La. 2/6/09), 999 So.2d 785. Figeroha failed to enter an objection on the record to the reading of Officer Foil's deposition; therefore, he did not preserve the objection for appeal. This assignment of error is without merit.

Figeroha's second and third assignments of error relate to the admission of portions of the deposition of Officer Foil. Figeroha's attorney objected to segments of the deposition of Officer Foil on the grounds of competency. According to Figeroha's attorney, Officer Foil's deposition testimony included

expert opinion as to causation, and he was not qualified as an expert in accident reconstruction.

Louisiana Code of Evidence article 701 permits non-expert testimony in the form of opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. Moreover, opinion testimony has been permitted by non-expert police officers based on training, investigation, perception of the scene, and observation of physical evidence. **Cooper v. Louisiana State Department of Transportation and Development**, 2003-1847 (La. App. 1st Cir. 6/25/04), 885 So.2d 1211, 1214, writ denied, 2004-1913 (La. 11/8/04), 885 So.2d 1142. However, if a law officer is not qualified as an accident reconstruction expert, his testimony in the form of opinions is limited to those opinions based upon his rational perception of the facts and recollections pertaining to the scene of the accident. **Whetstone v. Dixon**, 616 So.2d 764, 768 (La. App. 1st Cir.), writs denied, 623 So.2d 1333 (La. 1993).

Prior to Officer Foil's deposition being read into the record, and outside the presence of the jury, the attorneys for both sides read through the deposition with the judge, and he ruled on each of their objections. The trial court sustained numerous objections raised by Figeroha's attorney on grounds of competency and redacted those sections of the deposition before reading it to the jury. Figeroha's brief does not specify what statements by Officer Foil he contends were improper expert opinions. Figeroha claims that there were certain comments as to fault and causation he missed when going through the deposition with the court. We find the trial court provided ample time to go through the deposition with the attorneys, and we will not address anything that was not objected to by Figeroha's attorney.

The trial court overruled one of Figeroha's attorney's objections regarding Officer Foil's competency. In the deposition, when Officer Foil was asked about

how far Figeroha had traveled from impact to final rest, he stated, "if you have two forces that are going in two different directions, they share the same direction momentarily and then they release ... I really, strongly felt that he actually rolled over the top of the vehicle." The judge overruled the objection to this portion of the deposition and stated, "I think that's something that even a lay witness could give an opinion as." We agree. After careful review of the record, we find Officer Foil's testimony in his redacted deposition was limited to opinions based on his rational perceptions of the physical evidence of the accident scene. It did not cross the line into the realm of "scientific, technical, or other specialized knowledge" which is the hallmark of expert testimony. **State v. LeBlanc**, 2005-0885 (La. App. 1st Cir. 2/10/06), 928 So.2d 599, 604. Therefore, we find no error in the trial court's admission of the evidence objected to by Figeroha's attorney.

Counsel for Figeroha also made an Article 403[2] objection to Officer Foil's reference to the citation he issued to Figeroha for failure to yield. The trial court overruled his objection. The Louisiana Supreme Court stated the following regarding admissibility of a traffic citation in a civil case:

> In civil cases it is inadmissible to show that one or the other of the parties was charged by the police with a traffic violation or convicted. This would be merely the opinion of the officer or the judge, as the case might be. Trials and convictions in traffic courts and possibly in misdemeanor cases generally are not always trustworthy for they are often the result of expediency or compromise. To let in evidence of conviction of a traffic violation to prove negligence and responsibility in a civil case would unduly erode the rule against hearsay.

Ruthardt v. Tennant, 252 La. 1041, 1047- 48, 215 So.2d 805, 808 (La. 1968).

Considering the holding of the supreme court, we find the trial court abused its discretion in overruling Figeroha's objection to Officer Foil's testimony

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[2] Louisiana Code of Evidence article 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

regarding the issuance of a citation to Figeroha. We agree with Figeroha's contention that the admission into the record testimony that he was issued a citation was in error, and the objection should have been sustained. However, we must determine whether the error prejudiced Figeroha's cause. As the party challenging the evidentiary ruling, it is Figeroha's burden to prove that, when compared with the record in its totality, the complained-of ruling was prejudicial and had a substantial effect on the outcome of the case. La. C.E. art. 103; **Emery v. Owens-Corporation**, 2000-2144 (La. App. 1st Cir. 11/9/01), 813 So.2d 441, 449, writ denied, 2002-0635 (La. 5/10/02), 815 So.2d 842. There is ample evidence in the record, even disregarding Officer Foil's statement about the issuance of a citation to support the jury's conclusion. There were two independent eye-witnesses who testified Figeroha failed to stop at the stop sign. There was no evidence presented to the contrary. Further, Officer Foil did note in his deposition that "Law enforcement is not equipped to handle degree of negligence, I think that's up to the jury ultimately." Considering the record as a whole, we find Figeroha did not meet his burden of proving the ruling was prejudicial and had a substantial effect on the outcome of the case. Thus, a *de novo* review is not warranted.

In Figeroha's final two assignments of error, he contends that the trial court erred in refusing to give jury instructions advising the jury that (1) Officer Foil was not an expert, and that any testimony that may suggest an opinion should be disregarded, and that (2) uncontradicted expert testimony should be accepted as true in the absence of circumstances in the record that cast suspicion on the reliability of that testimony.

Louisiana Code of Civil Procedure article 1792(B) requires that a trial judge instruct the jury on the law applicable to the cause submitted to them. The trial judge is responsible for reducing the possibility of confusing the jury and may

exercise the right to decide what law is applicable and what law it deems inappropriate. **Wooley v. Lucksinger**, 2009-0571 (La. 4/1/11), 61 So.3d 507, 573. The question considered on review is whether the trial judge adequately instructed the jury. See **Adams v. Rhodia, Inc.**, 2007-2110 (La. 5/21/08), 983 So.2d 798, 804.

Adequate jury instructions are those that fairly and reasonably point out the issues and which provide correct principles of law for the jury to apply to those issues. While the trial judge must correctly charge the jury, the trial judge is under no obligation to give any specific jury instructions that may be submitted by either party. However, if the trial court omits an applicable, essential legal principle, its instruction does not adequately set forth the issues to be decided by the jury and may constitute reversible error. **Adams**, 983 So.2d at 804.

Nonetheless, an appellate court must exercise great restraint before it reverses a jury verdict because of erroneous jury instructions. Trial courts are given broad discretion in formulating jury instructions, and a trial court judgment should not be reversed so long as the charge correctly states the substance of the law. **Adams**, 983 So.2d at 804.

In the instant case, the following jury instruction was given: "If a witness was not accepted as an expert, he or she cannot express an opinion in an area that requires particular scientific, technical, or specialized knowledge." Figeroha's attorney objected stating that the language "is not as clear and as strong as [Figeroha] would like it to be." The trial court noted that to say anything further would have been a comment by him. Figeroha contends that it was essential to instruct the jury that Officer Foil was not admitted as an expert. We disagree; there is nothing in the redacted deposition of Officer Foil or the trial transcript that indicated to the jury that Officer Foil was accepted as an expert. We find the trial

court adequately and correctly instructed the jury as to the law regarding opinions of non-expert witnesses. Therefore, Figeroha's assignment of error lacks merit.

Figeroha's attorney also objected to the court's not including the following submitted jury charge:

> While uncontradicted expert testimony is not binding on the factfinder, such testimony should be accepted as true in the absence of circumstances in the record that cast suspicion on the reliability of that testimony. However, the value of the expert's opinion depends on the existence of the facts on which the opinion is predicated.

In declining to give the jury the proposed instruction, the trial court stated "the uncontradicted expert testimony is not binding on the finder ... I have found it was fairly included in the general charge." Further the trial court noted it found there was some contradiction. Figeroha challenges this ruling, contending that Dr. Griffith was the only expert tendered, and defendant offered no one to refute his testimony.

This language in the jury charge appears in **Mathews v. Dousay**, 96-858 (La. App. 3rd Cir. 1/15/97), 689 So.2d 503, 510. Although we acknowledge that this jury instruction is a correct statement of the holding in the third circuit case, we do not find it was an essential jury instruction. A fact finder may accept or reject the opinion expressed by an expert witness, in whole or in part. **Ryan v. Zurich American Insurance Company**, 2007-2312 (La. 7/1/08), 988 So.2d 214, 222. The trial court instructed the jury that a witness is presumed to speak the truth and that they could accept or reject the witnesses testimony. Additionally, the jury was instructed that expert opinion should be given the weight they think it deserves and if that testimony is not based on sufficient education or experience or the reasons given in support of the opinion are not sound or are outweighed by other evidence the jury may disregard the opinion. On review of the jury instructions as a whole, the instructions given by the trial court adequately set forth the applicable law. Further, under the particular facts of this case, we cannot conclude that the

trial court erred in refusing to give the requested jury charges. Accordingly, we find no merit to this assignment of error.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court and grant Figeroha's motion to strike as requested. All costs of this appeal are assessed to Envar Figeroha.

MOTION TO STRIKE GRANTED; AFFIRMED.