

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA09-460

TROY BLANKENSHIP

APPELLANT

V.

OWEN KELLY, M.D., and RUSSELL B.
ALLISON, M.D., P.A. d/b/a THE
ARKANSAS ORTHOPAEDIC
INSTITUTE

APPELLEES

Opinion Delivered April 21, 2010

APPEAL FROM THE POPE COUNTY
CIRCUIT COURT
[NO. CV 2006-213]

HONORABLE JAMES D. KENNEDY,
JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

This appeal follows a defendant’s verdict in a medical-malpractice case. Appellant Troy Blankenship argues that the trial court erred in excluding as hearsay the proffered testimony of Tammy Blake, Nathan Cunningham, Tommy Blankenship, and Marie Blankenship. We affirm.

Blankenship is a thirty-nine-year-old engineer and co-owner of a software business. On November 5, 2005, he fell and suffered a compound fracture of two bones in his left forearm. He presented for treatment at St. Mary’s Hospital emergency room in Russellville. Appellee Owen Kelly, an orthopaedic surgeon, operated on Blankenship at St. Mary’s. According to his postoperative notes, Kelly debrided the wound, then attached metal plates to both the radius and the ulna. After attaching the plates, Kelly irrigated the site, stapled the skin, and applied a sterile dressing and splint. He specifically stated that “the compartments were soft after

surgery and neurovascular status was not compromised.” Blankenship was placed on a prophylactic antibiotic.

Blankenship remained in the hospital until the morning of November 7, 2005. While there is a dispute about the severity of his discomfort, both sides acknowledged that Blankenship complained that his cast was too tight. Prior to discharge, Kelly made a cut in the cast to make it more comfortable. Yet, by all accounts, Blankenship’s discomfort continued despite strong pain medication. Just before midnight on November 8, 2005, Blankenship called the emergency room at St. Mary’s. According to Blankenship, he felt a “release” and some liquid flowing down his arm. The pain continued, but he felt less “pressure.” The discharge was malodorous—Blankenship described it as smelling like “catfish bait.” Kelly was the on-call orthopaedic surgeon that night, but was at his home when Blankenship called. Blankenship described his symptoms to Kelly, expecting to be seen by Kelly in the emergency room that evening. There is a dispute as to whether he described the discharge in his cast as smelling like “catfish bait”; Kelly claims that he never heard the words “catfish bait”; although he admitted that Blankenship told him that there was “an odor from his cast.” There is also a dispute as to whether Kelly gave Blankenship the “option” to be seen that evening or to wait until the next day, as Kelly recalls, or whether Kelly simply put off seeing Blankenship until regular office hours the next day. It was established that Kelly subsequently called Blankenship back to make sure that Blankenship understood that the appointment was for 12:30 p.m. in Kelly’s clinic, not 12:30 a.m. in the emergency room.

Blankenship presented at Kelly's clinic. When Kelly removed the cast, he discovered that a virulent infection was raging in Blankenship's arm. The forearm muscles were literally being eaten by bacteria. Blankenship testified that Kelly was shaken by what he saw, but Kelly professed to be far more insouciant. Nonetheless, Kelly opined at the time that Blankenship was suffering from "compartment syndrome."¹ Later Kelly would discard that diagnosis. However, Kelly immediately took Blankenship to surgery to debride the wound. Kelly performed two other surgeries in an attempt to stem the tide of infection, but by his own estimation, he was clearly out of his depth. Infectious-disease experts at UAMS were enlisted to take over the case. Ten more surgeries were performed to fight the infection and to try to restore some function to Blankenship's arm. According to Blankenship, he made 48 round trips to UAMS, 156 physical therapy sessions at Baptist Medical Center, and numerous doctor visits. He estimated that his care involved 24,989 miles of travel.

Blankenship brought a medical-malpractice suit against Kelly. His theory of the case was that he developed compartment syndrome; that he complained of tightness and pain in his arm, which were important symptoms of the malady; and that Kelly failed to timely treat his condition. Kelly denied that Blankenship developed compartment syndrome and blamed the

¹Blankenship's expert, Dr. John Anthony Ogden, defined compartment syndrome as a build up of pressure in an area of the body. Dr. Ogden further stated that all muscles are surrounded by tissue called fascia, which is like an envelope that wraps around the muscle. It has limited space for expansion. When fluid accumulates for any one of a variety of reasons, it damages the muscles, causes them to lose their normal blood supply, and eventually causes the death of muscle tissue. Dead muscle tissue provides a feast for bacteria that otherwise would not pose a threat to healthy tissue.

horrible outcome on a strange combination of different strains of flesh-eating bacteria that somehow appeared in the wound.

As noted previously, Blankenship is appealing the exclusion of portions of the testimony of Tammy Blake, Nathan Cunningham, Tommy Blankenship, and Marie Blankenship. The excluded testimony sought to establish two facts. First, through the testimony of all four witnesses, Blankenship sought to prove that he was manifesting the key symptoms of compartment syndrome. Second, through the testimony of Tammy Blake, Blankenship sought to corroborate his testimony that his arm smelled like “catfish bait,” a key symptom that he had a raging infection on the evening of November 8, 2005. We will address these issues in turn.

We first note our standard of review for evidentiary issues. The decision to admit or exclude evidence is within the sound discretion of the trial court, and we will not reverse a trial court’s decision regarding the admission of evidence absent a manifest abuse of discretion. *Teater v. State*, 104 Ark. App. 268, 290 S.W.3d 623 (2009). The threshold requirement for finding reversible error in evidentiary rulings is not simply that the trial court erred in its decision, but rather that the decision was arbitrary and groundless. *Id.* Further, we will not reverse absent a showing of prejudice, as prejudice is not presumed. *Id.*

There is no doubt that the excluded evidence indicating that Blankenship was developing compartment syndrome was relevant. At trial, Kelly testified that he had “a lot of experience with compartment syndrome.” He stated that the symptoms were “pain out of proportion to the injury; unrelenting pain not resolved with pain medication; pallor, which

means coolness of the fingers, pain with passive motion when the fingers are flexed down . . . paralysis . . . and [a] firm compartment.” Accordingly, Blankenship’s complaints about pain and pressure were probative of the issue of whether Kelly was put on notice of compartment-syndrome symptoms and failed to treat Blankenship for that condition.

Importantly, not all evidence relating to this issue was excluded by the trial court. Blankenship testified that he complained that his cast was too tight—he described the sensation as his arm felt like it would “explode.” Further, that testimony was corroborated by Blankenship’s fiancée, Tammy Sue Blake, during her direct examination. Additional corroboration was provided by Kelly’s own testimony that Blankenship complained about the cast being too tight and the fact that Kelly slit the cast prior to discharging Blankenship from the hospital on November 7, 2005. His complaints of pain also appeared in the nursing notes. The trial court excluded as hearsay similar testimony by Blankenship’s friend, Nathan Cunningham, and father, Tommy Blankenship. Further, the trial court stated that similar testimony by these witnesses would be “redundant.” Nonetheless, the trial judge did allow testimony about Blankenship’s complaints of pain and pressure in his arm prior to discharge to be presented by Blankenship’s stepmother, Marie Blankenship, and allowed Kelly’s trial counsel to stipulate that Cunningham heard Blankenship voice his complaints about cast tightness and pain.

Blankenship argues, and we agree, that the trial court erred in excluding as hearsay testimony concerning his complaints of cast tightness and pain. These complaints clearly fall

within the hearsay exception set forth in Rule 803(3), which concerns “Then Existing Mental, or Physical Condition.” It states:

A statement is excluded from the hearsay rule if it is a statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

Blankenship’s complaints about cast tightness and pain are clearly an exception to the hearsay rule as provided by Rule 803(3). However, that does not end our inquiry.

Erroneous evidentiary rulings will not support reversal if the rulings are found to be harmless error. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999). We believe that is the situation here. First, while the erroneous evidentiary rulings may have somewhat disrupted Blankenship’s trial strategy, the issue of whether or not he experienced pain and cast tightness was not really contested. Kelly acknowledged that he was aware of those very conditions prior to discharging Blankenship and, in fact, slit the cast to relieve the tightness. Moreover, essentially the same evidence that Blankenship was complaining about cast tightness and pain was before the jury through the testimony of several witnesses. In this regard, we believe that the trial court’s decision to exclude further testimony on this issue is analogous to the erroneous exclusion of testimony in *Hall v. State*, 286 Ark. 52, 689 S.W.2d 524 (1985), where the supreme court held that such error was harmless.

We next consider the trial court’s exclusion as hearsay Tammy Blake’s testimony concerning what Blankenship reported to Kelly on the evening of November 8, 2005. Of

particular concern is Blankenship's contention that he reported to Kelly that his arm smelled like "catfish bait." As noted above, Kelly denied hearing those words. Again, we agree that the trial court clearly erred when it found the testimony to be hearsay. The statement qualifies as a hearsay exception under Rule 803(3), a then-existing physical condition; 803(1), a present-sense impressions; and 803(4), a statement made for the purpose of medical diagnosis or treatment. Nonetheless, we hold that the erroneous evidentiary ruling does not constitute reversible error.

The record demonstrates that even though Ms. Blake was prevented by the trial court's erroneous hearsay ruling from testifying about what Blankenship told Kelly about his arm, the trial court nonetheless allowed her notes memorializing the conversation to be admitted into evidence. Accordingly, as with the exclusion of Blankenship's complaints of pain and cast tightness, the exclusion of Ms. Blake's live testimony fits within the supreme court's definition of harmless error. *Hall v. State, supra*. Accordingly, we are bound by this precedent.

Affirmed.

ROBBINS and HENRY, JJ., agree.