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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DEVARUS ROBINSON, Appellant, v. POLK COUNTY SCHOOL BOARD, Appellee.	)	Case No. 2D19-421

Opinion filed March 11, 2020.

Appeal from the Circuit Court for Polk County; Steven Selph, Judge.

Isaac R. Ruiz-Carus and Katherine Gannon of Rissman, Barrett, Hurt, Donahue, McLain and Mangan, P.A., Tampa, for Appellant.

Warren Hope Dawson of Dawson & Associates, Tampa, for Appellant.

W.A. "Drew" Crawford and Kevin M. Kohl of Boswell & Dunlap LLP, Bartow, for Appellee.

LUCAS, Judge.

Following a jury verdict that awarded Devarus Robinson damages against the Polk County School Board (School Board) for negligent hiring, supervision, or retention of a football coach, the circuit court granted the School Board's motion for new

trial. Because it appears that the circuit court's order utilized an erroneous legal standard, we reverse the circuit court's order and remand with directions to the circuit court to reinstate the jury's verdict.

Mr. Robinson played football for his high school's team. His coach, who had previously been suspended for hitting another student during a weightlifting competition, apparently used excessively vulgar and abusive language[1] around Mr. Robinson and, according to Mr. Robinson, on numerous occasions pinched or twisted Mr. Robinson's nipple for extended periods of time. When Mr. Robinson reported his coach's conduct in September of 2011, no action was taken against the coach, and Mr. Robinson reported that his playing time in football games was decreased.

Mr. Robinson claimed that he suffered physical and emotional injuries from his coach's actions. He filed a civil complaint against the School Board in 2013. Pertinent here, his complaint included a count alleging the School Board negligently hired, trained, retained, or supervised his coach. That claim proceeded to a jury trial in August 2018. From the limited record we have been provided it appears that the trial featured testimony from Mr. Robinson, the coach, the school's athletic director, and a clinical psychologist retained by the School Board who testified that Mr. Robinson suffered from an anxiety disorder. By all accounts, the evidentiary phase of the trial concluded without any noteworthy incidents. The focus of this appeal is on what purportedly happened in closing arguments.

[1]Some of the more notable examples included, "Oh, I'm your daddy. I done fucked your mama," and "Oh, Bro, tell your auntie that I said I'm coming over tonight . . . you know me and your auntie had sex before."

During his closing argument, Mr. Robinson's attorney outlined the elements of his claim and the evidence at trial he contended supported those elements. With respect to damages, he argued that while there was no disability or physical impairment, Mr. Robinson's nipple had been disfigured and Mr. Robinson had suffered mental anguish and distress. Counsel suggested that $250,000 would have been a reasonable, fair, and just award under the facts of the case.

In its closing argument, the School Board conceded that the coach had, on one occasion, twisted Mr. Robinson's nipple and that that should not have happened, but that the School Board had not been negligent in hiring or retaining the coach. The School Board argued that Mr. Robinson's counsel had mischaracterized some of the evidence that had been presented. And the School Board focused on what it perceived to be the lack of evidence supporting Mr. Robinson's claim that his nipple was scarred or permanently swollen. As the School Board's attorney pointed out:

> What about this damage to Mr. Robinson's nipple? We've been told that it's bigger than the other one. That's not difficult to show you. Where's the medical records? Where's the doctor appointment? Where's a photograph? Where is him just showing you that it's bigger than the other? It's not difficult to prove this. But yet they want you to take it [at] face value.

In rebuttal, Mr. Robinson's attorney appeared to take issue with the School Board's assertion that he had mischaracterized any of the evidence. Then the following somewhat enigmatic exchange is reported in the transcript:

> MR. RUIZ-CARUS: [I]n this case there isn't just a physical injury. And I could – and His Honor is not going to let me do it –
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> THE COURT: I'm not going to let you talk about what you could do. We're going to talk about what the evidence is.

> MR. RUIZ-CARUS: All right, your Honor.
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> THE COURT: If you're going to go beyond the evidence, I'm going to call you down.
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> MR. RUIZ-CARUS: I understand. So I'll talk about the injuries that you have heard about. You heard Devarus testify to you about what occurred and how his nipple looks. You heard him say he sent photos, which are attached to the email, that were sent to the school board. Those are the physical injuries, but this case includes injuries that are not just physical there's invisible injuries too, the mental anguish.

Whatever may have precipitated the presiding judge's interruption is not recorded or mentioned in the transcript. The School Board did not raise an objection or attempt to describe for the record what may have been happening in the courtroom. Indeed, it appears the School Board remained completely silent throughout the entirety of Mr. Robinson's closing rebuttal statement. Nor did the presiding judge report what he perceived, or what was occurring in the courtroom, or why he had interrupted Mr. Robinson's attorney. The rebuttal closing argument concluded shortly after this relatively brief exchange.

The jury returned a verdict in Mr. Robinson's favor, awarding him $125,000 in general damages. On September 4, 2018, the School Board filed a motion for a new trial. In its motion, the School Board alleged, for the first time, that during the plaintiff's rebuttal closing, "[a]s Plaintiff's counsel said '*And I could*' he gestured towards the Plaintiff, who on cue, stood up and began unbuttoning his shirt as if he was going to expose his nipple." This "improper statement/act," the School Board charged, was "preplanned and well-orchestrated" to create the impression that Mr. Robinson would show his nipple to the jury after the conclusion of the evidence, or at least would have

been willing to do so were he not prohibited by the court or the objection of the School Board. The School Board concluded that this "improperly crystallized to the jury that the nipple was indeed damaged and at the same time vilified the Defendant in their minds," such that the School Board was deprived of a fair trial.

Some three months later, the circuit court convened a hearing on the School Board's motion. There were no affidavits filed in support of the School Board's motion, nor did the School Board ask to proffer any testimony. At the outset of the hearing, the School Board's attorney admitted he had no eyewitness to verify what was alleged in the motion for new trial, but he renewed his allegation that Mr. Robinson's attorney had staged Mr. Robinson's actions so that the jury would believe it was "actively being prevented from seeing a key piece of evidence in this case." Mr. Robinson's counsel vehemently denied that he had orchestrated any kind of plan or scheme but noted that he had his back to his client the entire time he was presenting his closing rebuttal. Moreover, he noted that most of his rebuttal concerned the emotional impact Mr. Robinson had suffered as opposed to his physical injuries.

At the hearing, the judge who had presided over the trial stated he had seen Mr. Robinson stand up during the closing rebuttal and that it "looked like he was going to open his shirt." The court then elaborated:

> I do recall when that – statements were made. And by the time you [School Board's counsel] stood up to make your objection, I noticed that Mr. [Robinson] was standing up about that same time like he was going to show his – left nipple, I think, was the big center of attention at that time in the case of what was being referred to. And he was going to – it looked like he was going to try to show it. And then I can't remember; either his counsel or somebody motioned for him to sit down at that point.

Without making any further findings (beyond stating what it had observed Mr. Robinson doing during the closing rebuttal)[2] the court concluded: "I'm going to grant the motion for new trial. It's a close call here. I think I can almost flip a coin on this. But I'm going to grant it."

On January 25, 2019, the court entered a written order granting the School Board's motion for new trial based upon its ruling at the hearing. Mr. Robinson has filed this timely appeal of the court's order.

Our opinion in Carnival Corp. v. Jimenez, 112 So. 3d 513 (Fla. 2d DCA 2013), set forth a cogent summary of the law on this issue. In Jimenez, we explained at some length how trial courts should consider a motion for new trial based on allegedly improper comments or conduct, the substantive test and findings that should attend that consideration under the Florida Supreme Court's precedents, and how an appellate court should review a trial court's ruling on such a motion:

> Generally, improper comments by counsel during closing argument may provide a ground on which a trial court may properly grant a motion for a new trial. Mercury Ins. Co. of Fla. v. Moreta, 957 So. 2d 1242, 1250 (Fla. 2d DCA 2007) (citing Allison Transmission, Inc. v. J.R. Sailing, Inc., 926 So. 2d 404, 407 (Fla. 2d DCA 2006)). Instances of attorney misconduct during trial may also warrant the grant of a new trial. Sullivan v. Kanarek, 79 So. 3d 900, 906 (Fla. 2d DCA 2012); see, e.g., Irizarry v. Moore, 84 So. 3d 1069, 1072 (Fla. 5th DCA 2012). "If the issue of an opponent's improper argument [or conduct] has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the [objecting] party its right to a fair trial.' " Engle v. Liggett

[2]The presiding judge also inquired about the evidence of permanent injury that had been presented to the jury and whether there were any photographs of the nipple in evidence before the jury but did not make any findings about how the state of the evidence influenced the court's ruling on the motion.

> Grp., Inc., 945 So. 2d 1246, 1271 (Fla. 2006) (quoting Tanner v. Beck, 907 So. 2d 1190, 1196 (Fla. 3d DCA 2005)).
>
> On the other hand, if the issue of an opponent's improper argument or conduct has not been preserved by contemporaneous objection and motion for mistrial, a new trial will only be warranted when the improper behavior is "of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments." Id.; see also Murphy [v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1029-30 (Fla. 2000)]. In other words, if the error has not been properly preserved, a new trial is only warranted when the improper behavior amounts to fundamental error. Companioni v. City of Tampa, 51 So. 3d 452, 456 (Fla. 2010). Because of the inconsistency in this area of the law, the Florida Supreme Court in Murphy announced a four-part test to be applied in determining whether unobjected-to improper closing argument amounts to fundamental error requiring a new trial. To prevail on a motion for new trial under Murphy requires that the complaining party "establish that the [challenged] argument [or attorney misconduct] was (1) improper, (2) harmful, (3) incurable, and (4) so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial." Moreta, 957 So. 2d at 1250 (citing Murphy, 766 So. 2d at 1031); Companioni, 51 So. 3d at 456. If the complaining party successfully establishes these four criteria, the trial court must grant the party's motion for a new trial. Platz v. Auto Recycling & Repair, Inc., 795 So. 2d 1025, 1027 (Fla. 2d DCA 2001).
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> In reviewing a trial court's order granting or denying a new trial based on unobjected-to closing argument, an appellate court must determine whether such order was an abuse of the trial court's discretion. Murphy, 766 So. 2d at 1030–31; Platz, 795 So. 2d at 1026. "In so doing, [an appellate court must be] mindful that the new trial remedy is not a tool for punishing attorney misconduct. Rather, its focus is on the fairness of the proceedings." Platz, 795 So. 2d at 1026.

Id. at 519-20 (first, second, fourth, fifth, and sixth alterations in original).

Applying those standards here compels us to reverse the order below. We have no qualm accepting the veracity of the trial court's observations about Mr.

Robinson's conduct during his attorney's closing rebuttal. However, the effect of those actions and counsel's arguments should have been examined within the framework established by the Florida Supreme Court in Murphy, 766 So. 2d at 1031. That is, the trial court should have determined (i) whether the comments and conduct were in fact improper, (ii) whether they caused harm that was "of such a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for" the comments and conduct; (iii) whether the harm was incurable (which is to say, had the trial court sustained a timely objection and taken curative measures, it "could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict"); and (iv) whether the comments and conduct "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." Id. at 1029, 1030; see also Jimenez, 112 So. 3d at 520-22.

The trial court, however, did not engage in this required analysis. We can extrapolate the first element of the Murphy standard (that the comments and conduct were improper) from the court's ruling, but none of the other three. And the trial court's observations that the motion was a "close call" and could have been decided by a "coin flip" indicate that it would not have found that Mr. Robinson's actions during his lawyer's closing rebuttal met the high thresholds of the second, third, and fourth elements under Murphy had the trial court applied them. Rather, it appears that the trial court simply used an incorrect legal standard, and that, had it applied the correct standard, it would have properly denied the motion for new trial. Accordingly, we must reverse the trial court's order and direct the court to reinstate the verdict. See Meyers v. Shontz, 251 So. 3d 992, 1004-05 (Fla. 2d DCA 2018).

Reversed and remanded with instructions.

CASANUEVA and KELLY, JJ., Concur.