MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert T. Kirlin,
Appellant-Plaintiff,

v.

CSX Transportation, Inc.,
Appellee-Defendant

July 25, 2023

Court of Appeals Case No. 22A-CT-2248

Appeal from the Marion Superior Court

The Honorable David J. Dreyer, Senior Judge

Trial Court Cause No. 49D12-1906-CT-22280

Memorandum Decision by Judge Weissmann
Judges Bailey and Brown concur.

Weissmann, Judge.

[1] Robert Kirlin—an employee of railroad carrier CSX Transportation, Inc.—slipped, fell, and was injured while attempting to retrieve traffic cones from the bed of his CSX-issued service truck. Kirlin sued CSX under the Federal Employers' Liability Act, alleging, among other things, that CSX was negligent in failing to equip his truck with a cone holder. A jury returned a verdict in CSX's favor. Kirlin then filed a motion for judgment on the evidence, which the trial court denied. On appeal, Kirlin argues that the trial court erred by: (1) denying his motion for judgment on the evidence; (2) excluding certain evidence at trial; (3) refusing to give certain jury interrogatories; and (4) failing to give a certain jury admonition. We affirm.

Facts

[2] CSX requires its employees to place traffic cones around their vehicles when parked in CSX rail yards. For this purpose, Kirlin kept two cones in the bed of his service truck. Kirlin typically retrieved the cones from the truck bed while standing on the ground. But one rainy day, the cones slid forward in the bed, requiring Kirlin to step up onto the truck's bumper platform to retrieve them. Though the platform was made of diamond tread plating and coated with an anti-slip spray material, Kirlin slipped, fell, and injured his shoulder while retrieving the cones.

[3] Kirlin sued CSX under the Federal Employers' Liability Act (FELA), which holds railroad carriers liable for employee injuries "resulting in whole or in part

from [carrier] negligence." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 131 S. Ct. 2630, 2632, 180 L. Ed. 2d 637 (2011) (quoting 45 U.S.C. § 51)).[1] Kirlin specifically alleged that CSX was negligent by failing to provide an effective anti-slip surface on the bumper platform of Kirlin's service truck and by failing to equip his truck with a cone holder to prevent his cones from sliding forward.

[4] At trial, the parties presented competing expert witness testimony on Kirlin's negligent allegations. The jury returned a verdict in favor of CSX, after which Kirlin filed a motion for judgment on the evidence. The trial court denied Kirlin's motion and entered judgment in CSX's favor. Kirlin now appeals.

Discussion and Decision

I. Judgment on the Evidence

[5] Kirlin first argues that the trial court erred in denying his motion for judgment on the evidence. Judgment on the evidence is proper where the evidence most favorable to the non-moving party is insufficient to support the jury's verdict. *Smith v. Baxter*, 796 N.E.2d 242, 243 (Ind. 2003); Ind. Trial Rule 50(A). Where, as here, the moving party had the burden of proof at trial, the trial court may enter judgment on the evidence only where the moving party's evidence is "uncontradicted and unimpeached." *State ex rel. Peters v. Bedwell*, 267 Ind. 522,

[1] Indiana courts have subject matter jurisdiction over FELA claims pursuant to 45 U.S.C. § 56, which states: "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

527, 371 N.E.2d 709, 712 (1978) ("A party with the burden of proof may establish a prima facie case and the jury may, nonetheless, find against him.").

[6] At trial, Kirlin's expert witness, D. Joe Lydik, testified that Kirlin's service truck did not have an effective anti-slip surface on its bumper platform and should have been equipped with a cone holder to prevent the cones from sliding around in the truck bed. According to Lydik, a cone holder would have negated the need for Kirlin to climb onto the bumper platform to retrieve the cones.

[7] Kirlin claims Lydick's testimony was uncontradicted. But CSX's expert witness, William Keefe, testified that he knew of no requirement that service trucks like Kirlin's have a cone holder. Keefe further testified that diamond tread plating is commonly used to provide slip resistance on the bumper platforms of service trucks like Kirlin's. And according to Keefe, photographs taken of Kirlin's truck the day after his accident revealed that its diamond tread plating was in "good condition." Tr. Vol. III, p. 228. Ultimately, Keefe saw nothing that would have prevented Kirlin from safely using the bumper platform to retrieve his cones.

[8] Because Kirlin's evidence was not uncontradicted, the trial court did not err in denying his motion for judgment on the evidence.

II. Evidence Admissibility

[9] Kirlin next argues that the trial court erred in excluding evidence that other CSX trucks were equipped with cone holders at the time of Kirlin's accident. We generally review a trial court's rulings on the admissibility of evidence for

an abuse of discretion. *Clary v. Lite Machines Corp.,* 850 N.E.2d 423, 434 (Ind. Ct. App. 2006). But Kirlin does not identify any ruling by which the trial court excluded evidence that other CSX trucks were equipped with cone holders at the time of Kirlin's accident. We also find none in the record.

[10] "It is well settled that we will not consider an appellant's assertion on appeal when [the appellant] has not presented cogent argument supported by authority and references to the record as required by [Indiana Appellate Rule 46(A)(8)(a)]." *Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003). "[N]or will we address arguments which are either inappropriate, too poorly developed or improperly expressed to be understood.'" *Id.*

[11] Because Kirlin does not identify the evidentiary ruling he challenges on appeal, he has waived the issue.

III. Jury Interrogatories

[12] Kirlin also argues that the trial court erred by refusing to include his proposed jury interrogatories on the jury verdict form. The verdict form that was presented to the jury included the following question:

> Do you find that CSXT was negligent in failing to provide plaintiff with a reasonable safe place to work?

Appellant's App. Vol. II, p. 23. Kirlin, however, proposed that the following question be included as well:

> Do you find by a preponderance of the evidence that Defendant was negligent in failing to warn Plaintiff of a known hazard?
>
> Do you find by a preponderance of the evidence that Defendant was negligent in failing to remedy a defective condition about which they knew or should have known?

Id. at 27-28.

[13] Kirlin claims his additional questions encompassed theories of liability not presented by the question that was given. Thus, Kirlin contends the trial court did not allow the jury to decide all the issues presented by the evidence. Kirlin, however, claimed differently at trial.[2] And he ultimately did not object to the trial court's omission of the questions from its final draft of the jury verdict form. *See* Tr. Vol. IV, p. 189.

[14] "No party may claim as error the giving of an instruction unless he objects thereto . . . , stating distinctly the matter to which he objects and the grounds of his objection." Ind. Trial Rule 51(C); *see generally Helman v. Barnett's Bail Bonds, Inc.*, 175 N.E.3d 826, 834-35 (Ind. Ct. App. 2021) ("Verdict forms are essentially instructions to the jury[.]"). By failing to object to the verdict form given to the jury, Kirlin waived the issue for appeal. *Gary Cmty. Sch. Corp. v. Powell*, 906 N.E.2d 823, 832 (Ind. 2009) (citing *Fisher v. State*, 810 N.E.2d 674,

[2] When the trial court questioned the need for Kirlin's additional questions, his counsel explained: "It (sic) specifies how more precisely the defendant was negligent." Tr. Vol. II, p. 127. "And if on appeal the defense raises an issue that there wasn't sufficient evidence to support negligence, . . . then we have it more narrowly defined as [to] what specific negligence [the jury] didn't find." *Id.* at 128.

677 (Ind. 2004) ("The law is settled that failure to object to a jury instruction given by the trial court waives the issue for review.")).

IV. Jury Deliberation

[15] Finally, Kirlin argues that the trial court erred by failing to instruct the jury to reserve judgment until all the evidence was presented in the case. Kirlin specifically points to instances during breaks in the trial when the court, without objection, only admonished the jury not to talk about the case unless all jurors were together and in the jury room. Kirlin ignores, however, that the trial court's preliminary jury instructions included the following:

> Keep an open mind. Do not make a decision about the outcome of this case until you have heard all the evidence, the arguments of counsel, and the final instructions about the law that you will apply to the evidence you have heard.

Appellee's App. Vol. II, p. 2.

[16] We presume the jury followed the trial court's instructions. *Travelers Indem. Co. of Am. v. Jarrells*, 927 N.E.2d 374, 378 (Ind. 2010).[3] We therefore find harmless any error in the trial court's alleged failure to instruct the jury—beyond the

[3] Without citation to the record or any specific facts, Kirlin asserts: "The Judge presiding over the case was made aware after the verdict that the jury had already decided how they would rule on the first day of trial." Appellant's Br. p. 25. This unsupported assertion is insufficient to overcome the presumption that the jury followed the trial court's instructions. *See Lawson v. State*, 664 N.E.2d 773, 777 (Ind. Ct. App. 1996) (holding alternate juror's act of writing and signing note requesting television so jury could view video exhibits did not support defendant's assertion that alternate juror violated instruction that he not participate in deliberations).

preliminary jury instructions—to reserve judgment in the case until all the evidence was presented.

[17] We affirm the trial court's judgment.

Bailey, J., and Brown, J., concur.