IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CAIYUN MU,
Plaintiff-Appellee,

v.

HYOUN MIN OH,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0036-CIV

Superior Court No. 11-0352

OPINION

Cite as: 2015 MP 18

Decided December 31, 2015

Stephen J. Nutting, Saipan, MP, for Defendant-Appellant.

Victorino DLG. Torres, Saipan, MP, for Plaintiff-Appellee.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; JOSEPH N. CAMACHO, Justice Pro Tem.

CASTRO, C.J.:

¶ 1 Defendant Hyoun Min Oh ("Oh") appeals the trial court's judgment finding Oh negligent and liable for damages. Oh argues that the evidence was insufficient to find her negligent in operating her vehicle, the trial court erred in denying her motion for a directed verdict and judgment notwithstanding the verdict ("JNOV"), the jury erred in failing to find Plaintiff-Appellee Caiyun Mu ("Mu") contributorily negligent, and she was denied a fair trial because Mu's counsel advanced improper arguments at trial that influenced the verdict. For the reasons below, we AFFIRM the judgment and trial court's ruling on the directed verdict and JNOV.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 At or before 8:00 p.m.[1] on February 4, 2010, Oh left DK Poker in Koblerville, Saipan, and traveled northbound in her tinted vehicle. When Oh reached the San Antonio area near the Sunleader business establishment, she struck Mu. At or around the time Oh traveled northbound, Philip B. Quitugua ("Quitugua"), who frequents the San Antonio area, was a passenger of a southbound vehicle. Quitugua noticed Oh's vehicle traveling fast in the poorly lit area. Shortly thereafter, Quitugua heard "people . . . screaming" in the area, tr. 46, and the vehicle "struck something," *id.* at 431. Quitugua immediately turned around to head northbound, where he saw Mu on the ground. Quitugua dialed 911 and parked the vehicle. He then assisted Mu, who was lying down to the right of a white fog line on the paved road near Sunleader, with her head bleeding profusely. Sergeant Anthony I. Macaranas ("Macaranas") responded to the scene and testified that he saw Mu lying in a grassy area on the shoulder of the road and Oh's vehicle parked 150 feet away from Mu. Mu was transported to the hospital and diagnosed with a severe brain injury, which led her into a deep coma.

¶ 3 Sergeant Macaranas's traffic crash report noted that skies were clear that evening and the road was dry. The report also detailed that, according to Oh, Mu might have been crossing the street before the collision. While Sergeant Macaranas could neither determine Mu's location when she was struck nor the location of Oh's vehicle when it struck Mu, he concluded that the moderate damage to the right side of Oh's vehicle indicated Mu was pushed to the right.

¶ 4 At the conclusion of Mu's case-in-chief, Oh moved for a directed verdict, arguing Mu failed to demonstrate that she breached her duty to drive reasonably and that the breach caused the accident. The trial court denied the motion, finding the evidence was sufficient to establish negligence. The jury

[1] Oh testified the accident occurred around 8:30 or 9:00 p.m. However, Sergeant Macaranas responded to the scene at approximately 8:10 p.m., and Mu arrived at the Commonwealth Health Center ("CHC") emergency room at 8:23 p.m.

found Oh 100% at fault for the accident and liable for both economic and non-economic damages. Oh subsequently filed a motion for a JNOV, but the trial court denied the motion, determining that a reasonable jury could have found Oh drove "too fast to stop her car before hitting [Mu]" and did not "maintain a proper lookout." *Caiyun Mu v. Hyoun Min Oh*, Civ. No. 11-0352 (NMI Super. Ct. July 23, 2013) (Order Den. Def's Mot. for Judgment Notwithstanding the Verdict at 4). Oh now appeals the judgment finding her negligent and liable for damages, as well as the trial court's denial of the directed verdict and JNOV, and requests that the verdict be set aside and the matter remanded for a new trial.

II. JURISDICTION

¶ 5 We have jurisdiction over judgments and orders of the Superior Court. NMI CONST. art. IV, § 3; 1 CMC § 3102(a). Because Oh timely appealed, we have jurisdiction.

III. STANDARDS OF REVIEW

¶ 6 Oh raises four issues: (1) whether the evidence was sufficient to establish Mu negligently operated her vehicle, (2) whether the trial court erred in denying the directed verdict and JNOV, (3) whether Mu was contributorily negligent, and (4) whether Oh was denied a fair trial based on improper arguments allegedly raised by Mu's counsel.

¶ 7 We review the first three issues de novo. *Ishimatsu v. Royal Crown Ins.*, 2010 MP 8 ¶ 12 (stating that "[s]ufficiency of the evidence is a question of law reviewed de novo"); *Commonwealth v. Santos*, 1998 MP 6 ¶ 4 (applying the de novo standard in evaluating the denial of a motion for a directed verdict); *Ito v. Macro Energy, Inc.*, 4 NMI 46, 54 (1993) (reviewing contributory negligence de novo); *see also Century Ins. Co. v. Guerrero Bros., Inc.*, 2010 MP 4 ¶ 6 (citations omitted) (considering a judgment as a matter of law de novo). In assessing the sufficiency of the evidence and the denial of the directed verdict and JNOV, we "determine if the evidence viewed in the light most favorable to the prevailing party is sufficient to support the conclusion of the finder of fact." *Ishimatsu*, 2010 MP 8 ¶ 12 (citing *Torres v. Fitial*, 2008 MP 15 ¶ 7). We "draw all reasonable inferences in favor of [the non-moving] party," *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985) (citations omitted), and "may not weigh the evidence . . . where the jury's verdict is supported by substantial evidence," *Mendiola*, 2005 MP 2 ¶ 26. Substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Owens v. Commonwealth Health Ctr.*, 2012 MP 5 ¶ 8 (quoting *Santos v. Nansay Micronesia, Inc.*, 4 NMI 155, 165 (1994)) (internal quotation marks omitted).

¶ 8 We determine whether the trial court abused its discretion in allowing a demonstrative aid in rebuttal, one of the issues Oh claims led to a denial of a fair trial. *See United States v. Crockett*, 49 F.3d 1357, 1361–62 (8th Cir. 1995) (reviewing the use of visual aids for abuse of discretion); *see also United States v. Natale*, 719 F.3d 719, 743 (7th Cir. 2013) (reviewing the lower court's

decision to send demonstratives to the jury room during deliberations for abuse of discretion). "An abuse of discretion occurs when the decision 'rests upon a clearly erroneous finding of fact, errant conclusion of law or an improper application of law to fact.'" *Ishimatsu*, 2010 MP 8 ¶ 33 (quoting *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000)). We review for plain error Oh's claims concerning references to Oh as a hostile witness, golden-rule arguments, and pandering because they are raised for the first time on appeal, *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 276 (1995), and do not consider insufficiently developed arguments, *Matsunaga v. Cushnie*, 2012 MP 18 ¶ 13.

IV. DISCUSSION

A. Sufficiency of Evidence

¶ 9 Oh claims the evidence was inadequate to demonstrate she negligently operated her vehicle on the evening of the accident. To establish negligence, it must be shown by a preponderance of the evidence the elements of duty, breach, causation, and damages. *See Owens*, 2012 MP 5 ¶ 3 n.2 (listing the elements of negligence). "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). Furthermore, as the trier of fact, the jury serves to:

> weigh[] the contradictory evidence and inferences, judge[] the credibility of witnesses, . . . and draw[] the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion . . . cannot be ignored.

Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 115 (1963) (citations omitted).

¶ 10 Before turning to the evidence adduced at trial, we look to the standards of care for drivers and pedestrians. A person operating a vehicle has a duty "to exercise due care for the safety of any pedestrian upon a highway," 9 CMC § 5404(b), and "shall exercise due care to avoid colliding with any pedestrian . . . [and] give an audible signal when necessary," *id.* § 5408. *See also Mantz v. Continental Western Ins. Co.*, 422 N.W.2d 797, 802 (Neb. 1988) ("[A] driver ordinarily has a duty to drive an automobile on a public street at night in such a manner that he can stop in time to avoid a collision with an object within the area lighted by his headlights, and the driver is negligent if he fails to do so."). Additionally, motorists have a duty to

> operate[] at a careful, prudent rate of speed not greater than nor less than is reasonable and proper, having due regard to the surface of the highway, the width of the highway and the condition of traffic upon the highway and all other restrictions and conditions then and there existing.

9 CMC § 5251(a); *see also Michaud v. Gagne*, 232 A.2d 326, 330 (Conn. 1967) ("There are some circumstances which may require an exceedingly slow rate of

speed. . . . The test . . . is that speed at which a reasonably prudent person would operate under similar conditions."). Last, pedestrians must exercise a duty of care in crossing a highway within a marked or unmarked crosswalk and are required to "yield the right of way to all vehicles upon the highway." 9 CMC § 5404(a).

¶ 11 Against this backdrop, we assess whether the evidence at trial amply demonstrated that Oh negligently operated her vehicle on the night of the incident, and whether her actions proximately caused Mu's injuries. In addressing the issue, we review the evidence as a whole, including Oh's claims concerning tinted windows and speed.

¶ 12 At trial, Oh affirmatively stated that her vision was clear, and the tint on her vehicle "did not interfere" with her vision. Tr. 390. She noted that the front windshield of her vehicle was tinted approximately twenty centimeters or more from the top. Sergeant Macaranas also testified Oh's entire vehicle was tinted, while Quitugua characterized the tint on Oh's side and back windows as a dark, "limo" type tint—"tint . . . use[d] on the limo where you [cannot] see [inside]" a vehicle. *Id.* at 129–30.

¶ 13 Despite her clear vision, Oh testified she did not see Mu prior to the collision because the area was "too dark," *id.* at 267, 273, and she "wouldn't have hit" Mu had she seen her, *id.* at 273. However, her statement to Sergeant Macaranas on the night of the accident contradicts the trial testimony, in which she indicated she saw a person on the right side of the road, who may have been crossing the road before the accident.

¶ 14 In a deposition two months prior to trial, Oh noted there was a car in the middle lane traveling the same direction. When confronted with this statement at trial, Mu testified that what she meant was the area was dark, she "was trapped," *id.* at 282, and there was another car in the opposite lane.

¶ 15 Oh also testified at the deposition that "'since [she] wasn't driving too fast, the car behind [her] was trying to take over . . . .'" *Id.* at 284. At trial, she stated she "was trying to say . . . normally [she] drive[s] slowly" and cars behind her try to pass her car. *Id.*

¶ 16 There was also contradictory testimony concerning the speed of Oh's vehicle. Quitugua, the main witness who saw Oh's vehicle prior to the incident, stated that Oh's vehicle was traveling northbound "pretty fast." *Id.* at 42. He mentioned to Sergeant Macaranas that he turned around when he heard a vehicle hit something and found Mu was hit. Quitugua, who frequents the San Antonio area almost daily, described the area as poorly lit, an area where many pedestrians walk and where some cars travel over the speed limit of thirty-five miles per hour. Quitugua determined Oh's vehicle was traveling fast in relation to him because he traveled at a normal speed, and the vehicle was "far from where the victim was lying down." *Id.* at 117. While Quitugua admitted he did not receive training to calculate or estimate a vehicle's speed, he described

Mu's injuries as a "high speed injury" based on the amount of blood from Mu's head. *Id.* at 118.

¶ 17 In contrast, Oh testified she was driving at a normal speed, which could have been thirty-five or thirty-six miles per hour. She indicated to Sergeant Macaranas on the night of the incident that she was traveling at a normal speed. And according to Sergeant Macaranas's testimony, she saw a person "on the side of the travel lane," *id.* at 426, who may have been crossing the road, and did not have sufficient time to stop the vehicle before hitting the person. Oh testified that she heard a "normal" sound, "normal to the point that [she] couldn't tell if [she] hit a person or not," and was uncertain whether it was an accident at the time. *Id.* at 358. She applied the brakes about ten meters or more following the collision and did not swerve.

¶ 18 Sergeant Macaranas stated Oh's vehicle was parked 150 yards away from Mu's location, and was moderately damaged on the right side of the hood and pillar. He did not identify skid marks to indicate "the operator reacted after she struck, . . . and because of speed that's why it [threw] the pedestrian to the side of the road." *Id.* at 435.

¶ 19 Equally significant is the emergency room doctor's testimony relating to the severity of Mu's injuries. The doctor testified that Mu was in critical condition when she arrived at the CHC and sustained severe neurological impairment, including significant trauma to the skull and scalp. On a Glasgow Coma Scale of three to fifteen, Mu's level of consciousness was a five, which indicates "severe neurologic impairment." *Id.* at 492–93. Mu not only sustained a pelvic fracture, but underwent surgery for a five centimeter laceration on her head and a ten centimeter laceration on her right hip. Further, the physical therapist who assisted Mu during her stay at the CHC testified that Mu could not recall her name on the two occasions she interacted with her. During the physical therapist's last meeting with Mu, two days before Mu's discharge from the CHC, Mu could not use the bathroom or take a shower without assistance. At trial, Mu could not recall the events leading up to the accident up until she left the hospital.

¶ 20 Based on the evidence presented at trial, a reasonable fact finder could have found Oh negligently operated her vehicle. The jury weighed the contradictory and corroborative evidence and determined the credibility of the witnesses. Viewed in the light most favorable to Mu, we find that ample evidence exists to support the jury's verdict in Mu's favor.

B. Denial of Directed Verdict and JNOV

¶ 21 The trial court's denial of the directed verdict and JNOV are considered under the same standard. *Peterson*, 771 F.2d at 1256 (applying the JNOV standard in assessing a directed verdict). We determine whether the evidence is substantial to support the jury's verdict, *Mendiola*, 2005 MP 2 ¶ 26, and will not substitute our judgment for that of the trier of fact. *See Ishimatsu*, 2010 MP 8 ¶ 18 (citing *Torres*, 2008 MP 15 ¶ 7) ("[O]ur role is not to reweigh the

evidence and re-decide the case."). Further, we draw all reasonable inferences in favor of Mu. *See Peterson*, 771 F.2d at 1256. As determined *supra* ¶ 20, the evidence and all reasonable inferences therefrom, viewed in the light most favorable to Mu, supports the verdict. Thus, the trial court did not err in denying the directed verdict and JNOV.

C. Contributory Negligence

¶ 22 Oh claims the jury clearly erred in not finding Mu contributorily negligent based on Sergeant Macaranas's testimony.

¶ 23 A finding of contributory negligence involves a two-part test. First, we must determine that Mu "did not observe the proper standard of conduct for [her] own safety." *Ito*, 4 NMI at 59. The standard of conduct "is that of a reasonable [person] under like circumstances." *Id.* (citation omitted) (internal quotation marks omitted). Second, we consider whether Mu's conduct contributed to her injuries. *Id.* We may find Mu's negligence was "a legally contributing cause of [her] harm if, but only if, it [was] a substantial factor in bringing about [her] harm . . . ." *Id.* (citation omitted) (internal quotation marks omitted). We do not reach the second part of the test unless the first part is satisfied. *Id.*

¶ 24 On the night of the incident, Oh indicated to Sergeant Macaranas that there may have been a person crossing the street before she hit Mu. At trial, Sergeant Macaranas stated he could not determine Mu's location when she was struck.

¶ 25 These statements, coupled with other facts adduced at trial detailed *supra* ¶¶ 12–19, do not establish that Mu failed to yield the right of way.[2] As such, we decline to set aside the jury's determination, and there was ample evidence to support the verdict.

D. Denial of Fair Trial

¶ 26 Oh asserts she was denied a fair trial because Mu's counsel advanced improper arguments. Specifically, counsel allegedly posed improper questions concerning Oh's ownership interest in poker establishments as well as prior traffic citations; referred to Oh as a hostile witness; used golden-rule arguments during opening statements and closing arguments; introduced a drawing of the location of the accident in rebuttal; and pandered the jury with arguments for damages, positive descriptions of Mu, and addressing each juror by name.

¶ 27 Because Oh failed to sufficiently develop her arguments concerning ownership interest and prior traffic citations, we do not address these issues. *See Matsunaga*, 2012 MP 18 ¶ 13 ("A party must do more than simply cite to case law for an argument to be sufficiently developed. Consequently, when a

[2] We reiterate that a pedestrian crossing a marked or unmarked crosswalk "shall yield the right of way to all vehicles upon the highway," as provided in 9 CMC § 5404(a). Given the circumstances in this case, we find the evidence adequately supports the verdict.

party fails to sufficiently develop an argument, we have the discretion to find that a party waived the issue.").

¶ 28 References to Oh as a hostile witness, golden-rule arguments, and pandering are reviewed for plain error because these arguments were not properly preserved at trial.[3] Under the plain error standard, an appellant must show: (1) the error exists; (2) the error was plain or obvious; and (3) the error affected substantial rights or, stated differently, the outcome of the proceeding. *Commonwealth v. Guerrero*, 2014 MP 15 ¶ 11 (citation omitted). We then have the discretion to reverse only if "'the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 10 (citing *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Based on a review of the evidence, Oh failed to demonstrate that references to Oh as a witness was a plain or obvious error, and that golden-rule arguments and pandering[4] affected the outcome of the proceeding.

¶ 29 Moreover, the use of demonstrative aids in rebuttal may be permitted at the trial court's discretion to provide the jury with a better comprehension of the evidence. *Crockett*, 49 F.3d at 1360 ("The use of summary charts, diagrams, and other visual aids is generally permissible in the sound discretion of the trial court."). At trial, Oh objected to counsel's drawing of the location of the accident in rebuttal. Oh asserted that Mu did not hire an expert "to reconstruct [the] accident and plaintiff's counsel is not an expert witness to reconstruct this accident." Tr. 929. The trial court overruled the objection without explanation. Consequently, Oh claims the jury was led to believe that they could consider the drawing as evidence in deliberations. While Oh contends the drawing affected the fairness of the proceedings, the jury was instructed that statements and arguments by attorneys were not evidence. Moreover, the purpose of the drawing was to assist the jury in visualizing the location of the accident based on Quitugua's and Oh's trial testimony. Thus, we cannot conclude the trial court abused its discretion in allowing the use of the demonstrative aid in rebuttal. *See, e.g.*, *United States v. De Peri*, 778 F.2d 963, 979 (3d Cir. 1985) (holding the trial court did not abuse its discretion in allowing the government to use a demonstrative aid, a chart, in its opening statement); *United States v. White*, 241 F.3d 1015, 1023 (8th Cir. 2001) (citation omitted) (noting a

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[3] We are troubled by the apparent lackluster advocacy related to these arguments by Oh's trial counsel based on the transcript.

[4] *See State v. Azure*, 525 N.W.2d 654, 656 (N.D. 1994) ("addressing jurors by name, even though improper, was not prejudicial"); *People v. Davis*, 264 N.E.2d 140, 143 (Ill. 1970) (disapproving "tactic of addressing jurors individually, by name," but affirming the conviction nonetheless). *See generally Ishimatsu*, 2010 MP 8 ¶ 53 (holding the trial court did not abuse its discretion in refusing to grant a mistrial despite an inappropriate statement by counsel because the statement did not "infect[] the jury with passion or prejudice" and "[t]he jury's numerous damage awards also do not support the argument that the statement infected the trial because there [was] more than sufficient evidence").

prosecutor may "argue a personal interpretation of the evidence"); *United States v. Jumping Eagle*, 515 F.3d 794, 805 (8th Cir. 2008) (holding that the prosecutor's closing argument "did not improperly impassion or prejudice the jury" because the statements were "supported by evidence, or at a minimum, a reasonable inference from the evidence, adduced at trial").

¶ 30 Having considered the proceedings as a whole, we are satisfied that Oh received a fair trial. Accordingly, we decline to set aside the verdict and remand for a new trial.

IV. CONCLUSION

¶ 31 For the foregoing reasons, we AFFIRM the judgment finding Oh negligently operated her vehicle and the trial court's denial of the directed verdict and JNOV.

SO ORDERED this 31st day of December, 2015.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
JOSEPH N. CAMACHO
Justice Pro Tem