Affirmed and Opinion Filed April 1, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00424-CV

DENEE JACKSON, Appellant
V.
VENITA COLE AND VAN COLE, Appellees

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-09701

MEMORANDUM OPINION

Before Justices Miskel, Breedlove, and Smith
Opinion by Justice Miskel

Appellees Venita and Van Cole sued appellant Denee Jackson for damages from injuries sustained in a car accident allegedly caused by her negligent driving. The jury found Mrs. Jackson negligent and awarded damages to the Coles. In four issues, Mrs. Jackson appeals the trial court's judgment arguing: that the trial court erred by denying her motion for new trial because the jury probably rendered an improper verdict after (1) one of the Coles' witnesses told the jury that Mrs. Jackson had insurance, and (2) Mr. Cole told the jury that Mrs. Jackson had insurance; (3) that the trial court erred by denying her motion for new trial because the trial

judge's jury instruction failed to cure the error from the improper testimony; and (4) that the trial court erred by denying her motion for mistrial after the court's instruction to disregard did not cure the error.

We conclude that Mrs. Jackson failed to show that any error was harmful, because she did not explain how the improper testimony regarding insurance and the trial court's subsequent jury instruction to disregard probably caused the rendition of an improper judgment. Accordingly, we affirm the trial court's judgment.

I. Background

In July of 2019, the Coles sued Mrs. Jackson, alleging that they were injured in a car accident in downtown Dallas caused by her negligent driving. The accident took place shortly before 9:00 p.m. in August of 2018, at the intersection of Harwood Street and Elm Street. The parties disputed the facts, including the details of the discussion that occurred between the parties after the accident.

The Coles testified that Mr. Cole was a passenger in the car Mrs. Cole was driving. They were headed south on Harwood Street to pick up their son from a friend's house. Mrs. Cole testified that she was in the far-right lane and stopped at the red light at Elm Street, intending to head straight and continue south on Harwood Street. She was the first car in line at the red light.

Mrs. Jackson testified that, on the evening of the accident, she and her husband were headed to the Majestic Theatre, which is located on Elm Street, for a show and were running a few minutes late. They had gone out to dinner for about an hour and

a half beforehand, and Mrs. Jackson stated that she had one alcoholic drink at dinner. Afterwards she was driving north on Harwood Street with her husband. Mrs. Jackson stopped at a red light in the dedicated left-turn lane at the Elm Street intersection, intending to make a left turn onto Elm Street to reach the Majestic Theatre. The street was congested with pedestrian and vehicular traffic.

The Coles testified that, when the light turned green, Mrs. Cole headed straight, staying in the far right lane, and proceeded into the intersection where she was hit by Mrs. Jackson's car. The Coles testified that they read Mrs. Jackson's lips while Mrs. Jackson was still behind the wheel of her car and that she said "I'm so sorry." The Coles testified that they saw headlights when they were stopped at the light prior to the collision but then did not see Mrs. Jackson's car until the moment of impact in the middle of the intersection. Mr. Cole stated that he had his head turned and was looking down the street towards the theater when the impact occurred. He stated that, "to me it seemed like the lady smashed the gas and tried to beat us through there." Mrs. Cole testified that she had the right of way and did not cause the accident, and that Mrs. Jackson had not followed the traffic laws and had not been driving safely.

Conversely, Mrs. Jackson testified that her light turned green but, before she began to move, the front driver's sides of the two cars collided. Mrs. Jackson testified that she remained totally and completely stopped in the dedicated left-turn lane when the accident happened and that she did not fail to yield the right of way

because she had not begun her left turn and was not in the intersection. She testified that she asked the Coles if they were okay but did not apologize.

After the collision, Mrs. Cole pulled over on Harwood Street past the Elm Street light and stopped. Mrs. Jackson pulled over on Elm Street and stopped in front of the theater in the same block where the accident occurred, but the Coles testified that she then proceeded farther down Elm Street. The Coles thought that the Jacksons were fleeing the scene. Mr. Cole testified that he started yelling at pedestrians to stop that car, and Mrs. Cole ran up the street towards the Jacksons. Mr. Cole testified that one of the pedestrians "saw the license plate, so they finally pulled over."

Mrs. Cole testified that she smelled alcohol when Mrs. Jackson approached her and that Mrs. Jackson was fairly combative and uncooperative with exchanging information, stating that Mrs. Jackson "pretty much cursed me out." Mrs. Jackson denied this. When Mr. Cole reached the Jacksons, he testified that Mr. Jackson "gets in my face," asking "where the dope at? Where the dope at?" He stated that Mrs. Jackson was "yelling and screaming" and started cursing when Mr. Cole suggested calling the police. Mr. Cole testified that he saw two cups in the console of Jackson's car but did not know if they contained alcohol. He stated that he told them that he was calling the police and that Mrs. Jackson then told Mr. Jackson to get in the car, and the Jacksons drove off. The police arrived shortly thereafter, and the Coles made their report.

Mrs. Jackson testified that there was no alcohol in her car or cups in her cupholder. She also stated that there was no tension between the parties after the accident except some tension that occurred when Mr. Jackson made a comment that he felt the Coles were coming through the intersection quickly. She also testified that Mr. Cole would not tell her husband where the Coles' vehicle was so that Mr. Jackson could take photos of it.

Mrs. Jackson testified that she and her husband left after exchanging information and went home. She testified that she did not feel the police were needed or that anyone had been injured. She later acknowledged her earlier testimony that Mr. Cole had mentioned his neck was hurting. She further testified that she did not know that the police had been called and that, had she known, she would have stayed at the scene. Mrs. Jackson testified that she later contacted the police department and made an appointment with a detective to explain what she believed happened at the accident. The charge against her for fleeing the accident was dismissed.

A jury trial was first held in April of 2022. During examination of the first witness, the Coles' counsel showed the jury Mrs. Jackson's voluntary statement to the police in which she stated that the parties "exchanged insurance information." The trial court granted Mrs. Jackson's motion for a mistrial because this statement indicated that Mrs. Jackson had insurance.

During the re-trial of the case in January of 2023, the trial court granted an agreed motion in limine, prohibiting anyone from testifying that Mrs. Jackson was covered by insurance. The Coles called Denise Tappin, Mrs. Cole's close friend, to testify. During cross-examination, Mrs. Jackson's counsel asked Tappin what Mrs. Cole had told her about the cause of the accident. In the course of her response, the following exchange took place:

> [JACKSON'S COUNSEL]: Is that all she said about it?
>
> [TAPPIN]: I'm trying to think. It's been so long ago. I remember her saying that the—there was a gentleman in the car, and he was hollering and kind of screaming at them, trying to provoke a fight. Let see. And I remember her saying that she had—the lady in the vehicle had given her, *her I think ID or insurance*. And—
>
> [JACKSON'S COUNSEL]: Given her information, exchanged information?
>
> [TAPPIN]: Yeah, but the lady took off and left *her license or something, insurance* with her.

(Emphasis added). Mrs. Jackson did not object to this testimony at that time.

Later, during Mr. Cole's testimony regarding his encounter with the Jacksons after the accident, he testified as follows:

> [COLES' COUNSEL]: Were you hurting?
>
> [MR. COLE]: I felt—I mean, it might could have been like a little—I thought it might have been like a—because see, I didn't actually see the accident. We was at the light. And then when the light turned green, I looked down the street. So when she took off, I looked back around, and before I got all the way around the car had hit us. So, if I would have been—I felt like if I would have been able to see, I probably could have braced myself. But, I didn't have a clue until when I turned around, it was like right there. The car right there.

> And the lady said -- I could read her mouth because she was right there on us. I'm so sorry. I'm so sorry. I'm so sorry. And then they run like they was going to run, but all them people was out there. Somebody saw the license plate, so they finally pulled over. A whole block, because I had to walk down there, and our car is way up here at Harwood Street. They're way down there at Ervay somewhere. So, I asked him what was going on? Then, nothing. Nothing.
>
> So by the time we come back, the lady right there, I don't know their name, Ms. Jackson, or—you know, she's yelling and screaming. And I'm like, man, y'all calm down. So by the time he comes walking back down there, I said, let's just call the police. No, she started cursing. Don't call the police. I said, well—so then I—and this is what made me call the police. I don't know if it was alcohol in the car, but it was two cups right there in the floor, in the console. So I said, I'm fixing to call the police. So I started dialing 911. She said, get in the car. Get in the car. And he got in the car. And they drove off. *And we still had their insurance card in our hand*.
>
> [COLES' COUNSEL]: And so, at that point—
>
> [JACKSON'S COUNSEL]: Your Honor, permission to approach the bench, if we might?
>
> THE COURT: Okay.

(Emphasis added).

An off-the-record discussion then occurred before the trial judge asked the jury to step out. The trial judge admonished Mr. Cole for mentioning insurance and discussed the situation with counsel. Mrs. Jackson's counsel then moved for a mistrial, arguing that there was no way to cure the mention of insurance in front of the jury because the jury would believe that Mrs. Jackson has liability insurance coverage due to the reference and would return an improper verdict.

Mrs. Jackson's counsel also pointed out Tappin's references to insurance. The trial judge expressed concern that a curative instruction could further highlight

the fact that Mrs. Jackson had insurance. However, noting that this was Mrs. Jackson's first objection to the mention of insurance, he ultimately denied the motion for mistrial and gave the following instruction to the jury:

> So you guys remember during voir dire when I talked to you guys about the law, and that you all said that I needed to follow the law, and you guys agreed you needed to follow the law, right? Remember talking about that? So, and that means the parties also have to follow the law. Does that make sense? So, everybody here, we're all bound by what the law is. Maybe we like the law. Maybe we don't like the law. We have to follow the law. We all agreed to that, right?
>
> So, prior to this trial starting, I had made certain instructions to both sides on what was allowed to come into evidence. And [Mr. Cole] has violated one of those rulings. I'm not trying to be mean to him, but he has violated those rulings, and I've instructed him not to do it again. For those of you who noticed what he did, I'm going to instruct you to disregard it. It is not fair in this trial for this to be decided based on somebody violating the law, right? Is that fair?
>
> So, I'm going to instruct you one more time, Mr. Cole, you're instructed not to bring up the topic we discussed. If you do it again we will have to try this case again. So, I don't mean to be mean. I don't like to be mean to people, but we have to follow the law, right. And so, let's follow the law. We all need to follow the law, and include—you guys need to follow the law, and we need to move forward.

Mrs. Jackson's counsel did not object to the judge's instruction or request that a more specific curative instruction be given. After the close of evidence, Mrs. Jackson's counsel again moved for a mistrial on the same grounds as the earlier motion for mistrial. The trial judge denied the motion, stating that he had instructed the jury quite forcefully to disregard the mention of insurance and that the prejudice did not rise to the level that required a mistrial in this case.

In a 10-2 decision, the jury found Mrs. Jackson negligent and awarded $199,000 in damages to Mrs. Cole and $130,000 in damages to Mr. Cole. The trial court signed a judgment in favor of the Coles and denied Mrs. Jackson's motion to modify the judgment and her motion for a new trial.

II. Standard of Review

We review the denial of a motion for new trial for an abuse of discretion. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010). We also review a trial court's denial of a motion for mistrial for an abuse of discretion. *Villalobos v. Tvrs*, No. 05-23-00245-CV, 2024 WL 5244616, at *3 (Tex. App.—Dallas Dec. 30, 2024, no pet.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles such that the ruling is arbitrary or unreasonable. *Id.* The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985).

III. Applicable Law

In Texas, "[e]vidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." TEX. R. EVID. 411. Generally, the mention of insurance coverage by a party during a personal injury trial is considered error. *See id.*; *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962). However, the mere mention of insurance is not

necessarily grounds for reversal. *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989); *Nguyen v. Myers*, 442 S.W.3d 434, 440 (Tex. App.—Dallas 2013, no pet.).

An objection to an improper statement by a witness must be preserved by timely objection and request for an instruction that the jury disregard the improper remark. *See Nguyen*, 442 S.W.3d at 441; TEX. R. APP. P. 33.1(a)(1). A complaint about an "incurable" argument may be asserted in a motion for new trial, even without an objection and ruling during the trial. *See Living Centers of Texas, Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008) (per curiam); *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009); TEX. R. CIV. P. 324(b)(5). Reviewing courts evaluate whether an improper statement by a witness constitutes incurably harmful error under the same standards that are applicable to incurable jury argument. *Nguyen*, 442 S.W.3d at 441. Incurable statements are rare and generally encompass arguments that strike at the courts' impartiality, equality, and fairness because they inflict damage beyond the parties and the individual case under consideration if not corrected. *Id*. The mention of insurance is not regarded as incurable error. *See Dennis*, 362 S.W.2d at 309.

If anything is said from which the jury might reasonably infer that the defendant is insured, the trial court may order a mistrial, instruct the jury not to consider the improper statement, or even await the verdict before determining whether to grant a new trial. *See id.*; *see also Taylor v. Am. Fabritech, Inc.*,

132 S.W.3d 613, 625 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). We presume that jurors follow the instructions they are given. *In re BCH Dev., LLC*, 525 S.W.3d 920, 927 (Tex. App.—Dallas 2017, no pet.) (orig. proceeding). The presumption that jurors follow curative instructions is not to be disregarded without powerful reason. *See In re Rudolph Auto., LLC*, 674 S.W.3d 289, 312 (Tex. 2023) (orig. proceeding).

With respect to the mention of insurance, "an appellate court is not authorized to reverse merely because the record discloses evidence of some error reasonably calculated to cause a miscarriage of justice. The party appealing also must show that it probably did cause the rendition of an improper judgment in the case." *Dennis*, 362 S.W.2d at 309; *see also Nguyen*, 442 S.W.3d at 440; TEX. R. APP. 44.1(a)(1). A reviewing court must evaluate the whole case from voir dire to closing argument, considering the state of the evidence, the strength and weakness of the case, and the verdict. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008). "It is impossible to prescribe a specific test for harmless-error review, as the standard is more a matter of judgment than precise measurement." *Id.* To establish harmful error, the complaining party must demonstrate that the judgment turns on the particular evidence admitted. *Nguyen*, 442 S.W.3d at 440. Whether error is reversible depends on the facts in a given case. *See Brockett v. Tice*, 445 S.W.2d 20, 23 (Tex. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) ("Sometimes an instruction will cure the error. Sometimes the whole record in the

case from a factual standpoint will reflect that harm probably did not result."). A court may conclude that no harm occurred even in the absence of any curative instruction:

- *Nguyen*, 442 S.W.3d at 440–41 (concluding that, even if trial court erred by overruling appellant's objection to mention of insurance, any error was harmless);
- *Munoz v. Castillo*, No. 13-18-00451-CV, 2020 WL 1856476, at *9 & n.14 (Tex. App.—Corpus Christi–Edinburgh Apr. 9, 2020, no pet.) (mem. op.), *supplemented by* 2020 WL 1887807 (Tex. App.—Corpus Christi–Edinburg Apr. 14, 2020, no pet.) (supp. mem. op.) (concluding appellants were not harmed by isolated reference to insurance in case where no curative instruction was requested or given after denial of motion for mistrial on these grounds);
- *Beall v. Ditmore*, 867 S.W.2d 791, 796 (Tex. App.—El Paso 1993, writ denied) (concluding that trial court erred in overruling appellant's objection to testimonial reference to insurance policy but that appellant failed to show harm).

IV. The Trial Court Did Not Abuse Its Discretion by Denying Motion for New Trial

In her first three issues, Mrs. Jackson asserts that the trial court abused its discretion by denying her motion for new trial based on Tappin's reference to insurance, Mr. Cole's reference to insurance, and the trial court's nonspecific curative instruction.

A. Complaints about Tappin's Testimony Were Not Preserved

In her first issue, Mrs. Jackson argues that the trial court erred by denying her motion for new trial because the Coles' witness, Tappin, mentioned insurance twice during cross-examination by Mrs. Jackson's counsel. Tappin testified that

Mrs. Jackson had given Mrs. Cole "her I think ID or insurance" and that Mrs. Jackson "left her license or something, insurance with [Mrs. Cole]." Mrs. Jackson contends Tappin's statement was "not inadvertent" and liability was a "hotly contested" issue in the trial. Mrs. Jackson also asserts that a new trial is warranted because Tappin's second statement regarding insurance probably resulted in an improper verdict and caused harm.

However, Mrs. Jackson's counsel did not timely object to this testimony at trial and only raised concerns about Tappin's testimony after Mr. Cole's later mention of insurance. Mrs. Jackson argues that she did not need to object to Tappin's answer because the error was incurable. Statements referencing insurance, while improper, are not incurable error. *See Dennis*, 362 S.W.2d at 309. Mrs. Jackson has not shown how Tappin's statements rise to the level of those "rare" statements that are "so inflammatory as to be incurable." *See Nguyen*, 442 S.W.3d at 442. As a result, to preserve error for appellate review, the record must show that a timely objection was made and that the trial court ruled or refused to rule. *See* TEX. R. APP. P. 33.1(a); *see also Santos v. Deluna*, No. 04-22-00734-CV, 2024 WL 251975, at *2 (Tex. App.—San Antonio, Jan. 24, 2024, no pet.) (mem. op.) (concluding that appellant who failed to object to improper mention of liability insurance did not preserve error because reference to insurance is not incurable error). Because Mrs. Jackson failed to timely object, obtain a ruling, or request a

curative instruction regarding Tappin's statements, no error was preserved on the issue of whether Tappin's testimony warrants reversal.

We overrule Mrs. Jackson's first issue.

B. Assuming Error Regarding Mr. Cole's Insurance Testimony, Mrs. Jackson Has Not Demonstrated Harm

In Mrs. Jackson's second and third issues, she argues that the trial court erred by denying her motion for new trial because Mr. Cole improperly mentioned insurance, his testimony was not inadvertent, and the trial court's nonspecific instruction to disregard did not cure the improper statement. Mrs. Jackson asserts that Mr. Cole's improper testimony probably resulted in an improper verdict because liability[1] in this case was "hotly contested."

1. Mr. Cole's mention of insurance was improper.

Mr. Cole's statement that "we still had their insurance card in our hand" is considered error. *See* TEX. R. EVID. 411; *Dennis*, 362 S.W.2d at 309. Mrs. Jackson promptly approached the bench and, after discussion, moved for a mistrial. When insurance is mentioned to the jury, the trial court may either order a mistrial or instruct the jury not to consider the improper statement and await the verdict before determining whether to grant a new trial. *Dennis*, 362 S.W.3d at 309. In this case,

[1] Mrs. Jackson did not make any argument relating to damages or point to any evidence showing that the amount of damages awarded by the jury was excessive. Her appeal focuses only on the question of liability.

the trial court chose the latter option and determined a jury instruction was necessary as a result of the improper testimony by Mr. Cole.

2. Mrs. Jackson failed to preserve error regarding the curative instruction.

Mrs. Jackson argues that the trial court's instruction did not cure Mr. Cole's statement regarding insurance and, therefore, the trial court erred by denying Mrs. Jackson's motion for new trial. Basic curative instructions typically consist of sustaining the objection and instructing the jury to disregard. *In re Rudolph Auto.*, 674 S.W.3d at 311. In an effort not to draw attention to the reference to insurance, however, the trial court's instruction in the present case did not specifically instruct the jury as to which portion of Mr. Cole's response it needed to disregard.[2] The curative instruction immediately followed Mr. Cole's objectionable testimony, but this testimony occurred at the end of a lengthy response in which Mr. Cole mentioned several topics, including his call to the police after seeing two cups that may have contained alcohol in Mrs. Jackson's car, the Jacksons' departure from the scene, and the Jacksons' insurance card. The trial judge's instruction stated, "For those of you who noticed what he did, I'm going to instruct you to disregard it."Mrs. Jackson argues that the curative instruction given by the trial court failed to

[2] Texas case law provides examples of adequate jury instructions given by trial courts to cure improper references to insurance which did not mention insurance directly. *See, e.g., Michaelski v. Wright,* 444 S.W.3d 83, 90 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (op. on reh'g) (without mentioning insurance, trial court's curative instruction ordered jury to "disregard the question by [defendants' counsel] and answer of [defendants' expert] regarding any statement made by [plaintiff]"); *Cook v. Caterpillar, Inc.*, 849 S.W.2d 434, 441 (Tex. App.—Amarillo 1993, writ denied) (concluding that trial court's instruction to "disregard the last two questions and responses and the discussion that followed" was sufficient to cure any error concerning the injection of insurance).

specifically instruct the jury as to which testimony it should disregard, which of its instructions or rulings Mr. Cole had violated, and which topic it had ordered Mr. Cole not to raise.

However, Mrs. Jackson did not object to the trial court's curative instruction at trial or request a more specific instruction while the trial court still had an opportunity to clarify the instruction.[3] *See* TEX. R. APP. P. 33.1(a). The Texas Supreme Court has long held that most errors relating to the judge's conducting of the trial will not be considered on appeal unless the defendant by timely objection gives the trial judge a chance to correct his errors. *See, e.g., Lewis v. Tex. Emps.' Ins. Ass'n*, 246 S.W.2d 599, 601 (Tex. 1952); *State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965). Mrs. Jackson has not shown that any error in this instruction could not have been rendered harmless by a further clarifying instruction.[4] As a result, we conclude that Mrs. Jackson failed to preserve error

[3] When later denying Jackson's second motion for mistrial, the trial judge stated that he had forcefully instructed the jury to disregard Mr. Cole's improper testimony. He thus believed that he had provided a clear instruction to disregard to the jury, and Jackson did not voice any objection. In this case, a clarification of the curative instruction would have been possible if Jackson had brought the purported error to the trial judge's attention.

[4] Mrs. Jackson's complaint about this jury instruction is analogous to a complaint about an improper comment by the trial judge. To preserve error on a trial court's improper comment, a party must object at the time of the comment unless the comment is of a character that cannot be rendered harmless by proper instruction. *See State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965). Courts have applied these requirements to certain complaints about curative jury instructions. *See Smith v. Henson*, 270 S.W.3d 673, 675 (Tex. App.—Fort Worth 2008, pet.denied) (concluding that, by failing to object, appellant did not preserve error regarding her complaint that the trial court's curative instruction was an improper comment on the evidence); *Wilhoite v. Sims*, 401 S.W.3d 752, 764 (Tex. App.—Dallas 2013, no pet.) (same). In *Smith*, the appellate court stated that "[t]he trial court could have made any error harmless by clarifying its instruction." 270 S.W.3d at 675.

regarding her complaint that the trial court's curative jury instruction was erroneous or ineffective.

In addition, we note that Rule 226a, "Instructions to Jury Panel and Jury," requires the trial court to instruct the jury, "Do not consider or guess whether any party is covered by insurance unless I tell you to." TEX. R. CIV. P. 226a; *see also Meyers v. Searcy*, 488 S.W.2d 509, 514 (Tex. App.—San Antonio 1972, no writ) ("The approval of [Rule 226a] must be regarded as reflecting the [supreme court's belief] that a jury can, and will, obey it, unless we are ready to assume that the Supreme Court, in approving the instruction, was merely indulging an exercise in futility."). The reporter's record indicates the trial judge read "Instructions to Jurors in Civil Cases" to the jury after the jurors were selected, although the record does not contain a transcript of these instructions.[5] Neither party has asserted that the trial court failed to give the Rule 226a insurance instruction. We therefore assume that the trial court gave this required instruction. *See Pharo v. Chambers Cnty., Tex.*, 922 S.W.2d 945, 948 (Tex. 1996) ("While the record does not affirmatively reflect that the trial court gave this admonishment [regarding jurors mingling with trial participants], neither side raises any issue that it was not given, and we assume that

[5] The reporter's record in this case does not include a record of the voir dire proceedings, which the parties agreed to conduct off the record. In addition, the trial judge's preliminary instructions to the jury after it was sworn are referred to, but not transcribed, in the reporter's record. Also, the reporter's record does not contain the referenced transcript of the video deposition testimony of one of the Coles' physicians, which was played for the jury. We presume the omitted video deposition testimony supported the trial court's judgment. *See Crown Life Ins. Co. v. Est. of Gonzalez*, 820 S.W.2d 121, 122 (Tex. 1991) (per curiam) ("Absent a complete record on appeal, [the appellate court] must presume the omitted [items] supported the trial court's judgment.").

it was."). We presume that the jury followed this instruction. *See, e.g., In re Rudolph Auto.,* 674 S.W.3d at 312; *In re BCH Dev.,* 525 S.W.3d at 927.

3. Mrs. Jackson failed to show harm—that Mr. Cole's reference to insurance probably resulted in an improper judgment.

Mrs. Jackson argues that Mr. Cole's statement regarding the Jacksons' insurance and Tappin's similar statements were not inadvertent and that, because liability was hotly contested in the present case, these statements harmed Mrs. Jackson. She asserts that the statements probably caused the rendition of an improper judgment and, similarly, that the probability that the statements regarding insurance caused harm exceeds the probability that the verdict was grounded on proper proceedings and evidence.[6]

As discussed previously, Mrs. Jackson preserved no complaint about Tappin's statements. And even if Mrs. Jackson had preserved error regarding the ineffective jury instruction, she was still required to show harm caused by Mr. Cole's improper testimony. *See Michaelski v. Wright*, 444 S.W.3d 83, 91 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (op. on reh'g) (citing *Dennis* to explain that the appellants "must overcome the presumption that the jury followed the trial court's instruction *and* must show that the improper statement probably caused the rendition of an improper judgment" (emphasis added)). Accordingly, even absent a presumption that the jury followed the Rule 226a instruction or the trial court's attempted

[6] Mrs. Jackson has not expressly asserted on appeal that the evidence at trial was either legally or factually insufficient to support the jury's verdict.

instruction to disregard this testimony, a reviewing court will not reverse a verdict unless the appealing party demonstrates that the judgment turns on this particular evidence and the error probably resulted in an improper verdict. TEX. R. APP. 44.1(a)(1); *see also Dennis*, 362 S.W.2d at 309-10; *Nguyen*, 442 S.W.3d at 440.

We review the entire record, including the state of the evidence, the strengths and weaknesses of the case, and the verdict, to determine whether any error in Mr. Cole's mention of insurance probably caused the rendition of an improper judgment in this case. *See Reliance Steel*, 267 S.W.3d at 871; *see also Dennis*, 362 S.W.2d at 309. In determining whether error was harmful, we look to the role the evidence played in the context of the trial and the efforts made by counsel to emphasize the erroneous evidence, as well as whether there was contrary evidence that the improperly admitted evidence was calculated to overcome. *Nguyen*, 442 S.W.3d at 440. Harmless-error review relies on the reviewing court's judgment rather than precise measurement. *See Reliance Steel*, 267 S.W.3d at 871.

a. Evidence supported the jury's verdict on liability.

The starting point for harmless-error review is the judgment, including whether any aspects of the verdict on which the judgment was based indicate that something beyond the relevant evidence guided the jury's deliberations. *See id.* In this case, other than the finding of liability, Mrs. Jackson points to nothing specific in the jury's findings contained in the verdict that would indicate that the jury probably rendered its verdict based on the knowledge that the Coles were insured.

The jury found that 100% of the negligence that caused the collision was attributable to Mrs. Jackson.

In addition, the record contained the following evidence relating to liability:

- The accident occurred around 8:35 p.m. to 8:42 p.m. It was dark, and the roads were wet because it had rained.

- The Jacksons were coming from dinner where Mrs. Jackson stated that she had one alcoholic drink. The time on the police report and Mrs. Jackson's testimony show that that the Jacksons were running late for the 8:30 p.m. show they were planning to see at the theater.

- Mrs. Cole was headed south on Harwood Street but stopped at a red light at the intersection with Elm Street She was in the far-right lane and was the first car in line at the light. Mr. Cole, the passenger, testified that Mrs. Cole entered the intersection after her light turned green and that the collision occurred in the intersection.

- Mrs. Jackson was headed north on Harwood Street and stopped in the left-turn lane at the Elm Street intersection. Mrs. Jackson testified that her car was fully stopped in the dedicated left-turn lane and that the light turned green but that she had not started her turn when Mrs. Cole's car hit her car.

- The front left side (driver's side) of Mrs. Jackson's car and the front left side of Mrs. Cole's car made contact, which is confirmed by photos admitted at trial.

- The Jacksons ultimately left the scene prior to the police's arrival. Mrs. Jackson testified that she did not know that the police had been called. A charge against Mrs. Jackson for fleeing the scene was dismissed.

- The police report indicates that Mrs. Jackson failed to yield the right of way while turning left, although Mrs. Jackson later made a different report to the police.

Mrs. Jackson argues that the judgment should be reversed because liability was "hotly contested" and cites the conflicting testimony in the case. However, Mrs. Jackson has not shown that the judgment turned on Mr. Cole's reference to insurance. *See Nguyen*, 442 S.W.3d at 440. We conclude that adequate evidence supports the jury's conclusion that Mrs. Jackson was liable for the car accident. Although Mrs. Jackson testified to a different version of events, jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). Jurors may choose to believe one witness and disbelieve another. *Id.* Reviewing courts cannot impose their own opinions to the contrary. *Id.*

Mrs. Jackson asserts that several no-writ cases decided between 1929 and 1950 by other courts of appeals support her argument that the existence of hotly contested liability issues demonstrate that improper statements regarding insurance probably caused the rendition of an improper judgment.[7] We conclude that the mere fact that liability was "hotly contested" due to conflicting testimony in this case,

[7] *See M.J. Constr. Co. v. Deatherage*, 231 S.W.2d 501, 502 (Tex. App.—Eastland 1950, no writ) (reversing judgment when insurance was injected in closely contested case and evidence revealed jury could have fixed plaintiff's damages at much smaller sum than amount fixed or could have rendered judgment for defendant); *Thompson Drug Co. v. Latham*, 19 S.W.2d 825, 825 (Tex. App.—Amarillo 1929, no writ) (when liability was sharply contested and nothing suggested improper insurance statement was inadvertent, stating, "Under the facts and circumstances as disclosed in this record, it would be a mere surmise for this court to say whether or not the testimony complained of affected the jury in reaching a verdict."); *The Fair, Inc. v. Preisach*, 77 S.W.2d 725, 727 (Tex. App.—Beaumont 1934, no writ) (involving verdict appellant deemed grossly excessive and complicating issue that trial court did not submit question of whether oil was on the floor to the jury in this slip-and-fall case).

without more, has not demonstrated harm warranting reversal when the record contains evidence supporting the jury's verdict.

b. Mrs. Jackson concedes that neither Mr. Cole nor his counsel acted with bad intent.

The supreme court has noted that, in a harmless-error review of improper evidence of insurance, Texas courts often look to whether the injection of insurance was inadvertent or not. *Reliance Steel*, 267 S.W.3d at 874. When attorneys insist that prejudicial evidence be admitted, that can be some evidence that at least they thought it would have some likely effect on the verdict. *Id.* In the present case, however, Mrs. Jackson concedes that she is not suggesting that counsel for the Coles attempted to elicit the improper testimony, that counsel for the Coles emphasized the improper testimony at trial, or that Mr. Cole himself made the improper statement with bad intent. In addition, counsel for the Coles did not solicit or develop the references to insurance or mention insurance in closing argument. *See id.* at 873 ("In harmless-error review, we have also looked to efforts by counsel to emphasize the erroneous evidence."). This factor weighs against a determination of harm.

We emphasize that it is incumbent upon trial counsel to properly instruct their witnesses to avoid improper testimony regarding insurance. We also acknowledge that the intention of the party interjecting insurance into the case may not be relevant when the appealing party otherwise demonstrates that even the inadvertent mention

of insurance probably caused the rendition of an improper judgment. However, this is not such a case.

c. Mrs. Jackson does not challenge damages.

Moreover, Mrs. Jackson does not argue or point to evidence that the damages awarded by the jury were excessive. Although it is difficult to evaluate a jury's award for items such as future pain and mental anguish and future physical impairment given the lack of specific proof available to prove these damages, courts consider whether the jury's damages verdict exceeded the evidence provided in support of those categories for which evidence is available. *See Reliance Steel*, 267 S.W.3d at 872 (determining that, in combination with other awards, the jury's award of certain amounts significantly in excess of amounts supported by the evidence showed that the jury's findings were probably the result of something other than the admissible evidence in the case); *see also Taylor*, 132 S.W.3d at 625 (rejecting argument that large size of verdict was evidence that mention of insurance influenced jury, because medical expenses supported by evidence comprised large percentage of verdict and were not disputed on appeal).

In this case, the jury returned a verdict which, for the largest categories of damages (past and future medical expenses), approximated the amounts requested by the Coles. The jury awarded $88,000 to Mr. Cole for past and future medical expenses (of the $130,000 total award to him), and awarded $174,000 to Mrs. Cole for past and future medical expenses (of the $199,000 total award to her).

Mrs. Jackson does not dispute these amounts specifically or show that the admitted evidence failed to support the jury's award of these amounts.[8] Moreover, the jury awarded no amounts for Mrs. Cole's past and future physical impairment and a significantly lesser amount than requested for Mr. Cole's future mental anguish, suggesting that the jury thoughtfully considered its verdict.

d. In the absence of legal error or evidence demonstrating harm, we defer to the trial judge's special vantage point at trial.

The trial judge shared Mrs. Jackson's concern about the improper references to insurance and believed that he had instructed the jury to disregard the insurance testimony. We have assumed without deciding that the trial court's curative instruction did not presumptively cure the harm, if any, resulting from the mention of insurance because the jury instruction was nonspecific. However, the instruction clearly intended to instruct the jury to disregard *some* aspect of the immediately preceding testimony by Mr. Cole that caused Mrs. Jackson's counsel to interrupt the examination and approach the bench. In fact, given the trial judge's strong admonishment of Mr. Cole and reference to Mr. Cole's violation of the law, it could be argued that the jury also could have mistakenly discounted even proper testimony by Mr. Cole. *See In re Rudolph Auto.*, 674 S.W.3d at 309 (discussing the trial court's "harsh" but "clear" curative instruction and stating, "One may wonder if the

[8] The record does not clearly indicate the amounts requested for some of the smaller awards such as past and future pain and suffering, mental anguish, and physical impairment. The jury returned a verdict of between approximately $5,000 and $10,000 for most of these soft damages items, and awarded no damages for two items.

jury, hearing the court's denunciation of the expert, gave much heed to *anything* he had said.").

We also consider that the trial judge observed the remainder of the trial before denying Mrs. Jackson's motion for new trial. "Trial judges are entitled to great deference with respect to assessing the consequences of improperly admitted testimony, which can properly inform a trial court in exercising its authority to grant a new trial." *Id.* at 308 (internal citation omitted). The supreme court has emphasized that trial courts possess a "special vantage point" and must grant new trials when they observe problems that threaten the integrity of the process and, therefore, the reliability of the verdict. *Id.* at 302. However, it further reiterated that "disregarding a jury's verdict is an unusually serious act that imperils a constitutional value of immense importance—the authority of the jury." *Id.* Based on the record in this case, we conclude that Mrs. Jackson has not shown that the trial court abused its discretion in determining that the degree of harm from Mr. Cole's improper testimony did not warrant reversal of the jury's verdict.

e. Conclusion

Based on our review of the record and the complained-of jury instruction in this case, Mrs. Jackson has not shown that the improper reference to insurance probably resulted in an improper verdict. As a result, we conclude that the trial court did not abuse its discretion by denying Mrs. Jackson's motion for new trial.

We overrule Mrs. Jackson's second and third issues.

V. The Trial Court Did Not Abuse Its Discretion by Denying Motion for Mistrial

In Mrs. Jackson's fourth issue on appeal, she argues that the trial court erred when it denied her motion for mistrial. A mistrial halts trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile and is an appropriate remedy only in extreme circumstances for a narrow class of highly prejudicial and incurable errors. *Villalobosa*, 2024 WL 5244616, at *4. Here, after all evidence had been presented to the jury, the judge stated that he was denying Mrs. Jackson's second motion for mistrial because he did not believe that the prejudice rose to the level that required a mistrial in this particular case. We conclude that the trial court did not abuse its discretion by denying Mrs. Jackson's motion for mistrial because, as discussed above, Mrs. Jackson failed to demonstrate that the improper testimony probably resulted in an improper verdict. We overrule Mrs. Jackson's fourth issue.

VI. Conclusion

In conclusion, Mrs. Jackson did not preserve error regarding Tappin's improper testimony referencing insurance. Mrs. Jackson did preserve error about Mr. Cole's improper testimony, but not about the trial court's curative instruction. However, even if she had preserved error regarding the trial court's curative instruction, Mrs. Jackson has not shown harm—that a review of the entire record reflects that the injection of insurance probably caused the rendition of an improper

judgment. Accordingly, we conclude that the trial court did not abuse its discretion by denying Mrs. Jackson's motion for new trial and motion for mistrial.

We affirm the trial court's judgment.

/Emily Miskel/
EMILY A. MISKEL
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DENEE JACKSON, Appellant No. 05-23-00424-CV V. VENITA COLE AND VAN COLE, Appellees	On Appeal from the 68th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-19-09701. Opinion delivered by Justice Miskel. Justices Smith and Breedlove participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees VENITA COLE AND VAN COLE recover their costs of this appeal from appellant DENEE JACKSON.

Judgment entered this 1st day of April, 2025.