

83-LW-1752 (10th)

Joan Siemer, Plaintiff-Appellant

v.

Michael Charles Patton, et al., Defendants-Appellees.

No. 83AP-179 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on December 20, 1983.

APPEAL from the Franklin County Court of Common Pleas.

THOMAS M. TYACK & ASSOCIATES CO., L.P.A., and MR. THOMAS M. TYACK, for appellant.

MESSRS. LANE, ALTON & HORST, and MR. JOHN M. ALTON, for appellees.

OPINION

WHITESIDE, P.J.

Plaintiff Joan Siemer appeals from a judgment of the Franklin County Court of Common Pleas and raises two issues by a single assignment of error, as follows:

"The verdict of the jury finding neither plaintiff nor defendant negligent was inconsistent and against the manifest weight of the evidence."

A collision occurred at the intersection of Wilson Road and Sullivant Avenues between the automobile driven by plaintiff, proceeding northbound on Wilson Road, and the automobile driven by defendant, Michael C. Patton, proceeding eastbound on Sullivant Avenue and preparing to turn left onto Wilson Road. The intersection is controlled by a traffic light, including a left-turn phase arrow for turns onto Wilson from Sullivant.

Plaintiff claims that defendant's negligence in making a left turn against a red light directly resulted in personal and property damages to plaintiff. Defendant claims that plaintiff's negligence in failing to heed the red light for Wilson Road traffic was the sole cause of her claimed injuries and damages.

The jury returned a general verdict for defendant and, in addition, answered two interrogatories expressly finding that neither plaintiff nor defendant was negligent.

The first portion of the assignment of error raises an issue of law concerning the inconsistent answers to interrogatories. The determinative issue is whether or not the trial court properly entered judgment for defendant upon the verdict returned by the jury in light of the inconsistent interrogatories.

The general verdict, when tested by the answers to interrogatories, does not resolve the issues of fact between the parties so as to enable the trial court to determine, as a matter of law, in whose favor judgment should be entered. The testimony at trial was conflicting, plaintiff contending that she had a green light and defendant contending that he entered the intersection upon a green arrow. There was no evidence that either party was delayed by other traffic or that there was a change of signal after either entered the intersection. Nor was there evidence that the signals were malfunctioning or that the city of Columbus had been negligent in maintaining the signals. Testimony concerning the functioning of the traffic lights indicated it to be impossible for both the left-turn arrow for Sullivant and the light for Wilson Road to be green at the same time. Therefore, one of the parties ran a red light in violation of R.C. 4511.13 since, under the evidence adduced, the collision could not otherwise have occurred.

The jury's answers to the two interrogatories finding that neither plaintiff nor defendant was negligent by a

preponderance of the evidence indicate that the jury failed to perform its duty to decide determinative issues of fact and, instead, simply indicated it could, or would, not determine which party's evidence correctly reflected that which occurred. Such failure by the jury constitutes a mistrial and necessitates a new trial. Aetna Casualty & Surety Co. v. Niemiec Admx. (1961), 172 Ohio St. 53; Miller v. McAllister (1959), 169 Ohio St. 487; Fishback v. Norman (1946), 78 Ohio App. 140.

In Aetna, the jury answered an interrogatory "Don't know," and the court held this not to be a definite answer to an interrogatory so that the jury failed to return a verdict as required by law. In the instant case, in light of the evidence adduced at trial, the jury's answers to the interrogatories finding neither plaintiff nor defendant negligent also constituted an answer of "Don't know."

Prior to the trial court's discharge of the jury, plaintiff's attorney raised the issue of the irreconcilability of the jury's responses to the two interrogatories. The court stated that it would discharge the jury and consider plaintiff's motion. (Tr. 208-209.) Under the circumstances, the court could have returned the jury to the jury room for further deliberations because of the inconsistency in the verdict but failed to do so.

The second portion of the assignment of error raises an issue of manifest weight. There was testimony from independent eyewitnesses. One, an acquaintance of defendant, testified that she was travelling on Kingsford (Wilson Road) about one-half block behind plaintiff and that plaintiff entered the intersection on a green light and that the light remained green long enough for the witness also to pass through the intersection and turn right after the collision. The other had proceeded westbound on Sullivant and was stopped at a red light waiting to turn north onto Wilson. He observed that the traffic signal for northbound and southbound traffic "was also red." (Tr. 162.) He observed defendant make a left turn in front of him, and plaintiff proceed northbound on Wilson and the resultant crash. He assumed defendant had a green light but was in no position to observe the light. He admitted later he could not actually see the light for northbound traffic but saw red reflections.

Defendant testified that he first observed the green arrow for his left turn two blocks from the intersection and continued on and made his left turn without stopping, although he slowed down to make the turn. He stated the green arrow remained on for the entire two blocks and that the traffic light for eastbound traffic on Sullivant did not change to yellow. He also indicated he did not observe any left-turn traffic ahead of him, nor the eyewitness who claimed he was stopped for the westbound red light.

This testimony of defendant and his favorable eyewitness is not completely consistent with the evidence as to the functioning of the traffic light. The left-turn green arrow is not automatic but must be activated by a vehicle stopping in the left-turn lane on a tripping device and remaining for fifteen seconds. The green arrow then is activated following a green light for Sullivant traffic and remains on for eight seconds. After the green arrow (or any green light), the yellow light shows followed by a red light for traffic in all directions for one second.

While there is an obvious basis for discounting the evidence of both defendant and his eyewitness, both are competent witnesses, and one cannot find that neither witness's testimony is capable of being believed. Thus, their testimony constitutes competent, credible evidence in the face of which a reviewing court cannot find a jury verdict to be against the manifest weight of the evidence. C. E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279. This is true, even though defendant's eyewitness's testimony is not necessarily inconsistent with plaintiff's having entered the intersection on a green light since the light is red for all directions for one second following a green arrow for eastbound Sullivant traffic.

Nevertheless, we must find the assignment of error to be well taken because of the inconsistency between the general verdict and the interrogatories. While there are circumstances where it is possible for a trier of fact to determine that neither party has sustained his burden of proof, this is not such a situation. Rather, it is difficult to conceive how the jury could have found both defendant and plaintiff negligent any more than it could properly find neither of them negligent. One of them, either defendant or plaintiff, entered the intersection against a red light and, thus, was guilty of negligence per se, which negligence was the proximate cause of the resultant collision. The jury interrogatory response finding plaintiff not negligent is inconsistent with the verdict for defendant.

The jury was confused as to the law to apply and sought further instruction during deliberations, which was given. The trial court instructed the jury generally on the law as to traffic lights and as to right-of-way, as well as on negligence consisting of a failure to use ordinary care and upon contributory negligence. Much of this was unnecessary under the facts of this case.

Rather, this case presents a proper instance for the giving of a simple plain-language instruction as to liability. An appropriate charge as to liability could eliminate all the detailed instruction as to the various rules of law and have consisted of simply stating:

"If you find that defendant entered the intersection and commenced his left turn on a green arrow for eastbound Sullivant traffic, your verdict should be for defendant.

"If, on the other hand, you find that defendant did not enter the intersection and commence his left turn on a green arrow for eastbound Sullivant traffic, your verdict should be for plaintiff."

Since it was impossible for both plaintiff and defendant to have entered the intersection on a green light, such a simplified charge would have eliminated the confusion which resulted in inconsistent responses to the interrogatories, as well as the inconsistency with the general verdict.

Accordingly, for the foregoing reasons, the assignment of error is sustained with respect to the inconsistent jury verdict but is overruled as to the manifest weight of the evidence; the judgment of the Franklin County Court of Common Pleas is reversed; and this cause is remanded to that court for further proceedings in accordance with law consistent with this opinion.

Judgment reversed and cause remanded.

NORRIS, J., concurs.

STRAUSBAUGH, J., dissents.

STRAUSBAUGH, J., dissenting.

I would affirm the judgment rendered by the trial court for the reason that the jury merely found that neither side had sustained their burden of proof, as the trier of the fact is entitled to do.

State of Ohio, Plaintiff-Appellee

v.

Michael L. Moore, Defendant-Appellant.

83AP-271 (REGULAR CALENDAR).

Court of Appeals of Ohio, Franklin County.

December 20, 1983.

APPEAL from the Franklin County Court of Common Pleas.

MR. MICHAEL MILLER, Prosecuting Attorney, and MS. JOYCE S. ANDERSON, for appellee.

TYACK, DELLIGATTI & BRISCOE, and MR. G. GARY TYACK, for appellant.

WHITESIDE, P.J.

OPINION

Defendant-appellant, Michael L. Moore, appeals from his conviction in the Franklin County Court of Common Pleas of kidnapping and rape and raises three assignments of error, as follows:

"1. The trial court erred in failing to sustain the defendant's motion for a judgment of acquittal as to at least one of the two charges of rape and kidnapping,

"2. The trial court erred in failing to give the additional charge as to eye-witness identification.

"3. The trial court erred in failing to sustain the defendant's motion for a mistrial based upon the prejudice inherent in the jury being informed of the defendant's incarceration."

The victim testified that defendant engaged her in conversation at a bus stop where she was waiting for a bus. He then pulled a knife and forced her to walk down the street and then down an alley to a shed, which he forced her to enter. Once inside, he forced her to remove part of her clothing and raped her.

The first assignment of error raises the issue of whether the kidnapping was merged in the rape pursuant to R.C. 2941.25(A). Since defendant was convicted of kidnapping in violation of R.C. 2905.01(A)(4), it is an offense of similar import to rape, in violation of R.C. 2907.02(A)(1), of which defendant also was convicted. State v. Donald (1979), 57 Ohio St. 2d 73. In Donald, however, the Supreme Court noted in Footnote 3 that, even though offenses are of similar import, R.C. 2941.25(B) permits conviction of two or more similar offenses if the two offenses were either: (1) committed separately, or (2) committed with a separate animus as to each.

In State v. Logan (1979), 60 Ohio St. 2d 126, the Supreme Court discussed and determined the requirements for a separate animus between a kidnapping and a related offense. Logan did not purport to determine under what circumstances crimes of similar import are committed separately. Clearly, the two crimes involved under the circumstances, kidnapping and rape, do not have a separate animus. Kidnapping is defined by R.C. 2905.01(A)(4), as follows:

"No person, by force, threat or deception * * * shall remove another from the place where he is found or restrain him of his liberty * * *

* * *

"(4) To engage in sexual activity * * * with the victim against his will * * *."

Very clearly, such type of kidnapping could not possibly have a separate animus from the related rape, that is the accomplishment of the purpose for which the kidnapping was committed. However, if the mere existence of the same animus would in all cases require kidnapping in violation of R.C. 2905.01(A)(4) to merge in the ensuing rape committed in fulfillment of the purpose of the kidnapping, there could be no instance in which the kidnapping would not merge in the rape. This, however, clearly is not the import of R.C. 2941.25(B) since it provides that: "Where his conduct results in two or more offenses of the same or similar kind committed separately * * * the defendant may be convicted of all * * *." Nevertheless, equally important is the express language of R.C. 2941.25(A), which states that: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import * * * the defendant may be convicted of only one."

This case, therefore, brings forth the question of what constitutes the "same conduct by defendant" under R.C. 2941.25(A), as well as when two or more offenses of the similar kind or import are "committed separately" under R.C. 2941.25(B). This issue was not presented or determined in either Donald or Logan. This issue, on the other hand, was presented and determined in State v. Frazier (1979), 58 Ohio St. 2d 253. In that case, the court distinguished between burglary and aggravated robbery, finding that the offense of burglary was completed by the defendant's forcing his way into the house with the intent to rob the victim; whereas, the robbery thereafter ensued.

While the same cannot be said completely of the kidnapping in this case, it is true with respect to the asportation portion of the kidnapping. As indicated earlier, kidnapping under R.C. 2905.01(A)(4) consists of one of two acts: (1) removing the person from the place where he is found for the purpose of sexual activity against his will or (2) restraining the person of his liberty for the purpose of engaging in sexual activity against his will. The offense of removing the victim from the place where she was found, the bus stop, to the place where the rape was to take place for the purpose of committing the rape was completed when the victim was forced to enter the shed. While kidnapping still took place in the sense of restraining the victim of her liberty for the purpose of committing the rape, the initial kidnapping was already completed the same as the burglary was completed in Frazier.

The issue, therefore, as discussed in Logan in the context of animus, rather than separate commission, is whether "the movement is substantial so as to demonstrate a significant independence of the other offense."

In this regard, a distinction must be made as to whether the kidnapping in violation of R.C. 2905.01(A)(4) is committed by removing the victim from the place where he is found or is committed by restraining him of his liberty. The former is committed separately if the asportation is of a significant distance prior to the arrival at the place of the intended rape; whereas, the latter is significant only if the restraint of liberty is for a significant period of time prior to the commission of the intended rape.

Here, the victim was forcibly removed from the bus stop where she was found and forced to walk approximately one block to a shed, which she was forced to enter and where the rape occurred, the asportation taking less than five minutes. We find this to be sufficient asportation to constitute separate conduct of the defendant from the actual commission of the rape itself. Here, the same conduct did not constitute the kidnapping and the rape. While the kidnapping continued in the sense that the victim was continued to be deprived of her liberty, the kidnapping by removing her from the place where she was found to the shed was completed prior to the commission of the rape. Separate conduct was involved in the two offenses sufficiently to permit separate convictions. The first assignment of error is not well taken.

By the second assignment of error, defendant contends that it was error for the trial court to refuse to add to the special eyewitness identification instruction which the trial court gave, the sentence: "It is not essential that the witness himself be free from doubt as to the correctness of the statement." Defendant has not demonstrated how the adding of that sentence to the eyewitness identification charge would in any way have benefited defendant, nor can this court conceive of any possible benefit to defendant or any possibility that the verdict would have been different had that additional instruction been given. We find no error and no prejudice. The second assignment of error is not well taken.

By the third assignment of error, defendant contends that the trial court erred in overruling his motion for mistrial based upon a contention that his incarceration during the trial was suggested to the jury by the trial court's statement to the jury: "Let's recess for about five minutes in the jury room so that the defendant may make his appearance." We find no merit to this contention. Jurors are not naive persons, nor are they required to be. The fact that the defendant is charged with a crime of necessity must be known to the jury. Whether or not he has been released on bail is usually not known by the jury but, even if they know he has not, there is no per se prejudice to a defendant. What is prejudicial to a defendant is to be required to appear in court in a demeaning or suggestive garb or condition, which in itself constantly reminds the jury not only that the defendant is charged with a crime but also that he may be a "bad" person because of his garb or shackles. The comment by the trial court in this case in no way could possibly prejudice the jury against defendant. In addition, the trial court expressly charged the jury as to its responsibility not to be influenced by sympathy or prejudice and to decide the case impartially and without bias. There is nothing suggesting that the jury did not do so, or that the statement by the trial court in any way influenced the jury to ignore the trial court's instructions. The essential question is the credibility of the victim as to her identification of defendant as her assailant. She testified that she had known him previously and recognized him, as well as that she recognized his photograph from a tray of photographs at the police station.

There was no error with respect to the trial court's comment to the jury that it would wait for defendant to come in and leave the courtroom for that purpose, and, accordingly, the third assignment of error is not well taken.

For the foregoing reasons, all three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

REILLY and MOYER, JJ., concur.