

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF MADISON,

Plaintiff-Respondent,

v.

DANIEL W. MILLER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

VERGERONT, J.¹ Daniel W. Miller appeals from a judgment of conviction for violation of § 12.24(1)(c)(1) MADISON GENERAL ORDINANCE, which adopts § 346.37(1)(c)1, STATS., and requires stopping at a red signal.² Miller

¹ This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

² Section 346.37(1)(c)1, STATS., provides:

Vehicular traffic facing a red signal shall stop before entering the crosswalk on the near side of an intersection, or

contends that the trial court erred by: (1) denying his request to admit a copy of the WISCONSIN MOTORIST'S HANDBOOK AND STUDY GUIDE (handbook), (2) failing to grant a mistrial based upon comments made by the prosecution on the credibility of a witness, and (3) denying his requested jury instruction on his theory of defense. We hold that the trial court properly exercised its discretion in denying the admission of the handbook and denying the request for a mistrial, and that the trial court properly instructed the jury. We therefore affirm.

BACKGROUND

Miller was traveling on East Washington Avenue toward the State Capitol when he was pulled over by Officer Susan Armagost approximately three blocks past the intersection of Ingersoll Street and East Washington Avenue. Miller asked Armagost why he was being stopped and she stated that it was for a red signal violation. Miller told Armagost that he was unable to stop for the yellow light and proceeded through the intersection. Armagost issued Miller a citation for a red signal violation.

Miller challenged the citation before the Madison Municipal Court. The municipal court issued a decision and order finding Miller guilty of the red signal violation. Pursuant to § 800.14(4), STATS., Miller appealed the verdict to the Dane County Circuit Court and posted the necessary jury fees.

At trial, the jury trial in circuit court, Miller attempted to introduce into evidence two pages from the handbook. One page dealt with Wisconsin Rules of the Road relating to traffic lights and the other contained a section entitled, "Keeping A Space Cushion" which dealt with safe spacing between vehicles. The prosecutor objected to the admission of the handbook pages as irrelevant because the material did not assist in proving or disproving the red signal violation. The prosecutor also argued that the duty regarding following

(..continued)

if none, then before entering the intersection or at such other point as may be indicated by a clearly visible sign or marking and shall remain standing until green or other signal permitting movement is shown.

distance is pertinent only to the following vehicle, not the vehicle in front. The trial court declined to admit the pages, stating:

The information about stopping on a yellow light is not relevant and may be confusing to the jury since the allegation here is that Mr. Miller drove through a red light. The allegation or the information following this two second rule is not relevant because it applied to the car following, and according to the argument of counsel, Mr. Miller is the first car in line, not the car following. He can certainly testify that a car behind him was too close.

I don't think this manual would prove any additional information to the jury that would assist them in reaching their decision, and frankly, your client testifies that he was counting the seconds and watching milestones as the car behind him is driving, he would have to be looking through his rearview mirror and couldn't very well see the safety light in front of him. So, in any event, that exhibit is denied.

The admission of evidence is addressed to the sound discretion of the trial court. *State v. Jenkins*, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). We will affirm the trial court's exercise of discretion if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *Id.*

Miller contends that the handbook would have explained the reason he did not stop at the intersection. He claims that he proceeded through the intersection on a yellow light, not a red light, and that this evidence was relevant not only to his defense that he did not run the red light but also explained why he could not safely stop for the yellow light. We are not persuaded.

"Relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence." Section 904.01, STATS. The handbook pages do not make the existence of any fact of consequence more or less probable. Miller was charged with running a red light. His defense was that the traffic light was yellow when he entered the intersection, and he so testified. The handbook pages do not make one color of the traffic signal more probable than another. Whether Miller could or could not have stopped safely on the yellow light is not the issue. The handbook pages would not have provided the jury with any additional information that would assist it in reaching a verdict. We conclude that the trial court properly exercised its discretion in refusing to admit the handbook pages.

Next, Miller contends that the trial court erroneously exercised its discretion in failing to grant a mistrial based on the prosecutor's comments regarding the credibility of the State's only witness, Officer Armagost. In closing arguments the prosecutor referred to Armagost's testimony and stated: "She was honest from the moment she got up there to the moment she sat back down." Defense counsel objected immediately, stating: "I think the Court determines credibility." The court responded, "The jury will determine credibility of the witnesses." The court then instructed the jury that, "Counsel's opinion about credibility is not relevant."

After the jury began deliberation, defense counsel moved for a mistrial. The court denied the motion, stating:

At the time that I heard [the comment] I was satisfied that instructing the jury that counsel's opinion about the credibility of the witness is irrelevant was a sufficient curative for any problem that may have occurred. I am certainly not saying that the argument was improper, but if it was, I think that that was a sufficient correction. The motion is denied.

In reviewing a trial court's denial of a request for a mistrial, we look to see whether the trial court erroneously exercised its discretion in denying the motion. *State v. Davidson*, 44 Wis.2d 177, 194, 170 N.W.2d 755, 764 (1969). We do not reverse unless there has been a clear misuse of discretion. *Id.*

We will assume for purposes of argument that Miller is correct that the prosecutor's statement is improper comment on credibility. The prosecutor made a single comment, which was followed immediately by a curative instruction. In addition, the court read the following instructions to the jury: WIS J I-CRIMINAL 157, Remarks of Counsel; WIS J I-CRIMINAL 160, Arguments of Counsel; WIS J I-CRIMINAL 300, Credibility of Witnesses. These advised the jury that remarks of counsel are not evidence, that counsels' closing arguments, conclusions and opinions are not evidence, and that they [jurors] are the sole judges of the credibility of the witnesses and determine the weight and credit given to their testimony. We presume that jurors follow the instructions they are given. *State v. Hagen*, 181 Wis.2d 934, 948, 512 N.W.2d 180, 185 (Ct. App. 1994). We conclude that the curative instruction and the other instructions given were sufficient protection against any prejudice that may have occurred as a result of the prosecutor's remark.

Finally, Miller argues that the trial court erroneously denied his request for jury instructions on his theory of defense. He requested these non-pattern jury instructions:

(1) When shown with or following the green, traffic facing a yellow signal stop before entering the intersection unless so close to it that a stop may not be made in safety. It is a valid defense to a red signal violation to proceed through the intersection following safely. If you find from the evidence in this case that the defendant was unable to make a stop at the red light, you must find him not guilty; and

(2) vehicular travel facing a red signal shall stop before entering the crosswalk on the near side of an intersection, or if none, then before entering the intersection or at such other point as may be indicated by a clearly visible sign or marking and shall remain standing until green or other signal permitting movement is shown.

A trial court has wide discretion in presenting instructions to the jury. *State v. Amos*, 153 Wis.2d 257, 278, 450 N.W.2d 503, 511 (Ct. App. 1989).

If the instruction given adequately covers the law applied to the facts, we do not find error even if the refused instructions were not erroneous. *Id.* A defendant is entitled to an instruction on a valid theory of defense but not one that merely highlights evidentiary factors. *Id.*

We conclude the trial court did not erroneously exercise its discretion in declining to give the defense's proposed instructions. The trial court instructed the jury that the plaintiff had the burden of proving, by clear, satisfactory and convincing evidence, that:

[I]n the course of operating ... [his] vehicle, the defendant, when facing a red light, failed to stop before entering the crosswalk on the near side of the intersection, or, if there was no such clearly visible sign or other marking, or if there was no such sign or marking, before entering the intersection, and further failed to remain standing until a green light or other signal permitting movement was shown.

This instruction adequately instructed the jury on what the prosecution had to prove for a red signal violation. Miller's second requested instruction is simply a rephrasing of this. His first requested instruction incorporates language in § 346.37(1)(a)2(b), STATS., concerning what the driver should do when the traffic control signal is yellow. As we have discussed earlier, a driver's obligation when facing a yellow signal is not relevant when the charge is that the driver faced a red signal.

By the Court.-Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.