COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 01-0059

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN D. EISENBERG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Alan Eisenberg appeals from the trial court's order denying his motion for a new jury trial. He contends that the trial court erred by

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

refusing to instruct the jury on his emergency defense to the citation for passing in a no-passing zone. Additionally, he contends that he is entitled to a new trial because the prosecutor's wife was the court reporter and this relationship was not disclosed until after the trial. The order is affirmed.[2]

¶2 The essential underlying facts are undisputed. A state trooper was sitting in an unmarked car near an underpass checking for speeding vehicles on Highway 51. The trooper observed two semi-tractor trailers pass him traveling southbound and then noticed Eisenberg's vehicle trying to pass the semis in the northbound lane. The no-passing zone began about fifteen feet north of the underpass. As Eisenberg began to pass the northernmost semi, it accelerated and then the southernmost semi began to slow down. Because Eisenberg was attempting to pass the semis in a no-passing zone, the trooper pursued him. According to Eisenberg, he would have been able to pass the semi directly in front of him had the driver not begun to accelerate just as he was about to pass him. He contends that as he was about to complete passing the semi, he suddenly found himself trapped in the northbound lane. When he saw another vehicle approaching in the opposite direction in the northbound lane, he also observed the squad car with its lights and sirens engaged. Eventually, the northernmost semi slowed down and allowed Eisenberg to drive back into the southbound lane.

[2] Earlier, this court issued an order on February 27, 2001, holding that Eisenberg's appeal is limited to the order denying his motions for a new trial.

¶3 At the jury trial, the trial court denied Eisenberg's request for an instruction on the emergency doctrine.[3] Additionally, when Eisenberg attempted to argue an emergency defense to the jury on the theory that he was forced to be in the no-passing zone, the trial court sustained the prosecutor's objection.

¶4 Following the jury's guilty verdict, Eisenberg learned for the first time that the court reporter was married to the prosecutor. In his postverdict motions for a new trial, Eisenberg argued that the trial court erred by not allowing the emergency instruction and failing to disclose the court reporter's relationship to the prosecutor. The trial court denied both motions and this appeal followed.

[3] Eisenberg asked the court to give the standard jury instruction on emergencies, WIS JI—CIVIL 1105A, which provides:

> MANAGEMENT AND CONTROL - EMERGENCY
>
> When considering negligence as to management and control bear in mind that a driver may suddenly be confronted by an emergency, not brought about or contributed to by her or his own negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if he or she makes such a choice of action or inaction as an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that her or his choice was not the best or safest course.
>
> This rule does not apply to any person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of this emergency rule unless he or she is without fault in the creation of the emergency.
>
> This emergency rule is to be considered by you only with respect to your consideration of negligence as to management and control.

I. The emergency instruction

¶5 A trial court has broad discretion in determining which instructions to give the jury. *See* ***State v. Turner***, 114 Wis. 2d 544, 551, 339 N.W.2d 134 (Ct. App. 1983). A trial court's discretionary decision will be sustained if it is "the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). The trial court has properly exercised discretion if the instructions given adequately cover the law applicable to the facts. ***State v. Higginbotham***, 110 Wis. 2d 393, 403-04, 329 N.W.2d 250 (Ct. App. 1982). A trial court need give a requested instruction only where the evidence reasonably requires the instruction. ***State v. Dyleski***, 154 Wis. 2d 306, 310, 452 N.W.2d 794 (Ct. App. 1990). On review of the denial of a requested instruction, the evidence is to be viewed in the light most favorable to the defendant. ***State v. Stoehr***, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986).

¶6 In civil actions, the emergency rule has traditionally excused drivers of an automobile when they act on their judgment in an emergency of imminent peril not created by their own fault. *See* ***Hoehne v. Mittelstadt***, 252 Wis. 170, 173, 31 N.W.2d 150 (1948). In ***State v. Brown***, 107 Wis. 2d 44, 54-55, 318 N.W.2d 370 (1982), the supreme court held that legal defenses may, in certain circumstances, be available in the prosecution of traffic offenses. In ***Brown***, the defendant claimed that he was speeding because of the law enforcement officer's improper actions. ***Id.*** at 47. Although the ***Brown*** court permitted the emergency defense, it expressly reserved for another day the question whether the defense is available in civil forfeiture actions where the causative force is someone other than a law enforcement officer. ***Id.*** at 56.

¶7 This court need not resolve that open legal question, because even if the emergency defense was potentially applicable, Eisenberg would be entitled to the defense only if the emergency was not created by his own actions. *See* ***Papacosta v. Papacosta***, 2 Wis. 2d 175, 178-79, 85 N.W.2d 790 (1957). In ***Papacosta***, the supreme court observed that the emergency doctrine applies only when persons are compelled to act instantly, without time for reflection, after they are faced with an emergency not created by their own conduct. *See* ***id.*** Because the evidence produced at trial showed that Eisenberg's own conduct created the emergency, the emergency doctrine is inapplicable and the trial court did not erroneously exercise its discretion when it refused to give the instruction. *See* ***Dyleski***, 154 Wis. 2d at 310-11.

¶8 Here, the trial court astutely observed:

> The undisputed facts would be that the Defendant was following two south bound semi-tractor trailers and pulled out to pass the same some distance before the commencement of the no passing zone. At a point approximately 15 to 20 feet into the no passing zone, when a State Trooper observed the Defendant, the Defendant's car was at about the rear wheels of the northern most semi. It is at this point that the Defendant was in violation of the no passing zone statute. Had he heeded the no passing zone sign and/or highway yellow lines, he would have given up his efforts to pass, braked, and returned to behind the trailing semi before entering the no passing zone. It is important to note that no one's conduct other than his own placed him in the no passing zone in the first 275 feet thereof. It was only when he <u>continued</u> his attempt to pass after the first 275 feet of the no passing zone that an emergency situation developed because of an oncoming car. Again, it is important to point out that the emergency of the oncoming car is not what put him into the no passing zone but rather his own volition in starting the pass and continuing the attempted pass in the first 275 feet of the no passing zone. Neither can it be said that there was any necessity creating a danger to him until <u>after</u> he had proceeded for 275 feet in the no passing zone. It is only then that he saw an oncoming car and only then that he

> attempted to or even considered attempting braking to get behind the semis. Additionally, it is clear that since there was a Trooper stopped and pulled over at a point approximately 15 to 20 feet south of the beginning of the no passing zone and when the Defendant went by the Trooper, he was already in the no passing zone, the conduct of the law enforcement officer could have had no effect in putting him into the no passing zone and thus, violation of the statute.
>
> In regard to the Court's comments to the jury, the Defendant argued to the jury that "necessity was an absolute defense", at that point the Court advised the jury that this was an improper statement of law and that necessity was not an issue in this case.

¶9 This court agrees with the trial court. Even viewing the evidence in a light most favorable to Eisenberg, *see* ***Stoehr***, 134 Wis. 2d at 87, it is clear that the "emergency" was created by Eisenberg's own conduct when he continued to attempt to pass the nearest semi while first entering the no-passing zone. At that time he had the opportunity to slow down and wait for a later time to pass. He did not and that was on his own volition. Thus, the trial court did not erroneously exercise its discretion when it concluded that Eisenberg was not entitled to any emergency instruction.

II. Objection to court reporter

¶10 Next, Eisenberg reasons that because WIS. STAT. § 804.03(3) prohibits a court reporter from transcribing a deposition in which his or her spouse is counsel of record, it was error for the trial court to allow the court reporter to record this trial when her husband was the prosecutor. Even if Eisenberg is correct, it does not follow automatically that there should be a new trial. Eisenberg must still show that he was prejudiced by the alleged trial error. *See* ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985) (where there is

no reasonable probability that an error contributed to a defendant's conviction, the error is harmless).

¶11 Eisenberg has not demonstrated how a jury deciding the case only on the evidence it heard could have been influenced by the fact that the court reporter was the prosecutor's wife. Nor has he shown how he was denied any "due process" on appeal when he does not even make any claims of relevant discrepancy between the evidence heard at trial and the official transcript submitted to this court for review. Accordingly, the trial court did not erroneously exercise its discretion when it refused to grant Eisenberg's request for a new trial.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.