

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 00-0037

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STEPHEN GRAY,

PLAINTIFF-APPELLANT,

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

SUBROGATED PARTY-PLAINTIFF,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
GERALD C. NICHOL, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Stephen Gray appeals from a judgment dismissing his personal injury action against the Allstate Insurance Company based upon the jury's determination that he was sixty percent negligent in the accident which caused his injuries. He claims he is entitled to judgment because: (1) the trial court should have admitted additional evidence about his injuries; (2) the investigating officer violated a pretrial order by testifying that she thought Gray was intoxicated at the time of the accident; (3) there was insufficient evidence to support the verdict; and (4) the driver of the car that hit Gray conversed in the hallway with two of the jurors during trial. We conclude that the trial court reasonably limited the evidence of Gray's injuries because the parties had stipulated to the amount of damages; the violation of the pretrial order was harmless error; there was credible evidence to support the verdict; and Gray waived any claim of error relating to improper communication with jurors by waiting until this appeal to raise the issue. Accordingly, we affirm.

BACKGROUND

¶2 Gray was struck by a car driven by Allstate's insured, Tony Densmore, on a rainy night in August 1994. Densmore testified that he was traveling south in the right-hand driving lane on Midvale Boulevard at slightly under thirty miles per hour. He said that he saw a darkly dressed figure move in front of him from the right, or west, just as he reached the crosswalk at Regent Street. He maintained that he had a green light and could not avoid hitting Gray even though he braked immediately upon seeing him.

¶3 Gray testified that he had taken a bus to Regent Street from a downtown bar where he had drunk three or four beers prior to the accident. He said he pressed a button to get a pedestrian walk signal, then crossed the

northbound lanes of Midvale to the median, moving from east to west. He then paused slightly, but did not see any oncoming traffic until he had already stepped out into the street. He maintained that he was in the crosswalk with a walk signal when he was hit. He admitted that, as medical records showed, he lost consciousness and was not able to recall the event in the emergency room following the accident, but attributed his memory loss to shock and the drugs he was given. In response to a question from a juror, he indicated that he had hurt his back and his leg, but had not suffered a head injury.

¶4 A witness from another car that was stopped on Regent waiting to turn left onto Midvale saw Densmore's vehicle abruptly slow down as it came through the intersection. She did not see the impact, and was not even aware that a pedestrian had been hit until she saw Gray in the roadway when she began making her turn a few seconds later. She testified that her light was red when Densmore's car passed by her. Gray's former attorney testified that the witness had told him about a month after the accident that she did not know what color the light was or how long she had been sitting at the light. A civil engineer testified that the traffic lights at that intersection were programmed to overlap on red by one second after the yellow light on Midvale.

¶5 The investigating officer testified that she had been unable to determine the precise point of impact. She thought the location of Gray's shoes might be an indicator, and noted that one of Gray's shoes was found about sixteen feet outside of the crosswalk and some of Gray's other belongings were located about forty feet outside of the crosswalk. She admitted, however, that Densmore and the witness from the other car had moved Gray's things prior to her arrival, and their placement had to be reconstructed. The officer also testified that she believed Gray was intoxicated based on the strong odor of alcohol she noticed,

but, in accordance with a pretrial ruling it had made, the trial court instructed the jury to disregard the officer's opinion regarding intoxication.

¶6 Gray presented videotaped deposition testimony from his treating physician. The doctor explained that Gray had suffered an open, or compound, fracture of his right tibia. From the x-rays and the direction in which the shin bone punctured Gray's skin, the doctor concluded that the force that broke Gray's leg had come from his right side. The doctor offered no opinion as to what had caused the trauma, allowing that it could have been the car bumper, the street pavement, or the curb.

STANDARD OF REVIEW

¶7 We review the trial court's evidentiary decisions under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis.2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). We review the sufficiency of the evidence in the light most favorable to the verdict, and will not set aside the verdict if there is any credible evidence to support it. *Morden v. Continental AG*, 2000 WI 51, ¶¶ 38-39, 235 Wis. 2d 325, 611 N.W.2d 659.

ANALYSIS

Evidence of Gray's Injuries

¶8 Gray challenges "the judicial decision to disallow any evidence of the plaintiff's injuries." However, the record shows that Allstate stipulated that Gray's damages exceeded the policy limits, making it unnecessary to place

evidence relating to damages into the record. Pursuant to that stipulation, it appears the parties also agreed that testimony about Gray's injuries would be limited to information relevant to the doctor's opinion about whether Gray had been struck from the right or the left.¹ The doctor's opinion was presented by means of a videotape of his deposition. Thus, given the parties' stipulations, it is not clear that the trial court was even asked to rule on the admissibility of other evidence of Gray's injuries. Since Gray does not identify what specific evidence he believes the trial court precluded him from presenting, and the record does not show that an offer of proof was made, we have no basis to conclude that the trial court made any erroneous evidentiary ruling which would have prejudiced Gray. *See Wengerd v. Rinehart*, 114 Wis. 2d 575, 580, 338 N.W.2d 861 (Ct. App. 1983) (an offer of proof is necessary to preserve the issue of excluded evidence for appellate review).

Officer's Testimony About Gray's Intoxication

¶9 The trial court ruled on a motion in limine that Allstate could present evidence that Gray had been drinking, because it was relevant to his ability to meet his own standard of care, but that Allstate could not present the results of a blood alcohol test or offer any opinion that Gray had been "intoxicated" because it had no expert testimony to explain the effect that shock could have had on the blood alcohol test. The trial court subsequently determined that the officer's testimony that she had noticed an odor of alcohol from Gray was admissible, but

¹ Gray claims that he did not authorize any stipulation, and that evidence of the severity of his injuries would have been relevant to show how hard he was hit and how far he was likely thrown from the point of impact. It appears that Gray is complaining more about counsel's choice of strategy than a specific ruling made by the trial court. Such decisions, however, fall outside of this court's scope of review.

struck her testimony that she thought Gray was intoxicated, and instructed the jury to disregard the officer's opinion regarding intoxication.

¶10 Gray now appears to argue that he is entitled to a mistrial or judgment in his favor based on the officer's violation of the pretrial order. At the time, however, counsel asked only for a curative instruction, which the trial court gave. We again note that the trial court cannot commit error by failing to rule on issues that are not presented to it. Moreover, we are not persuaded that the officer's opinion that Gray was intoxicated was as prejudicial as he claims: Gray's own testimony established that he had been drinking at a bar prior to the accident, and the officer could testify that Gray still smelled of alcohol after the accident without violating the pretrial order.

Sufficiency of the Evidence

¶11 Gray complains that Densmore's testimony regarding what color clothing Gray was wearing, what direction Gray was walking, and where Gray was in relation to the crosswalk kept changing, and he argues that this is evidence of perjury. He similarly challenges aspects of the eyewitness's and investigating officer's testimony based on conflicts with the testimony that he and his former attorney gave. However, it is for the jury to resolve such inconsistencies and conflicts in the testimony. *State v. David J.K.*, 190 Wis. 2d 726, 741, 528 N.W.2d 434 (Ct. App. 1994). We do not review a fact finder's credibility determinations regarding whether or not a witness is telling the truth or how accurate the witness's recollection may be because we have not had the benefit of observing the witnesses first hand. See *State v. Marty*, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds*, *State v. Sanchez*, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). We further note the likelihood that the

jury did take some of the inconsistencies cited by Gray into account, since it found Densmore negligent.

¶12 Nonetheless, the jury could have concluded that Gray was crossing Midvale against a red light based not only on Densmore's testimony that he had a green light, but also on the improbability that the eyewitness on Regent would have been sitting at the intersection with a green light for more than a second or two, even if the eyewitness may have been distracted. The jury could have completely disregarded Gray's contrary testimony that he had been crossing Midvale with a walk sign, based on the evidence of his amnesia after the accident. It also could have concluded that Gray had a better chance of seeing Densmore's car with its headlights on than Densmore had of seeing Gray with dark clothing on a rainy night. In short, there was more than sufficient evidence to support the jury's determination that Gray's own negligence played a greater role than Densmore's in causing the accident.

Jurors' Conversation with Driver

¶13 Finally, Gray mentions for the first time in his reply brief that he observed Densmore talking with two jurors in the hallway during the trial. Again, however, it does not appear that this matter was ever brought to the trial court's attention. The jurors were never asked for their account of the contact, and we have no record, or even an allegation, as to what might have been said during the conversation. Therefore, we cannot review the issue.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

