IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GERARD PLASSE, Appellant, v. DUNG MAO and JANE DOE MAO, husband and wife and their marital community, Respondents, JOHN and JANE DOES 1-50 , inclusive, Defendants.	)	No. 66706-8-I DIVISION ONE UNPUBLISHED OPINION FILED: October 15, 2012

Appelwick, J. — Plasse alleges Mao negligently struck him while he was walking across a street in an unmarked crosswalk. The jury returned a verdict for Mao. Plasse has not shown the trial court committed an error of law or otherwise abused its discretion by rejecting his proposed jury instructions and by refusing to clarify the instructions it did give. We affirm.

FACTS

In a complaint against Dung Mao, Gerard Plasse claimed that he exited a bus near an intersection, crossed the street in front of the bus in an unmarked crosswalk, and was struck by Mao's vehicle. He alleged that Mao negligently failed to exercise ordinary care. Mao responded in his answer that Plasse negligently ran into the road from a hidden position in front of the bus. Beyond the facts alleged in the complaint and answer, the record on appeal establishes only that a bus stopped to let off passengers, Plasse traveled in front of the bus in an unmarked crosswalk, Mao's vehicle was travelling the same direction as the bus, at some point at least part of Mao's vehicle crossed the center line, and Mao struck Plasse.[1]

At trial, Plasse requested six jury instructions based on statutory rules of the road found in chapter 46.61 RCW. The trial court declined to give Plasse's proposed instructions and instead summarized what it deemed to be the relevant rules of the road in jury instructions 8, 9, and 10.

After deliberation, the jury returned a special verdict form indicating that Mao was not negligent. It was thus unnecessary to consider whether Plasse was contributorily negligent.

[1] Plasse provides a more robust version of the accident in his brief. He claims the road had only two lanes, with traffic allowed in both directions. He claims that when the accident occurred Mao was in the act of passing, was within 100 feet of the crosswalk, and was accelerating up an incline. He claims Mao passed the bus by crossing the center line and traveling in the oncoming traffic lane. But, Plasse did not provide a transcript of the full proceedings below, nor designate any evidence that establishes these facts. The only portions of the proceedings transcribed for appeal are the trial court's deliberations regarding jury instructions. RAP 9.2(b) requires a party seeking review to "arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." Plasse failed to do so, resulting in material omissions in the record.

DISCUSSION

Plasse argues that the trial court erred by not clarifying jury instruction 9, but the main thrust of his argument is that the trial court erred by rejecting his proposed instructions. He argues that one of the instructions was rejected based on an incorrect interpretation of case law, and that the others were necessary to argue his theory of the case. He claims they were improperly rejected based on the trial court's finding that violation of those statutes, if any, was not a proximate cause of the accident.[2]

I. Standard of Review

A party is generally entitled to a particular instruction only when there is evidence to support it. State v. Buzzell, 148 Wn. App. 592, 598, 200 P.3d 287 (2009). Instructions are proper when they allow the parties to argue their theories of the case, do not mislead the jury, and properly provide the applicable law. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

The trial court's refusal to give an instruction is reviewed for an abuse of discretion. A.C. v. Bellingham Sch. Dist., 125 Wn. App. 511, 516, 105 P.3d 400 (2004). But, an alleged error of law in a jury instruction is reviewed de novo. Boeing Co. v. Key, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). Instructional error only requires a new trial if it was prejudicial. Stiley v. Block, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996).

II. Failure to Clarify Jury Instruction 9

[2] In addition to Plasse's violation of RAP 9.2, his briefing violates GR 14(d) and RAP 10.3(a)(5), 10.3(a)(6), 10.3(g), 10.4(a)(2), and 10.4(g). As a result of these violations, we evaluate Plasse's arguments only to the extent that they are supported by the record and argued with citations to the record and legal authority. See, e.g., In re Disciplinary Proceeding Against Berhman, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008); State v. Wade, 138 Wn.2d 460, 465, 979 P.2d 850 (1999).

Plasse claims the trial court erred by failing to clarify jury instruction 9. The instruction states:

> The violation, if any, of a statute or ordinance is not necessarily negligence but may be considered by you as evidence of negligence on the part of the person committing the violation.
>
> A statute provides that the driver of a vehicle shall yield the right of way, slowing down or stopping if necessary, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling or approaching so closely from the opposite half of the roadway as to be in danger. A statute also provides that no pedestrian shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle that is so close that it is impossible for the driver to stop.
>
> The right of way described in this instruction, however, is not absolute but relative and the duty to exercise ordinary care to avoid collisions rests upon both parties. The primary duty, however, rests upon the party not having the right of way.
>
> The instruction references two provisions of RCW 46.61.235:
>
> The operator of an approaching vehicle shall stop and remain stopped to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning. For purposes of this section "half of the roadway" means all traffic lanes carrying traffic in one direction of travel, and includes the entire width of a one-way roadway.

RCW 46.61.235(1).

> The second provision provides:
>
> No pedestrian or bicycle shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle which is so close that it is impossible for the driver to stop.

RCW 46.61.235(2).

Plasse raises three challenges to this instruction. First, he argues, "The wording

of instruction number 9 gives the jury no guidance on the primacy of the two statutes presented to them and a process under our law for determining negligence and then perhaps an excuse, affirmative defense, or contributory negligence of the other party under a system that allows for gradation of those 'excuses' by apportioning percentages of negligence/liability among the parties." This argument ignores that jury instructions are read together. State v. Teal, 117 Wn. App. 831, 837, 73 P.3d 402 (2003), affirmed, 152 Wn.2d 333, 96 P.3d 974 (2004). Jury instructions 6 and 7 addressed the elements of negligence and the burden of proof, and jury instruction 13 explained the concept of contributory negligence. Further, the verdict form asked the jury to first determine if Mao was negligent, and then determine whether Plasse was contributorily negligent. The jury was instructed to apportion the responsibility for the accident between the two parties if it determined that they were both negligent. Thus, the verdict form allowed the jury to apply the jury instructions and perform the precise analysis Plasse claims is missing.

Second, Plasse claims "that the second statute could be interpreted by the jury to totally absolve the driver of any negligence in failing to yield the right of way, but this is clearly not the law." He fails to support this statement with any citation to legal authority, or explain how the trial court erred by directly copying the relevant statute into the jury instruction. Further, it is apparent that the second provision could absolve the driver of negligence if, for instance, a pedestrian runs into the street and a motorist is unable to avoid the pedestrian through no fault of his own.

Third, Plasse claims the jury instruction quoting the statute required clarification because "the second statute has many vague, undefined terms making its application

by the jury uninstructed." He claims that the statute's references to a pedestrian who walks or otherwise moves into the path of a vehicle is "ridiculous because a pedestrian moving through a crosswalk area is not moving into a path of a vehicle . . . and [the] vehicle must yield the right of way and as between the two there is no question that cars on the roadway even at lowest posted speeds of say 20 miles per hour for a school zone are so much more sudden and faster than pedestrians and clearly most people would say that the vehicle from outside the crosswalk area is moving into the crosswalk area and not the opposite that a pedestrian is moving into a vehicles roadway path when the pedestrian is crossing that path in a crosswalk area." But, Plasse does not cite to any legal authority to establish that the statutory language is insufficient and requires supplemental definitions.[3]

In fact, Plasse's entire argument on the issue includes only two references to legal authority. The first is to Jung v. York, 75 Wn.2d 195, 449 P.2d 409 (1969), that he claims stands for the proposition that "anywhere in the road is not a place of safety for a pedestrian and therefore a pedestrian does not lose his protection requiring cars to yield to him when he is properly in the road." In Jung, the court ruled that a pedestrian cannot dart suddenly from a curb in front of approaching traffic, but noted that there was no evidence the plaintiff did so. Id. at 199-200. That case is consistent with the plain language of RCW 46.61.235, and jury instruction 9 mirrors that statute. Plasse has not explained how Jung establishes the impropriety of the instruction.

[3] Plasse does not offer any suggestion of what further definitions could have been given. A party must propose an instruction to preserve the issue for appeal. Brown v. Dahl, 41 Wn. App. 565, 579, 705 P.2d 781 (1985). Beyond his six proposed instructions on the rules of the road, Plasse has not shown that he proposed any alternative to jury instruction 9 that included the clarification he sought.

Plasse's second legal reference is to Xiao Ping Chen v. City of Seattle, which recognizes that pedestrians in crosswalks have a right of way, and that pedestrians can assume vehicles will yield. 153 Wn. App. 890, 905, 223 P.3d 1230 (2009), review denied, 169 Wn.2d 1003, 223 P.3d 1230 (2010). Again, that case is consistent with RCW 46.61.235 and the instruction mirrors the statute. His argument also ignores jury instruction 8, which provides:

> Every person using a public street has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

The cited case law demonstrates no defect in jury instruction 9. Plasse fails to establish any abuse of discretion based on giving the instruction.

III. Rejection of Proposed Instruction Based on RCW 46.61.235(4)

Plasse argues that the trial court rejected one of his proposed instructions, modeled after RCW 46.61.235(4), based on an erroneous interpretation of case law. His argument encompasses both that the trial court improperly interpreted relevant cases, and that those cases were wrongly decided. The proposed instruction provides:

> The operator of an approaching vehicle shall stop and remain stopped to allow a pedestrian to cross the roadway within an unmarked crosswalk when the pedestrian is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning. "Half of the roadway" means all traffic lanes carrying traffic in one direction of travel, and includes the entire width of a one-way roadway.
>
> Whenever any vehicle is stopped at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

The trial court determined that this statute does not apply when a bus stops to

discharge or take on passengers, as opposed to when a bus stops to allow pedestrians to cross in front of the bus.

In Rettig v. Coca-Cola Bottling Co., a bus stopped to allow a boy and his family to get off the bus. 22 Wn.2d 572, 574, 156 P.2d 914 (1945). While the bus was stopped, the boy went around the front of the bus and was struck by a truck traveling in the same direction as the bus. Id. at 575. The Washington Supreme Court determined that he was not entitled to an instruction that, "[w]henever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at any intersection to permit a pedestrian to cross the roadway, the operator of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle." Id. at 575-77. In reaching its conclusion, the court cited (1) the fact that the bus was not stopped precisely at a crosswalk and (2) the fact that the bus had not stopped for the purpose of allowing a pedestrian to pass in front of it:

> The bus had not stopped at a crosswalk to permit a pedestrian to cross the roadway, but to permit passengers to alight. The evidence indicates the front of the bus was somewhat to the south of and beyond the crosswalk when it stopped. The statute contemplates a situation where a vehicle has stopped at a crosswalk and has yielded the right of way to a pedestrian so that he can pass in front of it and proceed across the roadway. When this occurs, a vehicle approaching from the rear must not pass the stopped vehicle but must also yield the right of way to the pedestrian.

Id. at 577.

In Jung, the Washington Supreme Court considered another case in which a pedestrian was struck while crossing the street. 75 Wn.2d at 196. On a road with multiple lanes of traffic traveling in the same direction, a vehicle in the outside lane stopped to allow a pedestrian to pass. Id. A second vehicle traveling in the same

direction in an inside lane struck the pedestrian. Id. The court stated that the driver of the second vehicle "had the duty to stop his vehicle when he saw another vehicle in an adjoining lane, stopped at the crosswalk, whether or not he was able to see the pedestrian." Id. at 197. The court noted that it was "aware of cases in which we have held that a pedestrian passing in front of a parked bus must ascertain that the way is clear before proceeding in the path of approaching traffic." Id. at 199. It explained that, "[i]n those cases, the bus had not stopped to allow pedestrians to pass, but rather to discharge and take on passengers; and in [Rettig], this court expressly held" that this rule of the road did not apply. Id. at 199. Panitz v. Orenge, followed Rettig and Jung, and held that this rule of the road "is not intended for the protection of passengers discharged from a bus who are not deemed to be pedestrians, even though they proceed across the street in front of a vehicle, but rather for the protection of persons for whom the vehicle has stopped to permit their safe passage over a crosswalk." 10 Wn. App. 317, 321, 518 P.2d 726 (1973).

Plasse argues that the trial court in this case, and the court in Panitz, misapplied the law. He cites the fact that the statute does not exclude bus passengers from protection. To that end, Plasse argues that the Supreme Court cautioned against this reading of Rettig in Daley v. Stephens, 64 Wn.2d 806, 394 P.2d 801 (1964), when it concluded, "such statement of the law is inapplicable to an uncontrolled and unmarked crosswalk case." However, that passage was referring to Rettig's holding that a driver does not have a duty to yield to a pedestrian until the driver knows or should know that there is a pedestrian in the crosswalk. Id. at 808-09; Rettig, 22 Wn.2d at 576. Daley did not even mention the Rettig holding regarding whether a driver has a duty to stop

when a bus has stopped to allow passengers to board or exit.

We agree that the statute does not explicitly create an exception for bus passengers. It simply does not apply to a vehicle, including a bus, stopped short of a crosswalk to discharge a passenger. As clearly recognized by judicial precedent, the focus of RCW 46.61.235(4) is the duty to stop and yield, created when a vehicle in the adjacent lane stops at the crosswalk to let pedestrians cross the street.

Further, whether the trial court correctly applied the law to exclude the instruction turns on the facts of the case. Plasse has failed to provide a factual record for review that establishes the factual premise of the instruction. And, he does not argue that the bus actually stopped at the crosswalk to allow pedestrians to cross. Therefore, we must conclude the trial court did not commit an error of law or abuse its discretion in excluding the proposed jury instruction.

IV. Rejection of Remaining Proposed Instructions

Plasse claims that the trial court committed an error of law, and necessarily abused its discretion, by declining to give the proposed instructions on the basis that any violation of the rules of the road was not a proximate cause of the accident. He does not identify a specific instruction that was rejected on this basis, and merely argues generally that the trial court determined the "subject RCWs," apparently referring to all six proposed instructions, were not a proximate cause of the accident. (Emphasis omitted.) The instruction based on RCW 46.61.235(4), discussed above, was rejected based on a proper interpretation of case law. We need not consider it further.

Plasse does not offer any argument of why four of the remaining five proposed

instructions were relevant or necessary for him to argue his theory of the case. RCW 46.61.100 provides that a vehicle shall generally be driven on the right side of the road. RCW 46.61.110 provides that a passing driver should do so at a safe distance to the left of the vehicle it is passing, and should pass safely to the left of a pedestrian or bicyclist. RCW 46.61.120 provides that a vehicle shall not drive on the left side of the road to pass another vehicle unless the left is visible and free of oncoming traffic. RCW 46.61.140 provides that a vehicle shall be driven as nearly as practicable within a single lane. We find no abuse of discretion in excluding these instructions.

Accordingly, Plasse's challenge to the trial court's refusal to accept the jury instructions on a proximate cause basis is only relevant to the one remaining instruction based on RCW 46.61.125.

Proximate causation includes both cause in fact and legal causation. Hiner v. Bridgestone/Firestone, Inc., 138 Wn.2d 248, 256, 978 P.2d 505 (1999). Cause in fact refers to the "but for" consequences of an act—the physical connection between an act and an injury. Hartley v. State, 103 Wn.2d 768, 778, 968 P.2d 77 (1985). Proximate cause in its factual context is "'a cause which in a direct sequence, unbroken by any new independent cause, produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.'" Id. (alterations in original) (quoting 6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01 (2d ed. 1980)). The question of cause in fact is generally left to the jury. Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 203, 15 P.3d 1283 (2001). But, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law. Id. Legal cause analysis focuses on whether, as a matter of policy, the

connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998). The analysis depends on mixed considerations of logic, common sense, justice, policy, and precedent. Id. at 479.

RCW 46.61.125 provides, in part:

> (1) No vehicle shall be driven on the left side of the roadway under the following conditions:
>
> (a) When approaching or upon the crest of a grade or a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event other traffic might approach from the opposite direction;
>
> (b) When approaching within one hundred feet of or traversing any intersection or railroad grade crossing;

Violation of a statute can be evidence of negligence. Martini v. State, 121 Wn. App. 150, 160, 89 P.3d 250 (2004). The implication of the requested instruction is that Mao violated this statute by virtue of driving on the left side of the road and passing the bus within 100 feet of the intersection.

Plasse does not identify where in the record the trial court made its purported ruling. But, his objection appears to be based on the trial court's statement that, "I don't see the causal connection between this infraction, if there was an infraction along these lines, and the occurrence." The trial court later elaborated:

> It seems to me what we are talking about is the approaching of a crosswalk and whether or not Mr. Mao exercised due caution at that spot. Crossing the centerline really bears no direct relevance to the harm that resulted in this case.

We can infer from the trial court's statement that Mao's vehicle may have partially crossed the center line before striking Plasse. However, we have no evidence before

us regarding the point of impact, including the location of Mao's vehicle, which portion of Mao's vehicle struck Plasse, or where Plasse was relative to the center line when he was struck. Plasse has provided no record from the trial court to establish that a jury could conclude that, but for passing the bus while close to the intersection or crossing the center line, the accident would not have happened. The common sense analysis indicates the factual cause of the accident from Plasse's perspective was failure to yield the right of way regardless of whether Mao was within the legal lane of travel or not. That theory of factual causation went to the jury.

His theory of legal causation was that he had the right of way and that Mao was negligent because he breached his statutory duty to yield the right of way to Plasse. Plasse has not explained, nor cited any legal authority establishing, how a violation of RCW 46.61.125 was essential to establish legal causation other than, or in addition to, the statutory duty to yield the right of way. Plasse has not shown that the trial court improperly took the issue of causation away from the jury, nor did it abuse its discretion in denying the proposed instruction.

We affirm.

Appelwick, J.

WE CONCUR:

Leach, C.J.

Becker, J.