

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94684

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

ANEDRA L. SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 09 CRB 016913

BEFORE: Blackmon, P.J., Jones, J., and Keough, J.

RELEASED AND JOURNALIZED: March 31, 2011

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Anedra L. Smith appeals her conviction in the Cleveland Municipal Court for first degree misdemeanor vehicular homicide.

Smith assigns the following errors for our review:

“I. Video that did not show, or meaningfully assist in showing, substantial lapse of due care should have been excluded under Ohio Rules of Evidence 403(A).”

“II. By not specifying clearly what it deemed to be defendant’s lapse of due care, prosecution inappropriately

shifted the burden of proof to defendant to prove that she was not negligent.”

“III. The accumulation of errors on evidence served to prevent defendant from effectively defending against any charge of substantial lapse of due care and her constitutional right to confront the witnesses against her.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Smith’s conviction. The apposite facts follow.

{¶ 3} On the morning of September 30, 2008, Miguel Muniz was struck by a Greater Cleveland Regional Transit Authority (“RTA”) bus driven by Smith as he was crossing the street at the intersection of West Superior and Prospect Avenues in Cleveland, Ohio. Muniz died a few days later as a result of the injuries he sustained when he was struck.

{¶ 4} On June 3, 2009, the city of Cleveland (“the City”) charged Smith with vehicular homicide, a first degree misdemeanor. Smith pleaded not guilty at her arraignment, several pretrials were conducted, and on December 7, 2009, a jury trial commenced.

Jury Trial

{¶ 5} At trial, the City presented the testimony of several witnesses including Steven Turner, who testified that he was the sole passenger on the bus at the time it struck Muniz. Turner testified that when the bus made the left turn at West Superior and Prospect Avenues, he heard a noise under

the bus, looked up from his cellular phone, made eye contact with Smith, who indicated that she thought she had just struck someone.

{¶ 6} Turner and Smith immediately exited the bus, where they found Muniz pinned beneath the left rear wheel of the bus. Turner comforted Muniz while he waited for emergency medical assistance to arrive. Turner testified that he did not see what Smith was doing immediately before she struck Muniz, because he was looking at his cellular phone.

{¶ 7} Shannon Sistrunk, a corrections officer on her way home from work, testified that she was stopped in the turning lane, at the light, right behind the RTA bus in question. Sistrunk testified that as the bus began to turn left, she observed Muniz in the middle of the crosswalk. Sistrunk stated that the bus struck Muniz, who fell, that the left front tire ran over him, and that Muniz ended up pinned under the rear left tire. Sistrunk immediately called for emergency assistance.

{¶ 8} Daisy Johnson, a security officer in the Frank J. Lausche State Office Building testified about the video camera that is mounted atop the main entrance of the building. Johnson identified the video and testified that it is kept in the normal course of business and was not altered in any manner.

{¶ 9} Douglas Smith,¹ a security officer with Tenable Protective Service, testified that he was stationed at the information desk in the Frank J. Lausche State Office Building on the morning of September 30, 2008. Douglas Smith was located about 75-100 feet away from the crosswalk where Muniz was struck. From Smith's position at the desk, he observed Muniz walking on the sidewalk along Superior Avenue near the curb.

{¶ 10} Douglas Smith testified that when Muniz reached the curb, he paused for a moment and then stepped into the crosswalk. Muniz entered the crosswalk when the traffic control device was displaying the "Walk" signal. Douglas Smith testified that when Muniz reached the middle of the crosswalk, the traffic control device began displaying the "Don't Walk" signal.

{¶ 11} Douglas Smith testified that he could no longer see Muniz after he reached the middle of the crosswalk. Douglas Smith stated that the bus struck Muniz shortly after he had reached the middle of the crosswalk. Douglas Smith testified that Muniz was wearing light clothing, that it was dark outside, but that the lighting was bright.

{¶ 12} During Douglas Smith's testimony, the City played the video recording that was captured by the surveillance camera atop the main entrance of the Frank J. Lausche State Office Building. Douglas Smith

¹We will refer to this witness by his first and last name because he shares the same last name as appellant.

interpreted the video recording, which showed Muniz stepping off the curb into the crosswalk as the traffic control device displayed the “Walk” signal, and later displayed the “Don’t Walk” signal when Muniz reached the middle of the crosswalk. Douglas Smith explained that a pedestrian has 15 seconds after the “Don’t Walk” signal appears to cross the street.

{¶ 13} Anedra Smith testified that on the morning of September 30, 2008, it was still dark outside and raining when she reached the intersection of West Superior and Prospect Avenues. Smith testified that she did not see any pedestrian in the crosswalk prior to her making the left hand turn, but heard a thump in the middle left hand side of the bus as she turned. Smith testified that she immediately applied the brakes after hearing the thump and subsequently discovered that she had struck a pedestrian.

{¶ 14} At the conclusion of the trial, the jury found Anedra Smith guilty of vehicular homicide. On January 13, 2010, the trial court imposed one year of active probation, ordered Smith to complete 100 hours of community work service, fined her \$1,000, and suspended her driver’s license for one year. Smith now appeals.

Admission of Evidence and Surveillance Video

{¶ 15} In the first assigned error, Smith argues the trial court improperly admitted the surveillance video of the crosswalk into evidence.

{¶ 16} A trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. *State v. Bleigh*, 5th Dist. No. 09-CAA-03-0031, 2010-Ohio-1182, citing *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056. The admission of relevant evidence pursuant to Evid.R. 401 rest within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus.

{¶ 17} An appellate court reviews the trial court's admission or exclusion of evidence under an abuse of discretion standard. *State v. Werber*, Cuyahoga App. No. 93716, 2010-Ohio-4883. As we have noted many times, the term "abuse of discretion" connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 18} Preliminarily, we note that at trial, Smith never objected to the use of the surveillance video until the third day of trial and after it was viewed during the testimony of three witnesses. Moreover, Smith never objected to the admission of the video recording of the crosswalk. In instances in which defense counsel failed to object to the state's presentation of evidence now cited as error on appeal, we must review the trial court's

rulings under the additionally restrictive scrutiny of the plain error standard. *State v. Russell*, 10th Dist. No. 03AP-666, 2004-Ohio-2501.

{¶ 19} Under Crim.R. 52(B), we have the power to recognize “[p]lain error or defect involving substantial rights * * * although they were not brought to the attention of the court.” However, this rule will only be invoked where it is shown that “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶ 20} “[T]he mere possibility that the jury might have reached a different conclusion is not sufficient to sustain the plain error standard.” *State v. Carr* (Aug. 23, 2001), 10th Dist. No. 00AP-1235. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Long*, paragraph three of the syllabus.

{¶ 21} We see no plain error here and we find no abuse of discretion in the trial court’s admission of the video recording.

{¶ 22} In the instant case, the video recording shows the crosswalk where the RTA bus driven by Smith struck Muniz ultimately causing his death. The video recording specifically shows Muniz stepping off the curb and entering the crosswalk, while the traffic control device displayed the “Walk” signal. The video further shows Muniz approaching the middle of the

crosswalk as the traffic control device begins to display the flashing “Don’t Walk” signal. The flashing “Don’t Walk” signal alerts pedestrians that they have 15 seconds to get to the end of the crosswalk.

{¶ 23} Here, the video recording reflects what Douglas Smith, who was stationed at the information desk 75-100 feet away from the crosswalk, observed on the morning Muniz was struck by the RTA bus. Douglas Smith testified that he observed Muniz walking along the sidewalk, approach the curb, pause, and then enter the crosswalk when the traffic control device displayed the “Walk” signal. Douglas Smith further testified that the traffic control device began to display the “Don’t Walk” signal as Muniz reached the middle of the crosswalk.

{¶ 24} Given that the video recording corroborates Douglas Smith’s testimony, Smith could not have been prejudice by its admission, because the outcome of the trial would not have been different. Nonetheless, Smith argues the video does not show when Muniz was struck. However, Sistrunk, who was stopped behind the bus at the intersection, testified that she saw when the bus struck Muniz. Further, both Sistrunk and Douglas Smith testified that Muniz was wearing light clothing, and although it was dark outside, there was ample lighting.

{¶ 25} Finally, given the testimony of the eyewitnesses, specifically that Muniz entered the crosswalk when the traffic control device displayed the

“Walk” signal, that Muniz was wearing light clothing, that there was ample lighting, and that Smith admitted that she did not see anyone in the crosswalk, the jury could have inferred that there was a substantial lack of due care on the part of Smith, resulting in Muniz’s death.

{¶ 26} We conclude, given the testimony of the eyewitnesses, the probative value of the video recording far outweighed any prejudice Smith might have suffered by its introduction. As such, we find no abuse of discretion in the trial court’s decision to admit the video recording into evidence. Accordingly, we overrule the first assigned error.

Substantial Lack of Due Care

{¶ 27} In her second assigned error, Smith argues the City failed to establish the element of substantial lapse of due care thereby shifting the burden to her to show that she was not negligent.

{¶ 28} In the instant case, the jury found Smith guilty of vehicular homicide, a violation of R.C. 2903.06(A)(3), a first-degree misdemeanor, which states in pertinent part as follows:

“A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another’s pregnancy in any of the following ways:

“(3) In one of the following ways:

“(a) Negligently”

{¶ 29} We agree with Smith that a substantial lapse of due care is a critical element of the offense of vehicular homicide. See *State v. Ovens* (1974), 44 Ohio App.2d 428, 339 N.E.2d 853 and *In re Vermaaten* (1996), 116 Ohio App.3d 639, 688 N.E.2d 1106.

{¶ 30} In *In re Vermaaten*, that court was clear that *State v. Ovens* requires some overt act to establish a substantial lapse of due care. For example, the *In re Vermaaten* court pointed to recklessness, substance abuse, falling asleep, or some act that sufficiently shows a substantial lapse of due care. It is not enough to say that Smith should have seen him; thus she was negligent. But her inattention coupled with her failure to yield is sufficient to establish a substantial lapse of due care under both sufficiency of evidence and manifest weight of the evidence.

{¶ 31} The evidence established that Muniz entered the crosswalk when the traffic control device displayed the “Walk” signal. He had proceeded to the middle of the crosswalk when he was hit by the bus. Both Douglas Smith and Shannon Sistrunk saw Muniz in the crosswalk. Sistrunk’s car was behind the bus and she saw Muniz under the same lighting and weather conditions that Smith faced. Consequently, her inattention and failure to yield constitutes sufficient evidence to establish a substantial lapse of due care.

{¶ 32} The determination of whether a lapse of due care is substantial is a question for the trier of fact. *State v. Self* (1996), 112 Ohio App.3d 688, 679 N.E.2d 1173. See, also, *Middletown v. Campbell* (1990), 69 Ohio App.3d 411, 418, 590 N.E.2d 1301. “Substantial” is a synonym of “material,” which is defined as “being of real importance or great consequence.” *Id.* Accordingly, we overrule the second assigned error.

Cumulative Errors

{¶ 33} In the third assigned error, Smith largely argues that the cumulative effect of the errors had to have impacted her ability to defend against the instant charges. We disagree.

{¶ 34} “It is true that separately harmless errors may violate a defendant’s right to a fair trial when the errors are considered together. In order to find ‘cumulative error’ present, we first must find that multiple errors were committed at trial. We then must find a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors.” *State v. Clark*, Cuyahoga App. No. 89371, 2008-Ohio-1404, quoting *State v. Djuric*, Cuyahoga App. No. 87745, 2007-Ohio-413.

{¶ 35} As discussed in the previous assigned errors, Smith was not prejudiced by the trial court’s admission of the video recording depicting Muniz in the crosswalk. We also concluded that the jury was presented with

competent credible evidence to support the jury’s determination that all the elements of vehicular homicide were proven beyond a reasonable doubt. As such, Smith was not denied her constitutional right to a fair trial. Consequently, having found no errors regarding Smith’s pivotal complaints in this case, we find that the doctrine of cumulative errors is inapplicable. Accordingly, we overrule the third assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

LARRY A. JONES, J., and
KATHLEEN ANN KEOUGH, J., CONCUR