COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1524

KIRA WAHLSTROM

vs.

JPA IV MANAGEMENT COMPANY, INC., trustee,[1] & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After she was raped in a parking garage owned and operated by the defendants, in which the very man who raped her had raped another woman less than two weeks earlier, the plaintiff, Kira Wahlstrom, brought suit alleging that her rape resulted from the defendants' negligence. A jury found for the plaintiff and awarded her $4 million in damages. The defendants filed a motion for new trial alleging misconduct by the plaintiff's attorneys. The motion judge, who was also the trial judge, allowed the motion. The plaintiff appealed from that decision. We issued an opinion holding that the motion judge's analysis applied the wrong legal standard. See Wahlstrom v. JPA IV Mgt. Co., 95 Mass. App. Ct. 445, 450 (2019). At the time our opinion issued, there was in the trial court a pending motion to

[1] Of the John Philopoulos Associates Trust.

[2] JPA I Management Company, Inc.

disqualify the motion judge based on public statements he had made about the case. We reasoned that, if the disqualification motion was denied, the motion judge would be in the best position to consider the motion for new trial under the appropriate standard, but if it was allowed then we would be in as good a position as any trial judge to assess it. Id. at 453-454. Consequently, we stayed the appeal pending a decision on the motion for disqualification. On August 8, 2019, the defendants reported to us the motion judge had recused himself from the case. Consequently, we lift the stay and decide the case on the merits.

As we explained in Wahlstrom, a motion for new trial based on attorney misconduct may be allowed only if "an actual 'miscarriage of justice would result' if the verdict were allowed to stand." 95 Mass. App. Ct. at 449, quoting Evans v. Multicon Constr. Corp., 6 Mass. App. Ct. 291, 295 (1978).[3] The

[3] We held that the motion judge mistakenly applied the "prejudicial error" standard of review of Fyffe v. Massachusetts Bay Transp. Auth., 86 Mass. App. Ct. 457, 472 (2014), which articulated an appellate standard of review applicable to direct appeals from the judgment, not a standard of review to be used by trial court judges in assessing motions for new trial. Wahlstrom, 95 Mass. App. Ct. at 448-449. In Fyffe, we applied the more defendant-friendly prejudicial error standard to evaluate arguments relevant to the motion for new trial because that case was also on direct appeal from the judgment, to which those arguments were also relevant. See Wahlstrom, 95 Mass. App. Ct. at 448-449. In a motion for reconsideration filed on June 24, 2019, the defendants argued that we overlooked Gath v. M/A-Com, Inc., 440 Mass. 482 (2003), which they argue imposes a

focus of such a motion is not on the "egregiousness of, or the disrespect to the court shown by, attorney misconduct," but "the harmful impact of the errors." Wahlstrom, supra at 450.

On appeal, the defendants point to several instances of alleged misconduct they say warrant a new trial. The judge granted a new trial based on four of them and did not rely on the rest. Those on which the judge relied are discussed at some length in our prior opinion, and we need not repeat all details of that discussion here. See Wahlstrom, supra at 450-453.

First, before the trial, the judge held inadmissible the contents of a discussion plaintiff's counsel had had with the rapist. Plaintiff's counsel said in opening statements that he had spoken with the rapist but did not say what the rapist told him. See Wahlstrom, supra at 451 n.9. Whether or not this violated the "spirit" of the judge's ruling, as the judge found it did, id. at 451, any harm stemming from it was minimal.

Second, plaintiff's counsel repeatedly, in violation of the judge's rulings and in front of the jury, attempted to impeach a security guard's testimony that he did not see the rapist on the

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lesser standard of "prejudicial misconduct of counsel that is not cured by the judge's instructions to the jury." Id. at 492. Whether or not there is any difference between that standard and the one we articulated in Wahlstrom, Gath, like Fyffe but unlike the instant case, was also on direct appeal from the judgment. See Gath, supra at 499. The motion for reconsideration also insists that using the prejudicial error standard will avoid the prospect of successive appeals. This is not a sufficient reason to overrule Evans.

night of the first rape by referring to video footage (video) that, according to plaintiff's counsel, showed the security guard viewing the rapist. According to the defendants, the "[m]ost important[]" reason this misconduct warranted a new trial is that the video did not show the guard observing the rapist. We have examined the video, and it shows the silhouette of a guard in the same frame as the rapist for several seconds, but it is not possible to determine where the guard is looking. This shows at a minimum that the guard was in a position to view the rapist. The defendants also argue that plaintiff's counsel's statements "would permit [an] inference" that the guards should have apprehended the rapist on the first night, but we disagree. While his conduct was no doubt inappropriate, plaintiff's counsel did not say that the guard saw the rapist doing anything that would have warranted his being apprehended.[4]

Third, the defendants refer to comments made by counsel for the plaintiffs suggesting to the jury that the defendants did not accept responsibility for the rape. The first is a reference by plaintiff's counsel in opening statements to cross claims the defendants had made against each other, in violation

[4] The motion judge, working from an unfinalized transcript, incorrectly stated that plaintiff's counsel said that the video would show the guard visualizing the first rape, which might have raised both problems the defendants argue apply to the statement plaintiff's counsel actually made. We need not and do not decide whether that comment would have created a miscarriage of justice.

of a pretrial order. But the judge gave an unobjected-to curative instruction to the jury that those cross claims were "not for the jury to consider." The other is a series of questions to the defendants' general manager regarding whether she thought the rape was merely "alleged," but the witness responded that she thought the plaintiff had been raped. Due to the judge's instructions and the witness's response, this behavior did not create a miscarriage of justice.

Fourth, plaintiff's counsel asked a witness whether he was aware that the sale price of the hotel was $143 million. The judge interjected before the witness could answer, and in his decision found that, because the damages sought were substantially higher than what the jury awarded, this question might not have made a difference to the jury's decision. Again, there was no miscarriage of justice.

We turn now to the instances of alleged misconduct raised by the defendants but not addressed by the judge. In opening statements, plaintiff's counsel referred to Department of Justice statistics concerning the frequency with which people are victims of violent crimes in parking garages, and stated that "[t]he media will be here to be an advocate for [the plaintiff]. That's how important these issues are." The defendants objected to neither statement. While the absence of an objection is not always dispositive, see Wahlstrom, 95 Mass.

App. Ct. at 449, in this case, especially given the absence of any objection, the comments were not so inappropriate as to create a miscarriage of justice.

Next, in opening, plaintiff's counsel said, "[T]he other reason we are here is that one of the benefits of having a tort law is that people who hear about decisions or have decisions rendered against them will be deterred from acting in the same way in the future." This statement was allowed by the judge but objected to by the defendants.[5] The defendants argue that the statement was an attempt to "communicate to jurors that they should use their verdict to punish Defendants and safeguard the community." But whether or not this is true -- deterrence and punishment are different concepts, and plaintiff's counsel did not mention punishment -- the judge also foreclosed that interpretation by instructing the jury that "the purpose of negligence law in the Commonwealth of Massachusetts is to compensate a victim for her injuries if you find that there was negligence and she was injured as a result. The purpose of the tort law is not to punish any defendant and it's not to reward, give a windfall to the plaintiff." The defendants also complain about the following statement, to which they did not object,

[5] Earlier the judge had precluded references to deterrence. The judge later said that he was confused during opening statements, but that it was "not [plaintiff's counsel's] fault, my own fault."

made by plaintiff's counsel in closing, which they say is an "indirect reference to concepts of punishment and deterrence": "Maybe you'll be going in a parking garage, maybe you'll hear of a rape. I don't know, but your mind will flashback to August 2015 in Suffolk County Court House. And when it does, we want you to smile and hold your head up high and say, I did the right thing." We disagree that the statement has any improper undertones concerning deterrence or punishment.

The defendants also argue that a new trial was warranted because of statements in opening and closing involving plaintiff's counsel's references to "safety rules," which the defendants argue were "improper and unfairly prejudicial" because they were attempts to "supplant the governing law -- traditional negligence concepts of reasonable care -- and replace it with a standard of 'maximum safety.'" We disagree that they have this implication. In his opening statement, immediately before his reference to safety rules, plaintiff's counsel said, "It is up to you, the jury, to determine what is reasonable as the Court will tell you later." In any event, as a result of the defendants' objection, the judge instructed the jury in accordance with Mass. G. Evid. § 414 (2015), which provides that "[s]afety rules . . . may be offered by either party in civil cases as evidence of the appropriate care under the circumstances." The judge then elaborated, "That means that

assuming some witness testifies to a particular industry standard or safety regulation or law, if there is testimony like that from a witness, you need to determine whether in fact there is a safety standard. That is, whether the witness has said there is a safety standard, and you would accept that as true. . . . And then, secondly, if that happens, if you hear evidence that there is a safety standard or regulation or rule and you find that it is true, then if you find that it was violated by these defendants, you can consider that as one piece of evidence about whether or not they were negligent." Given these thorough contemporaneous instructions, we are confident the jury were correctly apprised of their role following opening statements.

Also, the defendants complain of plaintiff's counsel's use of "safety rules" in closing because, they claim, there was no evidence of any such rules. But the plaintiff's security expert testified that "standards of care" are "also referred to as best practice and sometimes rules or regulations," and that in the security field "best practices" are used, implying that there exist industry standards, albeit not in written form. That plaintiff's counsel referred to them as "rules," while perhaps somewhat inaccurate, is not enough to warrant a new trial.

Finally, the defendants complain that plaintiff's counsel unjustifiably put evidence of subsequent remedial measures before the jury in violation of a pretrial ruling. Plaintiff's

counsel asked a witness, "You're aware that there's cameras on each parking level in that garage now, aren't you?" The judge instructed the witness not to answer the question and the jury to disregard it. While this question should not have been asked, it did not create a miscarriage of justice.

For the foregoing reasons, none of the actions by plaintiff's counsel individually created a miscarriage of justice. Moreover, after careful consideration and "a survey of the whole case," Wahlstrom, 95 Mass. App. Ct. at 447, quoting Evans, 6 Mass. App. Ct. at 295, we conclude that the cumulative effect of the attorneys' misconduct does not meet the "relatively high" burden necessary to warrant a new trial. Wahlstrom, supra.

Our stay of the appeal is lifted, and the order allowing the defendants' motion for new trial is reversed.

So ordered.

By the Court (Rubin, Maldonado & Lemire, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: November 6, 2019.

[6] The panelists are listed in order of seniority.