STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YOUNG MO HYUN,

Defendant-Appellant.

UNPUBLISHED
November 26, 1996

No. 183510
LC No. 94-2687-FH

Before: MacKenzie, P.J., and Markey and J.M. Batzer*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of involuntary manslaughter, MCL 750.321; MSA 28.553, and was sentenced to two concurrent prison terms of 5-1/2 to 8 years. He appeals as of right. We affirm.

The convictions arose out of a July 2, 1994 traffic accident that occurred when defendant, age 23, lost control of his red Mazda RX-7 and spun into the driver's side of a car driven by Keith Theisen. Theisen and his son, Matthew, died at the scene; his wife and daughter were injured. The accident took place at approximately 11:00 a.m. on Hollywood Road, a narrow asphalt road with rolling hills, in Berrien County.

Defendant testified that he had been in a hurry but that moments before the collision, as he approached a hill, he reduced his speed from 80 mph to 70 or 75 mph. Defendant was talking on a cellular telephone as he drove, steering with his left hand and holding the telephone with his right. After he came over the hill, defendant went into a ditch, jerked the car back onto the road, and went into a counter-clockwise spin. His car then struck the Theisens' car, which was in the oncoming lane.

Defendant admitted that he caused the accident because he was in a hurry, he had taken his eyes off the road, and he was paying attention to the telephone instead of the road. Defendant did not think he was driving dangerously or that he was speeding at the time of the accident, however. Eyewitnesses, on the other hand, stated that defendant's car was "a red blur" and one estimated that he

* Circuit judge, sitting on the Court of Appeals by assignment.

was traveling 120 mph. An expert witness called by the prosecution initially calculated defendant's speed at approximately 117 mph when he went into a skid and at 102 mph just prior to impact; upon discovery of a calculation error, these figures were later reduced to 114 mph and 99 mph, respectively. Defendant's expert opined that the average speed of the car was 62 mph.

On appeal, defendant first claims that there was insufficient evidence to support his involuntary manslaughter convictions. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Our Supreme Court has recently defined involuntary manslaughter as "[a]n unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death." *People v Datema,* 448 Mich 585, 606; 533 NW2d 272 (1995). Gross negligence exists where "the defendant has acted or failed to act with awareness of the risk to safety and in willful disregard of the safety of others." *Id.*

Defendant takes the position that speed alone is inadequate to prove gross negligence. He maintains that, because the only evidence of his gross negligence was that he was driving at an excessive speed at the time he lost control of his car, his convictions must be reversed. After reviewing the record, we are satisfied that we need not decide whether evidence of excessive speed, without more, will sustain a conviction of involuntary manslaughter. Viewed in a light most favorable to the prosecution, speed was not the only evidence of defendant's gross negligence. The evidence established that defendant was driving on a narrow, hilly two-lane road while admittedly in a hurry, talking on a cellular telephone, not paying attention to his driving, and not looking at the road. Under these circumstances, a rational juror could infer that defendant was acting in a grossly negligent manner.

Defendant next contends that he was denied a fair trial when the trial court admitted the prosecution's expert testimony indicating that defendant's speed ranged from 99 to 117 mph. Defendant did not object to the testimony, and its admission did not result in a miscarriage of justice. See *People v Travis,* 443 Mich 668, 686; 505 NW2d 563 (1993). The "correctness" of the testimony was a question of credibility, properly left to the trier of fact to resolve. *People v Daniels,* 172 Mich App 374, 378; 431 NW2d 846 (1988). We find no error requiring reversal.

Defendant next asserts that he is entitled to resentencing. Again, we disagree. Contrary to what defendant argues, OV 6 was properly scored since defendant took two lives. The fact that the deaths were caused by his gross negligence rather than an intent to kill is immaterial; the law is that gross negligence is equivalent to criminal intent. *Datema, supra,* p 604. Unlike *People v Antolovich,* 207 Mich App 714; 525 NW2d 513 (1994), defendant's sentence was within the sentencing guidelines' recommended range of three to eight years, and thus was presumptively proportionate. *People v Broden*, 428 Mich 343; 408 NW2d 789 (1987). His impeccable background was taken into consideration by the trial court, but is, without more, insufficient to overcome the presumption of proportionality in light of the seriousness of the offense. Compare *People v Moseler,* 202 Mich App 296; 508 NW2d 192 (1993). Further, because the sentence is proportionate, it cannot be cruel and

unusual punishment in violation of the Eighth Amendment. *People v Williams (After Remand),* 198 Mich App 537, 543; 499 NW2d 404 (1993).

Defendant's final claim is that he is entitled to be resentenced because the trial court failed to respond to defendant's challenge to the accuracy of the presentence report. We decline to order resentencing. Although a defendant is entitled to be sentenced on the basis of accurate information, where the asserted inaccuracies would have no determinative effect upon the sentence, the failure of the sentencing court to respond may be considered harmless error. *People v Daniels,* 192 Mich App 658, 675; 482 NW2d 176 (1991). In this case, the claimed inaccuracy was that plaintiff's experts testified that defendant was traveling at 117 mph when he lost control of his car and at 102 mph at the time of impact, when, in fact, the experts corrected those figures at trial to 114 mph and 99 mph, respectively. Under the circumstances of this case, where there the estimates of defendant's speed varied by as much as 58 mph, a difference of 3 mph is negligible and does not warrant resentencing. Additionally, the presentence report included defendant's version that he was traveling at 60 to 70 mph at the time of the collision. The court's failure to respond to the challenge was, at most, harmless error.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer