STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNIE SERONE BROWN,

Defendant-Appellant.

UNPUBLISHED
July 11, 1997

No. 193882
Calhoun Circuit Court
LC No. 95-002388-FH

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of involuntary manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, and one count of failure to stop at the scene of a serious personal injury accident, MCL 257.617; MSA 9.2317. Defendant was sentenced to imprisonment of eight-and-a-half to fifteen years for each of the involuntary manslaughter convictions and three to five years for failure to stop at the scene of the accident. Defendant appeals as of right. We affirm.

I

This case arises out of a car accident in which defendant lost control of his vehicle and struck a tree at the intersection of Dickman Road and South Avenue in Battle Creek. Two of defendant's passengers, Mindy Perry and Thurman Glenn, were killed as a result of the accident. Defendant first claims on appeal that the prosecutor failed to present sufficient evidence upon which the jurors could find him guilty of involuntary manslaughter with a motor vehicle. Defendant contends that, at most, there was sufficient evidence to sustain a conviction for the lesser offense of negligent homicide. In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Involuntary manslaughter requires death resulting from negligence that is gross, wanton or willful, or criminal, indicating a culpable indifference to the safety of others. *People v Trotter*, 209 Mich App 244, 249; 530 NW2d 516 (1995). Gross negligence requires: (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. *Id*. at 249. The crime of negligent homicide must be included as a lesser offense for every charge of manslaughter with a motor vehicle. MCL 750.325; MSA 28.557. Accordingly, the jury in this case was also instructed on the elements of negligent homicide, which require death resulting from negligence that is not willful or wanton, i.e., ordinary negligence. MCL 750.324; MSA 28.556; *People v Paulen*, 327 Mich 94, 99; 41 NW2d 488 (1950). Therefore, the distinction between the two crimes is that involuntary manslaughter is a felony requiring that defendant acted with "gross" negligence in the operation of his motor vehicle, while negligent homicide is a misdemeanor requiring that defendant acted only with "ordinary" negligence. *People v McKee*, 15 Mich App 382, 385; 166 NW2d 688 (1968).

The prosecutor presented overwhelming evidence that defendant was driving at approximately 60 mph at the time of the accident, which was twice the posted speed limit. Larry Robinson, one of the passengers in defendant's car, testified that he looked at the speedometer just before the accident and it indicated a speed of 60 mph. William Howe, the prosecution's accident reconstruction expert, estimated that defendant was traveling at 60 mph when he left the road and hit the tree. Mike Capman, defendant's reconstruction expert, estimated that defendant was traveling 55 to 60 mph at the time of impact. Finally, defendant himself admitted that he was driving down Dickman at 55 to 60 mph. Moreover, defendant was aware that he was driving in excess of the speed limit. Defendant knew that the speed limit was 30 mph at the intersection of Dickman Road and South Avenue where the accident occurred, and 35 mph on Dickman Road before it intersected with South Avenue.

The prosecutor also presented evidence that defendant failed to slow down before reaching the "curve" or "jog" in Dickman Road, despite his familiarity with that section of the road. Robert Conley, a passenger in defendant's car, testified that he told defendant to slow down as they approached the curve. Conley stated that defendant began to slow down, but the car started to slide sideways. However, Larry Robinson testified that defendant did not slow down at all before the accident. Quincy Adams, who was also in the car, testified that as soon as defendant turned onto Dickman he "floored it" and continued to accelerate until he lost control. Davis testified that he told defendant to slow down, but defendant told him to "shut up because [Davis] had never seen him drive." Both of the accident reconstruction experts testified that there were no skid marks left by defendant's car before it left the road.

In addition, there was evidence that defendant was drinking shortly before the accident. According to defendant, he drank about twenty ounces of beer and a shot or two of gin in the half hour to an hour before they left to go swimming. However, defendant claimed that he did not feel intoxicated when he left Conley's house. There was no evidence presented at trial that defendant's blood alcohol level was over the legal limit. Even if defendant was not legally drunk at the time of the accident, the

jurors may have reasonably inferred that defendant's consumption of alcohol just before driving impaired his judgment and caused him to behave more recklessly than normal.

Viewed in a light most favorable to the prosecution, we find that the above evidence is sufficient to support a finding of gross negligence, and thus, a conviction of involuntary manslaughter. The first element of gross negligence is satisfied because the operation of an automobile requires the exercise of ordinary care and diligence. *People v England*, 176 Mich App 334, 338; 438 NW2d 908 (1989). The evidence further showed that the area where the accident occurred was particularly dangerous because there was a "jog" or "curve," and defendant was aware of those conditions. Therefore, a rational trier of fact could have inferred that defendant knew of the dangers presented by that section of Dickman Road and that the exercise of ordinary care and diligence was necessary to prevent injury to his passengers. *Id*. at 339. With respect to the second element, defendant had the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand. *Trotter, supra*. Defendant could have avoided the accident by driving the speed limit, and/or heeding the warnings given by his passengers and slowing down to a prudent speed before reaching the curve. Instead, the evidence presented above indicates that defendant did not slow down at all as he approached the curve, or if he did, he did not brake hard enough to cause the tires to squeal or to leave skid marks.

Finally, defendant failed to use such care and diligence to avert the threatened danger when to the ordinary mind it would be apparent that the result is likely to prove disastrous to his passengers. *Trotter, supra*. The jury could have reasonably concluded that an ordinary person would have realized the danger of negotiating that section of road at twice the posted speed limit. Several witnesses, including Dale and Debra Asher, and William Howe, who were familiar with Dickman Road, testified that it would have been extremely dangerous to drive that portion of the road going at or near 60 mph. Passengers Conley and Rogers both testified that they believed that the car would crash if defendant maintained the same speed that he was driving as he approached the curve. Although defendant claimed that he did not expect the accident to occur because he had previously driven that section of the road going similar speeds without incident, the test only requires that the danger be apparent to the ordinary mind. *People v Harris*, 159 Mich App 401, 406; 406 NW2d 307 (1987).

Defendant argues that he should not have been convicted of involuntary manslaughter because there was dirt and gravel in the road that contributed to the accident. According to defendant, the dirt and gravel caused the car to slide, and when he tried to make a correction, he lost control. There was conflicting evidence at trial regarding the amount of sand, dirt, and gravel that was on Dickman Road in the area of the accident. Police officers Ron Alberty and Todd Rathjen both testified that there was no more than the normal amount of dirt and gravel on the road. Howe testified that there was construction on South Avenue, but it did not enter onto Dickman Road. According to Howe, there was not enough dirt, sand, or other debris on the road to have had any bearing on the accident. Howe further testified that there would have been evidence left on the roadway and on defendant's tires had defendant's car slid through sand or dirt. However, various witnesses including Conley and Rogers (passengers), Daniel Hillman (eyewitness who lived in the area), and Veronica Robinson (sister of passenger Larry Robinson who lived on South Avenue) testified that there were noticeable amounts of sand, dirt and gravel on Dickman at or near the accident scene.

When reviewing an appeal based on the sufficiency of evidence, this Court must not interfere with the role of the jury. It is the function of the jury alone to listen to testimony, weigh the evidence, and decide the questions of fact. *Wolfe, supra* at 514-515. Because the jurors see and hear the witnesses, they are in a much better position to decide the weight and credibility to be given to their testimony. *Id*. In this case the jurors were presented with conflicting testimony which required them to make a determination concerning the credibility of each witness and the weight to afford each witness' testimony. Moreover, any negligence on the part of a third party is not a bar to criminal liability. *People v Tims*, 449 Mich 83; 534 NW2d 675 (1995). Although a third party's contributory negligence may be considered in determining whether the defendant's negligence caused the victim's death, it is not a defense. *Id.* Based upon the evidence presented, it was not unreasonable for the jurors to reject the alleged excessive sand, dirt and gravel as a basis for convicting defendant of the lower offense of negligent homicide.

II

Next, defendant argues that the prosecutor impermissibly shifted the burden of proof by continuously eliciting evidence that defendant was traveling at a high rate of speed, and by repeatedly making reference to defendant's speed throughout his closing argument. Appellate review of improper prosecutorial conduct is generally precluded absent objections by counsel because the trial court is otherwise denied an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant failed to object to the alleged misconduct at trial; therefore, this Court's review is precluded absent a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996).

Defendant's burden-shifting argument is without merit. Excessive speed is often a significant factor in determining whether gross negligence exists for purposes of proving a case of involuntary manslaughter with a motor vehicle. See, e.g., *People v Moseler*, 202 Mich App 296, 298-299; 508 NW2d 192 (1993), and *England, supra* at 339. In this case, defendant's excessive speed was critical to the jury's finding of gross negligence. There is no legitimate basis upon which defendant can argue that the prosecutor should not have been permitted, or should have been limited in presenting evidence of defendant's high speed, or arguing in his closing argument that defendant was grossly negligent by driving through that section of Dickman Road at such a high rate of speed. The prosecutor was required to prove gross negligence and was merely fulfilling that obligation.

III

Defendant claims on appeal that the trial court erred in admitting photographs of victims Mindy Perry and Thurman Glenn that "depicted the condition of the victims soon after the injuries occurred." Defendant argues that the photographs were inadmissible because the injuries sustained by the victims were not in dispute, and thus, their probative value was outweighed by the danger of unfair prejudice. However, there is no evidence on the record that the photographs defendant describes were offered or admitted at trial. The only two photographs of the victims that were offered and admitted into evidence, People's Exhibits 1 (Perry) and People's Exhibit 2 (Glenn), were taken before the accident and were

used only for identification purposes. Because the prosecution did not introduce any photographs of the victims taken after the accident, review of this issue is unnecessary.

Affirmed.

/s/ Hilda R. Gage
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald