

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARNELDER DEWAYNE JACKSON, a/k/a  
FESTUS FESSA JACKSON,

Defendant-Appellant.

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UNPUBLISHED

March 3, 1998

No. 196484

Kent Circuit Court

LC No. 95-003541 FH

Before: Griffin, P.J., and Holbrook, and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary vehicular manslaughter, MCL 750.321A; MSA 28.553A, and leaving the scene of a personal injury accident, MCL 257.617; MSA 9.2317. He also pleaded guilty to a second offense of driving with a suspended license, MCL 257.940(1)(b); MSA 9.2604. Defendant was sentenced to nine to fifteen years' imprisonment for the involuntary manslaughter conviction, two to five years' imprisonment for leaving the scene of a personal injury accident, and time served for driving with a suspended license. Defendant now appeals as of right. We affirm.

On November 24, 1995, at approximately 11:30 a.m., defendant was involved in a serious automobile accident in which a woman and her unborn baby were killed. John James Florez was driving his fiancée Deborah Cooper's car on that particular morning. When he pulled onto Grandville Avenue, defendant, traveling at a high rate of speed, collided with Florez' car. Florez was thrown into the windshield and jolted back into his seat by the airbag. Cooper was pinned to the passenger seat with her seatbelt stuck around her neck, making it difficult for her to breathe. It took Florez three or four minutes to remove Cooper's seatbelt and get out of the car, and by that time, defendant had fled. Cooper, eight months pregnant, died shortly thereafter as a result of her injuries.

I

Defendant first argues that the trial court erred in refusing to instruct the jurors that they must, or even could, find defendant not guilty of manslaughter if they found that death occurred as a result of an

independent intervening cause. Jury instructions are reviewed in their entirety to determine if reversal is required. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). The failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that failure to give it seriously impaired the defendant's ability to effectively present a given defense. *Id.*

Defendant argues that Florez was grossly negligent because he did not check for oncoming traffic before entering the intersection. Defendant claims that this intervening third-party act of gross negligence negates defendant's culpability and the jury should have been so instructed. However, it is well established that although a third party's contributory negligence is a factor to be considered in determining whether the defendant's negligence caused the victim's death, it is not a defense. *People v Tims*, 449 Mich 83, 96, 100; 534 NW2d 675 (1995); *People v Kneip*, 449 Mich 83, 99; 534 NW2d 675 (1995). A defendant's conduct need only be "a" cause of death in order to sustain a conviction for involuntary manslaughter. *Id.* at 99.

Defendant requested an instruction to the jury that if it were to find that defendant's conduct was not a substantial cause of Cooper's death, but instead that the gross negligence of Florez was an intervening cause, it could not find defendant guilty. However, the trial court refused this request and instead gave instructions that encompassed an accurate statement of the law. *Tims, supra*. There was no basis on which to give an instruction regarding Florez' gross negligence, because there was no evidence on the record to support such a contention. Florez' ordinary negligence, even if established, would not have required acquittal. The trial court therefore did not err in refusing to give defendant's proposed instruction.

## II

We next consider whether there was sufficient evidence to convict defendant of leaving the scene of an accident. Defendant argues that although there was ample evidence that he knew an accident had occurred, there was no basis for a conclusion beyond a reasonable doubt that defendant had reason to believe that Cooper was seriously injured. We disagree.

Defendant was charged with one count of leaving the scene of a personal injury accident contrary to MCL 257.617; MSA 9.2317. That statute reads in pertinent part:

(1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon either public or private property, when the property is open to travel by the public, resulting in serious or aggravated injury to or death of a person shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of section 619 are fulfilled. The stop shall be made without obstructing traffic more than is necessary.

According to defendant, before he left the scene, he observed Florez get out of the car. He did not appear to be seriously injured. Defendant notes that his passenger, who would have sustained the

greatest force of the impact along with Florez, was also uninjured. Defendant surmises that if these two individuals were uninjured, defendant had no reason to believe that Cooper was seriously injured. Defendant also argues that if not for the fact that Cooper was pregnant, her injuries would not have been serious or fatal. Defendant therefore had no reason to know that the pregnancy would dramatically escalate the severity of the situation.

Defendant's argument fails for several reasons. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995). The circumstantial evidence in this case was sufficient to prove that defendant had reason to know that Cooper was seriously injured. Even if defendant observed Florez get out of his car and appear to be unharmed, which is contrary to Florez' testimony, the fact that Cooper remained in the car after several minutes would have been enough to raise a question as to whether she was seriously injured. She was obviously unable to get out of the car and walk around. In addition, one witness testified that just by looking into the car, he observed that Cooper was pinned under the dashboard, bleeding heavily, and having trouble breathing. There was testimony, and defendant concedes, that he looked into the car before walking away. In so doing, he could have easily observed the same things that the witness observed.

Moreover, the two photographs appended to plaintiff's brief, which were two of the many photographs entered into evidence, depict the seriousness of the accident. This view alone should have given defendant notice that Cooper was seriously injured. Whether defendant could have known that Cooper's pregnancy would make her injuries fatal, when they otherwise would not have been, is irrelevant to the fact that there was sufficient evidence that the accident was serious, and that defendant had reason to believe that Cooper was seriously injured. Viewed in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v McCoy*, 223 Mich App 500, 501; 566 NW2d 667 (1997).

### III

Defendant next argues that the trial court abused its discretion by admitting certain testimony. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Defendant first asserts that evidence was improperly admitted insinuating that he was intoxicated, despite the fact that his sobriety was never a genuine issue at trial. The trial court allowed the prosecutor to ask defendant's two acquaintances whether defendant appeared to be under the influence of drugs or alcohol when they spoke to him approximately thirty minutes before the accident. One witness indicated that defendant's eyes appeared red, but she did not smell alcohol or detect other evidence of drug use. The other acquaintance testified that she did not even notice defendant's eyes to be red. Defendant's passenger denied that he and defendant had used drugs or alcohol before the accident.

Evidence of intoxication is relevant to the issue whether defendant was grossly negligent. MRE 401; *People v Allan*, 158 Mich App 472, 474-475; 404 NW2d 266 (1987); *People v Pittinger*, 105 Mich App 736, 740-742; 307 NW2d 715 (1981). Though evidence of intoxication does not prove gross negligence as a matter of law, *People v Thinel*, 160 Mich App 450, 455, 458; 408 NW2d 474 (1987), vacated on other grounds 429 Mich 859, 859-860; 412 NW2d 923 (1987), it is evidence to be considered by the jury when determining whether the elements of gross negligence have been proven. *Id.* The prosecution's questioning was therefore relevant and, given the nature of the witnesses' responses, not unduly prejudicial.

Defendant's related argument that other acts evidence was improperly admitted is without merit. This evidence, indicating that defendant squealed his truck to a stop at a nearby location shortly before the accident, was offered not to show recklessness and a corresponding character trait, but to prove that defendant was driving without the ordinary care and diligence necessary to avert injury to another. The evidence was therefore properly admissible pursuant to MRE 404(b)(1).

#### IV

Defendant maintains that his right to a fair trial was violated when the trial court permitted the jury to be influenced by factors external to the proofs adduced at trial. Defendant first contends that he was deprived of a fair trial because the trial court refused his pretrial request to have spectators remove pins depicting Deborah Cooper. Defendant argues that wearing these pins was an attempt by the victim's family to improperly communicate with and sympathetically influence the jury. MCR 6.414(A) provides in part that:

The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. . . .

The trial court noted that it did not find these pins to be prejudicial in any respect, or even noticeable by the jury, given the small size of the pins. Defendant has provided no factual basis upon which this Court can conclude that any juror did, in fact, see these pins, either from the jury box or some chance encounter outside the courtroom. Under these particular circumstances, we find no discernible prejudice. Defendant's mere speculation that the jurors might have been unduly influenced by these pins does not warrant reversal of his conviction.

Defendant also argues that he was prejudiced by allowing the jury to see him being escorted into the courtroom under guard. Nothing in the record supports defendant's claim that he was handcuffed when escorted into the courtroom by the bailiff, only that defendant was in fact escorted. Accordingly, defendant's contention of prejudice is meritless.

#### V

Defendant finally offers three reasons why this case should be remanded for resentencing: (1) the trial court sentenced defendant without proper authority because no effort was made to ascertain whether the judge who presided over defendant's trial was reasonably available for sentencing, (2) the trial court abused its discretion by basing its decision in part on unproved assertions, and (3) defendant's sentence was not proportionate because it did not reflect defendant's actual culpability, but rather the unforeseeable, though tragic, results of this offense.

On the record, defendant requested that he be sentenced by Judge Boucher, who presided over the trial, but the sentencing judge denied this request, noting that Judge Boucher was not on assignment, at that time, to the Kent Circuit Court. A defendant is entitled to be sentenced before the judge who accepts his plea or presides over his trial provided that judge is "reasonably available." *People v Clemons*, 407 Mich 939; 291 NW2d 927 (1979). Defendant contends that simply because a visiting judge is technically no longer on assignment to the court does not mean that he is not reasonably available.

This Court, in *People v Van Aucker*, 132 Mich App 394, 399; 347 NW2d 466, 468 (1984), rev'd in part on other grounds, 419 Mich 918 (1984), held that a visiting judge was not reasonably available to sentence a defendant because he no longer had the authority to act as a circuit judge in that circuit at the time of sentencing. We conclude that under these similar circumstances, where Judge Boucher was no longer assigned to Kent Circuit Court at the time of defendant's sentencing, he likewise was no longer reasonably available.

Defendant next argues that the trial court erroneously relied on false information that he had been convicted of sixteen driving violations. The record shows that defendant had two prior infractions for driving with a suspended license. Although the trial court did make reference to multiple violations, this misinformation was by no means the basis for the sentence imposed on defendant. The trial court accurately noted that defendant never had a valid driver's license because he never fulfilled the requirements of his probationary license and that defendant nonetheless continued to drive. Noting the appropriate sentencing goals, the trial court stated that one of the reasons for the longer sentence was to send a message to society that this lack of regard for safety on the highways will not be tolerated. Defendant was an individual with a pattern of continued disregard for the law and the effects of his actions on other people. These factors were properly considered and constituted the primary basis for the defendant's sentence. *People v Van Etten*, 163 Mich App 593, 595; 415 NW2d 215 (1987). We conclude that the trial court articulated the proper criteria for imposing defendant's sentence and, in so doing, did not rely upon inaccurate information. *Id.*

Finally, we find no merit in defendant's argument that he is entitled to resentencing because his sentence is disproportionate in that it exceeds the sentencing guidelines. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The sentencing court may deviate from the guidelines range when the range is disproportionate to the seriousness of the crime and the defendant's prior record. MCR 6.425(D)(1); *Milbourn, supra* at 657.

In this case, the trial court adequately articulated its reasons for the deviation. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). As noted above, it emphasized that

defendant's record of driving with a suspended license and continued disregard for the safety of others must be deterred. Because the previous attempts at deterrence had failed and defendant's actions resulted in the death of a pregnant woman and her unborn fetus, a departure from the sentencing guidelines was warranted.

Affirmed.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

/s/ Janet T. Neff