

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PATRICK PAUL SEYMOUR,

Defendant-Appellant.

UNPUBLISHED

October 23, 2001

No. 229290

Delta Circuit Court

LC No. 99-006364-FH

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of three counts of operating under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), three counts of involuntary manslaughter, MCL 750.321, and failure to stop at the scene of an accident, MCL 257.617. He was sentenced to concurrent prison terms of eight to fifteen years each for the OUIL causing death and manslaughter convictions and two to five years for leaving the scene of an accident. Defendant now appeals by delayed leave granted. We affirm.

This case arises from a three-car collision that occurred during the early morning hours of December 3, 1998, near Escanaba, in which three persons died. The prosecutor presented evidence that defendant had been drinking at a party, left the party in a red Mustang with three companions, then, while attempting to pass a Chevrolet Caprice, swerved back into the Caprice's lane in order to avoid a head-on collision with a Ford Van, and struck the Caprice. The Caprice went out of control and collided with the van. The driver and passenger of the Caprice and the driver of the van were killed.

Defendant first challenges the sufficiency of the evidence to support his convictions of OUIL causing death and involuntary manslaughter. When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). This Court defers to the jury's determination of the credibility of witnesses. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

There is no dispute that defendant was the driver of the red Mustang involved in the collision, and that the three fatalities all resulted from the accident. All of defendant's driving companions admitted that they were seriously intoxicated with alcohol at the time.

One of defendant's companions that night testified that "everyone" was drinking at the party, that defendant himself had specified Southern Comfort as his choice in a liquor-buying run that night.¹ This same witness further admitted that she had falsely testified at the preliminary examination that she had not seen defendant drinking at all that night. But after confessing to her mother that she had lied, she returned to the examination and testified that defendant had consumed a single drink of beer. This witness further admitted telling a police officer that defendant had bragged that night that he was the world's best drunk driver, and that in the course of the drive, defendant boasted that they were going 110 miles per hour.

Another of defendant's companions spoke of defendant as having had "a couple of drinks out of some beers," even while asserting defendant's overall sobriety. This witness was impeached with her earlier statement to police that she had seen defendant drinking out of a bottle of hard liquor while driving from her house to the party, and that, at the party, defendant had consumed "[a]bout two to three beers." The person at whose home the party took place similarly testified that she had not seen defendant drinking or drunk, but then was impeached with her statement to the police that defendant and his companions were drunk, and that they had liquor with them.

Telling indeed is the evidence that defendant's older brother argued with defendant over whether defendant should go out driving that night, and that when defendant did so over his brother's protestations, the brother called the police. Although the brother joined defendant's other companions in insisting that defendant was not drunk that night, he admitted that the tape of his phone call to the police included his assertion about the people in the red Mustang that "[t]hey're all drunk." Further, a waitress in a tavern near the party that the brother visited that night testified that the brother came into the tavern and expressed concern that defendant should not have been driving because he was too drunk.

Finally, according to the evidence, immediately after the collision, defendant encouraged his companions to maintain that he had not been the driver and then fled the scene. Then, many hours later, the police officer who apprehended defendant testified that defendant had a stench of liquor that he recognized as an indication that the person had drunk heavily the night before.

The jury could reasonably have observed that each eyewitness who was in a position to observe defendant's drinking that night was defendant's friend, relative, or both, and that these

¹ Some witnesses testified that defendant dropped and broke the bottle of Southern Comfort without ever opening it. That evidence cuts both ways. Evidence that defendant was carrying a bottle of Southern Comfort, which he had asked to have purchased in the first place, poorly comports with the assertion that defendant had chosen to abstain from drinking that night. And although dropping and destroying the bottle does indeed suggest that defendant did not drink any Southern Comfort, if indeed the jury chose to believe that the bottle was never opened, that mishap also militates in favor of the conclusion that defendant was already intoxicated by that time.

comrades understood that the damage done that night could not be undone but felt an incentive to downplay defendant's drinking in order to cushion his resulting entanglement with the law.

We observe that if defendant actually were an island of sobriety in that sea of drunken excesses, it is strange that his older brother would be so concerned about his driving as to argue with defendant about it, and then to take the initiative to call the police when defendant left. Stranger still would be that defendant would instinctively try to evade responsibility for being the driver and that his companions would initially cooperate with the deception. If defendant had been the only sober person in the party, he should have understood that he was the only driver who could plausibly maintain that the collision was an innocent accident. The obvious inference for the jury was that defendant was drunk and unfit to drive, that his brother tried to protect him from that folly before the collision, and that all of defendant's well-wishers tried to protect him from some of the consequences after the collision.

For these reasons, we conclude that the jury could reasonably have concluded that defendant was driving under the influence of intoxicating liquor at the time of the crash.

A defendant charged with OUIL causing death may also be charged with involuntary manslaughter, "if there is a serious question about whether the driver's careless or unsafe driving, somehow unrelated to his intoxication, was the cause of the victim's death." *People v Lardie*, 452 Mich 231, 258 n 47; 551 NW2d 656 (1996). Involuntary manslaughter is an unlawful act, committed either intentionally or with gross negligence, that proximately results in another's death. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). Defendant challenges the sufficiency of the evidence of his gross negligence at the time in question.

"[T]he act of driving requires the exercise of ordinary care and diligence to avert injury to others." *McCoy, supra* at 503. The question of gross negligence must be determined on the basis of all the circumstances. *Id.* at 504. "[I]t is possible to drive in a grossly negligent manner even in the absence of exceeding the speed limit (e.g., . . . in fog)." *Id.*

All witnesses agree that there was heavy fog that night. The evidence suggests that defendant began his drive after arguing with his brother about whether he should be driving that night at all by doing "doughnuts" or making circles in the pavement on the street, and by racing through a parking lot with abandon, endangering parked cars.

A police officer testified that defendant had confessed to him that he was the driver of the red Mustang, and that, according to defendant, he saw lights in front of him and started to pass that car ahead of him. He then noticed headlights coming from the other direction, aborted his pass, and rammed the back of the car he was passing in order to avoid a head-on collision.

One truck driver testified that the red Mustang passed him on the double-yellow line that night going approximately 60 miles per hour, where the trucker himself thought 45 miles per hour safe and prudent in light of the fog. Another trucker testified that he passed a white sedan, possibly a Caprice, going in the opposite direction, and that perhaps a minute thereafter another car followed that was going dangerously fast.

An aggressive demeanor, or state of gross recklessness, like other aspects of intent, is often difficult to prove, and thus minimal circumstantial evidence is sufficient. See *Fetterley*, *supra* at 517-518.

Defendant argues that driving too fast, even in fog, is at worst only ordinary negligence. However, the evidence suggests that defendant had begun to pass the Caprice without establishing that he had reasonable opportunity to do so, and was forced to move quickly back to the lane with the Caprice in order to avoid a head-on collision. This is not mere speeding, but also aggressive passing where the fog required caution. In addition, good circumstantial evidence of defendant's aggressive driving is that defendant argued with his brother about whether he should be driving at all, that he began his drive with dangerous stunts, and that in the course of the drive, he passed another vehicle on the double-yellow line while traveling at a speed that appeared unsafe to others under the circumstances. Better than circumstantial is the evidence that defendant boasted to his passengers of going 110 miles per hour during the course of the fateful drive.²

Defendant insists that the combination of the Caprice's slowing down and defendant's own unanticipated brake failure ultimately caused the accident, and that he himself was guilty only of driving a little too fast. However, the prosecution need not disprove every plausible theory of innocence; the prosecution need only prove its own case beyond a reasonable doubt in the face of whatever contrary evidence the defense may produce. *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984). In this case, the jury was free to doubt that defendant suffered any significant brake failure and to doubt that the driver of the Caprice had applied the brakes at all.

Further, MCL 257.402(a) provides that if a driver's vehicle overtakes and strikes the rear end of another vehicle traveling in the same direction or lawfully standing, a rebuttable presumption of the striking driver's negligence arises. Although this presumption may be rebutted when the vehicle ahead abruptly slows down or stops, this applies only where the striking driver was not obliged to anticipate the sudden slow down. See *Hill v Wilson*, 209 Mich App 356, 360-361; 531 NW2d 744 (1995). Just as a driver must anticipate and the car ahead may have to stop abruptly in heavy traffic, *Hill*, *supra* at 361, so should a driver anticipate that the car ahead may have to slow abruptly in heavy fog.

For these reasons, we conclude that the jury had a sound evidentiary basis upon which to conclude that defendant caused the fatal accident by driving in a grossly negligent way.

Defendant next argues that his separate convictions and sentences for OUIL causing death and involuntary vehicular manslaughter violate the constitutional prohibitions against double jeopardy.³ This Court has squarely addressed this issue and has firmly concluded that the two criminal statutes implicate sufficiently distinct societal norms that both may be charged in

² The witness who reported that defendant had so boasted said that she did not believe it at the time. Even assuming the truth of that disclaimer, the evidence nonetheless indicates that defendant was trying to impress his companions with daring speeds.

³ US Const, Am V; Const 1963, art 1, § 15

connection with a singular vehicular homicide without violating double jeopardy principles. *People v Kulpinski*, 243 Mich App 8, 12-24; 620 NW2d 537 (2000), citing *Lardie, supra*, and *People v Price*, 214 Mich App 538; 543 NW2d 49 (1995). We decline defendant's invitation to revisit this issue.

Defendant next argues that the trial court improperly admitted into evidence a video reconstruction of the accident without establishing a sufficient similarity between the depictions and the circumstances of the accident. We disagree. Defense counsel objected to the use of the video as substantive evidence, but expressed an openness to having it used as demonstrative evidence. In the end, the court allowed the evidence for demonstrative purposes only.

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995); *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). "Demonstrative evidence . . . is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case." *Castillo, supra* at 444. Defendant argues that the evidence was ultimately used not as mere demonstration, but as recreation. We disagree. Defense counsel ably elicited from the preparer of the video that he was working from data supplied by the police in some instances and making assumptions and averages in others. The testimony brought to light various disputes, including the speed of defendant's car and whether the Caprice had applied its brakes just before the collision. We believe it would have been apparent to the jury that the video reconstruction was one expert's interpretation of selected bits of evidence plus reasonable assumptions. That the evidence did not uniformly support every basis from which the preparer worked went to the weight, not the admissibility of the video.

However, we agree with defendant that the trial court erred in pronouncing before the jury that the video represented the conditions prevailing that night, "accurately replicating those conditions surrounding the event." The court in effect credited evidence that the jury should have been left free to accept or reject as it saw fit. Nonetheless, this minor, unobjected-to error was harmless. The court referred to the "conditions surrounding the event," not the collision itself. Because there was no dispute that it was dark and foggy, defendant stood to suffer little if any prejudice if the jury felt obliged to presume that the darkness and fog at the time and place in question exactly matched what was presented on the video. Further, any possible prejudice could readily have been cured with a special instruction had defendant requested one. The trial court's statement upon admitting the evidence does not warrant reversal.

Defendant additionally argues that reversal is required because the trial court did not present his theory of the case within its instructions at the close of proofs. We disagree. The court rules do not require a trial court to restate a party's theory of the case at the close of proofs, but instead authorize a party to request such an instruction. MCR 2.516(A)(2) ("after the close of the evidence each party . . . may submit the party's theory of the case as to each issue" [emphasis added]). See also MCL 768.29, and *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Further, because the defense in fact reiterated its theory of the case in closing argument, no wrongful conviction could reasonably have resulted because the jury did not hear it again from the trial court shortly thereafter. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (setting forth the standard of review for unpreserved claims of error).

Finally, defendant challenges his eight-year minimum sentence arguing that the trial court did not sufficiently articulate its reasons for that sentence and that the sentence is disproportionately harsh. We disagree.

A sentencing court should articulate the reasons behind a particular sentence sufficiently to allow the defendant to understand the reasoning involved, but when the court explains that it is following the guidelines, or when remarks in court before sentencing clearly indicate that the guidelines have been utilized and the sentence is within the guidelines, the court need not provide further explanation. *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992). In this case, the sentencing proceeding began with the trial court eliciting from both attorneys that they had reviewed the presentence investigative report and had no objections to the guidelines scoring. Because the trial court verified that the parties had examined the PSIR and invited them to make objections, and because the court sentenced defendant within the minimum range recommended, the court sufficiently articulated its reasons for the sentence given for those reasons alone. Those, along with the court's additional comments that defendant had behaved very dangerously, and that society needed to be protected from him, amply establish the reasons behind the sentence.

Arguing that his sentence is disproportionately harsh, defendant points out that he acted without the intent to harm any of his three victims and cites authority for the proposition that it thus was not the worst kind of criminal conduct, adding that no special circumstances made these vehicular homicides worse than others. Defendant additionally points out that his prior criminal record consisted of only a single breaking & entering of a vehicle plus several misdemeanors. However, the eight-year minimum sentence well takes those considerations into account. Because the worst criminal conduct draws a sentence of life,⁴ defendant's eight-year minimum obviously reflects that defendant's was not the worst kind of criminal conduct. But it was sufficiently serious nonetheless to justify the sentence imposed. In light of the evidence of a pattern of brazen, reckless conduct that resulted in the deaths of three innocent persons, defendant's few protestations of mitigating circumstances do not suffice to overcome the presumption of proportionality for defendant's sentence within the guidelines.

We affirm.

/s/ Richard Allen Griffin

/s/ Jane E. Markey

/s/ Patrick M. Meter

⁴ See, e.g., MCL 750.316(1) (mandatory life for first degree murder), and MCL 750.349 (life or any term of years for kidnapping).