

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR RUSSELL,

Defendant-Appellant.

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UNPUBLISHED  
February 14, 2003

No. 236574  
Wayne Circuit Court  
LC No. 00-009460-01

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), causing death, MCL 257.625(4). Defendant was sentenced to thirty-eight months to fifteen years' imprisonment. He appeals as of right. We affirm.

**I. Facts and Procedure**

On May 28, 2000, at approximately 3:00 a.m., defendant and Tammy Hill-Kennedy were in defendant's Ford Excursion traveling north on Harrison Road when its right front and rear tires struck the curb. As a result of the impact with the curb, the right rear tire blew out. The Excursion continued traveling north after the blow out, with its right side on the grass and its left side on the concrete. After traveling in this manner for approximately two hundred feet, the vehicle totally reentered the roadway. It crossed the centerline and the southbound traffic lane and struck another curb directly head-on. The vehicle turned sideways and skidded. It began to flip and struck a smaller sign and also struck a power pole.

The prosecution's expert opined that defendant was driving at a high rate of speed, over the forty-five mile per hour speed limit, thereby resulting in snapping the power pole in half and dragging it completely out of the ground. Defendant's expert opined that as the vehicle headed directly toward the pole, he braked very hard and the right side of the vehicle hit the pole, knocking it partially down. Defendant's expert further opined that the pole came out of the ground easily because the ground was wet. Moreover, defendant's expert testified that although he could not calculate how fast the Excursion was traveling when it initially contacted the curb with its right side wheels, based on his calculations and measurements, it was traveling 43.2 miles per hour when it impacted the power pole.

After the accident, both occupants of the vehicle were removed from the vehicle around 4:20 a.m. The passenger, Tammy Hill-Kennedy, suffered a fractured neck, severed spinal cord, punctured lungs, lacerated aorta, torn liver, kidney and spleen, which resulted in extensive internal bleeding. Tammy Hill-Kennedy was pronounced dead at the scene. Defendant was conscious at the scene and Officer Balewski smelled the odor of intoxicants on defendant's breath. When defendant arrived at St. Joseph Mercy Hospital's emergency room at 5:50 a.m., he was unconscious and paralyzed because of medications given for the placement of a breathing tube. Blood was removed from defendant and a routine alcohol screen was conducted. The blood was analyzed at 6:02 a.m., and defendant had a blood alcohol level of .14. At 9:22 a.m., approximately six hours after the accident, defendant's blood was drawn, pursuant to a search warrant, and the Michigan State Police determined his blood alcohol level to be .07.<sup>1</sup> The test was run two times for confirmation.

## II. Analysis

### A. Expert Testimony

Defendant first argues that the trial court improperly admitted Officer Balewski's expert testimony regarding speed and causation over his objection and without a proper foundation. This issue is unpreserved because defendant did not object to the challenged testimony on the ground of improper foundation at trial. Rather, he objected only on the ground that the question was leading. An objection on one ground is insufficient to preserve an appellate challenge on another ground. *People v Johnson*, 205 Mich App 144, 148; 517 NW2d 273 (1994), citing *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992). Unpreserved issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We find no plain error in the admission of Officer Balewski's testimony that defendant was traveling at an excessive rate of speed when he hit the power pole. Expert testimony should be admitted if the testimony will "aid the fact finder in making the ultimate decision in the case." *People v England*, 176 Mich App 334, 340; 438 NW2d 908 (1989). If an expert opinion is based on measurements and observations, e.g., length of skid marks, measurements of gauge marks, photographs, etc., the opinion is based on sufficient information to support admissibility. *People v Ebejer*, 66 Mich App 333, 342; 239 NW2d 604 (1976). Further, the opposing party's challenge to an expert's interpretation of the facts, or the expert's ultimate opinion, is an issue of credibility or weight of the testimony only, not admissibility. *England, supra* at 340.

Sufficient information was presented to support the admissibility of Officer Balewski's testimony that defendant was traveling at an excessive rate of speed. Officer Balewski was a qualified expert that diagrammed the scene, took measurements at the scene, personally observed the vehicle and its resting spot immediately after the accident, and assisted in the photographing of the vehicle and accident scene. Upon considering the evidence as a whole, Officer Balewski's opinion testimony was not based solely on the force of impact but on his observations and measurements. Any disagreement with Balewski's conclusion presented an issue of credibility or weight, not admissibility. *Ebejer, supra* at 342; *England, supra* at 340. Therefore, sufficient

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<sup>1</sup> Both the blood alcohol level of .14 and .07 represent a whole blood level.

information existed to support the admissibility of Officer Balewski's testimony and the testimony did not amount to plain error. *Ebejer, supra* at 342.

### B. Erroneous Findings of Fact

Defendant next argues that the trial court made an impermissible finding of fact that excessive speed was the cause of the accident. Specifically, defendant argues that the trial court improperly reached its conclusion based only on speculation and the force of the impact. We disagree. When the right to a jury trial is waived, the trial court, sitting as the factfinder, must make specific findings of fact and state its conclusions of law. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). "Factual findings are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law." *Id.* The trial court's findings of fact at a bench trial are reviewed for clear error. MCR 2.613(C); *People v United States Currency*, 164 Mich App 171, 179; 416 NW2d 700 (1987).

In rendering its factual findings and conclusions, the trial court summarized both the prosecution's theory of the case and defendant's theory of the case. The trial court discounted defendant's expert's testimony concerning defendant's blood alcohol level, finding that it was speculative. However, upon reviewing the evidence, the trial court heard and considered the expert testimony, and it credited Officer Balewski's testimony that defendant was traveling at an excessive rate of speed. Further, contrary to defendant's argument, the trial court's finding of guilt was not based solely on the force of impact. While the force of impact was a consideration, the trial court additionally considered that defendant hit the curb in the first place, causing a blowout, and that defendant's vehicle thereafter continued to follow an erratic path and was totally out of control. In addition, the trial court disbelieved that defendant attempted to stop before hitting the pole. The trial court's findings of fact are supported by the evidence and are not clearly erroneous.

### C. Sufficiency of Evidence

Defendant next argues that the evidence was insufficient to enable a rational trier of fact to determine that the essential elements of the crime were proved beyond a reasonable doubt. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citations omitted). This standard applies to bench trials. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). All evidentiary conflicts must be resolved in favor of the prosecution. *Harmon, supra* at 524; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to secure a conviction for OUIL causing death, the prosecutor must prove that "(1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he consumed alcohol and may be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death." *People v Lardie*, 452 Mich 231, 259-260; 551 NW2d 656 (1996). On appeal, defendant specifically argues that there was insufficient evidence that he was intoxicated or had a blood alcohol level of

.10 or above while operating the vehicle. Viewing the evidence in a light most favorable to the prosecution and resolving all conflicts in the prosecution's favor, we disagree.

A blood test was administered at the hospital shortly after defendant arrived, which was approximately three hours after the accident. The results of the blood test revealed a .14 blood alcohol level. Defendant's own expert estimated that defendant's blood alcohol level was either .12 or .106, conservatively. Defendant's blood was later drawn pursuant to a search warrant at 9:22 a.m. and that test revealed a blood alcohol level of .07 six hours after the accident. While defendant's expert testified that it was not possible to figure out defendant's blood alcohol level at the time of the accident based on the information, he agreed that defendant was drinking alcohol before the accident and did not drink any alcohol after the accident and before the blood tests. Thus, while there was no evidence of defendant's actual blood alcohol level at the time of the accident, the evidence supported a finding that defendant had a blood alcohol level over .10 when the accident occurred. Balewski smelled intoxicants on defendant's breath and, three hours after the accident, defendant's blood alcohol level was well over the legal limit. Further, defendant still had alcohol in his system six hours after the accident.<sup>2</sup>

On appeal, defendant also summarily argues that the evidence at trial was insufficient with respect to speed or causation. As previously discussed, the evidence that defendant was traveling at an excessive rate of speed was properly admitted. The trial court credited this testimony and determined that defendant was, indeed, traveling at an excessive rate of speed and that this was the cause of the accident. We will not interfere with that decision. See *People v Sherman-Huffman*, 241 Mich App 264, 267; 615 NW2d 776 (2000) ("Special deference is given to a trial court's findings when based on witness credibility.") The evidence of defendant's intoxication, along with the erratic and out-of-control path of the speeding vehicle, leads to a reasonable inference that defendant's intoxication substantially caused the accident, which killed the victim. The challenged evidence of intoxication, speed and causation was sufficient.

#### D. New Trial

Defendant next argues that the trial court abused its discretion when it denied his motion for a new trial based on newly discovered evidence that the tires on his vehicle may have been the cause of the accident. Defendant points to evidence that, after his trial, Firestone recalled certain tires because of blowouts and tread separations. While defendant cites authority for the standard of review for a new trial motion, he fails to cite any authority in support of his claim that he was entitled to a new trial based on alleged newly discovered evidence. Therefore, defendant's argument on appeal is abandoned. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002). Additionally, even if we considered defendant's claim, we would find that the trial court did not abuse its discretion in denying defendant's motion for a new trial based on newly discovered evidence.

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<sup>2</sup> In discussing the issue of the sufficiency of the evidence, defendant also extensively discusses whether the blood alcohol evidence was properly admitted at trial. This issue is not properly presented to this Court because the evidentiary challenge to the blood alcohol testimony is not raised in the statement of the questions presented. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

“A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial.” *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). In the present case, by defendant’s own admission, the problem with Firestone tires became “public for the most part on August 9, 2000, when 6.5 million ATX, ATX II and Wilderness AT tires were recalled.” This was prior to defendant’s trial. Further, while there was a mass recall of Firestone tires after defendant’s trial, the particular tires that were on defendant’s vehicle were not subject to any recall. Moreover, although defendant discovered, after trial, that there have been numerous consumer complaints about the type of tire that was on his Excursion, he cannot show that such information was unavailable or could not have been produced at the time of his trial, or that the evidence would produce a different result on retrial. There was no dispute that the right rear tire of defendant’s vehicle hit the curb before the blowout. Thus, even if the Firestone tire at issue was prone to blow out, the evidence indicated that the contact with the curb, which was caused by defendant’s erratic driving while intoxicated, precipitated the blowout in this case. Therefore, under the circumstances, the trial court did not abuse its discretion when it denied defendant’s motion for a new trial on the basis of alleged newly discovered evidence.

#### E. Judicial Bias

Finally, defendant argues that the trial court was biased against him and that he is entitled to a new trial before a different judge. This issue is not preserved because defendant did not move below to disqualify the trial court. MCR 2.003(A); *In re Forfeiture of \$53.00*, 178 Mich App 480, 497; 444 NW2d 182 (1989). Accordingly, we review this issue for plain error. *Carines, supra* at 763-764.

In order to disqualify a judge from hearing a case, actual bias or prejudice must be shown. *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988). “A party who challenges a judge on the basis of bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.” *B & B Investment Group v Gitler*, 229 Mich App 1, 17; 581 NW2d 17 (1998). Disqualification for bias or prejudice is warranted only in the most extreme cases. *People v Leonard*, 224 Mich App 569, 596 n 9; 569 NW2d 663 (1997). Defendant needs to show a “deep-seated favoritism or antagonism that would make fair judgment impossible.” *Schellenberg v Rochester Michigan Lodge No. 2225 of Benevolent and Protective Order of Elks of USA*, 228 Mich App 20, 39; 577 NW2d 163 (1998).

Upon reviewing the record as a whole, defendant does not point to any portion of the transcript to support his claim that the trial court was biased against him during trial, when deciding his guilt or his initial sentence. Moreover, defendant has not demonstrated that the trial court’s ultimate rulings in the case show a deep-seated favoritism to the prosecutor or deep-seated antagonism to himself that made fair judgment impossible. Additionally, the trial court’s comments during the post-trial motions do not demonstrate the requisite bias or prejudice necessary to warrant reversal and a new trial. Although the trial court did indicate that it did not believe that defendant should be re-sentenced in accordance with the sentencing guidelines because he felt that defendant’s sentence was justified due to the gravity of the offense and the facts of the case, the trial court made no representations about defendant personally. Rather, the trial court referred only to the facts of the case, which were elicited at the bench trial. Defendant

has not demonstrated that the trial court was biased or prejudiced when deciding the issue of his guilt. Therefore, no plain error occurred requiring reversal. *Carines, supra* at 763-764.

### **III. Conclusion**

In sum, no plain error existed when the trial court admitted testimony of Officer Balewski that defendant was traveling at an excessive rate of speed when he hit the power pole. Further, the trial court's findings of fact were supported by the evidence and were not clearly erroneous. Moreover, sufficient evidence existed to convict defendant for OUIL causing death. Additionally, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. Lastly, defendant has not demonstrated that the trial court was biased or prejudiced; therefore, no plain error occurred.

Affirmed.

/s/ Henry William Saad  
/s/ Brian K. Zahra  
/s/ Bill Schuette