

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANE JOSEPH SMITH,

Defendant-Appellant.

UNPUBLISHED
February 25, 2003

No. 229137
Monroe Circuit Court
LC No. 99-030211-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle while his license was revoked, causing death, MCL 257.904(4) (count I), operating a motor vehicle while under the influence of intoxicating liquor (OUIL), causing death, MCL 257.625(4) (count II), manslaughter, MCL 750.321 (count III), and failure to stop at the scene of a serious personal injury accident, MCL 257.617 (count IV). Defendant was sentenced to concurrent terms of seven to fifteen years' imprisonment each for counts I-III, and thirty-six to sixty months' imprisonment for count IV. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing.

I. Facts

On October 4, 1999, at approximately 6:50 p.m., defendant was driving his pickup truck on US-23 in Dundee Township. Three witnesses testified that defendant was driving at a high rate of speed, at least 85 miles per hour, when defendant lost control of his vehicle and hit a pedestrian, Ronald Keeton, Jr., who had been walking on the side of the roadway. Mr. Keeton died as a result of injuries sustained in the accident. Defendant did not stop at the scene of the accident.

Officer Steven Pascoe was on duty four miles south of the accident when he heard central dispatch alert officers to be on the lookout for a red pickup truck that had left the scene of the accident. After receiving word that a vehicle matching this description had exited the freeway at US-223 and headed west, Pascoe eventually located defendant's truck at a gas station which was still under construction. Defendant's vehicle was parked next to a five-foot pile of dirt and behind a port-a-potty. Pascoe inspected defendant's truck; no one was inside, but there was a beer can on the driver's side floor.

Shortly thereafter, Pascoe saw defendant running to a Sunoco gas station, about 200 yards away. Officer Marvin Carlson responded to the call for help and found defendant using the phone at the Sunoco gas station. Carlson handcuffed defendant and, at that point, defendant said something about being hijacked. Carlson arrested defendant and read him his rights. Defendant volunteered that he had been traveling south on US-23 when he picked up a hitchhiker. Defendant claimed that the hitchhiker pulled a gun on him, forced him into the passenger's seat, and began to drive his truck. Defendant said the hitchhiker was driving at a high rate of speed, driving stupid, and that he swerved and struck another car. Defendant claimed that he was able to escape and run away, and the hitchhiker continued on in his truck.

Carlson believed that defendant was visibly impaired due to alcohol consumption. He smelled alcohol on defendant's breath, defendant's speech was rapid and somewhat slurred, and defendant's eyes were bloodshot and glossy. Defendant admitted that he had two beers. Defendant was then taken to the hospital for a blood test, the results of which showed that defendant's blood alcohol level ("BAC") was .063 two and one-half hours after the accident. Forensic toxicologist Julia Pearson testified that defendant's BAC was between .09 and .11 during the accident, assuming he did not have a beer when he was driving; or between .07 and .09 had he consumed a beer during his drive. Carlson later determined that defendant's driving privileges had been revoked by the State of Michigan, and that notice of this revocation had been issued to defendant.

Van Buren Township Police Officer Lawrence Temple was permitted to testify about defendant's involvement in a hit and run accident which occurred on September 5, 1999. Temple stated that he was flagged down by a driver who told him that he had just been struck by a white F-150 pickup truck, and that the driver of that vehicle did not stop. Temple located the white F-150 pickup truck at a nearby gas station, where defendant and a woman were standing outside the driver's side door looking at the damaged mirror. Defendant initially said that the woman had been driving the truck. At first the woman agreed, but then she started crying, said she wasn't driving, and told defendant, "I'm not taking the rap for you this time." Defendant then admitted he had been driving. Temple testified that he noted a strong odor of intoxicants on defendant's breath. Temple also testified that he gave defendant a "driving permit," which informed defendant that his driving privileges were denied, revoked and expired as of that day.

Defendant testified that he had risen for work at 3:00 a.m., worked until 3:30 p.m., and then made several stops, finally leaving a friend's house sometime after 6:00 p.m. Defendant stated that from 4:00 p.m. to 6:00 p.m. he drank about four beers and ate some fried vegetables. On defendant's behalf, several witnesses testified that defendant had consumed fried vegetables and a total of four beers. None of the witnesses felt that defendant was intoxicated, but rather that he was tired. Defendant's expert witness testified that given defendant's food consumption, his BAC would have been at or below .06 at the time of the accident.

Defendant further testified that he had his cruise control set at seventy-eight miles per hour as he traveled southbound on US-23. He stated that he came up behind a car, which put on its turn signal to get over. He then looked down at some paperwork on his seat, and when he looked back up he saw that the car had not moved over. Defendant applied his brakes, but did not think he was going to be able to stop quickly enough; so he jerked the wheel to the right to go around the car. Defendant testified that he jerked too hard, and when he brought the wheel

back the other way the back end started to slide and spin. Defendant stated he heard a smash, and subsequently managed to straighten out his vehicle and pull off at an exit.

Defendant denied ever seeing a pedestrian and had no idea that he had hit anyone. Instead, he thought he hit a mile marker or a pole. Defendant stated that his ability to drive was not affected by the alcohol he drank and denied driving at an excessive speed. He also denied knowing that his driving privileges had been suspended by the State of Michigan. He did admit that he lied to the police when they found him after the accident, explaining that he “lost control,” was not in his right frame of mind, and that he had no idea of what he was saying.

Defendant’s accident reconstructionist testified that the markings on the road indicated defendant had made a hard right steer, and then a corrective left steer. The markings also indicated that defendant was traveling between 73 and 76 miles per hour at the time. Defendant’s expert also testified that defendant’s vision would not have been focused on the shoulder area, but rather on the roadway and on his own vehicle, and that defendant would have had less than three seconds to observe anyone on the shoulder.

Defendant was convicted and sentenced in the manner described above, and now appeals asserting numerous claims of error.

II. Admissibility of Evidence

Defendant alleges that the trial court erroneously admitted several pieces of evidence. The decision whether evidence is admissible is within the trial court’s discretion and should only be reversed where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Rice (On remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

A. Lay Opinions

Defendant argues that the trial court erred in allowing the testimony of three lay witnesses regarding the speed of his vehicle. We disagree.

Lay witness testimony in the form of an opinion is permitted where it is rationally based on the witness’ perception and is helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue. MRE 701; *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995). Opinion testimony of lay witnesses with regard to speed has repeatedly been held to be admissible, even where the qualifications of the witnesses to judge speed are based on little more than their own assertion of their ability to do so, or the testimony borders on the incredible. *People v Zimmerman*, 385 Mich 417, 439; 189 NW2d 259 (1971) (Adams, J., separate opinion).¹

¹ See also *Hammock v Sims*, 313 Mich 248, 21 NW2d 118 (1946); *Zylstra v Graham*, 244 Mich 319, 326; 221 NW 318 (1928); *People v Schwartz*, 215 Mich 197, 183 NW 723 (1921); *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629; 415 NW2d 224 (1987); *Kuhnee v* (continued...)

In this case, all of the witnesses gave some basis for their speed estimates rooted in their personal experiences, and their testimony regarding the speed of defendant's vehicle was certainly material to the case. Accordingly, we find that the trial court did not abuse its discretion in allowing their opinion testimony.

B. 404(b) Evidence

Although defendant objected below, he failed to provide this Court with the transcript of the hearing at which the trial court considered and ruled on this issue. Therefore, because we were not provided with a record to review, defendant has waived review of this issue. *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

Defendant also raises a hearsay issue as it relates to the 404(b) evidence. Defendant did object below, but failed to frame this issue in his statement of questions presented on appeal; therefore, this issue is unpreserved. *People v Brown*, 239 Mich App 735, 748; 610 W2d 234 (2000). We review unpreserved, non-constitutional issues for plain error only. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At trial, the prosecutor asked Officer Temple what information he obtained from the driver whose vehicle had been hit in the September 1999 hit-and-run incident. Over defendant's hearsay objection, Temple testified that the driver told him that he had just been struck by a white pickup, which was driven by a white male with a white female passenger headed westbound. Temple further testified that the driver said that his friend was following the white pickup truck and that the driver of the white pickup truck did not stop.

Hearsay is an out of court statement offered for the truth of the matter asserted, and is generally inadmissible. MRE 801(c); MRE 802. The prosecutor argued that the information was not being offered for the truth of the matter, but rather to show why the officer located defendant's vehicle, and the trial court agreed. However, while the driver's statements regarding the occupants and the color of the pickup truck could be construed as foundational, we believe that the driver's statement indicating that the pickup truck did not stop is clearly hearsay.

The reason the prosecutor presented Temple's testimony was to show that defendant did not leave the scene of this accident by mistake. Therefore, the evidence was offered for the truth of the matter asserted, i.e., to show that defendant did not stop at the scene of the September 1999 hit-and-run accident. Therefore, we find that the court abused its discretion in allowing this testimony. However, we find the error did not affect defendant's substantial rights, given the other evidence presented at trial. *Carines, supra* at 763.

(...continued)

Miller, 37 Mich App 649, 653-655; 195 NW2d 299 (1972); *People v Ray*, 2 Mich App 623, 635; 141 NW2d 320 (1966).

III. Pre-trial Publicity

Defendant argues that he was denied the right to a fair and impartial jury, given the amount of pre-trial publicity in this case and the fact that nearly all the jurors admitted they had heard about the case from the media before trial. Because defendant failed to object at trial, we review this issue for plain error only. *Carines, supra* at 763.

The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. *People v Jendrzewski*, 455 Mich 495, 501; 566 NW2d 530 (1997). Juror exposure to newspaper accounts of a defendant's crime does not in itself establish a presumption that the defendant has been deprived of a fair trial by virtue of pretrial publicity. *Id.* at 502. Whether or not prejudice warranting a new trial results from the reading of news articles or seeing or hearing broadcasts must turn on the special facts of each case, and the question is left largely to the determination and discretion of the trial court. *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997).

In this case, during the jury selection process, the court explored the issue of bias against defendant. None of the jurors indicated that they were biased against defendant or had already formed an opinion about defendant's guilt. In fact, only two potential jurors recalled hearing about the case through the media, one of whom defendant exercised a peremptory challenge to remove. Ultimately, defense counsel said that he was satisfied with the jury as seated and may not now harbor any alleged error as an appellate parachute. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2001). Thus, we find no error that affected defendant's substantial rights.

IV. Constitutionality of MCL 257.904(4)

Defendant asserts that the statute which imposes criminal liability for operating a vehicle under a revoked license, causing death, MCL 257.904(4), is unconstitutional because it imposes strict liability. The constitutionality of a statute is a question of law that this Court reviews *de novo*. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). A statute is accorded a strong presumption of validity and this Court has a duty to construe it as valid absent a clear showing of unconstitutionality. *Id.*

MCL 257.904(4) provides,

(4) A person who operates a motor vehicle in violation of subsection (1) and who, by operation of that motor vehicle, causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500.00 or more than \$10,000.00, or both. This subsection does not apply to a person whose operator's or chauffeur's license was suspended because that person failed to answer a citation or comply with an order or judgment pursuant to section 321a.

Subsection (1), referred to above, provides,

(1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, whose application for license has

been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state. [MCL 257.904(1).]

A strict liability crime is one for which the prosecutor need to prove that the defendant performed the wrongful act, regardless of whether he intended to perform it. *People v Lardie*, 452 Mich 231, 241; 551 NW2d 656 (1996). Here, it is clear from the wording of subsection (1) that the Legislature intended to hold a person liable under the above provision only if the person had knowledge that they were driving without a valid license. Where a statute requires a criminal mind for some but not all of its elements, it is not one of strict liability. *People v Quinn*, 440 Mich 178, 187; 487 NW2d 194 (1992). Therefore, MCL 257.904(4) is not a strict liability statute just because there is no intent requirement for the “causing death” element.

Defendant also contends that subsection (4) of the statute is unconstitutional because driving while one’s license is suspended has no bearing on the person’s ability to operate a motor vehicle; there is no casual relation between a person’s decision to drive and the death of an individual, and thus, the provision violates his due process rights. We disagree.

MCL 257.904(4) is a general intent crime. The prosecutor needed to prove that defendant voluntarily drove a motor vehicle despite knowing that he was not entitled to do so. See *Lardie, supra* at 241. The statute is designed to discourage persons, who have been determine to be unfit drivers, from driving without being entitled to the privilege. 1998 PA 341. We find that MCL 257.904(4) is rationally related to a legitimate state purpose, and, therefore, is constitutional. *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997); see also *Quinn, supra* at 187. “A statute is not unconstitutional merely because it is undesirable, unfair, or unjust.” *Phillips v Mirac, Inc*, 251 Mich App 586, 589; 651 NW2d 437 (2002).

V. Sufficiency of the Evidence

We review de novo challenges to the sufficiency of the evidence at trial. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Defendant asserts that there was insufficient evidence to support his convictions for operating a motor vehicle while impaired, causing death, MCL 257.625(4), manslaughter with a motor vehicle, MCL 750.321, and operating a motor vehicle with a revoked license causing death, MCL 257.904(4). Again, we disagree.

MCL 257.625(4) provides that “[a] person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) or (3) and by the operation of that motor vehicle causes the death of another person” is guilty of a crime. MCL 257.625(1) and (3) provide,

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor

vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:

(a) The person is under the influence of intoxicating liquor, a controlled substance or a combination of intoxicating liquor and a controlled substance.

(b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

* * *

(3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of intoxicating liquor, a controlled substance, or a combination of intoxication liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired

Defendant's involuntary manslaughter conviction required that the prosecution prove that defendant operated his vehicle in a grossly negligent manner, *Lardie, supra* at 247-248, and caused the death of another, *People v Tims*, 449 Mich 83, 94; 534 NW2d 675 (1995).

The prosecution's forensic toxicologist testified that defendant's blood alcohol level was between .09 and .11 during the accident, assuming he did not have a beer when he was driving. Moreover, the arresting officer testified that he believed that defendant was visibly impaired due to alcohol consumption. Also, there was testimony that defendant was driving at a high rate of speed in an erratic fashion. This evidence, viewed most favorably to the prosecution, was sufficient to enable the jury to find that defendant was guilty of OUIL causing death and manslaughter with a motor vehicle.

Defendant contends that his conviction under MCL 257.904(4) should be reversed because there was insufficient evidence to show a causal connection between his driving with a revoked license and the victim's death. As support for his contention, defendant cites *Lardie, supra*.

In *Lardie*, the Court held that MCL 257.625(4), operation of a motor vehicle while intoxicated causing death, required proof of causation, i.e., the prosecutor must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death. *Id.* at 234; 257-258. In reaching its conclusion, the Court considered the Legislature's intent, which was to reduce fatalities by deterring drunken driving. *Id.* at 257. Therefore, the statute must have been designed to punish drivers only when their drunken driving caused another's death. *Id.* at 257-258.

In this case, the statute was enacted to address the problem of individuals who engage in drunk driving and have their license suspended or revoked, yet continue to drive on these invalid licenses. 1998 PA 341. The statute was obviously designed to punish drivers who cause a fatal accident because they disregarded their revoked or suspended status. The prosecution presented evidence that the state issued notice to defendant that his license was revoked, and additionally,

that defendant had been drinking. Therefore, we find that, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to support the conviction.

VI. Sentencing Issues

Defendant argues that the trial court erred in scoring offense variables (“OV”) 9, 13, and 18.²

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *Id.*

A. OV 9

Defendant contends that OV 9 was improperly scored at ten points. Ten points is properly scored if there are between two and nine victims. Each person who is placed in danger of injury or loss of life is considered a victim. MCL 777.39. The evidence indicated that there were four victims, Beth Ann Lay and her two children who were in the car that defendant passed and the decedent, Mr. Keeton. Ms. Lay testified that defendant pulled up behind her out of nowhere, driving at a high rate of speed, swerved to her right, hit Mr. Keeton, then cut back in front of her. The court properly assessed ten points.

B. OV 13

Defendant also disputes the twenty-five points which were scored for OV 13. Twenty-five points are properly scored for OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b).³ MCL 777.43(2)(a) states that “[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” Zero points should be scored if there is no pattern of felonious criminal activity. MCL 777.43(1)(f).

At sentencing, the prosecutor argued that OV 13 was properly scored at twenty-five points because there were four felony convictions, but conceded that there was no pattern of felonious criminal activity over the past five years outside the instant offenses. The court concluded that, while there was no pattern in the sense that defendant had prior felony convictions, the twenty-five point score was supported based on defendant’s multiple convictions.

The proper application of the statutory sentencing guidelines is a legal question reviewed by this Court *de novo*. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). In

² The offenses here were committed in October 1999; therefore, this matter is controlled by the legislative sentencing guidelines. MCL 769.34(2); See *People v Reynolds*, 240 Mich App 250, 253, 611 NW2d 316 (2000).

³ MCL 777.43 was amended by 1999 PA 279, effective October 1, 2000.

construing OV 13, we must assign the words their plain and ordinary meaning. *Id.* The use of the term “pattern” and the fact that the Legislature permitted consideration of all crimes within a five-year period evinces an intention that it is repeated felonious conduct that should be considered in scoring this offense variable.

In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), the Court held that twenty-five points were properly scored because of “defendant’s four concurrent convictions” in that case. The defendant was convicted of four counts of making child sexually abusive material, which were based on defendant’s activities in photographing two fifteen-year-old girls. Four photos, two of each girl, taken on a single date, supported defendant’s four convictions. *Id.* at 525. We believe that this case is distinguishable from *Harmon* because defendant’s convictions stemmed from one incident, not four individual acts. Therefore, we conclude that the trial court improperly scored OV 13 at twenty-five points; rather, no points should have been scored.

C. OV 18

Defendant also contends that the five point score for OV 18 is erroneous. Five points are to be scored for OV 18 if the offender operated a vehicle when his bodily alcohol content was 0.07 or more but less than 0.10 grams per 100 milliliters of blood, or while the offender was visibly impaired by the use of intoxicating liquor. MCL 777.48. The evidence indicated that defendant’s blood alcohol level was between .09 and .10 during the accident, assuming he did not have a beer when he was driving. His blood alcohol level would have been between .07 and .09 had he consumed a beer during his drive. Moreover, the arresting officer testified that defendant was visibly impaired due to alcohol consumption. Thus, the score of five points was warranted.

D. Resentencing

Because the reduction in score for OV 13 places defendant’s sentences for counts I-III above the sentencing guidelines⁴ and there is no indication on the record that the trial court would have found a substantial and compelling reason to depart, we must remand this case for resentencing. Cf *People v Mutchie*, 251 Mich App 273, 275; 650 NW2d 733 (2002). Accordingly, we need not decide whether these sentences are proportional.

However, we affirm defendant’s sentence for failure to stop at the scene of a serious personal injury accident (count IV). Even with the OV 13 scoring error, his sentence is within the range recommended by the statutory sentencing guidelines. A sentence within the guideline range is presumed proportional and defendant has not presented any circumstances for us to find otherwise. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997).

Defendant also contends that resentencing should take place before a different judge. In determining whether resentencing should occur before a different judge, this Court considers (1) whether the original judge would reasonably be expected upon remand to have substantial

⁴ Defendant’s new sentencing guideline’s range is 36 to 71 months’ imprisonment, MCL 777.64; thus, his minimum sentence of 84 months’ imprisonment for counts I-III is above this range.

difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Here, defendant cites nothing other than the court's misscoring of the three offense variables at issue in support of his claim. However, the court correctly scored two of these offense variables, and the third involved a question of law. Given these circumstances, we find that defendant has not shown he is entitled to resentencing before a different judge.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Michael R. Smolenski

/s/ Patrick M. Meter