

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 8, 2012

v

PERCY MONTE HARRISON,

Defendant-Appellant.

No. 304225
Ingham Circuit Court
LC No. 09-00148-FH

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Percy Monte Harrison of operating a motor vehicle while intoxicated causing serious injury (OUIL) in violation of MCL 257.625(5), and operating a motor vehicle while license suspended causing serious injury (DWLS) in violation of MCL 257.904(5). Defendant asserts that the prosecution presented insufficient evidence from which a jury could conclude that his driving, rather than the complainant's lane change, caused the motor vehicle accident. The causation issue was a factual question for the jury and we will not interfere with its judgment.

Defendant's concurrent sentences of 36 to 90 months' imprisonment fall within the appropriate minimum sentencing guidelines range for a second habitual offender. However, the trial court sentenced defendant on the incorrect presumption that defendant was not a habitual offender and therefore relied on a lower guidelines range. As we cannot discern whether the trial court would have imposed the same 36-month minimum sentence had it considered the correct guidelines range, we vacate defendant's sentences and remand for resentencing.

I. BACKGROUND

On October 2, 2009, at approximately 1:30 a.m., Stacey Hazel was driving the speed limit in the left, northbound lane of a four-lane highway. Hazel noticed a pair of headlights in her rearview mirror approaching at a high rate of speed. The approaching vehicle rammed her pickup truck from behind, pushing it into a utility pole. Hazel's airbag deployed and the collision's force broke her femur in four places. Hazel underwent several surgeries and still required a cane to walk 18 months after the accident.

At the time of the accident, defendant was driving with a suspended license. A responding officer testified that defendant appeared intoxicated; his eyes were bloodshot and

glassy, his speech was slurred, he used extremely vulgar language, and he smelled like alcohol. Defendant admitted at the scene that he had just left a bar where he had consumed “four shots of Hennessey” and “a lot of beer.” Defendant repeatedly said, “It’s a done deal, I’m a done deal . . . I know I’m going to jail. I am a done deal.” Officers transported defendant to the hospital where a blood test revealed that he had 0.17 grams of alcohol per 100 milliliters of blood.

II. SUFFICIENCY OF CAUSATION EVIDENCE

Defendant contends that the prosecution presented insufficient evidence to convict him of OUIL and DWLS causing serious injury because there was contradictory evidence that Hazel caused the accident by changing lanes without allowing faster moving traffic adequate response time. Defendant implies that Hazel veered into his lane of traffic. At trial, defense counsel asked Hazel if she told the officers that she had tried to change lanes right before the accident. Hazel responded, “He asked me that. And I said: It might have been possible, but I don’t think so. I didn’t have time to react.” On redirect, Hazel explained that she “may have” told the responding officer that she tried to change lanes to avoid the accident, but she could not remember. Hazel further indicated that she lacked sufficient time to react and try to avoid the accident. Lansing police officer Kyle Schlagel testified that Hazel told him at the scene that she “may have tried to move out of the way” of defendant’s vehicle. Schlagel testified, however, that there was no damage to the driver’s side of Hazel’s pickup truck, only to the rear and front ends. He asserted that if Hazel had tried to change lanes before the accident, there would have been damage to the driver’s side of her vehicle as well.

We review sufficiency-of-the-evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), with an eye toward determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt, *People v Wolfe*, 440 Mich 508, 515-514; 489 NW2d 748, mod 441 Mich 1201 (1992). In doing so, all evidence must be viewed in a light most favorable to the prosecution. *People v Railer*, 288 Mich App 213, 216; 792 NW2d 776 (2010). We defer to the fact-finder’s weighing of the evidence and assessment of witness credibility. *Wolfe*, 440 Mich at 514.

MCL 257.625(5) proscribes OUIL and MCL 257.904(5) proscribes DWLS. Both statutes create an enhanced penalty when a defendant “by the operation of [his or her] motor vehicle causes a serious impairment of a body function of another person.” Our Supreme Court has interpreted “by operation of” to mean that the defendant’s operation of the motor vehicle must cause the victim’s injury, not his or her intoxication. *People v Schaefer*, 473 Mich 418, 431; 703 NW2d 774 (2005) (interpreting identical language in MCL 257.625[4]), overruled in part on other grounds by *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006) (applying *Schaefer*’s statutory interpretation to MCL 257.625[5]), overruled in part on other grounds by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010). Consistent with the identical language of the DWLS statute, a defendant’s operation of the motor vehicle, but not his unlicensed driving, must cause the victim’s injury. See *Schaefer*, 473 Mich at 433 n 6.

For the OUIL and DWLS charges, the prosecution has the burden to prove both factual and proximate causation. Factual cause exists if “but for” the defendant’s actions, the victim would not have been injured. *Id.* at 435-436. Proximate cause exists if the victim’s injury was a direct and natural result of the defendant’s actions. *Id.* at 436. It “is a legal construct designed to

prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Id.* "In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken." *Id.* at 436-437. "The linchpin in the superseding cause analysis . . . is whether the intervening cause was foreseeable based on an objective standard of reasonableness." *Id.* at 437. Ordinary negligence on the part of others is foreseeable and does not break the causal chain. Gross negligence and intentional misconduct, on the other hand, are not reasonably foreseeable and would sever a defendant's criminal liability. *Id.* at 437-438. Ultimately, causation is a question of fact for the jury, and we may only interfere if the jury commits clear error. *People v Clark*, 171 Mich App 656, 659; 431 NW2d 88 (1988). In other words, we may only second-guess the jury "when although there is evidence to support [the judgment], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976).

We discern no clear error in the jury's assessment of the record evidence. Hazel does not remember trying to change lanes before the accident and testified that she had insufficient time to react. The damage to her vehicle is inconsistent with defendant's alternative theory of events. Even if Hazel did try to change lanes, there is no record indication that such conduct would have risen to the necessary level of gross negligence or intentional misconduct to sever the chain of causation. The evidence reveals that Hazel may have attempted to change lanes to avoid the collision. There is simply no support for defendant's theory that Hazel alone caused the accident by recklessly swerving into defendant's path.

III. DEPARTURE SENTENCE

Defendant also challenges the trial court's alleged departure from the minimum sentencing guidelines range. OUIL is a Class E felony against a person. Defendant scored 47 total prior record variable points and 60 offense variable points, placing him in Level D-V of the sentencing grid. For a first-time offender, the appropriate minimum sentencing guidelines range would have been 14- to 29-months' imprisonment. For a second habitual offender, however, the appropriate minimum guidelines range was 14 to 36 months.

In the felony warrant, the prosecution notified defendant that it was charging him as a second habitual offender. The Judgment of Sentence entered after the sentencing hearing also reflects that defendant was sentenced as a second habitual offender. Yet, the sentencing information report reflects that defendant was not a habitual offender and the trial court proceeded to sentencing based on that inaccurate report. At the sentencing hearing, the court indicated its intent to depart from the 14- to 29-month range applicable to first-time offenders as follows:

So I have to look at the protection of society in this matter, the terms. I'm going to exceed the adjusted guideline range,¹ which is 14 to 29 months. I find the substantial and compelling reason to exceed is really the lack of remorse, statements at the hospital about this, the attitude at the hospital.

I think, if you had an opportunity to take it back, you probably would; but you knew. I mean that's the part that just sticks in my mind.

I think my hands are tied, [defendant]. I don't know you from anybody else just looking at the - - you are what the record is. I think that's the most telling part to me, is that, knowing you had a drinking problem, you chose to drive, which meant that you were a ticking time bomb. You knew that, at some point, there was going to be an accident. And that's why I think you made that statement at the time - at the time of the accident, that you knew it was over, "I'm going to jail," because you knew it was ultimately going to happen

So I'm going to sentence you to the Michigan Department of Corrections for a period of 36 months to a maximum of 90 days.

It is clear from the record that the Department of Corrections erred in calculating defendant's minimum sentencing guidelines range as a first-time offender and the trial court erred in sentencing defendant as such. In actuality, defendant's minimum sentence of 36 months falls within the 14- to 36-month range applicable to second habitual offenders and consistent with the charges levied against defendant. Pursuant to MCL 769.34(1), we must affirm a defendant's minimum sentence if it falls within the appropriate guidelines range unless the trial court relied on inaccurate information or the guidelines were erroneously scored. The trial court sentenced defendant based on inaccurate information regarding his habitual offender status. Defendant is therefore entitled to resentencing. *People v Francisco*, 474 Mich 82, 90-91; 711 NW2d 44 (2006).

In *Francisco*, the correction of a scoring error altered the appropriate minimum sentencing guidelines range from an 87-to-217-month range to a new 78-to-195-month range. *Id.* at 91. Although the defendant's originally imposed minimum sentence of 102 months' imprisonment also fell within the corrected range, the Supreme Court remanded for resentencing:

The actual sentence suggests an intention by the trial court to sentence defendant near the bottom of the appropriate guidelines range—specifically, fifteen months or 17 percent above the 87-month minimum. Had the trial court been acting on the basis of the correct guidelines range, however, we simply do not know whether it would have been prepared to sentence defendant to a term 24 months or 30 percent above the new 78-month minimum. Indeed, appellate correction of an erroneously calculated guidelines range will always present this dilemma, i.e.,

¹ The guidelines range was adjusted downward at the sentencing hearing to reflect the court's correction of defendant's OV 13 score.

the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention. Thus, requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends. [*Id.* at 91-92.]

Here, we do not know whether the trial court would have imposed the same 36-month minimum sentence had it remembered that defendant had been charged as a second habitual offender and relied upon the correct minimum sentencing guidelines range. Accordingly, we must remand to allow the trial court to impose sentence in light of the correct information.

In the event the court decides to once again impose an upwardly departing sentence, it must state objective and verifiable, substantial and compelling reasons for the particular departure. MCL 769.34(3); *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). We "review the reasons given for a departure for clear error," whether the reasons are objective and verifiable de novo as a matter of law, and whether the reasons are substantial and compelling enough to support the particular departure for an abuse of discretion. *Smith*, 482 Mich at 300. Substantial and compelling reasons exist "only in exceptional cases" and "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Id.* at 299.

In imposing what it believed to be an upwardly departing sentence, the trial court cited defendant's lack of remorse, and his belligerence and vulgar language in the emergency room following the accident. Whether a defendant feels remorse for his offense is generally a subjective factor that cannot be objectively determined and verified. See *People v Fields*, 448 Mich 58, 80; 528 NW2d 176 (1995). However, it appears that the trial court was more concerned with defendant's admittedly long history of substance abuse and his concession that he had repeatedly driven under the influence and yet had evaded detection. If it chooses to rely on this factor again in imposing an upwardly departing sentence, we advise the trial court to clarify its reasoning.

The court also cited defendant's choice to drive despite knowing that he was intoxicated on this occasion as a ground for departing from the guidelines. Defendant's intoxication and voluntary choice to drive were both elements of the sentencing offense that were considered in scoring the guidelines. MCL 257.625(1); *Derror*, 475 Mich at 334. (Defendant's choice to drive despite his knowledge that he was intoxicated is not, however, an element of OUIL. *Id.*)

The trial court may not base a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." [*Smith*, 482 Mich at 300, quoting MCL 769.34(3)(b).]

There is no record indication that the trial court considered whether defendant's intoxication and his choice to drive were given inadequate weight when scoring defendant's offense variables.

Accordingly, if the trial court decides to depart from the 14- to 36-month minimum sentencing guidelines range on these factors, we again advise the court to carefully support its decision.

In summary, defendant is entitled to resentencing as the trial court sentenced defendant on the inaccurate assumption that defendant was a first-time offender. *Francisco*, 474 Mich at 88-91. If on remand the trial court decides to depart from the corrected minimum sentencing guidelines range, it must carefully support its chosen sentence with objective and verifiable, substantial and compelling reasons stated on the record. *People v Babcock*, 469 Mich 247, 266; 666 NW2d 231 (2003), citing MCL 769.34(11).

Affirmed in part, vacated in part and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher