

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS ALAN HALE,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 229607

Kalamazoo Circuit Court

LC No. 99-001220-FH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant was convicted of negligent homicide, MCL 750.324, as a result of a fatal motor vehicle-motorcycle accident. He was sentenced to twelve month's probation, \$2,000 restitution, costs and supervision fees and now appeals by right. We reverse.

I

The facts of the accident are not in dispute. Defendant was driving his Blazer southbound on Riverview Drive in Kalamazoo County about 10:00 p.m. on July 16, 1999. He intended to turn left into a store parking lot and noticed a single headlight coming toward him in the northbound lane. The headlight was that of a motorcycle driven by Michael Conrad. As defendant commenced his turn, the motorcycle struck the Blazer, and Conrad was fatally injured. The accident occurred in the northbound lane, Conrad's lane of travel.

Defendant had no alcohol in his blood. Conrad had small amounts of both alcohol and cocaine in his system. Defendant was ticketed for failing to yield to oncoming traffic and, as noted, later charged with negligent homicide.

II

At defendant's preliminary examination, defendant presented the testimony of an accident reconstruction expert and an expert in pharmacology. The latter testified over the prosecutor's objection about the effects of cocaine on the body, and particularly the effect on pupillary dilation in response to light, and the synergistic effects of alcohol combined with cocaine. He also testified that Conrad had ingested the cocaine between an hour and a half and fifteen minutes before the accident.

The magistrate found probable cause for the bindover because all the evidence was that defendant turned his vehicle into the lane occupied by the motorcyclist. He further commented that whether Conrad's death was the result of defendant's actions or his own (Conrad's) actions was a jury question.

Before trial, the prosecution filed a motion in limine in circuit court to preclude the testimony of the accident reconstruction expert and the pharmacology expert at trial. The court conducted a hearing at which it indicated that it had reviewed the parties' briefs and the preliminary examination transcript. The court then proceeded to hear the arguments of counsel.

The prosecution argued that the testimony of the disputed witnesses was not relevant because it went to the issue of the decedent's contributory negligence, which is not a defense to a charge of negligent homicide. Defense counsel agreed that contributory negligence is not a defense to a charge of negligent homicide, but that the decedent's conduct may be considered to determine if his own negligence was a proximate cause of his injuries and death.

The court denied the motion in limine as it related to the testimony of the accident reconstruction expert, holding that the expert might be able to offer opinions about the possible negligence of the decedent in failing to stop before the collision even though defendant turned his vehicle in front of the decedent's motorcycle. However, the court reached the opposite conclusion with regard to the expert in pharmacology. Relying on MRE 403, the court held that the testimony about the effect of cocaine and the synergistic effects of cocaine and alcohol had little probative value because the reason that the decedent could not stop in time "doesn't matter." The court also expressed its concern that allowing the testimony would result in "delay, waste of time, possibly misleading the jury, and the danger of unfair prejudice and confusion of the issues . . . particularly the use of an illegal substance" While reciting the language of MRE 403 as the basis for its ruling, the court did not explain how the proposed testimony would create delay, confusion or prejudice. The court ruled that the testimony of the pharmacology expert was precluded, and it is this ruling that is at issue on appeal.¹

III

The decision whether to admit evidence is within the trial court's discretion and will be reversed only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Generally, all relevant evidence is admissible, while irrelevant evidence is not admissible. MRE 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

¹ It should be noted that the judge who ruled on the motion in limine did not conduct the jury trial. Defendant filed a motion for reconsideration of the ruling on the motion in limine before the judge who heard the motion, but did not raise the issue before the judge who heard the trial.

IV

In *People v Tims*, 449 Mich 83, 97; 534 NW2d 675 (1995), our Supreme Court held that the negligence of the victim is not a complete defense to negligent homicide; however, a victim's contributory negligence is a factor to consider in determining whether the defendant's negligence caused the victim's death. See also CJI2d 16.20. Regarding causation, an essential element of negligent homicide, the Court in *Tims*, *supra* at 95, stated:

The common-law causation element is comprised of two components, cause-in-fact or proximate/legal cause. In order to convict a defendant of a criminal negligence offense, the prosecutor must prove beyond a reasonable doubt that the defendant's conduct was a factual cause of the fatal accident....

Although a cause-in-fact relationship is often sufficient, cases arise in which the death is so remote from the defendant's conduct that it would be unjust to permit conviction. In such a case, the question for the jury is whether the defendant's conduct was the proximate or legal cause of the decedent's death. See, e.g., *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914).

In *People v Moore*, 246 Mich App 172; 631 NW2d 779 (2001), an opinion issued after the lower court's ruling in this case, this Court ruled that an abuse of discretion occurred when evidence of marijuana use by a decedent was precluded in a negligent homicide case. While the facts in *Moore* vary considerably from the facts of this case, we find that the legal reasoning for the ruling in that case applies here.

The Court in *Moore* discussed *People v Phillips*, 131 Mich App 486; 346 NW2d 344 (1984), a case relied on by the court below in this case. In holding that *Phillips* did not support preclusion of the marijuana testimony, the *Moore* Court noted:

In the present case, unlike in *Phillips*, defendant is able to produce blood tests showing the presence of marijuana in the decedent's bloodstream and urine. Further, defendant is able to produce expert testimony stating that the presence of the by-products of marijuana in both the decedent's blood and urine indicates that the by-products were also in the decedent's brain, and, therefore, that the decedent was impaired at the time of the accident. Further, testimony at the preliminary examination suggests that the decedent's driving may have been impaired because one eyewitness testified that the decedent's vehicle was traveling too fast to avoid hitting the truck, a rather large and obvious obstacle. [*Moore*, *supra* at 180.]

In this case, while there was no evidence that Conrad, the decedent, was driving too fast or erratically,² defendant could produce a toxicology report that shows the presence of small amounts of alcohol and cocaine in the decedent's system and expert testimony that these

² At the preliminary examination defendant's accident reconstructionist agreed with prosecution witnesses that the motorcycle was not speeding before the accident. At trial, his testimony changed, but the judge who heard the motion in limine had only the testimony that the motorcyclist was not speeding.

substances affect the body in a manner that might have impaired the decedent's ability to stop or otherwise avoid the accident. This evidence is relevant, as the lower court seemed to concede in basing its ruling on MRE 403, not MRE 401.³ The jury was denied the opportunity to hear evidence that was relevant to the question whether defendant turned in front of the decedent under circumstances where the decedent could not stop, or whether the decedent's death was caused by his own inability to react in a timely fashion due to his ingestion of cocaine and alcohol.

We disagree with the lower court that the presentation of the disputed testimony is properly excluded under MRE 403. Based on the testimony offered at the preliminary examination and the arguments of counsel at the hearing on the motion in limine, it does not appear that any undue delay or waste of time would result if the pharmacology testimony is allowed. While the prosecution would undoubtedly produce testimony to rebut the conclusions of defendant's expert at trial, as it did at the preliminary examination, the issue is relatively straightforward and is of the type that juries are often called upon to evaluate. For the same reasons, we disagree that the jury might be misled or the prosecution unduly prejudiced by this testimony, in spite of the fact that it involves evidence of illegal drug use. Careful instructions should be adequate to overcome any such potential prejudice.

Accordingly, we find that the lower court abused its discretion in excluding the testimony of the pharmacology expert. Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens

³ The court specifically declined the prosecution's request to base its ruling on both rules, but did indicate that it "seriously question[ed]" whether the evidence was relevant.