

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYLE AARON JOHNSON,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 225965

Wayne Circuit Court

Criminal Division

LC No. 98-009516

Before: Holbrook, Jr., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor causing death, MCL 257.625(4), and operating a motor vehicle while under the influence of intoxicating liquor causing serious injury, MCL 257.625(5)(a). He was sentenced to concurrent terms of six to fifteen years' imprisonment for the OUIL causing death conviction and two to five years' imprisonment for the OUIL causing serious injury conviction. He appeals as of right. We affirm.

Defendant first argues that his motion for a directed verdict should have been granted because there was insufficient evidence to support his convictions. When reviewing the sufficiency of the evidence in a criminal case, we "must 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). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). We will not interfere with the jury's role of determining the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). Where a directed verdict motion has been made, a challenge to the sufficiency of the evidence is resolved by considering all of the evidence presented up to the time that the defendant moved for a directed verdict. *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988).

In this case, defendant challenges the sufficiency of the evidence that he was the driver of the red Ford Taurus, which hit another vehicle head on, causing Tommy Turner's death and Lisa Turner's permanent paralysis below the waist. Defendant also challenges the sufficiency of the evidence that his intoxicated driving was a substantial cause of the accident and injuries.

The evidence was sufficient to find beyond a reasonable doubt that defendant was the driver of the Taurus. The vehicle belonged to Aretha Parker. It was either dropped off at defendant's shop or defendant picked it up at Doug's Lounge. Under either scenario, defendant admitted to receiving the keys to the vehicle. Defendant also admitted that he did not leave the Taurus at his shop on the night in question because it did not fit inside at closing time. It was undisputed that Parker's Taurus was later involved in the accident with the Turner vehicle. Shortly after the accident, defendant was observed sitting behind the driver's wheel of the Taurus. He appeared dazed and indicated that he was "okay." In his statement to a private investigator, defendant admitted that he recalled leaving Doug's Lounge and, the next thing he knew, he was in the accident. At his deposition, he admitted that he was going home but never made it there. He testified that he was knocked unconscious by the accident and an acquaintance who lived near the scene of the accident woke him up *in* the car. The evidence, and inferences to be drawn from it, were sufficient to support a finding beyond a reasonable doubt that defendant was driving Parker's Taurus at the time of the accident. "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001), citing *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In addition, there was sufficient evidence that defendant was intoxicated. When he exited from the Taurus and went to the EMS truck, he was dazed and incoherent. Thereafter, it was noted that his speech was slurred, his eyes were glassy and blood shot, he could not stand on his own, and he smelled of alcohol. A breathalyzer test taken at 11:28 p.m. showed a blood alcohol level of .14 percent.

Finally, the evidence, viewed in a light most favorable to the prosecution, establishes that defendant's intoxicated driving caused the accident.¹ In *People v Lardie*, 452 Mich 231, 256-257; 551 NW2d 656 (1996), our Supreme Court stated that MCL 257.625(4) was enacted in an attempt to reduce the number of *alcohol-related* fatalities. As such, the Legislature wanted to deter drivers who willingly drink and drive by punishing them when their *drunken* driving causes death. *Id.* at 257. Thus, the Court in *Lardie* ruled that, in proving causation, the prosecution "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 258. In this case, the evidence indicated that Tommy's death and Lisa's injuries were caused by defendant's intoxication. There was testimony that defendant did not keep the Taurus in the eastbound lane of traffic. Rather, he crossed out of his lane, causing the accident. A fatal accident investigator, who arrived at the scene before 10:30 p.m. on the night of the accident, found the Taurus and the Turner vehicle unmoved from their final resting places. He found a gouge mark underneath the Taurus. The mark was in the westbound lane and it represented the point of impact. The investigator concluded that the Turner vehicle was traveling westbound in the westbound lane when the Taurus, which was traveling eastbound, crossed the center line and struck the Turner vehicle head-on, driver's side to driver's side. The Taurus was three-quarters of the way into the westbound lane. The Turner vehicle was entirely in the westbound lane. Another police officer also testified that the accident occurred in the westbound lane. Lisa Turner's testimony also

¹ In presenting his arguments on appeal, defendant improperly interprets the evidence most favorably to himself. This is not the applicable standard of review. *Hoffman, supra* at 111.

establishes that defendant was at fault. She testified that Tommy was driving westbound at the time of the accident, that he was maintaining his lane and was driving slowly. Bright lights suddenly appeared in front of their vehicle and it appeared the lights were coming directly toward them. Tommy attempted to swerve but the impact occurred. There was no evidence that Tommy swerved out of his lane or toward the Taurus. Moreover, defendant admitted that he could not recall the details of the accident or how the collision occurred. Because there was no evidence that defendant sustained any injury that would account for the lack of recall, a reasonable inference is that his intoxication caused his inability to recall. Simply put, the evidence supports a finding that defendant's alcohol consumption impaired his ability to control the vehicle by keeping it in its proper lane. He drove into oncoming traffic, causing the accident. When viewed in a light most favorable to the prosecution, the jury could have found that the essential elements of the crimes were proved beyond a reasonable doubt.

Next, defendant argues that his counsel was ineffective for failing to request a specific instruction that the jury could ignore the breathalyzer test results in their entirety if they chose to do so. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant cannot make the requisite showing.

The trial court instructed the jury that the breathalyzer test results could be given "whatever weight" the jury believed they deserved. The jury was also instructed to question and think about the accuracy of the test and the results. Further, the jurors were generally instructed that it was their duty to determine the weight of the evidence and the facts of the case. They were told that they should consider the evidence that they believed. These instructions were adequate to apprise the jurors of their role with regard to the test results. They knew they did not have to consider the results if they did not believe them. Counsel's performance in failing to request a more detailed instruction on this point did not fall below an objective standard of reasonableness.

We also note that, contrary to defendant's argument, the breathalyzer results were not the only evidence used to establish defendant's intoxication, and further, that establishing an unlawful blood alcohol content is not necessary to sustain a conviction under MCL 257.625. MCL 257.625(1) requires proof that defendant was under the influence of intoxicating liquor *or* had an unlawful blood alcohol level. MCL 257.625(3) allows for conviction if defendant was impaired. The jury was instructed on all of the alternatives. The evidence supporting the conviction was compelling and the jury was instructed on the matter even if the instruction was not as specific as defendant would have liked. Consequently, defendant cannot show that counsel's representation was prejudicial so that defendant was denied a fair trial.

Lastly, defendant argues that his sentence of six to fifteen years' imprisonment for OUIL causing death is disproportionate. When called upon to review the proportionality of a sentence, our review is limited to determining whether the sentencing court abused its discretion. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

On appeal, defendant does not argue that the sentence is disproportionate to the seriousness of the circumstances surrounding the offense *and* the offender. He argues only that it is disproportionate to the offense. MCL 257.625(4) allows for a sentence of up to fifteen years. The six-year minimum sentence imposed by the trial court is well within the statutory limits. Further, contrary to defendant's argument, there is substantial and compelling evidence that defendant was intoxicated when he crossed the center line of the road, went into oncoming traffic, and hit the Turner vehicle, killing Tommy. The seriousness of the offense supports the sentence. Defendant's attempt to shift the blame or minimize his role in the accident is disingenuous. Moreover, defendant has an abhorrent driving and criminal record of six prior felony convictions, demonstrating his disrespect for the law. The fact that he would choose to drive while intoxicated given his prior driving record supports the sentence. The sentence is proportionate to the offense and the offender.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder