STATE OF MICHIGAN

COURT OF APPEALS

REBECCA A. DUBY, as Next Friend of ARON GENE DUBY, a Minor,

Plaintiff-Appellee,

v

WILLIAM H. BARBER,

Defendant-Appellant.

UNPUBLISHED
May 3, 2002

No. 227457
Genesee Circuit Court
LC No. 96-045573-NI

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of negligence resulting from an accident in which defendant's truck collided with plaintiff's minor child's bicycle. We affirm.

The accident occurred when defendant's truck, traveling below the speed limit, attempted to pass Aron Duby and his companion, Ryan Johnston, who were bicycling side-by-side in the westbound lane of Carpenter Road in Genesee County. Defendant, Duby, and Johnston were all traveling west. Defendant saw the two boys well in advance and moved at least partially into the eastbound lane to pass them. Before defendant could pass the boys, Duby moved near the centerline of the road and was struck. The jury found defendant negligent and Duby comparatively negligent.

On appeal, defendant argues that the trial court should not have instructed the jury pursuant to SJI2d 12.01, which allows jurors to infer negligence based on a statutory violation, and erred in reading several specific statutory provisions. We disagree.

A violation of a civil statute can establish a prima facie case from which negligence may be inferred. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991). This Court reviews de novo claims of instructional error. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Defendant first claims that the trial court erred in reading the jury a portion of MCL 257.402, which raises a presumption of negligence in cases involving rear-end collisions, because Duby's bicycle was not proceeding in the same direction as defendant at the time of the accident. Although defendant's argument reflects a correct understanding of the law, see *Cassibo v Bodwin*, 149 Mich App 474; 386 NW2d 559 (1986), there was evidence from which

the jury could find that Duby and defendant were indeed traveling in the same direction when the collision occurred. The testimony of eyewitness Tommy Ragonese suggested that while Duby swerved into the eastbound lane as defendant approached, he returned to the westbound lane where he was struck by the front, right corner of defendant's truck. Jurors could reasonably conclude from the trial testimony that plaintiff and defendant were both traveling west when the collision occurred. An instruction is properly given if there is evidence, however scant, that raises an issue for the jury. *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 91; 393 NW2d 356 (1986). Thus, the trial court did not err in instructing the jury regarding this statutory provision.

Next, defendant claims that the trial court erred in instructing the jury pursuant to MCL 257.627, regarding the duty to drive at a speed which allows the driver to stop within an assured, clear distance, because Duby suddenly intersected defendant's assured clear distance. This Court has held this instruction inapplicable in cases where an object suddenly intersects the assured clear distance of the motorist. See, *e.g.*, *Cassibo*, *supra*, at 478; *Green v Richardson*, 69 Mich App 133, 139; 244 NW2d 385 (1976).

In this case, there was testimony that defendant was aware of Duby's presence well in advance of his approach and had moved at least partially into the eastbound lane to avoid Duby. Moreover, testimony at trial created a fact question in regard to whether Duby suddenly intersected defendant's path. Defendant testified that he was approximately 150 feet from the boys when he began moving into the eastbound lane to pass. When asked at what point he realized that he might hit one of the boys, defendant responded:

> When I seen him pull up over the side line and into my lane of traffic, I thought I could miss him, but I hit the brakes and-and 'fore I could turn the wheels, I was sliding. And I made a swerve to get around him. And I almost did it. But I didn't quite clear him.

When Johnston was asked whether Duby swerved sharply across the centerline, Johnston responded: "He might've. I don't know." Ragonese testified that he was following behind defendant and observed the collision. Ragonese slowed his vehicle and "start[ed] to back off" when he saw Duby move toward the centerline of the road. According to Ragonese, Duby was on his way back into the westbound lane when defendant's fender collided with the bike. Given that evidence, it cannot be said as a matter of law that Duby suddenly intersected defendant's assured clear distance. Ragonese's testimony, in particular, supports the finding that defendant had time to observe Duby's move toward the centerline and that Duby's movement did not suddenly precede the collision. Compare *Cassibo*, *supra*; *Green*, *supra*. Therefore, there was evidence supporting the instruction and we cannot say that the trial court erred in reading this statutory provision. *Klanseck*, *supra*.

Defendant's claim that the trial court erred in reading the remaining two sections of the assured clear distance statute does not require reversal. Although these sections were inapplicable to the case at bar, including them in the instructions was harmless error. See MCR 2.613(A) and *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001) (instructional error is a proper basis for reversal only when failure to reverse would be inconsistent with substantial justice). It was undisputed at trial that the posted speed on the relevant stretch of Carpenter Road was 55 mph and that defendant was traveling under that speed limit. The

inclusion of the portion of the assured clear distance statute, which states it is prima facie *lawful* for a driver to drive 25 mph or less in business or residential districts or in public parks could not have affected the verdict. See MCL 257.627(2)(a) and (b). Likewise the inclusion of MCL 257.627(3), which states it is prima facie unlawful to exceed the speed limits prescribed in subsection (2), could not have affected the verdict because no evidence suggested the collision occurred in the areas described in subsection (2). We conclude that the court's inclusion of subsections (2) and (3) did not confuse the jury given that the undisputed evidence suggested the circumstances described therein did not apply.

Defendant further claims that the trial court erred in reading a portion of MCL 257.643, which requires a driver to keep a reasonable and prudent distance when following another vehicle. Defendant contends on appeal that MCL 257.636 governs this situation because it specifically involves overtaking and passing. However, defendant did not raise any argument below regarding the applicability of MCL 257.636. Trial testimony suggested that defendant approached the boys who were traveling at a much slower speed and struck Duby while partially in the westbound lane. Thus, the trial court did not err in reading the portion of MCL 257.643. *Klanseck, supra*.

The trial court's instruction pursuant to MCL 257.706(a) regarding horns and other warning devices also was not error. Although some testimony indicated that Johnston warned Duby of defendant's presence, the evidence is unclear as to whether Duby heard and understood Johnston's warning,[1] or whether Duby would have reacted differently had defendant's horn alerted him to the truck's proximity. Because the question whether defendant's failure to sound his horn was a proximate cause of the accident was one of fact, the trial court did not err in giving the instruction. *Klanseck, supra*.

Next, defendant argues that the trial court erred in failing to instruct the jury that Duby had a duty to use ordinary care for his own safety. Defendant did not object to the challenged instruction below and, therefore, our review is limited to whether the instruction resulted in manifest injustice. *Phinney v Perlmutter*, 222 Mich App 513, 557; 564 NW2d 532 (1997). On review, jury instructions are viewed as a whole, not extracted piecemeal to establish error. *Cox v Flint Bd of Hosp Managers (On Remand)*, 243 Mich App 72, 85; 620 NW2d 859 (2000). A reading of the instructions as a whole makes clear that the court adequately defined Duby's standard of care in the context of the parties' respective duties.[2] The adequacy of the instruction

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[1] At one point during his trial testimony, Johnston stated that when he told Duby defendant's truck was approaching them from behind, Duby responded "okay." However, later in his testimony, Johnston stated that upon being warned, Duby "Never really said anything." Duby, himself, did not remember the accident and could not testify whether he was aware of defendant's approach. Defendant and Ragonese both testified at trial that they did not see Duby look back or otherwise acknowledge defendant's presence.

[2] The trial court instructed, in pertinent part:

> It was the duty of the defendant in connection with this occurrence to use ordinary care for the safety of Aaron [sic] Duby.

(continued…)

is borne out by the jury's finding of Duby's comparative negligence, which it could not have reached without understanding that Duby had a duty to use care for his own safety. Under these circumstances, no manifest injustice resulted from the trial court's instructions regarding the parties' duties of care. *Phinney, supra*.

Finally, as discussed, the only instructions that were erroneously given were those pertaining to MCL 257.627(2) and (3). The inclusion of those instructions was harmless. Under these circumstances, we reject defendant's cumulative error claim. See *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000).

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

(…continued)

> Now, a minor is not held to the same standard of conduct as an adult. When I use the words "ordinary care" with respect to Aaron Duby, I mean that degree of care which a reasonably careful minor of the age, mental capacity, and experience of Aaron [sic] Duby would use under the circumstances which you find exist in this case. And once again, it's for you to decide what a reasonably careful minor would do under the circumstances that exist in this case, or would not do.