STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SHADI BACHER AYOUB, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

SHADI BACHER AYOUB,

Respondent-Appellant.

UNPUBLISHED
February 13, 2007

No. 266159
Wayne Circuit Court
Family Division
LC No. 05-437821-DL

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a bench trial, respondent, a juvenile, was adjudicated guilty of felonious driving, MCL 257.626c, drag racing, MCL 257.626a, failure to stop at the scene of a serious injury accident, MCL 257.617(2), and operating a motor vehicle with a level one permit without adult supervision, MCL 257.306(4). He was sentenced to intensive juvenile probation subject to several conditions. He appeals as of right. We affirm as modified.

Respondent argues that the trial court erred in relying on inadmissible hearsay evidence for its truth. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). Preliminary questions of law concerning admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

This case arises out of an automobile accident that occurred while respondent and others were allegedly drag racing on Michigan Avenue in Dearborn. The prosecutor's theory at trial was that respondent made a sudden swerve that caused another vehicle, driven by Hussein Dabajeh, to lose control and strike the vehicle of Cheryl Slusher, who was seriously and permanently injured.

At respondent's trial, several witnesses initially testified that they did not remember the events surrounding the accident. Accordingly, the prosecutor used their police statements and depositions in a related civil case to refresh their recollection, as permitted by MRE 612. Under

MRE 612, the prosecutor was not required to first introduce the witnesses' out-of-court statements into evidence, or show the admissibility of those statements, and he did not attempt to do either.

On appeal, respondent specifically challenges the trial court's findings that he was driving 80 to 90 miles per hour ("mph"), that respondent caused Dabajeh to lose control by startling him or cutting him off, that the four juveniles (respondent, Dabajeh, Samya Chammout, and Mohamad Elsalman) were drag racing and acting in concert, and that respondent was the person who was driving the vehicle that cut off Dabajeh, causing the accident.

At trial, Elsalman testified that he heard tires screech, saw respondent speed by him in the middle lane, and looked in his rearview mirror and saw Dabajeh lose control of his vehicle and crash. Elsalman maintained that his deposition statement—that respondent was traveling between 80 and 100 mph—was the truth. Mercel Salamey, respondent's passenger, testified that he felt respondent swerve, "like, a sudden jerk of the wheel . . . and then went back." Billy Esseily, Dabajeh's passenger, testified that a black Tahoe cut in front of Dabajeh, causing Dabajeh to attempt to change lanes, which resulted in his losing control of his vehicle, crossing the median, and striking the victim. Esseily previously saw respondent driving a black Tahoe. Chammout testified that, just before the crash, she saw a truck cut off Dabajeh, and she believed that the maneuver caused the accident. None of this testimony was based on the witnesses' out-of-court statements.

Respondent's own statement to the police was properly introduced for its truth under MRE 801(d)(2)(A), as a party admission. As respondent argues on appeal, the trial court sustained defense counsel's objection to Officer Patrick Hayes's summary of respondent's statement. It appears that the basis for the objection was the best evidence rule, MRE 1004. But respondent's oral admission that the group was drag racing was not included in his written statement, so it was not covered by the objection. Additionally, the trial court did not strike Officer Hayes's preceding testimony. Therefore, under MRE 801(d)(2)(A), the trial court could properly rely on Officer Hayes's testimony that respondent admitted that he was drag racing to prove the truth of the matter asserted.

In his written statement, also admissible under MRE 801(d)(2)(A), respondent admitted that he was speeding, and that he flinched and swerved to the left. Respondent stated that he kept driving because he did not notice that Dabajeh had swerved and crashed. Respondent admitted that he was told that there had been an accident, and that he returned to the accident scene with Salamey and saw the ambulances, and then left.

While the witnesses' earlier statements to the police are hearsay, the witnesses' inconsistent statements given under oath during a deposition were not hearsay, considering that the witnesses testified at trial and were subject to cross-examination concerning the statements. See MRE 801(d)(1)(A). Additionally, statements of identification are also excluded from the definition of hearsay. See MRE 801(d)(1)(C). Accordingly, the trial court properly could rely on Esseily's deposition statement that, when the Tahoe cut Dabajeh off, he looked through the window and saw that it was driven by respondent. The court could also rely on Chammout's deposition statements that respondent and Dabajeh were racing, that the group was driving approximately 70 mph, that respondent was the person who cut off Dabajeh, and that Chammout believed that respondent acted intentionally.

In sum, the trial court did not rely on inadmissible hearsay evidence to support its findings concerning respondent's speed, swerving, drag racing, or identity.

Respondent also argues that the trial court improperly curtailed his cross-examination of Officer Hayes. Respondent complains that he was not permitted to ask Officer Hayes several questions concerning Dabajeh. At trial, however, respondent failed to make an offer of proof concerning what he hoped to elicit. Additionally, respondent failed to explain below, and does not explain on appeal, how the questions were relevant to exposing Officer Hayes's alleged motives, biases, or prejudices. For these reasons, we find no error.

In any event, there was admissible evidence of respondent's excessive speed, independent of Officer Hayes's analysis of Dabajeh's yaw mark. Officer Hayes also testified that respondent admitted that he was racing but, as previously discussed, there was other admissible evidence to that effect, independent of Officer Hayes's credibility. The only other evidence introduced through Officer Hayes was respondent's written and oral statements, whose authenticity was unchallenged. Thus, respondent cannot show that, but for the trial court's allegedly improper curtailing of respondent's ability to impeach Officer Hayes, the outcome of respondent's trial might have been different. Accordingly, any error was harmless. *Lukity*, *supra* at 495.

Next, respondent argues that the evidence was insufficient to support his adjudications of felonious driving, drag racing, and leaving the scene of a serious injury accident. We disagree.

An appellate court reviews the sufficiency of the evidence by evaluating the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime charged was proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). Similarly, in reviewing a trial court's decision on a motion for a directed verdict, "this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proved beyond a reasonable doubt." *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to support the elements of a crime. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991). Questions of credibility are for the trier of fact to resolve and this Court will not resolve them anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

As relevant to this case, felonious driving is operating a motor vehicle on a public street "carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person . . . resulting in serious impairment of a body function." MCL 257.626c. A showing of gross negligence is required. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). Whether a defendant was grossly negligent is determined from the totality of the circumstances. *Id*. at 504. Exceeding the speed limit, by itself, in not enough to show gross negligence. *Id*.

At trial, there was admissible evidence that respondent and Dabajeh were drag racing, that respondent was driving approximately 80 to 100 mph, and that respondent purposefully cut in front of Dabajeh, causing Dabajeh to attempt to change lanes to avoid a collision. Dabajeh

lost control of his vehicle, crossed the median, and struck the victim. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a reasonable trier of fact to find beyond a reasonable doubt that respondent was grossly negligent, and guilty of felonious driving.

With regard to the charge of leaving the scene of a serious injury accident, MCL 257.617, the prosecutor was required to prove that respondent knew or had reason to know that he had been involved in an accident resulting in serious injury or death. *People v Lang*, 250 Mich App 565, 573, 575; 649 NW2d 102 (2002). Contrary to what respondent argues, however, there is no requirement that there be physical contact between the cars. *People v Oliver*, 242 Mich App 92, 93-97; 617 NW2d 721 (2000). It was enough to show that respondent "played a part" in causing the accident, i.e., that he was "implicated in or connected with the accident in a logical or substantial manner." *Id*. at 96-97.

Viewed in a light most favorable to the prosecution, the evidence showed that respondent purposefully cut in front of Dabajeh, while driving 80 to 100 mph, and sped away. Respondent's actions caused Dabajeh to lose control, cross the median, and injure the victim. Shortly after the accident, respondent received two calls informing him of the accident. He briefly returned to the scene, but then left without complying with the statute. The trial court could reasonably infer from the evidence that respondent knew or should have known that he played a part in causing the accident because his actions caused Dabajeh to react, and eventually lose control and crash, seriously injuring the victim. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that respondent left the scene of a serious injury accident.

Next, as relevant to this case, drag racing is operating a motor vehicle on a public street, in a speed or acceleration contest. MCL 257.626a. "The operation of 2 or more vehicles either at speeds in excess of prima facie lawfully established speeds or rapidly accelerating from a common starting point to a speed in excess of such prima facie lawful speed is prima facie evidence of drag racing and is unlawful." *Id*.

Officer Hayes testified that respondent admitted that he and Dabajeh were drag racing. Chammout testified to that same effect in her deposition and, as previously discussed, her inconsistent deposition testimony is not hearsay. The trial court could also infer from the totality of the circumstances that all four drivers were drag racing. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that respondent was guilty of drag racing.

The fact that other juveniles were not charged is irrelevant to a determination of respondent's guilt. Respondent correctly observes that MCL 257.626a provides that "[p]ersons rendering assistance in any manner . . . shall be equally charged as participants." This language would appear to merely give a prosecutor the authority to charge non-driving assistants as principals, rather than requiring the prosecutor to charge them, which interpretation would raise concerns regarding prosecutorial charging discretion and the doctrine of separation of powers. See generally *People v Sierb*, 456 Mich 519, 531-533; 581 NW2d 219 (1998) (courts cannot usurp prosecutorial charging discretion). Even were we to interpret the statute as argued by defendant, it would not have any bearing on the charges brought against defendant and his subsequent convictions.

In sum, there was sufficient evidence to support respondent's adjudications of felonious driving, drag racing, and leaving the scene of a serious injury accident. The trial court properly denied respondent's motion for directed verdict.

Next, respondent challenges the validity of some of the conditions of his juvenile probation. We review questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Respondent argues that the trial court's restitution order is unlawful insofar as it requires respondent to pay the victim's actual expenses, including expenses covered by compensable insurance.

MCL 712A.30 provides, in pertinent part:

> (4) If a juvenile offense results in physical or psychological injury to a victim, the order of restitution may require that the juvenile do 1 or more of the following, as applicable:
>
> (a) Pay an amount equal to the cost of actual medical and related professional services and devices relating to physical and psychological care.
>
> (b) Pay an amount equal to the cost of actual physical and occupational therapy and rehabilitation.
>
> (c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the juvenile offense.
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> * * *
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> (8) The court shall order restitution to the crime victim's compensation board *or to any individuals, partnerships, corporations, associations, governmental entities, or any other legal entities that have compensated the victim or victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss.* The court shall also order restitution, for the costs of services provided, to persons or entities that have provided services to the victim as a result of the juvenile offense. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, an order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. *The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its actions.* If an entity entitled to restitution under this subsection for compensating the victim or the victim's estate cannot or refuses to be reimbursed for that compensation, the restitution paid for that entity shall be deposited by the state treasurer in the crime victim's rights fund created under . . . [MCL] 780.904 . . . .

> (9) Any amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim's estate by an award from the crime victim's compensation board made after an order of restitution under this section. [Emphasis added.]

Contrary to what respondent argues, the statute does not preclude the trial court from ordering respondent to pay amounts that have been compensated by insurance. In fact, the statute explicitly authorizes the court to order a juvenile to pay restitution for a victim's *actual* medical, rehabilitative, and work loss expenses. To the extent that the court orders restitution for losses covered by other sources, however, the court must order that the respondent reimburse the entity that has compensated the victim, rather than paying the victim directly.

At sentencing, the trial court ordered respondent to pay restitution "for actual expenses, not those incurred by [the victim] as a consequence of insurance payment but those that were required for her care," i.e., "not just her deductible." The order of disposition provides, "Restitution for actual expenses, not just deductible." Thus, it is apparent that the trial court ordered defendant to pay for all expenses incurred as a result of the victim's injuries that were suffered in the accident regardless of whether insurance covered the expenses. These expenses properly may be ordered as restitution under MCL 712A.30. However, the court did not state to whom this restitution was to be paid, either in its bench decision or in its dispositional order. Therefore, we modify the court's dispositional order to comport with the statute in this regard.

Respondent also complains that a condition of his probation prohibiting him from playing organized sports is punitive rather than rehabilitative and, therefore, illegal. Under MCL 712A.18(1)(b), the trial court had broad discretion to "order the terms and conditions of probation . . . as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile." Respondent was sentenced to intensive probation. The trial court reasonably could have determined that respondent would have difficulty successfully completing the other requirements imposed on him as conditions of his intensive probation if he also participated in organized sports. We are not persuaded that the prohibition against organized sports is unlawful.

Because we are affirming the trial court's adjudications and disposition (as modified), it is unnecessary to consider respondent's argument that this case should be reassigned to a different judge in the event of a remand.

Affirmed as modified.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter