STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 6, 2009
v	No. 284218 Berrien Circuit Court
DANIEL MATTHEW MORRISON, Defendant-Appellant.	LC No. 2007-411543-FH

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of involuntary manslaughter with a motor vehicle, MCL 750.321, and one count of felonious driving, MCL 257.626c. The trial court sentenced defendant to 57 to 180 months' imprisonment for both of his vehicular manslaughter convictions, and to 90 days for his felonious driving. He appeals as of right. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This case arose following a two-car accident at the intersection of Burgoyne Road and Shawnee Road in Berrien Springs, Michigan, where a car driven by defendant hit another car with three occupants. Two of those occupants were killed and the third was seriously injured. Shawnee Road is a through right-of-way, while traffic on Burgoyne Road is controlled by stop signs where the two roads intersect. The one-mile portion of Burgoyne Road, where defendant drove his car just before the accident, contains a number of hills. There was testimony that one can create a roller-coaster-like experience by driving at a certain rate of speed over those hills, and the intent of the driver and passengers was to take a "joy ride."[1]

[1] At trial, Sheriff's Deputy Rich Albers explained that by driving a car at a certain rate of speed on Burgoyne Road, a driver could create an experience similar to being on a roller coaster. According to Berrien County Sheriff's Department Lieutenant Don Goulooze, speed limits are not posted on either road; however, "[i]t's prima facie 55 miles per hour" (mph). Proceeding southbound on Burgoyne Road towards Shawnee Road, there is a "stop ahead" sign approximately 647 feet from the intersection. The last hill on Burgoyne Road is approximately 225 feet from the intersection. However, the stop sign is visible from 410 feet away; according

(continued…)

Defendant argues that testimony presented at trial by witnesses concerning defendant's vehicle traveling well beyond the speed limit was reversible error because such testimony constituted prior bad acts in contravention of MRE 404(b). We review the admission of evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).[2] "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b)(1) generally precludes "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." "Nevertheless, it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The res gestae exception to MRE 404(b) applies where previous or subsequent acts were so intertwined with the charged offense that proof of one incidentally involves the other or explains the circumstances of the offense. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

In the instant case, two witnesses observed defendant's car traveling at high rates of speed on Lauer Road on the day of the accident. A driver of another vehicle witnessed defendant's car "traveling kind of recklessly or at a high rate of speed," estimating that defendant's car was going 60 to 65 mph. An off-duty sheriff's deputy observed defendant's car pass in front of his residence twice at high rates of speed, exceeding 90 mph. The deputy was so concerned that he attempted to follow defendant's car. The deputy arrived at the accident scene four or five minutes after his seeing defendant's car pass by his residence the second time.

(…continued)

to Lieutenant Goulooze, "you can see the stop sign over the crest of the hill slightly." From the crest of the hill to the intersection, there is a downward slop of approximately eight feet.

[2] We note that defendant argues this Court should adopt the three-part standard of review articulated by the sixth circuit, where "the trial court's finding whether the conduct did in fact occur is reviewed for clear error, the decision whether the evidence was admissible for a proper purpose under 404(b) is reviewed de novo, and the decision whether the probative value of the evidence is substantially outweighed by its prejudicial effect is reviewed for an abuse of discretion," citing *United States v Latouf*, 132 F3d 320 (CA 6, 1997), cert den 523 US 1101; 118 S Ct 1572; 140 L Ed 2d 805 (1998); *United States v Merriweather*, 78 F3d 1070 (CA 6, 1996); *United States v Johnson*, 27 F3d 1186 (CA 6, 1994), cert den 513 US 1115; 115 S Ct 910; 130 L Ed 2d 792 (1995). While the decisions of federal circuit courts are not binding on our courts, although they may be persuasive, *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 396; 733 NW2d 734 (2007), cert den ___ US ___; 128 S Ct 1894; 170 L Ed 2d 782 (2008), we are bound by our Supreme Court's standard of review as set forth in *People v Johnson, supra.*

Defendant's two passengers provided testimony that the car ride only lasted 10 to 15 minutes before the accident.

We conclude that the trial court properly admitted the challenged testimony. Though the trial court conducted the proper analysis, it did not have to rule that the challenged testimony served a proper purpose under MRE 404(b) because the testimony falls within the res gestae exception to MRE 404(b). Here, the challenged testimony related to defendant's driving in the minutes leading up to the accident. Moreover, the aforementioned witnesses, as lay witnesses, were competent to provide opinions regarding the speed of defendant's car. See *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993). Defendant's conduct was relevant to one of the elements of the charged offense of involuntary manslaughter, namely whether his conduct amounted to ordinary negligence or gross negligence. *People v Herron*, 464 Mich 593, 604-605; 628 NW2d 528 (2001). The elements of an offense are always at issue, so the prosecution properly sought to introduce all relevant evidence to establish beyond a reasonable doubt that defendant was grossly negligent. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Because the jury had to determine whether defendant was guilty of involuntary manslaughter or negligent homicide (or not guilty), "[t]he more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty." See *Scholl*, *supra* at 742. Thus, the jury was entitled to have facts concerning the defendant's driving on Lauer Road as an integral part of the events that ultimately played out minutes later at the intersection of Shawnee Road and Burgoyne Road. *Delgado*, *supra* at 84. Further, there is no indication that the challenged testimony offends MRE 403, other than a general fear of prejudice expressed by defendant on appeal. *Mills*, *supra* at 75. The trial court did not abuse its discretion in admitting the testimony of the two witnesses regarding defendant's driving on Lauer Road; the ruling was a reasonable and principled outcome. *Babcock*, *supra* at 269.

Next on appeal, defendant asserts that the prosecution failed to present sufficient evidence regarding the element of gross negligence to sustain his convictions for involuntary manslaughter and felonious driving. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

To prove that defendant was guilty of involuntary manslaughter with a motor vehicle, the prosecution must demonstrate that defendant committed an unlawful act with the intent to injure or in a grossly negligent manner that proximately caused the death of another. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). A person is guilty of felonious driving by operating "a vehicle upon a highway . . . 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 or property resulting in a serious impairment of a body function of a person, but does not cause death." MCL 257.626c. "As with involuntary manslaughter, a conviction of felonious driving requires proof of gross negligence." *Id.* Gross negligence has three elements: (1) the knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger when to the ordinary

mind it must be apparent that the result is likely to prove disastrous to another. *Id.* at 503 (citations omitted).

In the instant case, we find that the first two elements are readily satisfied. With respect to the second element, it was defendant's choice to drive at high rates of speed over hills near intersections. With respect to the final element, it is undisputed that defendant was speeding, but that alone "is not adequate to establish the element of gross negligence." *Id.* at 504. However, under the totality of the circumstances, we conclude that a reasonable jury found that defendant's conduct amounted to gross negligence. *Id.*

The determination whether excessive speed constitutes gross negligence is generally a jury question to be resolved based on the totality of the circumstances. *Id.* at 504. Viewing the evidence in the light most favorable to the prosecution, a jury could reasonably find that defendant was driving at high rates of speed, that he disregarded a traffic control sign, that he was not paying attention to current driving conditions, and that he took no evasive action to avoid the accident. In *McCoy*, *supra* at 504, this Court found that "[t]he fact that defendant did not slow down or swerve in an attempt to avoid striking them suggests that he was traveling at a reckless speed." This is not a case, where defendant was merely speeding when the collision occurred. By his own admission, defendant was engaging in a dangerous activity. And, while defendant asserted that he was trying to slow down and that his brakes failed, the testimony of one of his passengers and his expert refuted that testimony to a certain extent. Further, there was conflicting testimony regarding the brakes' functionality. The jury could have accepted the prosecution experts' testimony that defendant's brakes worked, and inferred that defendant failed to brake. It is the province of the jury to give weight to the testimony of experts, and to decide which expert to believe. *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). "The jury has the discretion to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted." *Id.* Ultimately, we will not interfere with a jury's role, as factfinder, in determining the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could, and did, find that the prosecution proved the element of gross negligence beyond a reasonable doubt to sustain defendant's convictions of involuntary manslaughter and felonious driving. *McCoy*, *supra* at 504-505.

Finally on appeal, defendant contends that the trial court misscored offense variable (OV) 9, MCL 777.39, and OV 17, MCL 777.47. We review issues concerning the proper scoring of sentencing guidelines variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Defendant first challenges the trial court's OV 9 scoring of 100 points, reflecting that multiple deaths occurred. MCL 777.39(1)(a). In this case, there were two homicide victims as a result of the single two-car accident, which resulted in the charges for which defendant was convicted. The trial court properly scored OV 9 at 100 points, because multiple deaths occurred as a result of the same criminal transaction involving homicide. MCL 777.39(1)(a); see also *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008) (in scoring OV 9, the trial court should consider people placed in danger of injury or loss of life when the sentencing offense was

committed or during the same criminal transaction). We uphold the trial court's scoring decision with respect to OV 9, because the record supports that decision. *Kegler*, *supra* at 190.

OV 17 is scored at ten points where "[t]he offender showed a wanton or reckless disregard for the life or property of another person." MCL 777.47(1)(a). As discussed previously, the evidence demonstrated that defendant showed a reckless disregard for the life of other persons. We uphold the trial court's scoring decision with respect to OV 17 because the record supports that decision. *Kegler*, *supra* at 190.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello