

FILED BY CLERK

SEP -9 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2012-0457
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MATTHEW EDWARD FOSTER,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20113727001

Honorable Scott Rash, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and David A. Sullivan

Tucson
Attorneys for Appellee

West, Elsberry, Longenbaugh & Zickerman, PLLC
By Anne Elsberry

Tucson
Attorneys for Appellant

ECKERSTROM, Judge.

¶1 After a jury trial, appellant Matthew Foster was convicted of manslaughter, driving under the influence (DUI), and extreme DUI. He was sentenced to a slightly

mitigated term of nine years' imprisonment for manslaughter followed by two concurrent terms of probation for the DUI charges, the longer of which was five years. On appeal, Foster claims the trial court erred in refusing to give his proposed jury instruction regarding causation. For the following reasons, we affirm.

Factual and Procedural Background

¶2 “We view the evidence in the light most favorable to upholding the jury’s verdict.” *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In October 2011, Foster attended a concert at Kino Sports Complex. During the concert, he consumed numerous alcoholic beverages and became heavily intoxicated. Afterward, he got into his truck and began to drive home.

¶3 The victim, M., also attended the concert that evening, and when it had ended, walked toward a nearby gas station to meet his designated driver. As M. began crossing Country Club Road where it intersected with President Street, Foster struck M. with his vehicle. M. ultimately died of his injuries. Foster was charged with and convicted of manslaughter in connection with M.’s death.

¶4 Foster now appeals from that conviction and sentence. We have jurisdiction pursuant to A.R.S. §§ 12-120.01(A)(1) and 13-4033(A)(1).

Causation Instruction

¶5 Foster’s sole contention on appeal is that the trial court erred in denying his request that the jury be instructed on causation pursuant to A.R.S. § 13-203(A). We review a trial court’s denial of a requested jury instruction for an abuse of discretion. *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006).

¶6 Foster argues the jury should have been allowed to consider whether M.'s decision to cross "an unlit street in an area where there was no cross-walk" was a superseding cause that relieved him of liability for M.'s death. In order for an intervening event to qualify as a superseding cause relieving a defendant of liability, the event must meet a two-part test: first, it must be unforeseeable, and second, with the benefit of hindsight, it must be abnormal or extraordinary. *State v. Bass*, 198 Ariz. 571, ¶¶ 11-14, 12 P.3d 796, 800-01 (2000).

¶7 Foster cannot demonstrate that M. crossing the street was an unforeseeable event, regardless of whether M. was crossing illegally. A pedestrian attempting to cross a street is entirely foreseeable, particularly in the immediate aftermath of a large concert. *Cf. Ontiveros v. Borak*, 136 Ariz. 500, 507, 667 P.2d 200, 207 (1983) (accident involving pedestrian was foreseeable consequence of tavern's decision to sell driver excessive amounts of alcohol); *People v. Martin*, 640 N.E.2d 638, 646 (Ill. App. Ct. 1994) (foreseeable that person driving under the influence will injure pedestrians). Because M. crossing the street was an entirely foreseeable event, Foster cannot meet the first prong of the superseding cause test, and the trial court therefore did not abuse its discretion in refusing Foster's proposed causation instruction.

Disposition

¶8 For the foregoing reasons, we affirm Foster's convictions, sentence, and terms of probation.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge