STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN B. GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 195315
Genesee Circuit Court
LC No. 95-052988-FH

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of negligent homicide, MCL 750.324; MSA 28.556, failing to stop for a personal injury accident, MCL 257.617; MSA 9.2317, and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and was sentenced to ten to fifteen years' imprisonment for each of the negligent homicide convictions, twenty to thirty years' imprisonment for the failing to stop at a personal injury accident conviction, and twenty to thirty years' imprisonment for the unlawfully driving away an automobile conviction. Defendant now appeals as of right. We affirm defendant's convictions, but remand for resentencing.

On appeal, defendant first argues that there was insufficient evidence to convict him of two counts of negligent homicide. When reviewing a claim of insufficient evidence in a jury trial, this Court must view the evidence in the light most favorable to the prosecution to determine whether a reasonable jury could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

The offense of negligent homicide requires the jury to find that a death resulted from operation of a motor vehicle (1) at an immoderate speed, or (2) in a negligent manner, but not willfully or wantonly. *People v Mihlfield*, 183 Mich App 609, 613; 455 NW2d 349, rev'd on other grounds 437 Mich 853 (1990); MCL 750.324; MSA 28.556.

Defendant contends that because the decedents were intoxicated and were unlawfully operating their snowmobiles at the time of the crash, there was reasonable doubt with respect to whether

defendant's conduct was a proximate cause of their deaths. We disagree. Although it is permissible for the trier of fact to consider a decedent's conduct in determining whether defendant was a proximate cause of the accident and resulting deaths, such a finding is not an affirmative defense to a charge of negligent homicide negating liability. *People v Tims*, 449 Mich 83, 94; 534 NW2d 675 (1995); *People v Phillips*, 131 Mich App 486, 492; 346 NW2d 344 (1984). Despite any wrongdoing on the part of the decedents, the jury in this case was only required to find that defendant's negligence was "a" proximate cause of the deaths. *Tims, supra* at 99. Defendant admitted in his statement to police, which was admitted at trial, that he crossed the centerline. Daniel Grantham, defendant's passenger, testified that defendant was driving "down the middle" of the road, and that the car was "swerving all over the road." We conclude that the evidence presented was sufficient to enable the jury to conclude that defendant's negligence was a proximate cause of the accident and resulting deaths.

We also reject defendant's claim that the prosecution failed to prove that it was the collision of the snowmobiles with defendant's car that caused both of the decedents' deaths. There was testimony that at least one snowmobile made contact with the vehicle driven by defendant. George Thomas, an accident reconstructionist, opined that the first snowmobile side-swiped defendant's car, and that, as a result, the second snowmobile rear-ended the first one on impact. Viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have concluded that the elements of negligent homicide were proven beyond a reasonable doubt.

Defendant's second argument on appeal is that the trial court erred in denying his motion to suppress his statements made to the police on the night of the incident. Defendant argues that his heavy intoxication at the time of his arrest precluded him from voluntarily waiving his *Miranda*[1] rights and giving a statement. We disagree.

To admit a confession in its case in chief, the prosecution has the burden of proving that the confession was voluntarily given by the defendant, and, "if the confession was the result of custodial interrogation, the state must prove that the police properly informed the defendant of his *Miranda* rights and obtained a valid waiver." *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996). When reviewing a trial court's determination of the voluntariness of a defendant's statement, this Court must examine the entire record and make an independent determination based on the totality of the circumstances surrounding the confession. *Cheatham*, *supra* at 27, 29-30; *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972); *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). However, we defer to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's factual findings will not be reversed on appeal unless there is a showing of clear error. *Cheatham*, *supra* at 30.

In answering the voluntariness question, the trial court should consider several factors, including, but not limited to, the duration of the defendant's detention and questioning, the age, education, intelligence and experience of the defendant, the defendant's mental and physical state, including whether the defendant was injured, intoxicated or drugged, and whether the defendant was physically abused or threatened with abuse. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). "[A]dvanced intoxication, whether the product of drugs or alcohol, may preclude the effective waiver of *Miranda* rights." *People v Davis*, 102 Mich App 403, 410; 301 NW2d 871 (1980). However, the

fact that a person was intoxicated is not dispositive of the voluntariness issue. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987).

Despite the fact that defendant had been drinking prior to his arrest, we reject defendant's claim that his intoxication was such that it affected his ability to voluntarily waive his *Miranda* rights and give a statement. While defendant claims that the interviewing officer acted in bad faith by proceeding to interrogate defendant with knowledge that he was intoxicated, there is no evidence that the interrogating officer took advantage of defendant's intoxicated state in a manner that resulted in an involuntary waiver of his rights or an involuntary statement. In fact, the officer testified that although he smelled alcohol on defendant, he determined that defendant fully understood his rights as well as the consequences of waiving them prior to commencing interrogation. Moreover, in observing defendant during questioning, the office noted that defendant did not have trouble understanding the questions posed to him or answering them promptly. Nor was defendant stumbling or unbalanced when he arrived at the station. In light of the totality of the circumstances, we cannot say that the trial court clearly erred in denying defendant's motion to suppress.

Next, defendant argues that he was deprived of his due process right to a fair trial because the trial court denied his request for a cautionary instruction on the inherent unreliability of accomplice testimony. Defendant maintains that Grantham, who accompanied him throughout the evening, and who was in the stolen vehicle when the accident occurred, was an accomplice to the crimes, and that the jury should have been instructed accordingly. We disagree.

A trial court's determination of whether a jury instruction is accurate and appropriate lies within the sound discretion of the trial court. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996). On appeal, this Court reviews jury instructions in their entirety to determine whether error requiring reversal has occurred. *Id.* However, even imperfect instructions are not fatal as long as they fairly and accurately present to the jury the issues to be tried and sufficiently protect the defendant's rights. *Id.*

Defendant requested the court to read CJI2d 5.6, Cautionary Instruction Regarding Accomplice Testimony. Defendant claims that Grantham admitted to being an accomplice to the charged offenses at trial when he stated that he was worried that he may be charged with something in connection to the incident. Grantham indicated that he therefore cooperated with the police from the onset. However, we are not persuaded that Grantham's subjective fear of prosecution is equivalent to an admission of guilt. Contrary to defendant's claim, Grantham did not concede to participating in the offenses, and there was insufficient evidence at trial for the jury to infer that he aided and abetted defendant in the commission of the offenses. In addition, as defendant acknowledges, Grantham was never actually charged in connection with the incident, and, moreover, Grantham acknowledged that no one told him that he would be charged. Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's request.

Defendant's final argument on appeal is that he is entitled to resentencing because he was denied his right of allocution when the trial court imposed sentence without affording him the right to speak on his own behalf. We agree.

At sentencing, a trial court is required to "give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(D)(2)(c); *People v Lugo*, 214 Mich App 699, 711; 542 NW2d 921 (1995). The court must strictly comply with a defendant's right of allocution by specifically asking the defendant individually if he wants to address the court. *Lugo*, *supra* at 712; *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980). Sentence should not be imposed until the court has afforded defendant his right to allocute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). Failure to strictly comply with the provision of MCR 6.425(D)(2)(c) mandates resentencing. *People v Jones (On Rehearing)*, 201 Mich App 449, 453; 506 NW2d 542 (1993).

At sentencing in the instant case, the trial court inquired whether there were any comments that defendant wished to make regarding the presentence report or sentencing in general. Defendant responded affirmatively, but was never afforded the opportunity to express his thoughts. The court immediately turned its attention to the victims' mother, and then allowed defense counsel and the prosecutor the opportunity to speak. Apparently due to oversight, defendant was not thereafter permitted to directly address the court prior to his sentence being imposed. Thus, we find that defendant was denied his right of allocution contrary to MCR 6.425(D)(2)(c). Accordingly, we remand this matter to the trial court for resentencing.

Affirmed, but remanded for resentencing. We retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).