

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID KEITH RUMPH,

Defendant-Appellant.

UNPUBLISHED

January 19, 2006

No. 257354

Oakland Circuit Court

LC No. 2004-194888-FH

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of vehicular manslaughter, MCL 750.321, failure to stop at the scene of an accident resulting in death, MCL 257.617(3), operating a vehicle while license suspended causing death, MCL 757.904(4), operating a vehicle while license suspended causing serious impairment, MCL 257.904(5), failure to stop at the scene of a serious personal injury accident, MCL 257.617, and felonious driving, MCL 257.626c. We affirm.

It was undisputed at trial that, shortly after 1:00 a.m. on January 25, 2004, a red Dodge Ram pickup truck, with a snowplow mounted on the front, struck Jeremy Bartle and Stephanie Hughes on Oakland Avenue in the city of Pontiac. The vehicle was observed traveling erratically and dangerously before the crash. Witnesses observed only one occupant in the vehicle. Bartle was killed and Hughes was critically and permanently injured, including the loss of a limb.

The primary issue at trial was the identity of the driver of the red Dodge Ram pickup truck. The evidence revealed that Scott Legas owned the pickup truck. Legas and two other witnesses testified that, sometime before the accident, Legas gave the vehicle keys to defendant while they were in Lucky's bar in Pontiac. Defendant thereafter left the group with whom he had been socializing in the bar. At approximately 1:30 a.m., Legas left Lucky's bar with three friends, and he spent the night with one of them. He next saw his vehicle when he returned home with two of his friends on the afternoon of January 25, 2004. Legas and his friends observed the pickup truck in Legas' driveway and noted that the snowplow, hood, and rear taillight were damaged. The keys were on the floorboard of the truck.

There was also evidence that defendant called his ex-girlfriend at approximately 2:00 a.m. on January 25, 2004, and indicated that he had bad luck and did not know what he was

going to do. He called the same ex-girlfriend again on the afternoon of January 25, 2004, and indicated that he had to figure out what to do. Defendant's ex-girlfriend was suspicious that defendant may have been involved in the hit and run incident about which she had heard. She confronted defendant about the incident. He later informed her that he was scrolling through his cellular telephone numbers and accidentally swerved. He admitted that he "did it."

Additionally, there was evidence that, on the afternoon of January 25, 2004, Legas and defendant were overheard having a conversation. Defendant stated that "maybe he hit something." Legas testified that, on the same afternoon, defendant offered to have the damage to Legas' truck repaired, and defendant commented that he hoped he did not hit anyone with the truck. When Legas learned that the police were looking for his vehicle, he talked to defendant about the hit and run incident. Defendant stated, "Don't worry, you can't take the hit for this, you got enough alibis."

Defendant's defense was that he was not the driver of the vehicle at the time of the accident. He relied on the testimony of Darrell Davenport, a witness who called 911 early on the morning of January 25, 2004, to report a suspected drunk driver on Oakland Avenue. Davenport testified at trial that, before he called 911, he observed the driver of the vehicle at a stoplight. At trial, Davenport identified Legas, not defendant, as the driver he observed. Davenport's credibility was challenged at trial because he previously attended a lineup and indicated that participant number four looked like the driver. Participant number four was neither defendant nor Legas. Moreover, when Davenport telephoned 911, he did not indicate that he could identify the driver. To the contrary, he indicated that he was trying to get out of the way of the vehicle and could not even get a license plate number.

I

Defendant first challenges the trial court's admission of a 911 tape containing several calls from people, who contacted the police at the approximate time of the hit and run incident. Defendant argues that, even if this evidence was marginally relevant, it was unfairly prejudicial and should have been excluded under MRE 403. We review the admission of evidence for an abuse of discretion. *People v Bowman*, 254 Mich App 142, 145; 656 NW2d 835 (2002). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Outside the jury's presence, the trial court heard the 911 tape containing a series of three telephone calls. The first call was from an anonymous caller, who indicated that he observed a red Dodge pickup truck with a snowplow on the front heading south on Telegraph. The caller indicated that the truck was hitting everything in sight and that he had to pull to the side of the road to allow the truck to pass. The second call was placed by Davenport, who indicated that he observed a red Dodge pickup with a snowplow on it. Davenport informed the 911 operator that the driver was "drunk." Davenport indicated that he could not see the license plate number on the truck because he was "trying to get the hell out of the way." Davenport provided the 911 operator with a telephone number and address where he could be reached for further information if necessary. The final call was from Gretchen and Peter Sans, who were flagged down by an unidentified woman yelling for help. The Sans stopped at the scene and attempted to aid the victims and the unidentified woman, who appeared to be in shock. Gretchen informed the

operator that a red pickup truck had “nailed” the victims and that they were in pieces. She further indicated that she saw the truck swerving all over the road and that there was a girl in the middle of the road screaming that the driver had killed people. Gretchen provided information about the locations of the victims, their appearance when found, and their condition. Peter took the telephone from Gretchen during the telephone call and continued to talk to the 911 operator while Gretchen, a registered nurse, assessed the victims. Peter informed the 911 operator that the hit and run vehicle was a red pickup truck with a snowplow on the front. Peter also informed the operator that he did not obtain a license plate number on the truck. The trial court found that the evidence was both relevant and admissible. We agree.

MRE 401 defines relevant evidence as evidence “having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 402 provides that all relevant evidence is admissible unless otherwise prohibited by the United States or Michigan Constitutions, the rules of evidence, or other rules adopted by the Supreme Court. MRE 403 prohibits the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of the cumulative evidence. In the context of MRE 403, “prejudice means more than simply damage to the opponent’s cause.” *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). It means that evidence has an undue tendency to move the tribunal to decide on an improper basis such as an emotional basis. *Id.* Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight and whether the use of the evidence is inequitable. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212 (1995). Mere prejudice is insufficient to justify reversal of a conviction. *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003).

In this case, the evidence of the 911 telephone calls was relevant for several reasons. First, all three calls were relevant to the identification of the hit and run vehicle and whether the vehicle was out of control and appeared to be driven by a drunk driver. It was necessary to establish that the vehicle involved in the incident was the same vehicle to which defendant had keys and to establish that the vehicle was being operated in a grossly negligent manner. Second, the Sans’ telephone call was relevant to show that one victim died at the accident scene and that one remained alive and suffering while the driver of the pickup truck was not there to render assistance or provide information. Hughes had no recollection of the accident, and could not testify about the accident or its aftermath. Third, the evidence of the Sans’ 911 telephone call was relevant to support the credibility of their trial testimony, which was called into question by defense counsel on cross-examination before the 911 tape was played. The 911 statements corroborated their trial testimony about what they saw, heard, and did. Finally, the evidence of Davenport’s 911 telephone call was relevant to refute his trial testimony that Legas was the driver of the vehicle. At trial, Davenport testified that he was at a red stoplight while the red pickup truck was next to him. He claimed that he studied the profile of the driver and that it was Legas. In his 911 call, Davenport told the operator that he was trying to get out of the way of the pickup truck and did not even get the vehicle’s license plate number. Davenport made no statements indicating that he had time to study the driver’s identification.

The evidence was also not unfairly prejudicial. Even if the 911 calls evoked an emotional response by describing the erratic manner of the driving of the red truck, the panic of other drivers on the road, and the conditions of the victims and unidentified witness, they were not so prejudicial as to require exclusion. Nothing in the record evidences that the 911 calls would be, or were, given undue or preemptive weight or that the probative value of that evidence was substantially outweighed by unfair prejudice. The trial court did not abuse its discretion in admitting the challenged evidence. Furthermore, even if we accepted defendant's argument that the evidence should have been excluded under MRE 403, we would not reverse. Upon a review of the entire cause, it does not appear more probable than not that the admission of the 911 calls was outcome determinative. See *Lukity, supra*. They did not establish defendant's identity as the perpetrator, which was the primary issue at trial. Moreover, at trial, there was ample evidence to support defendant's identity as the driver of the vehicle.

II

Defendant also challenges the trial court's departure from the applicable sentencing guidelines range of 50 to 125 months under the legislative guidelines. The trial court articulated three factors to justify its departure from the sentencing guidelines range when sentencing defendant for his three convictions related to Bartle's death. Defendant argues that one of the factors was improperly considered, and that, where multiple reasons are given for a departure and one is not a sustainable reason, remand for resentencing is the appropriate remedy.

A departure from the sentencing guidelines range is only allowed if there is a substantial and compelling reason for the departure. *People v Babcock*, 469 Mich 247, 255, 272; 666 NW2d 231 (2003). A "substantial and compelling" reason is an objective and verifiable reason that keenly or irresistibly grabs our attention, is "of considerable worth" in deciding the length of the sentence, and exists only in exceptional cases. *Id.* at 257, 272.

[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. [*Id.* at 264-265, 273-274.]

Where a trial court articulates multiple "substantial and compelling" reasons for departure, this Court must determine whether the alternate reasons are substantial and compelling, and if some are not, it must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Id.* at 260, 273. An abuse of discretion occurs when the trial court chooses an outcome falling outside of the principled range of outcomes. *Id.* at 269, 274.

At sentencing, the trial court announced its intention to exceed the guidelines. It then stated:

Based on the defendant's driving record, which is deplorable, he has 27 traffic citations, which six are careless driving and reckless driving. He has another prior failure to stop at an accident scene. His total OV's are significantly higher than the 75 points allowed by the sentencing grid. Therefore, the Court finds there are substantial and compelling reasons to exceed the guidelines. Further, his driving record is not accounted for in the guidelines.

The trial court prepared a written sentencing departure evaluation, which stated three reasons for departing from the sentencing guidelines range:

1) Defendant's prior deplorable traffic record. This involves 27 prior suspensions for failure to appear or failure to comply with Court judgment. Further, Defendant has six prior careless driving and/or reckless driving convictions. Additionally, Defendant has one prior failure to stop at property damage accident. In sum, the Defendant has 27 prior traffic citations since 1988, four of which are for driving while license suspended. This reason is substantial and compelling, and further, is objective and verifiable. Last, the Defendant's prior driving record is not accounted for in [the] sentencing guidelines.

2) Defendant's total offense variable score grossly exceeds the top level of the sentencing grid for the underlying offense. Here, sentence guidelines were calculated for the homicide-manslaughter with motor vehicle charge. The maximum OV level in the applicable grid is VI, which includes all points above 75 points. Total OVs for this offense are 121 points. There are 46 points that do not impact the Defendant's guidelines or sentence. Because the Defendant substantially exceeded the maximum allowable points in the applicable grid (75), the Defendant's offense characteristics are given inadequate weight.

3) The sentencing guidelines do not adequately account for the extent of the injuries suffered by one of the victims. Defendant was assessed 50 points for OV #3. This variable accounts for a physical injury to a victim. Although the instructions to the variable provide for an assignment of 50 points for death to a victim if the defendant was operating the motor vehicle while impaired, this guideline does not adequately take into account for the injury sustained to the second victim of the underlying offense. Here, the second victim sustained physical injuries, which have greatly reduced her capacity to function in every day life. She has sustained amputation to the portion of her right leg below her knee, she is forced to feed by means of feeding tube, she sustained a broken back, lost a kidney, and broke her pelvis. Further, due to the severe injuries sustained, she has been unable to care for her two children. The Court finds that the extent of injuries sustained are objective and verifiable and keenly and irresistibly attention grabbing. Further, the Court finds that the above facts are inadequately accounted for in offense variable number 3.

Defendant does not challenge the first and second reasons articulated by the trial court. He argues only that the third reason articulated by the court was improper to support a departure from the guidelines. We disagree.

In calculating the minimum sentence range under the guidelines, the trial court scored defendant's most serious offense conviction, manslaughter with a motor vehicle. The offense variables accounted for the fact that there was a second victim to the offense, MCL 777.39(c),¹ but they did not account for the severity of the injuries to that victim. Offense variable (OV) 3, MCL 777.33, is the variable that takes into consideration physical injury to a victim. It provides that 50 points are to be scored if a victim was killed and the offense involved the operation of a vehicle. Offense variable 3 also provides for the scoring of points for injuries less than death. However, the statute requires the trial court to assess the highest number of points possible. *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005). In this case, the highest number of points that could be scored for OV 3 was 50 points for Bartle's death. The seriousness of Hughes' injuries was not accounted for in scoring OV 3 or in calculating the total offense variable score. The plain language of OV 3 does not consider a situation where a second victim is seriously injured by the same acts for which the guidelines are scored. We find no authority to support defendant's position that Hughes' injuries were irrelevant and should have been disregarded in sentencing defendant for his convictions arising out of Bartle's death. Hughes' injuries occurred during the same offense, and the severity of the offense was heightened by the presence of a second victim with catastrophic injuries. Because the guidelines, as scored, did not adequately account for Hughes' injuries, the trial court was permitted to rely on those injuries as an objective and verifiable, substantial and compelling reason to depart from the minimum sentence range under the guidelines. See MCL 769.34(3)(b).

We reject defendant's argument that the trial court abused its discretion with respect to the extent of the departure. The trial court sentenced defendant to a minimum term of 15 years, which is an upward departure of four years and seven months from the guidelines range of 50 to 125 months. The articulated reasons support the trial court's particular departure, and we conclude that the sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003). They are within the principled range of outcomes. See *Babcock*, *supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

¹ MCL 777.39(c) requires that offense variable (OV) 9 be scored at ten points if there are between two and nine victims. Defendant was scored ten points for OV 9.