STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee ,	UNPUBLISHED January 22, 2013
v STEVEN MAURICE DECALUWE, Defendant-Appellant .	No. 307118 Iosco Circuit Court LC No. 11-006343-FH

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of operating a motor vehicle while under the influence of intoxicating liquor causing serious impairment of body function, MCL 257.625(5). Defendant was sentenced to five months of jail. We affirm.

I. FACTUAL BACKGROUND

Defendant was driving when he was involved in a roll-over accident, causing injury to his two passengers, Shawn O'Dell and Cory Uhlbeck. Blood alcohol tests revealed that defendant's blood alcohol content was 163 milligrams for every deciliter. O'Dell and Uhlbeck, who had also been drinking at a bar with defendant that night, testified that defendant showed no signs of intoxication when they left the bar.

Defendant's good friend, O'Dell, testified that defendant was driving approximately 65 miles an hour when a deer jumped in front of the vehicle. O'Dell testified that defendant swerved to avoid the deer and then the vehicle hit a bump in the road, causing defendant to lose control of the vehicle. Uhlbeck, who was in the back seat of the vehicle, testified that he did not see a deer at the time of the accident as his view was limited. He also testified that when he drove in Iosco County, he saw deer "most of the time." A police officer who interviewed defendant on two separate occasions testified that defendant never mentioned a deer in the road and simply claimed that he hit a dip in the road. The officer also testified that when he initially questioned defendant at the scene of the accident, defendant indicated that O'Dell had been driving the vehicle.

The jury found defendant guilty of two counts of operating a motor vehicle while under the influence of intoxicating liquor causing serious impairment of body function, MCL 257.625(5). Defendant was sentenced to five months of jail. The trial court also ordered

defendant to pay various costs, including $130 crime victim assessment fee. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

Defendant argues that there was insufficient evidence of the causation element to support his convictions of operating a motor vehicle while under the influence of intoxicating liquor causing serious impairment of body function. "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation marks and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Lastly, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

B. Analysis

MCL 257.625(5) provides that if a person operates a motor vehicle while intoxicated "and by the operation of that motor vehicle causes a serious impairment of a body function of another person[,]" then that person "is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both." One of the elements of this offense is causation, which is comprised of two distinct elements: "factual causation and proximate causation." *People v Feezel*, 486 Mich 184, 194; 783 NW2d 67 (2010). "Factual causation exists if a finder of fact determines that but for defendant's conduct the result would not have occurred." *Id.* at 194-195 (citation omitted). Proximate causation, on the other hand, "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Id*. at 195 (quotations marks and citation omitted). Therefore, "[i]f the finder of fact determines that an intervening cause supersedes a defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken, proximate cause is lacking and criminal liability cannot be imposed." *Id.* (quotation marks and citation omitted). "Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability." *Id.*

Defendant asserts that the sudden appearance of a deer in the road was an act of God that severed the causal link between his driving and his passengers' injuries. Because of this intervening cause, defendant concludes that no rational jury could have found him guilty of operating a motor vehicle while under the influence of intoxicating liquor causing serious impairment of body function. Defendant's argument is flawed for two primary reasons. First, a reasonable jury could have found that there was no deer in the road at the time of the accident.

O'Dell testified that he was good friends with defendant and that he saw defendant swerve to avoid a deer in the road. Yet, Uhlbeck testified that he did not see a deer, as he was in the back seat of the car. Moreover, a police officer testified that during two interviews with defendant, defendant never mentioned anything about a deer and actually identified O'Dell as the driver of the vehicle at first. Therefore, a rational jury could have found that this alleged story of a deer's presence was not credible. We will not second-guess the jury's credibility determinations on appeal. *Unger*, 278 Mich App at 222.

Furthermore, defendant has failed to establish that the appearance of a deer, even if true, severed the causal link between defendant's driving and the resulting injuries. It is true that an "act of God or the gross negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause . . . ." *People v Schaefer*, 473 Mich 418, 438-439; 703 NW2d 774 (2005) (emphasis omitted), overruled in part on other grounds by *People v Derror,* 475 Mich 316, 334; 715 NW2d 822 (2006), overruled in part on other grounds by *Feezel,* 486 Mich 184. "[W]hether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability." *Feezel*, 486 Mich at 195. In the instant case, a rational jury could have found that the alleged deer was not a superseding force. Uhlbeck specifically testified that the presence of a deer in that area was not unusual and that he saw them all the time. Thus, a reasonable jury could have concluded that the appearance of a deer was reasonably foreseeable and would not qualify as a superseding cause severing the causal link of defendant's behavior. Therefore, defendant has failed to demonstrate that his convictions were supported by legally insufficient evidence.

III. Crime Victims Assessment Fee

Lastly, defendant argues that the trial court violated the ex post facto clauses of both the federal and Michigan constitutions by imposing a $130 crime victim assessment fee. Defendant claims that the ex post factor doctrine was violated because the statute in effect at the time of the sentencing offense provided for a $60 assessment. This Court recently addressed this exact issue. In *People v Earl*, 297 Mich App 104, 111-114; 822 NW2d 271(2012), this Court held that no violation of the ex post facto doctrine exists when a trial court orders a defendant to pay $130 crime victim assessment fee even though the sentencing offense occurred before the statutory fee increase. Thus, defendant has failed to establish any errors requiring reversal.

IV. CONCLUSION

There was sufficient evidence from which a reasonable jury could have found defendant guilty of two counts of operating a motor vehicle while under the influence of intoxicating liquor causing serious impairment of body function. Also, the ex post facto clauses of the federal and Michigan constitutions were not violated by the imposition of a $130 crime victim assessment fee. We affirm.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan