STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2013
v	No. 308967 Menominee Circuit Court
RICHARD W. JACQUES, Defendant-Appellant.	LC Nos. 11-003384-FH 11-003385-FH

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his convictions of failure to stop at the scene of an accident when at fault resulting in death, MCL 257.617(3), and operating a motor vehicle while intoxicated or visibly impaired causing death, MCL 257.625(4).[1] Defendant was sentenced to concurrent prison terms of seven to 15 years for each offense with credit for 43 days served. Defendant also appeals by right the trial court's sentence, insofar as it scored 15 points for offense variable five (OV 5), MCL 777.35(1)(a). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from a motor vehicle accident on December 18, 2010, that claimed the life of the victim, Brett Ingram. Defendant was operating the motor vehicle. Chad Sindler, the victim's brother-in-law, stated that he saw defendant in the early afternoon of the 18th, and that defendant stated he was going to pick up the victim and have lunch, then return to complete work on Sindler's home. However, Sindler received a text message from defendant at 2:40 p.m. saying he was "already drinking." Defendant later told Officer Bracket of the Michigan State Police that he also had smoked marijuana at around 11:00 or 11:30 a.m. that day.

[1] Defendant was also charged with failure to stop at the scene of an accident resulting serious impairment or death, MCL 257.617(2); this count was dismissed at trial. Defendant also stipulated that he was guilty of the charge of removing a dead body without medical examiner permission, MCL 52.204, and does not challenge that conviction on appeal.

Defendant and the victim were seen at several bars in the area that afternoon and evening. Samantha Bell, the bartender at the Heritage Bar, testified that she served defendant between six and eight alcoholic drinks that afternoon. Bell testified that she worked the 11:00 a.m. to 4:00 p.m. shift, that she served defendant and the victim during that time, and that defendant and the victim remained at the Heritage Bar until at least 6:00 or 6:30 p.m.[2] Bell testified that her training and experience as a bartender led her to believe defendant was intoxicated. John Pew, another bartender at Heritage Bar, also testified that defendant was not sober and should not drive. Elly Piatt, the supervisor on duty at Heritage Bar, testified that she personally served defendant two whiskey drinks at some time after 4:00 p.m. She also testified that she ordered Pew to stop serving defendant and eventually asked defendant to leave; she based this decision on defendant's conduct that included loud talking, swearing, riding "a chair like a horse" and attempting to grab the rear end of a woman whom he did not know. Piatt believed defendant was intoxicated. A customer at the Heritage Bar observed defendant mistake a stranger for the victim and ask if he was ready to go; this customer also opined that defendant was intoxicated.

Defendant and the victim went to other bars after defendant was denied service at Heritage Bar. An employee of the Wallace Pub testified that defendant was loud and not sober when he was at the pub. The bartender at the Stadium Club Bar testified that a tall man (who was accompanied by a short man) was denied service and asked to leave the bar because he was harassing a female customer and appeared intoxicated, although she could not identify defendant. A customer at the Stadium Club also recalled a tall man who was "really drunk and obnoxious," who had slurred speech, and who left in a van or a truck.

Keith Scanlan, an employee at the Camp Shakey Saloon, saw the victim and defendant pull into the parking lot; the victim was driving and nearly hit Scanlan's offroad vehicle that was parked out front. Debra Dahl, the bartender, initially served both men a beer, but cut them off after she determined that they were intoxicated. Dahl observed that defendant was "talking goofy" and was "kind of dozing off at the bar." Scanlan also observed defendant "half-sleeping at the bar[.]" A customer at the bar also saw defendant falling asleep at the bar and described defendant as "visibly intoxicated; another customer indicated that defendant was walking "like he was drunk."

Defendant and the victim also were observed at Camp Shakey Saloon by Ronald Johnson, a Michigan State Trooper on disability leave. Johnson spoke to both men that evening, and noted that defendant had watery, bloodshot eyes, was swaying heavily, and was slurring his speech. Johnson believed that defendant was intoxicated and would not have been safe to operate a motor vehicle.

Defendant and the victim left the saloon and purchased more beer before heading to Mitchell Harris's camp in Lake Township. Harris testified that they arrived at 9:00 p.m. and that he smoked marijuana with the victim and defendant. The victim left the camp about twenty minutes later and walked down the road, apparently after Harris had an argument with his

[2] Bell testified that, after her shift, she "went over to the other side [of the bar] and had a couple cocktails and had dinner" before leaving Heritage Bar at 6:00 or 6:30 p.m.

girlfriend. Defendant left the camp in his van in search of the victim shortly afterward. Harris testified that defendant made the comment that "I should run that little fucker over" and "maybe I'll just give him a little bump." Harris described defendant as "definitely intoxicated" when he drove off.

Defendant struck the victim with his van, killing him. Defendant "freaked out" and left the area without calling for assistance. The next morning, defendant returned and put the victim's body in his van, along with parts of the van that had become dislodged in the crash. Defendant then drove to Mark Sindler's camp and apparently attempted to commit suicide by using a pipe to direct the van's exhaust into the van. Janet and Mark Sindler testified that they found defendant in the van with a knife to his throat, and that defendant said he wanted to kill himself because he had killed Brett. Defendant claimed the victim had been in the middle of the road and he could not stop.

When the police interviewed defendant, he admitted he had been drinking during the day. Defendant admitted to consuming "eight to ten" whiskey drinks as well as beer, and stated that he drank "a lot" before arriving at the Harris camp. Defendant also admitted to smoking marijuana. A blood-alcohol test performed approximately 18 hours after the victim's death did not show any alcohol in defendant's blood. The Sindlers testified that they confronted defendant months after the incident, and that defendant admitted he was drunk at the time of the accident.

At trial, each side presented accident reconstruction experts. The prosecution presented Sergeant John Bruno of the Michigan State Police. Bruno concluded, based on the sight distance and conditions documented at the scene, that "a sober, safe driver would have been able to avoid this crash from happening." Defendant's expert, Dan Billington, a professional collision reconstructionist and former sheriff's deputy, disagreed. Billington stated his opinion that the collision was unavoidable and that a sober driver would not have been able to avoid hitting the victim.

The jury convicted defendant of failure to stop at the scene of an accident when at fault causing death, operating a motor vehicle while intoxicated or visibly impaired causing death, and removing a dead body without the medical examiner's permission. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first challenges the sufficiency of the evidence supporting his convictions for failure to stop at the scene of an accident when at fault resulting in death and operating a motor vehicle while intoxicated causing death. Specifically, defendant claims that the prosecution's evidence did not establish the causation elements of these two offenses beyond a reasonable doubt. Defendant additionally claims that the evidence was insufficient to establish that defendant was operating a vehicle while intoxicated or visibly impaired. For the reasons stated below, we disagree.

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were

proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

A. CAUSATION

Defendant was convicted under MCL 257.617, which provides in relevant part:

> (1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of section 619 are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of section 619(a) and (b) if there is a reasonable and honest belief that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary.
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> (3) If the individual violates subsection (1) following an accident caused by that individual and the accident results in the death of another individual, the individual is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both. [Footnote omitted.]

Defendant was also convicted under MCL 257.625, which provides in relevant part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:
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> (a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
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> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October

> 1, 2013, the person has an alcohol content of 0. 10 [sic] grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
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> (c) The person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
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> * * *
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> (3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.
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> 4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:
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> (a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. . . .

Defendant argues that the evidence offered at trial was insufficient to show that defendant "caused" the collision with the victim under either of these statutes. Factual and proximate causation are elements of both offenses. *People v Feezel*, 486 Mich 184, 193; 783 NW2d 67 (2010); *People v Schaefer*, 473 Mich 418, 433-434; 703 NW2d 774 (2005). "Factual causation exists if a finder of fact determines that 'but for' defendant's conduct the result would not have occurred." *Feezel*, 486 Mich at 193. However, factual causation alone is insufficient to hold a defendant criminally responsible; the prosecution must also establish that "the defendant's conduct was a proximate cause of . . . the victim's death." *Id.*, citing *Schaefer*, 473 Mich at 436.

Defendant does not challenge the finding of factual causation, but rather argues that the prosecution did not establish proximate causation, because the victim's conduct amounted to gross negligence and was an unforeseen intervening cause of the accident. Specifically, defendant claims that the victim was extremely intoxicated and was walking in the middle of a dark, snowy road with his back to traffic, and that this conduct was grossly negligent.

"Proximate causation '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.*, quoting *Schaefer*, 473 Mich at 436-437. The "causal link" between a defendant's conduct and a victim's injury can be broken by an "intervening cause" that supersedes[3] the defendant's

[3] Many cases use the terms "intervening cause" and "superseding cause" interchangeably. In this opinion, other than in direct quotation, we use the term "intervening cause" for this concept.

conduct. *Id.* at 195. This intervening cause must not be reasonably foreseeable. *Id.* "Ordinary negligence is considered reasonably foreseeable, and it is thus not a superseding cause that would sever proximate causation." *Id.*, citing *Schaefer*, 473 Mich at 437-438. However, gross negligence or intentional misconduct on the part of a victim is not reasonably foreseeable and, if established, breaks the causal chain between the defendant and victim. *Id.* Gross negligence is "more than an enhanced version of ordinary negligence" and means "'wantonness and disregard of the consequences which may ensue . . . ." *Id.*, quoting *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914).

Proximate cause must be decided on a case by case basis. See *id.* at 201; see also *Stoll v Laubengayer*, 174 Mich 701, 705; 140 NW 532 (1913). In situations where the victim was a pedestrian struck by a person operating a motor vehicle, evidence of the victim's intoxication can be relevant to a determination of gross negligence. *Feezel*, 486 Mich at 199. In *Feezel*, the proffered evidence of an intervening cause was "the victim's presence in the middle of the road with his back to traffic at night during a rain storm with a sidewalk nearby." *Id.* Our Supreme Court determined that the trial court had abused its discretion in failing to admit evidence of the victim's intoxication because, "under the facts of this case, the victim's BAC [blood alcohol count] was highly probative of the element of proximate causation . . . ." *Id.* at 200.

The victim in this case shares many characteristics with the victim in *Feezel*. Evidence was offered that a postmortem blood alcohol test revealed that his blood alcohol count was .23, over twice the legal limit for operating a motor vehicle. Further, the evidence indicated that he was struck in the back, and that he was walking on a roadway at night. However, there are also key differences. First, it does not appear that the victim had a sidewalk on which he could have walked, as the shoulder of the road appears to have been composed of snow banks. Additionally, the victim in *Feezel* was walking on an "unlit, five-lane road" in a lane reserved for traffic. *Id.* at 72. Here, the victim was walking down a rural, gravel roadway with no established lanes of traffic. Further, evidence of the victim's intoxication was not, as in *Feezel*, excluded from evidence; instead, the jury was able to consider and fairly evaluate the significance of that evidence. 486 Mich at 203.

Even more importantly, however, is the simple fact that defendant had reason to know the victim would be in the roadway. The victim had left the Harris camp shortly beforehand and was struck less than a mile from the camp. Defendant was also aware, at least roughly, of the victim's level of intoxication, as he had been drinking with him all day. It should have been foreseeable to defendant that his friend would be walking in the roadway near the camp in an intoxicated state. Nor can we say that the victim's use of the roadway in which to walk, in the absence of any space reserved for the exclusive use of pedestrians, was "wanton" or in "disregard of the consequences which may ensue." *Barnes*, 182 Mich at 198.

The evidence admitted at trial also undermines defendant's argument. Bruno testified that a sober, safe driver could have seen the victim and stopped the vehicle in time. Although defendant offered contrary expert testimony, we do not re-weigh the credibility of witnesses, and resolve all conflicts in evidence in favor of the prosecution. *Wolfe*, 440 Mich at 514; *Kanaan*, 278 Mich App at 619. Thus, taken in the light most favorable to the prosecution, defendant's collision with the victim was quite literally foreseeable; that is, defendant should have been able to see and avoid the collision, even apart from his foreknowledge that the victim would be

walking on the roadway. For all of these reasons, we find that the prosecution offered sufficient evidence to enable a rational juror to conclude that defendant's conduct was the proximate cause of the victim's death.

B. INTOXICATION

Defendant also argues that the prosecution failed to offer evidence that defendant was "operating while intoxicated" as required by MCL 257.625. It is undisputed that no breath or chemical tests were offered at trial to prove defendant's level of intoxication; nor did a police officer observe defendant after the accident or conduct field sobriety tests. Nonetheless we conclude that, taken in the light most favorable to the prosecution, sufficient evidence was offered to prove defendant's intoxication.

A driver is "visibly impaired" when his ability to drive is "so weakened or reduced by the consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful, and prudent driver." *People v Lambert*, 295 Mich 296, 305; 235 NW2d 338 (1975). Here, numerous individuals testified to defendant's increasing level of intoxication and impairment throughout the day. Lay witnesses are qualified to testify about opinions they form as a result of direct physical observation. MRE 701; *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996). Crucially, defendant was observed by numerous individuals, including a Michigan State Police officer on disability, at Camp Shakey Saloon in a state of intoxication shortly before the incident. Johnson testified that as of 8:30 p.m. that evening, he observed defendant falling asleep at the bar, swaying, and slurring his words. Harris then testified that defendant and victim arrived at his camp a half hour later and that defendant consumed another beer and smoked marijuana, and that the victim left fifteen or twenty minutes after that. Harris also testified that defendant went in search of the victim at approximately 9:30 p.m. Harris also testified that defendant got "hung up" leaving the camp's driveway and then "just took off, tearing down the road." Although Harris also testified that this was the result of snow, rather than defendant's intoxication, a jury is "free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

Defendant is incorrect in his assertion that evidence of intoxication can only be established by "chemical analysis" or by testimony of a witness who observed the impaired driving. The case cited by defendant for that proposition does not so hold. *People v Calvin*, 216 Mich App 403, 548 NW2d 720 (1996).

Viewed in the light most favorable to the prosecution, the evidence allowed a reasonable juror to conclude that defendant was still visibly impaired by alcohol when he struck the victim, less than a half hour after his last drink and consumption of marijuana, after drinking all afternoon and evening at various bars. Visible impairment "must be visible to an ordinary, observant person." *Lambert*, 295 Mich at 305. We conclude that an ordinary, observant person would have found defendant visibly impaired. We note also that the fact that no one observed defendant directly after the crash was caused by defendant's flight from the scene and the resulting delay in summoning the authorities. For us to hold, under the circumstances of this case, that the evidence was insufficient to prove defendant's intoxication would be in effect a reward to defendant for this behavior. The evidence does not compel such a holding, and we

accordingly do not so hold. Instead we hold that the evidence offered was sufficient to prove defendant's intoxication.

III. OV 5

Finally, defendant argues that the trial court erred in scoring fifteen points for OV 5. We disagree. We review a trial court's findings of fact in support of a score for clear error. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision. *Id.*

OV 5 addresses psychological injury to a member of the victim's family. MCL 777.35(1). A trial court must assess 15 points if "serious psychological injury requiring professional treatment occurred to a victim's family." *Id.* However, the fact that treatment has not been sought is not conclusive. MCL 777.35(2); *People v Portellos*, ___ Mich App ___; ___ NW2d ___ (2012), slip op at 9.

Here, numerous members of the victim's family testified at sentencing about how the victim's death had affected their lives. Mark Sindler testified that his daughter was "having problems" and had to "step out [of college] and get a little help." The presentence investigation report states that Sindler's daughter had to be placed on "psychotropic medications for Depression [sic]" following the victim's death. Sindler also testified that his son reacted strongly to his uncle's death, and that they discussed him going to therapy, although Sindler's son ultimately declined. Sindler also testified to his wife's difficulty sleeping, and stated that she had sought help from a coworker in lieu of professional counseling.

In short, the record contained an abundance of evidence that the victim's family suffered serious psychological injury. In addition, at least one member of the family required "professional treatment" in the form of psychotropic medication to address depression. Therefore, the trial court did not clearly err in scoring OV 5 at fifteen points.

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra