

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 19, 2013

v

CARLTON VUR ADAMS,

Defendant-Appellant.

No. 311084
Barry Circuit Court
LC No. 11-100068-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while having a controlled substance in his body (THC/Marijuana), third offense, MCL 257.625(8); MCL 257.625(9)(c), and sentenced to 12 months in jail. Defendant appeals by right. We affirm.

At about 8:30 p.m. on September 13, 2010, Jeremy Easterbrook was riding his motorcycle southeast on M-37 at a speed in excess of the posted limit. Defendant was headed west on the same road when he began to turn left onto a cross street. Easterbrook struck the rear passenger wheel well of defendant's truck, spinning it about 95 degrees and was killed in the accident. The first responding police officer spoke to defendant, who stated that he never saw what hit him. The officer smelled intoxicants, so he had defendant's blood drawn at about 10:30 that night. Defendant's blood was tested at the Michigan State Police Crime Lab and found to contain one nanogram per milliliter of THC and a blood alcohol content of 0.02. A state police reconstruction expert testified that his calculations suggested Easterbrook's motorcycle struck defendant's truck at about 57 miles per hour, but an expert defendant retained opined that the motorcycle was traveling at least 100 miles per hour. This expert also estimated that the motorcycle would have been potentially visible to defendant, had he looked, for about 9.5 seconds before impact.

The jury acquitted defendant of operating a vehicle while having a controlled substance in his body causing death, MCL 257.625(4) and (8), but convicted him of operating a motor vehicle while having a controlled substance in his body, MCL 257.625(8). At sentencing, offense variable (OV) 3, MCL 777.33, was scored 50 points over defendant's objection, and on appeal, defendant argues that the trial court erred in doing so.

MCL 777.33 provides in relevant part:

(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) A victim was killed . . . 50 points.

* * *

(2) All of the following apply to scoring offense variable 3:

* * *

(c) Score 50 points if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle . . . and any of the following apply:

(i) The offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

* * *

(iii) The offender's body contained any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code . . . or a controlled substance described in section 7214(a)(iv)

An "injury to a victim," MCL 777.33(1), is necessary to assess points under OV 3. *People v Laidler*, 491 Mich 339, 344; 817 NW2d 517 (2012). The term "victim" is not defined by the statute but based on its common meaning and the context in which it is used, "a 'victim' is any person who is harmed by the defendant's criminal actions." *Id.* at 347-348. Because MCL 777.33(2)(c) requires that the death "results from the commission of a crime," the defendant's criminal actions must be a factual cause of the death. *Laidler*, 491 Mich at 345. But "the defendant's conduct need not be the sole cause of the victim's death." *People v Portellos*, 298 Mich App 431, 448; 827 NW2d 725 (2012). To determine "whether a defendant's conduct is a factual cause of the result, one must ask, 'but for' the defendant's conduct, would the result have occurred? Specifically, 'but for' defendant's commission of a crime, would [the victim's] death have occurred?" *Laidler*, 491 Mich at 345 (citation and quotation mark omitted).

The crime for which defendant was found not guilty, operating a vehicle while having a controlled substance in his body causing death, MCL 257.625(4) and (8), required finding that defendant's acts both factually and proximately caused Easterbrook's death. See *People v*

Feezel, 486 Mich 184, 193-195, 201-202; 783 NW2d 67 (2010).¹ Scoring OV 3 at 50 points, however, requires only factual, “but for” causation. See *Laidler*, 491 Mich at 345; *Portellos*, 298 Mich App at 431. There was evidence in this case that conditions were clear, and there was still some daylight. Easterbrook’s motorcycle had relatively bright headlights, and defendant could have seen Easterbrook’s motorcycle approaching for 9.5 seconds. Although the call is close, we find that the preponderance of the evidence supports that if defendant had not been driving with intoxicants in his blood he may have noticed the oncoming motorcycle and avoided driving in front of it. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Thus, “but for” defendant’s act, the accident would have been avoided and Easterbrook would not have died, establishing factual causation that supports the trial court’s scoring decision.

Defendant nevertheless argues that OV 3 should not have been scored, citing *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), because the definitional elements of the offense for which he was convicted were complete before Easterbrook’s death. We disagree. Defendant’s offense of operating a motor vehicle while having a controlled substance in his body was not complete until he ceased operating the vehicle and returned it to a position of safety. See *People v Lechleitner*, 291 Mich App 56, 59-61; 804 NW2d 345 (2010).

Defendant next argues that the trial court abused its discretion when it awarded over \$15,000 in restitution arising from expenses related to Easterbrook’s death when defendant had been acquitted of operating a vehicle while having a controlled substance in his body causing death, MCL 257.625(4) and (8). Defendant has not cited to any restitution order in the record, and we have found none, so he has not shown that his claim is ripe. See *People v Jackson*, 483 Mich 271, 297-298; 769 NW2d 630 (2009). Moreover, defendant’s failure to provide a transcript of the disputed decision, MCR 7.210(B)(1)(a), constitutes a waiver of his claim that restitution was improperly awarded. See *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering

¹ Proximate cause may be found lacking where the result is too remote or unnatural or where there is an intervening or superseding cause. *Feezel*, 486 Mich at 195.