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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1374**

State of Minnesota,
Respondent,

vs.

Eugene Edward Rivetts,
Appellant.

**Filed June 17, 2013
Affirmed
Stoneburner, Judge**

Stearns County District Court
File No. 73CR1010243

Lori Swanson, Minnesota Attorney General, John B. Galus, Assistant Attorney General,
St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Eugene Edward Rivetts, Faribault, Minnesota (pro se appellant)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Chief Judge;
and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the sufficiency of the evidence to support his convictions of criminal vehicular homicide. We affirm.

FACTS

After a day of drinking that began at about 10:30 a.m. on August 16, 2009, appellant Eugene Edward Rivetts, driving a Hummer H2 eastbound on Stearns County Road 17, collided with a westbound Toyota Corolla driven by Ryan DeZurik at approximately 10:36 p.m. DeZurik was killed on impact. The Hummer traveled 160 yards beyond the point of impact and came to rest next to a power pole in the north ditch.

At the scene of the accident, Rivetts denied that he was the driver of the Hummer and his passenger, Timothy Rausch, who had been drinking “drink for drink” with Rivetts all day, asserted that he had been the driver. Rausch, who was unaware at the scene that a person had died in the collision, told an officer that he had swerved to miss a deer. Rivetts appeared intoxicated at the scene and was belligerent. He was arrested for obstructing the legal process.

Rausch’s blood was drawn and testing revealed an alcohol concentration of 0.26. Rivetts was not tested. Rausch was charged with criminal vehicular homicide.

Based on evidence in the Hummer, police began to suspect that Rivetts had been driving the Hummer at the time of the collision. Rausch eventually told the police that Rivetts was the driver. Rivetts was charged with two counts of criminal vehicular homicide, and Rausch was charged with aiding and abetting an offender. Rausch pleaded

guilty and testified for the state at Rivetts's trial, at which only the state presented evidence.

The state's expert accident reconstructionist, Lt. Adam Fulton of the Minnesota State Patrol, testified that County Road 17 is predominately an east-west, two-lane road with a posted speed limit of 55 m.p.h. and no lighting in the area of the collision. Fulton testified that skid marks from the Corolla started in its lane of travel (westbound) and crossed the centerline into the eastbound lane. Mark Sprengler, the Minnesota State Patrol Sergeant who assisted Fulton in the accident reconstruction, opined that Rivetts drove the Hummer straight into a slight, one-degree curve in the road near the collision site, causing the Hummer to cross into DeZurik's lane of travel. Both Fulton and Sprengler opined that this caused DeZurik to brake the Corolla and try to steer away from collision by going into the eastbound lane. The collision occurred near the centerline. There was no evidence that Rivetts applied the brakes before the collision, but skid marks from the Hummer indicate that he braked after impact.

Fulton testified that skid marks occur once the wheels have locked up, preventing the driver from steering. Based on marks on the road, Fulton estimated the Hummer's speed on impact at no less than 62 m.p.h. and the Corolla's speed on impact at no less than 29 m.p.h. The Hummer's sensing diagnostic module (SDM) indicated that the airbag deployed at the time of the crash and that the Hummer was going between 96 and 98 m.p.h. when the airbag deployed. Because the Hummer had smaller-than-standard tires, Fulton revised the SDM speed estimate to 89 to 91 m.p.h.

DeZurik's cell phone indicated that a text message was sent from his cell phone at 10:36 p.m., which would have been seconds before the collision. Fulton opined that DeZurik did not cross into the eastbound lane inadvertently while texting because the Corolla's skid marks indicate that DeZurik made an intentional choice to steer into the eastbound lane. Sprengeler opined that if DeZurik's texting had caused him to drift over the centerline, the skid marks would have started well over the centerline rather than in DeZurik's lane of travel.

The state's expert toxicologist, Brent Nelson, of the Bureau of Criminal Apprehension, tested the sample of Rausch's blood that was taken approximately one hour after the collision and determined that Rausch's blood alcohol content at the time was 0.26. Based on that test result, Rausch's weight, and evidence that Rausch was drinking beer, Nelson concluded that Rausch had to have consumed between 20 and 30 beers in 12 hours to have an alcohol content of 0.26 at the time of testing. Based on evidence that Rausch and Rivetts drank at the same rate throughout the day and evening and evidence that Rivetts's weight was within five pounds of Rausch's weight on the date of the collision, Nelson calculated that Rivetts's blood-alcohol concentration at the time of the crash would have been between 0.16 and 0.26.

A jury found Rivetts guilty of both charges. Based on a criminal history of two or more convictions for violent crimes, including a prior conviction for criminal vehicular homicide, Rivetts was sentenced to a ten-year prison term. This appeal followed.

DECISION

I. Standard of review

Rivetts challenges the sufficiency of the evidence to support his convictions. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A conviction based on circumstantial evidence merits stricter scrutiny than convictions based on direct evidence. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). Heightened scrutiny applies in cases in which both direct and circumstantial evidence support the conviction. *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *Jones*, 516 N.W.2d at 549. A jury, however, is in

the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

In applying the stricter-scrutiny standard for circumstantial evidence, a reviewing court does not examine inferences to be drawn from all of the evidence in the record: the reviewing court examines only the inferences that can be drawn from the circumstances proved. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). The reviewing court does not consider conflicting facts and circumstances that the jury has rejected, or inferences from those facts. *Id.* In assessing the inferences to be drawn from the circumstances proved, the reviewing court examines whether there are “no other reasonable, rational inferences that are inconsistent with guilt.” *Id.* at 330. “To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than guilt.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

II. Sufficiency of the evidence

Rivetts was charged with criminal vehicular homicide, operation of a motor vehicle in a grossly negligent manner, in violation of Minn. Stat. § 609.21, subd. 1(1) (2008), and criminal vehicular homicide, operation of a vehicle in a negligent manner while under the influence of alcohol, in violation of Minn. Stat. § 609.21, subd. 1(2)(i) (2008). To support Rivetts’s convictions, the state had to prove three elements for each charge. *See 10 Minnesota Practice*, CRIMJIG 11.63 (2006). Rivetts does not challenge the sufficiency of the evidence on the first and third elements of each charge: that DeZurik died and that Rivetts’s charged conduct took place on or about August 16, 2009,

in Stearns County. Rivetts also does not challenge the sufficiency of the evidence to prove that he was driving the Hummer at the time of the collision. Rivetts challenges only the sufficiency of the evidence to prove the second element of each charge: that he caused DeZurik's death by operating a motor vehicle in a grossly negligent manner (Count I) and that he caused DeZurik's death by operating a motor vehicle in a negligent manner while under the influence of alcohol (Count II).

Rivetts notes in his appellate brief that although "he operated the [Hummer] after consuming an excessive amount of alcohol," the BCA toxicologist acknowledged that heavy drinkers can tolerate higher levels of alcohol in their system. To the extent that Rivetts is implying that a reasonable inference can be drawn that he was not operating the Hummer while under the influence of alcohol, we find no merit in this argument. The direct evidence of witnesses who observed Rivetts's drinking on the day of the collision and witnesses who observed his demeanor shortly before and immediately after the collision is sufficient to support the jury's determination that Rivetts was driving under the influence of alcohol.

Rivetts's primary argument is that the evidence that the Corolla's skid marks began very near the centerline of the eastbound lane and the evidence of DeZurik's texting support a reasonable inference that DeZurik crossed into Rivetts's lane while texting and that the collision occurred as Rivetts attempted to avoid collision. We disagree.

"When reviewing the sufficiency of circumstantial evidence, our first task is to identify the circumstances proved." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted).

Here, the circumstances proved include (1) Rivetts operated the Hummer while under the influence of alcohol; (2) Rivetts drove significantly over the speed limit on a two-lane, unlit road; (3) DeZurik braked the Corolla while he was in his own lane, causing the wheels to lock and create skid marks in that lane before the collision; (4) Rivetts convinced Rausch to lie about who was driving; (5) Rausch told officers at the scene that he swerved to avoid a deer; (6) Rivetts did not brake before the collision; (7) a text message was sent from DeZurik's cell phone close to the time of the collision; and (8) the jury found credible the testimony of the state's expert witnesses that DeZurik did not drift across the centerline while texting and that he braked and deliberately steered toward the eastbound lane to avoid a collision with the Hummer in the westbound lane.

Based on the circumstances proved, we conclude that the only reasonable inferences that can be drawn support the jury's verdict that Rivetts was operating the Hummer in a grossly negligent manner and was operating the Hummer negligently while under the influence of alcohol. There is no evidence in the record, direct or circumstantial, that DeZurik crossed the centerline while texting. "We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Id.* (quotation omitted). "The State does not have the burden of removing all doubt, but of removing all reasonable doubt." *Id.*

III. Superseding cause

Rivetts also argues that DeZurik’s texting constituted a superseding cause of the collision that “broke the circumstantial evidence chain of causation precluding this [c]ourt from concluding that the evidence leads so directly to the guilt of the appellant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *See State v. Nelson*, 806 N.W.2d 558, 563 (Minn. App. 2011) (“An intervening, superseding act breaks the chain of causation set in operation by a defendant’s negligence, thereby insulating his negligence as a direct cause of the injury.” (quotation omitted)), *review denied* (Feb. 14, 2012). “If the defendant seeks to establish a superseding cause, the intervening conduct must be the sole cause of the end result.” *State v. Gatson*, 801 N.W.2d 134, 146 (Minn. 2011) (quotation omitted).

DeZurik’s conduct only constitutes a superseding cause if it meets four criteria:

- 1) its harmful effects must have occurred after the original negligence; 2) it must not have been brought about by the original negligence; 3) it must have actively worked to bring about a result which would not otherwise have followed from the original negligence; and 4) it must not have been reasonably foreseeable by the original wrongdoer.

State v. Hofer, 614 N.W.2d 734, 737 (Minn. App. 2000) (quotation omitted).

To support his argument, Rivetts asserts that (1) DeZurik’s texting “would have occurred after [Rivetts] failed to navigate the one-degree curvature on County Road 17”; (2) DeZurik’s negligent attention to driving did not result from Rivetts’s alleged negligence; (3) DeZurik’s negligent driving caused the Corolla to skid out of control and

into the eastbound lane; and (4) Rivetts could not have anticipated that DeZurik would be traveling close to the center line, while texting, which ultimately caused the collision that resulted in DeZurik's death." But as stated above, there is no evidence in the record to support Rivetts's mere speculation that texting caused DeZurik to cross the centerline or otherwise engage in any negligent driving. The jury was instructed on the theory of superseding cause and found that DeZurik's conduct was not a superseding intervening cause of the collision. The finding is supported by evidence in the record.

Affirmed.