

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW JOSEPH SOARES,

Defendant-Appellant.

UNPUBLISHED

July 24, 2008

No. 273333

Lapeer Circuit Court

LC No. 05-008462-FH

Before: Owens, P.J., and O’Connell and Davis, JJ.

DAVIS, J. (*dissenting*).

I respectfully dissent. Although the majority’s opinion is otherwise well reasoned, I believe the majority fails to afford the correct quantum of deference to the trial court on this close evidentiary question. I would therefore affirm.

As the majority observes, manslaughter with a motor vehicle and OWI causing death require proof that a defendant’s operation of the vehicle was a proximate cause of the victim’s death. *People v Schaefer*, 473 Mich 418, 436-437; 703 NW2d 774 (2005); *People v Tims*, 449 Mich 83, 95; 534 NW2d 675 (1995). Relevant to the instant matter, the critical determination is whether some unforeseeable – “e.g., *gross* negligence or intentional misconduct” – intervening cause “superseded the defendant’s conduct such that the causal link between the defendant’s conduct and the victim’s injury was broken.” *Schaefer, supra* at 436-438 (emphasis in original). As the majority also observes, the expert testimony presented in the trial court was only able to articulate that it was “certainly possible” that the victim’s reaction time “may” have been slowed by the marijuana he consumed, and that “it’s possible” he was intoxicated but it was impossible to determine “to what level that intoxication would be.” From this, it is possible that the factfinder could infer that but for the victim’s “possible” intoxication, he “may” have been able to stop sooner and perhaps avoid a collision altogether.

However, at defendant’s lowest possible speed, he was in the intersection for a second or less. Given this narrow window of time, the victim would already have had to be very close to the intersection when defendant drove through the stop sign. The majority notes that there was testimony that the victim could have avoided the crash with an additional .1 or .2 of a second, but that testimony was more specifically that the victim would have required an additional 10 to 12 feet of braking distance. There is *no* evidence that *any* person could react fast enough. Furthermore, the victim had the right of way at that intersection and might reasonably have expected that there would be no need to stop, irrespective of whether he was intoxicated. And if

the vehicles had been traveling faster than their lowest possible speeds, the window of opportunity in which to stop would have been even smaller.¹ The threshold for relevance, and therefore admissibility, is whether the victim's marijuana use affected his ability to avoid the accident enough that it constituted an intervening act that superseded defendant's conduct, thereby breaking the causal link between defendant's failure to stop at the intersection and the victim's death. Although possible, the evidence in support is tenuous.

It is on that basis that I believe the trial court did not abuse its discretion in excluding the evidence under MRE 403. "Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v Blackston*, ___ Mich ___, ___; ___ NW2d ___ (filed Jun 25, 2008) (Docket No. 134473, slip op at 10), quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). As discussed, the extent of the victim's actual impairment was unknown and likely unknowable, and his theoretical opportunity in which to react was, at best, very brief. Even if this evidence was probative, it was minimally so. But the mere fact that the victim was intoxicated on marijuana, albeit to an unknown extent, could possibly be given more weight by the jury than warranted and thus constitute a risk of unfair prejudice that substantially outweighs the evidence's probative value.

The majority correctly observes that initial questions of admissibility are reviewed de novo as questions of law. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Even if evidence is relevant, however, it may be excluded if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403; *Blackston, supra*, slip op at 10). A trial court abuses its discretion when it reaches a decision that "falls outside the principled range of outcomes," and it ordinarily cannot abuse its discretion when deciding a close evidentiary question. *Blackston, supra*, slip op at pp 9, 16-17. The evidence of the victim's use of marijuana provided only tenuous support for the supposition that it might have affected his ability to avoid the accident, and there is a possibility that it could be given disproportionate weight by the jury. Therefore, I find that this is precisely the kind of close evidentiary question that should be left to the discretion of the trial court. Under the circumstances of this case, I do not find that the trial court's decision to exclude the evidence under MRE 403 fell outside the range of principled outcomes. *Blackston, supra* slip op at pp 9, 16-17.

The majority also relies on a highly superficial similarity between this case and defendant's cited case of *People v Moore*, 246 Mich App 172; 631 NW2d 779 (2001). In that case, the defendant was charged with negligent homicide, and the facts were as follows:

The evidence from the preliminary examination indicates that defendant, who was driving a tractor-trailer, was turning right onto eastbound Walton Road from a parking lot. According to an eyewitness, defendant had pulled out onto Walton and the truck was in the right lane and about one-third of the right center lane, but could not complete the right turn because of traffic stopped at a red light in front

¹ The fact that the victim might, himself, have been speeding *was* admitted into evidence.

of the truck. The eyewitness, who was directly behind the truck in the right lane, noticed a vehicle (a Grand Prix) driving in the right center lane and it struck the front of the truck. The Grand Prix, driven by the decedent, Michael Williams, then crossed several lanes of traffic and into the two westbound lanes. The Grand Prix hit a van head on, and Williams was killed. According to the eyewitness, defendant's truck was either stopped or moving very slowly when it was struck by the Grand Prix. Further, defendant's accident reconstruction expert believed that the Grand Prix was traveling at about twenty-five miles an hour. [*Id.*, 173.]

This Court determined that, under the circumstances of that case, evidence that the victim had marijuana in his blood at the time of the accident was relevant “and may be considered by the jury in its determination whether the defendant's negligence, if any, caused the decedent's death.” *Id.* at 180.

But the facts in *Moore* were significantly different: the defendant's vehicle was either stopped or moving slowly, the victim's vehicle was also traveling relatively slowly, and traffic in front of the defendant had entirely stopped for a red light – the same red light the victim was approaching and at which the victim would have had to stop. In *that* case, there was evidence that the victim *actually was* impaired and that the impairment made a difference to the victim's ability to avoid the accident. In contrast, the evidence *here* could only show that the victim was, at most, “probably” impaired enough that he “may” have had a reduced reaction time, and more importantly the evidence failed to show that any such reduction in reaction time was practically relevant. I feel this case is more like *People v Phillips*, 131 Mich App 486, 492-493; 346 NW2d 344 (1984), which *Moore* distinguished, in which there was insufficient evidence from which a jury could determine whether the victim's ability to operate his motorcycle safely was impaired.

Again, I conclude that this case presents a close evidentiary question, and the majority inappropriately substitutes its own judgment for that of the trial court. I would hold that the trial court did not abuse its discretion in excluding the evidence.

/s/ Alton T. Davis