

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2466

September Term, 2015

JOHN GILBERT BARNES II

v.

STATE OF MARYLAND

Arthur,
Reed,
Raker, Irma, S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: May 9, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a bench trial in the Circuit Court for Caroline County, John Gilbert Barnes II, appellant, was convicted of negligent homicide while impaired by drugs, driving while impaired by drugs, negligent driving, and failure to drive on the right hand side of the road.¹ He was sentenced to three years of incarceration.² Appellant filed a timely appeal, and presents a single question for our review:

Is the evidence insufficient to sustain Appellant’s convictions?

We answer this question in the negative, and therefore affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 19, 2014, at around 11:00 p.m., Michael Plugge arrived at Dave’s Place, a bar and restaurant in Ridgely, Maryland. Once there, he ate, drank two beers, and left after about an hour. Bartender Mary Swann did not observe anything about Mr. Plugge that might have indicated that he was under the influence of alcohol.

At around 12:15 a.m. on April 20, 2014, police and emergency personnel responded to a report of a two vehicle accident on Route 480 near Eveland Road in Ridgely. At the

¹ The court merged both driving while impaired by drugs, and negligent driving into negligent homicide while impaired by drugs. Appellant was acquitted of manslaughter by vehicle by gross negligence, manslaughter by vehicle by criminal negligence, homicide by motor vehicle while impaired by drugs, reckless driving, and failure to maintain required security for his vehicle.

² The court sentenced appellant to three years of incarceration on the negligent homicide while impaired by drugs count, and sixty days of incarceration for driving while impaired, which was to run concurrent to his sentence for negligent homicide. No portion of appellant’s sentence was suspended. Appellant was ordered to pay fines on the remaining convictions.

scene they discovered a Dodge pickup truck resting in a ditch next to the westbound travel lane of Route 480. Appellant was standing in the grass near the Dodge. A Ford Explorer, the other vehicle involved in the accident, was overturned and located partially on the shoulder of the westbound travel lane of Route 480. Mr. Plugge, who was found to be deceased upon police arrival, was located between the back and front seats of the Ford. An autopsy revealed that Mr. Plugge, who was not wearing a seatbelt at the time of the collision, died from multiple injuries sustained in the accident, including lacerations to his heart and liver. Mr. Plugge had a blood alcohol level of .12% at the time of his death.³

Trooper Zachary Clark of the Maryland State Police was one of the first responders and came into contact with appellant at the scene. When speaking with appellant, Trooper Clark observed that appellant's speech was slowed and slurred. Appellant admitted that he had smoked marijuana "all day" and had used heroin earlier in the evening. Paramedics observed "previous needle access" marks on his arms. Appellant was not asked to perform field sobriety tests due to an injury he had sustained.⁴ Appellant told investigators that Mr. Plugge's vehicle had crossed into his lane and struck him. Appellant never indicated to

³ The blood alcohol concentration limit in Maryland is .08%. A blood alcohol level of .12% is evidence that Mr. Plugge was illegally driving under the influence. Mr. Plugge also had a slightly higher vitreous (fluid in the eye) alcohol content level of .15%.

⁴ The extent and nature of appellant's injuries were not stated on the record. When officers and paramedics arrived, appellant was standing but was in "obvious pain" and "favoring one leg." He was assessed with a possible skull fracture due to a laceration on his head, and flown by helicopter to Shock Trauma in Baltimore for treatment. His ultimate diagnosis is not contained in the record.

investigators that he had swerved outside of his lane in an effort to avoid striking Mr. Plugge's vehicle.

Once at Shock Trauma, appellant submitted to a blood test at 4:37 a.m., four hours after the accident. Appellant's blood sample was later tested for the presence of drugs and alcohol. While no blood alcohol was discovered, morphine and Carboxy THC were detected. Laura Waters, a forensic scientist supervisor for the Maryland State Police Toxicology Unit, conducted the controlled dangerous substances blood test on appellant's sample. She testified that heroin is broken down into "morphine, among other substances" and that the presence of morphine in a blood sample is "consistent with someone who had used heroin." She further testified that Carboxy THC is the "major marijuana metabolite in blood" and that its presence in blood "is an indicator of marijuana use sometime in the past." A search of appellant's vehicle was conducted pursuant to a search warrant and a small baggie of marijuana was found "next to the radio console in the center of the vehicle."

Trooper Jeffrey Chouma, a certified drug recognition expert, testified that marijuana use can "cause body tremors, eyelid tremors, general disorientation," and can impair a user's perception of time and distance. He further testified that heroin depresses a user's body, impairs physical motor skills, depresses reflexes, can cause a user to exhibit slow and lethargic movements, and can cause a user to become drowsy. Finally, he testified that heroin is metabolized or removed from the body within four to six hours.

Trooper Charles Gore, an expert in accident reconstruction assigned to the Maryland State Police Crash Team, responded to the accident scene. He noted that it was a clear night and there was no snow or water on the roadway. The stretch of roadway where the accident

occurred was a straightaway, “a decent amount either way,” and the posted speed limit was fifty miles per hour. The road was a two lane highway with vehicles traveling in opposite directions. Trooper Gore concluded that appellant’s vehicle was traveling east and Mr. Plugge’s vehicle was traveling west. Trooper Gore located gouge marks, furrows, and tire marks in the westbound lane of the roadway, and determined that the place of impact was on the westbound side of the road. He also found evidence, namely a tire mark, indicating that appellant’s vehicle had left the roadway on the western edge of the westbound lane of traffic prior to the accident. He did not discover any evidence that Mr. Plugge’s vehicle had left the roadway, or evidence that Mr. Plugge ever swerved into appellant’s lane of travel.

Trooper Gore took a series of measurements at the scene and calculated that appellant’s vehicle was probably driving faster than Mr. Plugge’s vehicle, but he could not be certain that appellant’s vehicle was going above the posted speed limit. Trooper Gore did calculate, however, that based upon the post-collision speed loss of both of the vehicles, Mr. Plugge would have had to have been driving fifteen miles per hour or slower for appellant not to have been speeding at the time of impact. Ultimately Trooper Gore concluded that “[appellant] was operating his vehicle east, eastbound on the westbound side of the highway and then collided with the front of Mr. Plugge’s vehicle.” Trooper Gore did not find any valid reason for appellant to be driving on the wrong side of the road, nor was any evidence discovered that Mr. Plugge contributed to the accident in any way.

Appellant called Wendell Cover, an expert in accident reconstruction, who testified that he had reviewed Trooper Gore’s report and had conducted his own investigation into

the accident. He criticized Trooper Gore’s calculations as they related to the speed analysis, and noted that portions of Trooper Gore’s investigation were not to industry standards. However, he agreed with Trooper Gore’s conclusions that appellant had crossed the center line and that the impact occurred on the westbound shoulder of the roadway. Further, he agreed that appellant was traveling faster than Mr. Plugge, but concluded that neither vehicle was speeding at the time of impact. He did not observe any physical evidence that Mr. Plugge had ever crossed the center line, nor did he find evidence that Mr. Plugge did anything out of the ordinary. He concluded that there was “no objective evidence to say when, where or why each vehicle moved in the direction in which they did,” nor was there “objective evidence that either vehicle was out of control prior to impact.”

Judge Karen A. Murphy Jenson found that she was convinced beyond a reasonable doubt that appellant was driving negligently by driving into Mr. Plugge’s lane of traffic, and that he was impaired by marijuana and heroin. This appeal followed.

DISCUSSION

A. Parties’ Contentions

Appellant argues that the evidence is insufficient to sustain his convictions. Appellant relies on *Webber v. State*, 320 Md. 238, 254 (1990) and reminds us that “[i]t is not enough to show that the motorist was intoxicated and that the death of another person resulted from the motorist’s act of driving a motor vehicle . . . the death must result from *negligent* driving.” (Emphasis in original). He argues that there are two possible explanations for the accident and that at trial, both experts agreed that either explanation was possible. In the first theory, appellant drifted into Mr. Plugge’s lane and collided with

him. Under the second, it was Mr. Plugge who drifted into appellant’s lane and both drivers swerved into the opposite lane and collided there. Appellant argues that the location of the vehicles at the time of the collision is not enough to prove that appellant was negligent beyond a reasonable doubt, and that we should not speculate as to which party was negligent when the evidence was consistent with either possibility.

The State responds that while a trier of fact is not permitted to speculate, the State is also not required to prove guilt beyond all reasonable doubt or to a mathematical certainty. *See Carroll v. State*, 428 Md. 679, 685 n.1 (2012). The State argues that there was “competent evidence to support the court’s factual finding that [appellant] was driving negligently when the crash occurred.” We agree.

B. Standard of Review

We review for sufficiency of the evidence by determining “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We do not, however, “undertake a review of the record that would amount to, in essence, a retrial of the case.” *State v. Albrecht*, 336 Md. 475, 478 (1994). “Nor is it the function of the appellate court to determine the credibility of witnesses or the weight of the evidence.” *Handy v. State*, 175 Md. App. 538, 562 (2007). Maryland Rule 8-131 (c) mandates that an appellate court “not set aside the judgment of the trial court on the evidence unless clearly erroneous,” and requires the reviewing court to “give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” We give deference to the trial court’s “ability to choose among differing

inferences that might possibly be made from a factual situation.” *State v. Smith*, 374 Md. 527, 534 (2003).

C. Analysis

Pursuant to Maryland Code, Criminal Law Article § 2-506(a) “[a] person may not cause the death of another as a result of the person's negligently driving, operating, or controlling a motor vehicle or vessel while the person is impaired by a controlled dangerous substance[.]” Furthermore, “[a] person is guilty of negligent driving if he drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual.”⁵ §2-506(b). Not only must the State prove that the “motorist was intoxicated and that the death of another person resulted from the motorist’s act of driving,” but the State must also show that the death resulted from the motorist’s negligent driving. *Webber*, 320 Md. 238, 245 (1990).

Here, both experts agreed that the entirety of the accident occurred in Mr. Plugge’s lane of travel. They both agreed that appellant’s vehicle had crossed the centerline, and had been travelling faster than Mr. Plugge’s vehicle at the time of impact. The State presented expert testimony that, while the exact pre-impact speeds of either vehicle could not be determined, a range of speeds for each vehicle could be determined based upon post-collision speed loss. The State’s expert testified that Mr. Plugge would have had to have been driving fifteen miles per hour or slower in the fifty miles per hour speed zone, for appellant not to have been speeding at the time of impact. There was physical evidence in

⁵ “Negligent driving is a lesser included offense within the greater offense of homicide by motor vehicle while intoxicated.” *Huff v. State*, 325 Md. 55, 75 (1991).

the form of a tire mark that appellant's vehicle was not only in Mr. Plugge's lane of travel before the accident, but that it was leaving the roadway on the right hand shoulder of Mr. Plugge's lane prior to impact. There was no physical evidence that Mr. Plugge crossed the centerline or had done anything out of the ordinary.

Mr. Plugge's blood alcohol level at the time of his death was .12, however, the State presented testimony from a witness who had seen him just before the accident and stated that he was walking and talking normally. In contrast, when police responded to the accident scene, appellant was "slow to respond" and his speech was noted to be "slowed and slurred." Appellant admitted to smoking marijuana "all day," and that he had used heroin prior to the accident. He was unable, however, to recall the times of the day when he used marijuana and heroin. Analysis of appellant's blood drawn four hours after the accident, and the presence of "previous needle access to his arms" corroborated his admitted drug usage.

Finally, the State presented evidence from a certified drug recognition expert about the different effects of marijuana and heroin on a user's body. Some of those effects include general disorientation, altered perception of time and distance, impaired physical motor skills, depressed reflexes, slow and lethargic movements, and drowsiness. Further, the State's expert testified that heroin is metabolized or removed from the body within four to six hours. Appellant's blood, drawn four hours after the accident, contained a heroin metabolite, suggesting that he used heroin close in time to the accident.

We hold that there is sufficient evidence to permit a finding that appellant's negligence caused the accident. Appellant argues that it is "equally possible" that Mr.

Plugge crossed into appellant’s lane first and that appellant and Mr. Plugge both then swerved into the westbound lane to avoid a collision. While appellant’s theory is possible, we hold that a rational finder of fact could have found that they were not “equally possible,” and that the evidence supported the State’s theory beyond a *reasonable* doubt. Any reasonable trier of fact could have found that Mr. Plugge’s death resulted from the appellant’s negligent driving.

We have reviewed the evidence in the light most favorable to the prosecution and affirm the judgment of the circuit court. “[A]ny reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319. There is no evidence that Mr. Plugge had been in appellant’s lane prior to impact. There is evidence, however, that appellant had not only crossed the centerline, but that he had travelled across Mr. Plugge’s lane and had begun leaving the roadway on Mr. Plugge’s right-hand shoulder prior to the accident. There were no tire marks observed in appellant’s travel lane to suggest that the chain of events that led to the collision began there. This evidence of causation, combined with appellant’s intoxication, constitutes sufficient evidence to sustain appellant’s conviction for negligent homicide while impaired by drugs, as well as his convictions for negligent driving and failure to drive on the right side of the road.

**JUDGEMENTS OF THE CIRCUIT COURT
FOR CAROLINE COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**