IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1994

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 02C01-9307-CC-00143
	)	
	)	Dyer County
	)	
v.	)	Hon. Joe G. Riley, Judge
	)	
	)	(Vehicular Homicide)
BOBBY WEAVER,	)	
	)	
Appellant.	)	

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Bobby Weaver, appeals from his jury conviction in the Circuit Court of Dyer County for vehicular homicide, a Class C felony. The defendant was sentenced as a Range I, standard offender to four years in the custody of the Department of Correction. In this appeal as of right, he contends the following:

1. that the evidence is insufficient to support his conviction,

2. that the trial court improperly charged the jury relative to its definition of proximate result under the vehicular homicide statute,

3. that the trial court erred in allowing a witness to testify regarding matters beyond his expertise, and

4. that the sentence imposed is excessive.

The facts surrounding this case involve an accident that occurred on June 19, 1992, and the death of Tommy Kirk, the victim. Angie Sanders testified that she was with the victim and another friend while they were driving southbound on Jones Road on the night of June 19th when the victim was unable to make a curve and slid into a ditch. The victim's truck was stuck, and the other friend went to get help while the victim and Ms. Sanders waited. She testified that three men in a truck drove by, stopped on the opposite side of the road and talked to her and the victim for about ten minutes. She stated that they saw a truck, later identified as the defendant's, driving erratically, all over the road at a high rate of speed and the men in the truck drove away. She said that she told the victim to move as she ran to a ditch. She stated that she heard a loud crash and found the victim lying on the road behind the defendant's truck.

Ms. Sanders recounted that the victim was breathing and was trying to move. She ran to the defendant's window and told him that he had hit her friend and that he needed to get out of the truck. She stated that the defendant told her "I've got

to get out of here" and backed up, running over the victim. She said that the defendant drove his truck into the opposite ditch and became stuck with the victim pinned underneath.

On cross-examination, Ms. Sanders admitted that she did not tell the defendant that the victim was behind his truck. She also stated that the three men with the truck were in the road as the defendant came around the curve. She further admitted that the victim had been drinking. On redirect examination, she recounted that the defendant asked her what he had hit.

Bobby Melton testified that he was at the accident scene with Johnny Anderson and Mike Thurman. He stated that he was driving Mike Thurman's truck northbound on Jones Road when the three of them stopped to talk to the victim and Ms. Sanders to make sure that no one was hurt and to see if they needed help. He stated that the victim's truck's lights were not on but that you could see the truck from far away. He said that he was familiar with the curve and, therefore, applied his brakes while approaching the curve. He stated that the victim's truck was completely off the road. He said that he heard the defendant's truck approaching and decided to pull up further down the road to get out of his way.

Mr. Melton reported that as he was pulling away, he heard the truck sliding and looked into his rearview mirror to see it hit an embankment and the victim's truck. He went back to the scene and found Ms. Sanders screaming. He stated that he went to call 911. He returned to the scene and saw that the victim was pinned underneath the defendant's truck. On cross-examination, he reported that the victim had a can of Budweiser in his hand. On redirect examination, he added that his lights were on the entire time that he was stopped to talk to the victim and Ms. Sanders.

Tim Williams, an officer with the Lake County Sheriff's Department and part-time emergency medical technician (EMT) with the Dyer County Ambulance Service, testified that he arrived on the scene as an EMT at 11:49 p.m. and found the defendant's Ford pickup truck situated across the road, blocking both lanes of traffic. He stated that the victim was pinned beneath the truck with the frame of the truck lying on the victim's head. He testified that the victim was dead at the scene.

Dr. Lawrence Matlock testified that he was the emergency room physician on duty at the Methodist Hospital in Dyersburg on the night of the accident. He stated that the victim was brought in with massive wounds to his head, face and neck. He said that other bruises were evident across the victim's body. He also recounted that the victim suffered from an indention on his head, indicating that his skull was crushed.

Thomas McQuarters, an officer with the Dyersburg Police Department, testified that he arrested John McCuiston at 11:04 p.m. on June 19th. He stated that the defendant was a passenger in Mr. McCuiston's truck. Officer McQuarters conducted field sobriety tests on the defendant in order to determine whether he could drive Mr. McCuiston's truck home. However, Mr. McCuiston's wife arrived and told the officer that she would take the defendant home. Officer McQuarters stated that he advised the defendant not to drive because he was impaired. He stated that the defendant failed the eye nystagmus test and was, in his opinion, under the influence of alcohol.

John W. Harrison, an analytical toxicologist with the Tennessee Bureau of Investigation (TBI), testified that he has performed over eight thousand blood alcohol content analyses and that his analysis of the defendant's blood revealed a .14 percent blood alcohol content. He also confirmed that the analysis of the victim's blood

revealed a .14 percent blood alcohol level. He stated that such a blood alcohol content would lead to impairment and that the reading was accurate for the moment that the victim was killed.

Don DeSpain, a seven-year veteran with the Tennessee Highway Patrol (THP), testified that he arrived at the scene to find the defendant standing outside his truck. He described the defendant as swaying with bloodshot eyes, smelling of alcohol. He took the defendant to the emergency room and obtained a blood sample which was sent to the TBI crime laboratory for analysis. He testified that, in his opinion, the defendant was impaired. He stated that he was familiar with the curve where the accident took place and that he never went over thirty miles per hour on the curve. On cross-examination, he admitted that the defendant's vision approaching the curve may have been impaired due to the trees and the curvature of the road. He also admitted that the defendant's windshield was cracked consistent with the defendant hitting his head and that the steering wheel was bent.

Tansil Phillips testified that he has worked for the THP since 1980 and that he was the primary investigating officer on this case. He stated that he arrived at the scene at 11:47 p.m. and found Officer DeSpain and several emergency vehicles already there. He prepared a diagram that was admitted into evidence. The diagram indicates that the victim's truck was entirely off the roadway and that the defendant's vehicle struck a ditch embankment about twenty-five to thirty feet in front of the truck before striking the truck itself. Officer Phillips testified that he found smeared blood on the front tire of the defendant's truck that indicated that the victim had been dragged about five feet before the defendant's truck came to its final stop. He stated that the defendant's speech was slurred, his eyes were bloodshot and he smelled of alcohol. He reported that the defendant failed the eye nystagmus, one-leg-stand and toe-heel tests. He admitted that the defendant complained of a head injury and that the

windshield of the truck indicated that he had struck his head. He added, however, that the defendant refused any medical treatment at the emergency room. He also admitted that he took a statement from the defendant in which the defendant said he slammed on his brakes and went out of control after seeing the third truck, driven by Bobby Melton, parked in the roadway.

Pam Weaver, the defendant's wife, testified on his behalf. She stated that she became worried when the defendant did not come home on time and went out to look for him around 11:30 p.m. She said that she came upon the accident and that Officer Phillips told her to go to the Dyersburg Jail to wait for the defendant. She stated that she and her brother, Clay Hamry, got the defendant out on bond around 8:00 a.m. the next morning. She said that the defendant's forehead was bloodied and bruised and that he favored his left knee while walking. She recounted that they went home and the defendant took a shower. Ms. Weaver stated that after her husband's shower, she went into the bathroom and noticed bruises on his neck, chest, genitals and hip. She also noticed a knot about the size of her fist at the base of the defendant's neck. She also reported that the defendant had bitten a hole in his tongue when the accident occurred. However, she stated that the defendant did not want to get any medical attention, so she took care of him at home. She acknowledged that the curve where the accident took place was very dangerous and that she would never drive it more than forty to forty-five miles per hour.

Clay Hamry, the defendant's brother-in-law, testified that he went with his sister to bail the defendant out of jail on the morning after the accident. He corroborated his sister's account of the defendant's neck, head and knee injuries. He also described the curve as "close to a ninety degree turn." He stated that he saw the defendant's truck and that the windshield was cracked and the steering wheel was bent.

Brenda McCuiston testified for the defense that she drove the defendant to his truck after her husband was arrested for driving under the influence. She stated that the trip from her husband's arrest scene to her house took about three minutes, that the defendant got into his truck and left immediately and that it would take another four minutes for the defendant to come upon the curve where the accident occurred. She stated that she allowed the defendant to drive despite the fact that Officer McQuarters told her to drive him home because she felt that he was not under the influence of alcohol. She added that had the defendant been drunk, she would have driven him home.

Mike Thurman, the owner of the truck driven by Bobby Melton, testified that he and Melton and another friend were travelling northbound on Jones Road when they came upon the victim's truck which was stuck in the southbound ditch. He said that Melton stopped the truck in the middle of the road and left the headlights on while they talked to the victim. He said that they saw the defendant's headlights through the trees and barely pulled out of the way when the accident occurred. He recounted that he heard the defendant's brakes lock down and the truck slide, followed by two crashes. He said that he and his friends stopped at two nearby homes to get help but no one answered their doors. They returned to the scene and left again to call 911. He stated that he considered thirty to thirty-five miles per hour to be a safe speed around the curve and that he had only been pulled away for about six seconds when he heard the defendant's brakes lock.

The defendant testified that he is thirty-nine years old, has two daughters, had never been arrested and had been working at the same job for twelve years before his arrest. He stated that he worked twelve hours on June 19th and decided to go to the barbecue cook-off at the local fairgrounds with his friend, Jim McCuiston. He recounted that they arrived at the cook-off around 8:00 p.m. and stayed until 10:40

p.m. He recalled that he ate about five barbecue sandwiches at the cook-off and consumed about five nine-ounce cups of beer. He stated that he was not intoxicated, despite what Officer McQuarters had told him, and decided to drive after his friend was arrested for DUI. He stated that as he approached the curve on Jones Road, he saw Thurman's truck and slammed on his brakes. He testified that he was not wearing his seat belt and does not remember what happened after slamming on his brakes. He stated that he did not see the victim's truck until after the wreck had occurred. He also considered the accident to be unavoidable and precipitated by the presence of Thurman's truck.

On cross-examination, the defendant admitted that he could have consumed up to seven beers. He also acknowledged that Officer McQuarters told him that he was too impaired to drive but felt that he was capable of driving. He claimed that the Thurman truck did not have its lights on when he approached the curve. He also stated that he felt badly that he had driven after Officer McQuarters had told him not to drive.

I

In his first issue, the defendant contends that the evidence is insufficient to support his conviction for vehicular homicide. He asserts that there is insufficient proof of the necessary elements of the offense, specifically as to his acting recklessly and as to his intoxication causing the victim's death. He also attacks the state's proof of the victim's cause of death, claiming that it is circumstantial and that an autopsy should have been performed.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, <u>any</u> 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, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Vehicular homicide is defined, in pertinent part, as "the reckless killing of another by the operation of an automobile . . . [a]s the proximate result of the driver's intoxication . . . ." T.C.A. § 39-13-213(a)(2). A reckless act occurs when a person:

> acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

T.C.A. § 39-11-106(a)(31). There is sufficient evidence from which the jury could conclude that the defendant acted recklessly. Within seven to ten minutes prior to the accident, Officer McQuarters instructed the defendant not to drive because, in McQuarters opinion, the defendant's ability to drive was impaired by his consumption of alcohol. Instead, the defendant chose to ignore this instruction and got behind the wheel of his truck. We conclude that these facts sufficiently show that the defendant consciously disregarded a substantial risk that would constitute a gross deviation from an ordinary person's standard of care.

Likewise, there is sufficient evidence that the victim died as a result of injuries sustained in the accident. Several witnesses testified that the victim was pinned beneath the defendant's truck, with the frame of the truck resting on the victim's head. Medical personnel testified that the victim was dead at the scene and that he died as a result of massive head, neck and facial injuries culminating in his skull being

crushed. As our supreme court has stated "[d]eath may be presumed to have been caused by apparent wounds, particularly when there is no suggestion in the record that the deceased died from any other cause than that relied on by the State." Cathey v. State, 191 Tenn. 617, 619, 235 S.W.2d 601, 602 (1951) (quoting Franklin v. State, 180 Tenn. 41, 44, 171 S.W.2d 281, 282 (1943)). The defendant also asserts that an autopsy should have been performed to determine the cause of death. There is no mandatory duty to perform an autopsy in a homicide case. See T.C.A. § 38-7-106. Furthermore, a district attorney's discretion to order an autopsy extends only to cases where the district attorney is of the opinion "that the cause of death cannot be adequately and safely determined in the absence of an autopsy." T.C.A. § 38-1-104(a). In this case, there was ample evidence of the victim's cause of death and the failure to perform an autopsy constitutes neither error nor prejudice.

Also, there is sufficient evidence that the accident was the proximate result of the defendant driving while intoxicated. Less than ten minutes before the accident occurred, the defendant was told not to drive after failing Officer McQuarters' field sobriety tests. Blood alcohol analysis of the defendant's blood revealed a blood alcohol content of .14 percent which is in excess of the statutory presumption for a determination that the defendant was driving under the influence. See T.C.A. § 55-10-408(b). The defendant's argument that the presence of Mr. Thurman's vehicle, rather than any alleged intoxication on his part, caused the accident was presented to and rejected by the jury. We cannot speculate regarding other possible precipitating factors to this accident and, in the light most favorable to the state, there is sufficient evidence to show that the accident and death of the victim were the proximate result of the defendant's intoxication.

II

The defendant contends that the trial court improperly instructed the jury relative to the definition of proximate result or proximate cause under the vehicular homicide statute. After almost two hours of deliberations, the jury returned to the courtroom and requested a definition of proximate result. The trial court informed the parties that he would charge the pattern jury instruction relative to the civil definition of proximate result, unless they had a "better one." Defense counsel stated that he did not think that was the proper definition, but he had no other one to offer. The trial court instructed the jury as follows: "[t]he specific definition of proximate cause under our law is a result which, in the natural and continuous sequence, is a product of an act occurring or concurring with another which had it not happened the result would not have occurred." The defendant complains that the charge is archaic, confusing and makes no mention of foreseeability of the event or a break in the chain caused by independent intervening causes.

The instruction given by the trial court is identical to the definition of proximate result contained in the pattern jury instructions for vehicular homicide. See T.P.I. -- Crim. § 7.08 (3d ed. 1992). Also, we believe that the full instructions regarding the offense of vehicular homicide sufficiently apprise the jury of the effect of the existence of an independent, intervening cause and of the extent of awareness required of the defendant to constitute a culpable mental state.

In criminal cases, the trial court has a duty to charge the jury on all of the law that applies to the facts of the case. State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992). Anything short of a complete charge denies a defendant his constitutional right to trial by a jury. State v. McAfee, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). However, the fact that instructions could have been more detailed does not render the instructions as given to be improper and, absent special requests therefor, a trial court

will not be held in error for not augmenting otherwise adequate instructions. We conclude that the instructions sufficiently informed the jury of the definition of proximate result as it relates to vehicular homicide.

III

The defendant contends that the trial court erroneously allowed John Harrison, the TBI toxicologist, to testify outside the area of his expertise. He claims that he was prejudiced by the witness' testimony regarding impairment at various blood alcohol levels.[1] Mr. Harrison testified that he was certified by the American Society of Clinical Pathology and that he had twelve years of clinical experience in addition to his five years with the TBI. He stated that he had performed over eight thousand blood alcohol analyses during his career. He testified that his analyses of the defendant's and the victim's blood samples revealed a .14 percent blood alcohol content for each.

The state sought to elicit Mr. Harrison's opinion regarding the effects of alcohol on individuals. In a jury-out hearing, he testified that he has worked on two separate studies that examined the effects of alcohol on various individuals. He stated that one of the purposes of the studies was to examine the effects of alcohol upon an individual's ability to drive safely. He stated that he has experience based upon his review of various literature and studies, as well as his personal experience with the two studies. On cross-examination, he admitted that he was not a doctor and that any opinion he might offer was based upon estimates of the effects of alcohol on the average individual. The trial court held that he met the standards of Rule 702, Tenn. R. Evid., and allowed his testimony.

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[1]Although not raised as a separate issue, the defendant also complains about the trial court not giving the jury "the limiting instruction as to expert and opinion testimony." The defendant provides no more explanation than that and we note that his motion for new trial does not, in any manner, address this complaint. Also, when the parties were asked by the trial court about any objections or special requests regarding the jury instructions, none were offered by the defendant. The nonaction in this case amounts to a waiver. In any event, we do not consider, absent request, the trial court's failure to instruct the jury about how to receive expert testimony or opinion evidence to be error in this case.

Before the jury, Mr. Harrison testified that an average person with a .14 percent blood alcohol content would be impaired and that "most of the individuals [in the studies] began to fail these tests before the .10 level." On cross-examination, he was asked whether his opinion that an individual with a .14 blood alcohol level would be impaired was based in part upon the particular characteristics of the individual and he replied that "[a]ll individuals are impaired by the time they reach a .10." After making this statement, defense counsel questioned Mr. Harrison extensively regarding the variables that may affect a blood alcohol reading, including the effects of time. He admitted that his analysis of the defendant's blood reflected its content at the time the blood was taken, 1:05 a.m., approximately an hour and a half after the accident occurred. He stated that the test does not reflect what the defendant's blood alcohol content was at the time of the accident and that he would need more data in order to determine the defendant's blood alcohol content at the time of the accident.

The decision to admit expert testimony is reserved to the discretion of the trial court and will not be disturbed on appeal absent an abuse of such discretion. State v. Cazes, 875 S.W.2d 253, 263 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 743 (1995). Rule 702, Tenn. R. Evid., permits opinion testimony by a witness "qualified as an expert by knowledge, skill, experience, training, or education." Mr. Harrison's testimony in the jury-out hearing demonstrated his general knowledge and experience relative to the effects of alcohol on individuals. He testified regarding estimates of the effects of alcohol on an average individual based upon his experience and knowledge of various studies in which he had personally participated. He admitted that he could not give an estimate of the effects of alcohol on the defendant, in particular, without further data and testing. We conclude that the trial court did not abuse its discretion in admitting this testimony.

IV

The defendant's final contention is that his four-year sentence is excessive and that he should be placed on probation. The defendant has failed to include a transcript of the sentencing hearing as part of the record on appeal. It is the duty of the appellant to prepare a complete and accurate record relating to the issues and "absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue." State v. Ballard, 855 S.W.2d 557, 561 (Tenn. 1993); see T.R.A.P. 24(b). Instead, we must presume conclusively that the ruling of the trial court was correct. State v. Brown, 756 S.W.2d 700, 705 (Tenn. Crim. App. 1988).

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

_____
Joe B. Jones, Judge

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John H. Peay, Judge