IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9507-CC-00199**
	)	
Appellee,	)	
	)	
	)	**CUMBERLAND COUNTY**
VS.	)	
	)	**HON. LEON BURNS, JR.**
RONNIE RAY HOOVER,	)	**JUDGE**
	)	
Appellant.	)	(Vehicular Homicide by Intoxication
	)	and Vehicular Assault)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF CUMBERLAND COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Ronnie Ray Hoover was convicted by a jury of vehicular homicide by intoxication and of vehicular assault. For the vehicular homicide, the jury imposed a $10,000 fine and for the assault, a $3,000 fine. As a Persistent Range III offender, Appellant received concurrent sentences to the Department of Correction of fifteen years for the homicide and twelve years for the assault. On appeal, Appellant challenges only the sufficiency of the evidence.

We find that the evidence supports the jury's verdict and affirm Appellant's convictions.

These convictions are the result of a motor vehicle collision which occurred at approximately 5:20 p.m. on Sunday August 15, 1993, on Shotgun Road--an asphalt road in southwest Cumberland County. Appellant was traveling west in his pickup truck when he made a left turn to go into his driveway. In doing so, Appellant's vehicle was struck by an east-bound motorcycle carrying two teen-age boys. Michael Frazier, the seventeen-year-old driver of the motorcycle, was transported to a nearby hospital where he soon died of an aortic rupture caused by the collision. John Kelley, one of Michael Frazier's best friends, was the passenger on the motorcycle. As a result of his injuries, Mr. Kelley was hospitalized for three or four days during which time surgery was performed on his knee and ankle.

At trial, Mr. Kelley testified that he and Mr. Frazier had been riding on the motorcycle all day long. Prior to the wreck, Mr. Frazier had insisted that they stop by Mr. Kelley's home so that Mr. Kelley could change into long pants and long sleeves which afforded more protection in case of a wreck. According to Mr. Kelley, at the time of the collision, the motorcycle was traveling at an especially slow speed--about 30 to 35 miles per hour--due to the potholes on the road. Mr. Kelley remembered that Mr. Frazier waved as they passed an antique black car immediately before the crash. He was certain that Mr. Frazier would not have lifted his hand to wave had they not been going fairly slowly. Though Mr. Kelley testified that he did not remember the motorcycle's brakes being applied before the collision, he did assert that Mr. Frazier was driving safely, that the motorcycle headlight was on, and that both passengers were wearing helmets.

Several people witnessed Appellant's truck and the motorcycle either immediately before, during, or after the accident. Boyd Neeley, who lived on Shotgun Road approximately a quarter mile from the scene of the accident, testified that he saw Appellant pass by in a Chevrolet truck around 5:00 or 5:20 p.m. on August 15, 1993. Mr. Neeley said that Appellant was following an antique black car and both vehicles were traveling fast. Mr. Neeley, who knew Appellant well and was even related to him, stated that Appellant was driving faster than he usually did. About four or five minutes after the cars passed, Mr. Neeley heard the crash.

The owner of and the passenger in the 1950 black Plymouth automobile which was traveling on Shotgun Road on August 15, Arnold Humble, testified that around 5:00 or 5:20 in the afternoon, he and his friend Helen Price, who was

driving, heard a crash after passing two boys on a motorcycle. Upon immediately returning to the scene of the accident, they found the boys lying on the ground. Both Mr. Humble and Ms. Price testified that they witnessed Appellant exit his truck and walk toward his house without stopping to check on the boys. They both noticed that Appellant carried into the house a rifle and what looked like a Mason fruit jar. Ms. Price observed that the jar was half full of clear liquid.

Ms. Price testified that she was driving the antique car at a speed of approximately 35 miles per hour and Mr. Humble confirmed that the car was traveling between 35 and 40 miles per hour. Though Mr. Humble testified that he was unable to estimate the speed of the motorcycle, he opined that the boys were not driving recklessly. He remembered that the motorcycle's headlight was on and that the boys were wearing helmets. Mr. Humble did not notice the boys wave at him when they passed; however, Ms. Price did recall that the passenger waved and the driver tilted his hand up.

Catherine Frazier, Appellant's wife at the time of the accident, had spent part of the morning of August 15 with Appellant. She testified that Appellant took her home around 9:30 or 10:00 a.m. before he began drinking a six-pack of beer that he had with him. The next time Ms. Frazier saw him was about five or ten minutes before the crash at her home, and she could tell that he had been drinking. When asked at trial if Appellant was drunk, Ms. Frazier responded that she did not "know. There's different stages of being drunk. . . [H]e hadn't drunk near as much as I've seen him drink." However, she later testified that Appellant was under the influence of alcohol on the afternoon of the accident. She testified that she had lived with Appellant for about two years and that she knew when he

was under the influence and when he was not. Her opinion was based on the fact that Appellant, when intoxicated, was much more talkative than usual.

Ms. Frazier, along with some members of her family, was out in her yard when the accident occurred. She saw the driver of the motorcycle go up in the air upon impact. Ms. Frazier said that she ran to the scene of the accident and said to Appellant "something to the effect, '[L]ook what you've done,' or something." She testified that Appellant exited his vehicle carrying nothing and went straight over to see about the injured boys. She testified that she did find a quart Mason jar and three bottles of beer in the bedroom of her home. She poured out the beer and the clear liquid in the completely full Mason jar. Ms. Frazier testified that Appellant did not drink anything after the accident-- "They wouldn't let him have a drink of water, or Pepsi, or a cigarette, or nothing."

Appellant's friend Grady Vaughn Lewis had been with Appellant for three or four hours on the day of the accident. Mr. Lewis testified that Appellant had come to his house around 12:00 noon appearing to be sober. Once the men were together, they did take a "drink or two" of Jim Beam. Mr. Lewis later stated that he was not sure if Appellant had anything to drink and still later that Appellant took two or three sips. He said that they "didn't drink very much at all, either one of us. There wasn't but about a half a pint gone out of [the fifth bottle]."

There was an abundance of testimony from police officers who came to the scene of the accident. When Eddie Hedgecoth, a chief deputy sheriff, arrived at the scene, he found the truck, the motorcycle, and the two victims lying in the road at the entrance of Appellant's driveway. Appellant, who was standing in his

yard about 300 feet away from the accident, readily admitted that he had been driving the truck. Deputy Hedgecoth testified that Appellant smelled of an intoxicant and that, after talking to Appellant for five or ten minutes, he concluded that Appellant was under the influence.

Sergeant Ted Swafford of the Tennessee Highway Patrol testified that he too noticed the odor of alcohol on Appellant. When talking to Appellant at the scene, Sergeant Swafford observed that Appellant would not talk to him without leaning against something. He assumed that alcohol was affecting Appellant and ordered a blood alcohol test.

Trooper Scott Mathews, also of the Tennessee Highway Patrol, testified that after discovering that Appellant's driver's licence had been suspended, he placed Appellant under arrest. Though he noticed that Appellant smelled like alcohol, he recorded on his accident report that Appellant's ability to drive was not impaired. After his investigation of the scene, Trooper Mathews noted that contributing to the collision were the facts that Appellant was on the wrong side of the road and that he failed to yield to the oncoming motorcycle before making a left turn. It was the trooper's opinion that Appellant had been in the process of making a "long lazy turn into the driveway" when the collision occurred. The accident scene indicated to him that the motorcycle was being driven within a reasonable speed on the correct side of the road.

Trooper Mathews testified that although Appellant denied drinking, he was transported to the hospital as soon as possible to have his blood drawn for an alcohol test. The trooper was with Appellant when his blood was drawn around

7:34 p.m.-- two hours and fourteen minutes after 5:20 p.m., the time of the collision. Trooper Mathews testified that Appellant's level of intoxication appeared to slightly increase during the two and a half hours that he was with Appellant that evening.

Highway Patrol investigator Tommy Calahan testified that the motorcycle would have been visible by Appellant for 300 feet from where he was turning into his driveway. Trooper Harold Walton, also of the Tennessee Highway Patrol, testified that it would have taken the motorcycle, traveling at the different speeds of 30, 35, and 40 miles per hour 6.82, 5.84, and 5.11 seconds, respectively, to travel from the point that it would have first come into view by Appellant 300 feet to the point of impact. In 2.8 seconds Appellant's truck, traveling at 10 miles per hour, would have moved 40.75 feet which is four times the distance needed to cross the nine-foot width of oncoming lane of traffic. In other words, according to Trooper Walton's calculations, had Appellant pulled up and made a proper turn at a time that the motorcycle was within view, Appellant had ample time to make it into his driveway. The trooper testified that with a proper turn, there was no reason for Appellant to have had an accident unless he failed to look for and see the motorcycle.

Jerry Maine, a forensic chemist with the Tennessee Bureau of Investigation testified as to the results of the blood alcohol tests of the involved parties. He stated that the blood from the victim Michael Frazier was negative for alcohol. Appellant's blood alcohol tested at .17 percent. Mr. Maine, who had observed people at varying blood alcohol levels in controlled drinking studies, opined that most people would be impaired at .17 percent. He also testified as to some

general information regarding the rate that blood alcohol content decreases over a given period of time. He stated that the statistical average for this decrease is .018 percent per hour.

The defense presented proof from only one witness, Landon Wyatt, the brother of Catherine Frazier. Mr. Wyatt testified that he was out in Appellant's yard at the time of the accident. From a distance of approximately fifty-five yards from the roadway, he saw the black Plymouth and the motorcycle pass each other and estimated the motorcycle's speed to be about fifty-five miles per hour--a speed which, as Mr. Wyatt testified, was consistent with what other people on the road traveled. In recent days, Mr. Wyatt had seen Mr. Frazier pass the house on a motorcycle at about this same speed. Mr. Wyatt testified that when Appellant exited his truck, he came over and knelt beside John Kelley. According to Mr. Wyatt, Appellant was not carrying a jacket or a gun or a jar of clear liquid when he first got out of the truck. However, because Mr. Wyatt went inside to call an ambulance taking five or six minutes to do so, he never saw Appellant leave the accident scene.

On appeal, Appellant challenges only the sufficiency of the evidence. Specifically, Appellant claims that the evidence fails to establish that his operation of the truck indicated that he was impaired. Also, Appellant asserts that there was insufficient evidence to show that he was actually intoxicated at the time of the accident as the blood alcohol test which was "the only significant evidence of intoxication was too remote in time from the accident."

This court must review the record to determine if the evidence adduced at trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Furthermore, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in that testimony are matters entrusted exclusively to the jury as the trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have determined that the essential elements of the crime were established beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 314-24 (1979).

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." Tenn. Code Ann. § 39-13-213(a)(2) (1991) (current version at Tenn. Code Ann. § 39-13-213(a)(2) (Supp. 1995)). A person commits vehicular assault if he or she, "as the proximate result of the person's intoxication . . . recklessly causes serious bodily injury to another person by the operation of a motor vehicle." Tenn. Code Ann. § 39-13-106 (1991). The code provides that 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.

Tenn. Code Ann. § 39-11-106(a)(31) (1991) (current version at Tenn. Code Ann. § 39-11-106(a)(31) (Supp. 1995)). Furthermore, "[i]f recklessness establishes an element of an offense and the person is unaware of a risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense." Tenn. Code Ann. § 39-11-503(b) (1991).

In this case, Appellant's challenge to the sufficiency of the evidence is limited to the questions of whether Appellant recklessly operated his vehicle and whether the subsequent collision which killed one victim and injured another was proximately caused by his intoxication. We find sufficient evidence proving that the collision was the proximate result of Appellant's being intoxicated while driving. There was testimony from Appellant's friend that they had spent the majority of the afternoon together during which they drank at least some liquor. Ms. Frazier, who was at that time Appellant's wife, testified that Appellant had a six-pack of beer which he was about to drink as early as 9:30 on the morning of the crash. When Ms. Frazier saw Appellant five or ten minutes prior to the wreck, it was her opinion that Appellant was under the influence of alcohol. She testified that, some time after the collision, she poured out some beer and Mason jar full of clear liquid which two witnesses saw Appellant carry from his truck into his home following the accident.

Three officers who were present at the scene of the wreck testified that, immediately after the collision, Appellant smelled of alcohol. Two of these officers thought that Appellant was intoxicated and one noted that Appellant

would not talk to him without leaning on something. Appellant places great reliance upon the testimony of a third officer who testified that Appellant was not impaired at the time of the collision. However, even this officer, Trooper Mathews, determined Appellant's blood alcohol content should be tested as soon as possible. In light of the other evidence that Appellant had been drinking and exhibited signs of being affected by alcohol, a reasonable jury could have rejected Trooper Mathews' testimony of his initial evaluation of Appellant and found that he was intoxicated beyond a reasonable doubt.

Analysis of Appellant's blood revealed a blood alcohol content of .17 percent which is in excess of .10 percent which, at the time of the accident, created a statutory presumption that a defendant was driving under the influence. See Tenn. Code Ann. § 55-10-408(b), amended by Tenn. Code Ann. § 55-10-408 (Supp. 1995) (providing, in cases arising after July 1, 1994, that .08 percent blood alcohol level creates a presumption and that .10 percent is conclusive proof that a defendant is under the influence).

As this Court has noted in State v. McKinney, 605 S.W.2d 842, 846 (Tenn. Crim. App. 1980), "[i]t would be virtually impossible for a sample of blood to be drawn until some time after the accident occurs." In that case, the Court held that "the jury properly inferred intoxication at the time of the offense from the results of a test of a blood sample taken about two and a half hours [after the crime]." Id.; see also State v. Jordan, No. 01C01-9311-CC-00419, 1995 WL 353524, at *3 (Tenn. Crim. App. June 13, 1995) (in a case where almost three hours passed from the time of the accident to the time when blood was drawn for tests, court stated that "[t]his time interval is generally pertinent to the weight of the evidence

and not to its admissibility"), perm. to appeal denied, (Tenn. 1996) (concurring in results only). In this case, an officer testified that Appellant's blood was drawn as soon as possible. Appellant was not given anything to drink or eat following the accident. Based on these circumstances and the authorities referenced above, we conclude that Appellant's blood-alcohol percentage was a factor on which a jury could base its decision that Appellant was intoxicated. We reject Appellant's contention that the blood sample taken from Appellant was too remote in time.

Lastly, there was sufficient evidence from which the jury could conclude that the defendant's drunkeness was the proximate cause of the reckless operation of his vehicle. Coupled with the evidence demonstrating intoxication, testimony revealed that Appellant was on the wrong side of the road and that he failed to yield to the oncoming motorcycle before making a left turn. An officer opined that Appellant was in the process of making a "long lazy turn into the driveway" when he hit the oncoming motorcycle. In addition, other officers testified that the motorcycle would have been visible by Appellant for 300 feet and that Appellant, had he made a proper turn into the driveway, would have had ample opportunity to cross the oncoming lane of traffic. The jury was certainly justified in concluding that Appellant's conduct created a substantial risk that constituted a gross deviation from an ordinary person's standard of care, and that his conduct was the result of his intoxication.

For the foregoing reasons, we affirm the judgment of the Cumberland County Criminal Court.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOHN K. BYERS, SPECIAL JUDGE