STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0477

State of Minnesota,
Respondent,

vs.

Carlos Viveros Colorado,
Appellant.

Filed February 3, 2014
Affirmed
Rodenberg, Judge

Ramsey County District Court
File No. 62-CR-12-5511

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Peter Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

On appeal from his convictions of criminal vehicular homicide and criminal vehicular operation, appellant Carlos Viveros Colorado argues that the evidence is

insufficient to convict him of operating a motor vehicle in a grossly negligent manner under Minn. Stat. § 609.21, subd. 1(1) (2010). We affirm.

FACTS

On July 5, 2012, appellant got off work around 12:45 p.m. and started to drive home in his Ford Expedition. While driving on Third Street in St. Paul, appellant crossed over into the oncoming lane of traffic, drove over the curb, and struck a fire hydrant. The collision caused the vehicle to begin rotating in a counterclockwise direction. The vehicle then struck a no-parking sign and bent it down before plummeting down a grassy hill.

Meanwhile, C.G. and E.V. had completed their summer-school classes for the day and were sitting on the grass under a tree outside Harding High School. They heard appellant's vehicle hit the fire hydrant. E.V. tried to jump out of the way but was struck on the back by the vehicle and pushed out of the way. C.G. was struck by the vehicle and died at the scene from what was later determined to be a "traumatic head injury due to truck-pedestrian collision." E.V. was taken to the hospital complaining of injuries to his hand, foot, and hip. The emergency room doctor noticed swelling but determined that E.V. had suffered no broken bones. E.V. testified at trial that, although appellant's vehicle came to a stop after hitting C.G., appellant tried to accelerate back up the hill. Appellant was unable to drive away. He then exited the vehicle and told E.V., "I tried to brake or something."

Appellant gave the police conflicting statements about having had numbness in his arms and legs before the incident. Police Officer Valerie Namen testified that appellant

initially told police that his left leg and right arm went numb as he was driving. He later said that it was his right leg that went numb, and then stated that both legs went numb. Appellant also said that it was his left arm that went numb. In one statement, appellant explained that the numbness began while he was still at work, but in other statements he said that the numbness began at different points on his drive home. Appellant told police that similar incidents of numbness had occurred on at least two prior occasions. At trial, appellant admitted that he had experienced intermittent numbness for "four or more months." The numbness would occur suddenly and last for five to ten minutes. It would go away after appellant rubbed the affected area. Appellant told police that "he was just hoping he could make it home" on July 5. Appellant "knew it was dangerous [to drive], but he had to get to work."

Regarding the events leading up to his vehicle leaving the roadway, appellant first told police that he swerved to avoid the street sign. Later, he told police that his foot got stuck on the accelerator because of the numbness, and so he was swerving to miss the parked cars, over-corrected, and then he was trying to miss the sign, hit the fire hydrant, saw the tree, swerved again to try and miss the tree and ended up hitting the young people. At trial, appellant testified:

> I tried to brake, but I could not. And my foot landed again on the accelerator. And the car accelerated, and I went into a panic. And that's when I lost—that happened in seconds. And then I don't know what happened. The panic that I was feeling—I did try to brake, but I could not.

A later inspection of the vehicle determined that the brakes were functioning and that the vehicle had no mechanical problems on the day of the accident.

At trial, one witness, H.C., testified that he saw appellant's vehicle drive over the center line four times before hitting the fire hydrant. H.C. estimated that the vehicle was travelling 40 to 50 miles per hour. Another witness, E.W., testified that appellant's vehicle was "out of control" before crossing the center line, hitting the fire hydrant, and going down the hill. E.W. testified that the vehicle was going significantly above the 30-mile-per-hour speed limit. E.W. saw no indication that appellant attempted to brake.

St. Paul Police Sergeant Gregory Gravesen performed a crash reconstruction. He testified that there was clear evidence of braking only when the vehicle hit the grass, and he was unable to find any evidence of swerving to avoid the fire hydrant. However, Sgt. Gravesen also testified that, once the vehicle started spinning and hit the grass, "I don't believe that any steering input is going to affect the trajectory of that vehicle. . . . I can't rule out the fact that there might have been some steering input during that sequence, but there was no evidence of that." Sgt. Gravesen opined that the minimum speed of the vehicle was 36 miles per hour, but he testified that the speed was probably higher than that. At the time the vehicle hit C.G., he calculated that it was travelling between 20 and 22 miles per hour.

Appellant was charged with criminal vehicular homicide for the death of C.G. and with criminal vehicular operation for the injuries sustained by E.V. Minn. Stat. § 609.21, subd. 1(1) (2010). Appellant waived a jury trial, and a court trial was held in November 2012. At trial, the only element of the charged offenses challenged by appellant was the

element of whether he drove in a grossly negligent manner.[1] After reviewing the evidence, the district court concluded that appellant had engaged in "grossly negligent behavior that resulted in the death of [C.G.] and bodily injury to [E.V.]"

In its memorandum, the district court explained that appellant "engaged in illegal, high-risk driving while suffering from a known and debilitating physical condition which had manifested itself during the two weeks and immediately prior to the devastating vehicular operation and homicide." The district court determined that appellant had experienced numbness on at least two prior occasions and that "he experienced a recurrence of the numbing problems" at work on the morning of the accident. The numbness recurred near the intersection of Highway 61 and I-494, and again when appellant drove on Third Street. When the numbness occurred on his drive home, appellant "ignored the symptoms and continued on to the scene of the accident without taking any corrective action." Furthermore, "[h]e inexplicably allowed his vehicle to veer at speeds increasing to more than 40 miles per hour." As a result, the district court found appellant guilty of both criminal vehicular homicide and criminal vehicular operation. This appeal followed.

[1] The state was required to prove that the death of C.G. and the injury of E.V. were caused by appellant having operated a motor vehicle in a grossly negligent manner. Minn. Stat. § 609.21, subd. 1(1) (2012); *see also* 10 *Minnesota Practice*, CRIMJIG 11.63 (2006) (identifying the elements for criminal vehicular homicide).

D E C I S I O N

When assessing "the sufficiency of evidence, we determine whether the legitimate inferences drawn from the facts in the record . . . reasonably support the jury's conclusion that the defendant was guilty beyond a reasonable doubt." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). "In reviewing a jury verdict, we view the evidence in a light most favorable to the verdict and assume the jury believed the state's witnesses and disbelieved contrary evidence." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) (quotation omitted). "We review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

"A person is guilty of criminal vehicular homicide or operation . . . if the person causes injury to or the death of another as a result of operating a motor vehicle . . . in a grossly negligent manner[.]" Minn. Stat. § 609.21, subd. 1(1). "Whether conduct constitutes gross negligence is a question for the trier of fact." *State v. Al-Naseer*, 690 N.W.2d 744, 751 (Minn. 2005). "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. . . . It is very great negligence, or the absence of slight diligence, or the want of even scant care." *Id.* at 752 (citing *State v. Bolsinger*, 221 Minn. 154, 159-60, 21 N.W.2d 480, 485 (1946)). Gross negligence requires "the presence of some egregious driving conduct coupled with other evidence of negligence." *State v. Miller*, 471 N.W.2d 380, 384 (Minn. App. 1991).

Here, the district court thoroughly set forth the basis for its determination that appellant had demonstrated "egregious driving conduct." *See id.* The district court determined that appellant failed to take corrective action when he experienced a recurrence of numbness. "He never pulled to the side of the road; attempted to use the unaffected left leg to brake his vehicle using his regular or emergency brakes; attempted to shift gears; or took any other action." Relying on H.C.'s testimony that appellant had weaved across the center line four times before finally hitting the fire hydrant and the fact that appellant increased his speed to well over the 30 mile-per-hour speed limit at the same time, the district court determined that appellant had the ability to control his vehicle. Viewing the evidence in a light most favorable to the verdict, these findings of fact are supported by the record and are sufficient to demonstrate that appellant engaged in egregious driving conduct.

In *State v. Iten*, we upheld a truck driver's conviction for criminal vehicular operation resulting in death when the driver failed to inspect his truck as required by law and failed to stop at a red light when he had sufficient time to do so. 401 N.W.2d 127, 128-29 (Minn. App. 1987). We determined that the failure to inspect and the failure to stop "displayed want of even scant care." *Id.* at 129 (quotation marks omitted). Under the *Miller* standard, the driver's failure to stop in *Iten* could be construed as "egregious driving conduct," and the failure to inspect the brakes could then provide the "other evidence of negligence." *See* 471 N.W.2d at 384.

Here, the district court determined that appellant's knowledge of his numbing condition provided the required "other evidence of negligence." *Id.* In *Iten*, the truck

driver drove after failing to inspect his brakes as required by law, and this failure "displayed want of even scant care." 401 N.W.2d at 128-29 (quotation marks omitted). Appellant drove his vehicle with the knowledge that he was prone to incidents of numbness and that such numbness had occurred on the morning of this incident. Appellant's decisions to attempt driving home with knowledge of his condition and to continue driving while experiencing an incident of numbness support the district court's determination that appellant displayed a "want of even scant care." *See Iten*, 401 N.W.2d at 128-29.

Appellant argues that this was an accident resulting from a medical emergency that caused him to lose control of his vehicle. But given appellant's knowledge that he had been experiencing incidents of numbness for "four or more months" and the fact that appellant had experienced more than one incident of numbness on the day of the incident, appellant's claim of a medical emergency fails. As determined by the district court acting as the trier of fact, appellant suffered from a medical condition that contributed to this tragic outcome, but appellant was aware of that condition and drove anyway.

The district court arrived at a thorough and well-reasoned determination that appellant's "egregious driving conduct was losing control of his vehicle so dramatically . . . and, the other evidence of negligence is testimony regarding his continuing to drive despite his knowledge that he was subject to intermittent disabling numbness." The district court properly applied the standard for gross negligence when determining guilt under Minn. Stat. § 609.21, subd. 1(1). *See Miller*, 471 N.W.2d at 384 (explaining that gross negligence requires "the presence of some egregious driving conduct coupled with

other evidence of negligence"). The record supports the district court's findings of fact, and those findings of fact support the verdict convicting appellant of criminal vehicular homicide and criminal vehicular operation. We therefore affirm.

Affirmed.