

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-248

MAY TERM, 2019

State of Vermont v. Michael J. Buxton*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 632-7-16 Wrcr
		Trial Judge: Timothy B. Tomasi

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction of operating a motor vehicle on a public highway in a negligent manner after defendant's vehicle struck a pedestrian, resulting in the pedestrian's death. Defendant argues that the court erred in denying his motion for acquittal, deeming admissible the fact that the pedestrian died as a result of his injuries from the accident, and permitting the pedestrian's father's testimony that, among other statements, the pedestrian had not expressed a desire to harm himself or to run into traffic. We reverse and remand for a new trial.

The parties stipulated to the following facts at trial. In the evening, defendant was driving a vehicle with his lights on while traveling westbound on Route 11 towards Chester. Defendant stopped at a red light. When the light turned green, defendant proceeded across the intersection. The pedestrian was crossing Route 11 towards a McDonald's on or near the crosswalk at the western end of the intersection. The pedestrian was wearing dark jeans, a dark green hooded sweatshirt, a hat, and blue and white shoes. The pedestrian had earphones but it was not clear whether they were in use. The pedestrian had alcohol in his system. There was a "do not walk" signal for the pedestrian and the overhead streetlamp nearest the crosswalk was not working. Defendant's vehicle struck the pedestrian at approximately 8:16 p.m. The speed limit was 35 mph and defendant was going 20-28 mph. Defendant was not using his telephone for calling or texting at the time of the collision. Defendant was not impaired by alcohol and there was no suspicion of drug use or impairment. Defendant stopped immediately after the collision and appeared shaken and remorseful. Defendant's radio was operational.

Prior to trial, defendant filed a motion in limine seeking to exclude certain evidence including the fact that the pedestrian died as a result of his injuries. Defendant argued that the pedestrian's death was not relevant to any element of the offense and was highly prejudicial. The State countered that the pedestrian's death was relevant to the force of the collision and would help explain to the jury why the pedestrian was not testifying. The court denied the motion, concluding that the impact on the pedestrian and the force involved were relevant to evaluating defendant's negligence. The court also noted that the instructions could limit concerns about potential prejudice. The court noted that excluding the evidence could result in confusion to the jury regarding the absence of the pedestrian at trial.

At trial, the State presented testimony from several witnesses. These included: a witness who arrived at the scene after the accident occurred; a state police officer, who did a reconstruction of the accident; the Springfield police officer who responded to the accident; a witness who was going through the McDonald's drive through at the time of the accident; a witness who was traveling through the intersection from the opposite direction; and the pedestrian's father. Some witnesses described that the pedestrian tried to stand after being hit. The witness traveling through the intersection testified that the pedestrian was walking slowly through the intersection and passed in front of his truck. He stated that he heard a car on the opposite side of the intersection accelerate rapidly and "[i]t was loud. It startled me it was that loud." The witness continued by saying that it sounded "like somebody floored it," that the car was "accelerating pretty—pretty well through the intersection" and the car did not "let off the gas at all until he hit him." He stated that the pedestrian did not look up before he was struck and the car did not slow down at all. The accident reconstructionist testified that pedestrian had to cross three lanes of traffic before the collision took place in the fourth lane. He testified that the pedestrian travelled forty-seven feet from the point of impact to where he came to rest. He explained that he estimated a speed range of 20-28 mph for defendant's vehicle at the time of impact based on normal and rapid acceleration rates. He also stated that speed could be inferred from the extent of damage and that a head injury such as occurred in this case is indicative of a speed of 25-30 mph. At trial, video footage of defendant being interviewed by a Springfield police office was played for the jury. In the video, defendant states that he did not see the pedestrian at all and that he did not know if the pedestrian was running. He explained that the light turned green and he thought he was "golden." He stated that his first memory of the accident was that he was attempting to turn his radio on. He stated he went to turn on the radio and then saw a shoe. He explained that he had to look down to turn on the radio because "it's a weird radio."

At the close of the State's case, defendant moved for judgment of acquittal, arguing that the evidence was insufficient to establish criminal negligence. The court denied the motion. The court explained that viewing the evidence in a light most favorable to the State, the facts were that defendant accelerated quickly through the intersection, that other operators were able to see the pedestrian, and that defendant looked down at the radio while traveling through the intersection. The court concluded that this evidence was sufficient to establish that defendant failed to exercise due care. The jury found defendant guilty. Defendant filed this appeal.

On appeal, defendant first argues that he was entitled to judgment of acquittal because the evidence did not support the verdict. Defendant claims that the accident reconstructionist admitted he did not know whether a driver across the intersection from the pedestrian could have seen the pedestrian. According to defendant, this establishes as a matter of law that defendant could not have been negligent because he could not have seen the pedestrian or reacted to prevent the accident.

"Our standard for reviewing a denial of a V.R.Cr.P. 29 motion for judgment of acquittal gauges whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Couture*, 169 Vt. 222, 226 (1999) (quotation omitted). Such a motion will be granted "only if the prosecution has failed to put forth any evidence to substantiate a jury verdict." *Id.*

Here, to establish a prima facie case, the State was required to show that defendant operated his vehicle "in a negligent manner." 23 V.S.A. § 1019(a). The statute incorporates an ordinary negligence standard as used to determine civil liability. *State v. Stevens*, 150 Vt. 251, 251 (1988). The State was not required to prove that had defendant not been distracted, he could have avoided

the collision. The State was only required to prove that defendant was not exercising due care. “Ordinary care is the level of care exercised by a careful and prudent person under like circumstances.” State v. Hawkins, 2013 VT 5, ¶ 16, 193 Vt. 297 (quotation omitted). The facts about the care with which defendant was driving immediately before the collision, when viewed in the light most favorable to the State, are as follows: defendant accelerated quickly into an intersection that included a pedestrian crosswalk; defendant diverted his eyes and attention away from the road to adjust his radio while entering the intersection; defendant did not slow down at all before colliding with the pedestrian; the pedestrian was walking in a cross walk; other operators were able to see the pedestrian crossing the road, and defendant’s vehicle hit the pedestrian with sufficient force to knock the pedestrian over forty feet from the point of impact. This was sufficient evidence to establish a prima facie case of negligence.

Defendant next asserts that the court erred in denying the motion in limine and admitting evidence that after the collision the pedestrian died as the result of the injuries he suffered in the accident. Defendant argues that any probative value of that evidence was substantially outweighed by the danger of unfair prejudice. As explained above, defendant filed a motion in limine, seeking to exclude this evidence at trial. The court denied the motion, reasoning that although the pedestrian’s death was not an element of the offense, it was relevant to demonstrating the location and mechanism of the collision and the force of the impact. The court concluded that the relevance was not outweighed by the danger of undue prejudice. The court noted that the jury would be instructed to make a decision based on the facts and not on emotion. The court also noted that, without the evidence, there was a danger of leaving the jury to speculate on what happened to the pedestrian. The court found that that it would be appropriate to allow the parties to voir dire the jurors about the pedestrian’s death to determine whether any juror would consider that fact for an inappropriate purpose.

We conclude that the court abused its discretion in denying defendant’s pretrial motion to exclude the fact that the pedestrian died as a result of injuries from the accident. See State v. Cameron, 2016 VT 134, ¶ 19, 204 Vt. 52 (“We review a trial court’s evidentiary rulings for abuse of discretion.”). Relevant evidence is any evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” V.R.E. 401. Here, pedestrian’s death was not relevant to any fact that was of consequence at trial. The court concluded that pedestrian’s death was relevant to demonstrating the location of the accident and the force of the collision. Certainly, the injuries the pedestrian sustained, as testified to by the accident reconstructionist, were relevant to demonstrating the force of the collision and the acceleration of defendant’s vehicle. Given, however, that pedestrian was not killed at the scene, the fact of his subsequent death did not add further relevant information. Also, this was not a charge where death resulting from the accident was an element the State was required to prove. The court’s concern about the jury’s possible confusion as to the pedestrian’s absence at trial could have been cured with an instruction.

Moreover, even assuming there was some relevance, any limited probative value was outweighed by the danger of unfair prejudice. See V.R.E. 403 (stating that relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice”). “Evidence is unfairly prejudicial if its primary purpose or effect is to provoke horror or punish the defendant, or to appeal to the jury’s sympathies.” State v. Kelley, 163 Vt. 325, 329 (1995). Here, the fact of the pedestrian’s death created a great risk of unfair prejudice because it could appeal to the jury’s sympathies and could cause a jury to find that defendant should be punished for causing the death of the pedestrian, even if it did not conclude that defendant was negligent. Therefore, we conclude that the court erred in denying the motion in limine.

We cannot conclude that the error was harmless. The fact of the pedestrian's death was used by the State in its recitation of facts and in its arguments to the jury. In its opening statement, the State explained that the jury would "learn that [the pedestrian] has passed away and that there is no opportunity to pass judgment on him for his role in this collision." In closing argument, the State argued that the jury could not "ignore the fact that the impact was sufficiently severe that it launched a real human being into the air and caused injuries that resulted in [the pedestrian's] death." Even though these were limited references to the death, because the fact of death was so inflammatory and created a great risk that the jury would base its verdict on improper motives, such as sympathy or a need to punish, we cannot say that the error was harmless beyond a reasonable doubt. See State v. Oscarson, 2004 VT 4, ¶ 30, 176 Vt. 176 ("For the error to be harmless, the reviewing court must find beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error.").

Finally, defendant contends that the court erred in permitting the pedestrian's father to testify and in not sanctioning the State for properly disclosing its witness list prior to trial. Because we are reversing and remanding for a new trial on other grounds, we need not reach these issues.

Reversed and remanded for a new trial.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice