STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0323

State of Minnesota,
Respondent,

vs.

Terry Lee Johnson,
Appellant.

Filed March 24, 2009
Affirmed
Stauber, Judge

Steele County District Court
File No. CR062108

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas L. Ruth, Steele County Attorney, 303 South Cedar, Owatonna, MN 55060 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of criminal vehicular homicide, appellant argues that (1) the district court's instruction on "gross negligence" failed to adequately distinguish between the meaning of gross negligence and ordinary negligence; (2) the evidence presented at trial was insufficient to prove that he operated his vehicle in a grossly negligent manner; and (3) the district court abused its discretion by declining to grant him a downward dispositional departure. We affirm.

FACTS

Appellant Terry Lee Johnson was involved in a single-vehicle accident in Steele County on October 28, 2006. The accident occurred while Johnson was driving eastbound on Southwest 28th Street, a rural road outside of Owatonna, with his friend E.L. The stretch of road near the accident scene includes a steep incline and railroad tracks that intersect the road at the top of the hill. The railroad crossing is conspicuously marked by signs.

Johnson's vehicle proceeded up the incline, became airborne as it crossed the railroad tracks, and skidded across the road before colliding with a driveway rock embankment. Upon impact with the embankment, the vehicle flipped and landed on its roof. E.L. was ejected from the vehicle and pronounced dead at the scene.

Johnson was charged with criminal vehicular homicide in violation of Minn. Stat. § 609.21, subd. 1 (2006). At trial, the state elicited testimony from several witnesses regarding the circumstances and cause of the accident. C.H., an eyewitness to the

accident, testified that he was walking along Southwest 28th Street near the railroad crossing when he heard a vehicle accelerating in the distance. Because the vehicle was approaching the incline, C.H. assumed the driver was planning to "try to jump the tracks." A short time later, he heard a loud noise as the vehicle crossed the tracks, a moment of silence as the vehicle became airborne, and another "hard slam" as it returned to the ground. C.H. testified that the vehicle proceeded to "fly sideways" past him and made loud screeching noises as it skidded across the road. He estimated that the vehicle was three-quarters into the westbound lane and came within a few feet of him as it passed. C.H. further testified that the roadway was dry and free from obstructions at the time of the accident. Sergeant Greg Snyder, an accident reconstructionist with the state patrol, testified that tire marks left at the accident scene indicated that the vehicle crossed the railroad tracks, rotated sideways, and skidded for 227 feet before leaving the road and colliding with the embankment. The vehicle came to rest on its roof 42 feet from the point of impact with the embankment. Based on an analysis of the accident scene, Sergeant Snyder concluded that the vehicle was traveling a minimum of 54 miles per hour prior to the accident. The posted speed limit for eastbound Southwest 28th Street is 55 miles per hour, but reduces to 45 miles per hour immediately after crossing the railroad tracks.

E.L.'s body was found next to the vehicle. The coroner determined that he died from massive head injuries. After being informed of her son's death, E.L.'s mother, P.M., called Johnson to discuss the accident. P.M. testified that Johnson told her they "were just out for a cruise" and mentioned that he and E.L. would regularly go for a

"loop" along this stretch of road. Johnson claimed that the accident occurred because he was unable to control the vehicle after it crossed the railroad tracks and became airborne. According to P.M., Johnson believed he had been speeding and estimated he was driving 70 to 80 miles per hour as he crossed the tracks. Johnson also allegedly told P.M. that he was aware he was approaching the tracks, but did not reduce his speed.

P.M.'s testimony regarding the speed of the vehicle was also corroborated by Johnson's father, who testified that his son acknowledged driving approximately 70 miles per hour at the time of the accident. Sergeant Snyder agreed that a speed of 70 to 80 miles per hour was consistent with the results of the accident reconstruction. Sergeant Snyder also posited that such speeds, in combination with the acute incline leading up to the railroad tracks, could have caused the vehicle to become airborne.

At the close of evidence, the district court instructed the jury that the offense of criminal vehicular homicide required the state to prove beyond a reasonable doubt that Johnson caused E.L.'s death by operating a vehicle in a grossly negligent manner. With the agreement of defense counsel and the state, the court informed the jury that "[g]ross negligence is more than ordinary negligence and is defined as very great negligence or absence of even slight care." During deliberations, the jury asked the court for a "more extensive, detailed definition of gross negligence." The district court denied the request, concluding that further definition would only lead to confusion.

The jury subsequently found Johnson guilty of criminal vehicular homicide. Johnson moved for a judgment of acquittal or a new trial. The motion was denied. This appeal followed.

D E C I S I O N

I.

To convict Johnson of criminal vehicular homicide, the state was required to prove, among other things, that Johnson caused the death of E.L. by operating a vehicle in a grossly negligent manner. *See* Minn.Stat. § 609.21, subd. 1(1) (2006); 10 *Minnesota Practice*, CRIMJIG 11.63 (2006). Johnson argues that the jury instruction defining "gross negligence" was inadequate and failed to comport with the model jury instructions or case law.

District courts have broad discretion in selecting the language in jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). But the instructions must state all matters of law necessary for the jury to render a verdict. Minn. R. Crim. P. 26.03, subd. 18(5). On appeal, this court reviews the instructions in their entirety to determine whether they fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). If the instructions correctly state the law in language that can be understood by the jury, there is no reversible error. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998).

Johnson concedes that he did not object to the instruction when it was originally proposed by the district court. A defendant who fails to object to jury instructions at trial generally forfeits the right to object on appeal. *See State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). "Nevertheless, a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998).

An error is plain if it is clear or obvious. *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). "Usually [plain error] is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

Johnson contends that the instruction presented by the district court was erroneous because it failed to properly distinguish gross negligence from ordinary negligence. He claims that the district court should have used language previously sanctioned by the supreme court to differentiate between these distinct degrees of negligence. Here, the district court instructed the jury that "[g]ross negligence is more than ordinary negligence and is defined as very great negligence or absence of even slight care." In comparison, the supreme court has quoted with approval the definition of "gross negligence" articulated in *Altman v. Aronson*, 121 N.E. 505, 506 (Mass. 1919). *See State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005). The *Altman* court defined "gross negligence" as follows:

> 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 an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary

> negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. . . . Ordinary and gross negligence differ in degree of inattention . . . .

121 N.E. at 506.

Johnson contends that the district court's definition failed to convey the "substantially higher degree of difference between negligence and gross negligence that is fundamental to the definition" in *Altman*. He argues that the language from *Altman* indicating that gross negligence is "substantially and appreciably higher in magnitude" and "materially more want of care" would have more accurately described the degree of culpability necessary to convict him of criminal vehicular homicide.

We disagree. Though the *Altman* definition is more expansive in scope and painstakingly defines "gross negligence" in a myriad of ways, the instruction provided by the district court here is an accurate statement of law. *See id.* (stating that gross negligence "is very great negligence . . . or the want of even scant care."); 10 *Minnesota Practice*, CRIMJIG 11.63 (2006) (defining "gross negligence" as "very great negligence or without even scant care.") The language utilized by the district court in distinguishing between gross and ordinary negligence is also identical to a definition previously adopted by this court. *See State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. App. 1996) (providing that "gross negligence is more than ordinary negligence, and has been defined as very great negligence or absence of even slight care." (quotation omitted)), *review denied* (Minn. Apr. 16, 1996). Because no error resulted from this instruction, Johnson is not entitled to relief on this basis.

Johnson also claims that the district court abused its discretion in denying the jury's request for further instruction regarding the meaning of "gross negligence." A district court's response to a jury's request for further instructions is reviewed for an abuse of discretion. *State v. Murphy*, 380 N.W.2d 766, 772 (Minn. 1986). Johnson argues that it was an abuse of discretion to deny the request for further instruction because it was apparent that the jury was confused about the meaning of the phrase. He notes that the jury asked for a dictionary while deliberating and indicated in a note to the court that it was uncertain about the level of culpability required to find gross negligence.

The record supports Johnson's contention that the jury had difficulty comprehending the meaning of the phrase "gross negligence." But the district court provided several rational reasons for its denial of the request. The court noted: (1) the original instruction was an accurate statement of law; (2) the jury could compare the definition of gross negligence contained in the instruction for criminal vehicular homicide with the ordinary negligence standard articulated in the instruction for the lesser-included offense of careless driving; and (3) another definition could potentially lead to more confusion because neither party would have the opportunity to argue its case under the new language. In light of these considerations, we conclude that the district court did not abuse its discretion in denying the request. *See* Minn. R. Crim. P. 26.03, subd. 19(3)(a) (providing that a district court shall give appropriate additional instructions in response to a jury's request unless the jury may be adequately informed by directing its attention to some portion of the original instructions).

II.

Johnson also argues that the evidence is insufficient to support his conviction. In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The credibility of witness testimony is within the exclusive province of the jury, *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990), and the reviewing court must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

To convict Johnson of criminal vehicular operation resulting in death, the state was required to prove: (1) the death of E.L.; (2) Johnson caused the death of E.L. by operating a vehicle in a grossly negligent manner; and (3) the act took place on October 28, 2006, in Steele County. *See* Minn. Stat. § 609.21, subd. 1(1); 10 *Minnesota Practice*, CRIMJIG 11.63 (2006). 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).

Johnson argues that the state failed to prove that he operated the vehicle in a grossly negligent manner because much of the evidence supports the conclusion that he

was travelling at or slightly above the posted speed limit at the time of the accident. He claims that, at most, the evidence is consistent with inadvertent speeding. We disagree. Reviewing the evidence in a light most favorable to the verdict, the state's theory that Johnson lost control of his vehicle after he made a conscious decision to travel well in excess of the posted speed limit in an attempt to jump the railroad tracks is supported by the evidence. According to the reconstruction performed by Sergeant Snyder and to the eyewitness testimony of C.H., Johnson drove his vehicle over the railroad tracks at a rate of speed that was significant enough to cause it to become airborne, rotate sideways, partially enter the oncoming traffic lane, skid for 227 feet, leave the road, collide with a driveway embankment, overturn, and land 42 feet from the embankment. The road conditions were dry at the time and the railroad crossing was conspicuously marked.

Though Sergeant Snyder could not provide an exact calculation of Johnson's speed, he did testify that Johnson was travelling a *minimum* of 54 miles per hour Johnson admitted to two witnesses, including his father, that he was probably travelling 15 to 20 miles per hour in excess of the speed limit at the time of the accident. He also told P.M. that he was familiar with the road and cognizant that he was approaching the railroad tracks, but did not decrease his speed before losing control of the vehicle. Further, C.H. testified that he could hear the vehicle accelerating as it approached the incline, which led him to believe that Johnson intended to jump the tracks. Despite Johnson's attempts at discrediting the state's evidence and characterizing his driving conduct as inadvertent, this evidence is wholly sufficient under Minnesota law for a jury to reasonably conclude that his actions were grossly negligent. *See, e.g.*, *State v. Tinklenberg*, 292 Minn. 271,

273, 194 N.W.2d 590, 591 (1972) (finding gross negligence where a defendant drove at excessive speed, was inattentive, and lacked control over vehicle); *Hegstrom*, 543 N.W.2d at 702-703 (finding evidence that defendant rear-ended victim while travelling at an excessive rate of speed and without applying the brakes on a roadway with good visibility and good conditions supported a conviction for negligent criminal homicide); *State v. Kissner*, 541 N.W.2d 317, 321 (Minn. App. 1995) (finding sufficient evidence of gross negligence where there was an unsafe pass, excessive speed, and inattention), *review denied* (Minn. Feb. 9, 1996).

III.

Finally, Johnson contends that the district court abused its discretion in declining to grant a downward dispositional departure because he is particularly amenable to probation. The district court must order the presumptive sentence "unless substantial and compelling circumstances" justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (Minn. App. 2007). "Whether to depart from the [sentencing] guidelines rests with the district court's discretion, and this court will not reverse the decision absent a clear abuse of that discretion." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a "rare" case will this court reverse a sentencing court's refusal to depart. *Kindem*, 313 N.W.2d at 7. Even if there are reasons for departing downward, this court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

The Minnesota Sentencing Guidelines provide a nonexclusive list of factors that a district court may use as reasons for granting a downward departure. Minn. Sent. Guidelines II.D.2.a. Amenability to probation is not listed, but the district court may impose probation "in lieu of an executed sentence when the defendant is particularly amenable to probation." *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). To assess a defendant's amenability to probation, the district court may consider the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Johnson emphasizes that the presentence investigation report recommended a stayed sentence and probation, and an independent psychological evaluation indicated that he was an appropriate candidate for community supervision. He also notes that he was only 19 years old at the time of the accident, his criminal record consisted of only a few traffic violations, he expressed remorse, and displayed a proper attitude while in court, and several friends and family requested that the court impose limited punishment.

We are sympathetic to the fact that this tragedy arose out of a single poor decision and that there is no evidence that Johnson's purpose in driving in this manner was to cause harm. Unfortunately, driving conduct of this nature is not uncommon for young adults and can have devastating consequences. But, although we appreciate the significant mitigating factors present here, the district court has provided valid reasons for rejecting Johnson's request. In denying the departure, the district court noted that only some of the evidence supported Johnson's claim that he was cooperative and remorseful. The court was also concerned about Johnson's prior traffic offenses, use of

marijuana, problems with authority, and antisocial behavior. Because the district court has broad discretion in deciding whether to depart, and because the court provided a rational basis for its decision, we conclude that the denial of the departure was not an abuse of discretion.

Affirmed.