ORIGINAL

Certification of Word Count: 2,825

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
District Court, Douglas County Honorable Nancy Hopf, Judge Case No. 05CR177	▲ **COURT USE ONLY** ▲
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. TRI NGUYEN, Defendant-Appellant.	Case No.: 07CA929
JOHN W. SUTHERS, Attorney General ALEXANDER C. REINHARDT, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5576 Registration Number: 34970 *Counsel of Record	

PEOPLE'S ANSWER BRIEF

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONS

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

The defendant, Tri Nguyen, appeals the judgment of conviction entered on jury verdicts finding him guilty of vehicular homicide – reckless driving, reckless vehicular assault, reckless manslaughter, reckless driving, and reckless endangerment. The judgment of conviction should be affirmed, and a limited remand for correction of the mittimus may be appropriate.

STATEMENT OF THE CASE AND FACTS

The defendant proceeded to trial on the charges of which he was convicted, including the lesser included offense of criminally negligent homicide (v. 1, p. 47; v. 2, p. 137).

At trial, Kathleen Yoho testified that on February 24, 2005, she saw the worst accident she's ever seen in her life (v. 6, p. 159). She testified that the accident involved a blue car and a silver car (v. 6, pp. 159-60), and she first noticed the blue car come up behind her very quickly while heading westbound on C-470 (v. 6, pp. 158-60). The blue car first attempted to pass her on the right (v. 6, p. 164), and after rapidly changing lanes two or three times, the blue car went onto the shoulder of the right lane, and turned back into the left lane and collided with the silver car (v. 6, p. 169). The silver car then darted across the median in a cloud

of dirt and debris (v. 6, p. 172), and collided with an oncoming vehicle (v. 6, p. 199).

The defendant admitted to driving the blue car, and to travelling at or around 80 miles per hour ("mph") when the accident occurred (v. 6, p. 223). Another eyewitness described the blue car as "out of control" (v. 6, p. 198). An accident reconstruction expert opined that the blue car colliding with the silver car caused the silver car to go through the median and collide with an oncoming vehicle (v. 7, pp. 82-89). The parties stipulated that the driver of the oncoming vehicle ("the deceased") died as a result of the injuries sustained in the collision (v. 7, p. 153), and the driver of the silver car ("the surviving victim") testified that he suffered severe injuries (v. 7, pp. 119-20).

The jury convicted the defendant of all charges (v. 2, pp. 249-59). Following the verdicts, the People conceded, and the court concluded that counts three, four, five and six merged with counts one and two and were therefore dismissed for sentencing purposes (v. 9, p. 18). The court imposed a four year sentence to be served in the custody of the Department of Corrections ("DOC") for vehicular homicide, to be served concurrently with a three-year DOC sentence for reckless vehicular assault (v. 2, p. 259).

This appeal followed.

SUMMARY OF THE ARGUMENT

First, the trial court properly excluded evidence of the victim's driving history because it was inadmissible under CRE 404(b) and was not admissible habit evidence under CRE 406. Second, because there was no evidence supporting the instruction, the trial court properly refused to submit to the jury the defendant's tendered instruction on the issue of whether the cable fence on the median was an independent intervening cause. Third, the evidence was sufficient to sustain the defendant's conviction for vehicular homicide. Finally, a limited remand for correction of the mittimus may be appropriate.

ARGUMENT

I. The trial court properly excluded evidence of the surviving victim's driving history.

First, the defendant argues that the trial court violated his right to present a defense and to confrontation when it denied admission of the surviving victim's driving history. Specifically, he argues that the surviving victim's driving history was admissible pursuant to CRE 404, CRE 405 and 406. This court should not be persuaded.

A. Standard of review.

"A trial court's rulings on evidentiary issues are reviewed for an abuse of discretion." People v. Stewart, 55 P.3d 107, 122 (Colo. 2002).

Assuming there is error where, as here, the defendant objects to the admission of evidence, but does not argue that the admission of the evidence violated his constitutional right to confrontation (v. 5, pp. 37-39), the standard of review of an appellate confrontation claim is for plain error. See People v. Vigil, 127 P.3d 916, 929 (Colo. 2006). Plain error must be obvious and substantial, and must so undermine the fairness of the trial so as to cast serious doubt on the reliability of the judgment of conviction. The defendant bears the burden of demonstrating plain error. Id.

Where the defendant lodges a contemporaneous objection to an evidentiary ruling on the same grounds he asserts on appeal, a non-constitutional harmless error standard of review applies. People v. Miller, 113 P.3d 743, 750 (Colo. 2005); Tevlin v. People, 715 P.2d 338, 341-42 (Colo. 1986). Under this standard, a conviction will be affirmed unless the error substantially influenced the verdict or impaired the fairness of the proceedings. Crim. P. 52(a); see, e.g., People v. Quintana, 665 P.2d 605, 612 (Colo. 1983).

B. Analysis.

CRE 404(b) provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To be admissible, similar transaction evidence must meet the following four-part test: (1) the proffered evidence must relate to a material fact in the case; (2) it must be logically relevant to the material fact; (3) the logical relevance must be independent of the inference that a person committed misconduct because of his bad character; and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. People v. Spoto, 795 P.2d 1314, 1318 (Colo. 1990). In addition, it must be established, by a preponderance of the evidence, that the person engaged in the prior misconduct. People v. Garner, 806 P.2d 366 (Colo. 1991).

CRE 405 provides methods of proving character, to the extent that character evidence is admissible under CRE 404. CRE 406 states that "[e]vidence of the habit of a person ... whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person ... on a particular

occasion was in conformity with the habit or routine practice." Habit evidence refers to a person's regular practice of responding to a particular kind of situation with a specific type of conduct. People v. T.R., 860 P.2d 559, 562 (Colo. App. 1993) citing McCormick's on Evidence § 190 at 574-75 (1984). In T.R., the court concluded that the trial court properly admitted evidence of the victim's cautious habits when regularly driving through the same intersection. Id.

Here, the defendant filed a motion seeking to admit evidence of the victim's prior traffic violations pursuant to CRE 404(b), 405(b) and 406 (v. 1, pp. 107-08; v. 5, pp. 41-52, 58-62). After taking the issue under advisement (v. 5, p. 62-63), the court concluded that evidence of the surviving victim's driving history was being offered as character evidence, and that its probative value was substantially outweighed by the risk of its unfair prejudice. The court further concluded that the surviving victim's driving record was not habit evidence linked to his behavior during the accident, but was instead inadmissible character evidence (v. 5, May 8, 2006 at pp. 13-16).

The court's ruling was not an abuse of discretion. Because the evidence did not concern the surviving victim's habit of responding to these specific circumstances (an accident) at this specific location, it was not admissible as habit evidence under CRE 406. Cf. T.R., 860 P.2d at 562. Furthermore, The defendant

did not demonstrate that the surviving victim's driving history was relevant for a reason independent of the inference that he was a "bad driver," and therefore, admission of the evidence was precluded under CRE 404(b) and 405.

Additionally, because the trial court properly precluded admission of this evidence under CRE 404, it did not violate the defendant's right to confrontation, or his due process right to a fair trial. See People v. Harris, 43 P.3d 221, 227 (Colo. 2002) (The Sixth Amendment right to confrontation and the Fifth Amendment right to due process of law require only that the accused be permitted to introduce all relevant and admissible evidence). Accordingly, there are no grounds for reversal.

II. The trial court properly rejected the defendant's tendered instruction on the issue of whether the cable fence on the highway median was an intervening cause.

The defendant also contends that the trial court erroneously refused to instruct the jury that the defective cable fence in the median of the highway, which failed to prevent the silver car's collision with an oncoming vehicle, could be an intervening cause of the eventual accident. This contention should be rejected.

A. Standard of review.

"Whether additional written instructions must be given which properly state the law and fairly and adequately cover issues presented is a matter committed to

the sound discretion of the trial court. The trial court's exercise of discretion will not constitute reversible error absent manifest prejudice or a clear showing of abuse of discretion." People v. Tweedy, 126 P.3d 303, 307 (Colo. App. 2005) quoting People v. Renfro, 117 P.3d 43, 48 (Colo. App. 2004).

Assuming there was error in instructing the jury, reversal will not be required if the error is harmless beyond a reasonable doubt. See People v. Fecht, 701 P.2d 161, 163 (Colo. App. 1985). For the error to be harmless under this standard of review, the reviewing court must be confident beyond a reasonable doubt that the error did not contribute to the verdict obtained. Griego v. People, 19 P.3d 1, 8-9 (Colo. 2001).

B. Analysis.

An intervening cause is an act of an independent person or entity that destroys the causal connection between the defendant's act and the victim's injury and thereby becomes the cause of the victim's injury. People v. Stewart, 55 P.3d 107 (Colo. 2002). Three elements must be satisfied to establish an independent intervening cause sufficient to relieve a defendant of responsibility for his or her conduct: (1) the defendant must not participate in the intervening cause; (2) the intervening cause is one but for which the death would not have occurred; and (3) the intervening cause must not have been reasonably foreseeable. People v.

Lopez, 97 P.3d 277, 282 (Colo. App. 2004). Simple negligence is foreseeable, while gross negligence, which is an extreme departure from the ordinary standard of care, is unforeseeable. Id.

The trial court must make the threshold finding as to whether there was sufficient evidence to support the affirmative defense of intervening cause. Id.

Here, the defendant tendered two instructions on intervening cause, arguing that the failure of the cable fence on the median to stop the silver car was an intervening cause, and that the surviving victim's prior drug use was also an intervening cause (v. 8, pp. 4-7). The trial court found that there was no evidence suggesting that the failure of the cable fence was not foreseeable, specifically, no evidence had been introduced about a duty to repair the fence (v. 8, p. 17). The trial court then found that the instruction related to the surviving victim's drug use was appropriate (v. 8, p. 17).

The record supports the trial court's ruling. No evidence was introduced suggesting that a person or entity was grossly negligent in the construction or maintenance of the fence, which would have made its failure to stop the silver car unforeseeable. Nor was any evidence introduced suggesting that the cable fence should have prevented this specific accident, making it unforeseeable that the silver car would have collided with the oncoming vehicle after breaking through

the cable fence. Accordingly, the trial court did not abuse its discretion when it concluded that there was insufficient evidence to support the defendant's independent intervening cause instruction as it related to the cable fence. See id. (because nothing in the record showed that the driver's actions were grossly negligent, the trial court properly declined the instruction on independent intervening cause).

III. There was sufficient evidence to sustain the defendant's conviction for vehicular homicide.

The defendant also argues that there was insufficient evidence upon which the jury could convict him for vehicular homicide. This argument fails.

A. Standard of review.

An appellate court reviews *de novo* the question of whether the evidence was sufficient to sustain a conviction. See Dempsey v. People, 117 P.3d 800, 807 (Colo. 2005).

B. Analysis.

When reviewing for sufficiency, the court must view the evidence, taken as a whole, and in the light most favorable to the People, to determine if the conviction was supported beyond a reasonable doubt. People v. Sprouse, 983 P.2d 771, 777 (Colo. 1999). The People must be given the benefit of every reasonable

inference which might be fairly drawn. People v. Taylor, 131 P.3d 1158, 1164 (Colo. App. 2005). In determining whether the evidence was sufficient to sustain a conviction, the law makes no distinction between direct and circumstantial evidence. People v. Taylor, 159 P.3d 730, 734 (Colo. App. 2006).

It is the fact finder's function to determine what weight should be given to all parts of the evidence and to resolve conflicts, inconsistencies, and disputes in the evidence. People v. Bastin, 937 P.2d 761, 765 (Colo. App. 1996); People v. Aalbu, 696 P.2d 796, 811 (Colo. 1985). Thus, an appellate court is not permitted to sit as a thirteenth juror and set aside a verdict because it might have drawn a different conclusion from the same evidence. People v. West, 724 P.2d 623, 631 (Colo. 1986). Where reasonable minds could differ, the evidence is sufficient to sustain a conviction. People v. Fuller, 791 P.2d 702, 706 (Colo. 1990).

Here, testimony at trial demonstrated that the defendant was driving "out of control," changed lanes two or three times at speeds of 80 mph, drove onto the shoulder of the highway, and then swerved into the surviving victim's car, causing it to cross the median and hit an oncoming vehicle, killing the driver. This evidence was sufficient to sustain the jury's conviction for vehicular homicide.

The defendant argues that evidence of the surviving victim's marijuana use and of his driving history, along with the defective cable fence, undermined the

jury's conviction. However, although the surviving victim's blood tests indicated prior marijuana use, he testified that he used it two or three weeks before the accident, and hadn't used it since (v. 7, p. 122). Evidence of his prior driving history was properly ruled inadmissible, and there was no evidence suggesting he was driving recklessly on that day, or that his actions, and not the actions of the defendant, caused the death of the deceased. Furthermore, there was no evidence introduced that, instead of the chain of events set in motion by the defendant's conduct, a defect in the cable fence was the cause of the death of the deceased. Accordingly, the defendant's arguments should be rejected, and the conviction should be affirmed.

IV. A limited remand to correct the mittimus may be appropriate.

The defendant also argues the mittimus must be amended removing the convictions for reckless driving, manslaughter and reckless endangerment. A limited remand for correction of the mittimus may be appropriate.

A. Standard of Review

Because whether two convictions merge requires the comparison and construction of the elements of criminal statutes, it is question of law which the court reviews de novo. See People v. Manzo, 144 P.3d 551, 554 (Colo. 2006).

B. Analysis

Section 18-1-408(1)(a), C.R.S. (2007) and merger principles preclude convictions for more than one offense if one offense is a lesser included offense of another crime for which the defendant has also been convicted in the same prosecution. People v. Leske, 957 P.2d 1030 (Colo. 1998). An offense is lesser included for purposes of merger when proof of the essential elements of the greater offense necessarily establishes all the elements required to prove the lesser offense. Section 18-1-408(5), C.R.S. (2006); Boulies v. People, 770 P.2d 1274 (Colo. 1989).

To determine whether one offense is included in another, the court compares the elements of the statutes involved and not the evidence at trial. Under this test, if proof of the facts establishing the statutory elements of the greater offense necessarily establishes all the elements of the lesser offense, the lesser offense is included for the purposes of § 18-1-408. People v. Carlson, 119 P.3d 491, 494 (Colo. App. 2004).

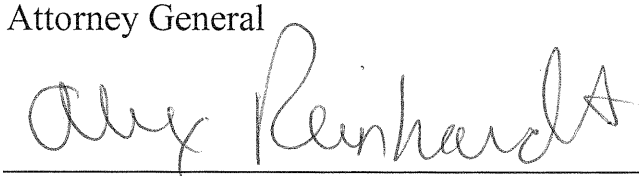
Here, the People conceded, and the trial court concluded that the offenses of reckless driving, manslaughter and reckless endangerment merged into the convictions for vehicular homicide and vehicular assault (v. 9, p. 18). Therefore, the defendant may not be separately punished for the aforementioned crimes. See

§ 18-1-408(1)(a), C.R.S. (2008). A limited remand to correct the mittimus may therefore be appropriate.

CONCLUSION

In light of the foregoing reasons and authorities, the judgment of conviction should be affirmed, and a limited remand for correction of the mittimus may be appropriate.

JOHN W. SUTHERS
Attorney General



ALEXANDER C. REINHARDT, 34970*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

AG ALPHA: DARR QEMA
AG File: Q:\AP\APREINAC\NGUYEN.AB.DOC

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 25th day of August 2008 addressed as follows:

Patrick J. Mulligan
1900 Grant Street, Suite 580
Denver, Colorado 80203