

[Cite as *State v. Moore*, 2009-Ohio-3766.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 22904
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CR-3700
v.	:	
	:	(Criminal Appeal from
DEXTER MOORE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 31<sup>st</sup> day of July, 2009.

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BROGAN, J.

{¶ 1} Dexter Moore appeals from his conviction and sentence on one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a).

{¶ 2} In his sole assignment of error, Moore contends the trial court erred in convicting him of the foregoing offense. He advances two arguments in support. First, he

challenges the legal sufficiency and manifest weight of the evidence to support his conviction. Second, he claims the trial court inadequately instructed the jury on the issue of recklessness.

{¶ 3} The present appeal stems from a fatal accident that occurred at approximately 2:40 p.m. on Friday, September 7, 2007 as Moore was driving on Derby Road in Jefferson Township. The State's evidence established that Moore reached a speed in excess of one-hundred miles per hour on a hilly, two-lane stretch of the road while arguing with his girlfriend, who was a front-seat passenger. The posted speed limit was thirty-five miles per hour. Due to his excessive speed, Moore's car went airborne over a hill and flew approximately one-hundred feet. He lost control when the car bottomed out after hitting the ground. The out-of-control vehicle struck and killed seventeen-year-old Julian Hill, who was standing in his own driveway after exiting a school bus. The impact disemboweled and dismembered Hill and launched his body thirteen feet up a tree located sixty feet from where he had been standing. Moore's car traveled another six-hundred and seventy-five feet before crashing into a ditch. Based on the foregoing incident, a jury convicted Moore of aggravated vehicular homicide. The trial court imposed a five-year prison sentence. This timely appeal followed.

{¶ 4} Moore first challenges the legal sufficiency and manifest weight of the evidence to support his conviction. His sole argument is that the State failed to prove he recklessly caused Hill's death. Moore contends his conduct constituted negligence, which only permitted a conviction for vehicular homicide, not aggravated vehicular homicide. In support, he argues that excessive speed alone is insufficient to prove recklessness. He then points to a lack of evidence that weather conditions were bad or

that he was under the influence of alcohol or drugs. Moore also maintains that he applied his brakes and swerved in an attempt to avoid hitting Hill. He denies losing control of his car and insists he was paying attention to the road. Moore also claims he was relatively unfamiliar with Derby Road and never had seen a school bus there.

{¶ 5} When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471. “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 6} Our analysis is different when reviewing a manifest-weight argument. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin*

(1983), 20 Ohio App.3d 172, 175.

{¶ 7} With the foregoing standards in mind, we conclude that Moore's conviction is based on legally sufficient evidence and is not against the manifest weight of the evidence. The jury found him guilty of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), which provides that no person, while operating a motor vehicle, shall recklessly cause the death of another. As Moore acknowledges, the only relevant difference between vehicular homicide and aggravated vehicular homicide is the culpable mental state. The former requires proof of negligence whereas the latter requires proof of recklessness. "One acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

{¶ 8} Moore contends excessive speed alone is insufficient to establish his recklessness and that no other facts or circumstances supported a finding of recklessness. We disagree. A driver's grossly excessive speed, particularly when combined with other factors, will support a finding of recklessness. *State v. Amerson* (Sept. 18, 1998), Montgomery App. No. 16529. In the present case, the State presented evidence of much more than mere speeding. The State's evidence established that Moore was traveling in excess of one-hundred miles per hour when he reached the hill on Derby Road and went airborne. When his car made contact with the road again, approximately one-hundred feet from the crest of the hill, it still was traveling nearly one-hundred miles per hour. Crash reconstruction expert Steve Gephart opined that the vehicle was out of control, and there was no evidence of braking by Moore before he struck the victim.

{¶ 9} In addition to Moore's grossly excessive speed, which was nearly three times the posted limit, the State presented evidence that Derby Road was a narrow, hilly, country road lined with homes and farms. Moore testified that he was not very familiar with the road, which further supports a finding of recklessness on his part.<sup>1</sup> In addition, Correnna White testified that she and Moore were arguing in the car just before the crash, which occurred at 2:40 p.m. on a Friday. According to White, he was extremely angry, yelling and pointing his finger at her, and not watching the road. Although Moore denied being distracted, the jury was entitled to reject this testimony and accept the State's contrary evidence.

{¶ 10} In our view, the evidence supports a finding that Moore acted recklessly by driving approximately one-hundred miles per hour and losing control on a narrow, hilly road with which he purportedly was unfamiliar, while being distracted in a heated argument with his girlfriend at a time of day when pedestrians or other vehicles were likely to be present. The jury's finding of recklessness is supported by legally sufficient evidence and is not against the manifest weight of the evidence. A rational trier of fact could have found the essential elements of aggravated vehicular homicide proven beyond a reasonable doubt, and the evidence does not weigh heavily against Moore's conviction. Accordingly, his first assignment of error is overruled.

{¶ 11} In his second assignment of error, Moore claims the trial court inadequately instructed the jury on the issue of recklessness. Specifically, he contends

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<sup>1</sup>The record contains other evidence, however, suggesting that Moore was familiar with Derby Road. But if this is true, the jury still could have found him reckless for driving at a grossly excessive speed on a road he knew to be narrow, hilly, and lined with homes.

the trial court erred in failing to give a requested instruction that speeding alone does not constitute recklessness.

{¶ 12} After initially refusing to give the requested instruction, the trial court reconsidered and advised that it would instruct the jury as follows:

{¶ 13} “You are instructed that excessive speed in the operation of a motor vehicle, in and of itself, is not sufficient to constitute an act of recklessness. However, excessive speed in combination with all other surrounding circumstances pertaining to the time and place and other conduct can constitute recklessness. These are matters for you to decide.” (Tr. Vol. V, p. 633).

{¶ 14} The trial court opined that the foregoing instruction, which it took from *State v. Barron*, Perry App. No. 05 CA 4, 2005-Ohio-6108, was a correct statement of law and was more “fair and balanced” than Moore’s “skewed” instruction that speeding alone does not constitute recklessness. (Id. at 634). Moore objected to the trial court’s proposed instruction. He expressed a preference for no instruction rather than the one the trial court proposed. (Id.). As a result, the trial court omitted any specific instruction about speeding and recklessness. It simply gave a standard instruction defining recklessness.

{¶ 15} “A trial court’s failure to give a proposed jury instruction is reversible error if the defendant demonstrates that the trial court abused its discretion, and that the defendant was prejudiced by the court’s refusal to give the proposed instruction.” *Walker v. Conrad*, Montgomery App. No. 19704, 2004-Ohio-259, ¶20, citing *Jaworowski v. Med. Radiation Consultants* (1991), 71 Ohio App.3d 320. “The trial court need not give a proposed instruction in the precise language requested by its proponent, even if it

properly states an applicable rule of law. The court retains discretion to use its own language to communicate the same legal principles.” Id. at ¶21, quoting *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 690-691. A defendant is entitled to have the essence of his proposed instruction given, however, if it is a correct statement of law, is pertinent to the evidence or material issues, and is not already covered in the trial court’s jury charge. *State v. Thornton*, Montgomery App. No. 20652, 2005-Ohio-3744, ¶46.

{¶ 16} In the present case, of course, the trial court did not refuse to give the essence of the requested instruction. Moore sought an instruction that speeding alone does not constitute recklessness. Conveying the same legal principle in slightly different words, the trial court agreed to instruct the jury “that excessive speed in the operation of a motor vehicle, in and of itself, is not sufficient to constitute an act of recklessness.”

{¶ 17} The real issue is whether the trial court abused its discretion by conditioning use of the foregoing instruction on the inclusion of an instruction that “excessive speed in combination with all other surrounding circumstances pertaining to the time and place and other conduct can constitute recklessness.” We see no abuse of discretion. This additional instruction was a correct statement of law. *Amerson*, supra. It also was more complete than the instruction requested by Moore. The trial court reasonably balanced the concept that speeding alone does not constitute recklessness with the concept that speeding plus other factors might constitute recklessness. It also proposed instructing the jury that “[t]hese are matters for you to decide.” Because the trial court’s instruction was complete and fairly balanced, it did not abuse its discretion in requiring Moore to choose between that instruction and no instruction. In response, Moore elected to forego an instruction on speeding and recklessness, advising the trial

court to “forget it.” Given that decision by Moore, we find no error in the trial court’s failure to instruct the jury about speeding and recklessness. Accordingly, the second assignment of error is overruled.

{¶ 18} Based on the reasoning set forth above, the judgment of the Montgomery County Common Pleas Court is affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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