IN THE COURT OF APPEALS 10/29/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00164 COA

THOMAS A. MILLER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

W.S. STUCKEY, JR.

ATTORNEYS FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: WAYNE SNUGGS, DEWITT T. ALLRED III

DISTRICT ATTORNEY: FRANK CARLTON

NATURE OF THE CASE: CRIMINAL - FELONY

TRIAL COURT DISPOSITION: DUI: SENTENCED FOR A PERIOD OF 5 YRS. PLACED ON SUPERVISED PROBATION UNDER THE DIRECTION OF MDOC (SEE OTHER RECORD INFORMATION)

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

Thomas A. Miller was convicted of aggravated DUI pursuant to section 63-11-30(4) of the Mississippi Code of 1972. He was sentenced to five (5) years, with the five-year sentence suspended. Feeling aggrieved, Miller appeals arguing (1) that the trial court erred in denying his motion for a directed verdict and (2) that the verdict of guilty was against the overwhelming weight of the evidence. Finding no merit in Miller's arguments, we affirm.

THE FACTS

On the night of January 22, 1993, four Mississippi Valley State University students were traveling on a rural road in Leflore County in a late model Mercury Cougar. The Cougar stopped on the side of the road so that some of its occupants could relieve themselves along the road. All of the occupants of the Cougar had gotten out of the car. The Cougar was parked partially in the road. At about the same time, Thomas Miller was traveling in the same direction in his 1966 Rambler as the Cougar, but slightly behind the Cougar. Miller was legally intoxicated while driving as his vehicle approached the parked Cougar. He registered a .16 blood alcohol content on an intoxilyzer machine one hour later.

When the students noticed the approaching Rambler, they all hurried to get back into the car. All made it back into the car, except for the driver, Terrence Goins. As he was preparing to enter the car, Miller's vehicle passed so closely to the left of the Cougar that it crushed the car door and Goins. It was estimated that Miller was operating his vehicle at forty to forty-five miles per hour as he hit Goins and the car door. Miller did not brake until after the impact. Goins died as a result of his wounds. Miller was tried and convicted of aggravated DUI without a jury in the Leflore County Circuit Court on January 18, 1994.

ARGUMENT AND DISCUSSION OF THE LAW

> I. WHETHER THE TRIAL COURT ERRED IN DENYING MILLER'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE FOR FAILURE OF THE STATE TO PROVE ANY NEGLIGENCE OF MILLER.

Miller argues that the State was unsuccessful in proving that he was negligent, and, therefore, he should have been granted a directed verdict. Our supreme court has stated that "[f]or review of the findings of a trial judge sitting without a jury, this [c]ourt will reverse 'only where the findings of the trial judge are manifestly erroneous or clearly wrong.'" *Amerson v. State*, 648 So. 2d 58, 60 (Miss. 1994) (citation omitted). Furthermore, this Court's standard of review of denials of directed verdicts is:

> In passing upon a motion for a directed verdict, all evidence introduced by the state is accepted as true, together with any reasonable inferences that may be drawn from that evidence, and, if there is sufficient evidence to support a verdict of guilty, the motion for directed verdict must be overruled.

Gray v. State, 549 So. 2d 1316, 1318 (Miss. 1989) (citing *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987)).

As reflected in the briefs, the parties disagree as to what level of negligence must be shown by the State in order to sustain a conviction based on section 63-11-30(4) of the Mississippi Code of 1972. In a case similar to the one before us now, our supreme court opined that "simple negligence is sufficient for a conviction pursuant to Miss. Code Ann. § 63-11-30(4) (Supp. 1994) (citation omitted) . . . [T]he statute (63-11-30(4) requires only negligence, not gross or culpable negligence." *Holloman v. State*, 656 So. 2d 1134, 1140 (Miss. 1995).

Our review of the record reveals sufficient evidence to support a verdict of guilty, and that the trial judge was correct in denying Miller's motion for a directed verdict. Finding no merit in this issue, we affirm.

> II. WHETHER THE VERDICT OF GUILTY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Miller also argues on appeal that the verdict of guilty was against the overwhelming weight of the evidence. This Court's standard of review is:

> The challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes [Mississippi Uniform Criminal Rule of Circuit Court Practice] 5.16. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

McClain v. State, 625 So. 2d 774, 781 (Miss. 1995). We hereby rely on the sound discretion of the trial court in affirming its denial of Miller's motion for a new trial. This issue is has no merit.

THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY OF CONVICTION OF AGGRAVATED DUI AND SUSPENDED SENTENCE OF FIVE (5) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND ORDER TO PAY RESTITUTION OF $4,160.00 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LEFLORE COUNTY.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.