

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HOSKINSON,

Defendant-Appellant.

UNPUBLISHED

March 4, 1997

No. 185220

Recorder's Court

LC No. 94-007664

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, and failure to stop at a serious personal injury accident, MCL 257.617; MSA 9.2317. The trial court sentenced defendant to concurrent terms of fifteen to twenty-five years' imprisonment for the murder conviction and forty to sixty months' imprisonment for the failure to stop conviction. Defendant appeals as of right. We reverse.

On July 3, 1994, defendant was driving a motor vehicle which struck and killed Miranda Andres while she was riding her bicycle in front of her house. Defendant was driving his car at a speed of approximately 60 mph in a residential area with a posted 25 mph speed limit. In addition, defendant was running stop signs. A subsequent breathalyzer test showed that defendant had a 0.22% blood alcohol level.

Defendant argues that the prosecutor abused his discretion in charging defendant with second-degree murder. We disagree. Defendant was originally charged with operating a vehicle under the influence of alcohol and/or blood alcohol content of 0.10% or more causing death, MCL 257.625(4); MSA 9.325. After the preliminary examination, the district court granted the prosecutor's motion to raise the charge to second-degree murder.

It would be a violation of the separation of powers for a court to second-guess whether a prosecutor has a "rational basis" or "good reason" for bringing charges under one applicable statute rather than another applicable statute. *People v Barksdale*, 219 Mich App 484, 488; ___ NW2d ___ (1996). Discretion is afforded the prosecutor by the fact that evidence is available to support a charge

under either statute. *Id.* That discretion is abused only if a choice is made for reasons that are “unconstitutional, illegal, or ultra vires.” *Id.* Courts thus review a charging decision under an abuse of power standard, questioning whether a prosecutor has acted in contravention of the constitution or the law. *Id.*

Here, as we explain *infra*, there was insufficient evidence to charge defendant with second-degree murder. However, there is no evidence that the prosecutor charged defendant with second-degree murder for reasons that were “unconstitutional, illegal, or ultra vires.” See *People v Baker*, 216 Mich App 687, 693; 551 NW2d 195 (1996), lv pending. The error came not in the prosecutor’s decision to charge defendant with second-degree murder, but in the district court’s decision to bind defendant over on that charge.

Defendant argues that there was insufficient evidence of malice to convict him of second-degree murder. We agree. When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *Id.*, p 689. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense, including the intent to kill. *Id.*

In order to prove malice to support a conviction of second-degree murder, the prosecutor must prove that the defendant possessed the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.*, p 690. For malice to exist to support a conviction of second-degree murder, the defendant must have a disregard for consequences almost certain to follow an action. *Id.*, p 691. In contrast, manslaughter merely requires disregard for possible consequences. *Id.*

The enactment of the OUIL causing death statute, MCL 257.625(4); MSA 9.2325(4), suggests a legislative presumption that an intoxicated driver who causes death, with no aggravating circumstances, does not possess the malice required for second-degree murder. *People v Goecke*, 215 Mich App 623, 631; 547 NW2d 338 (1996), lv gtd ___ Mich ___ (Docket No. ___, issued 1/28/97). Such aggravating circumstances can be found where there is evidence of malice other than the defendant’s intoxication. For example, in *People v Miller*, 198 Mich App 494, 496-497; 499 NW2d 373 (1993), the prosecution introduced evidence that the defendant drove recklessly to punish his girlfriend, who was sitting in the car with him. Similarly, this Court has found malice where the defendants were driving at high speeds to elude capture by pursuing police officers. See *People v Vasquez*, 129 Mich App 691, 694; 341 NW2d 873 (1983); *People v Goodchild*, 68 Mich App 226, 236; 242 NW2d 465 (1976). However, a defendant’s familiarity with the location of the accident and the local traffic conditions does not create a question of fact as to malice. See *Baker, supra*. Accordingly, the trial court erred by denying defendant’s motion for directed verdict on the charge of second-degree murder. *Id.*; *Goecke, supra*, p 632.

As to the remedy, in cases where the only error is a failure of proof on one element of the offense, it is sometimes permissible to remand for entry of a judgment of conviction on a lesser included

offense. *People v Borders*, 37 Mich App 769, 772; 195 NW2d 331 (1972). Several requirements must be met before such a disposition can be made: 1) the defendant must have been convicted of the offense with which he was charged, thus excluding the possibility that the jury verdict was the product of a compromise; 2) the new judgment of conviction must be for an offense which is a lesser included offense of the crime originally charged; 3) the element on which there has been a failure of proof must be an element which raises the greater offense above the lesser; and 4) the record must contain credible evidence which would support a conviction of the lesser offense. *Id.* Here, those requirements have been met as to involuntary manslaughter, MCL 750.321; MSA 28.553. Importantly, it is not necessary that the jury has been instructed on the lesser included offense. *People v Skowronski*, 61 Mich App 71, 78 n 5; 232 NW2d 306 (1975).

We vacate defendant's conviction of second-degree murder, and remand for entry of a judgment of conviction of involuntary manslaughter. *Baker, supra*, p 693.

/s/ Martin M. Doctoroff

/s/ Myron H. Wahls