

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 185220
Recorder's Court
LC No. 94-07664

JAMES HOSKINSON,

Defendant-Appellant.

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

SMOLENSKI, J. (dissenting).

I respectfully dissent.

If this case only involved evidence that defendant knew he was drunk, and that he ran a stop sign while speeding in an area with which he was familiar, then, being bound by *People v Baker*, 216 Mich App 687; 551 NW2d 195 (1996), and *People v Goecke*, 215 Mich App 623; 547 NW2d 338 (1996), *lv gtd* ___ Mich ___ (Docket No. 105878, issued 1/28/97); 1997 Mich LEXIS 32, I would agree that insufficient evidence of malice existed under current Michigan law. However, I believe that this case presents additional evidence of defendant's state of mind and other aggravating circumstances from which the jury could properly find malice in this case. See *Baker, supra* at 692; *Goecke, supra* at 632.

The evidence presented at trial indicated that defendant spent the day of July 3, 1994, drinking beer with some friends at the home of one of these friends. At approximately 7:00 p.m., defendant drove his friends to a local bar where they remained for approximately two hours. While at the bar, defendant drank beer and shots of liquor. When defendant and his friends left the bar, it was still daylight outside but starting to get dark. Defendant appeared drunk, and was staggering and stumbling. Defendant refused the offer of one of his friends to drive. While still in the bar's parking lot, defendant twice backed into the same parked vehicle. After leaving the bar, defendant traversed several side streets at speeds of approximately fifty to sixty miles per hour, at one point running a stop sign. Defendant's friends told defendant to slow down. One of the friends described defendant's driving as

“radical.” Still traveling at a high rate of speed, defendant eventually turned onto Joan Street and headed west back to his friend’s home.

Joan Street is a residential street running east and west with a posted speed limit of twenty-five miles per hour. After defendant turned west onto Joan Street, the next three crossstreets to intersect Joan Street are, respectively, McQuire Street, Marvin Street and Fellrath Street. The victim’s home was located on the south side of Joan Street at the intersection of Joan Street and Fellrath Street. “Speed dips,” variously described as “big,” or approximately six to eight inches deep, were located at almost every intersection throughout the victim’s neighborhood. Two such speed dips were located near the victim’s house. In particular, one speed dip was located at the intersection of Joan Street and Marvin Street. Defendant had driven down Joan Street numerous times and was thus aware of these speed dips.

Many people were outside that evening. At the intersection of Joan Street and Marvin Street, a vehicle also westbound on Joan Street and ahead of defendant was stopped at the stop sign posted at that intersection. Defendant was traveling at approximately fifty to sixty miles per hour as he approached Marvin Street while traveling westbound on Joan Street. Without stopping at the stop sign, defendant swerved into the eastbound lane and passed the stopped vehicle, and then immediately swerved back into the westbound lane of Joan Street because of another oncoming vehicle in the eastbound lane of Joan Street. Defendant hit the speed dip located at the intersection of Joan Street and Marvin Street, “bottomed out,” and lost control. Specifically, defendant hit the westbound curb, swerved left, and then swerved right. Defendant sideswiped a vehicle parked on the right side of Joan Street, and then went across the eastbound lane, over the curb, and across some grass where he hit the victim. Defendant did not stop, but, instead, continued driving upon the grass for approximately 340 feet. Defendant then reentered Joan Street and continued traveling west. Defendant ultimately stopped his vehicle approximately six blocks from the victim’s home and returned to the scene where he was arrested by the police after failing several sobriety tests. In a statement he later gave to the police, defendant admitted knowing that he was drunk when he left the bar and that he was driving too fast.

Viewing this evidence in a light most favorable to the prosecution, I believe that a rational trier of fact could find that a person who has been told that he is driving too fast but who, while darting in and out of traffic, nevertheless continues to knowingly speed with the awareness that he will encounter portions of the roadway that are constructed with obstacles in the road surface designed to reduce speed performs an act “in wanton and wilful disregard that the natural tendency of the act is to cause death or great bodily harm.” *Baker, supra* at 689, 691. The jury was instructed on the element of malice and no objection was lodged to these instructions. I would affirm the jury verdict in this case.

/s/ Michael R. Smolenski