STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DON McELHOES,

Defendant-Appellant.

UNPUBLISHED
June 13, 1997

No. 190171
Macomb Circuit
LC No. 95-000604

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to concurrent terms of twenty-five to forty years in prison. We reverse defendant's murder convictions and remand for entry of judgments of conviction for two counts of involuntary manslaughter, MCL 750.321; MSA 28.553, and for resentencing.

Defendant's first claim on appeal is that the trial court erred in denying his motion for directed verdict. We agree. When ruling on a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense, including the intent to kill. *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996), lv pending.

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 454 Mich 852; ___ NW2d ___ (1997). 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).

Here, the evidence shows that on February 16, 1995, defendant, while extremely intoxicated, drove his car at speeds of up to eighty miles per hour in a thirty-five mile per hour zone on a dry, four-lane residential street. Defendant's reckless driving caused the deaths of two young women when his car collided with their vehicle, which was lawfully stopped in an intersection. The facts that defendant's car collided into the back of the victims' car and that defendant was driving recklessly are not indicative of malice. See *Baker*, *supra*, p 691; *Goecke*, *supra*, p 630. Accordingly, the trial court erred in denying defendant's motion for directed verdict as to second-degree murder. *Baker*, *supra*, p 693; *Goecke*, *supra*, p 631.

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, the jury need not have been instructed on the lesser included offense. *People v Skowronski*, 61 Mich App 71, 78 n 5; 232 NW2d 306 (1975). Accordingly, we remand for entry of judgments of conviction for two counts of involuntary manslaughter and for resentencing. See *Baker*, *supra*, p 693; *Miller*, *supra*, p 495.

Defendant next argues that the trial court erred when it admitted evidence of his 1988 conviction of impaired driving. We disagree. Because evidence of defendant's 1988 conviction was coupled with evidence of defendant's subsequent attendance in a mandatory alcohol highway safety program in which

the standard curriculum addressed the risks associated with drunk driving, it was relevant to the issue of defendant's knowledge and offered for a proper purpose. See *Miller*, *supra*, p 497. In addition, because the prosecution had no less prejudicial means by which to show defendant's knowledge, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See *People v Cadle*, 204 Mich App 646, 656; 516 NW2d 520 (1994). Accordingly, the trial court did not abuse its discretion in allowing the prosecution to admit the evidence. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). In addition, any error was harmless given the overwhelming evidence of defendant's guilt. *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992).

Defendant next asserts that the trial court erred in denying his motion for mistrial based on the prosecutor's closing argument. We disagree. A trial court's decision on a motion for mistrial is a matter of discretion and its ruling will not be disturbed unless it was "so grossly in error as to deprive a defendant of a fair trial or amount to a miscarriage of justice." *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994).

It is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). During his closing argument, the prosecutor (1) explained that the case was especially sad because the families never had a chance to say goodbye, (2) described the victims as "innocent lambs slaughtered" by defendant, and (3) pointed out that defendant "will have many tomorrows, but [the victims'] families have no more tomorrows." Because the remarks emphasized the innocence of the victims and the enduring pain suffered by their families, we hold that they were intended to elicit a sympathetic emotional response, and therefore were improper appeals to sympathy. *Id.*

However, the trial court instructed the jury that it should not let sympathy or prejudice influence its decision, that it should consider only the evidence, and that the lawyers' arguments were not evidence. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). In addition, there was overwhelming evidence of defendant's guilt. See *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993). Under these circumstances, the trial court's error had only a slight or negligible influence on the verdict, and was therefore harmless. *People v Mezy*, 453 Mich 269, 286; 551 NW2d 389 (1996) (Weaver, J.).

Defendant makes several other claims of prosecutorial misconduct. These claims are without merit and bereft of citation to supporting authority. This Court will not search for authority to sustain or reject a party's position on appeal. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994).

Defendant's final argument is that the trial court erred when it denied defendant's motion for a mistrial based on the improper admission of defendant's 1993 conviction for impaired driving. We disagree. Because the jury was properly aware of defendant's 1988 conviction, it would have considered him a multiple offender even if it knew nothing of defendant's 1993 conviction. In addition,

the trial court instructed the jury not to consider the evidence of defendant's 1993 conviction. Under these circumstances, the trial court's decision to deny defendant's motion for a mistrial was not was "so grossly in error as to deprive a defendant of a fair trial or amount to a miscarriage of justice." *McAlister*, *supra*, p 495; see *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996).

We vacate defendant's conviction of second-degree murder. In addition, we remand for entry of judgments of conviction for two counts of involuntary manslaughter and for resentencing. See *Baker*, *supra*, p 693; *Miller*, *supra*, p 495. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Harold Hood