

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 190171

Macomb Circuit Court

LARRY DON McELHOES,

LC No. 95-000604-FC

Defendant-Appellant.

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

JANSEN, J. (dissenting).

I respectfully dissent from the majority's holding that the trial court erred in denying defendant's motion for directed verdict on the charges of second-degree murder. After reviewing the record, I believe that the prosecutor presented sufficient evidence for the jury to find that defendant was guilty of two counts of second-degree murder.

The question is whether, taken in a light most favorable to the prosecution, the jury could have found that the essential elements of second-degree murder were proven beyond a reasonable doubt. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). To establish second-degree murder, the prosecution must prove that the defendant caused the death of the victim and that the killing was done with malice and without justification or excuse. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. Malice may be inferred from the facts and circumstances of the killing. *Id.*

The evidence in this case was that the incident occurred on February 16, 1995, at approximately 8:25 p.m. in the City of Warren. Although it was dark at that time, the road was clear and dry and there was no precipitation. One witness testified that there was good lighting in the area because there is a high school not far from where the accident occurred. The two victims were in a black Chevrolet Cavalier and were stopped at a traffic light on Nine Mile Road. The headlights of the Cavalier were on, as was the left turn signal. The Cavalier was stopped at a flashing yellow light apparently waiting for traffic to clear in the opposite direction so that it could make a left turn onto

Marmon Street. According to several eyewitnesses, defendant, who was driving a Plymouth Fury, was traveling at a speed of between seventy to eighty miles an hour where the posted speed limit was thirty-five miles an hour. Defendant's car was not swerving and he was driving his car under control, but was driving at a very high rate of speed. The headlights of defendant's car were on. Defendant rear ended the victims' car. One accident reconstruction expert stated that the minimum impact speed was fifty-one miles an hour, while the testimony of those who actually witnessed the crash was that defendant was traveling between seventy and eighty miles an hour. The impact of the collision was so severe that the gas tank of the Cavalier was driven from the rear of the car, through the back seat, and hit the driver in the back of her head. According to witnesses, defendant's car did not slow down, did not try to evade the collision, and one witness who was behind defendant stated that he did not see any brake lights come on before the collision.

At 9:45 p.m., blood was withdrawn from defendant and his blood alcohol level was .254%. There was also a detection of marijuana in his urine sample. According to a work colleague of defendant's, in order to celebrate defendant's recent promotion, they went to a bar called Johnny Be Good shortly after 11:30 a.m. Defendant drank two to four beers and three to four shots of alcohol. They left the bar at 2:00 p.m. and went to a party store and bought a six-pack of beer. They then went to defendant's apartment and drank at least one more beer and smoked a marijuana cigarette. Defendant later went to the home of an acquaintance, Lee Ann Frauce. Defendant left her home at about 8:15 p.m. in an intoxicated state and Frauce indicated that she did not want him to leave because he was too intoxicated to drive. Frauce indicated that defendant sped away from her home. Moreover, the prosecution presented evidence that defendant was convicted of operating a motor vehicle while impaired in 1988 and 1993.

In *People v Goeke*, 215 Mich App 623, 630; 547 NW2d 338 (1996), lv gtd 454 Mich 852 (1997), this Court held that the legislative enactment of the crime of OUIL causing death precludes prosecution for second-degree murder when, without aggravating circumstances, a defendant whose operation of a motor vehicle while intoxicated causes the death of another. This Court in *Goecke* did not explain what those "aggravating circumstances" might be. Subsequently, in *People v Baker*, 216 Mich App 687,692; 551 NW2d 195 (1996), lv gtd 454 Mich 892 (1997), this Court held that "no reasonable inference can be drawn to support a finding of malice on the mere evidence of drunk driving. . . . [E]vidence consisting solely of drunk driving and the attendant erratic driving cannot support a finding of malice."

I would find that the prosecution presented such aggravating circumstances for a jury to properly find the malice element of second-degree murder in this case. Defendant had two prior convictions of drunk driving. Defendant had been drinking alcohol and smoking marijuana for at least eight hours before the collision and his blood alcohol level was .254% over one hour after the collision. Defendant, while extremely intoxicated, drove between seventy and eighty miles an hour in a speed zone of thirty-five miles an hour. Defendant did not brake, slow down, or attempt to evade a car that was lawfully stopped at a traffic light. Further, defendant's headlights were on, the area was well lit, and there was plenty of lighting in the area. The street was dry, there was no precipitation, and visibility was

clear. The car that defendant hit had its lights and turn signal on. The jury could reasonably infer that defendant saw the car stopped in front of him and did not attempt in any fashion to avoid hitting it.

Accordingly, I would conclude that the trial court did not err in denying defendant's motion for a directed verdict.¹ The prosecution presented sufficient evidence of malice for the jury to find that defendant intended to create a high risk of death or great bodily harm with knowledge that such is the probable result.

With respect to defendant's remaining claims of error, I find no error requiring reversal. I would affirm defendant's convictions and sentences.

/s/ Kathleen Jansen

¹ I note that the trial court instructed the jury on second-degree murder, OUIL causing death, and negligent homicide. Thus, the jury was not left with an "all or nothing" verdict. The jury clearly rejected the lesser charges.