STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MARK MCKINNEY,

Defendant-Appellant.

UNPUBLISHED
December 16, 1997

No. 190062
Oakland Circuit Court
LC No. 95-138150

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4); MSA 9.2325(4), failure to stop at a scene of a serious personal injury accident, MCL 257.617; MSA 9.2317, and fleeing a police officer resulting in serious bodily injury, MCL 750.479a; MSA 28.747(1). The jury acquitted defendant of second-degree murder, MCL 750.317; MSA 28.549, and unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.549. Defendant pleaded guilty to driving on a suspended license, MCL 257.904; MSA 9.2604.

The trial court sentenced defendant to concurrent sentences of seven to fifteen years' imprisonment on the OUIL conviction, one and a half to five years' imprisonment on the failure to stop at the scene of a personal injury accident conviction, one and a half to five years' imprisonment on the fleeing a police officer resulting in serious bodily injury conviction, and ninety days' imprisonment for driving on a suspended license. Defendant now appeals as of right. We affirm.

A police officer on patrol duty observed defendant run a red light. The officer activated his car's overhead lights and began to follow defendant. Defendant ran two more red lights before hitting a pickup truck. The passenger in the pickup truck died as a result of the accident. Defendant still did not stop but continued driving until his automobile hit a metal pole several blocks after hitting the truck. When his automobile came to a stop, defendant ran across a divided highway before being caught by the officer. Defendant's blood test revealed an alcohol level of .15 percent.

Defendant first argues that the trial court erred in not instructing the jury on the lesser included offense of negligent homicide because the evidence at trial supported such an instruction. We disagree.

The duty of the trial judge to instruct on lesser included offenses is determined by the evidence. If evidence has been presented that would support a conviction of a lesser included offense, refusal to give a requested instruction is error requiring reversal. *People v Hendricks*, 446 Mich 435, 442; 521 NW2d 546 (1994). To determine whether an instruction on a cognate lesser included offense must be given the trial court should examine the record. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). If there is evidence which would support a conviction of the cognate lesser offense, then the trial judge, if requested, must instruct on it. *Id*. Under this standard, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. Only then does the judge's failure to instruct on the lesser included offense constitute error. *Id*.

The negligent homicide statute permits criminal liability to be premised on an act of ordinary negligence:

> Any person who, by the operation of any vehicle upon any highway or upon any other property . . . in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than $2,000.00, or by both such fine and imprisonment. [MCL 750.324; MSA 28.556.]

See *People v Olson*, 181 Mich App 348, 353; 448 NW2d 845 (1989). The OUIL causing death statute in effect at the time of the accident stated that:

> A person . . . who operates a motor vehicle . . . under the influence of intoxicating liquor or . . . with a blood alcohol content of 0.10% or more by weight of alcohol, and by the operation of that motor vehicle causes the death of another person is guilty of a felony, punishable by imprisonment for not more than 15 years, or a fine of not less than $2,500.00 or more than $10,000.00, or both. [MCL 257.625(4); MSA 9.2325(4).[1]]

As a matter of law, there is an irrebuttable presumption of gross negligence if a driver voluntarily chooses to drive with the knowledge that he had consumed alcohol. *People v Lardie*, 452 Mich 231, 252; 551 NW2d 656 (1996). In the present case, the prosecution established that defendant was driving while voluntarily intoxicated, creating an irrebuttable presumption of gross negligence. Therefore, the evidence did not establish that defendant's actions constituted merely ordinary negligence, and the trial court did not err in refusing to instruct the jury on the lesser offense of negligent homicide. *Pouncey*, *supra* at 387.

Defendant next argues that the OUIL causing death statute is unconstitutional because it violates due process rights under the state and federal constitutions. Specifically, defendant contends that since the statute does not have a mens rea requirement, it must comport with the criteria for strict liability general welfare offenses set forth in *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952). This argument has no merit. The Michigan Supreme Court has specifically held that MCL 257.625(4); MSA 9.2325(4) does not violate due process rights and is constitutional. *Lardie*, *supra* at

234. Although defendant argues that the offense is a public welfare strict liability offense, the Court held that the statute contains a mens rea requirement because the prosecution must prove that a defendant acted knowingly in consuming the intoxicating liquor and acted voluntarily in deciding to drive after such a consumption. *Id*. at 256.

Finally, defendant argues that the trial court committed error requiring reversal in denying his motion for directed verdict on the second-degree murder charge. In reviewing a trial court's decision regarding a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

We agree that the evidence was insufficient to support a second-degree murder charge because the evidence does not establish the requisite element of malice. In order to prove malice to support a conviction of second-degree murder, the prosecutor must prove that the defendant possessed the mental state consisting of "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." *People v Baker*, 216 Mich App 687, 690; 551 NW2d 195 (1996). It cannot be said that the natural tendency of driving drunk along with the reckless driving behavior that often goes with it, including causing accidents, is to cause death or great bodily harm. *Id.* at 692. Causing the death of another while operating a motor vehicle in an intoxicated state does not establish that a defendant acted with malice sufficient to support a charge of second-degree murder. *People v Goecke*, 215 Mich App 623, 631-632; 547 NW2d 338 (1996). Therefore, in the absence of additional proof of malice, the mere evidence of driving while intoxicated does not support a charge or jury instruction of second-degree murder. *Baker*, *supra* at 692. The trial court therefore erred in denying defendant's motion for directed verdict on the second-degree murder charge.

We recognize that this Court has occasionally found the element of malice to support a second-degree murder charge present in similar circumstances. For example, this Court held that driving at grossly excessive speeds in disregard of traffic signals was conduct that imperiled the lives of others and constituted malice in *People v Vasquez*, 129 Mich App 691, 694; 341 NW2d 873 (1983).[2] In a more recent case, *People v Miller*, 198 Mich App 494; 499 NW2d 373 (1993), a panel of this Court affirmed a second-degree murder conviction where the defendant was driving while intoxicated and caused the death of his girlfriend. However, *Miller* is distinguishable from the present case because the *Miller* defendant had driven in a reckless manner on at least six prior occasions after arguing with his girlfriend in order to punish or intimidate her, and the panel found that the pattern of defendant's reckless driving indicated a willful and wanton disregard of the likelihood that death or great bodily injury could result from his conduct on the night in question. *Id.* at 496-497.[3]

Although we agree that the trial court erred in denying defendant's motion for directed verdict on the second-degree murder charge, the finding of error alone does not mandate the reversal of defendant's other convictions, as defendant argues to this Court. Defendant mistakenly relies on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), in which the defendant's conviction of

voluntary manslaughter was reversed because there was insufficient evidence to support the charged offense of first-degree murder. Unlike in *Vail*, defendant in the present case was charged with separate counts of second-degree murder and OUIL causing death. The separate nature of the two charged counts eliminates the danger that the jury reached a compromise verdict. See *People v Swartz*, 171 Mich App 364, 379; 429 NW2d 905 (1988). Therefore defendant was not prejudiced by the trial court's denial of his motion for directed verdict, and reversal is not warranted. See *Id.*; *People v Wilhelm (On Remand)*, 190 Mich App 574, 587; 476 NW2d 753 (1991).

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage

[1] The statute was amended again effective May 1, 1995. The amended statute does not substantially change the statute for the purposes of this analysis.

[2] To the extent our decision conflicts with *Vasquez, supra*, we believe that case was wrongly decided and is not binding on us under Administrative Order 1996-4.

[3] We note that defendant has presented a significant issue for our consideration. In light of the Supreme Court's grant of leave to hear *Baker, supra,* lv gtd 454 Mich 892; 562 NW2d 205 (1997) and *Goecke, supra*, lv gtd 454 Mich 852; 558 NW2d 726 (1997), we have elected not to publish this opinion.
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