

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN WAYNE ADAMS,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 230376

Kent Circuit Court

LC No. 99-010690-FH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction of two counts of involuntary manslaughter, MCL 750.321, and his sentence as a third-felony offender, MCL 769.11, to four to fifteen years in prison. We reverse and remand for a new trial.

I

On March 7, 1999, defendant was involved in events leading to a multi-car accident on westbound I-196, the “Ford Freeway,” in downtown Grand Rapids, culminating in the fiery deaths of two young persons, whose car had stopped on the freeway in a chain of evasive actions and was rear-ended by a drunk driver traveling an estimated eighty miles an hour at impact. The fatal crash occurred after defendant purportedly lost control of his van on the southbound 131 exit ramp of the Ford and, as a consequence, deliberately drove his van back onto westbound I-196 the wrong way, causing opposing, oncoming freeway traffic to take evasive action, resulting in a backup of stopped cars in the travel lane. Defendant’s van hit a median barrier, crossed the freeway, and then crashed into a north guardrail near the Ottawa Street freeway entrance, which defendant was attempting to use as an exit. Defendant and his passenger fled the scene of the accident on foot.

II

Defendant first claims that he was denied a fair trial and his right to due process by the special jury instructions devised by the trial court, which were confusing, misleading, and erroneous. We agree that the instructions constitute error mandating reversal.

A

This Court reviews de novo claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Generally, jurors are presumed to have followed the instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Yet, if both a correct and an incorrect instruction are given, this Court will presume that the jury followed the incorrect charge. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

Instructional error may be of constitutional magnitude. See *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). Omission of an essential element of a criminal jury instruction is constitutional error. *Id.* Constitutional error must be classified as structural or nonstructural. *People v Cornell*, 466 Mich 335, 363 n16; 646 NW2d 127 (2002). If a case involves nonstructural, preserved constitutional error, an appellate court should reverse unless the prosecution can show that the error was harmless beyond a reasonable doubt." *Cornell, supra* at 363 n16, citing *Carines, supra* and *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

B

Defendant argues that the trial court's jury instructions failed to follow the standard criminal jury instructions, were confusing, and incorrectly stated the law. After the jurors were sworn, the trial court gave detailed preliminary instructions on the law governing the case, which the court had independently researched and prepared without input from the trial counsel, in lieu of using the standard jury instructions. Prior to the jury's deliberations, the court gave essentially the same instructions as final instructions. The prosecutor expressed satisfaction with the jury instructions on the record; however, defense counsel did not, and set forth numerous specific objections to the instructions, to which the trial court responded.

At the outset, we note that plaintiff has not filed a brief on appeal in this case, and, thus, this Court does not have the benefit of plaintiff's view of the claims of error. Nonetheless, we find that the trial court's instructions on the elements of the charged offense misstated the law and denied defendant a fair trial.

A trial court is not required to give the standard criminal jury instructions and may fashion a jury instruction to meet the facts of a particular case so long as it accurately states the law and otherwise sufficiently protects a defendant's rights. *People v Stephan*, 241 Mich App 482, 495-496; 616 NW2d 188 (2000); *Aldrich, supra*. However, it is error for a trial court to give an erroneous or misleading jury instruction on an essential element of an offense. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); *Stephan, supra* at 495.

Defendant argues that the trial court's instruction on the nature of negligence and gross negligence took "from the province of the jury the right to adjudicate every element of the offense charged." Defendant raises a specific objection that the court instructed the jury that being intoxicated constitutes gross negligence per se, and that this instruction was contrary to the holding of this Court in *People v Thinel*, 160 Mich App 450, 455; 408 NW2d 474 (1987), vacated on other grounds 429 Mich 859 (1987), on remand 164 Mich App 717 (1987).

The trial court gave the following instruction:

Now gross negligence is acting in a way which is negligent to begin with, but is under circumstances such that it would appear to the ordinary person, given the circumstances, that doing so was likely to be disastrous to somebody else. That amounts to a reckless disregard for the safety of others, which is the essence of gross negligence.

Some acts are gross negligence by their nature. For example, driving a vehicle, either under the influence of alcohol or drugs, or when visibly impaired by their consumption is, in the eyes of the law, gross negligence because of the readily apparent risk it creates and the disregard for others that necessarily follows from taking that risk. [Emphasis added.]

In responding to defendant's objection to the above instruction, the trial court observed that the Michigan Supreme Court has long held that "driving under the influence is gross negligence" and under the statutory offense of OUIL (operating under the influence of liquor), causing death, MCL 257.625(4), "driving while visibly impaired, causing death, [is] likewise, in effect, gross negligence." Thus, the court indicated that, given the evidence, it could permit amendment of the information to include a charge of OUIL¹, causing death, but rather than doing so, the court was simply molding it into the instruction as a statement of law, i.e., "that drunk driving is gross negligence." We disagree with the trial court's reasoning and conclude that the resulting jury instruction is an erroneous statement of law with regard to the offense of involuntary manslaughter.

In support of its analysis, the trial court cited *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996), for the proposition that drunk driving constitutes gross negligence and the trial court's view that MCL 257.625(4) was enacted by the Legislature to make it even easier to prove. We cannot agree.

In *Lardie*, the Court considered, and rejected, the argument that the Legislature intended to make OUIL, causing death, a strict liability crime—a position essentially adopted by the court's instruction in this case. *Id.* at 256, 267. To the contrary, the *Lardie* Court, *id.*, stated that the statutory offense of OUIL, causing death is similar to common-law involuntary manslaughter *except that* it eliminates the people's need to prove gross negligence:

The only difference between causing death by operating a vehicle while intoxicated and the crime of involuntary manslaughter with a motor vehicle is that *under the common law the people must prove gross negligence*, whereas under the statute the people must prove that the defendant voluntarily drove, knowing that he might be intoxicated. [*Id.* at 265-266.]

¹ We find no evidence in the record that the prosecutor requested such amendment of the information and express no opinion whether the evidence would permit such amendment.

The *Lardie* Court concluded that the statute was not a codification of the common law of involuntary manslaughter. *Id.* at 245-246.

In this case, the court permitted the jury to find the defendant guilty of involuntary manslaughter without proof of gross negligence, i.e., merely by proof that defendant drove while under the influence or when visibly impaired, which misstates the law. *Id.* at 265, 267. Or, using the trial court's analysis, from the standpoint of the statutory offense, the court permitted a finding of guilt of OUIL, causing death, (an offense not charged here) without any proof of general intent, contrary to the holding in *Lardie*. *Id.* at 256. To prove OUIL, causing death, the people must prove that (1) the driver had the general intent to drive while intoxicated, and (2) the wrongful act, i.e., the *intoxicated* driving, was the cause of the death. *Id.* at 234.

We cannot conclude that this error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). By melding together a partial instruction for the statutory offense with the instructions for common-law involuntary manslaughter, the court's instructions essentially eliminated the people's burden of proving an essential element of the charged offense, gross negligence, and permitted a finding of guilt based on a violation of the OUIL or OWI statutes alone. *Lardie, supra* at 265.

In *Thinel, supra*, 160 Mich App 455, this Court held that it was error requiring reversal for a trial court to instruct the jury, with regard to involuntary manslaughter, that it was gross negligence to operate a motor vehicle while intoxicated; however, on appeal, the Supreme Court, *Thinel, supra*, 429 Mich 859, remanded the case for a determination whether the error was harmless beyond a reasonable doubt. On remand, this Court found the error harmless because there was overwhelming evidence of the defendant's guilt, including that the defendant had a blood-alcohol level of 0.23 percent;² he was staggering and incoherent at the accident site; he smelled of alcohol; he was verbally abusive to the police and thought he was registering for classes at the police station; he did not know why his car was damaged; and he admitted drinking before driving. *Thinel (On Remand), supra*, 164 Mich App 722.

The trial court in this case disregarded the holding in *Thinel* (that the gross negligence instruction was error), believing the holding to be incorrect and in conflict with *Lardie*. We disagree. Our reading of *Lardie* convinces us that the *Lardie* Court not only acknowledged the holding in *Thinel*, but concurred in that holding by its repeated statements that involuntary manslaughter requires proof of gross negligence. *Lardie, supra* at 247-249, nn 26-28, 251-252, 259, 265, 267 ("in light of *Thinel, supra*, and the standard jury instructions, the Legislature must have intended to eliminate this element [gross negligence] as a requirement when it enacted the statute").

In this case, unlike in *Thinel, supra*, the issue whether defendant was grossly negligent due to intoxication was sharply disputed, and the evidence does not support a finding that the

² Under the statute, a blood-alcohol content of 0.10 percent establishes a presumption that the individual is under the influence of intoxicating liquor. MCL 257.625(2); *Lardie, supra* at 246.

instructional error was harmless beyond a reasonable doubt.³ *Thinel, supra*, 429 Mich at 859; see also *Thinel (On Remand), supra*, 164 Mich App 719-722 (discussing harmless error in different contexts). Because defendant immediately fled the scene and was not questioned by the police until the day following the accident, there was no physical blood-alcohol evidence establishing a presumption of OUIL or OWI (operating while impaired), and no testimony of defendant's behavior or physical condition at the time of the accident as in *Thinel*. Although there was testimony that defendant had consumed alcohol the day of the accident, and an expert toxicologist provided opinion testimony that, assuming defendant's testimony to be accurate, defendant's blood-alcohol level at the time of the accident would have been approximately 0.04 percent, there was testimony and evidence to support a conclusion that OUIL or OWI was not proven. The defense theory was that defendant was not grossly negligent, that he was not intoxicated or incapable of driving, and that he drove as prudently as possible after his van spun out on the ramp. The instruction permitted the jury to avoid the question whether defendant's conduct was grossly negligent and simply address the question whether due to the ingestion of alcohol there was some observable reduction in his ability to drive normally. Thus, given the disputed issues, we are compelled to find that the error was not harmless beyond a reasonable doubt.⁴

We are further convinced that the melding together of the law with regard to the statutory offense and common-law involuntary manslaughter is not harmless error by a reading of the *Lardie* Court's distinction between the required causation for these offenses, and the court's failure to consider the distinction in this case. To prove causation under the statute, "the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim." *Lardie, supra* at 258. This particular proof is not required for a charge of involuntary manslaughter, pursuant to *Lardie*:

³ This is particularly so in light of the court's instruction on the standard for driving under the influence or while visibly impaired:

Driving under the influence is proven if the evidence, in whatever form, and any reasonable inferences which follow from that evidence, establish that alcohol and/or drug consumption substantially deprived a driver of the control and clarity of mind needed to normally drive a car. Driving while visibly impaired is proven if the evidence and inferences, whatever that evidence is, establish a lesser, but still observable reduction in a driver's ability to drive normally. If either effect has been proven, one or the other offense has been proven, even if only a small amount of alcohol or drugs was consumed, or even if the person's blood-alcohol level content is below the levels which create a presumption. That's because it is, as I said, effect, not quantity, [with] which the law is concerned.

⁴ Even were we to apply a lesser harmless error standard, we would conclude that the error was not harmless.

It is the *change* that such intoxication produces, and whether it caused the death, which is the focus of this element of the [statutory] crime. The concurrence argues that this conclusion “rewards” the careless or unsafe driver because the people will have a more difficult time proving causation against such a driver. This is misleading. Under this particular statute, the Legislature punishes drivers when their *drunken* driving causes the death of another. However, the people may also charge a defendant with involuntary manslaughter, at the same time in charging this crime, if there is a serious question about whether the driver’s careless or unsafe driving, somehow unrelated to his intoxication, was the cause of the victim’s death. [*Id.* at 258 n 47 (citation omitted).]

In this case, the jury instructions incorporated the element of intoxicated driving from the statutory offense without the corresponding requisite standard for causation,⁵ which is error requiring reversal in and of itself (even ignoring that defendant was not charged with the statutory offense).⁶ The crimes of involuntary manslaughter and OUIL/OWI, causing death are

⁵ With regard to causation, the court instructed the jury in relevant part:

I have been very careful to just say that Mr. Adams “might be” guilty of a crime if he drove negligently or grossly negligently, because neither negligence nor gross negligence by him is criminal, unless it was enough of a factor in the deaths [of] Mr. Arnold and Ms. Herr for it to be just to hold him criminally responsible. That is why the evidence must also prove that his misconduct was a substantial factor in bringing about the deaths of Mr. Arnold and Ms. Herr. If not, he is guilty of no crime.

* * *

If you find that Mr. Adams drove negligently or grossly negligently and was a substantial factor in causing the accident which killed Mr. Arnold and Ms. Herr, criminal conduct has been proven. . . .

Now, by “substantial factor” the law does not mean that any negligence or gross negligence by Mr. Adams must have been the major, the predominate, the biggest or the principal reason, all of which are saying the same thing, I believe, why Mr. Arnold and Ms. Herr were killed, nor must his misconduct have been the last cause. By “substantial factor” the law means that his negligence or gross negligence must have been more than an insignificant—must have had more than an insignificant or negligible effect in bringing about their deaths. In other words, that his negligence or gross negligence had an appreciable effect.

⁶ This error was compounded by the trial court’s instructions on the standards for driving under the influence and driving while visibly impaired, both of which were based on the statute, but again, disregarded that these standards only relate to the *felony* of OUIL/OWI, causing death, where the requisite causation is established under *Lardie*. In discussing the issue of causation, the *Lardie* Court acknowledged the link between the felony status of OUIL/OWI, causing death
(continued...)

separate and distinct offenses, with distinct punishments, which cannot be properly melded together under a charge of involuntary manslaughter. See *People v Kulpinski*, 243 Mich App 8, 18-23; 620 NW2d 537 (2000), decided after the trial in this case (finding no double jeopardy violation, and observing that the offenses of involuntary manslaughter and OUIL causing death protect distinct societal norms, the punishment does not involve a hierarchy of offenses, and each requires proof of an element that the other does not).

Having found error mandating reversal, we do not address defendant's remaining claims of error concerning the jury instructions. However, our failure to address the claims does not indicate a conclusion that they are without merit, but only our view that any remaining claims of error are properly addressed with the benefit of responsive argument from the prosecutor on remand.

III

Defendant also claims that there was insufficient evidence to sustain his conviction, arguing that the evidence did not establish that his conduct was a substantial factor in the resulting deaths. We find this claim without merit.

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 478, amended 441 Mich 1201 (1992). The prosecution need not negate every reasonable theory consistent with innocence, but need only convince the jury of the defendant's guilt in the face of whatever contradictory evidence the defendant may provide. *Nowack, supra* at 400. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

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and the requisite criminal intent:

[T]here is no reason to penalize an intoxicated driver with a fifteen-year felony when there is an accident resulting in a fatality if that driver, even if not intoxicated, would still have been the cause in fact of the victim's death. There would be no reason because it would not prevent that fatality from occurring again. Therefore, in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim. In this way, the statute does not impose a severe penalty when the injury was unavoidable for that particular driver (regardless of whether he was intoxicated), because the statute ensures that the wrongful decision caused the death in the accident. [*Lardie, supra* at 258 (footnote omitted).]

The elements of involuntary manslaughter are 1) acting in a grossly negligent, wanton or reckless manner, 2) so as to cause the death of another. *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993). Viewed in a light most favorable to the prosecution, the evidence permitted the jury to determine that defendant's conduct was grossly negligent and was a substantial factor in causing the deaths with respect to which he was charged. There was evidence that defendant was driving the wrong way on an interstate highway on which a moderate volume of traffic was moving at high speed, causing cars to stop and the victims, who had the misfortune to be at the back of the line of stopped cars, to be rear-ended by a drunk driver. The fact that the drunk driver was also grossly negligent does not exclude defendant's gross negligence as a substantial factor in causing their deaths, and, does not preclude a finding of criminal responsibility for them. See *People v Tims*, 449 Mich 83, 99; 534 NW2d 675 (1995) (the negligent act of a third party is but one factor to be considered in determining whether the defendant's negligence caused the victim's death).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Helene N. White

/s/ Donald S. Owens