

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WILLIAM SCHAEFER,

Defendant-Appellant.

UNPUBLISHED

March 25, 2004

No. 245175

Wayne Circuit Court

LC No. 02-004291

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), and negligent homicide, MCL 750.324. The trial court sentenced defendant to concurrent prison terms of fifty months to fifteen years for the OUIL causing death conviction, and one to two years for the negligent homicide conviction. He appeals as of right, asserting instructional error. We affirm the negligent homicide conviction, but reverse the OUIL causing death conviction and remand for retrial.

I

Defendant's convictions arise from a traffic fatality that occurred in January 2002 in Lincoln Park. Defendant was the driver of the car, and the deceased was his passenger and friend. The prosecutor presented evidence that defendant was drinking just before the accident. According to an eyewitness, the car defendant was driving had been "tailgating" the witness' vehicle, then another vehicle, on the freeway, then took an exit, generated sparks, and flipped over. Defendant testified that he had had three beers and admitted that his blood alcohol level was 0.16 three hours after the accident. Defendant denied drinking from empty bottles contained in a bag in the car, explaining that they were empty bottles from a party. According to defendant, after taking the victim to buy some beer and to visit friends, he was driving the victim to another friend's house when the victim abruptly told him that they had reached their freeway exit. Defendant turned quickly onto the off ramp, hit the curb and lost control. Defendant introduced the testimony of an expert witness who opined that the exit ramp was safe for thirty mile per hour speeds, but not higher speeds, and that the curb should not have been there and was dangerous because it was not high enough to redirect a vehicle and would only cause the driver to lose control.

II

Defendant argues that the trial court's OUIL instruction allowed the jury to convict him on culpability less than required by the essential elements of the crime, in violation of the Supreme Court's holding in *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996). Defendant notes that the court's erroneous instruction did not indicate that the prosecution was required to prove causation when defendant is actually engaged in the intoxicated driving and that the instruction never informed the jury that the defendant's intoxicated driving had to be a substantial cause of the victim's death. We agree.

"Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Although a trial court need not confine itself to standard jury instructions, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), instructions actually given must include all elements of the crime charged, *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

A

At pertinent times, the elements of OUIL causing death were that the defendant operated a motor vehicle on a place open to the general public while intoxicated or having a blood alcohol level above 0.10,¹ that he voluntarily decided to operate the vehicle knowing that he had consumed alcohol and might be intoxicated, and that his intoxicated driving was a substantial cause of the victim's death. *Lardie, supra* at 259-260, n 49,² citing MCL 257.625(4).

The trial court instructed the jury on OUIL as follows:

The Statute states that:

¹ The statute was amended by 2003 PA 61 to reduce this limit to 0.8

² OUIL causing death is a general intent crime, not a specific intent one. *Lardie, supra* at 240-241. The prosecutor is thus obliged to prove not only that the defendant did the wrongful act, but that he did so "purposefully or voluntarily." *Id.* at 241. The distinction, for purposes of this crime, arises "only in the rare circumstances where a defendant was driving when he honestly did not know he had consumed alcohol, which subsequently caused him to become intoxicated, or where he was forced to drive for some reason despite his intoxication." *Id.* The *Lardie* Court noted that "[t]he statute is designed to deter motorists from deciding to drive after they have become intoxicated. Therefore, the culpable act that the Legislature wishes to prevent is the one in which a person becomes intoxicated and then decides to drive." *Id.* at 245. There is no need to prove any degree of negligence. *Id.* at 249. However, the prosecutor must prove that "the particular driver's decision to drive while intoxicated was a substantial cause of the death[]." *Id.* at 267. [Emphasis added.]

“A person who operates a motor vehicle within the state, while under the influence of intoxicating liquor, or with a blood alcohol content of 0.10.”

And it has been agreed by both parties that the evidence in this case is 0.16.

So, the Statute says:

“Any person who shall operate a motor vehicle with an alcohol content of 0.10, by weight of alcohol, and by operation of that motor vehicle causes the death of another person is guilty of a felony.”

So, the elements are either operating under the influence, that’s one. Or, operating a motor vehicle while the blood alcohol content is 0.10.

And it is agreed by both parties that if the witness were here, the testimony would be that it was 0.16.

And while operating with that alcohol level content causes the death of another person, shall be guilty of a felony. Those are the elements of Operating a Motor Vehicle, under the first count.

It’s either driving under the influence, or driving with a blood alcohol content of 0.10. And as a result of so operating a motor vehicle, causes the death of another person.

Those are the elements of Count 1. You may bring back a verdict of guilty or not guilty.

The evidence, as I said, was stipulated to. You have a right to accept that, or you have a right to reject it. It’s entirely up to you.

Later, during deliberations, the jury asked for additional instructions:

JURY QUESTION

THE COURT: Okay. You’re asking to explain under the influence, as is stated in Count 1. is [sic] that what you want to know?

JUROR NO. 11: **Also causing death.**

THE COURT: I’m sorry; also what?

JUROR NO. 11: Under the influence causing death.

THE COURT: Yeah, okay.

All I can do is tell you what the Statute says. If that was the case, you have decide that.

But the Statute says:

“Did operate a motor vehicle”, at I-75 and Dix in the City of Lincoln Park, “while being under the influence of intoxicating liquor.”

“Or”, either one, “while being under the influence, or while having an alcohol content of 0.10 grams or more per 100 milliliters of blood.

And by the operation of that vehicle, caused the death of Ronald Rafalski.:

So, there are two different ways you can do it. Either under the influence of liquor, regardless of the blood, being under the influence of liquor. Or, having a blood—driving while the blood alcohol level was at least .10, causing the death of another person.

You have to decide whether or not this happened. **But that’s all that the Statute says. Either driving under the influence, or driving with a blood alcohol level of .10.** Okay?

So you have to decide whether or not that happened. All I can do is tell you what the law says. Okay. [Emphasis added.]

B

Defense counsel objected to the court’s initial instruction and moved for a mistrial, on the basis that the court had not instructed on the elements of the crime, noting that the standard jury instruction, CJI2d 15.11, did so, and because the court repeated to the jury the stipulation that defendant had a blood alcohol level of 0.16. Defendant argued that the latter was very prejudicial to the defendant and that “by combining it, it sounds as if you’re saying, well, this is the OUIL. If you find that he’s .10 or above, and we’ve stipulated that it’s .16, so ergo he must be guilty.” Defense counsel also objected to the additional instructions the court gave during the jury’s deliberations, at the jury’s request, again arguing that they did not set forth the elements of the crime.

At pertinent times, the standard jury instruction on OUIL, CJI2d 15.11, provided in pertinent part:

(1) The defendant is charged with the crime of operating a motor vehicle under the influence of intoxicating liquor . . . or with an unlawful bodily alcohol level, or while impaired, and in so doing, causing the death of another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

* * *

(4) Third, that the defendant was under the influence of intoxicating liquor . . . , or had an unlawful bodily alcohol level, or was impaired while [he / she] was operating the vehicle.

[Define . . . “unlawful bodily alcohol level”]

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he / she] had consumed alcohol . . . and might be intoxicated.

(6) **Fifth, that the defendant’s intoxicated [or impaired] driving was a substantial cause of the victim’s death.** [Emphasis added.]

In this case, the trial court failed to adequately instruct on the causation element. The jury was not instructed that it had to find that defendant’s driving under the influence or driving with an unlawful blood alcohol level was a substantial cause of the victim’s death. It was instructed only that defendant had to have caused the death by operating the vehicle, or that as a result of operating the vehicle in this condition, he caused the death. The court’s instruction thus failed to cover the causation element as set forth in *Lardie, supra* (and in CJI2d 15.11).

A preserved nonconstitutional error is not ground for reversal unless “after an examination of the entire cause, it shall affirmatively appear that the error asserted resulted in a miscarriage of justice.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The prosecution responds only to the failure to instruct on the argument that the driving while intoxicated be voluntary. The prosecution does not address the failure to properly instruct on causation. The dissent finds that the court’s initial instruction adequately conveyed to the jury the causation requirement. We cannot agree. The statement that the jury must find that defendant drove under the influence or drove with a blood alcohol content of .10 and “as a result of so operating a motor vehicle, causes the death of another person,” does not convey the concept that the intoxication or impaired driving must be a *substantial cause* of the victim’s death.

Moreover, the jury was clearly uncertain regarding the necessary causation, as expressed by its question, quoted *supra*. The court answered the question without any reference to causation, except to reiterate the language of the statute that defendant had to have been operating under the influence or while having an unlawful blood alcohol content “[a]nd by the operation of that vehicle, caused the death of [the victim]”; and that must have been operated either under the influence or “while the alcohol level was at least .10, causing the death of another person.” This answer clearly failed to convey the required elements as set forth in *Lardie, supra*.

In the instant case, the erroneous instruction misstated the essential causation element of the crime of OUIL, allowing the jury to convict defendant on a lesser showing of culpability than required. We thus conclude that the instructional error was not harmless, and remand for a new trial. In light of our disposition, we need not address defendant’s claim that the trial court’s inclusion, and repetition, of the parties’ stipulation to defendant’s blood alcohol level of .16 in the OUIL jury instruction essentially directed a verdict on an element of the charged offense.

Affirmed in part and reversed and remanded for new trial in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Helene N. White

