

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY ROSE BROOKS,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 262995

Oakland Circuit Court

LC No. 04-194073-FH

Before: Wilder, P.J. and Kelly and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while under the influence of liquor and causing death (“OUIL causing death”), MCL 257.625(4), and manslaughter with a motor vehicle, MCL 750.321, for which the trial court sentenced her to concurrent sentences of 86 months to 15 years’ imprisonment. Defendant appeals as of right her convictions and sentences. We affirm.

I. Jury Instruction

Defendant first contends that the trial court erred by refusing to give defendant’s proposed instruction on the sudden emergency doctrine. “This Court reviews de novo a defendant’s claim of instructional error.” *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). “Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred.” *Id.* “It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law.” *Id.* “Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence.” *Id.* at 162-163.

Defendant contends that because there was evidence that the victim suddenly applied her brakes and that defendant did not cause the accident, she was entitled to her proposed instruction on the sudden emergency doctrine. We agree with the trial court that this instruction should not have been given because it did not correctly reflect the applicable law in this case. In civil cases, one who suddenly finds himself in danger, and is required to act without time to consider the best means of avoiding the danger, is not guilty of negligence if he fails to use what, in hindsight, appears to have been a better method, unless the emergency is caused by his own negligence. *Lepley v Bryant*, 336 Mich 224, 235; 57 NW2d 507 (1953). Under this doctrine, the

circumstances of the accident must be either unusual or unsuspected. *Vander Laan v Miedema*, 385 Mich 226, 231-232; 188 NW2d 564 (1971).

In proposing an instruction on this doctrine, defendant asserted that it applies equally to civil and criminal cases. In the context of OUIL causing death, however, our Supreme Court recently interpreted the causation element of MCL 257.625(4) to clearly mean that “[w]hile an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superceding cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is foreseeable.” *People v Schaefer*, 473 Mich 418, 438-439; 703 NW2d 774 (2005) (emphasis in original). Because defendant’s proposed instruction did not accurately reflect this law,¹ the trial court did not err in refusing to read it to the jury.

Moreover, the trial court instructed the jury, “If you find that [the victim] was negligent, you may only consider that negligence in deciding whether the Defendant’s conduct was a substantial cause of the accident.” In accord with this instruction, defense counsel was still able to, and did, present his theory, based on the evidence, that when the victim suddenly hit her brakes, defendant, regardless of her intoxication, could not have stopped and, therefore, could not have been the substantial cause of the victim’s death. Thus, the instructions given did not deprive defendant of her defense theory. We find no instructional error warranting reversal.

II. Sentencing

A. *Blakely v Washington*

Defendant next contends that she is entitled to resentencing because the enhancement of defendant’s sentence based on facts not proven at trial was an unconstitutional violation of defendant’s Sixth Amendment right to a jury trial under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court, however, recently held that Michigan’s sentencing scheme does not offend the Sixth Amendment on the basis that sentences are based on facts not proved to a jury beyond a reasonable doubt. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). Therefore, this issue is without merit.

B. Judicial Bias in Sentencing

Defendant argues lastly that she is entitled to resentencing before a different judge because defense counsel’s contemptuous behavior and the trial court’s animosity toward defense counsel caused the court to sentence defendant at the high end of the sentencing guidelines range thereby violating her constitutional right to an impartial judge and the effective assistance of counsel. We disagree.

It is within the trial court’s discretion to give defendant a minimum sentence at the high end of the sentencing guidelines, and this Court must affirm a sentence within the applicable guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate

¹ The Court stated that *Schaefer* applies retroactively. *Schaefer, supra* at 444 n 80.

information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Defendant concedes that her sentence was within the applicable guidelines range and she does not assert that there were any scoring errors or reliance on inaccurate information. However, defendant asserts that the trial court's ire toward defense counsel biased the trial court and affected defendant's sentence thereby depriving her of her constitutional right to an impartial judge and the effective assistance of counsel.

Although defendant correctly points out that a sentencing court may not take into account "factors that violate a defendant's constitutional rights," *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998), we disagree that there is any indication in the record that defense counsel's behavior or judicial bias contributed to the trial court's sentencing decision. Despite defense counsel's behavior and the trial court having ultimately held defense counsel in contempt, the trial court stated that defendant's sentence was not a reflection of the apparent animosity between the court and defense counsel. The trial court proceeded to identify other permissible factors on which it did rely in sentencing defendant. After reading defendant's sentence, the trial court again stated, "It is not at all a reflection of some of the heated exchange this afternoon." Accordingly, defendant has not overcome the presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Likewise, although defense counsel's behavior caused him to be held in contempt, the record does not demonstrate that this affected defendant's sentence. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Because defendant's sentence was not based on factors that violated defendant's constitutional right to an impartial judge or the effective assistance of counsel, we must affirm the sentence, which was within applicable guidelines range and there was no error in the scoring of the guidelines and no reliance on inaccurate information in determining the sentence.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello