STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 2, 2013
v	No. 311644 Macomb Circuit Court
TIMOTHY MICHAEL WILDS, Defendant-Appellee.	LC No. 2011-003680-FH

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

This case arises from a fatal car accident. A blood test performed on the driver, defendant Timothy Michael Wilds, revealed the presence of two nanograms per milliliter of tetrahydrocannabinol (THC). The prosecutor charged defendant with having caused his passenger's death under MCL 257.625(4)(a), invoking two statutory theories: that defendant operated his vehicle with any amount of a controlled substance in his body, MCL 257.625(8), and that he drove while under the influence of a controlled substance, MCL 257.625(1).[1] Pretrial, the court ruled that it would instruct defendant's jury that the elements of both theories include that defendant "voluntarily decided to drive knowing that he had any amount of THC in his body." The prosecutor challenges this language as inconsistent with the statute. We granted the prosecutor's application for leave to appeal and now reverse.

I. BACKGROUND

Shortly before 6:00 a.m. on December 10, 2010, defendant drove along Plumbrook Road in Sterling Heights with his girlfriend, Brittany Nowicki, as his passenger. Approximately three inches of snow lay on the road. Defendant attempted to pass another vehicle, lost control of his car, and collided with an oncoming vehicle. Nowicki apparently had not been wearing her seatbelt and was ejected through defendant's windshield. She died later that morning at the hospital. A sample of defendant's blood contained two nanograms per milliliter of

[1] Count two of the information sets forth a misdemeanor charge of operating while intoxicated.

tetrahydrocannabinol (THC), "the psychoactive ingredient of marijuana,"[2] as well as 22 nanograms per milliliter of carboxy-THC, also known as TCHCOOH, a THC metabolite.

The prosecutor charged defendant with having caused Nowicki's death under MCL 257.625(4) based on two alternate theories: operating a vehicle with any amount of a controlled substance in his body causing death, MCL 257.625(4)(a), and operating a vehicle while under the influence of a controlled substance, MCL 257.625(1)(a). Both offenses arise under MCL 257.625, which sets forth the governing statutory scheme as follows:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:
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> (a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
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> * * *
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> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:
>
> (a) Except as provided in subdivision (b), the 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.
>
> * * *
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> (8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state ***if the person has in his or her body any amount of a controlled substance listed in schedule 1*** under [MCL 333.7212] of the public health code . . . . [Emphasis added].

Marijuana and THC are schedule 1 controlled substances under MCL 333.7212(c).

The criminal jury instruction for operating a motor vehicle with any amount of a schedule 1 controlled substance in one's body causing death, CJI2d 15.11a, describes the elements of that offense as follows:

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[2] *People v Derror*, 475 Mich 316, 319; 715 NW2d 822 (2006).

(2) First, that the defendant was operating a motor vehicle . . . .

(3) Second, that the defendant was operating the vehicle on a highway. . . .

(4) Third, that while operating the vehicle, the defendant had any amount of [marijuana or THC] in [his] body.

(5) Fourth, that the defendant voluntarily decided to drive ***knowing that [he] had any amount of [marijuana or THC] in [his] body.***

(6) Fifth, that the defendant's operation of the vehicle caused the victim's death . . . . [Emphasis added].

CJI2d 15.3a, the instruction for operating a vehicle with any amount of controlled substance in one's body, reads in relevant part:

The defendant is charged with the crime of operating a motor vehicle with a controlled substance in [his] body. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(1) First, that the defendant was operating a motor vehicle . . . .

(2) Second, that the defendant was operating the vehicle on a highway. . . .

(3) Third, that while operating the vehicle, the defendant had any amount of [marijuana or THC] in [his] body.

Notably, this instruction lacks an element that the defendant voluntarily decided to drive while knowing that he had a controlled substance in his body.

The instruction governing the charge of operating while under the influence of a controlled substance, CJI2d 15.3, also omits mention of a knowledge requirement. Rather, CJI2d 15.3 requires the prosecutor to prove that "the defendant operated a motor vehicle while [under the influence of a controlled substance]," and defines "under the influence of [a controlled substance]" to mean that due to the ingestion of a controlled substance, "the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened."

Before trial, the prosecutor moved to amend CJI2d 15.11a by eliminating the fourth element stated in the instruction: "that the defendant voluntarily decided to drive knowing that [he] had any amount of [marijuana or THC] in [his] body." Relying on *People v Derror*, 475 Mich 316, 320; 715 NW2d 822 (2006) overruled in part by *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010), the prosecutor argued that contrary to the instruction, defendant could be found guilty under MCL 257.625(4)(a) based on the presence of any amount of a controlled substance in his body, regardless whether he knew that THC was present in his bloodstream. The prosecutor instead proposed that paragraph 5 of the jury instruction (relating to the fourth element of the offense), read: "Fourth, that the defendant voluntarily decided to drive after knowingly ingesting [a controlled substance]. However, the prosecution does not have the

burden of proving that Defendant knew or should have known that he had the presence of THC within his body."

At a hearing, the circuit court observed that the Supreme Court had adopted CJI2d 15.11a despite that the fourth element was inconsistent with its own ruling in *Derror*. Further, the court noted that the Supreme Court overruled *Derror* in *Feezel*, and determined that the issues before it were controlled by *Feezel*. According to the trial court, *Feezel* "fulfills the constitutional requirement that there be the practical euphoric or the hallucinogenic effect of the drug which is prohibited, not just the b[y]-product" of past use. The circuit court ruled that based on *Feezel*, CJI2d 15.11a correctly states a knowledge requirement for the charge of operating a motor vehicle with any amount of a controlled substance in one's body causing death. The court further found that proof of this knowledge was necessary in order to prove that defendant operated a motor vehicle with any amount of a controlled substance in his body under MCL 257.625(8). This Court granted the prosecutor's interlocutory application for leave to appeal regarding the proper elements of the jury instructions. *People v Wilds*, unpublished order of the Court of Appeals, entered October 10, 2012 (Docket No. 311644).

II. STANDARD OF REVIEW

"We review de novo claims of instructional error." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). The instructions must be considered as a whole to determine whether any error occurred. *Id*. "A criminal defendant has a constitutional right to have a jury determine his guilt from its consideration of every element of the charged offense. A defendant is thus entitled to have all the elements of the crime submitted to the jury in a charge which is neither erroneous nor misleading." *Id*. (quotation marks and citation omitted).

The Criminal Jury Instructions are not promulgated by the Supreme Court; they are drafted by the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions and are adopted after taking public comments on proposed revisions and additions. *People v Stephan*, 241 Mich App 482, 495 n 10; 616 NW2d 188 (2000). While the Supreme Court "urges" trial courts to utilize these criminal jury instructions, this is not a mandate. *Id.* "Where a Criminal Jury Instruction does not accurately state the law," trial courts must refuse to give it. *Id.* at 495.

We review de novo any underlying questions of statutory interpretation. *Kowalski*, 489 Mich at 497. To realize the Legislature's intent, we must give statutory language its plain and ordinary meaning. *Id*. at 498. We may only employ the tools of statutory construction where the statutory language is ambiguous. *Feezel*, 486 Mich at 205.

III. ANALYSIS

The prosecutor contends that "the plain and unambiguous language" of the statute under which defendant stands charged does not require proof beyond a reasonable doubt that defendant "voluntarily decided to drive knowing that he had any amount of THC in his body." According to the prosecutor, this phrase conflicts with both the statute and controlling case law. Thus, the prosecutor posits, defendant's knowledge that his body contained THC is legally irrelevant, as

defendant may be properly convicted solely upon proof that "any amount" of THC was present in his body when he operated his vehicle.

"Criminal intent is ordinarily an element of a crime." *People v Lardie*, 452 Mich 231, 239; 551 NW2d 656 (1996), overruled in part by *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005).[3] The absence of an explicit mens rea element in a criminal statute should not be construed as an intention to eliminate the requirement. *Kowalski*, 489 Mich at 499. "[C]ourts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed." *Id*. at 499 n 12.

Neither MCL 257.625(4) nor subsections (1), (3) or (8) expressly provide for a specific intent to commit these crimes. However, MCL 257.625(4) "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." *Lardie*, 452 Mich at 245. In *Lardie*, the Court found that the Legislature did not intend to impose strict liability for violations of MCL 257.625(4), but instead intended to require proof of the general intent of voluntarily choosing to drive after having knowingly consumed alcohol or other intoxicating controlled substances. *Lardie*, 452 Mich at 249, 251, 256. The Court explained:

> The wrong the Legislature sought to prevent is driving after consuming an intoxicating liquor or a controlled substance, regardless of whether the person subjectively believed he was intoxicated. Consequently, ***we read the statute to prohibit a defendant from claiming that he had consumed an intoxicating liquor or a controlled substance but did not think he was intoxicated***. [*Id.* at 251 n 31 (emphasis added)].

Following this logic our Supreme Court held that MCL 257.625(4) required the prosecution to prove that the defendant "acted knowingly in consuming an intoxicating liquor or a controlled substance, and acted voluntarily in deciding to drive after such consumption." *Lardie*, 452 Mich at 256.

While *Lardie* dealt with a charge of OUIL causing death, the same principles apply to operating a motor vehicle with any amount of schedule 1 controlled substances in one's body. "The plain language of MCL 257.625(8) does not require the prosecution to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated," but instead imposes criminal liability when a person drives while having any amount of a schedule 1 controlled

[3] *Schaefer* reversed *Lardie* only to the extent that *Lardie* could be construed to require that the defendant's *intoxicated* driving caused the victim's death, and did not disturb the ruling that the required mental state was shown by proving that defendant voluntarily decided to drive while knowing that he had consumed alcohol. *Schaefer*, 473 Mich at 422 n 4.

substance in his or her body. *Derror*, 475 Mich at 334.[4] The Supreme Court restated this principle in *Feezel*:

> [B]ecause the prosecution need only establish that a defendant had any amount of a schedule 1 controlled substance in his or her body while operating a motor vehicle, under *Derror*, a person who operates a motor vehicle with the presence of any amount of 11-carboxy-THC in his or her system violates MCL 257.625(8). [*Feezel*, 486 Mich at 204-205.]

Accordingly, we hold that by identifying as an offense element that "the defendant voluntarily decided to drive knowing that he had any amount of controlled substance in his body," CJI2d 15.11a incorrectly states the law.

Defendant insists that "eliminat[ing]" this sentence removes the crime's mens rea element, which in turn renders MCL 257.654(4) unconstitutional. This argument rests primarily on the Sixth Circuit's opinion in *United States v Wulff*, 758 F2d 1121 (CA 6, 1985). The defendant in *Wulff* 758 F2d at 1122, was charged "with offering to sell migratory bird parts in violation of the Migratory Bird Treaty Act ("MBTA"), 16 USC § 703 *et seq*." The Sixth Circuit held that conviction under the MBTA required proof of "some degree of scienter. Otherwise, a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his reputation. This . . . the Constitution does not allow." *Wulff*, 758 F2d at 1125.

We resolve any potential constitutional due process problem by inserting in place of the disputed sentence the prosecution's suggested language, "that the defendant voluntarily decided to drive after knowingly ingesting marijuana." This amendment prevents conviction of a defendant who accidentally or unknowingly ingested a controlled substance.[5] We reiterate that the plain language of MCL 257.625(8) refutes that the Legislature intended the prosecution to prove a defendant's awareness of the controlled-substance level found in his bloodstream. Rather, the statutory purpose is simply to deter drivers who have used a controlled substance from driving.

Summarizing, we hold that to convict defendant under either MCL 257.625(1) or (8), the prosecution need not prove that defendant "voluntarily decided to drive knowing that he had any

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[4] In *Derror*, the defendant was found to have 11-carboxy-THC, a metabolite of THC and marijuana, in his system. In *Feezel*, 486 Mich at 205, the Court found that 11-carboxy-THC, while a metabolite of controlled substances, was not a controlled substance and reversed *Derror* on that basis. Defendant's blood contained THC, a schedule 1 controlled substance, in addition to the metabolite.

[5] We discern no basis for adopting the prosecutor's suggestion that the jury be further instructed that "the prosecution does not have the burden of proving that Defendant knew or should have known that he had the presence of THC within his body." However, where a defendant has attempted to raise this improper defense, this language would not be legally objectionable.

amount of THC in his body." An instruction to this effect misstates the law and should not be given. If consistent with the evidence, the circuit court should instead instruct that an element of either offense includes "that the defendant voluntarily decided to drive after knowingly ingesting marijuana."

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher