STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE ALLEN NELSON,

Defendant-Appellant.

UNPUBLISHED
August 23, 2012

No. 301253
Iosco Circuit Court
LC No. 09-004926-FC

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

On August 3, 1980, Cherita Thomas disappeared. She has not been seen or heard from since. Her body has not been found. Although she is presumed dead, no one has come forward as a witness to her death or the disposal of her body. There is no physical evidence regarding the manner of her death. And no one has admitted responsibility for her disappearance or death. The investigation into Thomas's disappearance continued for nearly 25 years and developed various suspects but did not initially focus on defendant Jimmie Allen Nelson. Multiple investigators were involved over the years, and Nelson was interviewed numerous times. He initially denied having any connection to Thomas on the night that she disappeared; however, Nelson eventually admitted that he was alone with Thomas for some time that night and provided inconsistent versions of the events of that night. In 2004, the police arrested Nelson on the charge of open murder, MCL 750.318. The district court initially refused to bind Nelson over, but after a lengthy appeal regarding the *corpus delicti* rule, Nelson was eventually bound over and tried on the charge. After a two-day bench trial in 2010, the trial court found Nelson guilty of second-degree murder, MCL 750.317, and sentenced him to 25 to 50 years' imprisonment.

Nelson appeals his conviction as of right. Except for *People v Fisher*, 193 Mich App 284; 483 NW2d 452 (1992), we find no other Michigan case of record comparable to this case and the evidentiary quandary it presents. In *Fisher*, this Court reversed a defendant's involuntary-manslaughter conviction because the evidence was insufficient to prove beyond a reasonable doubt that the defendant caused his wife's death. Based on our review of all of the evidence presented at trial in the present case, we find that, even when viewed in the light most favorable to the prosecution, the evidence was insufficient to establish beyond a reasonable doubt two elements of second-degree murder: (1) that Nelson is the one who caused Thomas's death and (2) that he acted with malice. Therefore, we must reverse defendant's conviction as

we did in *Fisher* because speculation is not a sufficient basis upon which to convict an accused under our system of justice.

I. FACTS AND PROCEDURAL HISTORY

According to the evidence presented at trial, on August 3, 1980, Thomas and Patricia Bates, Thomas's friend and next door neighbor, decided to see Bates's friend play in a softball tournament in Mikado. Before going to the tournament, Thomas and Bates left their children at the home of Bates's sister, Anna Bouchard. The women then visited Thomas's fiancé, William Merritt, at an Air Force base. Merritt gave Thomas some money, and the women went to the Hilltop Bar for a drink. While they were at the bar, Thomas and Bates saw Nelson, whom they both knew because he was Bouchard's brother-in-law. According to Bates, Nelson used "the 'N' word" and was not shy about telling people about his "dislike for black people." Indeed, according to Bouchard, Nelson once told her that he did not like Thomas being in her house because she was black. According to Shonda Champine[1], an employee at the Hilltop Bar, she would see Nelson at the bar six days a week. She once heard him say while he was drinking that "[t]he only good niger [sic] is a dead one." Furthermore, Champine believed that Nelson was a violent person because he got into "many" fights at the bar. After briefly speaking to Nelson, the women left the bar and went to the tournament in Mikado.

When Thomas and Bates arrived at the tournament, Bates's friend was not playing, so they went to the Mikado Tavern to eat. While they were at the tavern, people began to stare at them; they became uncomfortable and went into the bathroom together. When they came out, someone asked them, "[D]id you two have a good time in there?" Bates said yes, and the women walked out of the tavern and slammed the door. As they left the tavern, someone told them not to come back. However, Thomas and Bates later went back to the tavern with Bates's friend's softball team. At about 10:00 p.m., Thomas wanted to leave the tavern; Bates reluctantly lent Thomas her car and drew Thomas a map to Bouchard's house. Bates did not give Thomas the keys to her apartment.

While driving on River Road in Oscoda that evening, Albert McBride, Herb McViddy, and Eugene Lutz saw a broken-down car with steam coming from its hood. The driver was a well-dressed black woman. She did not exit the car and only rolled her window down slightly to talk to them. The woman told them that she was going to her babysitter's house to pick up her child. The three men offered her a ride, which she refused. The men fixed her radiator hose with duct tape but warned that the repair would not last long. They later saw the vehicle broken down again on Sunset Road.

Between 10:30 and 11:00 p.m. that night, Frank Perry was at his home on Sunset Road when he heard a door slam outside his house. He looked outside and saw a car with steam coming out of the hood. He saw the driver leave on foot and then return a short time later as a passenger in a blue pickup truck. The two individuals talked while attempting to get the car

[1] Champine died before trial, so the trial court admitted her preliminary-examination testimony. See MRE 804(b)(1).

running. According to Perry, it seemed "like they knew each other." After failing to get the car running, they both left in the pickup truck and drove south on Sunset Road. Gary Miner also lived on Sunset Road and saw a blue Ford pickup next to a broken-down car at about 11:00 p.m. He saw two people outside the vehicles and, although not certain, thought there was a third person in the blue pickup. Miner saw the pickup leave and drive south toward the woods and "Old 23."

Bates got to her apartment at 2:30 a.m. the next morning. Her car was not there. Bates called Bouchard to check on the children. Later that day, Perry called the police to report that the broken-down car was partially blocking his driveway. Bates was identified as the car's owner. The police notified Bates and took her to the car. The interior "was all messed up"; it contained Thomas's cigarettes and apartment keys and the map to Bouchard's home. The keys to the car were gone. The police removed the tape off of the car's heater hose under the hood and also collected "other things . . . for fingerprint comparison and things of that nature."

The day after Thomas's disappearance "became news," Nelson participated in a search for Thomas with Merritt and a group of people. Thomas has not been seen or heard from since August 3, 1980. Her body has not been found. According to Merritt, Thomas was "not the type of person that would leave her daughter." All of her personal possessions were left at the apartment that she shared with Merritt. Thomas has not used the welfare system and has had no credit history since 1980.

According to Champine, Nelson owned two pickup trucks in 1980: one blue Ford pickup truck and one red and orange truck. Shortly after Thomas's disappearance, Champine told Nelson that she saw him driving his blue pickup truck near the Hilltop Bar on the night of August 3, 1980; however, Nelson denied driving the blue truck and, instead, stated that he was driving the red and orange truck. Champine never saw Nels7on driving his blue pickup truck after Thomas disappeared; according to Champine, the truck stayed in Nelson's back yard, and then Nelson sold it sometime during the 1990s.[2] Moreover, Champine saw that Nelson both "mellowed out" after Thomas disappeared and began talking to black people.

Detective Raymond Knuth[3] of the Oscoda Township Police Department became the lead investigator in Thomas's disappearance. Early in his investigation, Knuth interviewed Merritt, Jaclyn Wrona and other residents in the area where Bates's car was found, and people from the Hilltop Bar and the Mikado Tavern. Knuth received information that a person in a blue pickup truck assisted Thomas with Bates's car. During Knuth's interview with Merritt, he found Thomas's wallet in her apartment where she was living with Merritt.

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[2] Similarly, JoAnn Daggett testified at trial that she also never saw Nelson drive his blue pickup truck after Thomas's disappearance.

[3] Knuth also died before trial, so the trial court admitted his preliminary-examination testimony. See MRE 804(b)(1).

About 12 days after Thomas disappeared, Detective Allen MacGregor saw Nelson driving a Ford Bronco. Knuth interviewed Nelson on August 18, 1980, because he drove a blue pickup truck and "lived down the street." Nelson told Knuth that he knew of Thomas but knew nothing about her, that his truck was not there because his wife was driving it to work, and that he was not "out and about as far as he knew on Sunday" (the day after Thomas disappeared). Nelson also told Knuth that he had never been in or around Bates's car and "made it a point to tell [Knuth] that something about him was different than the description" of "the guy that picked [Thomas] up." Knuth never looked at Nelson's blue pickup truck. Although Nelson apparently kept his blue pickup until the 1990s, at no time before he sold it did the police seek again to examine it.

Initially, Knuth's primary suspect for Thomas's disappearance was Grant Goddard, a federal fugitive who had a blue truck. Goddard, unlike defendant, matched the description that Wrona provided of the person who helped Thomas with Bates's car. In October 1980, a "fairly new" blue Chevy pickup truck owned by Goddard was found stripped in the national forest near Oscoda. Goddard's son, Ken, told Knuth that Goddard was involved in Thomas's disappearance. Knuth also considered additional suspects, including Ronald Laubon and Albert Powell (a sex offender who drove a blue pickup truck).

According to Champine, Nelson "wasn't very fond of Mr. Knuth." Nelson told Champine that Knuth would have to get a search warrant to see his blue pickup truck, which Nelson said he had surrounded in his backyard by two or three feet of firewood. Furthermore, Nelson told Champine that he was no longer hunting at his hunting camp near Old 23.

In 1987, Knuth retired as detective at the Oscoda Township Police Department, and MacGregor replaced Knuth as detective and took over the investigation of Thomas's disappearance. According to MacGregor, "Knuth talked to a lot of people [during his investigation], but he didn't put a lot of things on paper."

In 1993, FBI Special Agent David Marthaler interviewed Nelson. Nelson denied ever meeting Thomas. Marthaler also interviewed Goddard. Marthaler asked Goddard about his truck, and Goddard explained that he "ditched the truck in the woods because he didn't want to draw attention to himself because he was a fugitive at the time." Marthaler asked Goddard about Thomas's disappearance. Goddard stated that "somebody came up and asked him to assist in the disposing of that black woman from up north." According to Marthaler, Goddard "wanted to strike a deal." At one point, the FBI put a wire on Ken. According to Marthaler, Goddard denied "any involvement with the black woman" on about nine occasions. However, Goddard also stated in an exchange with Ken, "They bury me and they're going to get that black woman. They're going to bury us both, I'm telling you." In another exchange, Goddard told Ken, "Your mother once told him that I -- that I said that I knew where that woman's body was. You went over and told her, and then she went and told the F.B.I. . . . Boy, Ken, that was the biggest mistake you ever made. You should have never done that, man. Anything I ever said to you . . . should be between you and I." In June 1993, Goddard "changed his story a number of times" and eventually said that he "made the whole thing up . . . as a means of escape" in the event the police took him to where he stated that Thomas's body was. Moreover, Ken stated that he made up the accusation that Goddard was involved in Thomas's disappearance to try to get back at Goddard, who had testified against him in a homicide trial. According to MacGregor, "every

lead we ran with Mr. Goddard ran out. It never went anywhere. It was found to be a deception or a lie."

Nearly 15 years after Thomas' disappearance, MacGregor and Officer Gregory Proudfoot interviewed Nelson on February 24, 1995. Nelson said that he did not know Thomas. Nelson initially denied helping Thomas with her car but later stated that it was possible that he helped her with her car and gave her a ride. As Nelson left the interview, Proudfoot stated, "I know she was with you in your truck." Nelson responded, "[O]kay, maybe I was with her that night, but when I last saw her, she was alive."

In 2000, Joseph DeBuck did construction work for Nelson. After work one night, DeBuck spoke to Nelson while drinking a beer. Nelson told DeBuck that, "in his . . . wilder days when he was younger," he painted the inside of his pickup truck orange.

Over 20 years after Thomas' disappearance, FBI Special Agents David Hayes and Robert Foster interviewed Nelson in December 2000. According to Hayes, Nelson indicated that "he really had very little knowledge regarding [Thomas's] disappearance." Nelson again denied seeing Thomas on the night of August 3, 1980, and stated that he had only seen Thomas once: when she was babysitting at Bouchard's house.

Both Hayes and Foster interviewed Nelson a second time in March 2001. Nelson stated that he had visited a hypnotist that morning and, as a result, his memory had improved. Nelson stated that he saw Thomas at the Hilltop Bar where Thomas told him that her car broke down. Nelson agreed to take Thomas to her car and assist her. Nelson told Hayes that he could not get the car started, so he drove Thomas to "Patty" Bates's house where she went inside and got her keys and wallet (purse). Nelson then dropped Thomas off at Wiltse's Restaurant, where she went inside and sat down with two female employees. According to Hayes, Nelson told him that he sold his blue Ford pickup truck to his neighbor; Nelson denied painting the inside of the truck.

Marthaler interviewed Nelson again with FBI Agent David Sparks in March 2001. In a prior interview, Nelson had admitted to Marthaler that he met Thomas, worked on her car, took her to pick up her wallet, and dropped her off at Wiltse's Restaurant; Marthaler and Sparks confronted Nelson with the fact that Wiltse's was not open at the time Nelson said he dropped off Thomas.[4] Nelson responded, "[W]ell then I don't remember where I dropped her off." According to MacGregor, he "got passed [sic] Mr. Goddard" and eliminated him as a suspect in the investigation once Nelson stated that he picked up Thomas.

At some point about 20 years after Thomas's disappearance, Bouchard spoke to Nelson on the telephone on behalf of the FBI. Nelson knew that Bouchard had spoken to the FBI and wanted to know what Bouchard told them. Nelson told Bouchard that he sold his blue pickup truck to his neighbor. Nelson also told her that he had worked on Bates's car the night Thomas

[4] Dean Wiltse, the owner of Wiltse's restaurant, testified at trial that everyone would have been out of the restaurant by 9:30 p.m. on August 3, 1980, because the restaurant closed at 8:00 p.m. and it took 45 to 90 minutes to clean.

disappeared and that he took Thomas to either another bar or Wiltse's restaurant, but he was not sure. Nelson stated that he did not "remember a damn thing about that night" because of both his drinking and the 20 years that had passed. In this same time frame, a little over 20 years after Thomas disappeared, Nelson invited Champine to the Hilltop Bar to have a beer with him. Nelson told Champine that he had just spent the day with and fooled the prosecutor. Nelson also told Champine that he was buying some land and that she could have a little piece of it because they were friends.

On December 28, 2004, the police arrested Nelson for Thomas's murder. After a preliminary examination, the Iosco district court issued an order on October 20, 2005, concluding that there was insufficient evidence to bind over Nelson for open murder. The prosecutor appealed, and this Court reversed and remanded to the district court for reconsideration. *People v Nelson*, unpublished opinion of the Court of Appeals, issued December 23, 2008 (Docket No. 271768). On April 24, 2009, the district court bound over Nelson on the charge of open murder, and Nelson pleaded not guilty to the charge three days later. After a two-day bench trial in October 2010, the trial court convicted Nelson of second-degree murder. The court sentenced him to 25 to 50 years' imprisonment.

II. ANALYSIS

Nelson contends that the prosecution presented insufficient evidence for the trial court, the finder of fact at the bench trial, to conclude beyond a reasonable doubt that he committed second-degree murder. Based on the evidence presented at trial and the applicable law, we are compelled to agree.

"It is . . . important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Thus, the Due Process Clause of the United States Constitution protects a defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* The reasonable-doubt standard is, consequently, indispensible and the "prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363-364. Therefore, when conducting a de novo review of the sufficiency of the evidence presented at a trial, we examine the evidence in a light most favorable to the prosecution to determine whether a rational factfinder could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Evidentiary conflicts must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising from such evidence can be satisfactory proof of the elements of a crime. *Id.*

"The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009). Courts construe statutory homicide crimes by looking to common-

law definitions as Michigan's homicide statutes employ the general terms of the common law to describe an offense. *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002). "The common-law causation element is comprised of two components, cause-in-fact or proximate/legal cause." *People v Tims*, 449 Mich 83, 95; 534 NW2d 675 (1995). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "The facts and circumstances of the killing may give rise to an inference of malice." *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). Malice may be inferred "from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id.* And, "[m]alice may also be inferred from the use of a deadly weapon." *Id.*

Twenty years ago, this Court overturned a defendant's involuntary-manslaughter conviction because there was insufficient evidence that the defendant caused his wife's death; his wife's body was never found, there were no witnesses to either his wife's death or the disposal of her body, there was no physical evidence linking the defendant to her death, and the defendant did not confess to killing her. *People v Fisher*, 193 Mich App 284, 285, 288-289; 483 NW2d 452 (1992). Because of the legal precedent established by this Court in *Fisher* and the factual similarities between *Fisher* and the present case, we must conclude that there is insufficient evidence of causation to affirm Nelson's conviction in this case.

In *Fisher*, the defendant and his wife, Joyce Fisher, were getting a divorce in April 1978. *Id.* at 286. The defendant and Joyce had a "stormy two-year marriage." *Id.* The defendant subjected Joyce to "frequent beatings" and even "threatened to kill her in mid-January 1978." *Id.* Joyce moved to Chicago with their daughter to live with Joyce's parents. *Id.* On April 14, 1978, Joyce went to her parents' cottage at Indian Lake for a visit between defendant and their daughter. *Id.* Witnesses saw Joyce and the defendant having a "friendly breakfast" at a local drugstore on the morning of April 15. *Id.* Later that day, Joyce and the defendant got into the defendant's car to go get a vehicle title transfer notarized. *Id.* According to the defendant, Joyce discovered that they had the wrong title, so the defendant returned to where Joyce had her car. *Id.* No witnesses could support the defendant's contention, and no one saw Joyce after that time. *Id.* Two days after Joyce's disappearance, a police officer questioned the defendant and suggested a possible sequence of events for Joyce's disappearance. *Id.* at 289. The defendant responded, "It's not like it seems, it didn't happen that way, I didn't mean for it to happen that way." *Id.* "[A] year or two after Joyce's disappearance, while [the] defendant was drinking one evening, he said [Joyce] was gone 'and nobody can find her' or 'nobody is going to find her or something to that effect.'" *Id.* at 288. The defendant ultimately remarried and lied to his second wife about the circumstances surrounding the end of his marriage to Joyce. *Id.* The defendant also told people after Joyce's disappearance that he had either divorced Joyce or that she was being institutionalized. *Id.* In September 1987, the defendant was charged with open murder. *Id.* at 285-286. There was substantial testimony at trial that gave rise to a strong inference that Joyce was dead, including testimony about Joyce's ties to her family and friends and her long- and short-term plans. *Id.* A jury convicted the defendant of involuntary manslaughter. *Id.* at 285.

This Court reversed the defendant's conviction and remanded for a directed verdict of not guilty. *Id.* at 291. The *Fisher* Court concluded that the prosecutor "failed to introduce sufficient

evidence to support submitting any of the homicide theories to the jury." *Id.* at 287. The Court stated that the prosecutor "presented ample evidence of [the] defendant's motive and opportunity to kill his wife." *Id.* at 289. But, this Court emphasized that "[m]otive and opportunity . . . are not elements of any crime." *Id.* We stated that the evidence in the case "did not rise above the level of conjecture." *Id.* This Court explained that the prosecution did not offer evidence of an act that resulted in Joyce's death. *Id.* at 287. And, we emphasized the absence of the following: Joyce's body, a witness to the killing or the disposal of Joyce's body, a confession, and physical evidence linking the defendant to Joyce's death. *Id.* at 287-289.

Although *Fisher* and the present case are not identical, the cases are strikingly similar. In both cases, a body was never found and there were no witnesses to either a killing or the disposal of a body. Furthermore, there was no physical evidence linking either defendant to either woman's death, and neither defendant confessed. Instead, the evidence presented by the prosecution in both *Fisher* and the present case was limited to evidence of opportunity, motive, and various forms of evidence demonstrating consciousness of guilt. While the evidence in this case, which we discuss below, permits the reasonable inference that Nelson was involved in Thomas's disappearance or death, it does not permit the reasonable inference that he caused Thomas's death.

In this case, several witnesses testified about Nelson's racism toward African-Americans and that he was with Thomas shortly before she disappeared. This evidence established that Nelson had both a motive and an opportunity to kill Thomas. Although not dispositive of causation, evidence of opportunity is logically relevant in a prosecution for murder and supports an inference that Nelson was involved in Thomas's disappearance or death. See *People v Unger*, 278 Mich App 210, 224; 749 NW2d 272 (2008).

The prosecution also presented various evidence demonstrating Nelson's consciousness of guilt. First, he made inconsistent statements after Thomas's disappearance about both his relationship with her and the night of her disappearance. See *id.* at 225-227 (inconsistent statements indicate consciousness of guilt). Specifically, in the 1980 interview with Knuth, Nelson stated that he knew Thomas and that he had not been near the car that Thomas was driving the night she disappeared. In the 1993 interview with Marthaler and the 1995 interview with Proudfoot, Nelson stated that he had never met Thomas and did not know her. However, later in Nelson's interview with Proudfoot, he admitted that he helped Thomas with her car in the Hilltop Bar parking lot and possibly on Sunset Road. Nelson told Proudfoot, "[M]aybe I was with her that night, but when I last saw her, she was alive." Nonetheless, in a December 2000 interview with Foster, Nelson stated that he did not see Thomas on the night that she disappeared. However, in March 2001, he told both Hays and Sparks that he assisted Thomas with her car, took her to Bates's apartment to pick up her wallet, and then dropped her off at Wiltse's restaurant. Nelson told Marthaler in a second interview that he remembered meeting Thomas, working on her car, giving Thomas a ride so that she could pick up her wallet from either her or Bates's apartment, and then dropping her off at Wiltse's restaurant. Finally, Nelson told Bouchard that he worked on Thomas's car and may have taken Thomas to Wiltse's restaurant.

Second, Nelson's consciousness of guilt was illustrated by evidence that he made factual assertions about the night of Thomas's disappearance that could not have occurred. See *id.*

(consciousness of guilt may be inferred from evidence of lying or deception). Specifically, he stated that he took Thomas to either her or Bates's apartment to pick up her wallet and then dropped Thomas off inside Wiltse's restaurant on the night she disappeared. The evidence at trial, however, established that Bates's car broke down on Sunset Road between 10:30 p.m. and 11:00 p.m., and Wiltse testified that the restaurant would have been closed and empty by 9:30 p.m. that night. Furthermore, Bates testified that Thomas could not have entered Bates's apartment the night of the disappearance because Thomas did not have keys to the apartment. Moreover, Knuth testified that Thomas's wallet was found in her home, which contradicts Nelson's statement that Thomas picked up her wallet before going to Wiltse's restauarant. The factfinder could reasonably infer from this evidence that Nelson lied about his conduct on the night of Thomas's disappearance because he was involved in her disappearance or death.

Third, Nelson's consciousness of guilt was illustrated by evidence of his conduct after Thomas disappeared. Particularly, he stopped driving his blue pickup truck, concealed it in his backyard with firewood, and ultimately sold it. He told Champine that he was driving his red and orange truck on the day Thomas disappeared, but Champine remembered that Nelson drove his blue pickup truck that evening. Attempts to conceal involvement in a crime demonstrate consciousness of guilt. See *People v Kowalski*, 489 Mich 488, 508-509; 803 NW2d 200 (2011). The factfinder could reasonably infer from this evidence that Nelson attempted to conceal his truck after Thomas's disappearance because it was involved in her disappearance or death. Furthermore, Champine testified that Nelson "mellowed out" and began talking to African-Americans after Thomas disappeared. This evidence permits the reasonable inference that Nelson changed his demeanor and eliminated his outward expressions of racism because he either felt remorse for what he had done or did not want to not draw attention to himself because he was involved in Thomas's disappearance or death. Moreover, Nelson's statement to Champine that he had "fooled" the prosecutor would allow the trial court to reasonably find that Nelson "fooled" the prosecutor to conceal his involvement in Thomas's disappearance or death. Finally, the factfinder could reasonably infer that Nelson's offer to give Champine land was an attempt to influence Champine, demonstrating that Nelson had a guilty conscience because he was involved in Thomas's disappearance or death. See *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981) (consciousness of guilt can be inferred from evidence of an attempt to influence an adverse witness).

Notwithstanding this evidence of opportunity, motive, and consciousness of guilt that permits the reasonable inference that Nelson was involved in Thomas's disappearance or death, the evidence does not permit a reasonable inference that he is the one who caused her death. He may know how she died. He may have been involved alone or with someone else in her death. He may have intentionally killed her or engaged in inappropriate conduct with her that was unwanted and escalated out of control. Under *Fisher*, the evidence of causation in this case is too tenuous to find beyond a reasonable doubt that Nelson caused Thomas's death.

When comparing *Fisher* to the present case, the evidence of opportunity is of the same caliber in both cases. Nelson was the last known person to see Thomas, and the defendant in *Fisher* was the last known person to see Joyce. The evidence of motive in *Fisher* was stronger than the evidence of motive in the present case. Here, the only evidence of motive was Nelson's racism, which is a motive concerning a class of people in general. In *Fisher*, the defendant's motive was specifically directed at Joyce; the defendant subjected Joyce to domestic violence,

Joyce took their daughter to Chicago, the defendant and Joyce were getting a divorce, and the defendant threatened to kill Joyce just three months before she disappeared. Similarly, there is as much or more evidence of consciousness of guilt in *Fisher* than in the present case. In *Fisher*, the defendant lied to people about the circumstances surrounding the end of his marriage to Joyce, stated that "nobody is going to find [Joyce]," and stated that he "didn't mean for it to happen that way" when he was confronted with a potential sequence of events regarding Joyce's disappearance. In the present case, Nelson made inconsistent statements about both his relationship with Thomas and his presence with her on the night she disappeared. He also attempted to conceal the truck that he used to help Thomas (although he did not sell it for at least ten years), changed his behavior after Thomas disappeared, attempted to influence Champine by offering her land, stated that he "fooled the prosecutor," and provided an account of the night of Thomas's disappearance that contained events that could not have possibly occurred. The evidence of Nelson's consciousness of guilt that arose after Thomas's disappearance is probative of causation because it indicates that he was involved in Thomas's disappearance. But again, this evidence only permits the conclusion that he was involved in Thomas's disappearance or death; it does not permit a reasonable inference that he caused Thomas's death. As previously discussed, "[t]he prosecutor offered no evidence of an act that resulted in [Thomas's] death." See *Fisher*, 193 Mich App 287. No one testified about witnessing Thomas's death or the disposal of her body. See *id.* There was no physical evidence linking Nelson to Thomas's death, and he did not confess. See *id.* at 287-289.

Accordingly, we conclude that the evidence at trial was insufficient to determine beyond a reasonable doubt that Nelson caused Thomas's death.

In addition to concluding that the prosecution presented insufficient evidence of causation, we also conclude that the evidence at trial, when viewed in a light most favorable to the prosecution, was insufficient to determine beyond a reasonable doubt that Nelson acted with malice. In this case, malice cannot be inferred from evidence of Thomas's injury because there is no evidence regarding the manner of Thomas's death. See *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995). There is no evidence that Thomas died at the hands of a deadly weapon to support an inference of malice. See *Carines*, 460 Mich at 759. And, there is no evidence that Nelson "intentionally set in motion a force likely to cause death or great bodily harm" from which the factfinder could infer that he acted with malice. See *id.*

The prosecution did present evidence for the factfinder to infer that Nelson attempted to conceal an involvement in Thomas's disappearance. Specifically, Nelson provided inconsistent and deceptive accounts of both his relationship with Thomas and the day of her disappearance. See *Unger*, 278 Mich App at 225-227. After Thomas's disappearance, Nelson "mellowed out." He stopped driving his blue pickup truck, which he kept surrounded by firewood in his backyard and later sold. See *Kowalski*, 489 Mich at 508-509 (attempts to conceal involvement in a crime also show consciousness of guilt). Moreover, the prosecution presented evidence for the factfinder to infer that Nelson attempted to influence Champine by offering her a piece of land. See *Mock*, 108 Mich App at 389 (consciousness of guilt can be inferred from evidence of an attempt to influence an adverse witness). As previously discussed, all of this evidence illustrates Nelson's consciousness of guilt; however, mere consciousness of guilt does not demonstrate that defendant committed an act with malice. Indeed, a person may have a guilty conscience due to his or her involvement in another person's death without having committed an act with malice.

See generally *People v Hicks*, 96 Mich App 610, 610-613; 293 NW2d 646 (1980) (illustrating a factual scenario where a defendant who did not act with malice could nonetheless have a guilty conscience arising from his involvement in a person's death).

The prosecution also presented evidence that Nelson had a motive to kill Thomas. Specifically, several witnesses testified that Nelson disliked African-Americans and referred to African-Americans with racial slurs. Indeed, Champine testified that Nelson told her that the "only good niger [sic] is a dead one." Bouchard testified that Nelson told her that he did not like Thomas being in Bouchard's home. But, while evidence of motive in a murder prosecution is particularly relevant where the proofs are circumstantial, motive is not an element of the crime. *Unger*, 278 Mich App at 223. "A motive is an inducement for doing some act; it gives birth to a purpose. The resolve to commit an act constitutes the intent." *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925). Nelson's racism, his attempt to influence Champine, his attempts to conceal involvement in Thomas's disappearance, and his inconsistent accounts of his relationship with Thomas and the day of her disappearance do not permit the conclusion beyond a reasonable doubt that he had the resolve, i.e., the intent, to either kill Thomas, cause her great bodily harm, or act in wanton and wilful disregard of the likelihood that the natural tendency of his act would cause death or great bodily harm to Thomas.

Accordingly, we conclude that the evidence at trial was insufficient for the trial court to determine beyond a reasonable doubt that Nelson acted with malice.

Because the evidence presented at trial when viewed in a light most favorable to the prosecution was insufficient to establish both the malice and causation elements beyond a reasonable doubt, we hold that there was insufficient evidence to convict Nelson of second-degree murder.[5] Therefore, we must reverse his conviction.[6] We recognize the difficult task that a prosecutor's office faces in prosecuting a case 30 years after a person's disappearance and death. But courts must live with the evidence gleaned from a police investigation that did not seriously examine Nelson until many years after Thomas's disappearance and did not produce physical evidence linking Nelson to Thomas's death.

We also recognize the impact that this decision has on Thomas's community and family. Her death is a tragedy. But it is important to remember the distinction between having a good reason to believe that a defendant committed a crime and having proof beyond a reasonable doubt that a defendant committed a crime. The United States Constitution requires that evidence satisfy the latter indispensable standard. See *In re Winship*, 397 US at 362-364. As "a society that values the good name and freedom of every individual," we do not condemn men and

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[5] We note that the failure to establish causation prohibits a conviction for both second-degree murder and involuntary manslaughter. "[T]he sole element distinguishing manslaughter and murder is malice." *People v Holtschlag*, 471 Mich 1, 21; 684 NW2d 730 (2004) (quotation marks and citation omitted); see also *People v Zak*, 184 Mich App 1, 9-11; 457 NW2d 59 (1990) (discussing the causation element of involuntary manslaughter).

[6] Given this conclusion, we do not address the additional issues raised by Nelson on appeal.

women for the commission of a crime that has not been proven beyond a reasonable doubt. *Id.* at 363-364. The purpose of the reasonable-doubt standard is not to make it harder to convict guilty people but to prevent the conviction of the innocent. See *id.* If we dispense of the reasonable-doubt standard when there is a good reason to believe that a defendant committed a crime, then surely the innocent will be condemned. A conviction of murder or any other crime cannot be on the basis of a strong feeling of guilt but only on the basis of evidence that leaves no reasonable doubt.

When a conviction is not supported by sufficient evidence, retrial on the identical charge is prohibited by the Double Jeopardy Clause. *People v Watson*, 245 Mich App 572, 596; 629 NW2d 411 (2001). Thus, defendant's conviction of second-degree murder is reversed, and this case remanded for entry of an acquittal.

Reversed and remanded for entry of an acquittal. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro