

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GREGORY W. SHELL,

Defendant-Appellee.

UNPUBLISHED

August 26, 2003

No. 236993

Wayne Circuit Court

LC No. 01-000745-01

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY W. SHELL,

Defendant-Appellant.

No. 239328

Wayne Circuit Court

LC No. 01-000745-01

---

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), OUIL causing miscarriage or stillbirth, MCL 750.90d, and OUIL, MCL 257.625(1)(a). The trial court sentenced defendant to concurrent prison terms of one to fifteen years for the OUIL causing death and OUIL causing miscarriage or stillbirth convictions, and three months for the OUIL conviction. In Docket No. 236993, plaintiff appeals as of right, challenging the trial court's decision to depart from the recommended minimum sentence range under the sentencing guidelines for the OUIL causing death and OUIL causing miscarriage or stillbirth convictions. In Docket No. 239328, defendant appeals as of right, challenging his convictions and sentences.

Defendant's convictions arise from allegations that, while driving under the influence of intoxicating liquor, he struck and killed the victim as the victim attempted to cross the street. The victim, who was five months pregnant, suffered a broken neck as a result of the impact. Her fetus died from lack of blood flow after the victim's death.

Defendant argues there was insufficient evidence to support his convictions because there was no evidence that he was intoxicated at the time of the incident or that his driving was a substantial cause of the fatalities. We agree and vacate defendant's convictions.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and the reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). 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).

To sustain a conviction for OUIL causing death, the prosecution must establish beyond a reasonable doubt that (1) the defendant was operating a motor vehicle on a public highway or other place open to the general public while under the influence of intoxicating liquor, (2) the defendant voluntarily decided to operate the vehicle knowing that he had consumed alcohol and might be intoxicated, and (3) the defendant's intoxicated driving was a substantial cause of the victim's death. MCL 257.625(4); *People v Lardie*, 452 Mich 231, 259-260; 551 NW2d 656 (1996). The first two elements of OUIL causing death and OUIL causing miscarriage or stillbirth are the same, but for the latter offense, the third element requires a showing that the defendant's intoxicated driving was a substantial cause of the miscarriage or stillbirth. MCL 750.90d. To establish that the defendant was under the influence of intoxicating liquor, the prosecution must present sufficient direct or circumstantial evidence that, because of consuming alcohol, the defendant's physical or mental condition was significantly altered, and the defendant was not able to operate a vehicle in a normal manner. See *People v Walters*, 160 Mich App 396, 402; 407 NW2d 662 (1987); see also CJI2d 15.3.

We begin by addressing defendant's OUIL causing death and OUIL causing miscarriage or stillbirth convictions. In *Lardie*, *supra*, our Supreme Court undertook the task of analyzing MCL 257.625(4) to determine whether the statute provides for strict liability.<sup>1</sup> In other words, the Court analyzed whether the statute requires proof of any fault other than the act of driving while intoxicated. The Court concluded the statute does not codify the common-law crime of involuntary manslaughter and that OUIL causing death is not a strict-liability crime.

In its decision, the Court relayed that the purpose of the statute was to reduce the number of alcohol-related traffic fatalities and deter drivers who are "willing to risk current penalties"

---

<sup>1</sup> The *Lardie* Court recognized that the statutory provision had been amended after the date of the charged offense in the case, but indicated that the amendment did not substantially change the statute and had no bearing on the Court's analysis. *People v Lardie*, 452 Mich 231, 238-239 n 10; 551 NW2d 656 (1996). Likewise, we note that the statute has been amended several times since the *Lardie* decision, but the pertinent provisions remain substantially unchanged; therefore the Court's analysis in *Lardie* is applicable to the instant case.

from drinking and driving. *Lardie, supra* at 256-257. The Court found that in seeking to reduce fatalities by deterring drunk driving, the statute was designed to punish drivers “when their *drunken* driving caused another’s death.” *Id.* at 257. The Court rejected an alternative interpretation of the statute that would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted, stating that such an interpretation would “produce an absurd result by divorcing the defendant’s fault from the resulting injury.” *Id.* The Court reasoned that interpreting the statute to provide for strict liability would not further the Legislature’s purpose of reducing fatalities because “there 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 of in fact of the victim’s death.” *Id.* at 258. Therefore, the Court determined that in order to prove 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.” *Id.* (emphasis added). By this interpretation, the Court found that 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.” *Id.*

In this case, defendant admitted that he had two shots of “Martell Cognac” in the hour before the incident. Therefore, it is undisputed that defendant had been drinking before the incident. The incident occurred at approximately 10:00 p.m. The evidence established that defendant’s vehicle struck the victim while she was attempting to cross the street. The victim was either standing or walking at the moment of the impact, and at the time of the impact, the victim was either on the yellow line in the middle of the street or a few inches into the left traffic lane where defendant was driving. Finally, the evidence also established that all streetlights on the street were operable, with the exception of one.

An eyewitness to the incident testified that he saw the victim attempting to cross the street moments before the incident. According to the witness, the victim did not use the available crosswalk, but instead, walked from the driveway of the Taco Bell into the middle of the street. Although the witness was not entirely certain whether the victim was stopped or still walking at the time of the impact, the witness testified that the victim was between the yellow lines in the middle of the street just before she was hit.<sup>2</sup> The witness recalled that he saw defendant’s van driving in the left lane for “maybe a couple of seconds” before the impact and did not notice anything about the way defendant was driving. In other words, the van did not swerve or change lanes before hitting the victim. The witness further recalled that after the impact, defendant immediately stopped his van.<sup>3</sup>

---

<sup>2</sup> There were some discrepancies in the witness’ testimony with regard to whether the victim was walking or standing at the time she was hit and whether she was located in the center of the street or in the center turn lane of the street.

<sup>3</sup> The victim’s nine-year-old daughter testified that on the night of the incident she and her sister went to work with her mother at the Taco Bell. After her mother’s shift ended, the three attempted to cross the street to get to the bus stop. According to this witness, her mother told her and her sister to run ahead and once they arrived at the bus stop, they saw that their mother had  
(continued...)

Officer Paul Warner, who arrived at the scene shortly after the incident and is recognized as an accident reconstructionist, testified that he observed no skid marks or collision marks at the scene to show the actual point of impact. He acknowledged that the lack of visible skid marks on the street indicated that there was no sudden locking of the brakes or swerving of the van before or after the impact. Officer Warner further acknowledged that the point of impact was either at the yellow line in the middle of the street or a few inches off the line in the left traffic lane where defendant was driving.

All of the officers who had contact with defendant on the night of the incident testified that they either smelled alcohol on defendant's breath or smelled the odor of intoxicants coming from him. Officer Tamika Jones, who was one of the first officers to arrive at the scene, testified that when she put defendant in the patrol car, defendant was very quiet and the officer could smell intoxicants on his breath. Officer Warner also testified that he could also smell a strong odor of intoxicants coming from defendant.

Officer Louis Tanghe, who transported defendant from the scene and interviewed defendant at the police station, testified that two hours after the incident, he could smell intoxicants on defendant's breath, defendant's eyes appeared glassy, and defendant's speech was slow and slurred. Officer Tanghe observed that defendant had no problem walking from the squad car into the police station and observed no problems with defendant's balance. In the report made at that time, Officer Tanghe noted that defendant's attitude was good, his clothes were clean, and no unusual actions were observed. Also, according to Officer Tanghe, defendant refused a Breathalyzer test and all field sobriety tests. Officer Tanghe acknowledged that because no tests were performed, he did not fill out the conclusion section of his alcohol influence report because he was not "a hundred percent sure that [defendant] was incapable of driving a motor vehicle." Further, the officer stated that he made no conclusions regarding whether defendant was intoxicated because, "I didn't know if [defendant] was drunk or not." Finally, Officer David LeValley, who was at the police station when the officers brought defendant in, testified that he noticed that defendant smelled of intoxicants, his eyes were glossy and his speech was slurred while he was being given his constitutional rights. According to Officer LeValley, seeing these attributes in a person would draw the officer to the conclusion that the person was intoxicated.<sup>4</sup>

Although the officers testified that they could smell the odor of alcohol on defendant, all officers also consistently testified that they did not recall defendant walking unsteadily, losing his balance, or exhibiting any other unusual behavior. Beyond stating that defendant answered questions slowly, no officer testified that defendant was unable to understand the questions presented to him or that defendant was not able to answer the questions asked. Evidence established defendant refused a Breathalyzer test and any other tests. However, no officer ever concluded that defendant had in fact been drunk at the time of the accident. Notably, in the reports, the officers left the comment sections blank because they could not conclusively determine that defendant was drunk. Therefore, while it is clear that defendant had been

---

(...continued)

been hit by defendant's van.

<sup>4</sup> We note that Officer LeValley did not conclude that this particular defendant was intoxicated.

drinking on the night of the incident, no evidence was produced regarding defendant's actual blood alcohol content and no officer conclusively determined that defendant was intoxicated.

Most pertinent to our analysis, however, is the fact that there was insufficient evidence presented regarding defendant's manner of driving at the time of the incident. It is clear that defendant hit the victim with his vehicle as the victim attempted to cross the street and that the victim was either directly in the middle of the street or actually in defendant's lane when she was struck. However, no witness indicated that defendant was driving in the wrong lane or into oncoming traffic. Further, there was no testimony that defendant was driving erratically or weaving throughout lanes. Although there was evidence that most of the streetlights were working on the night of the incident, there was no evidence of skid marks or anything to indicate a sudden stopping or locking of brakes. The only eyewitness to the incident testified that he did not notice anything about the way defendant was driving; in other words, there was nothing out of the ordinary with regard to defendant's driving.

Under the circumstances, the prosecution failed to present sufficient evidence to justify a finding that defendant's alleged intoxicated driving was a substantial cause of the victim's death. See *Lardie, supra* at 259-260. The evidence was insufficient to establish that "defendant's decision to drive while intoxicated produced a change in [his] operation of the vehicle that caused the death of the victim." See *id.* at 258. Further, the prosecution failed to present sufficient evidence to find that defendant's alleged intoxicated driving "was a substantial cause of the miscarriage or stillbirth." See MCL 750.90d. Even viewing the evidence in a light most favorable to the prosecution, we find that based on this record, a rational trier of fact could not find defendant guilty of OUIL causing death or OUIL causing miscarriage or stillbirth. Therefore, we simply cannot affirm these convictions.

In the same regard, we find the evidence was insufficient with regard to the OUIL conviction. To obtain a conviction for OUIL, the prosecution must prove that defendant was unable to drive normally. See *Walters, supra* at 403.

In *Walters*, the defendant was charged with OUIL and convicted by a jury of driving while intoxicated (DWI). This Court was asked to decide whether the trial court erred in failing to grant the defendant's motion for directed verdict on the OUIL charge. In that case, a trooper testified that, although he did not observe anything improper about the defendant's driving, based on the trooper's experience, he "readily formed the opinion that defendant had been drinking heavily and was 'drunk on his feet.'" *Id.* at 404. He also testified that the defendant had a strong odor of alcohol, his eyes were glazed over, he "swayed," he was visibly angry, and he avoided the trooper's request to do a field sobriety test. *Id.* The defendant's stepdaughter likewise testified that the defendant had a slight sway or stagger and that his eyes were bloodshot, as they usually were when the defendant was drunk. *Id.* Further, the defendant admitted to drinking at least four or five beers. On this evidence, this Court found the circumstantial evidence "barely sufficient" to survive a directed verdict motion regarding an OUIL charge. *Id.* at 405. However, this Court concluded that although the case "probably represents the low-water mark in the amount of evidence necessary to allow the submission of an OUIL charge to a jury," the circumstantial evidence was strong enough to allow the jury to consider a DWI charge; therefore, this Court held that the trial court correctly denied a motion for directed verdict. *Id.*

In this case, no Breathalyzer or field sobriety tests were performed and no officer opined that defendant was intoxicated.<sup>5</sup> As addressed, *supra*, although the officers testified that defendant had a strong odor of alcohol, his eyes were glossy, and his speech was slow, no witness testified that defendant was unable to walk, keep himself balanced, or respond to the officers' questions. Instead, defendant's demeanor remained calm. Further, although the evidence established that defendant failed to apply the brake before hitting the victim, there was no evidence that defendant drove improperly. Finally the only evidence with regard to the amount defendant drank before the accident was defendant's acknowledgement that he had two shots of cognac. On this record we are simply unable to conclude that a rational trier of fact could find that defendant was driving while intoxicated in that because of his consumption of alcohol, defendant's condition was so altered that he was not able to operate a vehicle in a normal manner. See *Walters, supra*.

We acknowledge that the circumstances of this case are both difficult and tragic. We also stress that by this opinion, we are in no way condoning an individual's act of driving after consuming alcohol. However, under the circumstances, the evidence is so underwhelming in this case that we simply cannot affirm defendant's convictions for the instant crimes. Cf. *Walters, supra*.

Because we find there was insufficient evidence to convict defendant, we need not address defendant's remaining issues or plaintiff's issue regarding sentencing.

Defendant's convictions and sentences are vacated.

/s/ Kurtis T. Wilder  
/s/ Richard Allen Griffin  
/s/ Hilda R. Gage

---

<sup>5</sup> It is unclear why the officers did not pursue these tests.