

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL RAY ERSKINE,

Defendant-Appellant.

UNPUBLISHED

March 2, 2006

No. 258572

Kalamazoo Circuit Court

LC No. 03-001294-FH

Before: Meter, P.J., Whitbeck, C.J. and Schuette, J.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of operating under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4) and OUIL causing serious impairment of a body function, MCL 257.625(5). We affirm.

I. FACTS

This case involves a motor vehicle/pedestrian accident that occurred on the night of March 28, 2003. Kati Jones, who was 12 years old at the time, was seriously injured in the accident and Alicia Kelly, who was around the same age as Jones, was killed. Testimony indicated that Jones, Kelly, and Josh Reinhardt were walking on the shoulder of G Avenue. It was dark at the time and all three were wearing dark clothing. Reinhardt testified that the three were walking in a row, with him walking on the dirt part of the edge of the shoulder, Jones walking next to him on the shoulder, and Kelly walking next to Jones, on the shoulder, but near the fog line. Reinhardt testified that Kelly would occasionally be a step or two in the traveled portion of the roadway, but that she was never fully walking in the traveled portion.

A car caught Reinhardt's attention and he testified that he told Kelly and Jones to move onto the grass, but the girls stated that the car would move for them. Reinhardt stated that he then saw a big truck hit Kelly and throw her into the air about 100 feet. Reinhardt stated that he attempted to grab Jones, but the car clipped her and threw her into a nearby yard. Reinhardt testified that he never saw the truck take any evasive action to avoid hitting the girls and that he never saw the truck's brake lights, even after the collision. Reinhardt believed that if the car had stayed straight in its lane on the road, it would not have hit Kelly or Jones.

Francisco Ayerdi, a police officer with the City of Parchment, arrived at the scene and was told by someone that an accident had occurred and one person was dead and another injured. As he was viewing the scene, a pick-up truck pulled up and the driver stated that he had hit someone. Ayerdi told the man, who was identified as defendant, to turn his car off. Ayerdi put defendant in the back seat of his police car to wait for a Kalamazoo County Sheriff's Deputy to arrive. Ayerdi testified that once defendant was in the car, he could smell the odor of alcohol coming from defendant and defendant informed him that he had consumed two beers and was on his way home when the accident occurred. Ayerdi testified that he did not question defendant and defendant volunteered this information.

Mike Denoon, a deputy with the Kalamazoo Sheriff's Department, also responded to the accident scene and was assigned to investigate the driver of the truck for a potential OUIL. As Denoon and defendant were walking to an area where defendant could perform field sobriety tests, Denoon could smell the odor of alcohol. Denoon also noticed that defendant's eyes were bloodshot and that defendant stumbled a few times. Denoon testified that defendant stated to him that he knew that he hit two girls. Denoon testified that he asked defendant how much he had to drink and defendant stated three beers, the last one an hour earlier and that he did not have anything to drink since the accident. Defendant requested an attorney and refused to perform the field sobriety tests that Denoon requested. Defendant was then arrested.

After defendant's arrest, Denoon read him his preliminary breath test (PBT) rights and defendant again stated that he wanted to talk to an attorney. Defendant refused to take a PBT and was then read his *Miranda*¹ rights. Defendant indicated that he understood his rights and additionally indicated that he would agree to a blood test. Denoon testified that while he was filling out some paper work defendant stated that he saw two kids on the side of the road and that one of the kids looked like she was shoved into the roadway. Denoon testified that defendant further stated that he was doing his duty of staying between the lines, but that the kids were horsing around.

Denoon testified that while at the hospital for defendant's blood draw, defendant stated that it looked like the girls were playing tag and that one girl pushed another one into the roadway. Defendant stated that before he could do anything he hit at least one of the girls. Defendant further stated that he panicked and went to his home, but once there he decided to turn around and return to the scene. The results from defendant's blood draw indicated that his blood alcohol level was 0.20.

Expert testimony by both parties indicated that the accident took place at or near the fog line. Neither expert could determine the speed of defendant's vehicle, but the prosecution's expert testified that he did not believe it was excessive. Defendant's expert testified that based on the conditions that night and an average person's reaction time, he believed that a sober individual may have still hit the victims.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Before trial, defendant filed a motion to suppress his statements to police, claiming that they were obtained in violation of his *Miranda* rights. The trial court denied defendant's motion and allowed all of defendant's statements to police to be admitted at trial. A jury found defendant was found guilty of both OUIL causing death and OUIL causing serious impairment of a body function.

II. JURY INSTRUCTIONS

Defendant first claims a number of jury instruction errors denied him a fair trial. We disagree.

A. Standard of Review

Errors in jury instructions are questions of law that are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). A reviewing court is to examine the jury instructions as a whole, and reversal is only required when the jury instructions fail to protect a defendant's rights by unfairly presenting the issues to be tried. *People v Green*, 260 Mich App 392, 414; 677 NW2d 363 (2004). A trial court's determination whether a specific jury instruction is applicable to the case is reviewed for an abuse of discretion. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

B. Analysis

Defendant raises three instances of alleged instructional error. First, he contends the trial court erroneously instructed the jury that the prosecutor *must only* prove that defendant's intoxicated driving substantially contributed to the accident. Next, he contends that trial court erred when it refused to instruct the jury on contributory negligence. Third, he contends that trial court erred when, in its initial instructions to the jury, it omitted elements of the crime. We conclude that none of defendant's claims of instructional error have merit.

Defendant argues that the trial court erred when it defined substantial cause, for both OUIL causing death and OUIL causing serious impairment of a body function, as follows: "To show substantial cause, the People must only demonstrate that the defendant's culpable conduct – that is, the decision to drive while intoxicated – substantially contributed to the resulting death [or serious impairment of body function]." The trial court apparently took this language from a footnote in *People v Lardie*, 452 Mich 231, 260 n 51; 551 NW2d 675 (1996), which stated in part:

The concurrence suggests that our interpretation of the people's duty to prove causation is 'demanding' and 'onerous.' The people must only demonstrate that the defendant's prohibited conduct, i.e., his culpable decision to drive while intoxicated, substantially contributed to the resulting death. [Citation omitted.]

Defendant also relies on *Lardie* in arguing that the prosecutor must show that defendant's intoxicated driving was a substantial cause of the victim's death.

However, this holding from *Lardie* was recently overruled by our Supreme Court in *People v Schaefer*, 473 Mich 418, 422; 703 NW2d 774 (2005). The Court in *Schaefer* held that “[t]he statute requires that the defendant’s *operation* of the motor vehicle, not the defendant’s intoxicated manner of driving, must cause the victim’s death.” *Id.* (emphasis in original). The Court further held that in proving that a defendant’s driving caused the victim’s death, the prosecutor must prove both factual and proximate cause. *Id.* at 435. For the driving to be a factual cause of the death, the prosecutor must show that, but for the defendant’s conduct, the result would not have occurred. For proximate cause, the result must have been a “‘direct and natural result’ of the defendant’s actions” and there can be no foreseeable intervening cause that would sever the causal link. *Id.* at 436-437. The Court summarized:

Accordingly, in examining the causation element of OUIL causing death, it must first be determined whether the defendant’s operation of the vehicle was a factual cause of the victim’s death. If factual causation is established, it must then be determined whether the defendant’s operation of the vehicle was a proximate cause. In doing so, one must inquire whether the victim’s death was a direct and natural result of the defendant’s operation of the vehicle and whether an intervening cause may have superseded and thus severed the causal link. While an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable. [*Id.* at 438-439 (emphasis in original).]

The Court also concluded that its holding was “not ‘indefensible or unexpected’” and applied the holding retroactively. *Id.* at 444 n 80.

Based on the holding in *Schaefer*, the trial court should have instructed the jury that the prosecutor has to show that defendant’s *operation* of a motor vehicle was a substantial cause of the accident, not that defendant’s *intoxicated driving* was a substantial cause. The trial court also did not instruct the jury that the statute required defendant’s operation of a motor vehicle to be both the factual and proximate cause of accident.² See *Schaefer, supra* at 441. However, we find that any error in the jury instructions was harmless. “[I]nstructional error based on the misapplication of a statute is generally considered nonconstitutional error.” *Id.* at 442. Additionally, MCL 769.26 “creates a presumption that preserved nonconstitutional error is harmless unless the defendant demonstrates that the error was outcome determinative.” *Schaefer, supra* at 443. Defendant has not done so. As discussed *infra* in this opinion, there was

² We note that the trial court did not have the benefit of the Court’s decision in *Schaefer* at the time of the trial and that *Lardie* was still good law. However, the *Schaefer* Court determined that *Schaefer* was to be retroactively applied. *Schaefer, supra* at 444 n 80. The Court in *Schaefer* also found that the trial court erred by not defining “cause” as used in the statute to the jury and explaining that it encompassed both factual and legal cause. *Id.* at 441. Here the trial court defined “cause.” However, its definition is no longer accurate, hence the error in the jury instructions.

sufficient evidence for the jury to find that defendant's operation of his vehicle was both a factual and proximate cause of Kelly's death and Jones' injuries. Even assuming that the jury fully believed defendant's witnesses, specifically the expert witness who believed a sober individual may also have hit the victims, there was no evidence that the victims were grossly negligent. Only gross negligence by a victim or a third party will be considered a superseding cause and sever the causal link between defendant's conduct and the victims' injuries. *Schaefer, supra* at 438-439. Defendant only presented evidence of potential negligence on the victim's part and therefore, he has not overcome the presumption that any instructional error was harmless.

Defendant also claims the trial court erred in not instructing the jury on contributory negligence. However, the trial court did instruct the jury on contributory negligence and did so in a way similar to what defendant now requests on appeal. Defendant also made no objection to the instruction at the trial. Therefore, we find no error. Defendant finally claims that that trial court erred when it failed to instruct the jury on all the elements of the crimes at the commencement of the trial. Again, defendant did not object to this instruction and therefore, we review for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). The instruction defendant complains of consisted of the court reading the Information to the jury. The court specifically informed the jury that the Information was filed by the prosecuting attorney's office and it only "informs all of us of what is bare bones at issue." Additionally, when reading the Information, the court did state that the prosecutor had to show that defendant's operation of the vehicle caused the death and caused the serious impairment of a body function to the victims. The trial court also instructed the jury as to each element of the crimes at the end of the trial. The instructions fairly presented the issues to be tried to the jury. Defendant has not shown any error in the trial court's reading of the Information, much less plain error affecting his substantial rights.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to support the jury finding him guilty of both OUIL causing death and OUIL causing serious impairment of a body function. We disagree.

A. Standard of Review

In determining a sufficiency of the evidence claim, this Court determines "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The standard of review is deferential to the trial court and this Court is to draw inferences and make credibility determinations in favor of the jury verdict. *Id.* at 400.

B. Analysis

Defendant only challenges the causation element of both his convictions. Both OUIL causing death and OUIL causing serious impairment of a body function have the same causation element. The statutes state that a person who operates a motor vehicle under the influence of alcohol or a controlled substance, "and by the operation of that motor vehicle causes the death [or serious impairment of a body function] of another person" is guilty of a felony. MCL

257.625(4); MCL 257.625(5). Defendant does not dispute the other elements of both crimes; he only argues that there was insufficient evidence to show that his intoxicated driving caused Kelly's death and Jones' injuries.

However, defendant again bases this argument on the holding in *Lardie*. As discussed previously, the prosecutor did not need to show that defendant's intoxicated driving caused the accident, but only that defendant's operation of a motor vehicle was a factual and proximate cause of the accident. *Schaefer, supra* at 438-439. Considering the evidence in a light most favorable to the prosecutor, we conclude that there was sufficient evidence to establish that defendant's operation of a motor vehicle was both a factual and proximate cause of the accident that caused Kelly's death and Jones' injuries.

Defendant's conduct was clearly the factual cause of the victims' injuries, i.e. but for defendant's operation of the motor vehicle, the accident, and Kelly's death and Jones' injuries, would not have occurred. There was also sufficient evidence that defendant's driving was a proximate cause of the accident. Reinhardt testified that Kelly and Jones were both walking on the shoulder of the road, and although Kelly's foot would occasionally step on the fog line, she was never fully in the traveled portion of the roadway. Reinhardt also testified that Jones was never walking in the traveled portion of the roadway. Reinhardt testified that defendant's truck did not appear to take any type of evasive action to avoid the collision and if the truck would have driven straight in the travel lane of the roadway, the accident would not have occurred. Both experts that testified at the trial concluded that the accident occurred near the fog line of the roadway. Taken in the light most favorable to the prosecutor, the above evidence established that the injuries to the victims were a direct and natural result of defendant's driving.

Additionally, defendant has not shown an intervening cause that would "supersede [his] conduct such that the causal link between [his] conduct and the victim[is]'s injur[ies] was broken." *Schaefer, supra* at 436-437. Although defendant presented some evidence of potential negligence on the victim's part, i.e. wearing dark clothing, being at or over the fog line, defendant did not present any evidence of gross negligence or intentional misconduct. The only evidence defendant pointed out was Reinhardt's testimony that when he told the girls to move, they said the car would move for them. However, only *gross* negligence or intentional misconduct by the victim or a third party will be considered a superseding cause and make defendant's conduct not regarded as a proximate cause. *Id.* at 437-438. "Gross negligence 'means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent.' *Id.* at 438, quoting *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914). Ordinary negligence by a victim will not be considered a superseding cause because it is foreseeable. *Id.* 438-439. Defendant has shown only evidence of potential negligence by the victims, he has not shown gross negligence or intentional misconduct. Although the victims may have stated that the car would move for them, the testimony from Reinhardt was that they were never walking fully in the traveled portion of the roadway, or that they were grossly negligent in any way. There was sufficient evidence to support a jury finding defendant's operation of the motor vehicle to be both the factual and proximate cause of Kelly's death and Jones' injuries. Therefore, the jury verdict was supported by sufficient evidence.

IV. *MIRANDA* RIGHTS

Defendant finally argues that his statements to police were obtained in violation of *Miranda* and should have been suppressed. We disagree.

A. Standard of Review

Preserved constitutional questions are issues of law that are review de novo. *People v Haynes*, 256 Mich App 341, 345; 664 NW2d 225 (2003). Further, the determination whether someone was in custody is a mixed question of fact and law, with deference given to the trial court's factual findings unless they are clearly erroneous and the ultimate determination of whether a defendant was in custody reviewed de novo. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001).

B. Analysis

The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides in part that “No person . . . shall be compelled in any criminal case to be a witness against himself.” US Const, Am V. To insure protection of the right against self-incrimination, the Court in *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 16 L Ed 2d 694 (1966) held:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

The central principle established by *Miranda* was “if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt.” *Berkemer v McCarty*, 468 US 420, 429; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

“*Miranda* warning are necessary only when the accused is interrogated while in custody, not simply when he is the focus of an investigation.” *Herndon, supra* at 395. “[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” *People v Mendez*, 225 Mich App 381, 383-384; 571 NW2d 528 (1997), quoting *Oregon v Mathianson*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977). Whether a defendant is in custody for the purposes of *Miranda* is determined by considering the totality of the circumstances and asking whether a reasonable person in the defendant's position would feel free to leave. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). This is an objective determination and

it does not depend on the subjective view of the police officer or the defendant. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Interrogation refers “to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998).

Defendant argues that a number of statements he made to Officer Ayerdi and Officer Denoon should have been suppressed because they were obtained in violation of his *Miranda* rights. However, we conclude that defendant’s statements were not the result of any type of custodial interrogation by the police. *Marsack, supra* at 374. The majority of defendant’s statements to police were given spontaneously by defendant and were not in response to any questioning by the police. While conducting his investigation, Denoon did ask defendant if he had been consuming alcohol. However, at this point, defendant was not in custody for *Miranda* purposes. “Roadside questioning by police officers for the purpose of determining whether a motorist is intoxicated does not constitute custodial interrogation and, therefore, *Miranda* rights do not attach.” *People v Jelneck*, 148 Mich App 456, 460; 384 NW2d 801 (1986). See also *Berkemer v McCarty*, 468 US 420, 437-440; 104 S Ct 3138; 82 L Ed 2d 317 (1984). Denoon was engaged in roadside questioning of defendant when defendant informed him how much he had to drink. Therefore, these statements were properly admitted.

Defendant also argues that after he was arrested, he invoked his right to an attorney and therefore his statements to Denoon after invoking this right should have been suppressed. However, again defendant volunteered the statements to Denoon and they were not the result of any questioning by the police. Additionally, although he requested an attorney in regard to the field sobriety tests and the chemical tests, he made no request after receiving his *Miranda* rights. It is clear that once a defendant asserts his *Miranda* right to counsel, the police may not question the defendant regarding any offense until counsel is present. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). However, the *Edwards* rule applies “only when the suspect ‘ha[s] expressed’ his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. It requires, at a minimum, some statement that can reasonable be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*.” *McNeil v Wisconsin*, 501 US 171, 178; 111 S Ct 2204; 115 L Ed 2d 158 (1991) (citation omitted, emphasis in *McNeil*). Defendant did not request an attorney to deal with a possible custodial interrogation by police, but rather requested an attorney in dealing with the field sobriety tests and chemical test rights. Therefore, we conclude that defendant’s statements to the police were properly deemed admissible.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette