

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GRANT WILLIAM CZUJ,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2008

No. 276581

Livingston Circuit Court

LC No. 06-015829-FH

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a water vessel under the influence of liquor and causing death, MCL 324.80176(4) (“OUIL causing death”), negligent homicide, MCL 324.80172, operating a water vessel under the influence of liquor and causing a serious impairment of a body function, MCL 324.80176(5) (“OUIL causing serious impairment”), and negligent crippling, MCL 324.80172. The trial court sentenced defendant to 100 months to 15 years for the OUIL causing death conviction, 40 months to five years for the OUIL causing serious impairment conviction, and 16 months to two years for the negligent homicide and negligent crippling convictions. We affirm.

I. Basic Facts

Defendant drove his speedboat from Strawberry Lake to Zukey Lake<sup>1</sup> around midnight one night. Devil’s Basin, in which a wake is not permitted, connects the two lakes. As defendant exited Devil’s Basin and entered Zukey Lake, he accelerated, reaching a speed of less than 20 miles an hour to 40 miles an hour, as estimated by eyewitnesses and expert witnesses. Defendant approached a speedboat and a pontoon boat that were tied together and drifting on a sandbar. Defendant’s boat struck the two boats, and one of the occupants of the boats was thrown into the water and died of multiple blunt force injuries and drowning. Another occupant of the boats sustained severe injuries, and several others sustained minor injuries.

Witnesses reported that the moon was full and bright on the night of the accident and that the skies were clear. Testimony varied regarding whether the lights of the two boats were

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<sup>1</sup> Zukey Lake is misspelled throughout the trial transcripts as “Zuki Lake.”

illuminated. Some reported that the pontoon boat had its navigational lights on. However, some witnesses recalled that the pontoon boat did not have any lights on, and the driver of the pontoon boat explained that he had been experiencing battery trouble and had turned off the navigational lights about five minutes before the accident. Some witnesses reported that the speedboat had its navigational lights on, but one asserted that these lights were not on. Several witnesses recalled that the blue interior ground lights of the speedboat were on, and one witness recalled that the speedboat's spotlight was illuminated.

Defendant admitted to a police officer that he had drunk six beers within a four to five hour period, and two of his passengers estimated that he had drunk between four and eight beers. Two of defendant's passengers believed that defendant was drunk, but one of them claimed that he was not concerned about defendant's driving. Another passenger told defendant to slow down, and one passenger saw the two other boats and yelled to defendant right before they struck them. Defendant told a nurse at the hospital that he had looked away from the water to pick up some compact discs, and when he looked back at the water, he struck the boats. Defendant's blood alcohol content (BAC) almost three hours after the accident was .084 grams per 100 milliliters. Using retrograde extrapolation, an expert witness opined that defendant's BAC was between .103 and .119 at the time of the accident.

## II. Admission of Evidence of Prior Arrest

Defendant argues that the trial court abused its discretion in admitting evidence that he had previously been arrested for OUIL. We agree that the trial court improperly admitted this evidence, but reversal is not warranted because the error was harmless.

We review a trial court's decision regarding whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, the decision whether to admit evidence often involves a preliminary question of law, which we review de novo. *Katt*, *supra* at 278.

Pursuant to MRE 404(b), a prosecutor may not introduce evidence of other crimes, wrongs, or acts for the purpose of proving a defendant's character or propensity for criminal behavior. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). However, such evidence may be admissible for another purpose, such as "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b)(1). To be admissible, evidence of other acts must be offered for a purpose other than character or propensity, it must be relevant, and its probative value may not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, *supra* at 74-75.

Officer James Steinaway, who was dispatched to the lake after the accident, did not administer any field sobriety tests on defendant; rather, he asserted that he obtained a search warrant to draw defendant's blood because defendant had sustained a head injury. Outside the presence of the jury, the prosecutor sought to introduce evidence that, during a prior arrest in

which Steinaway was the arresting officer, defendant had consented to a blood test and changed his mind upon arriving at the hospital, requiring Steinaway to obtain a search warrant. The prosecutor asserted that defendant had opened the door to this questioning when he asked Steinaway about his failure to advise defendant of his chemical test rights before the blood test and about obtaining a search warrant. The trial court granted the prosecutor's request, the prosecutor asked Steinaway whether he had arrested defendant in 2004 for OUIL, and Steinaway responded affirmatively. Steinaway stated that his previous experience with defendant did not factor into his decision to obtain a search warrant in the instant case, but it did impact his decision "a little bit."

Evidence of defendant's prior OUIL arrest was offered to show that defendant had a pattern of consenting to a blood test and later withdrawing that consent upon arriving at the hospital. Although this may be akin to proof of a plan or system in doing an act, defendant's withdrawal of consent to a chemical test is not an element of OUIL causing death or OUIL causing substantial impairment, and it is not material to the commission of any of the crimes charged. Therefore, it was not offered for a proper purpose pursuant to MRE 404(b)(1), and the trial court improperly admitted this evidence. However, an error in the admission of evidence is not grounds for vacating a verdict unless substantial justice requires it. MCL 769.26; MCR 2.613(A); *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). A preserved nonconstitutional error such as this one is not harmless if it affected "the reliability of the verdict in light of the weight of the untainted evidence." *People v Albers*, 258 Mich App 578, 590; 672 NW2d 336 (2003). "The error is presumed to be harmless, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice." *Id.*, applying *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

MCL 324.80176(4) prohibits a person from operating a water vessel while under the influence of intoxicating liquor or controlled substances or while his BAC is greater than or equal to .10 grams per 100 milliliters of blood. The evidence showed that defendant consumed between four and eight beers, his eyes were glassy, he smelled of intoxicants, he was slurring his speech, two of his passengers believed he was drunk, and his BAC was estimated at greater than .10 grams per 100 milliliters. Therefore, there was considerable admissible evidence that defendant was under the influence of intoxicating liquor and his BAC was greater than .10 grams per 100 milliliters of blood, contrary to MCL 324.80176(4) and (5). Negligent crippling or homicide, MCL 324.80172, prohibits one from operating a water vessel at "at an immoderate rate of speed or in a careless, reckless, or negligent manner." The evidence showed that defendant was operating his boat at speeds estimated at between less than 20 miles an hour and 40 miles an hour at midnight, one of his passengers advised him to slow down, and he was looking in his boat for compact discs instead of at the water. Thus, there was extensive admissible evidence that defendant was operating his boat at in immoderate speed or in a careless, reckless, or negligent manner. In light of this evidence, we conclude that admission of evidence of defendant's prior arrest was harmless, and substantial justice does not require vacating defendant's convictions. See *Whittaker, supra* at 427; *Albers, supra* at 590.

Defendant also challenges the admission of evidence of his intoxication on prior occasions and evidence that he had previously driven his boat into a dock, as taken together with the evidence of his prior arrest. Defendant does not include any mention of these arguments in the "statement of questions presented" section of his brief on appeal as required by MCR

7.212(C)(5). Therefore, these issues are deemed waived and not subject to appellate review. MCR 7.212(C)(5); *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Further, the witness who was asked whether defendant had run into a dock denied that he had any knowledge of such an incident. In any event, as discussed, *supra*, there was extensive admissible evidence to support defendant's convictions, and admission of defendant's prior intoxication was harmless. See *Whittaker, supra* at 427; *Albers, supra* at 590.

### III. Mistrial

Defendant contends that the trial court abused its discretion in failing to grant his motion for a mistrial where the prosecutor commented on the fact that defendant had not testified on his own behalf. We disagree. A trial court's decision regarding a motion for a mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

"A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Bauder, supra* at 194 (internal quotation marks and citation omitted). A mistrial should only be granted when nothing else will remove the prejudicial effect of an error. *People v Horn*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 274130, issued May 15, 2008), slip op at 3. When defense counsel asked one of his witnesses whether defendant saw a boat that he passed before the accident, the witness responded, "Apparently," and explained that defendant had gone around the boat. The prosecutor objected, arguing that the testimony was speculative. Defense counsel replied that witnesses from this boat had testified that they saw defendant's boat go around their boat. The prosecutor responded, "And there's no indication from the witnesses that—the Defendant has not testified. We can't speculate as to whether he saw it or not without that. It's pure speculation." During the ensuing bench conference, defense counsel moved for a mistrial, and the trial court admonished the prosecutor. The trial court sustained the prosecutor's objection and made a note of defense counsel's motion for a mistrial. Although the trial court did not explicitly rule on the motion for a mistrial, it instructed defense counsel to ask his next question and continued with the trial. No further mention was made of the prosecutor's comment.

It is well established that "[a] prosecutor may not comment upon a defendant's failure to testify." *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996) (citations omitted); MCL 600.2159. Although the prosecutor's comment in the instant case was improper, whether it necessitates the declaring of a mistrial is a question within the trial court's discretion. *People v Jansson*, 116 Mich App 674, 690; 323 NW2d 508 (1982). Although defendant did not request a curative instruction, the trial court properly instructed the jury that defendant had an absolute right not to testify, that they may not consider the fact that defendant did not testify, and that his decision not to testify may not affect their verdict. The trial court also instructed the jury that the attorneys' statements and arguments were not evidence. Jury "instructions are presumed to cure most errors." *Horn, supra* at 3. Defendant has not demonstrated that a mistrial would have been the only method available to remove any prejudicial effect of this error or that the jury instructions were not followed. While we do not condone the prosecutor's commenting on defendant's failure to testify, defendant has failed to demonstrate that his rights were prejudiced by the prosecutor's isolated comment or that he did not receive a fair trial. The trial court did not abuse its discretion in failing to grant defendant's motion for a mistrial.

### IV. Peremptory Challenges

Defendant asserts that the trial court abused its discretion in denying his request for additional peremptory challenges. We disagree. We review a trial court's decision regarding a request for additional peremptory challenges for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997).

A criminal defendant has the right to be tried before a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). MCR 6.412(E)(2) provides, in relevant part: "On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges." Before jury selection began, defense counsel requested additional peremptory challenges, based on the wide publicity that this case had received and the fact that an alcohol-related death had occurred. The trial court denied this request, explaining that it had called additional prospective jurors and that challenges for cause were available to address the concerns expressed by defense counsel. On appeal, defendant identifies six veniremembers whom he claims responded tentatively to questions regarding whether they could be fair and impartial. Defendant asserts that these tentative responses came from veniremembers he "normally would have peremptorily challenged, but for the limited number of challenges available." Of these six veniremembers, only three, veniremembers 75, 113, and 139, were impaneled on the jury.<sup>2</sup> However, defendant does not articulate how these three jurors demonstrated that they were unable to be fair or impartial.

Veniremember 113 worked with the news department of a local radio station, and his father knew the family of the deceased victim and had worked with some of them. In response to the trial court's question about whether he believed the information he received would influence his ability to be fair and impartial, veniremember 113 replied that he did not believe it would. When the trial court asked him whether he believed that he would be able to render a verdict based solely on the evidence presented in court and the law as instructed, he responded that he believed he could. Veniremember 139 received information about the case through the media and had been the coach of the opposing baseball team of one of the witnesses. Veniremember 139 asserted that he understood that this information was not evidence and that he should not consider this information as a juror. When asked if he believed that he could be fair and impartial, he responded affirmatively. Veniremember 75 knew about the case from local media as well, and she asserted that she believed she would be fair and impartial and responded that she understood that the news was not evidence and might not be true. Veniremember 75 replied that she thought she would be able to base her verdict solely on the evidence admitted at trial and the law as instructed.

Defendant does not address the good cause requirement of MCR 6.412(E)(2); rather, he merely argues that the veniremembers expressed a "tentative ability to be fair and impartial." Good cause has not been defined in this context, but in *People v King*, 215 Mich App 301, 304; 544 NW2d 765 (1996), this Court found that pretrial publicity did not constitute good cause where the trial court had not erroneously concluded that such publicity was not unfairly biased

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<sup>2</sup> Defense counsel exercised peremptory challenges to excuse veniremembers 66 and 96. With respect to veniremember 116, defense counsel challenged him for cause, and the trial court excused him.

against the defendant. Similarly, in the instant case, there is no evidence that the publicity was unfairly biased against defendant. None of the veniremembers identified by defendant expressed opinions regarding defendant's guilt, and we disagree with defendant's characterization of the veniremembers' statements regarding their ability to be fair and impartial as tentative. The trial court asked them if they believed they could be fair and impartial, and they all replied that they believed they could. Therefore, good cause has not been demonstrated and the trial court did not abuse its discretion in denying defendant's request for additional peremptory challenges.

#### V. Excusing Jurors for Cause

Defendant argues that the trial court abused its discretion in excusing two veniremembers for cause. We disagree.

We review for an abuse of discretion a trial court's ruling regarding a challenge for cause. *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). However, "once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles*, 260 Mich App 379, 383; 677 NW2d 76 (2004). We review questions of law, including those involving the interpretation of a court rule, de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

Veniremember 34 disclosed that he had a 2004 DUI conviction from "up north," but he was unsure which county. Veniremember 32 disclosed that, ten years before the trial, he had received a drunk driving ticket in Westland and had a conviction related to refusing a Breathalyzer test. MCR 2.511(D)(10) provides, in pertinent part, that it is a ground to challenge a veniremember for cause if he or she is "or has complained of or has been accused by that party in a criminal prosecution." This constitutes a challenge of juror bias, and it "raises a question concerning that person's capacity to render a fair and impartial verdict in a criminal matter." *Eccles, supra* at 382-383 (internal quotation marks and citation omitted). In the instant case, the prosecution challenged veniremembers 32 and 34 for cause because of their prior convictions, and the trial court granted this challenge.

In *Eccles*, our Court held that the phrase "party in a criminal prosecution," as used in former MCR 2.511(11),<sup>3</sup> includes a county prosecutor. *Id.* at 381-383. As this Court explained in *Eccles, supra* at 383-384:

Unlike cases initiated in the civil arena, where any number of individual attorneys may be chosen to represent a particular party, it is the prosecuting attorney who represents the people in each and every criminal prosecution. This "oneness" of party and attorney explains the different language employed by the rule for criminal, as opposed to civil, actions and, when viewed in conjunction with the purpose underlying a challenge for cause as discussed above, militates against the argument advanced by defendant.

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<sup>3</sup> MCR 2.511 was amended, and former MCR 2.511(D)(11) is identical to MCR 2.511(D)(10).

Accordingly, the Livingston County Prosecutor's Office was not the challenging party. Rather, it was the attorney representing the challenging party, the People of the state of Michigan. Defendant attempts to distinguish *Eccles* on the basis that prosecutors of the same county had prosecuted the defendant and the excused veniremembers, whereas the excused veniremembers in the instant case were not prosecuted by Livingston County. Because the lower court record does not indicate what entity, i.e., city or county, prosecuted veniremembers 32 and 34, we are unable to determine whether the People of the state of Michigan was the party who had previously accused veniremembers 32 and 34 and evaluate defendant's argument.

In any event, we defer to the trial court's superior ability to assess a veniremember's demeanor in deciding whether the veniremember would be impartial. *Williams, supra* at 522. The trial court questioned veniremember 32 about his conviction and whether he had any bias or prejudice toward either party, and the veniremember stated that he did not. However, he also stated that he had "a little problem" with the .08 BAC limit because a person who consumes one drink has "an awful good chance" of being charged with an alcohol-related offense. The prosecutor questioned veniremember 34 about his conviction. The trial court had the opportunity to observe the demeanor of both veniremembers when they answered questions, and it has discretion in determining whether a veniremember falls within one of the grounds enumerated in MCR 2.511(D). See *Eccles, supra* at 383; *Williams, supra* at 521.

Further, defendant does not argue that this alleged error deprived him of a fair and impartial jury, and there is no indication that the seated jurors were not fair and impartial. When a criminal defendant has obtained a fair and impartial jury, he has no valid ground for complaint. *People v Sharbnaw*, 174 Mich App 94, 102; 435 NW2d 772 (1989); *People v Badour*, 167 Mich App 186, 190; 421 NW2d 624 (1988), rev'd on other grounds sub nom 434 Mich 691 (1990). The trial court's decision to grant the prosecutor's challenges for cause falls within the principled range of outcomes and does not constitute an abuse of discretion. See *Babcock, supra* at 269.

## VI. Causation

### A. Motion for Directed Verdict

Defendant contends that the trial court erred in denying his motion for a directed verdict because the conduct of the driver of the pontoon boat constituted an intervening, superseding cause. We disagree.

When reviewing a trial court's ruling on a motion for a directed verdict of acquittal, we review the record de novo to determine whether the evidence the prosecutor presented, viewed in the light most favorable to the prosecutor, could convince a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006).

Causation generally requires factual cause and proximate cause. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), mod on other grounds 475 Mich 316, 334; 715 NW2d 822 (2006). Factual causation means that the result would not have occurred but for the defendant's conduct. *Schaefer, supra* at 435-436. For defendant's conduct to constitute a proximate cause, the death and substantial impairment must be direct and natural results of defendant's acts. *Id.* at 436. We must therefore determine "whether there was an intervening

cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim[s'] injur[ies] was broken." *Id.* at 436-437. For an intervening cause to constitute a superseding cause, it cannot be reasonably foreseeable based on an objective standard of reasonableness. *Id.* at 437. "If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., gross negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death." *Id.* at 437-438.

Defendant claims that the failure of the pontoon boat's driver to turn on his lights, combined with his admitted consumption of alcohol and drifting in a navigable channel, constituted gross negligence that warranted the granting of a directed verdict of acquittal. In the criminal context, gross negligence has been defined as "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 (internal quotation marks and citation omitted). The testimony varied greatly regarding whether the lights of the pontoon boat and the speedboat were illuminated. Viewing the evidence in a light most favorable to the prosecution, as we are required to do, leads to a conclusion that the lights of the pontoon boat and speedboat were all illuminated at the time of the collision. *Martin, supra* at 319-320. Therefore, we do not even reach the question regarding whether it was reasonably foreseeable that the pontoon boat would be drifting without its lights on.

Although defendant asserts that the consumption of alcohol by the driver of the pontoon boat and the drifting of the two boats in a navigable channel constituted gross negligence when combined with the driver's failure to turn on the pontoon boat's lights, defendant has not presented any authority to support the argument that these additional factors constituted gross negligence on an independent basis. An appellant may not simply announce a position or assert an error and leave it to us to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We conclude that the trial court properly denied defendant's motion for a directed verdict.

#### B. Jury Instruction

Defendant claims that the trial court erred in failing to properly instruct the jury that, if they concluded that the failure to maintain proper navigational lighting was an intervening, superseding cause, they were required to acquit defendant. However, defendant expressly waived review of this issue. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). After reading the jury instructions, the trial court asked if there was "[a]nything regarding the instructions that were read." Defense counsel replied, "I'm satisfied." Before closing arguments, defense counsel requested a definition of slight negligence and requested a homicide instruction as a lesser-included offense of OUIL causing serious impairment. However, he did not object to the instructions as given or express any concerns on the record regarding the proximate cause or intervening, superseding cause instructions. Further, the instructions as given were based on the instructions defendant submitted to the trial court, which did not contain the statement that if the jury concluded that the failure to maintain proper navigational lighting was an intervening, superseding cause, they were required to acquit defendant.

In any event, the trial court instructed the jury that they must determine whether one victim's death, and the other victim's serious injury, were direct and natural results of defendant's operation of the boat and whether an intervening cause may have superseded and severed the causal link.<sup>4</sup> The instructions as given are an accurate description of proximate cause, as explained in *Schaefer, supra* at 436-438. Given that this Court reads jury instructions as a whole and the instructions as given "fairly presented the issues to be tried and sufficiently protected . . . defendant's rights," reversal is not warranted. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

## VII. Double Jeopardy

Defendant challenges his convictions of negligent homicide and negligent crippling, claiming that they violate the Double Jeopardy Clause of the Michigan Constitution. See Const 1963, art 1, § 15. We disagree. We review constitutional issues, including double jeopardy issues, de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

The Michigan Constitution contains a double jeopardy provision that provides "three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Smith, supra* at 299, quoting *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). Defendant argues that his negligent homicide conviction constitutes a multiple punishment in addition to his OUIL causing death conviction and that his negligent crippling conviction constitutes a multiple punishment in addition to his OUIL causing serious impairment conviction. In *People v Robideau*, 419 Mich 458, 486; 355 NW2d 592 (1984), our Supreme Court rejected the *Blockburger* same-elements

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<sup>4</sup> For example, the trial court instructed the jury on proximate causation with respect to the OUIL causing death charge as follows:

Proximate cause, if factual cause is established it must then be determined whether the Defendant's operation of the vessel 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 vessel and whether an intervening cause may have superceded [sic] 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 superceding [sic] cause, ordinary negligence by the victim or a third party will not be regarded as a superceding [sic] cause because ordinary negligence is reasonably foreseeable. Gross negligence means wantonness and disregard of the consequence which may ensue an [sic] indifference to the rights of others that is equivalent to a criminal intent. Intentional misconduct which is reasonably foreseeable is not a superceding [sic] cause.

The trial court's proximate cause instructions with respect to the negligent homicide, OUIL causing serious impairment, and negligent crippling, charges are almost identical.

test,<sup>5</sup> instead holding that the subject, language, and history of the statutes should be used to determine legislative intent. However, in *Smith, supra* at 315-316, 323-324, the Court explicitly overruled *Robideau* and adopted the *Blockburger* same-elements test. Therefore, if the Legislature has not clearly expressed an intent to impose multiple punishments, we must determine whether the two offenses each require proof of an element that the other does not. *People v Chambers*, 277 Mich App 1, 5; 742 NW2d 610 (2007).

Defendant contends that *Robideau* applies in the instant case because *Smith* was released after defendant was convicted and sentenced. Generally, judicial decisions are given retroactive effect. *People v Parker*, 267 Mich App 319, 326; 704 NW2d 734 (2005). In determining whether retroactive application is appropriate, the threshold question is whether “the decision clearly establish[es] a new principle of law[.]” *Id.* at 326-327 (internal quotation marks and citation omitted; alterations in original). With respect to criminal decisions, our courts must consider “(1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect on the administration of justice.” *Id.* at 326 (internal quotation marks and citation omitted). Prospective application is appropriate when the decision “overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed.” *Id.* at 327 (internal quotation marks and citation omitted).

In overruling *Robideau*, the *Smith* Court stated:

*Robideau’s* creation of a new rule to determine whether two statutory offenses constitute the “same offense” for double jeopardy purposes was predicated on the Court’s conclusions in previous cases that: (1) Michigan’s Double Jeopardy Clause afforded greater protections than the Double Jeopardy Clause of the United States Constitution; and (2) the *Blockburger* test did not account for Michigan’s then-current recognition of “cognate” lesser included offenses as “lesser offenses” under a fact-driven analysis. This conclusion that the Michigan Constitution affords greater protection than the Fifth Amendment has no basis in the language of Const 1963, art 1, § 15, the common understanding of that language by the ratifiers, or under Michigan caselaw as it existed at the time of ratification. Further, the concern expressed by the Court that *Blockburger* does not account for cognate lesser included offenses is no longer pertinent in light of *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002). Finally, nothing in the language of the constitution indicates that the ratifiers intended to give the term “same offense” a different meaning in the context of the “multiple punishments” strand of double jeopardy than it has in the context of the “successive prosecutions” strand. In the absence of any evidence that the term “same offense” was intended by the ratifiers to include criminal offenses that do not share the same elements, we feel compelled to overrule *Robideau* and preceding decisions that are predicated on the same error of law, and to hold instead that *Blockburger* sets forth the appropriate test to determine

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<sup>5</sup> *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

whether multiple punishments are barred by Const 1963, art 1, § 15. [*Smith, supra* at 314-315 (citations omitted).]

The *Smith* Court did not establish a new principle of law. Rather, it adopted the *Blockburger* same-elements test, which is a well-established principle that had already been applied by our Supreme Court in *Nutt, supra* at 591-592, in the context of successive prosecutions with respect to double jeopardy. *Smith, supra* at 315. Further, the *Smith* Court stated that it was overruling *Robideau* and prior decisions because they were predicated on an error of law. *Id.* We therefore apply *Smith* retroactively.

Given that the Legislature has not clearly expressed an intent to impose multiple punishments with respect to the instant convictions, we must determine whether the offenses each require proof of an element that the other does not. *Chambers, supra* at 5. MCL 324.80176(4) prohibits a person from operating a water vessel while under the influence of intoxicating liquor or controlled substances or while his BAC is greater than or equal to .10 grams per 100 milliliters of blood and causing death. Similarly, MCL 324.80176(5) prohibits a person from operating a water vessel while under the influence of intoxicating liquor or controlled substances or while his BAC is greater than or equal to .10 grams per 100 milliliters of blood and causing a serious impairment of body function. Negligent crippling or homicide, MCL 324.80172, prohibits one from operating a water vessel at “at an immoderate rate of speed or in a careless, reckless, or negligent manner.” Given that § 80176 does not contain any elements of operation with respect to speed or a careless, reckless, or negligent manner, and § 80172 does not contain any elements regarding BAC or the influence of intoxicating liquor or controlled substances, each section contains an element that the other does not. Accordingly, we conclude that OUIL causing death and negligent homicide are not the same offense pursuant to Const 1963, art 1, § 15 and that the trial court properly punished defendant separately for each offense. We similarly conclude that OUIL causing serious impairment and negligent crippling are not the same offense and that the trial court properly punished defendant separately for these offenses as well.

### VIII. Sentencing

Defendant claims that the trial court erred in assigning 20 points for prior record variable PRV 7. We disagree.

If there is evidence in the record to support the scoring of a particular variable, a sentencing court has discretion in determining the number of points to assign under the sentencing guidelines, and “[s]coring decisions for which there is any evidence in support will be upheld.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We review de novo questions of law, including the construction of the statutory sentencing guidelines. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Pursuant to MCL 777.57(1)(a), 20 points is an appropriate score for PRV 7 if “[t]he offender has 2 or more subsequent or concurrent convictions.” Given our resolution of defendant’s double jeopardy challenge, defendant has 3 convictions that are concurrent to the scored offense, and the trial court properly assigned 20 points for PRV 7.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly