

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KYLE JOHNATHAN MILLER,

Defendant-Appellee.

UNPUBLISHED

February 9, 2010

No. 289165

Oakland Circuit Court

LC No. 2008-222622-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

The prosecution appeals as of right from a circuit court order that granted defendant's motion to quash the charge of felonious driving, a violation of MCL 257.626c. For the reasons set forth in this opinion, we reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews the district court's decision to bind over a defendant, as well as the trial court's decision on a motion to quash an information, for an abuse of discretion. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997).

Defendant was charged with felonious driving, a violation of MCL 257.626c, which provides:

A person who operates a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person or property resulting in a serious impairment of a body function of a person, but does not cause death, is guilty of felonious driving punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

A conviction for felonious driving requires proof of gross negligence. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). Gross negligence has three elements:

(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.

(2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.

(3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Id.* at 503 (citations omitted).]

“[T]here must be a showing of something more than ordinary negligence resulting in crippling injury to warrant a charge under the felonious driving statute.” *People v Chatterton*, 102 Mich App 248, 250; 301 NW2d 490 (1980).

The circuit court erroneously substituted its judgment for that of the district court. The circuit court effectively dismissed Heather Rogers’s testimony and focused exclusively on defendant’s rate of speed at the time he entered the intersection. While it was true that Rogers could not say with certainty what defendant’s rate of speed was, it could be inferred from the testimony that, even if he was traveling at the posted speed limit of 50 to 55 miles per hour, the speed was excessive under the circumstances. Three witnesses testified regarding the delayed signaling at the intersection in which the traffic light would not change from red to green until at least four seconds had gone by, ostensibly to avoid the type of collision that occurred and allow for the occasional driver to safely travel through the intersection on an amber light. If defendant was traveling 50 or more miles per hour at the time he broadsided Rogers’s vehicle in the middle of the intersection, it would be reasonable to infer that the traffic light in his direction had been red for several seconds. Additionally, Rogers testified that she saw defendant actually change lanes in order to get out from behind another vehicle who was stopping for the light. This evasive action, coupled with the rate of speed and the fact that defendant made no effort to stop, slow down, or avoid Rogers’s vehicle, certainly supports a finding of probable cause that defendant was driving “carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger” others. There was evidence that defendant had the ability to avoid the resulting harm by ordinary care and diligence, but that he failed to do so. There may have been a reasonable doubt about defendant’s actual guilt, but the matter should have gone before a jury to resolve any factual disputes. Consequently, we find that the decision of the circuit court constituted an abuse of discretion. *Hamblin*, 224 Mich App at 91. Accordingly, we reverse the motion to quash and reinstate the charges on which defendant was bound over from district court.

Reversed.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello