STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v THABO JONES, Defendant-Appellee.	FOR PUBLICATION September 10, 2013 9:05 a.m. No. 312966 Wayne Circuit Court LC No. 12-003749-FH Advance Sheets Version

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J.

In this prosecution for reckless driving causing death, MCL 257.626(4), the prosecution appeals by leave granted the trial court's order granting defendant's motion to instruct the jury on the lesser included offense of moving violation causing death, MCL 257.601d, contrary to the prohibition against doing so under MCL 257.626(5). The case arises from a three-vehicle collision in which defendant struck another vehicle, causing the second vehicle to strike a third, killing the driver of the second vehicle. MCL 257.626(5) states that "[i]n a prosecution under [MCL 257.622(4) for reckless driving causing death], the jury shall not be instructed regarding the crime of moving violation causing death [under MCL 257.601d]." The trial court determined that this statutory prohibition unconstitutionally infringed on the judicial power to determine court practice and procedure. As a constitutional question, we review the matter de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). Because MCL 257.626(5) is unconstitutional, we affirm.

"It is a general rule of criminal law, that a jury may acquit of the principal charge, and find the prisoner guilty of an offense of lesser grade, if contained within it." *People v McDonald*, 9 Mich 150, 153 (1861). Many crimes, today and at common law, consist of several "concentric layers" of crimes, each of which is in fact another crime with an element added or subtracted; the "rejecting of successive aggravations is a function open to juries in all cases where there is presented to them one offense in which another is inclosed" and "[n]o question has ever been made as to this right on the part of the jury . . . ." 1 Wharton, *A Treatise on Criminal Law* (10th ed), § 27, pp 34-35. See also *Hanna v The People*, 19 Mich 316, 318 (1869). Michigan codified this principle by statute as early as 1846 in 1846 RS, ch 161, § 16, which provided that

> [u]pon an indictment for any offence, consisting of different degrees, as prescribed in this title, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such offence.

Our Supreme Court recognized that, at the time, the only crime *formally* divided into degrees was murder, for which no such provision was needed; consequently, the provision must "be construed as extending to all cases in which the statute has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, wherever the charge for the higher grade includes a charge for the less." *Hanna*, 19 Mich at 321-322. Our Supreme Court eventually concluded that this principle from *Hanna* had become inappropriately extrapolated to include cognate offenses, not only necessarily included offenses. See *People v Nyx*, 479 Mich 112, 118-121; 734 NW2d 548 (2007). However, *Nyx* affirmed the *Hanna* conclusion that the statutory language concerning inferior offenses referred to any offense contained within the charged offense, not just offenses within which the Legislature has formally created degrees. *Nyx*, 479 Mich at 127-129.

Today, MCL 768.32 provides essentially the same rule, with the addition of one enumerated exception, contained in MCL 768.32(2), and an explicit provision for the judge at a bench trial to make the same finding. We find it unambiguous that MCL 768.32(1) embodies a venerable and important rule of common law; consequently, the Legislature is strongly presumed not to have intended any alteration to the common law by enacting it. See *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898), overruled in part on other grounds in *Hosko v Hosko*, 385 Mich 39; 187 NW2d 236 (1971). Of course, the Legislature *can* abrogate the common law, but "[w]hen it does so, it should speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

In an earlier case, this Court determined that the previously noted exception contained in MCL 768.32(2), pertaining to certain drug offenses, is unconstitutional. *People v Binder (On Remand)*, 215 Mich App 30, 38-42; 544 NW2d 714 (1996). While that conclusion has never been overturned on any substantive basis, our Supreme Court subsequently vacated that portion of this Court's opinion as having been unnecessary to the resolution of the case. *People v Binder*, 453 Mich 915; 554 NW2d 906 (1996). No binding caselaw presently establishes whether MCL 768.32(2) is or is not constitutional.[1] Furthermore, no binding caselaw addresses whether, or to what extent, the Legislature could abrogate the longstanding rule that the trier of fact may find a defendant not guilty of a charged offense in lieu of finding the defendant guilty of a necessarily included lesser offense.

It is axiomatic that the Legislature may establish the elements of a given crime. *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003). The Legislature may, within

[1] We respectfully reject the dissent's assertion that we rely on *Binder*. We discuss *Binder* only to explain that it is not binding and therefore has no applicability. Because the parties discussed it, however, we believe we would have been remiss had we failed to address *Binder* at all.

constitutional limits, therefore, alter the definition of a crime so that it becomes or ceases to be a necessarily included lesser offense of another. There is no dispute before us that moving violation causing death is, by definition, a necessarily included lesser offense of reckless driving causing death; indeed, the prosecution explicitly so agreed at oral argument. The only distinction between the two crimes is that reckless driving causing death requires the motor vehicle to be operated "in willful or wanton disregard for the safety of persons or property . . . ." MCL 257.626(2). The Legislature could have defined a moving violation causing death in such a way that it included an element not present in reckless driving causing death, with the result that the two would be cognate offenses. However, the Legislature did not do so.

Rather, the Legislature provided that "[i]n a prosecution under [MCL 257.626(4) for reckless driving causing death], the jury shall not be instructed regarding the crime of moving violation causing death [under MCL 257.601d]." MCL 257.626(5). Significantly, this provision (1) does not change the fact that, by definition, moving violation causing death remains a necessarily included lesser offense of reckless driving causing death, (2) does not impose any restrictions on the trial court sitting as the trier of fact at a bench trial, and (3) does not even preclude the jury from *finding* a defendant guilty of the lesser offense.

Pursuant to Const 1963, art 6, § 5, "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." While not present in Michigan's first constitution of 1835, an essentially identical provision is found in all of Michigan's constitutions since 1850. See *McDougall v Schanz*, 461 Mich 15, 26 n 10; 597 NW2d 148 (1999). The courts therefore may "prescribe procedural rules that vindicate constitutional rights," but may not promulgate "procedural rules contrary to legislative enactments that involve nonconstitutional substantive policies." *People v Glass (After Remand)*, 464 Mich 266, 281 n 11; 627 NW2d 261 (2001). Consequently, our Supreme Court has "exclusive rule-making authority in matters of practice and procedure," but may not "enact court rules that establish, abrogate, or modify the substantive law." *McDougall*, 461 Mich at 26-27.

In *People v Cornell*, 466 Mich 335, 353-354; 646 NW2d 127 (2002), our Supreme Court held that only necessarily included lesser offenses could be considered by the fact-finder and observed that this rule extended to misdemeanor offenses. Courts are not free to expand upon what crimes may be considered by the trier of fact to include what are, essentially, uncharged offenses. *Cornell* therefore stands for the conclusion that the Legislature sets the substantive law. *Id*. at 353. As noted, the Legislature can therefore define what constitutes a given offense. Pursuant to the definitions it crafts, some of those offenses may constitute necessarily included lesser offenses of other offenses. However, the Legislature is not free to dictate that the courts give instructions to the jury that conflict with substantive law. The courts are to instruct the jury on the law; this is established by statute, MCL 768.29, but also by court rule, MCR 2.513(A) and (N), and, importantly, by the simple fact that a jury not properly informed of the law *cannot* fulfill its duty. See, e.g., *People v Potter*, 5 Mich 1, 8-9 (1858); *People v Duncan*, 462 Mich 47,

52-53; 610 NW2d 551 (2000).[2] Correctly instructing the jury, therefore, arguably involves more than mere "substantive law;" it is in fact a fundamental requirement of the fair and proper administration of justice. See *People v Murray*, 72 Mich 10, 16; 40 NW 29 (1888); *People v Townes*, 391 Mich 578, 587; 218 NW2d 136 (1974).

It is the role of the courts to effectuate the right to a properly instructed jury; it is *not* the role of the Legislature to dictate to the courts the details of how to do so. Indeed, in *Cornell* our Supreme Court quoted, seemingly with approval, Justice LINDEMER's dissent in *People v Chamblis*, 395 Mich 408; 236 NW2d 473 (1975),[3] in which he explicitly noted that MCL 768.32 "'does not speak to instructions on lesser included offenses,'" and that although MCL 768.29 "'says that the court shall instruct the jury as to the law applicable to the case, [it] does not mandate what law is applicable to the case.'" *Cornell*, 466 Mich at 349, quoting *Chamblis*, 395 Mich at 433 (LINDEMER, J., dissenting). Trial judges are, to the contrary, permitted to instruct the jury however they believe best, as long as they accurately convey to the jury the material substance of the law applicable to the case. This supports our view that it is the Supreme Court that determines the practice and procedure to be followed by the courts in effectuating the law. If anything, *Cornell* supports our conclusion that determining what instructions should be given to the jury is exclusively the judiciary's role. See *People v Knoll*, 258 Mich 89, 101; 242 NW 222 (1932). The Legislature's role is only to *create* the law.

Consequently, if a necessarily included lesser offense exists, it is a violation of the principle of separation of powers for the Legislature to forbid the courts to instruct the jury on that lesser offense. A trial court's duty is to instruct the trier of fact regarding what the law actually is, and the law actually is that moving violation causing death is a necessarily included lesser offense of reckless driving causing death.

Even if the statute was not invalid as a violation of the constitutional separation of powers, we would have to strike it down as a violation of the right to trial by jury. As discussed earlier in this opinion, MCL 257.626(5) does not state what is or is not a lesser included offense of reckless driving causing death. It merely states that "[i]n a prosecution under [MCL 257.626(4) for reckless driving causing death], the jury shall not be instructed regarding the crime of moving violation causing death [under MCL 257.601d]." MCL 257.626(5). The plain text of the statute does not state that a trial court sitting as the finder of fact may not consider the offense of moving violation causing death nor that it may not convict a defendant of this lesser included offense. Had the legislature wished to limit the judge in this fashion it could readily have included explicit language to that effect. Our Legislature is presumed to be aware of the consequences of its use or omission of statutory language as well as its effect on existing laws. *In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009). See also, *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002) ("When the

[2] *Binder*, 215 Mich App at 40, and *Duncan*, 462 Mich at 49 n 3, both refer to MCR 6.414(F), the predecessor rule concerning jury instructions, which was repealed and incorporated into MCR 2.513 in 2011.

[3] *Chamblis*, 395 Mich 408, was overruled in *Cornell*, 466 Mich 335.

Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional.").[4]

The limitation in MCL 257.626(5) is not a statement of substantive law. Instead, MCL 257.626(5) is an infringement on the exclusive role of the judiciary to establish procedures to vindicate constitutional rights, as well as an infringement on the fundamental right of criminal defendants to a properly instructed jury. MCL 257.626(5) is also infirm in that, under the statute, a criminal defendant must give up his or her right to a jury in order for the fact-finder to consider the lesser included offense. Significantly, a defendant has no right to a bench trial unless the prosecution and the judge agree. MCL 763.3; MCR 6.401. Therefore, the statute places defendants in the position of having to trade one right for another without even the ability to make an autonomous choice, and it presents the prosecution with a potentially improper basis for refusing to consent to a requested bench trial.

We conclude that MCL 257.626(5) is unconstitutional as a violation of fundamental due process and as a violation of the principle of separation of powers. Affirmed.

/s/ Amy Ronayne Krause
/s/ Douglas B. Shapiro

[4] The dissent suggests that we should ignore the plain language of the statute. It states that "the clear intent of the Legislature" would bar a judge from considering the lesser included offense of moving violation causing death. The dissent does not explain, however, what wording in the statute sets out this intent. Rather, the dissent seeks to impose what it views as a reasonable reading of the statute onto words that do not actually so read.