STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHON C. CLOUTIER,

Defendant-Appellant.

UNPUBLISHED
April 20, 1999

No. 204723
Macomb Circuit Court
LC No. 96-003368 FC

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, after killing the victim in a drunk driving automobile accident. He was sentenced to twenty to forty years' imprisonment, and appeals as of right. We affirm.

Defendant moved for a directed verdict on the grounds that the prosecutor had failed to show that defendant acted with malice. The trial court denied the motion. On appeal, defendant argues that the trial court's denial of the motion was error. We disagree.

We review the trial court's ruling on the motion for directed verdict under the same standard utilized by the trial court, and "consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the charged crime were proved beyond a reasonable doubt." *People v Warren*, 228 Mich App 336, 345; 578 NW2d 692 (1998), lv pending.

To support a conviction for second-degree murder, the prosecution must show: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice may be shown by proof of "wanton and wilful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm." *Goecke, supra* at 466.

In *Goecke*, our Supreme Court discussed when drunk driving cases may be prosecuted as murder. It ruled that there are some instances in which "misconduct . . . goes beyond that of drunk

driving." *Id.* at 649. In *Goecke,* there was evidence to infer that the defendant knew he was intoxicated and should not be driving, that the defendant drove recklessly at high speeds on a busy road, and that even after he almost hit another vehicle, he continued to speed through at least one red traffic light before colliding with the victim's vehicle. In *People v Baker,* a companion case, defendant had a blood-alcohol level of 0.18, drove well in excess of the speed limit, ran through a red light, and almost hit two other cars before hitting the victims' car, killing two people. In *People v Hoskinson,* another companion case, defendant was intoxicated, and he hit the same parked car two times before leaving a parking lot and driving through a residential subdivision at a high rate of speed. He almost hit another vehicle and after swerving to avoid it, ran through a stop sign and again, almost hit another vehicle. He then hit a parked car, and thereafter struck the victim. He left the scene and drove for several more blocks. The Court held that in all three companion cases, there was sufficient evidence of malice to support second-degree murder. *Id.* at 470-473.

This case is similar. There was evidence that the intoxicated defendant had been driving in excess of one hundred miles an hour; that when he hit the victim's vehicle he was going approximately ninety miles an hour; and that prior to the collision, he had driven through a red light, traveled southbound in both the center turning and northbound lanes of traffic, drove the automobile without its lights on for a portion of time, and even came close to hitting another vehicle before swerving to avoid it and hitting the victim's vehicle, causing it to roll over several times. The evidence, viewed in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find that the essential elements of the charged crime, including the element of malice, were proved beyond a reasonable doubt. *Warren, supra*. Therefore, the trial court did not err in denying defendant's motion for directed verdict.

Defendant next argues that the trial court erred in failing to instruct the jury as to the legal definition of malice. We disagree.

We review the jury instructions as a whole to determine if there is error requiring reversal, and even if the instructions are somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994).

In *People v Woods,* 416 Mich 581, 626-627; 331 NW2d 707 (1982), the Michigan Supreme Court expressly forbade courts from describing the terms "malice" or "malice aforethought" when instructing a jury. The Court feared that the technical terms were simply too confusing to juries and held:

> Rather than describing malice aforethought as a requisite element of murder, the trial courts should indicate the states of mind required for murder – the intent to kill, to cause great bodily harm, or to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. [*Id.*]

While the Court did not expressly require that trial courts read only from the standard jury instructions, it "strongly approve[d]" of their use. *Woods, supra* at 627-629.

In this case, the court, on two occasions, used the standard jury instructions to accurately instruct the jury as to requisite state of mind that defendant must have had in order to find defendant guilty of second-degree murder. We find that the trial court properly instructed the jury within the bounds of the law and that the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Daniel, supra*.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck