STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2002
v	No. 231693 Lapeer Circuit Court
ROGER JOSEPH BRUCE, Defendant-Appellant.	LC No. 99-006790-FH

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious driving, MCL 752.191,[1] and sentenced to eighteen months' probation, ninety days of which was to be served in jail. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in not granting his motion for directed verdict and that the jury's verdict was not supported by sufficient evidence. The Court reviews these issues de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could have supported a finding by a rational factfinder that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The elements of felonious driving in this case were that defendant (1) drove a vehicle on a highway (2) in a grossly negligent manner, and his gross negligence was (3) a substantial cause of an accident that (4) caused the victim a crippling injury. CJI2d 15.10. Gross negligence occurs when a person wilfully disregards the potential effect on others of an act or failure to act. CJI2d 16.18. Gross negligence has three elements: (1) the defendant perceived a situation that he knew required him to exercise ordinary care to avoid injuring others, (2) he could have avoided the resulting harm by using ordinary care, and (3) he failed to use that ordinary care when, to a reasonable person, it would have been apparent that the result of that failure was likely to be serious injury. *Id.*; *People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997). Whether a person charged with felonious driving was grossly negligent is ordinarily a

[1] MCL 752.191 has been repealed and replaced with MCL 257.626c. 2001 PA 134.

jury question that requires examination of the totality of the circumstances involved in the incident. *McCoy, supra* at 504.

On appeal, defendant disputes only the element of gross negligence. His theory of the case is that, once he moved to the left lane and had pulled alongside a truck following the victim's car, he no longer had the option to slow, but could only attempt to complete his pass. We disagree.

Defendant admitted that, when he saw the victim's car in the course of his attempted pass, he realized that it might turn left in front of him, and that if it did, in his words, "this could be a problem." This satisfies the first element of gross negligence. *McCoy, supra* at 503. Defendant did not deny that, at that moment, he had the ability to brake and thereby avoid or lessen any injury a collision might cause. This satisfies the second element of gross negligence. *Id.* Not only did defendant choose not to brake, he stated that he chose to accelerate. Failure to brake alone would satisfy the third element of gross negligence because an ordinary mind would realize that the result of a collision between a passenger vehicle turning left across a two-lane road and a tractor-trailer weighing twenty-five tons and moving at fifty miles an hour would likely prove disastrous to the car and its passengers. *Id.* Therefore, there was sufficient evidence on this element both to deny defendant's motion for directed verdict and to support the jury's verdict. *Herndon, supra* at 415; *Aldrich, supra* at 122.

Defendant next argues that the circuit court erred in denying his motion to quash the information for lack of probable cause on the element of gross negligence. Although the stated basis for the district court's decision to bind over defendant included an invalid element – the size of defendant's tractor-trailer truck – see *People v Sherman*, 188 Mich App 91, 92, 95; 469 NW2d 19 (1991), its decision was correct and should be affirmed because there was some evidence presented with respect to gross negligence. *People v Brake*, 208 Mich App 233, 242, n 2; 527 NW2d 56 (1994). In any event, because sufficient evidence to convict was presented at trial, the evidentiary error, if any, at the preliminary examination was harmless. *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990); *People v Moorer*, 246 Mich App 680, 682-683; 635 NW2d 47 (2001); *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

Finally, defendant argues that the trial court erred in denying his motion to dismiss on the ground of prosecutorial vindictiveness. A motion to dismiss is reviewed for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). A court abuses its discretion either when its ruling evidences perversity of will, defiance of judgment, and the exercise of passion or bias, or when an unprejudiced person considering the facts before the court would conclude there was no justification or excuse for the court's decision. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Prosecutorial vindictiveness violates due process because it punishes a defendant for having asserted a legal right. *People v Jones*, ___ Mich App ___, slip op 3; ___ NW2d ___ (Docket No. 238220, issued 7/21/02), citing *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996). Prosecutorial vindictiveness may be actual or presumed. *Ryan, supra* at 36. Actual vindictiveness requires a defendant to show actual prejudice through objective evidence of an "expressed hostility or threat." *Id.* Because a prosecutor has broad discretion to decide under which of the two applicable statutes a prosecution will be instituted, *Jones, supra* at slip op p 3, exercise of that discretion, even during plea negotiations where the object of the prosecutor is to

induce a guilty plea, does not constitute actual vindictiveness. *Ryan, supra* at 36, citing *Bordenkircher v Hayes*, 434 US 357, 364-365; 98 S Ct 663; 54 L Ed 2d 604 (1978); *Jones, supra* at slip op p 4, citing *People v Goeddeke*, 174 Mich App 534, 537; 436 NW2d 407 (1988). Presumed vindictiveness requires a "reasonable likelihood" the prosecution acted out of animus, *United States v Goodwin*, 457 US 368, 373, 380-382; 102 S Ct 2485; 73 L Ed 2d 74 (1982), but, like actual vindictiveness, it does not include recharging a defendant with a more serious offense because he declined to plead guilty to a lesser offense. *Jones, supra* at slip op p 4.

The only evidence defendant submitted to prove vindictiveness was a letter to his attorney from the prosecutor stating, "In fairness, I should advise you that we have reviewed the above referenced matter and if your client fails to plea to reckless driving, we are strongly considering a charge of felonious driving as it appears that we originally charged this matter too low." This evidence alone is insufficient to support a finding of either presumed or actual vindictiveness. *Ryan, supra* at 36; *Jones, supra* at slip op p 4. Therefore, the trial court did not abuse its discretion in denying defendant's motion to dismiss. *Ullah, supra* at 673.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra