

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD JAMES SOLDAN,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 235130

Crawford Circuit Court

LC No. 00-001781-FH

Before: Neff, P.J., and Hoekstra and O’Connell, JJ.

PER CURIAM.

Defendant was convicted by jury of negligent homicide, MCL 750.324. The trial court sentenced defendant to 14 to 24 months in prison, but stayed imposition of the sentence pending appeal. We affirm.

On December 12, 1998, two vehicles collided at the intersection of Fletcher and Military roads in Crawford County, Michigan. Responding emergency personnel found defendant pinned in the back part of one of the vehicles and a second individual lying dead on the shoulder of the road. Apparently, this person was ejected from the other vehicle involved in the crash.

At the conclusion of the investigation, the prosecution brought charges against defendant for operating a motor vehicle while under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4). At trial, the prosecution called an accident reconstruction expert who testified that defendant caused the accident by running a stop sign at a speed between 36 and 43 miles per hour. The prosecution also relied on the testimony of one of the emergency response persons at the scene who indicated that while in close proximity to defendant he smelled the odor of alcohol on defendant’s breath. Further, the prosecution introduced evidence that analysis of defendant’s blood revealed a blood alcohol content of .06. At the conclusion of the trial, the prosecution requested, and the trial court gave, an instruction for the lesser offense of negligent homicide. The jury convicted defendant of the lesser charge. This appeal ensued.

Defendant first argues that there was insufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt on the charge of OUIL causing death. Specifically, defendant asserts that the trial court erred in denying defendant’s motion for directed verdict of acquittal under the alternate theories of operating a motor vehicle under the influence of intoxicating liquor or while impaired. We disagree. “When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the

evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The elements of the charged offense are (1) the defendant was operating a motor vehicle; (2) the defendant was operating the vehicle on a highway or other place generally accessible to vehicles; (3) the defendant was under the influence of intoxicating liquor, or had an unlawful bodily alcohol level, or was impaired while operating the vehicle;¹ (4) the defendant voluntarily decided to operate the vehicle knowing that he had consumed alcohol and might be intoxicated; and (5) the defendant's intoxicated or impaired driving was a substantial cause of the victim's death. CJI2d 15.11.

At trial, evidence was presented that defendant was driving his vehicle on a public highway and that he had a blood alcohol level of .06 over an hour after the collision. Emergency personnel responding to the situation testified that they smelled alcohol in defendant's car. A paramedic testified that he smelled alcohol on defendant's breath. Evidence also indicated that defendant failed to obey both prewarning stop signs and the stop sign at the intersection and he drove into the path of oncoming car. Viewing this evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could be persuaded that the essential elements of OUIL causing death were proved beyond a reasonable doubt, and thus the trial court did not err in denying defendant's motion for directed verdict.

Defendant's final argument arises out of a situation that occurred during trial. The trial court impaneled a thirteen-person jury, anticipating that before jury deliberations one juror would be excused if all thirteen were still available at that point in the proceedings. After the jury was sworn, it came to the attention of the parties and the trial court that one of the jurors had an outstanding felony warrant that was sworn out by the employer of yet another juror. When it came time to excuse a juror, the trial court, believing that defendant agreed, did not randomly select a juror to excuse, as MCL 768.18 and MCR 6.411 require; rather, the trial court excused the juror that had the warrant outstanding. Afterward, defendant's counsel made a motion for a mistrial on the grounds that the trial court's failure to randomly excuse a juror was done without defendant's consent and in violation of the statute and court rule. While acknowledging that it made a mistake, the trial court denied the motion.

Defendant claims on appeal that the trial court erred in not granting his motion for mistrial and dismissing the case. Specifically, defendant maintains that he was denied the right to have his case decided by the jury as chosen and that any remedy other than dismissal will not protect that right. We disagree. We review the decision of the trial court concerning a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

¹ Driving while “impaired” means that “due to the drinking of alcohol, the defendant drove with less ability than would an ordinary careful driver. The defendant's driving ability must have been lessened to the point that it would have been noticed by another person.” CJI2d 15.4.

Our first task toward resolving this issue is to determine whether the trial court committed error and, if so, under what standard for harmless error should we decide whether defendant is entitled to relief. From the record, we learn that the trial court believed that it had made a mistake. However, the mistake admitted to was one of misunderstanding the instruction from defense counsel concerning defendant's position on whether defendant would consent to excusing a particular juror. This misunderstanding led the trial court to believe that it had defendant's consent not to follow the procedure prescribed by MCR 6.411. It also is apparent that the trial court would have employed the random draw procedure of MCR 6.411 had it correctly understood defendant's position.

Although we interpret the trial court's decision when addressing the motion for mistrial to conclude that its mistake was error, but that defendant was not entitled to the relief requested of outright dismissal, we are not convinced that excusing the juror was error. MCL 768.18(1) provides:

Any judge of a court of record in this state about to try a felony case which is likely to be protracted, may order a jury impaneled of not to exceed 14 members, who shall have the same qualifications and shall be impaneled in the same manner as is, or may be, provided by law for impaneling juries in such courts. All of those jurors shall sit and hear the cause. Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12. In the event that more than 12 jurors are left on the jury after the charge of the court, the clerk of the court in the presence of the trial judge shall place the names of all of the jurors on slips, folded so as to conceal the names thereon, in a suitable box provided for that purpose, and shall draw therefrom the names of a sufficient number to reduce the jury to 12 members who shall then proceed to determine the issue presented in the manner provided by law.

Under the authority of the statute, even if defendant objected, the trial court had the authority to excuse the juror. Further, this Court has stated, in the context of excusing a juror under MCL 768.18, that "[t]he trial court is in the best position to investigate and pass upon a juror's qualifications and the court's decision to remove a juror will be reversed only upon a finding of clear abuse of discretion. *People v Mason*, 96 Mich App 47, 49-50; 292 NW2d 480 (1980). If the trial court had decided over defendant's objection to excuse this juror, we would find no abuse of discretion. A juror with an outstanding bench warrant authorized by the employer of another juror presents a situation that could impact the ability of that juror to perform fairly and impartially. The trial court clearly was concerned about the situation and it would have been well within reason for the trial court to decide to excuse the juror. Under these circumstances, we are not persuaded that defendant can make out a claim of error for what happened here.

However, because the trial court did not excuse the juror for cause, we also address the defendant's claim assuming that error occurred here. Defendant argues that "[t]he procedure utilized by the trial court violated [d]efendant's right to have a jury chosen by lot" and that the mistaken communication between defense counsel and the trial court caused defendant to be denied his right to have his case decided by the jury as chosen.

For the error here to entitle defendant to any relief, it must not be harmless. MCL 769.26. This statute “clearly places the burden on the defendant to demonstrate that a preserved, nonconstitutional error resulted in a miscarriage of justice.” *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). When determining whether error is harmless, it must be determined “whether it is more probable than not that a different outcome would have resulted without the error.” *Id.* at 495.

Here, defendant has not shown, and we cannot say, that it is more probable than not that removing the chosen juror rather than one picked by random draw affected the outcome of the trial or undermined the reliability of the verdict. Contrary to defendant’s argument, the twelve jurors that ultimately deliberated and rendered a verdict were jurors that defendant approved. Although the trial court’s mistake was an unfortunate circumstance, it did not result in a miscarriage of justice, and thus defendant is entitled to no relief. *Lukity, supra.*

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell