STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2004
v	No. 244904 Saginaw Circuit Court
SHANNON NICOLE HINDMAN, Defendant-Appellant.	LC No. 01-020923-FC

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions and sentences for one count of second-degree murder, MCL 750.317; two counts of operating under the influence of liquor (OUIL) while a person less than 16 years of age is occupying the vehicle, MCL 257.625(7)(a); and one count of possession of an open container of alcohol in a motor vehicle, MCL 257.624a. We affirm in part, but vacate the excessive portion of defendant's second-degree murder sentence. This case arose when defendant, while drunk, placed her two children in her van and sped through a blinking red stoplight, hitting and killing another driver.

Defendant first argues that the trial court erred when it denied her motion for a directed verdict on the second-degree murder charge. We disagree. We review de novo a trial court's decision on a directed verdict motion. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). We will only reverse if a rational trier of fact could not conclude that the prosecutor proved the crime's elements beyond a reasonable doubt. *Id*. "The elements of second-degree murder are: (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). To prove malice, it is not necessary to show that a defendant had the specific intent to harm or kill. *Id*. at 466. "Malice may be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

Within *Goecke*, *supra*, our Supreme Court reviewed the consolidated case of *People v Baker*. The defendant in *Baker* "had a blood-alcohol content of 0.18, drove well in excess of the speed limit, ran a red stoplight, drove through an intersection, narrowly missed hitting two cars before hitting the victim's car, and killed two people." *Id*. at 471. Accordingly, the Court concluded "that the defendant placed himself in a position the results of which a reasonable person would know had the tendency to cause death or great bodily harm." *Id*. at 471-472. The

Court, therefore, affirmed the defendant's conviction for second-degree murder. *Id*. at 471. In the case at bar, defendant's blood had a stipulated alcohol level of 0.19 and tested positive for marijuana and cocaine. Defendant drove faster than 60 miles an hour in a 30-mile-an-hour zone and failed to stop for a flashing red light, killing another driver. Therefore, a reasonable jury could find that she, like the defendant in *Baker*, placed herself "in a position the results of which a reasonable person would know had the natural tendency to cause death or great bodily harm," *id*. at 472, and the trial court correctly denied defendant's motion for a directed verdict.[1]

Defendant argues that the prosecutor appealed to the jurors' sympathy, argued facts not in evidence, and accused defense counsel of mischaracterizing the evidence. Defendant also argues that her conviction for multiple counts of OUIL with a minor in the vehicle violates double jeopardy principles. Defendant failed, however, to assert a double jeopardy challenge below and did not object to the prosecutor's statements. Therefore, these issues were not preserved for appeal and we do not find any plain error requiring our review. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Defendant next argues that the trial court erred when it scored ten points under offense variable (OV) 10. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The instructions for OV 10 require scoring ten points if "[t]he offender exploited a victim's . . . youth . . . or the offender abused his or her authority status." MCL 777.40(1)(b). Here, the children qualify as victims for purposes of the OUIL statute at issue, MCL 257.625(7)(a), and there was evidence that defendant's two young children were in her van because of her parental authority over them. Therefore, there existed sufficient evidence to support the court's score for OV 10. *Hornsby, supra* at 468.

[1] Recognizing that this Court must follow precedent, Judge O'Connell respectfully questions the reasoning in *Goecke, supra*, and barring that decision, would remand for sentencing under the involuntary manslaughter guidelines. It is the role of the judiciary to define and standardize the law and its application. By using second-degree murder as a tool to discourage drunk driving, the *Goecke* decision abandons its duty to define further the admittedly amorphous differences between simple negligence and criminal (extreme gross) negligence, and criminal negligence and malice aforethought. It is not enough to leave such fuzzy distinctions of law to jurors. If necessary to prevent the extrapolation of malice aforethought from what traditionally qualified as only simple or criminal negligence, the courts, as the definers of second-degree murder, should insert new dividers into the ancient spectrum. For example, a defendant should receive a directed verdict on a second-degree charge if the prosecutor failed to present evidence from which a reasonable jury could conclude that the defendant displayed an *absolute* indifference to the fact that his or her actions would *very likely* cause death or serious bodily injury. Such a standard could not be met in drunk driving cases except in the rarest of cases because most drunk drivers, including the one in this case, are not indifferent about hitting someone. Short of not driving at all, they are usually trying hard to avoid a fatal collision but cannot adequately control their emotional condition and physical reactions. The standard would preserve second-degree murder's "general intent" characteristic and would properly relegate such factual scenarios to the traditional realm of negligent homicide and involuntary manslaughter.

Finally, defendant challenges her scores under OV 18 and prior record variable (PRV) 7. The record, however, indicates that defendant failed to object to the scoring of these variables at sentencing, forfeiting their appellate review. MCL 769.34(10). Nevertheless, the trial court violated the two-thirds rule set out in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), when it sentenced defendant to 444 to 660 months in prison on her second-degree murder conviction. Therefore, we remand to the trial court for the perfunctory task of reducing defendant's minimum sentence to 440 months. *People v Thomas*, 447 Mich 390, 394; 523 NW2d 215 (1994). In all other aspects we affirm.

Affirmed in part, vacated in part, and remanded for reduction of defendant's second-degree murder sentence by four months. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray