

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE EVAN FEEZEL,

Defendant-Appellant.

UNPUBLISHED

November 13, 2008

No. 276959

Washtenaw Circuit Court

LC No. 05-1254-FH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of failure to stop at the scene of an accident resulting in death, MCL 257.617(3), operating while intoxicated, second offense, MCL 257.625(1), and operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death, MCL 257.625(4), (8). The trial court sentenced him as a third habitual offender, MCL 769.11, to concurrent terms of 84 months to 30 years for the failure to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death convictions and one year for the OWI conviction.¹ We affirm.

I. Facts and Procedural History

Shortly before 2:00 a.m. on July 21, 2005, defendant, who was driving a Land Rover, struck and killed Kevin Bass on Packard Road in Ypsilanti Township in Washtenaw County. Packard Road is a five-lane road that runs east to west and includes a center turn lane. At the time of the accident, it was dark outside and was raining heavily. Although there was a sidewalk on the north side of Packard Road, the victim was walking in the middle of the road itself. Defendant had been drinking at two bar/restaurants on July 20, 2005, and into the early morning hours of July 21, 2005. The evidence revealed that defendant's blood alcohol content (BAC) at the time of the accident was at least .091 and as high as .115. The evidence also revealed the

¹ Defendant pleaded no contest to operating a vehicle with a suspended or revoked license, second or subsequent offense, MCL 257.904(3)(b), and the trial court sentenced him to imprisonment for ninety-three days for that offense.

presence of 6 nanograms per milliliter of 11-carboxy-THC² in defendant's blood. There were no skid marks on the road at the scene of the accident. Although he later returned, the evidence revealed that defendant initially left the scene of the accident after striking the victim and that he never called 911.

At the time of his death, the victim was extremely intoxicated. Before trial, the prosecutor filed a motion in limine to preclude the admission of evidence of the victim's BAC, which the prosecutor asserted was at least .286. The prosecutor argued that while the victim's presence in the roadway was relevant to the issue of causation, the reason for the victim's presence in the roadway, his intoxication, was irrelevant to causation. The prosecutor contended that the victim's presence in the roadway was reasonably foreseeable and therefore did not constitute a superseding cause that relieved defendant from liability. The trial court agreed with the prosecutor and granted its motion to preclude evidence of the victim's intoxication.

After defendant was convicted and sentenced, he filed a motion for acquittal or new trial. Defendant argued that the trial court's jury instructions regarding proximate cause were erroneous and resulted in the jury rendering contradictory verdicts. According to defendant, the trial court properly instructed the jury regarding proximate cause when it instructed the jury on the elements of OWI causing death (of which defendant was acquitted), but failed to instruct the jury regarding proximate cause when it instructed the jury on the elements of the offenses of failing to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death. Defendant further contended that because the jury convicted defendant of the lesser offense of OWI, and not OWI causing death, and the only distinction between the two offenses is the element of causation, the jury must have concluded that defendant was not the proximate cause of the victim's death. Thus, defendant contended, the jury would have acquitted defendant of failing to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death if it had been properly instructed regarding proximate cause for those two offenses. Defendant also argued that defense counsel was ineffective for failing to request instructions on proximate cause for failing to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death or in failing to object to the instructions as given.

The trial court denied defendant's motion for new trial. In so doing, the trial court ruled that defendant had waived any objection to the jury instructions by indicating satisfaction with the instructions as given. In spite of its conclusion that defendant had waived the instruction issue, the trial court nevertheless addressed the issue and rejected defendant's argument that the instructions were improper and that they rendered the jury verdicts inconsistent. The trial court found that the knowledge element distinguished OWI from OWI causing death and concluded, contrary to defendant's assertion, that "the only logical explanation for the jury's verdict in finding the defendant guilty of OWI but not OWI causing death, is the determination that, in fact, he did not have the knowledge at the time that he was intoxicated. Which therefore, does not

² 11-carboxy-THC is a "metabolite" or byproduct of metabolism created when the body breaks down THC (tetrahydrocannabinol), the psychoactive ingredient of marijuana[.]” *People v Derror*, 475 Mich 316, 319; 715 NW2d 822 (2006).

make it all inconsistent” In concluding that the basis for the jury’s verdict acquitting defendant of OWI causing death and convicting him of OWI was the knowledge element, the trial court referred to a note written by the jury to the trial court, in which the jury asked a question regarding the knowledge of intoxication element for the offense of OWI causing death. According to the trial court, the note led “to the conclusion that the issue the jurors had, from the standpoint of their determination, was the issue of knowledge” Because there is no knowledge of intoxication element in failing to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death, the trial court concluded that the verdicts were entirely consistent.

II. Analysis

A. Jury Instructions

Defendant argues that the trial court erred in failing to give the jury a proximate cause instruction when it instructed the jury on the elements of failing to stop at the scene of an accident resulting in death and operating a motor vehicle with a schedule 1 controlled substance causing death. According to defendant, the trial court’s erroneous instructions resulted in the jury rendering an inconsistent verdict. Defendant also argues that defense counsel was ineffective in failing to object to the instructions as given and in failing to request that the trial court repeat the proximate cause instruction when the trial court instructed the jury regarding the elements of failing to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death.

We review de novo claims of instructional error on appeal. *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). However, because defendant failed to object to the instructions as given, our review is for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Although defendant requested an evidentiary hearing in his motion for acquittal or for new trial, the trial court did not address defendant’s request in the order denying defendant’s motion, and an evidentiary hearing regarding defendant’s claim that defense counsel was ineffective was never held. Therefore, our review of defendant’s ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties’ theories. *Meyer v Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000). Jury instructions must include all the elements of the charged offenses and must not exclude material issues, defenses and theories if the evidence supports them. *People v Clark*, 274 Mich App 248, 255; 732 NW2d 605 (2007). Even if somewhat imperfect, jury instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Jackson, supra* at 647. “Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Clark, supra* at 255.

When it instructed the jury regarding the elements of OWI causing death, the trial court gave the following instruction regarding proximate cause:

In order to prove that the Defendant's operation of the motor vehicle caused Kevin Bass' death, the People must prove beyond a reasonable doubt that the Defendant's operation of the vehicle was both the factual and proximate cause of Kevin Bass' death. If you find that the People failed to prove beyond a reasonable doubt either factual causation or proximate causation, then you must find the Defendant not guilty.

* * *

To determine if the Defendant's operation of the motor vehicle was the factual cause of the death, ask yourself the following question: But for the Defendant's operation of the vehicle, would the death have occurred? That is, if Kevin Bass' death would not have occurred absent the Defendant having operated a motor vehicle, then factual causation exists. Factual causation alone, however, is not enough. Proximate cause must also be established. Proximate cause is a legal concept to design criminal liability from attaching when the death is too remote or unnatural a consequence of the Defendant's operation of the motor vehicle. For the Defendant's operation of the motor vehicle to be regarded as a proximate cause of the victim's death, the death must be a direct and natural result of the Defendant's actions. To determine if the Defendant's operation of the motor vehicle was a proximate cause of the death, ask yourself the following question: Was there an intervening cause that superceded the Defendant's conduct such that the causal link between the Defendant's conduct and the victim's injury was broken. The standard by which to gauge whether an intervening cause supercedes and thus severs the causal link is generally one of reasonable foreseeability. The linchpin in the superceding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the Defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable, that is, gross negligence or intentional misconduct then, generally, the causal link is severed and the Defendant's conduct is not regarded as a proximate cause of the victim's death. Gross negligence is not merely an elevated form of ordinary negligence. Gross negligence means wantonness and disregard of the consequences which may ensue and indifference to the rights of others that is equivalent to a criminal intent. Ordinary negligence by the victim or a third party will not be regarded as a superceding cause because ordinary negligence is reasonably foreseeable. . . .

Defendant is correct that the trial court did not repeat these proximate cause instructions when it instructed the jury regarding the offenses of failing to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death.

The trial court did not err in failing to repeat the proximate cause instruction for the failure to stop at the scene of an accident resulting in death offense because proximate causation is not an element of the offense according to the language of MCL 257.617(3). MCL 257.617(3) provides: "If the individual [fails to stop his or her vehicle] following an accident caused by that individual and the accident *results in the death* of another individual, the individual is guilty of a felony" (Emphasis added.) In *People v Schaefer*, 473 Mich 418, 436-439; 703 NW2d 774

(2005), rev'd in part on other grounds in *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), in which the Supreme Court interpreted MCL 257.625(4) (OUIL causing death), the Supreme Court observed that by using the words “*results in death*” in MCL 257.617(2), rather than the words “*causes the death*,” the Legislature eliminated proximate cause as an element of the offense:

Had the Legislature intended to require only factual causation and not proximate causation as well, the Legislature would have instead used the words “*results in death*” rather than “*causes the death*.”

Indeed, MCL 257.617, which requires motorists involved in accidents to remain at the scene of the accident, specifically uses the phrase “*results in . . . death*.” Section 617(2) provides:

“[I]f the individual [flees the scene of an accident] and the accident *results in serious impairment of a body function or death*, the individual is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine of not more than \$5,000.00, or both.” [Emphasis added.]

Accordingly, the Legislature is well aware of how to draft a statute that requires only factual causation and not proximate causation.

The United States Court of Appeals reached the same conclusion in construing an analogous federal criminal statute: distribution of a controlled substance resulting in death, 21 USC 841. Specifically § 841(a)(1) makes it illegal to “*knowingly or intentionally . . . distribute . . . a controlled substance*” and § 841(b)(1)(C) provides an enhanced sentence “*if death or serious bodily injury results from the use of such substance . . .*” (Emphasis added.) In recently addressing the proximate cause issue, the United States Court of Appeals for the Ninth Circuit held:

“[P]roximate cause is not a required element for conviction and sentencing under § 841(b)(1)(C). All that is necessary under the statutory language is that “*death . . . results*” from the offense described in § 841(a)(1). . . . Cause-in-fact is required by the “*results*” language, but proximate cause . . . is not a required element.” [*United States v Houston*, 406 F3d 1121, 1124-1125 (CA 9, 2005).]

In so holding, the Ninth Circuit joined numerous other circuits that reached the same conclusion. See *United States v Soler*, 275 F3d 146, 152 (CA 1, 2002); *United States v McIntosh*, 236 F3d 968, 972-973 (CA 8, 2001); *United States v Robinson*, 167 F3d 824, 830-832 (CA 3, 1999); *United States v Patterson*, 38 F3d 139, 145-146 (CA 4, 1994).

Therefore, if the Legislature had intended to eliminate proximate causation as an element of OUIL causing death, it would have used the phrase “*and by the operation of that motor vehicle the death of another person results*.” The Legislature, however, deliberately chose to use the word “*cause*” in § 625(4) and

thereby incorporated the technical, legal meaning of the term. [*Schaefer, supra* at 439-440 n 67.]

In light of *Schaefer*, the trial court did not err in failing to repeat the proximate cause instruction for the failure to stop at the scene of an accident resulting in death offense because proximate causation is not an element of MCL 257.617(3).

Proximate causation is an element of operating a motor vehicle with a schedule 1 controlled substance causing death, however. MCL 257.625(4) provides that a person who operates a motor vehicle in violation of, among other subsections, (8) (operating a motor vehicle with a schedule 1 controlled substance), “and by the operation of that motor vehicle *causes* the death of another person is guilty of a crime” (Emphasis added.) While the trial court thoroughly and accurately instructed the jury on proximate cause and superseding cause when it gave the instructions for OWI causing death, it did not repeat those instructions when it instructed the jury on the offense of operating a motor vehicle with a schedule 1 controlled substance causing death. In *Schaefer*, the Supreme Court stated:

[W]e conclude that the trial court erred because the word “cause” in § 625(4) is a legal term of art normally not within the common understanding of jurors, and thus, simply reading the statute to the jury was insufficient. The jury could not be expected to understand that the statute required the prosecutor to prove *both* factual causation and proximate causation. [*Schaefer, supra* at 441.]

The trial court’s causation instruction for the operating a motor vehicle with a schedule 1 controlled substance causing death offense, “that the Defendant’s operation of the vehicle caused the death of [the victim,]” was flawed in that it failed to convey to the jury that the prosecutor had to prove both factual and proximate causation. It is true that this Court has held, although not in the context of a proximate cause instruction, that a trial court is not required to repeat an instruction for one offense if it has already been given for another offense. In *People v Parker*, 133 Mich App 358; 360-361; 349 NW2d 514 (1984), this Court held that a trial court does not err in failing to repeat the intent instruction to the jury in connection with instructions on felonious assault where the instruction was properly given previously in connection with assault with intent to commit murder. However, in this case, the trial court did not clarify, when it gave the causation instructions for OWI causing death, that the causation instructions also applied to operating a vehicle with a schedule 1 controlled substance causing death. If the trial court had clarified that the causation instructions for OWI causing death also applied to operating a vehicle with a schedule 1 controlled substance causing death, it would not have been necessary for the trial court to repeat the instructions for the operating a vehicle with a schedule 1 controlled substance causing death offense. In the absence of such a clarification, however, the trial court’s causation instruction for operating a vehicle with a schedule 1 controlled substance causing death was flawed.

Although we find that the trial court’s causation instruction for the operating a motor vehicle with the presence of a schedule 1 controlled substance causing death offense was flawed, the trial court’s error in this regard is subject to a harmless error analysis. *Schaefer, supra* at 441. The trial court’s error in failing to explain the causation element of operating a motor vehicle with the presence of a schedule 1 controlled substance causing death was a nonconstitutional error. *Id.* at 442. Furthermore, because defense counsel expressed satisfaction

with the instructions as given, the error was not preserved. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). This Court reviews an unpreserved nonconstitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). Reversal is only warranted when the error resulted in the conviction of a defendant who is actually innocent or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 774. To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Grant*, *supra* at 549. The defendant bears the burden of persuasion with respect to prejudice. *Carines*, *supra* at 763. An unpreserved nonconstitutional error is presumed harmless and does not warrant reversal unless it is more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant has failed to bear his burden of persuasion regarding prejudice. Defendant asserts that the fact that the trial court properly instructed the jury regarding proximate cause for the OWI causing death offense and the jury acquitted defendant of OWI causing death establishes that the jury concluded that defendant was not the proximate cause of the victim's death and that if the jury had been properly instructed regarding proximate cause for the offense of operating a motor vehicle with a schedule 1 controlled substance causing death, the jury would have acquitted defendant of that offense as well. The offense of OWI causing death contains two elements that are not present for the offense of OWI: (1) that the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and might be intoxicated, and (2) that the defendant's operation of the motor vehicle caused the victim's death. *Schaefer*, *supra* at 434. A note sent to the trial court by the jury indicates that the jury was concerned with the knowledge element that distinguishes OWI from OWI causing death rather than the causation element that also distinguishes the two offenses. In the note, the jury specifically referred to the fourth element of OWI causing death, which is the knowledge element. Based on the jury note, the trial court concluded that the jury was concerned with the knowledge element of OWI causing death, rather than causation, and we agree. Absent any additional evidence of prejudice, we are not convinced that the jury's verdict regarding operating a vehicle with a schedule 1 controlled substance causing death would have been different had the trial court properly instructed the jury regarding causation for that offense.

Additionally, there was evidence that defendant was both the cause in fact and proximate cause of the victim's death. Defendant presented evidence that the victim was walking in the middle of Packard Road roadway at 2:00 a.m., when it was dark outside and raining heavily, and that there was a sidewalk on the north side of Packard Road. Defendant also elicited testimony that an unbroken glass bottle was recovered from the victim's person. In addition, the jury heard testimony that the victim was jaywalking at the time of the accident. For reasons that will be explained in more detail below, this evidence, even if believed by the jury, established at most that the victim was negligent. Only gross negligence³ or intentional misconduct⁴ by the victim

³ Gross negligence "is not merely an elevated or enhanced form of ordinary negligence." *Schaefer*, *supra* at 438. Gross negligence entails wantonness and a disregard of the consequences that may result, and an indifference to the rights of others that is equivalent to criminal intent. *Id.* Even if the victim was jaywalking in the middle of the road in the dark and

(continued...)

will be considered a superseding cause and sever the causal link between defendant's conduct and the victim's injuries. *Id.* at 438-439. Because defendant only presented evidence of ordinary negligence on the victim's part, and ordinary negligence is reasonably foreseeable, *id.* at 439, he has not overcome the presumption that the instructional error was harmless.

We are not persuaded by defendant's contention that the jury verdict was inconsistent because the jury acquitted defendant of OWI causing death, but convicted him of failing to stop at the scene of an accident resulting in death and operating a motor vehicle with a schedule 1 controlled substance causing death. According to defendant, the alleged inconsistent verdict results from the jury's conclusions regarding the proximate cause elements of these offenses. As we have noted, there is no proximate cause element for failing to stop at the scene of an accident resulting in death, so there is no apparent inconsistency in the jury's acquittal of defendant of OWI causing death and conviction of defendant for failing to stop at the scene of an accident resulting in death. We disagree that the jury's acquittal of defendant of OWI causing death and conviction of defendant of operating a motor vehicle with a schedule 1 controlled substance causing death renders the verdict inconsistent. In any event, however, juries may give inconsistent verdicts. *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). Furthermore, "[a] jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis in original). Inconsistent verdicts might be cause for reversal when there is evidence, beyond the inconsistent verdict itself, that the jury was confused, did not understand the instructions, or did not know what it was doing. *Id.* In this case, however, there is no such evidence. To the contrary, as explained *supra*, a note sent to the trial court by the jury indicates not that the jury was confused, did not understand the instructions, or did not know what it was doing, but that the jury was concerned with the knowledge element that distinguishes OWI from OWI causing death rather than the causation element that also distinguishes the two offenses. *Schaefer, supra* at 434. Based on the jury note, the trial court concluded that the jury was concerned with the knowledge element of OWI causing death, rather than causation, and we agree.

(...continued)

during a heavy rain and the jury inferred from the presence of the unbroken bottle on the victim's person that the victim had been drinking or was intoxicated, the victim's conduct did not constitute an indifference to the rights of others that is equivalent to criminal intent. Therefore, there was no evidence that the victim's conduct was grossly negligent.

⁴ On cross-examination, defense counsel questioned the prosecution's accident reconstruction expert, Corporal Michael Williams, regarding whether he had handled suicide calls and whether he was familiar with the term "suicide by cop." Corporal Williams indicated that he had handled suicide calls and was familiar with the term "suicide by cop." The prosecutor then asked Corporal Williams if he recovered a suicide note in this case, and Williams responded in the negative. Beyond defense counsel introducing the specter of suicide in this case, however, there was no evidence that the victim in this case was suicidal or that he intentionally walked or jumped in front of defendant's vehicle. To the contrary, Stephanie Meyer, who was a passenger in the vehicle that was driving right in front of defendant's vehicle on the night of the accident, testified that the victim did not jump in front of the vehicle in which she was a passenger. Thus, there was no evidence that the victim intentionally caused his death by walking or jumping in front of defendant's vehicle.

Defendant argues that defense counsel was ineffective in failing to object to the instructions as given or in failing to request that the trial court repeat the proximate cause instructions when it instructed the jury on the elements of failure to stop at the scene of an accident resulting in death and operating a vehicle with a schedule 1 controlled substance causing death. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). To establish ineffective assistance of counsel, the defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have had a different result. *Id.* Because proximate cause is not an element of failure to stop at the scene of an accident resulting in death, *Schaefer, supra* at 439-440 n 67, defense counsel was not ineffective for failing to request a proximate cause instruction for that offense. Defense counsel is not ineffective for failing to advocate a meritless position. *Clark, supra* at 257. Although proximate cause is an element of operating a vehicle with a schedule 1 controlled substance causing death, there was ample evidence that defendant was the proximate cause of the victim's death. Thus, defendant has not shown that but for counsel's error, the jury would have acquitted him of operating a vehicle with a schedule 1 controlled substance causing death.

B. Trial Court's Suppression of Evidence of the Victim's Intoxication

Defendant next argues that the trial court abused its discretion in refusing to permit him to introduce evidence that the victim was intoxicated on the night defendant's car struck and killed him. According to defendant, evidence that the victim's BAC was .286 on the night in question was relevant to whether defendant proximately caused the victim's death, and the trial court's refusal to allow him to introduce such evidence prevented him from arguing that the victim's conduct of "walking on a road in the dark and pouring rain while blind drunk" constituted gross negligence and was a superseding cause of the victim's death that severed the causal link between defendant's conduct and the victim's death.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). The abuse of discretion standard recognizes "that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). To the extent that the trial court's decision regarding the admission of evidence involves a preliminary question of law, it is subject to de novo review. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). This Court reviews a trial court's factual findings at a suppression hearing for clear error, but reviews de novo the ultimate ruling on a motion to suppress. *People v Marcus Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

In *Schaefer, supra* at 436-439, our Supreme Court explained the proximate cause element of the criminal offense of OUIL causing death:

For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions. In

making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. If an intervening cause did indeed *supersede* the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury.

The standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. . . .

The linchpin in the superseding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., *gross* negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death.

* * *

Accordingly, in examining the causation element of OUIL causing death, it must first be determined whether the defendant's operation of the vehicle was a factual cause of the victim's death. If factual causation is established, it must then be determined whether the defendant's operation of the vehicle was a proximate cause. In doing so, one must inquire whether the victim's death was a direct and natural result of the defendant's operation of the vehicle and whether an intervening cause may have superseded and thus severed the causal link. While an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable. [Footnotes omitted.]

In this case, proximate cause was an element of two of the offenses that defendant was charged with committing: OWI causing death and operating a vehicle with a schedule 1 controlled substance causing death. We find that the trial court properly granted the prosecutor's motion to bar evidence of the victim's BAC because such evidence was irrelevant to whether the victim's death was a foreseeable consequence of and proximately caused by defendant's conduct of driving while intoxicated. Defendant drove his Land Rover with a BAC of at least .091 and as high as .115. Defendant's conduct of driving while intoxicated was grossly negligent as a matter of law. *Schaefer, supra* at 429. When a person drives while intoxicated, it is foreseeable that an accident might occur. This is why the Legislature has criminalized driving while intoxicated. It is also "foreseeable that a pedestrian would be in the roadway for a variety of reasons." *Ridley v Detroit*, 231 Mich App 381, 390; 590 NW2d 69 (1998), remanded on other grounds sub nom *Ridley v Collins*, 463 Mich 932; 622 NW2d 65 (2000).

"In order to be a superseding cause, thereby relieving a negligent defendant from liability, an intervening force must not have been reasonably foreseeable." *Id.* at 389. The fact

that the victim, like defendant, may have been intoxicated does not alter or negate the foreseeability of an intoxicated driver causing an accident or striking a pedestrian in the road. It was reasonably foreseeable that defendant's conduct of driving while intoxicated would result in defendant's vehicle striking a pedestrian in the roadway without regard to the sobriety or intoxication of the pedestrian. "The determination whether wrongful conduct may be considered a proximate cause of an injury involves a determination whether the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable." *Id.* Proximate cause "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Schaefer, supra* at 436. In this case, the victim's intoxication does not constitute an intervening cause relieving defendant of liability because the victim's death was the natural and foreseeable result of defendant's conduct of driving his Land Rover while intoxicated. The victim's intoxication, or lack thereof, does not impact the foreseeability of an intoxicated driver striking a pedestrian in the road. Therefore, the victim's intoxication, extreme as it was, did not supersede defendant's conduct and relieve defendant from criminal liability.

Defendant contends that the victim's extreme intoxication constituted gross negligence. Gross negligence on the part of the victim is not reasonably foreseeable and generally severs the causal link so that the defendant's conduct is not regarded as a proximate cause of the victim's injury or death. *Id.* at 437-438. However, "'gross negligence' is not merely an elevated or enhanced form of ordinary negligence." *Id.* at 438. "[I]n criminal jurisprudence, gross negligence 'means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent.'" *Id.* In this case, the victim was extremely intoxicated and was jaywalking in the middle of the road at 2:00 a.m., in the dark and in the rain. Because there was a sidewalk running parallel to the road, there was a safer place for the victim to walk. However, the victim's conduct in this case was not so wanton and indifferent to the rights of others as to equate to criminal intent. Moreover, it does not constitute gross negligence. At most, the victim's conduct constituted ordinary negligence, and "ordinary negligence by the victim . . . will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable." *Id.* at 439. The victim's negligence and intoxication in this case does not alter or negate the fact that the events that resulted from defendant's conduct of driving while intoxicated were entirely foreseeable. The fact that the victim may have also been negligent did not supersede defendant's conduct of driving while intoxicated as a legally significant causal factor of the victim's death and does not preclude a finding of criminal responsibility. We therefore conclude that because the victim's intoxication was irrelevant to the issues whether it was reasonably foreseeable that a pedestrian might be present in the road and whether defendant's operation of his vehicle while intoxicated caused the victim's death, the trial court did not abuse its discretion in excluding evidence of the victim's BAC.⁵

⁵ Although defendant does not argue on appeal that the accident was unavoidable, we observe that defendant presented two experts, Paul Olson and Michael Van Dam, regarding the avoidability of the accident. Although Olson did not explicitly state that the accident in this case was unavoidable, Van Dam testified that at various speeds, the accident was unavoidable. At the same time, there was evidence that the accident was not unavoidable because Nicole Norman, (continued...)

Moreover, while the trial court did not permit defendant to introduce evidence regarding the victim's precise level of intoxication, the jury heard evidence regarding the victim's conduct that was relevant to causation and whether the victim's conduct was negligent or grossly negligent. As stated above, defendant presented evidence that an unbroken glass bottle was recovered from the victim's person, that the victim was jaywalking in the middle of Packard Road roadway at 2:00 a.m., when it was dark outside and raining heavily, and that there was a sidewalk on the north side of Packard Road. Therefore, although the trial court precluded defendant from offering evidence of the victim's precise level of intoxication, the jury was permitted to consider evidence that would have permitted the inference that the victim was intoxicated, as well as additional evidence that was relevant to whether the victim's own conduct was an intervening cause that superseded defendant's conduct, thereby relieving defendant of criminal liability. The only evidence that the trial court disallowed was direct evidence of the victim's intoxication. Because the victim's intoxication was not relevant to the critical issue in the proximate cause analysis, which is whether the victim's death was a foreseeable consequence of defendant's conduct of driving while intoxicated, the trial court properly excluded evidence of the victim's BAC.

C. Defendant's Conviction under MCL 257.625(8)

Defendant argues that his conviction of operating a motor vehicle causing death based on the presence of 11-carboxy-THC in his blood violates his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. This Court reviews de novo a trial court's determination whether a party has received due process. *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). For a due process violation to warrant reversal of a criminal conviction, a defendant must prove prejudice to his defense. *Id.* at 421-422. According to defendant, his conviction under MCL 257.625(8) violates due process because the statute fails to give notice of the prohibited conduct, is unconstitutionally vague, which creates a high potential for arbitrary and discriminatory enforcement, and is not rationally related to the objective. In *Derror, supra* at 334-341, our Supreme Court rejected these very arguments. We are bound to follow our Supreme Court's decisions. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), rev'd on other grounds in *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

(...continued)

who was driving her vehicle in front of defendant's vehicle, avoided hitting the victim only moments before defendant struck him. The jury heard the testimony of Olson and Van Dam, as well as the testimony regarding Norman avoiding the accident. The jury was in the best position to evaluate the credibility of the witnesses' testimony and make a determination regarding the avoidability of the accident, and we will not interfere with the jury's role in this regard.