STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2010
v	No. 285489 Eaton Circuit Court
JOEL ROBERT DIENHERT, Defendant-Appellant.	LC No. 07-020436-FC

Before: BECKERING, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

This case arises out of an August 25, 2007, incident wherein defendant, who was driving while intoxicated, disregarded a stop sign and collided into another car, seriously injuring his wife and killing the driver of the other car. Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of liquor (OUIL) causing death, MCL 257.625(4)(a),[1] operating a motor vehicle with a suspended license causing death, MCL 257.904(4), OUIL causing serious injury, MCL 257.625(5), and operating a motor vehicle with a suspended license causing serious injury, MCL 257.904(5). Defendant was sentenced to prison terms of 100 to 180 months for his OUIL causing death and operating a motor vehicle with a suspended license causing death convictions, and 36 to 60 months for his OUIL causing serious injury and operating a motor vehicle with a suspended license causing serious injury convictions. Defendant appeals as of right and we affirm.

I

Defendant's wife testified that on August 25, 2007, she and defendant stopped at a party store and purchased a case of beer for defendant. Defendant consumed 22 or 23 of the 24 beers throughout the afternoon and persistently made calls seeking to procure cocaine. Shawn Ingraham, a "party buddy" with whom defendant drank alcohol and ingested cocaine, testified that defendant called him multiple times that day. After unsuccessfully attempting to reach Ingraham, defendant showed up at Ingraham's house at approximately 5:00 or 5:30 p.m. seeking

[1] The prosecution also charged defendant with second-degree murder, MCL 750.317, as an alternative to OUIL causing death. The trial court instructed the jury regarding the alternative charges.

cocaine. Ingraham believed defendant was intoxicated. According to Ingraham, defendant always wanted to get high when he had been drinking, but on that occasion, Ingraham had no cocaine. Defendant asked Ingraham to help him obtain cocaine, but Ingraham declined. Defendant and Ingraham drank a beer together, and defendant left after about a half-hour, driving a black Toyota Corolla. After he left, defendant continued to call Ingraham seeking to procure cocaine.[2]

Later, at their house, defendant and his wife argued over his efforts to obtain cocaine. Defendant wanted his wife to take him to Ingraham's house, but she refused. The last thing she remembered was putting their kids in the car and sitting in the passenger seat while defendant drove to Ingraham's house. She testified that at one point, she thought she was driving the car.

Ingraham lives on Nye Highway in Eaton Rapids, Michigan. Several witnesses testified that shortly before the accident, they saw a dark or black-colored car drive down Nye Highway at a high rate of speed and turn onto Royston Road. Two of the witnesses testified that they thought the car would hit them, but it did not. Instead, the car ran the stop sign at the end of the road and drove through a yard at the corner. It was later determined, based on an analysis of the tire markings left in the yard, that the car was a 1999 Toyota Corolla, the same year and make of the car driven by defendant.

Keith and Patricia Miller, neighbors of defendant who had known him and his family for years, testified that the car ran through the stop sign and almost hit them before it drove into a yard, turned onto Royston Road, and continued north. The driver was male, and Patricia thought that the car looked like defendant's, but she was not sure. Gary James Newborn testified that the car had a male driver and a passenger with his or her knees up on the dash. He heard music playing and children crying in the back seat. Ten seconds after the car turned onto Royston Road, he heard a crash.

Clement and Stacia Beckman and their niece were driving on Spicerville Highway at approximately 8:00 p.m. that day. At the Spicerville Highway and Royster Road intersection, they came upon defendant's car as well as another car in which the driver was later pronounced dead. They did not see the accident. Defendant's car was against a telephone poll and the decedent's car was in a field. Stacia called 9-1-1. Defendant was in the driver's seat, the children were in the back seat strapped in their car seats, and defendant's wife was on the ground near the car. After asking defendant if everyone was okay, witnesses who came upon the accident extracted defendant's children from the car and tended to his wife. Defendant unbuckled his seat belt, got out of the car, walked over to his wife, and told her that he was sorry. She responded that it was okay.

Deputy Ronald Michael Howard responded to the 9-1-1 call regarding the accident. Deputy Howard testified that he interviewed both defendant and defendant's wife at the hospital.

[2] Detective Richard Buxton testified that approximately 22 calls were made from defendant's wife's cell phone to Ingraham. Ingraham testified that he believed defendant was using his wife's cell phone when calling him.

Defendant told the deputy that he remembered being at the scene, but not the accident. Detective Timothy Fandel also talked to defendant at the hospital. Defendant told Detective Fandel that he did not remember anything that happened after 2:00 p.m. that day. Defendant also said that he had not been drinking. Toxicology tests revealed that defendant's blood alcohol content (BAC) following the accident was .192 and that he had no controlled substances in his system. At the time of the accident, defendant's driving privileges had been suspended.

A forensic illustrator and crash reconstructionist investigated the accident and opined that the decedent was traveling in a westerly direction at approximately 40 to 41 mph when defendant hit her car. The reconstructionist opined that defendant was solely responsible for the accident when he, traveling at approximately 52 to 58 mph,[3] ran through a stop sign and hit the front rear of the decedent's car. He also opined that defendant did nothing to avoid the accident. The reconstructionist also testified, however, that it was possible that defendant saw the decedent's car, but was unable to stop in time. He did not think that excessive speed was a factor in causing the accident.

Defendant did not testify at trial.

II

Defendant first argues that the trial court abused its discretion when it denied his motion in limine and allowed the prosecution to admit evidence pertaining to his attempts to obtain cocaine in the time period leading up to the collision. Specifically, defendant argues that because the toxicology test results established that he had no cocaine in his blood after the accident, any evidence pertaining to his cocaine use and efforts to purchase cocaine were irrelevant and inadmissible pursuant to MRE 404(b) and MRE 403. The prosecution contends that the evidence was admissible under MRE 404(b) and as part of the res gestae of the charged offenses. According to the prosecution, the evidence was part of the complete story necessary for the jury to understand the context in which the charged offenses occurred, relevant to prove the intent element of the alternate charge of second-degree murder, and not unfairly prejudicial.

Because defendant preserved this issue, we review the trial court's decision to admit the evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Blackston*, 481 Mich 451, 467; 751 NW2d 408 (2008). Reversal is not

[3] The reconstructionist also testified that defendant was likely traveling at a slightly higher speed prior to the accident. He explained that after a driver applies the brakes, it takes time for the tires to heat up enough to leave skid marks. Without skid marks, it is difficult to determine the maximum speed. Accordingly, the 52 to 58 mph estimate was the minimum speed defendant had been traveling before the accident.

required for a preserved, nonconstitutional error unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).[4]

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Our courts use three factors to determine the admissibility of other-acts evidence. These factors are (1) whether the evidence is offered for a proper purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); see also MRE 403.

If the proffered evidence is part of the res gestae of a charged offense, the trial court may admit the evidence without regard to the requirements of MRE 404(b). *People v Delgado*, 404 Mich 76, 83-84; 273 NW2d 395 (1978). Evidence is part of the res gestae of the offense if the alleged acts are "'so blended or connected with the [offense] that proof of one incidentally involves the other or explains the circumstances of the crime.'" *Id*. at 83, quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964). As our Supreme Court stated in *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." The more jurors know about the full transaction, the better equipped they are to perform their sworn duty. *Id*. at 742. "The principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of [res gestae] evidence." *Delgado*, 404 Mich at 83; see also *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981) (stating that "res gestae has been referred to as the 'complete story'"). But even relevant res gestae evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403.

In this case, the proffered evidence regarding defendant's quest for cocaine was arguably

[4] On appeal, defendant also argues that his due process rights were violated by the trial court's admission of the evidence. Defendant did not, however, preserve that argument for appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) (stating that "to preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal"). Therefore, to the extent this issue implicates defendant's constitutional rights, it must be reviewed for plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006) (stating that a defendant has a due process right to present a defense).

relevant to establish the intent element of second-degree murder,[5] an issue of consequence at trial. The question of intent was at issue because defendant's general denial of guilt put all of the elements of the offense at issue. See *People v Sabin*, 463 Mich 43, 60; 614 NW2d 888 (2000). The prosecution's theory for the second-degree murder charge was that, unlike a drunk driver who was unfamiliar with the area and may have inadvertently blown a stop sign on his way home from a bar, defendant, who was frenetically drug seeking, chose to leave home and drive recklessly while intoxicated. He was "flying" down the road, disregarding stop signs, nearly hitting other cars, losing control and driving off the road, and then returning to the road to continue driving dangerously. He chose to disregard the safety of his wife, children, and others on the road, ignoring the likelihood that he could cause others great bodily harm or death. Defendant's frustration in not being able to get cocaine, combined with the amount of alcohol he had in his system, was relevant to establishing the requisite intent. The evidence made the likelihood that defendant intended to create a very high risk of death, knowing that his actions would probably cause death or great bodily harm, more probable. See *Herndon*, 246 Mich App at 386. Additionally, the proffered evidence arguably falls under the res gestae exception to MRE 404(b). Defendant's urgent quest for cocaine explains the circumstances of his driving—potentially twice—while intoxicated, links him to the area of Ingraham's house where others saw a dark-colored car similar to defendant's driving recklessly immediately before the accident, and helps explain the particularly helter-skelter manner in which he was driving. The admission of the evidence allowed the jury to hear the complete story surrounding defendant's decision to drive while intoxicated and explains his behavior leading up to and ending with the accident.

Defendant additionally argues that the evidence was unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); see also MRE 403. Had defendant not been charged with second-degree murder, which mandates proof of intent, his pursuit of cocaine would likely be more prejudicial than probative. In light of the second-degree murder charge, although the challenged evidence may have been damaging to defendant's position, it was probative because it was relevant to an issue of consequence. Furthermore, there is no evidence that the jury gave it preemptive weight beyond other equally damaging but clearly admissible evidence such as defendant's decision to drink 22 or more beers and drive with his family in the car. Therefore, defendant has not demonstrated that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting the evidence.

III

Defendant also argues that the trial court abused its discretion in denying his motion for a mistrial after a prosecution witness testified that defendant had three prior drunk driving offenses. We disagree.

[5] "Second-degree murder is a general intent crime, which mandates proof that the killing was done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001) (quotations omitted).

During the prosecution's direct examination of Ingraham, the following exchange occurred:

> *Q*. Did you discuss with him [defendant]—were you concerned about him driving if he was intoxicated?
>
> *A*. I was always concerned about—I mean, not even—he already had three prior drunk drivings. So, as far as driving—

Following this testimony, the jury was excused, and defendant moved for a mistrial. The trial court denied the motion on the basis that there had been no evidence presented of any other convictions, the witness was not a police officer with particular knowledge of defendant's criminal record, and under the circumstances, a curative instruction was a sufficient remedy. When the jurors returned, the trial court instructed them to disregard the witness's statement and not consider it in their deliberations.

We review for an abuse of discretion a trial court's decision whether to grant or deny a motion for a mistrial. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992).[6] Evidence of a defendant's prior convictions may be prejudicial to the defendant's case because the jury might misuse evidence of the convictions as evidence of his or her bad character. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). However, "an unresponsive, volunteered answer to a proper question is not grounds for [] granting [] a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A trial court should grant a mistrial only where the prejudicial effect of an error cannot be cured any other way. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Curative "'instructions are presumed to cure most errors.'" *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009) (citation omitted).

Ingraham's testimony regarding defendant's prior drunk driving record was an unresponsive, volunteered answer to a proper question. Further, it was an isolated remark in the course of a three-day trial during which substantial evidence of defendant's culpability for the convicted offenses was properly admitted. The trial court issued a prompt curative instruction and after closing arguments the court again instructed the jury not to consider any excluded or stricken testimony and to decide the case based only on the properly admitted evidence. Under the circumstances, the curative instruction was adequate to cure the error, and the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV

Finally, defendant argues that the trial court violated his right to present a defense when it excluded evidence of marijuana in the decedent's blood at the time of the accident. We disagree.

[6] Again, to the extent this issue implicates defendant's constitutional rights, it must be reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

As stated above, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Hine*, 467 Mich at 250. However, this Court reviews de novo whether a defendant has been deprived of the right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Criminal defendants have a constitutional right to present a complete defense. US Const, Am VI; Const 1963, art 1, § 20. However, this right is not absolute. See *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

MRE 402 provides: "All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." Evidence is relevant if it has a tendency to make a fact in issue more or less probable than without the evidence. MRE 401. However, even relevant evidence is inadmissible if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403.

Prior to trial, the prosecution moved to exclude as irrelevant evidence that the decedent had marijuana in her system at the time of the accident. The autopsy report indicates that the decedent had 12 nanograms per milliliter of TCH-COOH, a marijuana metabolite, in her blood. Defendant argued that based on this Court's holding in *People v Moore*, 246 Mich App 172; 631 NW2d 779 (2001), he was allowed to present evidence regarding the decedent's marijuana use. Defendant conceded, however, that he had no expert witness or other evidence to establish that the decedent had smoked marijuana on the day of the accident or that her marijuana use impacted her ability to drive or avoid the accident.

Following the parties' arguments, the trial court granted the prosecution's motion, stating:

> Well, it was certainly not my intent to preclude any offer of proofs that wish to be made, but either there has to be some indication that the amount of marijuana consumed would have an effect upon one's driving or that there was some negligence that could be attributed to it. But, absent either one of those situations, the Court would not allow it. So, until there is some indication that that is going to be offered, I will not allow it in, since it would not be relevant to any issue other than the driving. If the driving of the decedent is not an issue, then I don't see how that would be helpful to the trier of fact.

On appeal, defendant argues that the exclusion of the evidence prevented him from presenting a causation defense.

Both OUIL causing death, MCL 257.625(4), and OUIL causing serious injury, MCL 257.625(5), require the prosecution to prove that the defendant's operation of a motor vehicle caused the death or injury of another person, respectively. See *People v Feezel*, 486 Mich 184, 195; 783 NW2d 67 (2010).

> In *People v Schaefer*, [473 Mich 418; 703 NW2d 774 (2005),] we stated that, in the criminal law context, the term "'cause' has acquired a unique, technical meaning." Specifically, the term and concept have two parts: factual causation and proximate causation. Factual causation exists if a finder of fact determines that "but for" defendant's conduct the result would not have occurred. A finding of factual causation alone, however, is not sufficient to hold an individual criminally responsible. The prosecution must also establish that the defendant's conduct was a proximate cause of, in this case, the accident or the victim's death.
>
> Proximate causation "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." If the finder of fact determines that an intervening cause supersedes a defendant's conduct "such that the causal link between the defendant's conduct and the victim's injury was broken," proximate cause is lacking and criminal liability cannot be imposed. Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability. Ordinary negligence is considered reasonably foreseeable, and it is thus not a superseding cause that would sever proximate causation. In contrast, "gross negligence" or "intentional misconduct" on the part of a victim is considered sufficient to "break the causal chain between the defendant and the victim" because it is not reasonably foreseeable. Gross negligence, however, is more than an enhanced version of ordinary negligence. "It means wantonness and disregard of the consequences which may ensue . . . ." "Wantonness" is defined as "[c]onduct indicating that the actor is aware of the risks but indifferent to the results" and usually "suggests a greater degree of culpability than recklessness . . . ." Therefore, while a victim's negligence is not a defense, it is an important factor to be considered by the trier of fact in determining whether proximate cause has been proved beyond a reasonable doubt. [*Id*. at 194-196 (citations and footnotes omitted).]

In other words, a defendant is entitled to introduce evidence of a victim's gross negligence to demonstrate a break in the causal connection between the defendant's conduct and the victim's death or injury. See *People v Tims*, 449 Mich 83, 97-98; 534 NW2d 675 (1995); *Moore*, 246 Mich App at 179-180.

In *People v Lardie*, 452 Mich 231, 251; 551 NW2d 656 (1996), our Supreme Court stated that "the Legislature essentially has presumed that driving while intoxicated is gross negligence as a matter of law." While defendant does not argue that the decedent was intoxicated or "high," he contends that based on the Supreme Court's ruling in *People v Derror*, 475 Mich 316, 333-334; 715 NW2d 822 (2006), overruled in part by *Feezel*, the decedent should be considered to have committed a crime because she had "any amount" of a schedule 1 controlled substance in

her body when operating her motor vehicle in violation of MCL 257.625(8).[7] Therefore, defendant argues, he was entitled to admit evidence of the decedent's marijuana use as a causation defense. Given this novel argument, we held this case in abeyance pending the Supreme Court's ruling in *Feezel*. Now that the Court has issued its opinion in *Feezel*, overruling *Derror* to the extent that the *Derror* Court deemed 11-carboxy-THC to be a schedule 1 controlled substance under MCL 333.7212, *Feezel*, 486 Mich at 205, evidence of the decedent's marijuana would only be relevant if it created a genuine issue of material fact with respect to causation and gross negligence.

Proximate cause must be decided on a case-by-case basis. *Feezel*, 486 Mich at 201. The trier of fact is required to "determine whether the victim's own conduct amounted to a superseding cause." *Id*. "[E]vidence of a victim's intoxication may not be relevant or admissible in all cases." *Id*. at 202. When determining whether to admit evidence of a victim's intoxication, or in this case, marijuana use, the trial court must make a threshold determination that the proofs are sufficient to create a question of fact for the jury as to whether the victim was grossly negligent. *Id*.

Applying these standards to the facts of this case, we hold that the trial court did not abuse its discretion in excluding evidence of the presence of a marijuana metabolite in the decedent's blood, and defendant was not deprived a viable defense. By defendant's own admission, he could not proffer any evidence that the decedent had smoked marijuana on the day of the accident or that the amount of marijuana in her system directly affected her ability to operate her vehicle with due care. Without such evidence, defendant was unable to create a genuine factual question as to whether the decedent's actions contributed to her death. Hence, any testimony about the presence of marijuana in her system at the time of the accident was irrelevant and only marginally probative of whether she operated her vehicle with due care. See *People v Phillips*, 131 Mich App 486, 492-493; 346 NW2d 344 (1984).

Furthermore, the evidence admitted at trial undermines defendant's argument. The accident reconstructionist testified that the decedent was not speeding and that her vehicle was already in the intersection when defendant crashed into it. More importantly, the reconstructionist did not believe that the decedent was in any way responsible for the accident. Defendant did not offer any evidence to undermine the reconstructionist's opinion. Nor did defendant offer any evidence or argue below that the decedent could have done anything to avoid the accident, but failed to do so.

Defendant's reliance upon *Moore* is misplaced. In *Moore*, a panel of this Court held that a victim's contributory negligence was a factor that could be considered when determining whether the defendant's negligence caused the victim's injury or death. *Moore*, 246 Mich App

[7] The Supreme Court in *Derror* held: "[W]e are called upon to determine whether 11-carboxy-THC, a 'metabolite' or byproduct of metabolism created when the body breaks down THC (tetrahydrocannabinol), the psychoactive ingredient of marijuana, is a schedule 1 controlled substance under MCL 333.7212 of the Public Health Code. We hold that it is." *Derror*, 475 Mich at 319-320.

at 175, 179. As such, the panel held that the trial court abused its discretion when it prevented the defendant from introducing evidence that the victim had marijuana in his blood at the time of the accident. *Id*. at 179. In doing so, the panel distinguished that case from this Court's earlier holding in *Phillips*. *Id*. at 179-180.[8] The *Moore* panel stated that, unlike in *Phillips*, the defendant was able to produce evidence that showed that the victim's driving might have been impaired at the time of the accident. *Id*. at 180. Specifically, the panel stated that the defendant was able to produce evidence that the victim had marijuana in his bloodstream and urine at the time of the accident. *Id*. The panel also stated that the defendant was able to introduce expert testimony that the victim was impaired at the time of the accident. *Id*. Finally, the panel stated that testimony at the preliminary examination suggested that the victim was driving too fast to avoid the defendant. *Id*.

Unlike the defendant in *Moore*, other than the fact that the decedent had a marijuana metabolite in her bloodstream at the time of the accident, defendant was unable to produce any evidence that suggested that she was in any way responsible for the accident. That the defendant in *Moore* was able to produce evidence regarding the victim's negligence and how it might have caused the accident was the pivotal reason that the *Moore* panel rejected the holding in *Phillips*. *Id*. at 179-180.

Defendant's reliance upon *People v Soares*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2008 (Docket No. 273333), is also misplaced.[9] First, unpublished opinions of this Court are not precedentially binding on subsequent panels. MCR 7.215(C)(1). Second, this case is factually distinguishable from *Soares* because, unlike the defendant in that case, defendant did not have any evidence that the decedent was high at the time of the accident or that she could have done anything to avoid the accident. Again, the reconstructionist testified that the decedent had not contributed to the accident in any way.

Affirmed.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

[8] In *Phillips*, a panel of this Court upheld the trial court's decision to exclude evidence of the decedent's marijuana use because the defendant could not produce evidence to show the decedent's marijuana use prevented him from operating his bicycle with due care. *Phillips*, 131 Mich App at 492-493.

[9] On May 27, 2009, the Supreme Court ordered that the application for leave to appeal *Soares* be held in abeyance pending the Supreme Court's decision in *Feezel*.