STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2012
v	No. 304037 Wayne Circuit Court
NINO EDWARD DELPIANO, Defendant-Appellant.	LC No. 10-010022-FC

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant Nino Edward Delpiano appeals by right his jury convictions of second-degree murder, MCL 750.317, operating a motor vehicle while his license was suspended or revoked causing death, MCL 257.904(4), failure to stop at the scene of an accident resulting in death, MCL 257.617(3), and failure to use due caution when passing a stationary emergency vehicle causing death, MCL 257.653a(4). The trial court sentenced Delpiano as a fourth habitual offender, see MCL 769.12, to serve concurrent sentences of 45 to 67 ½ years in prison for his second-degree murder conviction and 15 to 30 years in prison for each remaining conviction. On appeal, Delpiano argues that this Court must reverse his conviction for second-degree murder because there was insufficient evidence from which the jury could find that he had the requisite malice and, for that same reason, the trial court erred when it denied his motion for a directed verdict on that basis. We conclude that the prosecutor presented minimally sufficient evidence to establish malice. Because the jury's findings were supported by sufficient evidence, the trial court did not err when it denied Delpiano's motion for a directed verdict and we must affirm.

I. BASIC FACTS

The prosecution charged Delpiano with having committed the various crimes noted above after he struck and killed Lieutenant Daniel Kromer in September 2010. At trial, Delpiano's trial lawyer conceded that Delpiano struck and killed Kromer while driving without a valid license, failed to stop at the scene of the accident, and failed to use due caution when passing a stationary emergency vehicle. He even conceded that the jury might reasonably find that Delpiano's actions were grossly negligent and, therefore, warranted finding Delpiano guilty

of the lesser offense of vehicular manslaughter.[1] However, he argued that the evidence would show that Delpiano's actions did not amount to second-degree murder and, as such, he asked the jury to find Delpiano not guilty on that count.

Timothy Justice testified that he was an auxiliary police officer with the Taylor Police department and that, on the day at issue, he was riding with Kromer in a fully marked police cruiser. They were on I-94 at around 8:45 pm when Kromer, who was driving, noticed a car parked on the shoulder of the opposite side of the highway. Kromer left the highway at the next exit and reentered I-94 on the same side as the stranded car. Justice said that he activated the cruiser's emergency lights after Kromer pulled up behind the car. Justice explained that their police cruiser was the "most lit up vehicle on our line"; it had red and blue strobe lights overhead, white strobe lights on the trunk, and flashing break lights.

After they parked, they both approached the passenger's side. The car had a driver and a passenger who were both foreign. Justice said that he surmised that they were trying to get to the airport, but he was having difficulty understanding them because of their broken English and the traffic noise. At some point, Kromer walked behind the car to the driver's side. Justice explained that the stranded car was parked "approximately three feet away from the first line of traffic"; indeed, Justice stated that he was standing in the weeds as he tried to speak with the passenger and he agreed that there was a "good strip of shoulder" for Kromer to stand on.

Karen Schmitt testified that she and her husband, Greg Schmitt, were driving on I-94 at around 8:45 pm: "it was not dark, but it was getting [to be] dusk." She was driving in the rightmost lane and noticed that there was an emergency vehicle with its lights on about 2 to 3 hundred feet ahead. She stated that the traffic was "busy", but after a semi flashed his lights, she was able to merge into a middle lane. She stated that the traffic was moving at about 75 miles per hour. Gregg Schmitt testified that, after they saw the emergency lights, his wife slowed and merged into a middle lane. He said he could see a police officer standing by the driver's side door of a car parked on the shoulder.

Steven Digna testified that he was driving behind a car that he later learned was occupied by the Schmitts. As he entered I-94, he noticed an emergency vehicle with its lights on up ahead. He said that the emergency vehilce was about "100 yards" ahead. There was a semi coming up on their side, which merged over so that they could get onto the highway. Digna said that the Schmitts then merged over and, after they moved ahead, he too merged over. They were both in front of the semi. He then set his cruise control to 75 miles per hour. He could see a police officer hunched over with his hand on the window of a car parked on the side of the highway.

[1] The prosecution charged vehicular manslaughter as a separate count, but the trial court instructed the jury that it could not find Delpiano guilty of both second-degree murder and vehicular manslaughter.

Digna testified that he saw a white car that was two lanes from the right. That car merged over behind the semi and into the rightmost lane—directly behind Digna—just as Digna was merging over to the semi's lane. That car then accelerated past him in the rightmost lane: "Within a matter of seconds he had gained three to four car lengths, maybe more."

Digna saw the driver pass him "in a dead open straight line", but he then "swerved at the officer quite directly" and struck him. Digna said that he had "seen absolutely no brake lights"; the white car just ran into the officer "and then corrected its path." Justice testified that he could see Kromer's white shirt through the driver's window and then "he didn't see the white shirt" anymore. He also noticed that the driver's side mirror was "just gone." He looked and saw that Kromer was lying on the shoulder approximately thirteen to fifteen feet in front of the stranded car. Karen and Gregg Schmitt both testified that they saw a car hit Kromer and that he flew into the air and landed on the side of the road.

Karen Schmitt testified that, after she saw Kromer get hit, she immediately pulled over. She was able to do so because there was no one driving in the lane behind the white car. Digna also pulled over and both Karen Schmitt and Digna saw the white car exit at the next ramp.

Testimony established that Kromer's body left scuff marks along the side of the stranded car from his "uniform and equipment striking the vehicle" and that there weren't any pre-crash skid marks. Another witness testified that she saw Delpiano driving shortly after the accident and noticed that his right headlight was out, his windshield was "completely shattered" and the A-arm, which is the part that "goes from the roof to the hood, was actually bent and crinkled." (The witness explained that she knew what an A-arm was because she worked in quality control at the Dearborn Truck Plant.) She said she took down his license, which later testimony established was used to identify Delpiano as the driver.

The medical examiner testified that Kromer died instantly. He stated that Kromer had injuries from head to toe, including tearing to the scalp that made his skull visible with the naked eye, trauma to the skin that was consistent with "the body violently jackknifing and overstretching of the skin", numerous abrasions and scrapes, tears in the left ventricle, the spleen, and bronchia. The medical examiner also observed that Kromer had broken leg bones, that his rib cage was completely broken on the right, and that his spine was broken in two places. He said that "the base of the skull was completely separated from the upper neck" in a way that was typical of "a violent type of whiplash injury." The medical examiner listed the cause of death as "multiple injuries."

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

This Court reviews de novo challenges to the sufficiency of the evidence. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). The standard of review applicable to a motion for a directed verdict of acquittal is the same as the standard applicable to challenges to the sufficiency of the evidence stated in *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). *People v Hampton*, 407 Mich 354, 366-368; 285 NW2d 284 (1979).

B. REVIEWING THE SUFFICIENCY OF THE EVIDENCE

The United States Constitution protects an accused from being convicted except by proof beyond a reasonable doubt. *Jackson*, 443 US at 315, citing *In re Winship*, 397 US 358, 90 S Ct 1068, 25 L Ed 2d 368 (1970). As the United States Supreme Court explained, the doctrine stated in *Winship* requires "more than simply a trial ritual":

> A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt . . . . Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand. [*Jackson*, 443 US at 316-317 (citations omitted).]

A court's review of the sufficiency of the evidence is, however, highly deferential: "'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if *no rational trier of fact could have agreed with the jury*.'" *Coleman v Johnson*, 566 US ___, ___; 132 S Ct 2060, 2062; ___ L Ed 2d ___ (2012) (emphasis added), quoting *Cavazos v Smith*, 565 US 1, ___, 132 S Ct 2, 4; 181 L Ed 2d 311 (2011). The reviewing court must be especially careful not to unduly impinge on the jury's role as factfinder; it may not engage in "fine-grained factual parsing" to undermine the jury's verdict. *Coleman*, 566 US at ___; 132 S Ct at 2064. This is because juries have broad discretion in deciding what inferences to draw from the evidence presented at trial and due process only requires that the jury "draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 US at 319. A reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326. Accordingly, if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt", the reviewing court *must* uphold the jury's verdict. *Id.* at 319.

C. MALICE

On appeal, Delpiano does not challenge any of his convictions other than his conviction of second-degree murder and, with regard to that conviction, he only challenges the sufficiency of the evidence tending to show that he had the requisite malice. Specifically, he contends that the evidence—at most—showed that he was driving in a grossly negligent manner when he struck and killed Kromer. In order to convict Delpiano of second-degree murder, as opposed to some lesser homicide—such as manslaughter, the prosecutor had to prove beyond a reasonable doubt that Delpiano caused Kromer's death and that he did so with malice and without justification or excuse. *Roper*, 286 Mich App at 84. A prosecutor may establish the requisite malice through evidence that the defendant intended to kill the victim or intended to cause the victim great bodily harm. *Id.* However, the prosecution may also satisfy this element by proving

that the defendant intended to do an act that was in "'wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *Id.*, quoting *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

As our Supreme Court has explained, carelessness amounting to gross negligence is sufficient to satisfy the criminal intent for manslaughter. *People v Datema*, 448 Mich 585, 596; 533 NW2d 272 (1995). It is not, however, sufficient to establish the mens rea of second-degree murder—that is, evidence of gross negligence is not sufficient to establish that the defendant took an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 596-597 (stating that lawful acts committed with reckless disregard for human life can support a manslaughter charge). Gross negligence—in the criminal context—"lies between the extremes of intention and negligence. As with intention, the actor realizes the risk of his behavior and consciously decides to create that risk. As with negligence, however, the actor does not seek to cause harm, but is simply 'recklessly or wantonly indifferent to the results.'" *Id.* at 604, quoting *People v Campbell*, 237 Mich 424, 429; 212 NW 97 (1927). This is in contrast to the culpability for a deliberate act done with *knowledge* of the danger to others:

> Where an actor knows of the danger to others that might follow form his act or failure to act, and willfully disregards the consequences by failing to use the care that a reasonable person would have used in the circumstances, his negligence is also advertent and wilful, but the mens rea is objective. This standard is akin to the state of mind that will permit a finding of the malice required for murder from the wilful and wanton disregard of a likelihood of death or great bodily harm. [*Datema*, 448 Mich at 607.]

Thus, the distinction between the mens rea for manslaughter—gross negligence—and the mens rea for second-degree murder under the wilful and wanton prong is the knowledge that the actor has when he or she engages in the negligent act. If the actor *knows* that he or she placing someone in danger and *knows* that the natural consequence is that someone will likely be killed or suffer great bodily harm, that knowledge elevates the mens rea from gross negligence to the malice sufficient to support a conviction of second-degree murder. See *People v Gillis*, 474 Mich 105, 139; 712 NW2d 419 (2006) (holding that no rational jury could conclude that intentionally driving the wrong way on an expressway amounted to mere gross negligence; that act amounted to malice: the defendant knew that he was driving the wrong way and knew that "a serious or fatal accident was the probable result . . . .").

Accordingly, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational jury could have found that Delpiano drove his car in such a manner that he knew he was placing others at a very high risk of death or great bodily harm and that death or great bodily harm was the probable result. *Jackson*, 443 US at 319 (reciting the standard for reviewing a claim of insufficient evidence); *Gillis*, 474 Mich at 139 (reciting the definition of malice sufficient to support a second-degree murder conviction).

D. APPLYING THE LAW TO THE EVIDENCE

Although a reasonable jury examining the totality of the evidence might reasonably conclude that Delpiano's actions on the day at issue were merely grossly negligent, the evidence also supports a finding that he acted with wilful and wanton disregard of a known risk to others and that he knew that death or serious bodily harm was the likely result. *Roper*, 286 Mich App at 84. This is not a case where Delpiano was driving in the slow lane and failed to merge into a middle lane or slow down. Digna testified that Delpiano merged from a safe lane into the lane next to the shoulder—that is, Delpiano moved from a place of safety to a place of danger. And he did so while every other driver, including Digna, was merging into the middle lanes. There was also evidence from multiple witnesses that, not only could they see the lights flashing on the police car hundreds of feet before passing it, they could actually see officer Kromer standing next to the stranded car. Accordingly, a reasonable jury could find that Delpiano too saw the police car's flashing lights and saw Kromer standing on the shoulder next to the rightmost lane. A reasonable jury could also have found that Delpiano knew that his decision to cut across the lanes and proceed as he did created a very high risk that he would strike Kromer and that the likely result was death or serious bodily harm. *Gillis*, 474 Mich at 139.

Testimony established that traffic was heavy on the night at issue and that it was turning to dusk. Karen Schmitt testified that the traffic was moving at about 75 miles per hour and Digna testified that, after he merged in behind the Schmitts, he set his cruise control to 75 miles per hour. Digna further testified that Delpiano merged over to the rightmost lane as Digna was moving into the middle lane and that Delpiano then proceeded to drive past him. Although Digna also testified at one point that he was driving at 70 miles per hour, a reasonable jury could conclude that he was actually driving closer to 75 miles per hour on the basis of his testimony about the cruise control and Karen Schmitt's testimony about the traffic. From Digna's testimony that Delpiano moved past him quickly—he stated that Delpiano was three to four car lengths past him in "a matter of seconds"—a reasonable jury could further find that Delpiano was moving at a significantly higher speed. Taken together, a reasonable jury could find that Delpiano not only merged around the traffic that was moving out of the rightmost lane, but that he deliberately accelerated past the merging traffic with utter and complete disregard for the safety of the officer that he knew was standing on the shoulder. Further, given the evidence that traffic was heavy and dusk was coming on, a reasonable jury could have found that Delpiano knew that executing the sudden lane change at such a high rate of speed in the vicinity of an officer standing on the shoulder created a very high risk that he would hit the officer and that he nevertheless proceeded to execute the maneuver in wilful and wanton disregard of that risk. Indeed, the evidence showed that Delpiano drove several feet onto the shoulder and directly ran down officer Kromer; he did not even have time to hit his brakes. Given the speed and conditions under which Delpiano executed this dangerous maneuver, as well as his proximity to a known pedestrian, a reasonable jury could find that Delpiano knew that—if he were to hit Kromer—the likely result was that Kromer would die or suffer great bodily harm. Consequently, there was sufficient evidence to support the jury's finding that Delpiano acted in "'wanton and wilful disregard of the likelihood that the natural tendency of such behavior [was] to cause death or great bodily harm.'" *Id.*, quoting *Goecke*, 457 Mich at 464.

III. CONCLUSION

This Court *must* uphold the jury's verdict unless no rational trier of fact could have agreed with that finding given the evidence actually presented. *Coleman*, 566 US at ___; 132 S Ct at 2062. And we cannot say that *no* rational trier of fact could have found Delpiano guilty. Therefore, the trial court did not err when it denied Delpiano's motion for a directed verdict and we must affirm.

Affirmed.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly