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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. JEFF DESANGE, Appellee.	)	Case No. 2D18-5026

Opinion filed April 17, 2020.

Appeal from the Circuit Court for Hillsborough County; Samantha L. Ward, Judge.

Ashley Moody, Attorney General, Tallahassee, and Laurie Benoit-Knox, Assistant Attorney General, Tampa, for Appellant.

Howard L. Dimmig, II, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellee.

SALARIO, Judge.

In a prosecution arising from a tragic car crash that killed one person and seriously hurt another, a jury found Jeff Desange guilty of vehicular homicide, reckless driving with serious bodily injury, and leaving the scene of a crash with property damage. The trial court sua sponte entered a judgment of acquittal notwithstanding the

jury's guilty verdicts on the vehicular homicide and reckless driving charges, finding that the evidence was insufficient to prove that Mr. Desange was driving recklessly—recklessness being an element of both charges. The State appeals, and we reverse.

The facts of the case are largely undisputed. In the evening on January 5, 2018, Mr. Desange and two of his friends, Dumitry Muse and Jorey Christophe, met in Ybor City in Tampa. The three young men all lived close together, and they decided to go home at the same time. Mr. Desange drove his red Ford Mustang, and Mr. Christophe drove his black BMW. Mr. Muse rode with Mr. Christophe in the BMW. The two cars traveled north up 40th Street in Tampa toward Lake Avenue. They were speeding and changing lanes. Mr. Desange sideswiped a car in traffic and kept going. As they approached Lake Avenue, Mr. Desange made a sudden right-hand turn onto Lake from the left lane of 40th Street. Mr. Christophe, who was traveling in the right lane, hit him. Mr. Christophe's BMW was propelled into a telephone pole and burst into flames. Mr. Christophe died, and Mr. Muse sustained serious injuries.

Three eyewitnesses testified at the trial. Around 9:00 on the night of the collision, Michael Burns was driving northbound on 40th Street. It appeared to him that traffic was heavy that night. A red Mustang caught his eye when it suddenly appeared directly behind him. When the Mustang passed him, it was driving a lot faster than Mr. Burns was. He described the Mustang as "driving in and out of traffic, between cars, in the . . . turn lane." He also saw a dark black car speeding about three or four car lengths behind the Mustang. He was surprised that the cars were going so quickly given the number of traffic lights on 40th Street. He was concerned for his safety because it appeared to him that the Mustang and the black car were "just driving too recklessly." Mr. Burns saw the Mustang pass in between two cars and sideswipe one of

them. The Mustang just kept going. He then saw the Mustang collide with the black car at the intersection with Lake Avenue. Mr. Burns got out of his car and grabbed a fire extinguisher. He was able to subdue the flames enough to pull Mr. Muse out of the wreckage of the black car. Unfortunately, he was unable to save Mr. Christophe.

Michael Burns's brother, Robert Burns, was in the car with him and saw the same events. He described how a red car and a darker car "came flying past" and were "going at a high rate of speed, driving carelessly." The two cars were switching lanes. He was afraid they were going to hurt somebody because of "[t]he rate of speed that they were traveling and the in and out that they were doing." He was only about two hundred yards behind the cars when he saw them collide and "burst into a ball of fire." He dialed 911, and while he was on the phone, he observed Mr. Desange getting out of the red car and Mr. Christophe being pulled out of the darker car.

Sandra Mitchell was also driving northbound in the left lane of 40th Street. Another vehicle was driving partially beside her in the right lane. She was surprised to see a red Mustang suddenly go "zooming" in between her car and the vehicle beside her. She heard a bang as the Mustang hit the passenger side of her vehicle. She was shocked that the Mustang hit her without stopping or even slowing down. To her, it appeared that the Mustang was driving "[l]ike the Indiana Speedway, that's how fast he was going." She then saw a black car use a bicycle lane to pass on the right-hand side of the vehicle in the right lane. Shortly after, she saw the Mustang collide with the black car further in front of her.

A traffic homicide detective also testified for the State. He explained that the Mustang Mr. Desange was driving was equipped with a "black box" that recorded the vehicle's speed immediately prior to the collision. The data from the black box

showed that the Mustang was traveling at seventy-two miles per hour five seconds before the collision and that it had slowed down to twenty-four miles per hour at the time of the collision. The detective was also able to calculate both vehicles' speeds from the video recordings of the collision which likewise suggest rapid deceleration of the Mustang in the few seconds preceding the collision. The detective's calculation of the Mustang's speed was consistent with the data recovered from the black box. The BMW was calculated at eighty-two miles per hour. The detective also testified that the speed limit on 40th Street was forty-five miles per hour. The only significantly inconsistent evidence from the trial came from Mr. Desange's recorded police interview, in which he had stated that he was only going about fifty miles per hour.

At the close of evidence, Mr. Desange made a motion for judgment of acquittal on the basis of causation—arguing, in essence, that Mr. Christophe caused his own death by traveling at excessive speed. The trial court denied the motion, and the jury returned a verdict finding Mr. Desange guilty on all counts. The trial court then sua sponte granted Mr. Desange a judgment of acquittal on the vehicular homicide and reckless driving counts, relying on a series of appellate decisions that, in its view, showed that Mr. Desange had not been driving recklessly. It adjudged Mr. Desange guilty of leaving the scene of an accident and sentenced him to six months' probation.[1] In this timely appeal, the State argues that the trial court erred in granting a judgment of acquittal on the vehicular homicide and reckless driving counts.

In reviewing a judgment of acquittal notwithstanding a jury verdict of guilty, we "conduct[] a de novo review of the record to determine whether sufficient evidence

[1]The factual basis for this charge was that Mr. Desange sideswiped Ms. Mitchell's car without stopping; he did not leave the scene of the fatal collision.

supports the jury's verdict." State v. Odom, 862 So. 2d 56, 59 (Fla. 2d DCA 2003). We must reverse a judgment of acquittal where, viewing the evidence in the light most favorable to the State, the State provided competent substantial evidence as to each element of the crime. Id. Competent substantial evidence is evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Dausch v. State, 141 So. 3d 513, 517-18 (Fla. 2014) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)).

"Vehicular homicide requires that the defendant (1) kill a human being, (2) by the operation of a motor vehicle, (3) in a reckless manner likely to cause death or great bodily harm to another." McCullough v. State, 230 So. 3d 586, 593 (Fla. 2d DCA 2017). As the name indicates, a charge of reckless driving likewise requires the State to prove that the defendant operated a motor vehicle recklessly. See Smith v. State, 218 So. 3d 996, 998 (Fla. 2d DCA 2017). Thus, the appellate question the judgment of acquittal raises with respect to both charges is whether the State presented competent substantial evidence showing that Mr. Desange drove recklessly.[2] We have no hesitation concluding that it did.

A person drives recklessly when he or she "drives any vehicle in willful or wanton disregard for the safety of persons or property." § 316.192(1)(a), Fla. Stat. (2018) (defining reckless driving); accord Fla. Std. Jury Instr. (Crim.) 7.9 (vehicular

[2]Although he moved for a judgment of acquittal in the trial court on the basis of causation, Mr. Desange has not raised the sufficiency of the State's proof of causation as a tipsy-coachman basis for affirmance. At all events, the argument would have no merit because "[t]he victim's negligence would have been an intervening act that relieved [the defendant] of criminal liability only if the act was the **sole** proximate cause of the accident that caused the victim's death." See Nunez v. State, 721 So. 2d 346, 347 (Fla. 2d DCA 1998); see also Reaves v. State, 979 So. 2d 1066, 1069 (Fla. 1st DCA 2008). That obviously cannot be said on these facts.

homicide); Fla. Std. Jury Instr. (Crim.) 28.5 (reckless driving). " ' "Willful" means intentionally, knowingly[,] and purposely,' and ' "[w]anton" means with a conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property.' " Smith, 218 So. 3d at 998 (alterations in original) (quoting Fla. Std. Jury Instr. (Crim.) 28.5). Thus, "the essential inquiry is whether the defendant knowingly drove the vehicle in such a manner and under such conditions as was likely to cause . . . harm." Id. (alteration in original) (quoting Stracar v. State, 126 So. 3d 379, 381 (Fla. 4th DCA 2013)). The defendant does not have to have intended to harm anyone; rather, he must have engaged in intentional conduct demonstrating a conscious disregard of a likelihood of death or injury. Fla. Std. Jury Instr. (Crim.) 7.9; State v. Ynocenscio, 773 So. 2d 613, 615 (Fla. 5th DCA 2000); see also D.E. v. State, 904 So. 2d 558, 562 (Fla. 5th DCA 2005) ("Although a person does not have to foresee the specific circumstances causing the death of a victim in order to be guilty of vehicular homicide, the person must have reasonably foreseen that the same general type of harm might occur if he or she knowingly drove a vehicle under circumstances that would likely cause death or great bodily harm to another.").

In determining whether the evidence is sufficient to prove recklessness, courts have distinguished the nature of the conduct involved from conduct constituting everyday negligence, which is not sufficient to sustain a conviction. See Smith, 218 So. 3d at 998-99 (concluding that the evidence showed the defendant was careless or negligent but was not reckless); Luzardo v. State, 147 So. 3d 1083, 1086 (Fla. 3d DCA 2014) ("Neither carelessness nor ordinary negligence in the operation of a motor vehicle are sufficient to sustain a conviction for vehicular homicide."). In this context, as in others, negligence is understood to mean a failure to use that degree of care an

ordinary person would use in like circumstances. See McCreary v. State, 371 So. 2d 1024, 1026 (Fla. 1979); Damoah v. State, 189 So. 3d 316, 320 (Fla. 4th DCA 2016). The key distinction between the two is whether the defendant's conduct was intentional. See Lott v. State, 74 So. 3d 556, 559 n.6 (Fla. 5th DCA 2011) (explaining that "reckless driving involves an element of intentional misconduct"); W.E.B. v. State, 553 So. 2d 323, 327 (Fla. 1st DCA 1989) (explaining that a defendant's accidental overcorrecting during a turn was "evidence only of simple negligence and not of willful or wanton conduct"). Determining whether a defendant's driving was reckless as distinguished from merely negligent is a "fact intensive, ad hoc inquiry" such that each case involving charges like these turns on its own specific facts. Natal v. State, 278 So. 3d 705, 707 (Fla. 4th DCA 2019) (on motion for rehearing) (declining to apply an often-recited rule that speed alone is insufficient to prove recklessness); Luzardo, 147 So. 3d at 1085-86 (eschewing "box-checking legal methodology").

Here, the facts were plainly sufficient to show recklessness as distinguished from ordinary negligence. The State's evidence established the following:

- The speed limit on 40th Street was forty miles per hour. The street had many traffic lights. There was testimony that, on the night of the collision, the traffic was heavy on 40th Street.
- Eyewitnesses testified that Mr. Desange's car was "flying," "zooming," driving "like the Indiana Speedway," "driving in and out of traffic," and driving "too recklessly."
- A second car driven by a friend of Mr. Desange and headed to the same destination as Mr. Desange was doing the same thing.
- The two cars were using turn lanes and bicycle lanes to pass traffic.
- Mr. Desange's car attempted to squeeze in between two occupied lanes of traffic and hit another car. Mr. Desange did not even stop.

- Five seconds before the collision, Mr. Desange was traveling at seventy-two miles per hour.
- At Lake Avenue, Mr. Desange rapidly decelerated and made a sudden right turn from the left lane, directly in front of Mr. Christophe.

This evidence showed far more than a mistake or a momentary lapse of judgment. It showed Mr. Desange in a race or other concerted driving with Mr. Christophe that was highly dangerous to life and limb. On this evidence, the jury could reasonably have concluded (1) that Mr. Desange was intentionally driving his car in a way that was likely to cause death or serious bodily harm to others, perhaps as part of a race with Mr. Christophe, and (2) that he consciously disregarded that likelihood.

This conclusion is confirmed by the fact that the evidence in this case aligns with the evidence in other cases in which the appellate courts have found the State's evidence sufficient to show recklessness. In Ruiz v. State, 286 So. 3d 338, 340-41 (Fla. 5th DCA 2019), the evidence showed, as the evidence did here, that the defendant was driving his car in concert with another vehicle well in excess of the speed limit and driving in and out of traffic. The defendant's car veered off the road and crashed into a light pole, killing a passenger. Id. at 339. The defendant was charged with and convicted of vehicular homicide, and the Fifth District held that the evidence was sufficient to sustain his conviction. Id. at 341. The court explained that "[t]he testimony regarding the vehicles' driving patterns, attempts to pass one another, acceleration, and high rates of speed was competent substantial evidence that Ruiz and the driver of the black vehicle were racing, sufficient to prove the element of reckless driving." Id.

And in cases not involving the evidence of racing or concerted conduct the State presented here, courts have found recklessness on the basis of individual conduct

similar to that involved here. In Natal v. State, 278 So. 3d 706, 708 (Fla. 4th DCA 2019), for example, the defendant was traveling at eighty-three miles per hour through a neighborhood of residences and businesses, and the Fourth District held that "his grossly excessive speed alone, given the area where he was driving, was sufficiently reckless" to support a conviction.[3] And in State v. Lebron, 954 So. 2d 52, 55-56 (Fla. 5th DCA 2007), the court concluded that the State had made a prima facie case for recklessness where the defendant was traveling at eighty-one miles per hour in a fifty-five-mile-per-hour zone and then attempted to quickly swerve around a slower moving vehicle to pass it, explaining that the defendant "operated her automobile at an excessive rate of speed at a time and under circumstances when traffic conditions might well make her operation of the vehicle reckless." The same kinds of things can be said in this case.

Mr. Desange points out that he reduced his speed to twenty-four miles per hour when he made the right turn from the left lane that immediately preceded the collision. That is true enough, but it does not follow from that that the evidence of recklessness was insufficient. Mr. Desange was engaged in obviously dangerous behavior leading up to the accident—including hitting another car and refusing to stop—which culminated in his slamming on his brakes to make an equally obviously dangerous right turn from the left lane. The evidence was sufficient to show that the turning maneuver that resulted in the collision was both knowingly dangerous and part

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[3]Our court, along with others, has recognized that merely speeding, without any other facts or circumstances demonstrating recklessness as distinguished from negligence, is insufficient to support a conviction of vehicular homicide. See House v. State, 831 So. 2d 1230, 1233 (Fla. 2d DCA 2002); Hamilton v. State, 439 So. 2d 238, 238-39 (Fla. 2d DCA 1983). Here, of course, there clearly are other factors and circumstances contributing to Mr. Desange's reckless driving.

and parcel of the knowingly dangerous conduct that preceded it. See, e.g., Ruiz, 286 So. 3d at 341 ("Additionally, contrary to Ruiz's alternative argument that the race ended prior to the crash, the evidence established that Ruiz's vehicle accelerated [by fifteen miles per hour] when it began to skid off the road. The acceleration of Ruiz's vehicle reasonably supported the conclusion that the race was still in progress when Ruiz lost control of his vehicle."); Opsincs v. State, 185 So. 3d 654, 657 (Fla. 4th DCA 2016) (affirming denial of defendant's motion for judgment of acquittal based, in part, upon defendant's driving "immediately before the accident," including swerving through traffic and approaching a red light while looking down and not braking); cf. House v. State, 831 So. 2d 1230, 1232-33 (Fla. 2d DCA 2002) (concluding that the only evidence of the defendant's recklessness at the time of the collision was that he was speeding, on facts where earlier dangerous driving was separated from the collision by time and distance).

The trial court reached a different conclusion by citing a number of cases that it thought bore similarities to this case. We note that in some of the cases upon which the trial court relied, the defendant's misconduct consisted of only a momentary lapse in judgment far more consistent with ordinary negligence than knowingly dangerous conduct. See Stracar, 126 So. 3d at 381 (involving a situation where "there was no evidence of any unsafe or erratic driving at any point up to the time of the accident"); W.E.B., 553 So. 2d at 327 ("At most, . . . [the defendant] was in the victim's lane of traffic because he was *overcorrecting* from having driven off the shoulder of the road."). Similarly, in others, the defendant was merely reacting to a situation beyond his or her control—again, evincing conduct more consistent with negligence than intentionally dangerous conduct. See Luzardo, 147 So. 3d at 1089 (involving a defendant who was "speeding on a straight road in sunny weather with clear visibility"

when the victim "inexplicably turned and braked in the defendant's path"); Berube v. State, 6 So. 3d 624, 626 (Fla. 5th DCA 2008) (involving a defendant who made a panicked illegal turn in order to avoid being hit by a truck). And finally, the trial court also relied on cases where the State's evidence did not involve misconduct that was so dangerous that it was likely to result in serious injury. See State v. Del Rio, 854 So. 2d 692, 694 (Fla. 2d DCA 2003) (involving circumstances where the State's only evidence of recklessness was that the defendant made a left turn at a T intersection without stopping); Miller v. State, 636 So. 2d 144, 150-51 (Fla. 1st DCA 1994) (involving a defendant who was speeding along a street with light to moderate traffic but slowed as he approached an intersection). Unlike this case, those cases did not involve evidence showing that a defendant knowingly engaged in a continuous pattern of highly dangerous behavior.

The trial court also contrasted the facts of this case from others in which courts have found sufficient evidence of recklessness and which the trial court characterized as involving more severe misconduct than that involved here. E.g., Santisteban v. State, 72 So. 3d 187, 196 (Fla. 4th DCA 2011) (affirming denial of a judgment of acquittal where the defendant drove a gasoline tanker at nearly twice the advisory speed limit on a curving highway ramp while weaving and cutting off at least one other driver). Although prior decisions finding the State's evidence of recklessness sufficient are certainly relevant, it would be a mistake to regard the specific facts of any case as establishing a minimum that the State's evidence must satisfy in every case. The ultimate question in determining whether the State's evidence of recklessness is sufficient is not whether that evidence mirrors exactly the evidence in another case where an appellate court found the evidence sufficient. It is whether the State

presented competent substantial evidence of recklessness—i.e., evidence sufficient to permit a reasonable mind to infer intentional conduct undertaken with conscious disregard for a likelihood of death or serious bodily injury. See Ruiz, 286 So. 3d at 340; Michel v. State, 752 So. 2d 6, 12 (Fla. 5th DCA 2000) (quoting Lewek v. State, 702 So. 2d 527, 531 (Fla. 4th DCA 1997)). The answer to this question necessarily depends on what a reasonable mind can infer from the facts and circumstances of each individual case.

For the reasons we have explained, the State's evidence here was sufficient to prove recklessness. The trial court therefore erred by granting Mr. Desange a judgment of acquittal notwithstanding the verdict on the charges for vehicular manslaughter and reckless driving. See Odom, 862 So. 2d at 59. We reverse and remand for reinstatement of the jury's verdict. See, e.g., State v. Campbell, 157 So. 3d 346, 350 (Fla. 2d DCA 2015) (reversing and remanding for reinstatement of the verdict where the trial court erroneously granted a judgment of acquittal).

Reversed and remanded with instructions.

CASANUEVA and MORRIS, JJ., Concur.