STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	FOR PUBLICATION September 10, 2013
v	No. 312966 Wayne Circuit Court
THABO JONES, Defendant-Appellee.	LC No. 12-003749-FH

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

K. F. KELLY (*dissenting*).

I respectfully dissent. MCL 257.626(4) provides that "a person who operates a vehicle in violation of subsection (2) [in willful or wanton disregard for the safety of persons or property] and by the operation of that vehicle causes the death of another person is guilty of a felony . . ." MCL 257.626(5) further provides that, "[i]n a prosecution under subsection (4), the jury shall not be instructed regarding the crime of moving violation causing death." Because the trial court clearly violated the statutory mandate of MCL 257.626(5) by granting defendant's motion to instruct the jury on the misdemeanor offense of moving violation causing death, MCL 257.601d(1), [1] and because the statutory mandate neither deprives defendant of the right to a jury determination of all of the elements of the crime charged nor violates the principle of separation of powers, I would reverse.

MCL 768.32(1) provides:

> (1) Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

[1] MCL 257.601d(1) provides that "A person who commits a moving violation that causes the death of another person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both."

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002) our Supreme Court discussed the principles supporting an instruction on lesser included offenses as well as when a necessarily included offense instruction should be given:

> "In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it . . . (is) entitled to an instruction which would permit a finding of guilt of the lesser offense." But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and the greater offenses. In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for a conviction of the lesser-included offense. [*Cornell*, 466 Mich at 356, quoting *Sansone v United States*, 380 US 343, 349-350; 85 S Ct 1004; 13 L Ed 2d 882 (1965) (citations omitted).]

The *Cornell* Court thus held that a court could properly give an instruction on a necessarily included lesser offense "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. To permit otherwise would be inconsistent with the truth-seeking function of a trial . . ." *Cornell*, 466 Mich at 357 (footnote omitted).

However, defendant argues that because MCL 257.626(5) allegedly conflicts with the holding in *Cornell*, it unconstitutionally infringes on our Supreme Court's rule-making authority and violates the separation of powers doctrine. I disagree.

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

The Legislature has the power over matters of substantive law. See *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007). While the Legislature has the sole power to define crimes and set punishments, *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003), the Supreme Court has the power to establish practice and procedure, *People v Watkins*, 491 Mich 450, 472; 818 NW2d 296 (2012). Therefore, "the Legislature may not enact a rule that is purely procedural, i.e., one that is not backed by any clearly identifiable policy consideration other than the administration of judicial functions." *Pattison*, 276 Mich App at 619. In the course of deciding whether a statutory rule of evidence violated the principle of separation of powers, our Supreme Court held that the Legislature infringes on the Supreme Court's domain

> only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified. Therefore, if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration[,] the court rule should yield.

* * *

> [P]rocedural rules of evidence involving the orderly dispatch of judicial business are those rules of evidence designed to allow the adjudicatory process to function effectively. Examples are rules of evidence designed to let the jury have evidence free from the risks of irrelevancy, confusion and fraud. [*Watkins*, 491 Mich at 474, quoting *McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999) (internal quotations omitted).]

Contrary to the majority's conclusion, MCL 257.626(5) is obviously not a matter of practice and procedure; rather, § 626(5) is absolutely within the substantive power of the Legislature.

Cornell clearly stated that MCL 768.32 is not confined to practice and procedure, but is a matter of substantive law:

> As this Court has recognized, matters of substantive law are left to the Legislature. *Determining what charges a jury may consider does not concern merely the "judicial dispatch of litigation." Rather, the statute concerns a matter of substantive law*. As this Court has noted,
>
> > [t]he measure of control exercised in connection with the prevention and detection of crime and prosecution and punishment of criminals is set forth in the statues of the State pertaining thereto, particularly the penal code and the code of criminal procedure. The powers of the courts with reference to such matters are derived from the statutes. [*Cornell*, 466 Mich at 353 (emphasis added) (citations and internal quotations omitted).]

Where our Supreme Court has determined that MCL 768.32, involving the jury's consideration of lesser included offenses, is a matter of substantive law, it follows that MCL 257.626(5) is also a matter of substantive law. MCL 257.626(5) identifies two specific offenses, prohibiting a jury instruction on the less serious offense where the more serious one has been charged. It reflects the Legislature's policy decision that, in certain cases, the jury shall not be instructed on certain offenses. Consequently, § 626(5) is within the Legislature's power over matters of substantive law and does not violate the separation of powers doctrine.

I find unavailing the majority's reliance on *People v Binder*, 215 Mich App. 30; 544 NW2d 714 (1996). In *Binder*, the defendant was charged with delivery of a controlled substance and MCL 768.32(2) specifically prohibited the trial court from instructing the jury on mere possession. *Binder*, 215 Mich App at 32-33. The Court of Appeals held that MCL 768.32(2) was contrary to the constitutional doctrine of separation of powers. *Binder*, at 39-41. "Once the Supreme Court takes action on a matter relating to practice or procedure, the Legislature is without authority to set other requirements." *Id.* at 40. Our Court concluded that the Supreme Court demonstrated its intent to occupy the domain of jury instructions by court rule and case law and, therefore, MCL 768.32(2) was an impermissible infringement on the Court's rulemaking authority. *Binder*, 215 Mich App at 40-41. However, our Supreme Court vacated

> only that portion of the judgment which held that the lesser offense and jury instruction provisions of [MCL 768.32(2)] are an unconstitutional infringement by the Legislature on the Supreme Court's authority over practice and procedure, . . . because it was unnecessary for the Court of Appeals to reach this constitutional question after determining that the defendant's conviction would be affirmed in any event. [*People v Binder*, 453 Mich 915; 554 NW2d 906 (1996).]

Because that portion of *Binder* was specifically vacated by the Supreme Court, no binding authority supports the majority's conclusion. Statutes are presumed constitutional, and courts must construe statutes as constitutional unless the unconstitutionality of a statute is clearly apparent. *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009). That a statute may appear ill-advised does not make it unconstitutional and empower a court to override the Legislature. *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002).

Finally, while the majority expresses concern that MCL 257.626(5) effectively allows a judge, sitting without a jury, to find a defendant guilty of a lesser included offense, I believe that such an assumption is contrary to the long-standing principle that "[i]n a bench trial, the trial court is presumed to know the applicable law." *People v Lanzo Const Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006); see also *People v Cazal*, 412 Mich 680, 691 n 5; 316 NW2d 705 (1982) (a trial court is not required in a bench trial to give instructions on the law to be applied in open court). Given the clear intent of the legislature to carve out the particular elements of reckless driving causing death, MCL 257.626(5), when a defendant is charged pursuant to MCL 257.626(4), a judge trying a case without a jury would surely understand that it could not convict on the lesser misdemeanor offense of moving violation causing death.

For these reasons, I would reverse.

/s/ Kirsten Frank Kelly