

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEAN DECKER,

Defendant-Appellant.

---

UNPUBLISHED

January 27, 1998

No. 191289

Tuscola Circuit Court

LC No. 95-006727-FH

Before: O’Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle under the influence of intoxicating liquor causing death, MCL 257.625(4); MSA 9.2325(4). He was sentenced to seven to fifteen years’ imprisonment. Defendant appeals as of right, and we affirm.

While driving a pickup truck on a highway, defendant crossed the center line and collided with an oncoming car. A deputy sheriff who arrived on the scene shortly after the accident testified that there was a strong odor of alcohol on defendant’s breath. There was an open bottle of vodka between defendant’s legs that was “about a quarter, maybe a little more” full. The driver of the oncoming car died of massive internal injuries and shock within a few hours of the accident. Defendant was also taken to a hospital and received transfusions of two units of blood in the emergency room. A sheriff’s deputy testified that he attempted to have a blood sample drawn from defendant for testing approximately one hour after the accident but was unable to do so, apparently because defendant was being medically treated. The officers obtained a search warrant for defendant’s blood sample while defendant was being transported to a second hospital. Some five hours after the accident, blood samples for alcohol content testing were drawn from defendant and sent to the state police laboratory. These samples showed a blood alcohol content of .16 percent.

Defendant now argues that the trial court violated his due process rights by admitting into evidence the results of his blood alcohol test. Defense counsel moved the trial court to preclude the admission of the results based on the time that elapsed between the accident and the drawing of the blood samples. The trial court denied this motion. A trial court’s determination whether to admit into evidence the result of a blood alcohol test is reviewed for an abuse of discretion. *People v Prelesnik*, 219 Mich App 173, 178; 555 NW2d 505 (1996).

The trial court first indicated that it denied defendant's motion because the district court had previously determined that the blood was drawn from defendant within a reasonable time and defendant had not appealed that determination. As defendant points out, the trial court incorrectly concluded that the district court's ruling precluded defendant from raising this matter again to the trial court. MCR 6.110(D). However, the trial judge also indicated that he had read the district court file and independently agreed with the district court's decision.

There is little case law covering this precise issue. In *People v Schwab*, 173 Mich App 101, 103; 433 NW2d 824 (1988), this Court stated:

In order for the results of chemical tests of blood alcohol to be admitted into evidence, the proponent of such tests must meet four foundational requirements. First, it must be shown that the operator is qualified. Second, the proper method or procedure must be demonstrated as having been followed in the tests. Third, *the tests must have been performed within a reasonable time after the arrest*. Finally, the testing device must be shown to be reliable. Failure to meet any of these foundational requirements will preclude the use of the test results. [Emphasis added; citations omitted.]

*Schwab* involved the admissibility of a Breathalyzer test in a prosecution for driving under the influence of intoxicating liquor. The panel of this Court declined to adopt a fixed time frame in which such tests must be conducted in order to be admissible. In holding that the district court did not abuse its discretion in finding the tests inadmissible, the panel noted:

The reasonableness of the time lapse involved is a foundation issue, going to the admissibility of the test results. Pursuant to MRE 104(a), this is an issue for the trial judge and is consigned to his sound discretion. Absent an abuse of discretion, such a determination will not be overturned on appeal. . . .

We do not reach the issue of how much of a delay is reasonable in every case. Reasonableness is a somewhat amorphous concept that varies from one set of factual circumstances to the next. We find it unnecessary to set a time and limit the discretion of trial courts. Trial judges are capable of protecting each defendant's right to a fair trial by making case-by-case evaluations based on the prosecutor's ability to prove the reasonableness of the delay. [*Id.* at 104-105; citations omitted.]

In the present case, we find that the trial court did not abuse its discretion in determining that the delay in obtaining defendant's blood sample was reasonable because the delay was caused by the administration of medical treatment to defendant. The police sought a search warrant to prevent further delay in drawing the blood sample. Their conduct appears at all times reasonable under the circumstances of this case.

Next, defendant argues that the trial court violated his due process rights by failing to instruct the jury that a necessary element of the charged offense was that he voluntarily drove knowing that he had consumed an intoxicating liquor or controlled substance. Defendant did not object to the challenged jury instruction at trial, and accordingly the issue was not preserved for our review absent manifest injustice. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995). As a general rule, this

Court is hesitant to reverse the judgment of a trial court because of an error in jury instructions where no objection was raised at trial. *Id.*

Defendant was convicted of violating MCL 257.625(4); MSA 9.2325(4), which at the time the incident underlying his conviction occurred provided:

A person, whether licensed or not, who operates a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state, under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or with a blood alcohol content of 0.10% or more by weight of alcohol, and by the operation of that motor vehicle causes the death of another person is guilty of a felony, punishable by imprisonment for not more than 15 years, or a fine of not less than \$2,500.00 or more than \$10,000.00, or both.

In *People v Lardie*, 207 Mich App 615, 618, 620; 525 NW2d 504 (1994), this Court held that the OUIL, causing death statute was a “strict liability, public welfare offense” that did not require a finding of intent on the part of a defendant. Contrary to the findings of the trial court, this Court held that the statute was, nonetheless, constitutional. The Michigan Supreme Court affirmed this Court’s holding that the statute was constitutional, albeit on different grounds. *People v Lardie*, 452 Mich 231, 234-237; 551 NW2d 656 (1996). More importantly, for our analysis here, the Supreme Court found that the offense was not a strict liability offense and that the prosecutor must prove that the defendant “had a general intent to commit the wrongful act: to drink and then drive.” *Id.* at 267. In other words, the prosecutor must prove that the defendant “voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated.” *Id.* at 259.

In the present case, the trial court instructed the jury with regard to the elements of OUIL causing death:

To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt. First, that the defendant was operating a motor vehicle on or about January 4th, 1994. . . .

Second, that the defendant was operating the vehicle on a highway or other place that was open to the public, or generally accessible to motor vehicles, including any designated parking area.

Third, that the defendant was under the influence of liquor, or had a blood alcohol level of 0.10 percent or more while he was operating the vehicle.

To prove the defendant operated a motor vehicle under the influence, or with an unlawful blood alcohol level, the prosecutor must also prove beyond a reasonable doubt that the defendant was either under the influence of liquor while operating the vehicle, or that the defendant operated the vehicle with a blood alcohol level of 0.10 percent or more.

Under the influence of alcohol means that because of drinking alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened. . . .

Fourth, that as a result of operating under the influence of intoxicating liquor, or a blood alcohol level of 0.10 percent or more, was a substantial cause of the death of Lynn Hodges.

The trial court did not instruct the jury that a voluntary decision to drive knowing that one had consumed alcohol was an element of the charged offense. We note again that defendant did not request this instruction nor did he object to the instructions as read to the jury. As a general rule, issues that are not properly raised before the trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Even certain constitutional errors, such as jury instructions that shift the burden of proof to the defendant, can be subject to a harmless error analysis. This standard requires a court to be convinced beyond a reasonable doubt that the challenged error did not contribute to the verdict obtained. *People v Hall*, 435 Mich 599, 609, n 8; 460 NW2d 520 (1990). If we assume for the sake of our analysis that the Supreme Court's construction of the OUIL causing death statute is to be given retroactive effect, and the trial court's jury instructions were therefore erroneous, such an error is subject to a harmless error inquiry and is not susceptible to automatic reversal. *Grant, supra* at 543. Moreover, our Legislature has clearly directed that no criminal verdict shall be reversed or set aside on the ground of misdirection of the jury absent a miscarriage of justice. MCL 769.26; MSA 28.1096. In other words, reversal is only required if the error was prejudicial. The inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Defendant did not argue below, nor does he contend on appeal, that he did not voluntarily decide to drive the automobile on the date in question or that he did not voluntarily and knowingly consume alcohol before and while driving. Moreover, the evidence presented at trial established that defendant was found in his car after the accident with a mostly empty 1.75 liter bottle of vodka between his legs, and that his breath smelled of alcohol. Defendant's entire defense theory was that the prosecution failed to show beyond a reasonable doubt that his blood alcohol level exceeded .10 percent at the time of the accident. However, five hours after the accident defendant's blood alcohol level was .16 percent. As the Supreme Court noted in *Lardie, supra* at 241, the distinction between a strict liability crime and a general intent crime "is important only in the rare circumstances where a defendant was driving when he honestly did not know he had consumed alcohol, which subsequently caused him to be intoxicated, or where he was forced to drive for some reason despite his intoxication." Such is not the situation in the present case, and we conclude that any error in instructing the jury was harmless beyond a reasonable doubt because no prejudice to defendant resulted from the error.

Accordingly, we affirm.

/s/ Peter D. O'Connell  
/s/ Barbara B. MacKenzie  
/s/ Hilda R. Gage