

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE EVAN FEEZEL,

Defendant-Appellant.

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UNPUBLISHED

November 13, 2008

No. 276959

Washtenaw Circuit Court

LC No. 05-1254-FH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

SAAD, C.J. (*concurring in part and dissenting in part*).

I concur with the majority's holding that the trial court correctly declined to instruct the jury on proximate causation for the charge of failure to stop at the scene of an accident resulting in death. However, I respectfully dissent from the majority's other rulings on the trial court's exclusion of evidence of the victim's intoxication and the trial court's failure to instruct the jury on proximate causation for the charge of operation of vehicle with a schedule 1 controlled substance present in the body causing death. The combination of the trial court's errors deprived defendant of a substantial defense and denied him a fair trial.

Defendant was acquitted of operating a motor vehicle while intoxicated causing death, MCL 257.625(4), (1). This appeal concerns defendant's conviction of operating a vehicle with the presence of a schedule 1 controlled substance in his body causing death, MCL 257.625(4), (8). Our Supreme Court has held that THC, the main psychoactive substance in marijuana, and its waste product, 11-carboxy-THC, are both schedule 1 controlled substances under the statute, MCL 257.625(8). *People v Derror*, 475 Mich 316, 325-326, 331; 715 NW2d 822 (2006). Here, defendant had an amount of THC in his system so small that the Michigan State Police Crime Lab does not report it. However, the lab did report that defendant had in his system six nanograms per milliliter of blood of 11-carboxy-THC. It is undisputed that 11-carboxy-THC has no pharmacological effect on the human body, which means that it has no psychoactive properties, does not impair a person's ability to function and, therefore, does not impair a person's ability to drive. *Id.* at 321-322, 330. However, our Supreme Court has also held that a driver may be held criminally responsible under MCL 257.625 if 11-carboxy-THC is present in

his body, regardless of the amount or whether it can, in any way, impair his driving. *Id.* at 338-341, citing *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005).<sup>1</sup>

In light of these precedents and the facts of this case, it was critical that the trial court correctly handle the question of whether defendant *caused* the victim, Kevin Bass's death. Evidence established that, at approximately 2:00 a.m., in a "monsoon"-like rainstorm, Bass was walking down the middle of a lane of traffic on an unlit section of Packard Road. The record reflects that it was pitch-dark outside and visibility was significantly diminished because of the storm. Notwithstanding these conditions, and that there was a sidewalk running parallel to Packard Road, Bass was walking down the center of a through lane of traffic with his back to oncoming cars. Defendant's vehicle was traveling down this lane of Packard Road when it struck Bass from behind. Again, no evidence suggests that defendant drove over a lane marker, that he lost control of his vehicle or that he was weaving. The only evidence presented with regard to defendant's driving was that, based on Bass's injuries, defendant's vehicle may have been traveling well under the speed limit, at the speed limit, or over the speed limit. In other words, witnesses offered conflicting testimony on this issue.

In *Schaefer*, our Supreme Court explicitly stated that the Legislature's use of the word "cause" in MCL 257.625(4) is a legal term of art that must "be construed and understood [by the jury] according to such peculiar and appropriate meaning." *Schaefer, supra* at 435, n 52-53. Accordingly, the jury's determination of causation is two-fold:

[I]t must first be determined whether the defendant's operation of the vehicle was a factual cause of the victim's death. If factual causation is established, it must then be determined whether the defendant's operation of the vehicle was a proximate cause. In doing so, one must inquire whether the victim's death was a direct and natural result of the defendant's operation of the vehicle and whether an intervening cause may have superseded and thus severed the causal link." [*Id.* at 438.]

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<sup>1</sup> Here, unlike in *Derror*, no evidence established when defendant may have ingested marijuana and no evidence showed that the presence of 11-carboxy-THC in his body could have had any bearing on his driving or the resulting accident. I respectfully disagree with our Supreme Court's decision in *Schaefer*, as clarified by *Derror*, that eliminated any inquiry if defendant's ingestion of marijuana before driving contributed to the victim's death. I should think that the proper inquiry is whether the result would have occurred in the absence of the defendant's *illegal* conduct and this necessitates an inquiry into whether the defendant's *intoxicated* driving caused the victim's death. Though it is clearly illegal to ingest marijuana, I do not see it as the Legislature's intent to impose additional criminal liability on drivers simply because their body retains any amount of a non-psychoactive substance that may subsist for several hours or days after the psychoactive derivative of marijuana has disappeared. *Derror, supra* at 321-322. While our Legislature has determined that a person's driving is presumed to be affected if that person's blood alcohol content is .08 or above, it is unreasonable to presume a driver is negligent, intoxicated or impaired or that his driving is in any way influenced when his body contains even a negligible amount of a substance that, by all accounts, has no effect on a person's perception, judgment, thought processes, or reaction time.

In other words, the statute requires the prosecutor to establish both factual causation and proximate causation beyond a reasonable doubt as separate elements of the charge of operation of a vehicle with a schedule 1 controlled substance present in the body causing death. Indeed, in *Schaefer*, the Court specifically held that it was error for the trial court to instruct the jury that it must find only that the operation of the motor vehicle “causes” death. *Id.* at 441. As the Court explained, “[t]he jury could not be expected to understand that the statute required the prosecutor to prove *both* factual causation and proximate causation.” *Id.*

The majority agrees that the trial court erred when it failed to properly instruct the jury that, to convict defendant of causing Bass’s death, it must find that the prosecutor proved both factual and proximate causation. However, the majority concludes that the trial court’s error was harmless. I cannot agree with this holding because, not only was the trial court’s causation instruction insufficient as a matter of law, the court compounded the error by precluding defendant from introducing evidence of Bass’s severe intoxication at the time he was struck by defendant’s vehicle.<sup>2</sup> In *Schaefer*, the Court explained that the element of proximate cause necessitates an analysis of whether a superseding cause exists to cut off criminal liability:

For a defendant’s conduct to be regarded as a proximate cause, the victim’s injury must be a “direct and natural result” of the defendant’s actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant’s conduct such that the causal link between the defendant’s conduct and the victim’s injury was broken. If an intervening cause did indeed *supersede* the defendant’s act as a legally significant causal factor, then the defendant’s conduct will not be deemed a proximate cause of the victim’s injury. *Id.* at 436-437.

Not only did the trial court fail to instruct the jury that it must determine whether defendant’s conduct was a proximate cause of Bass’s death, it failed to give the jury the opportunity “to examine whether there was an intervening cause that superseded the defendant’s conduct such that the causal link between the defendant’s conduct and the victim’s injury was broken.” *Id.* To establish a superseding cause, the jury must decide whether an intervening act by the victim was not reasonably foreseeable. If a defendant proves that the victim’s conduct was grossly negligent or intentional, “then generally the causal link is severed and the defendant’s conduct is not regarded as a proximate cause of the victim’s injury or death.” *Id.* at 438.

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<sup>2</sup> I also disagree with the majority’s reasoning that the verdict acquitting defendant of OWI causing death and the guilty verdict for operating a vehicle with the presence of a schedule 1 controlled substance in his body causing death are consistent because the jury inquired about the knowledge element for OWI causing death. While the majority is correct that operating a vehicle with the presence of a schedule 1 controlled substance in his body causing death does not have a knowledge element, the jury’s inquiry establishes nothing about its reasoning in issuing its verdict. Rather, it is just as likely that the jury did not find proximate cause for purposes of OWI causing death, but convicted defendant of operating a vehicle with the presence of a schedule 1 controlled substance in his body causing death because they were not instructed on proximate cause for operating a vehicle with the presence of a schedule 1 controlled substance in his body causing death.

The majority erroneously concludes that the trial court correctly ruled that Bass's severe intoxication is irrelevant to the question of whether his conduct was grossly negligent. Specifically, when ruling to exclude evidence of Bass's .286 blood alcohol content, the trial court explained its reasoning as follows:

Well given the prior rulings of this Court, what is relevant is not the state of mind of the person who is walking in the middle of the road. It is what is the causation relationship between the actions of the defendant and finding a person in the middle of the road?

In giving this question some thought, the analogy that I draw is, is it reasonably foreseeable you would find someone in the middle of the road, let's say even at that time of the morning. Someone who is a War Veteran who has lost a leg and is walking on crutches across the street, and is in the middle of the road and is struck. The issue isn't whether or not because someone is on crutches and walks slowly across the street, they are somehow a contributing cause of the accident.

At least based on the prior rulings, the argument at least counsel has made before me, and the argument today, the issue is with regard to whether or not he victim's causation is relevant to the causation analysis, and I don't find that. The motion is granted.

The majority agrees with the trial judge's ruling and reflexively opines that "it was reasonably foreseeable that a pedestrian might be present in the road . . . ." The majority further asserts, without analysis, that Bass's conduct merely amounts to ordinary negligence. This reasoning is unsound because it entirely negates the inquiry into whether the victim's conduct might be intentional or grossly negligent. Indeed, under the majority's reasoning, a pedestrian could never be grossly negligent and his or her mere presence in the road is always foreseeable.

"[G]ross negligence 'means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent.' " *Id.* at 438, quoting *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914). By definition, therefore, when a defendant presents evidence regarding a victim's intervening conduct, a jury must consider evidence relevant to the victim's wantonness, disregard or indifference, all of which are directly related to the person's state of mind. Clearly, Bass's blood alcohol content of .286 was relevant to his state of mind and whether his conduct was grossly negligent. Defendant should have been permitted to present evidence of Bass's severe intoxication at the time of the accident, which, combined with evidence that he was walking down the middle of an unlit, through lane of traffic during a torrential rainstorm at 2:00 a.m. with his back to oncoming cars, could constitute wanton disregard of or criminal indifference to the consequences of his conduct.

The majority dispenses with any inquiry about Bass's state of mind and so did the trial court. By reasoning that Bass *could have been* a disabled veteran crossing the street on crutches, the trial court ignored defendant's legal right to present evidence of whether Bass acted with wantonness, disregard and indifference. The trial court's reasoning is also logically unsound. The comparison of Bass to a disabled veteran ignores the importance of the gross negligence inquiry: Though a disabled veteran might have difficulty crossing a street, Bass's severe

intoxication would have directly affected his ability to perceive and avoid a substantial risk of injury, which goes directly to whether he was grossly negligent and whether that gross negligence proximately caused his death. Further, had defendant struck a veteran crossing the street on crutches under these circumstances, defendant nonetheless could have presented evidence that the victim's conduct was intentional or grossly negligent. Simply put, the proximate cause inquiry is not curtailed by the simple assertion that the presence of any pedestrian in the road is always foreseeable.

I further note that, in other criminal contexts, this Court has held that a person's intoxication is relevant to establish gross negligence. *People v Allan*, 158 Mich App 472, 474-476; 404 NW2d 266 (1987); *People v Thinel*, 160 Mich App 450, 455, 458; 408 NW2d 474, vacated on other grounds 429 Mich 859 (1987). I know of no case law that would negate intoxication as a relevant factor when the inquiry involves evidence of grossly negligent conduct by the victim as a possible superseding cause. Indeed, when determining whether a defendant is grossly negligent for a conviction of involuntary manslaughter, our Court has stated that the jury should consider the following elements:

(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.

(2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.

(3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997) (citations omitted).]

The above factors are instructive to determine whether a victim's gross negligence was a superseding factor for purposes of MCL 257.625, and the factors make clear why, in this context, Bass's intoxication is especially relevant to the issue of gross negligence. It is apparent that Bass's presence in the middle of a lane of traffic on an unlit road during a rainstorm could cause injury and his acute intoxication undoubtedly contributed to his "decision" to walk with his back to traffic or otherwise prevent him from seeing oncoming headlights in order to avoid being hit.

The majority reasons that the trial court's evidentiary ruling was correct because the jury could *infer* that Bass was intoxicated when the accident occurred. Contrary to the majority's assertions, the jury was presented with *no* evidence that Bass was intoxicated on the night of the accident. The trial judge prohibited the jury from hearing that Bass was carrying a bottle of gin while he was in the roadway and no other evidence suggests that Bass had consumed alcohol before he decided to walk down the middle of the road late at night in such severe weather conditions. Most importantly, the trial court prevented the jury from weighing evidence of Bass's severe intoxication, evidence that weighs heavily on the question of Bass's ability to avoid the accident and the foreseeability of his walking in the middle of the road, in pitch darkness, during a rainstorm. Thus, contrary to the majority's contentions, the jury had no opportunity to consider relevant evidence with regard to Bass's intent or state of mind and could, therefore, not properly consider the question of proximate cause and whether Bass was grossly negligent.

I also disagree with the majority's attempt to bolster its holding that the trial court correctly excluded evidence of Bass's severe intoxication by suggesting that this accident was "not unavoidable." I believe the trial court's omission of a proximate cause instruction and its decision to exclude evidence of Bass's blood alcohol content is especially troubling when ample evidence showed that, in fact, the accident could not be averted. The majority's opines that "the accident was not unavoidable because Nicole Norman, who was driving her vehicle in front of defendant's vehicle, avoided hitting the victim only moments before defendant struck him." The statement implies that Norman was able to maneuver around the victim to avoid hitting him in the roadway and it is a mischaracterization of the record. Stephanie Meyer was a passenger in the vehicle driven by Norman. Meyer testified that, in the monsoon-like rain, she and Norman first saw the victim when he was parallel to the driver's side door of Norman's vehicle. Meyer stated, "We had both snapped our necks backwards noticing him and continued forward." Meyer recalled that, when Norman saw the victim on the road, she blurted out, "That man's going to get killed." Just after they passed him, Meyer heard the front end of defendant's vehicle hit the victim. Norman testified that, when she first saw the victim, he was approximately 30 feet away from her vehicle on the pitch-dark road and in the pouring rain. Norman recalled that the victim was not simply crossing the street, but was walking down the middle of the roadway and she said, "Oh, my gosh, that guy is crazy." She further testified that her vehicle passed the victim, but that, had he been walking in her lane, she probably would not have been able to stop her vehicle in time to avoid hitting him.

Several witnesses testified that no driver would be able to perceive the danger and take action to avoid hitting Bass under the conditions on the night of the collision. Moreover, the testimony of Meyer and Norman does *not* establish that the accident was preventable or that Norman was able to "avoid" hitting the victim. Rather, the testimony shows that Norman did not hit the victim simply because he was not walking in her lane as she passed him. Moreover, where, as here, the accident appears unavoidable, the trial court's erroneous rulings regarding the victim's severe intoxication, coupled with the trial court's failure to properly instruct the jury on causation, resulted in the conviction of a defendant whose criminal conduct (the presence of 11-carboxy-THC in his body) has no connection to the resulting death. In light of the above, it was especially important for the trial court to properly instruct the jurors on causation and for the jurors to decide whether the victim's conduct, including his severe intoxication, was grossly negligent.

For these reasons, I would hold that defendant was seriously prejudiced by the trial court's errors. The court's deficient instruction and its incorrect evidentiary ruling deprived defendant of the opportunity to present a viable and substantial defense and it removed from the jury's consideration an essential element of the crime. Under the circumstances of this case, I believe that the errors affected the fairness and integrity of the proceedings. Accordingly, I would vacate defendant's conviction of operating a vehicle with the presence of a schedule 1 controlled substance in his body causing death and would grant him a new trial.

/s/ Henry William Saad