

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID AMES WARDWELL,

Defendant-Appellant.

UNPUBLISHED

January 27, 2009

No. 280298

Kent Circuit Court

LC No. 06-007552-FH

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant David Wardwell appeals as of right his bench conviction of operating a motor vehicle while intoxicated causing serious bodily injury of another person.¹ The trial court sentenced Wardwell to 18 months' probation. We affirm.

I. Basic Facts And Procedural History

On April 29, 2006, Wardwell struck and injured Yancy Szczerbowicz with his motor vehicle. At the time of the incident, Wardwell was driving friends home from Monte's bar in Grand Rapids, Michigan. Wardwell testified that over the course of the evening he had three or four beers, but had stopped drinking before 12:30 a.m. After leaving Monte's at approximately 2:00 a.m., Wardwell headed eastbound on Michigan Street. As he approached another bar called Logan's Alley, he saw a group of people, including Szczerbowicz, on the sidewalk in front of the bar. According to Wardwell and his passengers, as Wardwell got closer to the group of people, Szczerbowicz suddenly left the sidewalk and ran in front of Wardwell's car. Wardwell struck Szczerbowicz, and according to Wardwell and his passengers, the accident was unavoidable. Szczerbowicz testified that he was merely crossing the street to get to his parked car. Similarly, Szczerbowicz's friend who was present during the incident testified that Szczerbowicz did not run into the road, rather Szczerbowicz had probably only taken "a step" into the road.

Officer Curtis Creighton arrived at the scene of the accident at approximately 2:30 a.m. Officer Creighton had Wardwell perform a series of field sobriety tests, which Wardwell failed.

¹ MCL 257.625(5).

Both parties stipulated at trial that Wardwell had a blood alcohol level of .13 grams per 100 milliliters, which is over the legal limit.

While at the scene of the accident, Officer Creighton also observed Szczerbowicz and noticed that Szczerbowicz appeared to be intoxicated. When Officer Creighton spoke with Szczerbowicz at the hospital, Szczerbowicz indicated that he stumbled into the road.

As a result of the accident, Szczerbowicz suffered several broken bones in his foot, and torn ligaments in his right knee. The knee injuries required surgery, and, following surgery, Szczerbowicz was advised not to place any weight on his knee for six weeks. Medical testimony revealed that if Szczerbowicz had not received treatment for his injury, it might have prevented him from walking.

At the request of the prosecution, Detective Allen Noles, an accident reconstruction expert, investigated the accident. According to Detective Noles, Michigan Street runs east to west and is wide enough to accommodate four lanes of traffic. However, as it passes Logan's Alley, the road is zoned for two lanes. Detective Noles testified that on Michigan, the lanes are "very large" and that when Szczerbowicz stepped off the curb he was in the lane of traffic. Where Szczerbowicz entered the lane, there was no designated crosswalk. In addition, Detective Noles testified that it is not uncommon for people in Grand Rapids to cross in the middle of the street, and he would expect to see someone jaywalk in front of a bar.

Based on witness's observations, Detective Noles estimated that Wardwell was traveling at approximately 30 miles an hour, which is the lawful speed limit on Michigan Street. Also based on witness statements, Detective Noles opined that Szczerbowicz took two to four steps into the road before the car hit him. Detective Noles conducted "a time/distance analysis to try to determine if there was an opportunity for Mr. Wardwell to avoid the accident." And as a result of the tests, Detective Noles established that Wardwell did not have enough time to stop. Additionally, during the trial, a photograph of Wardwell's car was introduced showing damage on the front right quarter panel. Detective Noles testified that the damage the photograph depicted was "consistent with a person running into the side of the vehicle."

After concluding his investigation, Detective Noles determined that, other than the fact that Wardwell was intoxicated, he was not violating any other traffic laws, and "his driving was fine." Detective Noles concluded that Szczerbowicz was negligent and that he was the one that was responsible for this crash.

After considering the evidence, the trial court first found that Szczerbowicz's injuries were sufficient to satisfy the statutory requirement of serious impairment of body function. Turning its attention to causation, the trial court found that Wardwell's operation of his vehicle was the factual cause of Szczerbowicz's injuries: "[A]bsent [Wardwell's] operation of the vehicle, this would not have occurred. If you had stayed—or hadn't driven the car or had never gotten into the car, this never would have happened." The trial court then went on to address proximate cause and apply an intervening-superseding cause analysis. The trial court found that Szczerbowicz was negligent in failing to exercise due caution before running into the street, but that his actions did not amount to gross negligence. The trial court explained:

I agree with the analysis of the expert, that the person who is at fault here is the victim of this crime. However, under the law and the analysis of this particular charge, . . . this Court finds that he was committing ordinary negligence by cross walking, by stepping into the street. Therefore, that, according to Michigan law, is reasonably foreseeable. If it's reasonably foreseeable, then it is not an intervening cause or superseding cause, and accordingly, proximate cause has also been met, then.

Accordingly, the trial court found Wardwell guilty of operating a motor vehicle while intoxicated causing serious bodily injury of another person.

II. Causation

A. Standard Of Review

Wardwell argues that he was not the factual cause of the accident and, therefore, the trial court did not need to determine if Szczerbowicz's actions were a superseding cause sufficient to mitigate Wardwell's culpability. According to Wardwell, because the trial court determined that Szczerbowicz's negligence caused the accident, the trial court should have acquitted Wardwell of the charge of operating while intoxicated causing serious bodily injury. We review de novo questions of statutory interpretation.² Further, whether a defendant's alleged conduct falls within the scope of a statute presents a question of law that we review de novo.³

B. Analysis

The primary goal of statutory construction is to "discern and give effect to the Legislature's intent."⁴ To properly determine the Legislature's intent, this Court "begins by examining the language of the statute itself."⁵ We give the words the statute contains "their plain, ordinary meaning unless the Legislature employs a term of art."⁶

The trial court found Wardwell guilty of operating while intoxicated causing serious bodily injury under MCL 257.625(5). This statute states:

A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a felony

² *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005), overruled in part on other grounds *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).

³ *People v Edenstrom*, 280 Mich App 75; ___ NW2d ___ (2008).

⁴ *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999).

⁵ *People v Disimone*, 251 Mich App 605, 609; 650 NW2d 436 (2002) (quotations and citations omitted).

⁶ *Bukowski v Detroit*, 478 Mich 268, 274; 732 NW2d 75 (2007).

punishable by imprisonment for not more than 5 years or a fine of not less than \$1,000.00 or more than \$5,000.00, or both.

The prosecution “must establish beyond a reasonable doubt that 1) the defendant was operating his or her motor vehicle in violation of MCL 257.625 (1), (3), or (8); 2) the defendant voluntarily decided to drive, knowing that he had consumed an intoxicating agent and might be intoxicated; and 3) the defendant’s operation of the motor vehicle caused the victim’s [serious impairment of a body function].”⁷

At trial, the parties stipulated that Wardwell had a blood alcohol level of .13 grams per 100 milliliters, in violation of MCL 257.625(1)(b). Further, on appeal, Wardwell does not dispute that he voluntarily operated a motor vehicle the night of the incident after consuming alcoholic beverages. Nor does he dispute that Szczerbowicz sustained a serious bodily impairment. Therefore, the only issue we need to consider on appeal is whether Wardwell’s operation of the vehicle caused Szczerbowicz’s injury.

“In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause.”⁸ To determine if Wardwell was the factual cause of the result, “one must ask ‘but for’ the defendant’s conduct, would the result have occurred?”⁹ If the result would not have occurred without Wardwell’s actions, then factual causation has been proven.¹⁰

We first note that in *People v Schaefer*, the Michigan Supreme Court held that

“[t]he defendant’s status as ‘intoxicated’ is a separate element of the offense and entirely irrelevant to the causation element of the crime. It is the defendant’s *operation* of the motor vehicle that must cause the victim’s death under §625(4), not the manner by which the defendant’s intoxication may or may not have affected the defendant’s operating ability.”^[11]

The Court later held that the reasoning in *Schaefer* also applied to MCL 257.625(5).¹²

Wardwell argues that the trial court found that he was not the factual cause of the accident because Szczerbowicz was at fault for negligently walking into the road and into the path of his car. But Wardwell misconstrues the trial court’s findings. In his brief on appeal, Wardwell explains the trial court’s findings as follows:

⁷ *Schaefer*, *supra* at 434. See also MCL 257.625(5).

⁸ *Id.* at 435.

⁹ *Id.* at 435-436.

¹⁰ *Id.* at 436.

¹¹ *Id.* at 446 (emphasis in original).

¹² *Derror*, *supra* at 334.

The court first found that Mr. Wardwell was not negligent and the accident was not his fault. However, the court went on to apply the reasoning of *People v. Schaefer*, 473 Mich 418, 703 NW2d 774 (2005), and its “intervening-superseding cause” analysis. The court found that, while Mr. Szczerbowicz was negligent in failing to exercise due caution before running into the middle of the road, his actions did not amount to gross negligence. Based on this finding, the court found that Mr. Wardwell was the “but for” cause of the accident and that he was thus guilty of Operating While Intoxicated Causing Serious Bodily Injury.

* * *

Even the prosecution’s evidence showed that the accident was unavoidable and was not Mr. Wardwell’s fault. Thus, it was not a stretch for the court to find that Mr. Wardwell was not negligent and that the accident was Mr. Szczerbowicz’s fault: “But that is not to say [Mr. Wardwell] was negligent. I agree with the analysis of the expert, that the person who is at fault here is the victim of this crime.”

However, the court went further and held that, since the victim was not grossly negligent, it had no choice but to find Mr. Wardwell guilty. [Record citations omitted.]

Contrary to Wardwell’s description, as we stated above, the trial court *first* determined that Wardwell was indeed the factual cause of the accident. The trial court *then* went on to address proximate cause. During the course of that analysis, the trial court found that while Szczerbowicz was actually at fault for the accident by walking into the street, his ordinary negligence did not supersede Wardwell’s conduct.

Of necessity, we therefore turn to the propriety of the trial court’s finding that Wardwell was the factual cause of the accident. In *People v Large*, consolidated with *Schaefer*, the Court determined that the defendant was the factual cause of a child’s death because “absent defendant’s operation of the vehicle, the collision would not have occurred.” The Court made this determination even though the evidence showed that “the victim rode a bicycle without brakes down a partially obstructed hill onto a busy road, and thus, according to the prosecution’s own expert witness, made the collision unavoidable.”¹³ The Court did not consider the victim’s own culpability when it determined that the defendant was the factual cause. Similarly, in this case, the testimony established that Wardwell made a conscious decision to drive his vehicle on the night of the accident. Consequently, but for Wardwell’s decision to drive his vehicle, the injuries to Szczerbowicz would not have occurred. Thus, Wardwell was the factual, “but for,” cause of the accident.

¹³ *Schaefer*, *supra* at 445.

However, factual cause alone will not permit a finding of criminal liability.¹⁴ Proximate causation must also be established, and proximate causation is a “legal colloquialism,” “designed to prevent criminal liability from attaching when the results of defendant’s conduct is viewed as too remote or unnatural.”¹⁵

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.^[16]

If an intervening cause was foreseeable based on an objective standard of reasonableness, we consider a defendant’s conduct as the proximate cause.¹⁷ “If, however, the intervening act by the victim or the third party was not reasonably foreseeable—e.g., *gross* negligence or intentional misconduct—then generally the causal link is severed and the defendant’s conduct is not regarded as a proximate cause of the victim’s injury”¹⁸

While an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable.^[19]

Gross negligence is defined as “wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to criminal intent.”²⁰

Wardwell argues that after determining that he was not negligent, the trial court should not have considered proximate cause. However, because the trial court found that Wardwell was a factual cause of the accident, it was necessary for the trial court to address the issue of proximate cause.

At trial, testimony demonstrated it was not unusual for patrons of this bar to walk in the middle of the street to get to the parking lot on the other side of the roadway. A police officer

¹⁴ *Id.* at 436.

¹⁵ *Id.*

¹⁶ *Id.* at 436-437.

¹⁷ *Id.* at 437.

¹⁸ *Id.* at 437-438 (emphasis in original).

¹⁹ *Id.* at 438-439 (emphasis in original).

²⁰ *Id.* at 438, quoting *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914).

also testified he would expect to see people routinely jaywalk in that area. In addition, Wardwell and his passengers testified that they all noticed a group of people standing on the sidewalk in front of the bar. It was reasonably foreseeable that a person would negligently walk out into the roadway. Therefore, even though Szczerbowicz's negligence contributed to the accident, it did not rise to the level of gross negligence. Accordingly, the trial court properly concluded that Wardwell was the proximate cause of the accident.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly