STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2009
v	No. 283458 St. Clair Circuit Court
JESSICA STARR BARKLEY, Defendant-Appellant.	LC No. 07-000496-FH

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of negligent homicide, MCL 750.324, and one count of operating a motor vehicle with any amount of a schedule 1 or 2 controlled substance in her body (OWCS) causing death, MCL 257.625(4). Defendant was sentenced to concurrent terms of one to two years' imprisonment for each negligent homicide conviction and 30 months to 15 years' imprisonment for the OWCS causing death conviction.[1] Defendant appeals as of right. We affirm.

In October 2006, defendant failed to stop at a stop sign and collided with a truck driven by Daniel Dorland. In defendant's vehicle were her minor sons Julian and Antonio Vega and her friend Rico Nichols. Julian and Nichols died as a result of injuries sustained in the accident. Antonio Vega survived. Nichols's blood tested positive for marijuana derivatives. Defendant's urine tested positive for tetrahydrocannabinol (THC).

First, defendant argues that the prosecution presented insufficient evidence to permit a trier of fact to conclude that she voluntarily decided to drive knowing either that she had any amount of a controlled substance in her body or that she might be intoxicated. Her argument reflects a misreading of *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), with respect to the elements of the crime. MCL 257.625 provides, in relevant part:

[1] Defendant's sentence for OWCS causing death was a downward departure from the recommend guideline range of 50 to 100 months' imprisonment.

> (4) 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 the death of another person is guilty of a crime.
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> (8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles . . . within this state if the person has in his or her body any amount of a controlled substance listed in . . . MCL 333.7212 . . . .

In accord with CJI2d 15.11a, the jury was instructed in part that it had to find beyond a reasonable doubt that defendant voluntarily decided to drive knowing that she had any amount of marijuana in her body. In *Derror*, *supra* at 334, our Supreme Court modified its holding in *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005), to be consistent with the plain language of MCL 257.625(4), (5), and (8). *Schaefer* had held that to establish OUIL causing death, "the prosecution . . . must establish beyond a reasonable doubt that . . . the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and might be intoxicated." *Schaefer*, *supra* at 434. Modifying this ruling, the *Derror* Court held that "[t]he plain language of MCL 257.625(8) does not require the prosecution to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated." *Derror*, *supra* at 334.

Thus, *Derror* established that although the first portion of the *Schaefer* instruction on this element—"the prosecution . . . must establish beyond a reasonable doubt that . . . the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent"—was in accord with the plain language of the statute, the second—"the prosecution . . . must establish beyond a reasonable doubt that . . . the defendant voluntarily decided to drive, knowing that he or she . . . might be intoxicated"—did not. The instructions given by the trial court in this case are consistent with *Derror*.

Defendant also argues that the prosecution is still required to show that she voluntarily drove knowing she might be intoxicated, but they do not need to establish this element beyond a reasonable doubt. This is also a misreading of *Derror* and is inconsistent with basic constitutional principles. *Derror* reasons that the prosecution is not required to prove "intoxication, impairment, or knowledge that one might be intoxicated; it simply requires that the person have 'any amount' of a schedule 1 controlled substance in his or her body when operating a motor vehicle." *Derror*, *supra* at 334. In other words, knowledge of possible intoxication is not an element and, thus, need not be proved under any standard. Moreover, it is a fundamental tenet of American jurisprudence that in a criminal prosecution the state must prove each element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 US 358, 361-364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Accordingly, because plaintiff was not required to establish that defendant drove knowing that she might be intoxicated, defendant's argument that insufficient evidence was adduced on this point lacks merit.

A rational trier of fact could have found that the prosecution established the elements of OWCS causing death beyond a reasonable doubt. "'Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.'" *People v*

Truong (*After Remand*), 218 Mich App 325, 337; 553 NW2d 692 (1996), quoting *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence was presented at trial from which the jury could have inferred that the defendant knew that she had THC or marijuana in her body. Forensic pathologist Dr. Daniel Spitz testified that delta-9-THC and delta-9-carboxy-THC were found in Nichols's blood. Delta-9-carboxy-THC (11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid) is a metabolite of delta-9-THC, which is the primary pharmacologically active component of marijuana. Spitz testified that the active THC metabolite found in Nichols (delta-9-THC) can remain in the blood for many hours, while THC can remain for an even longer period of time. Defendant and Nichols were seen together in the car at approximately 12:30 p.m. and then again at approximately 2:30 p.m. A police officer pulled defendant's vehicle over around 12:30 p.m. after receiving a call to be on the lookout for an erratic driver who was cutting in and out of traffic. Viewing this evidence in the light most favorable to the prosecution, the jury could have reasonably inferred that the defendant and Nichols were ingesting marijuana together before the accident and that defendant would have known that the marijuana was still in her system when she got behind the wheel of her car.

Defendant next argues that the trial court failed to instruct the jury on negligent homicide as a lesser offense of OWCS causing death. Defendant's argument draws no clear distinction between necessarily included offenses, whose elements are completely contained within the greater offense, *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001), and cognate offenses that share several elements with, and are in the same category as, the greater offense, but also include elements not contained in the greater offense, *People v Mendoza*, 468 Mich 527, 532 n 4; 664 NW2d 685 (2003). MCL 768.32 only permits instruction on necessarily included lesser offenses, which are entirely encompassed by the greater offense. *Id.* at 532-533. Because instruction on cognate lesser offenses is not permitted, *People v Randy Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007), we assume that defendant is arguing that negligent homicide is a necessarily included lesser offense.

In determining whether an offense is necessarily included in a greater offense, we must analyze the abstract elements of each offense, not the facts of the particular case. *Id*. at 73. The elements of OWCS causing death are (1) that the defendant operated a motor vehicle, (2) that the defendant operated that motor vehicle on a highway or other place open to the public, (3) that the defendant had any amount of a schedule 1 or 2 controlled substance in her body, (4) that defendant voluntarily chose to drive knowing that that she had any amount of a schedule 1 or 2 controlled substance in her body, and (5) that the defendant caused the death of that victim by the operation of that vehicle. MCL 257.625(4), (8); CJI2d 15.11a. The elements of negligent homicide are (1) that the defendant operated a motor vehicle, (2) that the defendant was negligent in the operation of that motor vehicle, (3) that the defendant's negligence was a substantial cause of the accident causing injuries to the victims, and (4) that the victims died as a result of these injuries. MCL 750.324; see also *People v Paulen*, 327 Mich 94, 99; 41 NW2d 488 (1950); CJI2d 16.14.

Negligent homicide contains an element that OWCS causing death does not—negligence. Defendant seems to be arguing that because proof of intoxication is not required, the only remaining issue at trial was whether she was negligent in operating her vehicle. It is true that proof of intoxication is not required under *Derror*. However, it does not follow from this proposition that negligence is an element of OWCS causing death. Defendant's assertion seems

not to be predicated on the elements of the crime, but on her view of the evidence. In sum, because negligent homicide is a cognate lesser offense of OWCS causing death, not a necessarily lesser-included offense, the requested instruction was improper.

Finally, we agree with both parties that offense variable (OV) 4 should have been scored at zero points instead of ten points. MCL 777.34(1)(a), (2). However, the scoring error does not require a remand for resentencing. Because the minimum guideline range is not impacted by the change, it is reasonable to conclude that the altered score would not have impacted the court's downward departure from the guidelines. See *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004), rev'd in part on other grounds 473 Mich 399 (2005) (resentencing is unnecessary if the change in scoring would not change the recommended minimum sentence range), and *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003) (resentencing is unnecessary if it is clear than the trial court would impose the same sentence). It does not impact any of the rationales given by the trial court to justify its determination that substantial and compelling reasons existed to justify a downward departure from the sentencing guidelines.[2] *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). However, we remand for the ministerial task of correcting the OV 4 score. *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006).

Affirmed in part. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

[2] We reach no judgment on whether the reasons provided satisfy the applicable legal principles.