

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SCOTT THEODORE WHITE,

Defendant-Appellant.

UNPUBLISHED

October 4, 2011

No. 298593

Berrien Circuit Court

LC No. 2009-003639-FH

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction negligent homicide, MCL 750.324. Defendant was sentenced to five years' probation. Defendant was also convicted of operating a motor vehicle while intoxicated and causing death, MCL 257.625(4), though he does not challenge that conviction on appeal. Defendant was acquitted of involuntary manslaughter, MCL 750.321. We affirm.

Defendant's conviction arises out of the death of his wife, Debra White. It is undisputed that Mrs. White was killed after being struck by a vehicle that defendant was driving while he was intoxicated. The accident occurred at approximately 2:00 a.m. on August 2, 2009. Prior to the accident, defendant and Mrs. White attended a party at the home of Dana Rose, where they were each drinking beer. Mrs. White drank significantly more at the party than defendant. While at the party, Mrs. White apparently slipped and fell into a sump drain.¹ She became upset after defendant laughed about the fall and the couple subsequently left the party. While leaving the party, they walked over a muddy hill adjacent to Rose's home. Mrs. White told defendant that she wanted more beer for the way home. Defendant grabbed four beers from Rose's garage and the couple drove off in defendant's truck.

Defendant wanted to give Mrs. White time to drink her beer on the way home from the party. As a result, he chose to take a longer route while driving home. It was during that drive that Mrs. White died as a result of being run over by defendant's vehicle. The exact sequence of

¹ Defendant's testimony at trial regarding Mrs. White falling into the drain was corroborated by another witness, Bradley Rose, Jr.

events that preceded Mrs. White's death is unclear. At trial, defendant testified that while he was driving on Forest Beach Avenue, Mrs. White began to argue with him about his reaction to her fall. She then took her shoes, which were muddy from the hill, and wiped them on the dashboard of the car. Because defendant was distracted by her behavior, he pulled over. Mrs. White got out of the vehicle, "stomped around," and then got back in. The couple continued to argue. Recognizing that the argument was not going to end soon, defendant decided to resume driving. He turned up his radio as loud as he could, put the vehicle in drive, checked his blind spot and drove off. He stated that "seconds later" he felt a lump under one of the tires. He turned to ask his wife what the source of the lump was and noticed that she was no longer in the vehicle. He continued to drive just far enough to see his wife in the rear view mirror. He backed up just enough to get out of the way of traffic. He got out of the vehicle and ran to his wife. He saw a large amount of blood and realized that she was dead. He put his arm underneath her body, causing blood to get on his clothing, and began screaming for help. When another driver arrived on the scene to assist him, defendant told her that Mrs. White and fallen out of the car and then was run over.

In slight contrast, when police officers arrived on the scene, defendant stated that Mrs. White had jumped, not fallen, out of the car and was run over. Defendant acknowledged drinking that night and was found to have a blood alcohol content (BAC) of .12. Two different officers testified that defendant stated he had been arguing with Mrs. White, that she jumped from the vehicle and that he accidentally ran over her and saw her body in the rear view mirror after feeling a thump. The statements were consistent with defendant's testimony at trial.

An autopsy was performed on Mrs. White's body. At the time of the autopsy, Mrs. White had a BAC of .33. She had contusions on her head consistent with being run over by a vehicle. She also was found to have minor injuries to the chest and her lower leg. At trial, both Lieutenant Donald Goulooze, an accident reconstructionist, and Dr. David Start, the medical examiner, testified that the chest and leg injuries possibly indicated that Mrs. White was first struck by the vehicle while it was reversing, and the injury to her chest was caused by the spare tire on the back of defendant's truck. Lt. Goulooze further testified that the injury to Mrs. White's shin was consistent with the height of the trailer hitch on the back of defendant's truck.

At trial, the prosecution's opening statement clearly demonstrated that its theory was that Mrs. White got out of the vehicle while it was stationary. While she was standing behind the vehicle, defendant put the vehicle in reverse, struck Mrs. White and knocked her down. Then, while Mrs. White was on the ground, defendant pulled forward and ran over her skull, which killed her. In contrast, defendant's opening statement demonstrated his theory that Mrs. White, in a state of extreme intoxication, exited the moving vehicle and, in the process, her head became situated in the path of the vehicle's rear tire and was crushed.

In support of their theories, the parties offered the various pieces of physical evidence and testimony discussed above. At the close of testimony, the parties offered their closing arguments. Once again, the prosecution maintained that Mrs. White was killed after first being struck by the vehicle as it reversed. Defendant contested that theory and argued that she exited the moving vehicle. Then, in the prosecution's rebuttal, the prosecutor stated that defendant's theory, even if true, did not break the causal chain. The prosecutor stated that even if Mrs. White

stepped from the moving vehicle and fell under the tire, defendant could still be convicted because his operation of the vehicle was, nonetheless, a proximate cause of Mrs. White's death.

After closing arguments, defendant requested that the judge instruct the jury that in order to convict defendant of negligent homicide, each juror needed to agree regarding which of defendant's negligent acts caused the death. Defense counsel specifically noted that it was concerned that some jurors might have been persuaded that defendant hit Mrs. White while in reverse while others may have concluded that there was some other negligent act. The trial court stated that the request was denied because the court "did not find that in the statute anywhere and it was not in the standard jury instructions." After the jury was instructed and deliberated, it convicted defendant of negligent homicide.

Defendant argues on appeal that the trial court erred in denying his request to instruct the jury regarding unanimity. We disagree. "We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

As defendant argues and the prosecution acknowledges, the Michigan Constitution entitles criminal defendants to unanimous jury verdicts. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Defendant asserts that, because there were multiple theories presented regarding the negligent act that led to Mrs. White's death, he was entitled to have the jury instructed regarding the unanimity requirement. Our Supreme Court explained in *Cooks*, 446 Mich at 512-513, that

a specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice.

While defendant asserts that the jurors may have disagreed regarding the act that led to Mrs. White's death, the prosecution's brief on appeal asserts that there was only one theory of liability at trial: "The defendant operated a motor vehicle with an unlawful blood alcohol level and ran over his wife thereby causing her death." According to the prosecution, there is no material distinction between the theory that defendant first hit Mrs. White while backing up and the theory that the vehicle only struck Mrs. White while driving forward. In this instance there was no dispute that defendant operated a motor vehicle with a blood alcohol content that rendered him in violation of law, thus raising the inference that he was negligent. Whether the deceased met her demise as a consequence of defendant backing over her person or running her over as she exited the vehicle does not constitute a material difference when determining if he is guilty of the crime of negligent homicide. While the nature of the impact might be of some consequence for a specific intent crime, negligent homicide is a general intent crime. Thus the denial of the instruction did not run afoul of *Cooks*.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens