STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2012
v	No. 307339 Berrien Circuit Court
PAIGE LEAH KARSTEN, Defendant-Appellant.	LC No. 2010-002230-FH

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right her conviction by a jury of operating a motor vehicle while intoxicated causing death, MCL 257.625(4). The trial court sentenced defendant to 19 months' to 15 years' imprisonment, with credit for one day served. This case arises out of a fatal car crash that occurred on Eastbound I-94 in Benton Township. Defendant had a blood alcohol level of 0.18 grams per deciliter (g/dL). Primarily at issue in this appeal is evidence of the victim's blood alcohol level, which was measured to be 0.06 g/dL approximately an hour after the crash. We affirm.

The crash itself was, unfortunately, not fully investigated because the police were not aware until later that the victim—who initially appeared alert, conscious, and not physically injured—had died of internal injuries. According to the computer in defendant's car, she decelerated by 19.5 miles an hour in 78 milliseconds during the crash, consistent with hitting a wall. It was not known how fast each of the vehicles were travelling, although defendant testified to the Secretary of State that she had been exceeding the speed limit by 5 to 10 miles an hour, and a Canadian truck driver reported that the victim was driving approximately 10 miles an hour below the speed limit. Defendant had bloodshot eyes and slurred speech and failed a field sobriety test at the scene. Her vehicle was found in the middle lane with damage to its front, and the victim's vehicle was found in the ditch on the right side of the road with damage to its left side and rear. Defendant stated at the scene that "the other car had stopped" in front of her and that she could not stop herself in time, although she also stated that the victim's car had turned in front of her. The victim apparently stated that he had been in the left hand lane and getting over to exit the freeway. There was no eyewitness testimony or crash reconstruction.

Dr. P. Dennis Simpson, an expert in "retrograde extrapolation of alcohol levels" and "the affect [sic] of alcohol consumption on the operation of a motor vehicle," opined that, depending

on the precise time of the crash, the victim's blood alcohol level would have been approximately 0.08 g/dL. At all relevant times, a blood alcohol level of 0.08 g/dL was the legal limit for driving while intoxicated. MCL 257.625(1)(b). Dr. Simpson's testimony was, however, not presented to the jury. Defendant contends that trial counsel was ineffective for not doing so and, additionally, that the trial court erred by not permitting trial counsel to present other evidence of the victim's intoxication. We disagree.

It is not disputed that defendant operated her motor vehicle with a blood alcohol content exceeding 0.08 g/dL and that she voluntarily decided to drive after knowingly consuming alcohol; consequently, the only element of her convicted offense at issue is causation. See *People v Schaefer*, 473 Mich 418, 434; 703 NW2d 774 (2005), overruled in part on other grounds by *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006). The "causation" element of MCL 257.625 requires a showing of factual causation and proximate causation. *People v Feezel*, 486 Mich 184, 194-195; 783 NW2d 67 (2010). Ordinary negligence is reasonably foreseeable, so it is not a superseding cause that would sever proximate causation. *Id*. at 195. Gross negligence is not reasonably foreseeable, so it is a superseding cause that severs proximate causation. *Id*. at 195-196. Accordingly, when a victim's conduct is grossly negligent, the conduct "cut[s] off proximate cause" and relieves the defendant of criminal liability. *Id*. at 196 n4. Gross negligence "means wantonness and disregard of the consequences which may ensue[.]" *Id*. at 195, quoting *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914). "'Wantonness' is defined as '[c]onduct indicating that the actor is aware of the risks but indifferent to the results[.]'" *Id*. at 196, quoting Black's Law Dictionary (8th ed).

Defendant's theory is that the victim in this case was grossly negligent, thereby relieving her of criminal responsibility for his death. We disagree.

The instant matter turns on actual causation, which in turn depends on actual conduct. Our Legislature has essentially created a presumption that a defendant-driver's intoxication while driving constitutes gross negligence. *Schaefer*, 473 Mich at 429; *People v Lardie*, 452 Mich 231, 251; 551 NW2d 656 (1996). However, no such presumption has been established as to victim-drivers' illegal intoxication. *Feezel*, 486 Mich at 196 n 5. We decline to create a bright-line rule linking a particular blood alcohol level to gross negligence on the part of a victim driver.

This is not to say that evidence of a victim-driver's intoxication is necessarily inadmissible. Indeed, in *Feezel*, our Supreme Court held that the trial court abused its discretion by refusing to admit evidence of the pedestrian's intoxication. *Id*. at 216. Our Supreme Court reasoned that the evidence was relevant because it made the pedestrian's gross negligence more or less probable. *Id*. at 198-199; see MRE 401. The Court stated,

> Depending on the facts of a particular cares, there may be instances in which a victim's intoxication is not sufficiently probative, such as when the proofs are insufficient to create a question of fact for the jury about whether the victim was conducting himself or herself in a grossly negligent manner. Generally, the mere fact that a victim was intoxicated at the time a defendant committed a crime is not sufficient to render evidence of the victim's intoxication admissible. *Id* at 198-199.

The Court went on to indicate that victim's extreme intoxication was highly probative of the issue of gross negligence, and therefore causation. *Id* at 199. No such bizarre behavior exists in the instant case to warrant a similar explanation.

The physical evidence in this case shows that the victim's car sustained damage to its left and rear and found in the ditch on the right-hand side of the road. Defendant's car was found in the middle lane with damage to its front end. It was established that defendant was speeding and the victim was travelling below the speed limit. Construing all of the available evidence in the light most favorable to defendant, the victim may possibly have attempted to change lanes and decelerate too quickly in front of the defendant—considering the physical evidence, it would have been impossible for the victim to have "stopped," or even to have been travelling at an unsafely low speed. Furthermore, considering the location of the damage to the victim's vehicle, the victim would already have been at least most of the way over to defendant's right. There is, in short, absolutely no evidence of any erratic or unsafe driving on the part of anyone but defendant. Consequently, there was no potentially grossly negligent conduct that the victim's theoretical blood alcohol level could have been relevant to explain.

"To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). A defendant must show "the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The failure to present testimony "only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). When a defense is not supported by the law or the facts, defense counsel is not rendered ineffective by failing to present the defense. See *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004), overruled in part on other grounds by *People v Monaco*, 474 Mich 48; 710 NW2d 46 (2006).

We find that there was no evidence of gross negligence by the victim, and any evidence of the victim's intoxication neither provided nor supported any such evidence. Consequently, the evidence of the victim's intoxication was properly not admitted. Therefore, defense counsel could not have been ineffective. For the same reason, we reject defendant's contention that the trial court erred by excluding the same evidence from being presented to the jury. We emphasize, however, that our conclusion in this regard is strictly limited to the facts of the instant case.

Defendant additionally contends that the trial court should not have qualified Benton Township Police Deputy Chief Carl Robert DeLand as an expert. We disagree. DeLand examined the brake lights from defendant's vehicle for a phenomenon called "hot shock," essentially a characteristic deformation caused by heat during a crash, and concluded that they did not appear to have been activated during the crash. DeLand testified that he had received training in the concept of "hot shock" at Michigan State University. The inspection of brake-light filaments for hot shock is "not within the knowledge of a layman," so DeLand's unusual knowledge of hot shock was adequate to constitute expert knowledge. See *People v Ray*, 191

Mich App 706, 708; 479 NW2d 1 (1991). Further, the prosecution was able to lay a foundation for DeLand's expert testimony by showing that DeLand had "knowledge . . . training, or education" on the topic of hot shock. MRE 702.

Defendant argues that DeLand's knowledge was limited to a one-day class, but according to his testimony, he also reviewed literature on the topic. Defendant correctly notes that DeLand did not inspect her vehicle until three days after the crash, during which time it could conceivably have been tampered with. However, DeLand explained that although it would have been easy to create a false *positive* result, i.e., a false showing that the brakes had been activated, it would be impossible to create a false *negative*. Because DeLand's findings were that the brakes had not been activated, the delay could not have prejudiced defendant's case. We note that DeLand did concede the limitation of this investigatory technique that it only tested the brake lights themselves, and so it would be possible for the brakes to have been activated if, say, the bulb had been broken. However, that limitation would go to weight rather than admissibility.

In summary, on the specific and particular facts of this case, the trial court did not err and trial counsel was not ineffective for not presenting evidence of the victim's intoxication to the jury. Furthermore, the trial court did not err by qualifying DeLand as an expert.

Affirmed.

/s/ Jane E. Markey
/s/ Amy Ronayne Krause