STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2012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

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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SHAPIRO, J. (*dissenting*).

I respectfully dissent as I conclude that *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010) mandates reversal. In that case, our Supreme Court made three determinations each of which is relevant to our conclusion in this case. First, the Court held that the offense of OWI causing death, MCL 257.625 contains an element of causation. *Id*. at 192. Second, the Court held that gross negligence by the decedent may constitute an intervening superseding cause that severs the chain of causation necessary for conviction. *Id*. at 195. Third, the Court held that evidence that the decedent was intoxicated is admissible to support a claim of gross negligence where there is other evidence of gross negligence. *Id*. at 202. The Court explained that a victim's intoxication is relevant to the issue of gross negligence because intoxication may affect the "ability to perceive the risks" posed by the surrounding environment and the potential to respond accordingly. *Id*. at 199.

In this case, the decedent was driving on a highway while under the influence of alcohol. Blood drawn from the decedent at the hospital one hour after the crash and after he had been supplied with intravenous fluids revealed a blood alcohol level of .06. An expert retained by the defense opined that given the passage of time and the hydration, the decedent's blood alcohol level at the time of the crash was between .075 and .082. Under *Feezel*, the hospital blood test result and the expert's extrapolation based upon it would be admissible if there is other evidence giving rise to a question of fact as to gross negligence on the part of the decedent. *Id*. at 202.

Such evidence was present. The police testified that when questioned at the scene, defendant stated that the decedent's car had suddenly slowed or stopped immediately before the

accident.[1] In addition, defendant asserts that officers in the on-scene video recording stated that the victim appeared intoxicated. There was also evidence suggesting that the decedent was not wearing his seatbelt at the time of the accident and while that would not on its own rise beyond ordinary negligence, it has to be considered along with the evidence that the decedent suddenly slowed or stopped.

As defense counsel did not seek to admit evidence of the decedent's blood alcohol level at trial, the issue must be considered within the confines of a claim of ineffective assistance of counsel. "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).

The first question is whether trial counsel's failure to present the expert's retrograde extrapolation to the trial court was objectively unreasonable. *Werner*, 254 Mich App at 534. I would conclude that it was objectively unreasonable. Well before trial and before the defense had consulted an expert, the prosecution brought a motion in limine to exclude any evidence that the decedent was under the influence of alcohol. The motion was heard on March 3, 2011. During the argument, the trial court noted that .06 was not an unlawful level of blood alcohol and defense counsel responded by informing the court that it intended to obtain expert testimony on the actual blood alcohol level at the time of the crash: "we intend to bring an expert on this issue . . . to testify as to the issue of the blood alcohol content and the effect of that." The trial court characterized the issue as "as close a call as it is." The court concluded that based on the evidence presently before it, it would not permit introduction of the decedent's blood alcohol level.

However, the trial court made explicit that its ruling granting the prosecution's motion in limine would be reconsidered if trial counsel presented evidence that the victim's blood alcohol was in fact at .08 or higher at the time of the crash. The court noted that the defense intended to obtain an expert's opinion and stated:

> [T]hat testimony may come in at a future date. . . . [I]n the event there is expert testimony—because it's so close, obviously, .06 to .07 – but, in the event that there is some expert testimony, that, in fact, because of the IV and because of the metabolic rate and the time from the accident to the blood draw, that his blood alcohol level was more likely at the time of the collision .08 or .075. Again, that's one factor to put into that balancing test. I'm not certain that's, in and of itself, is going to be enough to shift the balance to the defense. But, clearly, as the trial progresses, I'll let you revisit this issue if you can develop additional facts . . . .

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[1] While the statement was made by defendant it was nonetheless valid evidence supporting her argument regarding the victim's alleged gross negligence and was properly admitted as it was introduced by the prosecution under MRE 801(d)(2).

Defense counsel then promptly obtained an expert review as to the decedent's blood alcohol level. The expert opined that at the time of the accident, decedent's blood alcohol level was between .075 and .082. But despite the court's expressed willingness to revisit the motion in limine and the court's indication that evidence that the level was closer to .08 would be a significant factor, defense counsel did not ask the court to revisit the question based on this new evidence.

The sole defense in this case was that the decedent's driving was grossly negligent, breaking the chain of causation. Evidence that the decedent was intoxicated would obviously have strengthened that defense and presented no disadvantages for the defense. Thus, there is no strategic reason for choosing not to inform the trial court of the expert's conclusions and moving to admit those conclusions.[2] I would conclude that trial counsel's performance in this regard was objectively unreasonable.

The second question is whether proper action by defense counsel would have reasonably likely resulted in a different outcome. I would conclude that this standard was met since evidence that the decedent was intoxicated would have bolstered the evidence that he acted with gross negligence because of a diminished ability to perceive the risks posed by the surrounding environment and his actions. Thus, there is a reasonable probability that, but for trial counsel's error, the result of the proceedings would have been different. *Werner*, 254 Mich App at 534.[3]

I would reverse and remand for a new trial.

/s/ Douglas B. Shapiro

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[2] If the trial court had declined to admit the evidence, it would have been reversible error.

[3] I respectfully disagree with the majority's characterization of the evidence concerning causation and believe the interpretation of those facts are best left to a jury. The majority asserts that given the physical evidence in this case, it would have been "impossible" for the victim's vehicle to have stopped or sharply slowed immediately before the accident. But, as the majority correctly observes, an expert testified that the change in velocity of defendant's vehicle was consistent with hitting a wall. In other words, the change in velocity of defendant's vehicle was consistent with striking a fully stopped vehicle, which contradicts the majority's assertion that dangerous or grossly negligent driving by the victim was "impossible." Certainly, a reasonable jury could conclude that stopping on an interstate highway indicates gross negligence just as walking in the middle of a dark roadway was evidence of gross negligence in *Feezel*.