# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STARR LYNN KIOGIMA,

Defendant-Appellant.

UNPUBLISHED
July 26, 2016

No. 326159
Eaton Circuit Court
LC No. 14-020114-FC

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Before: TALBOT, C.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right her convictions for second-degree murder, MCL 750.317, and operating a motor vehicle under the influence (OUIL) causing death, MCL 257.625(4). The trial court sentenced defendant to 25 to 50 years' imprisonment for the second-degree murder conviction and 10 to 15 years' imprisonment for the OUIL causing death conviction. Because the evidence was sufficient to support defendant's convictions and she was not denied the effective assistance of counsel, we affirm.

This case arises from a fatal crash that occurred on I-96 on the afternoon of September 11, 2013. As defendant attempted to enter the highway, she drove her vehicle across some grass and crashed into a vehicle driven by Raymond Anderson. Anderson's vehicle was pushed across the lanes of traffic into a guardrail. Defendant's vehicle rolled over several times and defendant's four-year old daughter was ejected from the car. Attempts by passersby to resuscitate the child proved unsuccessful. Defendant was intoxicated at the time of the accident, and tests also showed the presence of controlled substances in her blood. The jury convicted defendant as noted above. Defendant now appeals as of right.

## I. SUFFICIENCY OF EVIDENCE

Defendant argues that there was insufficient evidence adduced at trial to convict her of second-degree murder. Specifically, relying on *People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998), defendant emphasizes that drunk driving alone is not sufficient to establish malice and she argues that, in this case, there was no evidence of "misconduct that goes beyond that of drunk driving," such as evidence of reckless driving before the accident or other evidence to indicate that defendant should have been aware that she was too intoxicated to drive. In these

circumstances, defendant maintains that the prosecution failed to establish beyond a reasonable doubt that she acted with the malice necessary to sustain a second-degree murder conviction.

We review a challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to establish the elements of a crime. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Moreover, questions of witness credibility and the weight of the evidence are issues for the jury; and, we will "not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification. *People v Henderson*, 306 Mich App 1, 9; 854 NW2d 234 (2014). Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 9-10 (citation omitted). These are alternative means of proving malice. *People v Johnson*, 187 Mich App 621, 629; 468 NW2d 307 (1991). Consequently, "second-degree murder does not mandate a finding of specific intent to harm or kill." *Goecke*, 457 Mich at 466. Rather, malice may be "inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Reeves*, 202 Mich App 706, 712; 510 NW2d 198 (1993) (citation omitted). As the Court in *Goecke* explained:

> Because depraved heart murder is a general intent crime, the accused need not actually intend the harmful result. One way of expressing this concept is that malice may be established even absent an actual intent to cause a particular result if there is wanton and wilful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm. [*Goecke*, 457 Mich at 466.]

Whether a defendant acted with malice "is to be determined from all the facts and circumstances of the crime." *Reeves*, 202 Mich App at 712.

In the context of drunk driving in particular, not all drunk driving that leads to death involves malice warranting a second-degree murder conviction. *Goecke*, 457 Mich at 468-469. See also *People v Werner*, 254 Mich App 528, 533; 659 NW2d 688 (2002). In other words, drunk driving alone is not sufficient to establish malice. *Goecke,* 457 Mich at 469. Instead, malice requires "egregious circumstances," and to sustain a second-degree murder conviction there must be "a level of misconduct that goes beyond that of drunk driving." *Id.* at 467, 469. See also *Werner*, 254 Mich App at 533. For example, although there are no set factors for determining whether an intoxicated driver acted with malice, in *Goecke*, the Court found the requisite evidence of malice in three cases that involved misconduct beyond drunk driving around the time of the fatal accident, including evidence of traffic violations, speeding, minor collisions and near collisions, and erratic driving. See *Goecke*, 457 Mich at 470-473.

Likewise, in the present case, we conclude that the prosecutor presented sufficient evidence of misconduct beyond drunk driving to establish malice and sustain defendant's second-degree murder conviction. To begin with, the evidence clearly established that defendant was operating a motor vehicle while intoxicated. Tests on defendant's blood drawn in the emergency room showed that defendant had an ethanol blood alcohol level of 285 milligram per deciliter and later testing, more than two hours after the accident, detected the presence of 0.15 grams of alcohol per 100 millimeters of blood. Two controlled substances—Oxycodone, a schedule 2 narcotic analgesic, and Lorazepam, a schedule 4 drug—were also found in defendant's blood. Evidence established that the potential side effects of Oxycodone include somnolence and dizziness, while Lorazepam can cause sedation, confusion, and lethargy. And, these side effects can be enhanced by mixing the drugs with alcohol. In short, the evidence amply demonstrates that defendant was in no condition to drive and yet she chose to drive after having consumed a significant amount of alcohol, which she coupled with two controlled substances.

In addition to this evidence of inebriation, the evidence shows that defendant did more than operate her vehicle while intoxicated. Defendant greatly exacerbated the risks of drunk driving by also choosing to operate her vehicle on a highway at a high rate of speed, by failing to properly restrain her child, and by disregarding basic rules of the road. In particular, she entered I-96 traveling between 76 to 79 miles per hour. By her own admission, defendant failed to keep her eyes on the road, and instead attempted to merge with her attention focused on the backseat of her car rather than the highway traffic. Defendant then failed to stay in the lines, or even on the road, as she merged. She instead crossed a grassy area before colliding with Anderson's vehicle. Indeed, there was testimony from eyewitnesses that defendant entered the highway at a "right angle" and drove "straight across 90 degrees to [traffic]" toward Anderson's vehicle, meaning that she was travelling perpendicular to the flow of traffic. Notably, defendant undertook these reckless maneuvers without even affording her daughter the protections of an appropriate restraint in the car.[1] Defendant knew the dangers of failing to properly restrain a child as evinced by testimony that, during a previous traffic stop, she had been cited for "unrestrained child" and educated on the need to use a child restraint seat. Yet, despite this knowledge, defendant drove drunk at a high rate of speed with an unrestrained child in her vehicle as she crossed a grassy area and drove into Anderson's vehicle. Taken as a whole, this level of misconduct goes beyond that of mere drunk driving, and a rational jury could conclude that defendant acted in willful and wanton disregard of the likelihood that her actions would

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[1] On appeal, defendant debates whether the evidence established that the child was not restrained, or not properly restrained, in the vehicle. At trial, the prosecutor and defendant presented somewhat opposing expert testimony on this point. To the extent there were conflicts in the evidence, it was for the jury to assess the credibility of the experts and to decide whether the child was appropriately restrained. See *Dunigan*, 299 Mich App at 582. Consequently, the testimony of defendant's expert does not render the evidence insufficient; rather, we resolve all credibility conflicts in favor of the jury verdict. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

result in death. Thus, contrary to defendant's arguments, the evidence was sufficient to establish malice and to support her second-degree murder conviction.

## II. BINDOVER

Defendant also argues on appeal that the evidence presented at the preliminary examination was insufficient to support her bindover to circuit court on a charge of second-degree murder. However, "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004). Consequently, because defendant was fairly convicted of second-degree murder at trial, she cannot appeal the sufficiency of the evidence presented at the preliminary examination. See *id.*; *People v Bosca*, 310 Mich App 1, 45; 871 NW2d 307 (2015).

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that her trial counsel rendered ineffective assistance. In particular, defendant contends that counsel performed ineffectively by (1) failing to pursue a motion to quash the bindover in the circuit court and (2) failing to renew a request for jury instructions on an accident defense.

Because defendant did not move in the trial court for a new trial or an evidentiary hearing, her claim is unpreserved and this Court's review is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). To establish ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defense counsel is afforded "broad discretion" in the handling of cases, *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994), and a defendant claiming ineffective assistance must overcome a strong presumption that counsel's performance constituted sound strategy, *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). "Failing to request a particular jury instruction can be a matter of trial strategy." *Dunigan*, 299 Mich App at 584. "This Court will not substitute its judgment for that of counsel regarding matters of strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

First, defendant argues that her trial counsel's abandonment of the motion to quash filed by her first attorney at the preliminary examination hearing amounted to ineffective assistance of counsel. In particular, defendant's original attorney sought a dismissal of the second-degree murder charge in the district court at the close of the preliminary examination. The district court denied this request, and defendant was bound over for trial. Before the circuit court, a motion to quash was filed, but newly appointed defense counsel then withdrew the motion. Counsel was not ineffective on this basis. In binding defendant over for trial, the district court found sufficient indication of malice in the evidence of defendant's intoxication coupled with her child's unrestrained presence in the car, defendant's inattention to the roadway, and defendant's entry on the expressway over the grass, which caused the accident. The district court did not

abuse its discretion by finding that this evidence was sufficient to support a bindover, meaning that counsel was not ineffective for failing to pursue a futile motion to quash. See *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011). And, in any event, given that there was sufficient evidence introduced at trial to support defendant's convictions, she cannot show prejudice arising from the bindover. See *Wilson*, 469 Mich at 1018. Consequently, defendant's claim is without merit.

Defendant also argues that trial counsel should have renewed a request for a jury instruction on the defense of accident. Specifically, before trial, defendant's attorney requested an instruction on the defense of accident in keeping with M Crim JI 7.1. The prosecutor objected and the trial court refrained from deciding the issue until the close of proofs. On the final day of trial, during a discussion of jury instructions, defense counsel requested an involuntary manslaughter instruction, which the trial court granted. Defense counsel did not make another request for an instruction on the defense of accident, and such an instruction was not read to the jury. Counsel then argued during closing that "[t]his is not murder." Counsel stated that, as a matter of "common sense," it was "unreasonable" to say that defendant was a "murderer" simply because she was driving over 70 mph and made some errors while driving, including looking in the back seat while entering the highway.

On the record before us, it appears that counsel made the strategic decision to propose a lesser finding of involuntary manslaughter rather than arguing that defendant should be found not guilty on the basis of accident as a defense to murder, and we cannot conclude that this was unreasonable on the facts of this case. That is, accident may be a defense to homicide, but a defendant may only be completely excused in the killing of a human being on this basis if "the death is the result of an accident and the actor was not criminally negligent." *People v Morrin*, 31 Mich App 301, 310; 187 NW2d 434 (1971). In other words, accident is not a defense to involuntary murder; rather, the defense of "'accident' is subsumed within the charge of involuntary manslaughter because the jury must consider whether the defendant's conduct was negligent, careless, reckless, wilful and wanton, or grossly negligent." *People v Hess*, 214 Mich App 33, 37-39; 543 NW2d 332 (1995). Given defendant's conduct on the day in question, counsel could have reasonably concluded that a claim of accident was not worth pursuing, but that the jury might be persuaded to return a verdict of involuntary manslaughter, which would be consistent with a claim of accident while acknowledging the criminal negligence involved. See generally *id.* at 37-39 (discussing defense of accident in relation to involuntary manslaughter). Although defense counsel would not be precluded from seeking an accident instruction simply because there was evidence of criminal negligence, *People v Hawthorne*, 474 Mich 174, 178 n 2; 713 NW2d 724 (2006), on the facts of this case, counsel's choice of defense does not evince deficient performance. See *People v Chapo*, 283 Mich App 360, 372; 770 NW2d 68 (2009).

Moreover, even if counsel should have requested an accident instruction, defendant has not shown prejudice. While the accident defense contained in M Crim JI 7.1 was not read to the jury, the jury was thoroughly instructed on the elements of second-degree murder, including the malice requirement and the fact that malice "requires more than mere drunk driving." The instructions on second-degree murder made it clear that an unintentional accident would be inconsistent with a finding that defendant acted with the malice required for murder. Cf. *Hawthorne*, 474 Mich at 185. Further, as noted, the defense of "accident" is subsumed within involuntary manslaughter, *Hess*, 214 Mich App at 39, and the jury was instructed on involuntary

manslaughter. It follows that, if the jury believed defendant's conduct to be accidental or if the jury had any doubts that defendant acted with malice, it would have convicted defendant of involuntary manslaughter, which does not require malice. Cf. *Hawthorne*, 474 Mich at 185. Instead, the jury found malice and returned a verdict of guilty as to second-degree murder. Given the instructions read to the jury and the jury's second-degree murder verdict, defendant cannot show prejudice arising from counsel's failure to request an accident instruction. Thus, her ineffective assistance of counsel claim is without merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra

**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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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 26, 2016 |
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Before: TALBOT, C.J., and HOEKSTRA and SHAPIRO, JJ.

SHAPIRO, P.J. (*dissenting*)

I respectfully dissent. Because there is insufficient evidence of malice as defined in *People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998), I would vacate defendant's second-degree murder conviction, MCL 750.317. I would, however, affirm her conviction of operating a motor vehicle under the influence (OUIL) causing death, MCL 257.625(4), and her sentence of 10 to 15 years imprisonment on that conviction.[1]

In addition, I write to respectfully suggest that the Michigan Supreme Court further clarify the legal standards to be applied in determining when a defendant may be charged with and convicted of second-degree murder arising out of a drunk-driving fatality. The Supreme Court first allowed such common-law prosecutions in *Goecke* in 1998. In my view, the common-law standards defined in *Goecke* are too imprecise to provide sufficient guidance to juries, and so challenge the principle of consistent application of a defined rule of law.

## I. BASIS FOR DEFENDANT'S CONVICTION

Defendant's actions led to her daughter's tragic and unnecessary death. Defendant's blood alcohol count was .21 shortly after the crash that occurred around 1:30 p.m. According to her statement to the police at the scene, defendant drank very heavily the previous night before going to bed at 4:00 a.m. and when she woke up at 8:00 a.m. she did not think she was still drunk. It appears the effects of the alcohol may have been mitigated by the fact that defendant,

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[1] Given this result, I would not reach the additional questions presented in defendant's brief on appeal.

an alcoholic, had a high tolerance, but her blood alcohol content was nevertheless a particularly high level, more than twice the legal limit.

After waking, defendant stated that she got her older daughter off to school, prepared a lunch for her husband, and drove to his worksite to drop it off. Defendant's four-year-old daughter was in a booster seat in the backseat of defendant's vehicle. On the way home, defendant stopped for gas and bought her daughter some candy. She stated that she put her daughter back in the booster seat and buckled her in with the seat belt, but not the shoulder harness, and she presented expert testimony to that effect. The prosecution, however, presented testimony from an expert that the child was not buckled in at all.

There was conflicting evidence as to defendant's speed while she was driving on the entrance ramp. Several witnesses testified that she was driving under the posted limit, whereas an accident reconstructionist testified that she was traveling 76 to 79 miles per hour. On the ramp, defendant opened the candy and turned to hand it to her daughter who had been asking for it. Defendant took her eyes off the road at that moment. The vehicle traveled onto the grassy divider between the entrance ramp and the right lane of the highway and defendant lost control of it. In the resulting rollover crash, defendant's daughter was thrown from the vehicle and killed.

In order to convict defendant of second-degree murder, the prosecution had to prove that she acted with malice. In Michigan, malice sufficient to convict a defendant of second-degree murder is defined by common law, not by statute. Malice takes three forms: "the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984). In this case, the prosecution did not allege that defendant specifically intended to kill or inflict great bodily harm, or any harm, on her daughter. Defendant was charged solely on the basis of the third form of malice, i.e., "the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." Traditionally, this form of malice is the basis for depraved-heart murder.[2]

In *Goecke*, our Supreme Court held that "drunk driving alone is [not] sufficient to establish probable cause of malice." *Goecke*, 457 Mich at 469. Nevertheless, the Court held that second-degree murder may be charged where the drunk driver's other actions are such that, combined with the intoxication, a jury could find that the driver acted with "wanton and wilful disregard of the likelihood that the natural tendency" of the defendant's conduct was to cause death or great bodily harm. *Id*. at 464, 468-469.

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[2] The precise terms used to define malice sufficient to convict a defendant of depraved-heart murder are varied and, as discussed below, would benefit greatly from clarification. However, regardless of which variation is used, I do not believe that sufficient evidence was presented to demonstrate that defendant acted with malice in this case.

In *Goecke* there were three cases consolidated for appeal: *People v Goecke*, *People v Hoskinson*, and *People v Baker*. An examination of the facts in each case is helpful.

> In *Hoskinson*:
> Defendant was staggering when he left the bar [after drinking for two hours]. Testimony indicated that defendant may have refused the offer of one of his friends to drive. Defendant twice drove his vehicle into a parked car while trying to leave the parking lot. He next drove through a residential neighborhood at speeds of approximately forty to sixty miles an hour. Speed dips were located at almost every intersection throughout this neighborhood. Defendant had driven down this street numerous times and was aware of the speed dips.
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> A vehicle traveling westbound just ahead of the defendant was stopped at a stop sign. Defendant swerved into the eastbound lane and passed the stopped vehicle, and then immediately swerved back into the westbound lane in order to avoid hitting an oncoming vehicle. Defendant hit a speed dip and lost control of his vehicle. He hit the westbound curb, swerved left, then swerved right, and struck a car parked on the right side of the street. Defendant jerked his wheel to the left, accelerated, drove across the eastbound lane, over the curb, and across some grass where he hit [a] four-year-old [child] who was riding her tricycle on the sidewalk. . . .
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> An officer who was called to the accident scene testified that defendant approached him and admitted that he was the driver. A blood alcohol test disclosed that defendant's blood alcohol level was 0.22 percent. In a statement to the police, defendant admitted that he knew he was drunk when he left the bar and that he was driving too fast. Testimony indicated that before the accident occurred the occupants of defendant's car told defendant to slow down. [*Goecke*, 457 Mich at 454-455.]

In *Goecke*, the defendant drank approximately seven to nine bottles of beer while sitting in his car in the parking lot of a liquor store. *Id*. at 448. When a police car drove into the lot, the defendant drove off in order to find a different place to drink and continued to drink while he drove around. *Id*. at 449. Later, while doing an estimated 70 to 80 miles per hour on a city road, the defendant nearly struck a van. *Id*. The van driver attempted to tell the defendant to slow down. *Id*. There was also testimony that the defendant thereafter drove through a red light without hitting anyone and that he then drove through a second red light, this time striking a vehicle and killing its driver. *Id*. at 449-450. "Approximately fifteen to twenty empty beer bottles were observed on the floor of the defendant's car." *Id*. at 450. At the scene of the accident the defendant stated: "I was going way too . . . fast. I have had to[o] . . . much to drink . . . . I should not have been driving. I know I'm drunk." *Id*. (first alteration added).

The defendant in *Baker*, like the defendants in *Goecke* and *Hoskinson*, was driving excessively fast—he was driving at twice the speed limit on a city road while intoxicated. *Id*. at 451. He approached an intersection where he had a red light. *Id*. at 451, 471. He saw multiple cars crossing the intersection directly in front of him as he sped towards it. *Id*. at 471. Nevertheless, without braking, the defendant continued into the intersection at about 70 miles per

hour. *Id*. at 452-453 n 7. The defendant narrowly avoided hitting two cars before striking a third and killing its driver and passenger. *Id*. at 451.

After examining the facts of each case, the *Goecke* Court concluded that the defendants' convictions were justified by behavior that rose to a level of culpability beyond that demonstrated only by driving while intoxicated. *Id*. at 469-473. The facts in those cases, however, are far afield from the facts in the instant case. In the *Goecke* cases, the defendants were operating their vehicles at high speed on local streets and repeatedly ignored traffic control devices at busy intersections. They failed to stop at crashes and/or near misses that occurred just minutes or seconds before the fatal crash, despite the fact that these events could not have left any doubt that continued driving represented a clear and present danger. Two of the *Goecke* defendants were warned by occupants of their vehicle or other vehicles that they were unfit to drive and their driving was out of control. In sum, the *Goecke* defendants did not merely ignore the general risk of driving while intoxicated. They also ignored the immediate and direct evidence that their driving on that particular journey had already nearly resulted in catastrophe and that the likelihood of serious injury or death was not merely a possibility but was extremely probable absent an immediate change.

In the instant case, however, the facts do not rise to that level of culpability. There was no evidence that defendant had a prior accident or near miss that morning. There was no evidence that anyone urged her to stop driving.[3] There was no evidence of her having driven recklessly until the incident on the entrance ramp. Nor was there any evidence that she had ever been ticketed or arrested for drunk driving prior to this incident. See *People v Werner*, 254 Mich App 528, 531, 534; 659 NW2d 688 (2002) (upholding a second-degree murder conviction when the facts showed that the defendant drove drunk despite knowledge that drinking heavily had caused him to black out in the recent past). Defendant's daughter's death was caused by four things: (1) defendant's consumption of alcohol and prescription drugs, (2) defendant's failure to properly seatbelt her daughter into her the booster seat,[4] (3) defendant's failure to keep her eyes on the road while on the highway entrance ramp, and (4) her speed on the entrance ramp of six to nine miles over the speed limit. Under such circumstances, defendant's actions were grossly

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[3] To the contrary, a gas station clerk and a store owner who saw defendant that morning before the crash testified that they did not think she was drunk or should not be driving.

[4] The prosecution placed great emphasis on defendant's failure to properly seatbelt her daughter. While failing to do so had a catastrophic result and was negligent, I question whether it can be legally viewed as evidence of malice. By statute, failing to properly restrain a child in a vehicle is a civil infraction, not a crime. See MCL 257.710d (child less than four years old) and MCL 257.710e(5) (children between the ages of four and sixteen). The failure to do so "may be considered evidence of negligence." MCL 257.710e(7). However, the recovery of damages for such negligence shall not be reduced by more than 5%. MCL 257.710e(7). Moreover, the requirement that children be seat belted is still not universal. For instance, our law does not require children to be seat belted on school buses or taxicabs. MCL 257.710d(3); MCL 257.710e(1) and (2).

negligent, but did not rise to the level of malice necessary for depraved-heart murder. Accordingly, I would vacate her second-degree murder conviction.

## II. THE NEED FOR CLARIFICATION OF THE *GOECKE* STANDARD

Beyond the appeal we decide today, this case serves to point out the need for additional guidance from the Supreme Court. Since *Goecke* was decided in 1998, there has been a dearth of caselaw addressing the meaning of depraved-heart murder within the specific context of drunk-driving fatalities.

Depraved-heart murder has always been a nebulous concept. Until *Goecke*, however, its application appears to have been limited to factual scenarios that were so clear that the vagueness of the concept could be ignored. Classic examples of depraved-heart murder include firing a bullet into a room that the defendant knows is occupied by several people, starting a fire at the door of an occupied dwelling, or shooting into a moving vehicle. See 2 LaFave, Substantive Criminal Law (2d ed), § 14.4, p 440.[5] In such situations, the likelihood of death or injury is overwhelming; indeed, absent particularly good fortune someone is almost certain to be hurt or killed. Moreover, anyone taking the action would or should know this to be the case. An observer need not know whether someone was ultimately hurt to know that any person who commits such an act does so with a depraved heart, one which is at best indifferent to the death or infliction of injury on others. Indeed, few would dispute that where no injury results, a person who takes such action could properly be charged with attempted murder.

In other circumstances, distinguishing between gross-negligence manslaughter and depraved-heart murder is far more difficult. While we do not expect every jury to think identically, the rule of law depends on our ability to trust that the law is sufficiently clear so that two juries that reach identical factual findings will reach the same verdict absent nullification. Jurors are to judge facts, not law. The problem was well-articulated by the Mississippi Court of Appeals in *Johnson v State*, 52 So3d 384, 399-400 (2009):

> It is apparent that even the trained legal professionals . . . grappl[e] with determining a clear distinction between a depraved-heart murder of a specific

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[5] 2 LaFave, Substantive Criminal Law (2d ed), § 14.4, pp 440-441 provides:

> The following types of conduct have been held, under the circumstances, to involve the very high degree of unjustifiable homicidal danger which will do for depraved-heart murder: firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into the caboose of a passing train or into a moving automobile, necessarily occupied by human beings; throwing a beer glass at one who is carrying a lighted oil lamp; playing a game of "Russian roulette" with another person; shooting at a point near, but not aiming directly at, another person; driving a car at very high speeds along a main street; shaking an infant so long and so vigorously that it cannot breathe; selling "pure" (i.e., undiluted) heroin.

individual and the lesser offense of manslaughter. . . . Presiding Justice Hawkins was prophetic when he stated that "[w]hether [a] defendant is convicted of murder or manslaughter will depend upon the whim or circumstance of the jury hearing the case, *not upon understandable instructions delineating what constitutes each crime*." [quoting *Windham v State,* 602 So 2d 798, 805 (1992) (emphasis added).][6]

The problem of defining the difference between gross-negligence manslaughter and depraved-heart murder is at its most confounding in the context of drunk-driving fatalities. The personal misery and social costs of drunk driving is beyond debate, and deterrence through the application of the criminal law is necessary. However, in our evidence-based system, we must not ignore that the likelihood that any single drunk driving incident will result in injury or death is of a fundamentally different order than that present in activities such as setting fire to an occupied dwelling or shooting into a crowded room.[7] This comparison is not intended to minimize the terrible cost these crashes incur nor to suggest that Michigan should not vigorously seek to eliminate drunk-driving incidents altogether. However, it helps to demonstrate the complexity of the problem of determining (non-retrospectively) whether the driver was negligent, grossly negligent, or acted with a depraved heart.[8]

The lack of clarity regarding this form of common-law murder is demonstrated by the inability of the courts and commentators to settle on the definition of the required intent.

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[6] See also 2 LaFave, Substantive Criminal Law, § 14.4, pp 437-438 ("The distinction between an unreasonable risk and a high degree of risk and a very high degree of risk are, of course, matters of degree, and there is not exact boundary line between each category; they shade gradually like a spectrum from one group to another. Some have thus questioned whether this is a sound basis upon which to make the important distinction between murder and manslaughter.").

[7] It appears that alcohol-related injury crashes and alcohol-related fatal crashes in Michigan occur at the rate of about 1 in 500 and 1 in 25,000 respectively. According to the Center for Disease Control and Prevention, Michigan has approximately 497 alcohol-impaired driving incidents annually per 1,000 members of the population. See http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6430a2.htm, last accessed July 18, 2016. This means that, with a population of just under 10 million, Michigan has nearly 5 million alcohol-impaired driving incidents per year, out of which, thankfully, only a very small percentage result in crashes causing injury and a far smaller percentage result in crashes causing death. According to Michigan Traffic Crash Facts (MTCF), in 2015 the total number of alcohol-related crashes was 9,537 and the total number of alcohol-related fatal crashes was 271. See http://publications.michigantrafficcrashfacts.org/2015/At_a_Glance_2015.pdf, last accessed July 11, 2015.

[8] It may be that the difficulty in determining intent was a reason that the Legislature adopted MCL 257.625(4), which defines a standard penalty for all drunk-driving caused deaths regardless of intent. The statute provides for a 15 year term unless the driver's blood alcohol level is greater than .17%, in which case the term is 20 years. *Id*.

According to Black's Law Dictionary (5th ed), a depraved mind exhibits: "ill will, hatred, spite or evil intent." Our caselaw offers several other variations. In *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980), the Supreme Court stated:

> malice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm.

In *Dykhouse*, 418 Mich at 495, the Court defined depraved-heart murder as requiring "the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." Next, the jury instruction on second-degree murder provides that the third-method of establishing malice, i.e. depraved-heart malice, exists if the defendant:

> knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [her] actions. [M Crim JI 16.5.]

Further, in *Goecke*, our Supreme Court quoted the language from *Aaron* requiring "wanton and willful conduct." *Goecke*, 457 Mich at 464. However, the Court also expressly approved the definition of malice from *People v Fuller*, 86 Cal App 3d 618, 628; 150 Cal Rptr 515 (1978), which provided that "malice may be implied when the defendant does an act with a *high probability* that it will result in death and does it with a base antisocial motive and with wanton disregard for human life." *Goecke*, 457 Mich at 467 (emphasis added). The *Goecke* Court further noted the language in *Fuller* was meant to supplement, not supplant the requirement that the conduct be done with a wanton and willful disregard for the act's natural tendency to cause death or great bodily harm. *Id*. at 467 n 31.

That these standards are inconsistent demonstrates both the nebulous nature of the charge and the need for clarification from our high court.[9] They also demonstrate that our common law seems to leave the distinction between gross-negligence manslaughter and depraved-heart murder to the whims, emotions, and idiosyncrasies of a given jury rather than to a clear rule of law. It is basic to our system of justice that we ask juries to determine facts, but that the law defines the crime to which those facts attach. When it comes to depraved-heart murder, at least in the context of drunk driving, two juries could be presented with the exact same set of uncontested facts and could rationally reach different verdicts, one finding manslaughter and one finding depraved-heart murder, not because they see the facts differently, but because they see the legal nature of the crime differently. The legal distinction between gross negligence and the

[9] I would respectfully suggest that the jury be instructed that the defendant's actions must pose a "near certainty" of serious injury or death and that the jury be specifically instructed that they are to determine defendant's intent strictly as of the time he took his actions, i.e. before the actual harm occurred. If the actual harm is considered it is difficult to see how a jury could ever find no intent, even if the pre-harm risk was modest.

present depraved-heart standards is so porous as to effectively allow each jury to create its own set of instructions.[10]

## III. CONCLUSION

In this case, I would conclude that insufficient proofs of depraved-heart murder were submitted. Accordingly, I would vacate defendant's murder conviction while affirming her OUIL causing death conviction for which she was sentenced to a term of 10 to 15 years in prison.

/s/ Douglas B. Shapiro

[10] I am not suggesting that defendant's *subjective* awareness of the danger posed her behavior is relevant. Since voluntary intoxication is not a defense to murder, *Goecke*, 457 Mich at 464, if someone shoots a gun into a crowded room in a drunken state it is not a defense to murder, at least in Michigan, that he was too drunk to properly consider the risks. The question therefore, at least where a defendant claims that voluntary intoxication clouded his ability to comprehend the risk, is whether the actions, if taken by someone who did understand the risks would demonstrate an unambiguous willingness to cause death or great bodily harm.