STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG LEE RAYMOND,

Defendant-Appellant.

UNPUBLISHED
July 23, 1996

No. 171907
LC No. 92-001915-FH

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a vehicle under the influence of alcohol causing death, MCL 257.625(4); MSA 9.2325(4). He was sentenced to three to fifteen years' imprisonment. Defendant appeals as of right from his conviction and sentence. We affirm.

Defendant and two other individuals, including the victim, were involved in a one-car accident. Defendant's theory was that he was not the driver of the car at the time the accident occurred.

On appeal, defendant first argues that the trial court erred in failing to instruct the jury on the lesser included offenses of operating a vehicle under the influence of alcohol and on the misdemeanor offense of negligent homicide. However, defendant did not request the instructions. This Court will not reverse a conviction on the basis of alleged instructional error unless the defendant has requested the omitted instruction or objected to the instructions given. *People v Van Dorsten* 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Further, the trial court did not err in failing to sua sponte instruct on the lesser included offense of operating a vehicle under the influence of alcohol because a rational view of the evidence adduced at trial fails to support defendant's contention that he is entitled to such an instruction. To be supported by the evidence, the "proof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." *People v Stephens,* 416 Mich 252, 262-263; 330 NW2d 675 (1982), quoting

United States v Whitaker, 144 US App DC 344, 347; 447 F2d 314 (1971). The only differentiating element between the two instant crimes is that the offense of operating a vehicle under the influence of alcohol causing death requires the additional element that a death occurred. Cf. MCL 257.624(4); MSA 9.2325(4) and MCL 257.624(1); MSA 9.2325(1). Here, the fact that a death occurred was not in dispute; rather, the only fact in dispute was whether defendant was the driver of the car. Thus, if the jury found that defendant was the driver of the car, to be consistent and rational, it had to find defendant guilty of the greater offense. Therefore, defendant was not entitled to a jury instruction on the offense of operating a vehicle under the influence of alcohol.

The trial court also did not err in failing to sua sponte issue a jury instruction on the lesser misdemeanor offense of negligent homicide because there is not an appropriate relationship between the charged offense and the misdemeanor. To have an inherent relationship, the greater and lesser offense must relate to the protection of the same interests, and must be so related that proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. *Stephens*, *supra* at 262. Here, the proof of the lesser crime of negligent homicide is not necessarily presented as part of the showing of the greater crime. To be convicted of negligent homicide, the proofs would have to show that defendant caused a death by operating a motor vehicle in a careless, reckless or negligent manner. MCL 750.324; MSA 28.556. On the other hand, to establish the offense of operating a vehicle under the influence of alcohol causing death, the proofs would have to show that a death occurred while defendant was operating a motor vehicle while under the influence of alcohol. Therefore, because no inherent relationship existed between the two crimes, defendant was not entitled to a misdemeanor jury instruction on the offense of negligent homicide

Defendant next argues that MCL 257.625(4); MSA 9.2325(4) is unconstitutional because it eliminates the mens rea requirement for causing the death of another. Defendant's argument was addressed and rejected in *People v Lardie*, 207 Mich App 615; 525 NW2d 504 (1994), aff'd ___ Mich ___; ___ NW2d ___ (Docket Nos. 101640, 102742, dec'd July 9, 1996).

Finally, defendant argues that he is entitled to resentencing because the presentence investigation report contained a sentencing guideline recommendation. Defendant argues that the trial court's potential use of the guidelines recommendation was error because defendant was convicted of an offense that is not subject to the Michigan Sentencing Guidelines. While the presentence investigation report contained a sentencing information report, the record is devoid of any evidence that the trial court relied upon this report. In fact, the record shows that the trial court specifically noted that "there are no sentencing guidelines for this particular offense." Hence, defendant's argument is without merit.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald