STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 286057 Alpena Circuit Court
RODERICK HAROLD PERSON, Defendant-Appellant.	LC No. 07-001705-FC

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant Roderick Person appeals as of right his jury conviction of second-degree murder,[1] and OWI causing death.[2] The trial court sentenced Person to concurrent terms of 15 to 30 years in prison on each charge. We affirm Person's convictions, but remand for resentencing on Person's conviction for OWI causing death.

I. Basic Facts And Procedural History

On July 19, 2007, Person and his friend Victor Gornall, Jr., went to the Dry Dock bar in Alpena at approximately 2:00 a.m. Person and Gornall had been drinking at Person's home before arriving at the bar. Person persistently asked the bartender for a drink, but was not served any alcohol at the bar because he arrived after last call.

Jean Anderson, Person's neighbor was also a patron of the bar that night. Anderson had walked to the bar, so Person offered her a ride home when the bar closed, and she accepted. Gornall was passed out in the back seat of Person's car.

Alpena Police Department Officer William Gohl, who was on duty that night in a marked patrol car, observed Person's vehicle after it left the bar and noticed that it had a burnt out passenger side headlight. Officer Gohl followed the vehicle and observed it stop at a flashing red light at River Street and Second Avenue. The vehicle stopped well beyond both the white

[1] MCL 750.317.

[2] MCL 257.625(4).

line and the cross walk at the intersection. Person's vehicle then made a sweeping left turn onto Second Avenue into the right turn lane, and then switched lanes without signaling in order to travel over the bridge. At this point, Officer Gohl activated his overhead lights. Both vehicles were traveling at normal speeds at the time.

Person's vehicle continued without stopping and caught up with another vehicle, then abruptly changed lanes and passed it. In a portion of her preliminary examination testimony admitted at trial, Anderson testified that at this point she told Person to "just pull over," but Person responded that "he didn't want to go to jail." Officer Gohl turned on his siren and alerted dispatch that he was following a fleeing vehicle. Person's vehicle picked up speed and was traveling much faster than Officer Gohl vehicle, which was traveling approximately 70 mph. Officer Gohl testified that he decided not to increase his speed further because he was approaching an intersection.

The area had poor lighting, and Officer Gohl became concerned that he would lose sight of the fleeing vehicle, so he turned on his vehicle's spotlight. As Person's vehicle entered a curve in the road, Officer Gohl saw its brake lights briefly and then could no longer see the vehicle. Officer Gohl discovered that Person's vehicle had left the roadway, and he could see skid marks and a large plume of smoke or dust in the air. Person's vehicle had come to rest near a creek bottom, which was approximately a six-foot drop from the roadway. Officer Gohl advised dispatch of the crash and requested an ambulance.

As Officer Gohl approached the vehicle, he could see two people inside it. Officer Gohl first made contact with Anderson, who was groaning in the front passenger seat. Officer Gohl could not see any major wounds, so he told her to stay put and approached Person, who was in the driver's seat. Officer Gohl then noticed Gornall in the grass near the vehicle. Gornall was breathing but unresponsive.

Additional officers and paramedics responded to the scene, and all three passengers were transported by ambulance to the hospital. Two officers who responded to the scene reported that, before Person was removed from the vehicle, the odor of intoxicants was present, Person had bloodshot eyes, and Person denied being the driver of the vehicle, despite the fact that he was belted in the driver's seat. A search warrant was obtained to retrieve a sample of Person's blood. Testing revealed that Person's blood contained 0.17 grams of alcohol per 100 milliliters of blood.

As part of the investigation into the accident, the air bag module was retrieved from Person's vehicle, which recorded the speed at the time of crash as 87 mph. In addition, an expert in accident reconstruction determined that the absolute minimum speed of Person's vehicle at the beginning of the visible skid marks was 48 to 50 mph. The speed limit on Second Avenue is 25 mph.

Dr. Bevin Clayton, an emergency room physician at Alpena Regional Medical Center, testified that he treated Gornall upon his arrival. Dr. Clayton could feel Gornall's ribs crunching when he attempted CPR. In addition, Gornall's eyes were fixed and dilated, which Dr. Clayton testified, usually indicates the chance of recovery is less than 1 percent. Shortly thereafter, Gornall was pronounced dead. Hospital staff testified that Person, who had been belligerent and

threatening, quieted after being told of Gornall's death and stated that Gornall had been dead before the accident.

Gornall's autopsy resulted in the determination that the cause of death was multiple blunt force injuries. The medical examiner, Kanu Virani, M.D., testified that Gornall had suffered numerous internal and external injuries, including a broken leg, separation of the first, second, and third vertebrae of the neck, lacerations of the lungs and liver, a nearly completely separated kidney, as well as other relatively minor injuries. Dr. Virani did not note any seat belt marks, which would normally be present when someone is wearing a seat belt and is injured.

II. Sufficiency Of The Evidence

A. Standard Of Review

Person argues that there was insufficient evidence to support his conviction for second-degree murder. We review de novo sufficiency of the evidence claims.[3] In reviewing a sufficiency challenge, we examine the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt.[4]

B. Legal Standards

Due process prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt.[5] Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof.[6] In addition, the prosecution is not required to disprove all innocent theories when a case is based on circumstantial evidence.[7]

The essential elements that must be established beyond a reasonable doubt to sustain a conviction for second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse."[8] The element of malice can be satisfied by establishing that the defendant intended "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."[9] While not every case in which intoxicated driving leads to death constitutes second-degree

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[3] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[4] *Id*.

[5] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[6] *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[7] *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

[8] *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).

[9] *Id*. at 464.

murder, when the evidence establishes "'a level of misconduct that goes beyond that of drunk driving,'" a conviction for second-degree murder can be sustained.[10]

C. Applying The Standards

Person argues that his conviction for second-degree murder cannot be sustained because his conduct was not so egregious to rise to the level of wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. In support, Person compares the facts present here to other cases in which a defendant convicted of second-degree murder had been driving while intoxicated;[11] Person asserts that the level of disregard for risk in those cases cannot be found here. For example, Person notes that in *People v Goecke*,[12] the three defendants engaged in such conduct as driving recklessly at a high rate of speed on a main road, narrowly avoiding collisions, and disregarding traffic signals. Person argues that because there was no evidence of any near-miss accidents, the chase lasted only a minute, and there was very little traffic during the pursuit, his conduct did not rise to the level necessary to sustain a conviction for second-degree murder.

However, Person fails to acknowledge that this Court has also upheld a conviction for second-degree murder when there has been no evidence of near-miss collisions, prolonged police pursuit, or other traffic. In *Werner*, this Court acknowledged that there was no evidence regarding the defendant's behavior from the time of his departure until the fatal crash occurred.[13] Nonetheless, this Court concluded that the prosecution had met its burden by establishing that the defendant had recently experienced an alcohol-induced blackout while driving, but still chose to drink heavily while driving.[14] This decision demonstrates that there is no set formula of behaviors that must be present to demonstrate that a particular defendant engaged in conduct sufficient to constitute the element of malice.

The evidence at trial established that Person's blood alcohol level at the time of the accident was 0.17 grams per 100 milliliters—more than twice the legal limit.[15] In addition, Person was traveling at excessively high rate of speed, at least twice the speed limit of 25 mph, perhaps as high as 87 mph. This rate of speed is especially egregious in light of the fact that Person had an unrestrained passenger, passed out and lying down in the back seat. Person failed to pull over when Officer Gohl activated his vehicle's lights and sirens or when Anderson asked him to. Such conduct goes beyond drunken driving and constitutes wanton and willful disregard

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[10] *People v Werner*, 254 Mich App 528, 533; 659 NW2d 688 (2002), quoting *Goecke*, *supra* at 469.

[11] *People v Weeder*, 469 Mich 493; 674 NW2d 372 (2004); *Goecke*, *supra*; *People v Vasquez*, 129 Mich App 691; 341 NW2d 873 (1983).

[12] *Goecke*, *supra* at 449-454.

[13] *Werner*, *supra* at 533-534.

[14] *Id.* at 534.

[15] See MCL 257.625.

of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Taken as a whole and viewed in a light most favorable to the prosecution, the evidence and the reasonable inferences stemming from that evidence was sufficient to support Person's convictions.[16]

III. Hearsay

A. Standard Of Review

Person argues that the trial court erred in admitting a portion of Anderson's preliminary examination testimony under the unavailability exception to the hearsay rule[17] without first requesting that she attempt to refresh her memory. Generally, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[18] However, because Person now raises a different basis for error than he did before the trial court, this issue is unpreserved.[19] We review unpreserved evidentiary issues for plain error affecting the defendant's substantial rights.[20]

B. Analysis

The prosecution called Anderson to testify at trial. She was able to recall some events of that evening, but not others, including whether she said anything to Person about driving too fast or whether she had testified at the preliminary examination that she told him to pull over. The trial court allowed the prosecutor to read a portion of Anderson's preliminary hearing testimony to the jury, "given that [Anderson] testified she can't remember that."

Hearsay is an unsworn, out-of-court statement, which is offered to demonstrate the truth of the matter asserted.[21] Hearsay is generally inadmissible unless it falls under one of the recognized exceptions.[22] MRE 804 sets forth an exception to the hearsay rule when the declarant is unavailable. A declarant can be considered unavailable for purposes of this exception when he or she "has a lack of memory of the subject matter of the declarant's statement."[23] Former testimony of an unavailable witness is excluded from the hearsay rule when the testimony was given "at another hearing of the same or a different proceeding, if the party against whom the

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[16] *Hawkins*, *supra* at 457.

[17] MRE 804.

[18] *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

[19] *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.").

[20] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[21] MRE 801(c).

[22] MRE 802.

[23] MRE 804(a)(3).

testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[24]

Person recognizes that MRE 804 allows for the introduction of prior testimony of an unavailable witness, but asserts that there was an inadequate effort to attempt to refresh Anderson's memory before allowing the prior testimony to be entered. This argument is unpersuasive. First, pursuant to court rule, there is no requirement that a prior statement be provided when examining a witness concerning a prior statement, unless requested.[25] And no such request was made here. Second, a review of the record demonstrates that the prosecutor and the trial court made numerous attempts to refresh and probe Anderson's memory. Anderson repeatedly stated that she could not recall statements that she had made earlier, either to police officers or at the preliminary hearing, which effectively put this evidence out of reach if her claim was genuine.[26] For example, when asked if she had testified at the preliminary examination that she asked Person to pull over, she responded, "I don't remember. I could have said that, yes." If her claim was false, she was subject to examination and cross-examination and, theoretically, a contempt ruling.[27] In addition, Anderson testified at trial that she had been drinking the night of the accident and that her ability to perceive and recall events may have been affected as a result. Therefore, because the trial court properly concluded that Anderson was unavailable for purposes of the hearsay rule, the trial court did not err in allowing the prosecutor to read a small portion of Anderson's preliminary examination testimony into evidence.

IV. Sentencing

A. Standard Of Review

Person argues that he is entitled to resentencing on his OWI causing death conviction because the trial court erroneously imposed a 15 to 30 year sentence in excess of the 15-year statutory maximum. Generally, the interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review.[28] However, because Person did not object to his sentence, this issue is not properly preserved for appellate review,[29] and we review it for plain error affecting his substantial rights.[30]

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[24] MRE 804(b)(1).

[25] MRE 613(a).

[26] See McCormick, Evidence, § 253, p 445 (Hornbook Series; 4th ed).

[27] *Id*.

[28] *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

[29] *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004).

[30] *Carines*, *supra* at 763-764.

B. Analysis

We agree that Person was improperly sentenced on his conviction for OWI causing death. The trial court imposed concurrent sentences of 15 to 30 years for both second-degree murder and OWI causing death. The statutory maximum sentence for OWI causing death is 15 years.[31] A sentence is invalid when it is beyond statutory limits.[32] Moreover, a trial court may not impose a minimum sentence that exceeds two-thirds of the statutory maximum sentencing, even if the sentence imposed is a departure from the guidelines.[33] Imposition of a sentence that violates the two-thirds rule and is beyond the statutory maximum constitutes plain error affecting Person's substantial rights, and he is entitled to resentencing.

We affirm Person's convictions, but we vacate Person's sentence on his conviction for OWI causing death and remand for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

[31] MCL 257.625(4).

[32] *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

[33] MCL 769.34(2)(b).