STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0390

State of Minnesota,
Respondent,

vs.

Lindsay Van Tassel,
Appellant.

Filed June 16, 2009
Affirmed in part and reversed in part
Lansing, Judge
Concurring in part and dissenting in part; Schellhas, Judge

Dodge County District Court
File No. CR-06-22

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Paul Kiltinen, Dodge County Attorney, Dodge County Courthouse, 22 Sixth Street East, Mantorville, MN 55955 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

Lindsay Van Tassel was the driver of a car involved in a single-vehicle accident resulting in the death of her passenger. In this appeal from convictions of criminal vehicular homicide and reckless driving, Van Tassel raises three issues: the admissibility of her attorney's oral stipulation to an element of the criminal-vehicular-homicide charge, the sufficiency of the evidence to prove criminal vehicular homicide, and the violation of the rule prohibiting multiple sentences for the same behavioral incident. We conclude that the error in admitting the stipulation was harmless, but the evidence of gross negligence, on this record, is insufficient to prove criminal vehicular homicide. Because we reverse the criminal-vehicular-homicide conviction, the remaining sentence for reckless driving does not violate the multiple-sentencing rule, and we affirm that sentence.

F A C T S

On the afternoon of December 19, 2005, nineteen-year-old Lindsay Van Tassel and her eighteen-year-old friend and passenger, Aaron Waters, were on their way to visit Van Tassel's father, after which they planned to go Christmas shopping. Van Tassel and Waters drove approximately twenty-five miles outside of Waltham to the intersection of County Road 15 and County Road 6.

Traveling on County Road 15, Van Tassel braked for the approaching intersection, and her car began to slide. She put the car in neutral, looked to make sure that no other cars were travelling across County Road 6, and decided that, because she could not likely

stop the car, it was less dangerous to go through the stop sign. Van Tassel's car drove over the rise in the middle of the intersection, and her car fishtailed. Although she corrected and almost regained control of the car, her tires caught the snow-covered shoulder. She then lost complete control of the car, which went into the ditch and rolled.

Neither Van Tassel nor Waters was wearing a seatbelt, and both were ejected from the car. Van Tassel was transported to a hospital by ambulance. Waters was flown to a hospital where he died an hour later. The state charged Van Tassel with gross-negligence criminal vehicular homicide and reckless driving.

At trial, the state and Van Tassel's counsel stipulated that "Waters died as a result of the injuries sustained" in the accident. Van Tassel, however, did not waive her right to a jury trial on that element of the charge. Although the stipulation was not submitted as evidence, the district court instructed the jury that it was uncontested that Waters died as a result of injuries sustained in the motor vehicle accident. Notwithstanding the language of the stipulation, the prosecutor repeatedly referred to the accident as one in which Van Tassel killed Waters. When Van Tassel testified, she admitted that Waters died as a result of the accident. The police report, which was admitted into evidence, indicates that Waters died and provides the time of death.

During deliberations, the jury requested further instruction on the meaning of "grossly negligent" and also on the meaning of "homicide." The district court instructed the jury to consider the definition of the whole phrase, "criminal vehicular homicide," and provided an additional definition for gross negligence. The jury found Van Tassel guilty of both criminal vehicular homicide and reckless driving. The district court

sentenced her to forty-eight months' imprisonment for criminal vehicular homicide and a concurrent ninety days for reckless driving. Van Tassel appeals.

D E C I S I O N

I

We first address Van Tassel's argument that her conviction for criminal vehicular homicide must be reversed because the district court accepted her attorney's oral stipulation on an element of the offense without Van Tassel's personal waiver.

Defendants have the right to a jury trial on every element of the charged offense. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). If an offense element is waived by stipulation, the defendant must provide an oral or written waiver. *Wright*, 679 N.W.2d at 191; *see also* Minn. R. Crim. P. 26.01, subd. 3 (requiring oral or written waiver if defendant stipulates to facts and waives right to jury trial). The defendant's counsel cannot waive the right to a jury trial on behalf of the defendant. *State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2002).

If the district court accepts a stipulation on an element of the charge without a defendant's personal waiver, we apply a harmless-error test to determine whether it was prejudicial to the defendant. *Wright*, 679 N.W.2d at 191; *see also State v. Hinton*, 702 N.W.2d 278, 281-82 (Minn. App. 2005) (applying harmless-error analysis when defendant stipulated to element of offense but did not waive his right to jury trial), *review denied* (Minn. Oct. 26, 2005). On appeal, the state bears the burden of establishing beyond a reasonable doubt that the error was harmless and that a new trial is therefore

unwarranted. *Wright*, 679 N.W.2d at 191. An error is harmless beyond a reasonable doubt if the verdict was "surely unattributable to the error." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (stating standard for constitutional error).

The district court erred by accepting the stipulation between the state and Van Tassel's counsel that Waters died as a result of the injuries he sustained in the accident. Van Tassel did not waive—either orally or in writing—her right to a jury trial on this element. *See Wright*, 679 N.W.2d at 191 (providing that stipulations to offense elements require defendant's oral or written waiver).

Allowing the stipulation without Van Tassel's waiver, however, was harmless beyond a reasonable doubt. The stipulation occurred during the district court proceedings when Van Tassel was present, and she did not object. *See id.* (considering defendant's presence and lack of objection in determining whether error was harmless). And the other evidence in the record, including the police report and Van Tassel's own concession that Waters died as a result of the accident, establishes the element without the stipulation. *See Hinton*, 702 N.W.2d at 282 (noting that because offense element was not challenged and record was accurate, stipulation was harmless). The verdict was surely unattributable to the district court's error in admitting the invalid stipulation because the cause of Waters's death was established by other evidence, and Van Tassel was present when the stipulation was stated on the record.

Even though the acceptance of the invalid stipulation does not constitute reversible error, the prosecutor's improper use of the stipulation by mischaracterizing its contents raises serious questions about the role of the prosecutor and the effect of the improper

characterizations. The stipulation was admissible only for the purpose of satisfying the element of Waters's death resulting from the accident. Nevertheless, the prosecutor transformed the stipulation into a basis for repetitive references to Van Tassel killing Waters. During the cross-examination of Van Tassel's aunt, the prosecutor asked, "And at that time you were under the assumption that your niece could not be prosecuted for killing [Waters] unless she was under the influence of some drug or alcohol." He repeated the phrase, "killing [Waters]," three more times during the cross-examination and suggested three times during closing arguments that Van Tassel killed Waters. The stipulation concedes that "Waters died as a result of injuries sustained in the accident," but does not provide a basis for the prosecutor repeatedly characterizing the death as Van Tassel "killing" Waters.

In addition to implying that Van Tassel "killed" Waters, the prosecutor misstated the motor-vehicle driving code and the degree of negligence required to satisfy the gross-negligence requirement. He implied that disobedience of traffic laws amounts to vehicular homicide if it "endangers and kills another human being." And, in his closing argument, he said, driving "[fifty-six miles an hour] is a prima facie case of negligence," but "driving her car with purpose, with intent of traveling [seventy] miles an hour . . . takes this beyond gross negligence." As he neared the end of his closing argument the prosecutor repeated the statement, saying, "Remember, ordinary negligence under the law would be [fifty-six] miles an hour under perfect conditions, a prima facie case of lack of ordinary care. You may not like it, but that is the law. Here we have [seventy] miles an hour, on purpose . . . ." This statement is misleading because

"[n]egligence at criminal law is not the same as negligence [in] a civil cause of action." *State v. Grover*, 437 N.W.2d 60, 63 (Minn. App. 1989). Speeding can be "prima facie" evidence of *civil* negligence, but criminal liability requires "gross deviation" from the ordinary standard of care. *See id.* (stating generally that gross deviation is standard for criminal liability).

The prosecutor's persistent reference to Van Tassel's intentionally or purposely driving seventy miles an hour is equally troubling. As evidence of Van Tassel's speed, the state relied on her attempt, immediately after the accident, to tell the police officer what had happened. The record indicates that Van Tassel was not advised that these statements would be admissible at trial, and at trial she stated that she did not know what speed she was driving, did not remember saying that she was going about seventy, and that she was in a state of shock when she was talking to the officer. As the officer testified, "She said she was doing about [seventy]. She was crying at this point. She was upset." The officer stated that, although the distance of Van Tassel's car from the roadway was consistent with a speed of seventy miles an hour, it is difficult to make a reasonably accurate assessment when a vehicle is sliding on snow.

The prosecutor also referred consistently to Van Tassel's "intentionally" or "purposely" driving seventy miles an hour. In his closing statement, the prosecutor said, "She didn't accidentally travel [seventy] miles an hour. She did it on purpose." He reinforced that characterization by saying, "She didn't even attempt to stop at that stop sign. She intended all along to go through it." And, again by saying, "To call this an accident, a traffic accident, is to minimize the truth and diminish the memory and the life

of Aaron Ivan Waters." And he stated, "She also chose not to require her passenger to wear a seatbelt." Finally, the prosecutor declared, "Lindsay Van Tassel was stone cold sober. There is no evidence to the contrary. There is no excuse for impaired judgment. This was conscious."

The prosecutor's statements likely affected the jury's perception of Van Tassel and the elements of proof in the case, as shown by the jurors' questions during deliberations. The jury asked the district court, "We were wondering if you could further explain in different words the sentence 'grossly negligent means with very great negligence or without even scant care'" and "[c]ould we please have the definition of homicide." The jury's struggle indicates that the prosecutor's statements adversely affected their understanding of criminal vehicular homicide. Contrary to the prosecutor's suggestions, the jury should not have been permitted to think that driving one mile an hour above the speed limit constitutes criminal negligence and that, when death occurs, driving fifteen miles an hour above the speed limit is prima facie evidence of gross-negligence criminal vehicular homicide. *See id.* (rejecting proposition that "negligence, in the civil sense, is sufficient evidence of [criminal negligence]").

Prosecutors are considered ministers of justice who safeguard the defendant's rights as well as enforce the public's rights. *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005). Prosecutors are charged with the ethical responsibility of determining that justice is done, not just with winning a case. *Berger v. United States*, 295 U.S. 78, 88 55 S. Ct. 629, 633 (1935). Although prosecutors have a duty to "use every legitimate means

to bring about a just [conviction]," they also have a duty to "refrain from improper methods calculated to produce a wrongful [one]." *Id.*

The prosecutor crossed the line between legitimate means and improper methods. He twisted the stipulation to imply that Van Tassel "killed" Waters and he improperly altered the jurors' understanding of the charges against Van Tassel and their understanding of the underlying evidence. With this in mind, we now turn to the question of whether the evidence—viewed with proper objectivity and without the influence of the prosecutor's inflammatory insinuations—is sufficient to sustain the conviction.

II

In analyzing a challenge to the sufficiency of the evidence, we painstakingly analyze "the record to determine whether the evidence, when viewed in a light most favorable to the conviction," sufficiently supports the jury's verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury believed the evidence supporting the verdict and disbelieved evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Criminal vehicular homicide occurs when a person causes another's death while operating a motor vehicle in a grossly negligent manner. Minn. Stat. § 609.21, subd. 1(1) (2004). Grossly negligent manner "means with very great negligence or without even scant care." 10 *Minnesota Practice*, CRIMJIG 11.63 (2006). Gross negligence requires evidence of negligence coupled with "the presence of some egregious driving conduct." *State v. Miller*, 471 N.W.2d 380, 384 (Minn. App. 1991). To determine the distinction

between ordinary negligence and gross negligence, the defendant's conduct as a whole must be examined. *State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005).

On this record, we cannot conclude that Van Tassel's actions show egregious conduct above and beyond ordinary negligence or that the evidence demonstrates very great negligence without even scant care. Viewed in the light most favorable to the conviction, the evidence establishes that Van Tassel was driving too fast—an estimated fifteen miles above the speed limit—for the icy road condition at the intersection. The evidence shows that when she tried to stop for the approaching stop sign, she started sliding and made a tactical decision to go through the intersection without stopping. The bump created by the crossroad caused her to lose control, catch part of the snow-covered shoulder, and slide into the ditch. The car rolled and Van Tassel and Waters were ejected from the car.

Driving above the speed limit and too fast for weather conditions violates traffic laws and is evidence of civil negligence. *See* Minn. Stat. § 169.14, subd. 1 (2004) (requiring driver to maintain speed that is "reasonable and prudent under the conditions"); Minn. Stat. § 169.96(b) (2004) (stating that violation of traffic law is evidence of negligence in civil actions). But without more, exceeding the speed limit by driving about seventy miles an hour in a fifty-five-mile-an-hour speed zone while approaching an intersection that proved to be slippery, is driving too fast for conditions but it is not gross negligence. *See Grover*, 437 N.W.2d at 63 (stating that mere violation of statute generally does not satisfy standard for criminal negligence, much less criminal *gross* negligence).

The negligence that the state proved was Van Tassel's speed of an estimated seventy miles an hour in a fifty-five-mile-an-hour speed zone on a day in which intersections were icy, the sides of the road were snow covered, and the wind was blowing snow from around the roadway onto the travelled part of the road. No testimony indicated that it was snowing on the day of the accident and the testimony varied on whether the roads were dry, icy, or snow-packed. It was undisputed that the intersection and the approach to the intersection was icy. The responding officer, in his accident report, described the road surface as "dry" at the time of the accident. In his testimony he said that the conditions at the intersection were hazardous and indicated that dry could also mean snow-packed. Van Tassel described her mood and her passenger's mood as having a good time and "jamming out to music," but denied any inattentive driving, and the responding officer made no notes on suspected lack of attention and suggested none in his testimony. Playing loud music does not automatically equate to lack of attention.

What the evidence shows is what the responding officer noted on his report—unsafe speed and an inexperienced driver. As the prosecutor at one point suggested to the jury, the whole accident could have been avoided if Van Tassel had been going slower. The record does not show that Van Tassel was inattentive to the road. *See State v. Kissner*, 541 N.W.2d 317, 320 (Minn. App. 1995) (noting excessive speed and evidence that driver was inattentive to oncoming traffic, perhaps because he was drinking beer), *review denied* (Minn. Feb. 9, 1996); *State v. Plummer*, 511 N.W.2d 36, 39 (Minn. App. 1994) (noting excessive speed and evidence that driver was not watching road). There was no evidence that Van Tassel was driving fast intentionally for thrills or excitement.

See State v. Johnson, No. A08-0323, 2009 WL 749479, at *5 (Minn. App. Mar. 24, 2009) (noting excessive speed and evidence supporting state's theory that defendant was trying to jump railroad track). The evidence does not show that Van Tassel had been negligent in maintaining her car. *See State v. Shatto*, 285 N.W.2d 492, 493 (Minn. 1979) (noting excessive speed and failure to inspect brakes).

Additionally, the record does not support a conclusion that Van Tassel acted with "scant care" in operating her car that day. Van Tassel explained her numerous and evident corrective maneuvers at the time of the accident and her testimony at trial was consistent and undisputed. She first lost control because she knew the stop sign was approaching and tried to brake. After she began sliding, she tried shifting into neutral to slow her approach to the intersection. When it seemed it might be best to continue through the intersection, she looked both ways to make sure no traffic was coming. She tried to correct the direction of the car after it hit the rise in the crossroad. She overcorrected, but again tried to right the car's path, only to be pulled into the ditch after catching the snow-covered shoulder. Instead of accepting these corrective maneuvers for what they obviously were, the prosecutor instead aggregated the actions in an attempt to establish a series of moving violations.

In short, this record does not establish negligence "substantially higher in magnitude than ordinary negligence . . . or [the] absence of even slight care." *Plummer*, 511 N.W.2d at 39. The evidence of the driving conduct does not satisfy the necessary element of gross negligence required for conviction of criminal vehicular homicide, and we, therefore, reverse this conviction.

III

Van Tassel's final contention is that her reckless-driving sentence must be vacated because it is a prohibited multiple sentence for the same behavioral incident under Minn. Stat. § 609.035, subd. 1 (2004). Because we reverse Van Tassel's criminal-vehicular-homicide conviction and vacate the sentence imposed for that conviction, no multiplicity of sentences occurs. Van Tassel did not appeal her reckless driving conviction and her sentence for reckless driving remains. She, however, will receive credit for the time that she has already served for her criminal-vehicular-homicide sentence. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (noting that credit will be given for any time served for vacated sentence).

Affirmed in part and reversed in part.

SCHELLHAS, Judge (concurring in part and dissenting in part)

I concur with the majority's conclusion that because the majority is reversing Van Tassel's criminal-vehicular-homicide conviction and vacating the sentence imposed for that conviction, no multiplicity of sentences occurs. But I respectfully dissent from the majority's conclusion that the evidence was insufficient to support the criminal-vehicular-homicide conviction.

Criminal vehicular homicide as defined by Minn. Stat. § 609.21, subd. 1(1) (2004) has three elements: (1) the defendant causes the death of another; (2) as the result of operating a motor vehicle; (3) in a grossly negligent manner. Sufficient evidence of all three elements supports the jury's guilty verdict. Van Tassel conceded that the victim's death resulted from the crash. Evidence that the vehicle was operated in a grossly negligent manner includes that Van Tassel drove "about 70" miles per hour in a 55 mile-per-hour zone, drove partially on a snow-covered shoulder, put the car in neutral, ran a stop sign, was "jamming out to music," and was driving in this manner during blowing snow that made driving conditions hazardous. On this evidence, a jury could reasonably conclude that Van Tassel operated her vehicle in a grossly negligent manner. *See State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988) (stating that a verdict will not be disturbed where a jury, acting with due regard for the presumption of innocence and requirement of proof, could reasonably conclude that the defendant was guilty); *see also State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989) (stating that a reviewing court views the record in the light most favorable to the conviction).