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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5363-12T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILLIAM T. LIEPE,

Defendant-Respondent.

Argued March 18, 2014 – Decided April 10, 2014

Before Judges Fisher and Espinosa.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 12-12-2766.

Deborah A. Hay, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for appellant (James P. McClain, Acting Atlantic County Prosecutor, attorney; Ms. Hay, of counsel and on the brief).

Steven J. Feldman argued the cause for respondent.

PER CURIAM

In this interlocutory appeal, we consider the dismissal of a count of the indictment that charged defendant with first-degree aggravated manslaughter, N.J.S.A. 2C:12-1(b)(1),

regarding his role in a fatal automobile accident. In reversing, we reject defendant's argument that the State is required to prove more than just a high level of intoxication.

Following the fatal automobile accident, defendant was charged in a multi-count indictment, including a count of first-degree aggravated manslaughter,[1] which defendant moved to dismiss. The trial judge granted defendant's motion, and the State moved for leave to appeal, which we denied. The State then moved for leave to appeal in the Supreme Court, which granted the motion and summarily remanded to this court for consideration of the State's interlocutory appeal.

The charged offense in question – aggravated manslaughter – requires proof that the actor "recklessly cause[d] death under circumstances manifesting extreme indifference to human life." N.J.S.A. 2C:11-4(a)(1).

Recklessness may be found from evidence that defendant "consciously disregard[ed] a substantial and unjustifiable risk" that death "will result from his conduct" and that "[t]he risk must be of such a nature and degree that, considering the nature

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[1]Defendant was also charged with second-degree vehicular homicide, N.J.S.A. 2C:11-5, two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1), two counts of third-degree assault by auto, N.J.S.A. 2C:12-1(c)(2), and fourth-degree assault by auto, N.J.S.A. 2C:12-1(c)(2). These other counts are not questioned in this appeal.

and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." N.J.S.A. 2C:2-2(b)(3). In State v. Curtis, 195 N.J. Super. 354, 364-65 (App. Div.) (emphasis added), certif. denied, 99 N.J. 212 (1984), we explained the nature of aggravated manslaughter by comparison with the requirements of reckless manslaughter:

> [T]he difference between aggravated manslaughter and reckless manslaughter is the difference in the degree of the risk that death will result from defendant's conduct. This difference in degree is to be established by the second element in aggravated manslaughter which is not required in a reckless manslaughter case. We envision that the Legislature intended that the degree of risk in reckless manslaughter be a mere possibility of death. In aggravated manslaughter, however, the additional element that death be caused "under circumstances manifesting extreme indifference to human life" elevates the risk level from a mere possibility to a probability.
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> Hence, the Legislature intended for the higher degree of recklessness to distinguish aggravated manslaughter from reckless manslaughter. . . . The relevant "circumstances" are objective and do not depend on defendant's state of mind. The degree of recklessness must be determined from all the surrounding circumstances.

We, thus, examine the alleged facts and circumstances presented to the grand jury to determine whether they can support these

required findings. Our examination, at this stage, is guided by the principles that an "indictment should be disturbed only on the 'clearest and plainest ground,'" State v. Perry, 124 N.J. 128, 168 (1991) (quoting State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 18-19 (1984)), and "only when the indictment is manifestly deficient or palpably defective," State v. Hogan, 144 N.J. 216, 229 (1996).

Here, the grand jury heard testimony that at 1:00 p.m., Sunday, April 10, 2011, a Honda Civic, operated by Max Guzman, had traveled south on Cologne Avenue in Hamilton Township until stopping in the southbound lane to make a left turn into a park with ballfields. The Honda did not immediately turn because of oncoming traffic on the northbound side of Cologne Avenue. Guzman's eleven-year-old child was in the front passenger seat; his nine-year-old occupied a back seat. At the same time, Rosa Vasquez was driving a Cadillac Escalade north on Cologne Avenue; her fifteen- and two-year-old children, as well as her mother, were also occupants.

A Ford Explorer, operated by defendant, was traveling southbound on Cologne Avenue – the same direction as Guzman's vehicle. Defendant's Ford rear-ended Guzman's Honda, causing the Honda to be spun counterclockwise into the northbound lane, where it was struck in the rear by Vazquez's Cadillac. Guzman's

nine-year-old died from his injuries, Guzman and his older child sustained significant injuries but survived, and Vasquez's mother was treated for a cardiac event.

The State presented evidence to the grand jury that defendant's blood alcohol content (BAC) was .192 at the time of the accident. At the scene, defendant acknowledged to police that he had "several beers" at a nearby tavern at around 9:00 a.m. that morning. An open container of beer was found in plain view in defendant's vehicle, as was a closed beverage cooler; no evidence regarding the cooler's contents was presented.

The State's expert in forensic toxicology testified in the grand jury proceedings that:

> At a BAC level of .19%[,] [the] abilit[y] to perform divided attention tasks, such as are required during the operation of a motor vehicle, are adversely affected. At these levels the abilities to perform even simple tasks requiring lower level motor coordination, examples are simple reaction time, tasks requiring modest eye hand coordination is impaired. Likewise, basic perceptual processes are significantly compromised. Ability to maintain vigilance is significantly impaired as is judgment.
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> Further, risk taking is increased and the ability to appropriately judge risk is impaired. Hence at these levels skills required to operate a motor vehicle are significantly impaired. <u>BAC[]s at this level are associated with a more than sixty fold risk for a fatal motor vehicle accident</u>.

[Emphasis added.]

Additionally, the State provided the grand jury with accident-reconstruction evidence, which revealed that if defendant's vehicle was traveling at forty-six miles per hour, the perception reaction time of an unimpaired individual would have required 141.98 feet and would have taken 4.91 seconds to stop with full braking to avoid collision. Defendant had double the length of road – between 230 to 283 feet – required to avoid the collision, but he did not stop. Indeed, the investigator testified in the grand jury proceedings that defendant admitted he "did not see the [Guzman] vehicle in front of him because his attention was drawn to his left towards the athletic fields."

We agree with the State that this evidence was sufficient to compel denial of defendant's motion to dismiss the aggravated manslaughter charge. Defendant appears to recognize that driving while intoxicated is an act of recklessness, but he forcefully argues that more was required to support the contention that this alleged recklessness "manifest[ed] extreme indifference to human life." N.J.S.A. 2C:11-4(a)(1). That is, defendant contends that the State was required to present evidence not only of defendant's intoxication but also additional reckless conduct in order to demonstrate an extreme indifference to human life.

By way of example, defendant alludes to State v. Bogus, 223 N.J. Super. 409, 416, 418-19 (App. Div. 1988), where there was not only proof the defendant was driving with a .23 BAC but also that he drove his truck through a red light on a main thoroughfare at an excessive rate of speed. We reasoned from this evidence that the judge did not err in sentencing defendant to an aggravated manslaughter prison term, in denying defendant's motion to dismiss the indictment, or in denying defendant's motion for judgment of acquittal. Id. at 418. In State v. Choinacki, 324 N.J. Super. 19, 49 (App. Div. 1999) – defendant's second example – we concluded that the judge properly instructed the jury on reckless manslaughter when, among other things, the judge charged that there must be evidence of an "act or acts of recklessness" in addition to the reckless operation of the motor vehicle. And, in State v. Radziwil, 235 N.J. Super. 557, 563 (App. Div. 1989), aff'd o.b., 121 N.J. 527 (1990), upon which defendant also relies, we found sufficient evidence in the defendant's conviction for aggravated manslaughter when the jury could have found defendant was intoxicated based on evidence that "defendant almost always became intoxicated" on weekends. We observed in Radziwil that there was additional evidence of indifference to human life in defendant's high rate of speed, his lack of control over his

vehicle, his rear-ending of the vehicle in front of him, and his leaving the scene of the accident. Id. at 570.

Defendant argues from the facts of these cases that more than a showing of intoxication is required to support an aggravated manslaughter charge. To be sure, in each of these cases the State provided evidence of reckless conduct beyond intoxication. But none of these cases stands for the proposition that dismissal of an aggravated manslaughter charged is required when only intoxication – regardless of the degree of intoxication – is shown. To the contrary, in Radziwil – which the Supreme Court affirmed "substantially for the reasons expressed" in our opinion, 121 N.J. at 528 – we said "a jury may infer that an individual who drives while intoxicated is consciously disregarding the risk of an accident and acting with extreme indifference to human life." 235 N.J. Super. at 563 (citing State v. LaBrutto, 114 N.J. 187, 204 (1989) and Bogus, supra, 223 N.J. Super. at 419). In Radziwil, we did not hold that other evidence or even a particular degree of intoxication was required, since there was only an inference of intoxication presented to the jury in that case.

We lastly consider the Court's holding in State v. Kromphold, 162 N.J. 345 (2000), upon which defendant also relies. There, the Court examined a jury charge on the question

of recklessness based on intoxication. The trial judge charged the jury that "if you should find a .10 percent[2] or higher level of blood alcohol, you may consider this as a factor in determining whether the defendant was reckless at the time of the alleged crime"; the jury was also permitted to "consider the degree of intoxication in determining whether circumstances manifesting extreme indifference to the value of human life existed." Id. at 355 (emphasis omitted). Of relevance here is the Court's comment that

> [a]lthough defendant could have been convicted for driving while intoxicated with a blood-alcohol level of .10 percent, N.J.S.A. 39:4-50, the presence of that blood-alcohol level does not necessarily equate to reckless behavior that manifests extreme indifference to the value of human life.
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> [Id. at 356 (emphasis added).]

The Court held that the trial judge "properly permitted the jury to consider the extent of defendant's intoxication on the issue of defendant's recklessness," and noted that defendant's convictions for second-degree aggravated assault required "a jury finding of recklessness that, pursuant to the trial court's instruction, could have been based on the jury's reliance on defendant's extraordinary level of intoxication," ibid., that

[2] The legal limit at the time Krumphold was decided was .10; it is now .08.

is, .382, id. at 347. This analysis was relevant to the Court's consideration of whether the jury finding "precluded the sentencing court from using defendant's level of intoxication as an aggravating factor." Id. at 356.

We accept for present purposes that Kromphold inferentially holds that a BAC at or near the legal limit is insufficient – when standing alone – to support an aggravated manslaughter charge, i.e., that intoxication at that lower level "does not necessarily equate" with extreme indifference to human life. Id. at 356. But we reject the argument that intoxication at such a high level as suggested here – when standing alone – is insufficient. The State provided the grand jury with expert testimony as to the significantly increased risk of harm posed by a driver with a .192 BAC – more than twice the legal limit.

Moreover, even if we were to agree that more than intoxication is required to support an aggravated manslaughter charge, that additional evidence was in fact provided to the grand jury. Although defendant relies in this regard on the investigator's testimony in the grand jury proceedings that an eyewitness driving behind defendant's vehicle observed that defendant was traveling at approximately forty to forty-five miles per hour – within the fifty mile per hour speed limit posted in this location of Cologne Avenue – and was not driving

erratically, the grand jury also heard the investigator testify that defendant acknowledged taking his eyes off the road as he looked to the ballfields to his left prior to impact. A jury could find from evidence as to the time defendant would have had to brake before coming into contact with the Guzman vehicle, that his attention was diverted for more than a moment. And from this failure to heed the traffic to the front of him for a relatively lengthy period of time, when coupled with defendant's extreme intoxication, a jury could conclude that defendant acted with extreme indifference to human life.

As a result, we conclude that the trial judge erred when he dismissed the aggravated manslaughter count.

The order under review is reversed and the matter remanded for further proceedings on the indictment. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION