COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1572-CR **Cir. Ct. No. 2013CF195**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDI L. RUPNOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County: MARK L. GOODMAN, Judge. *Affirmed*.

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Randi Rupnow appeals an amended judgment convicting her of homicide by negligent operation of a vehicle. She challenges the sufficiency of the evidence and a jury instruction. We affirm for the reasons discussed below.

Sufficiency of the Evidence

¶2 We review the sufficiency of the evidence to support a criminal conviction by comparison to the instructions actually given to the jury, so long as those instructions conform to the statutory requirements of the charged offense. ***State v. Beamon***, 2013 WI 47, ¶22, 347 Wis. 2d 559, 830 N.W.2d 681. In doing so, "we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. In this context, "we consider all of the evidence produced at trial, including any evidence that the defendant challenges as being improperly admitted." ***State v. LaCount***, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29 (quoted sources omitted).

¶3 In order to obtain a conviction for homicide by negligent use of a vehicle, the State needed to prove: (1) Rupnow operated a vehicle; (2) in a manner constituting criminal negligence; (3) causing the death of another person. WIS. STAT. § 940.10 (2015-16);[1] WIS JI—CRIMINAL 1170. In this case the second element is at issue. Criminally negligent conduct is that which the actor "should

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

realize creates a substantial and unreasonable risk of death or great bodily harm to another." WIS. STAT. § 939.25(1). As the circuit court properly instructed the jury:

> Criminal negligence is ordinary negligence to a high degree. Ordinary negligence exists when a person creates an unreasonable risk of harm to another by failing to exercise ordinary care. Ordinary care is the amount of care which a reasonable person exercises under similar circumstances. Negligence does not require that the person be aware of the risk of harm that his or her conduct creates; it is sufficient that a reasonable person in the same circumstances would be aware of that risk.
>
> Criminal negligence differs from ordinary negligence in two respects. First, the conduct must create a risk not only of some harm but also of serious harm – that is, of death or great bodily harm. Second, the risk of that harm must not only be unreasonable, it also must be substantial. Therefore, for the defendant's conduct to constitute criminal negligence, the defendant should have realized that the conduct created a substantial and unreasonable risk of death or great bodily harm to another.

WIS JI—CRIMINAL 925.

¶4 The evidence most favorable to the verdict is as follows. Shortly after 10:00 a.m. on October 10, 2012, Rupnow was traveling northbound in a Ford Windstar van on a two-lane rural highway with a posted speed limit of 55 mph. Jesse Rauk was on a Suzuki motorcycle traveling southbound on the same highway, going approximately 52 mph, with his headlight on. Rupnow slowed down to about 21 mph and turned left directly in front of Rauk, attempting to enter a private driveway. Rupnow began her turn ahead of the driveway, so that she was actually traveling northbound in the southbound lane for a short period of time. Rauk's motorcycle struck Rupnow's van in Rauk's southbound lane, nearly head-on at a sixteen degree angle, less than one second after Rupnow crossed the centerline. Rauk was thrown from his motorcycle and killed.

¶5 Under WIS. STAT. § 346.18(7)(a), it was Rupnow's obligation to yield the right of way to any oncoming traffic prior to making a left turn. The sun would have been behind and to the right of Rupnow at the time of the accident, and there were no known conditions of the van or road hazards that would have obstructed Rupnow's visibility. Given the clear daytime conditions and the straight and level section of road on which the accident occurred, Rupnow would have had about ten seconds to see Rauk before she made her turn. There was no physical evidence of braking by either Rupnow or Rauk.

¶6 Although Rupnow testified that she looked for oncoming traffic before she turned but did not see Rauk, the jury was not required to accept her testimony. The jury could instead infer from the length of time that the motorcycle would have been visible and from the place and angle of impact that Rupnow either did not look for oncoming traffic before making her turn, or mistakenly thought she could complete her turn ahead of the motorcycle. The jury could reasonably conclude that Rupnow should have been aware that crossing into an oncoming lane of traffic to make a left turn on a highway either without looking or without waiting for an approaching motorcycle to pass created a substantial risk of death or great bodily harm.

Jury Instruction

¶7 In addition to the evidence summarized above, the State presented testimony that Rupnow failed to appear for her preliminary hearing; that a warrant was then issued for Rupnow's arrest; and that Rupnow was not apprehended until about six months later. The circuit court ruled prior to trial that evidence that Rupnow had disappeared for months after being charged with a crime could be fairly characterized as "concealment from justice," and was thus admissible to

show consciousness of guilt. The court reasoned that such evidence was not unfairly prejudicial, because Rupnow would be presented with an opportunity to explain her conduct.

¶8 Rupnow took the stand in her own defense and testified that she did not appear at her preliminary hearing because she "panicked," and got really scared that she would have to go to jail that day because of the seriousness of the charge, and that she was pregnant at the time and did not want to have her baby in jail. Rupnow acknowledged that she knew a warrant had been issued for her arrest, and that she did not turn herself in even during the three months after she had her baby.

¶9 The circuit court subsequently gave the jury what is commonly known as a "flight" instruction, stating that:

> Evidence has been presented relating to the defendant's conduct after the defendant was accused of the crime. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.

WIS JI—CRIMINAL 172.

¶10 Rupnow argues that any inferences that could be made from her conduct to a consciousness of guilt and/or from a consciousness of guilt to actual guilt were insufficiently probative to warrant the flight instruction, given her own explanation of her conduct. We disagree.

¶11 "A trial court has broad discretion in instructing the jury on the law, and we will not reverse if the instruction at issue correctly states the law and is supported by facts that were properly before the jury." ***State v. Selders***, 163 Wis. 2d 607, 620, 472 N.W.2d 526 (Ct. App. 1991). By Rupnow's own account,

her conduct—*i.e.*, her failure to appear at the preliminary hearing or to turn herself in over the following six months—was a deliberate choice undertaken to avoid potential consequences flowing from the accident. Rupnow's self-reported fear of going to jail supports the inference that she believed she was at fault in the accident, and the jury could consider Rupnow's state of mind when evaluating the credibility of Rupnow's testimony about her actions immediately prior to the crash.

¶12 Rupnow also appears to make a collateral argument that the State used the instruction as a "pretext" to make other prejudicial remarks to the jury, regarding how much the victim's family suffered by the delay in going to trial, and what kind of character Rupnow had, without actually making any direct argument as to consciousness of guilt. Whether the prosecutor made any improper remarks, however, has no bearing on whether evidence of Rupnow's failure to appear at her preliminary hearing was admissible, or whether the jury instruction on flight was properly given. In sum, the record shows that the circuit court properly exercised its discretion in admitting the evidence and giving the instruction by applying the relevant case law to the facts presented.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.