

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

MATTHEW RAYMOND LECHLEITNER,

Defendant-Appellant.

FOR PUBLICATION
December 7, 2010
9:00 a.m.

No. 293577
Ingham Circuit Court
LC No. 08-000226-FH

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of and sentence for operating a motor vehicle while under the influence of a controlled substance and causing death, MCL 257.625(4). The circuit court sentenced defendant as a second habitual offender, MCL 769.10, to serve a term of imprisonment of 43 to 270 months. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from a traffic accident that occurred during the early morning hours of November 22, 2007. The parties stipulated that defendant's blood alcohol was .12 grams of alcohol per 106 milliliters of blood.¹ According to the testimony, during the time his blood alcohol exceeded the statutory limit, defendant drove his truck on a slippery freeway surface and lost control. The truck struck the right guardrail, then the left guardrail, and then stopped in the middle of the freeway, taking up two lanes. Defendant turned off his headlights and activated his hazard lights, then opened the door and attempted to propel the truck out of harm's way with his leg. Another motorist swerved to miss the truck, then stopped on the shoulder out of concern for the accident. Then a third car, which also had two occupants, swerved to avoid defendant's truck and, in so doing, struck the vehicle that had stopped on the shoulder, killing that motorist.

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This is well over the proscribed limit of "0.08 grams or more per 100 milliliters of blood" MCL 257.625(1)(b).

On appeal, defendant argues that the trial court applied an incorrect definition of "operate" in concluding that defendant was operating his vehicle at the time in question and that the court erroneously scored one of the offense variables under the sentencing guidelines.

Statutory interpretation is a question of law calling for review de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). However, defendant admits that this issue is unpreserved. defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Canines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

MCL 257.625(4) sets forth penalties for a person who "operates a motor vehicle" while intoxicated "and(by the operation of that motor vehicle causes the death of another person" MCL 257.35a defines "operate" and "operating" as "being in actual physical control of a vehicle . . ." MCL 257.36 defines "operator" as "every person, other than a chauffeur, who is in actual physical control' of a motor vehicle upon a highway."

In explaining its view operation and causation the trial court stated as follows:

[A] per'sbn who places a motor vehicle in motion or in a position posing a significant risk of causing a collision, remains responsible for that motor vehicle until such time as that vehicle is put into some position where it poses no risk to other driVers. In other words, we cannot simply stop our car in the middle of the road foit'whatever reason, in this case striking the curbs or striking the sides, but we can4' just stop our car in the middle of the road, stagger off somewhere, standingnsomewhere else, and expect our liability for that vehicle to end. People are respOnsible for placing that vehicle in a proper environment.

Now, the only exceptions to that would be in situations where there was a grossly kiegligent act by another citizen or some type of emergency occurs .. . But basically, ordinary negligence by other citizens does not cause a person otherwiS'e responsible for a serious breach of the law to be not liable. . . .²

On appeal, defendant concedes that the trial court addressed the issue of what constituted operation of a vehicle so as to comport with our Supreme Court's opinion in *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995). In that case, the Court stated that "operating" must be defined "in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a Orson under the influence of intoxicating liquor with other persons or property." *Id.* at 404. Aces'xdingly, "[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person

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²This case contains no allegation of intervening gross negligence. t.

continues to operate it until the vehicle is returned to a position posing no such risk." *Id.* at 404-405.

This is consistent with both the language and the purpose of the statute. The statute provides that a defendant may be convicted where he "operates a motor vehicle" while intoxicated and "by the operation of that motor vehicle causes the death of another person." The statute does not require that the defendant's vehicle be in motion at the time of the accident, but rather that the victim's death be caused by the defendant's operation of the vehicle while intoxicated. In this case, defendant was intoxicated, operated his vehicle, and crashed it, with the result that it sat in the middle of the freeway at night creating a risk of injury or death to others.

Defendant disparages the reasoning of *Wood* as "outmoded" and suggests instead that we adopt the definition of "operation" employed in a lay dictionary, i.e. "to cause to function." Defendant argues that, since after the crash his vehicle was no longer capable of functioning, defendant could not "cause" it to "function" and so, by definition, defendant could not have operated it. As just noted, we reject this argument as injecting a temporal component into the statute that is not present. Moreover, defendant's suggestion that we rely preeminently upon a lay dictionary to determine how to apply a statute ignores the axiom that the first requirement of statutory interpretation is to determine the intent of the Legislature. Certainly, a dictionary is one of the arrows in the court's quiver regarding statutory interpretation, but it is not the only one, nor is it necessarily the one that will bring the interpreting court closest to the Legislature's target. Moreover, reliance on a single dictionary definition fails to take into account the reality that there are many dictionaries of the English language while there is only one Michigan Legislature. We should not make reference to a particular dictionary definition by the proponent of a certain result, with the demanding task of statutory interpretation that judges are expected to perform using the available data and time-tested rules of construction.

Thus, we conclude that *Wood* remains good law and that the trial court properly followed it, and affirm defendant's conviction.³

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Defendant also challenges the scoring of Offense Variable (OV) 9 which concerns the number of victims. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

³ We also note that as recently as 2007, our Supreme Court adopted a broader interpretation of "operate" than defendant suggests when it concluded that "[t]he loading and unloading of passengers is an action within the 'operation' of a shuttle bus." *Martin v Inter-Urban Transit*, 480 Mich 936; 140 NW2d 657 (2007).

A score of ten points is prescribed where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . ." MCL 777.39(1)(c). In rejecting defense counsel's challenge to the assessment of ten points for this variable at sentencing, the trial court explained, "the other gentleman who was trying to assist [defendant] was in a place of danger. And . . . the people driving the other vehicle that had to swerve around everything were in a potentially dangerous situations because of it"

Defendant relies on *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), to argue that OV 9 should have been scored at 0, because only the victim was placed in danger. However, *McGraw* is plainly distinguishable. In that case, the sentencing offense was breaking and entering and the trial court assessed ten points for OV 9 on the ground that the additional victims only came into play when the defendant fled from the police by car with two passengers then crashed. *Id.* at 132-133. Our Supreme Court held that the transactional approach to scoring OV 9 was not appropriate. *Id.* at 133. "OV 9 does not provide for consideration of conduct after completion of the sentencing offense," and thus had in that case to be scored "solely on the basis of defendant's Conduct during the breaking and entering." *Id.* at 133-134.

Using the *McGraw* approach, we conclude that defendant's intoxication and the fatal car collision endangered not only the person who died, but also both occupants of the car that struck that person; obviously, those three persons faced a serious risk of physical harm (simultaneously). Further, there was also a passenger traveling with the decedent. While he was uninjured, he was also placed in danger.

Thus, the trial court correctly identified a total of four victims, resulting in a score of ten points under OV 9, because, in addition to the decedent, defendant created a risk of physical injury to the decedent's passenger, the driver of the car that struck the decedent, and the passenger in that car, all in the course of the sentencing offense.

Affirmed.

/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

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WILDER, P.J., (*concurring*)

I concur-in the result reached by the majority, but decline to join the majority's comments concerning the use of dictionaries to interpret a statute, which fail to fully acknowledge the well-established rule concerning this subject. See *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 56 n11; 746 NW2d 282 (2008).

/s/ Kurtis T. Wilder