STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v GINO ROBERT REA, Defendant-Appellee.	FOR PUBLICATION April 19, 2016 9:15 a.m. No. 324728 Oakland Circuit Court LC No. 2014-250517-FH

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

GLEICHER, P.J.

The prosecution appeals the circuit court's order dismissing a charge of operating while intoxicated, MCL 257.625, levied against defendant. Because defendant was not operating his vehicle in an area generally accessible to motor vehicles, we affirm.

I. BACKGROUND

Late one spring night, defendant had a lot to drink and withdrew to his Cadillac sedan to listen to loud music. A neighbor objected to the noise and called the police. Two officers responded. They found defendant seated in his car, the driver's door ajar. The vehicle was parked deep in defendant's driveway, next to his house. An officer instructed defendant to turn down the music. The neighbor complained a second time, and one of the officers returned to the scene. The officer heard no music and could not see the Cadillac.

When the third noise dispatch issued, Northville police officer Ken Delano parked on the street near defendant's home and began walking up defendant's driveway. The door to the detached garage opened and defendant's vehicle backed out for "about 25 feet" before stopping. At that point the car was still in defendant's side or backyard. As noted by the officer:

> Q. . . . So at all times he was either in his side yard or in his own backyard, correct?
>
> A. Yes, sir.

Defendant then pulled the car back into the garage. He was arrested as he walked toward his house.

Here are two photographs depicting defendant's driveway and its relationship to his house:

At no time did defendant's car cross "the front of the house," officer Delano admitted.

The prosecution charged defendant with operating while intoxicated, MCL 257.625(1). The statute provides in relevant part:

> A person . . . shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles . . . if the person is operating while intoxicated.

The circuit court granted defendant's motion to quash the information, ruling that "the upper portion of Defendant's private residential driveway" does not constitute an area "generally accessible to motor vehicles."

II. ANALYSIS

We review for an abuse of discretion a circuit court's decision to quash a criminal information and de novo any underlying questions of statutory interpretation. *People v Lemons*, 299 Mich App 541, 545; 830 NW2d 794 (2013). To bind a defendant over for trial, "the prosecutor must establish probable cause, which requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt on each element of the crime charged." *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006) (quotation marks and citations omitted). Dismissal is appropriate only

when no "inference may be drawn establishing the elements of the crime charged" based on the evidence presented. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

Here, the prosecution failed to establish probable cause to believe that defendant "operate[d] a vehicle upon . . . [a] place open to the general public or generally accessible to motor vehicles." The term "generally" means: "to or by most people; widely; popularly; extensively." *Webster's New World Dictionary of the American Language* (2d College ed), p 581. Other dictionaries provide similar definitions:

> **generally . . .** adv. **1.** Popularly; widely; *generally known*. **2a.** As a rule; usually: *The child generally has little to say*. **b.** For the most part: *a generally boring speech*. **3.** Without reference to particular instances or details; not specifically: *generally speaking*. [*The American Heritage Dictionary of the English Language* (5th ed), p 731.]

> **generally** . . . **1** [sentence adverb] in most cases; usually: *the term of a lease is generally 99 years*.
>
> **2** in general terms; without regard to particulars or exceptions: *a decade when France was moving generally to the left*.
>
> **3** widely: *the best scheme is generally reckoned to be the Canadian one*. [*New Oxford American Dictionary* (3d ed), p 722.]

Common to all three definitions is the concept of regularity, ordinariness, or normality.

In the statute, the adverb "generally" modifies the adjective "accessible."[1] "An adjective must modify a noun or pronoun." *People v Prominski*, 302 Mich App 327, 334; 839 NW2d 32 (2013). "Generally accessible" in the current statute modifies the noun phrase "other place." The statute thereby prohibits intoxicated driving upon a highway or upon an "other place . . . generally accessible to motor vehicles."

Defendant drove his car from his garage to a point in his private driveway in line with his house. A residential driveway is private property. See MCL 257.44 (" 'Private driveway' means any piece of privately owned and maintained property which is used for vehicular traffic, but is not open or normally used by the public."). Even assuming that the *bottom* of one's private driveway qualifies as a "place open to the general public" or an "other place generally accessible to motor vehicles," reasonable fact finders could not differ on this record that the area of defendant's driveway in which defendant operated his car was not. The "general public" is not

[1] "Accessible" is denominated an adjective in all three dictionaries. It means "that can be approached or entered . . . easy to approach or enter." *Webster's New World Dictionary* at 8, or "[e]asily approached or entered," *The American Heritage Dictionary* at 71, or "(of a place) able to be reached or entered: *the town is* ***accessible by*** *bus[;] this room is not* ***accessible to*** *elderly people*." *New Oxford American Dictionary* at 9.

"widely" or "popularly" or "generally" permitted to "access" that portion of a private driveway immediately next to a private residence.[2] That part of a private driveway is simply not a "place . . . generally accessible to motor vehicles." Rather, it is a place accessible to a small subset of the universe of motor vehicles: those belonging to the homeowner, or those using the driveway with permission.[3] This particular area of defendant's driveway is akin to a moat; it is an area which strangers are forbidden to cross but defendant could wade at will. Defendant consumed alcohol and drove but only in this private area. Accordingly, charges were not supportable.

The prosecution insists that because the driveway was not barricaded and any visitors or delivery persons could access the driveway, the trier of fact must decide whether the specific area in which defendant drove was "generally accessible to motor vehicles." We are unpersuaded. That other vehicles had the ability to enter the area of defendant's driveway between his house and his garage misses the point. Physical ability is not the touchstone of general accessibility. Had the Legislature intended to include every place in which it is physically possible to drive a car, it could have so provided. However, the plain language of the statute prohibits driving while intoxicated in places where cars are regularly, "widely," and "usually" expected to travel. The area of a private driveway between one's detached garage and house is not such a place.

Moreover, had the Legislature wanted to criminalize driving while intoxicated in one's own driveway, it could have outlawed the operation of a motor vehicle in *any* place "accessible to motor vehicles," omitting the adverb "generally." But the statute uses the word "generally" to modify the word "accessible," and the combined modifier to further describe "other place." The commonly understood and dictionary-driven meanings of the term "generally" in this context compel the conclusion that the Legislature meant to limit the reach of MCL 257.625(1). On this record, no one could reasonably conclude that defendant drove in an area open to the public or generally accessible to motor vehicles, other than to defendant and the members of his household. As such, the circuit court properly quashed the information.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro

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[2] We note that our analysis would be different had defendant driven intoxicated in the driveway of an apartment building or other community living center, if defendant's property shared its driveway with the neighboring property, or if defendant proceeded to an area of his driveway where he could encounter a member of the general public.

[3] Again, had a member of the public trespassed upon defendant's rights and driven while intoxicated in this area, a different result might be required.

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Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent because I believe that it is the role of the trier of fact to determine whether defendant's driveway was generally accessible to motor vehicles. Accordingly, I would reverse and remand for reinstatement of the charge against defendant and for further proceedings.

The issue in this case involves whether the portion of defendant's driveway on which he drove while intoxicated was "generally accessible to motor vehicles" under MCL 257.625(1). MCL 257.625(1) provides, in relevant part:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated.

The parties contest whether a private driveway is an area "generally accessible to motor vehicles" as a matter of law under the plain language of the statute and whether the portion of defendant's driveway on which he operated his vehicle while intoxicated was generally accessible to motor vehicles. The prosecution argues that a private driveway is an area generally accessible to motor vehicles as a matter of law, while defendant contends that the upper portion of his private driveway was not generally accessible to motor vehicles. Both parties argue that the language of MCL 257.625(1) supports their position.

I believe that the issue whether the upper portion of defendant's private driveway was generally accessible to motor vehicles is a question of fact for the trier of fact to determine after hearing the evidence in the case. The parties agree regarding what occurred during the incident. Defendant drove his vehicle out of his garage and backed it down his driveway approximately 25

feet. He stopped driving his car before crossing over the point where the fence line began and before passing the front of his house. The vehicle's back bumper was "pretty close to the front of the house" when the vehicle stopped. Defendant then drove his vehicle back into his garage. Defendant was intoxicated during the incident. Thus, defendant only drove his motor vehicle while intoxicated on the upper portion of his driveway, which was encompassed in the backyard and side yard next to the front of his house.

However, the parties do dispute whether the driveway was generally accessible to motor vehicles. The prosecution argues that defendant's driveway was generally accessible to motor vehicles because the driveway was not blocked off and defendant, or any visitors or delivery persons, could access the driveway with a motor vehicle. The prosecution further contends that defendant did not have any "no trespassing" signs on his property. In contrast, defendant argues that the area on which he operated his motor vehicle was not generally accessible to motor vehicles as it was in his "backyard/side-yard," was next to his house, and was behind the fence-line of his property. Defendant contends that a reasonable driver would not conclude that he or she had permission to access or use this portion of his driveway.

I believe the trier of fact must determine whether the area on which defendant drove his vehicle while intoxicated was generally accessible to motor vehicles under the particular facts and circumstances of this case. I disagree with the majority's conclusion that the area of defendant's driveway on which he operated his vehicle was akin to a moat that strangers were forbidden to cross because it is unclear whether other vehicles were routinely permitted or forbidden to access the portion of defendant's driveway on which he operated his vehicle. The majority concludes that motor vehicles are not widely or generally permitted to access the upper portion of a private driveway immediately next to a private residence, but also notes that there are several factual scenarios in which a private driveway may constitute an area generally accessible to motor vehicles. In this case, there was no evidence presented at the preliminary examination regarding the frequency with which other vehicles accessed defendant's driveway. Therefore, I conclude that the issue whether the upper portion of the driveway constitutes an area generally accessible to motor vehicles is a question of fact for the trier of fact to determine based on the evidence presented at trial.

M Crim JI 15.2 further supports the conclusion that the issue is one for the trier of fact to determine at trial. M Crim JI 15.2 provides:

> To prove that the defendant operated while intoxicated [or while visibly impaired], the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (1) First, that the defendant was operating a motor vehicle [on or about (*state date*)]. Operating means driving or having actual physical control of the vehicle.
>
> (2) Second, that the defendant was operating a vehicle on a highway or other place open to the public or generally accessible to motor vehicles.

(3) Third, that the defendant was operating the vehicle in the [county/city] of _____.

The jury instruction indicates that it is the role of the trier of fact to determine whether a defendant operated a vehicle on an area generally accessible to motor vehicles because the jury instruction charges the jury with the task of making this determination. In this case, because there was no testimony regarding the vehicles that accessed the driveway and because the prosecution established that vehicles could enter the area, I believe that the issue is one for the trier of fact to determine after examining the evidence presented at trial. Therefore, I conclude that the circuit court improperly quashed the information. Accordingly, I would reverse and remand for reinstatement of the charge against defendant and for further proceedings.

/s/ Kathleen Jansen