STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2003
v DEAN MATTHEW MIDDLETON, Defendant-Appellant.	No. 236547 Genesee Circuit Court LC No. 99-004755-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v PEDRO ALFREDO ESPINOZA, Defendant-Appellant.	No. 237163 Genesee Circuit Court LC No. 99-004754-FH

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendants appeal as of right their jury trial convictions for operating a motor vehicle while under the influence of intoxicating liquor causing the death of another person ("OUIL causing death"), MCL 257.625(4); involuntary manslaughter, MCL 750.321; and furnishing alcohol to a minor, MCL 436.33(1).[1] Defendant Middleton was sentenced to two terms of 90-180 months' imprisonment for his OUIL causing death and involuntary manslaughter convictions. Defendant Espinoza was sentenced to two terms of 60-180 months' imprisonment for his OUIL causing death and involuntary manslaughter convictions. Defendants also received

[1] The judgment of sentence reflects that defendants were convicted under MCL 436.33(1). However, we note that MCL 436.33 was repealed by 1998 PA 58, effective April 14, 1998, and essentially recodified as MCL 436.1701. Defendants were originally charged with furnishing alcohol to a minor under MCL 436.1701(1). Thus, we remand for the limited purpose of directing the trial court to correct the judgment of sentence.

60 days in jail for furnishing alcohol to a minor. We affirm but remand for the limited purpose of correcting the judgment of sentence.

On the evening of September 23, 1998, defendants entered a BP gas station in Linden, Michigan, and purchased a case of beer. Stephanie Cross was at the BP station when defendants arrived. She asked defendants if they were going to a party. Defendant Espinoza responded that there was a party in Fenton and asked her to join them. Ms. Cross agreed to go but asked to bring her brother and his two friends because she did not know defendants. On the way to the party, defendant Espinoza gave beer to everyone in the car. Ms. Cross testified that she consumed at least one beer on the way to the party.

Ms. Cross testified that she continued to receive beer from defendant Espinoza during the party. Shortly after their arrival, however, Ms. Cross' brother decided to leave the party. Defendants dropped Ms. Cross and her brother off at a friend's house and informed Ms. Cross that they would return for her later that evening. Instead of waiting for defendants, Ms. Cross walked back to the BP station with her brother. When defendants returned to the BP store and purchased another case of beer, Ms. Cross agreed to leave with them if she could drive the car. Defendant Middleton gave Ms. Cross the keys to his car. According to Ms. Cross, she had previously informed defendants that she was fifteen years old and did not have a driver's license. When Ms. Cross got into the driver's seat, her brother and the store clerk threatened to call the police. Whereupon defendant Middleton told her to hurry up and leave.

Ms. Cross proceeded to drive defendant Middleton's vehicle to Flint, which is approximately thirty minutes from Linden. Throughout this trip, Ms. Cross claimed that she continued to drink the beers offered by defendants. She explained that whenever she finished a beer, defendant Middleton would hand her another opened beer can. She testified that he would get these beers from defendant Espinoza in the back seat. While returning from Flint, defendants allowed Ms. Cross to pick up her sixteen-year-old friend, Kathleen Fortin. When Ms. Cross drove up to Ms. Fortin's home, Ms. Fortin climbed out her bedroom window and got into the backseat of the car.

Ms. Cross then took the group back to the BP station. At trial, Ms. Cross admitted that she felt drunk while driving to the gas station. The store clerk also testified that Ms. Cross appeared visibly intoxicated upon her arrival and that she was slurring her speech. When the clerk informed the group again that she was going to call the police, defendant Middleton told Ms. Cross to drive off. It was shortly thereafter that Ms. Cross approached the stop sign at the intersection of Whitaker Road and Owen Road. As Ms. Cross entered the intersection, the car she was driving was struck by another vehicle driven by Denise Jenkins-Cahill. Ms. Fortin died at the scene of the accident. Ms. Cross testified that she did not remember stopping at the intersection. An accident reconstruction expert concluded that the collision occurred because the driver of defendant Middleton's vehicle failed to yield the right of way.

Ms. Cahill acknowledged at trial that she had been drinking with some friends earlier that evening. However, she denied being intoxicated at the time of the accident. Nevertheless, blood tests conducted shortly after the accident revealed that both Ms. Cahill and Ms. Cross had blood alcohol levels above .10 percent. Ms. Cahill was not charged with OUIL causing death and was ultimately acquitted of drunk driving. Ms. Cross was charged as a juvenile and entered into a

plea agreement, under which she pled guilty to OUIL causing death in exchange for the dismissal of an involuntary manslaughter charge.

I. Sequestration Order Violation

Defendants initially contend that the trial court abused its discretion in refusing to either exclude Ms. Cross' testimony or provide a special instruction to the jury. Specifically, defendants argue that the trial court should have instructed the jury to consider Ms. Cross' testimony in light of a violation of a sequestration order. We disagree. The decision to sequester witnesses and the penalties for a violation of a sequestration order are matters within the trial court's discretion. *People v Nixten,* 160 Mich App 203, 209-210; 408 NW2d 77 (1987). A trial court's decision involving jury instructions is reviewed de novo. *People v Marion,* 250 Mich App 446, 448; 647 NW2d 521 (2002).

A sequestration order serves to prevent witnesses from coloring their testimony in relation to the testimony of other witnesses. *People v Stanley,* 71 Mich App 56, 61; 246 NW2d 418 (1976). To obtain appellate relief for a sequestration order violation, a defendant must demonstrate prejudice. *People v Solak,* 146 Mich App 659, 669; 382 NW2d 495 (1985). It is undisputed that Ms. Cross was present during arguments regarding the scope of defendants' cross-examination in violation of the trial court's sequestration order. Defendants claim that they were prejudiced by Ms. Cross' presence because she was able to shade her testimony according to the theories put forth in the arguments. However, defendants have failed to identify any portion of Ms. Cross' testimony that was altered or inconsistent with her preliminary examination testimony. Absent any evidence to support defendants' claims that Ms. Cross altered her testimony, the trial court properly denied their request for a jury instruction concerning the violation. *People v Mills,* 450 Mich 61, 81; 537 NW2d 909, mod 450 Mich 1212 (1995).

II. Sufficiency of the Evidence

Defendants next raise several issues concerning the sufficiency of the evidence supporting their convictions. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich App 720, 723; 597 NW2d 73 (1999). A trial court's decision on a motion for directed verdict is reviewed in a similar manner. *People v Aldrich,* 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

A. Involuntary Manslaughter

Defendants assert that there was insufficient evidence to convict them of involuntary manslaughter under an aiding and abetting theory. Defendant Espinoza also argues that the trial court improperly denied his motion for a directed verdict in this regard. We disagree.

Involuntary manslaughter is defined as "'the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.'" *People v Datema*, 448 Mich 585, 595-596; 533 NW2d 272 (1995), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923). A person who aids or abets in the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). A defendant may be convicted as an aider and abettor if: (1) the defendant or some other person committed the charged crime; (2) the defendant assisted in the commission of the crime by performing acts or offering encouragement; and (3) the defendant either intended the commission of the crime or knew that the principal had such an intent when he offered aid and encouragement. *Izarraras-Placante, supra* at 495-496.

There is record evidence that defendants provided Ms. Cross with beer throughout the evening. Despite this fact, defendant Middleton allowed Ms. Cross to drive his car. There was also testimony that defendants knew Ms. Cross was only fifteen years old and that she did not have a learner's permit or a driver's license. The record further reveals that Ms. Cross appeared visibly intoxicated when defendant Middleton told her to drive away from the BP station shortly before she collided with Ms. Cahill's vehicle. While defendant Espinoza may have lacked physical control of the vehicle, the record indicates that he actively contributed to Ms. Cross' intoxication by providing alcoholic beverages. On this record, a rational trier of fact could have concluded that defendants encouraged and contributed to Cross' driving in an intoxicated state, which played a role in the ultimate commission of involuntary manslaughter.

Nevertheless, defendants assert that they could not be criminally liable in this case because the death was actually and proximately caused by an intervening intentional act of a third person. Specifically, defendants note that Ms. Cahill was driving while intoxicated and in excess of the speed limit when she ran into their car. In this regard, defendant Middleton, citing *People v Zak*, 184 Mich App 1, 13; 457 NW2d 59 (1990), alleges that a person cannot negligently or recklessly aid and abet a murder. However, defendant Middleton's reliance on *Zak, supra*, is misplaced. In *Zak, supra* at 9, this Court ultimately concluded that the theory of involuntary manslaughter failed due to a lack of causation between the negligent acts and the homicide.

In the present case, there is sufficient evidence from which a jury could conclude that defendants' conduct was *a* cause of Ms. Fortin's death. Indeed, an expert who examined the scene opined that it was defendant Middleton's vehicle that failed to yield the right of way. In *People v Bailey*, 451 Mich 657, 676; 549 NW2d 325; amended 453 Mich 1204 (1996), the Supreme Court of Michigan held:

> [i]n assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found. Quite the contrary, all acts that proximately cause the harm are recognized by the law. If a certain act was a substantial factor in bringing about the loss of human life, it is not prevented from being a proximate cause of this result by proof of the fact that

> it alone would not have resulted in death, nor by proof that another contributory cause would have been fatal even without the aid of this act.

Because there was evidence that Ms. Cahill's conduct was not the sole cause of the accident that resulted in the victim's death, a reasonable finder of fact could find that defendants' actions were substantial contributing factors to the accident.

B. OUIL Causing Death

Defendant Espinoza argues that the trial court improperly denied his motion for a directed verdict because there was insufficient evidence to support his conviction for OUIL causing death under an aiding and abetting theory. According to defendant Espinoza, he could not be liable for this offense because defendant Middleton owned the vehicle and he was merely a passenger. He further contends that he was unaware of the level of Ms. Cross' intoxication and that he did not intentionally assist Ms. Cross in the commission of the crime. We disagree.

A conviction for OUIL causing death requires proof that "(1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and may be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death." *People v Lardie*, 452 Mich 231, 259-260; 551 NW2d 656 (1996) (footnotes omitted). OUIL causing death is considered a general intent crime requiring evidence that an individual made the decision to drive after consuming intoxicants. *Id*. at 267. A person can aid and abet general intent crimes such as those involving negligence or gross negligence. See *People v Malach*, 202 Mich App 266, 277; 507 NW2d 834 (1993).

The record indicates that defendant Espinoza supplied Ms. Cross with beer throughout the evening. Significantly, the evidence reveals that defendant Espinoza also made beer available for Ms. Cross *while she was driving*. Given the short period of time and the number of beers he provided Ms. Cross, a reasonable trier of fact could conclude that he possessed an awareness of the fact that she was intoxicated. Moreover, Ms. Cross testified that she felt drunk and another witness claimed that she appeared visibly intoxicated shortly before the accident. Accordingly, the trial court did not err in denying defendant Espinoza's motion for a directed verdict on this offense.

III. OUIL and Involuntary Manslaughter Convictions

Defendant Middleton contends that his convictions for OUIL causing death and involuntary manslaughter should be reversed because he is only guilty of the misdemeanor offense of permitting an intoxicated minor to drive his car, MCL 257.625(8). Case law clearly provides that "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). To the extent this issue involves a question of statutory interpretation, our review is de novo. *People v Stone Transport, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000).

The primary goal when interpreting statutes is to ascertain and facilitate the intent of the Legislature. *Id*. To determine the Legislature's intent, this Court looks to the specific language

of the statute. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). When the language of a statute is clear, judicial construction is inappropriate. *Id.*

Defendant Middleton properly notes that at the time of the accident, an owner of a vehicle who authorized or permitted an intoxicated person to operate his motor vehicle was generally guilty of a misdemeanor. MCL 257.625(2) and (8). Thus, defendant claims that his only conviction in this case should be for the misdemeanor offense of allowing a drunk driver to use his vehicle. However, defendant Middleton was not charged or convicted under those statutes. Rather, he was charged and convicted pursuant to OUIL causing death, MCL 257.625(4); and involuntary manslaughter, MCL 750.321.

"If warranted by the facts, the prosecutor has the discretion to proceed under any applicable statute." *People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996). As previously determined, there was ample evidence on the record to convict defendant Middleton of involuntary manslaughter under an aiding and abetting theory. Further, a review of the record indicates that there was also sufficient evidence to charge and convict defendant Middleton of OUIL causing death under an aiding and abetting theory.

The plain language of MCL 257.625(1) and (4) states that if a person operates a motor vehicle under the influence of intoxicating liquor and causes the death of another in the process, he is guilty of a felony. There was evidence presented at trial that Ms. Cross was driving Middleton's car while under the influence of intoxicating liquor, and that her operation of his vehicle in that intoxicated state caused the victim's death. Defendant Middleton admits that he provided Ms. Cross with alcohol and that he permitted her to drive his car despite the fact that he should have known she was intoxicated. More importantly, the record shows that defendant Middleton gave Ms. Cross alcoholic beverages while she was driving.[2] Because there was evidence that defendant Middleton actively aided and encouraged Ms. Cross to drive while intoxicated, the prosecution properly charged him with OUIL causing death under an aiding and abetting theory. Consequently, defendant Middleton's argument that he is merely guilty of the misdemeanor offense of permitting an intoxicated minor to drive his car is without merit.

IV. Right of Confrontation

Defendants contend that the trial court deprived them of their Sixth Amendment right to confrontation by limiting their cross-examination of Ms. Cross. We disagree. This Court reviews constitutional issues de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). Because defendants failed to object on this ground below, our review is limited to plain error affecting their substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

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[2] Unlike the defendant in *People v Marshall*, 362 Mich 170; 106 NW2d 842 (1961), who remained home after giving his car keys to an intoxicated person, both defendants in this case remained in the vehicle and contributed to the driver's level of intoxication by giving her alcoholic beverages.

A defendant has a constitutional right to present a defense and confront his accusers. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, "[t]he right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society." *Adamski, supra* at 138. In the instant case, the trial court refused defendants' requests to question Ms. Cross regarding her prior juvenile adjudications and her alleged runaway status. According to defendants, this evidence was necessary to rebut the prosecution's portrayal of Ms. Cross as "some innocent little girl that [was] duped into drinking this alcohol and driving a vehicle." However, the trial court ruled the evidence inadmissible because defendants failed to show that it was sufficiently relevant to their argument.

It appears that Ms. Cross' status as a runaway from the Tennessee adjudication system would arguably tend to make it more likely that she was not a young naïve girl who defendants took advantage of on the night in question. See MRE 401. Nevertheless, defendants have failed to demonstrate that their substantial rights were prejudiced by the trial court's refusal to admit this evidence. Indeed, Ms. Cross acknowledged that she was not forced to drink. She further admitted that it was her idea to drive defendant Middleton's vehicle, despite her awareness that it was illegal. Ms. Cross also claimed that she had driven on at least ten prior occasions and she admitted that she was a "wild child." On this record, defendants have failed to establish that their substantial rights were affected by the trial court's decision. *Carines, supra* at 763-764.

V. Double Jeopardy

Defendants next assert that their sentences and convictions for both OUIL causing death and involuntary manslaughter constitute double jeopardy. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). We disagree. Because defendants failed to raise this issue below, our review is again limited to plain error affecting their substantial rights. *Carines, supra* at 763-764.

This issue was put to rest in *People v Kulpinski*, 243 Mich App 8; 620 NW2d 537 (2000). In *Kulpinski, supra* at 23, a panel of this Court determined that:

> [t]he offenses of involuntary manslaughter and OUIL causing death protect distinct societal norms, the amount of punishment for each statute does not involve a hierarchy of offenses, and each statute requires proof of an element that the other does not. Thus, pursuant to *Price*,[3] defendant's convictions and punishments under both statutes *do not violate the Double Jeopardy Clauses of the United States and Michigan Constitutions*. [Emphasis added, footnote added.]

Accordingly, we find no double jeopardy violation in this case. See MCR 7.215(I)(1).

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[3] *People v Price*, 214 Mich App 538; 543 NW2d 49 (1995).

VI. Sentencing

Defendants raise several issues concerning their sentences. A trial court's sentencing decisions are reviewed for an abuse of discretion. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The judicial guidelines are applicable in this case because the offenses were committed before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000); see also MCL 769.34(1). Under the judicial guidelines, scoring errors cannot form the basis for appellate relief unless the factual predicate relied upon by the trial court is wholly unsupported by the evidence, is materially false, and there is a finding that the sentence is disproportionate. *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998). We further note that the claim of a miscalculated variable is not in itself a claim of legal error. *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997).

"As a general rule, a sentence that falls within the guidelines' range is presumed to be neither excessive nor disparate." *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). The presumption of the validity and fairness of a sentence within the judicial sentencing guidelines is removed if a court finds that "unusual circumstances" exist. *Milbourn, supra* at 660-661; *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Unusual circumstances refer to "uncommon" or "rare" factors. *Sharp, supra* at 505. Absent a showing of unusual circumstances, the presumption of proportionality of a sentence within the guidelines range cannot be overcome. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994); *Sharp, supra* at 505-506.

A. Offense Variable Seven

Defendants' assert that the trial court improperly scored fifteen points under offense variable (OV) 7. Specifically, defendants claim that the mere fact Ms. Fortin was sixteen failed to indicate that she was exploited in a manner contemplated by the guidelines. Defendants also suggest that the trial court could not consider Ms. Cross when scoring this offense variable because she was considered a co-defendant rather than a victim.

Fifteen points is appropriate under OV 7 where the offender exploited the victim's youth or abused the offender's authority status. *People v Nantelle*, 215 Mich App 77, 84; 544 NW2d 667 (1996). The record in this case indicates that the trial court considered Ms. Fortin, rather than Ms. Cross, as the victim when scoring OV 7. The trial court reasoned that while Ms. Cross was not a victim in this case, defendants did exploit her age and the situation. Indeed, it was through this connection with Ms. Cross, that the trial court determined defendants were able to similarly exploit Ms. Fortin. The record reveals that the twenty-eight year-old defendants picked up fifteen-year-old Ms. Cross at the local gas station. Throughout the evening, defendants provided Ms. Cross with beer and allowed her to drive. Defendants then permitted an obviously intoxicated Ms. Cross to pick up her sixteen-year-old friend, Ms. Fortin, to go riding with them. Because there is some evidence in the record to support the trial court's determination that

defendants exploited Ms. Fortin's youth in this case, appellate relief is unavailable. See *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

B. Principle of Proportionality

Defendants also opine that their sentences violate the principle of proportionality. Because defendants' sentences are within the range recommended by the judicial sentencing guidelines, they are presumptively proportionate. *Kennebrew*, *supra* at 609. Further, we note that defendants' ages and minimal criminal histories do not constitute unusual circumstances requiring a finding that the trial court abused its discretion by imposing a sentence within the guidelines range. See *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995); *Daniel*, *supra* at 54. Moreover, the record shows that defendant Middleton was involved in at least two additional drunk driving incidents subsequent to the accident in this case. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendants.

Affirmed, but remanded to correct the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy