**S T A T E  O F  M I C H I G A N**

**C O U R T  O F  A P P E A L S**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SUSAN BRUSH SWANSON,

Defendant-Appellant.

---

UNPUBLISHED
June 21, 2005

No. 252906
Ingham Circuit Court
LC No. 02-001189-FH

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions for operating a motor vehicle while under the influence of intoxicating liquor causing death (OUIL), MCL 257.625(4), and failure to stop at the scene of a serious personal injury accident, MCL 257.617. Defendant was sentenced to concurrent terms of 54 to 180 months and 36 to 60 months. We affirm.

I

A. Synopsis of Basic Facts and Parties' Theories

This action arose from incidents occurring during the evening hours of July 30, 2002 and early morning hours of July 31, 2002, including an accident involving defendant's motor vehicle shortly after midnight culminating in the death of a pedestrian, Alejandro Salinas. On July 30, 2002, defendant and her children, returned from their summer home in northern Michigan and defendant agreed to meet a friend, Dawn Harrison, at the University Club in East Lansing. In violation of the rules of the University Club, defendant brought a thermos with ice, tonic and vodka to her get together with Harrison. Defendant and Harrison were observed drinking from the thermos over a two and a half or three and a half hour period. Defendant and her children ate dinner at the University Club before departing. After driving the children home, defendant met her daughter, Dena Swanson, at a local bar and restaurant, Harrison Roadhouse, at approximately 8:30 p.m. Defendant and Dena Swanson each had a drink before they were joined by James Blanchard, a friend of Dena Swanson's. The evidence established that an appetizer and 18 drinks consisting of vodka tonics, gin and tonics, and various "shots" were delivered to Dena Swanson, Blanchard, and defendant's table between 8:30 p.m. and 10:45 p.m. At 11:15 p.m., defendant, Dena Swanson and Blanchard walked approximately 1-1/2 blocks to Blanchard's apartment where Blanchard prepared three vodka tonics in large plastic cups. Defendant remained at Blanchard's apartment for approximately thirty to forty-five minutes after which she

left to retrieve her vehicle from the bar. Defendant then began to drive home on Grand River Boulevard.

On Grand River near Cornell, between the Cornell and Dobie exits, defendant encountered a new construction area marked by large construction barrels in a dimly lit area. For approximately 500 yards, construction barrels diverted traffic during the expansion of the two-lane road to a four-lane road. During the construction, traffic was first routed to one half of the road while the other half was completed, then reversed. The traffic routing was reversed while defendant was vacationing. Defendant normally would exit at Cornell. As she approached the Cornell exit, barrels diverted traffic to the opposite side of the road for approximately 500 feet and then diverted traffic back to the original lane. The construction barrels did not block the Cornell exit and the exit was not closed.

Defendant passed the Cornell exit and suddenly heard a thud and a crash. She also observed her passenger side windshield breaking. Defendant testified that she did not know what she struck and she proceeded to drive to a nearby gas station to examine the damage. Not seeing anything specific to indicate what she hit, defendant returned to the scene of the accident. Testifying that she did not see anything unusual, she assumed she struck a construction barrel. Defendant drove home without further incident. The next day, she and her husband viewed the damage to the vehicle from a distance, while the vehicle was parked in their garage. Her husband contacted their insurance agent, who advised them to have an estimate prepared. In course of running errands that afternoon, defendant went to the Capital Cadillac dealership to get a repair estimate. The dealership, which had been alerted to watch for a damaged Cadillac suspected of being involved in a hit-and run accident involving a pedestrian, contacted the police.[1] Lansing police stopped defendant as she was leaving the dealership. Defendant was taken to the Meridian Township police station and briefly questioned. When asked about the accident, defendant admitted that she was driving her vehicle the night before, but asserted that she struck a construction barrel. Defendant denied that her drinking impaired her ability to drive. Defendant was subsequently charged with alternative counts of operating a motor vehicle while under the influence of intoxicating liquor causing death, MCL 257.625(4), or negligent homicide, MCL 750.324.[2] Defendant was also charged with failure to stop at the scene of a serious personal injury accident, MCL 257.617. The prosecution theorized that the accident occurred because defendant steadily drank between seven and nine alcoholic drinks in the hours immediately preceding the accident and as a result, her ability to drive was impaired. Defendant did not dispute that her vehicle struck the victim, but she asserted in her defense that the accident occurred, in part, due to poor lighting in the area, her unfamiliarity with the new construction in the area, and the victim's contributory negligence by walking with traffic on the wrong side of the road. Defendant further disputed that her ability to drive was impaired and testified that she

[1] The police suspected a Cadillac was involved in the accident after finding a side-view mirror at the scene.

[2] Following the preliminary examination, the district court bound defendant over on both charges, OUIL and negligent homicide; however, because defendant could not be convicted of both, the parties entered a stipulation agreement to amend the Felony Information and the negligent homicide charge was prosecuted as a lesser included offense to the OUIL charge.

had one vodka tonic at the University Club, that she had between three and four drinks between 8:30 p.m. and 11:30 p.m., and that she did not drink any intoxicating liquor at Blanchard's apartment.

## B. Trial

### 1. Physical Evidence

During the fourteen-day trial, the prosecution proceeded on alternative theories of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), operating a motor vehicle with an unlawful blood alcohol level (UBAL), and operating while impaired (OWI), and vigorously challenged defendant's theory of the case. Michael Fisher, a construction worker, testified in the prosecution's case-in-chief that he aligned the construction barrels along the construction route at the end of his shift on July 30, 2002, checked them at the beginning of his shift the next day, and did not find any barrels out of position. Testimony established that Salinas' body was recovered from a depression, but conflicted as to whether the body was visible from the road. The jogger who discovered the body indicated that the body was not easily visible from the road. A paramedic who arrived at the scene indicated that the body could be seen when his ambulance was positioned perpendicular to the road.

Gail Herron, Capital Cadillac body shop manager, testified that in the course of examining the damage to defendant's vehicle for the insurance estimate, she observed hair in the windshield and clothing fibers near the passenger side headlight. Sergeant Allen Spencer and Meridian Township Detective Brad Bach's inspection of defendant's vehicle also revealed that hair and biological matter were imbedded in the windshield. Blue denim fibers were also observed near the right headlight. Lansing Officer Donald Porter observed dried smeared blood on the vehicle.

### 2. Theories on the Cause of the Accident

Michigan State Police Officer Gary Megge and Donald Holmes, an independent consultant, each offered opinion testimony on the cause of the accident as prosecution experts in traffic reconstruction. Megge stated defendant's probable minimum speed or average speed was forty miles an hour and that the impact point between Salinas and defendant's vehicle was 1.4 feet south of the fog line on the gravel shoulder. Megge conceded that his impact point findings had a variance of a few feet, which potentially placed the point of impact on the road; however, he believed that his review of the police evidence, the damage to defendant's vehicle, Salinas' injuries, and the location of the debris from the accident (the "cone of debris"[3]) supported his conclusions that the accident occurred because defendant drifted or drove off the right side of the road, striking Salinas with the right, front corner of the vehicle which caused Salinas' body to

[3] The cone of debris represents the placement of objects and/or debris involved in the accident. After considering the velocity and trajectory paths of the objects or debris, either a precise point of impact or probable area of impact may be determined.

travel on to the vehicle's hood, partially onto the windshield and finally resting in the grassy shoulder.

Holmes, in contrast, concluded that a precise point of impact could not be determined because no immediate investigation of the accident was performed. He determined that the pavement edge, one to two feet to the north and one to two feet to the south, on the gravel shoulder was the probable area of impact. Holmes determined that defendant's minimum speed was thirty-five miles per hour. Holmes opined that Salinas' body was not thrown straight forward because he did not pick up the full speed of defendant's vehicle upon impact. Holmes conducted several driver visibility tests at the accident scene with alerted drivers (drivers who were aware that a pedestrian was walking along the road) and determined that defendant could have avoided the accident because Salinas was wearing a light refracting white t-shirt. According to Holmes, defendant could not have hit a construction barrel at the accident scene because the line of construction barrels on the right of the road ended 640 feet before she reached the area of impact.

Megge and Holmes' opinions as to the cause of the accident were also based in part on partial tire marks found at the scene. However, Mr. Suniph from the State Lab eliminated all the defined tracks as originating from defendant's vehicle. Defendant argued that a police car or ambulance left the one remaining indiscernible track.

Defendant called Dr. Warner Spitz as an expert in the field of forensic pathology to rebut the testimony of Megge and Holmes. Spitz opined that Salinas was struck on his left side, lifting his body in a seated position rearward onto the right fender of defendant's vehicle, which was moving at 45 miles per hour, and that Salinas' body continued to travel partly on the windshield, scraping down along the side mirror where he was propelled outward. Spitz further opined that because Salinas sustained injuries on his left side, he had not been walking in the line of travel of defendant's vehicle per se, but that if he had been more to the right he would not have been struck. Spitz concluded that Salinas' injuries were consistent with a grazing, sideswiping-type impact caused by Salinas' movement of crossing the road, and that therefore Salinas had not been struck directly from behind. In Spitz's opinion, Salinas was walking with his right leg down and his left leg up to rotate at the moment of impact. By Spitz' estimations, the point of impact occurred in milliseconds and the entire accident between five milliseconds and thirty seconds.

Defendant also called Jeffrey Muttart to testify as an expert in traffic reconstruction. Muttart specializes in driving behavior and decision-making in response to driving stimuli. Although he conceded the possibility that a cone of debris determination could be made, Muttart testified that he reached no conclusion as to the point of impact or the cone of debris, because in his judgment, the five to six hour time span between the accident and the arrival of the police affected the integrity of the accident scene. Muttart further concluded that Salinas' contributed to the accident because his body's trajectory was inconsistent with a straight-on hit. Muttart explained that because Salinas' body traveled at an angle after impact, it was his opinion that Salinas walked from defendant's right to her left, i.e. walked into the street. Muttart further explained that in his opinion if Salinas had been directly hit, his body would have traveled in a straight pattern. Muttart opined that Salinas had the best opportunity to avoid the accident because the area was dimly lit and few cars traveled on that road at that time of night. Although he acknowledged that alcohol could negatively affect response time, Muttart attributed the cause

of the accident to Salinas' moving into the path of the vehicle and the fact that defendant had a 50-50 likelihood of avoiding the accident.

3. Medical Examiner's Report

The medical examiner's report reflected that Salinas sustained skull fractures, scrapes, abrasions, and symmetrical bruises to the back of his thighs. The medical examiner opined that Salinas' symmetrical bruising was inconsistent with his being struck from the side. The medical examiner conceded that it would be more likely that Salinas' weight bearing leg would be broken if he was hit straight on, however, he testified that it was not impossible that he would not have a broken leg with a straight on impact. Salinas also sustained fractures to the pelvic bone, clavicle and ribs. The injuries to his arms were attributed to gravel abrasions. The official cause of death was listed as multiple blunt force injuries due to a pedestrian-motor vehicle collision.

4. Testimony regarding Defendant's Conduct/Drinking

At trial, evidence conflicted regarding the amount of alcohol defendant consumed at the Roadhouse and Blanchard's apartment.[4] The prosecution theorized that defendant's alcohol consumption of 7 to 9-1/2 drinks could be determined by examining the itemized bill introduced at trial, deducting the drinks that Blanchard and Dena Swanson drank, adding at least one of two shots that did not appear on the itemized receipt and were paid for and delivered by the bartender, and finally adding the alcohol she drank at Blanchard's apartment.

Detective Dena Smith testified that when defendant was interviewed at the police station, she stated that she had consumed three or four vodka tonics and an appetizer at the bar. Dena Swanson stated that defendant drank five to six vodka tonics at the Roadhouse and one to one and a half vodka tonics at Blanchard's. When she testified, Dena Swanson denied making any such statement to Detective Smith, and asserted that Detective Smith suggested the number of drinks. Dena Swanson further testified that, because she was intoxicated on the evening in question, she could not remember the number of vodka tonics that defendant drank, and that while shots of liquor were delivered to their table, she was certain that defendant did not drink any of the shots. Cheryl Daly, the Harrison Roadhouse bartender, testified that two shots, were delivered to the table free of charge and all the glasses were empty when she cleared the table.

Blanchard testified that he drank two vodka tonics before he arrived at the Roadhouse, and that at the Roadhouse he drank three to four vodka tonics and two shots, Dena Swanson drank three gin and tonics and two shots, and defendant had two vodka tonics. Because he was intoxicated, he was not certain whether defendant drank any shots at the bar or the vodka tonic he had prepared at his apartment. Dawn Harrison, Ed Swanson, and Dena Swanson characterized defendant as a "sipper," a person who would sip on one drink for hours.

Both Blanchard and Dena Swanson testified that they did not stop defendant from driving because she showed no signs of intoxication. Robert Steingreaber, Roadhouse general manager,

---

[4] Although there was evidence that defendant drank at least one, potentially two, drinks at the University Club, they were not considered in the blood alcohol level calculations discussed, *infra*.

recalled that he, twice, stopped by defendant's table. Both Daly and Steingreaber completed T.I.P.S., a service industry program that trains workers to recognize signs of intoxication. Nothing in defendant's conduct gave Daly or Steingreaber reason to believe defendant was intoxicated.

5. Expert Testimony Regarding Blood Alcohol Levels

The prosecution offered expert testimony from Dr. Felix Adatsi, a toxicologist with the Michigan State Police, as an expert in the field of toxicology, including but not limited to the relation back of test results and general toxicology. Defendant had no objection to Adatsi's testimony concerning toxicology in general or potential blood alcohol levels, but because no chemical test had been administered to defendant, defendant challenged Adatsi's qualifications to give testimony on the effects of alcohol on a person's ability to operate a motor vehicle. The trial court, concluding that the jury was aware that a chemical test was not performed, overruled defendant's objection. The trial court ruled that once Adatsi had offered an opinion on defendant's blood alcohol level near the time of the accident, Adatsi would also be permitted to give expert testimony on the effects of alcohol on a person's ability to operate a motor vehicle. Using the Widmark formula[5] together with an average elimination rate of 0.015, and assuming defendant drank three or five vodka tonics with three shots in four hours, Adatsi estimated that at midnight, defendant had a blood alcohol level between 0.097 and 0.137. Adatsi further opined that defendant had a blood alcohol level between 0.082 and 0.162 at 1:00 a.m., and between 0.067 and 0.147 at 2:00 a.m., assuming the same amount of alcohol was injested. Adatsi testified that because he rounded his numbers down, his original blood alcohol level estimations were conservative figures.

On cross-examination, Adatsi was asked to calculate estimated blood alcohol levels using a more aggressive elimination rate of 0.018, adding thirty minutes for burn off, and a lower amount of alcohol per "shot." Keeping the amount of alcohol per vodka tonic constant, defendant's blood alcohol level calculated with these assumptions would have been 0.04, 0.031, and 0.022 at 12:30 a.m., 1:00 a.m., and 1:30 a.m., respectively. Adatsi further calculated that with a lower amount of alcohol per shot, but using the 0.015 elimination rate in his original calculations, defendant's blood alcohol level would have been 0.0535, 0.046 and 0.0385 for the same time periods. Finally, Adatsi acknowledged on further cross-examination that assuming defendant had three mixed drinks for a total of 3.75 ounces of alcohol, and 40 percent alcohol, and further assuming an elimination rate of 0.015, defendant would have had an estimated blood alcohol level of 0.018 at 12:30 a.m., 0.011 at 1:00 a.m., and 0.003 at 1:30 a.m.

[5] Widmark's formula dates back to the 1930's and is used by toxicologists to estimate an individual's maximum blood alcohol level. It incorporates the individual's weight and gender, the type and amount of alcohol, the absorption rate and the elimination rate. Generally, the formula assumes an average of ninety minutes for a person to completely absorb one alcoholic drink into the bloodstream if the person has eaten, and forty-five minutes on an empty stomach. Elimination rates range between a low of 0.01 and a high of 0.03, depending on the individual's metabolism.

On redirect, Adatsi testified that defendant's judgment, ability to process information, decision-making ability and reaction time would have been negatively impacted if at midnight, the approximate time of the accident, she had a 0.097 blood alcohol level, and that her performance would have worsened as the level of alcohol increased.

Dr. Dennis Bryde, an expert on the effects of alcohol on the body, testified on behalf of the defense. Bryde criticized the use of the Widmark formula solely to determine blood alcohol levels because it only gives maximum levels. Bryde stated that the average burn off rate in a healthy individual is between 0.01 and 0.025. The generally accepted mean is 0.018 for males and 0.02 or higher for females. Bryde disputed that a 0.015 elimination rate is conservative because it will overstate the blood alcohol concentration. Under Bryde's calculations, if defendant had had three drinks with 1.25 ounces of 80 proof liquor, her blood alcohol level would have been zero at 12:30 a.m., 1:00 a.m., and 1:30 a.m. Bryde further estimated that if a person is nursing a drink, causing the individual's elimination rate to exceed the absorption rate, the individual's blood alcohol level does not automatically increase.

6. Denial of Directed Verdict

Following the prosecution's case-in-chief, defendant moved for a directed verdict on Count I, arguing that that the prosecution failed to present sufficient evidence to establish that she had any problems with her ability to "walk, talk or motivate [sic]" in light of Blanchard's and Dena's Swanson's testimony that defendant was not impaired. Defendant also argued that a directed verdict was warranted on Count II, failing to stop at the scene of a serious personal injury accident, because there was no evidence establishing that she knew that she struck a person.

The trial court denied defendant's motion for directed verdict on Count I, reasoning that the jury could infer that defendant was drinking before the accident, that she was intoxicated at the time of the accident, that her intoxication caused her to leave the roadway and strike Salinas, and that therefore defendant's intoxicated driving was a substantial cause of Salinas' death. The trial court also denied defendant's motion for directed verdict on Count II, concluding that the damage to defendant's vehicle, and the hair, denim fibers, and blood on the vehicle supported a determination that defendant had reason to know that she was involved in a serious personal injury accident.

7. Motion for New Trial

After the jury convicted defendant as charged, defendant filed motions for a new trial, to set aside the verdict, and for stay of sentence or bond pending appeal. Defendant argued (1) that the trial court erred in admitting Adatsi's testimony, (2) that the trial court improperly instructed the jury on the unlawful blood alcohol level (UBAL) charge, (3) that MCL 257.625a(9) outlines several presumptions pertaining to a specific blood alcohol level, and because there was no chemical test in the instant case, the trial court erred in denying defendant's requested jury instruction advising the jury that there could be no presumptions, (4) that the trial court erred in denying defendant's requested jury instruction which would have advised the jury that Salinas' committed a civil infraction by walking with traffic, thus preventing the jury from properly considering Salinas' contributory negligence per se during deliberations on the lesser included charge of negligent homicide, and (5) that the verdict was against the great weight of the

evidence as there was no showing that defendant was visibly impaired as required by *People v Lambert*, 395 Mich 296, 235 NW2d 338 (1975).

The trial court denied defendant's motions on the basis that its evidentiary and jury instruction rulings were correct, that the proofs were sufficient for the jury to convict defendant, and that the verdict did not result in miscarriage of justice.

Defendant filed a claim of appeal with this Court on December 23, 2003. Thereafter, although defendant's motion for immediate consideration was granted, this Court denied defendant's motion for bond pending appeal.[6]

II

Preserved claims of instructional error and the applicability of jury instructions are reviewed de novo. *People v Gonzalez*, 468 Mich 636, 641-643; 664 NW2d 159 (2003); *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). This Court reviews the instructions in their entirety to determine whether the instructions fairly presented the issues and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). However, where a defendant fails to object, this Court reviews unpreserved claims of instructional error for plain error affecting defendant's substantial rights. *Id.* at 124-125.

This Court reviews de novo questions concerning the interpretation of statutes. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002).

In determining whether the jury intended to convict a defendant of the charged offense, this Court applies a "rule of reasonableness" in construing the jury verdict. *People v Gabor*, 237 Mich App 501, 504; 603 NW2d 840 (1999), citing *People v Rand*, 397 Mich 638, 642; 247 NW2d 508 (1976), mod on other grounds, 399 Mich 1040 (1977).

This Court reviews for clear error the trial court's factual findings at sentencing. MCR 2.613; *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), lv gtd in part 471 Mich 913 (2004). But this Court reviews de novo the proper construction or application of statutory sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). The trial court has discretion in scoring the sentencing guidelines, and its scoring will be upheld if there is any evidence in the record to support it. *Houston, supra* at 471; *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

A trial court's decision to grant or deny a motion for a new trial on the basis that the verdict was against the great weight of the evidence is reviewed for abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). This Court examines the reasons given by the trial court for granting a new trial in order to determine if the trial court

---

[6] *People v Swanson*, unpublished order of the Court of Appeals, entered March 1, 2004 (Docket No. 252906).

abused its discretion. *People v Bart*, 220 Mich App 1, 12; 558 NW2d 449 (1996), citing *People v Gallagher*, 116 Mich App 283, 291; 323 NW2d 366 (1982) (the most logical way to test a trial court's decision to grant a new trial is to determine whether the reasons assigned are legally recognized ones and then to determine whether these reasons are supported by any reasonable interpretation of the record). A trial court's determination that a verdict is not against the great weight of evidence is given substantial deference. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

This Court reviews de novo the trial court's decision on a motion for a directed verdict, *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999), to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *Aldrich, supra* at 122. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

III

A

In defendant's first two claims of instructional error,[7] she argues that a chemical analysis is required to establish the crime of UBAL, and that the trial court, over her objection, improperly instructed the jury that it could find defendant guilty when no chemical analysis was performed or submitted to the jury. Defendant contends in her second argument that the jury was allowed to speculate regarding defendant's blood alcohol levels to establish her guilt and codify the Widmark formula.

We first observe that defendant did not originally object to the admission of the blood alcohol level estimations and only objected to any testimony regarding the effects of any particular level on defendant's ability to operate a motor vehicle. In any event, we find defendant's arguments without merit.

1. Chemical Test Not Required for UBAL Conviction

At the time this offense was committed on July 31, 2002, to obtain a UBAL conviction, the prosecution had to prove that the defendant drove with a blood alcohol level of 0.10 percent or higher.[8] MCL 257.625(1)(b); *People v Lardie*, 452 Mich 231, 235; 551 NW2d 656 (1996). "When properly conducted, chemical tests for [blood alcohol level] are a generally reliable

---

[7] The parties and trial court's initial discussions regarding the jury instructions were held off the record. The trial court held an abbreviated second discussion, after the substantive instructions were given to the jury, but before the procedural instructions pertaining to deliberations, to allow defendant to place her objections on the record. Thus, the detailed reasoning behind the trial court's determination to give or not give a particular instruction is not preserved for the record.

[8] The Motor Vehicle Code was subsequently amended, changing among other things, the minimum blood alcohol level to 0.08 for offenses committed after September 30, 2003. 2003 PA 61, effective July 15, 2003.

indicator of the degree of intoxication, and that their results are admissible at trial, along with other competent evidence of the defendant's guilt or innocence." *People v Calvin*, 216 Mich App 403, 408; 548 NW2d 720 (1996).

The provisions in the Motor Vehicle Code pertaining to chemical tests are found in MCL 257.625a, which states in pertinent part:

> (6) The following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than preliminary chemical breath analysis:
>
> (a) The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged *as shown by chemical analysis* of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is *presumed* to be the same as at the time the person operated the vehicle.
>
> * * *
>
> (7) The provisions of subsection (6) relating to chemical testing do not limit the introduction of any other admissible evidence bearing upon the question of whether a person was impaired by, or under the influence of, intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or whether the person had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or if the person is less than 21 years of age, whether the person had any bodily alcohol content within his or her body.
>
> * * *
>
> (9) Except in a prosecution relating solely to a violation of section 625(1)(b) or (6), the amount of alcohol in the driver's blood, breath, or urine at the time alleged *as shown by chemical analysis* of the person's blood, breath, or urine *gives rise to the following presumptions:*
>
> (a) If there were at the time 0.07 grams or less of alcohol per 100 milliliters of the defendant's blood, per 210 liters of the defendant's breath, or per 67 milliliters of the defendant's urine, it is presumed that the defendant's ability to operate a motor vehicle was not impaired due to the consumption of intoxicating liquor and that the defendant was not under the influence of intoxicating liquor.
>
> (b) If there were at the time more than 0.07 grams but less than 0.10 grams of alcohol per 100 milliliters of the defendant's blood, per 210 liters of the defendant's breath, or per 67 milliliters of the defendant's urine, it is presumed that the defendant's ability to operate a vehicle was impaired within the provisions of section 625(3) due to the consumption of intoxicating liquor.

> (c) If there were at the time 0.10 grams or more of alcohol per 100 milliliters of the defendant's blood, per 210 liters of the breath, or per 67 milliliters of the defendant's urine, it is presumed that the defendant was under the influence of intoxicating liquor. [Emphasis added.]

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). If a statute is clear, it must be enforced as plainly written, *People v Spann*, 250 Mich App 527, 530; 655 NW2d 251 (2002), and judicial construction is neither permitted or required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Relying on the well-established principles of statutory construction, we find no support for defendant's contention that subsection (6) reflects that blood alcohol levels may *only* be "shown by chemical analysis." This section merely provides for the admissibility of chemical tests. See, e.g., *People v Wager*, 460 Mich 118, 122, 594 NW2d 487 (1999) (commenting that the parties are free to introduce other competent evidence, besides chemical tests, that bears on the question whether a driver was driving under the influence). As plainly provided in subsection (7), when it allowed for the admission of other competent evidence, the Legislature did not intend that blood alcohol levels were to be exclusively "shown by chemical analysis."

Our reading of subsection (7) is consistent with well-established evidentiary principles. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Aldrich, supra* at 101. Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402. MRE 703 permits an expert to rely on hearsay, when giving an opinion and permits the trial court to require that the underlying facts or data essential to an opinion or inference be in evidence.[9] Under the rules of evidence, defendants' rights are sufficiently protected because considerations of unfair prejudice may preclude the disclosure of the facts underlying an expert's opinion on a defendant's blood alcohol level, thus evidence on which an expert bases his opinion may not be automatically admissible. MRE 403. Moreover, "[c]ircumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Therefore, applying the statute as written, and given defendant's failure to cite any rule or law precluding the evidence, we find no basis to reverse.

2. Objections To The UBAL Instruction Are Not Preserved

Defendant in an argument first raised on appeal, next challenges the trial court's UBAL instruction under Count I, arguing that the trial court failed to properly instruct on causation. The trial court's instruction stated, in pertinent part:

---

[9] On March 25, 2003, MRE 703 was amended requiring that the underlying facts or data essential to an opinion or inference be in evidence.

> In Count I, [defendant] is charged with the crime of operating a motor vehicle under the influence of intoxicating liquor, or with an unlawful bodily alcohol level, or while impaired, and in doing so caused the death of another person. To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:
>
> * * *
>
> Third, that the defendant was under the influence of intoxicating liquor, or had an unlawful bodily alcohol level, or was impaired while she was operating the vehicle.
>
> * * *
>
> Fifth, that the defendant's intoxication or impaired driving was a substantial cause of the victim's death.
>
> To prove that the defendant operated under the influence, operated with an unlawful bodily alcohol level, or operated while impaired, the prosecution must prove each of the following common elements beyond a reasonable doubt:
>
> * * *
>
> To prove that the defendant operated a motor vehicle under the influence or with an unlawful bodily alcohol level, the prosecution must prove beyond a reasonable doubt that the defendant was either under the influence of liquor while operating the vehicle, or that the defendant operated the vehicle with a blood alcohol level of .10 grams or more per 100 milliliters of blood.

This issue is not properly before this Court. In the trial court, defendant objected to the UBAL instruction on grounds that no accurate or reliable information pertaining to defendant's blood alcohol level was admitted as evidence. Defendant further asserted that if the trial court was going to give the UBAL instructions, because there was no specific evidence as to her blood alcohol level, the jury should not be instructed on the presumptions found in MCL 257.625a(9). The trial court granted this limited request, and while the UBAL instructions were given, the trial court did not instruct the jury on the presumptions as provided under MCL 257.625a(9). Defendant now argues that, while the trial court's instruction informed the jury that under the OUIL theory, defendant's intoxicated or impaired driving must be a substantial cause of the victim's death, the trial court failed to do the same for the UBAL instruction. Because defendant did not first raise this specific issue in the trial court, we decline to consider it on appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (issues first raised on appeal need not be addressed by the appellate court).

3. Contributory Negligence as to the OUIL Offense Was Not Requested by Defendant

Defendant next argues that the trial court failed to properly inform the jury of the victim's contributory negligence. Thus, defendant contends that on the OUIL claim, the trial court

deprived her of a substantial defense by failing to instruct the jury that, pursuant to MCL 257.655, the victim committed a civil infraction by walking with traffic. We disagree.

MCL 257.655 reads:

> (1) Where sidewalks are provided, a pedestrian shall not walk upon the main traveled portion of the highway. Where sidewalks are not provided, pedestrians shall, when practicable, walk on the left side of the highway facing traffic which passes nearest.
>
> (2) A person who violates this section is responsible for a civil infraction.

In connection with the trial court's instruction on the lesser-included offense of negligent homicide, defendant requested that the jury be instructed that if the victim committed a civil infraction by walking with the traffic, this civil infraction could be considered as contributory negligence. Defendant did not make this request, however, in connection with the causation element of the charged offense of OUIL:

> THE COURT: . . . . Anything else?
>
> [Defendant's Counsel]: Yes, Your Honor. I'd request [sic] and I've provided the Court with a copy of the Michigan Vehicle Code section pertaining to pedestrians on highways, violation of civil infraction, providing for sidewalks and - -
>
> THE COURT: That had to do, I believe with - -
>
> [Defendant's Counsel]: *Contributory negligence*.
>
> THE COURT: Yeah, which is the lesser included case of negligent homicide. Okay.
>
> [Defendant's Counsel]: *Yes*. [Emphasis added.]

Thus, to the extent that defendant argues that the trial court erred by failing to sua sponte instruct on contributory negligence regarding the causation element of OUIL, which denied her a substantial defense, this argument is waived as defendant otherwise expressed satisfaction with the instructions pertaining to causation. When given the opportunity to raise the issue that the civil infraction instruction was critical to her defense on the OUIL charge, plaintiff instead affirmatively expressed agreement with the trial court's limitation of the civil infraction instruction to the negligent homicide charge. Her waiver extinguishes any error for appellate review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

### 4. The Jury Was Properly Instructed on Contributory Negligence as to the Negligent Homicide Charge

"Contributory negligence of a victim is not a complete defense to negligent homicide, [but] it is a factor to consider in determining whether the negligence of the defendant caused the

victim's death." *People v Moore*, 246 Mich App 172, 175; 631 NW2d 779 (2001), citing *People v Tims*, 449 Mich 83, 97; 534 NW2d 675 (1995). In *Moore*, the victim's car collided with the defendant's truck while it was stopped or nearly stopped, careened off the truck, and hit a third vehicle. *Id*. at 173. In reversing the defendant's conviction, this Court held that the trial court abused its discretion when it barred evidence that the victim had marijuana in his blood, and failed to wear a seatbelt, reasoning that the evidence was relevant to determine whether the defendant's negligence caused the victim's death. *Id*. at 178-181.

In this case, reversal is not required as *Moore* is distinguishable and thus defendant's reliance is misplaced. Here, although the trial court denied defendant's request that the jury be informed that the victim's act of walking with traffic constituted a civil infraction, the jury was permitted to hear evidence of Salinas' ambulatory path and defendant was permitted to argue that Salinas' contributed to, or was the cause of the accident. The record shows defendant's expert, Muttart, opined that Salinas had the best opportunity to avoid the accident, and that Salinas moved into the path of defendant's vehicle. In closing arguments, defense counsel was further permitted to argue the defense theory that Salinas contributed to the accident. Finally, the trial court read CJI 2nd 16.14(4) and (5) to the jury. We therefore, conclude, that defendant has not established instructional error based on a failure to inform the jury of the victim's contributory negligence. Reviewing the instructions in their entirety, we conclude the instructions adequately instructed on the law.

B

Defendant's next claims that her right to a unanimous verdict was violated because the jury verdict as stated by the jury spokesperson failed to indicate which of the three theories of criminal liability the jurors convicted defendant. Specifically, defendant contends that the jury may have improperly premised liability on the per se or UBAL theory, the most serious offense. At the hearing on defendant's motion for a new trial, the trial court rejected defendant's argument on this issue on the basis that she had failed to request a special verdict form.

Even assuming that defendant has not forfeited this issue because she failed to request a special verdict form, see *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998), rev'd on other grounds 469 Mich 487 (2003) (the defendant waived the issue by failing to object to the verdict form and by failing to request an instruction apportioning fault), we find no error.

Defendant correctly states that defendants are entitled to unanimous jury verdicts. MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510; 521 NW2d 275 (1994). In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *Id*. at 511. When a defendant claims that a verdict is void for uncertainty, this Court reviews the pleadings, the trial court's charge, and the entire record, under a standard of "clear deducibility." *Rand*, *supra* at 643. If the jury's intent can be clearly deduced by reference to the record, the verdict is not void as uncertain. *Id*.

In this case, when rendering the verdict, the jury spokesperson stated:

> On Count I, operating a motor vehicle under the influence of intoxicating liquor or with and alcohol content of .10 grams or more per hundred milliliters of blood, or when her ability to operate that vehicle was visibly impaired due to the

consumption of intoxicating liquor, causing the death of Alejandro Salinas, we find the defendant guilty of operating a motor vehicle causing death.

The jury verdict form states with respect to Count I:

> Count I: OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF INTOXICATING LIQUOR, OR WITH AN ALCOHOL CONTENT OF 0.10 GRAMS OR MORE PER 100 MILLILITERS OF BLOOD, OR WHEN HER ABILITY TO OPERATE THAT VEHICLE WAS VISIBLY IMPAIRED DUE TO THE CONSUMPTION OF INTOXICATING LIQUOR, CAUSING THE DEATH OF ALEJANDRO SALINAS.[10] [Footnote added.]

We find that the verdict is not void for uncertainty. In this case, the offenses which the prosecution presented as alternate theories stand in hierarchal relationship to one another. When a statute lists alternative means of committing an offense, and those offenses in and of themselves do not constitute separate and distinct offenses, "jury unanimity is not required with regard to the alternate theory." *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991). OWI is considered as a necessarily included lesser offense of OUIL/UBAL. See *Lambert, supra* at 296; *Oxendine v Sec of State*, 237 Mich App 346, 354-355; 602 NW2d 847 (1999); *People v Considine*, 196 Mich App 160, 162-163; 492 NW2d 465 (1992) (in light of the hierarchal relationship of the offenses, the trial court's failure to instruct on attempted OUIL was harmless error when the jury convicted defendant of UBAL).

We are also not persuaded by defendant's unpreserved argument that the jury verdict form, is contradictory because the language finding "defendant guilty of operating a motor vehicle causing death" is not a crime in Michigan. Because defendant failed to object to the verdict form at trial, this Court's review is limited to plain error that affected her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant has failed to establish such error. Upon our review of the pleadings, the trial court's instructions, and the entire record, under a standard of "clear deducibility," the jury's verdict can be interpreted to reflect that the jury convicted defendant as charged. In *Rand*, *supra* at 643, the Supreme Court observed that "[j]urors are not trained in the law, and therefore will often fail to state their verdict with technical legal precision." In our judgment, to hold a jury to a higher standard not reflected in forms in the record and prepared by persons trained in the law is inapposite. We therefore agree with the prosecution's contention that (1) the jury's verdict is simply shorthand for the charged offense, (2) the verdict may be discerned under the rule of reasonableness and the clear and plain language of the verdict form, and (3) defendant has not established a basis for reversal.

---

[10] The verdict form in this case listed three possible verdicts: not guilty, guilty of operating a motor vehicle causing death, and guilty of the lesser offense of negligent homicide.

C

Defendant also contends that the trial court erred in assessing, over her objection, ten points in scoring Offense Variable 19 (OV 19).[11] We disagree. MCL 777.49(c) provides that ten points should be scored under OV 19 if the defendant interfered with or attempted to interfere with the administration of justice. In reliance on *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002), vacated in part 470 Mich 895 (2004), defendant argued at sentencing that zero points should be assessed.

In *Deline*, the trial court, in scoring OV 19, concluded that the defendant's conduct of switching seats with the passenger of his vehicle and refusing an immediate blood alcohol level test warranted the assessment of ten points. *Deline*, *supra* at 596-597. On appeal, this Court determined this was error. In so concluding, this Court made a distinction between conduct designed to evade charges and conduct that "interfere[d] with the administration of justice," which the *Deline* court stated was the equivalent to "obstruction of justice," i.e., conduct designed to undermine or prohibit the judicial process. *Id*. at 597. Concluding that the defendant's conduct was an effort to evade charges, this Court held that evasion of charges is not conduct "aimed at undermining the judicial process" and this Court remanded with instructions for the trial court to reassess its scoring of OV 19. *Id*. at 597-598.

We find defendant's reliance on *Deline* is misplaced. In *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004), the Supreme Court criticized the *Deline* court's reasoning which narrowly construed the language "interfered with or attempted to interfere with the administration of justice" as applicable only to the judicial process. The Supreme Court concluded that law enforcement officers and the investigation of crime are critical to the administration of justice. *Id*. at 288-289.

In this case, the prosecution argued at sentencing that by parking her car in her garage away from public view, arriving with her car at the dealership to obtain repairs just before it closed, intending to leave the vehicle with the dealership over the weekend, and failing to render assistance or anonymously contact the police concerning the victim, all warranted the assessment of 10 points. The trial court found incredible defendant's claim that she struck a barrel and failed to inspect the vehicle and concluded that "defendant's conduct the following day as if nothing out of the ordinary occurred [was] an abortive attempt to mislead the authorities and to bolster [her] claim of ignorance." Based on the record evidence identified by the trial court, we find no error in the trial court's determination to score 10 points under OV 19.

Finally, defendant argues in her supplemental brief that the trial court's scoring decisions violated her right to a jury trial pursuant to the recent United States Supreme Court decision, *United States v Booker*, 543 US __ ; 125 S Ct 738; 160 L Ed 2d 621 (2005) (ruling that federal sentencing guidelines are unconstitutional infringements on the jury's role as factfinders) and *Blakely v Washington,* 542 US 2531; 124 S Ct 2531, 2532; 159 L Ed 2d 403 (2004) (ruling that

[11] Defendant also challenged the scoring of OV 17 at sentencing, but does not raise this claim on appeal.

determinate sentencing schemes are unconstitutional infringements on the role of the jury). Defendant concedes that, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. However, defendant argues that *Claypool* is non-binding on this issue because it is dicta. We disagree. In *People v Dorhan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), this Court rejected the same argument that *Claypool*'s holding pertaining to *Blakely* was mere obiter dictum. We adopt the rationale in *Dorhan* and reject defendant's argument. MCR 7.215(C)(2).

We similarly reject defendant's next claim that *Booker* applies because both the Michigan and federal sentencing schemes are indeterminate. Contrary to defendant's attempts to characterize the federal sentencing scheme as "indeterminate," the United States Supreme Court in *Booker* noted that the federal sentencing guidelines, akin to the determinate sentencing scheme struck down in *Blakely*, would not implicate Sixth Amendment concerns *if they were* indeterminate. See *Booker, supra* at 749-750. Accordingly, we find *Booker's* holding extending *Blakely* to the federal sentencing guidelines inapplicable to Michigan's sentencing scheme.

D

Next, defendant argues the trial court improperly denied her motion for a new trial because the verdicts on both counts were against the great weight of the evidence. Defendant claims that the only reliable and logical evidence establishing the amount of alcohol she consumed was presented in her testimony and the jury improperly speculated as to the amount of alcohol she consumed. We disagree. New trial motions that are based solely on the weight of the evidence regarding witness credibility are not favored and should be granted only with great caution and in exceptional circumstances. *Lemmon, supra* at 639 n 17. If the issue involves credibility and there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id*. at 642-643. Conflicting testimony, even when impeached to some extent, is not a sufficient ground for granting a new trial. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), quoting *Lemmon, supra* at 647. A narrow exception exists when testimony contradicts "indisputable physical facts or laws" or "defies physical realities." *Lemmon, supra* at 643, 647.

The elements of OUIL causing death are: (1) the defendant operated a motor vehicle while intoxicated; (2) the defendant voluntarily decided to drive knowing that she had consumed alcohol and might be intoxicated; and (3) the defendant's intoxication was a substantial cause of the victim's death. *People v Lardie*, 452 Mich 231, 259; 551 NW2d 656 (1996). Because OUIL is a general intent crime, the prosecution must prove that the defendant did the wrongful act, "purposefully or voluntarily." *Id.* at 241. Proof of causation requires that the prosecutor establish that the defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle to cause the death. *Id*. at 258. Significantly, an unavoidable killing is insufficient to justify an invocation of the statute, "[o]therwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted." *Id.* at 257-258.

A motorist may be convicted of OUIL/UBAL if the motorist either operated a motor vehicle while under the influence of intoxicating liquor or operated the vehicle while having an unlawful blood alcohol level. *People v Rizzo*, 243 Mich App 151, 162; 622 NW2d 319 (2000),

citing MCL 257.625(1) and CJI2d 15.3. Further, a "defendant may be convicted of OUIL even if he is observed driving in a normal fashion." *People v Crawford*, 187 Mich App 344, 350; 467 NW2d 818 (1991), citing *People v Walters*, 160 Mich App 396, 402-403; 407 NW2d 662 (1987).

Here, the fact that the jury rejected defendant's theory of the case presented through her expert witness as an insufficient basis for granting a new trial. Defendant has failed to establish that the expert testimony introduced by the prosecution was based on erroneous information. Defendant argues that the testimony of the prosecution experts that defendant drove off the roadway was erroneously premised on a partial tire track attributed to defendant's vehicle, which defendant claims was actually left by a police vehicle. The record shows that all but one track was decisively eliminated as originating from defendant's vehicle. However, the jury was nonetheless free to conclude, in the absence of evidence attributing the remaining partial tire track to the police vehicle, that the partial track originated from defendant's vehicle. Stated differently, defendant has not established that the expert traffic reconstruction testimony presented by the prosecution contradicts "indisputable physical facts or laws" or "defies physical realities." *Lemmon, supra* at 643, 647.

Further, there was no real dispute that defendant had at least three or four drinks before driving home. Although defendant denied drinking additional drinks, the jury was free to accept or reject her testimony when compared with the testimony of Blanchard and Dena Swanson and evidence of the itemized bill. This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe,* 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In addition, the jury was presented with evidence showing that the victim's body was visible from the road as reflected in the paramedic's testimony. Although no chemical tests were ever administered to defendant or submitted as evidence, the jury could reasonably infer defendant drove while intoxicated on the basis of Adatsi's testimony establishing potential blood alcohol levels between 0.122 and 0.147, Holmes' determination that Salinas was visible from the road, and Megge and Holmes' testimony that the probable area of impact was off the roadway. Because the trial court's denial of the motion was not manifestly against the clear weight of the evidence, no abuse of discretion occurred when it denied defendant's motion for a new trial. *Abraham*, *supra* at 269.

Giving substantial deference to the trial court's decision, we similarly find no error occurred when the trial court denied defendant's motion for a new trial on Count II. To establish the offense of failing to stop at the scene of an accident resulting in serious injury to or death of a person, the prosecutor must show that: (1) the defendant was the driver of a motor vehicle; (2) the motor vehicle driven by the defendant was involved in an accident; (3) the defendant knew or had reason to know that he or she was involved in an accident that resulted in serious injury or death; (4) the defendant knew or had reason to know the accident occurred on a public road or property open to travel by the public; and (5) the defendant failed to immediately stop his or her vehicle at the scene in order to give assistance and provide information as required by law. MCL 257.617(1); *People v Lang*, 250 Mich App 565, 572; 649 NW2d 102 (2002).

Here, the record evidence permits a finding that defendant committed the charged offense of failing to stop at the scene of an accident resulting in serious injury to or death of a person at the time of the accident. The damage to defendant's vehicle, particularly the windshield where Salinas' head struck the vehicle, as well as the victim's hair, denim fibers, and blood on the vehicle, were visible to law enforcement and the body shop manager with the naked eye, and

supported a determination that defendant had reason to know that she had been involved in an accident. Even assuming the area was dimly lit, the prosecution presented evidence that Salinas' was wearing a light-refracting white t-shirt while walking on the gravel portion of the road, and that defendant had the best opportunity to observe Salinas and avoid the accident. The jury was free to accept or reject defendant's claim that although she was driving appropriate to the conditions of the area, she never saw Salinas or had reason to know that she struck him with her vehicle.

In sum, reviewing the evidence in a light most favorable to the prosecution, and because the trial court's stated reasons are legally recognized ones and supported by a reasonable interpretation of the record, we conclude that defendant's convictions were not against the great weight of the evidence, and that the trial court did not abuse its discretion in denying defendant's motion for a new trial. See *Lemmon, supra* at 647; *Gallagher, supra* at 291.

E

Finally, in a related argument, defendant argues that the trial court improperly denied her motion for a directed verdict on the OUIL charge because the prosecution offered no direct evidence that defendant drove her motor vehicle while intoxicated and that her driving while intoxicated substantially caused Salinas' death. Again, we disagree. Because we previously concluded the jury could properly infer defendant's intoxication to determine whether the elements of OUIL causing death were proved beyond a reasonable doubt, we further conclude, on the basis of the same evidence supporting the trial court's decision to deny defendant's motion for a new trial, *supra*, that the trial court did not err in denying defendant's motion for a directed verdict on the OUIL charge.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder