

sufficient evidence to establish probable cause that Hall committed reckless manslaughter, and the court should have bound Hall's case over for trial. * * * Thus, we remand this case to the district court for trial.

NOTES & QUESTIONS

1. *Criminal Recklessness*. Should the prosecutor have charged this case as a criminal action? What is the key fact that shows Hall's conduct was reckless? Is it his status as a ski instructor, the presence of alcohol, conditions on the ski slope at the time of the collision, or his making a jump at a high rate of speed where others may be present? If the case proceeds to trial, should defense counsel call Hall as a witness? If one had similar facts and the accused had a reputation among the other ski instructors as "a guy who skis on the edge" and who participates in "extreme sports" as a hobby, should the defendant be called as a witness?

2. *Standard of Review*. The *Hall* case is at the pre-trial stage. The Colorado Supreme Court in *Hall* considered the evidence in the light most favorable to the government. The reason is that the dismissal of the charges is the equivalent of a grant of summary judgment, so appellate review of the facts is made in the light most favorable to the losing party below, in this case the prosecution. Note that the court is careful to point out that its analysis is not a factual resolution of the case.

E. Negligently

State v. Larson

103 P.3d 524 (Mont. 2004)

Justice JIM REGNIER delivered the Opinion of the Court.

Defendant Mark Theodore Larson (Larson) was convicted by a jury * * * on one count of negligent homicide, a felony, and one count each of the following misdemeanors: driving under the influence, speeding and failure to wear a seatbelt. Larson appeals his convictions. We affirm.

* * * The State's evidence at trial showed during the evening hours of November 10 and early morning hours of November 11, 2001, Larson and two college friends, Morgan and Clare, were drinking in his vehicle and in various bars and residences in the Conrad and Dutton area.

At about 3:30 a.m., Larson was driving his pickup at a high rate of speed south on the frontage road between Conrad and Brady when it veered off the right

shoulder of the road surface near the beginning of a left curve. Larson pulled the pickup back onto the asphalt surface but overcorrected, sending his pickup across the highway and into the ditch on the left side of the highway. At that point, the car flipped multiple times, ejecting all three passengers, who were not wearing seatbelts.

The State's expert, Lynn Kurtz, of the state crime lab, testified analysis of Larson's blood sample taken three hours after the accident showed a blood alcohol concentration of 0.12%. Kurtz also testified concerning the effects of alcohol on an individual's ability to operate a motor vehicle, stating alcohol impairs an individual's ability to drive.

* * * At the conclusion of the trial but before deliberations, the parties submitted proposed jury instructions to the District Court. During the settling of jury instructions, Larson objected to the State's Instruction 19 which defined criminal negligence as follows:

A person acts negligently with respect to the death of a human being or to a circumstance when an act is done with a conscious disregard of the risk that death of a human being will occur or that the circumstance exists or when the person disregards a risk of causing the death of another human being which the person should be aware that the result will occur or that the circumstance exists.

The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care.

Larson objected to the instruction on the grounds the word "consciously" should have been inserted before the word "disregards" in defining criminal negligence. The court rejected Larson's objection, stating, "I believe the Court's Instruction is the definition, as provided by the Statute."

* * * Larson argues the District Court erred when it lowered the standard of proof required under the statutory scheme defining criminal negligence. Larson maintains the instruction for criminal negligence given to the jury should have included the word "consciously" as it related to the individual's disregard for a known risk. Larson contends by omitting the modifying adverb "consciously" before the word "disregards," the District Court lowered the standard of proof as required under the Criminal Code.

The State counters the District Court properly instructed the jury on the definition of criminal negligence. The State asserts the existing statutory definition given to the jury provided an adequate means of distinguishing criminal negligence

from ordinary negligence. The State contends the instruction given to the jury made clear the standard on which to judge Larson's disregard of the risk involved as well as his gross deviation from a reasonable standard of conduct.

A person commits negligent homicide if the person negligently causes the death of another human being. A person acts negligently with respect to a result or circumstance, "when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or the circumstance exists." Section 45-2-101(42), MCA. Further, the risk "must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." The term "gross deviation" is defined by the statute as meaning "a deviation that is considerably greater than lack of ordinary care."

This Court has previously decided mental state is not at issue in negligent homicide cases. *State v. Gould*, 704 P.2d 20 (Mont. 1985). In *Gould*, we held the defendant's proposed instruction referred improperly to the necessity of acting with the mental state of "consciously" as an element of the offense of negligent homicide. We deemed such instruction improper. Similarly, Larson's proposed instruction included the term "consciously," as used in § 45-2-101(42), MCA, to define criminal negligence. Unlike deliberate homicide however, which requires the offense be committed purposely or knowingly, negligent homicide does not require such purpose and knowledge. Negligent homicide only requires a gross deviation from a reasonable standard of care. Further, we have held criminal negligence can arise as a result of intoxication. Larson's mental state at the time he was driving his car is not at issue. Instead, the issue is whether the driving of a car while intoxicated was a gross deviation from the standard of reasonable care. It is difficult to imagine that conduct, which included drinking both beer and whiskey over many hours, disregarding the prevailing notion that drinking and driving is dangerous, and then getting behind the wheel of a vehicle and driving down an isolated county road at a speed in excess of the speed limit, could not be classed as a gross deviation that is considerably greater than the lack of ordinary care.

* * * We hold the jury was adequately instructed on negligence and the elements of the offense charged. Under the given instructions, if the jury believed Larson's account of the accident, they could have found in his favor. However, it was the jury's duty to determine which account of the accident, the State's or Larson's, they believed more credible and worthy of belief. Where the jury is adequately instructed, no error occurs in refusing a proposed instruction which is already covered. Here, the jury was fully instructed and Larson had a full opportunity to argue the merits of his defense. Accordingly, we hold the District Court properly instructed the jury on the definition of criminal negligence.

* * * Larson argues the State's evidence at trial was insufficient to support the jury's determination he was impaired by alcohol at the time of the accident. Larson maintains the inference of impairment resulting from his 0.12% blood alcohol concentration was rebutted by other evidence indicating the accident was caused by a momentary lapse of attention while driving on a dangerous road.

* * * We conclude the State provided sufficient evidence of Larson's impairment to support Larson's conviction for negligent homicide and driving under the influence. Here, the State presented evidence Larson drank a substantial amount of alcohol during the evening and morning hours before the accident. Further, Larson admitted to EMTs and officers at the hospital he had consumed a considerable amount of alcohol. The State also showed Larson drove his pickup at a high rate of speed off the shoulder of the highway, causing the pickup to roll over and eject all three passengers. The State's expert witness testified the driving ability of anyone with a blood alcohol concentration of 0.08% or more is impaired or diminished. The jury in this case also heard testimony Larson's blood alcohol concentration was 0.12% two hours after the accident and four hours after he had stopped drinking.

We cannot know precisely why or how the jury reached its decision to convict Larson. We only know Larson presented his theory that other mitigating factors may have caused the accident, and the jury apparently rejected it. We hold, therefore, sufficient evidence exists to support Larson's convictions. * * *

PROBLEM SEVEN

Jess is driving an automobile within the speed limit on a sunny day. Jess passes through a crosswalk and — because of the blinding sun — does not see Lynn in the crosswalk in her wheelchair. Jess' car hits and kills Lynn. If the jurisdiction had a statute that made the "reckless killing of a human being" a crime, did Jess act recklessly? Should Jess be considered to have acted negligently? If Jess had been going five miles over the speed limit, would that change the level of intent? At what point does a person pass from acting negligently to recklessly? If Jess had been intoxicated, what would be the appropriate level of *mens rea* to charge an offense under the Model Penal Code?