

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

861

KA 22-02000

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL LAVELLE, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 20, 2022. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the second degree (Penal Law § 125.15 [1]). The charge arose from a fatal accident in which defendant's motor vehicle crossed over the double yellow line of a two-lane roadway and struck an individual operating a motorcycle in the opposite lane of travel. Defendant was neither speeding nor intoxicated at the time of the accident. The People introduced eyewitness testimony at trial that, before the accident, defendant was tailgating a sport utility vehicle (SUV), "hitting his fist on the steering wheel[,] and looking a little agitated." The driver and front passenger of the SUV testified that, as they made a left-hand turn, defendant passed their vehicle by driving onto the right shoulder of the two-lane roadway, yelling out that he was "going to get [them]." After defendant passed the SUV, his vehicle sharply turned left, crossed into the opposite lane, and struck the motorcycle.

Defendant contends, inter alia, that the conviction is not supported by legally sufficient evidence. We agree with defendant.

A conviction is supported by legally sufficient evidence "when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a

rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). A defendant is guilty of manslaughter in the second degree under Penal Law § 125.15 (1) when the defendant "recklessly causes the death of another person." A defendant's conduct is reckless with respect to the death of another person when the defendant "is aware of and consciously disregards a substantial and unjustifiable risk" that death will result from it (§ 15.05 [3]). "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (*id.*; see *People v Asaro*, 21 NY3d 677, 684 [2013]; *People v Licitra*, 47 NY2d 554, 558-559 [1979], *rearg denied* 53 NY2d 938 [1981]).

Here, viewing the facts in the light most favorable to the People, the only risk-creating conduct by defendant supporting his conviction of manslaughter in the second degree was his briefly driving on the shoulder of the road to pass a vehicle in front of him that was turning and his subsequently making a sharp left turn and crossing over the double yellow line into the opposite lane. We conclude that that conduct, standing alone, did not exhibit "the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong" necessary to establish recklessness with respect to the death of another (*Asaro*, 21 NY3d at 685 [internal quotation marks omitted]; *cf. generally* *People v Vazquez*, 211 AD3d 1592, 1592-1594 [4th Dept 2022], *lv denied* 40 NY3d 937 [2023]; *People v Wolz*, 300 AD2d 606, 606 [2d Dept 2002], *lv denied* 1 NY3d 636 [2004]).

In light of our determination, we do not address defendant's remaining contentions.