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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1317**

State of Minnesota,
Respondent,

vs.

Jessica Lyn Howe,
Appellant.

**Filed May 29, 2012
Affirmed
Huspeni, Judge***

Anoka County District Court
File No. 02-CR-10-4357

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Tony Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney,
Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle Rene Winn, Assistant
State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Huspeni,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUSPENI, Judge

Appellant Jessica Lyn Howe challenges her conviction, following a bench trial, of criminal vehicular homicide and failure to provide vehicle insurance. She argues that the evidence was insufficient to support her conviction of criminal vehicular homicide because her conduct was not grossly negligent.¹ See Minn. Stat. § 609.21, subd. 1(1) (2008). In a pro se supplemental brief, she seeks reversal of her conviction and challenges several of the district court's findings as unsupported by the evidence; in the alternative, she urges this court to reconsider her request, which was made at sentencing, for a dispositional departure and imposition of a probationary sentence. Because the evidence was sufficient to establish beyond a reasonable doubt that appellant's conduct was grossly negligent and because the district court did not abuse its discretion in denying appellant's request for a dispositional departure, we affirm.

FACTS

At a little before 11 a.m. on March 18, 2010, J.S. was driving south on Central Avenue in the City of Columbia Heights, having just exited Interstate 694. He testified that he came up behind a car in the right-hand lane that was waiting for the light to change at the intersection of 52nd and Central. He noticed that the windshield of the car was cracked, mostly on the passenger side. J.S. switched into the left-hand lane, pulled alongside the car, and stopped at the light.

¹ At the beginning of trial, appellant stipulated that the accident caused the child's head injuries and death. Thus, causation was not an element that the state had to prove.

J.S. testified that when the light turned green he accelerated rather quickly to 45 miles per hour, even though the speed limit was 40 miles per hour, because he was running late. He testified that the car next to him accelerated even more quickly and moved over into the left-hand lane, so that it was in front of him again.

As the car was passing him, J.S. was also looking ahead to the next intersection at 50th and Central, where he saw a number of vehicles stopped for the red light. He testified that he eased up on his accelerator at that point, because he knew that he needed to slow down. But the car in front of him appeared to pull farther away from him, possibly gaining speed. J.S. testified that he could see an accident was going to occur because the car in front of him was going too fast and was not going to stop. J.S. watched the car rear-end another car that was stopped at the intersection, without ever braking. J.S. was unsure whether the light changed to green before the collision because he was focused on the car in front of him, which was pulling away from him and not slowing down as it approached the intersection. The car that J.S. was focusing on ahead of him was driven by appellant.

The driver of the vehicle that was rear-ended testified that he and his 14-month old son were on their way to pick up his older son from preschool. He was stopped in the left-hand lane at the light at 50th and Central. When the light changed and neither of the two cars in front of him moved, he realized that the first car had stalled. The car immediately in front of him was able to pull around the stalled car. As he looked into his right-hand and rear-view mirrors to determine whether he too could pull around the stalled car, he realized that a car was coming up fast behind him and that it was not going

to stop. He braced himself and stood on his brake. His car was rear-ended by the car driven by appellant, and was pushed into the stalled car in front of him. He managed to get himself out of his car and ran to the other side of the vehicle to get his son out of his car seat, which was in the back seat. His son was silent, like he was sleeping, and would not wake up; the child died two hours later at the hospital from head injuries he received in the collision.

Two Columbia Heights police officers who responded to the accident testified that when they interviewed appellant, she admitted that she was reaching for her cell phone that had fallen on the floor on the passenger side of her car, did not see the stopped car until just before the collision, and did not have time to brake or take evasive measures. One officer testified that he cited appellant with misdemeanor careless driving, inattentive driving, and no insurance, but that the citations were voided once he learned that the child had died.

An investigating officer testified that he interviewed appellant twice, once on the phone the day after the accident and a couple of weeks later in person. The investigator confirmed that appellant told him she was reaching for her cell phone, which had slid or fallen onto the floor in the front passenger-side of her car, and that by the time she looked up she could not stop. Appellant explained to the investigator that after she brushed aside some papers or debris and saw the phone on the floor, she looked up, felt her car jerk, and knew she should have stopped looking for the phone at that point. But she decided to look back down at the floor and grab her phone, and by the time she looked back up it was too late. The investigator confirmed that appellant's cell phone records revealed that

she was not on the phone at or around the time of the collision. The investigator further confirmed that appellant told him that she knew she was approaching an intersection and that she should not have been looking for her phone.

A state trooper who was an accident reconstruction expert testified that according to his calculations, appellant was traveling approximately 55 miles per hour at the time of the accident. The expert testified that no vehicle conditions contributed to the collision and that weather was not a contributing factor. The expert concluded that the accident was caused solely by appellant's excessive speed and her inattention to the forward view.

Appellant testified at trial that when she stopped at the light at 52nd and Central, her cell phone, purse, and papers must have fallen or slid off the passenger side front seat, onto the floor. She acknowledged that she looked down two times, first to brush aside the papers and discover her phone underneath and again to reach down and grab the phone. She stated that after brushing aside the papers, she felt her car "jerk" and looked up; she claimed that when she did not see any brake lights on the vehicles in front of her, she decided to look back down and grab her phone. By the time she came back up, she had no time to stop or brake. Appellant claimed that she took her eyes off the road for only three to five seconds.

The district court made a number of findings and concluded that appellant operated her vehicle "with very great negligence or without even scant care," based on her "complete inattention to the forward view [while] approaching vehicles stopped at a busy intersection," the "speed of [her] vehicle which was traveling at . . . 55 miles per hour in a 40 mile per hour zone," the "complete absence of any attempt to avoid the

accident through evasive maneuvers or braking prior to impact,” and her “knowingly creat[ing] a very dangerous situation for herself and other drivers on the roadway when she consciously chose to look for her cellular phone a second time.”

DECISION

I.

When reviewing a sufficiency of the evidence claim, this court conducts a painstaking review of the record to determine “whether the facts in the record and the legitimate inferences drawn from them would permit the [factfinder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt.” *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (quotation omitted). This court reviews the evidence in the light most favorable to the verdict. *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998). The factfinder is the exclusive judge of witness credibility, and this court assumes the factfinder believed the evidence supporting the state’s case and disbelieved contrary evidence. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995). This court’s standard of review of a bench trial is the same as its review of a jury trial. *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008).

Appellant was convicted of criminal vehicular homicide in violation of Minn. Stat. § 609.21, subd. 1(1), which required the state to prove that she caused the death of another by operating her motor vehicle in a grossly negligent manner. “Gross negligence is substantially higher in magnitude than ordinary negligence and is defined as very great negligence or absence of even slight care.” *State v. Plummer*, 511 N.W.2d 36, 39 (Minn. App. 1994) (quotation omitted). In criminal vehicular cases, gross negligence requires

“the presence of some egregious driving conduct coupled with other evidence of negligence.” *State v. Miller*, 471 N.W.2d 380, 384 (Minn. App. 1991). But gross negligence does not require willful or intentional conduct, and lies somewhere between ordinary negligence and reckless conduct. *State v. Bolsinger*, 221 Minn. 154, 159-60, 21 N.W.2d 480, 485 (1946); *see also State v. Chambers*, 589 N.W.2d 466, 478 (Minn. 1999) (defining gross negligence as “without even scant care but not with such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong”).

To determine whether appellant engaged in ordinary or gross negligence, her conduct is examined. *See State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005). Appellant argues that her excessive speed and distraction from the road to attend to a perceived problem within her vehicle does not rise to the level of “gross negligence.” She notes that other people driving on Central Avenue that day, including one of the state’s witnesses, J.S., were also speeding. She insists that her decision to speed and take her eyes off the road to retrieve her cell phone from the floor were two mistakes and constituted poor judgment but that her actions did not amount to gross negligence.²

But appellant’s description of her conduct that day is subjective and somewhat incomplete. She notes that others were also speeding. But she was traveling at a speed of 55 miles per hour in a 40 mile-per-hour zone on a busy roadway while she was approaching a controlled intersection that was filled with stopped cars. She reached

² As support for her argument, appellant cites an opinion from this court that is unpublished and thus lacks any precedential value. *See* Minn. Stat. § 480A.08, subd. 3 (2010). The unpublished opinion cited by appellant is not only factually distinguishable from this case but is unpersuasive on a legal basis because it includes a strongly worded dissent and is slightly inconsistent with published opinions from this court.

down once, looked up, and decided to reach down again and take her eyes off the road completely for three to five seconds. She did not slow down or brake, and by the time she looked up again, she was unable to take any evasive action before the collision.

The decisions made by appellant are in stark contrast to the decisions made by J.S., who was also speeding. J.S. testified that as appellant was passing him and pulling ahead of him, he was easing up on his accelerator because he looked ahead and saw numerous cars stopped at the next intersection. Appellant's decisions to reach for her phone twice during that time period and take her eyes off the road completely for three to five seconds, while traveling at a speed of 55 miles per hour, when she knew she was approaching an intersection on a busy street, were much more than poor judgment or ordinary negligence.

When compared to other cases upholding verdicts against claims of insufficient evidence,³ appellant's conduct fits squarely within the definition of gross negligence. In *State v. Pelawa*, 590 N.W.2d 142, 145 (Minn. App. 1999), *review denied* (Minn. Apr. 28, 1999), *overruled on other grounds by Al-Naseer*, 690 N.W.2d at 752, fn.4., this court upheld a jury's guilty verdict where the evidence showed that the defendant's northbound car first crossed the center line into the southbound lane, continued across that lane onto the southbound shoulder, returned to the southbound lane, and collided with a

³ The cases cited by the state involved prosecution appeals from dismissals of criminal vehicular homicide charges for lack of probable cause. In each case, this court reversed and concluded that probable cause existed to support charges of grossly negligent driving conduct based on inattentive driving conduct combined with other factors. *See, e.g., State v. Hegstrom*, 543 N.W.2d 698 (Minn. App. 1996), *review denied* (Minn. Apr. 16, 1996); *State v. Plummer*, 511 N.W.2d 36 (Minn. App. 1994).

southbound car, killing two of its passengers. This court concluded that the defendant's conduct showed "a degree of inattention to the road sufficient to meet the gross negligence standard." *Id.* (quotation omitted).

In *State v. Kissner*, this court upheld a jury verdict that found the defendant guilty of grossly negligent driving based on evidence that showed the defendant attempted to pass a vehicle too close to a no-passing zone and collided head-on with another vehicle, killing the driver and two of her passengers. 541 N.W.2d 317, 321 (Minn. App. 1995), *review denied* (Minn. Feb. 9, 1996). The evidence also suggested that the defendant was traveling in excess of the speed limit and that a reduced speed may have been appropriate given the misty weather conditions. *Id.* This court concluded that the jury acted reasonably in reaching the verdict that it did, even though the case lacked "a single dramatic piece of evidence." *Id.* at 321-22.

Similarly, here, appellant's lack of attention to the forward view, combined with the speed of her vehicle and the knowledge that she was approaching an intersection where a number of cars were either stopped or just beginning to accelerate, establishes more than ordinary negligence and supports a determination that even scant care was lacking. Based on the evidence presented, the district court could reasonably conclude that appellant was guilty beyond a reasonable doubt of grossly negligent driving.

II.

Appellant has filed a pro se supplemental brief in which she generally challenges several of the district court's findings and argues that her actions were not criminally negligent. In particular, she challenges the district court's finding that she failed to

maintain visual contact with the road while attempting to retrieve her phone from the floor. But the district court obviously did not find appellant's testimony on this point to be credible. And by her own admission, appellant took her eyes off the road for three to five seconds.

Appellant also suggests that she should not be in prison for an accident and that her actions were not intentional. But the criminal vehicular homicide statute does not require intent to harm, and only requires grossly negligent driving conduct. *See* Minn. Stat. § 609.21, subd. 1(1). As discussed earlier, the evidence is sufficient to support the finding that appellant's driving conduct was grossly negligent.

III.

In her pro se supplemental brief, appellant alternatively requests that if this court is not willing to reverse her conviction, it should nevertheless reconsider placing her on probation.⁴ The district court denied appellant's motion for a dispositional departure and imposed the presumptive 48-month prison sentence. This court will reverse the imposition of a presumptive sentence only in a "rare" case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

In denying appellant's request for a dispositional departure, the district court acknowledged that some factors weighed in favor of a probationary sentence, including

⁴ Appellant includes, as examples, four other cases in which she claims that the defendants were given probationary sentences. The state notes that this information was not provided to the district court at sentencing and is not part of the record on appeal. The state further asserts that this information has little or no relevance to the sentencing decision made in appellant's case, which was based on the PSI and on the impact to the victim's family. We agree and find appellant's arguments on this point to be unpersuasive.

appellant's remorse and her recent treatment and employment successes, as outlined in the presentence investigation. The court nevertheless decided to deny appellant's request for a dispositional departure:

And as I was going through this case contemplating the different types of sentences, every time I went through and contemplated a probationary sentence, trying to justify a probationary sentence, I found the rationale lacking. I finally came to the realization or the appreciation that departing from the Guidelines and not imposing the required sentence would both minimize the importance and significance of [the young child's] life, but it also would minimize the devastating impact on the family, and that is something I just can't overlook.

The district court thus considered the parties' arguments on the record before rejecting her request for a dispositional departure. *Cf. State v. Curtiss*, 353 N.W.2d 262, 263-64 (Minn. App. 1984) (remanding when record suggested that district court put aside arguments and abandoned departure topic before court exercised its discretion).

This court has held that a district court is not required to address all of the *Trog* factors if the record demonstrates that the court deliberately considered circumstances for and against the requested departure and exercised its discretion. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011); *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (holding that factors to consider on request for dispositional departure may include "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family"). Moreover, when considering a dispositional departure, a district court may focus "on the defendant as an individual and on whether

the presumptive sentence would be best for [her] and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983).

Despite its consideration of the factors supporting a departure, the district court in this case cited the impact appellant’s conduct had on the victim’s family and concluded that a dispositional departure would inappropriately minimize the seriousness of her offense. Given this, we cannot conclude that this is a “rare case” warranting reversal of the district court’s imposition of a presumptive sentence. *See Kindem*, 313 N.W.2d at 7.

Affirmed.