

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

709

KA 22-01739

PRESENT: SMITH, J.P., CURRAN, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

DONALD M. LEWINSKI, DEFENDANT-RESPONDENT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (HERBERT L. GREENMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), dated October 4, 2022. The order granted that part of the omnibus motion of defendant seeking to dismiss the indictment and dismissed the indictment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment on the ground that, inter alia, the evidence before the grand jury was not legally sufficient to establish the charged offense of criminally negligent homicide (Penal Law § 125.10). We affirm.

"To dismiss an indictment on the basis of insufficient evidence before a Grand Jury, a reviewing court must consider whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury" (*People v Gaworecki*, 37 NY3d 225, 230 [2021] [internal quotation marks omitted]). "In the context of grand jury proceedings, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*id.* [internal quotation marks omitted]; see *People v Grant*, 17 NY3d 613, 616 [2011]). On our review, we must determine "whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference" (*Gaworecki*, 37 NY3d at 230 [internal quotation marks omitted]).

As relevant here, the People were required to present competent evidence demonstrating that defendant, acting with "criminal negligence," caused the victim's death (Penal Law § 125.10). A person

acts with criminal negligence in this context when that person "fails to perceive a substantial and unjustifiable risk" that death will result (§ 15.05 [4]). "Criminal negligence also requires the defendant's conduct to be a gross deviation from the standard of care that a reasonable person would observe in the situation" (*Gaworecki*, 37 NY3d at 230-231 [internal quotation marks omitted]). Criminally negligent homicide cannot be predicated on every careless act merely because that carelessness results in another's death (see *People v Haney*, 30 NY2d 328, 335 [1972]). Proof of facts which tend to merely show, through the occurrence of the result and the concurrence of the defendant's conduct, that the risk existed and ultimately resulted from the defendant's conduct is not sufficient (see generally *People v Warner-Lambert Co.*, 51 NY2d 295, 305-306 [1980], cert denied 450 US 1031 [1981]).

We conclude that the evidence presented to the grand jury failed to establish a prima facie case that defendant acted with criminal negligence. The evidence showed that defendant and the victim were engaged in a verbal altercation at a restaurant over the course of several hours. The victim made various comments and threats to defendant, including that the victim would kill defendant. The victim left his seat and approached defendant, who was standing at the bar to pay his bill. The men were standing face-to-face and engaging in a verbal altercation when defendant gave a single shove to the victim. The victim fell straight backwards and hit his head on the floor. We conclude that the evidence, viewed most favorably to the People, did not establish "the kind of seriously condemnatory behavior that the Legislature envisioned when it defined 'criminal negligence,' even though the consequences here were fatal" (*People v Cabrera*, 10 NY3d 370, 378 [2008]).

In light of our determination, we do not address the remaining contention of the People.