

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1916-CR

Cir. Ct. No. 2005CF15

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD O. COMSTOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Donald Comstock was convicted, after a jury trial, of two counts of homicide by negligent operation of a vehicle and one count of homicide of an unborn child by negligent operation of a vehicle. Comstock argues

that the circuit court should not have denied his motion for a directed verdict and that there is insufficient evidence to support the conviction. We affirm.

¶2 Comstock first argues that the circuit court should not have denied his motion for a directed verdict. At the close of the State's evidence, Comstock's attorney asked the circuit court to consider Comstock's motions at the next break. During the break a short while later, after the defense's first witness had begun testifying, Comstock moved for a directed verdict, which the circuit court denied.

¶3 The general rule is that where a defendant moves for dismissal based on a directed verdict at the close of the prosecution's case and the motion is denied, the introduction of evidence by the defendant waives appellate review of the motion. *See State v. Scott*, 2000 WI App 51, ¶6, 234 Wis. 2d 129, 608 N.W.2d 753. Comstock contends that he has not waived his right to appellate review of this issue because he had begun to present his case before the circuit court decided his motion for directed verdict. *See, e.g., id.*, ¶¶7-8 (holding that the waiver rule did not apply where the circuit court did not rule on the motion for directed verdict until after the close of evidence because, not knowing how the court would rule, the defendant was unable to make a fully informed choice about whether or not to offer evidence). Here, however, it was at Comstock's request that the circuit court delayed ruling on his motion until after he had begun presenting his evidence. The court ruled on the motion only shortly after Comstock had begun presenting his case and, after the court's ruling, Comstock did not indicate that he did not want to proceed with presenting his evidence. Under these circumstances, we conclude that Comstock has waived his right to raise the issue.

¶4 Comstock next argues that there is insufficient evidence to support the jury's verdict. On review of a claim that the evidence is insufficient to support

the verdict, we will not reverse a conviction unless the evidence, “viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict” *Id.* at 507.

¶5 A person who “causes the death of another human being by the negligent operation or handling of a vehicle” is guilty of homicide by negligent operation of a vehicle. WIS. STAT. § 940.10(1) (2005-06).¹ A person who “causes the death of an unborn child by the negligent operation or handling of a vehicle” is guilty of homicide of an unborn child by negligent operation of a vehicle. WIS. STAT. § 940.10(2). The crime of homicide by negligent operation of a vehicle contains three essential elements: (1) the defendant operated a vehicle; (2) the defendant operated the vehicle in a criminally negligent manner; and (3) the defendant’s criminal negligence caused the death of the victim. *See State v. Schutte*, 2006 WI App 135, ¶19, 295 Wis. 2d 256, 720 N.W.2d 469, *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 203 (No. 2005AP658-CR). “Criminal negligence” is “ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another [or] to an unborn child.” WIS. STAT. § 939.25(1); *see also Schutte*, 295 Wis. 2d 256, ¶19.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 Our review of the evidence shows that there was sufficient evidence to support the verdict. Comstock was driving a large pickup truck on a state highway, traveling between 40 and 55 miles per hour. The accident happened on a stretch of highway that was straight, and the road conditions were good. State Trooper Michael Marquardt, who is a fatality and serious crash reconstructionist, testified that Comstock was driving about four feet over the white fog line that separates the road from the shoulder when he struck a horse-drawn buggy being driven by Amos Stoltzfus. The Stoltzfus buggy was marked with an orange triangular sign indicating that it was a slow-moving vehicle. According to two witnesses, Comstock did not immediately stop after the collision but traveled for a distance to a supper club parking lot before turning around and returning to the scene of the accident. In addition to these facts from the trial, the parties stipulated that Comstock had operated a vehicle, that the collision involving the vehicle operated by Comstock with the horse and buggy driven by Amos Stoltzfus caused the death of Amos's wife Mary Stoltzfus, who was pregnant, the death of their unborn child, and the death of Benjamin Stoltzfus, their son.

¶7 Viewing the evidence in the light most favorable to the jury's guilty verdict, we conclude that a reasonable jury could find beyond a reasonable doubt that Comstock was guilty of two counts of homicide by negligent operation of a vehicle and one count of homicide of an unborn child by negligent operation of a vehicle. The crash occurred four feet over the white fog line on the side of the road, which shows that Comstock had not been paying attention and had drifted off the road. The weather and road conditions were good, so Comstock should have been able to see the buggy had he been paying adequate attention. Comstock should have been aware that he needed to stay in his lane as he approached the buggy driving on the shoulder, and should have realized that drifting over the fog

line in his large pickup truck onto the shoulder when approaching the horse-drawn buggy created a substantial and unreasonable risk of death or great bodily harm. A reasonable jury could find that Comstock acted in a criminally negligent manner when he hit the Stoltzfus's buggy. The evidence thus supports the jury's verdict.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

