

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1054**

State of Minnesota,
Respondent,

vs.

Jake Richard Mattern,
Appellant.

**Filed June 4, 2018
Affirmed
Stauber, Judge***

Hennepin County District Court
File No. 27-CR-16-14723

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

Susan L. Segal, Minneapolis City Attorney, Jennifer Saunders, Assistant City Attorney,
Minneapolis, Minnesota (for respondent)

John L. Lucas, Robert M. Paule, Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Hooten, Judge; and Stauber,
Judge.

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

UNPUBLISHED OPINION

STAUBER, Judge

Jake Mattern ran over and killed a woman with his 6,000 pound work truck, while she was lawfully in the crosswalk, when he made a left turn at a busy intersection in downtown Minneapolis. A jury convicted Mattern of criminal vehicular operation resulting in bodily injury-gross negligence, careless driving, and misdemeanor failure to yield to a pedestrian. Mattern challenges on appeal only his criminal vehicular operation-gross negligence conviction, arguing that there was insufficient evidence that he operated his truck in a grossly negligent manner and that the prosecutor committed reversible misconduct during closing argument. Because the circumstances proved are inconsistent with any reasonable hypothesis other than that Mattern was grossly negligent and, because any prosecutorial misconduct did not prejudice Mattern, we affirm.

FACTS

Mattern was driving a Ford F350 Super Duty pick-up truck in downtown Minneapolis on a snowy February day. He stopped his car in the left lane of 8th Street, a southeast-bound one-way street, for a red light at the intersection of Hennepin Avenue, a two-way street with two lanes in each direction. At that same time, Rachel David was standing at the northeast corner of Hennepin Avenue, waiting to cross. The light changed, the walk sign turned on, and David began to cross, but she was quickly overtaken by six other pedestrians. Mattern waited as the pedestrians began to cross, and then he slowly entered into the intersection. The six other pedestrians proceeded through the crosswalk much more quickly than David. Mattern began to turn left when the six pedestrians were

nearly at or beyond the edge of the lane Mattern was turning into. But David was trailing behind. She was only a quarter of the way across the intersection, still in the lane Mattern was turning into, when Mattern went into the turn. Mattern avoided the other pedestrians, but struck David when she was lawfully in the crosswalk with the walk light visible. Mattern's truck rolled over David, and he continued about a half block down Hennepin Avenue before coming to a stop. David died as a result.

At trial, the state presented a video recording of the incident, as well as witnesses to the event, and expert testimony. Mattern's expert opined that Mattern never saw David because his view was obscured by the truck's A-pillar—the structural component of the truck that separates the windshield from the driver-side door and supports the roof. The state's expert did not give such a definite opinion, conceding only that it was possible that Mattern's view of David was obstructed by the A-pillar or by the navigational device that was installed in the bottom-left corner of his work truck's windshield.

At closing, the prosecutor showed the jury a portion of the video recording that was not shown during the presentation of the evidence. The clip showed Mattern making the same turn at the same intersection approximately three minutes before he made the turn that struck David. In the clip, Mattern passes closely by a pedestrian lawfully in the crosswalk. While showing this part of the video, the prosecutor said to the jury, “Do you see how close he came to the pedestrian the first time?” Mattern objected on the basis of improper argument, and the district court sustained the objection. The prosecutor then said, “So Mr. Mattern had already been through that intersection once before and he went through it again, knowing that pedestrians could cross there.” Mattern later moved for a

mistrial, arguing that the prosecutor made an improper *Spreigl* argument without notice to the defense. The district court denied the motion for a mistrial, but instructed the jury to disregard that portion of the video and the prosecutor's comments.

Mattern's attorney argued at closing that gross negligence requires a lack of "even scant care," and Mattern's apparent concern for at least some of the pedestrians showed that he exercised at least some care. The state argued in its rebuttal the fact that Mattern apparently looked for some of the pedestrians did not absolve him of his responsibility to wait for each and every person. The jury acquitted Mattern of reckless driving but convicted him of careless driving, failure to yield to a pedestrian, and criminal vehicular operation resulting in bodily injury-gross negligence.

Mattern appeals.

D E C I S I O N

I.

Mattern argues that the evidence at trial was insufficient to sustain his conviction of criminal vehicular operation resulting in bodily injury-gross negligence. When reviewing a challenge to the sufficiency of the evidence, this court ascertains whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged. *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010). When any element of a crime is supported by circumstantial evidence, this court takes a two-step approach to determine if the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt. *State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010). The state argues that the circumstantial-evidence

test should not govern our review here because Mattern’s intent was not at issue. We disagree.

The state contends that even though it argued to the jury that it could infer from circumstantial evidence that Mattern was not paying attention to the road and was therefore grossly negligent, Mattern’s state of mind was not an element of the crime and, so, the circumstantial-evidence test does not apply. But the circumstantial-evidence test applies whenever an element of a charge rests on circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). And gross negligence in the criminal-vehicular-operation context is defined by the degree of inattention or lack of care the driver pays to the road. See *State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005) (“Ordinary and gross negligence differ in degree of inattention”) (quotation omitted); *State v. Kissner*, 541 N.W.2d 317, 321 (Minn. 1995), *review denied* (Minn. Feb. 9, 1996) (applying the circumstantial-evidence test to determine if the jury could reasonably infer from the defendant’s driving conduct that he lacked “even scant care”). The jury had to decide whether Mattern paid so little attention to the road as to constitute gross negligence. No direct evidence showed what degree of attention Mattern was paying to the road, so the jury was left to infer from other evidence—most significantly the video showing Mattern strike David while she was lawfully in the crosswalk—that Mattern paid so little attention to the road as to constitute gross negligence. We apply the circumstantial-evidence test to Mattern’s conviction.

When reviewing the sufficiency of circumstantial evidence, we first identify the circumstances proved. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). In

determining the circumstances proved, we disregard evidence that is inconsistent with the jury's verdict. *Harris*, 895 N.W.2d at 601. We then independently consider the reasonable inferences that can be drawn from the circumstances proved when viewed as a whole. *Id.* If the proven circumstances support a reasonable hypothesis inconsistent with guilt, then the state has not met its burden to prove the defendant's guilt beyond a reasonable doubt and we must reverse. *State v. Johnson*, 173 Minn. 543, 545-46, 217 N.W. 683, 684 (1928).

The video exhibit best depicts the circumstances proved. The video shows David waiting at the corner of 8th Street and Hennepin Avenue in downtown Minneapolis. The light changes, and she begins to cross. Six other pedestrians quickly overtake her as she walks slowly through the crosswalk. Mattern's white work truck enters the frame. Mattern then accelerates slightly into the turn when the six other pedestrians are nearly halfway across the street or further, but David is still only one-quarter of the way and is clearly in Mattern's path of travel. The truck proceeds through the intersection and collides with David at what appears to be an almost completely head-on angle. The truck rocks after rolling over her and proceeds until slowly coming to a stop half-way down the block.

Mattern seems to argue that other circumstances were proved, specifically his expert's testimony that Mattern never saw the victim. Under the circumstantial-evidence test, we "assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013) (quotation omitted). The state's accident reconstruction expert stated only that it was possible that Mattern's view was obstructed.

In the second step of the circumstantial-evidence test, we must decide if there is any reasonable hypothesis based on the circumstances proved that is inconsistent with the crime of criminal vehicular operation-gross negligence. We must first pin down what the gross-negligence element requires. Mattern argues that our decision in *State v. Miller*, 471 N.W.2d 380 (Minn. App. 1991), should control. In *Miller*, we considered whether a driver's failure to inspect his truck's brakes, by itself, rose to the level of gross negligence required by the statute. *Id.* at 384. We reviewed existing caselaw and concluded that "some egregious driving conduct coupled with other evidence of negligence" was required. *Id.* Mattern seizes on this language and argues that if we were to disregard the fact that the victim was in the crosswalk when he made his turn, we would see that there was no "egregious driving conduct," and so Mattern was not grossly negligent. But, the state responds that *Miller* alone should not control because cases since have not followed its formula.

The state is correct that later cases do not uniformly rely on *Miller*. In *Kissner*, we did not mention *Miller* and instead determined that the defendant's excessive speed, imprudent use of a passing lane in misty weather conditions, and the presence of a half-empty beer can all indicated that the defendant failed to exercise "even scant care" and therefore was grossly negligent. *Kissner*, 541 N.W.2d at 321. And *State v. Hegstrom*, a case decided after *Miller*, clarifies that a sufficient degree of inattention to the road may constitute a lack of even slight care that equals gross negligence. 543 N.W.2d 698, 703 (Minn. App. 1996). The lack of even slight care is the most persistent thread running through Minnesota's criminal vehicular operation-gross negligence cases. (*In*

chronological order) *State v. Bolsinger*, 221 Minn. 154, 159, 21 N.W.2d 480, 485 (1946); *State v. Meany*, 262 Minn. 491, 496, 115 N.W.2d 247, 252 (1962); *Kissner*, 541 N.W.2d at 321; *Hegstrom*, 543 N.W.2d at 702-03; *Al-Naseer*, 690 N.W.2d at 752. Even *Miller* quotes *Bolsinger*'s language that gross negligence is the "absence of even slight care." *Miller*, 471 N.W.2d at 383 (quoting *Bolsinger*, 221 Minn. at 159, 21 N.W.2d at 485).

The sole issue *Miller* decided was that more than a mere failure to inspect brakes was required to constitute gross negligence after the state had conceded that Miller was not negligent at the time of or immediately before the collision. *Id.* at 383-84. That later cases have ruled that a sufficient degree of inattention to the road may constitute gross negligence suggests that *Miller*'s egregious-driving conduct plus other evidence of negligence formula is merely dicta. See *Al-Naseer*, 690 N.W.2d at 752; *Hegstrom*, 543 N.W.2d at 702-03. We now consider whether there was any rational hypothesis consistent with the circumstances proved that Mattern exercised even scant care and so was not grossly negligent.

Mattern asserts that one hypothesis inconsistent with the theory that he failed to exercise "even slight care" is that he was waiting at the red light and approached the intersection cautiously, taking note of the group of pedestrians and allowing six of the seven pedestrians to cross before turning. But when Mattern makes the turn and nears the crosswalk, the video clearly shows that if Mattern had been looking directly through his front windshield, he would have been able to see David in front of him. We cannot say that just because Mattern exercised some care *before* he actually made his way through the intersection a jury had to find that he exercised "scant care" moments later when he struck David. It would be absurd to suggest, for example, that a person cannot be convicted of

criminal vehicular operation-gross negligence when he runs a red light and hits a car traveling with the right of way simply because he properly signaled that he was changing lanes before he reached the intersection.

We have already ruled that a driver's lack of attention to the road can constitute gross negligence, even if it occurs only briefly. *See Hegstrom*, 543 N.W.2d at 703 ("The trial court appears to have concluded that, as a matter of law, failure to maintain a proper lookout on a clear day is not gross negligence unless the inattention continues for a lengthy period of time. We disagree."). The circumstances proved are reasonably consistent only with the hypothesis that Mattern failed to exercise even scant care after he saw the group of pedestrians pass the half-way point and proceeded through the intersection to make the turn. This degree of inattention to potential pedestrians, even if it occurs briefly after a driver apparently exercises some care, constitutes gross negligence. The evidence was sufficient to convict Mattern.

II.

Mattern next argues that the prosecutor committed prosecutorial misconduct by showing and referring to a portion of the video during closing argument that was not presented to the jury as evidence. When reviewing claims of prosecutorial misconduct, we reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). The defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt. *Id.* We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error. *Id.*

This portion of the video showed Mattern making the same turn at the same intersection approximately three minutes before the turn that resulted in David's death. Mattern argues that the prosecutor's playing of this portion of the video and his accompanying comments constituted *Spreigl* evidence. Evidence of another act is not admissible to prove the character of a person in order to show action in conformity therewith. Minn. R. Evid. 404(b). The prosecutor's comments to the jury—asking “Do you see how close he came to that pedestrian the first time?” and stating, “So Mr. Mattern had already been through that intersection once before and he went through it again, knowing that pedestrians could cross there”—suggested that Mattern twice did the same thing: drove through an intersection without proper care for potential pedestrians. We can discern no purpose for these comments other than to suggest that Mattern had the propensity to make turns without sufficient regard for pedestrians.

But after Mattern objected to the prosecutor's argument, the district court gave a curative instruction. The district court told the jury:

First of all, you were shown a video that was not shown—a portion of which—of the safe zone video which was not shown to you during the trial, and I'm going to instruct you to disregard that portion of the video. That was improper, and I've deemed it so, that that should not have been played to you.

Further, I am going to instruct you to disregard the comments of Mr. Bernstein while that video was playing, and—because I've deemed that those were also improper. And when I say disregard, that means that when you are considering the evidence during your deliberations, that evidence cannot be considered by you in any way.

We “presume that jurors follow the court’s instructions.” *State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002). If there is no indication that the jury did not follow the court’s instructions, then we must presume that the court’s cautionary instructions cured any prejudicial effect. *Id.* We see no indication that the jury failed to follow the district court’s instructions, and we are confident that the properly admitted evidence was more than sufficient to convict Mattern. Mattern’s grossly negligent driving at the time he struck David was caught on video, and the jury saw him drive his work truck over the victim while she was lawfully in the crosswalk. Any prejudice from the portion of the video showing Mattern making the earlier turn was insignificant and harmless compared to the strong, properly admitted evidence of Mattern’s guilt.

Affirmed.