

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1749**

State of Minnesota,
Appellant,

vs.

Pedro Ricardo Flores,
Respondent.

**Filed July 5, 2022
Reversed and remanded
Smith, Tracy M., Judge**

Anoka County District Court
File No. 02-CR-20-6168

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant State of Minnesota brings this pretrial appeal from the district court's dismissal for lack of probable cause of six counts of criminal vehicular homicide and operation against respondent Pedro Flores. Because we conclude that the state has

presented sufficient facts to establish probable cause for the associated elements of gross negligence and negligence, we reverse and remand.

FACTS

The following facts are drawn from the record submitted by stipulation of the parties for purposes of Flores's motion to dismiss for lack of probable cause.

At around 4:00 p.m. on November 30, 2019, Flores was driving his 2005 Dodge Ram truck eastbound on Main Street N.W., a divided road, in Coon Rapids. It was very snowy that day, with "blizzard like conditions at times." The temperature was around freezing, and the "roadway was extremely slippery, as there was also freezing rain at times during the day." A winter-storm warning was in effect until noon the following day.

About 1,000 feet west of the Main Street/Shenandoah Boulevard intersection, Flores's truck began to fishtail, and he lost control of the vehicle. The vehicle crossed the median and went into oncoming westbound traffic, colliding head-on with a Toyota Camry. Another vehicle, a Chevrolet Silverado, rear-ended the Camry, and a fourth vehicle, a Honda Civic, rear-ended the Silverado. Three of the Camry's four passengers were seriously injured. Tragically, one of those passengers—a two-year-old child—died from his injuries several days later.

Officers arrived at the scene of the crash. Officer Morin noted the smell of alcohol on Flores's breath. When asked how much he had to drink that day, Flores first said, "Nothing," and then said, "No, much earlier. Much earlier this morning." Flores said that he had consumed a beer that morning while plowing snow. Officer Morin observed that Flores's speech was slurred and that Flores had "bloodshot, watery, glossy eyes." Officer

Morin administered three field sobriety tests, on which Flores performed poorly. Officer Morin then administered a preliminary breath test, which indicated the presence of alcohol.

Officer Morin obtained a search warrant for a blood test. A technician drew a blood sample at 6:22 p.m., which showed an alcohol concentration of 0.038 as well as the presence of THC and THC metabolites.

Officers searched Flores's vehicle and found unopened cans of alcohol (one of which was punctured in the crash) as well as a McDonald's bag and receipt showing that Flores had purchased two burgers about 60 minutes before the crash. On the front passenger floor, officers also found a partially eaten McDonald's burger.

Officers interviewed witnesses to the collision. C.D., one of these witnesses, explained that she, too, was heading eastbound on Main Street. She stated that she first saw Flores's truck "a mile or two back" after he turned onto Main Street where "the lane kinda was ending or right before we hit the bridge going over Highway 10." She noticed that Flores was crossing into her lane:

[H]e kinda was hovering over my like dotted line coming into my lane [H]e was coming across my line enough for me to be like what are you doin'? Stay in your lane. And I couldn't tell if he was . . . on his phone, like kinda swerving and then he'd jolt back . . . and it was like two times it happened before but enough to catch my attention. . . . Especially with the roads being slippery.

Flores then "sped past" C.D. At that time, C.D. was traveling at "probably like 40 [m.p.h.] maybe."

C.D. continued traveling eastbound with Flores ahead of her. When the speed limit increased to 55 m.p.h., she looked at her speedometer and saw she was going around 50

m.p.h. But then, “with the road conditions and [Flores] was . . . you know on the radar,” she “pulled back a little bit.” She then saw that Flores’s truck began “kinda fishtailing” and then “flew into oncoming traffic.” She estimated that Flores was going “probably 50, 55 maybe.” She said that it was “snowing it was like slushy” and “was slippery enough . . . to go under the speed limit.”

M.H., the driver of the Silverado, also gave a statement to police. M.H. stated, “I watched the whole thing and, I guess that’s pretty much how it happened, you know. Slick roads and . . . bad conditions and people drivin’ too fast.” S.P., the driver of the Camry, told police that he was driving approximately 40 to 45 m.p.h. at the time of the crash.

Flores gave a statement to officers on the day of the crash. In explaining what happened, he said:

I’m headin’ back on Main, goin’ east, and I just . . . somehow lost traction and started to spin, started to fishtail to one side or the other. I’m not sure which side now, but I went to correct it and when I did, it just took me into a spin . . . and that spin took me, and that spin seemed to gain momentum, it took me right over the middle, the middle divider and I could see cars comin’ at me and that’s all I remembered ‘till I stopped.

In describing how the spinout started, he said that “[he] started feeling the back end” and “[he] felt it come out from . . . from one side to the other and [he] just remembered trying to correct it and it just all of a sudden spinnin’, it went right into a spin immediately.” Flores also stated that he “wasn’t goin’ any faster or slower than the rest of traffic” and that he and the other drivers “were all just travelin’ the same.”

Sergeant Kelly Phillips of the Minnesota State Patrol performed a crash-site analysis at the scene. She recovered a module from the Camry that showed the Camry was traveling

at a speed of 46 m.p.h. seconds before the crash and a module from the Silverado showed that it was traveling at 50 m.p.h. seconds before the crash. In her report, Sergeant Phillips concluded:

The primary contributing factor in this crash is with Pedro Ricardo Flores. It is Flores's responsibility to drive at a reduced rate of speed so he can safely operate his motor vehicle and maintain his traffic lane. Had he not failed to do so, it is likely this crash would have not happened.

In a separate, follow-up report, Sergeant Phillips opined that “[t]he damage to the side of the Dodge and front of the Toyota is consistent with higher closer speed (meaning higher than the posted speed limit) between the two vehicles.”

The state charged Flores with seven criminal counts. Counts I, III, and V allege gross negligence in the operation of a motor vehicle resulting in death (Minn. Stat. § 609.2112, subd. 1(a)(1) (2018)), great bodily harm (Minn. Stat. § 609.2113, subd. 1(1) (2018)), and substantial bodily harm (Minn. Stat. § 609.2113, subd. 2(1) (2018)), respectively. Counts II, IV, and VI allege negligent operation of a motor vehicle while under the influence of alcohol and a controlled substance resulting in death (Minn. Stat. § 609.2112, subd. 1(a)(2)(iii) (2018)), great bodily harm (Minn. Stat. § 609.2113, subd. 1(2)(iii) (2018)), and substantial bodily harm (Minn. Stat. § 609.2113, subd. 2(2)(iii) (2018)), respectively. Count VII alleges second-degree driving while impaired (Minn. Stat. § 169A.20, subd. 1(4) (2018)). Flores moved to dismiss all counts for lack of probable cause.

The parties stipulated to documentary exhibits to serve as the record for the contested omnibus motion. The district court thereafter dismissed all six of the criminal-

vehicular-operation counts against Flores; it denied Flores's motion to dismiss the count for impaired driving. As to the six counts that it dismissed, the district court concluded that, as a matter of law, the evidence could not establish gross negligence or negligence.

The state appeals.

DECISION

The state challenges the district court's pretrial dismissal of six criminal-vehicular-operation counts that depend on the element of either gross negligence or negligence. Before addressing the merits of that decision, we briefly address the state's ability to bring this appeal.

I. Pretrial Appeal

The state's ability to bring a pretrial appeal in a criminal case is limited. *See State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009). In a pretrial appeal, the state must show that "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." *State v. Stavish*, 868 N.W.2d 670, 674 (Minn. 2015) (quoting Minn. R. Crim. P. 28.04, subd. 2). The critical-impact requirement is met when a district court dismisses charges against a defendant. *See State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *rev. dismissed* (Minn. June 22, 2001).

"The state may appeal from a pretrial order dismissing a complaint for lack of probable cause when the dismissal was based on a legal determination." *State v. Gerard*, 832 N.W.2d 314, 317 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013). We review such a dismissal de novo, with no deference to the district court. *Id.*

Flores does not challenge the authority of the state to bring this pretrial appeal. And, because any error in the district court's dismissal of six charges would have a critical impact on the case, we turn to our de novo review of whether probable cause exists to support the charges.

II. Probable Cause

Upon a defendant's motion to dismiss for probable cause, the "court must determine whether probable cause exists to believe that an offense has been committed and that the defendant committed it." Minn. R. Crim. P. 11.04, subd. 1(a). At this stage, "[i]t is not necessary for the state to prove the defendant's guilt beyond a reasonable doubt." *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976) (quotation omitted). "Unlike proof beyond a reasonable doubt or preponderance of the evidence, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Harris*, 589 N.W.2d 782, 790-91 (Minn. 1999) (quotation omitted). "[T]he threshold factual showing of probable cause necessary to support a charge is low." *State v. Lopez*, 778 N.W.2d 700, 705 (Minn. 2010).

"The district court must view the evidence in the light most favorable to the state and may not assess the relative credibility or weight of conflicting evidence." *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (citation and quotation omitted). Such issues are, "with rare exception," left to the jury. *State v. Elmourabit*, 373 N.W.2d 290, 294 (Minn. 1985).

A. Gross Negligence

The district court dismissed three counts that are predicated in part on driving in a grossly negligent manner. *See* Minn. Stat. §§ 609.2112, .2113 (2018). “Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.” *State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005) (quotation omitted). “It is very great negligence, or the absence of slight diligence, or the want of even scant care.” *Id.* (quotation omitted). Gross negligence does not require evidence of willful and wanton disregard or reckless conduct. *State v. Hegstrom*, 543 N.W.2d 698, 703 (Minn. App. 1996), *rev. denied* (Minn. Apr. 16, 1996). “A sufficient degree of inattention to the road could constitute a lack of ‘slight care,’ that is gross negligence.” *Id.* Evidence that a driver crossed the center line and drove into oncoming traffic may show inattention sufficient to meet the gross-negligence standard. *State v. Pelawa*, 590 N.W.2d 142, 145 (Minn. App. 1999), *rev. denied* (Minn. Apr. 28, 1999), *overruled on other grounds by Al-Naseer*, 690 N.W.2d at 751.

The state argues that the record shows a probable or substantial chance that Flores engaged in gross negligence in two ways. First, it contends that there is evidence showing that Flores was driving too fast for conditions. It points to Sergeant Phillips’s analysis, C.D.’s testimony regarding Flores’s driving, and other drivers’ statements regarding their speed and the conditions. Flores responds that the evidence is insufficient. He contends that the evidence shows that he was not exceeding the speed limit and that he was driving at or close to the same speed as other drivers under the same conditions.

We conclude that the evidence in the record is sufficient to raise a factual question for the jury of whether Flores was driving too fast for conditions. The record is replete with evidence of very poor driving conditions. Driving too fast for conditions does not require that a driver be exceeding the speed limit. *See* Minn. Stat. § 169.14, subd. 1 (2018); *see also Hatley v. Klingsheim*, 53 N.W.2d 123, 127 (Minn. 1952) (applying this concept in a civil case). Viewed favorably to the state, the evidence shows that the Camry was traveling at a speed as low as 40 m.p.h. at the time of the crash; the Silverado, 50; and C.D., less than 50, as C.D. “pulled back” because of conditions and concern about Flores’s driving. Meanwhile, Flores, according to C.D., was traveling up to 55 m.p.h. The evidence thus shows that Flores was driving faster than all of the other drivers. And all of those drivers were driving below the speed limit in the snowy conditions. Moreover, the fact that some of those other drivers were traveling at a speed that was arguably close to Flores’s speed does not itself establish that he was not driving too fast for conditions—a jury could decide that all of the cars at the scene were traveling at a rate that was too fast for conditions. Finally, Sergeant Phillips concluded that Flores had caused the crash and that, had he “not failed” to “drive at a reduced rate of speed so he can safely operate his motor vehicle,” “it is likely this crash would have not happened.”

Second, the state argues that there is direct and circumstantial evidence that shows that Flores was distracted while driving. This evidence includes C.D.’s testimony that Flores was moving into her lane when he entered Main Street, driving like “maybe he was on his phone.” The state also points to a recently purchased, partially eaten burger found in Flores’s vehicle after the crash, suggesting that Flores may have been distracted by

eating while driving. Flores responds that the evidence is insufficient because the encroaching into C.D.'s lane occurred one to two miles before he lost control of his truck and the theory that he was eating is both speculative and cannot prove inattention to the road.

We conclude that, viewed in the light most favorable to the state, the evidence sufficiently presents a fact question for the jury as to whether Flores engaged in distracted driving. C.D. witnessed Flores “coming into [her] lane” and “jolt[ing] back.” It caught her attention and raised concerns about Flores’s driving. It is true that C.D. did not observe that conduct at the moment that Flores started fishtailing, but the apparently distracted driving was nevertheless close enough in time and place to contribute to probable cause. Likewise, while the evidence of recently purchased and partially eaten food does not necessarily mean that Flores was eating, or distracted by eating, at the time of the crash, it, too—especially in conjunction with the driving conduct observed by C.D.—contributes to probable cause that Flores was distracted while driving. *See State v. Kissner*, 541 N.W.2d 317, 321 (Minn. App. 1995) (“For example, from the discovery of a half-empty beer can in the front of the Ford, the jury could have found that appellant was drinking from the can at the time of the accident and that his attention was diverted from the road.”), *rev. denied* (Minn. Feb. 9, 1996).

At this stage, the state does not need to prove beyond a reasonable doubt or show by a preponderance of the evidence that Flores’s conduct constituted gross negligence. *See Florence*, 239 N.W.2d at 896. It must meet only the “low” threshold of showing a “probability or substantial chance of criminal activity.” *Lopez*, 778 N.W.2d at 705; *Harris*,

589 N.W.2d at 790. Because the state has presented evidence that meets that threshold, it was error for the district court to dismiss the three gross-negligence counts.

B. Negligence

The district court also dismissed three counts that are based on driving in a negligent manner while under the influence of alcohol or controlled substances. *See* Minn. Stat. §§ 609.2112, .2113. Negligence is the doing of something which an ordinarily prudent person would not do or the failure to do something which an ordinarily prudent person would do under like or similar circumstances. *State v. Munnell*, 344 N.W.2d 883, 886 (Minn. App. 1984). “In the context of careless driving, carelessness is synonymous with ordinary negligence.” *Al-Naseer*, 690 N.W.2d at 752. “[W]hether [a driver] exercised the required degree of care is a fact question for the jury.” *State v. Dittel*, 464 N.W.2d 601, 604 (Minn. App. 1991) (quotation omitted), *rev. denied* (Minn. Mar. 6, 1991).

Because, as described above, the evidence is sufficient to establish probable cause of gross negligence based on driving too fast for conditions and distracted driving, it is likewise sufficient to establish probable cause of negligence. The district court therefore erred by dismissing the three negligence-based counts.¹

Reversed and remanded.

¹ In his brief to this court, Flores states that he “reiterates and incorporates his previous arguments challenging probable cause that he was under the influence of alcohol or a combination of substances as pertaining to Counts II, IV, VI, and VII, but elaborates only on the element of negligence below in the interest of brevity.” However, an argument not briefed on appeal is forfeited. *State v. Morrow*, 834 N.W.2d 715, 724 n.4 (Minn. 2013). In any event, we discern no error in the district court’s determination that the evidence is sufficient to establish probable cause that Flores was driving under the influence.