

**IN THE COURT OF APPEALS OF IOWA**

No. 1-051 / 10-0721  
Filed April 27, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ANDREA BIRDSALL LAFORGE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,  
Judge.

The defendant contends there is insufficient evidence to support her  
conviction for involuntary manslaughter. **REVERSED.**

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des  
Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Steve Foritano and David  
Porter, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no  
part.

**DANILSON, J.**

Andrea LaForge appeals from judgment and sentence entered upon her conviction for involuntary manslaughter by public offense in violation of Iowa Code section 707.5(1) (2007). She argues there is insufficient evidence to support a finding of careless driving and because the jury had returned verdicts of not guilty on the two other public offense alternatives, which were lesser-included offenses of other counts, the conviction cannot stand. Because a rational trier of fact could not find LaForge guilty of unintentionally causing the death of a passenger in her vehicle by careless driving as defined by section 321.277A, we reverse the conviction.

**I. Background Facts and Proceedings.**

At about 11:00 p.m. on February 27, 2007, LaForge was driving her 1994 Ford Mustang from Derry's bar on Merle Hay Road via I-80 to take one of her two male passengers home.<sup>1</sup> When exiting I-80 eastbound at the Northeast 14th Street off-ramp, the vehicle spun clockwise, left the roadway on the right-hand side of the ramp, flipped several times, and came to rest upside down. The passenger who had been sitting in the back seat was ejected from the vehicle and subsequently died.

After amendment to the trial information, LaForge was charged with homicide by vehicle by operating while under the influence in violation of Iowa Code section 707.6A(1) (count I), homicide by vehicle by reckless driving in violation of section 707.6A(2) (count II), and involuntary manslaughter by public

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<sup>1</sup> The trio had gone to Derry's at about 6:30 p.m. as the men were playing league pool.

offense in violation of section 707.5(1) (count III); the alternative public offenses alleged were operating while intoxicated, reckless driving, and careless driving.

The jury was instructed that to prove involuntary manslaughter by public offense, the State must prove both the following elements: (1) “the defendant recklessly committed the public offense of Operating a Motor Vehicle While Under the Influence of Alcohol and/or Reckless Driving and/or Careless Driving”; and (2) “[w]hen the defendant committed the public offense, the defendant unintentionally caused the death” of a person.

The jury was further instructed:

A person is “reckless” or acts “recklessly” when she willfully disregards the safety of persons or property. It is more than a lack of reasonable care which may cause unintentional injury.

Recklessness is conduct which is consciously done with willful disregard of the consequences. For recklessness to exist, the act must be highly dangerous. In addition, the danger must be so obvious that the actor knows or should reasonably foresee that harm will more likely than not result from the act. Though recklessness is willful, it is not intentional in the sense that harm is intended to result.

Careless driving was defined:

As referred to in [instruction defining involuntary manslaughter by public offense], Careless Driving is:

1. The defendant intentionally operated a motor vehicle upon a public road or highway;
2. The defendant intentionally:
  - a. created or caused unnecessary tire squealing, skidding, or sliding upon acceleration or stopping; or
  - b. caused any wheel or wheels to unnecessarily lose contact with the ground; or
  - c. causes the vehicle to unnecessarily turn abruptly or sway.<sup>[2]</sup>

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<sup>2</sup> This instruction substantially follows the language of section 321.277A, which defines the offense of careless driving.

The jury returned a not guilty verdict on count I, “Homicide by Vehicle—OWI,” a lesser-included offense of which was operating a motor vehicle while under the influence of alcohol. The jury also returned a not guilty verdict on count II, “Homicide by Vehicle—Reckless,” a lesser-included offense of which was reckless driving. The jury did find the defendant guilty of involuntary manslaughter.

On appeal, the defendant contends the only public offense alternative possible to sustain the involuntary conviction is careless driving, which she contends is not supported by sufficient evidence. The State attempts to sustain the conviction on each of the three public offense alternatives charged. But our supreme court has recently held that “in a case involving conviction of a compound felony when the defendant is acquitted of the underlying predicate crime, the conviction cannot stand.” *State v. Halstead*, 791 N.W.2d 805, 814 (Iowa 2010). Here, the jury acquitted defendant of driving while under the influence and reckless driving. We thus agree with the defendant that her conviction stands or falls on whether there is sufficient evidence to support the careless driving alternative of her conviction for involuntary manslaughter by public offense.

## **II. Scope and Standard of Review.**

We review sufficiency-of-evidence claims for correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

We uphold a verdict if substantial evidence supports it. “Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” Substantial evidence must do more than raise suspicion or speculation. We consider all record evidence not just the evidence supporting guilt

when we make sufficiency-of-the-evidence determinations. However, in making such determinations, we also view the “evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.”

*Id.* (internal citations omitted).

### **III. Merits.**

The defendant argues that “the record is devoid of even a scintilla of evidence that would suggest Ms. LaForge committed the offense of careless driving” as defined by the jury instructions. The State, however, points to the testimony of Bernard McDonough and Kurt Burkhalter, both of whom stopped to render aid after the defendant’s Mustang left the roadway.

McDonough testified that he was traveling east on I-80 “just past the Second Avenue on-ramp that comes back on I-80, and I have to merge over, so I checked my . . . right mirror.” He testified he saw a dark-colored Mustang coming “really fast” in the south lane. McDonough stated he was traveling at sixty-five miles per hour and the Mustang passed him on the right side.

I let it pass, and when it passed, I merged on over, and this was probably about the halfway point, between Second Avenue and 14th Street, that I got in behind it.

. . . .

And it passed me really fast, fast enough that I knew something was going to happen. And so I watched it, and it kept going, and I kept looking for brake lights. It didn’t brake, and it kept getting onto 14th Street here.

. . . .

Q. Say you saw the taillights. Why was that important for you? A. Uh-huh. Well, I was watching to see if it would brake, because I knew they wouldn’t be able to make the curve there at that speed.

. . . .

I saw the car, the back end come around clockwise in front of the car, and then the headlights were pointing at me, and it went

backwards for a ways, and then hit the snowbank, and then it rolled, like five times.

McDonough testified that when he saw the headlights facing him, he could see the car “was floating on the road.” He was asked if he had ever seen anything like the “floating thing” before. McDonough stated, “[j]ust like in a stock car race, when a car comes out of a curve and you see kind of they’re just barely hooking up with the road.” McDonough acknowledged that other than the speed of the vehicle, which he thought to be inappropriate for winter conditions, he did not consider it to be driven in an erratic manner; the vehicle was not swerving or weaving in and out of traffic.

Burkhalter testified he, too, was driving on I-80 that night. He saw a dark green Mustang get on the interstate at Merle Hay and they “[f]ollowed each other all the way to the Southeast [sic] 14th exit, where the Mustang made a quick maneuver into the exit lane and proceeded to have an accident.” Burkhalter stated he was traveling with his cruise control set at a speed of approximately seventy miles per hour. The Mustang was in front of him and he “[d]idn’t see any erratic moves until the end, when they made the last-minute decision to get off on Southeast—or on East 14th.” He further described his observations:

At that point [Northeast 14th Street exit] I saw the Mustang, they were two lanes over from the exit, so it would be the center lane of the interstate. They crossed the slow lane into the exit lane, crossed in front of a white van, and at that point I saw them accelerate around the exit. There is a curve on the exit, that’s when they lost control and the accident happened, so—

Q. And you saw them pass a van? A. Yep

....

Q. Okay. Tell me, did they—as they were going past the van, tell me about their speed, the Mustang’s speed. A. It increased. I mean, it’s almost as if they punched it to the floor.

....

Well, when they made the maneuver in front of the van, that's when they accelerated, the best I can remember. That's when they accelerated and that exit ramp, they should have been slowing down, not speeding up.

Burkhalter was asked to further describe his observation of the Mustang on the exit ramp. He stated:

Okay. As it moved over to the exit ramp, it accelerated. As it starts to curve on the exit ramp is when the tail end seemed to lose control. As the car slid off the exit ramp towards the ditch, there is a drop-off. That's when the nose took a dive and the car started rolling.

Iowa State Patrol Trooper Kirk Lundgren, one of the investigating officers, also observed skid marks, "where the vehicle [was] sliding sideways as it was entering the ditch." Burkhalter opined the "last-minute decision" to exit the highway "was not a wise decision. Something you shouldn't be doing in the time of year, with the road conditions the way they were."

Here, the two eyewitnesses both agree that until LaForge reached the curve on the exit ramp, there was no swerving or weaving of her vehicle. They both observed LaForge's high rate of speed during the attempt to traverse the exit ramp. Although Burkhalter first stated the quick maneuver occurred as LaForge switched lanes to take the exit lane, in cross-examination he agreed LaForge exited onto the exit ramp from the center lane of the interstate rather than the exit lane. Notwithstanding where the last-minute decision to exit occurred, there was no testimony that LaForge lost control of her vehicle at this point. In fact, she traversed almost half of the ramp before her wheels lost contact with the ground or there was any swaying, sliding, or skidding according to the witnesses. Under these facts even if the quick maneuver constituted

careless driving by an intentional and unnecessary abrupt turn, as defined by section 321.277A, it is difficult to conclude the abrupt turn was a proximate cause of the accident.

Reading section 321.277A<sup>3</sup> as a whole, we are convinced the provision was primarily intended to outlaw those acts where a driver is intentionally attempting to clown-around or show-off to others inside or outside of the vehicle and does not include negligent acts. We do not believe the swaying, skidding, sliding, or loss of the wheels' contact with the ground as a result of an operator losing control of her vehicle is an intentional act constituting careless driving. The facts here reflect a tragic accident caused by poor judgment, a high rate of speed on the exit ramp, and less than ideal road conditions—but not careless driving as defined by section 321.277A.

#### **IV. Conclusion.**

There was not substantial evidence from which a rational trier of fact could find LaForge guilty of involuntary manslaughter by the public offense of careless driving. We therefore reverse the conviction.

#### **REVERSED.**

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<sup>3</sup> Section 321.277A reads:

A person commits careless driving if the person intentionally operates a motor vehicle on a public road or highway in any one of the following ways:

1. Creates or causes unnecessary tire squealing, skidding, or sliding upon acceleration or stopping.
2. Simulates a temporary race.
3. Causes any wheel or wheels to unnecessarily lose contact with the ground.
4. Causes the vehicle to unnecessarily turn abruptly or sway.