IN THE COURT OF APPEALS OF IOWA

FILED
AUG 17 1995
CLERK SUPREME COURT

No. 5-260 / 94-0332

STATE OF IOWA,

Appellee,

vs.

LAWRENCE MICHAEL HENNING,

Appellant.

Appeal from the Iowa District Court for Johnson County, William R. Eads, Judge.

Defendant appeals judgment and sentence, following a jury trial, entered upon his conviction of vehicular homicide, in violation of Iowa Code section 707.6A(1)(a) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Thomas G. Fisher, Jr., Assistant Attorney General; J. Patrick White, County Attorney; and Janet Lyness, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Huitink, JJ.

DONIELSON, C.J.

The defendant, Lawrence Henning, appeals from his conviction for vehicular homicide. Iowa Code § 707.6A(1)(a) (1993). He asserts: 1) the State failed to prove beyond a reasonable doubt he committed vehicular homicide; 2) he was denied his right to effective assistance of counsel; 3) the trial court abused its discretion in denying his motion for a mistrial; 4) the trial court abused its discretion in admitting expert testimony regarding whether a sober driver would have seen the victim; and 5) the trial court abused its discretion in admitting evidence of an expert opinion based upon hearsay. We affirm.

I. SUFFICIENCY OF THE EVIDENCE.

The defendant argues the State failed to prove beyond a reasonable doubt his alleged intoxication was the proximate cause of the victim's death. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. We consider all of the evidence, not merely that supportive of the conviction, in

determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

The definition of "proximate cause" in a criminal case is the same as in a civil case. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In the criminal context, proximate cause serves as a requirement that there be a sufficient causal relationship between the defendant's conduct and a proscribed harm to hold him criminally responsible. *Id.* A defendant's conduct is the proximate cause of another's death if: 1) his conduct is a "substantial factor" in bringing about the harm; and (2) there is no other rule of law relieving the defendant of liability because of the manner in which his conduct resulted in the harm. *Id.*

The defendant argues the record shows his alleged intoxication was not a substantial factor in the victim's death. He asserts "[t]he record further establishes that the sole cause of death was [the victim's] unexpected conduct of riding on the dark highway at such a late hour wearing dark clothes and using no lights or reflectors." The defendant contends it was his inability to see the victim, and not his intoxication, which caused the victim's death.

The defendant argues he was entitled to a judgment of acquittal given the striking similarity between the facts of this case and those of *State v. Wieskamp*, 490 N.W.2d 566 (Iowa App. 1992). In *Wieskamp* an intoxicated driver hit and killed a victim who was wearing dark clothing and lying in the street in an unlit area of the highway. *Id.* at 567. We found as a matter of law that a sober driver with reasonable

care would have struck and killed the victim and, therefore, Wieskamp's intoxication was not a substantial factor in causing the victim's death. *Id.*

In *Wieskamp* it was undisputed a sober driver would not have seen the victim "until they were right on top of them." This case is distinguishable in that expert testimony was offered as to the visibility of the victim and there was evidence another driver had been able to observe the victim bicycling on the edge of the road and safely move to another lane of traffic. We reject the defendant's arguments that the State's expert testimony was internally inconsistent and carries no evidentiary weight.

There was sufficient evidence from which the jury could find the defendant's intoxication was a substantial factor in causing the death of the victim. The State met its burden of proof on the issue of proximate causation and the trial court did not err in denying the defendant's motion for a judgment of acquittal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant claims his trial counsel was ineffective in failing to request a jury instruction on the theory of intervening cause. The defendant bears the burden of proving by a preponderance of the evidence that he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: 1) counsel failed to perform an essential duty; and 2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The

test for the second element is whether there is a reasonable probability that but for his trial attorney's unprofessional errors, the resulting conviction and sentence would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* Our review is based upon an evaluation of the totality of circumstances. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa 1994).

An intervening cause is an independent force which actively operates in producing harm to another after the other actor's negligent act or omission has been committed. *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990). Only intervening causes which are also superseding relieve the defendant of liability. *Id.* A criminal defendant can be relieved of criminal responsibility if an intervening event breaks the chain of causal connection between the defendant's actions and the victim's death. *Wissing*, 528 N.W.2d at 565. "However, for a factor other than the defendant's act to relieve the defendant of criminal responsibility for homicide, the other factor must be the *sole* proximate cause of death." *Id.* (emphasis in original).

We cannot find trial counsel was ineffective in failing to request a superseding cause instruction. This case is analogous to *State v. Hubka*, 480 N.W.2d 867, 870 (Iowa 1992). In *Hubka* the supreme court held the victims' failure to wear seat belts

or other restraints was not a superseding cause of their deaths. Similarly, in this case, the victim's dark clothing and failure to have reflectors or a light on his bicycle may have been a factor contributing to his death but was not the sole proximate cause. The defendant's claim of ineffective assistance of counsel is denied.

III. MOTION FOR MISTRIAL.

The defendant contends the trial court abused its discretion in denying his motion for a mistrial where it was evident the jury had become aware of the defendant's prior OWI convictions. We review the trial court's decision for an abuse of discretion. *State v. Wade*, 467 N.W.2d 283, 285 (Iowa 1991).

After jury deliberations had commenced, the court was informed the jury had become aware, through extraneous sources, that the defendant had prior OWI convictions. The court gave the jury the following admonishment:

> Ladies and gentlemen of the jury, this case has been tried at great effort and expense and you have been chosen as the jurors in this case. I want to reemphasize to you not to allow any publicity or any external forces that you may have heard about or come to bear on you since you started your deliberations to in any way affect your deliberations that are based on anything other than the evidence heard in this courtroom, the arguments of counsel, the instructions of the Court, that the decision not be based in any way on any other matters that -- publicity or those matters that you may have heard there or otherwise, again stressing your sacred duty as jurors in this case, to put aside any matters you may have heard and decide this case strictly on the evidence as you have been instructed and as jurors you have sworn to uphold.

Consideration by a jury of matters outside the record may, under certain circumstances, require a new trial. *State v. Johnson*, 445 N.W.2d 337, 341 (Iowa 1989). Iowa Rule of Criminal Procedure 23(2)(b)(2) provides a trial court may grant a new trial "[w]hen the jury has received any evidence, paper or document out of court not authorized by the court." Pursuant to Iowa Rule of Evidence 606(b), a court may consider evidence that extraneous prejudicial information was brought to a jury's attention, but it cannot consider evidence of the impact such evidence had upon the jury's deliberations.

When there is proof extraneous material has reached the jury room, the party seeking a new trial must prove the misconduct was calculated to, and with reasonable probability did, influence the verdict. *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991). The impact of the misconduct is to be judged objectively by the trial court in light of all the allowable inferences brought to bear on the trial as a whole. *Id.*

The exposure of the jury to information outside the record was especially troubling in this case due to the similarity in nature between the extraneous information and the crime for which the defendant was being charged. However, the jury promptly notified the court of its exposure to the information and the court gave it an emphatic admonition not to allow publicity or external forces to affect its deliberations. The jury was firmly reminded its decision was to be based on nothing

other than the evidence presented in the courtroom. We assume a jury abides by a court's directives and, given these circumstances, we find no abuse of discretion in the denial of the defendant's motion for a mistrial.

IV. EXPERT TESTIMONY -- SOBER DRIVER.

Two law enforcement officers were allowed to testify they believed an unimpaired driver would have been able to see the victim prior to the time of the accident. The defendant contends this testimony was improperly admitted because it is tantamount to an opinion on the defendant's innocence or guilt. The exercise of discretion to admit expert testimony is reversed only upon a finding of an abuse of discretion. *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994). While opinion evidence is generally admissible subject to the rules of evidence, a witness may not express an opinion on the defendant's guilt or innocence. *Id.*

In his brief the defendant concedes the two key issues in this case were whether the defendant was intoxicated and whether such intoxication was the proximate cause of the accident. The expert testimony pertaining to the visibility of the victim and whether an unimpaired driver would have seen him was relevant to the issue of causation. The testimony did not rise to the level of being a pronouncement on the defendant's guilt. There was no abuse of discretion in the admission of this testimony.

V. EXPERT TESTIMONY -- HEARSAY.

The defendant contends it was an abuse of discretion for the trial court to admit the testimony of Officer Mebus when his expert opinion was based on hearsay. An expert's opinion may be based upon facts or data not admissible in evidence if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon a subject. Iowa R. Evid. 703.

The testimony to which the defendant objected was Officer Mebus's opinion as to how DOT reaction time studies differ from the reaction times he uses in accident reconstruction studies. The witness indicated his opinion was based, in part, upon his conversations with DOT engineers. However, his opinion was also based upon his training, personal experience, and the evidence offered at trial through the testimony of witness Klaus. Officer Mebus was qualified to testify as to his understanding of the difference in the reaction times, and we find no abuse of discretion in the admission of this testimony.

AFFIRMED.