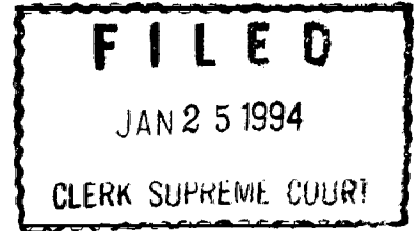


IN THE COURT OF APPEALS OF IOWA

No. 3-525 / 92-1828



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STATE OF IOWA,

Appellee,

vs.

RONALD J. SPIKE, JR.,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Richard J. Vipond, Judge.

Defendant, Ronald J. Spike appeals his conviction, following a jury trial, of vehicular homicide committed while participating in a drag race, in violation of Iowa Code section 707.6A(2)(a) (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Thomas G. Fisher, Jr., Assistant Attorney General; Thomas S. Mullin, County Attorney; and Karrie S. Kelly, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

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HABHAB, J.

Defendant, Ronald J. Spike appeals his conviction, following a jury trial, of vehicular homicide committed while participating in a drag race, in violation of Iowa Code section 707.6A(2)(a) (1991). We affirm.

On June 23, 1991, a motorcycle driven by William Duff struck a Camaro driven by Ray Coenen on Nebraska Street in Sioux City. Duff died as a result of the accident.

The State charged Spike with vehicular homicide while participating in a drag race. From the evidence presented at trial, a jury could have found the following facts: Spike and Duff were riding side-by-side, popping wheelies, and traveling at 25 to 30 mph. The speed on Nebraska Street is 25 mph.

Spike and Duff turned around, revved their engines, and sped back down Nebraska Street. Duff pulled out ahead of Spike. Duff suddenly braked, skidded, and struck the Camaro. Spike managed to pull behind the car, avoiding collision. Duff died as a result of injuries suffered from this collision.

Duff was going at least eighty-five to ninety-five miles per hour when he started to skid. Spike was going five-to-ten miles per hour slower. David Hansen, a traffic investigator, estimated Duff's speed at ninety-three miles per hour based upon a rear-wheel mark and the bike's speedometer. The speedometer froze at about ninety-one

miles per hour. The speed limit on the street the motorcycle was traveling on was twenty-five miles per hour.

Spike testified he was traveling between thirty-five and forty miles per hour while Duff was moving between sixty and seventy miles per hour prior to the accident. He denied they were drag racing.

The district court submitted Instruction No. 15 on proximate cause:

To prove that a defendant's conduct caused a death, the State must prove that the conduct was a proximate cause of the death.

A defendant's conduct was a "proximate cause" of a person's death----

1. If the death would not have happened except for the conduct.
2. If the conduct was a substantial factor in producing the death and----
3. If a reasonable person in the defendant's position would have known that the conduct was likely to result in injury to the other person.

A death may have more than one proximate cause.

The jury found Spike guilty as charged. The district court allowed Spike's counsel to withdraw and appointed the public defender for the purpose of filing posttrial motions. The public defender filed a motion for new trial based on the alleged insufficiency of the evidence. The district court denied the motion, entered judgment, and gave Spike a suspended sentence. Spike appeals.

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1. The defendant does not challenge the accuracy of this instruction.

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Iowa Code section 707.6A(2)(a) (1991) states:

2. A person commits a class "D" felony when the person unintentionally causes the death of another by operating a motor vehicle in any of the following manners:

a. Drag racing, in violation of section 321.278.

"Preliminarily, we note that the fact that defendant's automobile did not physically contact either of the other two vehicles does not, standing alone preclude his conviction." State v. McFadden, 320 N.W.2d 608, 610-11 (Iowa 1982) (fact that deceased motorist voluntarily participated in drag race did not itself bar defendant, the other racer, from being convicted of involuntary manslaughter from the motorist's death).

Spike claims his original trial counsel rendered ineffective assistance by failing to request an instruction on intervening and superseding cause. Spike maintains the district court's sole instruction on proximate cause failed to convey a possible alternate defense theory to the jury.

Established principles govern our review of defendant's Sixth Amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by 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. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986) (citation omitted). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

At trial, Spike's theory of the case was that he was not involved in a race and therefore he was not acting negligently. Spike testified accordingly. On appeal, Spike argues his trial counsel also should have argued the alternate theory that even if there had been a race, the accident was caused by the Camaro rolling through a stop sign. Spike then argues that in support of this alternate theory, his trial counsel should have requested an instruction that defined intervening and superseding cause.

Requesting jury instructions is a strategic decision made by trial counsel. Brewer v. State, 444 N.W.2d 77, 85 (Iowa 1989). In deciding whether trial counsel's performance was deficient, we require more than a showing

that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Counsel is not required to ask for instructions that do not fit within the trial strategy. Wycoff v. State, 382 N.W.2d 462, 472 (Iowa 1986) ("[N]ot every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency.")

We find that Spike's trial counsel was within the normal range of competency when he chose to rely only on the theory that Spike was not involved in a drag race.

We also find Spike has failed to show he would have been entitled to an instruction on the issue of intervening and superseding cause. In order to obtain an instruction on a defense, the defendant must produce substantial evidence to support it. State v. Broughton, 425 N.W.2d 48, 52 (Iowa 1988). Substantial evidence means evidence which could convince a rational trier of fact that the defendant has established his affirmative defense. Id.

The only testimony at trial that the driver of the Camaro contributed to the death was the testimony of Randy Glau. Mr. Glau testified the Camaro slowed down for the stop sign, but did not come to a full stop.

The element of proximate cause in criminal prosecutions serves as a requirement that there be sufficient causal relationship between the defendant's conduct and a

proscribed harm to hold the defendant criminally responsible. State v. Marti, 290 N.W.2d 570, 584 (Iowa 1980).

When, conduct or forces occur after a defendant's conduct, the defendant may be relieved of criminal responsibility if a court finds that the intervening events are such as to break the chain of causal connection between the defendant's conduct and the victim's death. However, a defendant cannot escape criminal responsibility for homicide merely because factors other than his acts contributed to the death, provided such other factors are not the sole proximate cause of death. Indeed, we have specifically stated that the alleged contributory negligence of a homicide victim may not be used as a defense in a subsequent homicide prosecution.

State v. Hubka, 480 N.W.2d 867, 869 (Iowa 1992) (emphasis added) (citations omitted). The fact that evidence shows the actions of a victim were a concurrent cause of the harm does not shield a criminal defendant. State v. Shimon, 182 N.W.2d 113, 115 (Iowa 1970).

We conclude Spike has failed to present sufficient evidence to show the driver of the Camaro, Ray Coenen's actions superseded Spike and William Duff's actions so that Coenen became the sole proximate cause of Duff's death. At most the evidence shows Coenen's conduct contributed to the death.

We therefore find Spike has failed to show his trial counsel breached an essential duty by not requesting a jury instruction on intervening and superseding cause.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., specially concurs.

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SACKETT, J. (specially concurring)

Defendant appeals following his conviction for vehicular homicide in violation of Iowa Code section 707.6A(2)(a)(1991). Defendant contends his trial attorney was ineffective in failing to request an instruction on intervening cause. The majority has affirmed his conviction and denied his ineffective assistance of counsel claim. I concur with the affirmance of the conviction. I would reserve the claim of ineffective assistance of counsel for postconviction procedure.

The Iowa Code addresses homicide or serious injury by vehicle as follows:

- 2. A person commits a class "D" felony when the person unintentionally causes the death of another by operating a motor vehicle in any of the following manners:
 - a. Drag racing, in violation of section 321.278.

Iowa Code § 707.6A(2)(a)(1991).

Iowa Code section 321.278 provides:

No person shall engage in any motor vehicle speed contest or exhibition of speed on any street or highway of this state and no person shall aid or abet any motor vehicle speed contest or speed exhibition on any street or highway of this state, except that a passenger shall not be considered as aiding and abetting. Motor vehicle speed contest or exhibition of speed are defined as one or more persons competing in speed in excess of the applicable speed limit in vehicles on the public streets or highways.

Iowa Code § 321.278 (1991).

The jury could have found defendant was drag racing with decedent when the motorcycle decedent was driving collided with an automobile that entered a controlled intersection after stopping for the stop sign at the entrance to the intersection.

The motorcycle defendant was driving was not involved in the crash. However; our court in a similar case said, "[t]he fact that defendant's automobile did not physically contact either of the other two vehicles does not, standing alone, preclude his conviction." State v. McFadden, 320 N.W.2d 608, 610-11 (Iowa 1982). Nor do the Iowa courts find a victim's voluntary and reckless participation in the drag race, of itself, bars defendant from being convicted of involuntary manslaughter. Id. at 611. As contrasted to Oregon where the court found in a drag-racing case that Oregon's involuntary manslaughter statute "[s]hould not be interpreted to extend to those cases in which the victim is a knowing and voluntary participant in the course of reckless conduct." State v. Petersen, 526 P.2d 1008, 1009 (Or. 1974).

Defendant contends his trial counsel was not effective because he did not ask for an instruction on intervening cause.

Proximate cause plays a familiar function in both criminal and civil trials. McFadden, 320 N.W.2d at 612. In McFadden, the Supreme Court said:

The element of proximate cause in criminal prosecutions 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. Similarly, in the law of torts is the element that requires there be a sufficient causal relationship between defendant's conduct and the plaintiff's damage to hold the defendant civilly liable.

McFadden, 320 N.W.2d at 612.

In McFadden, the court found the trial court did not err in applying ordinary proximate cause principles to determine whether the causation element of the Iowa Code section 707.5(1) had been met. McFadden, 320 N.W.2d at 613.

Defendant argues because the Supreme Court of Iowa adopted the principle of proximate cause normally associated with civil litigation, it was, therefore, necessary for the trial court to instruct the jury on proximate cause, sole proximate cause, intervening cause, and superseding cause rather than defining criminal violations in terms of direct causation.

Defendant's theory is if there had been an instruction on intervening cause, the jury could have concluded the accident was the result of the intervening cause, namely, the third driver's entering a controlled intersection and failing to yield.

Randy Glau, an eyewitness to the event, testified (1) only one motorcycle was in view when the accident occurred; and (2) the driver of the car had failed to stop at a marked intersection.

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There were facts that would have supported a finding the collision was the proximate result of the intervening negligence of the driver of the vehicle that entered the intersection.

I do not believe the issue of whether there was a valid reason for not requesting the instruction can be developed on this record. I would affirm the conviction but reserve defendant's claim of ineffective assistance of counsel for a postconviction proceeding.