

IN THE COURT OF APPEALS OF IOWA

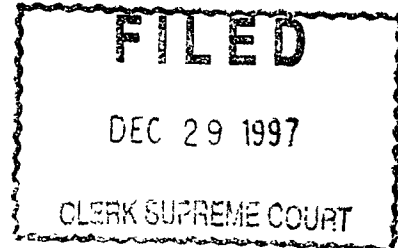
No. 7-591 / 96-1988

000361

STATE OF IOWA,
Appellee,

vs.

MICHAEL SCOTT KRUCKENBERG,
Appellant.



Appeal from the Iowa District Court for Calhoun County, Allan L. Goode,
Judge.

Michael Kruckenberg appeals his conviction, following a jury trial, for
homicide by vehicle in violation of Iowa Code section 707.6A (1995). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, and Cynthia Voorde, County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

The defendant, Michael Kruckenberg, appeals his conviction, following a jury trial, for homicide by vehicle in violation of Iowa Code section 707.6A (1995). Kruckenberg contends his trial counsel was ineffective for failing to challenge inadmissible hearsay testimony from an investigating police officer.

Background facts. A jury convicted Michael Kruckenberg of homicide by vehicle. The conviction was based on the State's evidence that Kruckenberg drove his car recklessly, crashing into another vehicle and killing the person in that vehicle. The district court sentenced Kruckenberg to a ten-year prison term.

Scope of review. As this claim implicates a constitutional right, we make an "independent evaluation of the totality of the relevant circumstances; this is the equivalent of a de novo review." *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984); *see State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

Hearsay evidence. Kruckenberg argues defense counsel breached an essential duty by failing to object to an investigating officer's (William McClure's) testimony which allegedly constituted inadmissible hearsay evidence.

In order for Kruckenberg to prevail on an ineffective assistance of counsel claim, he must prove by a preponderance of the evidence that 1) counsel failed to perform an essential duty; and 2) prejudice resulted. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Kruckenberg must establish under the first prong of this test that

counsel's performance was not within the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). Under the second prong of the ineffective assistance of counsel test, Kruckenberg must prove but for counsel's error, the outcome of the trial would have been different. *Ray*, 516 N.W.2d at 865; see *Strickland v. Washington*, 466 U.S. 668, 694 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984).

Iowa Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* Iowa Rule of Evidence 802 provides that hearsay is inadmissible unless it falls within an enumerated exception to the rules. Courts must objectively determine, in analyzing whether evidence is offered to prove the truth of the matter asserted, the real purpose of the offered testimony based on the "facts and circumstances developed by the record." *State v. Deases*, 518 N.W.2d 784, 792 (Iowa 1994).

The officer was asked about his investigation and replied:

I asked him [Kruckenberg's passenger] first who he was and about injuries. He didn't indicate that he had any serious injuries. I asked him then if he was involved in the accident. He said yes, he was in the car that was in the ditch, which would be the Kruckenberg car. And I asked him if he had been driving and he said no. I asked him if he remembered what happened. He stated, uh, that he just looked up and saw this car in front of him and there was a big crash.

Kruckenberg raised the issue of inadmissible hearsay. We need not rule on the issue of hearsay as the statements were not prejudicial to Kruckenberg. Defense counsel had an opportunity to thoroughly cross-examine Jones, who repeated during his testimony that Kruckenberg was the driver. It was up to the jury to accept or reject Jones's version of the accident. *See State v. Bush*, 518 N.W.2d 778, 780 (Iowa 1994). Additionally, it is not the case that but for counsel's conduct, the outcome of the trial would have been different. McClure's testimony of Jones's statement was cumulative evidence. *See State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996). Several other witnesses gave probative testimony that pointed to Kruckenberg as the driver at the time of the accident. Thus, it is unlikely that had counsel objected to the testimony, the outcome would have been different.

We are therefore unable to conclude trial counsel breached an essential duty and operated outside the normal range of competency because they failed to object to McClure's testimony. We determine Kruckenberg had not met his burden by establishing he was prejudiced by defense counsel's allowance of the testimony.

Kruckenberg has failed to prove the second (prejudice) prong under *Strickland* and its progeny. We accordingly uphold the trial court's decision and deny Kruckenberg's ineffective assistance of counsel claims.

AFFIRMED.