

IN THE COURT OF APPEALS OF IOWA

No. 7-349 / 96-1028

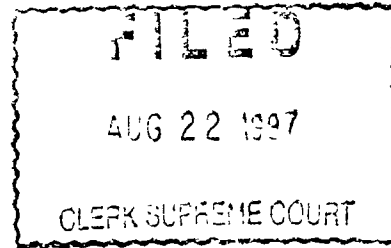
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JARED ALAN BLANK,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, David E. Schoenthaler,
Judge.

Jared Blank appeals from his conviction, following a jury trial, for homicide
by vehicle in violation of Iowa Code section 707.6A(1) (1995). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, William E. Davis, County Attorney, and Joseph A. Grubisich, Assistant
County Attorney, for appellee.

Decided en banc.

SACKETT, P.J.

Defendant-appellant Jared Blank appeals following his conviction of homicide by vehicle in violation of Iowa Code section 707.6A(1) (1995). Defendant contends his trial counsel was not effective because he failed to challenge inconsistent guilty verdicts finding him guilty of both vehicular homicide and manslaughter. We affirm.

Defendant saw Roe standing by his pick-up and drove his car into the pick-up. Roe was caught under the front of defendant's car. Defendant drove away. Roe was found some two thousand feet away lying in the road. Roe died a few hours later from injuries received in the incident.

Defendant was charged with homicide by vehicle, voluntary manslaughter, and leaving the scene of an accident. A jury returned guilty verdicts on all three charges.

Defendant contends his trial counsel should have objected that the jury's verdicts were inconsistent when it found him guilty of both vehicular homicide and manslaughter. Defendant asserts voluntary manslaughter is an intentional killing, whereas vehicular homicide is the unintentional death of someone caused by reckless behavior. Defendant advances the jury's verdicts are not consistent because, taken together, **they result in a finding defendant intentionally caused an unintentional death.**

The State contends **the jury may have believed defendant intended to strike Roe but did not intend to kill him and this would be consistent with the elements of**

both crimes. The State further advances defendant suffered no prejudice as a result of his counsel's failure to object to the verdicts because the district court, on its own motion, only entered judgment on the homicide by vehicle conviction and the conviction for leaving the scene of an accident.

Iowa Code section 707.4 defines voluntary manslaughter as murder with a mitigating circumstance, that is, a sudden and violent passion. Murder is killing someone with malice aforethought. Iowa Code § 707.1. To commit murder, one must intend to cause the death of another. Vehicular homicide is defined as the unintentional death of someone caused by presumptively reckless behavior. Iowa Code § 707.6A. The definition of these two offenses makes it apparent it is not possible to be guilty of both. One cannot intentionally cause an unintentional death.

Generally, when an inconsistent verdict is returned in a criminal case, the jury should be sent back for further deliberations or a new trial should be ordered. *See State v. Mumford*, 338 N.W.2d 366, 371 (Iowa 1983).

This case comes to us on a claim of ineffective assistance of counsel. To establish his claim, defendant must show both that his attorney failed in an essential duty and prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). To prove prejudice, defendant must show that but for his trial counsel's mistake the result would be different. *See State v. Hildebrandt*, 405 N.W.2d 839, 841 (Iowa 1987).

A review of the evidence leaves no doubt but that defendant drove his car into Roe, dragged him down the street, and failed to stop. The trial court, on its own motion, only found defendant guilty on one of the inconsistent verdicts. Defendant has failed to show prejudice.

AFFIRMED.

All judges concur, except Habhab, C.J. and Cady, J., who specially concur.

HABHAB, C.J. (concurring specially)

I totally agree with the result reached by the majority. However, I write separately lest there be no misunderstanding that the trial court acted properly when it submitted for the jury's consideration the two crimes of vehicular homicide and voluntary manslaughter in separate counts.

There is not much question had the defendant been charged with vehicular homicide and involuntary manslaughter, double jeopardy principles would not be violated in submitting to the jury each of these two crimes under separate counts. This is so because each offense requires proof of an additional fact which the other does not.

In *State v. Wissing*, 528 N.W.2d 561 (Iowa 1995), vehicular homicide and involuntary manslaughter was submitted to the jury. Although there is the common element in each of these counts of unintentionally causing the death of the victim, the separate counts require proof of an additional fact which the other does not. But, where the offenses (vehicular homicide and involuntary manslaughter) arise from one homicide, sentencing can only be on one of the homicides. Thus, judgment was entered on the conviction and sentencing proceeded on the finding of guilt of vehicular homicide. The judgment of guilt entered on the involuntary manslaughter was set aside.

Turning then to the case at bar, I do not believe the trial court violated double jeopardy principles when it submitted to the jury in separate counts homicide by

vehicle and voluntary manslaughter. Each count submitted required proof of an additional fact which the other did not. Thus, contrary to appellant's contention, the verdicts reached by the jury are not inconsistent in the sense that it warrants a new trial.

Rather, the trial court acted properly when it declined to enter judgment on the voluntary manslaughter charge. In addition, it acted properly when it entered judgment on the conviction of vehicular homicide and sentenced the defendant on that charge. The court also acted properly when it entered judgment on the conviction of leaving the scene of an accident and sentencing the defendant on that charge.

Cady, J., joins this special concurrence.