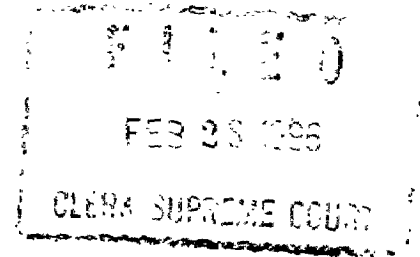


IN THE COURT OF APPEALS OF IOWA

No. 6-007 / 94-1996



STATE OF IOWA,

Appellee.

vs.

VIRGIL LASLEY,

Appellant.

Appeal from the Iowa District Court for Tama County, Thomas M. Horan,
Judge.

Defendant appeals judgment and sentence, following jury trial, entered upon his
conviction of vehicular homicide. **AFFIRMED.**

Michael M. Pedersen of Martin, Nutting, Miller, Pedersen, Kelsen & Pieters,
Waterloo, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney
General, Brent D. Heeren, County Attorney, and Richard Vander Mey, Assistant
County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

CADY, J.

Clifford Kinsel appeals his conviction and sentence for second-degree murder. We affirm.

The life of Herlie Johnson, Jr. ended August 18, 1993 after he was struck by a pick-up truck driven by Clifford Kinsel while walking on a sidewalk in Waterloo. A jury subsequently convicted Kinsel of second-degree murder. He was sentenced to a term of incarceration not to exceed fifty years.

The important facts of the case begin during the early morning hours of August 18, 1993. Kinsel was driving his truck near West Second and Commercial Streets in Waterloo, an area known to be a hangout for prostitutes. At approximately 12:30 a.m., Kinsel stopped his truck and picked up a prostitute, but dropped her off at the corner of West Second and Commercial Street a short time later, after telling her he would return after obtaining some money from his sister.

Kinsel was observed driving his truck in the same area a short time later, where he picked up another prostitute, Sonya Harmon. Kinsel informed Harmon he only had \$14.45 and requested a sex act. Harmon agreed to the request and Kinsel parked his truck in a nearby parking lot. Harmon testified she engaged in vaginal intercourse with Kinsel for a few minutes, but stopped before Kinsel completed the act. She dressed and left. To the contrary, Kinsel testified Harmon accepted the money and told him she needed to go to the bathroom prior to engaging in the sex act. Kinsel said Harmon then ran away with the money.

Two witnesses observed Harmon walk quickly along Commercial Street, while looking nervously over her shoulder. Witnesses then saw Kinsel pull his pickup into the entrance of a parking lot and block Harmon's path. They also heard Kinsel yell "bitch, I'm going to get you." Harmon walked around Kinsel's truck and continued along Commercial Street toward West Seventh Street. Kinsel speed across the parking lot, turned into an alley, and onto West Second Street. Kinsel then drove slowly along West Second Street. Harmon, who had also reached West Second Street, was standing on the adjacent sidewalk, hugging Herlie Johnson as Kinsel drove by.

Kinsel drove to the corner of West Second and Commercial Streets, made a fast, sharp U-turn, jumped the curb, and gunned his truck down the sidewalk in the direction of Harmon and Johnson. Harmon jumped from the path of the approaching pickup. Johnson, however, was unable to do the same. The truck struck Johnson, bouncing up as it ran over his leg. Kinsel made no attempt to swerve or brake his truck, but appeared to accelerate as he drove down the sidewalk. Eyewitnesses and investigators estimated the truck was traveling 25-35 mph down the sidewalk.

At trial, Kinsel admitted he drove his truck down the sidewalk, but testified he was unaware he struck anyone. He said he drove down the sidewalk only after failing to successfully complete the U-turn, and was simply looking for Harmon to get his money from her.

submit these photos, Lasley maintained he was entitled to an instruction that the jury could infer the missing photos would have been favorable to the defense. The court refused to give the requested instruction.

The jury found Lasley guilty of operating while intoxicated and of vehicular homicide. Lasley moved for a new trial contending prosecutorial misconduct, insufficiency of the evidence, and error in the jury instructions. The district court overruled the motion, and Lasley was sentenced to a term not to exceed ten years. Lasley now appeals on the grounds asserted in his motion for a new trial. We consider each of these claims separately.

I. Prosecutorial Misconduct.

Lasley first contends he was prejudiced by what he maintains are the prosecutor's overzealous attempts to introduce opinion testimony concerning his speed at the time of the accident. He cites several instances where he claims the prosecutor, over sustained objections, asked improper questions regarding both road conditions and the speed of Lasley's vehicle. The State claims Lasley did not preserve error on this issue and, even if he did preserve error, the prosecutor's questions were not improper.

We find Lasley failed to preserve error on this issue. To preserve error on a claim of prosecutorial misconduct based on improper questioning, the defendant must move for a mistrial when the allegedly prejudicial question is asked. *State v. Cornelius*, 293 N.W.2d 267, 269 (Iowa 1980). This is true even if the question or

questions were successfully objected to when asked. *Id.* Here, Lasley did not move for a mistrial when the alleged misconduct occurred but waited to hear the jury's verdict, raising the issue for the first time in his motion for a new trial. This motion, absent a prior motion for a mistrial, is not sufficient to preserve error. *See id.* We accordingly will not consider Lasley's prosecutorial misconduct argument on appeal.

II. Sufficiency of the Evidence.

Lasley next challenges the sufficiency of the evidence supporting his conviction. He contends the State failed to establish the causation element required to find him guilty of vehicular homicide. He claims the State did not show any of his acts were the proximate cause of Davenport's death and Wade Brown's actions were an intervening cause relieving him from liability. We disagree.

This court will reverse a conviction only if the verdict is not supported by substantial evidence or is clearly against the weight of the evidence. *State v. McGrew*, 515 N.W.2d 36, 37-38 (Iowa 1994). In determining whether substantial evidence supports a conviction, we examine all of the evidence in the light most favorable to the State, without regard to contradiction or inconsistencies, and assisted by all reasonable inferences. *State v. Propp*, 532 N.W.2d 784, 785 (Iowa 1995). Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.*

Lasley was charged with vehicular homicide under Iowa Code sections 707 6A(1)(a) and (1)(b) (1993). In proving causation as an element of vehicular homicide, the State must show that defendant's acts were the proximate cause of the death. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). A defendant's conduct is the proximate cause of another's death if (1) his or her 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 or her conduct resulted in the harm. *Id.* at 564-65.

At trial the State presented a variety of bases by which the jury could have concluded Lasley's actions proximately caused Davenport's death. The State's evidence established that Lasley was very intoxicated at the time he was driving Davenport's Bronco and that his intoxication would have affected his judgment and response time. The State also provided evidence that Lasley was driving too fast for road conditions and that he was driving to the side of Brown's car before it exited the roadway. Testimony further indicated Brown's vehicle collided with Lasley's immediately prior to entering the ditch and that Lasley failed to reduce his speed even after this initial collision forced Brown's vehicle off the road.

Any of these offers of proof could have allowed the jury to reasonably conclude Lasley's actions proximately caused the collision. The jury may have found that Lasley's impaired judgment and response time were substantial factors in the accident.

in that they led to his excessive speed, his decision to drive to the side of Brown's car, and failure to reduce his speed after the initial collision forced Brown into the ditch. The jury may have concluded that both drivers were taking unreasonable risks in driving side-by-side at speeds in excess of fifty miles per hour on a narrow, shoulderless gravel road. The jury also may have found that Brown's car entered the ditch because Lasley sideswiped him, in turn forcing him off the road. On our review of the record, we find substantial evidence supports the jury's conclusion Lasley proximately caused the collision resulting in Davenport's death. We affirm on this issue.

III. Jury Instructions.

Finally, Lasley contends the district court erred in failing to give a proposed jury instruction regarding photographs of the accident scene which the State had in its possession. Although the State did not offer these photographs into evidence, Lasley maintains the State should have submitted them in an effort to disclose the "true condition" of the roadway rather than relying on the testimony of the investigating officers. The proposed instruction stated

If the State is relying on . . . weaker or less satisfactory evidence, when in fact it has in its possession evidence which is of a stronger character, and that evidence is within the control of the State to produce, and where it's fair to presume that if favorable it would have been produced, the jury may then conclude that if the better evidence had been given, it would have been unfavorable.

The trial court's decision on jury instructions will not be disturbed unless the defendant shows the court abused its discretion. *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990). In order to show an abuse of discretion, one generally must show that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

There is no indication in the record, nor does Lasley claim, the State destroyed the photographs or made them unavailable. Had this been the case, a spoliation instruction such as the one Lasley proposed would have been appropriate. *See State v. Hulbert*, 481 N.W.2d 329, 334 (Iowa 1992). Here, the State provided defense counsel with photocopies of the contested photographs and allowed him full access to the prosecution's file before trial. Defense counsel could have obtained the original photographs at any time prior to trial and admitted them into evidence if he wished the jury to view them, but chose not to do so. We conclude Lasley was not entitled to a jury instruction permitting the inference that these photographs would have been exculpatory. The district court did not abuse its discretion in rejecting the proposed instruction.

In summary, we decline to consider Lasley's prosecutorial misconduct claim on the grounds that he failed to preserve error on the issue. We further find substantial evidence supports the jury's determination that Lasley's actions proximately caused the collision which killed Geraldine Davenport. Finally, we conclude that the district court

did not abuse its discretion in rejecting Lasley's proposed spoliation instruction. We affirm the district court in its entirety.

AFFIRMED.