

IN THE COURT OF APPEALS OF IOWA

No. 4-197 / 93-0901

**FILED**

NOV 28 1994

CLERK SUPREME COURT

**STATE OF IOWA,**

Plaintiff-Appellee,

vs.

**DAVID JEROME HART,**

Defendant-Appellant.

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Appeal from the Iowa District Court for Clinton County,  
David H. Sivright, Jr., Judge.

Defendant appeals from his conviction, following a jury trial, of second-degree murder in violation of Iowa Code sections 707.1 and 707.3 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and Lawrence H. Schultz, County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

**SACKETT, J.**

Defendant-appellant David Jerome Hart appeals his conviction after a jury trial of second-degree murder in violation of Iowa Code sections 707.1 and 707.3 (1991). Defendant contends there is not sufficient evidence to support his conviction and his trial counsel was not effective because he failed to request a jury instruction on intervening and superseding cause and failed to object to the admission of certain exhibits. We affirm.

Defendant was accused of murdering Michael James. Defendant had let James and a friend sleep on his apartment floor. The next morning, defendant discovered money missing from his apartment and, when James denied knowing about the money, defendant beat him on the head, back, legs, and arms with a baseball bat. After the confrontation, defendant gave James's companion fifty cents and told her to call the police from a pay phone.

When officers arrived, defendant admitted fighting with James. The officers found James about half a block from defendant's apartment, collapsed on the sidewalk. At about 11:00 a.m., James was taken to a hospital emergency room where his condition was evaluated and it was determined he had several lacerations and contusions, a fractured right ankle, and a foreign object was embedded in his right wrist. The object later was found to be a three and one-half inch by one-half inch piece of wood from the baseball bat. James was found to be sufficiently stable and surgery was not scheduled until 5:00 p.m.

About 3:30 p.m., James became confused and disoriented and was transferred by helicopter to University Hospitals in Iowa City, Iowa, where he died at 4:15 a.m. the next morning. An autopsy was performed, and it was determined James died from fat embolism syndrome which led to adult respiratory distress syndrome. Fat embolism syndrome occurs when there is a serious soft tissue injury or long bone fracture.

Defendant made a motion for a directed verdict and a motion for a judgment of acquittal. He contended the evidence was not sufficient and the State failed to prove its case. Defendant argued there was not substantial evidence to prove beyond a reasonable doubt his actions were the proximate cause of James's death. Defendant advances the respiratory complications arising from the fat embolism syndrome and the failure of doctors to identify and treat the problem broke the causal connection between defendant's actions and James's death. The trial court overruled both motions. Defendant contends we should reverse the trial court and dismiss the case.

Defendant's second contention is, even if the trial court correctly refused his motions for a directed verdict and acquittal, his attorney was not competent because he failed to request an instruction on intervening cause.

Both issues hinge on defendant's contention James died as a result of negligent medical treatment and not as a result of James's actions. The focal point of defendant's

defense was James died not because of the blows defendant delivered, but because the doctors did not correctly diagnose and treat James.

Ordinarily, negligent treatment or neglect of an injury will not excuse a wrong done unless the treatment or neglect was the sole cause of death. State v. Murray, 512 N.W.2d 547, 550 (Iowa 1994). Proximate cause is defined the same way in criminal and civil cases. See State v. Hubka, 480 N.W.2d 867, 869 (Iowa 1992). The general rule is a defendant's conduct is considered the proximate cause of an injury or death if there is no other rule of law relieving the actor from liability because of the manner in which his or her conduct resulted in the harm. See id. When conduct or a force occurs after defendant's conduct, defendant may be relieved of criminal responsibility if a court finds there were intervening events that broke the chain of causal connection between defendant's conduct and the victim's death. See id.

An act is a cause of an event if two conditions are satisfied: the event would not have occurred without the act; the act made the event more likely.

There was substantial evidence from which a fact finder could determine the medical decisions that preceded James's death were also part of the chain of events set in motion by defendant's act because they were the product of the physical condition in which James had been placed as a result of defendant's blows.

We agree the trial court correctly concluded the motions for directed verdict and of dismissal should not have been sustained. There is evidence from which a fact finder could find James's death resulted from the blows. The next question is whether defendant's counsel should have requested an instruction on intervening cause.

In considering proximate cause, intervening cause, also, can be an issue.

Restatement (Second) of Torts section 443 (1965), provides:

The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.

Id.

The interpretive comment to the above section describes what is meant by normal.

The word "normal" is not used in this Section in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events.

Id. at cmt. b.

The jury was never instructed on the relevance of intervening and superseding acts of James's treating physicians. Without the instruction, the jury could not understand or properly consider the causation element or defendant's position the State did not prove that element.

There is substantial evidence from which a fact finder could find James's death did not result from the blows. The blows were not originally diagnosed by James's doctors as life threatening. The blows also were not originally treated by the doctors as life threatening. There was substantial evidence, had the doctors earlier discovered and treated the "fat embolism syndrome" from which James suffered, death would not have occurred. See State v. Cunningham, 463 N.W.2d 887, 889-90 (Iowa App. 1990). Judged by this standard, we cannot conclude the medical misdiagnosis was as a matter of law the normal consequence of the situation created by defendant's criminal conduct. Rather, the misdiagnosis evidence presented a fact question as to whether death was the normal consequence of the blows or the misdiagnosis. The evidence supported the submission of an intervening cause instruction. We cannot, however, determine on this record defendant's attorney was not competent in failing to request the instruction. We reserve this issue for postconviction relief.

Defendant's last claim is his trial counsel was not effective because he failed to object to photographs of the crime scene introduced into evidence by the State.

At trial, the photographs were identified by a police officer as photographs of the crime scene taken during his investigation. The officer testified the photographs were a fair and accurate description of the scene. The exhibits were admitted into evidence after defense counsel stated he

had no objection to their admission. The officer then described to the jury what each photograph depicted. On the back of each photo was taped a label describing the exhibit. No reference was made to any of the labels during trial. Defendant contends his attorney should have objected to the photographs because the attached labels were hearsay and unduly emphasized the State's evidence.

Generally, the admission of incriminating evidence with an evidence tag still attached is prejudicial error. State v. Gallup, 500 N.W.2d 437, 441 (Iowa 1993) (citing State v. Shultz, 231 N.W.2d 585, 587 (Iowa 1975); State v. Branch, 222 N.W.2d 423, 427 (Iowa 1974)). Such a tag is hearsay. Gallup, 500 N.W.2d at 441. The tag has the effect of unduly emphasizing the State's evidence because it is "a neat condensation of the [State's] whole case against the defendant." Id. So, even though recitals on the tag are merely cumulative of the State's evidence, prejudicial error can still occur. Id. A hearsay objection, if made, should have been sustained.

The standard for reversible error is different in claims of ineffective assistance of counsel. State v. Carberry, 501 N.W.2d 473, 477 (Iowa 1993). Hearsay evidence which is admitted into evidence is not presumed to be prejudicial. Id. Instead we look to see whether, under all the circumstances, the performance of counsel fell below normal range. Id. Counsel need not take advantage of every opportunity to object to satisfy the standard of normal competency. Id. The description on the photos was

in accord with evidence admitted at trial. Defendant did not meet the requisite burden for reversal on this issue. We think any error created by the omission was harmless. See Gallup, 500 N.W.2d at 441 (Iowa 1993).

**AFFIRMED.**

All judges concur except Habhab, J., who concurs in part and dissents in part.

**HABHAB, J.** (concurring in part; dissenting in part)

I concur in part. I agree with the majority's affirmance of the conviction. I also agree with the majority's discussion on photographic exhibits. I dissent, however, regarding the majority's discussion on intervening and superseding cause.

**I. Sufficiency of the Evidence.**

Hart claims the district court erred in denying his motion for a directed verdict and a motion for a judgment of acquittal because the evidence was not sufficient to generate a jury question or to support the jury's verdict. I agree with the majority under this division that there is sufficient evidence.

In reviewing motions for a directed verdict and a judgment of acquittal based upon sufficiency of the evidence in criminal cases, we view the evidence in light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Similarly, a jury verdict of guilty is binding upon

this court unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of evidence. Id. Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

Hart contends the State failed to establish his actions were the proximate cause of James's death. Specifically, Hart alleges that the respiratory complications arising from the fat embolism syndrome, coupled with the failure of doctors to identify and treat the problem, broke any causal connection between the defendant's actions and the injuries James sustained from the beating. I would find this argument to be without merit.

It is well-established that the definition of "proximate cause" in criminal cases is identical to its definition in civil cases. The general rule is that a defendant's conduct is the proximate cause of injury or death to another if (1) 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 her conduct resulted in the harm.

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.

State v. Hubka, 480 N.W.2d 867, 869 (Iowa 1992) (citations omitted). However, it is also "well established that ordinarily negligent treatment or neglect of an injury will not excuse a wrong done unless the treatment or neglect was

the sole cause of death." State v. Murray, 512 N.W.2d 547, 550 (Iowa 1994) (quoting State v. Inger, 292 N.W.2d 119, 125 (Iowa 1980)).

In this case, there is substantial evidence the complications were a direct result of the injuries the victim sustained when the defendant struck him with the bat. The decedent's girlfriend, Teresa Yenney, testified to the following:

Q. Could you explain, specifically, how you were awoken? A. He hit us over the head with the baseball bat and was screaming at Michael that he wanted his money back. And Michael told him that he did not have his money. And he said, "Yes, you do." And he kept on saying, "I'm going to kill you." And he kept on just hitting him in the head. He hit him in the side, in his ribs, on his legs. And then I was screaming over by the dresser, because I was dizzy--was screaming, and he turned around and he told me to shut up. And then he kept on hitting Michael and he hit Michael in the head. And then Michael kind of dozed off for a couple of minutes.

Q. You mean he became unconscious? A. Yes. And while he was unconscious, Dave still kept on hitting him with the bat.

\* \* \*

Q. How many times would you say you saw Mr. Hart strike Mr. James? A. (Pause) A lot of times. About 20 times in the head, about four times to the ribs. I don't know how many times in the legs, and I don't know how many times in the arms neither.

Hart admits to striking James with the bat. The autopsy results revealed James died of adult respiratory distress syndrome. The respiratory problem was a complication arising from fat embolism syndrome. James's treating physician testified fat embolism syndrome occurs

when a serious soft tissue trauma or long bone fracture causes fat globules to be released in the blood stream. The fat particles then block capillaries, such as the ones in the lungs necessary for the exchange of oxygen, thereby causing respiratory problems.

Also, the medical decisions that preceded the victim's death were also part of the chain of events set in motion by the assailant's act because they were the product of the physical condition in which the victim had been placed as a result of his assailant's blows. See id. There is no evidence in the record the medical treatment James received was the sole proximate cause of death. The evidence strongly supports a finding that, but for the assault by Hart, James would be alive today.

Hart argues that because James died of a rare complication, he should be relieved from liability because the complication was not foreseeable.

Our supreme court recently discussed the principles to be applied in deciding legal causation issues in homicide situations similar to the one now before us. Id. In Murray, the court stated:

[A]n act is a cause of an event if two conditions are satisfied: The event would not have occurred without the act; the act made the event more likely. The first condition is necessary to distinguish the attempted from the completed crime, the second to rule out cases in which, while the event in question would not have occurred but for the act, the act did not create the kind of dangerous condition that would make such events more likely to occur.

Id. (quoting Brackett v. Peters, 11 F.3d 78, 79 (7th Cir. 1993)).

Here, Hart's striking the victim with a baseball bat is the kind of dangerous condition which makes the release of a fat embolism more likely to occur. In addition I note, other jurisdictions have also found the defendant criminally responsible for the death of the victim after the defendant struck the victim causing the release of fat emboli. White v. State, 373 So.2d 356, 357 (Ala. Crim. App. 1979); Neal v. State, 374 S.W.2d 668, 669 (Tex. Crim. App. 1964); see also Penton v. State, 548 So.2d 273, 274-75 (Fla. App. 1 Dist. 1989) (defendant can be held criminally liable for the death of a person caused by the release of fat emboli if the defendant actually performed some affirmative act that caused fat emboli to be released, here however, no affirmative act).

I agree with the majority that there is substantial evidence to support the jury's verdict that Hart was guilty of second-degree murder.

## **II. Ineffective Assistance of Counsel.**

Hart also claims his trial counsel was ineffective. The ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699

(1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32.

**A. Jury Instruction on Superseding Cause.**

Hart claims his trial counsel was ineffective in failing to request a superseding and intervening cause jury instruction.

An intervening act is a normal consequence of the original tortfeasors negligence if it is normal to the situation which the tortfeasor created. Prosser § 44 at 272, see Restatement (Second) of Torts § 443; Iowa Elec. Light & Power Co. v. General Elec. Co., 352 N.W.2d 231, 236 (Iowa 1984).

Generally, medical treatment sought by an injured person is considered a normal consequence of the tortfeasors conduct. Prosser at 287-88; see Cardamon v. Iowa Lutheran Hosp., 256 Iowa 506, 514, 128 N.W.2d 226, 231-32 (Iowa 1964). The general rule is framed as follows:

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner.

Restatement (Second) of Torts § 457. A defendant will be liable for the adverse results of medical treatment unless the treatment is extraordinary or the harm is outside the risks incident to the medical treatment. Restatement (Second) of Torts § 457 comment d, e.

The governing principle in deciding whether the medical complications the victim suffered and the medical decisions the doctors made could be a superseding cause is covered by Restatement (Second) of Torts section 443 (1965). That section provides:

The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.

Id. The interpretive comment to the above section describes what is meant by normal.

The word "normal" is not used in this Section in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary. It means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events.

Id. at cmt. b.

Judged by this standard I would conclude the respiratory complications the victim suffered and the medical decisions made by the doctors were, as a matter of law, normal consequences of the situation created by Hart's criminal conduct. See also Murray, 512 N.W.2d at 550-51.

There was no basis for instructing the jury with respect to superseding cause, therefore, Hart's trial counsel did not breach a duty in failing to request such an instruction. I would not preserve this issue for possible postconviction relief.

**B. Labels on Photographs.**

Hart next claims his trial counsel was ineffective in failing to object to the State's photographic exhibits of the crime scene which were labeled on the back. I agree with the ruling of the majority on this issue.

At trial, Sergeant Thomas Hansen identified State's exhibits 1 through 36 as photographs of the crime scene which he had taken during his investigation. He testified the photographs were a fair and accurate description of the scene. The exhibits were admitted into evidence after defense counsel specifically stated he had no objection. Sergeant Hansen then briefly described to the jury what each photograph depicted. On the back of each photo was taped a label describing the exhibit. No reference was made to any of the labels during trial.

Generally, the admission of incriminating evidence with an evidence tag still attached is prejudicial error. State v. Gallup, 500 N.W.2d 437, 441 (Iowa 1993) (citing State v. Schultz, 231 N.W.2d 585, 587 (Iowa 1975); State v. Branch, 222 N.W.2d 423, 427 (Iowa 1974)). Such a tag is clearly hearsay. Id. Also, the tag has the effect of unduly emphasizing the State's evidence because it is "a neat

condensation of the [State's] whole case against the defendant." Id. (citations omitted). "So even though recitals on the tag are merely cumulative of the State's evidence, prejudicial error can still occur." Id. However, when the defendant admits the very facts the evidence was intended to prove, the error created by the admission of the tag is harmless. Id. (evidence tag attached to envelop allegedly containing LSD defendant had sold to another was harmless error because defendant admitted he had sold the LSD).

I also note the standard for reversible error is different in claims of ineffective assistance of counsel. State v. Carberry, 501 N.W.2d 473, 477 (Iowa 1993). Hearsay evidence which is admitted into evidence is not presumed to be prejudicial. Id. Instead we look to see whether, under all the circumstances, the performance of counsel fell below normal range. Id. Counsel need not take advantage of every opportunity to object to satisfy the standard of normal competency. Id.

My review of the descriptions on the back of the photographs convinces me this evidence was not likely to be outcome determinative. The labels and the photographs were consistent with Hart's defense that he used reasonable force to defend property. In his testimony at trial, Hart admitted most of the information contained on the labels. He admitted that on October 24 he hit James with his baseball bat. He admitted the bat broke in two when he hit

the floor and the door with it. He also admitted he broke the large tree branch by hitting the door with it. In addition, Hart admitted his gloves were covered with James's blood because he had used them to wipe up the blood on the floor after James left. None of the descriptions of the photographs contained evidence which was in dispute.

I am unable to say that Hart's trial counsel was ineffective in failing to object to the labels on the back of the photographs.

I would affirm the defendant's conviction for second-degree murder and would not preserve any of the ineffective assistance of counsel questions for possible postconviction relief.