

IN THE COURT OF APPEALS OF IOWA

No. 3-501 / 92-1047

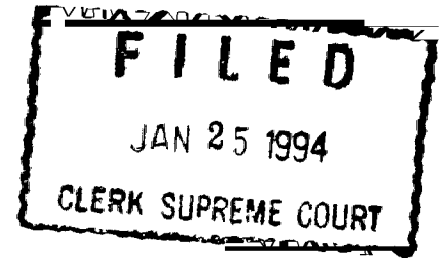
STATE OF IOWA,

Appellee,

vs.

JAMEY L. COOK,

Appellant.



Appeal from the Iowa District Court for Scott County,
Margaret S. Briles, and Edward B. De Silva, Jr., Judges.

Defendant appeals his conviction, after a jury trial,
for homicide by vehicle. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Amy M. Anderson,
Assistant Attorney General, William E. Davis, County
Attorney, and Joseph A. Grubisich, Assistant County
Attorney, for appellee.

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

OXBERGER, C.J.

On August 18, 1991, at approximately 1:15 a.m., defendant Jamey Cook was involved in a traffic accident which resulted in the death of Douglas Youngs. Cook and his friend, Bryan Gregory, had been drinking beer at Cook's home in Davenport, Iowa, during the evening of August 17. Shortly before the accident, they decided to go for a drive in Cook's Plymouth. Cook drove on 12th Street, a residential street which intersects with Division Street, a four-lane major thoroughfare. There is a stop sign on 12th Street at the intersection with Division Street. There are no stop signs or traffic lights on Division Street in this area.

There was conflicting evidence as to whether Cook stopped his vehicle before attempting to cross Division Street. Cook testified he did stop and looked both ways. Gregory testified that he could not remember if Cook stopped or not. William Morton, who was then traveling on Division Street and was the only other witness to the accident, testified Cook did not stop at the stop sign.

At about this same time, Youngs was driving north on Division Street on his motorcycle. He had been at a party on the evening of August 17 where he had consumed alcohol. Youngs' brother and some friends were in another vehicle behind him. They testified Youngs had passed their vehicle at a speed of about thirty-five to forty miles per hour.

The speed limit on Division Street was thirty-five miles per hour.

Cook's vehicle and Youngs' motorcycle collided in the intersection of 12th and Division Streets. Youngs was thrown 128 feet from his motorcycle and onto the vehicle driven by Morton. Youngs died at the scene.

Within seconds after the accident, Youngs' brother and friends arrived at the scene. They had been too far behind Youngs to observe the accident. They screamed in reaction to the death of Youngs. Upon hearing these screams, Cook and Gregory abandoned their vehicle and ran from the scene to Cook's house, which was only two blocks away.

After police officers arrived, they traced the vehicle to Cook and then visited him at his home. Initially, Cook denied any involvement in the accident. About two and one-half hours after the accident Cook had a blood alcohol level of .098. Robert Monserrate, of the Division of Criminal Investigation, gave his opinion that Cook's blood alcohol level was .148 at the time of the accident.

Evidence showed Youngs' blood alcohol level was .125 at the time of his death. A police officer who investigated the accident testified Youngs was driving about fifty-one miles per hour before the collision. Defendant's expert, Charles Roberts, testified Youngs had been traveling between forty-four to seventy-six miles per hour. There was no evidence to show either Cook or Youngs took any evasive action before the accident.

As a result of the incident, Cook was charged with five counts: (I) homicide by vehicle; (II) operating a motor vehicle while intoxicated; (III) failure to remain at the scene of an accident; (IV) failure to stop; and (V) failure to possess a valid driver's license. Count II was dismissed prior to trial on the ground it was a lesser included offense of Count I.

The case proceeded to a trial by jury on Counts I, III, and IV. A jury found defendant guilty of Count III, failure to remain at the scene of an accident. The jury was unable to reach a verdict on the other two counts and a mistrial was declared. Defendant subsequently pled guilty to Count V, failure to possess a valid driver's license, and was fined \$25.

A second trial was held on Counts I and IV. The jury found defendant guilty of Count I, homicide by vehicle, but acquitted him on Count IV, failure to stop. Defendant's sentence on Count III has been merged with his sentence on Count I. Defendant now appeals.

Defendant raises one contention on appeal. He claims the district court erred in refusing to instruct the jury on intervening and superseding cause. Defendant claims Youngs' own actions of driving while intoxicated and speeding were the actual cause of his death and that an instruction on the issue of intervening and superseding cause was needed to allow the jury to consider this defense.

The trial court has the duty to instruct the jury as to the law on all material issues supported by the evidence. State v. Watkins, 463 N.W.2d 15, 17 (Iowa 1990). 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 trial court's decision on instructions will not be disturbed absent an abuse of discretion. State v. Cunningham, 463 N.W.2d 887, 889 (Iowa App. 1990). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. The burden of proving abuse of discretion lies with the defendant. Id.

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. State v. Hubka, 480 N.W.2d 867, 869 (Iowa 1992). In order to

relieve the defendant of responsibility, the intervening event must also be a superseding cause of the harm. State v. Ayers, 478 N.W.2d 606, 608 (Iowa 1991).

A defendant may not escape criminal responsibility merely because factors other than the defendant's acts contributed to the death of the victim, provided such other factors are not the sole proximate cause of the death. Hubka, 480 N.W.2d at 869. Indeed, the alleged contributory negligence of a homicide victim may not be used as a defense in a homicide prosecution. Id. 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 the district court did not abuse its discretion in refusing to instruct the jury on intervening and superseding cause here. Defendant failed to present sufficient evidence to show Youngs' actions were an intervening and superseding cause. There was no evidence to show Youngs' actions broke the chain of causal connection between defendant's action of driving into the intersection where Youngs had the right-of-way and Youngs' death. Additionally, the evidence does not support a finding that Youngs' actions superseded defendant's action so that Youngs' actions became the sole proximate cause of his death.

At most, the evidence shows Youngs' actions of speeding and driving while intoxicated were a concurrent cause of

his death. This is not sufficient to provide defendant with a defense to the crime charged.

We affirm defendant's conviction for homicide by vehicle, in violation of Iowa Code section 707.6A(1)(1991).

AFFIRMED.