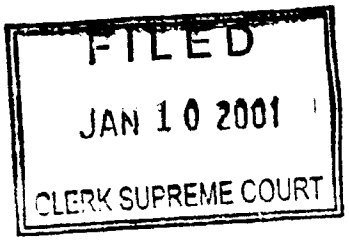
IN THE COURT OF APPEALS OF IOWA

No. 0-588 / 99-1245
Filed January 10, 2001



STATE OF IOWA,
Appellee,

vs.

JOSEPH ALLEN SUTTON,
Appellant.

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

Joseph Sutton appeals his conviction following a jury trial for vehicular homicide in violation of Iowa Code section 707.6A(2)(a) (1997). **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, William E. Davis, County Attorney, and Jerald Feuerbach and Robert Cusack, Assistant County Attorneys, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

VOGEL, J.

Joseph Allen Sutton appeals his conviction following a jury trial for vehicular homicide in violation of Iowa Code section 707.6A(2)(a) (1997). We find the record contains substantial evidence to support the verdict. However, Sutton correctly argues on appeal the trial court should have applied the weight-of-the-evidence standard in ruling on Sutton's motion for new trial and, accordingly, we reverse and remand on that issue.

Background facts. On October 10, 1998, Sutton and two other teenagers were alternating as the driver of a car. Joseph Butler was driving when the car struck three-year-old Steven Choate, causing fatal injuries. Sutton, the front seat passenger, was seventeen-years-old at the time the incident occurred.

Sutton was waived up from juvenile court to district court and was charged with Homicide by Vehicle, under Iowa Code section 707.6A(2)(a), as an aider and abettor. A jury convicted him on this charge and the trial court sentenced him to a ten-year indeterminate term of incarceration. He now appeals on five separate grounds.

Standard of review. The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). 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. *State v. Astello*, 602

N.W.2d 190, 197 (Iowa App. 1999). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions, which may fairly and reasonably be deduced from the record. *State v. Blair,* 347 N.W.2d 416, 418-19 (Iowa 1984). Circumstantial evidence is just as probative as direct evidence. *State v. Parrish,* 502 N.W.2d 1, 3 (Iowa 1993); *State v. Garr,* 461 N.W.2d 171, 173 (Iowa 1990). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Thornton,* 498 N.W.2d 670, 673 (Iowa 1993). The jury is in the best position to assess credibility. *State v. Knox,* 536 N.W.2d 735, 742 (Iowa 1995); *State v. Hulbert,* 481 N.W.2d 329, 332 (Iowa 1992). It is the jury's duty to sort out the credibility of witnesses and place credibility where it belongs. *State v. Schertz,* 328 N.W.2d 320, 322 (Iowa 1982). The jury may believe or disbelieve the testimony of witnesses as it chooses. *Blair,* 347 N.W.2d at 421. It is the jury's duty to assign the evidence presented whatever weight it deemed proper. *Thornton,* 498 N.W.2d at 673.

Sufficiency of the evidence. Sutton alleges the record does not contain substantial evidence to allow a jury to find him guilty of vehicular homicide. First, he asserts the State failed to prove the driver, Butler, was driving the car in a

reckless manner, so as to cause the death of Choate. Second, he claims the evidence was insufficient to convict him, as merely a passenger, of aiding and abetting vehicular homicide. The State contends the jury was free to determine what weight should have been given to the evidence presented and render the verdict it deemed appropriate.

On October 10, 1998, Sutton was driving a black Lincoln Continental without the owner's knowledge or consent. Rather than return the car to its owner, as his mother instructed him to do, he picked up two friends: thirteen-year-old Markey Glenn and fifteen year-old Joseph Butler. The boys set out to drive around with no particular destination. Sutton allowed both of the other boys to take turns driving the car, even though none of the boys had a driver's license. Butler was driving the car when Choate was struck.

Jim Willert provided testimony for the State, as he witnessed the accident. Willert testified that he was traveling north on Wilkes Avenue in a van pulling a stockcar on a trailer. He noticed children playing on the east side of the street and testified he was driving about fifteen miles-per-hour. Willert noticed an oncoming car and pulled between two parked cars on his side of the street, to allow the oncoming car to pass. He testified his van and trailer, at that point, were completely in his own lane.

Willert estimated the Lincoln was traveling approximately twenty-five to thirty-five miles-per-hour as the vehicles approached each other. As it passed Willert, the Lincoln tilted, appearing to travel up onto the curb. Willert's testimony was confirmed by Leon Peters from the Accident Investigation Unit, an expert for

the State who determined that, based on marks left by the tires, the Lincoln had been driven onto the curb and about two feet over on the grass. As the car was passing him, Willert heard the Lincoln's engine accelerate. He also stated he looked at the Lincoln in his rear view mirror because he thought it was being driven in an unsafe manner for the conditions at that time. As he watched in his mirror, he saw a child run out from behind his trailer. The Lincoln attempted to stop but was unable to do so before striking three-year-old Steven Choate. The child was retrieved by Butler from under the left front framework of the car and laid on the hood. Sutton and the backseat passenger, Glenn, fled the scene on foot. An ambulance was summoned. Steven died later that day, from massive internal injuries.

Sutton alleges there was insufficient evidence Butler drove the car in a reckless manner, which unintentionally caused the death of Choate. Recklessness is conduct that shows a willful or wanton disregard for the safety of others. *State v. Ayers*, 478 N.W.2d 606, 608 (Iowa 1991) (citing *State v. Kemes*, 262 N.W.2d 602, 605 (Iowa 1978)).

Sutton claims the Lincoln's estimated minimum speed of twenty-seven miles-per-hour through a twenty-five mile-per-hour zone does not constitute reckless conduct. Peters, the State's expert, indicated the speed of the Lincoln varied somewhat because of running up over the curb and returning to the street, attaining a speed of up to thirty-two miles per hour. The jury was free to consider all the evidence offered and find the Lincoln was traveling too fast for the

circumstances of passing a large oncoming vehicle with children playing near the street.

Sutton also argues the swerving motion by Butler while passing Willert's van and trailer was a good, defensive move to avoid the oncoming vehicle. The State, however, contends the swerve up onto the curb demonstrated Butler's poor control of the Lincoln and was an unwarranted and reckless maneuver. According to Willert, it was unnecessary for the Lincoln to go up on to the curb, as he had remained on his own half of the street and there was ample room for both vehicles to pass each other. The State further alleges the swerve was merely an example of the lack of skills and ability to control the car by the young driver. It claims the swerving motion could have also been attributed to the "loose" steering on the Lincoln, which made it difficult to keep the car under control. Doug Devine, an investigating officer, tested the vehicle and confirmed the steering difficulties. According to Glenn, after the vehicles passed each other, Sutton and Butler congratulated each other with some sort of a "high-five" gesture, which the State claims only distracted the driver at a critical moment. It was just after this congratulatory gesture that Choate ran out into the street. Butler applied the brakes but the Lincoln did not stop in time and Choate was struck.

Sutton argues the accident was unavoidable because the child just ran out in front of the car. The State however, presented testimony that the front brakes on the Lincoln were barely functional, with the rear brakes being non-operational. This was supported by Officer Thomas Merritt's testimony that there

was brake fluid in only one-half of the master brake cylinder. Further, Glenn testified when he was driving the car, he stepped on the brakes and almost slid through the intersection because the brakes "sort of gave out". Officer Devine testified that when he later started the car, a red brake light came on, which should have been a warning to the driver that there was a problem with the brakes. He also testified the brakes were "mushy" and had to be pressed all the way to the floor before they would engage. He stated the poor condition of the brakes was immediately apparent to him while he was attempting to stop the car.

Leon Peters, an expert witness for the State, testified if the brakes had been in working order, they would have properly engaged and stopped the car at about thirty-five feet from the point of application. From skid marks measured at the scene, it took fifty-six feet for the brakes to stop the Lincoln. Peters further opined the child was struck at fifty feet from where the brakes were applied. Sutton presented a theory that the point of impact was much closer to the beginning of the skid marks, based on the testimony of a couple of children who saw Steven trip on a rock in the street. Sutton alleges Choate was struck early in the braking process, dragged under the vehicle and, thus, the accident was unavoidable and not attributable to the manner of the driving or faulty brakes. The State's expert determined the point of impact based on where the child was found under the stopped car and the amount and type of abrasions suffered by the child. This testimony was consistent with Willert's testimony as to where he observed Choate run into the street and his recollection of the impact.

The jury was free to believe the testimony presented by the State and find the child was struck at the further point of impact and that if Butler had not been driving the vehicle with faulty brakes, the accident could have been avoided. The jury was free to find Butler had driven the car recklessly based on all of the evidence presented to it.

Sutton next contends even if the record supports Butler was driving in a reckless manner, it does not reflect sufficient evidence to find him guilty of aiding and abetting Butler's conduct. The record must contain substantial evidence to show that Sutton assented to or lent countenance and approval to the criminal act either by active participation in it or in some manner encouraging it prior to or at the time of its commission. *State v. Miles,* 346 N.W.2d 517, 520 (Iowa 1984). In the present case, the record shows Sutton procured the car, failed to return it as his mother instructed, picked up Glenn and Butler instead, allowed them to take turns driving despite the fact they did not have a driver's license, drove the vehicle himself so should have been aware of the brake and steering problems, told Butler to drive around this particular neighborhood in order to avoid police contact, and witnessed Butler and Glenn's lack of control while each was driving. Further, Sutton's congratulatory or high-five gesture served to both encourage and distract Butler at a critical moment just prior to hitting Choate. We find, therefore, the record does contain substantial evidence to support Sutton's conviction of homicide by vehicle, under the theory of aiding and abetting.

Motion for new trial. Sutton next alleges the trial court incorrectly denied his motion for a new trial based on the sufficiency of the evidence rather than

using the correct weight-of-the-evidence standard. We review a denial of a motion for new trial for abuse of discretion. *State v. Atley,* 564 N.W.2d 817, 821 (Iowa 1997).

In *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998), Iowa adopted the weight-of-the-evidence standard as the appropriate measure to apply in a motion for new trial. In denying Sutton's motion for a new trial, the district court stated, "There is *sufficient* evidence in the record to support the verdict." (emphasis added) We find the record reflects the trial court incorrectly used the sufficiency-of-the-evidence rather than the weight-of-the-evidence standard. Accordingly, we reverse and order a limited remand to allow the district court to rule on the motion, applying the correct weight-of-the-evidence standard.

Ineffective assistance of counsel. Sutton asserts his trial counsel was ineffective in failing to request jury instructions on proximate cause and legal causation. Counsel did request a general instruction on foreseeablilty which was denied by the trial court. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder,* 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger,* 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain,* 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil,* 264 N.W.2d

293, 296 (Iowa 1978). To prevail on a claim of ineffective assistance of counsel, the defendant must ultimately show that the attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McKettrick,* 480 N.W.2d 52, 55 (Iowa 1992).

Sutton alleges a jury instruction on proximate cause was necessary to require the jury to find that even if Butler drove the vehicle in a reckless manner, the recklessness must have been a proximate cause of Choate's death. Generally, a defendant's conduct is the proximate cause of injury or death to another if (1) his 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 conduct resulted in the harm. *State v. Travis,* 497 N.W.2d 905, 908 (Iowa App. 1993) (citations omitted). The State asserts the jury was required to make such a finding in jury instruction number nineteen, which stated as follows:

> The State must prove both of the following elements of Homicide by Vehicle:
>
> 1. On or about the 10th day of October, 1998, the defendant drove a motor vehicle in a reckless manner as to indicate a willful or wanton disregard for the safety of persons or property.
>
> 2. The *defendant's acts unintentionally caused the death of Steven Choate.* (emphasis added)

Sutton also claims a jury instruction as to legal causation should have been requested, instructing the jury that a pedestrian shall not cross a roadway

outside a crosswalk without yielding to oncoming traffic. However, Sutton cannot escape criminal liability for vehicular homicide when Choate's stepping into the street was not the sole proximate cause of his death. *See State v. Hubka,* 480 N.W.2d 867, 869 (Iowa 1992). The jury clearly found Butler's reckless driving was the cause of the death. Therefore, we find Sutton's attorney did not have a duty to request an instruction on proximate cause from the trial court.

Peremptory strike. When an appellant asserts a violation of constitutional safeguards, such as are raised here, we make our own evaluation based on the totality of the circumstances. *Hinkle v. State,* 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of a de novo review. *Id.* Sutton next contends the trial court erred in allowing the State to strike the only juror of the same ethnicity as Sutton from the jury. He claims the State failed to provide a clear, race-neutral explanation for the strike, thereby violating Sutton's constitutional right to due process through equal protection. We find the record does contain a specific, race-neutral explanation of why this juror was struck. *State v. Griffin,* 564 N.W.2d 370, 375 (Iowa 1997). Specifically, the juror articulated that he had been physically mistreated by law enforcement in the past and expressed a lack of trust in the fairness of the judicial system. He was very reluctant to serve on a jury and felt hesitant in this decision-making capacity. Because the record so reflects a non-discriminatory reason for his dismissal, we find the trial court did not err in allowing the peremptory strike to stand.

Victim restitution statute. Finally, Sutton asserts the victim restitution statute requiring him to pay $150,000 in restitution to the estate of the victim

violates his federal and state constitutional rights against excessive fines and to due process. *See* U.S. Const. amend. VIII; U.S. Const. amend. XIV, § 17; Iowa Const. art. I, § 17; Iowa Const. art. I, § 9. Sutton alleges because the restitution is mandatory in any case involving a felony where a death occurs, it fails to afford him a right to be heard as to the appropriateness of the penalty to his particular conviction. In addition, he argues the fine is excessive because it is not proportionate to the gravity of the offense. Earlier this year, our supreme court carefully analyzed this very issue. The court determined this statute does not violate a defendant's constitutional right to due process because in order for the fine to be imposed, the defendant must already have been found guilty beyond a reasonable doubt, or established such by entry of a guilty plea, for the underlying felony. *State v. Izzolena,* 609 N.W.2d 541, 553 (Iowa 2000). Additionally, the defendant has an opportunity for a hearing once the court issues the restitution order, or at any time during the pendency of the order. *Id.; see* Iowa Code § 910.7 (1997).

In determining the statute does not violate the Excessive Fines Clause of the Federal and State Constitutions, the supreme court found the restitution award applies only to those deaths caused by a felonious act. *Izzolena,* 609 N.W.2d at 550.

> Thus, the restitution award under the statute could not be imposed in a case involving an unintentional or negligent offender. Instead, it is limited to an offender who has demonstrated a willful and wanton disregard for the rights of others in the commission of the crime.

Id. (citations omitted). The legislature has broad discretion in determining the appropriate penalties for crimes. *Id.* The taking of another life is the most serious of all criminal offenses and the amount of the fine is not disproportionate to the circumstances of the crime. *Id.* We find, therefore, the restitution statute, as applied in this case, does not violate Sutton's constitutional rights.

Accordingly, we affirm in part, reverse in part and remand.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Streit, P.J., concurs; Hecht, J., dissents.

HECHT, J. (dissenting)

I respectfully dissent. I would preserve Sutton's claim of ineffective assistance of counsel for possible postconviction proceedings. The causation question was a crucial issue in the trial of this case. Both parties presented expert testimony as to the point of impact. Sutton sought to establish Choate entered the path of the car at a time and place that made it impossible for a driver exercising reasonable care to avoid the tragedy.

The definition of "proximate cause" in criminal cases is identical to its definition in civil cases. *State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992). Generally, a defendant's conduct is a proximate cause of injury or death to another if (1) his 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 conduct resulted in the harm. *State v. Travis*, 497 N.W.2d 905, 908 (Iowa App. 1993). "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause. *See* Iowa Uniform Jury Instruction 700.3. The district court's instructions failed to communicate these fundamental principles to the jury and Sutton's trial counsel failed to preserve error on the issue.

The majority's opinion effectively holds trial counsel had no duty to object to the causation instruction because Sutton's conduct was, as a matter of law, a proximate cause of Choate's death. I disagree. Parties are entitled to have their legal theories submitted to a jury if they are supported by substantial evidence in the record. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). Evidence is

substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). The issue of causation was hotly contested in this case, and a proper jury instruction on the issue was crucial to Sutton's defense. The issue of prejudice remains, however, for we will reverse only if an instructional error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App. 1998).

The majority opinion correctly observes Sutton cannot avoid criminal liability in this case unless "Choate's stepping into the street was . . . the sole proximate cause of the death." *Hubka*, 480 N.W.2d at 869. Although the jury did apparently find Sutton's conduct was a cause of Choate's death, they did so after receiving a clearly inadequate causation instruction. On this record, I cannot resolve the causation issue as a matter of law. I am similarly unable to resolve the prejudice issue against Sutton as a matter of law. Accordingly, I would preserve the issue of ineffective assistance of counsel for possible postconviction proceedings.