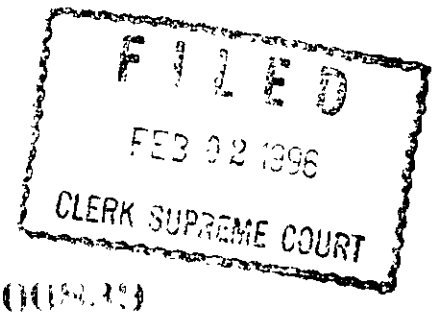
**IN THE COURT OF APPEALS OF IOWA**




No. 5-674 / 95-0114

**STATE OF IOWA,**

Appellee,

**vs.**

**BRENT D. CARLSON,**

Appellant.

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Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Defendant appeals his conviction, following a jury trial, for vehicular homicide in violation of Iowa Code sections 707.6A and 902.9(3) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John F. Fatino, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Mary Tabor, Assistant Attorney General; John P. Sarcone, County Attorney; and Odell McGhee, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., Habhab, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

**McCARTNEY, S.J.**

The defendant, Brent Carlson, appeals from his conviction of homicide by vehicle. He argues: 1) there was insufficient evidence to support the conviction; 2) the trial court abused its discretion in sentencing him; and 3) his trial counsel was ineffective. We affirm with respect to the first two issues and preserve the third for postconviction relief.

The defendant argues there was insufficient evidence to support his conviction of homicide by vehicle. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

The definition of "proximate cause" in a criminal case is the same as in a civil case. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In the criminal context proximate cause serves as a requirement that there be a sufficient causal relationship between the conduct of a defendant and a proscribed harm to hold him criminally

responsible. *Id.* The conduct of a defendant is the proximate cause of the death of 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. *Id.*

The defendant argues the conduct of the victim was the sole proximate cause of his death, and his conduct was not a substantial factor in bringing it about. The victim was intoxicated and had a blood alcohol level of approximately 2.5 He was purportedly depressed and was standing in the traveled portion of a road at approximately two o'clock in the morning. The defendant hit the victim with his truck. The defendant had also been drinking throughout the night, and police officers at the scene observed he had red, watery eyes, smelled of alcohol, and had slow and slurred speech. The defendant failed one of the field sobriety tests administered by the officers, and he had a blood alcohol level of 1.8.

While there was disputed evidence as to the street lighting and the speed of the vehicle of the defendant, there was substantial evidence from which the jury could have found the street where the accident occurred was well-lit and the defendant was traveling forty to fifty miles per hour in a thirty-five mile per hour zone. The defendant observed another car swerve to avoid hitting the victim before his vehicle hit him, and the driver of an oncoming vehicle testified she saw the victim and was able to slow down.

The defendant was intoxicated and his driving ability was impaired. His blood alcohol level exceeded the legal limit. Other drivers were able to observe the victim and slow down or take evasive action. This was not a case in which even a sober driver would not have been able to avoid the collision. *See State v. Wieskamp*, 490 N.W.2d 566 (Iowa App. 1992). There was sufficient evidence from which the jury could find the conduct of the defendant was a substantial factor in bringing about the harm to the victim.

The second issue raised by the defendant is whether the sentencing court abused its discretion in sentencing him to be incarcerated. The defendant contends a deferred or suspended sentence would have been more appropriate. Our scope of review is for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995).

Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

In exercising its discretion the trial court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character and propensities or chances for reform. *Id.*

It is clear from a review of the transcript of the sentencing hearing that the sentencing court considered a number of mitigating factors such as the defendant's lack of a prior criminal record, his education, his steady employment and his ability to contribute to the community. However, the court was aggrieved by the nature of the defendant's offense. The defendant had voluntarily consumed a substantial amount of alcohol resulting in an alcohol level of 1.8. As the court noted, this was not a small amount of alcohol and the defendant voluntarily chose to drive after consuming alcohol for over a six- hour period.

While a case may be made for the imposition of a lighter sentence, there was a sufficient basis to support the decision to incarcerate the defendant. Given the nature of the offense and the impact on the family of the victim, we find no abuse of discretion in the sentencing of the defendant.

The final issue raised by the defendant is whether his trial counsel was ineffective in failing to properly impeach a witness of the State by means of a learned treatise. Trial counsel did question two of the State's witnesses about the effect of acetone on blood alcohol levels and intoxilyzer tests, but he did not introduce evidence of a learned treatise which contained views contrary to those espoused by the witnesses. The defendant asks this issue be preserved for postconviction proceedings so an adequate record may be made regarding the conduct of his trial counsel.

A defendant bears the burden of proving by a preponderance of the evidence that he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). Generally, claims of ineffective assistance are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied*, 459 U.S. 841 (1982); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Where the record on direct appeal is not adequate to permit us to resolve an issue, we preserve the claim of the defendant for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives trial counsel an opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

At trial defense counsel broached the issue of the effect of acetone and may have had strategic reasons for not further pursing the issue via introduction of a learned treatise. We decline to address the claim of ineffective assistance on direct appeal and preserve this issue for postconviction proceedings.

**AFFIRMED.**