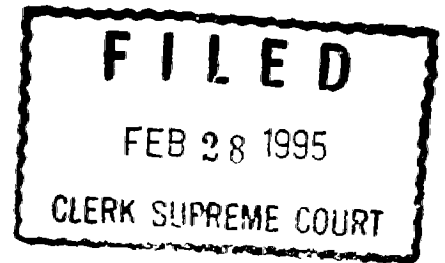


IN THE COURT OF APPEALS OF IOWA

No. 4-565 / 93-1696



STATE OF IOWA,

Appellee,

vs.

KEVIN JOSEPH MICHAEL,

Appellant.

Appeal from the Iowa District Court for Polk County,
Joel D. Novak, Judge.

Kevin Joseph Michael appeals the judgment and sentence entered upon his conviction, following a bench trial, of involuntary manslaughter, in violation of Iowa Code section 707.5(1) (1991). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Melodee Hanes, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., Cady, J., and Schlegel, S.J.*

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

PER CURIAM

The defendant, Kevin Michael, appeals from the judgment and sentence entered upon his conviction for involuntary manslaughter in violation of Iowa Code section 707.5(1) (1991). He argues there was insufficient evidence to support the conviction, and he specifically contends the evidence failed to establish he acted recklessly or was the proximate cause of the victim's death. We have reviewed the parties' arguments, the record and the applicable law, and we affirm the conviction.

The trial court found the defendant was the sole aggressor of an altercation which occurred on November 21, 1992. The defendant initiated a fight inside the bar area of the Eagles Lodge and forced the victim, Fred Whitlow, outside where he continued to strike him. Substantial evidence indicated Whitlow did not wish to fight, but the defendant continued to engage in persistently assaultive behavior. As a result of the defendant's blows, the victim's head hit either a car or the pavement, resulting in his subsequent death.

I. STANDARD OF REVIEW

The district court's finding of guilt is binding upon us unless we find there was not substantial evidence in the record to support such a finding. State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993). In determining whether there was substantial evidence, we view the evidence in the light

most favorable to the State. Id. Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. Id. In determining if there is substantial evidence we must consider all of the evidence in the record, not just the evidence supporting a finding of guilt. Id.

II. RECKLESSNESS

Iowa Code section 707.5(1) (1991) provides:

A person commits a class "D" felony when the person unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape.

The underlying public offense must be committed recklessly in order to form the basis of involuntary manslaughter. State v. Travis, 497 N.W.2d 905, 907 (Iowa App. 1993). The underlying public offense with which the defendant was charged was assault.

In order to establish recklessness, the defendant's conduct must show a willful or wanton disregard for the safety of others. Id. "Ordinarily, such conduct should be conscious and intentional, creating an unreasonable risk of harm to others, where such risk is or should be known to defendants." State v. Kernes, 262 N.W.2d 602, 605 (Iowa 1978). The Iowa Supreme Court recently summarized the recklessness standard for involuntary manslaughter.

Simply put, for recklessness to exist the act must be fraught with a high degree of danger. In addition the danger must be so obvious from the facts that the actor knows or should reasonably

foresee that harm will probably--that is, more likely than not--flow from the act.

State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993).

Autopsy findings revealed Whitlow's death was caused by a trauma to the back side of his head. The defendant asserts the blows he inflicted on the victim's face were not life threatening and did not cause his death. The defendant argues it was clearly not foreseeable his actions in striking Whitlow in the face would result in Whitlow subsequently falling and sustaining a severe injury to the back of his head.

The defendant cites Torres and argues his is a similar case in which his conduct does not rise to the level of being reckless. In Torres the supreme court held the defendant's "critical act" of sweeping a lamp off of a table was not by itself highly dangerous or unlawful. Torres, 495 N.W.2d at 682. In Torres the court concluded it was unreasonable to have expected the defendant to have known or foreseen the chain of events which followed from the breaking of the lamp and ultimately led to the victim's death. Id.

We believe Torres is distinguishable. The blows inflicted by the defendant were the "critical act" from which flowed the harm causing the victim's death. Those blows were in and of themselves highly dangerous and unlawful. It is clearly foreseeable a direct consequence of a blow to a person's face is a victim falling and

striking his head on surrounding objects or the ground. The danger resulting from the defendant's actions was obvious and he should have known of the harm likely to flow from his actions. In addressing this matter the trial court concluded:

In this case the critical conduct of the defendant was his assaultive behavior both inside and outside the bar. More specifically, the final critical act was his striking Fred Whitlow in an extremely hard manner with his fist. Such conduct is a perfect example of a highly dangerous act constituting recklessness as defined above.

We agree with the trial court's conclusions. The blows inflicted by the defendant upon the victim were conscious and intentional. The defendant's persistently assaultive behavior constituted a willful and wanton disregard for the safety of Whitlow. Substantial evidence supported the trial court's factual findings and its ultimate conclusion that the defendant's conduct was reckless.

III. PROXIMATE CAUSE

The defendant argues the failure to obtain prompt medical assistance for Whitlow, coupled with Whitlow's blood alcohol level, alcoholism and receipt of subtherapeutic medication, constituted intervening and superseding causes which actively operated as independent forces resulting in Whitlow's death. He contends these intervening factors broke any causal connection between his actions and Whitlow's death.

The definition of "proximate cause" in criminal cases is much the same as its definition in civil cases. State v. Travis, 497 N.W.2d 905, 908 (Iowa App. 1993). 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. Id. Proximate cause is based on the concept of foreseeability. Id.

When conduct or forces occur after a defendant's conduct, the defendant may be relieved of criminal responsibility if the intervening events break the chain of causal connections between the defendant's conduct and the victim's death. Id. In order to relieve the actor of responsibility, the intervening event must be the superseding cause of harm. Id. "However, responsibility for criminal acts cannot be escaped merely because other factors contributed to the injury or death, provided those factors were not the sole proximate cause of death." Id.

We reject the defendant's argument that his blows did not proximately cause Whitlow's death. His conduct was a substantial factor in bringing about the harm to Whitlow. In fact, but for the defendant's conduct Whitlow's death would not have occurred. Furthermore, the evidence does not support the defendant's contention that other factors were intervening and superseding causes of Whitlow's

death. There was substantial evidence to find the defendant's actions proximately caused Whitlow's death, and we affirm the defendant's conviction.

AFFIRMED.