FILED
MAY 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-557 / 89-1640

**STATE OF IOWA,**

Appellee,

vs.

**JEFFREY DEAN BRYANT,**

Appellant.

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Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Defendant appeals his conviction, following a bench trial, for homicide by vehicle. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; James Smith, Polk County Attorney; D. William Thomas, Assistant County Attorney for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

**HABHAB, J.**

Jeffrey Bryant, who was allegedly driving while intoxicated, collided with another vehicle. The collision killed an occupant of the other vehicle.

Bryant was charged with homicide by vehicle, a violation of Iowa Code section 707.6A. Following a bench trial, Bryant was convicted of that charge. He has appealed. We affirm.

I.

The significant facts are not in dispute. On the evening of January 28, 1989, the defendant and two friends, Scott Giannetto and Dennis Carol, went to a bar in a truck owned and driven by Scott. Prior to arriving at the bar, Scott and defendant had been drinking. The three individuals stopped to pick up a twelve-pack of beer on the way to the bar.

When they arrived at the bar, the bartender would not permit defendant inside because he did not have identification to prove that he was twenty-one years old. It was raining and cold outside. Therefore, Scott Giannetto handed the truck keys to the defendant and told defendant to wait in the truck for Scott and Dennis to finish drinking their beers and that they would be out in five minutes. Scott and Dennis, however, did not return to the truck.

After some period of time, defendant began driving in circles around the gravel parking lot, "cutting nuts." A

patron of the bar complained to the bartender, and the bartender directed defendant to leave the parking lot or he would "call the law."

Minutes later, a collision occurred between the truck driven by defendant and a car driven by Deana Den Adel in a intersection near the bar. Deana Den Adel was fatally injured as a result of the collision, and the passenger in her car, Regina Butcher, was seriously injured. A breath test conducted on defendant after the accident indicated that he had a breath/alcohol concentration of .217.

II.

Bryant first contends the district court should have ordered a pretrial hearing on his mental competency to stand trial. He points out that during a pretrial hearing on his waiver of a jury trial, the court learned that he was under treatment (including medication) for depression. Bryant argues that at that point the court had a duty under Iowa Code section 812.3 to suspend the proceedings and order a competency hearing.

Our supreme court has determined that the relevant factors to be considered in a section 812.3 hearing include (1) presence of irrational behavior, (2) other demeanor during trial which suggests a competency problem, and (3) medical evidence of which the trial court is aware concerning defendant's mental competency. State v. Lucas, 323 N.W.2d 228, 232-33 (Iowa 1982); see also State v. Myer, 460 N.W.2d 458, 460 (Iowa 1990).

The evidence establishes the defendant elected to waive his jury trial. When he chose to do this, the judge questioned him and the defendant then stated he had been treated for depression and had taken some medication intended to treat this depression. He acknowledged he had ample opportunity to discuss his case with his attorney and understood the rights he would forego by waiving a jury trial.

At this point, the prosecutor lodged a complaint regarding defendant's waiver. The defendant's attorney then offered to bring the defendant's doctors from Mason City to establish a knowing and voluntary waiver. The district court elected to recess the case, and when proceedings resumed, the prosecutor and defendant's counsel stipulated the defendant had seen a psychologist and this psychologist said there was no impairment to Bryant's mental condition. He further stated there was no reason to believe Bryant would not be able to understand the nature of the legal proceedings. The district court again questioned the defendant and accepted his waiver of jury trial. Trial then immediately began and at no time was the issue of defendant's competency again raised.

Iowa law provides that with or without a motion by the prosecutor or defense counsel, a trial judge must conduct a hearing on an accused's incompetency if a "substantial question" on that issue exists at any stage of the proceedings. State v. Kempf, 282 N.W.2d 704, 706 (Iowa

1979). The record clearly establishes that the defendant appreciated the charges against him and that he understood the legal proceedings. Further, the evidence indicates the defendant effectively assisted in his defense. The trial judge witnessed the defendant's demeanor in the court room and there is no evidence that a substantial question existed with regard to the defendant's competency. We affirm on this issue.

III.

Bryant next contends the district court erred by allowing the State to amend the trial information at the close of the State's evidence. Iowa Rule of Criminal Procedure 4(8)(a) provides:

> The court may, on motion of the state, either before or during the trial, order the trial information amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment or if a wholly new and different offense is charged.

The original trial information charged Bryant with homicide by vehicle by driving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of others; this crime is a violation of Iowa Code section 707.6A(1)(b).

When the State moved to amend the trial information, it added as an alternative the charge of homicide by vehicle while under the influence of alcohol, a violation of subsection 707.6A(1)(a). Bryant contends the amendment prejudiced him by adding the element of intoxication; he

states he had not previously known he needed to defend against a theory of intoxication.

We disagree with the defendant's argument that he has been prejudiced by the amendment. As the record reflects, this cause was tried to the court without a jury. The trial court, in accordance with Iowa Rule of Criminal Procedure 16(2), found the facts specifically and separately stated its conclusions of law and then rendered its verdict.

In its ruling, the trial court set forth the elements of the offense which the State had to prove beyond a reasonable doubt before judgment of guilt could be entered. In this respect, section 707.6A provides:

> 1. A person commits a class "D" felony when the person unintentionally causes the death of another by either of the following means:
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> a. Operating a motor vehicle while under the influence of alcohol or a drug or a combination of such substances or while having an alcohol concentration of .10 or more, in violation of section 321J.2.
>
> b. Driving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property, in violation of section 321.277.

Iowa Code § 707.6A(1)(a) (1989).

The trial court found that the State had met its burden of proof as to both subsections 1(a) and 1(b) of section 707.6A. It, in effect, found that the defendant unintentionally caused the death of Deana Marie Den Adel by driving a motor vehicle in a reckless manner with willful

or wanton disregard for the safety of person in violation of section 321.277.

The defendant does not challenge on appeal that finding; nor does he assert that there is not substantial evidence to support that ruling. He merely contends that the amendment relative to subsection 1(a) above should not have been allowed for it substantially prejudiced his rights.

We recognize that the court also found the State had proven subsection (a) above. But in view of the finding as to the charge contained originally in the information, the defendant was not prejudiced in any respect by the amendment. Therefore we affirm the trial court.

Although we affirm, we are not particularly impressed with the reason advanced by the county attorney for the delay in filing his amendment. He stated on the record:

> I [county attorney] can briefly state why that's done, Your Honor. Prior to the admission of certain evidence at trial concerning alcohol concentration, the State never knows whether, in fact, that piece of evidence will, in fact, be admitted in court, and so I always charge under the 1(b) section, but where that piece of information has been admitted in this case, I then also add section 1(a).

We can envision any number of circumstances when an amendment of the type submitted here can cause prejudice to substantial rights of defendants. We need but refer counsel to State v. Williams, 328 N.W.2d 504 (Iowa 1983), and State v. Cooper, 223 N.W.2d 177 (Iowa 1974), as examples of cases reversed on grounds that belated

amendments prejudiced substantial rights of defendants. We of course direct our closing remarks to the reasoning employed by the county attorney for the delay in amending the trial information. We affirm the trial court in all respects.

**AFFIRMED.**