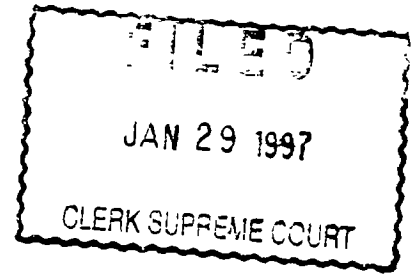


IN THE COURT OF APPEALS OF IOWA

No. 6-762 / 95-1807



000419

STATE OF IOWA,
Appellee,

vs.

ADAM BLAINE HORAK,
Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Defendant appeals his convictions for involuntary manslaughter in violation of Iowa Code section 707.5(1) (1995), and carrying weapons in violation of section 724.4(1). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Christopher A. Cooklin and Sharon R. Stevens, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ.

VOGEL, J.

Defendant, Adam Horak, had taken a loaded gun to a party on January 13, 1995. He maintains he thought a friend had unloaded the gun, after he arrived at the party, when he picked it back up and began twirling it on his finger "cowboy style." The gun discharged, killing another guest. Horak was charged with involuntary manslaughter and carrying weapons.

The jury found defendant guilty as charged. The court imposed consecutive, indeterminate prison terms of five years on the involuntary manslaughter conviction and two years for the carrying weapons conviction.

Defendant appeals.

Scope of review. The district court has the discretion whether to give additional instructions after the jury has retired for deliberations. Iowa R. Crim. P. 18(5)(g); *State v. Dvorsky*, 322 N.W.2d 62, 66 (Iowa 1982). A discretionary ruling is presumptively correct and will not be reversed unless an abuse of discretion has been demonstrated. *State v. Watkins*, 463 N.W.2d 15, 18 (Iowa 1990).

I. Supplemental jury instructions. Iowa Code section 707.5 defines involuntary manslaughter:

" . . . when the person unintentionally causes the death of another person . . . by the commission of a public offense other than a forcible felony"

Jury instruction #14 delineating the elements of involuntary manslaughter stated in part:

1) . . . the defendant **recklessly** committed the crime of **Carrying Weapons**.

2) When the defendant committed that crime, the defendant unintentionally caused the death of Chad Rice.

The jury was also given this instruction on reckless:

A person is reckless or acts recklessly when they willfully disregard the safety of person or property. It is more than a lack of reasonable care which may cause unintentional injury. Recklessness is conduct which is consciously done with willful disregard of the consequences, and a person knows or should know a risk of harm to another or to property is created. Though recklessness is willful, it is not intentional in the sense that harm is intended to result.

During its deliberations, the jury requested additional definitions of the terms “negligence,” and “willful.” Defense counsel requested the jury be given a uniform civil jury instruction which defined negligence and a uniform criminal jury instruction which defined the term willful. The court denied the requests and gave a note to the jury which stated,

“State vs. Horak, FE87652, you have been provided all the necessary instructions to decide this case. Please continue your deliberations.”

Defendant Horak argues the court incorrectly refused to give the requested supplemental instructions. He argues the recklessness instruction which was given to the jury incorporated the concepts of negligence and willfulness but failed to define them. Defendant contends the fighting issue in this case was whether his conduct was reckless and the jury’s requests indicate it did not understand the law on this crucial issue. He asserts the requested instructions would have conferred to the jury the high

degree of risk or danger necessary to establish reckless conduct. Defendant maintains that under these circumstance the trial court was obligated to give supplemental instructions.

A. Negligence. The charges did not include the term “negligence” nor was it part of the jury instructions. It was an unnecessary term apparently prompted by jury discussions. We find the court did not abuse its discretion in failing to give an additional instruction on negligence and that such an unwarranted instruction would amount to a comment on the evidence by the trial court.

B. Willful. Defense counsel did request the court give the criminal jury instruction No. 700.05 defining “willful.” On appeal defendant argues the civil instruction No. 210.4 defining “willful and wanton” should have been given. As the request to the trial court and the alleged error on appeal are substantially different, we find this issue has been waived. Iowa R. App. P. 14. Nonetheless, the trial court’s refusal to expand on the original set of instructions was not an abuse of discretion. *See Dvorsky*, 322 N.W.2d at 66. Furthermore, Horak failed to show any prejudice warranting reversal. *See State v. Webb*, 516 N.W.2d 824, 831 (Iowa 1994). We accordingly affirm.

II. Merger of offenses. Our scope of review is de novo as a constitutional issue is raised. *State v. Funke*, 531 N.W.2d 124, 126 (Iowa 1995). Horak argues the offense of carrying weapons was a lesser included offense of the involuntary manslaughter charge and the court should have merged the former charge into the

conviction for the latter. He argues the imposition of sentences on both offenses violates Iowa Code section 701.9 (merger of lesser included offenses) and his Fifth Amendment right to double jeopardy protection.

Iowa Code section 701.9 provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty on the greater offenses only. (Emphasis added.)

There are many ways in which to commit involuntary manslaughter, one of which could involve the crime of carrying weapons. Each public offense as defined by the Code, (other than a forcible felony or escape), constitutes a separate, alternative method of committing the single offense of involuntary manslaughter. *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981). The State proved Horak committed involuntary manslaughter by committing the public offense of carrying weapons.

Because it is possible to commit involuntary manslaughter as defined in section 707.5(1) without committing a carrying weapons offense, the greater crime does not necessarily include the carrying weapons charge. *Webb*, 313 N.W.2d at 553. Thus, when a crime is not necessarily included in the greater offense for which defendant has been convicted, Iowa Code section 701.9 does not require merger. *State v. Finnell*, 515 N.W.2d 41, 44 (Iowa 1994). We affirm on this issue.

Having considered all arguments presented, we find no basis for overturning Horak's conviction.

AFFIRMED.

Streit, J., concurs; Habhab, C.J., specially concurs.

HABHAB, C.J. (specially concurring)

I concur specially.

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