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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed December 29, 1982
Plaintiff-Appellee,	)	329
vs.	)	2-326 / 66723
MARK EDWARD FELTMAN,	)	
Defendant-Appellant.	)	

Appeal from Polk District Court, Dale S. Missildine, Judge.

Defendant appeals from his conviction of involuntary manslaughter. AFFIRMED.

Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant appeals from his conviction of the involuntary manslaughter, Iowa Code § 707.5(1)(1981). On appeal, defendant asserts that (1) evidence defendant was driving while his license was suspended was evidence of "other crimes," and should therefore not have been admitted; and (2) the court's marshalling instruction omitted an element of felony involuntary manslaughter, so defendant should not have been given a five-year indeterminate sentence. We affirm.

The defendant, Mark Edward Feltman, was the driver of an automobile which went out of control while turning, resulting in the death of a front-seat passenger. At the time of the accident, he was speeding at approximately 60-65 m.p.h. in downtown Des Moines, his windows were fogged, and he was attempting a turn at high speed without brakes. Prior to the accident, he had been drinking, and after the accident he left the scene.

He was charged with involuntary manslaughter under Iowa Code section 707.5(1) in an information specifying that the involuntary manslaughter involved the commission of a public offense without specifying the particular public offense.

I. Evidence Concerning Other Crimes.

Feltman contends that the trial court abused its discretion by allowing the prosecution to elicit testimony, over objection, concerning the fact that Feltman was driving with a suspended license. He argues that evidence showing that a defendant committed a crime other than the one charged is generally inadmissible as being irrelevant and prejudicial. State v. Walton, 311 N.W.2d 2d 110, 112 (Iowa 1981). At trial, the State contended that the evidence tended to show defendant's "state of mind," but Feltman argues that "state of mind" is not a recognized exception to the rule against evidence of other crimes, citing State v. Powell, 256 N.W.2d 235, 237 (Iowa 1977). He also cites State v. Davis, 196 N.W.2d 885, 894

(Iowa 1972), in which the court held that admission of evidence that the accused in a manslaughter case did not have a valid driver's license at the time of the offense constituted reversible error, since there was no causal relationship between the invalid license and the collision. Here too, Feltman contends that there was no causal nexis between the suspended license and the collision.

We are not persuaded by the State's argument that it was necessary to introduce this testimony in order to establish Feltman's "reckless state of mind" at the time of the accident. However, there was so much other evidence in the record from which the jury could infer that the defendant was driving recklessly that any potential prejudice deriving from this inadmissible evidence was nullified.

II. The Sentence for Involuntary Manslaughter Under Section 707.5(1).

Neither the prosecutor nor counsel for the defense objected to the instruction concerning the statute which he was accused of having violated. If the error were to have been on the instruction alone, he would be debarred from invoking it on appeal, since it had not been preserved. However, the issue, he says, is not instructional error, but an illegal sentence, which may be raised at this time. Iowa R. Crim. P. 23(5)(a). See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).

In essence, Feltman argues that section 707.5(1) contains an element that is not contained in section 707.5(2). Thus, section 707.5(2) is a lesser included offense under section 707.5(1). In the marshalling instruction, Feltman contends that one of the essential elements of section 707.5(1) was omitted by the court. Thus, Feltman concludes that it was illegal for the court to sentence Feltman for a violation of section 707.5(1). At the same time, he insists that he is not complaining of instructional error.

We disagree. Feltman was convicted of a violation of section 707.5(1). The proper time to object to the instructions given by the court to the jury was prior

to their submission to the jury. We need not consider at this time whether Feltman's analysis of section 707.5(1) is correct or not, for that question is not properly before us, since the issue was not preserved. Having failed to object at the proper time in order to preserve error, the defendant cannot then complain that he was sentenced for the crime of which he was convicted rather than some other crime which was not submitted to the jury.

AFFIRMED.