

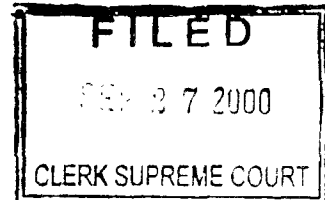
IN THE COURT OF APPEALS OF IOWA

No. 0-410 / 99-1338
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DIONICIO HERNANDEZ, JR.,
Defendant-Appellant.



Appeal from the Iowa District Court for Plymouth County, Gary E. Wenell,
Judge.

Dionicio Hernandez, Jr. appeals from his conviction and sentence for homicide by motor vehicle in violation of Iowa Code section 707.6A(1) (Supp. 1997). Hernandez contends the district court erred in (1) denying his motion for judgment of acquittal based on insufficiency of the evidence, and (2) failing to question jurors concerning prejudice resulting from in-trial publicity. Hernandez also contends (1) he was denied effective assistance of counsel and, (2) the imposition of \$150,000 in restitution pursuant to Iowa Code section 910.3B violated the Constitutions of the United States and the State of Iowa.

AFFIRMED.

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P.,
Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, and Darin J. Raymond, County Attorney, for appellee.

Heard by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant-Appellant, Dionicio Hernandez, Jr., appeals from his conviction and sentence for homicide by motor vehicle in violation of Iowa Code section 707.6A(1) (1997). Defendant contends the district court erred by (1) denying his motion for judgment of acquittal based on the sufficiency of the evidence and (2) failing to question jurors concerning prejudice resulting from in-trial publicity. Defendant also contends (1) he was denied effective assistance of counsel and (2) the imposition of \$150,000 in restitution pursuant to Iowa Code section 910.3B violated the United States and State of Iowa Constitutions. We affirm.

In the early morning hours of November 23, 1998, defendant driving south on Fourth Avenue Northeast in LeMars, Iowa, lost control of his vehicle and crashed into the LeMars Fire Station Number 2. The crash did considerable damage to defendant's car. Lisa Dalton, seated in the passenger seat of defendant's vehicle, was declared dead at the scene.

An officer who arrived at the scene of the crash identified a man standing outside the vehicle involved in the crash as the defendant. He immediately detected a strong odor of alcoholic beverages. The defendant did not respond to the officer's questions but said he needed to go to the hospital. Defendant was taken to the Floyd Valley Hospital. Based upon his observations at the scene of the crash, the officer obtained a search warrant to get a blood sample from the defendant. A blood sample obtained at the hospital revealed the defendant had an alcohol concentration of .177.

Defendant was charged with vehicular homicide under Iowa Code section 707.6A(1) (1997). A jury found defendant guilty. Defendant was sentenced to a

~~term not to exceed twenty-five years and ordered to pay victim restitution in the amount of \$150,000 pursuant to Iowa Code section 910.3B.~~

Defendant first claims there was not sufficient evidence to (1) establish he was under the influence of alcohol and (2) had a blood alcohol concentration in excess of .10 at the time of the crash. Defendant claims his actions were consistent with injuries he sustained in the crash, rather than from being under the influence of alcohol. Defendant testified he only consumed five alcoholic beverages over a six-hour time span. Relying on the testimony of the State's criminalist, defendant argues that in order to obtain a blood alcohol concentration of .177 someone of defendant's approximate height and weight would have to consume anywhere from thirteen to twenty beers.

We review challenges to the sufficiency of the evidence for errors at law. Iowa R.App. P. 4; *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999). We uphold a finding of guilt if "substantial evidence" supports the verdict. *Pace*, 602 N.W.2d at 768. "Substantial evidence" is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt. *Id.* We review the facts in the light most favorable to the State. *Id.* Furthermore, we consider not only evidence that supports the verdict, but all reasonable inferences that could be derived from the evidence. *Id.*

Substantial evidence exists to support a finding that defendant was under the influence of alcohol and had a blood alcohol concentration in excess of .10. Defendant admitted to drinking five alcoholic beverages prior to the crash. The jury had the right to reject this testimony and find from his blood alcohol count that he drank more. The credibility of witnesses, in particular, is for the jury:

"[t]he jury is free to believe or disbelieve any testimony as it chooses." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Defendant's blood specimen contained .177 grams of alcohol per 100 milliliters of blood. A rational trier of fact could conclude that defendant was guilty of operating a motor vehicle under the influence and with a blood alcohol level in excess of .10. There is substantial evidence to support the verdict. We affirm on this issue.

Defendant next contends the district court erred in failing to question the jurors individually about their possible prejudice as a result of publicity after they were impaneled. The jury was impaneled on July 22, 1999. On July 23, 1999, the bold headline of the *LeMars Daily Sentinel* read, "Murder trial opens with jury selection". Defendant claims the district court failed to use the proper standard in dealing with this publicity and further asserts the court should have questioned the jurors individually regarding this article.

The standard of review on this portion of the issue is abuse of discretion. *State v. Jones*, 511 N.W.2d 400, 408 (Iowa App. 1993); *State v. Bishop*, 387 N.W.2d 554, 561 (Iowa 1986). Defendant contends the headline was so inaccurate that it may have prejudiced the jury. He argues the district court should have questioned each juror individually to assess any possible prejudice that may have come from the headline.

We will not presume prejudice from the mere publication or broadcast of news stories. *State v. Sefcheck*, 261 Iowa 1159, 1173, 157 N.W.2d 128, 136 (1968). The trial court need not act on mere speculation. *State v. Frank*, 298 N.W.2d 324, 327 (Iowa 1980). The defendant failed to establish that any juror read the headline. The jury was admonished prior to the trial not to read or listen

to any news accounts of the trial. There was no evidence the jury had violated that admonition. When a jury has been admonished not to expose themselves to media publicity of the trial in which they are serving as jurors, a presumption arises that they will not violate that admonition. *State v. Sallis*, 262 N.W.2d 240, 246 (Iowa 1978) (quoting *Rizzo v. United States*, 304 F.2d 810, 815 (8th Cir), cert. denied, 371 U.S. 890, 83 S. Ct. 188, 9 L. Ed. 2d 123 (1962)). Where there is no showing that any of the jurors violated the admonition of the court not to read newspaper accounts of the trial, it is not to be assumed that as a matter of human nature they did violate the admonition. *Id.*

Under this record the district court did not abuse its discretion in not asking the jurors individually if they had read the headline. First, the defendant failed to establish any juror violated the court's admonition to avoid any news accounts of the trial. Second, the court adequately addressed the issue by informing the jury of the inaccurate headline, explaining its inaccuracy and reminding the jury to continue to disregard any news accounts of the trial. Third, the defendant presented no evidence of possible juror prejudice that would have warranted further individual questioning by the court. We affirm on this issue.

Defendant next claims the \$150,000 restitution award imposed as a part of the sentence violated the Excessive Fine and Double Jeopardy Clauses of the United States and Iowa Constitutions. He also claims the imposition of restitution pursuant to Iowa Code section 910.3B is not mandatory.

The issue of the constitutionality of the restitution award under section 910.3B was addressed in *State v. Izzolena*, 609 N.W.2d 541, 545 (Iowa 2000). *State v. Artzer*, 609 N.W.2d 526, 532 (Iowa 2000). Applying the reasoning in

Izzolena, we find the \$150,000 restitution award in this case does not constitute an excessive fine, nor violate principles of double jeopardy. *See id.* The issue of the mandatory nature of the award pursuant to section 910.3B was addressed in *State v. Klawonn*, 609 N.W.2d 515, 517 (Iowa 2000). *See id.* Applying *Klawonn*, we determine the district court was required under the section to impose the minimum restitution award. *See id.* We affirm the restitution award imposed by the district court.

Defendant also claims he was denied effective assistance of trial counsel. He asserts his trial counsel was ineffective for (1) failing to hire or use an expert, (2) failing to request an instruction for the lesser included offense of involuntary manslaughter and (3) failing to prove prejudice from jury exposure to in-trial publicity.

A defendant is entitled to effective assistance of counsel. *See Strickland v. Washington*, 466 U.W. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). To succeed on his ineffective-assistance-of-counsel claim, the defendant has the burden to prove by a preponderance of the evidence that his trial counsel failed in an essential duty, and that prejudice resulted from this failure. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Ordinarily, we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Where the record is sufficient,

however, we will consider claims of ineffective assistance on direct appeal. See *McPhillips*, 580 N.W.2d at 748, 754 (Iowa 1998).

The present record is not adequate to determine whether trial counsel failed to provide effective assistance of counsel in regard to defendant's claims his trial counsel should have hired an expert witness and should have established juror prejudice from the jury's exposure to the headline in the LeMars paper. "Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel." *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). There may have been tactical reasons why defendant's counsel did not call an expert witness.

However, we can address defendant's claim his trial counsel should have requested an instruction for involuntary manslaughter. We apply the legal-elements test to determine lesser included offenses. *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999); *State v. Jeffries*, 430 N.W.2d 728, 736 (Iowa 1988). An offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser crime. *State v. Beeson*, 569 N.W.2d 107, 112 (Iowa 1997); *State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). If the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater. *Beeson*, 569 N.W.2d at 112. For involuntary manslaughter to be a lesser included offense of vehicular homicide, the greater offense (vehicular homicide) must have an element not found in the lesser offense (involuntary manslaughter) *State v. Coffin*, 504 N.W.2d 893, 895 (Iowa 1993). Because there are no dissimilar

elements, involuntary manslaughter is not a lesser included offense of vehicular homicide.

For these reasons, we affirm defendant's conviction and sentence and reserve his ineffective assistance of counsel claims, if any are brought.

AFFIRMED.