IN THE COURT OF APPEALS OF IOWA

No. 3-541 / 12-1041
Filed August 7, 2013

MERLE ANDREW SHANK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Sean W. McPartland, Judge.

The applicant appeals the decision of the district court denying his request for postconviction relief. **AFFIRMED.**

Lars G. Anderson of Holland & Anderson, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Robert A. Hruska, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., Danilson, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MILLER, S.J.

I. Background Facts & Proceedings

For these postconviction proceedings we adopt the detailed recitation of facts made by this court on the direct appeal of Merle Shank, as follows:

> Around 3 a.m. on April 9, 2005, Linn County Deputy Douglas Riniker passed a pick-up truck just outside Cedar Rapids. Riniker believed he smelled ether coming from the truck, and decided to follow. The truck accelerated to seventy-five to eighty miles per hour. He activated his lights and siren, but the truck did not stop. Instead, the truck engaged Riniker in a chase reaching ninety-five miles per hour. When the driver attempted to make a right turn at an intersection, the truck rolled into the ditch.
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> The truck was lying on its top when officers approached. Shank's lower body was trapped underneath the cab on the driver's side. On the other side of the truck, Kirby Truesdell was lying on his back in the grass. Deputies found Mark Loesel on his stomach in the cab of the truck. Finally, Katrina Nelson was pinned under the truck with her arms and legs sticking out. In one hand, she was clutching a lighter. She had no pulse.
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> At the scene, officers questioned Truesdell about the number of passengers in the truck. He responded, "What truck?" and denied being in the truck. Loesel, who was lying inside the cab, told officers he was fine and asked permission to get out of the truck. He was handcuffed and eventually placed in the back of a patrol car. Sometime later, Loesel waved Deputy Chad Colston over to the patrol car to ask when he could leave. Colston asked Loesel if he could help officers identify the driver. According to Colston, Loesel stated he was not a "snitch" but the person trapped under the truck was the driver. Loesel told another officer, Sergeant Pete Wilson, that the driver was pinned under the truck. When asked if the female was the driver, Loesel stated the driver was not the female but the other person trapped under the truck. Loesel reportedly told another officer, Captain Brian Gardner, that the driver had shorter hair than Gardner, who was balding. He also stated the driver was the husband of the female passenger and the father of her unborn child.
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> At the hospital, Truesdell told an officer the passengers were seated in the following order: the driver, the female passenger, Truesdell, and another male passenger. Shank, however, maintained Nelson was the driver. He initially told officers Nelson was driving, with Truesdell, Shank, and Loesel sitting in that order. Later, he stated he sat next to Nelson as she drove.

Shank was charged with vehicular homicide as an habitual offender on May 13, 2005. The State amended the charge on August 31, 2005, to add counts of vehicular homicide as an habitual offender (count II) and nonconsensual termination of a human pregnancy (count III). Prior to trial, Shank filed a motion in limine to exclude as hearsay the statements Loesel and Truesdell made shortly after the accident. The district court ruled that the statements qualified as "excited utterances" and would be allowed at trial.

At trial, both Truesdell and Loesel testified Nelson was driving the truck during the chase. Shank's family members testified only Nelson drove the truck and they never saw Shank driving it. Due to the court's ruling on the motion in limine, police officers testified to the statements Truesdell and Loesel made after the accident. The State's accident reconstruction expert testified he determined Shank was the driver. He based his conclusion on bruises Shank sustained that were consistent with hitting the steering wheel and driver's door. The State's expert also determined Nelson was sitting somewhere in the middle of the cab. He found injuries on her knees that were consistent with hitting the sharp edge of an ash tray. Further, DNA evidence taken from the exterior of the driver's side door, the driver's side visor, and from glass found on the seat matched a sample taken from Shank.[1] The defense's accident reconstruction expert, however, testified the State's evidence did not identify where the occupants of the vehicle were located and that it would be difficult to make a driver-only determination without also knowing when and how the other occupants were ejected. He concluded the evidence did not support any conclusive determination of the driver's identity.

The jury found Shank guilty of the unenhanced charges. Shank stipulated to two prior felony convictions for the purposes of the habitual offender sentencing enhancement. The district court sentenced Shank to an indeterminate term of imprisonment not to exceed fifteen years with a three-year mandatory minimum on counts I and II. On Count III, the court sentenced Shank to an

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[1] We note there was controversy about the blood on the driver's side door of the pickup. Photographs taken at the scene did not show this blood. But when the pickup was taken to storage, the blood was there and was shown to be Shank's. There was evidence Shank had sustained a severe laceration to the top of his head, had bled profusely, and there was a large amount of blood on the ground where Shank had been lying while partially trapped under the overturned pickup. The pickup had to be turned over from its top to its wheels before it could be picked up, loaded on a "low boy," and removed. We believe this may provide an explanation for the disparity between the photographs taken before the pickup was moved, and the presence of Shank's blood on the door after it was moved.

> indeterminate term not to exceed ten years with a $1000 fine. The sentences are to run consecutively. Finally, the court ordered Shank to pay $150,000 toward Nelson's estate.

State v. Shank, No. 05-2082, 2007 WL 249819, at *1-2 (Iowa Ct. App. Jan. 31, 2007) (internal footnotes omitted). A footnote provided, "Counts I and II were treated and merged as the same offense for the purposes of sentencing." *Id.*

On January 8, 2008, Shank filed an application for postconviction relief, claiming he received ineffective assistance of counsel on several different grounds. After a hearing, the district court denied his request for postconviction relief, finding Shank had failed to show he received ineffective assistance. Shank now appeals the decision of the district court denying his application for postconviction relief.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

III Ineffective Assistance

Shank contends he received ineffective assistance because defense counsel failed to: (1) move for a new trial, (2) request a spoliation instruction, (3) object to a jury instruction on recklessness, (4) require a colloquy before Shank stipulated to being a habitual offender, (5) call medical personnel to testify at his criminal trial, and (6) object to the imposition of two convictions for vehicular homicide. We will address each of these issues, beginning with the last.

A. Shank contends he received ineffective assistance because defense counsel did not object to the imposition against him of two convictions for vehicular homicide based on the death of one person, Nelson. Shank was charged in two counts with two alternative means of committing vehicular homicide—driving in a reckless manner, in violation of Iowa Code section 707.6A(2)(a) (2005), and eluding a pursuing law enforcement vehicle, in violation of section 707.6A(2)(b). A jury found the State had proved both.

Shank correctly asserts that not only the sentences, but also the convictions for vehicular homicide merge. "Iowa case law observes a one-death one-homicide rule—prohibiting a trial court from entering judgment and imposing sentences for multiple homicide offenses if the defendant was convicted for killing only one person." *State v. Fix*, 830 N.W.2d 744, 745 (Iowa Ct. App. 2013).

At the sentencing hearing, the court stated, "Under Counts I and II it is the judgment of the court that you are guilty of the Class C Felony *Offense* of vehicular homicide in violation of section 707.6A sub 2, a, and b, both methods of committing the *single offense* of vehicular homicide." (Emphasis added.) This

statement by the experienced and capable trial court judge shows the court was fully aware the two guilty verdicts for vehicular homicide would merge into one conviction.

Furthermore, the written judgment and sentence states, "It is the judgment of the Court that defendant is guilty of the *offense* of Vehicular Homicide, a Class C Felony Offense, under Counts I and II, in violation of Iowa Criminal Code Section 707.6A(2)(a) and (b), and as an habitual offender under Section 902.8." (Emphasis added.) Again, this shows Shank was convicted of only one offense of vehicular homicide. The only confusion arises from the sentencing memorandum, which states, "Under Counts One and Two of the Trial Information, the vehicle homicide *offenses* in violation of Iowa Criminal Code Section 707.6A(2)(a) and (b), and as an habitual offender under Section 902.8, merge for purposes of sentencing . . . ." (Emphasis added.)

The court's statement at the sentencing hearing shows the court intended to enter judgment against Shank for only a single offense of vehicular homicide. The judgment and sentence, dated December 15, 2005, also shows Shank was convicted for one offense of vehicular homicide. Based on this record, we conclude only one conviction for vehicular homicide, in violation of section 707.6A(2), was entered against Shank. He has not shown he received ineffective assistance due to defense counsel's failure to object on this ground.

B. Shank claims he received ineffective assistance because his defense counsel did not file a motion for a new trial. He claims that if such a motion had been made, it would have been successful because the weight of the

evidence as a whole did not support the verdicts in the case. A motion for new trial will be granted if the district court finds the verdict is contrary to the weight of the evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). In making this determination, the court may weigh the evidence and consider the credibility of witnesses. *Id*. at 658.

The district court determined Shank had not shown he was prejudiced by counsel's conduct because even if defense counsel had filed a motion for new trial, he had not shown that it was likely the district court would have granted the motion. In order to show prejudice, an applicant must show that there is a reasonable probability that the result of a criminal trial would have been different. *King v. State*, 797 N.W.2d 565, 572 (Iowa 2011). "The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable." *Id*. In the direct appeal, we found, "the evidence identifying Shank as the driver is not only properly in the record, but also overwhelming." *See Shank*, 2007 WL 249819, at *3. We conclude Shank has not shown he received ineffective assistance due to defense counsel's failure to file a motion for new trial.

C. Shank claims he received ineffective assistance because defense counsel failed to request a spoliation instruction. He asserts the State intentionally failed to preserve the vehicle involved in the car accident and the scene of the accident. He claims he was denied the opportunity to have an expert examine the vehicle while it was still at the crash scene. He also

contends that by moving the vehicle, potentially exculpatory evidence might have been lost.

A spoliation instruction directs the jury that the State's intentional failure to preserve evidence may give rise to an inference that the evidence would have been adverse to the State. *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004). In order to justify a spoliation instruction, there must be substantial evidence of the following: (1) the evidence was in existence, (2) the party charged with destroying the evidence was in possession or control of the evidence, (3) the evidence would have been admissible at trial, and (4) it was intentionally destroyed. *Id*.

We first note that the vehicle was on private property and could not have been left there indefinitely. Furthermore, defense counsel testified that he made a purely strategic decision not to request a spoliation instruction. He testified:

> It would have been a waste of time. I thought we did a very thorough analysis of the incident from the videotape to the accident reconstruction expert offered by the State. We thoroughly impeached the accident reconstruction expert offered by the State. We were allowed to hire our own accident reconstruction expert, whose purpose was not to prove how the accident happened, but to undermine the State's experts' conclusions in their analysis, and I believe we did that. We had all of the evidence available to us. I was able to physically inspect the pickup truck. I believe at that time it was in a shed at the Cedar Rapids Police Department lot. There was no further analysis of either the scene or the pickup itself that I believe, in my training and experience, to have—that would have aided us in any further way in preparing or conducting the trial.

A claim of ineffective assistance of counsel that involves a tactical or strategic decision "must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities

of an attorney." *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). It is clear that in this case defense counsel made a careful and well-thought-out decision not to request a spoliation instruction. A strategic decision made after a thorough investigation of law and facts is virtually unchallengeable. *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). We conclude Shank has not shown that counsel breached an essential duty by failing to request a spoliation instruction, and he has failed to show he was prejudiced by counsel's strategic decision not to request such an instruction.

D. Shank asserts he received ineffective assistance because his defense counsel did not object to the jury instruction defining "reckless." One of the charges against Shank was that he had unintentionally caused the death of Nelson by driving a vehicle in a reckless manner. *See* Iowa Code § 707.6A(2)(a). The jury was instructed:

> A person is "*reckless*" or acts "*recklessly*" when he willfully disregards the safety of persons or property. Recklessness is more than a lack of reasonable care that may cause unintentional injury. It is conduct that 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.

The jury instruction did not include any language regarding "dangerousness."[2] Iowa Criminal Jury Instruction No. 200.20 contains the additional sentences, "For recklessness to exist, the act must be highly

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[2] *State v. Torres*, 495 N.W.2d 678, 682 (Iowa 1993), provides, "Simply put, for recklessness to exist the act must be fraught with a high degree of danger." *See also State v. Sutton*, 636 N.W.2d 107, 112 (Iowa 2001) (holding that to prove a charge of vehicular homicide based on recklessness, the State must prove the defendant engaged in conduct fraught with a high degree of danger).

dangerous. In addition, the danger must be so obvious that the actor knows or should reasonably foresee that harm will more likely than not result from the act." Shank contends that if the jury had been properly instructed on dangerousness, he may not have been found guilty on one count of vehicular homicide.

We have already determined Shank was convicted for a single offense of vehicular homicide. Even if he was correct and, if the jury instructions had included the information about dangerousness, the jury would not have found him guilty of vehicular homicide based on driving in a reckless manner under section 707.6A(2)(a), the jury nevertheless did find him guilty of vehicular homicide based on eluding a pursuing law enforcement vehicle under section 707.6A(2)(b). Shank therefore cannot show that even if the jury instructions were different he would not have been convicted of vehicular homicide. We conclude Shank has failed to show he was prejudiced by defense counsel's failure to object to the jury instruction on recklessness.

E. Shank claims he received ineffective assistance because defense counsel did not request that the district court engage in a colloquy with Shank before he stipulated to being a habitual offender. He claims the record is insufficient to establish that he made a voluntary and knowing stipulation to his prior felony convictions. He asserts that it is not clear whether the State could have proved his prior convictions if he had not stipulated to them.

Under Iowa Rule of Criminal Procedure 2.19(9), an offender has the opportunity to admit or deny in open court prior convictions that may increase a sentence. If a defendant admits to the prior convictions, trial courts have a duty

to ensure that this stipulation is knowing and voluntarily. *State v. McBride*, 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001). "In order to knowingly stipulate, a defendant should have an adequate grasp of the implications of his or her stipulation." *Id.* at 375.

We note that the case cited by Shank on this issue is a direct appeal. In this postconviction action, where Shank is claiming ineffective assistance of counsel, he is required to show a reasonable probability that the State would not have been able to establish his prior convictions if he had not stipulated to the convictions. *See Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012) (noting a party must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

Shank has made no claim or showing that he did not have the prior convictions attributed to him. At the sentencing hearing, the district court outlined Shank's prior convictions, including five prior felony convictions, and Shank did not object to that recitation. Furthermore, he has made no claim or showing that in his two acknowledged prior felony convictions he was without counsel and had not waived assistance of counsel, or that his stipulation to two prior felony convictions was not knowing and voluntary. He has thus not shown the result of the proceeding would have been different if he had not stipulated, and on this ground he is unable to show he received ineffective assistance of counsel.

F. After the accident Shank was airlifted to Iowa City for medical treatment. During the flight he told medical personnel that he had been seated in the middle of the vehicle. He claims he received ineffective assistance because

his defense counsel did not call these medical professionals to testify at his criminal trial about the statements he made to them. He believes these statements would have been more persuasive to the jury than other statements on the same issue.

Leaving aside the issue of hearsay, and whether or not Shank's statements came within an exception to the hearsay rule, we note there was other substantial evidence in the record that Shank had made statements that he was not the driver of the vehicle. This included Shank's statements to officers that Nelson was the driver of the vehicle. Shank cannot show prejudice from defense counsel's decision not to present cumulative testimony on the issue. *See Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) ("[T]he withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffectiveness of counsel."). We conclude Shank has not shown he was prejudiced because defense counsel did not call these witnesses to testify at the criminal trial, and therefore, he has not shown he received ineffective assistance of counsel on this issue.

We conclude Shank has failed to show he received ineffective assistance of counsel at his criminal trial. We affirm the decision of the district court denying his request for postconviction relief.

AFFIRMED.