IN THE COURT OF APPEALS OF IOWA

No. 6-414 / 05-0600
Filed November 30, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GARY WADE MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Judge.

Gary Wade Miller appeals from his conviction and sentence for vehicular homicide. **AFFIRMED.**

Eric Parrish of Parrish, Kruidenier, Moss, Dunn, Boles, Gribble & Cook, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Wayne Reisetter, County Attorney, and Jeannine Gilmore and Stacy Ritchie, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Gary Wade Miller appeals from his conviction and sentence for homicide by vehicle in violation of Iowa Code sections 707.6A and 321J.2 (2003). He contends there was insufficient evidence to support his conviction, the State improperly withheld evidence, and the district court erred in failing to instruct the jury on intervening and superseding cause. Because we find no merit in any of Miller's appellate claims, we affirm.

I. Background Facts & Proceedings

A jury could have found the following facts from the evidence presented at trial. Gary Miller and his friend, Larry Massure, spent the afternoon and early evening hours of April 10, 2004 drinking. Miller picked up Massure around noon, and the pair traveled to Bo Jangles, a bar in Adel. They stayed at Bo Jangles for one and a half to two hours and then went to another bar called Rendezvous. After drinking at Rendezvous, they drove to the Coon River Bar and Grill in Van Meter. Miller and Massure stayed at that bar from approximately 3:30 p.m. to 7:00 p.m. Both Miller and Massure drank alcoholic beverages at all three bars. Miller did not eat food at any of the bars.

Miller and Massure left the Coon River Bar and Grill at approximately 7:00 p.m. and headed west on De Soto Road with Miller driving. At the same time, Sam Osier, his wife Toni, their ten-year-old daughter Marina, and the family's three dogs were taking a walk on De Soto Road. The family was walking west on the south shoulder of the road looking for asparagus that grew in the ditches. As always, they walked facing oncoming traffic, stayed close to the shoulder of the road, and were aware of anything approaching them from behind. Toni was

walking on Sam's left side, closest to the ditch. Marina was walking behind her parents, and the three dogs were on either side of Toni.

Toni heard the defendant's vehicle approaching the family from behind. It sounded like the car was accelerating. Sam and Toni checked to make sure Marina and the dogs were off the road. According to Toni, the family was on the grass near the ditch because they were nearing an asparagus patch. Toni glanced to her right and saw a vehicle hit Sam. Her husband's body was thrown into the ditch on the south side of the road. Investigators concluded Miller's car struck Sam on the left side of the road. Sam Osier was pronounced dead at the scene.

The State filed a trial information charging Miller with homicide by vehicle, a class B felony, and operating while intoxicated, first offense, a serious misdemeanor. The case proceeded to trial, and a jury found Miller guilty of homicide by vehicle. Miller was sentenced to an indeterminate term of incarceration not to exceed twenty-five years, and the district court ordered him to pay $16,905.60 victim restitution and $150,000 restitution to the victim's estate or heirs. Miller now appeals.

II. Discussion

Miller contends the jury's verdict is not supported by substantial evidence. He also argues the State improperly withheld evidence, and he contends the district court erred in failing to instruct the jury on intervening and superseding cause. We will address each of Miller's appellate claims in turn.

A. Sufficiency of the Evidence

Miller contends the State failed to prove he was operating his vehicle while intoxicated, and he argues the evidence was insufficient to prove he caused the accident that took Sam Osier's life.

We review sufficiency of the evidence claims for the correction of errors at law and uphold the jury's verdict if substantial evidence supports it. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). Substantial evidence is evidence that could convince a trier of fact the defendant is guilty of the crimes charged beyond a reasonable doubt. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). We consider all the evidence in the record, not just the evidence supporting guilt. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). We also consider legitimate inferences and presumptions that may reasonably be deduced from the evidence in the record. *Id.* We view the evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Circumstantial and direct evidence are equally probative, but evidence that merely raises suspicion, speculation, or conjecture is insufficient. Iowa R. App. P. 6.14(6)(*p*); *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996).

In order to convict Miller of homicide by vehicle, the State had to prove the following elements by proof beyond a reasonable doubt.

1. On or about the 10th day of April, 2004, the defendant operated a motor vehicle:
   a. while under the influence of alcohol; or
   b. while having an alcohol concentration of .08 or more.

2. The defendant's act or acts set out in Element 1 unintentionally caused the death of Sam Osier.

We conclude there is substantial evidence in the record showing Miller operated a motor vehicle while under the influence and while having a blood alcohol level above the legal limit.

Miller and Massure spent the afternoon of April 10 drinking at three bars. Shortly after the collision, Miller told a paramedic and Deputy Sheriff Michelle Leonard that he was drunk.[1] Deputy Leonard observed Miller had slurred speech, and she noticed his balance was so poor he had to hold onto a car to stay upright. Miller also had bloodshot and watery eyes, and he emitted a strong odor of alcohol. Dallas County Deputy Sheriff Jon Thomas, a certified drug recognition expert, testified Miller had slurred speech and poor balance, was confused, and emitted the odor of alcohol. Because Miller refused to submit to a breath test, Dr. Steven Donnenwerth drew his blood at the Dallas County Hospital. The doctor observed Miller's speech was slurred and abnormally loud, and he smelled strongly of alcohol. Miller stated he consumed at least five, but no more than seven drinks at the bars he visited with Massure.

Miller failed three field sobriety tests. He failed the walk and turn test and was unable to complete the one-leg stand after attempting the test three times. Miller failed the horizontal nystagmus test. While doing so, he exhibited vertical nystagmus, which Deputy Thomas testified is much less common than horizontal nystagmus and indicates Miller's blood alcohol concentration was very high. In addition, Miller's booking videotape shows he had trouble following directions, he was unable to complete the field sobriety tests, and he spoke loudly. We

[1] Deputy Leonard testified Miller told her, "I did it. I'm drunk." Timothy Morlan, a paramedic for Dallas County EMS, testified Miller said, "My only problem is that I'm too drunk."

conclude there was substantial evidence to support the conclusion that Miller operated his vehicle while under the influence of alcohol.

The record also reveals substantial evidence from which a jury could have determined Miller's blood alcohol concentration exceeded .08. Miller's blood was drawn approximately three hours and forty minutes after the accident. Orville Berbano, a criminalist for the Iowa Division of Criminal Investigation (DCI), testified Miller's blood alcohol concentration (BAC) was .193, more than two times the legal limit. Berbano testified the blood sample was valid and the test results were accurate. Berbano estimated Miller's BAC would have been between .253 and .273 four hours earlier. Miller presented testimony disputing the results of his blood test on the basis that the collection vials did not contain a preservative and the blood samples were not refrigerated for several days, allowing the blood to produce its own alcohol. The State offered testimony from Dr. Francis Garrity that indicated blood would have to be in a visibly advanced state of decomposition to produce alcohol, and Berbano said there was no problem with the blood sample. It was for the jury to decide which of the experts was more credible and whose opinion to accept. *Mercy Hosp. v. Hansen Lind & Meyer, P.C.*, 456 N.W.2d 666, 672 (Iowa 1990).

We next consider Miller's claim that substantial evidence does not support the jury's determination that he caused San Osier's death. In support of this argument, Miller claims the State did not establish where on the roadway Miller's car struck Osier. Based on the evidence we have already described, the jury could have reasonably concluded that while driving his vehicle while intoxicated, Miller drove out of his own lane of traffic and struck Sam Osier on the left side of

the road. The State sufficiently proved Miller was a proximate cause of Osier's death. We reject this assignment of error.

B. Late Evidentiary Disclosures

Miller contends two late evidentiary disclosures violated his right to a fair trial. He claims the State failed to timely inform him the vials used to store his blood sample did not contain a preservative, as indicated by different colored stoppers in the tubes. Miller also maintains the State failed to provide him with approximately fifteen minutes of additional footage from a booking videotape which he did not discover until he played the tape at trial.

Miller filed a motion to produce on June 15, 2004, requesting all information encompassed by *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). In response to Miller's motion, the State produced an alcohol content report and a laboratory receipt for the four vials of blood drawn from Miller. Neither document contained information regarding the specific vials used to collect Miller's blood. Miller claims he did not discover the vials did not contain preservative until he served a subpoena on DCI Criminalist Berbano.

To establish a *Brady* violation, Miller must prove: (1) the prosecution suppressed evidence, (2) the evidence was favorable to him, and (3) the evidence was material to the issue of guilt. *State v. Veal*, 564 N.W.2d 797, 810 (Iowa 1997), *overruled in part on other grounds by State v. Hallum*, 585 N.W.2d

249, 253-54 (Iowa 1998). Evidence is material to the issue of guilt if there is a reasonable probability disclosure of the evidence would have altered the outcome of the proceeding. *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996). We review this constitutional issue de novo. *Id.*

Even if we assume without deciding that the State did not timely disclose evidence that the vials used to collect Miller's blood did not have gray stoppers that indicate the use of sodium fluoride as a preservative, we find no *Brady* violation here. Evidence is not considered "suppressed" if the defense is able to take advantage of it at trial. *Veal*, 564 N.W.2d at 810. The record reveals Miller referred to the different colored stoppers in a motion in limine filed almost one month prior to trial. Furthermore, Miller used this evidence extensively at trial to his own advantage in cross-examining the State's witnesses and questioning his own expert. Nothing in the record suggests that earlier disclosure of this evidence would have altered Miller's trial strategy or changed the outcome of this proceeding. We conclude Miller failed to establish a *Brady* violation with regard to the blood collection vials.

Miller also contends a *Brady* violation occurred when the State failed to provide him with approximately fifteen minutes of additional footage from a booking videotape he did not become aware of until the tape was shown at trial. The State made a DVD copy of the original booking videotape, and Miller also made DVD copies from his copy of the videotape. The State showed a portion of its DVD copy at trial. Later, Miller showed the remainder of the DVD to the jury. Miller claims he discovered for the first time at trial that the DVD contained approximately fifteen minutes of additional footage he had not received from the

State, which included "a very incriminating statement [made by Miller] about the likely results of his blood test." Miller made a motion for mistrial, and the district court overruled the motion, finding Miller had waived any objection by allowing the entire video to play.

Miller has not shown the State suppressed fifteen minutes of the booking videotape. The reason for the discrepancy between Miller's copy of the tape and the tape shown at trial is unknown. Obviously, the State had no reason to suppress an incriminating statement by Miller. For a *Brady* violation to occur, the evidence in question must have been favorable to Miller. In this case, it was not. Furthermore, Miller himself played the additional footage at trial and invited the alleged error he now raises on appeal. Defense counsel could have stopped the DVD as soon as he observed footage he had not seen before; instead, he allowed the entire tape to play. We will not permit a party to a criminal proceeding to complain of error with respect to the admission or exclusion of evidence when he or she committed or invited the error. *State v. Washington*, 257 N.W.2d 890, 893 (Iowa 1977). Finally, there is no indication this evidence would have been excluded if an objection had been lodged. We conclude Miller failed to establish a *Brady* violation with regard to the DVD footage.

C. Jury Instructions

Miller claims the district court erred in failing to instruct the jury on intervening and superseding cause.[2] In his brief on appeal, Miller suggests three

[2] The court gave the following instruction regarding causation:

> With regard to Element No. 2 of Instruction No. 17, the State must prove that the Defendant's act (operating a motor vehicle while under the

events caused the accident rather than his driving while intoxicated. He claims (1) the victim was intoxicated and may have been walking in the middle of the road, (2) the victim's three dogs contributed to the accident, and (3) the glare of the sun caused the accident.

We review a trial court's refusal to give a requested jury instruction for the correction of errors at law. *State v. Martinez*, 679 N.W.2d 620, 623 (Iowa 2004). We will not reverse a conviction based on an error in instructing the jury unless the error is prejudicial to the defendant. *State v. Holtz*, 548 N.W.2d 162, 164 (Iowa Ct. App. 1996). A jury instruction error is presumed prejudicial unless upon a review of the entire case, we find the error resulted in no prejudice. *State v. Bone*, 429 N.W.2d 123, 127 (Iowa 1988).

During the conference on jury instructions, Miller's theory that the glare from the setting sun caused the accident was a subject of discussion. However, Miller did not contend the alleged actions of Sam Osier or his dogs somehow constituted intervening and superseding causes warranting a jury instruction. One fundamental doctrine of appellate review is that issues must be raised and

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> influence of alcohol) was a proximate cause of the death of Samuel Osier. Defendant denies he was intoxicated and claims that the sole proximate cause of the accident that resulted in the death of Samuel Osier was the glare of the sun in the Defendant's eyes.
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> The conduct of a party is a proximate cause of injury or death when it is a substantial factor in producing injury or death and when the injury or death would not have happened except for the conduct.
>
> "Substantial" means the party's conduct has such an effect in producing the injury or death as to lead a reasonable person to regard it as a cause.
>
> There can be more than one proximate cause of an injury or death.
>
> Sole proximate cause means the only proximate cause.
>
> The State does not have to prove that Defendant's act was the sole proximate cause of death; however, it must prove that Defendant's act was a proximate cause of death.

decided by the district court before we will decide them on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). We find Miller failed to preserve error on the claims that the victim's intoxication or the alleged interference of the victim's dogs warranted an instruction on intervening and superseding cause.

Even if Miller had preserved error on his claims that the victim's intoxication and interference by the dogs were intervening and superseding causes for the accident, we find the court did not err in refusing to instruct the jury regarding those issues. Miller relies on medical testimony that Sam had consumed some alcohol prior to his death and Toni's testimony that Sam had consumed two glasses of beer at a steakhouse before their walk to speculate Sam was intoxicated and must have been walking in the middle of the road. Contrary to Miller's assertion on appeal, nothing in the record indicates Sam was intoxicated and walking in the middle of the road when Miller's vehicle struck him.

Dr. Garrity, who conducted the autopsy, testified Sam's blood alcohol content was under the legal limit. The record indicates Sam and Toni were walking close to the shoulder of the road when Sam was struck. Toni testified they were in the grass bordering the road at the time of the collision because they were nearing an asparagus patch in the ditch. Investigators determined Miller's car struck Sam on the left side of the road because pieces of the lens cover from the broken driver's side headlight were discovered on the left side of the roadway in the soft gravel portion. Furthermore, damage to Miller's car was on the driver's side of the vehicle, and tire tracks took a sharp right turn away from the point of impact and led to the place where Miller's car came to rest.

Nothing in the record indicates the Osiers' dogs were in the road when the collision occurred. Toni testified the dogs were all well-trained and obedient. She stated two of the dogs were in the ditch because she and Sam were already headed toward an asparagus patch in the ditch, and the other dog was at her right leg. None of the dogs were struck by Miller's car. We find the evidence did not support a jury instruction on the victim's intoxication or interference by the dogs as intervening and superseding causes for the accident. We conclude an instruction on intervening and superseding cause based on the actions of Sam or his dogs would have been inappropriate.

We also reject Miller's final claim that the glare caused by the sun warranted an instruction on intervening and superseding cause. The Iowa Supreme Court has held that superseding causes are those that flow from the acts of third persons or some other active force that produces the harm. *State v. Henning*, 545 N.W.2d 322, 325 (Iowa 1996). The *Henning* court held conditions such as light are not active forces: "Contributing factors such as road and lighting conditions against which the primary actor's conduct is being weighed to determine its culpability are neither the acts of third persons nor other active forces that produce a superseding cause." *Id.* We agree with the district court's ruling that Miller's claim regarding glare from the sun did not warrant a further jury instruction on intervening and superseding cause.

III. Conclusion

Because we find no merit in any of Miller's appellate claims, we affirm his conviction of homicide by vehicle.

AFFIRMED.