IN THE COURT OF APPEALS OF IOWA

No. 1-116 / 10-0936
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMIE CARL MCFARLAND,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey, Judge.

The defendant appeals the restitution order entered upon his conviction and sentence for burglary in the first degree. **AFFIRMED.**

Jeffrey M. Lipman, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Paul L. Martin, County Attorney, and Carlyle D. Dalen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Miller, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

Jamie McFarland pled guilty to burglary in the first degree, a class "B" felony, in violation of Iowa Code sections 713.1 and 7.13.3 (2007) (aiding and abetting a person or persons who, without right, license, or privilege to do so and while in possession of a dangerous weapon, entered an occupied structure, not open to the public, in which one or more persons are present, with intent to commit a felony, assault, or theft). In a written plea of guilty, signed and filed the same day as an in-court guilty plea proceeding, McFarland acknowledged that he would "be ordered to make restitution for damages resulting directly from [the Burglary in the First Degree] to the victim."

In sentencing McFarland, the district court ordered him to pay restitution of $150,000, pursuant to Iowa Code section 910.3B, jointly and severally with the two co-defendants whom he aided and abetted. McFarland appeals, asserting the court erred in concluding that section 910.3B applied to his acts giving rise to his conviction for burglary in the first degree. We affirm.

I. Background Facts.

Certain facts are established by McFarland's written plea of guilty; the in-court plea colloquy and plea proceeding; and the minutes of evidence, which McFarland acknowledged to be true.

On August 8, 2008, McFarland and co-defendant Damion Seats were involved in a fight with Reuben Ramirez and Gabina Labra at 1504 North Adams in Mason City, a residence at which Ramirez was a renter. About two weeks later, in the evening hours of August 23, McFarland, Seats, and co-defendant

Andre Wells Jr. were present at a party at the mobile home of a Nate Lee in Mason City.

In the late evening hours of August 23, or early morning hours of August 24, Andre Wells Jr. acquired a .25 caliber pistol from the home of his father, Andre Wells Sr. Thereafter the three co-defendants were together in the bathroom at Nate Lee's residence, at which time the pistol's magazine was loaded with ammunition, the magazine was placed in the pistol, and a bullet was loaded into the pistol's firing chamber.

The three co-defendants discussed going to the 1504 North Adams residence of Ramirez and their purpose for doing so. McFarland, who had a vehicle present, agreed to drive the three to 1504 North Adams. The pistol was placed in a boxing glove in the trunk of McFarland's vehicle, and McFarland drove to 1504 North Adams in the early morning hours of August 24.

After arriving at Ramirez's residence, the three co-defendants got out of the vehicle and McFarland opened the trunk to retrieve the pistol. Co-defendants Seats and Wells Jr. concealed their faces, took the pistol, and entered Ramirez's residence without permission. McFarland waited their return to his vehicle.

Ramirez had apparently left to see his girlfriend shortly before the three co-defendants arrived. Isadoro Cervantes-Erreguin was sleeping on a sofa in the living room. Seats, perhaps believing that Cervantes-Erreguin was Ramirez, approached the sofa and shot Cervantes-Erreguin five times with the .25 caliber pistol, killing him. McFarland and his two co-defendants then fled, with McFarland driving his vehicle and his co-defendants and the pistol aboard.

McFarland drove to Seats's sister-in-law's apartment, near which Seats then hid the pistol.

The three co-defendants were jointly charged with murder in the first degree and burglary in the first degree arising out of the events of early August 24. From the prosecuting attorney's statement at McFarland's sentencing hearing, it appears that co-defendant Seats was convicted of murder in the first degree, and co-defendant Wells Jr. was convicted of involuntary manslaughter. McFarland pled guilty to and was convicted of aiding and abetting burglary in the first degree.

As noted above, on appeal McFarland claims the district court erred in ordering him to pay restitution of $150,000 jointly and severally with his two co-defendants.

II. Scope of Review.

"We review restitution orders for correction of errors at law. When reviewing a restitution order, we determine whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010) (citations and internal quotations omitted). We also review issues of statutory interpretation and application for correction of errors at law. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000).

III. Discussion.

Iowa Code section 910.3B(1) provides, in relevant part:

> In all criminal cases in which the offender is convicted of a felony in which the act or acts committed by the offender caused

> the death of another person . . . the court *shall* . . . order the offender to pay at least one hundred fifty thousand dollars in restitution to the victim's estate if the victim died testate. If the victim died intestate, the court shall order the offender to pay the restitution to the victim's heirs at law . . . .[1]

(Emphasis added).

McFarland initially points out that at sentencing both the prosecutor and defense counsel opined that section 910.3B did not apply. He appears to argue that the court therefore erred in ordering the $150,000 in restitution. We disagree.

McFarland's written plea of guilty indicates an understanding on his part that the State was not then requesting restitution from him. It further indicates, however, that McFarland "understand[s] any plea agreement or sentencing recommendation is not binding on the court and, at the time of sentencing, the court can impose any sentence it finds appropriate, up to the maximum penalties permitted by law." In addition, as noted above, McFarland's written plea of guilty acknowledges that he will be ordered to make restitution for damages resulting directly from the crime to which he is pleading guilty.

Restitution is a phase of sentencing. *State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996). When the circumstances described in section 910.3B(1) (a defendant convicted of a felony in which the act[s] committed by the defendant caused the death of another person) apply, the district court has a mandatory duty to impose the restitution award of $150,000 called for by the statute. *See State v. Klawonn*, 609 N.W.2d 515, 521-22 (Iowa 2000) (holding the use of the

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[1] The district court ordered the $150,000 paid to Isadoro Cervantes-Erreguin's heirs at law. No claim is made that Cervantes-Erreguin died testate.

word "shall" in section 910.3B(1) creates a mandatory duty); *see also Jenkins*, 788 N.W.2d at 643-44 (holding the use of the word "shall" in section 910.2 left judges no discretion to decline to impose restitution).

We conclude, as the district court apparently did, that the mere fact the prosecutor and defense counsel were both of the opinion section 910.3B(1) did not apply to the facts, did not preclude the court from ordering the restitution in question if the court correctly found that section 910.3B(1) did apply.

McFarland asserts that section 910.3B(1) does not apply to the facts. He argues the district court erred in finding that his acts were a proximate cause of Cervantes-Erreguin's death, stating:

> USING A PROXIMATE CAUSE ANALYSIS[,] DEFENDANT'S ACTIONS DID NOT CAUSE THE DEATH OF ANOTHER PERSON

In order for the restitution provided for by section 910.3B(1) to be imposed, "the commission of the offense must have been the proximate cause of the victim's death." *State v. Izzolena*, 609 N.W.2d 541, 553 (Iowa 2000). The definition of "proximate cause" in criminal cases is identical to its definition in civil cases. *State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992). A defendant is criminally responsible for a death if his acts were a proximate cause of the death. *See id.* ("[A] defendant cannot escape criminal responsibility for homicide merely because factors other than his acts contributed to the death, provided such other factors are not the sole proximate cause of death."); *see also State v. Wissing*, 528 N.W.2d 561, 565 (Iowa 1995) (holding that for a factor other than the defendant's acts to relieve the defendant of criminal responsibility for homicide, the other factor must be the sole proximate cause of death).

Until recently, Iowa's rule was that a defendant's conduct was a proximate cause of death if (1) the conduct was a substantial factor in bringing about the death, and (2) no rule of law relieved the defendant of liability because of the manner in which the defendant's conduct resulted in the death. *See, e.g., Hubka*, 480 N.W.2d at 869 (citing the civil, dram shop case *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 349 (Iowa 1991). Proximate cause was based on the concept of foreseeability. *State v. Ayers*, 478 N.W.2d 606, 608 (Iowa 1991). Quoting 40 Am. Jur. 2d *Homicide* § 22, at 314 (1986), and citing 40 C.J.S. *Homicide* § 90, at 473-74 (1991), the court stated in *Ayers*:

> We understand the rule to be as follows:
>
> > One is deemed guilty of culpable homicide only if the act causing death is either actually or constructively his; death must have resulted from an act committed by the accused or by someone acting in concert with him, or acting in furtherance of a common object or purpose, as distinguished from someone acting independently or in opposition to him . . . where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose for which the parties were assembled or combined together . . . .

Ayers, 478 N.W.2d at 608-09. Proximate cause issues are genuinely for the fact finder. *Id.* at 608.

McFarland argues in part that the facts do not support a finding that his acts were a "substantial factor" in bringing about Cervantes-Erreguin's death. McFarland was aware of the loaded pistol. He concealed or helped conceal it in the trunk of his vehicle. McFarland drove himself, his two co-defendants, and the loaded pistol to the Ramirez residence. It readily appears that the trip was not

designed or intended to result in a social visit, but rather was for a confrontation and in all likelihood to "even the score" or exact revenge for the August 8 fight. McFarland observed Seats and Wells disguise themselves, retrieved or assisted in retrieving the pistol from his trunk, and watched is two co-defendants go to and enter the residence. He stood by to aid and participate in their escape from the area, drove himself and his two co-defendants from the area, and participated in the concealment of the pistol used in the homicide.

The district court could reasonably find from these facts that Cervantes-Erreguin's death resulted from an act committed by persons acting in concert with McFarland and in furtherance of an object or purpose that was common to all three co-defendants. It could reasonably find that McFarland's conduct was a substantial factor in bringing about Cervantes-Erreguin's death and that the death was a foreseeable result of the acts of McFarland and his two co-defendants. McFarland makes no claim that a rule of law relieves him of otherwise applicable criminal responsibility for Cervantes-Erreguin's death. Under what was until recently Iowa's formulation of proximate cause, we find no error in the district court's determination that McFarland's conduct was a proximate cause of Cervantes-Erreguin's death. *See, e.g., State v. Brown*, 589 N.W.2d 69, 75 (Iowa Ct. App. 1998) (holding that the defendant's engagement in conduct that created a very high risk of death or serious bodily injury to others was a proximate cause of a death).

In *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), our Iowa Supreme Court has recently revisited and revised our formulation of proximate

cause. *See id.* at 836-39. That reformulation of proximate cause has also affected any analysis of "factual cause." *See id.* at 837-38.

The court's November 13, 2009 opinion in *Kaczinski* occurred before McFarland's March 11, 2010 guilty plea and the subsequent sentencing and imposition of restitution. The reformulated test for proximate cause in *Kaczinski* thus arguably applies to the issue raised in this appeal.

In *Kaczinski*, the court noted it had previously applied the test articulated in the Restatement (Second) of Torts when determining whether a defendant's conduct constitutes a proximate (legal) cause of harm. *Id.* at 836. It stated that such a formulation had been the source of uncertainty and confusion, at least in part because it confused a factual determination (substantial factor in bringing out harm) with policy judgments (no rule of law precluding liability) by including both within the legal (proximate) cause test. *Id.* at 836-37. The court thereafter noted that in order to eliminate the confusion of factual and policy determinations resulting from the Restatement (Second) formulation of proximate (legal) cause, the drafters of the Restatement (Third) of Torts have opted to address "factual cause" and "scope of liability" (proximate cause) separately, *id.* at 837, and that the "assessment of scope of liability . . . no longer includes a determination of whether the actor's conduct was a *substantial factor* in causing the harm at issue, *a question properly addressed under the factual cause rubric*." *id.* at 837-38. (emphasis added). The court found the drafters' clarification of scope of liability sound, and adopted it. *Kaczinski*, 774 N.W.2d at 839. In doing so it noted that foreseeability remains relevant in scope-of-liability determinations. *Id.* at 839.

Causation has two components, a "cause in fact" or "but-for" component, and a "legal cause" or "proximate cause" component. *Faber v. Herman*, 731 N.W.2d 1, 7 (Iowa 2007). Although McFarland states his issue as involving "proximate cause analysis," he argues in part that the facts do not support a finding that but for his actions Cervantes-Erreguin would not have died. Under our supreme court's reformulation of proximate cause in *Kaczinski*, these arguments go not to proximate cause ("scope of liability" in *Kaczinski*) but to "factual cause."

> We apply a "but for" test to determine whether the defendant's conduct was a cause in fact of the plaintiff's harm. Under that test, "the defendant's conduct is a cause in fact of the plaintiff's harm, if, but-for the defendant's conduct, that harm would not have occurred. The but-for test also implies a negative. If the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm.

Yates v. Iowa West Racing Ass'n, 721 N.W.2d 762, 774 (Iowa 2006) (quoting *Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005)).

We have above summarized McFarland's actions during the late evening hours of August 23 and early morning hours of August 24, 2008, and need not repeat them in detail here. A fact finder could reasonably determine that but for McFarland participating in concealing a fully-loaded and ready-to-fire pistol in the trunk of his vehicle; providing the vehicle to transport the pistol, his two co-defendants, and himself to the Ramirez residence; waiting to aid in the escape from that residence; and providing the means to escape, Cervantes-Erreguin would not have been killed in the early morning hours of August 24. Similarly, a fact finder could reasonably determine that Cervantes-Erreguin would not have

been killed on August 24 if McFarland had not taken the actions he in fact took. We find no error in a determination that McFarland's conduct was a factual cause of Cervantes-Erreguin's death.

AFFIRMED.