IN THE COURT OF APPEALS OF IOWA

No. 3-292 / 12-0742
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH E. TERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

A defendant contends (1) the evidence was insufficient to support the jury's finding of guilt on a serious injury by vehicle charge, (2) the district court should have merged the serious injury by vehicle and operating while intoxicated sentences, (3) the prosecutor committed misconduct in mischaracterizing the defendant's blood alcohol content, and (4) defense counsel was ineffective in several respects. **AFFIRMED.**

Stephen P. Dowil of Booth Law Firm, Osceola, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

A Des Moines police officer controlling traffic during the Iowa State Fair was injured when a vehicle driven by Keith Terry struck him. A jury found Terry guilty of serious injury by vehicle and operating a motor vehicle while intoxicated.[1] On appeal, Terry asserts: (1) the evidence was insufficient to support the jury's finding of guilt on the serious injury count, (2) the district court should have merged the serious injury and OWI sentences, (3) the prosecutor committed misconduct in mischaracterizing Terry's blood alcohol content, and (4) his trial attorney was ineffective in several respects.

I. Sufficiency of the Evidence—Serious Injury by Vehicle

The jury was instructed that the State would have to prove the following elements of the reckless driving alternative of serious injury by vehicle:

> 1. On or about the 19th day of August, 2011, the defendant, KEITH EDWARD TERRY, drove a motor vehicle in a reckless manner.
> 2. The defendant, KEITH EDWARD TERRY's, act of driving a motor vehicle in a reckless manner unintentionally caused serious injury of Phoukam Tran.

The court further instructed the jury, in part, that a person is "reckless" when the person "willfully disregards the safety of persons or property." The court also advised the jury that "[d]riving under the influence is itself a 'reckless act.'"

On appeal, Terry focuses on the causation element of the crime. He argues there was insufficient evidence to establish that his conduct was the "proximate cause" of Tran's injuries. The State responds that Terry failed to preserve error. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) ("To

[1] Terry pled guilty to possession of marijuana, and that conviction is not at issue on appeal.

preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal."). We disagree with the State's assertion.

In arguing his motion for judgment of acquittal, Terry's attorney stated, "[W]e also believe the State has failed to prove beyond a reasonable doubt that Mr. Terry caused a serious injury to Officer Tran by—for being reckless." While the attorney did not refer to "proximate cause," the gist of his challenge was apparent. Accordingly, we proceed to the merits, reviewing the jury's finding of guilt for substantial evidence. *See State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

The district court instructed the jury that "[t]he conduct of the defendant is a proximate cause of the serious injury of Phoukham Tran when it is a substantial factor in producing the serious injury and when the serious injury would not have happened except for the conduct." The jury reasonably could have found the following facts.

Terry and fellow employee Phillip Stilley left work and went to the fair. They had a couple of rounds of beer at the fair, then consumed more alcohol at a nearby bar where they had parked Terry's vehicle. They also smoked marijuana outside the bar.

Shortly before midnight, Terry and Stilley left the bar and got into Terry's truck. Terry drove his truck toward an intersection outside the fairgrounds. With the fair winding down for a midnight close, Officer Tran and another officer

entered the intersection to control traffic and facilitate pedestrian crossings. They wore neon green reflective vests and carried orange wands.

As Terry approached the intersection, Stilley noticed that traffic was stopped "due to the police officers directing traffic" and the passage of an ambulance. He quickly surmised Terry needed to slow down. Moments later, he "hollered 'stop' or 'whoa,'" but it was too late. Terry struck Tran, who flew into the air and landed on his back. Tran broke multiple segments of his ribs, fractured portions of his vertebrae, bruised his lungs, fractured his skull, ruptured his spleen, and experienced bleeding in his brain.

Officers detained Terry and transported him to the Des Moines Police Department. Terry failed three field sobriety tests Cchemical testing revealed breath alcohol content of .264, over three times the legal limit.

A jury reasonably could have found from this evidence that Terry drove his truck in a reckless manner and his reckless driving was the proximate cause of Tran's serious injuries. The jury could have made this finding whether the light at the intersection was red or green or whether Terry was going at or over the speed limit because, however the jury resolved these disputed facts, there was independent substantial evidence to establish the elements of the crime.

II. Merger

Terry next contends "the OWI verdict should have merged into the serious injury by vehicle verdict." This argument is premised on the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments for the same offense. *State v*. *Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). That proscription is codified in Iowa Code section 701.9 (2011), which states:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Terry appears to ground his argument on this statutory provision. Accordingly, our review is on error. *Id.*

In *State v*. *Pettyjohn*, 436 N.W.2d 65, 68 (Iowa Ct. App. 1988), this court concluded that operating while intoxicated was a lesser-included offense of homicide by vehicle. Key to that determination was the fact that the prosecutor charged Pettyjohn with the "operating while intoxicated" alternative of homicide by vehicle as well as the "recklessness" alternative of the crime. *Id.* The court concluded that the crime of operating while intoxicated was a lesser-included offense of the operating while intoxicated alternative of homicide by vehicle but was not a lesser included offense of the recklessness alternative of the crime. *Id.*

The crime of serious injury by vehicle also contains both alternatives for committing the crime. Iowa Code § 707.6A(4) (incorporating "operating a motor vehicle while intoxicated" alternative and "driving a motor vehicle in a reckless manner" alternative). Unlike in *Pettyjohn*, the jury in this case was only instructed on the recklessness alternative. *See* 436 N.W.2d at 68. We conclude operating while intoxicated is not a lesser-included offense of this alternative. *See id.*

We reach this conclusion notwithstanding the jury instruction that driving under the influence was a "reckless" act. As the Iowa Supreme Court stated, "Although driving under the influence is certainly reckless behavior, proof of recklessness is not an essential element of operating while intoxicated." *State v*. *Massick*, 511 N.W.2d 384, 387 (Iowa 1994).

III. Prosecutorial Misconduct

Terry argues that the prosecutor committed misconduct during closing argument when he stated,

> Mr. Terry could not have stopped that Ford F350. And why? Because at that time 26 percent of his blood was alcohol, a quarter of his blood at that time of the collision was alcohol.

As Terry points out, there was no testimony that 26% of his blood constituted alcohol.

Preliminarily, we question whether Terry preserved error on his challenge to this statement. Although there was an off-the-record discussion with the court immediately after the prosecutor made the assertion, the discussion was not subsequently committed to the record.

Assuming without deciding that error was preserved, the prosecutor's statement did not amount to misconduct because he immediately clarified that Terry's blood did not consist of twenty-six percent alcohol but instead his "BAC" was .264.[2] *See State v*. *Krogmann*, 804 N.W.2d 518, 526 (Iowa 2011) (setting forth the elements of a misconduct claim).

IV. Ineffective Assistance of Counsel

Terry argues that his trial attorney was ineffective in (a) failing to file a motion to suppress the alcohol test result, (b) failing to object to the admission of the alcohol test result, (c) appearing to concede an element of the serious injury

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[2] "Alcohol concentration" refers to "the number of grams of alcohol per any of the following:

a. One hundred milliliters of blood.
b. Two hundred ten liters of breath.
c. Sixty-seven milliliters of urine."

Iowa Code § 321J.1(1).

by vehicle crime, and (d) failing to request a change of venue. To prevail, Terry must show that counsel breached an essential duty and that prejudice resulted. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984).

"Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim." *State v*. *Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). We find the record adequate to address the first three issues.

(a) Failure to file a motion to suppress. Terry underwent a test to determine the alcohol in his system. Police used a machine known as the DataMaster to administer the test. Terry asserts that had his attorney filed a motion to suppress and succeeded in excluding the DataMaster test result, the State might have dismissed "the OWI charge or the case entirely." He acknowledges his attorney filed a motion in limine seeking to exclude the test result, but asserts that a ruling on that motion would not have definitively resolved the admissibility of the test result.[3] *See Twyford v*. *Weber*, 220 N.W.2d 919, 923 (Iowa 1974) ("Motions in limine may have the effect of precluding the introduction of certain evidence at trial, yet they are not the same as a motion to suppress evidence and the basis of the latter is completely different.").

The record reveals that the district court entertained a lengthy discussion about the merits of challenging the admissibility of the DataMaster test result via a motion in limine rather than a motion to suppress. The court ultimately accepted the State's assertion, raised in its own motion in limine, that Terry

[3] The court did not rule on Terry's motion in limine.

should have filed a motion to suppress if he wished to have the test result excluded at trial. At the same time, the court accepted the State's additional assertion that Terry should be precluded from arguing that the DataMaster was "per se" unreliable. According to the State, any variances from standard operating procedures would go to the weight rather than the admissibility of the test results.

The court's acceptance of the State's argument was effectively a ruling that the DataMaster test result was admissible. Subsequent discussions with the court confirm that Terry's attorney and the State took the court's ruling on the State's motion in limine to be a final ruling on the admissibility of the test result. In consonance with these discussions, the test result was admitted without objection, and the questioning centered on the reliability of the machine and operating procedures.

On our de novo review of the record, we conclude Terry received exactly the relief he now requests, a ruling on the admissibility of the test result. *See State v. Feddersen*, 230 N.W.2d 510, 512 (Iowa 1975) (entertaining as a motion to suppress a pretrial motion in limine "to suppress eyewitness identification" and concluding the motion "presented a question regarding admissibility of evidence which would and did eliminate the need for an in-course-of-trial-ruling thereon"); *State v. Guess*, 223 N.W.2d 214, 216 (Iowa 1974) (stating motion in limine was "more akin to a motion to suppress than a motion in limine and will be treated as such"). Accordingly, his attorney did not breach an essential duty in failing to file a motion to suppress.

(b) Failure to object to the admission of DataMaster evidence. In a related claim, Terry asserts his attorney should have objected to the admission of the test result at the time of trial. In light of our conclusion that the district court's ruling on the State's motion in limine was a final ruling on the admissibility of the test result, we further conclude that Terry's attorney did not breach an essential duty in failing to raise a trial objection to the admissibility of the test result.

(c) Misstatement during closing argument. Terry next argues that his attorney conceded an element of the State's case during his closing argument. On our de novo review, we disagree. *See Truesdell*, 679 N.W.2d at 615 (setting forth the standard of review).

Terry's attorney stated, "So if you find him guilty of the OWI, just by law you'll end up finding him guilty of the reckless." While we agree the statement sounds like a concession, it was an accurate restatement of the jury instruction that "[d]riving under the influence is itself a 'reckless act.'" *See State v. McQuillen*, 420 N.W.2d 488, 489 (Iowa 1988) ("[D]runk driving is itself a reckless act."). Terry's attorney simply reiterated a given instruction and quickly moved on to the crux of the case: whether Terry's operation of a motor vehicle while intoxicated caused Tran's injuries. We conclude Terry's attorney did not breach an essential duty in making the statement.

(d) Motion for change of venue. Finally, Terry argues that his attorney was ineffective in failing to move for a change of venue. We find the record inadequate to address the issue and we preserve this issue for postconviction relief proceedings.

V. Disposition

We affirm Terry's judgment and sentence and preserve for postconviction relief proceedings his claim that counsel should have requested a change of venue.

AFFIRMED.