IN THE COURT OF APPEALS OF IOWA

No. 8-818 / 07-1657
Filed November 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER JON McCOY,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Stephen P. Carroll, Judge.

Christopher McCoy appeals from his convictions for child endangerment resulting in death, and involuntary manslaughter resulting from a public offense. **AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Paul L. Martin, County Attorney, and Gregg Rosenbladt, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

HUITINK, P.J.

Christopher McCoy appeals from his convictions of child endangerment resulting in death, and involuntary manslaughter resulting from a public offense. McCoy contends the trial court erred in denying his request for a separate defense of accident jury instruction. Alternatively, he seeks merger of his two convictions. The State concedes that McCoy's involuntary manslaughter conviction should be merged into the greater offense of child endangerment resulting in death. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background Facts and Proceedings.

The record indicates McCoy lived with Mindy Prazak and her twenty-five month-old son, Riley. Riley died of head injuries sustained while in McCoy's care.

The State's trial information as amended charged McCoy with first-degree murder and child endangerment resulting in death. Under the State's version of the evidence, McCoy became angry at Riley and slammed or threw him down, causing the head injuries resulting in Riley's death. McCoy denied the State's allegations and claimed Riley was injured when he accidently fell out of bed.

At trial, McCoy requested the jury be instructed as follows:

> It is the theory of defense that Riley died from injuries he sustained due to an accidental fall. If the cause of the injury was due to an accidental fall, that is a complete defense to all of the charges. If after considering all of the evidence and jury deliberations, you have a reasonable doubt as to whether or not Riley died as a result of an accidental fall, you must find the Defendant not guilty.

The trial court denied McCoy's request for the following reasons:

> Accident has loosely been called an affirmative defense, but it really negates guilt by canceling out any of what we know as the mens rea requirements, the level of guilt.
>
> . . . .
>
> Here the theory is that [McCoy] was asleep and that he indicated "I don't know quite what happened except I heard a couple thumps that woke me up and there Riley is on the floor." So his theory of the defense, so to speak, is that he had nothing to do with what happened, which is really not an affirmative defense, but is a complete denial. And I think I've adequately instructed on the law to be applied to the case.

In addition to instructing the jury on the State's duty to prove each element of the offenses charged beyond a reasonable doubt, the court also instructed the jury:

> To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he or she did so voluntarily, not by mistake or accident.

The jury returned guilty verdicts on the child endangerment resulting in death count, as well as involuntary manslaughter resulting from a public offense, a lesser-included offense under the first-degree murder count. The trial court denied McCoy's motion for a new trial and separately sentenced McCoy to indeterminate consecutive five and fifty-year terms of incarceration resulting in this appeal.

II. Jury Instruction.

We review alleged errors in jury instructions for errors at law. Iowa R. App. P. 6.4; *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 748 (Iowa 2006). Error in giving or refusing jury instructions does not merit reversal unless the error results in prejudice to the party. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). "Prejudice exists when the rights of the defendant 'have been injuriously affected'

or the defendant 'has suffered a miscarriage of justice.'" *State v. Hartsfield*, 681 N.W.2d 626, 633 (Iowa 2004).

The defendant is entitled to a theory of defense instruction if the instruction is timely requested and supported by the evidence. *State v. McFarland*, 598 N.W.2d 318, 321 (Iowa Ct. App. 1999). There is no error if the substance of the requested instruction is included in other instructions. *State v. Freeman*, 267 N.W.2d 69, 70-71 (Iowa 1978).

Contrary to McCoy's claims, we conclude his theory of accident was sufficiently addressed by the earlier quoted jury instruction that was submitted, as well as the jury instructions requiring the State to prove all of the elements of each offense beyond a reasonable doubt. *See, e.g., State v. Johnston*, 221 Iowa 933, 941-42, 267 N.W. 698, 702 (1936) (instruction requiring State to prove beyond a reasonable doubt that fatal shot fired by defendant was intentional and not accidental).

Even if we were to conclude otherwise, the record fails to establish that McCoy was prejudiced by the trial court's refusal to submit the proposed instruction. McCoy could and did argue his accidental death theory to the jury. Moreover, the State presented a formidable array of physicians and expert witnesses whose opinions supported the State's version of the cause of Riley's head injuries and resulting death. An emergency room physician testified that a fall such as that described in Riley's history "doesn't produce all of the signs we saw in [Riley]." An intensive care physician who treated Riley testified Riley's symptoms "did not fit the reported method of injury." A forensic pathologist who performed Riley's autopsy testified that the cause of Riley's death was blunt force

injury to the head. He also noted the inconsistency with the history given to him. Moreover, the State's experts rebutted testimony by McCoy's expert witness, a biomedical engineer, that low level gravitational falls are lethal to children. *See, e.g.*, *State v. Griffin*, 576 N.W.2d 594, 597-98 (Iowa 1998) (instructional error was not prejudicial because weight of evidence of guilt was overwhelming). We affirm on this issue.

III. Merger.

As noted earlier, the State concedes that McCoy's manslaughter and child endangerment convictions should be merged. We accordingly reverse and remand to the trial court for entry of an amended judgment of conviction and sentence in conformity with our opinion.

We have carefully considered all of the issues McCoy raised on appeal and find them without merit or controlled by the foregoing.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.