IN THE COURT OF APPEALS OF IOWA

No. 9-226 / 08-0909
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH ALFRED DAILEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Steven J. Andreasen, Judge.

A defendant appeals from his conviction of homicide by vehicle. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Patrick Jennings, County Attorney, and James Loomis, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Joseph Dailey appeals from his conviction of homicide by vehicle. He challenges the sufficiency of the evidence and raises two ineffective-assistance-of-counsel claims. We affirm.

I. Background Facts and Proceedings

At approximately 11:00 p.m. on August 11th, 2007, Dailey was driving Danny Peterson home from a Sioux City bar. Just a few blocks from the bar, Dailey crashed into another vehicle and Peterson was killed in the accident. Dailey's blood alcohol content (BAC) was .212.

Subsequently, the State charged Dailey with homicide by vehicle in violation of Iowa Code section 707.6A(1) (2007). On March 18, 2008, a jury trial began. The State presented evidence that at the time of the accident, the night was clear and dry, the intersection was regulated with a marked turning lane and working stoplights, and the brakes on Dailey's vehicle were in proper working order. Ana Alcala testified that she was stopped at an intersection in the left-hand turn lane. Just prior to the crash, she had no indication of an approaching vehicle, except for a quick flash of light in her left or driver's side mirror. Before she had time to react, Dailey smashed into the rear driver's side of her vehicle. As a result of the impact, both vehicles spun around.

One of the first officers on the scene testified that Dailey was in the driver's seat of his vehicle. He was initially unconscious and breathing, but eventually regained consciousness. However, Peterson was unconscious and not breathing. Peterson's legs were in the passenger compartment but his upper body was laying on the seat, towards the driver. Because the passenger side of

the vehicle was mangled around Peterson, emergency workers needed to use the "jaws of life" to get him out of the vehicle. The majority of damage to Alcala's vehicle was on the rear driver's side and the majority of damage to Dailey's vehicle was on the front passenger side.

Both Dailey and Peterson were taken to a hospital, where Peterson was pronounced dead. Dailey suffered a gash to his head, requiring the need for twenty staples. Another officer described Dailey as agitated and not cooperative with hospital staff or officers. Dailey also resisted being put in handcuffs and threatened to kick an officer. It took four officers to escort Dailey from the building.

The State and Dailey stipulated pretrial that testing revealed Alcala had a BAC of zero and Dailey had a BAC of .212. They also stipulated to the fact that alcohol has a depressant effect on the central nervous system, which affects a person's judgment, decreases reaction time, and decreases motor skill abilities. As the level of alcohol increases, the effects of alcohol increase.

Dailey testified that he did not believe he was drunk when he left the bar and that he was not impaired to any extent to drive. He claimed that just prior to the accident, Peterson grabbed the steering wheel and made "some remark about '[l]et's go this way' and kind of laughed." Dailey attempted to correct the path of the vehicle, which he claimed explained his vehicle "swooping . . . to the left." Dailey could not remember whether he applied his brakes. However, Dailey did not tell officers of this version of events nor did he tell his own accident reconstruction expert until the night before the trial.

On March 21, 2008, a jury found Dailey guilty as charged. Dailey appeals and challenges the sufficiency of the evidence and raises two ineffective-assistance-of-counsel claims.[1]

II. Sufficiency of the Evidence

Dailey first asserts that the jury verdict was not supported by sufficient evidence. Our review is for errors at law. Iowa R. App. P. 6.4. A verdict will be upheld where there is substantial evidence in the record supporting each element of the charge. *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004). Substantial evidence is evidence that would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id*.

The State was required to show Dailey "unintentionally cause[d] the death of another by operating a motor vehicle while intoxicated, as prohibited by section 321J.2." Iowa Code § 707.6A(1). Dailey does not challenge the fact that

[1] Dailey also contends that because homicide by vehicle caused by OWI is a class B felony and homicide by vehicle caused by reckless driving is a class C felony, the State must prove "more than recklessness and more than recklessness in willful and wanton disregard for another's safety" in addition to proving OWI. *Compare* Iowa Code § 707.6A(1) (providing that homicide by vehicle, a class B felony, requires proof that (1) a person unintentionally caused the death of another (2) by OWI, as prohibited by section 321J.2), *with* Iowa Code Iowa Code § 707.6A(2)(a) (providing that homicide by vehicle, a class C felony, requires proof that (1) a person unintentionally caused the death of another (2) by driving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property in violation of section 321.277). However, Dailey overlooks two facts. First, reckless driving and OWI are two separate offenses. *See State v. Massick*, 511 N.W.2d 384, 387 (Iowa 1994) (discussing reckless driving and operating while intoxicated are separate offenses). The legislature has chosen to make an unintentional death while committing the public offense of OWI a more egregious offense than an unintentional death while committing the public offense of reckless driving. Next, the State is not required to prove reckless driving because operating while intoxicated is in itself reckless. *See Massick*, 511 N.W.2d at 387 ("Although driving under the influence is certainly reckless behavior, proof of recklessness is not an essential element of operating while intoxicated."); *State v. McQuillen*, 420 N.W.2d 488, 489 (Iowa Ct. App. 1988) ("[D]runk driving is itself a reckless act."). We find this argument without merit.

he was operating while intoxicated. Rather, he claims the State did not prove a causal connection between his intoxication and the accident.

Dailey testified that Peterson had grabbed the steering wheel just prior to the accident, causing it to swerve and Dailey was not able to correct the direction before it crashed into Alcala's vehicle. He supported this theory with his accident reconstruction expert opining Peterson was likely leaning to his left when the collision occurred. Based on that testimony, the jury was instructed that they could find Peterson's conduct was the sole proximate cause of his own death.

However, the jury was not required to accept Dailey's version of the events. *See State v. Garr*, 461 N.W.2d 171, 174 (Iowa 1990) (stating a jury may accept or reject a defendant's versions of events). Additionally, the jury may not have found Dailey's story credible, especially in light of the fact he told no one, not even his own expert, until the night before trial. *See id*. ("The very function of the jury is to sort out the evidence presented and place credibility where it belongs."). Regardless, even if the jury did find Peterson grabbed the steering wheel, it could have found that an unimpaired driver could have avoided the accident. *Cf. State v. Wieskamp*, 490 N.W.2d 566, 567 (Iowa Ct. App. 1992) (discussing that there was no possible way a sober driver with reasonable care would have avoided the accident). This would support the State's position, that even if Peterson had grabbed the steering wheel, it would not have been the sole proximate cause of the accident. *See State v. Wissing*, 528 N.W.2d 561, 565 (Iowa 1995) ("[F]or a factor other than the defendant's act to relieve the defendant of criminal responsibility for homicide, the other factor must be the *sole* proximate cause of death."). The jury was so instructed. Upon our review of the

record, we conclude that there was sufficient evidence to find Dailey, driving with a BAC of .212, guilty, beyond a reasonable doubt, of homicide by vehicle pursuant to Iowa Code section 707.6A(1).

III. Ineffective Assistance of Counsel

Generally, we review challenges to jury instructions for errors at law. Iowa R. App. P. 6.4. However, because Dailey claims his trial counsel was ineffective for either failing to object to a specific jury instruction or failing to request a specific jury instruction, our review is de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant is required to show by a preponderance of the evidence that (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish the first prong, a defendant must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney. *Id*. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94; *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To establish the second prong, the defendant must demonstrate the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *Ledezma*, 626 N.W.2d at 142.

A. Jury Instruction

In instruction number fourteen, the jury was instructed that in order to find Dailey guilty of homicide by vehicle, the State was required to prove (1) the defendant was operating while intoxicated; and (2) "the defendant's acts . . .

unintentionally caused the death of Danny Peterson." The next two instructions defined the terms "operate" and "under the influence." Instruction number seventeen stated: "The state does not need to prove how the defendant was driving. However, you may consider his manner of driving in deciding if he was under the influence of alcohol." *See* Iowa Crim. Jury Instruction No. 2500.8 (OWI—Method of Operation). Then, instruction number eighteen discussed alcohol concentration in the defendant's blood. In instructions number nineteen and twenty, the jury was instructed as to proximate cause.

Dailey contends that his trial counsel should have objected to instruction number seventeen because this instruction "freed the State from the responsibility of proving Dailey caused his passenger's death." This assertion is a continuation of the causation argument discussed above. First, we note that our supreme court has approved this particular instruction in an operating while intoxicated case, which is an element the State was required to prove. *State v. Hepburn*, 270 N.W.2d 629, 630 (Iowa 1978); *see also State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992) (discussing that in an involuntary manslaughter case, the jury instructions included this particular instruction). Additionally, due to the numerical placement of the instruction within the instruction packet, it clearly applied to the operating while intoxicated element. *See State v. Shanahan*, 712 N.W.2d 121, 140 (Iowa 2006) ("In evaluating a challenge to jury instructions, we consider the instructions as a whole and not separately."). Finally, the jury was instructed as to causation in three separate jury instructions. It rejected Dailey's theory that Peterson was the sole proximate cause of his own death, and found Dailey was operating a motor vehicle while intoxicated and that act

unintentionally caused the death of Peterson. *See* Iowa Code § 707.6A(1). Thus, we conclude that Dailey cannot establish either a breach of duty nor prejudice.

B. Involuntary Manslaughter Instruction

Dailey next contends that his trial counsel rendered ineffective assistance for failing to request that the jury be instructed as to felony involuntary manslaughter in violation of Iowa Code section 707.5(1) as a lesser-included offense of homicide by vehicle in violation of Iowa Code section 707.6A(1). *See Dominguez*, 482 N.W.2d at 391-92 (holding that aggravated misdemeanor involuntary manslaughter is not a lesser-included offense of homicide by vehicle)*; State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1998) ("[T]o preserve error, a defendant must request a lesser-included offense instruction or object to the court's failure to give it."). The State responds that felony involuntary manslaughter is not a lesser-included offense of homicide by vehicle. We agree.

"For a lesser included offense to be included in the greater, our test requires that the lesser offense 'be composed solely of some but not all of the elements of the greater offense.'" *State v. Thornton*, 506 N.W.2d 777, 780 (Iowa 1993) (quoting *State v. Coffin*, 504 N.W.2d 893, 896 (Iowa 1993)); *Jeffries*, 430 N.W.2d at 736 (stating if the lesser offense contains an element not part of the greater offense, the lesser cannot be included in the greater). In a jury case, we look to the marshaling instruction to determine whether a particular lesser crime must be submitted as a lesser-included offense of the crime charged. *Coffin*, 504 N.W.2d at 895.

In this case, the jury was instructed that in order to find Dailey guilty of homicide by vehicle, the State was required to prove that Dailey: (1) unintentionally caused the death of another person (2) by operating a motor vehicle while intoxicated as prohibited by section 321J.2. *See* Iowa Code § 707.6A(1); Iowa Crim. Jury Instruction 710.1 (Homicide by Vehicle (Intoxication)—Elements). Had the jury been instructed as Dailey requested, the jury would have also been instructed that in order to find Dailey guilty of felony involuntary manslaughter, the State was required to prove that Dailey: (1) unintentionally caused the death of another person (2) by the commission of a public offense, which in this case is operating a motor vehicle while intoxicated as prohibited by section 321J.2. *See* Iowa Code § 707.5(1); *see also State v. Wilson*, 523 N.W.2d 440, 441 (Iowa 1994); *Dominguez*, 482 N.W.2d at 392 (stating that operating while intoxicated is a public offense).

In comparing the two statutes, it is apparent both elements are common to the two offenses. "[T]he greater offense must have an element not found in the lesser offense. Without such a dissimilar element, it is not proper to submit a lesser included offense." *Coffin*, 504 N.W.2d at 896. Therefore, under the present circumstances, felony involuntary manslaughter is not a lesser-included offense of homicide by vehicle. Although the class B felony of homicide by vehicle carries a more severe penalty than the class D felony of involuntary manslaughter, the decision of which violation to charge rests in the hands of the prosecutor. *See Wissing*, 528 N.W.2d at 567 ("When a single act violates more than one criminal statute, the prosecutor may choose which charge to file, even if the two offenses call for different punishments."); *Coffin*, 504 N.W.2d at 896

(explaining the reasons, including prosecutorial discretion, for not requiring the submission of an included offense in which all of the elements of the offense charged are also contained).

In this case, Dailey was charged with the higher felony. Had Dailey's trial attorney requested an instruction on felony involuntary manslaughter, that request would have been properly denied. *See Wilson*, 523 N.W.2d at 441; *Coffin*, 504 N.W.2d at 896-97. Trial counsel is under no duty to make meritless objections; therefore, we conclude that trial counsel did not fail to perform an essential duty.

IV. Conclusion

Upon our review of the evidence, we find Dailey's conviction of homicide by vehicle was supported by sufficient evidence. Additionally, we conclude that Dailey's trial counsel was not ineffective for failing to object to the jury instruction or for failing to request the jury be instructed as to felony involuntary manslaughter. Therefore, we affirm.

AFFIRMED.