IN THE COURT OF APPEALS OF IOWA

No. 7-083 / 06-0883
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD ALLEN HEIEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, John Ackerman, Judge.

Richard Allen Heien appeals from his convictions following jury trial of homicide by vehicle, involuntary manslaughter, and leaving the scene of a personal injury accident. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Darin J. Raymond, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Richard Allen Heien appeals from his convictions following jury trial of homicide by vehicle in violation of Iowa Code section 707.6A (2003), involuntary manslaughter in violation of section 707.5(1), and leaving the scene of a personal injury accident in violation of section 321.261(2). Heien contends there was insufficient evidence to support his convictions. He also argues his trial counsel was ineffective for failing to argue the jury's verdict was against the weight of the evidence. We affirm.

I. Background Facts and Proceedings

A jury could have found the following facts from the evidence presented at trial: Shortly before dark on May 2, 2004, Joan Wilson's body was discovered on a rural Plymouth County road. Wilson had been running or jogging when she was struck from behind and killed by a hit-and-run driver. The absence of skid marks or scuff marks at the scene indicated the driver of the vehicle that struck Wilson made no attempt to swerve, slow down, or stop. The gravel road where the victim's body was found was well-maintained, level, and wider than normal. At the time of Wilson's death, the weather was dry, and there were no obstructions in the road. Wilson was struck at approximately 8:00 p.m.

During their investigation at the scene, law enforcement officers discovered several vehicle parts, including a parking light lens that displayed a part number. The officers contacted a parts manager at a local car dealership and determined the lens originated from the right side of a late 1980s or early 1990s Chevrolet pickup, Suburban, Blazer, or Tahoe. The morning after Wilson was killed, a deputy sheriff checked area farms and discovered a 1993 Chevrolet

pickup at Heien's residence.[1] The right front portion of the pickup had been damaged. It was apparent someone or something had struck the hood of the pickup. The deputy sheriff observed blood on the front fender and right side mirror. The deputy also discovered an empty eighteen-pack of Old Milwaukee beer and four or five empty beer cans in the pickup.

Investigators matched the vehicle parts recovered from the gravel road where Wilson was killed to the pickup. An analysis of the blood on the vehicle revealed the DNA from the blood matched the DNA profile developed from blood found on Wilson's clothing. Furthermore, an injury on the back of Wilson's right thigh corresponded with the height of the pickup's bumper, and a mark on her back corresponded with the hood of the vehicle.

The pickup located at Heien's residence was registered to Mike Flanagan; however, Flanagan had given the vehicle to Barry Ludwigs to satisfy a debt. Ludwigs spoke to Heien or Heien's brother, Steve, about doing some repair work on the truck. One of the brothers collected the truck from Ludwigs and took it to their residence. Ludwigs told the police Richard Heien was in possession of the truck on the day of the collision.

Heien admitted he had operated the vehicle during the late morning, afternoon, and early evening hours of May 2. Heien told law officers he left his residence in the pickup at approximately 6:00 p.m. He claimed he hit a deer about three miles from his house and returned home about ten minutes after he left. Russ Plueger, an acquaintance of Heien, thought he saw Heien driving on the road where Joan Wilson was killed sometime between 6:00 and 8:00 p.m.

[1] Heien shared his residence with several other people.

Law officers searched the area where Heien claimed to have struck a deer but found no signs of a dead or injured deer. An inspection of the pickup revealed no evidence Heien had hit a deer with the vehicle. An analysis of blood found on the front of the pickup detected only human blood.

On the day Wilson was stuck and killed, David Probst, a friend of the defendant, spoke with Heien at the Fuel-N-More gas station at approximately 12:45 p.m. Probst smelled alcohol on Heien's breath and saw Heien purchase beer. Probst asked Heien if he had "been partying already" and was "[g]etting some beer already."[2] Isaac Holtrop installed new tires on the pickup the day of the collision. He observed Heien consume one or two beers after Heien arrived at Holtrop's auto shop between noon and 1:00 p.m.[3] At around 5:00 p.m. that same afternoon, Travis Thorngren, another acquaintance of Heien, saw Heien drink a "couple beers" he took from the pickup.

On June 16, 2005, a grand jury returned an indictment charging Heien with three offenses: homicide by vehicle, involuntary manslaughter, and leaving the scene of a personal injury accident. Trial commenced on March 22, 2006. The jury returned guilty verdicts on all three charges. Following trial, Heien filed a motion for new trial and reasserted his previous motion for judgment of acquittal. The district court denied the motions.

On May 4, 2006, the court sentenced Heien to twenty-five years in prison for the homicide by vehicle conviction. No sentence was imposed for the

[2] Although Heien told a police officer he stopped at the gas station to purchase soda, security cameras at the station showed Heien purchasing an eighteen-pack of Old Milwaukee beer.

[3] There appears to be no dispute Heien went to Probst's shop after he left the Fuel-N-More.

involuntary manslaughter conviction because that offense merged with the homicide by vehicle conviction. Heien was also sentenced to one year for leaving the scene of a personal injury accident. His sentences were ordered to run concurrently. Heien now appeals.

II. Sufficiency of Evidence

Heien claims the record contains insufficient evidence to support his convictions of homicide by vehicle, involuntary manslaughter, and leaving the scene of a personal injury accident. All three offenses submitted to the jury required proof Heien was operating the pickup when the vehicle struck Joan Wilson. In addition, the offense of homicide by vehicle required, and the offense of involuntary manslaughter could be based on, proof beyond a reasonable doubt that Heien was under the influence of alcohol at the time Wilson was struck and killed.

We review sufficiency of evidence claims for the correction of errors at law, and we uphold the jury's verdicts if substantial evidence supports them. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). Substantial evidence is defined as evidence that "could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). 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, and we view the evidence in the light most favorable to the State. *Id*. Circumstantial and direct evidence are equally probative. Iowa R. App. P. 6.14(6)(*p*).

Heien first claims the trial court should have granted his motion for judgment of acquittal because the State failed to prove he was the operator of the vehicle that struck Joan Wilson. We disagree. Upon review of the record, we find abundant circumstantial evidence supports the jury's conclusion Heien was operating the pickup at the time it struck Wilson. *See State v. Braun*, 495 N.W.2d 735, 739 (Iowa 1993) (stating "[o]peration of the motor vehicle by the defendant may be established by circumstantial evidence."). The owner of the pickup entrusted the pickup to Heien and his brother so they could perform repairs on the vehicle. Heien admitted he had operated the vehicle during the late morning, afternoon, and early evening hours on the day Wilson was killed.

The evidence confirms Heien drove the pickup to Isaac Holtrop's shop between noon and 1:00 p.m. on May 2 to have tires mounted. Heien was witnessed driving the pickup at approximately 5:00 p.m. by Travis Thorngren. Heien admitted he drove the pickup for about ten minutes at approximately 6:00 p.m. Russ Plueger thought he saw Heien sometime between 6:00 p.m. and 8:00 p.m. driving on the road where Wilson was killed. Nothing in the record suggests anyone other than Heien drove the truck on the day Wilson died. At the time of the collision, Heien's brother had already eaten dinner and gone to bed early.

Heien claimed he hit a deer with the pickup shortly after leaving his home at 6:00 p.m. on May 2. Law enforcement officers investigated Heien's story but were unable to locate evidence of a dead or injured deer at the location described by Heien. Furthermore, the pickup showed no evidence of deer hair or any other indication that Heien hit a deer. As we have already mentioned, the

blood found on the truck came from Wilson, not a deer. From this evidence, the jury could have reasonably concluded Heien concocted the story about hitting a deer because he knew he had hit someone while driving the pickup and needed to explain the damage to the truck. We find the jury's conclusion that Heien was operating the truck at the time of the collision is supported by substantial evidence.

Heien also claims there was insufficient evidence to support a finding that he was operating a motor vehicle while under the influence. Once again, we conclude abundant circumstantial evidence supports the conclusion Heien was under the influence of alcohol at the time the pickup he was driving struck Wilson. An individual is "under the influence" when his or her alcohol consumption results in one or more of the following: (1) the person's reason or mental ability has been affected, (2) the person's judgment is impaired, (3) the person's emotions are visibly excited, or (4) the person has lost control of bodily actions or motions. *State v. Walker*, 499 N.W.2d 323, 325 (Iowa Ct. App. 1993). The individual's manner of driving is relevant evidence bearing on whether he or she was under the influence. *Id.*

Heien was observed buying and consuming beer the day of the collision. Probst witnessed Heien purchasing beer and smelled alcohol on the defendant's breath at about 12:45 p.m. Heien told officers he purchased soda at the gas station, but security cameras at the Fuel-N-More showed he purchased an eighteen-pack of Old Milwaukee beer. *See State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) (holding, "[a] false story told by a defendant to explain or deny a material fact against him [or her] is by itself an indication of guilt"). Holtrop saw

Heien drink one or two beers between noon and 1:00 p.m. Thorngren witnessed Heien drinking a couple of beers around 5:00 p.m. A deputy sheriff found an empty box from the eighteen-pack of Old Milwaukee beer in Heien's pickup along with four or five empty cans. Although Heien claimed other residents at his house could have consumed some of the beer, the box apparently never left the truck.

Heien's manner of driving is also compelling evidence he was impaired. The road where Wilson was stuck from behind was level, free from obstruction, well-maintained, and wider than normal. Heien struck Wilson despite the fact she was jogging close to the right side of the road and would have been visible from 1300 feet away at the time of the collision. The absence of skid marks or scuff marks shows the defendant did not attempt to swerve out of the way or stop the vehicle. Even though Heien's vehicle struck Wilson with enough force to propel her body ninety feet, he did not stop at the scene of the accident. *See id.* (holding that "[l]eaving the scene of the collision is evidence of impaired judgment").

Based on the evidence presented at trial, the jury could have reasonably concluded Heien was driving the pickup and was under the influence at the time he struck and killed Wilson. We find there was substantial evidence to support Heien's convictions of homicide by vehicle, involuntary manslaughter, and leaving the scene of a personal injury accident.

III. Ineffective Assistance of Counsel

Heien claims his trial counsel was ineffective for failing to argue the jury's verdict was contrary to the weight of the evidence at the time his motion for new

trial and reasserted motion for judgment of acquittal were argued. We review ineffective assistance of counsel claims de novo. *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998). We usually preserve ineffective assistance claims for postconviction relief; however, if the record sufficiently presents the issue, we will resolve the claim on direct appeal. *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997). We find the record in this case adequate to rule on Heien's ineffective assistance claim.

Heien has the burden to establish by a preponderance of evidence that his trial counsel was ineffective. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). A defendant receives ineffective assistance of counsel when: (1) counsel fails to perform an essential duty and (2) prejudice results. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). To establish the first prong of the test, a defendant "must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the second prong, a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). If Heien is unable to prove either prong, his ineffective assistance claim will fail. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003).

Defense counsel filed two motions after the jury returned its verdicts. He moved for a new trial, and he filed a "reasserted motion for judgment of acquittal." After hearing arguments regarding the motions, the trial court asked if it was Heien's position "that you're arguing strictly sufficiency of the evidence as

opposed to the weight of the evidence standard as set forth in *State v. Ellis*." *See State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998) (holding that "contrary to the evidence" for purposes of ruling on a motion for new trial means "contrary to the weight of the evidence"). Trial counsel responded, "it's just simply the sufficiency of the evidence, so the *Ellis* case doesn't apply." Heien now argues trial counsel was ineffective for failing to ask the court to apply the *Ellis* standard of review.

We find Heien has failed to show a reasonable probability that the result of the proceeding would have differed if his counsel had asked the district court to apply a "weight of the evidence" standard. The district court described the evidence supporting the jury's verdicts as "significant and substantial" and "very strong, very substantial." Upon review of the record, we are confident the defendant would not have prevailed if the court had analyzed his motion for new trial under a weight of the evidence standard. Because Heien failed to demonstrate he suffered any prejudice by his counsel's alleged breach of duty, we reject his ineffective assistance of counsel claim.

IV. Conclusion

Because we find no merit in any of Heien's appellate claims, we affirm his convictions of homicide by vehicle, involuntary manslaughter, and leaving the scene of a personal injury accident.

AFFIRMED.