

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 25 1984

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 25, 1984 192

vs.

)

4-314

83-640

ALFRED PETTES,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Pottawattamie County—Glen M. McGee, Judge.

Defendant appeals from his conviction of Attempted Murder, Iowa Code §707.11 (1981); Willful Injury, Iowa Code 708.4 (1981); and Going Armed with Intent, Iowa Code §708.8 (1981). On appeal, he asserts that (1) certain testimony should have been excluded; (2) he was denied effective assistance of counsel by his lawyer's failure to object to certain expert testimony; and (3) he was denied effective assistance of counsel by his lawyer's concession in his closing statement that defendant was "guilty of something." AFFIRMED.

Charles Harrington, Appellate Defender and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General and Mary Jane Blink, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

This is an appeal from the conviction and sentence of Defendant, Alfred Pettes, for Attempted Murder, Willful Injury and Going Armed with Intent in violation of Iowa Code §§707.11, 708.4 and 708.8 (1981), respectively. On September 23, 1982, the defendant was charged by trial information. A jury trial commenced on March 8, 1983, and a guilty verdict was returned two (2) days later. On April 26, 1983, the defendant was sentenced to a term of imprisonment not to exceed twenty-five (25) years on the charge of Attempted Murder, not to exceed ten (10) years for the Willful Injury charge and not to exceed five (5) years for Going Armed with Intent.

At or about 7:30 a.m., on September 9, 1982, Jennifer (Pettes) Hutchison, who was at the time married to the defendant, was driving to work. Jennifer testified that while driving she noticed the defendant behind her, and he appeared to be waving some papers. The defendant gestured for her to pull over, which Jennifer did. After she stopped, both persons got out of their cars. Defendant said he had some papers for her to sign. Jennifer further testified that defendant told her he had a gun and to get into her car. She testified that defendant said, "I'm going to kill you." The defendant pushed her into the car and a struggle ensued. She testified that plaintiff pointed the gun at her but she didn't hear any click of the trigger. At some point, Jennifer got out of the car and was grabbed by the defendant. She stated that she remembered being on the ground and that the defendant had his hands around her throat, was choking her, and beating her head on the pavement. Defendant admitted choking Jennifer.

According to the testimony of the defendant, on or about August 4, 1982, he was notified that his wife was suing him for divorce. He testified that although he and Jennifer had been having some marital problems in the past, he believed the marriage was on the mend when he was served with divorce papers. Defendant stated that he had problems coping with a new job, and a promotion had put him

under increased pressure. The defendant became very depressed about his family relationship and problems and decided to take his own life. Defendant testified that he wanted to kill himself in front of Jennifer. Defendant stated that he did not have plans of murdering his wife when he drove to see her. He testified that he wanted to shoot himself.

L. Notice Of Testimony Against Defendant.

Before trial, the defendant moved to exclude testimony of several State's witnesses because of an alleged State's failure to give timely notice of the witnesses' testimony through additional minutes of testimony. Defendant moved to exclude the testimony contained in each Notice of Introduction of Witness because the prosecutor had failed to give the defendant notice of additional testimony at least 10 days prior to trial.

The defendant was charged by a trial information. Procedural rules mandate that the prosecuting attorney shall, among other things, give the names of the witnesses whose evidence the attorney expects to use, and a "full and fair statement of the witness' expected testimony." See Ia. R. of Crim. P. 5(5) (1983). Ia. R. Crim. P. 18(2) requires the prosecuting attorney to give notice of additional testimony, not previously noticed, in the form of minutes of evidence. The prosecutor may use the additional testimony at trial "if he or she has given the defendant's attorney of record, or the defendant . . . , a minute of such witness' evidence, . . . at least ten days before the commencement of the trial." Ia. R. Crim. P. 18 (2) (1983). Rule 18 further provides for the circumstance when the prosecutor fails to give the proper notice:

3. Failure to give notice. If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses (except rebuttal witnesses) at least ten days before trial, the court may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses.

The county attorney, in filing the trial information on September 23, 1982, filed Minutes of Testimony of Dr. Crawford. These minutes stated that Dr. Crawford would be testifying that "in his opinion the injuries that [the victim, Jennifer] suffered were serious injuries." Also, that the doctor would testify "that his examination showed damage to the left eye, numerous cuts and broken bones in the face and head area." Minutes of Witnesses need not detail each circumstance of the testimony, but they must be sufficient—fully and fairly—to alert defendant generally to the source and nature of the evidence against him. State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). What constitutes a "full and fair statement of the witness' testimony" must necessarily be decided on a case-by-case basis. Id.

The record before us shows that the test laid out in Rule of Criminal Procedure 5(5) has been adequately met. The minutes of Dr. Crawford's testimony filed along with the trial information alerted the defendant generally to the source and nature of the evidence against him regarding the injuries to Jennifer. The Notice of Introduction of Witness filed February 25, 1983, gave a more specific statement of Dr. Crawford's expected testimony. However, this does not change the fact that the original filing of Dr. Crawford's testimony was adequate, and therefore the provisions of Rules of Criminal Procedure 18(2) and (3) were not invoked.

II. Claim Of Ineffective Assistance Of Counsel Because Of A Failure To Object To Certain Expert Testimony.

On any claim for ineffective assistance of counsel our review is de novo. R. of App. P. 4 (1983). The focal point for judging ineffective assistance of counsel claims is whether an attorney's conduct so undermined the adversarial process that the trial cannot be relied on as having produced a fair and just result Strickland v. Washington, ___ U.S. ___, 194 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The proper standard for judgments as to attorney performance is that of reasonably

effective assistance, and whether their performance fell within the normal range of competency for lawyers. See State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973). The test for determining if a defendant's claim that counsel's assistance was so defective as to require a reversal has two criterion. First, the defendant must show that counsel made error(s) so serious that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment; i.e., that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In the case at bar we do not even reach the second tier of the ineffective assistance of counsel analysis. On our review of the record we find that defense counsel was not deficient in his performance.

The Iowa Supreme Court follows a liberal rule on the admission of expert testimony and has given trial courts wide discretion in ruling on such matters. Duke v. Clark, 267 N.W.2d 63, 66 (Iowa 1978). There will be a reversal of the trial court decision to admit expert opinion testimony only for an abuse of trial court discretion. Id.; Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977). The admissibility of expert opinions lies within the sound discretion of the trial court. Hayes Bros., Inc. v. Economy Fire & Cas. Co., 634 F.2d 1119, 1125 (8th Cir. 1980). This state adheres to a liberal policy concerning the admissibility of opinion testimony. Such evidence will be admitted if it is of a nature that will aid the jury and is based upon special training, experience, or knowledge with respect to an issue in controversy. Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977). The admissibility of opinion testimony, lay or expert, has not been distilled into distinct rules. Rather, it rests in the sound discretion of the trial court, and the trial court's determination will not be disturbed on appeal unless manifest abuse of that discretion causing prejudice to the complaining party is shown. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973).

In the case before us, Dr. Crawford testified as to the eye injuries suffered by the victim. Defendant claims that his attorney should have objected to this testimony on the grounds that Dr. Crawford was incompetent to testify because he is not an expert. We hold that Dr. Crawford in his capacity as a medical doctor was competent to testify as an expert concerning the eye injuries of Jennifer (Pettes) Hutchison. As such, it was within the realm of competency for defendant's attorney to allow this testimony into evidence without objection. Dr. Crawford is familiar with and has treated injuries to the eye. His testimony aided the jury in determining the extent of Jennifer's injuries. The doctor testified that he could explain the procedures that were followed during the victim's operation. He explained what went on when he examined the victim and reported his findings. Dr. Crawford was duly qualified as an expert. Therefore defendant's counsel did not act deficiently in not objecting to his testimony, and as a matter of course, the defendant was not prejudiced by this fact.

III. Claim Of Ineffective Assistance Of Counsel Because of Statements Made By Defendant's Attorney During Closing Argument.

Defendant claims that his counsel rendered ineffective assistance because he stated on closing argument that "I know my client is guilty of something, and I can't deny that." When read in context with the record as a whole, this statement does not meet the defendant's burden of proving ineffective assistance of counsel. Defendant admitted during his own testimony that he assaulted his ex-wife. He was charged with attempted murder by the county attorney. Trial tactics may dictate that counsel forego certain avenues of defense in pursuit of the perceived best interests of the accused. By admitting defendant was guilty of something, the defendant stood a better chance of maintaining credibility with the jury, and a better chance of being found guilty of a lesser included offense, instead of the most serious charges. This is reasonable strategy under these particular circumstances. There is no showing of ineffective assistance of counsel.

AFFIRMED.

All judges concur except Schlegel, who dissents.