IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 5-266 / 94-719

STATE OF IOWA,

Appellee.

vs.

JAMES EDWARD DAVIS,

Appellant.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Davis appeals his conviction and sentence for second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Huitink, JJ.

HAYDEN, J.

James Davis, Defendant, was charged by trial information with second-degree robbery, stemming from an incident at Younkers on October 23, 1993. The testimony of several eyewitnesses was presented to the jury. Karmen Summers, a Younkers sales associate, testified she saw a suspicious man who eventually left with several leather coats. Jane Perdue, a customer service manager, tried to halt the robber and was pushed aside. Perdue testified she saw the robber's apparel, and noted his broad nose and predominant mouth. Jeffrey Stanley, a Younkers sales associate, testified he saw the robber running out the door with two coats. Stanley testified he helped Davis the day before the robbery. All three eyewitnesses identified Davis as the robber.

Following the filing of formal charges, defendant filed an application for authorization to retain an expert witness on eyewitness testimony on March 11, 1994. The trial court denied the application on March 25, 1994, stating the opinion sought was not beyond the knowledge and experience of jurors. Davis subsequently filed a motion to reconsider on March 30, 1994. The trial court denied the motion to reconsider on the same grounds.

On April 1, 1994, the parties took the telephonic deposition of Dr. Thomas Sannito, regarding the reliability of eyewitness testimony. Jury trial commenced on April 4, 1994. The trial court would not allow the deposition holding it did not assist the jury in an ultimate determination of fact. Following the close of all the evidence,

the case was submitted to the jury. The jury returned a verdict of guilty. Defendant argues the trial court erred in not allowing him to obtain the services of an expert witness and present expert testimony.

I. Standard and Scope of Review.

Davis raises a claim concerning the right to an expert witness protected under the Sixth and Fourteenth Amendments of the United States Constitution. *English v. Missildine*, 311 N.W.2d 292, 293-94 (Iowa 1981). Generally, the scope of review in cases raising a constitutional claim is de novo. *State v. Jump*, 269 N.W.2d 417, 423 (Iowa 1978) (citation omitted). However, the standard of review employed is abuse of discretion. *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987) (citations omitted); *State v. Sanders*, 312 N.W.2d 534, 541 (Iowa 1981); *State v. Galloway*, 275 N.W.2d 736, 739 (Iowa 1979); *State v. Van Scoyoc*, 511 N.W.2d 628, 631 (Iowa App. 1993).

II. Expert Witnesses On Eyewitness Identification.

Defendant contends the trial court erred by not allowing defendant to obtain the services of an expert witness, and by excluding at trial, expert testimony on eyewitness identification. Iowa Rule of Criminal Procedure 19 (4) provides:

> *Witnesses for indigents.* Counsel for a defendant who because of indigency is financially unable to obtain expert or other witnesses necessary to an adequate defense of the case may request in a written application that the necessary witnesses be secured at public expense. Upon finding, after appropriate inquiry, that the services are necessary and that the defendant is financially unable to provide compensation, the court shall authorize counsel to obtain the witnesses on behalf of the

> defendant. The court shall determine reasonable compensation and direct payment pursuant to Iowa Code chapter 815.

Iowa R. Cr. P. 19(4). Iowa Rule 19(4) is intended to protect an indigent defendant's right to due process of law. *Coker*, 412 N.W.2d at 591-92. However, an indigent defendant is not entitled to "'anything which a wealthy one could purchase.'" *State v. Walters*, 426 N.W.2d 136, 140 (Iowa 1988) (quoting *State v. Campbell*, 215 N.W.2d 227, 229 (Iowa 1974)).

Two requirements are embodied in Iowa Rule of Criminal Procedure 19(4): (1) the defendant must be indigent; and (2) the services of an expert must be necessary to the preparation and presentation of an adequate defense. *Coker*, 412 N.W.2d at 592. On appeal, there is no dispute defendant is indigent. However, the trial court found expert testimony on eyewitness identification unnecessary to the preparation and presentation of an adequate defense because such opinion is not beyond the knowledge and experience of the jurors.

This case is governed by our supreme court's decision in *Galloway*, 275 N.W.2d at 736. A majority of the Iowa Supreme Court in *Galloway* stated eyewitness identification is not a proper subject for expert testimony. *Galloway*, 275 N.W.2d at 741 (Reynoldson, C. J., concurring specially and joined by six other justices). The court stated:

> In the final analysis, jurors daily experience the fragility of their own memories. They know recollection fades with time and is affected by the relative significance of the incident. . . .Explanation of the scientifically

> identified mechanisms which bring about memory decay may be of academic interest, but it is of little aid to the jury in judging reliability of the particular eyewitness before them.

Id. at 741. In addition, our supreme court cautioned to be slow to approve a rule injecting expensive experts into an area traditionally reserved for the factfinder. *Id.* at 742. Rather, the court commanded testing of reliability should be conducted by vigorous and specific cross-examination of the eyewitnesses. *Id.* at 741. In this case, defendant effectively cross-examined the eyewitnesses, allowing the jury to see the discrepancies and flaws in the testimony of various eyewitnesses. Further testimony from an expert witness explaining the mechanical process of memory decay in eyewitness identification would have been of little aid to the jury. *See, e.g., State v. Myers*, 382 N.W.2d 91, 95 (Iowa 1986) (expert witness testimony on the truthfulness of a witness should be excluded since credibility of a witness is a matter exclusively for the factfinder). We hold expert testimony on eyewitness identification was unnecessary for the preparation and presentation of an adequate defense.

III. Enactment of Iowa Rules of Evidence.

Defendant claims the enactment of the Iowa Rules of Evidence alters the analysis to be applied in determining the admissibility of expert testimony on eyewitness identification. Iowa Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 702. The committee comments to Iowa Rule of Evidence 702 and 703 hold the rules to be "consistent with prevailing Iowa case law," and specifically cite *Galloway*. Iowa R. Evid. Committee Comment 1983. In fact, *Galloway* has continued to be applied and upheld since the enactment of Rule 702 and 703. *See Myers*, 382 N.W.2d at 93-94; *Sanders*, 312 N.W.2d at 541; *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573, 578 (Iowa App. 1987). Thus, the Iowa Rules of Evidence have not altered or displaced the analysis to be applied.

We hold the trial court was within its discretion in denying defendant's application for appointment of an expert for eyewitness identification, and in excluding Dr. Sannito's deposition at trial. Defendant's conviction is affirmed.

AFFIRMED.