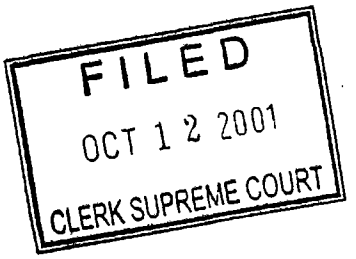
IN THE COURT OF APPEALS OF IOWA

No. 1-412 / 99-0601
Filed October 12, 2001



STATE OF IOWA,
Appellee,

vs.

GARY LYNN FREDRICK,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Gary Fredrick appeals from his convictions and sentences for assault while using or displaying a dangerous weapon and first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher M. Wilson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Gary Fredrick appeals his convictions and sentences for one count of assault while using or displaying a dangerous weapon, in violation of Iowa Code sections 708.1 and 708.2(3) (1999), and two counts of robbery in the first degree, in violation of Iowa Code sections 711.1(2) and 711.2 (1999). We affirm.

Background Facts and Proceedings. According to their own testimony, John Clark and George Coan were working in Clark's garage when two men walked in and began asking questions about one of Clark's cars. The taller of the two men then pointed a handgun at Clark and Coan, claimed to be an FBI drug enforcement agent, and ordered them to the ground. The two men took Coan's and Clark's billfolds, a total of $304 in cash, as well as Clark's cell phone and keys. The men fled into an alley, and Clark pursued them on foot, while Coan called the police. While in the alley the taller man shot at Clark, then both men fled in a white Chevrolet Corsica automobile, the shorter man driving. The taller man fired at Clark from inside the car.

Clark was able to obtain a partial license plate number, which he provided to the police. Clark described the man with the handgun as taller and thinner, with his accomplice being shorter, heavy-set, with longer hair and possibly a mustache. Coan also described the man with the gun as being tall and skinny, with the other being shorter and muscular. Clark described the gun as being a small weapon, such as a twenty-five or thirty-two caliber handgun. Two neighbors of Clark's also testified to seeing two men at the time of the shooting, and indicated that they fled in a white car. Other people reported hearing

firecracker-like sounds at the time of the incident, and to witnessing a white car flee the area.

According to both Clark and Coan, approximately one week later a homeless person arrived at Clark's residence and returned both wallets and the cell phone, as well as a pair of license plates. The man claimed to have found the items abandoned in a dumpster behind a local grocery store. The first four characters on the license plates matched the partial number Clark had seen on the suspects' car. Clark turned the license plates over to the police, who traced them to a 1988 white Chevrolet Corsica owned by a Shirley Kirkpatrick.

A search of the Kirkpatrick car turned up a twenty-five caliber automatic shell casing and a twenty-five caliber automatic round of ammunition, both located under the vehicle's back seat. In a previous search of the alley the police had located one twenty-five caliber automatic shell casing. The state crime laboratory was able to identify the two casings as being fired from the same weapon.

Shirley's Kirkpatrick's husband, Gary, fit the description of the shorter man described by Clark and Coan. Clark was able to identify Gary Kirkpatrick from a photo array as one of the two men who had robbed him, and repeated this information at trial. Coan was not able to identify Kirkpatrick's picture. From a second photo array both men identified Kirkpatrick's cousin, Gary Fredrick, as the assailant with the gun, and both repeated their identifications during trial.

Kirkpatrick entered into a plea bargain with the State, in which the State agreed to a suspended sentence and probation in exchange for Kirkpatrick's

testimony against Fredrick. Kirkpatrick testified that, at Fredrick's invitation, he drove to Fredrick's apartment in Shirley Kirkpatrick's Corsica. He stated that Fredrick then asked him to "go somewhere," informed him they were going to rob "a big drug dealer" named John Clark, and took possession of Kirkpatrick's twenty-five caliber automatic handgun. Kirkpatrick's testimony of the assault and robberies corroborated that of the State's witnesses, from the events in the garage through the escape in the Corsica, which Kirkpatrick admitted to driving both to and from the crime scene.

An area of dispute in the evidence and testimony presented was the description of the suspects' appearances on the day of the robbery. Kirkpatrick described Fredrick's attire on that day as being a long-sleeved shirt, jeans, a ball cap and sunglasses, and his own as being a colored, short-sleeved t-shirt and a cap. He could not recall whether he wore sunglasses as well. Kirkpatrick also testified that large portions of Fredrick's arms were covered with tattoos, and Kirkpatrick apparently uncovered his arms within the jury's view.

At trial Clark described both men as wearing long-sleeved shirts, hats and glasses or sunglasses. In his initial statements, however, he described the men as wearing light-colored t-shirts. During his trial testimony Coan stated that both men were wearing glasses and hats, and indicated the taller suspect was wearing a long-sleeved jacket, a t-shirt and blue jeans, with the shorter suspect wearing only a shirt and blue jeans. However, during his initial statements he only described the suspects as wearing shirts or t-shirts, and during trial was

repeatedly confused as to the color of the shirts. Neither Clark nor Coan recalled seeing tattoos or other identifying marks on the arms of either suspect.

Independent eyewitness testimony was also conflicting. One of Clark's neighbors testified that of the two men she saw at the time of the shooting, the taller man was wearing a long-sleeved shirt and a baseball cap. However, in a verbal, tape-recorded interview with police detective Arthur Vazquez, another witness, Josh Petry, indicated that the two men he observed fleeing the scene were wearing white t-shirts and blue jeans. He further stated that neither man had tattoos but that both men had guns, and gave a physical description of the shooter that more closely matched the appearance of Kirkpatrick than Fredrick.

Fredrick moved, over the State's objection, to introduce a transcript of Petry's taped interview, noting that neither side had been able to locate Petry. In conjunction with the motion Fredrick's attorney stipulated that if Detective Vazquez were called in rebuttal, he would testify that, in his own opinion, Petry was mentally retarded. The trial court then accepted the transcript by noting "16 is received." The transcript was the only evidence offered by Fredrick.

Although the closing statement was not recorded, the presiding judge and both counsel provided a "supplemental record" in the form of a written statement:

> At the request of Defendant the transcript of Joshua L. Petry's interview with police was admitted by the Court as Exhibit 16. During his closing argument the prosecuting attorney made reference to the exhibit and asked the jury to read and consider it carefully during their deliberations. The Judge interrupted the prosecuting attorney and informed him and defense counsel that exhibit 16 would not be allowed to go with the jury during deliberations. Since the attorneys had felt the exhibit was admitted and would therefore go with the jury during deliberations, the transcript had never been read to or by the jury. As a remedy and

over Defendant's objection the Judge had the prosecuting attorney read exhibit 16 to the jury during his closing argument.[1]

The jury then returned a verdict of guilt for one count of assault while using or displaying a dangerous weapon, and two counts of first-degree robbery. Fredrick appeals. He contends the trial court erred when it refused to allow the jury to review Petry's transcribed statement during its deliberations, and that trial counsel was ineffective in stipulating to Detective Vazquez's opinion of Petry's mental abilities.

Scope of Review. A trial court's decision to withhold an exhibit from the jury during its deliberations is reviewed for an abuse of discretion, and reversal is warranted only if abuse is shown and prejudice results. *See State v. Jackson*, 387 N.W.2d 623, 629 (Iowa Ct. App. 1986). However, as an allegation of ineffective assistance of counsel raises constitutional issues, our review is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App. 1994).

Withholding Transcript from the Jury. Fredrick criticizes the way in which Petry's statement was presented to the jury, and argues the jury was confused in light of instruction number five, which informed the jury live testimony, depositions and exhibits were evidence, but statements or comments by the lawyers were not.[2] Fredrick claims that, because the statement was read

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[1] This paragraph is the second section of a three-section statement compiled pursuant to a limited remand. The other sections are not relevant to Fredrick's arguments on appeal.

[2] That instruction stated, in pertinent part:

> You shall base your verdict only upon the evidence and these instructions.
>
> Evidence is:

by the prosecutor during closing, and the jury did not receive the written transcript as an exhibit, it did not understand the statement was evidence, and failed to give it proper weight. He appears to argue that the only valid method of avoiding this confusion would have been to allow the transcript into deliberations, and that failure to do so was therefore an abuse of discretion. He further argues he suffered prejudice as a result of the jury's failure to properly consider Petry's statement, asserting the varied and conflicting descriptions of the gunman made Petry's statement "crucial" to the jury's determination of the assailant's identity.

There is some merit to Fredrick's argument that the jury may have been confused as to how Petry's statement was to be treated. However, the admissibility of the exhibit, the propriety of the jury instruction and the manner in which Petry's statement was presented are not before us on review. Any consideration of those issues is limited to the extent they impact on the trial court's decision to withhold Petry's written statement from the jury. We therefore look to see if error was preserved on that limited question.

A claimed error must first be raised before the trial court, so that the trial judge is alerted to the claim and has an opportunity to correct any erroneous

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1. Testimony in person or by deposition.
2. Exhibits received by the Court. You may examine the exhibits closely, but, be careful not to alter or destroy them.

. . .

Sometimes, during a trial, references are made to pre-trial statements or reports, witness's depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to, which were not offered and received into evidence, are not available to you.

The following are Not evidence:

1. Statements, arguments, questions, and comments by the lawyers.

decision. *State v. Escobedo*, 573 N.W.2d 271, 276-77 (Iowa Ct. App. 1997). If the trial judge is denied such an opportunity, "we have no decision or action to review." *Id.* at 277. Here, the supplemental record indicates only that the prosecuting attorney read the statement to the jury "over Defendant's objection." We cannot tell from this statement what, precisely, was objected to by Fredrick's attorney.

While this statement may refer to an objection to the judge's decision to withhold Petry's statement as an exhibit, it could also indicate an objection to the reading of the statement by the prosecuting attorney during his closing argument. Even Fredrick, in his reply brief, only urges the later interpretation. Based on the record before us, we cannot find Fredrick's objection sufficiently specific to put the trial court on notice of his claim that Petry's written statement should be submitted to the jury. *See, e.g., State v. McPhillips*, 580 N.W.2d 748, 750 (Iowa 1998) (regarding suppression ruling); *State v. Howard*, 509 N.W.2d 764, 769 (Iowa 1993) (regarding hearsay objection). He has therefore failed to preserve this issue for our review.

***Ineffective Assistance** of Counsel.* Fredrick contends his trial attorney was ineffective when he stipulated to the fact that, if called in rebuttal to Josh Petry's interview transcript, Detective Vazquez would testify to his opinion of Petry's mental retardation. Fredrick argues Vazquez was not qualified to offer an expert opinion as to the level of Petry's mental capacity, and that his opinion was both irrelevant and an impermissible impeachment of Petry's statement. He indicates the record may be inadequate to resolve this claim, and requests that

we preserve it for postconviction review. While we do preserve ineffective assistance of counsel claims for postconviction proceedings where the record on appeal is inadequate for the purpose of review, *State v. Astello*, 602 N.W.2d 190, 198 (Iowa Ct. App. 1999), we find the record sufficient in this case.

To establish his claim of ineffective assistance of counsel, Fredrick must show his attorney's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To demonstrate prejudice he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome of his case. *State v. Carillo,* 597 N.W.2d 497, 500 (Iowa 1999). In meeting his burden, Fredrick must overcome the strong presumption of his trial counsel's competence. *State v. Ray,* 516 N.W.2d 863, 865 (Iowa 1994).

Detective Vazquez's testimony regarding Petry's mental abilities would have been an attempt to impeach Petry's credibility through a lay opinion. Lay opinion is admissible so long as it has an adequate foundation, will aid the jury, and is rationally based on the witness's knowledge or perception. *See Sonnek v. Warren*, 522 N.W.2d 45, 50 (Iowa 1994). Furthermore, a proper use of Vazquez's lay opinion would be impeachment of the testimonial quality of Petry's statement, *see State v. Turecek*, 456 N.W.2d 219, 224 (Iowa 1990), but only to

the extent it demonstrated a "defect in [Petry's] capacity to observe, remember or recount" his observations. *State v. Peterson*, 219 N.W.2d 665, 671 (Iowa 1974).

The record before us provides no indication of Vazquez's observations or perceptions, whether those observation or perceptions would be in any way relevant to Petry's powers of observation or recollection and, even if relevant, whether they would be sufficient foundation for his opinion. We therefore are unable to judge whether the testimony was in fact admissible. Nor does the record provide a clear picture as to whether counsel's decision to enter such a stipulation could be accurately characterized as a tactical decision that might be made by a reasonably competent attorney. *See State v. Oetken*, 613 N.W.2d 679, 683-84 (Iowa 2000) (finding that a trial tactic or strategy, even if improvident, miscalculated or mistaken, does not necessarily amount to ineffective assistance of counsel).

However, even if his attorney's performance was deficient, Fredrick cannot demonstrate he was prejudiced by the stipulation. Even if we assume Vazquez's opinion worked to diminish Petry's credibility in the eyes of the jury, there is not a reasonable probability that a refusal to stipulate would have resulted in a different verdict. *See Oetken*, 613 N.W.2d at 684. As previously noted, the State provided a substantial amount of evidence in support of its theory that Fredrick was the man who robbed Clark and Coan, and then shot at Clark while fleeing the scene. Consideration of Petry's statement, absent any impeaching evidence, does not create a reasonable probability of a different

outcome. Because Fredrick cannot demonstrate prejudice, his ineffective assistance of counsel claim must fail.

AFFIRMED.