

IN THE COURT OF APPEALS OF IOWA

No. 6-589 / 95-1349

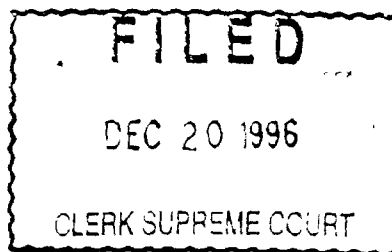
STATE OF IOWA,

Plaintiff-Appellee,

vs.

BOBBY WOODBERRY,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals from his convictions for first-degree murder in violation of Iowa Code section 707.2 (1993), and assault with intent to inflict serious injury in violation of Iowa Code section 708.2(1) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Dan Voogt and George Karnas, Assistant County Attorneys, for appellee.

Heard by Cady, P.J., and Vogel, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

Defendant Bobby Woodberry was charged with first-degree murder in the shooting death of Terrance Jackson. Jackson had been shot in the head, chest, and abdomen. Evidence at trial indicated defendant fired two of the shots during a struggle between one of his friends and Jackson inside a video arcade. Defendant began to exit the arcade but then returned and fired a shot into Jackson's head as he lay on the ground. Defendant claimed he shot Jackson in self-defense.

The jury found Woodberry guilty as charged. The district court entered judgment and sentenced him to mandatory life imprisonment.

The sole issue before us on appeal is whether trial counsel rendered ineffective assistance during the course of his representation of defendant.

Defendant argues his counsel was ineffective in failing to object to testimony given by State Medical Examiner Dr. Bennett. During his testimony, Dr. Bennett characterized Jackson's head wound as an "execution-type" wound. Defendant asserts Dr. Bennett's characterization of the wound was an improper opinion on guilt or innocence contrary to *State v. Myers*, 382 N.W.2d 91 (Iowa 1986). Furthermore, defendant contends the testimony was inadmissible under Iowa Rule of Evidence 702 as it failed to assist the jury in understanding the evidence. Finally, defendant asserts the testimony was improper as it was an inflammatory characterization which undermined defendant's defense of self-defense.

Defendant asserts the prejudicial impact of Dr. Bennett's testimony was compounded when defense counsel allowed Dr. Gary Peterson, the chief medical examiner for Hennepin County, Minnesota, to quote the portion of Dr. Bennett's deposition testimony which included his characterization of the wound as "execution style" and when defense counsel used the term "execution-type" in his closing argument.

Defendant contends the present record is adequate to resolve his claim of ineffective assistance. The State asserts the claim should be preserved for postconviction proceedings to allow trial counsel an opportunity to respond. Alternatively, the State argues defendant cannot meet his burden to prove a breach of duty by his counsel or prejudice.

When a defendant asserts a violation of a constitutional right, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Capper*, 539 N.W.2d 361, 367 (Iowa 1995). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.* We find the present record is adequate to resolve defendant's claim for ineffective assistance of counsel and address defendant's claim.

A defendant bears the burden of proving by a preponderance of the evidence he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). To prevail on a claim of ineffective assistance of counsel, a defendant

must show: (1) counsel failed to perform an essential duty; and (2) he was prejudiced by counsel's omission. *Id.* at 561-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result. *Id.*

Dr. Bennett performed an autopsy on Jackson. During the State's redirect examination, Dr. Bennett was asked to characterize the wound to Jackson's forehead.

Dr. Bennett responded:

That wound to the forehead is a shot fired with a gun in very close proximity of the skin surface. During the deposition it was asked and I characterized it as an execution-type gunshot wound to the head.

Part of defendant's self-defense theory was that at the time the head wound was inflicted on Jackson, the victim was partially erect and attempting to raise a gun. Defendant offered the opinion of Dr. Peterson to support his contention the victim was not lying on his back when the wound was inflicted.

During the redirect examination of Dr. Peterson, defense counsel asked him to consider alleged differences in the certainty of the medical opinions given by Dr.

Bennett in his deposition and at trial. In doing so, Dr. Peterson read aloud the following from Dr. Bennett's deposition:

It may have been the last shot fired. I don't say that with any degree of probability or medical certainty or anything else. It appears to be an execution-style wound. It is very close range.

During the closing argument defense counsel reiterated this characterization of the wound:

[Y]ou expect fairness from your government and your government isn't going to attempt to convict somebody in our society, label somebody as an execution-type murderer in the first degree. . . .

Defendant maintains that in allowing and utilizing this characterization of Jackson's head wound, his counsel rendered ineffective assistance. We disagree.

In our de novo review of the record, we find that in characterizing the wound to Jackson's forehead as "execution-type" and "execution-style," Dr. Bennett did not give an impermissible opinion as to the guilt or innocence of defendant. *See Myers*, 382 N.W.2d at 95; *State v. Akright*, 506 N.W.2d 465, 468 (Iowa App. 1993). Dr. Bennett's use of this characterization aided the jury in understanding the evidence and did not actually invade the jury's exclusive domain of determining defendant's guilt or innocence. *See Myers*, 382 N.W.2d at 95. The testimony was not improper as Dr. Bennett merely made the characterization and then described the gunshot wound and explained that it was the result of a "shot fired with a gun in very close proximity of the skin surface." *See State v. Dinkins*, 553 N.W.2d 339, 341 (Iowa App. 1996) ("[T]he manner in which the expert's opinion is expressed will often determine where

the fine line between proper and improper opinion testimony will be drawn.”) We find that this opinion is not improper under *Myers* and, as such, defense counsel’s failure to object to the use of this characterization did not breach an essential duty. *See Akright*, 505 N.W.2d at 468.

For these same reasons, we find Dr. Bennett’s testimony was not improperly admitted under Iowa Rule of Evidence 702. Iowa’s liberal view of the admissibility of expert opinion testimony has been consistently followed since its pronouncement in *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942). *See Myers*, 382 N.W.2d at 94; *State v. Buller*, 517 N.W.2d 711, 713 (Iowa 1994); *Akright*, 506 N.W.2d at 468. District courts have discretion in determining the admissibility of expert opinion testimony and reversal is justified only when the court has abused its discretion. *Buller*, 517 N.W.2d at 713; *State v. Hulbert*, 481 N.W.2d 329 (Iowa 1992).

Expert testimony consisting of scientific, technical or other specialized knowledge is admissible at trial when it is helpful for the trier of fact to understand the evidence in the case or to determine a fact in issue, as long as its probative value is not substantially outweighed by the danger of unfair prejudice.

Hulbert, 481 N.W.2d at 330; *Dinkins*, 553 N.W.2d at 341; Iowa R. Evid. 403, 702.

Here, Dr. Bennett’s testimony assisted the jury in understanding the evidence and determining facts in issue; therefore, it was proper and admissible. The trial court did not abuse its discretion in allowing the testimony and defense counsel did not render

ineffective assistance in failing to object to this testimony as he had no duty to do so.
See Dinkins, 553 N.W.2d at 342.

“In addition to rule of evidence 702, expert testimony must survive rule of evidence 403.” *Buller*, 517 N.W.2d at 713.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Iowa R. Evid. 403. We find that the probative value of the testimony was not outweighed by the danger of unfair prejudice. The characterization did not unfairly prejudice the defendant as Dr. Bennett did not give an improper opinion on whether the defendant was acting in self-defense. *See Myers*, 382 N.W.2d at 95-98. Thus, we reject defendant's contention that Dr. Bennett's characterization of Jackson's head wound was inflammatory or unfairly prejudicial.

Accordingly, we reject defendant's contention defense counsel rendered ineffective assistance when Dr. Bennett's characterization was repeated by Dr. Peterson and when defense counsel used the term “execution-type murderer” in his closing argument. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Defendant has not shown defense counsel breached an essential duty by allowing Dr. Peterson's testimony or by using this characterization in his closing argument. Furthermore, defendant has not shown he

was prejudiced by the testimony and closing argument to the extent that our confidence in the outcome of the trial is undermined.

In our de novo review of the record, we find that defendant has not met his burden of establishing his defense counsel breached an essential duty by failing to object to Dr. Bennett's characterization of the head wound; by allowing Dr. Peterson to reiterate the characterization made by Dr. Bennett; nor by utilizing the same characterization in closing argument. There is no reasonable probability that but for these alleged errors, the result of the trial would have been different.

AFFIRMED.