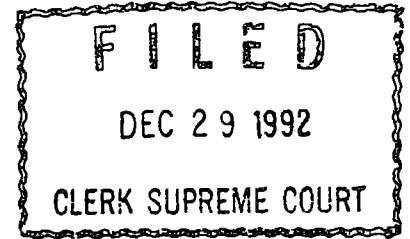


IN THE COURT OF APPEALS OF IOWA

No. 2-471 / 91-1350



STATE OF IOWA,

Plaintiff-Appellee,

vs.

LINDA J. HOOK,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County,
James R. Haverkamp, Judge.

Defendant appeals from her conviction for murder in the
first degree. **AFFIRMED.**

Peter W. Berger of Berger & Culp, P.C., Des Moines, for
appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich,
Assistant Attorney General, William E. Davis, County
Attorney, and Realff Ottesen and Hugh Pries, Assistant
County Attorneys, for appellee.

Heard by Donielson, P.J., and Sackett, J., and
McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on
this court by order of the Iowa Supreme Court.

SACKETT, J.

Defendant-appellant Linda J. Hook appeals from a jury verdict finding her guilty of the first-degree murder of her former husband, Steven P. Hook. We affirm.

Steven Hook was shot and killed after he and his fiancée finished watching a television broadcast of an Iowa football game. The person delivering the fatal shot was identified as defendant.

The evidence that defendant fired the fatal shot was very strong. The victim's dying words to the paramedics and the emergency room doctor were, "My ex-wife shot me." The decedent's fiancée testified that while she did not see the shot being fired, she had recognized defendant's voice and heard the decedent call defendant by name.

Defendant did not deny shooting Steven, rather, her defense was she lacked the mental capacity to deliberate, premeditate and form a specific intent. The question of her mental capacity was addressed by the two psychiatrists, both of whom testified at trial. Dr. Michael Taylor testified as an expert for the State and said defendant had the capacity to deliberate, premeditate and form a specific intent. Dr. Vernon Varner, called as a witness by defendant, testified that defendant lacked the ability to form the requisite intent to commit first-degree murder.

Defendant's sole issue on appeal is that her trial counsel was deficient in his performance to the extent that she was denied her right to counsel and her attorney's

performance prejudiced the defense so as to deprive her of a fair trial. Defendant does not rely on separate assertions of incompetence against her trial attorney, rather, she contends when taken collectively, the alleged mistakes her trial counsel made clearly deprived her of a fair trial. We affirm defendant's conviction but reserve to her the right to challenge in a postconviction proceeding certain of her claims of ineffective assistance of counsel.

The standard defendant must meet to prove her claim is a difficult one. State v. Hill, 449 N.W.2d 626, 628 (Iowa 1989). Defendant must prove both that her trial counsel failed to perform an essential duty and prejudice resulted from counsel's failure. Id.; State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984); Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

To show prejudice, defendant must show there is a reasonable probability that were it not for her trial counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 688, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984); Hill, 449 N.W.2d at 628.

Although ineffective assistance of counsel claims are generally reserved for postconviction relief proceedings, they are resolved on direct appeal when the record adequately presents them. State v. Ueding, 400 N.W.2d 550,

553 (Iowa 1987); Kellogg v. State, 288 N.W.2d 561, 564 (Iowa 1980).

Defendant first claims her trial attorney was ineffective in not objecting when the State asked a witness whether he had last seen defendant "after the murder or before the murder." Defendant contends the State's question sought to enter an opinion of the ultimate fact in the case; that is, whether defendant's act in shooting Steven was murder. Defendant contends the question was prejudicial but has failed to show how, but for the remark, the result of her trial would have been different.

The question was not proper, however, it was asked in isolation during a long trial. Admittedly, defendant had caused Steven's death. Objection to the question may have merely served to emphasize it. Looking at the strong evidence that supported the finding defendant fired the shot that killed the decedent, we cannot determine that if this reference had not been made in isolation at this lengthy trial the result of the proceedings would have been different. Defendant is not entitled to relief on this issue.

Defendant's next contention is her trial attorney was ineffective because he did not cross-examine two witnesses. Defendant had dated the two witnesses. These witnesses testified defendant did not appear depressed to them. Defendant contends her trial counsel should have used cross-examination to show the witnesses were not

experts and a person could be depressed without showing signs of depression. It certainly was obvious to the jury and it is obvious to us after examining the record of the witnesses' direct examination the two witnesses claimed no expertise in diagnosing mental illnesses. Furthermore, lacking expertise, the witnesses would have no basis to elaborate on the physical signs of depression. We find no breach of duty on this challenge.

Defendant claims her trial counsel was ineffective in failing to object to defendant's assertion of her right to remain silent. After the shooting, police officers went to defendant's home and told her she was a suspect in the shooting and advised her of her constitutional right to remain silent. One officer testified that after he advised her of her right to remain silent and her right to legal counsel, he asked her if she wanted to talk to them and she said no. The State also established at that time the defendant was quiet, asked no questions, seemed withdrawn, seemed to understand, responded in one word answers to everything she was asked, was extremely calm and acted appropriately while the officer talked with her in her home. The State questioned another officer who said they asked defendant to come with them and she did. He further testified defendant was asked if she wanted to take anything and was followed upstairs where she got her coat and her purse. He testified defendant consented to a search of her purse, and when he asked her if he could

search her car and if there were weapons in the house, she answered affirmatively. The officer said when he asked her to show him, she took him to the master bedroom, pointed to an end table next to the bed. He opened the top drawer, found two boxes of ammunition and a gun case and took the items into his custody. The officer said there was no further conversation between him and defendant on the way to the police department.

Two other officers also testified that after defendant was advised of her rights and asked if she wished to speak to the officers, she said no. The State also showed defendant answered all booking room questions appropriately. The officers testified to the arrival of defendant's attorney, defendant knew her rights and was utilizing those rights, and would not speak to the police officers without an attorney.

Examining this evidence, we agree with defendant the State introduced evidence that commented on her invocation of the right to remain silent. Had defendant's trial attorney objected to the admission of a number of these comments on her exercising her right to silence, the objections should have been sustained. A comment on a defendant's invocation of the right to silence is unconstitutional. See Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 98 (1976); State v. Porter, 283 N.W.2d 351, 352 (Iowa 1979); State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976). The State may not comment

on defendant's silence even for the purpose of establishing defendant's sanity. See Wainwright v. Greenfield, 474 U.S. 284, 295, 106 S. Ct. 634, 641, 88 L. Ed. 2d 623, 632 (1986).

The State acknowledges there were references in the record to the fact that defendant declined to speak to police officers after she was advised of her rights and, absent an underlying defense reason for failing to make the objection, defendant may be able to establish a breach of an essential duty by her trial attorney. The State alleges defendant is not entitled to relief because she cannot prove resulting prejudice.

The State argues the references to defendant's silence were not used to infer her guilt, to impeach her trial testimony, or to prove her sanity, therefore, no unfavorable inference was drawn from this reference, and the evidence against her was so strong that she cannot demonstrate without the testimony of her silence at the time of her arrest she would not have been acquitted of first-degree murder.

Unfortunately, defendant's brief gives us minimal assistance on the prejudice issue. However, we cannot say in looking at this record that defendant was not prejudiced by these admissions. The only real issue in the case was defendant's state of mind at the time of the shooting. The testimony of the two psychiatrists clearly created a factual dispute on this issue. The mental state of

defendant immediately after the shooting and her alleged ability to understand and employ her constitutional guarantees of silence may have been used by the jury in assessing her state of mind, whether the State advanced this factor in argument or not. It is not fair to use a defendant's silence to overcome a defendant's pleas of insanity. See Wainwright, 474 U.S. at 292, 106 S. Ct. at 639, 88 L. Ed. 2d at 630-31; Doyle, 426 U.S. at 619, 96 S. Ct. at 2245, 49 L. Ed. 2d at 98; Griffin v. California, 380 U.S. 609, 612-13, 85 S. Ct. 1229, 1232, 14 L. Ed. 2d 106, 108-09 (1965). It is fundamentally unfair to promise an arrested person her silence will not be used against her and breach that promise by using her silence to overcome an insanity defense. See Wainwright, 474 U.S. at 292, 106 S. Ct. at 639, 88 L. Ed. 2d at 631.

The defense counsel may have had strategic reasons for failing to object to this testimony. This matter would best be considered in a postconviction relief proceeding where defendant would have the opportunity to develop prejudice and defense counsel would have the opportunity to explain his strategy, if any. We reserve only this issue for postconviction relief procedure.

Defendant also contends her trial attorney should have moved to suppress the gun. Because the evidence is so overwhelming that defendant fired the fatal shot, we find defendant cannot show any prejudice in having the gun

admitted in evidence. We deny defendant's claim on this issue.

AFFIRMED.