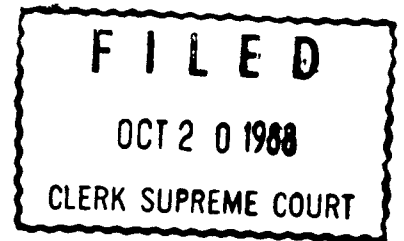


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
ROYAL NATE WELLS,)
Defendant-Appellant.)

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7-585
86-1802

Appeal from the Iowa District Court for Polk County
(Criminal No. 32292), Theodore H. Miller, Judge.

Defendant appeals from the trial court's judgment of
conviction and sentence on three counts of attempted
murder. **REVERSED AND REMANDED**

Charles L. Harrington, Appellate Defender, and B. John
Burns, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes,
Assistant Attorney General; James Smith, Polk County Attor-
ney; and Nan M. Horvat, Assistant Polk County Attorney, for
appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ., but
decided en banc.

SACKETT, J.

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Defendant Royal Nate Wells appeals his conviction and sentencing for three counts of attempted murder in violation of Iowa Code section 707.11 (1985). His arrest came after an April 1986 fight in a Des Moines convenience store where three men, including Steve Garity, were shot.

I.

Defendant contends the trial court erred in allowing Garity to testify at trial that defendant was the man who shot him. On August 1, 1986, Garity's deposition was taken. At the time of the deposition Garity was unable to identify defendant as the man who shot him. Defendant was present at the deposition. Garity identified defendant at trial and testified he was able to do so because after the deposition he had dreams of the shooting and could then identify defendant.

Defendant objected to the dream identification contending dream identification is not admissible because it is not based on facts and events of the occurrence. We agree with defendant it was error to allow Garity to identify defendant as the perpetrator of the shooting based on a dream.

The question is (1) was the out-of-court identification procedure impermissibly suggestive, and (2) if so, did it give rise to a very substantial likelihood of irreparable misidentification? State v. Haskins, 316 N.W.2d 679, 681

(Iowa 1982); State v. Mark, 286 N.W.2d 396, 403-04 (Iowa 1979).

Defendant argues the procedure was impermissibly suggestive because it occurred only after defendant met face-to-face with Garity at his deposition, and there was a very substantial likelihood of misidentification based on Garity's dream identification and testimony at trial that defendant's face regularly appeared in his dreams due to the trauma of the incident. The identification was made only after the witness saw defendant at the deposition. The identification of the defendant was derived from the dream not from observations made at the time of the shooting. See Haskins, 316 N.W.2d at 681.

There is no reliable way to determine whether the recollection through the dream is made from original recall, information learned from later events, including those at the deposition, or an unconscious filling in of details by the witness to fulfill the expectations of the county attorney or someone else. See United States v. Valdez, 722 F.2d 1196, 1200-1202 (5th Cir. 1984), (where the court discussed some of these factors in rejecting post-hypnotic testimony of witness who identified a person, after being hypnotized, known by the witness to be under suspicion).

We consider State v. Hall, 727 P.2d 1255, 1259 (Idaho Ct. App. 1986) where the court found error in admitting

victim's testimony of events of which he admitted having no previous recollection but which he claimed to have experienced in dreams. In Godfrey v. State, 365 S.E. 93, 93 (Ga. 1988) the court found mother's testimony concerning statements made by the victim while asleep were inadmissible because of the lack of information regarding the fundamental nature of sleep talk was insufficient to meet the indicia of reliability test. We distinguish People v. Opsen, 632 P.2d 602, 603-04 (Colo. Ct. App. 1981) where court allowed a witness to testify because identification was only partly based on witness' dream and there was no assertion the witness' basis, independent of dream, was unreliable or a result of impermissible suggestion.

We determine the trial court abused its discretion in admitting the testimony. We find it to be prejudicial. Defendant testified and admitted the fight. He denied shooting the gun. There were two men identified as starting the fight. Four individuals were injured. Two of the victims were unable to identify defendant as the person who shot them. The third victim identified defendant at trial but had not initially positively identified him. A female passenger in defendant's car parked across the street from the convenience store identified defendant as the one who pulled the trigger. There was testimony she had been using cocaine all day. There was no other

evidence identifying defendant as pulling the trigger. The evidence identifying defendant is not so overwhelming as to render the error harmless. See State v. Sowder, 394 N.W.2d 368, 373 (Iowa 1986).

The additional grounds of error raised by defendant should not occur on retrial. Consequently, we need not address them.

We reverse and remand for new trial.

REVERSED AND REMANDED.

All judges concur except Habhab and Donielson, JJ., who dissent.

HABHAB, J. (dissenting)

I respectfully dissent. The trial court did not commit error when it permitted Garity to identify the defendant as the man who shot him.

I concur with the majority that a witness may not testify to a matter that is based on a dream. Such testimony is inadmissible for the reason that the witness is not testifying to a matter from personal knowledge. Iowa R. Evid. 602. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. . . . This rule is subject to the provisions of Iowa Rule of Evidence 703, relating to opinion testimony by expert witnesses."

But here there is sufficient evidence to support a finding that Garity has personal knowledge that the defendant is the person who shot him. On direct examination, Garity was asked if he could identify the person who shot him. He said that he could. It was at this time that defense counsel asked permission of the court to examine Garity out of the presence of the jury. During the course of this examination, Garity admitted that when his deposition was taken, he could not identify the defendant, who at that time was sitting across the table from him, as the man who shot him. In explanation as to why he could now identify the defendant, Garity testified:

"Well, when you see this guy in your dreams time and time again, you learn what he looks like."

Mr. Garity's dreams were factual; that is, he relived in his dreams the shooting incident. In response to a question, "So you are having dreams and you are reliving this incident [the shooting] over and over again and now you say that you can identify this individual as a result of that?" he answered, "Yes."

The trial court made this observation and inquiry of the witness, "It is also a fact that he [Garity] was at the store when this happened. Now, I ask you, witness [Garity] whether or not your dreams are factual in accordance with your memory of the occurrence?" Garity replied, "Yes, they are." The court then stated, "And they add up to what you believe you saw at the time of the occurrence?" Garity replied, "Yes." The court at that time overruled defendant's motion.

When the parties returned to the courtroom, Garity, in front of the jury, was asked if he recognized the individual seated at counsel's table. He said that he did and when asked how, he replied that he (defendant) was the man who shot him. Defense counsel then was permitted to cross-examine Garity concerning his dreams and the effect those dreams had on his ability to identify the defendant.

Garity's testimony was based on his actual memories. He gave testimony of the events as they actually occurred

independent of his dreams. This distinguishes this case from the cited case of State v. Hall, 727 P.2d 1255 (Idaho App. 1986), where the witness remembered nothing during the time period from the afternoon before the shooting until he awakened in the hospital with a head wound. During the course of his examination, he admitted he was uncertain as to whether his testimony was based on actual memory or on dreams after the shooting. Clearly in Hall, it was error to allow the witness to testify as to his dreams; although the Hall court held it was harmless error for there was extensive testimony concerning the matter that was objectionable.

I conclude that the trial court acted properly in overruling the objection. In doing so, I also concur with the trial court that it is for the jury under these circumstances to determine the credibility and trustworthiness of the witness and the weight to be given his testimony. This type of testimony by Garity goes to his credibility as a witness, not to its admissibility.

But, even assuming it was error to admit the objectionable testimony, I believe the evidence identifying the defendant as the person who did the shooting is so overwhelming as to render the error harmless. Two witnesses identified the defendant as the person who pulled the trigger. It is true that the testimony of at least one of the witnesses is questionable, but the trustworthiness

and credibility of that witness is for the jury to weigh along with the other testimony.

I find no merit in the other assignments of error urged by the defendant. Therefore, I would affirm the trial court.

Donielson, J., joins this dissent.