

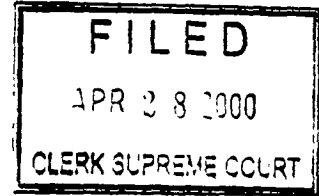
IN THE COURT OF APPEALS OF IOWA

No. 0-144 / 98-2047
Filed April 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ISIDRO RAMIREZ,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

Defendant appeals from his conviction for first-degree murder.

REVERSED AND REMANDED FOR NEW TRIAL.

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steve Foritano and Frank
Severino, Assistant County Attorneys, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

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HECHT, J.

On appeal from his conviction for first-degree murder, Isidro Ramirez contends the district court erred in: (1) excluding the testimony of an expert witness; (2) failing to give a proposed jury instruction on proximate cause; (3) finding sufficient evidence existed; and (4) refusing to let the defendant review peer review committee records of a witness. He also contends he was denied effective assistance of counsel. We reverse and remand for new trial.

I. Background Facts and Proceedings. Isidro Ramirez ("Ramirez") and four companions were together on the evening of March 28, 1998. An unidentified man approached in a vehicle and talked to Ramirez. The man offered to pay Ramirez and his companions \$100 each to beat up Daniel Hernandez ("Hernandez") who allegedly owed money for a drug transaction. The man led Ramirez and his companions to Hernandez's home. Four of the men, including Ramirez, entered the home where they assaulted Hernandez with a baseball bat and beer bottles. In the melee, one of the men shot Hernandez four times. Two bullets entered the victim's right leg, while the other two perforated both of his lungs and his stomach.

Hernandez was transported to Iowa Methodist Medical Center where he underwent surgery for his abdominal and chest wounds. The pulmonary injury required removal of a portion of one of his lungs and repair of a stomach perforation. Hernandez soon developed Acute Respiratory Distress Syndrome ("ARDS"), a condition which often develops in trauma victims despite successful treatment of the wounds which provoked the treatment. The blood vessels of

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ARDS patients typically leak and their body tissues retain fluid and swell. The treatment protocol for the condition requires infusion of additional fluids to keep internal organs properly perfused and commonly includes use of a ventilator.

Hernandez's treatment regimen included insertion of a tracheostomy tube. While shaving the patient, a nurse "nicked" the trach tube and caused a leak which decreased the effectiveness of the ventilation. A treating physician decided the trach tube should be replaced. Unfortunately, the patient's neck edema was so severe the replacement tube could not be inserted in a timely fashion. Hernandez could not breathe without mechanical assistance and he was asphyxiated.

Ramirez was charged with murder in the first degree. The State filed a motion for adjudication of law points to establish the testimony of Ramirez's medical expert, Dr. Lawrence Repsher ("Dr. Repsher"), on the issue of causation was irrelevant and therefore inadmissible. Ramirez resisted the motion, contending his due process rights would be infringed if he were prevented from presenting a causation defense through a qualified expert. The district court ruled the defense of intervening/superseding cause was not available to the defendant because negligent medical care was not, as a matter of law, the sole proximate cause of Hernandez's death, and the testimony of Dr. Repsher was irrelevant and therefore inadmissible. A jury subsequently found Ramirez guilty of murder in the first degree.

II. The Medical Testimony. The State presented expert testimony of Dr. Francis Garrity ("Dr. Garrity") who performed an autopsy on Hernandez. Dr.

Garrity testified, in relevant part, that Hernandez would have died from the gunshot wounds had he received no medical treatment and the decision to put Hernandez on the ventilator was precipitated by ARDS occasioned by the gunshot wounds. Dr. Garrity also testified the medical decisions – including the decisions to replace the leaking trach tube and to utilize high doses of narcotic medications – were the result of the gunshot wounds. He added Hernandez had worsening ARDS and a number of failing organ systems before the medical care providers attempted to replace the trach tube, and would have died within three or four days even if the “surgical misadventure” with the tube had not occurred. He stated Hernandez had an extremely poor prognosis even if the trach tube had been successfully replaced and the gunshot wounds “were, in fact, the inciting event, the proximate cause, the incident that resulted in everything essentially that followed.” Dr. Garrity concluded the gunshot wounds initiated the chain of events leading directly to Hernandez’s death. The State also presented the testimony of Dr. Akella Chandrasekhar (“Dr. Chandrasekhar”), a treating physician, in an attempt to explain and justify the medical treatment provided to Hernandez at the hospital.

Ramirez attempted to offer the testimony of Dr. Repsher to counter the testimony of the State’s medical experts. Dr. Repsher is a graduate of Harvard College and the University of Rochester School of Medicine. He is board certified in both internal medicine and pulmonary diseases, and practices the specialties of pulmonology and critical care medicine in the State of Colorado. In preparation for his testimony, Dr. Repsher reviewed the medical records of

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Hernandez and the depositions of the State's medical experts. At the hearing on the State's motion, he testified, in relevant part, as follows: (1) the cause of Hernandez's death was asphyxiation due to "iatrogenic loss" (inappropriate removal) of the tracheal cannula; (2) medical care provided to Hernandez was below the prevailing standard of care in several respects, including the introduction of excessive fluids; administration of improper medications (beta blocker – Metoprolol – which exacerbated a weak left ventricle, and Nimbex - a paralyzing agent employed immediately prior to the attempt to change the tube); and administration of excessive doses of other medications (Dilaudid and Lorazepam); (3) the medical decision to attempt to replace the tracheal cannula was "outrageous" under the circumstances (there "was just no – absolutely no reason to do it and all sorts of reasons not to do it. I mean it was just extraordinary. . . . It's completely irrational . . . a grossly irrational therapeutic maneuver . . ."); (4) the asphyxiation of Hernandez was "solely and immediately caused by the removal of the tube;" and (5) there was less than a fifty percent chance Hernandez would have died as a result of the gunshot wounds and ARDS if he had received appropriate medical care.

The district court concluded, as a matter of law, the defense of intervening/superseding cause was not available to Ramirez, and did not receive the testimony of Dr. Repsher into evidence.

III. Standard of Review. Our review of evidentiary rulings is for abuse of discretion. *State v. Haskins*, 573 N.W.2d 39, 45 (Iowa App. 1997). In order to show an abuse of discretion, one generally must show the court exercised its

discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999); *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). With regard to opinion evidence, the "general rule in this jurisdiction is one of liberality in the admission of opinion evidence." *State v. Rains*, 574 N.W.2d 904, 916 (Iowa 1998); *State v. Hummell*, 228 N.W.2d 77, 82 (Iowa 1975).

Where a defendant claims infringement of his constitutional right to present a defense, our review is de novo. *State v. Peterson*, 532 N.W.2d 813, 816 (Iowa App. 1995).

IV. Testimony of Expert Witness. Ramirez contends the district court erred by refusing to admit the testimony of Dr. Repsher. We have recently addressed this issue with regard to Ramirez's co-defendants in *State v. Garcia*, No. 98-2089 (Iowa App. Feb. 23, 2000) and *State v. Ramirez*, No. 99-0087 (Iowa App. Feb. 23, 2000). For the same reasons delineated in those decisions, we find the district court erred in refusing to receive the defendant's expert testimony and in refusing to consider the superseding cause defense. We reverse and remand for a new trial.

V. Discovery of Peer Review Records. Ramirez also contends the district court erred not allowing discovery of Dr. Chandrasekhar's peer review records pertaining to the treatment of the victim. Because this issue is likely to resurface at trial, we will address it. Section 147.135 speaks to the admissibility of peer review records:

Peer review records are privileged and confidential, are not subject to discovery, subpoena, or other means of legal compulsion for

release to a person other than an affected licensee or a peer review committee and are not admissible in evidence in a judicial or administrative proceeding other than a proceeding involving licensee discipline or a proceeding brought by a licensee who is the subject of a peer review record and whose competence is at issue.

Iowa Code § 147.135(2) (1997). Ramirez concedes this statutory privilege protects peer review committee documents from discovery in proceedings other than licensee discipline and this privilege furthers several important public interests. *See Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa 1996). However, he urges us to subordinate these interests to his constitutional right to present a defense. Ramirez cites no statutory or common law authority for the proposition that we may disregard the statutory privilege that protects peer review records from discovery in the context of this criminal case. Consequently, the district court did not abuse its discretion when it rejected Ramirez's request for production of Chendrasekhar's peer review records.

Having determined a new trial will be necessary, we do not reach the other issues raised by Ramirez.

REVERSED AND REMANDED FOR NEW TRIAL.

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