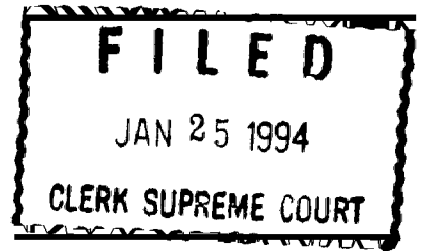


IN THE COURT OF APPEALS OF IOWA

No. 3-506 / 92-1446



STATE OF IOWA,

Appellee,

vs.

GREGORY DEAN CONNER,

Appellant.

Appeal from the Iowa District Court for Linn County,
L. Vern Robinson and William L. Thomas, Judge.

Defendant appeals his convictions, following a jury trial, of two counts of murder in the first degree and one count of second-degree arson. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; Denver D. Dillard, County Attorney; and Harold Denton, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., Hayden, J., and McCartney,
S.J.*

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

McCARTNEY, S.J.

On the evening of November 30, 1991, defendant Gregory Dean Conner visited the home of Charles and Lorena Martin in Cedar Rapids, Iowa. He left there at approximately 7:30 to 7:45 p.m., but admitted that he returned to the Martin residence at about 8:30 p.m.

At 9:15 p.m., neighbors noticed the Martin house was on fire and called the fire department. When the fire department arrived, the living room and part of the kitchen were on fire. Fire fighters found the body of Charles Martin in the kitchen and took it outside where they saw that Charles had been fatally shot in the abdomen. After the fire had been extinguished, fire fighters then found the body of Lorena Martin, who had also been fatally shot, in the living room.

An investigation by fire officials determined that the fire had been the result of arson. Six separate fires had been started in the basement, but they had gone out by the time the fire department arrived. After the basement fires had self-extinguished, gasoline had been poured on the two dead bodies and in the areas of the living room and kitchen, and then ignited.

Police officers were also called to the scene. They found the Martin home had been ransacked prior to the fire, with jewelry found on the floor in various places, and jewelry boxes stacked by the front door of the house. The investigation revealed that the Martins had been growing

marijuana in their basement. One shell casing was found in the kitchen and one was found in the living room, together with a pair of eyeglasses. The eyeglasses, found in the living room, were traced to defendant.

Investigators found a window in one of the bedrooms had been broken. Glass was found outside the house, indicating that someone had left the house by that window. On the ground below the window were a pocket from a gray nylon jacket, a cigarette lighter, a marijuana scale, a bag of marijuana, and some papers. One of the papers was a video rental receipt for defendant's video membership number. A trail of blood determined to be the same type as the defendant's led from the window to the alley behind the house.

At about 10:00 p.m., while the investigation at the Martin house was still proceeding, defendant arrived at a friend's house. The defendant had severe burns on his face and hands and asked to be taken to the hospital. He was taken to the emergency room of a hospital, where he was treated for second and third degree burns. He told hospital personnel that he had been leaving a house when someone threw gasoline in his face and then lighted it. The defendant was given morphine for his pain.

A police officer came to the hospital to discuss the reported assault with the defendant. He told the officer he had been in the 16th Avenue bar district of Cedar Rapids when someone threw gasoline in his face and then lighted

it. The officer took possession of the clothes of the defendant, which clothing smelled of gasoline.

The officer was aware that a fire had occurred in southeast Cedar Rapids, but did not know any of the particulars. However, the burns that defendant suffered to his hands and face were not entirely consistent with burns one would suffer if gasoline was thrown on the defendant as he had described the incident.

The officer and defendant discussed only the reported assault upon the defendant, an assault which the officer was then investigating.

As a consequence, the officer then called headquarters and asked for a detective to come to the hospital. Two detectives arrived. They questioned defendant briefly after telling him his Miranda rights. He again stated he had been on 16th Avenue when someone had thrown gasoline on him. He admitted that he knew the Martins and had been at their house earlier that evening. He was then taken to the University of Iowa Hospitals in Iowa City for treatment of his burns.

Police officers received permission from defendant's wife to search his car. They found a map with a drop of blood on it and a piece of glass. The blood was the same type as defendant's. The glass was the same type as the broken window at the Martins' house.

A search warrant for the residence of the defendant was obtained. Defendant's guns were seized. However, none

of the guns was the murder weapon. Some ammunition was also seized. A scientific examination of the trace elements in these bullets showed that they had the same composition as the bullets taken from the bodies of Charles and Lorena. Additionally, a scientific examination of defendant's sweatshirt revealed melted gray nylon fibers similar to those of the pocket found at the scene of the crime.

Defendant was questioned on December 1 and December 3, 1991, while he was in the hospital in Iowa City. He was told his Miranda rights on each occasion. He continued to maintain he had been on 16th Avenue when someone had thrown gasoline on him and lit it. He admitted he may have left some of his papers at the Martin residence when he was there earlier that day, but he could not positively identify any of the other items found at the house.

Upon release from the hospital, the defendant was arrested on December 16, 1991. He was charged with two counts of first-degree murder and one count of first-degree arson. At trial, the State presented the evidence noted above. The defendant testified that when he arrived at the Martin house at 8:30 p.m., no one answered the door, but when he started to leave he saw a flickering light and walked into the house. He stated that two men beat him and then poured gasoline on him and that when he came to, the house was on fire and he escaped through a window. He testified he could not remember what he did after he left

the Martin house until he arrived at a friend's house at about 10:00 p.m. and asked to be taken to the hospital.

The jury found defendant guilty of two counts of first-degree murder and one count of second-degree arson. Defendant was sentenced to life imprisonment on the murder charges. He now appeals.

I. MOTION TO SUPPRESS

Defendant contends the district court should have granted his motion to suppress. Prior to trial defendant filed a motion to suppress all statements he made while in the hospital on the ground that the statements were not voluntary because they were made while when he was suffering from extreme pain and shock. The district court denied the motion. The court found that defendant was not in custody when he was questioned by police officers in the hospital and also that the evidence showed defendant had the ability to understand the questions and respond, and thus, the statements were voluntary.

In discussing a constitutional issue, our review is de novo. State v. Evans, 495 N.W.2d 760, 762 (Iowa 1993). Nevertheless, the district court's findings on credibility of the witnesses are entitled to considerable deference by this court. Id.

A. Miranda Issue

We first address the initial police contact with defendant. It is clear that no Miranda warning was given by the police officer at the initial questioning of

defendant in the hospital. However, Miranda applies only to "custodial interrogation," that is, questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom in any significant way. State v. Cain, 400 N.W.2d 582, 583 (Iowa 1987). Custodial interrogation does not include investigatory questioning without custody, basic identification questioning, or general on-the-scene questioning. State v. Cook, 330 N.W.2d 306, 311 (Iowa 1983).

We determine defendant was not in custody when he was initially questioned by a police officer at the hospital. The defendant had reported to hospital personnel that he had been the victim of a possibly criminal incident. Thus, the questioning of defendant was because he reported he had been the victim of a crime, not because he was suspected of committing a crime. Therefore, police officers had no reason to take defendant into custody.

At the three subsequent occasions when defendant was questioned by police officers while he was in the hospital, he was, however, given a Miranda warning. He claims that because of his medical condition, he could not voluntarily waive his rights.

As noted above, however, a Miranda inquiry is not triggered unless there is custodial interrogation. State v. Schwartz, 467 N.W.2d 240, 245 (Iowa 1991). Our supreme court has previously held that where a defendant's

hospitalization is volitional, police interrogation in a hospital is not custodial interrogation. Cain, 400 N.W.2d at 584; State v. Kyseth, 240 N.W.2d 671, 673 (Iowa 1976). The evidence in this case shows defendant's hospitalization was volitional because he asked to be taken to the hospital. Furthermore, there was no evidence police officers took any action to keep defendant in the hospital or caused any restraint of his freedom of movement.

We conclude defendant has failed to show his statements in the hospital should have been suppressed due to a violation of his Miranda rights.

B. Voluntariness of Statements

Defendant also contends he was denied due process under the Fourteenth Amendment to the United States Constitution by the use of his involuntary statements. He claims that due to his medical condition, his statements in the hospital were not voluntary. He points out that he was in pain from his burns and that he was given morphine for the pain.

Inculpatory statements must be the product of a rational and free will in order to be admitted into evidence. State v. Davis, 446 N.W.2d 785, 789 (Iowa 1989). The test for voluntariness is whether the totality of the circumstances demonstrates that the statement was the product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination

critically impaired. State v. Vincik, 398 N.W.2d 788, 790 (Iowa 1987). An incriminating statement is not involuntary in the constitutional sense unless it can be established that it was extorted from the defendant by means of coercive police activity. Davis, 446 N.W.2d at 789.

The mere fact that one is under the influence of a drug while making an inculpatory statement does not render the statement involuntary. Vincik, 398 N.W.2d at 793. There must be evidence the capacity of the defendant for self-determination was critically impaired by the drug's effect. Id. In State v. Vincik, the defendant's confession was determined to be involuntary because it was the product of tough police interrogation and a mind enfeebled by brain damage, a surgical procedure, fatigue, medication and drugs. Id.

We note that in the present case there is no evidence of tough police interrogation, brain damage, surgical procedures, or fatigue. There was evidence defendant was in pain and he was administered morphine. Three different police officers questioned defendant at various times when he was in the hospital. All of the officers testified that defendant was able to understand questions and respond appropriately. We find defendant's capacity for self-determination was not critically impaired by pain or drugs. We conclude defendant's statements were voluntary.

The motion of the defendant to suppress included his contention that the search of his car was illegal. His

issues and arguments on appeal relate only to his statements given the officers. However, we have reviewed this contention, made in the trial court, and determine that the search was appropriate. The defendant advised the officers of the location and description of his car--his wife consented to the warrantless search. Under these circumstances, and given the facts available to the officers at that time, the search was justified. Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).

We affirm the district court's denial of the motion to suppress.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends he received ineffective assistance of trial counsel because his counsel failed to object to: (1) evidence that he had invoked his right to remain silent and right to counsel; (2) testimony by a witness who lacked personal knowledge; and (3) prosecutorial misconduct.

Ineffective assistance of counsel claims involve violation of a constitutional right, consequently, the totality of the circumstances relating to conduct of counsel must be reviewed de novo. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

The test we apply to a claim of ineffective assistance of counsel is whether under the entire record and totality of the circumstances, counsel's performance was within the range of normal competency. Meier v. State, 337 N.W.2d

204, 206 (Iowa 1983). To establish a claim of ineffective assistance of counsel, the defendant must show: (1) that performance of counsel was so deficient as not to be functioning as counsel guaranteed by the Sixth Amendment; and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989).

We may first examine the prejudice component of an ineffectiveness claim. Risdal, 404 N.W.2d at 132. In order to establish prejudice, a defendant must show that the failure of counsel worked to his substantial and actual disadvantage, to the end that there is a reasonable probability that but for trial counsel's alleged unprofessional errors, the result of the proceeding would have been different. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989).

A. Invocation of Right to Silence

During the trial, a police officer testified about the events surrounding defendant's arrest:

Once Mr. Conner was taken into custody by Detective McClurg and myself, he was transported to the Cedar Rapids Police Department Detective Bureau where we provided Mr. Conner with a waiver of rights which is basically the police department standard form for advising a person of their rights and then I verbally advised Mr. Conner of his rights and he advised me that he did not wish to talk to us and wished to contact an attorney.

Defendant's counsel did not object or ask that the answer be stricken. Defense counsel did later file a motion for mistrial based on this statement. On cross-examination,

defense counsel questioned the police officer:

Q. Now, on the 16th of December when you arrested Greg, you mentioned he requested an attorney. That's not inappropriate, is it? He has the right to do that, does he not? A. He has the right, yes.

We determine defendant has failed to show he was prejudiced by the failure of his counsel to object to the police officer's statement. There was no evidence defendant's silence was used against him or used as a tool for impeachment during the trial. See State v. Baccam, 476 N.W.2d 884, 887 (Iowa App. 1991). Furthermore, the evidence implicating defendant in the crimes was overwhelming. This evidence has been set forth previously in the decision. Defendant has not shown that but for his counsel's action in failing to object to the police officer's statement the result of the trial would have been different.

B. Lack of Personal Knowledge

The State's fire expert testified the six fires in the basement were set at one time, and the fires on the main floor were set some time later. He testified:

Subsequently the person who set these fires realized they didn't do what they intended them to do, came back to the structure and was going to redo what he attempted to do initially.

Defendant claims his trial counsel was ineffective for failing to object to this testimony on the ground the expert lacked personal knowledge of the intention of the person who set the fires.

An expert's testimony need not be based on personal knowledge, but may be based on other information. Brunner v. Brown, 480 N.W.2d 33, 34 (Iowa 1992). The information must only be of a type reasonably relied on by other experts in the field. Id. at 35. In this case, the expert's testimony was based on his observations of the crime scene. We find no ineffective assistance due to trial counsel's failure to object to this testimony.

C. Prosecutorial Misconduct

Defendant claims his trial counsel was ineffective for failing to object to prosecutorial misconduct. During closing argument, the prosecutor stated:

Look at the way in which the evidence shows the shooting was carried out and the death resulted. The description of the wound to Lorena Martin, the description of the wounds to Charles Martin, it is clear they were in effect executed.

Defendant contends the prosecutor was creating evidence by this statement because there was no evidence in the record to show the victims were executed.

A prosecutor in closing argument may draw conclusions and argue all permissible inferences which may reasonably flow from the record. State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975). Clearly, the evidence show the victims were executed in the sense they were killed. We do not find the prosecutor's statement meant the victims were killed in an execution-style shooting. We find no ineffective assistance of counsel due to counsel's failure to object to the prosecutor's argument.

D. Preservation of Other Ineffective Assistance of Counsel Claims

Defendant asks that certain other claims of ineffective assistance of counsel be preserved for post conviction proceedings. We determine there is insufficient evidence to resolve these issues on direct appeal. Therefore, these issues are reserved for post conviction proceedings in order for a more complete record to be developed on the issues. See State v. Bumpus, 459 N.W.2d 619, 627 (Iowa 1990).

Upon reviewing all issues raised in this appeal, we affirm defendant's convictions for two counts of first-degree murder and one count of second-degree arson.

AFFIRMED.